

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

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| In the Matter of |) | |
| |) | WC Docket No. 07-245 |
| |) | |
| |) | RM-11293 |
| Implementation of Section 224 of the Act; |) | |
| Amendment of the Commission's Rules and |) | RM-11303 |
| Policies Governing Pole Attachments |) | |

**REPLY COMMENTS OF
PACIFICORP, WISCONSIN ELECTRIC POWER COMPANY,
AND WISCONSIN PUBLIC SERVICE CORPORATION**

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EXECUTIVE SUMMARY

Consistent with the initial Comments filed by PacifiCorp, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation (referred to collectively herein as the “Utilities”), the comments in this proceeding confirm that Incumbent Local Exchange Carriers (“ILECs”) are not entitled to the benefits of Section 224, and that the ILECs’ arguments to the contrary ignore the statutory language, the legislative history, and the consistent interpretation of Section 224 by all parties, including the ILECs themselves.

The record indicates overwhelming support for the FCC to adopt a unified pole attachment rate formula. Although cable operators argue for expansion of the cable rate to even cable systems providing more than cable television service, it is entirely appropriate (and long overdue) for the FCC to increase the rates paid by cable operators as was anticipated when Congress adopted the new pole attachment rate formula in 1996. Comments also demonstrate support for the FCC to review other policies that have engendered controversies between attaching entities and utility pole owners, such as the proper allocation of the communications worker safety space to attaching entities and the presumptions as to the number of attaching entities on a pole.

Comments do not indicate a need for the FCC to micromanage agreements between wireless providers and pole owners since there are a wide variety of wireless system configurations.

The record demonstrates that many controversies over safety and engineering standards arise between pole owners and attaching entities because many attaching entities have found it more convenient to simply attach to utility poles without prior notice to or approval of the pole owner, and without the necessity of complying with recognized industry standards or the utility’s

engineering requirements. Rather than setting national safety standards for the electric power industry, the FCC could help eliminate such disputes in the first place by removing the current incentive attaching entities have to ignore the permitting and engineering review process.

Finally, attaching entities have presented no compelling argument for retention of the sign-and-sue rule. To the contrary, their comments indicate that they intentionally defraud pole owners into believing they have reached agreement simply as a matter of expediency, knowing full well that they can always complain at a later date about any terms in the agreement that the utility might try to enforce. It is not surprising that there is exceedingly little trust between pole owners and attaching entities when the regulatory process imposes no penalty on an attaching entity for engaging in such deceit during the negotiating process.

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REPLY COMMENTS OF PACIFICORP, WISCONSIN ELECTRIC POWER COMPANY, AND WISCONSIN PUBLIC SERVICE CORPORATION

PacifiCorp, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation (sometimes referred to collectively as the “Utilities”) respectfully submit their joint Reply to the comments submitted by other parties with respect to the Notice of Proposed Rulemaking in the above-captioned matter.¹

I. Discussion

A. ILECs are Not Entitled to Regulated Pole Attachment Rates Under the Communications Act

Not surprisingly, the only parties who believe Section 224 can be interpreted to provide incumbent local exchange carriers (ILECs) with rights to regulated pole attachment rates are the ILECs themselves. The vast majority of commenters, however, note that the language of Section 224 is very clear that ILECs do not have such rights. Moreover, even if there were ambiguity

¹ *Notice of Proposed Rulemaking*, FCC 07-187, released November 20, 2007 (*NPRM*). The *NPRM* was published in the Federal Register on February 6, 2008. By *Order*, DA 08-582,

(continued...)

(which there is not), the legislative history of Section 224 as well as public policy indicate that ILECs do not and should not have a right to regulated pole attachment rates under Section 224.

1. The Statutory Language Is Clear that ILECs are Not Entitled to Regulated Pole Attachment Rates

The language of Section 224 is clear that ILECs are not entitled to the benefits of FCC pole attachment regulation. The single thread on which the ILECs base their argument is that two synonymous terms in the same section of the same statute can be given different meanings. The ILECs argue that even though Section 224(a)(5) states explicitly that the definition of “telecommunications carrier” for purposes of pole attachment regulation “does not include any incumbent local exchange carrier,” the FCC has authority under Section 224(b)(1) to regulate the rates, terms and conditions for “pole attachments,” which include attachments by a “provider of telecommunications service.” AT&T argues that it is of “no legal consequence” that the term, “telecommunications carrier,” is defined in Section 3 of the Communications Act of 1934, as amended, as a “provider of telecommunications service.”² AT&T would have the FCC ignore the statutory definition and ask the FCC to believe that Congress intended these two terms to have different meanings for purposes of Section 224.³ No such intent can be found within Section 224. To the extent Congress made the terms synonymous in Section 3 of the Act, there was no reason for Congress to separately define the term, “provider of telecommunications service,” for

released March 14, 2008, the deadline for filing Reply Comments was extended to April 22, 2008.

