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

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

REPLY COMMENTS OF CENTURYTEL, INC.

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SUMMARY

All parties in this proceeding agree that pole attachments are a vital part of the infrastructure of communications companies. As such, all pole attachers are entitled to protection under Section 224 of the Communications Act, the Pole Attachment Act. This protection is vital for rural communications companies, such as CenturyTel, in order to correct the markedly unbalanced bargaining power which has been exhibited by the juggernaut of electric utilities filing comments in this proceeding.

The record contains substantial support from electric utilities, cable TV operators, incumbent local exchange carriers ("ILECs") and broadband providers for the Federal Communications Commission ("FCC") to establish a uniform pole attachment rate. A single formula is essential to promote competition among communications competitors, which include electric utilities. Although the Cable Formula would produce a tried and Court-approved rate for all, selecting the CLEC Formula would be better than attempting to reinvent the wheel by redoing the already settled rate formulas that are already part of the FCC's rules.

Section 224 squarely requires the FCC to ensure reasonable rates, terms, and condition by all providers of telecommunications services, a term which includes ILECs. At worst the statute is ambiguous, and the FCC should interpret it to give Section 224(b) its intended broad meaning as well as Section 706's advanced services mandate, both of which were endorsed by the Supreme Court in *Gulf Power*. Electric utilities arguments as to why the FCC should not regulate ILEC pole attachment rates are unpersuasive. First, ILECs use of joint poles has declined markedly in recent years due in large part to the higher engineering requirements for electrical connections. Second, even with existing joint use arrangements, utilities own the vast majority of poles, substantially reducing ILECs' relative bargaining power. Third, the fact that different rates exist in current agreements is scant reason to avoid establishing a fair formula—

negotiations do and will work in this situation at a minimal burden to government and the parties involved. CenturyTel believes that it should do its part to provide fair compensation to pole owners, but it should not be singled out for exorbitant rates that other attachers are not forced to pay. However, the FCC should clarify that the rate is applied "per pole" and that any reference to a rate "per attachment" would not also include equipment associated with the wire attachment, such as guys, J hooks, and the like.

The FCC should not alter the current "sign and sue" provisions in the pole attachment rules. ILECs and other attachers should all be able to utilize the complaint procedures to enforce Section 224(b) of the Communications Act. Existing contracts were entered into without the protection of the law, and therefore ILECs must be permitted to file a complaint to remedy even these existing arrangements.

There is no reason why the FCC should adopt any further safety requirements than those already provided in its rulings. Although safety and unauthorized attachments are an issue, private negotiations can rectify this situation. However, the FCC should not adopt the utilities' proposals to allow them to privately assess penalties for violations of pole agreements. Such a private enforcement remedy is subject to serious abuse, as has been demonstrated in Oregon.

For the foregoing reasons, CenturyTel urges the Commission to adopt a uniform formula for mixed use or broadband services that is also applicable to ILEC attachments. The FCC should reject attempts to increase pole rates as suggested by the electric utilities or to seek penalties for safety violations or unauthorized pole attachments.

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REPLY COMMENTS OF CENTURYTEL, INC.

CenturyTel, Inc. ("CenturyTel"), on behalf of its incumbent local exchange carrier ("ILEC") and competitive LEC ("CLEC") subsidiaries, hereby files these reply comments in the above captioned proceeding. CenturyTel appreciates the diverse and adamant positions taken by various segments of the industry, including those of electric utilities, cable TV companies, alternative broadband providers, wireless providers, and ILECs. Despite this fractious debate, however, all appear to shed light on one fact: the ability to attach to existing utility poles is an essential part of network infrastructures that are necessary to deliver telecommunications, video, broadband, and power services to American consumers. Because of this unanimous recognition, all in these industry groups should have an interest in ensuring that pole attachers pay a fair rate, and pole owners receive fair compensation. Setting all the sharp rhetoric aside, the FCC should see that the public interest would be served if all communications providers, including power companies providing broadband, are placed on an equal footing so that competition for communications services can flourish and benefit consumers. CenturyTel urges the Commission to adopt an order which affects this pro-competition and pro-consumer goal, without leaving any class of carriers, such as ILECs, out in the dark.

