

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of

Implementation of Section 224 of the Act;
Amendment of the Commission's Rules and
Policies Governing Pole Attachments

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WC Docket No. 07-245

REPLY COMMENTS OF COMCAST CORPORATION

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SUMMARY

The *Notice* launching this rulemaking was premised upon two fundamental concerns. First, does the current cable pole attachment rate provide adequate compensation for utilities, or does it constitute a subsidy to cable operators? Second, should there be “parity” of pole attachment rates for cable, CLEC and ILEC attachers? The comments submitted in response to the *Notice* provide definitive answers. First, the electric utilities are *substantially overcompensated* by the cable pole attachment rate. Second, to the extent CLECs and cable operators have similar pole attachment rights and obligations, pole rate parity should be set at the cable rate. However, because ILEC joint use and joint ownership agreements establish far superior ILEC pole attachment rights and benefits, there is no legitimate basis for parity of pole rates between ILEC attachers and cable/CLEC attachers.

The comments provide no support for the *Notice*'s tentative proposal to raise pole attachment rates when cable operators provide broadband services. Instead, the comments establish that imposing such a massive “pole tax” on cable-delivered broadband services would conflict with the Commission's broadband deployment policy and would have a dramatically harmful impact upon cable's facilities-based voice competition to the ILEC monopoly. State utility commission comments also support a single pole rate set at the cable rate to ensure that broadband deployment is encouraged.

The comments provide powerful support for a broadband pole attachment rate set at the current cable rate -- a rate both the Commission and the courts have found to be more than compensatory to utilities. The comments of ILECs, CLECs and cable operators go further, demonstrating that under the current regulatory framework, electric utilities are generating

unjustified and excessive pole attachment revenues. The comments also establish that the electric utilities have systematically acquired a greater percentage of utility poles owned over the past decade -- thus belying any utility claim of under compensation for such poles. Any pole rate increase now proposed by the Commission would do nothing more than further bloat utility company pole attachment profits.

The comments confirm that CLECs have pole attachment rights and obligations substantially similar to those held by cable operators under their pole attachment agreements. As a result, cable commenters agree that pole rate parity with CLECs is warranted at the current cable rate. The Commission has available several lawful approaches to achieve such parity at the cable pole rate: Section 10 forbearance; the Section 224(e)(1) nondiscriminatory rate requirement; the Section 224(b) discretion to establish a commingled rate; or application of a telecommunications rate revised to eliminate excessive utility cost recovery.

The comments establish that ILEC joint use and joint ownership agreements with electric utilities convey rights and benefits that are substantially superior to those provided to cable and CLEC attachers. Among the many superior pole attachment rights enjoyed by ILECs, the following were identified in comments filed by their electric utility joint owners and users: (1) minimal or no make-ready costs imposed; (2) no pre-approval from the utility required for making an attachment; (3) a guarantee of communications space on the pole that substantially exceeds cable or CLEC pole space; and (4) no imposition of pole relocation or rearrangement costs. As long as ILEC pole attachment rights and benefits continue to exceed those of other communications attachers, there is no basis for parity of pole rates. If at some point in the future parity exists in all operational and legal respects, such that no party has superior rights or more

burdensome attachments than the other, then parity should exist in the rates paid among cable companies, CLECs and ILECs.

Finally, the comments demonstrate that the utilities have once again dramatically overstated the presence of both unauthorized pole attachments and pole safety concerns. Cable operator comments and expert declarations establish that cable attachers have a strong and continuing interest in insuring that their attachments to poles are properly permitted, and that their facilities are compliant with applicable safety requirements. Utility claims of safety violations are habitually overstated and, upon review, are often found to be caused by the utility itself. In reality, cable, ILEC and electric facilities have coexisted on poles safely and successfully for over forty years with only an occasional need to seek Commission intervention to correct unreasonable utility behavior.

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REPLY COMMENTS OF COMCAST CORPORATION

Comcast Corporation (“Comcast”) hereby responds to comments in the Commission’s Notice of Proposed Rulemaking¹ (“*Notice*”) addressing the rates, terms and conditions for pole attachments under Section 224 of the Communications Act (“Act”).

I. INTRODUCTION

The comments filed in this proceeding provide powerful support for the Commission to establish a common broadband pole attachment rate for cable and CLEC attachers at the current cable rate -- a rate both the Commission and the courts have found to be more than compensatory to utilities. The comments of cable operators, ILECs and CLECs all demonstrate that under the current regulatory framework, electric utilities are generating unjustified and excessive pole attachment revenues -- thus eliminating any possible basis for the pole rate increase proposed in the *Notice*.

¹ *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, FCC 07-187, 22 FCC Rcd 20195 (2007) (hereinafter “*Notice*”).

The comments make equally clear that cable pole attachment rate increases triggered by the provision of broadband services will negatively impact the deployment of those services -- especially the facilities-based voice competition so long sought by the Commission. The comments of state public utility commissions confirm the wisdom of rejecting higher pole rates for new broadband services.

The comments also specifically identify the superior pole attachment rights obtained by ILECs through their joint use and ownership agreements with the electric utilities. As long as ILEC pole attachment rights and benefits continue to exceed those of other communications attachers, there is no basis for "parity" of pole rates. In contrast, the comments show that CLEC pole attachment obligations and benefits are similar to those of cable operators and deserve parity with the cable pole rate.

Finally, utilities have once again dramatically overstated the presence of both unauthorized pole attachments and pole safety concerns. These allegations have previously been refuted by both the Commission and independent field studies. For over forty years, these issues have been resolved in the field by the parties (without sacrificing safety) -- with effective Commission intervention when needed to curb unreasonable utility terms and conditions.

II. ELECTRIC UTILITIES ARE USING POLES AS A PROFIT CENTER

a. Electric Utilities Are Generating Excessive Pole Revenue.

Cable operators, CLECs and ILECs agree on one fundamental point -- electric utility companies have used their monopoly control over poles to turn those poles into profit centers.² AT&T provides interesting insight on this point -- from the perspective of a pole owner with decades of joint ownership and joint use experience involving millions of poles.³ In its comments, AT&T reports that “electric utilities view pole attachments as a line of business to generate revenue rather than a cost recovery mechanism.”⁴ Very often the space rented to cable and CLEC attachers is the same space for which the ILEC is paying the electric utility through its joint use arrangement, however, “[electric utilities] typically decline to discuss, much less to incorporate, any offset in their pole costs generated by income they receive from the proliferating number of users seeking to attach to utility poles today.”⁵ As a result, in some cases electric utilities are recovering over 129% of the cost of poles.⁶

² Commenters agree that utilities maintain monopoly control over distribution poles. *See, e.g.*, Comments of the National Cable Telecommunications Association (“NCTA Comments”) at 6-8; Comments of Charter Communications, Inc. (“Charter Comments”) at 8, nn.7-9; Comments of the Alabama Cable Telecommunications Association, et al. (“State Cable Association Comments”) at 10-11 nn.28-29; Comments of Time Warner Cable Inc. (“Time Warner Cable Comments”) at 18-25; Comments of Time Warner Telecom Inc., One Communications and Comptel (“TWT Comments”) at 1-2; Comments of Sunesys, LLC (“Sunesys Comments”) at 4-5. Thus, the Supreme Court’s observation in 2002 continues to be true today: “[Cable companies have] found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles.... Utilities, in turn, have found it convenient to charge monopoly rents.” *NCTA v. Gulf Power*, 534 U.S. 327, 330 (2002).

³ Comments of AT&T, Inc. (“AT&T Comments”) at 5 (Joint use agreements among utilities introduced in the 1920s and 1930s); *id.* Declaration of Philip Jack Gauntt (“Gauntt Declaration”) at ¶ 5 (noting that in its Midwest, Southwest and Southeast regions AT&T now owns less than 24 percent of the “more than 12 million joint use poles...”).

⁴ Gauntt Decl. ¶ 11.

⁵ AT&T Comments at 8; Declaration of Veronica Mahanger MacPhee (“MacPhee Decl.”) ¶¶ 17, 19.

⁶ MacPhee Decl. ¶ 19.

AT&T's conclusions are confirmed by many other commenters. For example, Knology reports that "utilities are increasingly using pole attachment inventories ... as uncontrolled revenue-generating operations."⁷ Numerous CLECs complain about a litany of excessive, unnecessary or erroneous pole attachment charges and fees that appear designed solely to drive pole profits. Utility pole profit programs include the imposition of excessive charges per attachment in performing counting audits, exorbitant safety inspection charges, unnecessary replacement of poles at the attacher's expense, excessive make-ready charges (many of which are to correct the utilities' own violations), and excessive and unexplained material and labor charges.⁸

The electric utilities' relentless acquisition of poles from ILECs over the past decade provides independent confirmation that the current cable rate formula benefits those utilities.⁹ As noted by AT&T, when AT&T has offered to purchase poles from electric companies to

⁷ Comments of Knology, Inc. ("Knology Comments") at 12.

⁸ See, e.g., Knology Comments at 15, n.27 ("One utility charges an exorbitant sum of \$3.58 *per attachment* for a pole inventory."); Sunesys Comments at 8 ("Utilities often seek to charge attachers for work that is either (i) unnecessary or (ii) should be paid by the utility"), at 9 ("Sunesys has ceased attempts to enter the Delaware market as a result of Connectiv's high costs and lengthy delays for make-ready") and at 10 ("Sunesys has abandoned efforts to provide wide area network services to an interested school district in Maryland because the excessive make-ready charges demanded by BG&E rendered the project economically infeasible"); TWT Comments at 15 ("pole owners needlessly replace poles and pass on the substantial replacement cost to attachers instead of simply rearranging the attachments to create additional space on existing poles at a much lower cost; ... pole owners incorrectly bill attachers for make-ready costs incurred by previous attachers; and ... pole owners often bill an attacher for the entire cost of correcting a safety violation which may have been caused by a prior attacher"); and Comments of Fibertech Networks, LLC and Kentucky Data Link, Inc. at 7 ("make-ready estimates typically require unnecessary and time-consuming work, improperly impose the entire cost of the work on the license applicant even when the owners use some or most of the newly created space, and are based on frequently unexplained and very high labor or material rates").

⁹ The Utilities Telecom Council ("UTC") confirms that ILEC ownership of poles has declined from 47 percent in 1979 to approximately 30 percent today. Since 1996, ILEC pole ownership has declined by almost 1 million poles. Comments of the Utilities Telecom Council ("UTC Comments") at 4-5. AT&T reports that its ownership share has declined significantly and that ILEC pole ownership is now in the range of 25 to 30 percent. AT&T Comments at 7; MacPhee Decl. ¶ 21.

restore some balance in pole ownership, electric companies have uniformly resisted selling.¹⁰ Clearly, electric companies are not acquiring poles (and refusing to sell poles) because they are losing money on them. As observed by economist Harold W. Furchtgott-Roth, if pole attachment rates were in fact subsidies, electric utilities would be expected to “sell pole network assets to unregulated third parties.”¹¹ The electric utilities’ pole acquisition strategy directly conflicts with their unsupported claims of subsidized pole rates. When provided an opportunity *just last year* to demonstrate to the Commission that higher cable pole rents were justified, Gulf Power Company could show no losses.¹²

b. The Cable Rate Formula Permits Over Recovery of Electric Utility “Costs.”

Utility commenters argue that they incur additional and “hidden” costs caused by cable and other Section 224 attachers that are not recovered. For example, the Utility Coalition identifies numerous FERC cost accounts claimed to be improperly excluded from the Commission’s pole attachment rate formula.¹³ Attached as Exhibit 1 to these Reply Comments is a detailed explanation addressing each Utility Coalition rate increase argument with citations to the specific Commission decisions rejecting each such claim.¹⁴ Of the “hidden costs”

¹⁰ MacPhee Decl. at ¶ 24.

¹¹ Comments of Comcast Corporation (“Comcast Comments”), Exhibit 2 (Declaration of Harold Furchtgott-Roth) at 15 (“Furchtgott-Roth Report”).

¹² *Florida Cable Telecomms. Ass’n v. Gulf Power Co.*, Initial Decision, FCC 07D-01, 22 FCC Rcd 1997, 2001 ¶ 11 (2007) (“[make-ready amounts] paid by attachers are over and above the Cable Formula, showing that Gulf Power is not operating at a financial loss in complying with the Cable Formula.”)

¹³ Utility Coalition Comments at 8-9.

¹⁴ See Exhibit 1 (“Appendix of FCC Authority Rejecting Miscellaneous Utility Rate Increase Arguments”); Exhibit 2, Reply Report of Patricia D. Kravtin (“Kravtin Reply Report”) at ¶¶ 14-16, 31-35. The Exhibit 1 Appendix also addresses a number of other utility rate increase arguments that have been repeatedly rejected by the Commission (and in many cases the courts) and/or otherwise would undermine important policy goals of the Commission. These issues include the Commission’s rejection of (i) reassigning the safety space to unusable space or allocating it to communications attachers; (ii) charging attachers for equipment that is located in unusable space; (iii) requiring

identified by the Utility Coalition, most have no place being recovered from attachers at all, while the rest are fully recovered by utilities either through make-ready or post-construction inspection charges paid by attachers,¹⁵ or are embedded in costs recovered through the pole rent.¹⁶ Contrary to electric utility claims, many of the accounts *included* in the cable formula contain costs that are *entirely unrelated* to Section 224 attachments.¹⁷ The AT&T Comments expand upon the Commission’s findings and identify numerous other costs unrelated to attachers that are nevertheless recovered by utilities under the cable pole rent formula. AT&T identifies excessive cost recovery by electric utilities arising from the inclusion of both tower costs and the costs of wooden poles beyond the 40 foot, Class 5 poles found in FERC Account 364 -- the poles typically used by power companies for third-party attachments. In addition, AT&T identifies excessive maintenance expenses that are recovered in the carrying charges based upon the use of FERC Account 593.¹⁸ To remedy the material over inclusiveness of electric utility costs in the Commission’s formula, AT&T recommends that “electric companies should not be permitted to

permitting or charging duplicative rent for overlashing; (vi) changing the attaching entity presumptions when the rules allow rebuttal; and (iv) requiring certification of types of services to utilities.” *See also* Kravtin Reply Report ¶¶ 21-30.

¹⁵ Kravtin Reply Report at ¶ 15.

¹⁶ For example, an appropriate share of tree trimming cost is included in FERC Account 365, which is part of the pole rent. Costs related to additional weight/load, bracing costs and deeper settings are all make-ready or post-construction related charges that are imposed on the attacher that causes them. *See* Kravtin Reply Report at ¶ 15. Concerns with obtaining easements and transfer costs for attachments are both areas that utility pole agreements require the attacher to resolve or pay for. The Utility Coalition indicates that utilities incur additional liability if they damage an attacher’s facilities while working on a pole. However, many pole attachment agreements require attachers to indemnify the utility for any liabilities or claims that arise from the “presence” of the attacher’s facilities on the poles. Similarly, any additional legal vulnerability from having other employees/contractors working on utility poles is adequately covered by the ubiquitous indemnification, insurance and security requirements in pole agreements. *Id.*

¹⁷ *See* Ex. 1 at 3.

¹⁸ *See* MacPhee Decl. ¶¶ 37-46 (FERC Account 593 “includes a multitude of non-pole related expenses that appear to constitute the greater proportion of this account, and that are inappropriate to pass on to a pole user”).

include any costs associated with the maintenance of their overhead electric facilities”¹⁹ and that the Commission ensure the expenses attributed to 40 foot poles “reflect no conductor or other cable or facility related expenses of the owner; no business or industry related expenses of the owner; no right-of-way maintenance expenses of the owner; no recurring expenses already reimbursed by other pole users; and no other non pole related expenses of any sort.”²⁰

Economist Patricia Kravtin confirms AT&T’s conclusion that the current cable rate formula overcompensates utilities through the inclusion of numerous FERC account costs that should not be assigned to cable or CLEC attachers.²¹

c. The Cable Rate Does Not Subsidize Cable Operators.

The comments clearly eliminate any possible utility claim that the cable pole rate is a subsidy to cable operators. Economists Furchtgott-Roth and Kravtin establish that, contrary to the utilities’ unsupported claims,²² there can be no subsidy as long as attachers pay at least the marginal cost of attaching to a pole.²³ The Commission and the courts have repeatedly recognized that the cable rate reimburses utilities for both their marginal costs and a proportional

¹⁹ *Id.* ¶ 44.

²⁰ *Id.*

²¹ Kravtin Reply Report ¶¶ 36-49.

²² *See, e.g.,* Comments of Ameren Services Company and Virginia Electric and Power Company (“Ameren/VEPCO Comments”) at 21; Utility Coalition Comments at 6-22; UTC Comments at 16-22; Comments of the Edison Electric Institute and the Utilities Telecom Council (“EEI/UTC Comments”) at 13-15, 19, 92, 94, 96-97.

²³ *See* Comcast Comments at 12-15; Furchtgott-Roth Report at 11-12. Kravtin Reply Report ¶¶ 9-13 (“First, it is a widely acknowledged tenet of economics that a rate is not a subsidized rate if it covers the provider’s marginal costs ... Marginal costs are those costs that would not exist ‘but for’ the attacher.” This would include, for example, the cost of any necessary rearrangement of facilities or replacement of a pole to accommodate a third party attachment.)

share of the fully allocated costs for each entire pole.²⁴ As a result, utilities “are more than fully compensated” for attachments made by cable operators paying the cable rate.²⁵

Notwithstanding unanimous Commission and court precedent to the contrary, utility commenters continue to argue that the cable rate unfairly subsidizes cable attachers. However, as Kravtin explains:

Under the utilities’ distorted reasoning, the term “subsidy” is used synonymously with any rate that is below a monopoly rental price, a definition that has no basis in economics or public policy. Rather than present a valid economic basis to support their claims that regulated rates are “subsidized” rates, the utilities instead focus on what they subjectively believe they “deserve” to be paid (Concerned Utilities at 18-22). This sense of entitlement to a higher monopolist rate level is not properly considered as an economic cost, under principles of economics or just compensation, or reimbursable under any legitimate regulatory regime (see Kravtin Report at 60-61).²⁶

Moreover, Kravtin points out that, despite repeated utility assertions that the cable rate is a “subsidized” rate, utilities provide no substantive economic analysis to support their claim, nor could they in light of well-established principles of economics.²⁷

d. Utilities Misunderstand the Cable Rate Formula.

Utility comments identify two principal sources for their alleged rate concerns, neither of which survives scrutiny. First, it appears that utilities continue to misunderstand how pole costs are allocated under the cable formula. For example, the utilities’ principle trade associations, EEI/UTC, complain of subsidized cable rates because the cable rate formula’s “space factor does

²⁴ Comcast Comments at 15-21.

²⁵ *Alabama Power v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002); Comcast Comments, Exhibit 1 (Declaration of Patricia D. Kravtin) (“Kravtin Report”) ¶¶ 12-14, 67-72; Furchtgott-Roth Report at 9-11.

²⁶ Kravtin Reply Report ¶ 12.

²⁷ *Id.* ¶ 10.

not include common (i.e. unusable”) space....”²⁸ The UTC attaches a White Paper that incorrectly reports:

The cable rate only recovers the costs associated with the space on the pole that is actually occupied by the attachment; and it subsidizes the cable industry by excluding any other costs associated with the rest of the pole. ²⁹

Other utility commenters also incorrectly observe that “the cable rate does not allocate a share of the costs associated with this non-attachment space to the cable companies whose attachments similarly benefit from the existence and maintenance of this part of the pole.”³⁰ As explained in Comcast’s Comments, and by the Commission itself, such misstatements are “a complete mischaracterization of the Pole Attachment Act and the Commission’s rules.”³¹ In fact, the cable rate pays proportionately for the costs of the entire pole -- unusable as well as the usable space.³²

Utilities also argue that under the cable formula attachers are not paying their “fair share” of the unusable space portion of the pole. For example, the Utility Coalition states:

[T]he cable rate formula results in a grossly subsidized rate, primarily because cable companies pay only a negligible portion of the costs associated with the common space on the pole, even though the common space and associated benefits are shared equally by

²⁸ EEI/UTC Comments at 14 (referencing NPRM ¶ 19); *see also* Comments of Frontier Communications at 4; Comments of Verizon (“Verizon Comments”) at 4 n.4 (“The cable rate is based on the amount of usable space on a pole”).