² Comments of AT&T Inc. (“AT&T”) in WC Docket No. 07-245, at 31. Unless otherwise noted herein, all citations to comments of other parties are with respect to their submissions in this proceeding, WC Docket No. 07-245.

³ See also Comments of Qwest Communications International Inc. (“Qwest”), at 2.

purposes of pole attachment regulation. Absent an explicit definition for “provider of telecommunications service” in Section 224, the definition of “pole attachment” in Section 224(a)(4) must be interpreted as any attachment “by a [telecommunications carrier] to a pole, duct, conduit, or right-of-way owned or controlled by a utility.” The logic of this analysis is overwhelming, which is also evident from the fact that all parties, including the ILECs, the FCC, and the courts, have treated these terms as interchangeable in Section 224 for the past ten years.⁴

Perhaps most telling as to the weakness of the ILECs’ position is Qwest’s half-hearted observation that the use of “provider of telecommunications service” in Section 224(a)(4) “*seems* intentional.”⁵ It may *seem* intentional to the ILECs, but without any evidence in Section 224 or the rest of the Communications Act that these otherwise synonymous terms are no longer synonymous in Section 224, the ILECs are not entitled to seek relief from the FCC for rates, terms, and conditions for pole attachments. As noted by the Edison Electric Institute and the Utilities Telecom Council (EEI/UTC), if Congress had intended the term, “provider of telecommunications service” to have a different meaning in Section 224 it would have used that term in other parts of Section 224 where regulated rates, terms and conditions are addressed.⁶ Ameren notes, for example, that even if the term, “provider of telecommunications service,” in the definition of pole attachments is different, Section 224 also states that for purposes of regulated rates and mandatory access, only pole attachments of “telecommunications carriers” are covered.⁷ The fact that Congress enacted a very specific rate formula for attachments by

⁴ Comments of Ameren Services Company and Virginia Electric and Power (“Ameren”), at 28;

⁵ Comments of Qwest, at 3 (*emphasis added*).

⁶ Comments of the Edison Electric Institute and the Utilities Telecom Council (“EEI/UTC”), at 115.

⁷ Comments of Ameren, at 31.

“telecommunications carriers” cannot be reconciled with an interpretation of Section 224 that would suggest Congress also intended the FCC to have broader authority to adopt a different rate formula for “providers of telecommunications service.”

2. The Legislative History Confirms That ILECs Were Not Intended to Benefit from Regulated Pole Attachment Rates

Commenters also point out that the legislative history to Section 224 evidences congressional intent to treat ILECs as pole owners, with distinct rights and obligations from attaching entities.⁸ Comcast notes, for example, that the alternating use of the terms, “telecommunications carrier” and “provider of telecommunications service,” were due to stylistic differences between the House and Senate bills that were reconciled into the Telecommunications Act of 1996.⁹ Given the nearly 30 years of history behind the 1978 Pole Attachment Act and the significantly longer period over which ILECs were parties to joint use and joint ownership agreements with electric utilities, it is inconceivable that Congress would have vested the FCC with jurisdiction over ILEC attachments without making some mention of this in the extensive legislative history.¹⁰ USTelecom is therefore stretching to suggest that Congress granted ILECs rights under Section 224 to complain to the FCC about rates, terms and conditions for pole attachments but specifically withheld a right to seek access to electric utility poles because ILECs already had access to poles.¹¹

⁸ Comments of Ameren, at 30, 33-34.

⁹ Comments of Comcast Corporation (“Comcast”), at 50.

¹⁰ *Id.*

¹¹ Comments of the United States Telecom Association (“USTelecom”), at 9.

3. The FCC, Courts and Even the ILECs Have Consistently Interpreted Section 224 as Excluding ILECs from the Benefits of Regulated Pole Attachment Rates

A number of parties have noted that Section 224 has been consistently and universally interpreted as excluding ILECs from the benefits of FCC pole attachment regulation. EEI/UTC point out that the FCC and the courts have used the terms, “telecommunications carrier” and “provider of telecommunications service” interchangeably when interpreting Section 224.¹² EEI/UTC even notes that the ILECs themselves have argued that Section 224 excludes them from its benefits.¹³ It is thus disingenuous for USTelecom to now argue, as it does in its comments, that the FCC’s earlier interpretations of Section 224 were “flawed” because the FCC ignored the distinct use of the term, “provider of telecommunications service,” in Section 224(b) and focused only on the exclusion of ILECs from the definition of “telecommunications carrier.”¹⁴

4. The FCC Should Not Disrupt the Economic Relationship Between Electric and Telephone Utilities on Joint Use or Joint Ownership

Even if the FCC had some discretion to interpret Section 224 to cover ILECs, which it does not, it would have to conclude that there is no compelling public policy reason to do so. As noted by Comcast, ILECs have state-based remedies for dealing with pole attachment issues.¹⁵ Given the extensive oversight of joint use and joint ownership arrangements among telephone and electric utilities, it would be very difficult for the FCC to regulate the rates, terms and

¹² Comments of EEI/UTC, at 119-120.