I. POLE ATTACHMENTS ARE A VITAL PART OF THE INFRASTRUCTURE OF A NUMBER OF COMMUNICATIONS COMPANIES AND THEREFORE ALL DESERVE PROTECTION UNDER SECTION 224.

CenturyTel agrees that poles are vital network infrastructure that is necessary for electric utilities, broadband providers, multi-channel video providers, and telecommunications companies alike to provide services to American consumers. All of the commenters in this proceeding seem to agree on this transcendent fact. It is for this very reason that Section 224 was enacted in the first place. And it is the same reason why the FCC initiated the instant *Notic*e: to ensure that it is fully and faithfully implementing Section 224 section of the Communications Act.[1]

The vital nature of pole infrastructure for communications services is even more true in rural areas, where companies incur substantially higher costs to bring services to consumers. Wired broadband is currently the most used and reliable mechanism for achieving broadband penetration.[2] Although rural companies have been successful in building out broadband-capable infrastructure to rural America, there is an extremely difficult-to-serve and costly 15 to 25 percent of the population that continue to be an issue with respect to broadband availability. If companies cannot obtain pole attachments on just and reasonable terms and conditions, these rural Americans will be doomed to either never receive broadband service, or only receive service from their power companies who own poles out in the hinterlands.[3]

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[1] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Notice of Proposed Rulemaking, FCC No. 07-187 (rel. Nov. 20, 2007)("*Notice*")

[2] Independent Telephone & Telecommunications Alliance Comments, WC Docket No. 07-245, at 8 (Mar. 7, 2008)("ITTA Comments"); see also Industry Analysis & Technology Division, Wireline Competition Bureau, Federal Communications Commission, *High-Speed Services for Internet Access: Status as of June 30, 2007*, FCC, at Table 1 (rel. Mar. 2008).

[3] *See* Comments of Windstream, WC Docket No. 07-245, at 2 (Mar. 7, 2008); National Telecommunications Cooperative Association, WC Docket No. 07-245, at 4 (Mar. 7, 2008).

The juggernaut of power utilities that filed multiple, lengthy comments in this proceeding attest to their sheer size and coverage: their customer bases run into the multiple tens of millions.[4] Rural companies such as CenturyTel are dwarfed in comparison, which operates in smaller territories that are much more widespread than do these power utilities. These admitted facts demonstrate that rural ILECs have markedly unequal bargaining power against these gigantic utilities.[5]

There is also no question that electrical pole plant is uniquely costly for electric utilities because modern electricity needs have been growing. Higher power and capacity requirements have mandated that electric utilities engineer stronger and taller poles so that they can provide electrical service to their customers. Because these electric wires are highly dangerous, there is a unique separation requirement between these electric wires and communications wires, a cost which as the cost-causer should be borne by electric consumers, not communications users. Therefore, communications attachers should pay a relatively lesser part of the costs of poles as compared to electric utility pole owners.

II. THERE IS SUBSTANTIAL SUPPORT FOR THE FCC TO ADOPT A UNIFORM POLE ATTACHMENT RATE.

A large number of electric utilities and communications providers,[6] including ILECs, cable TV companies, broadband providers and electric utilities, support adoption of a uniform

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[4] Just to name a few of these companies, FirstEnergy has 4.5 million customers using over 2 million poles; National Grid has 3.4 million customers over 2.3 million poles; Georgia Power serves 2.25 million customers with 1.4 million poles; Florida Power and Light has 4.5 million customers over 1.1 million poles; and Dominion Virginia Power has 2.4 million customers. Although not every utility participating revealed its numbers, from a quick summary of filed comments, these power companies represent over 64.8 million customers with over 12.8 million poles.

[5] Although some utilities argue that large companies do not need protection against actions of electric utilities, that is certainly not the case with CenturyTel and many other ILECs that are relatively small, own relatively few poles, and serve mostly rural areas of the country.

