
**Before the
Federal Communications Commission
Washington, DC 20554**

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

To: The Commission

**REPLY COMMENTS OF THE DAS FORUM
A MEMBERSHIP SECTION OF PCIA–THE WIRELESS INFRASTRUCTURE ASSOCIATION**

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SUMMARY

The record in this proceeding establishes that wireless infrastructure architectures such as distributed antenna systems (“DAS”) are a useful component of the wireless industry’s nationwide effort to introduce wireless broadband and other new services to the public. It is equally clear that consumers will not receive the benefits of wireless infrastructure like DAS unless operators are able to attach their facilities to utility poles in a fair and nondiscriminatory manner. Accordingly, it is critical that the Commission’s rules ensure that DAS operators and other wireless attachers are not denied the pole attachment rights afforded to them under the United States Supreme Court’s *Gulf Power* decision and Section 224 of the Communications Act of 1934, as amended.

Unfortunately, the record confirms that some utility pole owners continue to use safety and other issues as an alleged reason for stalling and even prohibiting wireless attachments, particularly on pole tops. Some utility companies routinely delay responding to requests for pole access by longer than 45 days. Likewise, some utility companies delay pole surveys that must precede make-ready work and needlessly replace poles in lieu of rearranging attachments to create additional pole space. DAS operators and other wireless commenters also report that some utility companies offer their wireless pole attachment agreements on a “take-it-or-leave-it” basis, refusing to negotiate on terms and conditions that are unjustly weighted in favor of the utility companies. The rule clarifications and modifications requested in the DAS Forum’s initial comments are an essential first step towards eliminating these problems that fall within the Commission’s authority under Section 224 and its broader statutory mandate to promote deployment of wireless broadband service.

The Commission should unequivocally declare that DAS and other wireless operators providing telecommunications services are entitled to the attachment rate paid by telecommunications providers under Section 224 and the associated Commission rules. Such a declaration is necessary because some utility companies continue to discriminate against DAS operators and other wireless providers by imposing “market-based” attachment rates that substantially exceed the statutory telecommunications rate.

Finally, any unified broadband attachment rate the Commission adopts should be no greater than the statutory telecommunications rate. There is no question that use of the telecommunications rate as the benchmark for broadband attachment rates would provide utility companies with “just and reasonable compensation,” particularly since the Eleventh Circuit Court of Appeals has confirmed that the substantially lower statutory attachment rate for cable services is “just and reasonable.”

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The DAS Forum, a membership section of PCIA–The Wireless Infrastructure Association (“PCIA”),¹ on behalf of itself and PCIA as a whole, submits these reply comments on the Commission’s *Notice of Proposed Rulemaking* in the above-captioned proceeding.²

Operators of distributed antenna systems (“DAS”) and other wireless interests are in agreement on the following principles: (1) fair and nondiscriminatory access to utility poles has become essential to ensure timely deployment of DAS and other wireless infrastructure;³ (2) “access” must include, among other things, access to pole tops and reasonable timeframes and

¹ The DAS Forum membership includes virtually every outdoor DAS provider, several commercial mobile radio service (“CMRS”) carriers currently deploying DAS as part of their networks, and many other wireless industry representatives. PCIA members, in turn, include CMRS carriers and wireless infrastructure providers that construct, modify, own, operate, lease and manage more than 115,000 communications towers and antenna facilities nationwide, which enable valuable wireless and broadcasting services to the public. *See* DAS Forum Comments at 2.

² *Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 (2007) (“*Notice*”).

³ *See, e.g.*, DAS Forum Comments at 3-6; Comments of CTIA – The Wireless Association® (“CTIA Comments”) at 2-6.

procedures for securing pole attachment agreements and attaching facilities to poles;⁴ (3) some utility companies deny the wireless industry such access via a variety of tactics;⁵ and (4) Commission intervention is necessary to address the problem.⁶ Likewise, wireline providers have endorsed pro-competitive reforms similar to those advocated by the wireless industry.⁷

Congress has directed the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”⁸ The record confirms that the wireless industry is in the midst of an unprecedented nationwide effort to install and operate networks that deliver “advanced telecommunications capability” to consumers, using tools such as DAS. Accordingly, if the Commission wishes to “create even-handed treatment and incentives for broadband deployment,”⁹ it must eliminate unreasonable obstacles to wireless pole attachments via clear and specific rules and policies that create regulatory certainty and promote investment in DAS and other modes of wireless broadband deployment.