¹³ Comments of EEI/UTC, at 124.

¹⁴ Comments of USTelecom, at 12.

¹⁵ Comments of Comcast, at 51.

conditions for ILEC attachments on electric utility poles without becoming embroiled in disputes over ownership interests or raising issues of preemption under state law.¹⁶

Moreover, to the extent joint use and joint ownership agreements subject ILECs to different rate structures than for CLECs, there are a number of complex underlying relationships in the joint use/joint ownership environment that are not present in the pole attachment licensing process governed by Section 224.¹⁷ This rate differential cannot be considered unreasonably discriminatory.¹⁸

B. The FCC Should Interpret Section 224 to Eliminate Unfair Subsidies to Attaching Entities

A number of commenters have questioned the continued need for separate rate formulas for attachments by cable television companies and telecommunications carriers. As discussed in the Utilities' initial Comments, the presence of two rate formulas in Section 224 was primarily due to lobbying by the cable television industry for "grandfathering" of the cable television formula for "mom-and-pop" cable operators who had no intention of offering any telecommunications services, while phasing in, over a 10-year period, the new telecommunications attachment formula which was expected to result in significantly higher, but more rationally-based, pole attachment rates.¹⁹

There is widespread support in this docket among all industry sectors for adoption of a unified "broadband" rate formula. Not surprisingly, attaching entities argue that they should be

¹⁶ Comments of EEI/UTC, at 52-53.

¹⁷ Comments of Comcast, at 28-29; Comments of Time Warner Cable Inc. ("Time Warner Cable"), at 12.

¹⁸ Comments of Time Warner Cable, at 18.

entitled to a virtually free ride on the infrastructure that has been developed by the electric utilities, and that utilities should be bound by significant timing limits and operational requirements designed to expedite the attaching entities' provision of commercial services at the least possible cost to them. Significantly, while complaining that attachment rates paid to electric utilities are too high, AT&T concedes that electric utilities are usually required to develop infrastructure in new residential and commercial developments before other services can be brought in, are the first on the scene to repair damaged poles following accidents, and are the first to clear an area of downed poles and wires following a natural disaster in order to ensure safety of citizens and electric workers.²⁰

Thus, while there is broad consensus that electric utilities have a significant public service obligation to provide electric power safely and efficiently, the attaching entities also argue that the FCC should exercise its authority over pole attachments to ensure that electric utilities continue to subsidize the commercial deployment of communications services to ensure that electric utilities do not allow their provision of electric service to interfere with the attaching entities' rapid initiation of communications service to their customers. Fibertech even goes so far as to suggest that electric utilities should be divested of all control over managing their infrastructure and should instead be required to operate through an unbiased, third-party administrator to be funded by all attaching entities, including the pole owner.²¹ The National Cable Television Association (NCTA) makes no secret of the fact that it does not care about the

¹⁹ Comments of the Utilities, at 11-14.

²⁰ Comments of AT&T, at. 7.

²¹ Comments of Fibertech Networks, LLC and Kentucky Data Links, Inc. ("Fibertech"), at 10.

primary mission of electric utilities, or whether electric ratepayers subsidize the development of commercial communications networks:

As an initial matter, Congress has given the Commission no role whatsoever in protecting electric ratepayers. State regulators are charged with regulating electric companies and looking after the interests of their ratepayers and they are fully capable of performing that role on their own. The Commission's job is to promote broadband investment and facilities-based competition for services within its jurisdiction and to adopt a pole attachment policy that promotes these goals in a manner consistent with constitutional principles and the parameters established under Section 224.²²

For too long these entities have expected a free ride at utilities' expense and are now incapable of imagining a world where they might have to reasonably share in the maintenance and protection of shared infrastructure. The FCC has an opportunity in this proceeding to bring Fibertech, the cable industry, and other attaching entities back into the real world where electric utilities exist to provide electric power and must maintain this critical infrastructure in the interest of the public welfare and national security.

