

255. EAI's inspection of SBC poles does not provide a benefit to Complainants.⁴⁴⁸

b) EAI

256. EAI has a legitimate safety interest in ensuring that its facilities are not adversely impacted by unsafe cable attachments, no matter the context. Given the extent of the violations uncovered on EAI-owned poles, EAI was justified in inspecting non-EAI poles where cable facilities could be endangering EAI's equipment.⁴⁴⁹ [Complainants cannot stipulate to this paragraph. EAI has not shown that Complainants are responsible for a significant number of outages and trouble calls.⁴⁵⁰ Further, Complainants do not dispute that EAI has a legitimate interest in ensuring the safety of its plant. However, it does not have a legitimate right to charge Complainants for those inspections under the agreements or under law.⁴⁵¹]

⁴⁴⁸ *First Commonwealth Communications v. Virginia Electric Power Co.*, 7 FCC Rcd. 2610, at ¶ 8 (1992)

⁴⁴⁹ Arnett Decl. Resp. Ex. 1 at ¶ 9 and Attachment C; Resp. Exs. 90-94.

⁴⁵⁰ Summary pages, Response Exhs. 90-93; Billingsley Reply Decl. ¶¶ 6-16; Hooks Reply Decl. ¶¶ 5-12; Gould Reply Decl. ¶¶ 6-12; Allen Reply Decl. ¶¶ 4-12; Trouble Tickets 1023846013 and 1023846151, pages 1 and 2, Response Exhibit 91; Trouble Ticket 100009396, page 12, Tab 3, Volume 4, Response Exhibit 93; Trouble Ticket 1001045047, page 28, Tab 1, Volume 1, Response Exhibit 92; Outage Summary Charge, Reply p. 14; Trouble Ticket 1038412558, page 20, Tab 15, Volume 2, Response Exhibit 90; Trouble Ticket 1022516697, page 39, Tab one, Volume one, Response Exhibit 92; Harrelson Reply Report ¶¶ 12-15.

⁴⁵¹ See Disputed law section above.

VI. UNAUTHORIZED ATTACHMENTS

A. Have The Cable Operators Made Unauthorized Attachments? If So, How Many? Was EAI's Back-Billing Policy For Such Attachments Reasonable?

1. Stipulated Facts

257. None

2. Disputed Facts

a) Complainants (WEHCO and Comcast)

258. Complainants have not made unauthorized attachments. The truth is that Complainants have attempted to work with EAI to reconcile attachment counts in accordance with their past practices with varying results. [EAI cannot stipulate to these statements. EAI has identified numerous unauthorized attachments, including 12,592 for Comcast.⁴⁵²]

259. WEHCO and EAI affirmatively worked together to compare maps and settle on an attachment count.⁴⁵³ In accordance with the parties' agreement, WEHCO paid back rent on attachments that were not previously captured in EAI's records.⁴⁵⁴ [EAI cannot stipulate to this statement. The terms of the pole attachment agreements require application prior to attachment. Failure to do so is a violation of the agreement.]

⁴⁵² See, e.g., Tabor Decl. Resp. Ex. 17 at ¶ 9; Resp. Ex. 40; Inman Decl. Resp. Ex 9 at ¶ 11. .

⁴⁵³ Dial Reply Decl. ¶¶ 8-12.

⁴⁵⁴ Dial Reply Decl. ¶¶ 8-12.

260. Comcast has been trying to work with EAI, without success, to reconcile attachment counts.⁴⁵⁵ In addition, Comcast has been trying to work with EAI, without success, to reconcile USS' method of counting billable attachment with the parties' past practices.⁴⁵⁶ Comcast has been trying to work through this problem with EAI and has even paid a disputed amount to show good faith.⁴⁵⁷ [EAI cannot stipulate to this statement. Despite claims that an alternative count was generated, Comcast has not submitted the results of such count into the record. Comcast has not paid any "disputed" amounts.⁴⁵⁸]

261. EAI's conclusion that Complainants have made widespread unauthorized attachments disregards the parties' past practices to reconcile attachment counts.⁴⁵⁹ [EAI cannot stipulate to this statement for the reasons cited above.⁴⁶⁰]

262. EAI's conclusion that Complainants have made widespread unauthorized attachments disregards the importance of ensuring the USS' method of counting billable attachments is consistent with the parties' past

⁴⁵⁵ Billingsley Reply Decl. ¶¶ 41-45.

⁴⁵⁶ Billingsley Reply Decl. ¶¶ 41-45.

⁴⁵⁷ Billingsley Reply Decl. ¶¶ 41-45.

⁴⁵⁸ Inman Decl. Resp. Ex. 9 at ¶¶ 38-40.

⁴⁵⁹ Dial Reply Decl. ¶¶ 8-12.

⁴⁶⁰ *See also*, Bethea Decl. Resp. Ex. 2.

practices.⁴⁶¹ [EAI cannot stipulate to this statement for the reasons cited below.⁴⁶²]

b) EAI

263. The Cable Operators have made a number of unauthorized attachments since the last pole inventory.⁴⁶³ Comcast has made more than 170 unauthorized attachments to EAI transmission facilities.⁴⁶⁴ [Complainants cannot stipulate to this paragraph for the reasons set forth in their disputed facts section above.]