²⁹ UTC Comments, Appendix (White Paper by UTC) at 21; *see also* UTC Comments at 20 (cable rate is a subsidy because it fails to include unusable space costs.)

³⁰ Ameren/VEPCO Comments at 21.

³¹ *Alabama Cable Telecomms. Ass’n v. Alabama Power Co.*, 16 FCC Rcd 12209, 12236 ¶ 60 (2001); Comcast Comments at 13-14; NCTA Comments at 8-10; TWT Comments at 30-32.

³² *See, e.g.*, Kravtin Reply Report ¶¶ 3-4; Comcast Comments at 12-15; NCTA Comments at 8-10; Time Warner Cable Comments at 31-35; Charter Comments at 8-9; State Cable Association Comments at 12-13, 31; MacPhee Decl. ¶ 35.

all attaching entities...The telecom rate paid by [CLECs] also fails to allocate a reasonable share of common space costs...³³

The argument that the cable formula does not equitably share unusable space costs among attachers is fundamentally flawed and has been rejected by Congress, the courts, the states and the Commission on multiple occasions.

As explained in Comcast's Comments and in the Kravtin Report, the costs of the entire pole (usable and unusable space) are properly allocated to each attacher based upon that attacher's percentage of occupancy of usable space on the pole.³⁴ There is nothing unfair or unusual in this manner of allocating costs. Congress clearly explained this concept in 1977 in adopting the Pole Attachment Act -- a renter occupying one unit in a building of ten units pays one tenth of the common area costs (*i.e.*, the reception area, lobby, grounds and elevator). Another renter occupying 6 units in the same building would pay six tenths of the common area costs.³⁵ AT&T's Comments confirm this analysis in addressing the electric utilities' exclusive use of 12 to 13 feet of space on the typical 40 foot pole:

The only way to give recognition to this disparity of usage by one of the four parties is to have each pole user responsible for a percentage of the cost of the entire pole *that reflects its specific allocation of usable space.*³⁶

Just as contemplated by Congress, the cable formula does exactly that -- unusable (common) space costs are allocated to attachers based on the percentage of usable space occupied.

³³ See, e.g., Utility Coalition Comments at 6-7; UTC Comments at 21; Comments of Alabama Power, et al. ("Alabama Power Comments") at 18-19.

³⁴ See Comcast Comments at 12-15; Kravtin Report ¶¶ 45-48; see also Time Warner Cable Comments at 31-32.

³⁵ 123 Cong. Rec. 5080 (1977) (statement of Rep. Wirth).

³⁶ MacPhee Decl. ¶ 39.

III. LOWER POLE RENTS WILL PROMOTE BROADBAND DEPLOYMENT AND VOICE COMPETITION

Numerous commenting parties confirm that increasing the cost of pole attachments -- an essential facility for cable broadband and voice service providers -- will harm broadband deployment and facilities-based voice competition.³⁷ The NCTA estimates that if the Commission were to increase the pole rent for cable operators that provide broadband to the telecom rate, the industry's costs would increase by between \$208 million and \$672 million annually.³⁸ This translates into average annual cost increases from \$10.46 to \$33.75 per cable broadband Internet customer, although in more rural areas the estimated annual cost increase would be in the range of \$52.27 to \$392.00.³⁹ If applied only to cable VoIP customers, the average annual cost increase ranges from \$27.65 to \$89.18 per customer.⁴⁰ According to NCTA's expert Michael Pelcovits:

There will be significant damage to the economy and to consumer welfare from the proposed pole attachment increase in pole attachment rates. The harm will come from three sources: (1) higher prices to consumers from direct pass through of higher pole attachment rates; (2) reduced availability of broadband services to consumers, particularly in rural areas; (3) reduced investment by cable companies in new plant and technology.⁴¹

³⁷ See, e.g., Charter Comments at 2-7; State Cable Association Comments at 2-3; NCTA Comments at 17-21; Time Warner Cable Comments at 1-2.

³⁸ NCTA Comments at 18-19; *id.*, Appendix B (Declaration of Dr. Michael D. Pelcovits) ¶ 22, Table 4, ¶ 48 (hereinafter "Pelcovits Report").

³⁹ Pelcovits Report ¶¶ 23, 28. Charter notes that in its rural service areas (the large majority of its systems) the increased cost per customer of providing broadband would be as high as \$8.65 *per month* if the telecom rate were adopted. Charter Comments at 5.

⁴⁰ *Id.*; see also Charter Comments at 5 (Applying the telecom rate would drive Charter's costs for providing VoIP up to between \$13.27 to \$23.23 per customer *per month*). Charter states that "the increases will be so significant and the cost pressures so intense that many competitors will forego providing service in rural areas...." *Id.* at 6.

⁴¹ Pelcovits Report ¶ 24.

The comments also document the success of the Commission's existing cable rate regime in promoting the wide deployment of broadband and the introduction of facilities-based voice competition to the ILEC monopoly service. Charter notes that the savings to customers that subscribe to cable VoIP service averages \$11.70 per month and that total savings to consumers are projected to be \$71 billion over the next five years.⁴² Time Warner Cable reports that the Commission's cable pole rent formula has been an important factor in its ability to deploy broadband effectively over the past ten years.⁴³ The NCTA and eleven state cable telecommunications associations state that the proposed "pole tax" on cable broadband represents a reversal of Congressional intent and Commission policy to promote broadband deployment and local voice competition -- and will lead to "scaling back new investment..., raising retail prices or both."⁴⁴ Ultimately, these providers of competitive broadband services agree that imposition of higher pole rates will reduce service choices and increase service prices for American consumers.⁴⁵

The harmful effects of such pole rate increases are recognized by the vast majority of certified states that have implemented a single pole rate formula -- set at the cable rate -- regardless of what services are transmitted over the attachments.⁴⁶ In this proceeding, the Utah Public Service Commission filed initial comments reporting on its recent two-year review of

⁴² Charter Comments at 2.

⁴³ Time Warner Cable Comments at 1-2 (Time Warner has deployed broadband to more than 25 million homes and spent hundreds of millions of dollars to upgrade to two-way broadband capable plant).

⁴⁴ NCTA Comments at 19; *see also* State Cable Association Comments at 4-5, 19-23; Charter Comments at 6.

⁴⁵ *See, e.g.*, Charter Comments at 11; NCTA Comments at 18-19; Time Warner Cable Comments at 6-7.

⁴⁶ *See, e.g.*, Comcast Comments at 21-24; TWT Comments at 7-14; State Cable Association Comments at 23-30; NCTA Comments, Appendix A at A-3 – A-5; Charter Comments at 9, 11 n.16; Time Warner Cable Comments at 35-39.

pole attachment rates. Following this comprehensive review, the PSC adopted “uniform technology neutral rates” for all attachers (cable, broadband and wireless) at the FCC cable formula rate.⁴⁷ This approach allows for the payment of “relatively low rental rates that are just, reasonable and in the public interest.”⁴⁸ Moreover, the Utah PSC -- which is bound by law to consider the interests of both communications and utility customers in establishing attachment rates⁴⁹ -- determined that uniformly adopting the FCC cable rate promoted numerous key policy objectives including establishing rates that “do not place barriers for deployment of new and existing technologies, fair compensation to pole owners, uniform definitions and rate formula to reduce the likelihood of disputes....”⁵⁰

The Oregon Public Utility Commission Comments report a similar “technology neutral” attachment rate reflecting many of the same policy objectives as Utah. The Oregon rate formula results in an attachment rate that is only slightly higher than the FCC cable rate and was found to “fairly compensate pole owners for use of space on the pole.”⁵¹ These conclusions were the result of a “comprehensive review of pole attachment rules” as reflected in new pole attachment rules issued in April 2007.

⁴⁷ Comments of Utah Public Service Commission (“Utah PSC Comments”) at 1. *See In the Matter of an Investigation into Pole Attachments*, 2006 Utah PUC LEXIS 213 (2006) (adopting the FCC cable rate formula) codified at Utah Admin. Code R.746-345-5(A) (2006).

⁴⁸ Utah PSC Comments at 1.

⁴⁹ *See* 47 C.F.R. § 1.1414(a)(2) (certified states must consider the interests of cable subscribers and consumers of utility services in regulating rates).

⁵⁰ Utah PSC Comments at 1.

⁵¹ Public Utility Commission of Oregon Comments (“Oregon PUC Comments”) at 1 and attached PUC Order at 9-10.

The electric utility comments do not address how their proposed massive broadband pole tax will impact consumers or the national policies promoting broadband deployment and facilities-based voice competition. Not surprisingly, the electric utility comments focus squarely on what is necessary to increase their rent payments from cable and CLEC attachers.⁵² Toward that end -- and against the overwhelming weight of authority from certified states -- the electric utilities point to a small minority of pricing approaches that increase the rents paid by cable and CLEC attachers.⁵³ These outlier examples are modeled after discredited (and disregarded)⁵⁴ state pole attachment formulas (Delaware and Maine); a rate formula adopted by the City of Seattle that does not even apply to investor-owned utilities; a rent formula applicable only with respect to pole rents between *one* ILEC and *one electric cooperative* in Indiana;⁵⁵ and a formula rejected by the United States House of Representatives in 1996. Each of these formulas generally follows the discredited approach of allocating the cost of unusable space on a pro rata basis rather than in proportion to the usable space occupied by an attacher.⁵⁶ Each would result

⁵² Most electric utility commenters and their trade associations argue for attachment rates that exceed even the telecommunications rate. *See, e.g.*, EEI/UTC Comments at 92-95; UTC Comments at 22; Utility Coalition Comments at 39-41; Ameren/VEPCO Comments at 23-27.

⁵³ *See, e.g.*, Utility Coalition Comments at 25-36; Ameren/VEPCO Comments at 23-27; Alabama Power Comments at 18-19; EEI/UTC Comments at 103-05; UTC Comments at 24-28.

⁵⁴ The “Maine” formula, for instance, is not actually used even in Maine in setting cable operator or CLEC pole rates. Because the formula is so deficient and complicated, attachers and the electric companies use settlement rates instead. *See, e.g.*, In re *Cable Television Cos.*, Docket No. 93-030, Pub. Util. Rep. 4th Series, slip op. (Mar. 25, 1994) (setting negotiated pole attachment rates between the cable industry and Central Maine Power Company for four years). Similarly, although Delaware adopted its deficient formula in 1989, to our knowledge, no utility in the state applies it and the vast majority of poles in the state are subject to rates approximating the Commission’s cable formula rate.

⁵⁵ Since Indiana is not a certified state, for investor-owned utilities, the FCC formula applies.

⁵⁶ Maine is unique in following an “avoided cost” model with regard to allocating unusable space costs, although as noted earlier no cable attacher or utility appears to apply it. As explained by Kravtin, this approach, which looks to the costs that an attacher has avoided by not having to build its own pole line, is fundamentally flawed and is not

in huge rent increases over the cable rate, and each has been rejected by the vast majority of certified states.⁵⁷

IV. PARITY WITH CLEC ATTACHERS

Commenters agree that where there is parity of pole attachment rights and obligations between cable and CLECs, then a common broadband attachment rate formula should apply. However, while most commenters also agree that the common rate should be set at the cable rate,⁵⁸ electric utilities argue that the rate should be either the telecommunications rate or some higher rate.⁵⁹ Application of the cable pole rate is necessary to avoid increasing the excessive pole revenue already flowing to electric utilities and to further promote broadband competition.⁶⁰

Recognizing that payment of marginal costs precludes any subsidy, Section 224 provides the Commission with discretion to require *only* marginal costs as sufficient compensation to utilities for cable pole attachments.⁶¹ The Commission was also given the latitude to impose a maximum compensation rate for cable attachments that included a proportionate share of fully

followed elsewhere because it disregards the lack of a free marketplace for poles and results in pricing for pole attachments far in excess of marginal cost and fully allocated costs. It, therefore, further increases the significant subsidies already flowing from communications attachers to utilities. Kravtin Reply Report ¶¶ 50-54.

⁵⁷ See, e.g., Comcast Comments at 21-24; Time Warner Cable Comments at 35-39; TWT Comments at 7-14.

⁵⁸ See, e.g., Comcast Comments at 35-37; NCTA Comments at 21-22; Time Warner Comments at 44-47; Charter Comments at 11; State Cable Association Comments at 22; Time Warner Telecom Comments at 6; Comments of CenturyTel, Inc. (“CenturyTel Comments”) at 14-15; Knology Comments at 6; Oregon PUC Comments at 1; Utah PSC Comments at 1. AT&T’s comments recommend changes to the Commission’s formula that would result in an attachment rate very close to the cable rate. See Kravtin Reply Report ¶¶ 3-9.

⁵⁹ See note 53, *supra*.

⁶⁰ See discussion *supra* pp. 5-7, 11-13.

⁶¹ 47 U.S.C. § 224(d).

allocated costs.⁶² This *maximum* compensation option was adopted by the Commission as the cable rate. As a result, the current cable rate reflects the highest level of compensation that can be accorded to utilities for cable attachments -- marginal costs *plus* fully allocated rent. The Commission, however, retains the discretion under Section 224 to significantly *reduce* the current cable rate to more closely reflect the actual marginal costs incurred by utilities.⁶³ The Commission may, therefore, fully consistent with the Act, reduce the pure cable service pole rate to the marginal cost level allowed by Section 224(d)(1), and then adopt the current fully allocated cable rate for commingled broadband services.

The Commission has ample authority to establish the common broadband pole rate at the cable rate notwithstanding concerns expressed in the *Notice*. Preliminarily, the Commission's rationale for "questioning" Time Warner Telecom's proposal to establish the common rate at the cable rate was based on a misunderstanding of what costs are actually recovered by utilities under the cable formula:

We question TWTC's assertion that the cable rate should apply to all pole attachments particularly because...the cable rate *does not include an allocation of the cost of unusable space*.⁶⁴

As demonstrated in the comments, the cable rate does recover a fair and economically sound share of *all* pole costs -- including unusable space -- and the Commission's related concern over

⁶² *Id.*

⁶³ From an economics and public policy perspective, in pricing essential facilities (pole attachments), the closer the price is to marginal cost, "the greater the benefits to consumers in the ultimate market for broadband services." Kravtin Reply Report ¶¶ 17-20. Pelcovits agrees that increasing pole attachment rates above the cable rate (which is closer to marginal cost than other present alternatives) and "linking these higher rates to their delivery of broadband Internet access or voice service will create a new marketplace distortion and cause significant harm to consumers." Pelcovits Report ¶¶ 11, 12-31.

⁶⁴ *Notice* ¶ 22 (emphasis added).

utility subsidies flowing to communications attachers likewise has been shown to be unfounded.⁶⁵

Utilities argue that if a common rate is to be established for both cable and telecommunications carriers that provide broadband, such rate can be no less than the telecommunications rate under Section 224(e). For example, EEI/UTC contends that Section 224(e) requires that telecommunications carriers always pay at least the telecommunications rate regardless of whether broadband or other services are commingled over the carriers' attachments.⁶⁶

As explained by several commenters⁶⁷ the Commission can take any one of the following approaches to establish a common broadband rate at the cable rate.

a. The Commission Can Forbear From Applying the Telecom Pole Rental Rate to Commingled Attachments.

The Commission can establish the cable rate as the unified broadband pole rate for CLECs by forbearing from enforcing the telecom rate 47 U.S.C. § 224(e).⁶⁸ Under Section 10 of

⁶⁵ See discussion *supra* pp. 7-10.

⁶⁶ See EEI/UTC Comments at 95, 98-100.

⁶⁷ See, e.g., NCTA Comments at 21-22; Time Warner Cable Comments at 44-47; TWT Comments at 6-7; AT&T Comments at 18-25; Comments of United States Telephone Association ("USTA Comments") at 2-3; CenturyTel Comments at 14.

⁶⁸ Comcast acknowledges that 47 C.F.R. § 1.53 generally instructs that forbearance petitions should be filed separately to guarantee Commission consideration within a one-year time frame; however, Section 10(a) provides that the Commission shall forbear where the relevant requirements are met. 47 U.S.C. § 160(a). Recently, the Commission expressed a preference for addressing forbearance issues in the context of a broader rulemaking rather than through individual petitions because individual forbearance petitions can require the Commission to "prejudge important issues [] in broader rulemakings" and can "distort [its] deliberative process." *Petition of SBC Communications, Inc.*, Memorandum Opinion and Order, FCC 05-95, 20 FCC Rcd 9361, 9364 ¶ 9 (2005). Indeed, the Commission has granted forbearance in ongoing proceedings. See *Implementation of the Call Home Act of 2006*, Order, FCC 07-2, 22 FCC Rcd 1030 (2007); *Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, FCC 06-79, 21 FCC Rcd 7290, 7299 ¶ 25 (2006); *Federal-State Board on Universal Service*,

the Communications Act, the Commission may “forbear” from enforcing any Title II requirement where enforcement is “not necessary” to ensure that rates for telecommunications service are just and reasonable; and where it “will promote competitive market conditions” and “enhance competition among providers of telecommunications services.”⁶⁹

b. The Cable Formula Can Be Applied to All Commingled Service Attachments to Ensure Nondiscriminatory Rates.

Section 224(e)(1) requires the Commission to establish pole attachment rates that are “just, reasonable and nondiscriminatory.” As Time Warner Telecom explains, this requirement provides the Commission with authority to establish a uniform attachment rate at the cable formula rate to ensure that entities providing similar services (and subject to comparable pole attachment rights and obligations) are not disadvantaged by different attachment rates.⁷⁰

c. The Commission Can Exercise Its Discretion to Apply the Cable Formula to Commingled Service Attachments.

Section 224(b) provides broad authority to the Commission to establish a “just and reasonable” attachment rate formula for commingled services -- apart from the rate formulas that

Order, FCC 05-178, 20 FCC Rcd 16883, 16893-94 ¶ 20 (2005). The cable operators are willing to submit a separate “forbearance-only” petition should the Commission so request.

⁶⁹ Section 10(a) of the Communications Act requires forbearance if the Commission concludes that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 160(b); *In re Petition for Forbearance of Iowa Telecomms. Servs., Inc.*, 17 FCC Rcd 24319, 24321 ¶ 6 (2002).

⁷⁰ See TWT Comments at 5-7; Letter from Thomas Jones, Counsel for Time Warner Telecom Inc., to Marlene H. Dortch, Secretary, FCC, RM-11293, RM-11303, Attach. at 13-22.

apply to cable service or telecommunications service attachments. Unlike the specific methodologies Section 224 provides for cable and telecommunications services, the Act does not establish any formula for commingled services. The Supreme Court upheld the Commission’s decision to use the cable formula for commingled cable and broadband service observing that “nothing about the text of 224(d) and (e), and nothing about the structure of the Act, suggest that these are the two exclusive rates allowed.”⁷¹ The Court explained:

It might have been thought prudent to provide set formulas for telecommunications service and “solely cable service,” and to leave unmodified the FCC’s customary discretion in calculating a “just and reasonable” rate for commingled services.⁷²

A more restrictive interpretation of the Commission’s authority over commingled services “would defeat Congress’ general instruction to the FCC to ‘encourage the deployment’ of broadband Internet capability and, if necessary, ‘to accelerate deployment of such capability by removing barriers to infrastructure investment.’”⁷³

In light of the substantial evidence provided in this proceeding showing that increased pole attachment rates will harm the pace of broadband deployment and facilities-based voice

⁷¹ *Gulf Power*, 534 U.S. at 335.

⁷² *Id.* at 339.