⁴ See, e.g., DAS Forum Comments at 11-12 (“It is critically important that DAS antennas be placed at the correct height. . . . While the optimal height varies as a function of topology and foliage, it typically falls between 30 and 40 feet above ground level. Thus, the pole top is often the only viable location for a DAS antenna.”); Crown Castle Solutions Corp. Comments (“Crown Castle Comments”) at 4-5 and 7-9; CTIA Comments at 7-8 and 11-13; ExteNet Systems Comments at 5-8.

⁵ See, e.g., NextG Networks Comments at 5-9; Wireless Communications Ass’n Int’l Comments at 2-4; FiberTower Corporation Comments at 5.

⁶ See, e.g., DAS Forum Comments at 9-14; MetroPCS Communications Comments at 7; T-Mobile USA, Inc. (“T-Mobile”) Comments at 3-4.

⁷ See, e.g., Alpheus Communications, L.P. and 360Networks (USA) Comments (“Alpheus Comments”) at 2-3; Cavalier Telephone Comments at 6-7; Knology Comments at 8-11; segTEL Comments at 3-5; Sunsys Comments at 13, 16-18.

⁸ Telecommunications Act of 1996, Section 706, 47 U.S.C. § 157 nt.

⁹ Notice, 22 FCC Rcd at 20209.

I. CONCERNS OVER SAFETY AND UNAUTHORIZED ATTACHMENTS DO NOT WARRANT BLANKET PROHIBITIONS AGAINST WIRELESS ATTACHMENTS

A. Safety

Some utility companies contend that wireless pole attachments (including those on pole tops) raise a unique safety threat and, therefore, the Commission should afford utility companies unlimited discretion to deny or delay the wireless industry's access to poles for safety-related reasons.¹⁰ Indeed, some utility companies go so far as to contend that the Commission has no jurisdiction to regulate safety-related issues at all.¹¹ As shown below, these arguments are meritless.

The Commission plainly has authority to regulate safety as necessary to ensure that pole owners do not use it as a pretext for treating wireless attachments in a discriminatory manner:

Under Entergy's construction, the Commission would lack jurisdiction any time a utility raised safety or reliability concerns to justify the engineering standards it imposed on attachers. To allow utilities to thus evade Commission review would undermine the purpose of section 224 to 'prohibit utilities from engaging in unfair pole attachments practices' and to 'ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of . . . scarce infrastructure and rights-of-way. . . .' We affirm the Commission's authority to decide whether Entergy's application of the particular engineering standards at issue in the Complaint is unjust and unreasonable under section 224(b), and whether Entergy unlawfully denied Complainants access to its poles based on purported safety and reliability concerns in violation.¹²

¹⁰ See, e.g., Alabama Power, *et al.* Comments at 34-35; Coalition of Concerned Utilities ("CCU") Comments at 45-48.

¹¹ See, e.g., Comments of Florida Power & Light, Tampa Electric and Progress Energy ("Florida Power & Light, *et al.* Comments") at 9-10; Comments of Oncor Electric Delivery Company at 9.

¹² *Arkansas Cable Telecommunications Association*, 21 FCC Rcd 2158, 2162-63 (EB 2006) (footnotes omitted); see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16073 (1996) ("[W]e reject the contention of some utilities that they are the primary arbiters of [capacity, safety, reliability or engineering] concerns, or that their determinations (continued on next page)

DAS and other wireless providers have safely occupied utility poles across the country for some time. Indeed, DAS Forum members have safely attached their facilities on poles owned by approximately 98 different utility companies nationwide, without any evidence of harm to workers, utility operations or utility customers.¹³ Likewise, the utility companies' concerns about the safety of pole top attachments are disingenuous. It is well known that utility companies have routinely permitted such attachments without incident, and several utility companies actually rely on pole-top antennas *themselves* for internal operations such as System Control and Data Acquisition ("SCADA"). One utility company has had pole-top antennas in place for nearly twenty years and continues to rely on them for maintaining system reliability. The use of pole-top antennas for SCADA operations is a common example of how reasonable procedures are in effect for access to the tops of poles, and suggests that wireless access to pole tops can also be enabled through similar processes.