264. EAI documented and invoiced Comcast for 12,592 unauthorized attachments in May 2004,⁴⁶⁵ billing Comcast the amount of \$177,439.18 representing attachment rental for the year 2004, inclusive of unauthorized attachments. Comcast paid only \$133,870.86 of this amount, which is equal to the attachments rental paid by Comcast for the year of 2002. There remains past due and owing by Comcast to EAI the amount of \$43,568.32 in unpaid pole rental for the year 2004.⁴⁶⁶ [Complainants cannot stipulate to

⁴⁶¹ Billingsley Reply Decl. ¶¶ 41-45.

⁴⁶² See also, Bethea Decl. Resp. Ex. 2; Inman Decl. Resp. Ex. 9 at ¶ 39; Buie Decl. Resp. Ex. 4 at ¶ 52.

⁴⁶³ Harrell Decl. Resp. Ex. 8 at ¶ 8; Neumeier Decl. Resp. Ex. 14 at ¶ 9; Willems Decl. Resp. Ex. 20 at ¶¶ 9-10; Documents and maps Resp. Ex. 40; Letter from M. Osborne to C. Dial, Resp. Ex. 50; Letter from M. Willems to D. Hodges, Resp. Ex. 61.

⁴⁶⁴ Welch Decl Resp. Ex. 19 ¶¶ 17-18; Letter from W. Darling to R. Colvin Resp. Ex. 73.

⁴⁶⁵ Resp. ¶ 320; Inman Decl. Resp. Ex. 9 at ¶ 37-40. Letter from D. Inman to M. Grimmett, Resp. Ex. 74; Letter from K. Birch to W. Darling, Resp. Ex. 89.

⁴⁶⁶ Inman Decl. Resp. Ex. 9 at ¶ 40; Letter from D. Inman to M. Grimmett Resp. Ex. 74. Comcast's payments for 2005 are similarly based on the 2002 count.

this paragraph for the reasons set forth in their disputed facts section above. Further, Complainants disagree that these amounts are past due and owing or that they otherwise represent pole rental because of discrepancies in the way USS and Entergy each count billable attachments.⁴⁶⁷]

265. Comcast has not provided EAI with an alternate count, although it claims to have conducted an independent audit, and Comcast has not made any effort to reconcile the count.⁴⁶⁸ EAI back-billed Comcast for unauthorized attachments in the amount of \$341,623.88, representing five years of rental plus interest based on 12,592 attachments.⁴⁶⁹ Comcast has paid no portion of this amount.⁴⁷⁰ [Complainants cannot stipulate to this paragraph for the reasons set forth in their disputed facts section above.]

3. Stipulated Points of Law

266. None.

4. Disputed Points of Law

a) Complainants

267. It is unjust and unreasonable to blame or penalize Complainants for unauthorized attachments where Complainants have taken affirmative steps, in good faith, to reconcile attachment counts.⁴⁷¹ [EAI cannot stipulate to this statement. Requiring payment of back rental for

⁴⁶⁷ See Billingsley Reply Decl. ¶¶ 41-45.

⁴⁶⁸ Inman Decl. Resp. Ex. 9 at ¶ 40.

⁴⁶⁹ Inman Decl. Resp. Ex. 9 at ¶ 40, Inman Attachment A.

⁴⁷⁰ Inman Decl. Resp. Ex. 9 at ¶ 40.

⁴⁷¹ Dial Reply Decl. ¶¶ 8-12.

actual attachments made is not penal. Comcast has made no effort to reconcile attachment counts. The FCC has also recognized the permissibility of unauthorized attachment penalties to function as a deterrent for unauthorized use of utility plant.^{472]}

268. It is unjust and unreasonable to blame or penalize Complainants for unauthorized attachments where Complainants have administered pole counts in accordance with the parties' past practices.⁴⁷³ [EAI cannot stipulate to this statement for the reasons cited above. Complainants have made attachments without application or permit.^{474]}

269. It is unjust and unreasonable to blame or penalize Complainants for unauthorized attachments where EAI has been either unwilling or unable to reconcile USS' method of counting unauthorized attachments with the parties' past practices.⁴⁷⁵ [EAI cannot stipulate to this statement. EAI has been responsive to requests for clarification related to

⁴⁷² *Mile Hi Cable Partners v. Public Service Co. of Colo.*, 15 FCC Rcd. 11,540, at ¶ 14.

⁴⁷³ Dial Reply Decl. ¶¶ 8-12. *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd 11450, ¶ 15 (Cab. Serv. Bur. 2000), *aff'd on reconsideration*, 17 FCC Rcd 6268 (2002), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

⁴⁷⁴ See Section VI, *infra*.

