Before the
Federal Communications Commission
Washington, D.C. 20554

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

To: The Commission

REPLY COMMENTS OF THE COALITION OF CONCERNED UTILITIES

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SUMMARY

Many of the Comments in this proceeding make clear that the Commission's NPRM has the potential to exacerbate an already troubling pole attachment and joint use regulatory environment and jeopardize the safe and efficient operation of the nation's electric utility distribution systems. Despite cable industry claims that the Commission owes no duty to electric utilities,[1] the Coalition of Concerned Utilities urges the Commission to rectify existing unsafe and self-serving practices and to establish equitable cost sharing. The Coalition urges the Commission to adopt the common sense safety and operational proposals that the Coalition has proposed so that communications attachers, whose attachment rights are zealously protected by the Commission, will behave in a manner that is consistent with those rights.

At this late stage of cable development -- especially in the midst of an energy crisis and deep concerns over electric utility rates -- there is no public policy justification for electric utility ratepayers to continue their subsidization of communications giants like Comcast and Time Warner Cable. The cable industry, whose defense of its subsidy is grossly incorrect and outdated, has largely built out its system and now receives sharply higher revenue per pole today than ever before, due to much higher cable rates and the introduction of broadband services like Internet access and VoIP service. Considering these factors, there is no reason for the cable industry to continue receiving the colossal subsidy that electric utility ratepayers have provided for years. The Commission should not continue favoring one industry (communications) over another (electric utility). The Coalition therefore encourages the Commission to adopt the cost allocation proposal explained in the Coalition Comments.

[1] NCTA Comments at 12-13.

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REPLY COMMENTS

Allegheny Power, Baltimore Gas and Electric, Dayton Power & Light, FirstEnergy, Kansas City Power & Light, National Grid, and NSTAR (collectively, "the Coalition of Concerned Utilities" or "Coalition"), by their counsel and pursuant to Section 1.415 of the rules and regulations of the Federal Communications Commission's ("FCC" or "Commission"), 47 C.F.R. § 1.415, appreciate the opportunity to submit these Reply Comments in the above-captioned proceeding.

Extensive factual details regarding the adverse effect of widespread deployment of attachments to the nation's electric utility infrastructure have been detailed by numerous electric utilities during the course of this proceeding. Much has been presented to the Commission regarding the extent of unauthorized attachments and safety violations, and other serious operational concerns related to attachments. Extensive information regarding unfair rates and inappropriate subsidies favoring one industry over another also has been provided.

Most of the issues raised by parties representing attacher interests already have been addressed in the Coalition's Comments and will not be repeated here. But a large amount of misinformation provided by cable operators regarding pole attachment rates must be corrected. In addition, it must be emphasized that attachment-related proposals submitted by certain

commenters would have an obviously detrimental effect on electric utility operations and the safety and integrity of the nation's electric distribution system.

I. CABLE'S DEFENSE OF ITS SUBSIDY IS INCORRECT AND OUTDATED

A. Cable Television Companies No Longer Deserve Subsidies

At this late stage of cable development -- especially in the midst of an energy crisis and deep concerns over electric utility rates -- there is no public policy justification for electric utility ratepayers to continue their subsidization of communications giants like Comcast and Time Warner Cable.

The incredible pole attachment rate subsidy provided by Congress 30 years ago to jump-start the "nascent" "community antenna television companies" has had its intended effect and a whole lot more. "CATV" companies are no longer "fledgling" new entrants with no reasonable access to pole distribution facilities. They now include a number of gigantic communications corporations worth billions of dollars that collectively provide not only video programming services but also high speed Internet access to 92 percent of the country.[2]

Cable companies already have built out the bulk of "their" distribution systems and by now have actually attached to the vast numbers of poles envisioned in the 1970s. They have access to all of the poles to which they request access. They have expanded their offerings and transformed themselves into "triple-play" providers of video, Internet access and telephone services that exploit utility pole distribution systems even more. The ability of "CATV" companies to provide broadband and now telephone service via subsidized pole attachment rates has unfairly increased the revenues that these companies have generated and will continue to generate -- at the expense of electric utilities and their ratepayers.

[2] NCTA Comments at i.

Now that cable companies have fully built out their systems and are generating far more revenue than before, the only thing that has not changed is the unduly low rate that they pay to attach to utility poles. That artificially low rate, which may have made sense years ago to subsidize a "nascent" CATV industry, makes not a bit of sense today.