Certainly, the DAS Forum takes no issue with the proposition that pole attachments must be safe, nor does it dispute that utility companies have a statutory right to limit pole attachments where they have a legitimate safety concern.¹⁴ Safety in and of itself, however, is not the issue

should be presumed reasonable.") (*Local Competition Order*); *Kansas City Cable Partners v. Kansas City Power & Light Co.*, 14 FCC Rcd 11599, 11604 (Cab. Serv. Bur. 1999) (a utility "may rely on the NESC [National Electric Safety Code] to provide standards for safety, reliability, and generally applicable engineering standards, but the utility is not the final arbiter of such issues and its conclusions are not presumed reasonable").

¹³ See T-Mobile Comments at 3 ("CMRS attachments are now as predictable in configuration and routine in deployment as any other utility pole attachment. Many utilities recognize this and have established transparent processes to apply for and negotiate agreements for wireless attachments.").

¹⁴ See 47 U.S.C. § 224(f)(2) (utility may deny access to poles "for reasons of safety, reliability and generally applicable engineering purposes").

here.¹⁵ The real issue is the utility companies' use of alleged safety considerations to either ban or effect an extreme delay in the deployment of wireless attachments.¹⁶ The Commission can and should take a significant step towards eliminating this problem by requiring all pole owners to comply with the IEEE's National Electrical Safety Code ("NESC") standards and permit NESC-compliant attachments.¹⁷ NESC antenna attachment standards are specifically designed to ensure safety and DAS providers routinely coordinate with utility companies to further ensure safe installation of DAS facilities. Experience has shown that antenna attachments can be made without compromising safety and reliability, rendering blanket bans on antenna attachments unnecessary. Equally important, the Commission's rules should include a clear and unequivocal statement that Section 224 of the Act prohibits pole owners from conditioning access on compliance with arbitrary safety requirements that exceed NESC standards.¹⁸ Although Section 224 and relevant precedent make clear that utility companies may not establish a blanket presumption

¹⁵ One Northeast utility, for example, that has denied access to pole tops where primary voltage class wires are present has acknowledged that they have no empirical data to support a claim that such attachments are unsafe. *See Review of the State's Public Service Company Utility Pole Make Ready Procedures*, Connecticut Department of Public Utility Control Docket No. 07-02-13, Hearing Minutes (Mar. 17, 2008).

¹⁶ *See, e.g.*, DAS Forum Comments at 8 ("[E]lectric utilities in Hawaii have told DAS Forum members that they will not permit *any* wireless antennas to be placed on their poles for 'safety reasons.' Other pole owners impose voltage limitations more stringent than those set forth in NESC standards, which effectively block all wireless attachments or prohibit all third-party pole-top attachments. . . In another example, another DAS Forum member has been attempting to obtain permission from an electric utility in New Jersey to place DAS antennas on the tops of twenty-five poles, and has provided the utility with extensive documentation of the consistency of its proposal with NESC and other relevant safety standards. Still, the utility has refused to allow the DAS network to be deployed."); NextG Comments at 5-6; CTIA Comments at 13-14.

¹⁷ *See* DAS Forum Comments at 9. The IEEE's NESC sets forth detailed requirements for the attachment of wireless antennas, including placement of antennas on pole tops, and provides useful guidelines for physical separation of attached equipment. *Id.* at 7. At least 19 states automatically adopt the latest edition of the NESC as state law while many more adopt the NESC through rulemakings. *Id.* at 8 n.9.

¹⁸ *Id.* at 9; *see also* Crown Castle Comments at 6-7.

against wireless or DAS access to pole tops,¹⁹ it appears to be necessary also to codify this limitation in the rules to help ensure that pole owners will comply.

B. Unauthorized Attachments

Certain commenters assert that unauthorized attachments are a widespread problem although they generally acknowledge that wireless attachers are not the source of that problem.²⁰ While the DAS Forum cannot speak to this issue as it relates to wireline or cable providers, it has never suggested that attaching parties of any kind should be permitted to circumvent a utility company's reasonable authorization procedures, nor has it suggested that utility companies should be prohibited from including reasonable protections against unauthorized attachments in their pole attachment agreements.²¹

Crucially, however, any concerns that utility companies may have about this problem cannot be a basis for denying or restricting wireless attachments in a discriminatory manner. The fact that some providers attach without authorization does not justify unlawful treatment of those who seek lawful attachment.

¹⁹ See *infra* text at Section II.A.

²⁰ See Edison Electric Institute and Utilities Telecommunications Council Comments ("EEI Comments") at 32-34; Empire District Electric Company Comments at 2-3; Florida Power & Light *et al.* Comments at 10-12.