[6] CenturyTel uses herein the term "communications" to refer collectively to cable TV, multi-channel video, broadband, and telecommunications services.

pole attachment rate.[7] Competition among all these providers is growing, and each has been providing or plans to provide a mix of services to the public over the same wires. Cable TV operators are providing voice and broadband services, sometimes using Internet protocol ("IP") connections. Power companies are beginning to provide broadband services over their power lines. Telecommunications companies are seeking to introduce video service over the same or new wires which also provide telecommunications and broadband services. And wireless providers are also pushing into the broadband and video services marketplace from the same wireless transmitters they seek to locate on poles. The Commission has often concluded that allowing competitors to operate on a level-playing field is essential to the promotion of competition.[8] Being able to utilize a single formula to govern attachments that provide this mix of services is thus a sensible and necessary policy that the FCC should adopt to promote this basic level-playing field policy.

As anyone can readily recognize, adopting a single formula that produces rates at some level other than the existing pole attachment formulas, would not solve any controversy and would not produce a level-playing field. A formula which produces a rate between the Cable and CLEC Formulas would encourage cable TV operators to claim that only the Cable Formula applied to their attachments. There would be incessant debates among competitors about the characteristic of the services traversing a particular wire, producing uneconomic arbitrage opportunities and endless litigation. It is for this reason that CenturyTel suggested that the new

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[7] *See, e.g.*, United States Telecom Association Comments, WC Docket No. 07-245, at 11 (Mar. 7, 2003)("US Telecom Comments"); Edison Electric Institute and Utilities Telecom Council Comments, WC Docket No. 07-245, at 8-9 (Mar. 7, 2003)("Edison Electric Comments"); National Cable & Telecommunications Association Comments, WC Docket No. 07-245, at 22 (Mar. 7, 2003).

[8] *See, e.g.*, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14878, ¶45 (2005); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Servic*e, 21 FCC Rcd 13281, 13281-82, ¶2 (2006).

uniform rate, whether it be applied to broadband attachments or whenever a mix of services is offered, should be set according to the Cable Formula.[9] Nevertheless, there is no reason to redo existing rate formulas to achieve a uniform rate formula. To do so risks exposing a lot of knotty issues which have been previously heavily litigated, even unto the Supreme Court, by various parties.[10] Such repeated reexamination of current FCC rate formula decisions is simply wasteful and unnecessary. To reduce this controversy, if the FCC is concerned about adopting the Cable Formula for all, then it could simply adopt the CLEC Formula and make it applicable to all mixed-use attachments.

III. SECTIONS 224 AND 706 CLEARLY PROVIDE THE FCC WITH JURISDICTION TO ENSURE THAT RATES FOR POLE ATTACHMENTS BY ALL PROVIDERS OF TELECOMMUNICATIONS SERVICES, INCLUDING ILECS, ARE JUST AND REASONABLE.

The FCC is authorized to establish just and reasonable rates for all pole attachers, including ILECs. Parties such as US Telecom, Independent Telephone & Telecommunications Alliance ("ITTA"), and CenturyTel have clearly outlined the legal reasons to support Commission action to adopt a formula under Section 224(b)(1) applicable to ILECs and other attachers.[11] Electric utilities and some cable TV operators, who all have an anti-competitive or revenue-producing motive to oppose ILEC rate fairness, have done nothing to undermine this

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[9] CenturyTel Comments, WC Docket 07-245, at 14 (Mar. 7, 2008)('CenturyTel Comments").

[10] In any event, the FCC should not adopt the additions and changes to the new unified pole attachment formula suggested by power utilities. Although CenturyTel leaves it to others to dispute the specific requests made by the power industry, we note, for example, that the FCC has already addressed and rejected all of the utility arguments. For instance, the FCC has held that the "safety space" should not be allocated in part to communications companies. *Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453, 6467-68, ¶¶ 20-22 (2000). And there is no reason to alter the currently adopted presumption with respect to the number of attachers in urban and rural areas. This presumption is rebuttable, so there is no reason why the existing formula cannot continue to be applied. FCC rules also provide a mechanism for an individual utility to alter these presumptions upon a specific factual showing. 47 C.F.R. § 1.1417(d). Parties negotiating contracts and the FCC can alter the number of attachers in accordance with these existing procedures.