⁷³ *Id.* As observed by many commenters, the originally anticipated method of deploying facilities-based voice competition involved the attachment of multiple additional facilities to poles. With the dramatic evolution of VoIP technology, cable acquired the means to effectively and efficiently deliver facilities-based competitive voice service without the need to make additional attachments to poles. In the process, no additional costs are imposed on utilities. *See, e.g.*, Charter Comments at 9-10 (“[Competitive voice technology changed] from one involving more attached lines to that of integrated IP-enabled broadband networks that carry video, Internet access and voice on one line that occupy no more space and add no new burden to justify any surcharge.”); Time Warner Cable Comments at 39-41 (“Utilities incur no additional costs as a result of cable operators providing Internet access service over the same physical facilities used to provide cable television service”.)

competition, and in light of the Commission's prior decisions -- upheld by the courts⁷⁴ -- that the cable rate is the appropriate rate for commingled services, the Commission is fully authorized to designate the cable rate as the appropriate rate to apply to all regulated broadband attachments including those by CLECs.⁷⁵

d. The Commission Can Eliminate Excessive Utility Cost Recovery in the Telecommunications Formula.

If the Commission determines that it has no authority to establish a uniform broadband attachment rate for CLECs at the cable rate, then it should correct the numerous "shortcomings" that exist in its current telecommunications rate formula that result in subsidizing utilities by paying pole costs from which the attachers derive no benefit. AT&T identifies a number of such adjustments to the formula that would result in pole rates that are comparable to the cable rate formula result.⁷⁶

The Commission has a number of legal options available to establish a uniform pole attachment rate for commingled service attachments at the cable rate -- and it should use that authority to resolve the current discrepancy among similarly situated attachers in a manner that promotes broadband deployment and the continued development of facilities-based voice competition.

⁷⁴ See *Texas Util. Elec. Co. v. FCC*, 997 F.2d 925 (1993); *Gulf Power*, 534 U.S. at 339.

⁷⁵ See, e.g., Time Warner Cable Comments at 44-47; CenturyTel Comments at 14 ("The FCC has clear authority under 224(b) to establish an independent rate formula that would be applicable when a mix of services are provided over a pole attachment.").

⁷⁶ As Kravtin points out, the alternative of revising the current cost inputs and accounts raises the risk of controversy and litigation particularly where there are no reliable and publicly available records to confirm the accuracy of the cost inputs. Kravtin Reply Report ¶ 49.

V. RATE PARITY FOR ILEC ATTACHERS MUST BE RELATIVE TO POLE ATTACHMENT RIGHTS

ILEC comments provide some valid indications that their leverage in negotiating pole agreements with electric utilities is diminishing as their ownership share of poles continues to decline.⁷⁷ However, the electric utility comments specifically confirm many of the points made by cable attachers regarding the superior pole rights that ILECs have through their joint use and ownership agreements.⁷⁸

AT&T and other ILECs argue that notwithstanding their reduced need for space on joint use poles and the commensurate expanded space needs of the electric utilities, electric companies have been unwilling to reform old joint use agreements to reflect current realities.⁷⁹ Moreover, as electric companies acquire a greater percentage of poles owned, ILECs argue that they have lost negotiating leverage and that electric companies have abused their monopoly control by demanding attachment rates far in excess of what the Commission's pole rent formulas would permit.⁸⁰

⁷⁷ AT&T Comments at 7-8, MacPhee Decl. ¶¶ 10-14, 18-19.

⁷⁸ Utility Coalition Comments at 53-55; Alabama Power Comments at 13; Comments of Oncor Electric Delivery Co. ("Oncor Comments") at 25-26.

⁷⁹ AT&T explains that over time the relative need for use of space on poles on the relative percentage of pole ownership has changed dramatically between the joint use parties. Originally, both parties required 3 or 4 feet of pole space and rental rates between the utilities reflected this ratio. MacPhee Decl. at ¶¶ 5-11. However, over time ILEC pole space needs have declined from about 3 feet to approximately 1 or 2 feet per pole. Electric company pole space needs have in the meantime expanded dramatically to approximately 8 to 12 feet per pole. *Id.* at 13-14 (electric company space requirements expanded significantly with use of higher voltages, Y configuration construction and the need for increasingly larger transformers). To accommodate their expanding facilities, electric companies have been required to increase pole lengths from an average of 35 feet to 40 or 45 feet today. *Id.* at 13.

⁸⁰ AT&T Comments at 2, 8-9; Verizon Comments at 4-5; USTA Comments at 2; CenturyTel Comments at 2-5; Comments of Qwest Communications International, Inc. at 2.

Electric utilities dispute many ILEC contentions and also point out that under their joint use agreements, ILECs have substantial rights that are denied to cable and CLEC attachers. EEI/UTC points out that it is “difficult to compare the reciprocal arrangements under joint use and ownership agreements with regulated rates under pole attachment agreements.”⁸¹ The Utility Coalition further points out that “*ILECs receive a whole host of advantages that third party attachers like cable companies and CLECs do not enjoy. . . . [P]ermitting ILECs to receive the same rate as cable companies and CLECs would be grossly unfair to the cable companies and CLECs. . . .*”⁸² The electric utilities identify the following benefits that ILECs receive from their joint use/ownership agreements:

- ILECs have minimal make-ready costs;⁸³
- ILECs need not seek approval from the electric company to make attachments as cable and CLECs do;⁸⁴
- ILECs do not pay for post-construction inspections;⁸⁵
- Electric utilities often obtain rights-of-way for ILECs while cable and CLECs must secure their own;⁸⁶
- ILECs are guaranteed a specific number of feet on each pole while cable and CLECs must pay make-ready if pole space is limited; and⁸⁷

⁸¹ See UTC Comments at 5-6. UTC does confirm that ILEC ownership of poles has declined from 47 percent in 1979 to approximately 30 percent today. Since 1996, ILEC pole ownership has declined by almost 1 million poles. *Id.* at 4-5.

⁸² Utility Coalition Comments at 53 (emphasis added).

⁸³ *Id.* at 53-55.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

- ILECs do not incur relocation and rearrangement costs.⁸⁸

Because the comments confirm that ILECs retain pole rights and benefits that are substantially superior to those of cable or CLEC attachers, any considerations of “relative” parity for ILEC attachment rates would be dependent upon a full Commission review of the rates, terms and conditions in ILEC joint use/ownership agreements. Alternatively, the Commission could consider allowing ILECs to opt in to existing cable pole attachment agreements as one pre-condition to obtaining the cable pole rate. In either case, it is clear that the current disparity in pole attachment rights provides no basis for parity of rates between ILECs and cable/CLEC attachers.

VI. EXAGGERATED UTILITY ALLEGATIONS OF UNSAFE POLES AND UNAUTHORIZED ATTACHMENTS HAVE BEEN REFUTED BY THE COMMISSION AND BY INDEPENDENT FIELD STUDIES

a. All Attachers Have a Strong Interest in Reliable and Safe Poles.

Contrary to electric utility assertions, cable attachers have a strong and obvious interest in ensuring that their attachments to poles are properly permitted, and that all their facilities are compliant with applicable safety requirements and will not be disrupted due to improper pole engineering practices. For cable operators and utility companies alike, the primary concern is for the safety of field personnel and community residents.⁸⁹ Moreover, cable companies are subject to legal requirements under local franchise agreements and state and local laws that demand

⁸⁸ *Id.*

⁸⁹ Comcast Reply Comments, Exhibit 3 (“Declaration of Michael T. Harrelson”) (“Harrelson Decl.”) ¶ 4 (“Comcast is vitally interested in safe and reliable pole infrastructure throughout the country as well as the safety of its employees, contractors, others who work on the poles, and the public.”). Utility assertions to the contrary are unsupported. Ameren/VEPCO Comments at 4 (“The historical pole attachment dynamic is that attachers try to move quickly and reach customers while utilities are concerned with safety and reliability...”); Utility Coalition Comments at 72 (“Competition among [communications providers] is driving rollouts of facilities that is compromising utility and communications safety and electric system reliability and efficient operation of electric systems.”); EEI/UTC Comments at 39.

stringent attention to safety compliance, proper permitting and maintenance of reliable plant. Disregard for these interests would also be self-defeating in an increasingly competitive marketplace where service disruptions caused by poorly engineered plant deployment will quickly lead to customer defections to alternative providers.

Utility disparagement of cable engineering staff and contractors' safety training⁹⁰ ignores that fact that utilities and cable typically use the same engineering firms in any given area to perform make-ready and to maintain facilities.⁹¹ Standard contractor agreements do not reward speed over safety and in fact such contracts include detailed requirements that contractors comply with applicable safety and legal requirements as a condition of being paid. Failure to comply requires the contractor to cure the problem or not get paid. Ironically, on review of the claimed safety violation, it is often discovered that the electric utility caused the violation itself.

b. Claims That Cable Operators Cause Most Safety Violations Are Unsupported.

As explained in Comcast's Comments, it has become a tired theme for utilities to blame cable for causing alarming numbers of safety violations on poles.⁹² It is equally common for utility allegations to be proven false or vastly overblown when the facts are examined.⁹³

⁹⁰ See, e.g., Utility Coalition Comments at 71-72; EEI/UTC Comments at 39.

⁹¹ Harrelson Decl. ¶¶ 4, 14.

⁹² Comcast Comments at 25, n.85.

⁹³ In addition to the background provided in Comcast's Comments and in this Reply, attached is a summary of numerous Commission cases that have examined and uniformly rejected reckless utility allegations that cable and other attachers are the cause of most safety violations and other related arguments. See Exhibit 4 (Appendix of Commission Authority Rejecting Utility Safety Arguments).

Utility commenters simply allege, without any support whatsoever, that cable companies are the cause of “countless” safety violations.⁹⁴ UTC relies on an unsworn and unverified survey of anonymous companies to conclude that 13 percent of third party attachments violate code.⁹⁵ Oncor submits a sworn declaration in support of findings from a safety inspection covering approximately 102,500 poles between April 2004 and March 2006 that reports a violation rate for attachers ranging “from a low of 17 percent to a high of 44 percent.”⁹⁶ Each of these charges should be viewed with great skepticism by the Commission.

The most compelling reason to question the accuracy of Oncor’s findings (as well as the unsupported allegations) is that an independent field investigation by a professional engineer reviewing a sample of Oncor’s findings determined that a large number of the violations charged to the cable company had in fact been caused by Oncor itself or the ILEC.⁹⁷ Mr. Michael Harrelson, a professional engineer, was retained by a cable company in order to determine

⁹⁴ Utility Coalition Comments at 72.

⁹⁵ EEI/UTC Comments at 38.

⁹⁶ Oncor Comments, Ex. B (Declaration of Larry Kohrmann) ¶ 18.

⁹⁷ See Harrelson Decl. ¶ 15. Another reason to question the credibility of the Oncor inspection results is because up until 2004 (when the safety inspections were in progress) Oncor’s affiliate (TXU Communications) *was* installing fiber on the utility poles and *was* a competitor or potential competitor of cable and other attachers. See Press Release, Oncor, TXU Agrees to Sell TXU Communications to Consolidated Communications (Jan. 16, 2004), available at <http://www.oncorgroup.com/news/newsrel/detail.aspx?prid=753> (visited Apr. 18, 2008). Indeed the TXU Communications’ construction caused a number of safety violations that were blamed on cable operators until challenged. Harrelson Decl. ¶ 18. In addition, Oncor has constructed broadband over power line (“BPL”) which is being used by Current Communications to compete with cable and other attachers: “Current is deploying in Dallas on the distribution lines of Oncor Electric Delivery, a unit of TXU. Oncor may face regulatory questions on pole attachment fees and “income generation issues.” See *DirectTV BPL Deal Not Seen Raising Big Regulatory Issues*, Satellite Week, Sept. 10, 2007. Moreover, Current (through Oncor BPL facilities) apparently provides broadband service as part of a package with DirectTV -- an obvious competitor to cable and other attachers. In light of this background, it is less than candid for Oncor to assert that it is not “in commercial or retail competition with CATV and CLEC attachers...and has no motivation to delay the attachers’ speed to market .” Oncor Comments at 14-15. This background shows that Oncor had, and continues to have, ample motivation to shift costs to competitors and to otherwise disrupt their deployment.

whether Oncor and/or its contractor, Utility Support Services (“USS”), had accurately found cable company-caused safety violations. With Oncor and USS representatives present, a sample of poles that Oncor had demanded be replaced because of alleged cable operator safety violations was reviewed. At the conclusion of this joint review, it was found that *Oncor had in fact caused all of the violations that necessitated the pole replacements* for the sample of poles reviewed.⁹⁸ The vast majority of all other violations found on the reviewed poles had also been caused by Oncor. Further, the inspectors simply ignored obvious, continuing violations caused by the ILEC involving insufficient clearance with power and roadway clearance -- even after the violations were pointed out to the inspectors by Mr. Harrelson.⁹⁹

During the course of the field inspection, Mr. Harrelson learned from the USS/Oncor representatives that the standard they used for assigning “blame” to cable was whether there would be a clearance or other violation for either Oncor or the ILEC “but for” the presence of the cable facility.¹⁰⁰ Thus, even when a preexisting cable attachment is in compliance (having paid make-ready in many cases to make room for the attachment), if a subsequent modification made by either Oncor or an ILEC results in creating a violation with a cable attachment, cable will be held responsible. This approach to inspecting third-party attachments violates the Pole Attachment Act and any inspection that purports to assign blame for violations based on this approach is invalid.¹⁰¹

⁹⁸ Harrelson Decl. ¶ 16.

⁹⁹ *Id.*

¹⁰⁰ *Id.* ¶ 17.

¹⁰¹ 47 U.S.C. § 224(i) (an attacher cannot be required to bear any of the costs of rearranging or replacing its attachment if the rearrangement or replacement is the result of an additional attachment or modification of an

The violations created by Oncor and the ILEC are typical of the types of utility behavior that result in utility allegations of cable operator caused safety violations.¹⁰² Many of these such utility caused violations are illustrated by photographs attached to Mr. Harrelson's Declaration.¹⁰³

attachment sought by "any other entity (including the owner of the pole..."). See also 47 C.F.R. § 1.1416(b). In addition, a pole owner cannot require an attacher to pay to correct the safety violations of other parties, including those of the pole owner. See *Knology v. Georgia Power Co.*, Memorandum Opinion and Order, FCC 03-292, 18 FCC Rcd 24615, 24629 ¶ 37 (2003); *Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, Order and Request for Information, DA 00-1250, 15 FCC Rcd 9563, 9571 ¶ 17, vacated by settlement, DA 02-3319, 17 FCC Rcd 24414 (2002). The Commission should also be aware that field inspections conducted by USS have been the source of controversy on a number of occasions before the Commission arising from its misapplication of Commission policies governing pole attachments. See, e.g., *Cable Television Ass'n of Georgia v. Georgia Power Co.*, Order, DA 03-2613, 18 FCC Rcd 16333, 16339-40 ¶ 12 and n.43 (Enf. Bur. 2003) (Georgia Power's "exhibits relating to safety fall short of establishing a record of recent safety violations by the Cable Operators.... Specifically, a spreadsheet [prepared by USS] submitted by Georgia Power purportedly documenting recent safety violations contains no date ... and a [USS] summary of violations purportedly committed in part by AT&T/MediaOne contains dated information that calls into question the report's accuracy"). *Knology*, 18 FCC Rcd at 24626 ¶ 28; *Arkansas Cable Telecomms. Ass'n v. Entergy Arkansas, Inc.*, Hearing Designation Order, DA 06-494, 21 FCC Rcd 2158, 2160-63 ¶¶ 8-12 (Enf. Bur. 2006) (rejecting Entergy's contention that the Commission lacks jurisdiction to decide whether Entergy's application of engineering standards is unjust and unreasonable). USS was the contractor used by Entergy for these safety inspections and USS's misapplication of the NESC and Commission policies was challenged by the entire Arkansas cable industry. The Commission should be particularly skeptical regarding any safety inspection findings involving USS.

¹⁰² Harrelson Decl. ¶ 19.

¹⁰³ Examples include: (i) Oncor improperly sags its secondary line too close to compliant cable and demands that cable pay to resag the secondary; (ii) Oncor installs new transformers to serve a new customer and then installs a service riser a few inches either above or below the cable company's existing and previously compliant attachment, blames cable, and demands cable buy a taller pole and/or pay to extend Oncor's riser to proper position; (iii) Oncor installs a service drop too close to existing compliant cable and Oncor/USS blames cable and demands that it replace the pole; (iv) Oncor installs transformer and service drop too close to existing compliant cable and then orders cable to pay to replace pole to resolve clearance issue; (v) Oncor improperly connects quadruplex line from pole to serve customer that is too close to existing compliant cable. ILEC has mid-span violation over roadway (15 feet). Oncor directs cable to replace with taller pole to resolve Oncor and ILEC violations; (vi) Oncor fiber affiliate (at the time of the inspection) installs its line between existing compliant cable and ILEC and in the process moves cable up the pole creating clearance violation with Oncor power. Oncor blames cable for the violation and directs it to pay to lower cable; and (vii) Oncor orders cable to remove cable from a pole with a mid-span violation, which cable agrees to do. However, the ILEC located *below cable* at only 11.5 feet was not cited for any violation (although pointed out by Mr. Harrelson to USS) and permitted to remain in its dangerous location. *Id.* ¶ 18.

c. Field Resolution of Safety Issues Is Typically Accomplished in the Ordinary Course of Business.

Notwithstanding the unreliable safety allegations reported in this proceeding by electricians, the reality is that cable, ILEC and electric company facilities have coexisted on poles safely and successfully for some 40 years with only an occasional need to seek Commission intervention to correct unreasonable utility behavior. Given the millions of poles in the field it is obvious that the vast majority of issues are resolved amicably in the ordinary course of business by appropriate field representatives of attachers. There is no need for the Commission to modify the status quo by acceding to any of the electric utilities' demands for extraordinary powers that will only increase their ability to abuse the position of power they have as monopoly pole owners.¹⁰⁴

d. Utility Claims Regarding Unauthorized Attachments Are Inflated and Misleading.

Much like the utilities' safety violation claims, their allegations of rampant unauthorized attachments are exaggerated and misleading. Utilities can and do reach the conclusion that an attachment is "unauthorized" based on any number of assumptions that are invalid when scrutinized. For example, the Commission rejected a claim by a utility that a cable company had more than 25,000 unauthorized attachments requiring a penalty of almost \$6 million.¹⁰⁵ The Commission found that under a previous pole attachment agreement there was no contract requirement that the cable company apply for, or pay rent for, "drop" poles. However, when the

¹⁰⁴ As explained by Mr. Harrelson, it would be a mistake for the Commission to provide the broad unchecked powers sought by the utilities in this proceeding such as open-ended penalties for purported safety violations and unauthorized attachments. Current Commission policies provide the appropriate balance in light of the utilities' demonstrated predilection to abuse their monopoly position and to develop their poles as a profit center. In addition, the Commission should reject utility arguments that the NESC is insufficient to protect safety interests and that the individual "safety" and operating requirements of utilities should be presumed just and reasonable. *Id.* ¶¶ 9-11, 23.

¹⁰⁵ See *Mile Hi Cable Partners, LP*, Order, FCC 02-95, 17 FCC Rcd 6268 (2002) ("*Mile Hi*"), *aff'd*, *Public Serv. Co. of Colorado v. FCC*, 328 F.3d 675 (2003).

utility modified its pole agreement to include drop poles, it immediately conducted a pole inventory applying a definition of attachment that counted both regular attachments and drop pole attachments. The inclusion of drop poles in the inventory naturally led to the discovery of thousands of “unauthorized attachments” (i.e., the previously compliant unlicensed drop pole attachments).¹⁰⁶

The Commission ruled that it was unjust and unreasonable to consider the drop pole attachments as “unauthorized” since they were permitted prior to the contract modification.¹⁰⁷ In addition, the Commission determined that the records of the utility were such that the cable company was paying for many attachments that no longer existed and that payments for those “nonexistent” attachments should be taken into account in determining the overall number of unauthorized attachments.¹⁰⁸

The Commission’s *Mile Hi* decision illustrates how utilities can misuse the label “unauthorized attachment,” and through the application of “penalties” can create an enormous and unjustified profit center.¹⁰⁹ The fact pattern in *Mile Hi* is by no means unique. Utilities can easily inflate unauthorized attachment numbers by retroactively reclassifying driveway poles and similar smaller, non-current carrying customer drop poles. Other practices that lead to inflated “unauthorized” pole claims include:

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* ¶ 12 (“We agree that it would be unjust and unreasonable to allow Respondent to collect unauthorized attachment fees for drop poles when Respondent has provided no evidence to contradict Complainant’s evidence that prior to 1998, Complainant was not required to apply for, or pay for, attachments to drop poles.”)