²¹ *Mile Hi Cable Partners, L.P. et al.*, 14 FCC Rcd 3244, 3249 (1999) ("PSCo is entitled to compensation for attachments to its poles according to the provisions of Section 224 of the Act, whether those attachments are authorized or unauthorized. . . . The appropriate amount of compensation, however, is for the Commission to decide under Section 224 of the Act, as is the reasonableness of the terms and conditions of the agreement. To the extent that the penalty, even if characterized as being for 'theft, trespass and conversion,' is 'bargained for' and part of the agreement subject to Commission jurisdiction, it too is subject to Commission jurisdiction. The Bureau must determine the reasonableness of the penalty and whether it is not just a penalty, but excessive compensation for unpaid attachment fees.") (footnotes omitted).

II. THE RECORD HIGHLIGHTS THE NEED FOR COMMISSION ACTION TO ENSURE NONDISCRIMINATORY ACCESS FOR WIRELESS ATTACHMENTS TO UTILITY POLES AND POLE TOPS

A. Wireless Providers Are Entitled to Nondiscriminatory Access Under Section 224

Some commenters continue to question whether wireless providers have a right to non-discriminatory access to utility poles, ducts, conduits, and rights-of-way under Section 224 of the Act.²² For instance, CCU asserts:

Wireless attachers have other deployment options, [so] [u]tility poles are not ‘bottle-neck’ facilities as they relate to the deployment of wireless attachments, and the FCC should not impose access obligation on pole owners nor establish regulations regarding such use. Wireless attachments should be handled by marketplace negotiations without government oversight.²³

CCU’s statement does not recognize that the Commission resolved this question a decade ago, finding that “[w]ireless carriers are entitled to the benefits and protection of Section 224.”²⁴

As the Commission recognized:

Section 224(e)(1) plainly states: “The Commission shall . . . prescribe regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services.” This language encompasses wireless attachments.²⁵

The United States Supreme Court upheld the Commission’s conclusion in its *Gulf Power* decision,²⁶ and courts and the Commission have since repeatedly confirmed that Section 224 governs

²² See Idaho Power Company Comments at 5; Alabama Power, *et al.* Comments at 25-27, 32-33.

²³ CCU Comments at 44-55.

²⁴ *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, 6798 (1998) (“*Pole Attachment Order*”).

²⁵ *Id.*

²⁶ *National Cable & Telecomm. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 341 (2002) (holding “attachments at issue in this suit . . . ones which provide wireless telecommunications – fall within the heartland of the [Pole Attachments] Act.”).

wireless attachments.²⁷ This long-standing conclusion continues to serve important public policies, particularly in light of increased intermodal competition from wireless providers in both voice and broadband delivery, and in the particular advantages of DAS deployments in sensitive environments.²⁸

In short, “the only recognized limits to access for antenna placement by wireless telecommunications carriers are those contained in the statute: ‘where there is insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes.’”²⁹ Utility companies thus cannot establish a blanket presumption against wireless or DAS access to poles or pole tops, nor can they use the pole attachment process to accomplish the same purpose through delay and other tactics.

**B. Some Utility Companies Continue to Impede Wireless Attachments
Contrary to the Requirements of Section 224**

Despite the existing federal statute and regulations, wireless attachers around the country experience significant difficulties in negotiating and obtaining fair pole attachment agreements, for both mid-pole and pole-top wireless attachments. The record before the Commission identifies the various roadblocks some utility companies utilize to delay the attachment process, particularly when wireless attachers seek access to pole tops. The DAS Forum, Fibertech Networks, LLC (“Fibertech”), Time Warner Telecomm, Inc. (“Time Warner Telecomm”), CTIA and many

²⁷ See *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002); *Omnipoint Corp. v. PECO Energy Co.*, 18 FCC Rcd 5484, 5486 (EB 2003) (“Finally, PECO argues that the Commission does not have jurisdiction in this matter because Omnipoint seeks to attach wireless equipment. We disagree. . . . the Commission has jurisdiction over wireless telecommunications service attachments.”); Public Notice, “Wireless Telecommunications Bureau Reminds Utility Pole Owners of their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates,” 19 FCC Rcd 24930 (WTB 2004) (“*Wireless Attachments Public Notice*”).

²⁸ See generally DAS Forum Comments.