The FCC can preclude many types of pole attachment disputes that have occurred since implementation of the Telecommunications Act of 1996. For example, adoption of a unified rate structure would eliminate the incentive for cable operators to evade paying the higher telecommunications attachment rate and the controversies that arise when a pole-owning utility seeks to charge the higher rate. Similarly, conforming some of the presumptions to more realistic levels will reduce controversies in how the formulas should be applied. Perhaps most importantly, the FCC has an opportunity to make very clear that all affected parties – pole owning utilities and attaching entities – have a common interest in maintaining this shared

²² Comments of the National Cable & Telecommunications Association (“NCTA”), at 12-13.

infrastructure, and that pole-owning utilities must have adequate resources and flexibility to manage this infrastructure for the provision of both electric service and communications service.

1. The FCC Should Adopt a Unified Rate Formula for All Jurisdictional Attaching Entities, Including Cable Operators

There is broad support for a unified rate formula to replace, to the extent possible, the cable and telecommunications rate formulas. Commenters agree that to avoid competitive concerns and to facilitate pole administration, a single rate formula should be adopted.²³

2. To the Greatest Extent Possible the FCC Should Eliminate the Subsidies Available to Cable Television Operators Through the Pole Attachment Formula

In adopting a new rate structure, the FCC should eliminate the current rate disparities between cable television operators and other attaching entities and achieve Congress's original intent in the Telecommunications Act of 1996 of having a unified rate that more equitably compensates pole-owning utilities. As noted above, the cable-only rate in Section 224(d) was a grandfathering provision intended to shield smaller cable operators from the rate increases that were inevitable when the new telecommunications rate formula was fully implemented. Cable operators have been able to extend these grandfathering rights indefinitely simply because competition has evolved differently from what Congress anticipated in 1996; that is, instead of providing "telecommunications service," cable operators have successfully been able to argue

²³ See, e.g., Comments of AT&T, at 12; CURRENT Group, LLC ("CURRENT"), at 11; EEI/UTC, at 94; Knology, Inc. ("Knology"), at 5; Qwest, at 4; Verizon Communications Inc. ("Verizon"), at 6; Ameren, at 17; Time Warner Telecom Inc., One Communications Corp., and COMPTTEL ("Time Warner Telecom"), at 7.

that they provide “information services” and have therefore been able to avoid application of the higher “telecommunications” attachment rate in Section 224(e).

Adoption of a “broadband” rate for jurisdictional attaching entities would close the loophole under which cable operators have been able to enjoy highly subsidized pole attachment rates that were never intended to be maintained by large, multi-service cable operators competing with telecommunications carriers in the provision of voice and Internet access services. It is incredible that cable operators continue to argue that the cable-only rate in Section 224(d) is not a “subsidy rate” just because it is not confiscatory under the Fifth Amendment to the U.S. Constitution.²⁴

Cable operators are quick to point out that the telecommunications rate in Section 224(e) produces a higher rate because it more fully accounts for the utility’s costs of providing space to attaching entities.²⁵ Therefore, it is obvious that cable operators have been able to obtain the same attachment rights as telecommunications carriers at a reduced rate that results in an effective subsidy of their operations at the expense of pole-owning utilities. It is also important to recognize that while the rate formulas outlined in Section 224 limits the amount a given entity may be charged for pole attachments, Section 224 does not limit the total amount that a utility may recoup when providing pole attachments. Thus, it is unnecessary to complicate a new formula with factors intended to ensure that a pole-owning utility is not “over compensated” for pole attachments.²⁶

²⁴ Comments of Comcast, at 13

²⁵ Comments of Ameren, at 21.

²⁶ *Cf.*, Comments of Comcast, at 17.

Comcast raises a number of weak arguments to support its position that cable operators pay more than their fair share under the current cable television rate formula. For example, it argues that cable is only allowed to access a utility pole if there is “left over” space on the pole or if the cable operator is willing to purchase a replacement pole, and then deed ownership of the pole to the utility, to which the cable operator continues to pay rent for the pole.²⁷ Comcast is wrong in calling this a “double payment” to the utility. First, to the extent an attaching entity pays to replace a pole to accommodate its attachment, it is the same cost the attaching entity would pay if it had to construct its own pole lines instead of using the utility’s infrastructure.²⁸ Second, to the extent a pole is installed that is not purchased by the utility, the costs of that pole are not included in the rate base on which the utility calculates pole rental rates. Thus, none of the capital costs of that pole are included in the rental charged to the attaching entity (or to any attaching entity, for that matter). Moreover, even if the cable operator were given “free” rent on that pole as a credit toward its purchase price, it would take hundreds of years of “free rent,” given the extraordinarily low annual rental payments made by the typical cable television operator (typically less than \$10 per pole per year), to fully credit the cable operator for the cost of the pole. By that time, the utility would have replaced the pole several times at its own expense. However, Comcast does raise a good point that poles are expensive, and that it is unfair that the entity that must purchase, install and maintain them (*i.e.*, the utility) must subsidize their use by other parties at ridiculously low annual rental rates per pole.