¹⁰⁸ *Public Serv. Co. of Colorado v. FCC*, 328 F.3d at 679.

¹⁰⁹ The lesson learned in *Mile Hi* is that the Commission should absolutely not provide any additional authority to utilities to increase the costs of attachments artificially through easily abused attachment inventory fees and penalty provisions.

- As pole ownership has shifted from ILECs to electric companies, attachments properly licensed from ILECs are no longer on ILEC poles. Cable attachers are not made aware of these changes in individual pole ownership (cumulatively amounting to millions of poles over time) and utility records are not updated. The result after an electric inventory is to “discover” many “unauthorized” attachments for which the attacher is still paying pole rent to the previous owner.¹¹⁰
- Pole records have been inaccurate and are often lost through changes in ownership of utilities and cable companies. Computerization of pole records often leads to loss of data. The result is that when a new inventory is conducted, the utility finds attachments that do not match up with pole locations its records which it then labels as “unauthorized.” This can occur, as in *Mile Hi*, even if the cable company is paying rent on attachments for unspecified poles and for nonexistent attachments.¹¹¹
- Contractors hired to count attachments are often compensated on the basis of the number of attachments counted or on a contingency basis. This approach is rife with conflict and can inflate the number of attachments counted.¹¹²

While it is not possible to review all of the unsupported pole inventory results reported in the utility comments, for those audits where background is available, it is clear that the findings reflect substantially inflated and misleading numbers.¹¹³

¹¹⁰ *Id.*; Comcast’s Reply Comments, Ex. 5 (Declaration of John Detweiler); Time Warner Cable Comments at 55.

¹¹¹ Harrelson Decl. ¶¶ 20-21. *See* note 109 *supra*.

¹¹² *See* Knology Comments at 15, 17-20.

¹¹³ For example, while Comcast does not have the information to provide substantive comment regarding the specifics of the unsupported and unverified unauthorized attachment reports submitted by most of the utilities, the information that Comcast does have provides strong evidence that the utility reports are highly exaggerated and misleading. PPL Electric Utilities submits a report of very high levels of unauthorized attachments in its service area. *See* Comments of American Electric Power Service Corporation, et al., at 13-15. However, as explained in the attached Declaration of John Detweiler, PPL has long engaged in inventory practices that create highly exaggerated results that, when reviewed and challenged by Comcast, result in significant reversals and refunds of assessed unauthorized attachment penalties. Mr. Detweiler concludes, based on his experience with PPL inventories over a number of years and his familiarity with the results of PPL’s inventories, that the report presents a highly exaggerated, unreliable and misleading impression to the Commission. *See* Comcast Reply Comments, Ex. 5.

CONCLUSION

The Commission's concern that the cable pole rate is a "subsidy" has been shown by the comments to be wholly unfounded. Instead, the comments demonstrate both that the cable pole rate overcompensates utilities and that electric utilities have turned distribution poles into profit centers through the collection of excessive pole revenues. Any further increase in pole attachment rates proposed by the Commission would have a damaging effect upon broadband deployment and facilities-based voice competition. The comments also establish that CLECs should have pole rate parity with cable attachers at the cable pole rate. However, the record confirms that ILECs still possess far superior pole attachment rights and benefits when compared to cable and CLEC attachers. Therefore, no legitimate basis for rate parity between ILEC attachers and cable/CLEC attachers currently exists.

Respectfully submitted,

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EXHIBIT 1

APPENDIX OF COMMISSION AUTHORITY REJECTING MISCELLANEOUS UTILITY RATE INCREASE ARGUMENTS

I. Inappropriate Attempts to Include Additional FERC Accounts that the Commission Has Expressly and Repeatedly Excluded

The electric utilities once again claim in this rulemaking that “[t]he Commission’s existing two rate formulas do not include enough FERC Form 1 accounts . . . to fully compensate electric utilities for pole attachments,” an argument that the Commission has rejected numerous times over several decades. Utility Coalition Comments at 8-9. Specifically -- with absolutely no evidentiary support whatsoever -- the electric utilities seek to recover costs from additional FERC Accounts including: FERC Accounts 360; 365; 367; 368; 369; 389-399; 580; 583; 584; 588; 590; and 598. The Commission has expressly excluded each of these accounts in prior rulemakings and contested cases, as specifically set forth in the Commission findings below.

- “[The electric utility] SPS includes FERC expense Accounts 580, Operation supervision and engineering, 583, Overhead line expenses, 588, Miscellaneous distribution expenses, and 590, Maintenance supervision and engineering, in addition to Account 593 in the numerator of the [maintenance] calculation. SPS argues that these additional accounts reflect the actual expenses incurred in maintaining pole attachments and that [the cable operator] should be allocated its pro rata share of these expenses. . . . We reject SPS’s inclusion of these other accounts in the maintenance expense carrying charge calculation. We have previously determined that the only expense account that electric utilities should include in their maintenance expense calculations is Account 593. The additional accounts SPS seeks to include in those calculations have a minimal relation, if any, to pole attachments and thus, should not be included in maintenance expenses.” *TCA Mgmt. Co. v. Southwestern Pub. Serv. Co.*, Hearing Designation Order, FCC 95-221, 10 FCC Rcd 11832, 11841-42 ¶¶ 24-25 (1995) (citing *Warner Amex Cable Commc’ns, Inc. v. Southwestern Elec. Power Co.*, Mimeo No. 2718 (1982); *Trenton Cable TV, Inc. v. Missouri Pub. Serv. Co.*, Mimeo No. 2152 (1982) (rejecting inclusion of FERC Accounts 583, 588 and 590 in maintenance expense calculations).
- “We decline to add portions of Accounts 365 or 368 to the net cost of a bare pole factor. This factor already contains adjustment components, relating to appurtenances such as crossarms, that can be challenged with appropriate verifiable data. We affirm our conclusion that lightning protectors and grounding installations recorded in accounts other than Account 364 should not be included in the calculation of the net cost of a bare pole factor. . . . Portions of Accounts 365 and 369 are already included in the maintenance element. . . . We do not believe that portions of 580 (Operation: Supervision and Engineering) and 583 (Operation Overhead Line Expenses, Major Utilities Only) should be included even if they contain some capital expense incurred with respect to all

electric power distribution plant. Based on the record, we believe that any increased accuracy that would be derived from including some minute percentage of pole-related expenses that may be recorded in miscellaneous accounts, is outweighed by the complexity of arriving at an appropriate and equitable percentage of the expenses. The descriptions of what expenses are to be reported to Accounts 365, 368, 580 and 583, contained in FERC Part 101, appear to relate more directly to the electric utilities' core business operations than 'actual capital costs attributable to the entire pole, duct, conduit, or right-of-way,' as required for inclusion in the rate formula." *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, FCC 00-116, 15 FCC Rcd 6453, 6475-76 ¶¶ 38-39 (2000) ("2000 Pole Order") (internal citations omitted), *aff'd*, *Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order On Reconsideration, FCC 01-170, 16 FCC Rcd 12103, 12161-62 ¶¶ 120-124 (2001) ("2001 Pole Order").

- "Electric utility pole owners assert that Account 590 expenses are appropriate for inclusion in [sic] carrying charge rate factor of the *Cable Formula*. . . . Cable operators contend that Account 590 is designed to cover maintenance costs that have little or no nexus to the pole network and attachment of communications facilities to such poles and that actual maintenance expenses associated with poles, conductors and services (drops) are already accounted for in other accounts. Further, cable operators contend that the amount of return possible is not justified by the level of detail and calculations required. We disagree with electric utilities that Account 590 should be included in the carrying charge rate factor . . . just because the expenses relate to the maintenance of a distribution system which may include poles. The description of Account 590 advises that 'direct field supervision of specific jobs shall be charged to the appropriate maintenance account.' To the extent that pole owners are able to specifically identify and report maintenance costs related to poles on which there are pole attachments, those expenses should be included in Account 593 on which the maintenance element is currently based. We are not persuaded that any residual expense related to poles that may be included in this account is significant." *2000 Pole Order*, 15 FCC Rcd at 6485-86 at ¶¶ 60-61, *aff'd*, *2001 Pole Order*, 16 FCC Rcd at 12159-60 ¶ 117 ("We disagreed in the [2000] Order, and we have been provided no additional evidence to rebut the description of Account 590 or that 'direct field supervision of specific jobs shall be charged to the appropriate maintenance account,' in this case Account 593. [Electric utility] petitioners do not persuade us that there is any significant expense related to poles included in Account 590.")
- "[Electric utility] petitioners also include a list of FERC accounts they would like included as maintenance expenses in the pole and conduit calculations. These include Accounts 580 (operation and supervision), 583 (overhead line expenses (Major only)), 584 (underground line expenses (Major only)), 584 (operation of underground lines), 588 (miscellaneous distribution operation expenses), 590

(maintenance supervision and engineering-Major only), and 598 (maintenance of miscellaneous distribution plant). . . . We will not include any portion of Accounts 580, 583, 584, 588 or 598 in the calculation of the maintenance element of carrying charge rate for pole or conduit because the costs or expenses reported to these accounts do not reflect a sufficient nexus to the operating expenses and actual capital costs of the utility attributable to the pole or conduit attachment. The pertinent maintenance expenses are reported in Accounts 593 (poles) and 594 (conduit) and we include those in the calculations.” *2001 Pole Order*, 16 FCC Rcd at 12160-61 ¶ 119.

- “In addition to its arguments for including additional accounts in the carrying charge component . . . Southern Co. argues that additional capital accounts should be included in the investment calculation for poles and conduit, including FERC Accounts 360 (land and land rights); 365 (overhead conductors and devices); 368 (line transformers) and Accounts 389-399 (General Plant). UTC/EEI joins in arguing for inclusion of Accounts 360, 365, 367 (underground conductors and devices), 369 (services), and 397 (communications equipment). We calculate net pole or conduit investment for two purposes in the formula. First, we calculate net investment to identify the portion of net investment that is allocable to the physical attachment. We then apply the rate of return against that portion so that the utility is fully compensated for the capital investment that is being used by the attacher. The only account pertinent to that calculation is the pole or conduit investment account. . . . Based on our extensive view of the record and the description of the accounts, we affirm that only FERC accounts to be included in the investment calculation are Accounts 364 for pole investment and Account 366 for conduit investment. Petitioners fail to provide any new information and their reiteration of the same arguments fail to persuade us to include additional accounts in our calculation of the pole or conduit investment. . . . Our inclusion of unrelated expenses in certain accounts and our exclusion of possible minor expenses in other accounts provides a balanced overall allocation of costs while avoiding a prolonged and contentious ratemaking process.” *Id.* at 12161-64 ¶¶ 120-128.

II. Inappropriate Reallocation of “Safety Space” from Usable to Unusable Space

As in prior pole rulemakings, various electric utilities use this rulemaking to argue that the 40-inch “safety space” that separates power lines and communications facilities should be considered “unusable,” rather than “usable” space. Utility Coalition Comments at 10; UTC Comments at 25-28 and n.64; EEI/UTC Comments at 103-04. The Commission has consistently rejected this same argument for decades and considers the “safety space” as “usable” because the space can and is used by electric utilities. The utilities offer nothing new that would justify an outcome different from the following Commission rulings.

- In 1979, the Commission concluded that the neutral zone is *usable* space and that no portion of it may be attributed to cable: “[W]e note the common practice of electric utility companies to make resourceful use of this safety space by mounting street light support brackets, step-down distribution transformers, and grounded, shielded power conductors therein.” *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Mem. Op. and Second Report and Order, 72 F.C.C. 2d 59, 70-71 ¶ 24 (1979), *aff’d*, *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981).
- In 1984, the Commission reaffirmed that its “‘several years of experience’ in regulating pole attachments . . . has [not] altered the fact, conceded by petitioners, that some utilities make resourceful use of the safety space. . . .” *Petition to Adopt Rules Concerning Usable Space On Utility Poles*, 1984 FCC LEXIS 2284, at *11 (1984).
- Following passage of the 1996 Telecommunications Act, the Commission again confirmed that electric utilities are the primary beneficiaries of the 40-inch safety space and, indeed, use the space: “After consideration of the evidence in this proceeding, we decline to decrease the amount of usable space from 13.5 feet to 11 feet by reallocating the 40-inch safety space as unusable space. . . . It is the potentially hazardous electric lines that makes the safety space necessary and but for the presence of those lines, the space could be used by cable and telecommunications attachers. The space is usable and is used by electric utilities. A bare pole, when erected has portions to which attachments cannot be made at any time—the ground clearance and the part below ground. The rest is available for attachments; it is usable space. A communications attachment, even though it may be a fiber optic cable with a diameter of only one inch, is presumed to occupy one foot of the attachment space because of separation requirements. In a like manner, the electric supply cable on the pole, because of its unique spacing requirements must be 40 inches away from communications attachments. No one questions that the eleven inches of space not physically occupied by a fiber optic cable, but attributable to it, is usable space. Because the electric supply cable precludes other attachments from occupying safety space, which would otherwise be usable space, the safety space is effectively usable space occupied by the supply cable. So long as their crews make the installation, the electric utilities are not limited by the NESC in what equipment or cable they may attach in the safety space. Accordingly, we reject the electric utilities’ argument to reduce the presumptive usable space of 13.5 feet by 40 inches.” *2001 Pole Order*, 15 FCC at 6467-69 ¶¶ 20-24.
- In 2001, the Commission once again rejected utility arguments to reallocate the 40-inch safety space from “usable” to “unusable” space: “UTC/EEI continues to urge that we consider as unusable the 40-inch safety space that exists to minimize the likelihood of physical contact between employees working on cable television or telephone lines and the potentially lethal voltage carried by the electric lines, as well as to prevent electrical contact between such cables. No new arguments or evidence

was presented in filings and based on our previous reasoning, that the space is usable and used by the electric utility, we reject arguments to reduce the presumptive usable space of 13.5 feet by 40 inches.” *2001 Pole Order*, 16 FCC Rcd at 12130 ¶ 51.

III. Inappropriate Additional Rental Charges on Attacher Equipment in Unusable Space

Similarly, the Commission long ago dismissed electric utility attempts to charge additional rents for equipment normally required by the presence of the cable attachment, including equipment located in unusable space. Some electric utilities nevertheless claim, without any legal support, that they should now be entitled to charge rent for “risers, j-hooks, power supplies, and any additional items that occupy space on the pole,” in addition to the one foot allocated for the cable attachment. EEI/UTC Comments at 109. The utilities provide no legitimate basis for the Commission to revise its consistent position as set forth below.

- In *Capital Cities Cable, Inc. v. Mountain States Tel. & Tel. Co.*, 1984 FCC LEXIS 2443 (1984), the Commission concluded that it was inappropriate for the pole owner to allocate an extra 1.67 feet of usable space to the attacher for equipment required by the cable attachment, including risers and power supplies in unusable space: “We must, however, reject the utility’s ‘space used by CATV’ study. In arriving at its figure of 1.67 feet for occupied space, Arizona Public adjusted the Commission-adopted one-foot figure to account for space occupied by ‘multiple attachments.’ An examination of its study reveals that Arizona Public has defined ‘multiple attachments’ to include not only multiple cable attachments, but also facilities other than cable such as underground dips (i.e., transitions for overhead lines to continue underground) and power supplies. With respect to multiple cable attachments, the maximum rate determined by the Commission is per pole attachment. If the cable company has multiple cable attachments on the poles, the utility may charge for each one. However, these multiple cable attachments do not increase the one foot of space utilized per attachment. As for underground dips, Arizona Public has measured the distance that the overhead line travels down the pole to the ground . . . and assigns cable television the responsibility for one third of this distance. Here, the utility is attempting to credit cable with occupying over 6 feet of space that is largely, if not all, included in the unusable 18 to 28 feet of ‘ground clearance,’ which, by definition, is excluded from usable space. Likewise, the power supplies are normally mounted at 8 feet, according to Arizona Public, and are thus also in the unusable ground clearance space. Nevertheless, the space deemed occupied by CATV includes not only the cable itself, but also any other equipment normally required by the presence of CATV. Thus, the company has not met the burden of showing that CATV occupies an additional 0.67 feet of space because of dips and power supplies.” *Id.* at *24-26.
- The Commission reaffirmed its decision in *Capital Cities Cable* less than a year later in *Texas Cablevision Co. v. Southwestern Electric Power Co.*, 1985 FCC

LEXIS 3818, at *3 (1985): “The parties disagree on the amount of space occupied by the CATV attachments. Complainants base their calculation on the 12-inch standard adopted by the Commission. SWEPCO, on the other hand, contends that CATV occupies an average of 1.5094 feet per pole. This figure is based on a field inventory which, according to SWEPCO, shows that a pole frequently has more than one attachment and that the attachments are frequently devices which use more than one inch, e.g., service drop risers, power supply cables and underground risers. SWEPCO argues that the Commission’s one foot figure does not account for multiple attachments per pole, or the actual excess usage for a given contact. Although the Commission has assigned one foot of space to CATV and has indicated that it will not deviate from this figure for space occupied by CATV, since SWEPCO has submitted a study which purports to show that CATV in fact occupies more than 1.5 feet on its poles, we will point out some of the errors in its study. In arriving at its figure, SWEPCO adjusted the Commission’s one-foot figure to account for space occupied by ‘multiple attachments.’ SWEPCO has apparently defined ‘multiple attachments’ to include not only attachments of multiple cables, but also attachment of facilities other than cable such as power supply cables and underground risers. SWEPCO is misguided. First, in adopting a standard of one foot for space deemed occupied by CATV, the Commission not only included that space occupied by the cable itself, but also the space associated with any equipment normally required by the presence of the cable television attachment. Moreover, to the extent that this ancillary equipment may occupy the 18-28 feet designated as ‘ground clearance,’ which by definition is excluded from usable space, it is to be omitted from any measurements.” *Id.* at *3-4 (internal citations omitted).

IV. Unreasonable Restrictions and Charges Imposed on Overlapping

Several electric utilities argue that cable operators should be required to obtain a permit from the utility prior to overlapping and pay additional rental charges for overlapped facilities, even though the Commission has repeatedly rejected these same electric utility arguments for important legal and policy reasons in prior rulemakings and complaint cases. EEI/UTC Comments at 74-74, 109.

- In 1995, the Commission cautioned pole owners against unreasonably restricting overlapping: “Recently, allegations have been made that utility pole owners may be unreasonably preventing ‘overlapping’ fiber to their existing lines by failing to process a request to overlap fiber within a reasonable time period and/or unreasonably denying the request. While legitimate safety issues may justify certain precautions relating to fiber upgrades, we are concerned that there could be serious anticompetitive effects from preventing cable operators from adding fiber to their systems. Without prejudging any pending or future matters concerning cable pole attachments, we hereby affirm our commitment to ensuring that the growth and development of cable television facilities is not hindered by unreasonable conduct on the part of the utility pole owners.” *Common Carrier*

Bureau Cautions Owners of Utility Poles, FCC Public Notice, 1995 FCC LEXIS 193, at *1 (1995).