⁴⁷⁵ Billingsley Reply Decl. ¶¶ 41-45. See e.g., *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd 11450, ¶ 15 (Cab. Serv. Bur. 2000), *aff'd on reconsideration*, 17 FCC Rcd 6268 (2002), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

methods for counting attachments and for reconciling inaccurate database queries.^{476]}

270. Attachers need not "obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment," although some notice may be reasonable.⁴⁷⁷ [EAI cannot stipulate to this statement as it is irrelevant to the question posed. EAI has not counted overlashings as second attachments nor have Complainants previously alleged this to be the case.]

271. It is unjust and unreasonable for EAI to allege that Complainants have made unauthorized attachments by overlashing existing facilities.⁴⁷⁸ [EAI cannot stipulate to this statement for the reasons cited above.]

b) EAI

272. Comcast has failed to rebut EAI's data regarding the number of attachments despite claiming to have data to that effect, and has been fully advised of EAI's method for counting and defining attachments.⁴⁷⁹ Failure to

⁴⁷⁶ Inman Decl. Resp. Ex. 9 at ¶ 39.

⁴⁷⁷ *Amendment of Rules and Policies Governing Pole Attachments*, 16 FCC Rcd. 12103, ¶ 75 (2001), *aff'd Southern Company Services, Inc. v. FCC*, 313 F.3d 574,582 (D.C. Cir. 2002); *see also Cable Television Association of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, ¶ 13 (2003). *See also* Response (alleging Complainants have engaged in unauthorized overlashing activities).

⁴⁷⁸ *Amendment of Rules and Policies Governing Pole Attachments*, 16 FCC Rcd. 12103, ¶ 75 (2001), *aff'd Southern Company Services, Inc. v. FCC*, 313 F.3d 574,582 (D.C. Cir. 2002); *see also Cable Television Association of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, ¶ 13 (2003).

⁴⁷⁹ Inman Decl. Resp. Ex. 9 at ¶ 38-40.

rebut this number entitles EAI's number to a presumption of correctness, and should be employed with back rental accordingly awarded. It is reasonable for EAI to have charged Comcast for back rental to the date of the most recent pole audit for identified unauthorized attachments.⁴⁸⁰ [Complainants cannot stipulate to this paragraph because it incorrectly interprets FCC precedent, including the *Mile Hi v. Public Service Company of Colorado* cases. (See Complainants' Disputed Law section above). Further, it is unreasonable for EAI to require Comcast to rebut its attachment count where it has failed to provide the standards it used or the definition of attachment it used. (See Complainants Disputed Facts Section above). Once EAI provides this information, Comcast will be in a position to assess what attachments EAI counted and whether that count is consistent with the parties' prior billing practices.]

VII. ASSIGNMENT OF RESPONSIBILITY FOR CORRECTIONS

A. Is It Reasonable To Make Initial Assignments Of Responsibility For Remediation Based On Field Evidence And Presumptions As To The Normal Course Of Installation Including First Electric, Then Telephone, Then Cable?

1. Stipulated Facts

273. None.

2. Disputed Facts

a) Complainants

⁴⁸⁰ *PSCo.* at ¶ 14.

274. This question is inappropriate because it assumes facts that are in dispute. Complainants strongly contest EAI's assertion that the "normal course" of installation includes first electric, then telephone, then cable. Further, Complainants strongly contest EAI's assertion that the field evidence supports this presumption. Because the basic facts underpinning this question are in dispute, Complainants cannot offer any stipulated or disputed facts or points of law. The appropriate questions are whether it is just and reasonable for EAI to presume that this is the "normal course" of installation and whether it is just and reasonable for EAI to assign responsibility on this presumption. Complainants answer this question in subsection VII.E. below.

b) EAI

275. When installing new distribution facilities, electric facilities are typically installed first, with incumbent telephone installed second, and CATV installed third.⁴⁸¹ Weathering or other physical evidence may aid in assessing the installation date of facilities relative to each other and help an inspector to identify situations where facilities have been installed or upgraded after the initial installation sequence is completed.⁴⁸² Absent definitive field evidence, however, an inspector must have access to records or other documentation as to the age of the installation in order to determine

⁴⁸¹ Resp. at 57; Wagoner. Decl. Resp. Ex. 18 at 20-24; Buie Decl. Resp. Ex. 4 at 33, 34; Reply at p. 36; Harrelson Reply Decl. at 28.

⁴⁸² Resp. at 92-94; Wagoner. Decl. Resp. Ex. 18 at 20-24; Buie Decl. Resp. Ex. 4 at ¶ 32.

which facility preceded the other and which entity is responsible for creating a non-compliant condition.⁴⁸³ [For the reasons set forth above, Complainants cannot stipulate to or offer any facts or points of law.]

276. The age of CATV equipment relative to other attachments cannot consistently be determined in the field when assessing responsibility for correction.⁴⁸⁴ EAI and USS reasonably used a combination of assumptions based on the typical installation sequence for new facilities, later-acquired knowledge regarding recent cable upgrades by the Complainants, and assessments of physical evidence where available to make an initial assessment of which entity should be responsible for correcting an identified violation.⁴⁸⁵ [For the reasons set forth above, Complainants cannot stipulate to or offer any facts or points of law.]