As explained below, the Comments filed by the cable industry in this proceeding are misleading and distort the truth about pole attachment rates. We urge the Commission to view such comments for what they are: continued self-serving requests for government mandated handouts by large communications companies that can afford to pay their fair share of expenses to distribute their services.

B. Make-Ready Costs Do Not Provide Revenues for Utility Pole Owners

Cable operators in this proceeding make much of the make-ready costs that they pay to electric utilities in order to access poles where space is not available.[3] But, make-ready costs caused by an entity that needs make-ready are not inappropriate. Every other attaching entity, including competitive local exchange carriers ("CLECs"), as well as electric utility and incumbent local exchange carrier ("ILEC") pole owners, are required to pay their own make-ready costs.

The National Cable and Telecommunications Association ("NCTA") claims that "[f]or some utilities, make-ready generates millions of dollars in payments annually."[4] Wrong. This statement improperly suggests that electric utilities make money from make-ready, but in fact the opposite is true. Make-ready work is performed by utility personnel and their contractors specifically to accommodate attaching entities. The utility pole owner collects only its out-of-pocket expenses -- if it is fortunate enough -- incurred to accommodate the attacher. These

[3] Time Warner Comments at 17.

[4] NCTA Comments at 10 (footnote omitted).

expenses should of course be paid by the attacher to reimburse the utility pole owner for costs caused by the attacher. Utility pole owners make no "profit" on make-ready, and in fact are burdened by having to interrupt their core business activities to perform make-ready in the first place.

C. Make-Ready Expenses Are Only the Beginning of the Huge Amount of Utility Costs Incurred Because of Third Party Attachments

Comcast claims that a pole attachment rental rate provides just compensation to a utility pole owner if it compensates the utility for the "marginal" cost of the attachment, which is the incremental cost incurred by the utility to provide the attachment.[5] Comcast claims that "[]through the make-ready process, the cable industry pays *all* such marginal costs (totaling millions of dollars annually)."[6]

This claim is ridiculous. First, it ignores the "free ride" made available to attachers, who pay only marginal costs (if that) while piggy-backing on pole systems that are constructed and maintained by others. In addition, it ignores the fact that make-ready costs are only the beginning of the huge expense and inconvenience to electric utilities of accommodating third party attachments. Only a small portion of these costs is recovered through make-ready charges.

The Coalition's Comments explained that pole owners often construct pole distribution systems that are taller than otherwise required in order to accommodate the possibility of future communications attachments.[7] A 40-foot standard for pole height has been established by most electric utilities for some time, and others have established a 45-foot standard.[8] An electric utility typically requires poles of only 35 feet to accommodate its own attachments but often

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[5] Comcast Comments at 4, 13. *See also*, Time Warner Cable Comments at 33.

[6] Comcast Comments at 4 (emphasis in original).

[7] Coalition Comments at 23.

[8] FirstEnergy operating companies Penelec and MetEd, to cite just two examples, have been installing 45-foot poles to accommodate all attachers for at least 10 years.

installs taller poles because cable, CLEC and ILEC companies can be expected to attach. One very important reason that taller poles are needed is the National Electrical Safety Code ("NESC"), which requires that a pole containing attachments of communications facilities must include a 40-inch "Communications Worker Safety Zone." As discussed in the Coalition's Comments, the Zone is required for one reason only: the presence of communications attachments. It would not be required otherwise, yet the FCC's pole attachment rate formulas allocate all costs for the entire Communications Worker Safety Zone to the utility.

Installing taller and stronger poles to accommodate communications attachers can cost the electric utility an additional $180 to $310 per pole. Not only must the utility pay these additional capital costs to install taller poles, the utility pole owner also incurs significant additional charges to operate and maintain such taller poles, as the Coalition explained in its Comments.[9]

The installation of taller poles and the increased costs associated with taller poles is only the beginning. Comcast not only ignores the increased costs associated with installing and maintaining taller poles, but the enormous additional operating expenses that pole owners incur simply to administer and monitor cable company and other foreign attachments, no matter what the pole size.