²⁷ Comments of Comcast, at 25.

²⁸ Although Comcast alleges utilities charge \$6,000 to \$12,000 per pole, WPSC’s cost to replace a pole is typically only \$1,500 to \$3,000 per pole. Comcast does not acknowledge the extreme cost variations that can occur in different parts of the country and seems to be pointing to prices in high-cost areas.

Comcast also posits that in a “truly competitive market, there would be multiple pole owners with their own infrastructure, each vying for buyers to rent space on their poles.”²⁹ Comcast believes that in such a competitive market, prices would tend to be bid down to levels approximating marginal costs, which is essentially the cost of make-ready. The fallacy of this argument is in its premise: that any rational business would install hundreds of thousands of poles, at a few thousands of dollars per pole, for the privilege of renting the poles to third parties at the cost of “make ready.” As noted, above, even at a rental rate calculated under the cable rate formula, it would take hundreds of years for the pole owner to recoup just its initial investment. Most, if not all, pole-owning utilities would agree that if they were not compelled to afford access to cable operators, they would not allow attachment under the rates, terms and conditions mandated by the FCC, and under the typical operational practices of the cable industry:

- The utility gains very little benefit from any make-ready performed by the cable operator. While the utility may receive a newer pole if it has to be replaced, the utility typically credits the cable operator with the salvage value of the older pole).³⁰
- Utilities incur significant administrative costs that cannot be fully recovered; e.g., for Joint Use staff, for joint use meetings to coordinate with other utilities and third-party attaching entities; preparation of maps and reports; etc.
- Third-parties (and cable operators in particular) are responsible for numerous violations of relevant safety codes on poles for which the utility is responsible to maintain, exposing the utility to decreased reliability of the electric system and increased risk of accident.

²⁹ Comments of Comcast, at 44.

³⁰ For example, WPSC provides the cable operator in these circumstances with a used-life credit for the pole that was replaced. WPSC also maintains records for poles replaced by attaching entities so that in the event WPSC needs additional space on the pole, WPSC would be responsible for the pole replacement (*i.e.*, the attaching entity would only pay once).

- The utility has other operational costs that are not fully recovered in the rental rate, such as returning to a pole to remove it after the cable operator moves its facilities to a new pole, sending utility crews in response to a report of a downed wire (even if it turns out to be a cable television cable), and the additional costs involved in changing out electric facilities on a pole with communications attachments, especially when the pole is “boxed” in by a third-party.

Thus, the Utilities find it incredible for Comcast to suggest that any kind of a market for pole attachments could arise at the rates currently paid by cable operators. By analogy to Comcast’s argument, in a truly competitive video services market, cable operators should provide cable service at their one-time, incremental cost to connect a customer to the cable operator’s system, regardless of the amount spent by the cable operator in developing and maintaining its system.

It has been more than 10 years since Congress directed the FCC to adopt the more fully compensatory telecommunications attachment rate. Congress recognized that the new rate formula should be phased-in over a 10-year period to avoid rate-shock to cable operators accustomed to paying the much lower rate under the 1978 Pole Attachments Act. The phase-in was not, as Comcast argues, intended to result in a lower attachment rate over time as more and more competitive local exchange carriers (CLECs) made attachments to utility poles.³¹ If Congress had intended the rate for CLECs to be as low as the grandfathered rate for cable-only attachments, it could have simply carried forward the cable television attachment rate and applied it to all attaching entities. The fact that Congress adopted a new rate formula and provided for a phase-in very clearly demonstrates that Congress knew that attachment rates would be substantially higher. In fact, Section 224(e)(4) specifically provides that “any increase” in the rates was to be phased-in; it does not contemplate rates decreasing over time.

³¹ Comments of Comcast, at 20.

It is therefore very timely and appropriate for the FCC to fully implement congressional intent by adopting a unified rate formula that better compensates pole-owning utilities along the lines of the parameters specified in the telecommunications rate formula of Section 224(e).

A number of parties agreed with the Utilities that it would be very reasonable to acknowledge that the attachments of cable operators and telecommunications service providers are being used to offer voice, broadband Internet access services and other communications services, thereby making all such providers subject to a more fully compensatory “broadband” attachment rate.³² This step alone would eliminate many of the controversies and greatly simplify pole attachment administration. Comcast argues that increasing pole attachment rates to cable operators will inhibit Voice over Internet Protocol (VoIP) services from being competitive with ILEC voice services. However, the FCC is not responsible for ensuring that certain segments of the industry are more competitive than others; it is the FCC’s role to promote competition by eliminating barriers to entry and ensuring reasonable and non-discriminatory opportunities for all potential service providers. Comcast also argues that it will increase the costs for all cable subscribers if higher “broadband” pole attachment rates are charged to cable operators offering broadband Internet access services or VoIP service.³³ However, Section 224 does not dictate whether or how an attaching entity passes through to its customers any of its pole attachment costs. Just as cable operators suggest that pole attachment revenues could inure to the benefit of electric utility stockholders as opposed to ratepayers,³⁴ cable operators could just as easily offset

³² Comments of AT&T, at 16; Comments of Ameren, at 17; Comments of EEI/UTC, at 100;

³³ Comments of Comcast, at 41.