277. EAI can document the age of its own facilities based on the birthmark of the pole, serial numbers of equipment, and manufacture dates for equipment and hardware tied to installation periods, among other things.⁴⁸⁶ EAI is not obligated to track the age of CATV equipment on behalf of the Cable Operators, and the Cable Operators do not provide EAI with information as to all of their installation, upgrade and maintenance activities. The pole attachment agreements assign responsibility to the Cable Operator to maintain a perpetual inventory of its attachments, and logic

⁴⁸³ Id.

⁴⁸⁴ Resp. at ¶ 91; Wagoner Decl. Resp. Ex. 18 at ¶ 20-24.

⁴⁸⁵ Wagoner Decl. Resp. Ex. 18 at ¶¶ 20-24.

⁴⁸⁶ Buie Decl. Resp. Ex. 4 at ¶ 32-33.

dictates that the cable company is the best position to track the age of its attachments given that they do not always notify EAI of their attachments, upgrades or overloading activities.⁴⁸⁷ The Cable Operators have not provided EAI with specific evidence of the age of an attachment relative to EAI's facilities (1) to justify adherence to an earlier version of the NESC under the grandfathering clause or (2) to illustrate that its facilities predate the electric facilities on the pole such that responsibility for correction should be assigned to another party.⁴⁸⁸ [For the reasons set forth above, Complainants cannot stipulate to or offer any facts or points of law.]

3. Stipulated Points of Law

278. None.

4. Disputed Points of Law

a) Complainants

279. [For the reasons set forth above, Complainants cannot stipulate to or offer any facts or points of law.]

b) EAI

280. All parties agree as to the typical sequence for installation of new facilities places utility and telephone facilities on a pole before cable

⁴⁸⁷ Wagoner Decl. Resp. Ex 18 at ¶ 23, 27; Buie Decl. Resp. Ex 4 at ¶¶ 32-34; 49, 81; Bettis Decl. Resp. Ex. 3 at ¶ 12; Willems Decl Resp. Ex. 20 at ¶ 14; Neumeier Decl. Resp. Ex. 14 at ¶¶ 13, 14; Harrell Decl. Resp. Ex 8 at ¶ 23.
⁴⁸⁸ Kelley Dec. Resp. Ex. 11 at ¶¶ 6-8.

facilities are installed.⁴⁸⁹ Use of such a baseline as an assumption for making an initial assessment of responsibility for coming “last to the pole” and thereby being responsible for correction of a violation absent any evidence to the contrary, therefore, is reasonable. USS used evidence as to the date of EAI equipment and physical conditions where available to assign responsibility.⁴⁹⁰ USS and EAI cannot be faulted for not knowing the age of Complainants’ facilities where such information has not been provided by Complainants and Complainants do not provide notification regarding activities impacting their attachments.⁴⁹¹ [For the reasons set forth above, Complainants cannot stipulate to or offer any facts or points of law.]

B. Is It Reasonable To Place The Responsibility On The Cable Operators To Monitor And Keep Records As To Their Own Facilities?

1. Stipulated Facts

281. None.

2. Disputed Facts

a) Cable Operators

282. It is unjust and unreasonable for EAI to require Complainants to keep detailed pole records when EAI has not done so in the past. EAI is exploiting the parties’ historically informal and undocumented pole attachment practices to cast Complainants as bad actors. It is unjust,

⁴⁸⁹ Resp. at ¶ 57; Wagoner. Decl. Resp. Ex. 18 at 20-24; Buie Decl. Resp. Ex. 4 at ¶ 33, 34; Reply at p. 36; Harrelson Reply Decl. at 28.

⁴⁹⁰ Wagoner Decl. Resp. Ex. 18 at ¶ 20-27.

⁴⁹¹ Bettis Decl. Resp. Ex. 3 at ¶ 12; Willems Decl Resp. Ex. 20 at ¶ 14; Neumeier Decl. Resp. Ex. 14 at ¶¶ 13, 14; Harrell Decl. Resp. Ex 8 at ¶ 23.

unreasonable and inconsistent with the parties' prior practices to impose heightened recordkeeping requirements retroactively. [EAI cannot stipulate to this statement as it is Complainants' conclusion of law. The pole attachment agreements assign responsibility to the attacher to maintain a perpetual inventory. The Cable Operators do not notify EAI of attachments, upgrades or other activities conducted that impact their attachments.⁴⁹² The Cable Operators are in the best position to know the age and maintenance history of their own facilities.⁴⁹³]

283. Complainants have records and maps identifying their attachments. Complainants have offered these maps to EAI.⁴⁹⁴ [EAI cannot stipulate to this statement. Maps, if any, were inadequate, or, in the case of Comcast, never provided.⁴⁹⁵ GPS identification of poles was the only feasible way to ensure both EAI and the attacher could locate the same poles for purposes of remediation of violations.⁴⁹⁶]

⁴⁹² Bettis Decl. Resp. Ex. 3 at ¶ 12; Willems Decl Resp. Ex. 20 at ¶ 14; Neumeier Decl. Resp. Ex. 14 at ¶¶ 13, 14; Harrell Decl. Resp. Ex 8 at ¶ 23.