Investor-owned electric utilities must employ teams of pole attachment personnel who are devoted entirely to service foreign requests and attachments. Additionally, numerous other employees are involved on a part time basis one way or the other in the attachment process by, *e.g* , scheduling, supervising attachment activity, providing back-office clerical support, and otherwise. In order to accommodate third party attachments, procedures and standards must be

[9] Coalition Comments at 23.

developed, work management and other business systems must be developed, third party attachment recordkeeping is required, contracts must be negotiated, insurance and bond requirements must be maintained, notifications must be provided, invoices must be submitted and inquiries about them answered, legal fees must be incurred for regulatory advice, pole attachment conferences must be attended, etc. Apart from administering the attachment process, a host of additional work is created as a direct result of communications attachments. For example, electric utilities must respond to non-electric wire down calls that would not exist if communications wires were not on the poles.[10] These additional costs are not recovered as part of make-ready costs and none would have been incurred but for the presence of foreign attachers.

In addition to these considerable operating expenses incurred by electric utilities when attachers perform as required under their contracts, utilities incur extensive additional costs when attachers do not do perform as required. Electric utility pole owners routinely encounter and often are required to correct safety violations that would not exist but for third party attachments. Electric utilities often transfer third party attachments to relocated or replaced poles at their own expense, after repeated visits to a site because an attacher had taken no action. Additional strains are placed on electric utility pole plant by third party attachments that are not properly guyed or are not guyed at all, resulting in reliability and safety concerns and decreased pole life.

In addition to all of these costs, there are additional costs directly related to the expanded new liabilities associated with sharing poles with third party communications attachers. Communications attachments increase the chance that someone working on a utility pole will be

[10] In 2007, for example, Dayton Power and Light responded to approximately 1700 wire down calls that were not electric utility wires. At an expense of approximately $100 per response, the total expense to Dayton Power and Light was $170,000.

injured or killed. The Andy Blood case, described in detail in the Coalition Comments, resulted in an $84 million judgment against the pole owner, Qwest.[11]

All of these additional operating expenditures are huge expenses to electric utilities that they would not incur but for the existence of communications attachers on their poles. Yet none of them are recoverable under the Commission's rules via make-ready charges or on any other pass-through basis.

Instead, these costs (to the extent that they are even allowed) are included in the carrying charge component of the electric utility's pole attachment rental calculation, which is designed to determine how much it costs the electric utility pole owner to own and operate a single pole throughout the year. The Commission's cable-only rate formula requires cable companies to reimburse pole owners for only 7.4% of those total annual per pole costs. That means that pole owners only receive 7.4% recovery from cable attachers of the considerable additional costs described above that the electric utility pole owner would not have incurred but for the cable company attachments. In other words, pole owners are required to pay 92.6% of these costs directly attributable to attachers, who solely benefit from them.

D. The Cable Rate Is An Outdated, Colossal Government Subsidy to Cable Operators

NCTA contends that electric utilities should be content with a rate system that results in no revenue loss to the pole owner as a result of third party attachments:

> The key point for constitutional purposes is that the compensation regime the Commission has established under Section 224(d) puts a pole owner in a financial position that is at least as good as it would be if there were no other parties attaching facilities to its poles. . . . Any contribution that attaching parties make to the recovery of that investment through payment of the annual rental

[11] Coalition Comments at 3, n.5.

> fee is a net positive for the utility, which otherwise would bear 100 percent of these costs.[12]

In other words, NCTA contends that because the cable rate is designed to put electric utilities in at least the same position that they would be with no cable attachments, there is no subsidy to cable operators and the electric utilities should be happy. One wonders how the cable industry would react if, in light of the current energy crisis, cable companies were required to pay full boat for their pole distribution systems and electric utilities could jump on board by paying only the incremental, marginal costs of their attachments.

The cable industry's reasoning is flawed for several reasons. For one thing, cable operators have benefited enormously from obtaining nondiscriminatory access to fully constructed distribution corridors that they can use to deliver their video programming (and now broadband and telephone) services to their customers, yet their attachment rate comes nowhere near reflecting the value of the sophisticated distribution system made available for their use.

No other part of the cable operator business is subsidized in this manner. Cable operators pay license fees for cable programming from ESPN and Discovery that represent what that programming is worth. They pay rent on their office space based upon what the lease is worth. They purchase fiber optic cable at a price that is based upon what it is worth. And they pay their employees and contractors at a level that is based upon what those employees and contractors are worth. But they do not pay attachment rates that reflect what access to the distribution system is worth.