- In 1998, in an order implementing the goals of the 1996 Act to “establish a pro-competitive, deregulatory national policy framework designed to accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition,” the Commission reaffirmed its policies promoting overlashing: “We believe overlashing is important to implementing the 1996 Act as it facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities. Overlashing promotes competition [and helps] provide diversity of services over existing facilities, fostering the availability of telecommunications services to communities, and increasing opportunities for competition in the marketplace.” *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, Report and Order, FCC 98-20, 13 FCC Rcd 6777, 6807 ¶ 62 (1998) (“*1998 Pole Order*”).
- In 2001, the Commission announced its strongest statement promoting overlashing and clarified that pole owners were forbidden from requiring permits prior to overlashing: “Cable companies have, through overlashing, been able for decades to replace deteriorated cables or expand capacity of existing communications facilities, by tying communications conductors to existing, supportive strands of cable on poles. The 1996 Act was designed to accelerate rapid deployment of telecommunications and other services, and to increase competition among providers of these services. Overlashing existing cables reduces construction disruption and associated expense. . . . We affirm our policy that neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment.” *2001 Pole Order*, 16 FCC Rcd at 12140-41 ¶¶ 73-75.
- The Commission’s 2001 ruling on overlashing was affirmed by the Court of Appeals for the District of Columbia Circuit: “Overlashers are not required to give prior notice to utilities before overlashing. . . . “[T]he overlashing rules show due consideration for the utilities’ statutory rights and financial concerns. The record shows that these matters played a role in the Commission’s decision, but petitioner’s concerns were balanced with the efficiency gains that overlashing brings to the industry.” *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002).
- In 2003, the Commission again rejected utility attempts to impose permitting-like requirements on overlashing in pole attachment agreements: “The [proposed pole attachment agreement] challenged by the Cable Operators requires Georgia Power’s written consent to any overlashing, which the utility may take up to 30

days to grant or deny. This new provision is unjust and unreasonable on its face. The Commission has expressly articulated a policy promoting overlashing, and stated that ‘neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment.’ Georgia Power is therefore ordered to negotiate in good faith a reasonable provision consistent with Commission precedent.” *Cable Television Ass’n of Georgia v. Georgia Power Co.*, Order, DA 03-2613, 18 FCC Rcd 16333, 16340-41 ¶ 13 (2003) (internal citations omitted).

Moreover, because overlashed fiber is affixed to other wires and does not increase the amount of space occupied by a pole attachment, the Commission has consistently ruled that additional charges for overlashed fiber are not appropriate.

- “[W]e reject TU Electric’s argument that the amount of the refund due TCI should be decreased by the amount of the regulated pole attachment rate for each additional cable lashed to an existing cable on TU Electric’s poles. The Commission has held that [a utility] can charge only one regulated rate per pole attachment, not per cable. The support strand is attached to the pole at only one point. The number of cables that are strung along that strand does not affect the total usable space required by the pole attachment.” *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Util. Elec. Co.*, Order, DA 93-11, 8 FCC Rcd 373, 374-75 ¶ 16 (1993).
- The Commission has also held that any additional ice, wind and weight load that may be caused by an overlashed fiber should be taken care of through routine make-ready: “We have been presented with no persuasive reason to change the Commission’s policy that encourages overlashing, and we agree with representatives of the cable and telecommunications industries that, to the extent that it does not significantly increase the burden on the pole, overlashing one’s own pole attachment should be permitted without additional charge. To the extent that the overlashing does create an additional burden on the pole, any concerns should be satisfied by compliance with generally accepted engineering practices. . . . We also do not believe that overlashing is an expansion of the pole owners’ obligation. Overlashing has been in practice for many years. We believe utility pole owners’ concerns are addressed by Section 224’s assurance that pole owners receive a just and reasonable rate and that pole attachments may be denied for reasons of safety, reliability, and generally applicable engineering purposes.”) *1998 Pole Order*, 13 FCC Rcd at 6807-08 ¶ 64.
- The Commission affirmed its 1998 holding in its *2001 Pole Order* in the face of renewed urgings by the electric utilities: “[Electric Utility] petitioners continue to urge that we allow some factor for increased weight and wind load in cases of overlashing. We have reviewed Sections 24 through 26 of the NESC that address loading and structural requirements in detail. Based on our analysis and the record, we continue to believe that an attachment’s ‘burden on the pole’ relates to

an assessment of need for make-ready changes to the pole structure, including pole change-out, to meet the strength requirements of the NESC. . . . [P]etitioners present no new or persuasive evidence that the ‘burden on the pole’ due to weight and wind load is an additional factor for consideration in the determination of the amount of space occupied through which some rate increase would be calculated. We affirm our position that the costs of the physical attachments of an attaching entity are normally paid to the pole owner as a condition of attachment, addressing such factors as weight, wind load and safety space. Overlashing does not increase the amount of space actually occupied by the attachment.” *2001 Pole Order*, 16 FCC Rcd at 12142-43 ¶¶ 77-78.

- In 2002, the Commission’s holding in this regard was affirmed in the Southern Company case by the Court of Appeals for the District of Columbia Circuit: “Because overlashing by definition involves a physical connection to other wires and not to the pole itself, the Commission concluded that a utility is not entitled to charge overlashing parties for pole space. This is a permissible construction of the statute, one that comports with the Commission’s permissible construction of ‘attaching entities.’ The overlashing rules allow utilities to charge overlashers ‘make ready’ costs if the overlashing wires require enhancing the strength of the pole.” *Southern Co. Servs. v. FCC*, 313 F.3d at 582.

V. Inappropriate and Unnecessary Reduction of the Number of Attaching Entities for Purposes of Allocating Unusable Space in the Telecom Formula

The electric utilities renew identical arguments recently rejected by the Commission that only Section 224 (cable and CLEC) attachers should be considered “attaching entities” for purposes of allocating unusable space in the telecom formula. EEI/UTC Comments at 105-107; UTC Comments at 25-27. The utilities claim that this revision would be “consistent with the rest of the statute,” even though the Commission has already ruled to the contrary, and was upheld on appeal. To the extent individual utilities believe that the presumptions established by the Commission are incorrect as applied to them, they are free to provide appropriate support to rebut the presumption. 47 C.F.R. § 1.1417(d).

- For example, in the 2001 Order, the Commission concluded that “[t]he term ‘attaching entities’ includes, without limitation, and consistent with the Pole Attachment Act, any telecommunications carrier, incumbent or other local exchange carrier, cable operator, government agency, and any electric or other utility, whether or not the utility provides a telecommunications service to the public, as well as any other entity with a physical attachment to the pole. This is consistent with the language of the statute and with Congress’ intent to count all attaching entities when allocating the costs of unusable space. We believe that if Congress had intended that only telecommunications carriers’ with attachments on a pole, or in a conduit, duct or right-of-way, should be counted as attaching entities for the purpose of apportioning costs of unusable space pursuant to section 224(e)(2), Congress would have used the specific term ‘telecommunications carrier’ or ‘provider of telecommunications services’ instead

of the more general and more inclusive term ‘entity’ and ‘entities.’ We find arguments that the pole owner must absorb unfairly the costs of government attachments to be unpersuasive. As we stated in the *Telecom Order*, because the government attacher and the pole owner have a relationship that benefits both parties, we are not persuaded that the pole owner is unfairly absorbing the cost of government attachments to the extent the pole owner’s franchise so provides. Moreover, many attachers pay a separate fee to governments for the ability to attach to poles in public right of ways in addition to the pole rental fee. We also find unpersuasive arguments that the non-telecommunications utility pole owner should not be included as an attaching entity. We find no reasonable distinction to be drawn when comparing telecommunications utility pole owners and non-telecommunications utility pole owners that would warrant different treatment in counting attaching entities. We do not believe that Congress intended for a single attacher, protected by the Pole Attachment Act, that uses one foot of space on a pole, to pay a higher (double) portion of the unusable space cost than the pole owner that controls, and uses a good portion of, the rest of the usable space. Therefore, we include the utility pole owner in the count, resulting in a minimum of two attaching entities being counted. *2001 Pole Order*, 16 FCC Rcd at 12133-34 ¶¶ 59-60.

- The Commission’s attaching entity rule including electric utilities and others as “attaching entities,” was upheld on appeal by the Court of Appeals for the District of Columbia Circuit as “an eminently reasonable interpretation of the statute: “In applying the statute, the Commission’s rules prescribe that any party with a physical attachment is an ‘attaching entity.’ This mean that even municipalities and utility owners themselves may be deemed ‘attaching entities.’ Petitioners challenge this rule, claiming that the statute only allows telecommunications and cable companies to be counted as attaching entities. Petitioners’ view of the statute is wrong. The specific provision at issue, 47 U.S.C. § 224(e)(2), merely says that the Commission must equally apportion costs ‘among all attaching entities.’ Petitioners argue, however, that the statutory definitions of ‘pole attachment,’ § 224(a)(4), and ‘telecommunications carrier,” § 224(a)(5), which do not include utilities and municipalities, show that Congress meant to exclude utilities and municipalities from the category of attaching entities. This argument fails, because the cited provisions do not establish what parties qualify as ‘attaching entities’ for purposes of apportioning costs under § 224(e)(2). In fact, to the extent the Act mentions ‘entities’ at all, the term bears different meanings depending upon the context. . . . The FCC’s decision to count utilities among ‘attaching entities’ is an eminently reasonable interpretation of the statute. The FCC reasoned that its broader definition better reflects the operative language in the Act. Congress chose not to use a more specific term like ‘telecommunications carrier’ or ‘provider of telecommunications services,’ which would have evidenced an intent to distribute the unusable space costs more narrowly. The broader definition is also justified because it limits the financial burden on telecommunications providers and therefore encourages growth and competition in the industry. Finally, the FCC noted that, absent the rule, a

telecommunications provider might bear the entire cost of unusable space where it is the sole paying attachers. In sum, the agency's interpretation of § 224(e)(2) is clearly a permissible interpretation of the statute to which we must defer." *Southern Co. Servs. v. FCC*, 313 F.3d at 580-81.

- The Commission has also enforced its attaching entity rule in contested cases: *Teleport Commc'ns Atlanta, Inc. v. Georgia Power Co.*, Order, DA 01-2653, 16 FCC Rcd 20238, 20242-43 ¶ 11 (2001) (rejecting Georgia Power's average number of attaching entity of less than two attachers), *aff'd*, Order Denying Motion, File No. PA 00-0005 (rel. June 1, 2001), *available at* <http://www.fcc.gov/Bureaus/Cable/Orders/2001/da011332.doc> ("The [Cable Services] Bureau rejected GPC's average number of attachments figure of 1.59222 because the minimum possible number of attachers to be used in the Telecom Formula is two.").

VI. Utilities Request a Presumption that All Cable Operator Attachments Are Used to Provide Telecommunications Services and a Requirement for Annual Reporting of Certain Attachment Information -- Despite the Commission's Rejections of Identical Utility Requests in the Past.

Despite the fact that the Commission has already rejected identical prior requests to adopt a rebuttable presumption that "all cable operator attachments are used to provided [sic] telecommunications services," EEI/UTC nevertheless makes the same request here. EEI/UTC Comments at 75. EEI/UTC further urges the Commission to require attachers to "provide an annual report to the utility and the Commission certifying the number of attachments, the location of each attachment the date the attachment was made, and the service provided using the attachment." *Id.* at 76. The Commission has also refused to adopt similar reporting requests made by EEI/UTC in the past, deeming them burdensome for all parties, including the Commission.

- "We also disagree with utility pole owners that submit that all cable operators should be 'presumed to be telecommunications carriers' and therefore charged at the higher rate unless the cable operator certifies to the Commission that it is not 'offering' telecommunications services. We think that a certification process would add a burden that manifests no benefit. We believe the need for the pole owner to be notified is met by requiring the cable operator to provide notice to the pole owner when it begins providing telecommunication services. The rule we adopt in this *Order* will reflect this required notification. We also reject the suggestions of utility pole owners that the Commission should be responsible for monitoring and enforcing a certification of cable operators regarding their status. The record does not demonstrate that cable operators will not meet their responsibilities. If a dispute arises, the Commission's complaint processes can be invoked." *1998 Pole Order*, 13 FCC Rcd at 6796 ¶ 35.
- "[Utility] petitioners request that we require cable operators to certify that they are *not* providing telecommunications service. We decline to adopt such a regulatory

reporting requirement as it would impose unnecessary administrative burdens on cable operators, utilities, and the Commission. We affirm the requirement that a cable operator notify the utility when the cable operator begins providing telecommunications services itself or via third party overloading.” *2001 Pole Order*, 16 FCC Rcd at 12145 ¶ 84, *aff’g 1998 Pole Order*.

* * * * *

EXHIBIT 2

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

In the Matter of

Implementation of Section 224 of the Act;
Amendment of the Commission's Rules and
Policies Governing Pole Attachments

WC Docket No. 07-245

RM 11293

RM 11303

REPLY REPORT OF

PATRICIA D. KRAVTIN

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INTRODUCTION AND SUMMARY

1. My name is Patricia D. Kravtin. My business address is 57 Phillips Avenue, Swampscott, Massachusetts. I am an economist in private practice specializing in the analysis of telecommunications regulation and markets.

2. On March 7, 2008, I submitted a Report in this proceeding on behalf of Comcast Corporation (Kravtin Report). A detailed resume summarizing my educational background and experience was provided in Attachment 1 to that report. I was asked by Counsel for Comcast Corporation to review certain of the comments filed by the electric utilities and incumbent local exchange carriers (ILECs)¹ in this proceeding and to prepare a reply report responding to these comments concerning matters addressed in my earlier report. This reply report addresses and explains the following points:

- From an economics and public policy standpoint, the existing cable rate is the best overall choice for a unified rate that will promote competition and broadband deployment.
- By assigning costs of the entire pole (both usable and unusable space) in direct proportion to the attacher's relative use of the pole, the cable rate is a more economically efficient rate than the telecom rate. The cable rate formula also offers many other key economic and policy advantages over the telecom rate formula.
- The more the rental rate for pole attachments – an essential input of supply for cable operators, CLECs, and other broadband providers – deviates from the rate that would be determined in a competitive market, consumers will reap fewer of the benefits of a competitive market.

¹ In preparing this reply, I reviewed comments filed March 7, 2008 by the following utility and ILEC commenters: Coalition of Concerned Utilities (Concerned Utilities), Edison Electric Institute and the Utilities Telecom Council (EEI), Florida Power & Light and Tampa Electric (Florida Power), United States Telecom Association (USTA), and AT&T (including the Declarations of Veronica Mahanger MacPhee and Philip Jack Gauntt).

- The electric utilities put forth no substantive economic analysis in support of their positions; rather their comments rely largely on unsupported assertions, many of which have been explicitly rejected by the Commission in the past.
- Based on principles of economics, one cannot assume it to be more fair or reasonable to share common costs equally among users as opposed to proportionally – indeed there are compelling reasons why in the case of pole attachments it is neither.
- The additional “value” that utilities seek to recognize in higher pole attachment rental rates does not reflect a true economic cost to the pole owner; any increase to the cable rate to recover such uncaptured “value” will result in a less economically efficient rate with negative consequences for competition and broadband deployment.
- The electric utilities offer no substantive economic evidence to counter the widely accepted tenet of economics that a rate for a service is not subsidized if it covers the provider’s marginal costs, i.e. the additional costs incurred by the provider that would not exist “but for” the provider’s offering of that particular service.
- The average cable formula rate greatly exceeds marginal cost, and this is not even taking into account the substantial sums of make-ready payments by cable operators and others that already reimburse pole owners for the costs of hosting third-party attachments.
- Given that utilities can be shown to be financially better off as a result of hosting an additional attachment, it cannot rationally be argued that the rate is subsidized; under the utilities’ distorted reasoning, the term “subsidy” is used synonymously with a rate that is below a monopoly (economically inefficient and illegal) level.

- Claims by the electric utilities that they have had to absorb the costs of taller poles required to accommodate third-party attachments are unfounded, as are utilities' claims of other "hidden" or unreimbursed costs associated with third-party attachments.
- The modifications proposed by the utilities pertaining to safety space, space allocations, and FERC cost accounts, previously rejected by the Commission based on solid economic reasoning, would move the telecom formula even further away from a rate that could stimulate competition and broadband deployment.
- A downward revision to the presumptive number of attaching entities is not necessary as the rules allow utilities to rebut the presumption. If the Commission elects to modify the presumption, it must be based on credible, reliable, and verifiable data. However, any downward revision must be *in conjunction with other appropriate changes* to better align the telecom formula with an economically efficient marginal cost standard to achieve the Commission's goals.
- The adjustments outlined in Ms. MacPhee's declaration on behalf of AT&T pertaining to standard pole height, embedded bare pole cost, reimbursement to capital costs, and carrying charge factor, generally have merit; however, not all adjustments are readily achievable. Other adjustments, such as employing a relative-use allocator to assign both usable and non-usable space, are already reflected in the cable rate.
- The anomalous pricing approaches advocated by the utilities suffer from a common set of overarching flaws, including: (1) reliance on stand alone or avoided costs to set pole rental rates instead of actual costs; (2) pole space used by and useful to the pole owning utilities is improperly attributed to attachers; (3) the sharing of common costs in equal or disproportionate measure vis-à-vis the pole owner and the actual space used by the attacher; and (4) lack of economic sense and practical application.

THE EXISTING CABLE RATE IS THE BEST OVERALL CHOICE FOR A UNIFIED BROADBAND RATE.

3. By assigning costs of the entire pole (both usable and unusable space) in direct proportion to the attacher's relative use of the pole, the cable rate is a more economically efficient rate than the telecom rate. The cable rate formula has a number of desirable attributes vis-à-vis the telecom rate formula that individually and collectively produce a maximum rate that more closely mimics the outcome of a competitive market, including lower rates to consumers and the provision of a greater array of innovative and advanced service offerings (*see* Kravtin Report at 38-44). The more the rate for pole attachments, an essential input of supply for cable operators, CLECs, and other broadband providers, deviates from the rate that would be determined in competitive market, consumers will reap fewer of the benefits of a competitive market for broadband services. For these reasons, the cable rate is the best overall choice for a unified broadband rate.

4. As discussed below, it is quite remarkable that the utilities put forth no substantive economic report or declaration in support of their comments. Instead their comments rely largely on unsupported assertions, many of which have been explicitly rejected by the Commission in the past, and are either addressed in my earlier report or in this reply.

The cable formula's relative-use approach produces a more economically efficient rate than the per-attacher approach of the telecom formula.

5. The utilities argue, consistent with prior, unsuccessful challenges to the cable rate formula, that a "pro rata share of costs for the entire pole that is based on [cable attachers'] *portion* of the usable space" does not recognize the "*value provided* to cable attachers." Concerned Utilities at 10 (emphasis added). According to the utilities, "[a] formula that correctly recognizes the *value* provided to cable attachers would share the costs *equally* between attachers and the electric utility for the space up to the first attachment." *Id.* (emphasis added). The utilities' reasoning is flawed in two major respects, both of which are fully addressed in my earlier report: (1) based on principles of economics, one cannot assume it is more fair or reasonable to share common costs equally among users – indeed, there are compelling reasons why in the case of pole attachments, it is neither fair nor reasonable; (2) the additional "value" the utilities seek to recognize in a

higher pole attachment rate is not a true economic cost, and any increase to the cable rate to recover such uncaptured “value” will result in a less economically efficient rate that will have negative consequences for competition and broadband deployment.

6. An equal per capita attribution of common costs – such as the unusable space on the pole – is *not* the most economically efficient method of attributing such costs. The economic logic underlying this point is quite evident in numerous applications in various sectors of the economy, including the commercial real estate market identified by Congress in the legislative history in connection with the initial adoption of pole rate regulation (*see* Kravtin Report at 40-43).