⁴⁹³ Buie Decl. Resp. Ex. 4 at ¶ 49.

⁴⁹⁴ Dial Reply Decl. ¶¶ 8-12; Hooks Reply Decl. ¶¶ 24-25; Gould Reply Decl. ¶¶ 27, 44-46; Billingsley Reply Decl. ¶ 31.

⁴⁹⁵ Wagoner Decl. Resp. Ex. 18 at ¶ 13; Letter from W. Darling to K. Birch Resp. Ex. 26.

⁴⁹⁶ Wagoner Decl. Resp. Ex. 18 at ¶ 9.

284. Complainants have had good field relationships with their EAI counterparts and have made them aware of upgrades and construction.⁴⁹⁷ [EAI cannot stipulate to this statement for the reasons cited above.]

285. EAI has actual knowledge of when Complainants facilities were installed and upgraded.⁴⁹⁸ [EAI cannot stipulate to this statement. As stated elsewhere, EAI does not maintain records as to the field history of Complainants' attachments and have not been notified of attachments or upgrades undertaken by Complainants.⁴⁹⁹]

286. EAI, not Complainants have full knowledge of activities on the poles. Complainants do not have access to EAI's or other attachers' information regarding dates of attachment and types of equipment. [EAI cannot stipulate to this statement for the reasons cited above.]

287. Prior to the maps USS created which established a numbering system for all poles, neither EAI nor Complainants used pole numbers in the permitting process.⁵⁰⁰ [EAI cannot stipulate to this statement. Use of pole numbers is irrelevant for purposes of the question posed. EAI also identifies and tracks all poles and EAI equipment through birthmarks and serial

⁴⁹⁷ Dial Reply Decl. ¶¶ 8-12; Hooks Reply Decl. ¶¶ 24-25; Gould Reply Decl. ¶¶ 27, 44-46.

⁴⁹⁸ Response ¶ 222; Wagoner Decl. ¶ 40; Tabor Decl. ¶¶ 6-8, 15; Lewis Decl. ¶ 4; Neumier Decl. ¶ 14; Willems Decl. ¶ 14; Harrel Decl. ¶ 22; Hooks Reply Decl. ¶ 20.

⁴⁹⁹ Bettis Decl. Resp. Ex. 3 at ¶ 12; Willems Decl Resp. Ex. 20 at ¶ 14; Neumeier Decl. Resp. Ex. 14 at ¶¶ 13, 14; Harrell Decl. Resp. Ex 8 at ¶ 23.

⁵⁰⁰ Gould Reply Decl. ¶¶ 44-46.

numbers and has its own mapping system that is incompatible with the GPS data collected.^{501]}

b) EAI

288. Data as to the date of an installation and upgrade/maintenance activities is necessary to determine (1) the appropriate edition of the NESC when assessing grandfathered compliance; and (2) the age of installations relative to each other for determining responsibility for correction. EAI tracks its own installation, maintenance and upgrade activities.⁵⁰² The pole attachment contracts require the Cable Operators to keep a perpetual inventory of their own attachments. EAI does not track the dates of CATV installations, maintenance and upgrades, nor is it obligated to do so. EAI is not provided with notice of attachments, upgrades or other maintenance activities by the Cable Operators.⁵⁰³ The Cable Operators are in the best position to have information about their own equipment and its installation.⁵⁰⁴ [Complainants cannot stipulate to this paragraph. Complainants disagree that the date of an installation and upgrade/maintenance activities are necessary on a pole-by-pole basis. EAI has demonstrated that it has basic knowledge of when Complainants attachments are installed.⁵⁰⁵ For the most part, it is not necessary to

⁵⁰¹ Wagoner Decl. Resp. Ex. 18 at ¶¶ 20-24.

⁵⁰² Id.

⁵⁰³ Bettis Decl. Resp. Ex. 3 at ¶ 12; Willems Decl. Resp. Ex. 20 at ¶ 14; Neumeier Decl. Resp. Ex. 14 at ¶¶ 13, 14; Harrell Decl. Resp. Ex. 8 at ¶ 23.

⁵⁰⁴ Buie Decl. Resp. Ex. 4 at ¶ 49.

⁵⁰⁵ See, e.g., Wagoner Decl.

pinpoint the exact date each attachment was installed.⁵⁰⁶ Moreover, as Complainants explained above, given the fact that EAI did not have a reliable pole numbering system prior to USS' inspection, it is somewhat difficult to identify which attachment was attached to which pole on what date. Complainants' requests for access identified lines of poles identified by geographic area and address.⁵⁰⁷ In addition, the pole attachment agreements' requirement that Complainants' keep a perpetual inventory refers only to the number of attachments. Finally, whether Complainants have information about their own attachments is irrelevant if it does not have access to information about other attachers' attachments.]