³⁴ Comments of NCTA, at 30.

higher pole attachment costs against the higher profits they enjoy when providing a wider range of services.

3. The FCC Should Eliminate Other Subsidies in its Application of the Cable and Telecom Rate Formulas

Regardless of whether the FCC adopts a unified rate formula for broadband services provided by jurisdictional attaching entities, it should take this opportunity to eliminate other subsidies that have been included in the current pole attachment rate formulas. A number of commenting parties agreed with the Utilities that two factors in particular cannot be reconciled with how poles are actually used: (1) attributing to the electric utility costs for maintaining separation between electric facilities and communications attachments for the protection of communications workers, and (2) presumptions regarding the number of attaching entities on the average utility pole.

The Utilities agree with EEI/UTC that the communications worker safety space should be allocated to common space and proportionately charged to all attaching entities on the pole.³⁵ But for the presence of communications attachments on the pole, and but for the need to protect communications workers, there would be no need for electric utilities to preserve this space on the pole. The FCC previously stated that the communications worker safety space could also be utilized for other facilities, but it is incorrect to conclude that this space is used or useful for any facilities needed by the electric utility.³⁶ Although it is true that street light support brackets and traffic signals are sometimes installed in this space, such use is permitted in support of public safety, and not for the benefit of the pole-owning utility. More importantly, the NESC does not

³⁵ Comments of EEI/UTC, at 103-04.

³⁶ Comments of Comcast, at 17.

permit the communications worker safety space to be used for step-down distribution transformers or conductors because this space exists on the pole to maintain appropriate safety clearances for communications workers so they do not have to invest in costly equipment or be specially trained to work in the electric supply space.

A number of commenters also agreed with the Utilities that FCC should revise the number of attaching entities presumed to be attached to the average utility pole. Evidence submitted in this proceeding indicates that there are significantly fewer attaching entities on the average pole than the FCC assumed would be the case when the rules were last revised. The Utilities presented information showing that on poles owned by Wisconsin Public Service Corporation (“WPSC”), there are on average fewer than 1.4 cable television, ILEC, and non-ILEC telecommunications carrier attachments on WPSC poles having attachments. If one were to calculate the percentages based on all of WPSC’s poles, it would be less than 0.3 attachments per pole. Similarly, CenterPoint Entergy reported that it has an average of 2.66 attaching entities per pole (including CenterPoint as an attaching entity) for those poles having third-party attachments.³⁷

In revisiting these presumptions, the FCC should also eliminate consideration of the electric utility’s facilities on the pole as well as government attachments such as traffic lights and street lights. As explained by EEI/UTC, only a small percentage of poles have government attachments and, even if government entities could be appropriately considered “attaching entities” for purposes of Section 224, the presence of these facilities on utility poles would make very little difference in calculating the average number of attaching entities per pole.³⁸

³⁷ Comments of EEI/UTC, at 45-46.

³⁸ Comments of EEI/UTC, at 47.

A number of commenters also agree with the Utilities that the FCC should reverse its policy decision to count the pole owner as an “attaching entity” on its own poles given the very specific statutory language in Section 224(e) that already compels the pole owner to absorb the cost of one-third of the non-usable space on the pole regardless of the number of attaching entities on the pole.³⁹

C. The FCC Should Not Adopt a Rate Formula for Wireless Attachments Due to the Great Disparity in Attachment Requirements for Such Equipment

No compelling evidence has been presented in this proceeding that the FCC should alter its current approach to wireless attachments used to provide telecommunications services. As indicated throughout this proceeding, not only do electric facilities vary widely by company and area of the country, but there are even great variations in wireless facilities such that it would be impossible for the FCC to develop a rate methodology that could contemplate the variety of ways in which wireless carriers would want to deploy or in how utilities could accommodate a wireless carrier’s request for access. For this reason, the FCC should decline wireless carriers’ request that the FCC compel utilities to provide pole-top access for all wireless attachments.⁴⁰ Just because wireless carriers claim to be responsible for complying with a variety of engineering and safety standards,⁴¹ they are not familiar with each utility’s operational standards and maintenance procedures, nor the utility’s plans for installation of components necessary to the operation of the electric grid itself. Therefore, while it might be possible to accommodate a

³⁹ Comments of EEI/UTC, at 105.