²⁹ *Wireless Attachments Public Notice*, 19 FCC Rcd at 24930 (citing 47 U.S.C. § 224 (f)(2)).

others show that some pole owners have refused to permit any wireless attachments at all, routinely delay responding to a request for access well beyond the 45-day response deadline, delay performing pole surveys which must precede make-ready work, delay for months (even years) after receiving an initial application to complete make-ready work, needlessly require wireless attachers to replace poles instead of rearranging attachments to create additional space, and require work to be done by utility employees despite the fact that pole attachments can (and are) done safely and reliably by qualified contractors.³⁰

Wireless commenters also report that some utility companies offer their wireless pole attachment agreements on a “take-it-or-leave-it” basis, refusing to negotiate on terms and conditions that are unjustly weighted in favor of the pole owners.³¹ Such agreements typically include, for example, complete insulation of the pole owner from any liability (even in the case of the pole owner’s gross negligence) and agreement durations too short to allow the wireless attacher to earn any return on its investment and to ensure network reliability and continuity.³² Some utility companies also have sought to impose provisions that afford them broad latitude to power down antennas without notice, remove an antenna based on neighbor complaints, restrict the types of services that may be provided over the attached facilities, and displace the Commission’s enforcement jurisdiction with utility-friendly mediation or arbitration provisions.³³

³⁰ See, e.g., DAS Forum Comments at 7-11; Fibertech Comments at 7-8; Time Warner Telecomm Comments at 14-17; CTIA Comments at 8-9; Crown Castle Comments at 7-8; CenturyTel Comments at 3-4; Cavalier Telephone Comments at 2-4; ExteNet Systems Comments at 7-8; MetroPCS Communications Comments at 7; Sunesys Comments at 3, 6-8.

³¹ DAS Forum Comments at 11; CTIA Comments at 8-9; Sunesys, LLC Comments at 5-6; Crown Castle Comments at 7-8.

³² DAS Forum Comments at 11.

³³ CTIA Comments at 9.

In an apparent effort to justify their conduct, CCU and other commenters fall back on vague, unsubstantiated “concerns” related to wireless attachments.³⁴ For instance, CCU asserts that wireless attachments are different from wireline attachments and therefore “each utility must make its own decision whether it is comfortable permitting wireless attachments on its electric distribution system.”³⁵ Section 224, however, gives utility companies the right to bar wireless attachments on a specific pole only where the utility demonstrates that a given wireless attachment will create substantial safety or operational concerns.³⁶ Of course, the burden is on the utility company to show that a proposed installation will not be safe or will create significant operational concerns.

Moreover, the fact that wireless attachments may be physically different from other attachments does not give a utility company authority to prohibit categorically any and all wireless attachments. As discussed above, there is no question that wireless facilities can be safely attached to utility poles and pole tops as contemplated by Section 224 of the Act.³⁷

Similarly, concerns regarding the potential for utility worker exposure to RF energy are unfounded.³⁸ RF exposure is comprehensively regulated by the Commission and the Occupational Safety and Health Administration.³⁹ Utility company concerns regarding operational is-

³⁴ See CCU Comments at 44-45; Alabama Power, *et al.* Comments at 34-35; EEI Comments at 22-31; Florida Power & Light, *et al.* Comments at 15-16.

³⁵ CCU Comments at 45.

³⁶ 47 U.S.C. § 224(f)(2) (“ . . . a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.”).

³⁷ See *supra* text at Section I.A.

³⁸ CCU Comments at 46.

³⁹ See, e.g., Federal Communications Commission, Office of Engineering & Technology, OET Bulletin 65, “Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromag- (continued on next page)

sues such as climbing clearances, tree trimming, handling of metered electric service, responsibilities for emergency restorations, capacity concerns, wind and ice loading, the need to secure local approvals, and cost recovery are similarly without merit.⁴⁰ None of these issues are unique to wireless attachments, and they can readily be resolved between the utility company and attaching carrier through agreements and other standard business transaction mechanisms. Again, they do not support categorical denial of wireless attachments under Section 224.