7. Other experts agree. The inherent reasonableness of the cable formula’s relative-use approach to allocating the unusable space on a pole is also recognized by Veronica Mahanger MacPhee, in a declaration submitted on behalf of AT&T. Ms. MacPhee (at ¶ 33) describes the space usage component of the Commission’s formula methodology allocated to a cable attacher as being “based on the non-owner’s fair and reasonable share of both the usable and the unusable space on an average joint pole, and taking into account all attaching entities on the pole.” She further states (at ¶ 39) that “[t]he only way to give recognition to this disparity in usage by one of the four parties [referring to the utility’s disproportionate use of space] is to have each pole user responsible for a percentage of the cost of the entire pole that reflects its specific allocation of the usable space.” In an earlier report by Ms. MacPhee submitted by BellSouth Corporation in support of the US Telecom Petition and incorporated into this record, Ms. MacPhee similarly validated the fairness and reasonableness of the Commission’s cable formula.²

8. The relative use or pro-rata sharing of common costs under the cable formula properly recognizes costs and not “value provided to cable attachers.” There are numerous reasons why

² “We are of the opinion, that the FCC’s CATV formula, which allocates total pole costs, in direct proportion to usable space occupied, actually produces the fairest, most reasonable and most easily calculated pole attachment rates. Once the usable space on a distribution or transmission pole or tower is established, a user’s percentage of its cost is easily determined. It would not vary based on the number of entities, as the CLEC Formula does. It is also fair and equitable – one would expect to share the common facilities, in say, an office building, in proportion to the number of offices one occupies.” Veronica Mahanger MacPhee and Mark Simonson, *Two Wrongs Don’t Make a Right, The Electric Industry’s Exploitation of its Captive Pole User Market*, Attachment A to BellSouth Corporation Comments in Support of US Telecom Petition, Rulemaking, RM No. 11293, December 2, 2005, p. 12.

the utilities inability to extract additional “value” from attachers in the form of monopoly rents is not appropriately or legally considered in setting just and reasonable pole rents (*see* Kravtin Report at 60-61).

9. Moreover, the utilities claim (incorrectly) that the relative use approach to assigning common pole costs in lieu of a per-attacher approach produces a subsidized rate. According to EEI (at 44): “[t]he statutory Cable formula is inherently a subsidy formula ... because it does not divide the cost of the common space equally among all attachers.” As discussed below, the electric utilities’ assertion that the cable formula’s relative use approach produces a subsidized rate has no economic integrity.

Utilities offer no substantive economic evidence to support their assertions that the cable rate is a subsidized rate.

10. Contrary to the oft-repeated claims of utilities, the cable rate is *not* a subsidized rate. The cable rate provides just compensation and is well in excess of a competitive market rate, as repeatedly found by the Commission and the Courts (*see* Kravtin Report at 23, footnote 25, and 44-48) and therefore by no applicable economic, regulatory, or public policy standard could be considered “subsidized.” While the utilities use the word “subsidy” repeatedly in their comments,³ they never present any substantive economic analysis to support their claim or to refute well-established economic reasoning or judicial analysis (*see* Kravtin Report at 55-58) demonstrating that the cable formula does *not* subsidize cable at the expense of electric consumers.

11. First, it is a widely acknowledged tenet of economics that a rate is not a subsidized rate if it covers the provider’s marginal costs (*see* Kravtin Report at 44-45). Nonetheless, the utilities in

³ *See, e.g.*, “Currently, both cable systems and CLECs receive substantial *subsidies* at the expense of electric consumers...” (EEI at 43); “the Commission is therefore correct... to seek comment on ‘whether cable operators should continue to receive such *subsidized* pole attachment rates at the expense of electric consumers.’” (*id.* at 92); “the existing pole attachment rate formula for telecommunications carriers also results in a *subsidy* to attachers at the expense of electric utility customers.” (*id.* at 92); “The current telecom rate formula... results in a subsidy to CLECs at the expense of electric consumers.” (*id.* at 95); “EEI and UTC recommend that the Commission specifically modify these presumptions to ensure that they no longer result in competition-distorting *subsidies* at the expense of electric consumers.” (*id.* at 102) (emphasis added in all).

their comments, as did the NPRM in parts, use the term “subsidy” when discussing the cable rate, without ever demonstrating on the basis of *any* established economic principle that the cable rate is a “subsidized” rate. Marginal costs in this context are defined as any additional costs incurred by the utility in order to accommodate or host a third-party attachment that would not exist “but for” the presence of the particular third-party attachment. These are precisely the types of costs that the make-ready charges paid by cable operators and other third parties pay are designed to recover. Annual rental payments based on the cable rate formula provide payments to the pole owner *over and above* those make-ready charges. As recognized by the FCC⁴ and by the Courts,⁵ the cable rate formula is based on a fully allocated cost standard designed to recover much more than the ongoing marginal costs of attachments, which based on the true economic definition of marginal costs are closer to zero. Significantly, this does not even take into account the substantial sums of make-ready charges paid on an up-front basis by cable operators and other third-party attachers for the additional costs of hosting an attachment which are fully sufficient to reimburse marginal costs.⁶

12. Under the utilities’ distorted reasoning, the term “subsidy” is used synonymously with any rate that is below a monopoly rental price, a definition that has no basis in economics or public policy. Rather than present a valid economic basis to support their claims that regulated rates are “subsidized” rates, the utilities instead focus on what they subjectively believe they “deserve” to be paid (Concerned Utilities at 18-22). This sense of entitlement to a higher monopolist rate level is not properly considered as an economic cost, under principles of economics or just compensation, or reimbursable under any legitimate regulatory regime (*see* Kravtin Report at 60-

⁴ By design, the carrying charge factor incorporated in both the cable and telecom formulas “reflects those costs incurred by the utility in owning and maintaining pole attachment infrastructure regardless of the presence of attachments,” the precise opposite from what marginal costs would be intended to reflect. *Amendment of Commission’s Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, FCC 01-170, 16 FCC Rcd 12103, 12156 ¶ 110 (2001) (“*Reconsideration Order*”), citing *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, FCC 00-116, 15 FCC Rcd 6453, 6477-78 ¶ 44 (2000) (emphasis added).

⁵ *See Alabama Power Co. v. FCC*, 311 F.3d 1357, 1363, 1369 (11th Cir. 2002).

⁶ “The known fact is that the Cable Rate requires the attaching cable company to pay for any “make-ready” costs and all other marginal costs (such as maintenance costs and the opportunity cost of capital devoted to make-ready and maintenance costs), in addition to some portion of the fully embedded cost . . . [so that] much more than marginal cost is paid under the Cable Rate” 311 F.3d at 1368-69.

61). Adoption of a unified rate higher than the existing cable rate benefits *only* the monopoly owner of the poles – as distinct from utility ratepayers – as nothing in the utilities’ comments demonstrates any specific ratepayer benefit that would result from a higher formula rate (*see* Kravtin Report at 48-49).

13. Second, the utility pole owner ends up decidedly “better off” after an incremental cable attachment because it recovers all its additional costs through make-ready *plus* it receives a contribution to its expenses including a return through rental payments *and* it has greater available pole capacity to use itself or to rent to others (*see* Kravtin Report at 45-46). Given that the utilities are financially better off as a result of hosting an additional attachment, it cannot rationally be argued that the rate for such additional attachments is subsidized. Not surprisingly, the utilities seek to downplay the role of make-ready charges, but even the utilities acknowledge – albeit relegated to a footnote – that “attachers may be required by utilities to pay for replacement of a pole if it is too short to accommodate their attachments” (Concerned Utilities at 23, footnote 47). In this context, any claim by utilities that it has had to absorb the costs of taller poles required to accommodate attachments (*see* Concerned Utilities at 23-24) is baseless.

Utilities’ claims of “hidden” costs associated with third-party attachments are unfounded.

14. The electric utilities identify a number of so-called “hidden” costs they allege are not recovered from third-party attachers (*see* Concerned Utilities at 23-24). Such claims are simply not credible. The costs identified by the utilities are either (1) recoverable from third parties in the form of make-ready, through indemnification provisions, or in the pole-related expenses that form a significant portion of the calculated rental rate; or (2) direct costs associated with the utilities’ core electric business and therefore properly recoverable from utility ratepayers and not third-party attachers.

15. Because make ready charges are set unilaterally by the utility and generally in the absence of regulatory scrutiny, it is unclear why electric utilities would allow any material “hidden” costs in connection with a third-party attachment to go unreimbursed (*see* Kravtin Report at 47). One category of costs identified by the utilities as “hidden costs” are those associated with tree

trimming (Concerned Utilities at 23). The Commission has specifically recognized the role of make-ready in making utilities whole for any cost outlay related to tree trimming associated with a third-party attachment.⁷ The same would be true of costs associated with pole rearrangements to tidy up “messiness” associated with a third-party attachment that utilities allege result in additional costs related to the handling of customer complaints (Concerned Utilities at 24). Costs of pole rearrangements are routinely included in make-ready charges. Another category of costs identified as “hidden costs” relate to legal liabilities or concerns about the use of easements and rights-of-way. However, third-party attachers are generally required to indemnify pole owners from additional liabilities associated with their attachment, and provide insurance or a bond with respect to potential liabilities, so claims of “hidden costs” associated with the use of easements or rights-of-way are similarly unfounded. In addition to indemnification, bond and insurance requirements, the rental rate formula also provides for recovery of certain costs relating to the pole owners’ insurance to protect against injuries and damages (*see* Attachment 1 to this reply).

16. Other costs identified by the utilities as “hidden costs” of attachments are not costs related to poles or pole attachments at all, but rather are directly associated with the provision of the utilities’ core electric services and therefore properly recoverable from the electric ratepayers. With regard to tree trimming costs from Account 365 (overhead conductors and devices), the Commission specifically found these costs to “relate to the core business function of the utility.”⁸ Similarly, many other of the alleged “hidden costs” associated with taller poles that the utilities identify (Concerned Utilities at 24), such as costs associated with additional weight loads, safety concerns, or specialized equipment are properly attributed to the utility’s core business. Electric lines and ancillary equipment are by far the heaviest of all attachments, generating stresses and height requirements that far exceed those of third-party attachments (*see* Kravtin Report at 64, also MacPhee at ¶¶ 11-14). Following cost causation principles, any such additional costs

⁷ “If tree trimming is required as part of make-ready activity to pay for installation of an attaching entity’s pole attachment, the attacher pays or reimburses that amount as part of make-ready charges.” *Reconsideration Order*, 16 FCC Rcd at 12161-62, ¶ 122.

⁸ *Id.*

engendered by the taller poles are not “hidden costs” of third-party attachments, but costs properly attributable to the utility’s core electric business.

A UNIFIED RATE SHOULD BE BASED ON AN EFFICIENT MARGINAL COST STANDARD TO ACCOMPLISH THE COMMISSION’S STATED GOALS.

17. As consistently acknowledged by Congress, the Courts, and this Commission over the past three decades, pole attachments are critical inputs needed by cable and other third parties and for which there is little practical choice but to share poles owned by utilities (*see* Kravtin Report at 9-12). It is a gross misrepresentation on the part of the utilities to suggest that cable and other third parties have strategically chosen *not* to build their own pole networks (Concerned Utilities at 22). As essential facilities, provided on a monopoly basis, the closer to the competitive market price the utilities are allowed to charge for pole rentals, i.e., the marginal cost of attachment, the greater the benefits to consumers in the ultimate market for broadband services. These benefits include the widest array of new services offered to the largest number of customers across the most areas, and at prices that will generate the greatest level of demand for these services.

18. Accordingly, in order to achieve the stated goals of the Commission to stimulate broadband competition and the deployment of broadband services, it is important that any unified broadband rate be more closely aligned with an economically efficient marginal cost standard – the lower end of the permissible range of rates specified in Section 224(d) – rather than the higher fully allocated cost standard at the upper end of that range. Moreover, as I understand it, a unified broadband rate might be considered a Section 224(e) rate, but that section only specifies the manner in which costs associated with usable and unusable space are to be apportioned, and not the specific cost standard to be applied. It would therefore not appear that the Commission is under any requirement to set the (e) rate in reference to fully allocated costs or simply upwardly adjust the (d) rate. Instead, for the reasons I have explained, the Commission should rely on a pro-competitive marginal cost standard reflected in the (d) rate that best promotes achievement of its goals.

19. As summarized above, the existing cable rate is a logical choice from an economics and public policy standpoint for a unified rate designed to promote competition and broadband

deployment. The cable formula has withstood the test of time and offers ease of administration and implementation without the problems and complications that would result should the Commission decide to adopt some variant of the telecom formula. The telecom formula, in its current form, has a number of elements that deviate from an economically efficient rate standard, and its adoption for purposes of a unified rate, in the absence of significant modifications, would adversely affect development of the broadband market (*see* Kravtin Report at 42-44). While the cable rate, combined with make-ready charges, still produces payments to the utility well in excess of marginal costs, its relative-use approach to attributing costs of the entire pole (usable and unusable space) produces a rate closer to the marginal cost ideal than the telecom formula's per-attacher approach.

20. Some commenters have proposed modifications to the telecom rate which I address below. With limited exception, the modifications proposed by the electric utilities would move the telecom formula even further from an economically efficient, competitive market rate required to achieve the Commission's goals of stimulating competition and broadband deployment.

“Tweaking” the telecom rate as proposed by the utilities would move the rate in the opposite direction of that needed to promote broadband competition.

21. By and large, the modifications to the telecom rate proposed by the utilities reflect changes previously sought by the utilities in their quest for higher pole rental rates but that have been rejected by the Commission based on solid economic reasoning. The specific aspects of the cable and telecom formulas that the utilities earmark for change are not competition *distorting* as claimed by the utilities, but competition *enhancing*. The principal areas for modification identified by the utilities include: (1) allocation of safety space, (2) presumptive number of attaching entities, (3) unusable space allocations, and (4) modifications to FERC Form 1 cost accounts. These are addressed in turn below.

Safety Space

22. Utilities argue that the separations or safety space should be allocated as common (unusable) space and attributed equally to all attachers (*see* Florida Power at 14-15, Concerned Utilities at 10, and EEI at 103-104). As found by the Commission, the safety space in question is used and

usable by the utilities.⁹ Accordingly, it is not of “equal” benefit to owners and attachers, and the costs associated with this space are properly treated as direct costs of the utility for purposes of cost attribution which are incurred regardless of the presence of third-party attachers. If such safety space is too small for a safe attachment, associated costs are usually reimbursed through make-ready paid by the new or next attacher. Indeed, electric utilities commonly recover such expenses in make-ready and also derive income from this space from the attachment of streetlights (*see* Kravtin Report at 17; MacPhee Declaration at 6).

23. More generally, an equal assignment of common costs is *not* economically appropriate in the case of pole attachments, any more so than the assignment of an equal share of an office building’s common costs would be to all tenants, regardless of how much office space each actually occupies. The utilities have presented no new arguments in support of their proposal to shift a higher percentage of the cost of this space onto attachers, and the Commission should once again reject the utilities’ proposed modification on the same grounds as it has in the past.

Number of attaching entities.

24. Utilities argue that the presumed numbers of rural and urban attaching entities should be lowered to “reflect actual prevailing conditions,” and that the utility itself should not be counted as an attaching entity (*see* Florida Power at 15-16, Concerned Utilities at 13-18, and EEI at 103, 105-108). Citing their experience that “the number of attaching entities does not vary substantially between rural and urban areas,” the utilities argue that the number of attaching entities presumed under the telecom formula should be equalized across urban and rural areas and set at no more than three.

25. Presumptions regarding the number of attaching entities are complicating factors. According to the utilities, “[e]stablishing the average number of attaching entities per pole is often the most contentious aspect of the telecom rate calculation” (Concerned Utilities at 13). The contentiousness surrounding the attaching entity figure used in the telecom rate formula is another reason why the cable rate formula offers a better overall approach for a unified rate.

⁹ *See, e.g., Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Second Report and Order, 72 FCC 2d 59, 1979 FCC LEXIS 374, at *71 (1979).

Because unusable space is allocated on the basis of relative use, the inherent problems of the per-capita methodology embodied in the telecom rate formula are avoided entirely.

26. As a general matter, the presumptions utilized in the Commission's rate formulas should, as the utilities argue, "reflect actual prevailing conditions." Importantly the Commission's rules already allow utilities to rebut the presumptive number of attaching entities used in the formula. Any modification to the presumption is not needed but, in any event, any revision would have to be based on credible, reliable, and verifiable data. Moreover, any downward revision must be *in conjunction with other appropriate changes* in the formula needed to ensure the formula remains economically sound and continues to promote the pro-competitive goals articulated by Congress at the time the formula was created. Otherwise, in the absence of other economically appropriate changes, reducing the number of attaching entities used to attribute unusable space will simply increase rates and have a chilling effect on broadband competition in total conflict with Congressional and Commission goals.

27. There are several problems with the utilities' use of the "prevailing conditions" argument to justify a reduction in the number of attaching entities used to attribute unusable space that must be addressed if the utilities' proposal is to be seriously considered:

- Facilities-based competition *did not emerge* at the level or using the technology envisioned by Congress in the mid-1990's, the result being fewer attaching entities among which to divide the costs of unusable space, and a greater divergence from the cable formula rate than was expected by Congress (*see* Kravtin Report at 36-38).
- The number of attaching entities *is not the only presumptive assumption* in the formula that could be updated to "reflect actual prevailing conditions." A similar review of "actual prevailing conditions" for other presumptions, i.e., rate of return and pole height, would substantiate changes in their presumptive values (11.25 and 37.5 feet, respectively) that would actually (and fairly) produce a *lower* formula rate.

- The pole-owning utilities are assigned *far less* than the proportion of common space commensurate with their own usage when one takes into account payments by cable, CLEC, and ILEC attachers, even using the current presumptive values of 3 and 5 attaching entities in rural and urban areas respectively (*see* Kravtin Report at 30; MacPhee at ¶19).¹⁰

28. Given a utility is not even required to pay for its own proportionate share of pole costs, there is no validity to the claim of “double jeopardy” whereby “[t]he utility [is] required to pay twice: once for its one-third of the cost of unusable space, and again for an equal share of the remaining two-thirds” (EEI at 106-107). The current *over-recovery* of pole costs by utilities relative to their own proportional use of the pole is another key reason why should the Commission decide to reduce the presumptive number of attaching entities used in the calculation of the telecom formula based on current industry data, that the Commission (1) continue to include the utility as an attaching entity,¹¹ and (2) balance that change by permitting changes to other presumptive values utilized in the formula such as rate of return and height of pole.

Space allocations.

29. Utilities argue that the space allocations used to attribute direct costs should reflect the number of attachments and the full amount of space occupied, citing space used “for risers, J-hooks, power supplies, and any additional items that occupy space on the pole,” and that “each overlash should be counted as an additional attachment for which the attaching entity must pay a separate, additional rate” (Concerned Utilities at 108-109). This proposed “tweak” is inappropriate for several reasons:

- *Attachers already pay for any additional items and space that would not be required but for their presence* in the form of make-ready charges plus their share of the fully allocated costs of the entire pole. To charge a recurring rental fee over and above the existing rental fee and make-ready payments in effect triple charges an existing attacher for its use of the pole.

¹⁰ MacPhee shows a utility could recover as much as 80% of its annual carrying cost of a pole from attachers, leaving it with cost responsibility for only 20% - far less than its own proportional share given its use of the pole.

- It is logically inconsistent for the utilities to argue that additional items on the pole should be treated as an additional separate attachment for purposes of *charging rates*, while at the same time arguing that the number of attaching entities used for the purposes of *allocating costs* should be reduced.

30. As with the utilities' proposal to change the formula's treatment of the safety or separations space, the utilities' proposal with regard to treatment of overlashing has been previously rejected by the Commission.¹² Similarly, the utilities present no new evidence to warrant a reconsideration of the Commission's reasoned findings on this issue. There is no economic basis upon which to charge an additional fee for overlashing, as it results in no additional economic cost or other impact on the utility, and if there was, it would be recovered in make-ready. When overlashing occurs, equipment is tied to existing single strands of cable, and accordingly, there is no additional space requirement and no lost opportunity for the pole owner, i.e., no uses or users are displaced. As found by the Commission, "[o]verlashing does not increase the amount of space actually occupied by the attachment."¹³ If anything, overlashing serves to minimize the costs of attachment.¹⁴ Moreover, as further found by the Commission, overlashing is pro-competitive by "facilitating access to the pole."¹⁵

*FERC Form 1 Cost Accounts*¹⁶

31. Utilities argue that "[t]he Commission's existing two rate formulas do not include enough FERC Form 1 accounts in the Net Cost of a Bare Pole and Carrying Charges portions" (Concerned Utilities at 8-9). The costs they seek to include, however, are *not* directly related to

¹¹ See *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, FCC 98-20, 13 FCC Rcd 6777, 6800-03 ¶¶ 45-51.