289. Moreover, Comcast, Alliance and WEHCO have all recently undertaken large scale upgrades and rebuilds which required them to touch virtually every pole.⁵⁰⁸ Complainants, therefore, were the most recent parties to have had contact with the poles on a large scale prior to the safety inspections. They did not notify EAI of any non-compliant circumstances or safety violations during their upgrades, although this is standard industry practice.⁵⁰⁹ However, these conditions exist now on a significant scale. The Cable Operators, therefore, either installed *more* facilities on already non-complaint poles (which is improper), or created the non-compliant conditions

⁵⁰⁶ See, e.g. Harrelson Reply Report.

⁵⁰⁷ Gould Reply Decl. ¶¶ 44-46.

⁵⁰⁸ Tabor Decl. Resp. Ex. 17 at ¶ 7; Carpenter Decl. Resp. Ex. 5 at ¶ 7.

⁵⁰⁹ Bettis Decl. Resp. Ex. 3 at ¶ 12; Willems Decl. Resp. Ex. 20 at ¶ 14; Neumeier Decl. Resp. Ex. 14 at ¶¶ 13, 14; Harrell Decl. Resp. Ex. 8 at ¶ 23; Wagoner Decl. Resp. Ex. 18 at ¶ 23; Lewis Decl. Resp. Ex. 12 at ¶ 6.

through their upgrade work.⁵¹⁰ [Complainants cannot stipulate to this paragraph. As explained elsewhere in this statement, Complainants disagree that many of the conditions EAI cites as violations are indeed safety violations. Further Complainants disagree that EAI historically considered these conditions to be violations.⁵¹¹ Finally, Complainants submitted many, many pictures in the Harrelson Reply Declaration that show that Entergy, not Complainants were the most recent parties to contact the poles.]

3. Stipulated Points of Law

290. None.

4. Disputed Points of Law

a) Cable Operators

291. It is unjust and unreasonable for EAI to impose retroactively new terms and conditions of attachment that a) the parties have not historically followed and b) do not appear in the agreements.⁵¹² [EAI cannot stipulate to any statements in this section. These arguments are also raised nowhere in the pleadings. EAI has no obligation to keep Complainants' records for them. As stated elsewhere, EAI has records as to its own equipment, and has clearly indicated its willingness to hear any evidence

⁵¹⁰ Resp. 30; Wagoner Decl. Resp. Ex. 18 at ¶¶ 23, 40; SCTE Recommended Practices for General Cable Construction and Testing, §§ 1.4, 1.5 (2d Ed. 2002); Arnett Decl. Resp. Ex. 1 at 25; Tabor Decl. Resp. Ex. 17 at ¶ 8.

⁵¹¹ See Section VIII.E., below.

⁵¹² See *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd 11450 (Cab. Serv. Bur. 2000), *aff'd on reconsideration*, 17 FCC Rcd 6268 (2002), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

Complainants' have as to the relative age of their equipment on EAI's poles.

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292. It is unjust and unreasonable for EAI to allocate responsibility to Complainants for identifying dates of installations and upgrades where it has demonstrated full knowledge of those facts. There is no basis in safety, reliability or generally applicable engineering purposes for EAI to require this information or otherwise to deny access or allocate remediation responsibility based on not having this information where it has already demonstrated that it has full possession of it.⁵¹⁴

b) EAI

293. FCC precedent and the pole attachment rules generally endorse the view that the burden falls on the party controlling the information to come forth with that information.⁵¹⁵ The Cable Operators are in control of the data related to their own facilities and therefore bear the burden,⁵¹⁶ and have not notified EAI of attachments, upgrades or other activity impacting their facilities.⁵¹⁷ They have not produced any data to justify their claims as to (a) grandfathered compliance with prior editions of the NESC; or (b) the relative age of facilities on a pole (*i.e.*, who is responsible for creating a non-compliant condition), nor have they otherwise presented quantitative data to

⁵¹³ Inman Decl. Resp. Ex. 9 at ¶¶ 35-36; Harrell Decl. Resp. Ex. 8 at ¶ 21.

⁵¹⁴ 47 U.S.C. § 224.

⁵¹⁵ *See, e.g., Knology* at ¶ 42.

⁵¹⁶ Buie Decl. Resp. Ex. 4 at ¶ 49.