Imposing the cable rate on electric utilities is akin to requiring a group of individuals to work for the cable industry and be paid wages that are not based on the value of their labor, but instead are set at a level by the government that is just high enough to keep them from starving to

[12] NCTA Comments at 10-11 (footnotes omitted).

death. In such a case, those employees would correctly believe that the cable industry for which they are working is being subsidized. In this same way, electric utilities across the country have been subsidizing and continue to subsidize cable companies.

In addition, it appears that the cable rate, which may at one time have been thought to allow recovery of at least all of the electric utility pole owner's additional costs, may not do so in practice. It has been years since the court rulings which determined that the cable rate does not constitute an unconstitutional "taking."[13] Since that time, the actual costs associated with pole attachments have in practice been determined to be far greater than what the Commission or the courts previously had been led to believe. Electric utilities theoretically may be able to recover all of their make-ready costs associated with new attachments, but it is entirely possible that they do not recover 100% of their capital, operating and other costs of accommodating and administering those attachments, as described above. A full economic analysis, which was not performed earlier by the Commission, may very well reveal that pole attachments increase the electric utility's annual costs of owning and operating its poles by considerably more than the 7.4% recovery amount that the cable rate allows. Electric utilities, for instance, certainly would be losing money if their per pole costs went up 10% as a result of cable attachments but they were permitted to recover only 7.4% of those total inflated per pole costs. A cable attacher that pays 7.4% of a pole owner's costs is one thing. A cable attacher that pays 7.4% of a pole owner's costs after increasing those costs by 10% is quite another.

Thus, while the cable rate may have been designed to prevent electric utilities from starving to death, in practice they may be starving after all. In any event, a rate that seeks to do no more than prevent starvation cannot be fair.

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[13] *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987).

Comcast and other cable operators defend the cable formula by comparing the small amount of usable space it occupies to the renter of one unit in a ten-unit apartment building.[14] Comcast contends that a renter of one unit should only be required to pay for one-tenth of the costs associated with the building's common areas.

That comparison, which was used by Congress in 1978 to help justify subsidized cable rates, is a poor analogy for several reasons. As an initial matter, it fails to consider that utility poles are revenue-generating assets for cable companies, just as they are for ILECs and electric utilities, and that all pole occupants *equally* use the common space on the pole to reach their customers. The "use" is not proportional at all. Each attacher must have its own pole distribution system or must share the system belonging to someone else.

Further, the analogy fails to consider that the cable company has increased the common area costs considerably *before* paying its one-tenth share of them. As a result, the costs are inflated before they are split. In other words, the nine-tenth share paid by the utility is based on a larger number that otherwise would have been required, thereby increasing disproportionately the utility's share of the payments.

In addition, the common areas of a utility pole, which the Commission has classified as "unusable space," comprises nearly two-thirds of the total space to be allocated (24/37.5 = 64%), far more than the common areas of an apartment building. To our knowledge, no apartment building is composed of two-thirds common space. A more appropriate analogy for cost allocation purposes in the pole attachment world might be a revenue-generating farm which is used to produce a cable crop, an ILEC crop and an electric crop. On top of the hill, cable uses one barn, the ILECs use two and the electrics use several. The land below the hill, which

[14] Comcast Comments at 14. *See also* Time Warner Comments at 31-32.

constitutes two-thirds of the land area of the farm, is the common area that is divided in three equal parts. Cable uses one-third of the common area to produce its cable crop, the ILEC uses one-third of the common area to produce an ILEC crop, and the electric company uses one-third of the common area to produce an electric crop. Since all three companies are using the common area equally to generate revenue, each should pay one-third of the costs associated with that common area. That is precisely how the Coalition has proposed that common space costs be allocated on utility poles.

E. Pole Replacements By Cable Companies Do Not Benefit Utility Pole Owners

Cable contends that utilities somehow unfairly benefit when, during the make-ready process, cable companies change out a used pole for a new pole that is tall enough to accommodate cable's attachments.[15] Comcast claims that it buys replacement poles for pole owners at a cost of $6,000 - $12,000 per pole.[16]

The cost to buy a typical replacement pole, in fact, is far less than Comcast claims. The replacement cost of the pole is about one thousand dollars ($1,000). The other costs incurred typically relate to outage costs, transfer of existing wires and equipment to the new pole, and the removal and disposal of the old pole. The total cost to replace a pole and transfer facilities might reach $6,000-$12,000 per pole in exceptional cases, but Coalition members far more commonly experience total costs in the $2,000-$5,000 range. Time Warner Cable itself more realistically identified these total pole and transfer costs in the range of $3,000-$5,000.[17]

Coalition members estimate that the requirement that a pole be changed out to a taller pole occurs with respect to only 4-5% of the poles to which cable companies seek to attach. And

[15] Time Warner Comments at 32.