Equally misplaced are utility company concerns about the potential use of unqualified workers in the attachment process.⁴¹ The Commission has long recognized that “utilities should be able to require that only properly trained persons perform work in the proximity of the utilities’ lines,” but utility companies may not “dictate that only specific employees or contractors be used.”⁴² No legitimate telecommunications carrier would suggest that work in the electric supply space be conducted by anyone other than a trained electrical worker. The DAS Forum emphatically agrees that work in the electrical supply space must be performed by qualified workers. Accordingly, speculation that an individual wireless attacher might use unqualified workers is not a basis for establishing a per se prohibition against all wireless attachers.

netic Fields,” (Ed. 97-01), OET Bulletin 56, “Questions and Answers about Biological Effects and Potential Hazards of Radio Frequency Electromagnetic Fields,” (4th Ed., Aug. 1999); 29 C.F.R. Part 1910, Subparts G, J and R; 29 C.F.R. Part 1926, Subpart D.

⁴⁰ See generally CCU Comments at 45-47.

⁴¹ *Id.* at 46.

⁴² *Implementation of the Local Competition Provision in the Telecommunications Act of 1996*, 14 FCC Rcd 18049, 18077 (1999) (citing *Local Competition Order*, 11 FCC Rcd at 16083).

C. The Commission Should Revise its Section 224 Regulatory Scheme to Enable DAS Deployment

The record leaves little doubt that the current regulatory framework for pole attachments is not conducive to the efficient deployment of DAS systems. The Section 224 process, however well intentioned, allows delays and uncertainty, thereby preventing DAS operators and other wireless attachers from addressing coverage needs in a timely manner. This, in turn, stalls DAS deployment nationwide, depriving the public of the benefits of wireless services in areas that are otherwise difficult to serve.⁴³ Accordingly, it is vital that the Commission use this proceeding to revise its pole attachment rules to encourage and streamline the deployment of DAS networks.

To this end, the Commission should take affirmative steps to enforce the 45-day deadline by which utility companies must respond to a request for access,⁴⁴ and should establish and enforce reasonable timeframes in which utility companies must complete make-ready work.⁴⁵ State regulations are appropriate guidance in this regard. The New York Public Service Commission, for example, grants utility companies 45 days to complete surveys and 45 days for make-ready work.⁴⁶ Several other states have adopted or are considering similar timeframes.⁴⁷

⁴³ See *supra* text at 8.

⁴⁴ 47 C.F.R. § 1.1403.

⁴⁵ DAS Forum Comments at 9-10 (citing *Proceeding on Motion of the [New York Public Service] Commission Concerning Certain Pole Attachment Issues*, NY PSC Case 03-M-0432, Order Adopting Policy Statement on Pole Attachments, Appendix A at 3-4 (Aug. 6, 2004)).

⁴⁶ *Id.*

⁴⁷ See Oregon PUC Comments, Appendix A at p.7 (45-day make-ready period in most instances). The Maine Public Utilities Commission apparently has established a make-ready timeframe of 90 days for completion of all required make-ready work by pole owners with a possible extension extended to 180 days in cases requiring pole replacement. See SegTEL, Inc. Comments at 4-5 (citing *Oxford Networks f/k/a/ Oxford County Telephone Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles*, Maine Public Utilities Commission, Order, Docket No. 2005-486 (Oct. 26, 2006) ("Maine PUC Order"); *Oxford Networks f/k/a Oxford County Telephone Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles*, Maine Public Utilities Commission, Order on Reconsideration, Docket No. 2005-486 (Maine PUC, Oct. 26, 2006) (Feb. (continued on next page)

To further promote timely and efficient wireless pole attachments, the Commission should take affirmative steps to require utility companies to allow DAS operators to hire qualified and trained contractors to perform field surveys, make-ready determinations, and make-ready work where the utility company cannot or will not meet reasonable performance deadlines.⁴⁸ Utility company comments opposing this concept are entirely without merit.⁴⁹ As discussed above, the Commission has already concluded that utility companies may not prohibit attachers from using qualified contractors.⁵⁰

The Commission should also explicitly reaffirm that a wireless provider's rights under Section 224 include access to pole tops.⁵¹ As highlighted by the DAS Forum and others, the statute contains no language to the contrary.⁵² For further guidance, the Commission should look to Utah's recently-amended pole attachment regulations, which define the usable space on a pole to be "the space on a utility pole above the minimum grade level *to the top of the pole*, which includes the space occupied by the pole owner."⁵³ The Utah Public Service Commission "re-

28, 2007)). The Connecticut Department of Public Utility Control has issued a Draft Decision proposing to adopt a maximum 70-day interval for the entire attachment process (25 days for releasing an estimate for the make-ready work and 45 days for licensing the attachment and performing the make-ready work). See Fibertech Comments at 22 (citing *Connecticut DPUC Review of the State's Public Service Company Utility Pole Make-Ready Procedures – Phase I*, Draft Decision, Docket No. 07-02-13, at 18 (Feb. 14, 2008)).