[11] US Telecom Comments at 11-16; ITTA Comments at 2-5; CenturyTel Comments at 5-12.

legal rationale. Rather, they make unsupportable allegations, such the almost flippant argument that the use of two different terms, "telecommunications carrier" and "provider of telecommunications services" in Section 224 is just stylistic and therefore meaningless.[12] CenturyTel fully supports the analyses of ITTA and US Telecom in refuting these legal arguments.

Although the FCC has never really squarely faced this particular issue in the past, the fact that the FCC may have misinterpreted the Pole Attachment Act should not prevent it from correcting this interpretation now. Court opinions have made clear that agencies have the power to reinterpret a statute as long as the interpretation is reasonable and consistent with the statutory terms.[13] In any event, a number of the power company quotations of past FCC precedent do not even address the issue of whether (b)(1) encompasses ILECs, but rather address other purposes of Section 224 or other subsections, such as (e) and (f), which do clearly exclude ILECs.[14]

At worst, Section 224 is ambiguous. It is black letter law that the FCC, as the administrator of Section 224, has the power to interpret its own statute. Under *Chevron* such interpretation is entitled to deference by the courts.[15] The FCC should firmly resolve this

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[12] *See, e.g.*, Comments of Comcast, WC Docket 07-245, at 49-50 (Mar. 7, 2003).

[13] *See, e.g., Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996); *Rust v. Sullivan*, 500 U.S. 173, 187 (1991); *Office of Communication, Inc. of the United Church of Christ v. FCC*, 327 F.3d 1222, 1228-29 (D.C. Cir. 2003) (finding that the Commission had adequately explained its departure from two longstanding policies, which were based on the agency's interpretation of an ambiguous statute); *see also Communications Vending Corp. of Ariz., Inc. v. FCC*, 365 F.3d 1064, 1070 (D.C. Cir. 2004) (finding the Commission's explanation of its change in position regarding independent payphone providers' end-user status "more than sufficient to provide the 'reasoned explanation' we require of an agency that changes its position."); *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 322-24 (5th Cir. 2001), *cert. den.*, 535 U.S. 986 (2002).

[14] *See, e.g.*, Edison Electric Comments at 122 n.135; Comments of PacifiCorp, Wisconsin Electric Power Co., and Wisconsin Public Service Corp., WC Docket. 07-245, at 7 nn.14 & 15 (Mar. 7, 2007)("PacifiCorp Comments").

[15] *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *National Cable & Telecom. Assoc. v. Brand X Internet Services*, 545 U.S. 967, 982-

ambiguity to establish a fair rate formula applicable to any provider of telecommunications service, including ILECs.

Section 706 of the Act reinforces the ability of the FCC to adopt a uniform rate in order to promote availability of advanced communications to all Americans.[16] The ability of the FCC to utilize Section 706 in this manner was specifically upheld by the Supreme Court in *Gulf Power*.[17] Electric utilities paid scant attention to this provision.

There is one issue that CenturyTel would like to clarify with respect to the application of rates. Some pole owners declare that their pole attachment rates are "per attachment," rather than "per pole." In other words, if there are multiple attachments on a pole, the rental rate can be increased exponentially overall. This method is incorrect because some of the equipment associated with a single attachment does not occupy any more room on the pole than the wire itself. The "per attachment" formulation inevitably leads to arguments about what constitutes a chargeable "attachment," and it becomes administratively difficult and counterproductive to argue among the parties whether risers, J-hooks, overhead guys and anchors are all separately chargeable "attachments". Therefore, the FCC should clarify this issue and find that only the wire itself constitutes an "attachment" that would entail a pole attachment charge.

IV. ELECTRIC UTILITIES' POLICY ARGUMENTS AGAINST FCC REGULATION OF ILEC POLE ATTACHMENT RATES ARE UNPERSUASIVE.

Electric utilities argue that the FCC should not regulate pole attachment rates of ILECs because to do so would disrupt years of joint use agreements between electric utilities and ILECs. They argue that these reciprocal agreements entail different rates from contract to

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86 (2005) (where statute is ambiguous, and implementing agency's construction is reasonable, *Chevron* requires federal court to accept agency's construction of statute, even if agency's reading differs from prior judicial construction).