¹² *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002); *Cable Television Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd 16333, 16340-41 ¶ 13 (2003); *Reconsideration Order*, 16 FCC Rcd at 12140-12103 ¶¶ 73-75; *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Util. Elec. Co.*, 8 FCC Rcd 373, 375 ¶ 16 (1993); *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, 6 FCC Rcd 7099 (1991), *recon. dismissed*, 7 FCC Rcd 4192 (1992), *aff'd sub nom. Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

¹³ *Reconsideration Order*, 16 FCC Rcd at 12128 ¶ 43.

¹⁴ "Overlashing existing cable reduces construction disruption and associated expense." *Id.* at 12140 ¶ 73.

¹⁵ *Report and Order*, 13 FCC Rcd at 6809 ¶ 68.

¹⁶ Certain of the expense account definitions are set forth in Attachment 1 hereto.

poles (not to mention the costs of pole attachments by third-parties), and have been previously rejected by the Commission on that basis. On the expense side, with regard to Account 590 (maintenance supervision and engineering (Major only)), the Commission previously ruled that “any indefinite and uncertain attempt to identify a possibly minute percentage of pole related expenses that may be included in Account 590, is outweighed by the complexity of arriving at an appropriate and equitable percentage of the account.”¹⁷

32. Similarly, in regard to Accounts 580 (operation and supervision), 583 (overhead line expenses (Major only), 584 (underground line expenses (Major only), 584 (operation of underground lines), 588 (miscellaneous distribution operation expense), and 598 (maintenance of miscellaneous distribution plant), the Commission previously found none of these account to relate to pole or conduit expenses. In the Commission’s words, Accounts 580, 583, 584 and 588, are “operational accounts to which electric utilities report expenses relating to the utility’s core regulated business services, and not pole or conduit expenses,” and Account 598 is “the miscellaneous account related generally to maintenance of equipment on customer premises and is not associated with pole or conduit expenses.”¹⁸

33. Similarly, on the investment side, the utilities’ arguments regarding Accounts 360 (land and land rights), 365 (overhead conductors and devices), 367 (underground conductors and devices), 368 (line transformers), 369 (services), and 389-399 (General Plant), are also repetitions of arguments the Commission previously rejected based on sound reasoning. As found by the Commission, the investment account included in the Commission’s rate formula “[e]ven with the 15% reduction for non-pole appurtenances...is still a very generous account, including the cost of towers, transformer racks and platforms.”¹⁹

34. As on the expense side, the Commission found “[t]he accounts suggested by petitioners include capital expenditures *which support the utility’s core business function and are not*

¹⁷ *Reconsideration Order*, 16 FCC Rcd at 12159 ¶ 116.

¹⁸ *Id.* at 12160 ¶ 119.

¹⁹ *Id.* at 12161 ¶ 121.

related to the pole costs.”²⁰ The Commission further found that in the exceptional case that a cost associated with an account excluded from the rate formula (e.g., tree-trimming) was incurred in connection with a pole attachment, the utility would already be reimbursed for the cost of that activity as part of the required make-ready charges.²¹ As found by the Commission in its last ruling on these matters, “[p]etitioners failed to provide any new information and their reiteration of the same arguments fail to persuade us to include additional accounts in our calculation of the pole or conduit investment.”²² As was the case then, the utilities have provided no new information to consider, and there is no substantive economic basis upon which to support a reversal of the Commission’s prior findings.

35. If anything, the Commission has been too generous in the inclusion of FERC accounts, producing a maximum rate, by its own characterization, based on the upper range (the fully allocated cost) of the permissible costs identified in 224(d) and in excess of economically efficient marginal costs. To achieve the Commission’s goals of stimulating competition and broadband deployment, there are a number of costs unrelated to pole attachment that are properly *removed* from the pole formulas in order to bring them more in line with the competitive market standard of marginal costs. Adding costs *not* causally related to poles or pole attachments as advocated by the electric utilities, would be a step backwards and in the wrong direction from that needed to achieve the Commission’s stated policy goals.

A number of adjustments to the telecom rate are warranted for economic and policy reasons if that rate is to be used as the basis for a unified rate.

36. There are numerous modifications to the telecom rate formula that would be required to better align that formula to an economically efficient marginal cost standard as would be required to achieve a unified rate consistent with the goals of leveling the playing field, stimulating competition and promoting broadband deployment. A number of potential modifications proposed by Veronica MacPhee on behalf of AT&T are addressed below.

²⁰ *Id.* at 12161-62 ¶ 122, emphasis added.

²¹ *Id.*

²² *Id.* at 12164 ¶ 128.

Standard Pole Height

37. Currently, the space factor is based on the presumption of a 37.5 foot pole, which is a blend of 35 and 40 foot poles. Ms. MacPhee (at ¶ 37) recommends this presumption be standardized for the normal 40 foot joint use pole, and I agree. For companies occupying 1 foot of space on a pole, this means they would be allocated 1 out of 16 feet of usable space ($40' - 24' = 16'$) rather than the current allocation of 1 out of 13.5 feet of usable space ($37.5' - 24' = 13.5'$).

Embedded Bare Pole Cost

38. Ms. MacPhee (at ¶ 40) recommends that “only the net average cost of a standard 40-foot Class 5 wood pole should be considered in calculating pole attachment rates,” rather than “the cost of *all* poles” as is currently the case. She further recommends (at ¶¶ 40-41) the Commission strip out any and all “pole costs from which attachers derive no benefit,” citing to the owners’ investments in towers and fixtures reflected in FERC Electric Account 364, and for which at present, the Commission’s presumption provides for only a 15% reduction in non-pole related fixtures.²³ Where “these costs are not tracked separately by a pole owner,” Ms. MacPhee proposes (at ¶ 41) the Commission apply a factor “to each owner’s pole line account that either reduces or increases investment as required.” Where the actual costs of fixtures are separately tracked, she proposes (¶ 42) that owners not be allowed to use the “15 percent presumption simply because it is lower than their actual costs and therefore produces higher rates.”

39. While the various adjustments proposed by Ms. MacPhee are sound based on economic principles of cost causation and the desirability of consistency among elements of the formula, information on the owner’s embedded pole costs are not tracked in FERC Form 1 at the level of granularity required to fully implement these kinds of adjustments. In some instances, implementation would entail performing a detailed analysis of other non-publicly reported accounting data such as continuing property records for individual utilities, and the increase in cost accuracy must be weighed against potential increases in complexity and/or disputes. I strongly agree that renters should *not* be required to subsidize the pole owner’s cost relating to space on the pole either dedicated to the owner’s own use or “from which renters derive no

²³ For ILEC pole owners, the Commission applies an analogous 5% reduction factor. *See Reconsideration Order*, 16 FCC Rcd at 12122-23 ¶ 32.

benefit.” However, it is also true that renters benefit greatly from the use of a formula that relies on uniformly reported and publicly available data such as in the current cable rate formula.

Number of Attaching Entities

40. Ms. MacPhee (at ¶ 38) recommends standardizing the number of attaching entities in urban and non-urban areas to 4, versus the current 5 and 3, respectively. The current presumptions have not systematically been shown to be incorrect and if a utility believes a presumption is incorrect it may be properly rebutted.

41. However, if the Commission modifies the presumptions downward, any reduction to the number of attaching entities used in the telecom formula must be accompanied by other changes to the formula that better align costs according to an economically efficient marginal cost standard. As it is currently formulated, the telecom rate already diverges considerably from an economically efficient rate. In adopting a new rate formula specifically to accomplish the Commission’s stated goals to promote for broadband competition and deployment, the Commission must weigh carefully the impact of any changes that, in isolation, will exacerbate that divergence. Otherwise, the adoption of a unified rate based on the telecom formula will work counter to the Commission’s stated goals.

Space Allocation Based on Relative Use of the Pole

42. Ms. MacPhee recommends (at ¶ 39) that “each pole user’s space and associated cost allocation factor for both the usable and the non-usable space on the pole [] be calculated by expressing its allocated usable space as a percentage of the pole’s total usable space.” I agree with Ms. MacPhee that a relative use based allocator for allocating the entire cost of the pole (usable and unusable space alike) is the most efficient based on economic cost causation principles. Because this is the precise manner in which the cable rate formula allocates cost, it would appear that Ms. MacPhee is also in agreement with me that the cable rate formula is the first best solution for an economically efficient unified rate for broadband providers.

Reimbursements to Capital Costs

43. Ms. MacPhee recommends (at ¶ 43) the Commission take steps to “ensure that contributions to a pole owner’s capital costs, received in the form of reimbursements by other pole owners for

pole attachments or change outs, are excluded from the pole owner's costs." I agree with Ms. MacPhee that such reimbursements in the form of make-ready charges should be netted out from costs to be recovered in the pole rate formula to avoid "double-dipping," but once again believe that as a practical matter, there may be little choice but to rely on the data publicly reported by the utilities in their FERC Form 1 accounts.

44. At the same time, it is important to recognize all the areas such as this one in which the pole costs utilized in the Commission's pole rate formulas *overstate* the actual costs of pole attachment, as they further belie claims by utilities that attachers are being subsidized. If there is any subsidization, it is flowing the other way, *from* the attachers *to* the pole owners who are paying rental rates well in excess of economically efficient marginal costs plus make-ready charges. Even if there is no ready modification to the Commission's rate formulas to address this likely double recovery of costs by utilities, this is yet further reason why any unified rate formula adopted by the Commission should be set equal or closer to the existing cable rate than it is to the existing telecom rate.

Carrying Charge Factor

45. Ms. MacPhee (at ¶ 44) recommends that the carrying charge factor²⁴ be adjusted "to ensure that only annual expenses directly associated with a shared pole are included in calculating a pole attachment rate." I agree with Ms. MacPhee (at ¶ 44) that "[a] pole owner should not be allowed to include any costs that are exclusively related to the conduct of its own [electric enterprise] business." For economic efficiency and to promote competition, the expenses captured in the carrying charge factor should include only those costs that vary directly with the use of poles by attachers, and conversely, exclude those that exist, and would continue to exist, independent of the presence of pole attachments. I further agree with Ms. MacPhee (¶ 45) that "[m]any non-pole related expenses that are specific to a pole owner's business enterprise, and that a pole user should clearly not be expected to subsidize, are included in these [FERC] accounts."

46. Ms. MacPhee at ¶ 46 singles out the expense account that is used in the calculation of the maintenance carrying charge factor, Account 593 (Maintenance of Overhead Lines) as one that “includes a multitude of non-pole related expenses that appear to constitute the greater proportion of this account, and that are inappropriate to pass on to a pole user.” A review of the definition of FERC Account 593 (*see* Attachment 1 to this reply) confirms the inclusion of many non-pole related expenses. I therefore agree, that to the extent data is available, an adjustment should be made to correct for this deficiency in the Account 593 account.

47. In addition to the maintenance account identified by Ms. MacPhee, there are a number of expense accounts incorporated in the administrative carrying charge factor that fall into this same category of costs that are – either entirely, or almost entirely – non-pole related expenses and that are properly *excluded* from the carrying charge factors based on fundamental economic principles of cost causation. These include Accounts 920 (administrative and general salaries, which cover officer salaries), 921 (office supplies and expenses), 926 (employee pensions and benefits), 930.1 (general advertising), and 930.2 (miscellaneous general). Full descriptions of these accounts are provided in Attachment 1. As in the case of maintenance, an adjustment is necessary to exclude such non-pole related costs from the administrative component of the carrying charge factor utilized in the Commission’s rate formulas.

48. Moreover, it is not just the non-pole related expenses that would be appropriate to exclude from a unified pole rate formula, but more generally, all expenses – even those that might nominally in some respect “relate” to poles – but that exist as a result of the utility’s electric enterprise and would exist in the absence of third-party attachments. In this economic context, depreciation and tax expenses²⁵ (with the exception of any incremental tax burden engendered by the pole rental payments) as well as the bulk of administrative expenses as relate to the pole owner’s business enterprise. These types of expenses are clearly not variable with pole attachments, and are properly *excluded* in the development of a new unified rate formula designed to be closer aligned with an economically efficient cost standard. The inclusion of

²⁴ The carrying charge factor is used to translate pole investment into annual costs, and is comprised of several different components including rate of return, depreciation, taxes, maintenance, and administrative - each expressed as a percentage of expense to net plant in service.

²⁵ *See* Time Warner Telecommunications White Paper at 19-20.

these types of expenses in the carrying charge serves only to increase the rate far beyond the economic cost of attachment and would be at counter purposes to the Commission's stated policy goals.

49. However, while I agree in principle with Ms. MacPhee at ¶ 45 that “[FERC] accounts should be used only as a starting point and should not be utilized in their entirety in establishing rates unless and until all non-pole-related expenses have been removed,” as a practical matter, I recognize such a standard may not readily be achieved given the existing FERC accounting system. The introduction of additional adjustment factors akin to the Commission's fixtures or appurtenances factor may introduce additional complexity and disputes that could offset the benefits of a uniform, predictable formula approach. The fact that it may not be practically feasible to remove all non-pole related expenses from the pole formulas such as contained in the Maintenance Account 593, because there is not the necessary level of granularity in the FERC accounting system, is one important reason why I support the use of the existing cable rate as a unified broadband rate. While it is similar to the telecom formula rate in terms of including non-pole related costs, its apportionment of total pole costs based on a more cost causative relative use method minimizes the distorting effects of the former.

**THE COMMISSION SHOULD IGNORE THE ALTERNATIVE “FORMULAS”
ADVOCATED BY THE ELECTRIC UTILITIES**

50. Reasoning that would potentially support the use of any of the so-called “formulas” advocated by the utilities²⁶ depends critically on the attacher being a pole owner itself, or on the existence of a free and competitive market for poles, neither of which are true. In the latter scenario, an attacher would face a number of choices with regard to obtaining pole attachments, including the building of its own set of poles, and competitive forces would exist to push down prices toward marginal costs. Even if cable attachers were deemed to enjoy privileges and benefits equivalent to pole owners, which they assuredly do not (*see* Kravtin Report at 21, 50, 62-64, and 71), the sharing of common space or indirect costs on an equal basis with the owner

²⁶ The alternative “formulas” advocated by the electric utilities include ones from Delaware, Indiana, Maine, and the City of Seattle, as well as a proposal considered by the House of Representatives, but rejected by the House-Senate Conference Committee in favor of the existing telecom formula (*see* Concerned Utilities at 25-36).

does not make economic sense in a situation where the utility pole owner occupies a much greater share of space on the pole than any cable attacher.²⁷ These alternative formulas, with their excessive allocations, are essentially disguised “replacement cost” formulas this Commission has repeatedly rejected for good reason.

51. Putting these overarching deficiencies aside, none of the alternative “formulas” make economic sense or have practical application. For example, the “Maine” formula has never been applied to cable operators or CLECs because it is too complicated and results in excessively high rates. Instead, attachers and the IOU electric company use settlement rates.²⁸ Moreover, because the data that would be required to actually establish (and verify) rates based on the “Maine” formula are “at a level of detail not utilized by [the electric utility] in FERC Form 1 reporting,” litigation at the Maine Public Utilities Commission ensued the moment the electric utility attempted to impose it.²⁹ Ultimately, the cable industry and the electric utility decided to settle the litigation because “the complete adjudication of the issues . . . would involve considerable resources and expenses of both parties, and for the Maine Public Utilities Commission and its Staff. . . .”³⁰ Such a proceeding would be similar to a full-blown electric rate-making case in sharp contrast to the FCC cable formula, which is easily applied without Commission intervention. The “Delaware” formula suffers from the same kind of practical deficiencies as the “Maine” formula. It is my understanding that cable operators in Delaware rely on negotiated rates, rather than use the excessive Delaware formula, and the rates paid by cable operators in that state to the IOU and ILEC are very close to the FCC cable rate.

²⁷ EEI at 14 also asserts “[i]n a competitive, non-subsidized market, each competitor would pay its full and fair share of the costs of access to critical electric infrastructure.” The utilities’ own words highlight the fallacies of their argument. First, a “competitive” market does not exist for poles. Moreover, the regulated cable rate is not a subsidized rate, and costs do not have to be apportioned on an equal share basis to be considered “full and fair” (*see* Kravtin Report at 26-32, and 38-48). The fact that the “critical electric infrastructure” are essential facilities controlled by the utilities and needed by cable operators, CLECs and others in order to provide broadband services on a widespread basis – an important national goal – is precisely what makes the marginal cost benchmark so appropriate and “fair” in the broader context of social well-being in contrast to the narrow, pecuniary interests of the pole-owning utilities.

²⁸ *See, e.g., In re Cable Television Cos.*, Docket No. 93-030, Pub. Util. Reports, 4th Series, slip op. (Mar. 25, 1994) (setting negotiated pole attachment rates between the cable industry and Central Maine Power Company for four years).

²⁹ *Id.*

³⁰ *Id.*

52. With respect to the “Indiana” formula, it is significant that in Indiana the FCC formula is actually used to set pole attachment rates for cable television operators and CLECs.³¹ Indiana has not certified to the FCC to regulate pole attachments, thus the Indiana “formula” only applies to utilities and ILECs under an Indiana statute establishing pole attachment rates for entities that are not subject to federal law.³² The cited case is instructive, however, to demonstrate the abuses that one can expect from cooperative pole owners, even in dealing with other pole owners that have their own anti-competitive and pecuniary interests in establishing high pole rents. The Indiana Commission never reached any policy judgment of its own that the rate was correct or the allocation fair for non-pole owning attachers.

53. The so-called “Seattle” formula adopted by one city and described in the unpublished *TCI Cablevision of Washington, Inc. v. City of Seattle* case is also completely inappropriate and inapplicable. In the cited case, the appeals court upheld the formula used by the City which is unregulated and afforded much “deference,” on dozens of factors. The court also held that if the City had decided to use the FCC “pro rata method of allocation,” that method “could also be reasonable.”³³ Moreover, although municipalities are not regulated for pole attachments in Washington state, the Washington Utilities and Transportation Commission does in fact use the FCC cable formula to determine just and reasonable rates for third party attachments to IOU poles in Washington.³⁴ The “Seattle” formula is thus limited to one city, has only been justified under municipal deference, not economic theory, and has never been followed anywhere else even in its home state that uses the FCC formula instead for IOUs.

³¹ Because Indiana has *not* certified to the FCC, investor-owned utilities in that state are required to charge an attachment rate based on the FCC formula. 47 C.F.R. § 1.1414(a).

³² See *In the Matter of the Complaint by United Telephone Company of Indiana dba Sprint v. Kankakee Valley Rural Electric Membership Corporation*, Cause No. 42755, approved March 22, 2006 at 15 (“Indiana Coop Rate Decision” attached to DEC Comments as Exhibit 4). The federal Pole Act protects cable operators and “telecommunications carriers”. However, telecommunications carrier is defined by Section 224(a)(5) to exclude “any incumbent local exchange carrier.” 47 U.S.C. § 224(a)(5).

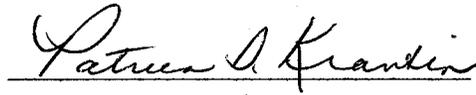
³³ *TCI Cablevision of Washington, Inc. v. City of Seattle*, No. 97-2-02395-SSEA, Findings of Fact, Conclusions of Law and Judgment, III. Conclusions of Law, ¶ 30 (May 20, 1998, J. Learned, Washington Sup. Ct., King County).

³⁴ REV. CODE WASH § 80.54.040.

54. Finally, it is quite odd that the electric utilities would even mention, let alone propose the Commission rely on, a *rejected* provision in a House Bill preceding the 1996 Act in support of its contention that support space should be allocated by a higher percentage. Of course, the failure of the Congress to enact the provision (in favor of an alternative) demonstrates Congress' intent not to adopt such an approach.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: April 21, 2008

A handwritten signature in cursive script, reading "Patricia D. Kravtin", is written over a horizontal line.