⁵¹⁷ Bettis Decl. Resp. Ex. 3 at ¶ 12; Willems Decl. Resp. Ex. 20 at ¶ 14; Neumeier Decl. Resp. Ex. 14 at ¶¶ 13, 14; Harrell Decl. Resp. Ex. 8 at ¶ 23.

rebut EAI's inspection statistics illustrate widespread and specific instances of non-compliance with contract standards and/or with the NESC.⁵¹⁸ The Cable Operators' poor record keeping cannot operate to shield them from their responsibility to maintain the safety of their facilities on EAI's poles. The Complainants, therefore, have not met their burden, whether they bore it initially or whether it was shifted to them as a result of EAI's inspection efforts and resulting data. [Complainants cannot stipulate to this paragraph because it reiterates facts with which Complainants already disagreed above. Further, EAI fails to identify any record support for its statement of law. Finally, Complainants disagree that they have not kept Entergy apprised of their activities in the field.⁵¹⁹]

C. What Would A Reasonable Time Frame Be For Requiring Corrections To Be Made?

1. Stipulated facts

294. The Cable Operators are required to install and maintain their facilities in a safe manner. The pole attachment contracts require "immediate" correction of non-compliant conditions.⁵²⁰

⁵¹⁸ Arnett Decl. Resp. Ex. 1; Maps and violation detail Resp. Ex. 94; Kelley Decl. Resp. Ex. 11 at ¶¶ 6-8.

⁵¹⁹ Dial Reply Decl. ¶¶ 8-12; Hooks Reply Decl. ¶¶ 24-25; Gould Reply Decl. ¶¶ 27, 44-46.

⁵²⁰ Pole Attachment Agreement Comp. Ex. 1 at Article V.

2. Disputed facts

a) Complainants

295. This question is inappropriate. The only question EAI raised in its Response was whether Complainants should be required to complete cited violations in a timely manner. The parties have not asked the FCC to set a reasonable time for requiring corrections in the pleadings. Further, to the extent this question asks the question to render a decision generally and as a matter of law, this has not been briefed and it is inappropriate. Finally, EAI has specifically stated that the FCC does not have the regulatory competence or expertise to set or otherwise establish engineering standards. It is therefore inappropriate for EAI to request the FCC to determine what constitutes a proper amount of time for corrections. Obviously, each specific case will depend on a number of issues that are not before the Commission, including other EAI's and other attachers' willingness and ability to make corrections. [EAI cannot stipulate to the statements in this paragraph. EAI is permitted to plead in the alternative assuming, arguendo, that the FCC determines it has jurisdiction. Complainants' objection, therefore, is irrelevant. In any event, a lapse of more than 4 years in some instances with no effort at correction in more than a year's time is not timely or immediate.]

296. Neither EAI nor the telephone companies have completed all of the violations USS and EAI cited as a result of the survey. EAI used the audit results to correct 11,122 violations on distribution circuits in Little Rock, North Little Rock and Jacksonville and has additional corrections left

to complete.⁵²¹ [EAI will stipulate to the following: Where EAI learned of a violation for its own plant incidental to the inspection of the cable plant, EAI has taken affirmative action to correct those violations. EAI has corrected 11,122 violations in Little Rock, North Little Rock, and Jacksonville as of April 2005, and intends to complete all corrections by December 2005.⁵²²]

297. Complainants have made many changes to their plant. Many of these changes involve conditions that Complainants do not agree constitute violations. Complainants have made these changes in an effort to reach a compromise with EAI.⁵²³ [EAI will stipulate that Complainants have made changes to their plant.⁵²⁴ EAI cannot stipulate to the remainder of these statements.]

298. The practical realities of field construction are that not all violations can be corrected "immediately." Standard industry practices provides that the parties begin to work immediately on the most pressing violations. However, it is impossible to obtain results immediately.⁵²⁵ [EAI cannot stipulate to these statements. Complainants have only addressed

⁵²¹ Kelley Decl. ¶ 12; Response

⁵²² Kelly Decl. Resp. Ex. 11 at ¶ 12.

⁵²³ Allen Reply Decl. ¶¶ 13-14; Hooks Reply Decl. ¶¶ 14; Gould Reply Decl. ¶ 15; Billingsley Reply Decl. ¶ 17.

⁵²⁴ Arnett Decl. Resp. Ex. 1 at Attachments B, C.

⁵²⁵ Billingsley Reply Decl. ¶¶ 21-22.

inexpensive and uncomplicated corrections, and have not prioritized according to “most pressing” violations.^{526]}

299. Complainants are reluctant to make all of the disputed changes because they do not have access to a clear set of standards under which USS and EAI are operating.⁵²⁷ [EAI cannot stipulate to this statement. EAI has provided clear guidance on its contract standards and the compromises it has been willing to make as to demonstrated NESC compliance for past violations.^{528]}

300. In addition, because USS does not provide documentation of its sign off on “cleared” poles and because USS and EAI inspectors regularly overrule and contradict each other, Complainants are reluctant to enter into potentially costly and unnecessary changes.⁵²⁹ [EAI cannot stipulate to this statement as it has no basis to assess Complainants’ “reluctance.” Attempts to accommodate Complainants as to disputes do not constitute contradiction. USS and EAI maintain records as to corrections completed.^{530]}

⁵²⁶ Arnett Decl. Resp. Ex. 1 at ¶ 33; See Violation Progress Reports of Comcast, Alliance and WEHCO Resp. Ex. 82, 83 and 84; Tabor Decl. Resp. Ex. 17 at ¶ 22.

⁵²⁷ Allen Reply Decl. ¶¶ 15; Hooks Reply Decl. ¶ 16; Gould Reply Decl. ¶ 17.