[16] 47 U.S.C. § 706.

[17] *National Cable & Telecommunications Assoc. v. Gulf Power Co*, 434 U.S. 327, 339 (2002).

contract because each party can attach to each other's poles and they are thus different from pole attachment contracts entered into with third parties. They argue that applying rate regulation to benefit ILECs could not only disrupt multiple existing contracts, but also would undermine the ILECs' interest in helping to build out this infrastructure.[18] These arguments have been dug out of forty-year-old archives and dusted off for these comment rounds. These arguments are devoid of any factual basis, and belie modern realities.

First, as CenturyTel and others have demonstrated in their comments, the incidence of joint pole ownership has been declining rapidly, and electric utilities now own the vast majority of poles.[19] This reduction has been caused because utilities often have contiguous properties, unlike the rural ILEC patchwork of exchange areas. In addition, as stated previously electricity's technical requirements are vastly different than for communications attachments, necessitating that poles be engineered to electrical standards, not communications. Second, even where there is an existing joint use agreement, electric utilities often own a much greater portion of the poles than ILECs do, particularly for rural ILECs like CenturyTel. This makes any rate that an electric utility has to pay for attachments to ILEC poles inconsequential to the overall price of the joint use contract. Third, the fact that there are different rates in different contracts is irrelevant. Perhaps these various rates need reformation under the new rules because excessive rates should not stay in place. We are also sure that a huge number of these contracts will probably remain unchanged. Most of any renegotiation that will occur can be adequately handled under the private negotiation process which will be invisible to regulators. Finally, CenturyTel is happy to

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[18] Comments of Coalition of Concerned Utilities, WC Docket 07-245, at 53-71 (Mar. 7, 2008)("Utilities Coalition Comments"); Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power, WC Docket No. 07-245, at 11-13(Mar. 7, 2008); Edison Electric Comments at 48-53.

[19] CenturyTel Comments at 2; Comments of AT&T, WC Docket No. 07-245 at 4-8 (Mar. 7, 2008).

invest in pole infrastructure, and often does, where warranted. However, as noted previously, there are often prohibitions against construction of duplicative pole plant. It only makes environmental and economic sense to share poles once they are constructed. CenturyTel believes it should pay a fair rate for such attachments, thereby contributing to these vital infrastructure costs. However, it should not be required to pay penalties or exorbitant prices simply because the electric utility has a monopoly over the pole infrastructure, regardless of how that monopoly was acquired.

Cable companies and some utilities also argue that there is not a good competitive reason to treat ILECs the same as cable TV operators and CLECs because ILECs have traditionally owned poles with utilities.[20] Some argue that ILECs should not receive rate protection because they are monopolies like utilities, and CLECs are not.[21] In fact these parties would permit ILECs to receive rate protection if they are subject to competition.[22] We must note that these dated arguments have nothing to do with the proper legal interpretation of Section 224. In any event, ILECs no longer have monopolies for telecommunications services, and never have had one for broadband or video services. We do not know where the power companies (and cable TV operators and broadband providers who make this same argument) have been, but the 1996 Act dramatically changed all that. Particularly for broadband and video services, ILECs often serve substantially less than half the customers in a market. Finally, in the "market" that matters, access to poles, ILECs have no market power at all when the electric utility owns most if not all of the poles in a geographic territory, regardless of what their market power is with respect to the

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[20] *See, e.g.*, Utilities Coalition Comments at 49.

[21] Joint Comments of Alpheus Communications, L.P. and 360 Networks (USA), Inc., WC Docket No. 07-245, at 4 (Mar. 7, 2008).

[22] Comments of segTel, Inc., WC Docket No. 07-245, at 16 (Mar. 7, 2008).

services which traverse the wires attaching to the poles. As such, ILECs appear to be in the same position as cable TV operators and CLECs vis-à-vis the electric utility pole owner.

There is a good reason why Congress stepped in to require pole owners to share their poles with communications attachers for a fair price: utility owners have abused their monopoly position to the disadvantage of other pole attachers, and now competitors. Any "provider of telecommunications service" should be aided in its fight against these monopolistic positions. The electric utilities' policy arguments should be rejected.