[16] Comcast Comments at 25.

[17] Time Warner Comments at 17.

in these few cases, replacing a pole with a newer pole in many instances does not significantly benefit the electric utility. New poles that are inserted in an existing pole line often are replaced at the same time that the existing pole line is replaced, even though that particular pole may be a bit newer. Until it is replaced, the new pole is no more functional than the older poles that surround it.

F. Higher Pole Attachment Revenue Reduces Electric Utility Revenue Requirements and Reduces Electric Utility Rates

NCTA claims that raising the pole attachment rate for cable companies would provide a "windfall" to electric utility shareholders.[18] NCTA claims that because of "lessened forms of utility rate regulation," allowing utilities to collect higher pole attachment rentals would have no impact on utility rates.[19] Coalition members cannot speak for other electric utilities in the country, but unlike cable operators, every one of the Coalition members continues to be rate regulated, and every cent of pole attachment revenues received by them is used to offset their revenue requirements. There is no doubt, therefore, that ratepayers of Coalition members will benefit fully from increased pole attachment revenues. Considering the current mature state of cable deployment in this country, the additional services being offered by cable operators and the dramatic increases in per pole revenue generated for cable companies by these new services, the termination of the cable attachment subsidy and return of income to electric utility ratepayers is long overdue.

The Coalition of Concerned Utilities implores the Commission not to adopt the cavalier approach of cable companies toward electric utility ratepayers, which is perhaps best expressed by NCTA, which argues that "[a]s an initial matter, Congress has given the Commission no role

[18] NCTA Comments at ii.

[19] NCTA Comments at 13.

whatsoever in protecting electric ratepayers."[20] The Coalition is encouraged to note that the Commission appears to disagree, recognizing that electric utility ratepayers are part of "the public," and that rate regulated entities such as electric utilities should not be required to provide subsidies to unregulated, gigantic cable companies.[21]

G. Eliminating the Cable Rate Subsidy Will Not Slow the Development of Broadband and VoIP Services

Another cable industry fantasy for retaining the subsidized cable rate is that higher pole attachment rates will impede the spread of broadband and VoIP services, particularly to rural areas where numerous poles are required to reach few customers.[22]

This contention makes little sense and cannot be taken seriously. Cable has benefited from ultra-low pole attachment rates for decades and has succeeded in providing not only cable service but also "high-capacity broadband Internet access" service to over 92 percent of the country.[23] These systems primarily were built-out when the only service that cable had to offer was video programming. These same poles on which it already has attached can now be used to dramatically increase revenues from cable modem service and VoIP services.

Eliminating the cable rate subsidy will cause the average cost per pole attachment to increase for cable operators, but cable's average revenue per pole attachment has been increasing

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[20] NCTA Comments at 12.

[21] Statement of Chairman Kevin J. Martin, *Re: Implementation of Section 224 of the Act; Amendment to the Commission's Rules and Policies Governing Pole Attachments*, released Nov. 20, 2007, WC Docket No. 07-245, RM-11293, RM-11303 (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-187A2.pdf)(last visited March 3, 2008)("It is ... important that pole owners be properly compensated for the use of their infrastructure by others. I do not think electric consumers should be subsidizing any broadband companies. Establishing parity should not come at the expense of pole owners or electric consumers. ... The safety and reliability of critical electric infrastructure is a paramount concern. Our work on telecommunications reliability should not come at the expense of other public safety systems.").

[22] NCTA Comments at 19-20.