⁴⁸ See Alpheus Comments at 2-3; Fibertech Comments at 25-27; MetroPCS Communications Comments at 7; NextG Networks Comments at 23-24; Sunesys Comments at 13-15; Time Warner Telecomm Comments at 17-23.

⁴⁹ See CCU Comments at 84-89; Empire District Electric Company Comments at 3-4; Florida Power & Light, *et al.* Comments at 21.

⁵⁰ See *supra* text at 10-11.

⁵¹ DAS Forum Comments at 11-12.

⁵² See *Wireless Attachments Public Notice*, 19 FCC Rcd at 24930.

⁵³ Utah Admin. Code, Rule R746-345-5(A)(2)(d) (emphasis supplied), available at < <http://www.rules.utah.gov/publicat/code/r746/r746-345.htm> > (last visited April 17, 2008).

cently spent the better part of two years reviewing and amending [its] pole attachment rules,” and the “process involved participation by all interested parties and providers of multiple telecom and information technology providers.”⁵⁴

Finally, the Commission should adopt a rebuttable presumption favoring the use of boxing and extension arms on the terms proposed by Fibertech.⁵⁵ As noted by the Maine Public Utility Commission, “boxing is an accepted practice in the industry and . . . its use can create space on utility poles. Neither the NESC nor the [Bellcore] Blue Book prohibit or restrict boxing.”⁵⁶ While some utility companies generically resist these practices on putative grounds of safety,⁵⁷ any legitimate safety concerns can be “alleviated by the Commission conditioning the use of boxing and extension arms when facilities are accessible by ladder, bucket truck, or emergency equipment.”⁵⁸

III. DAS OPERATORS AND OTHER WIRELESS ATTACHERS SHOULD PAY REASONABLE ATTACHMENT RATES THAT ARE NO HIGHER THAN THE STATUTORY TELECOMMUNICATIONS RATE

It is beyond argument that DAS operators and other wireless providers are telecommunications carriers “entitled to the benefits and protection of Section 224.”⁵⁹ Accordingly, they are to pay the attachment rate paid by telecommunications carriers under the statute. Nevertheless, the record before the Commission confirms that some utility companies continue to discriminate

⁵⁴ Utah Public Service Commission Comments at 1.

⁵⁵ See Fibertech Comments at 16-20; see also Petition for Rulemaking of Fibertech Networks, LLC, RM 11303 (filed Dec. 7, 2005).

⁵⁶ Current Group, LLC Comments at 10-11 (quoting *Maine PUC Order* at 15).

⁵⁷ See CCU Comments at 81-84; Florida Power & Light, *et al.* Comments at 18-19; Verizon Comments at 18-19.

⁵⁸ segTEL, Inc. Comments at 9; Fibertech Comments at 19-20; Time Warner Telecomm Comments at 23-24.

⁵⁹ *Pole Attachment Order*, 13 FCC Rcd at 6798; see also 47 C.F.R. § 1.1402(h); *supra* text at 7.

against DAS operators and other wireless providers by imposing “market-based” attachment rates that substantially exceed the permitted telecommunications rate.⁶⁰ Worse, several utility company commenters urge the Commission to condone this practice, arguing that the supposedly unique make-ready work and cost variables associated with wireless attachments somehow render them ineligible for the permitted telecommunications rate.⁶¹

The utility companies’ arguments are baseless. The Commission should adopt a bright-line rule applying the telecommunications rate on a per-foot basis, as extrapolated from the three-foot assumption implicit in the current rate.⁶² Moreover, any differences between wireless and wireline attachments in terms of make-ready work should not affect the attachment rate itself, since the attachers pay for the make-ready work on a stand-alone basis. To eliminate any further uncertainty, however, the DAS Forum recommends that the Commission clarify that DAS operators and other wireless providers are entitled to the permitted telecommunications attachment rate as providers of telecommunications services.

In addition, the Commission should establish a unified broadband attachment rate that is no higher than the current telecommunications rate. The overwhelming majority of commenters addressing this issue concur that the Commission has the legal authority to adopt a uniform

⁶⁰ See CTIA Comments at 10-11; DAS Forum Comments at 10-11; ExteNet Systems, Inc. Comments at 3-5; NextG Networks, Inc. Comments at 12-13; T-Mobile Comments at 5-6.