V. THE FCC SHOULD NOT ALTER THE "SIGN AND SUE" PROVISIONS OF THE CURRENT REGULATIONS.

Some electric utilities argue that the FCC should modify its current "sign and sue" complaint rules.[23] They argue that the ability of the FCC to reform existing agreements can lead to abuse by the pole attacher. This argument should be rejected.

First, ILECs should able to use the complaint procedures just like its competitors can. The ability to use existing complaint procedures would further the statutory mandate that pole attachments be provided on just and reasonable rates, terms, and conditions, as required by Section 224(b). Section 224(b) provides:

> Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, *and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. . . .*[24]

The complaint process is the enforcement mechanism that ensures that that statutory mandate can be fulfilled.

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[23] *See, e.g.*, PacifiCorp Comments at 32.

[24] 47 U.S.C. § 224(b)(emphasis added).

Second, the FCC's ability to reform existing contracts has been in existence for years. The FCC did not propose in the *Notice* to change this policy and there is no justification for doing so.

Third, while there are many reasonable ILEC pole contracts, it is hard to ignore two other categories of ILEC pole contracts that are not reasonable. One type can scarcely be called "voluntarily negotiated" because these contracts were signed by the ILEC only to preserve its right of access to the pole. These contracts often contain rates or terms that deviate from the existing FCC rules. The other set of unreasonable contracts have been in existence for many years and use antiquated rate and term provisions that do not comply with FCC rules. Often, ILECs are not able to fix these antiquated issues by renegotiation with power companies[25] due to the legal uncertainty associated with ILEC status. The fact that ILECs have not had the right to file a complaint at the FCC and in many states because of an erroneous interpretation of statute, should not be used to disadvantage an ILEC's ability to reform unreasonable agreements to bring them into conformance with law and into parity with its competitors.

Fourth, there are enormous benefits to the pole attachment process by allowing parties that cannot reach agreement to be able to sign the disputed agreement, make actual pole attachments, and provide service efficiently to consumers, and then invoke the normal complaint processes of the government agency to define the parties' rights. This procedure gives the government and the parties a reasonable period of time to make their legal arguments and present their costs to demonstrate whether pole attachment rates, terms, and conditions, are unjust or unreasonable without interrupting the ability of consumers to receive service.

[25] CenturyTel notes that it has suffered from similar bad treatment from Cooperatives, Public Utility Districts, and other similarly unregulated entities.

Finally, the small number of pole attachment complaints that have been filed to date belie electric utilities' "chicken little" argument: the sky will not fall if the FCC continues to be able to reform existing agreements.

VI. THE FCC SHOULD NOT ADOPT SAFETY REQUIREMENTS OR PENALTY PROVISIONS.

CenturyTel agrees with a number of parties that unauthorized attachments are an issue for the industry.[26] Pole owners should be able to reasonably approve pole attachments and should be able to ensure that these attachments are safely made, and in conformance with generally accepted electrical standards organizations. Pole owners also have the right to ensure that they receive compensation for attachments, which may be impeded when attachments are made without authorization.

However, we note that the electric utilities are sharply divided on whether the FCC should adopt safety or penalty provisions to aid the utilities in preventing unauthorized or unsafe attachments.[27] CenturyTel believes that the FCC should not address safety issues in its rules beyond the rules it has previously adopted.[28] Because of existing competition among providers of telecommunications, video, and Internet access services, telecommunications carriers and cable TV operators are motivated to maintain safe and reliable connections to poles in order to better serve their customers. If a problem does arise, compliance with safety standards can generally be worked out between the pole attachers and the utility pole owner pursuant to typical contract-based enforcement provisions. If there is a problem that cannot be resolved through that contractually provided process, the issue could be presented to the Commission for resolution or

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[26] *See* Utilities Telecom Council Comments, WC Docket No. 07-245, at 5 (Mar. 7, 2008); Utilities Coalition Comments at 71-75.

[27] Many utilities argue that the FCC should not impose safety regulations. *See, e.g.*, Utilities Coalition Comments at 80; PacifiCorp Comments at 22.