⁵²⁸ Complaint Ex. 2A-2D; Inman Decl. Resp. Ex. 9 at ¶¶ 35-36; Harrell Decl. Resp. Ex. 8 at ¶ 21.

⁵²⁹ Hooks Reply Decl. ¶ 17

⁵³⁰ Arnett Decl. Resp. Ex. 1 Attachment C; Violation Progress Reports at Resp. Ex. 82, 83, 84.

301. In some cases, Complainants make changes and EAI fails to record them properly.⁵³¹ In other cases, Complainants agree to costly changes, pay for the changes, and EAI's construction crews do not do the work or do not do it properly.⁵³² [EAI cannot stipulate to this statement. EAI has always been willing to correct any inadvertent errors in the inspection process.⁵³³ EAI disagrees with Complainants' characterization of EAI's construction practices.]

302. Finally, for many required changes, Complainants must wait for other attachers, including EAI to take action first.⁵³⁴ [EAI cannot stipulate to this statement. Only 10% of cited violations require the action of another party for Complainants to proceed with corrections.⁵³⁵]

b) EAI

303. The Cable Operators have been aware of some violations since 2001, which have not been corrected to date. Comcast initially made a commitment to correct violations within 15 days of discovery where correction may be made without adjustment from another party, which is a reasonable timeframe in EAI's view.⁵³⁶ Most of the cited violations – approximately 90% - do not require the involvement of another or make-ready to correct.⁵³⁷

⁵³¹ Dial Reply Decl. ¶ 19.

⁵³² Gould Reply Decl. ¶ 18; Billingsley Reply Decl. ¶¶ 26-27.

⁵³³ Inman Decl. Resp. Ex. 9 at ¶¶ 35-36.

⁵³⁴ Hooks Reply Decl. ¶ 15; Gould Reply Decl. ¶ 16; Billingsley Reply Decl. ¶ 20.

⁵³⁵ Tabor Decl. Resp. Ex. 17 at ¶ 27; Wagoner Decl. Resp. Ex. 18 at ¶ 45

⁵³⁶ Comcast Action Plan, Resp. Ex. 21.

⁵³⁷ Tabor Decl. Resp. Ex. 17 at ¶ 27; Wagoner Decl. Resp. Ex. 18 at ¶ 45.

[Complainants cannot stipulate to this paragraph for the reasons set forth above. In addition, for the reasons set forth in this and previous disputed facts sections, Complainants a) do not agree that all of the violations EAI cited are violations that need correction b) do not agree that most of the violation do not involve other parties and c) do not agree that the violations were caused by or should be Complainants' responsibility.⁵³⁸ Finally, at the time Comcast's initial commitment was made, the number of violations to be fixed were a small fraction of the violations EAI now alleges to exist.⁵³⁹]

3. Stipulated points of law

304. None.

4. Disputed points of law

a) Complainants

305. The amount of time the Complainants need to make corrections to their plant depend largely on field conditions and other attachers', including EAI, willingness to be cooperative in the field. It is neither reasonable nor feasible for the FCC to set a hard and fast rule on this issue.⁵⁴⁰ [EAI cannot stipulate to this statement for the reasons cited above.]

b) EAI

306. It is reasonable to require immediate remediation of safety violations identified on Complainants' plant. The inaction on the part of the

⁵³⁸ See, e.g., Harrelson Reply Report ¶¶ 55-63; Hooks Decl. ¶ 26; Billingsley Decl. ¶ 42; Harrelson Reply Report ¶¶ 84-88.

⁵³⁹ Comcast Action Plan, Resp. Ex. 21.

⁵⁴⁰ 47 U.S.C. § 224.

Cable Operators with respect to correction of violations for three to four years constitutes unreasonable delay and is an unreasonable practice.⁵⁴¹

[Complainants cannot stipulate to this paragraph for the reasons set forth above. Further, Complainants deny that Complainant's have engaged in "inaction."⁵⁴²]

D. Should the Cable Operators be required to report corrections to the pole owner in a timely manner? Have the Cable Operators done so, and should they be required to provide an immediate accounting of corrections to date?

1. Stipulated facts

307. None.

2. Disputed facts

a) Complainants

308. This question has not previously been raised and, as a result, Complainants cannot answer it based on record evidence. The only question EAI raised in its Response was whether Complainants should be required to remediate cited violations in a timely manner. Neither party has asked the FCC to set a reasonable time for reporting corrections in the pleadings. Further the issue of whether Complainants should provide an immediate accounting was neither raised nor briefed in the pleadings. This question is inappropriate and need not be considered by the FCC.

⁵⁴¹ Tabor Decl. Resp. Ex. 17 at ¶ 22; *See generally, Knology, supra* (delay of more than one year unreasonable).

⁵⁴² Gould Reply Decl. ¶¶ 15-16; Allen Reply Decl. ¶¶ 13-14; Hooks Reply Decl. ¶ 14-15; Billingsley ¶ 17.