[23] NCTA Comments at i.

for years. As pointed out in the Coalition's Comments,[24] the average monthly bill for cable's expanded basic programming package in 1996 was $24.41, but Comcast's average revenue per customer now is $95 per month (nearly four times as high) and growing.[25] The "triple play" of video, broadband and voice generates average monthly revenues for Comcast of $120-$130 per customer (over five times as high).[26] And these revenue figures continue to increase, while attachment rates remain stagnant and outdated.[27]

Considering these potential revenue gains, and the fact that cable already has built out its distribution system and now offers broadband service to 92% of the country, cable companies would appear to have the same incentive to offer these services to all of their existing customers regardless of whether the pole attachment rate continues to be subsidized or is increased to a more reasonable level. Cable companies already are on utility poles; they will not be removing attachments and refusing to provide advanced new services that promise to generate considerable additional revenues at minimal additional cost.

Several cable commenters have calculated the impact of higher pole attachment rates on a per-VoIP customer and per-broadband customer basis, but these calculations are meaningless.[28] Cable rates are largely unregulated and cable companies can be expected to spread the costs of higher pole attachment rates among all of its video, VoIP and broadband customers -- just as electric utility ratepayers have been required to pay for subsidized attachment rates for years.

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[24] Coalition Comments at 21.

[25] Comcast Corporation Form 10-K for fiscal year ending December 31, 2006 at 30.

[26] *Id* at 19.

[27] *See, Comcast Reports 2007 Results and Provides Outlook for 2008* at 1 (last visited February 20, 2008), http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=1108172&highlight== (reporting 24% growth in revenue and 25% growth in operating cash flow due largely to the addition of 523,000 new digital cable subscribers).

[28] NCTA Comments at 19-20.

H. Claims of Monopoly Abuses by Pole Owners Are Outdated and Not Credible

The cable industry's final defense of the cable subsidy is that extremely low attachment rates are needed because utility pole owners have a monopoly over their poles, which they will use to their advantage now that they are competing with cable operators in the provision of certain services.[29]

If these arguments of utility abuse sound familiar, it is because they are the same ones that the cable industry made in the run up to the 1978 Pole Attachment Act, before any federal pole attachment regulation ever existed. The days during which the cable industry could claim that they have been denied nondiscriminatory access to electric and ILEC pole distribution systems is over, and has been for decades. Any argument that electric utility or ILEC pole owners must be constrained by artificially low rates or otherwise is outdated and ridiculous.[30]

II. SAFETY ISSUES

A. Facilitating Access for Cable and Communications Attachers Should Not Come at the Expense of Safe and Reliable Electric Service

The Commission's pole attachment regulations have provided cable operators for decades and CLECs for more than a decade with ease of access to electric utility and ILEC poles at subsidized pole attachment rates and on other favorable terms and conditions. This government mandated benefit bestowed on attaching entities has in part enabled these companies collectively to provide their services to 92% or more of the country. In that limited sense, the Commission's pole attachment regulations have been a tremendous success.

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[29] Time Warner Comments at 24.

[30] To claim that electric utility pole owners are becoming competitors in the provision of communications services takes this argument even further off base. None of the Coalition members (like the vast majority of investor-owned electric utilities around the country) offers commercial Broadband over Power Line service or is even considering such commercial use.

In another sense, however, the regulations have failed miserably. Not only have electric utility rate payers been required to subsidize attaching entities at extremely low pole attachment rates, the Commission's regulations do not provide adequate enforcement mechanisms to allow electric utility pole owners to regulate and enforce even the most basic of requirements.

Granting unfettered low cost access to electric utility infrastructure with no mechanisms to enforce good behavior has enabled cable operators and CLECs to hire contractors of dubious qualification, to provide little field oversight of those contractors, to create flagrant and irresponsible violations of good engineering practices and safety codes, and to make attachments to numerous pole owner facilities without complying with the utility's permitting process or even providing notification of those attachments.

These irresponsible practices and violations are degrading utility infrastructure, reducing service reliability and continuity, and increasing the risk, liability and costs of the pole owner and its ratepayers.

Time Warner Cable advises the Commission to reject the utilities' "trumped-up charges" that cable operators and other attachers create unsafe conditions and make attachments without authorization.[31] The use of such terminology is appalling to Coalition members who know better, but is indicative of the cable industry's cavalier approach to this issue. Electric utilities have no reason to fabricate claims of pole loading, clearance violations, or any other unsafe conditions. Violations of the National Electrical *Safety* Code are valid cause for concern and action by utilities across the country. Just one trip to an electric utility will confirm this fact. Signs are posted everywhere about worker safety because worker safety, the integrity of the pole line and the reliability of the electric system are at the heart of electric utility concerns.