⁶¹ See Alabama Power, *et al.* Comments at 25-27; CCU Comments at 44-48; PacifiCorp, Wisconsin Electric Power Company and Wisconsin Public Service Corporation Comments at 8.

⁶² The Commission’s current rules encourage negotiation. *Pole Attachment Order*, 13 FCC Rcd at 6799 (“There is no clear indication that our rules cannot accommodate wireless attachers’ use of poles when negotiations fail. . . . If parties cannot modify or adjust the [telecommunications] formula to deal with unique attachments, and the parties are unable to reach agreement through good faith negotiations, the Commission will examine the issues on a case-by-case basis.”). This has proven unworkable in practice and should be replaced by a bright-line rule.

broadband rate and should exercise that authority.⁶³ The parties, however, do not agree on the appropriate level for the broadband rate. Some utility companies argue that the broadband rate should be based upon modifications to the telecommunications rate or should be higher than the telecommunications rate,⁶⁴ while other parties contend that the broadband rate should be no higher than the telecommunications rate⁶⁵ or should be based upon the cable rate.⁶⁶

The DAS Forum continues to believe that the unified broadband rate should be no greater than the telecommunications rate. There is no question that the telecommunications rate would provide utility companies with just and reasonable compensation. Indeed, the Eleventh Circuit Court of Appeals has confirmed that cable rate, which is significantly lower than the telecommunications rate, already ensures that utility companies receive just and reasonable compensation.⁶⁷

The Commission should also clarify that the usable space occupied by a wireless attachment does not include the length of vertically-placed cable and wires running between the antenna and the equipment box.⁶⁸ The Utah Public Service Commission, for instance, has already concluded that it is appropriate to exclude vertically-placed cable or wire when measuring wire-

⁶³ See, e.g., Alabama Power *et al.* Comments at 14-19; Ameren Servs. Corp. and VEPCO Comments at 18-23; AT&T Comments at 10-23; CCU Comments at 37-44; CTIA Comments at 14; Current Group Comments at 11-13; EEI Comments at 93-110; Empire District Electric Company Comments at 1-2; Florida Power & Light and Tampa Electric Comments at 11-17; Knology Comments at 3-8; MetroPCS Communications Comments at 3-4; Time Warner Telecomm Comments at 5-14; *but see* Charter Communications Comments at 10-11; Comcast Corp. Comments at 1-23.

⁶⁴ See, e.g., EEI Comments at 102-03; Ameren Servs. Corporation and VEPCO Comments at 23-27.

⁶⁵ See, e.g., Alabama Power, *et al.* Comments at 17-19; DAS Forum Comments at 14; Zayo Bandwidth Entities Comments at 6-7.

⁶⁶ See, e.g., CenturyTel, Inc. Comments at 14; Knology, Inc. Comments at 8; National Cable Television Ass'n Comments at 17-20; State Cable Ass'ns Comments at 19-20; T-Mobile Comments at 5-6.

⁶⁷ See *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002); *Georgia Power Co. v. FCC*, 346 F.3d 1033 (11th Cir. 2003).

⁶⁸ See NextG Networks Comments at 12; T-Mobile Comments at 5.

less attachments.⁶⁹ This is a sensible position, since such cables or wires do not prevent another attacher from placing a pole attachment in the usable space of the pole.⁷⁰

CONCLUSION

The record establishes that DAS networks facilitate timely and cost-efficient provision of new wireless offerings in areas that cannot be easily served by traditional wireless infrastructure. Use of DAS architecture is likely to increase over time. Pole owners that deny DAS operators their right of access to the poles and to pole tops will jeopardize the viability of DAS as a solution and thus block timely deployment of new wireless services, including wireless broadband.

⁶⁹ Utah Admin. Code, Rule R746-345-5(A)(3)(e)(i). New York has also addressed this issue, ordering National Grid to establish a rate for wireless attachments and granting National Grid permission to use its pole tops for antenna attachments. *See Joint Petition of Niagara Mohawk Power Corporation and National Grid Communications, Inc. for Approval of Pole Attachment Rate for Certain Wireless Attachments to Niagara Mohawks Distribution Poles*, NYDPS Case 03-E-1578.

⁷⁰ NextG Networks Comments at 12; T-Mobile Comments at 5.

The Commission can and should eliminate this problem by amending its pole attachment rules as requested by the DAS Forum.

Respectfully submitted,

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