[28] *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16071-72, ¶ 1151 (1996).

through arbitration or court action (as provided in the contract), at the option of the party who is experiencing a safety or reliability issue. In addition, there is already a framework of existing safety standards that can be found in current pole attachment agreements which include provisions for enforcing the terms of the agreement. These contractual safety standards are ordinarily based upon compliance with the National Electric Safety Code. Typically, parties are obligated to work out any problems between themselves. If such a negotiated resolution does not resolve the issue, either party is free to bring a lawsuit in the forum of its choice in order to seek resolution.

However, the FCC should not adopt any provisions that permits pole owners to levy fines for safety violations or unauthorized attachments. The suggested penalties are themselves highly problematic because they allow the pole owner unilaterally to impose a fine on the pole attacher without any due process or fact finding by a neutral arbiter.[29] Failure to pay a disputed "penalty" could lead to threats of termination of the pole attachment agreement and ultimately to attachments on the poles themselves, thereby risking delivery of service to the public. This is a particularly dangerous situation given that ILECs have carrier-of-last-resort responsibilities that could be jeopardized through such private penalty provisions. Normally, fines are only levied by neutral arbiters, such as governmental bodies, who are subject to basic fairness and due process requirements in evaluating the facts and proposed solutions, including the potential of levying a fine.

We also note several unreasonable suggestions electric utilities make with respect to the penalty proposals. First, the proposed fines in this rulemaking stage are exorbitant multiples of the pole rates themselves. Second, the penalty payments go directly to the pole owner.

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[29] *See, e.g.*, Edison Electric Comments at 78.

Consequently, the party receiving payment for penalties is the same party that finds, determines and decides upon penalties. This creates a natural incentive to find and levy penalties as a revenue enhancement, and even worse, the incentive could devolve into threats or actual removal of attachments if there is any disagreement between the attacher and the pole owner. Allowing a pole owner to unilaterally determine the facts and impose fines could be generated through anticompetitive or revenue-generating motives. This could turn minor or ambiguous infractions into major cause celebrè. We find it interesting that some parties cite to Oregon's pole attachment fine provisions as the model to be followed.[30] In fact, this experiment proves that such a rule can and has been abused. What electric utilities do not mention is that the Oregon Public Utility Commission had to substantially modify and scale back its original penalty rules because of such abuse.[31] Thus, a more reasonable suggestion, if penalties have to be utilized, would be to require that penalty payments should have to be paid into a public interest fund, such a donation to a state or local school fund. This would eliminate the improper incentive, but also benefit local non-profit organizations. Third, a pole owner should not be able to force an attacher to pay any penalty that is disputed absent bringing such a situation to the attention of the Commission for adjudication. Such a requirement would allow the pole attacher its due process rights by permitting it to present its side of the factual situation for determination by a neutral government body.[32]

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[30] *Id*. at 79.

[31] *Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment Use and Safety (AR 506) and Rulemaking to Amend Rules in OAR 860, Division 028 Relating to Sanctions for Attachments to Utility Poles and Facilities (AR 510)*, Order No. 07-137, at 23-26 (Pub. Util. Com. Or., Apr. 10, 2007).

[32] We note that the FCC has in the past refused to permit imposition of penalties for violation of a pole attachment agreement. *See, e.g., Salsgiver Communs., Inc. v. North Pittsburgh Telephone Co*., 22 FCC Rcd 20536, 20545, ¶ 28 (rel. Nov. 26, 2007) ($250 penalty for unauthorized attachment is unreasonable).

VII. CONCLUSION

For the foregoing reasons, CenturyTel urges the Commission to adopt a uniform formula for mixed use or broadband services that is also applicable to ILEC attachments. The FCC should reject attempts to increase pole rates as suggested by the electric utilities or to seek penalties for safety violations or unauthorized pole attachments.

Respectfully submitted,

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April 22, 2008

Certificate of Service

I, Gregory J. Vogt, do hereby certify that I have on this 22d day of April 2008 caused a copy of the foregoing "Reply Comments of CenturyTel, Inc." to be served by electronic mail upon the following:

Federal Communications Commission
Wireline Competition Bureau
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