⁴⁰ Comments of CTIA – The Wireless Association (“CTIA”), at 13.

⁴¹ Comments of CTIA, at 14.

carrier's request for pole top access, that might not be the case in all circumstances.⁴² This is precisely the kind of issue that is best left to negotiation among the parties.

Moreover, there do not appear to have been many disputes between utilities and wireless providers over pole access, most likely due to the fact that there are a number of options available to wireless carriers for siting antennas, and the rates typically charged by utilities for pole-top access are orders of magnitude lower than rates charged by commercial tower site providers. Although the cellular industry alleges that wireless carriers are "afraid" to assert their rights under Section 224 because it might negatively impact negotiations with utilities, that seems specious given the fact that wireless carriers are among the largest companies in the country and fully capable of asserting their rights.⁴³ If anything, this demonstrates that wireless carriers see value in negotiating with utilities for reasonable attachment agreements and that litigation over the cost of accessing utility poles is not worth the effort. For an industry that so strongly advocates reliance on the free market in lieu of regulation and its opposition to open-access, it is ironic that the wireless industry is asking the FCC to compel utilities to open their networks to access by wireless carriers at sub-market rates. The Utilities therefore agree with Qwest that to the extent a pole owner permits an attachment at the top of the pole, the rate should be at a "market rate" because unlike lateral space, each pole has only one top.⁴⁴

⁴² Comments of Ameren, at 38.

⁴³ Comments of CTIA, at 9.

⁴⁴ Comments of Qwest, at 6.

D. There is No Need, and it Would Be Inappropriate, for the FCC to Adopt Specific Safety or Engineering Standards for Pole Attachments

As explained by a number of commenting parties, many controversies over safety and engineering standards arise between pole owners and attaching entities because many attaching entities have found it more convenient to attach to utility poles without prior notice to or approval from the pole owner. Moreover, the prevalent use of third-party contractors by cable television companies and CLECs results in haphazard construction methods and many instances of noncompliance with national safety standards, let alone utility standards. Commenters have also documented why it is unnecessary and improper for the FCC to dictate certain engineering practices and standards for pole attachments.

The Utilities agree with other commenters advocating the availability of significant penalties against entities that attach to utility property without prior approval.⁴⁵ Attaching entities have a strong economic incentive to install facilities without prior approval and without significant engineering considerations in order to deploy a large number of attachments quickly.⁴⁶ In fact, comments in this proceeding from attaching entities emphasize their need to have attachments installed quickly and without concern for any safety standards other than the most basic standards. It is therefore understandable why attaching entities complain when utilities seek to protect their infrastructure and, in many cases, require the attaching entities to correct problems they created because of their failure to secure prior approval for the attachments and/or adhere to the safety and engineering standards.

⁴⁵ Comments of Ameren, at 10; and Comments of EEI/UTC, at 71-80.

⁴⁶ A UTC survey indicates that, on average, 11 percent of all attachments were not authorized by the pole owner, and approximately 13 percent of all attachments are in violation of the NESC.

The Utilities therefore join other parties in requesting the FCC to modify its current policy that limits pole owners to charging no more than five years' back rent for unauthorized attachments. It is obvious that this policy does not serve as an adequate deterrent to unauthorized attachments, and that the costs to the utility or the public could be much greater if unauthorized attachments cause safety or operational problems. The experience in Oregon is particularly instructive in showing how substantial penalties for unauthorized attachments and/or safety violations can serve as an effective incentive for all parties to share in the proper maintenance of this critical infrastructure.⁴⁷

Other commenters agree with the Utilities that it is not within the FCC's expertise to dictate safety and engineering standards for electric utilities.⁴⁸ The Utilities agree with EEI/UTC that because of the significant differences in how utilities design and operate their facilities, a more workable solution would be for the FCC to establish a rebuttable presumption that a utility's design specifications, standards, and operational and maintenance requirements are just and reasonable, subject to clear and convincing evidence that the utility is willfully and knowingly discriminating, or if the utility provides similar communications service to the public for a fee upon a demonstration that the utility is willfully and knowingly attempting to provide for itself a competitive advantage.⁴⁹ As explained by Ameren, such a policy would also ensure that the FCC is not placed in the position of deciding whether particular engineering or design

⁴⁷ Comments of EEI/UTC, at 79-80.