[31] Time Warner Cable Comments at iv.

Time Warner Cable asserts that in its experience, "utility claims of 'unlawful' and 'unauthorized' attachments are largely a byproduct of poor utility recordkeeping or utilities' sudden reversal of accepted attachment practices."[32] This claim is as insulting to utilities as it is inflammatory. While utility recordkeeping (like any recordkeeping) is not always 100%, it is well known throughout the utility and communications industries that electric utilities' records are far superior to attachers' records in accuracy and reliability. These pole systems are, first and foremost, utility assets owned by electric utilities. Owners have an inherent need to know these assets inside and out. Attachers have only self-serving interest in their wires, with considerably fewer recordkeeping needs and far less interest in the poles themselves.

Time Warner Cable is in an odd position to be casting aspersions on utility pole owners. The Coalition Comments explained that Time Warner Telecom ("TWTC") was apparently overlashing a cable company's facilities and leasing its dark fiber for years in a number of cities throughout the country, in order to provide telecom service. Yet, strangely, neither TWTC nor the cable company had apparently been telling the utility pole owners of this telecommunications use so that the higher telecom rate could be charged.[33] The cable company that was involved with TWTC in this arrangement was Time Warner Cable.

Easy access to electric distribution systems should not come at the expense of the safety and reliability of electric distribution systems, and the Commission's regulations should promote responsible behavior on the part of those who are granted mandatory access. A government agency that carefully enforces the pole attachment rights of its constituent communications companies also should enforce the pole attachment duties and responsibilities that those constituents owe to the entities whose poles they exploit to provide their services. To that end,

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[32] Time Warner Cable Comments at iv.

[33] *See* Coalition Comments at 41-44.

the Commission should adopt the safety and operational proposals recommended in the Coalition's Comments, including compliance with utility safety and operations requirements, attacher inspections, unauthorized attachment penalties, safety violation penalties, presumptions regarding safety violations, Imposition Costs, and greater attacher oversight.[34]

B. Utilities Must Retain Authority to Decide on a Case-By-Case Basis Whether Attachments Are Appropriate, and Presumptions that Compromise This Review Are Unacceptable

Attachers have requested that presumptions be established by the Commission to grant them authority to make certain types of attachments with little or no opportunity for electric utility oversight. NextG Networks, for example, has proposed that wireless attachments which comport with the NESC, FCC and OSHA requirements may not be denied on the basis of safety or reliability.[35] Fibertech, to take another example, would like a presumption that boxing and extension arms be permitted if a utility has ever allowed it before.[36]

While the NESC is an industry standard for utility installations and has been widely adopted by regulatory agencies, it is a minimum safety standard. It is not an operational guide or a design manual. As such, the NESC does not always provide in each and every instance workable guidance for facilities that are exposed to increased safety risks (such as poles with multiple attachments). Because it is general in nature, the NESC may not adequately address unique ice, wind, lightning, grounding, soil, animal, tree, or environmental contaminate issues that are known to local electric utilities. Such local utilities may have established construction standards or operational procedures to address these concerns. A Florida utility, for example, that has increased its guying standards beyond the NESC to ensure greater reliability and

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[34] *See* Coalition Comments at 71-80.

[35] NextG Network, Inc. Comments at 26.

[36] Comments of Fibertech Networks, LLC and Kentucky Data Link, Inc., at 18.

hurricane survivability should not have that requirement negated by an attacher, even one meeting minimum NESC Code requirements.

Fibertech's proposal with respect to boxing and extension arms (like other attacher proposals) reflects the notion that every attacher should be permitted to meet the very lowest standard found anywhere on the utility system. If an attacher got by with unguyed attachments in one location, they should be able to get by with such improper attachments everywhere. If boxed poles or poor construction exists in one location, it should be allowed everywhere.

The problem with this logic is that every utility system contains a certain amount of compromised construction, and adding more instances of compromised construction does not make a better or more reliable system. Instead, it perpetuates, and even worsens, the critical infrastructure to the detriment of all who use or depend upon it.

III. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, the Coalition of Concerned Utilities urges the Commission to act in a manner consistent with the views expressed herein.

Respectfully Submitted,

COALITION OF CONCERNED UTILITIES

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FirstEnergy Corp.
Kansas City Power and Light
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