⁴⁸ Comments of Ameren, at 12

⁴⁹ Comments of EEI/UTC, at 70.

standards for the utility industry are “just and reasonable,” but only whether a particular utility’s practices are discriminatory, in the context of an adjudicatory setting.⁵⁰

More specifically, the Utilities urge the FCC not to mandate the specific standards and response times requested by attaching entities. For example, while a number of attaching entities request the FCC to mandate the use of boxing and extension arms,⁵¹ such practices should only be implemented at the discretion of the pole-owning utility and subject to applicable safety standards.⁵² Similarly, the FCC should not require utilities to permit temporary attachments in the communications space with reduced spacing to other attachments.⁵³ Experience has shown that “temporary” attachments have a tendency to become permanent and add to a utility’s administrative costs in identifying and enforcing the replacement of such temporary attachments.

Finally, the Utilities oppose the imposition of hard-and-fast response times for pole owners to respond to attachment requests and make-ready work. Imposition of such requirements would effectively require electric utilities to give priority to communications attachments over utility service, maintenance and operations.⁵⁴

E. The FCC Should Eliminate, or at Least Modify, the “Sign and Sue” Provisions to Require Good Faith Negotiations

As the Utilities explained in their initial Comments, the so-called sign-and-sue rule generates continuing frustration for utilities in negotiating pole attachment agreements. Despite

⁵⁰ Comments of Ameren, at 14.

⁵¹ Comments of CURRENT, at 10; and Comments of Fibertech, at 16;

⁵² Comments of EEI/UTC, at 85.

⁵³ Comments of CURRENT, at 6.

⁵⁴ Comments of EEI/UTC, at 86.

very clear language in Section 224 and earlier FCC orders encouraging private negotiations between pole owners and attaching entities, history has shown that no pole attachment agreement is impervious to challenge at any time by any attaching entity for any reason. The FCC's willingness to entertain such complaints at any time means that a pole owner can never have confidence that it will realize the bargain it has struck with an attaching entity. It also means that a pole owning utility can expect any attaching entity to initiate a complaint proceeding at the FCC if the utility would seek to enforce any provision of the agreement in local court.

Attaching entities concede that the sign-and-sue rule allows them to defraud utilities into believing they have an agreement. For example, Comcast argues that the rule helps ensure that attaching entities are not forced to choose between timely access to poles while accepting unreasonable rates, terms and conditions.⁵⁵ Comcast asserts that cable operators or telecommunications providers may need to sign an unreasonable pole attachment agreement while they are undergoing time-sensitive buildouts or plant upgrades and cannot afford to be delayed by protracted negotiations or litigation before the FCC.⁵⁶ Similarly, Knology argues that attaching entities do not know whether unreasonable terms will be enforced or triggered, and should therefore not be put to the effort of challenging those provisions in advance.⁵⁷

These comments perfectly illustrate attaching entities' state of mind when it comes to negotiating with pole-owning utilities. Because of the sign-and-sue rule, attaching entities feel no legal or moral compulsion to abide by the terms of a pole attachment agreement because they can always disavow the agreement as "unjust or unreasonable" if and when the utility ever seeks to

⁵⁵ Comments of Comcast, at 42.

⁵⁶ Comments of Comcast, at 45.

⁵⁷ Comments of Knology, at 11.

enforce the agreement. Attaching entities have convinced themselves, with support from the FCC, that their need-for-speed fully justifies signing an agreement with no intent to abide by its terms. When a contractual relationship is established under circumstances whereby one party may disavow the agreement at any time, it is no wonder that attaching entities have such little regard for utility property or procedural rights. The attaching entity's relationship with the utility is premised on a fraud for which the FCC imposes no penalty.

Rather than protecting the rights of attaching entities – most of whom are very sophisticated business entities with other contracts far exceeding the value of the typical pole attachment agreement – the sign-and-sue rule has led to serious distrust between pole-owning utilities and attaching entities. Attaching entities have lost respect for the negotiating process and the sanctity of contract, and pole owners have no faith that any agreement they enter will be observed by the attaching entity or enforceable without first defending the agreement at the FCC on a complaint by the attaching party. Moreover, the fact that an attaching entity can so easily forestall any enforcement litigation by the pole owner through the filing of a complaint at the FCC has led to the perception that utilities are universally trying to overreach in pole attachment agreements. To the contrary, the sign-and-sue rule means that attaching entities are not negotiating in good faith, are willing to sign anything put in front of them as a matter of expediency, and are prepared to use the FCC's complaint process to forestall or upset the utility's ability to enforce the agreement. The Utilities therefore urge the FCC to eliminate or modify the sign-and-sue rule so that utilities and attaching entities have confidence that a bargain freely struck, without duress or coercion, can and will be enforced without delay.

II. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, PacifiCorp, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation respectfully request that the Commission take action in this proceeding consistent with the views expressed herein.

Respectfully submitted,

**PACIFICORP, WISCONSIN ELECTRIC
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