Patricia D. Kravtin

EXHIBIT 2

Attachment 1

FERC Form 1 Account Definitions for Maintenance and Administration Expenses

Excerpted From:

[Code of Federal Regulations]

[Title 18, Volume 1, Parts 1 to 399]

[Revised as of April 1, 1999]

From the U.S. Government Printing Office via GPO Access

[CITE: 18CFR]

[Page 369-399]

CHAPTER I--FEDERAL ENERGY REGULATORY COMMISSION, DEPARTMENT
OF ENERGY

593 Maintenance of overhead lines (Major only).

This account shall include the cost of labor, materials used and expenses incurred in the maintenance of overhead distribution line facilities, the book cost of which is includible in account 364, Poles, Towers and Fixtures, account 365, Overhead Conductors and

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Devices, and account 369, Services. (See operating expense instruction 2.)

ITEMS

1. Work of the following character on poles, towers, and fixtures:
 - a. Installing additional clamps or removing clamps or strain insulators on guys in place.
 - b. Moving line or guy pole in relocation of pole or section of line.
 - c. Painting poles, towers, crossarms, or pole extensions.
 - d. Readjusting and changing position of guys or braces.
 - e. Realigning and straightening poles, crossarms, braces, pins, racks, brackets, and other pole fixtures.
 - f. Reconditioning reclaimed pole fixtures.
 - g. Relocating crossarms, racks, brackets, and other fixtures on poles.

- h. Repairing pole supported platform.
 - i. Repairs by others to jointly owned poles.
 - j. Shaving, cutting rot, or treating poles or crossarms in use or salvaged for reuse.
 - k. Stubbing poles already in service.
 - l. Supporting conductors, transformers, and other fixtures and transferring them to new poles during pole replacements.
 - m. Maintaining pole signs, stencils, tags, etc.
2. Work of the following character on overhead conductors and devices:
- a. Overhauling and repairing line cutouts, line switches, line breakers, and capacitor installations.
 - b. Cleaning insulators and bushings.
 - c. Refusing line cutouts.
 - d. Repairing line oil circuit breakers and associated relays and control wiring.
 - e. Repairing grounds.
 - f. Resagging, retying, or rearranging position or spacing of conductors.
 - g. Standing by phones, going to calls, cutting faulty lines clear, or similar activities at times of emergency.
 - h. Sampling, testing, changing, purifying, and replenishing insulating oil.
 - i. Transferring loads, switching, and reconnecting circuits and equipment for maintenance purposes.
 - j. Repairing line testing equipment.
 - k. Trimming trees and clearing brush.
 - l. Chemical treatment of right of way area when occurring subsequent to construction of line.
3. Work of the following character on overhead services:
- a. Moving position of service either on pole or on customers' premises.
 - b. Pulling slack in service wire.
 - c. Retying service wire.
 - d. Refastening or tightening service bracket.

920 Administrative and general salaries.

A. This account shall include the compensation (salaries, bonuses, and other consideration for services, but not including directors' fees) of officers, executives, and other employees of the utility properly chargeable to utility operations and not chargeable directly to a particular operating function.

B. This account may be subdivided in accordance with a classification appropriate to the departmental or other functional organization of the utility.

921 Office supplies and expenses.

A. This account shall include office supplies and expenses incurred in connection with the general administration of the utility's operations which are assignable to specific administrative or general departments and are not specifically provided for in other accounts. This includes the expenses of the various administrative and general departments, the salaries and wages of which are includible in account 920.

B. This account may be subdivided in accordance with a classification appropriate to the departmental or other functional organization of the utility.

Note: Office expenses which are clearly applicable to any group of operating expenses other than the administrative and general group shall be included in the appropriate account in such group. Further, general expenses which apply to the utility as a whole rather than to a particular administrative function shall be included in account 930.2, Miscellaneous General Expenses.

ITEMS

1. Automobile service, including charges through clearing account.
2. Bank messenger and service charges.
3. Books, periodicals, bulletins and subscriptions to newspapers, newsletters, tax services, etc.
4. Building service expenses for customer accounts, sales, and administrative and general purposes.
5. Communication service expenses.

6. Cost of individual items of office equipment used by general departments which are of small value or short life.
7. Membership fees and dues in trade, technical, and professional associations paid by a utility for employees. (Company memberships are includible in account 930.2.)
8. Office supplies and expenses.
9. Payment of court costs, witness fees and other expenses of legal department.
10. Postage, printing and stationery.
11. Meals, traveling and incidental expenses.

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922 Administrative expenses transferred--Credit.

This account shall be credited with administrative expenses recorded in accounts 920 and 921 which are transferred to construction costs or to nonutility accounts. (See electric plant instruction 4.)

923 Outside services employed.

A. This account shall include the fees and expenses of professional consultants and others for general services which are not applicable to a particular operating function or to other accounts. It shall include also the pay and expenses of persons engaged for a special or temporary administrative or general purpose in circumstances where the person so engaged is not considered as an employee of the utility.

B. This account shall be so maintained as to permit ready summarization according to the nature of service and the person furnishing the same.

ITEMS

1. Fees, pay and expenses of accountants and auditors, actuaries, appraisers, attorneys, engineering consultants, management consultants, negotiators, public relations counsel, tax consultants, etc.
2. Supervision fees and expenses paid under contracts for general management services.

Note: Do not include inspection and brokerage fees and commissions

chargeable to other accounts or fees and expenses in connection with security issues which are includible in the expenses of issuing securities.

924 Property insurance.

A. This account shall include the cost of insurance or reserve accruals to protect the utility against losses and damages to owned or leased property used in its utility operations. It shall include also the cost of labor and related supplies and expenses incurred in property insurance activities.

B. Recoveries from insurance companies or others for property damages shall be credited to the account charged with the cost of the damage. If the damaged property has been retired, the credit shall be to the appropriate account for accumulated provision for depreciation.

C. Records shall be kept so as to show the amount of coverage for each class of insurance carried, the property covered, and the applicable premiums. Any dividends distributed by mutual insurance companies shall be credited to the accounts to which the insurance premiums were charged.

ITEMS

1. Premiums payable to insurance companies for fire, storm, burglary, boiler explosion, lightning, fidelity, riot, and similar insurance.

2. Amounts credited to account 228.1, Accumulated Provision for Property Insurance, for similar protection.

3. Special costs incurred in procuring insurance.

4. Insurance inspection service.

5. Insurance counsel, brokerage fees, and expenses.

Note A: The cost of insurance or reserve accruals capitalized shall be charged to construction either directly or by transfer to construction work orders from this account.

Note B: The cost of insurance or reserve accruals for the following classes of property shall be charged as indicated.

(1) Materials and supplies and stores equipment, to account 163,

Stores Expense Undistributed (store expenses in the case of Nonmajor utilities), or appropriate materials account.

(2) For Major Utilities, transportation and other general equipment to appropriate clearing accounts that may be maintained. For Nonmajor utilities, transportation and garage equipment, to account 933, Transportation Expenses.

(3) Electric plant leased to others, to account 413, Expenses of Electric Plant Leased to Others.

(4) Nonutility property, to the appropriate nonutility income account.

(5) Merchandise and jobbing property, to Account 416, Costs and Expenses of Merchandising, Jobbing and Contract Work.

Note C (Major only): The cost of labor and related supplies and expenses of administrative and general employees who are only incidentally engaged in property insurance work may be included in accounts 920 and 921, as appropriate.

925 Injuries and damages.

A. This account shall include the cost of insurance or reserve accruals to protect the utility against injuries and damages claims of employees or others, losses of such character not covered by insurance, and expenses incurred in settlement of injuries and damages claims. For Major utilities, it shall

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also include the cost of labor and related supplies and expenses incurred in injuries and damages activities.

B. Reimbursements from insurance companies or others for expenses charged hereto on account of injuries and damages and insurance dividends or refunds shall be credited to this account.

ITEMS

1. Premiums payable to insurance companies for protection against claims from injuries and damages by employees or others, such as public liability, property damages, casualty, employee liability, etc., and amounts credited to account 228.2, Accumulated Provision for Injuries

and Damages, for similar protection.

2. Losses not covered by insurance or reserve accruals on account of injuries or deaths to employees or others and damages to the property of others.

3. Fees and expenses of claim investigators.

4. Payment of awards to claimants for court costs and attorneys' services.

5. Medical and hospital service and expenses for employees as the result of occupational injuries, or resulting from claims of others.

6. Compensation payments under workmen's compensation laws.

7. Compensation paid while incapacitated as the result of occupational injuries. (See Note A.)

8. Cost of safety, accident prevention and similar educational activities.

Note A: Payments to or in behalf of employees for accident or death benefits, hospital expenses, medical supplies or for salaries while incapacitated for service or on leave of absence beyond periods normally allowed, when not the result of occupational injuries, shall be charged to account 926, Employee Pensions and Benefits. (See also Note B of account 926.)

Note B: The cost of injuries and damages or reserve accruals capitalized shall be charged to construction directly or by transfer to construction work orders from this account.

Note C: Exclude herefrom the time and expenses of employees (except those engaged in injuries and damages activities) spent in attendance at safety and accident prevention educational meetings, if occurring during the regular work period.

Note D: The cost of labor and related supplies and expenses of administrative and general employees who are only incidentally engaged in injuries and damages activities may be included in accounts 920 and 921, as appropriate.

926 Employee pensions and benefits.

A. This account shall include pensions paid to or on behalf of retired employees, or accruals to provide for pensions, or payments for

the purchase of annuities for this purpose, when the utility has definitely, by contract, committed itself to a pension plan under which the pension funds are irrevocably devoted to pension purposes, and payments for employee accident, sickness, hospital, and death benefits, or insurance therefor. Include, also, expenses incurred in medical, educational or recreational activities for the benefit of employees, and administrative expenses in connection with employee pensions and benefits.

B. The utility shall maintain a complete record of accruals or payments for pensions and be prepared to furnish full information to the Commission of the plan under which it has created or proposes to create a pension fund and a copy of the declaration of trust or resolution under which the pension plan is established.

C. There shall be credited to this account the portion of pensions and benefits expenses which is applicable to nonutility operations or which is charged to construction unless such amounts are distributed directly to the accounts involved and are not included herein in the first instance.

D. For Major utilities, records in support of this account shall be so kept that the total pensions expense, the total benefits expense, the administrative expenses included herein, and the amounts of pensions and benefits expenses transferred to construction or other accounts will be readily available.

ITEMS

1. Payment of pensions under a nonaccrual or nonfunded basis.
2. Accruals for or payments to pension funds or to insurance companies for pension purposes.
3. Group and life insurance premiums (credit dividends received).
4. Payments for medical and hospital services and expenses of employees when not the result of occupational injuries.
5. Payments for accident, sickness, hospital, and death benefits or insurance.
6. Payments to employees incapacitated for service or on leave of absence beyond periods normally allowed, when not the result

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of occupational injuries, or in excess of statutory awards.

7. Expenses in connection with educational and recreational activities for the benefit of employees.

Note A: The cost of labor and related supplies and expenses of administrative and general employees who are only incidentally engaged in employee pension and benefit activities may be included in accounts 920 and 921, as appropriate.

Note B: Salaries paid to employees during periods of nonoccupational sickness may be charged to the appropriate labor account rather than to employee benefits.

927 Franchise requirements.

A. This account shall include payments to municipal or other governmental authorities, and the cost of materials, supplies and services furnished such authorities without reimbursement in compliance with franchise, ordinance, or similar requirements; provided, however, that the utility may charge to this account at regular tariff rates, instead of cost, utility service furnished without charge under provisions of franchises.

B. When no direct outlay is involved, concurrent credit for such charges shall be made to account 929, Duplicate Charges--Credit.

C. The account shall be maintained so as to readily reflect the amounts of cash outlays, utility service supplied without charge, and other items furnished without charge.

Note A: Franchise taxes shall not be charged to this account but to account 408.1, Taxes Other Than Income Taxes, Utility Operating Income.

Note B: Any amount paid as initial consideration for a franchise running for more than one year shall be charged to account 302, Franchises and Consents.

928 Regulatory commission expenses.

A. This account shall include all expenses (except pay of regular employees only incidentally engaged in such work) properly includible in utility operating expenses, incurred by the utility in connection with formal cases before regulatory commissions, or other regulatory bodies,

or cases in which such a body is a party, including payments made to a regulatory commission for fees assessed against the utility for pay and expenses of such commission, its officers, agents, and employees, and also including payments made to the United States for the administration of the Federal Power Act.

B. Amounts of regulatory commission expenses which by approval or direction of the Commission are to be spread over future periods shall be charged to account 186, Miscellaneous Deferred Debits, and amortized by charges to this account.

C. The utility shall be prepared to show the cost of each formal case.

ITEMS

1. Salaries, fees, retainers, and expenses of counsel, solicitors, attorneys, accountants, engineers, clerks, attendants, witnesses, and others engaged in the prosecution of, or defense against petitions or complaints presented to regulatory bodies, or in the valuation of property owned or used by the utility in connection with such cases.

2. Office supplies and expenses, payments to public service or other regulatory commissions, stationery and printing, traveling expenses, and other expenses incurred directly in connection with formal cases before regulatory commissions.

Note A: Exclude from this account and include in other appropriate operating expense accounts, expenses incurred in the improvement of service, additional inspection, or rendering reports, which are made necessary by the rules and regulations, or orders, of regulatory bodies.

Note B: Do not include in this account amounts includible in account 302, Franchises and Consents, account 181, Unamortized Debt Expense, or account 214, Capital Stock Expense.

929 Duplicate charges--Credit.

This account shall include concurrent credits for charges which may be made to operating expenses or to other accounts for the use of utility service from its own supply. Include, also, offsetting credits for any other charges made to operating expenses for which there is no direct money outlay.

930.1 General advertising expenses.

This account shall include the cost of labor, materials used, and expenses incurred in advertising and related activities, the cost of which by their content and purpose are not provided for elsewhere.

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ITEMS

Labor:

1. Supervision.
2. Preparing advertising material for newspapers, periodicals, billboards, etc., and preparing or conducting motion pictures, radio and television programs.
3. Preparing booklets, bulletins, etc., used in direct mail advertising.
4. Preparing window and other displays.
5. Clerical and stenographic work.
6. Investigating and employing advertising agencies, selecting media and conducting negotiations in connection with the placement and subject matter of advertising.

Materials and Expenses:

7. Advertising in newspapers, periodicals, billboards, radio, etc.
8. Advertising matter such as posters, bulletins, booklets, and related items.
9. Fees and expenses of advertising agencies and commercial artists.
10. Postage and direct mail advertising.
11. Printing of booklets, dodgers, bulletins, etc.
12. Supplies and expenses in preparing advertising materials.
13. Office supplies and expenses.

Note A: Properly includible in this account is the cost of advertising activities on a local or national basis of a good will or institutional nature, which is primarily designed to improve the image of the utility or the industry, including advertisements which inform

the public concerning matters affecting the company's operations, such as, the cost of providing service, the company's efforts to improve the quality of service, the company's efforts to improve and protect the environment, etc. Entries relating to advertising included in this account shall contain or refer to supporting documents which identify the specific advertising message. If references are used, copies of the advertising message shall be readily available.

Note B: Exclude from this account and include in account 426.4, Expenditures for Certain Civic, Political and Related Activities, expenses for advertising activities, which are designed to solicit public support or the support of public officials in matters of a political nature.

930.2 Miscellaneous general expenses.

This account shall include the cost of labor and expenses incurred in connection with the general management of the utility not provided for elsewhere.

ITEMS

Labor:

1. Miscellaneous labor not elsewhere provided for.

Expenses:

2. Industry association dues for company memberships.
3. Contributions for conventions and meetings of the industry.
4. For Major utilities, research, development, and demonstration expenses not charged to other operation and maintenance expense accounts on a functional basis.
5. Communication service not chargeable to other accounts.
6. Trustee, registrar, and transfer agent fees and expenses.
7. Stockholders meeting expenses.
8. Dividend and other financial notices.
9. Printing and mailing dividend checks.
10. Directors' fees and expenses.
11. Publishing and distributing annual reports to stockholders.

12. Public notices of financial, operating and other data required by regulatory statutes, not including, however, notices required in connection with security issues or acquisitions of property. For Nonmajor utilities, transportation and garage equipment, to account 933, Transportation Expenses.

EXHIBIT 3

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of

Implementation of Section 224 of the Act;
Amendment of the Commission's Rules and
Policies Governing Pole Attachments

WC Docket No. 07-245

RM 11293

RM 11303

REPORT OF

MICHAEL T. HARRELSON

April 22, 2008

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INTRODUCTION

Qualifications

1. My name is Michael T. Harrelson. My business address is P.O. Box 432, McRae, GA 31055. I am a professional engineer (Electrical) registered in the states of Georgia and Florida. I have been qualified as an expert in (1) the National Electrical Safety Code (“NESC”) requirements; (2) electric power distribution design, construction, engineering, operation, and maintenance procedures; (3) joint use of utility poles by power and communications companies; (4) OSHA, electric power and communications safety regulations; and (5) the National Electric Code, which applies to electric power utilization systems
2. I have testified in the above subject areas either in deposition or at trial approximately 43 times in the past 18 years. I have testified in pole attachment matters and disputes before the Utah Public Service Commission, the Florida Public Service Commission, the Federal Communications Commission (“FCC”) and participated in a mediation session before the FCC. I have also submitted written comments to the Louisiana Public Service Commission in a proceeding to reconsider regulations regarding pole attachment procedures in Louisiana. In the spring of 2007 I gave deposition testimony, submitted direct testimony and testified live on cross examination before the Chief Administrative Law Judge (“ALJ”) at the FCC on behalf of the Florida Cable Telecommunications Association and four of its member operators. The issue in that proceeding was whether Gulf Power was entitled to charge pole attachment rates in excess of rates produced using the FCC formula for cable operator attachments based on, among other things, Gulf Power’s claim that its poles were “full” and that no capacity for further attachments existed. I testified that safe and customary engineering practices, based on my years of experience and the NESC, demonstrated that Gulf Power’s poles had capacity and the Chief ALJ

agreed with my analysis. The matter is now on appeal. I also participated in the Florida Public Service Commission rulemaking proceeding in Dockets No. 060172-EU and 060173-EU, on utility pole storm hardening rules and in Dockets No. 060198-EIQ, and testified in related storm hardening dockets 070301 and 07298. I have been involved in inspecting joint use facilities, training field engineers and line workers in the NESC, joint use contracts and safe-work rules, and negotiating specific separation, clearance and arrangement requirements (which are additional requirements sometimes imposed by power companies). I have also negotiated procedures, techniques and schedules to complete safety audits, make-ready engineering, make-ready construction and post inspection for joint use projects. I have prepared and conducted workshops or seminars for national joint use conferences and personally conducted several NESC code compliance audits, as well as prepared the make-ready engineering for the power companies and communications companies involved that was necessary to correct violations uncovered in those audits. I worked for Georgia Power Company for a total of 27 years, including during the late 1960s and early 1970s when the first cable television systems were being built in Georgia and elsewhere around the country. Because I worked for Georgia Power until 1992, I also witnessed the upgrade and rebuild of improved generations of cable television systems and saw how both cable companies and pole owners, including power companies, work together to complete these system upgrades and rebuilds. Since retiring from Georgia Power, I have worked as a consulting engineer and an expert witness to electric companies, cable companies and others. I have also participated in more than 100 pieces of litigation or accident investigations as a consultant. In addition to working in this industry for quite a number of years, I regularly attend conferences on joint use, conduct training sessions and conduct pole-line inspections for pole owners like electric utilities. Through these activities I am very familiar not

only with standard industry practices as they relate to outside aerial utility plant and joint use, but I am also very familiar with the trends and “state-of-the-art” utility and communications company practices in this area. A detailed resume summarizing my educational background and previous experience is provided in Attachment 1 to this Declaration.

Purpose and Summary of Report

3. The purpose of this report is to respond, on behalf of Comcast Corporation, to matters raised in Comments filed by a number of electric utilities, the Edison Electric Institute and the Utilities Telecom Council in the Commission’s Notice of Proposed Rulemaking (“Notice”) released November 20, 2007 and published February 6, 2008, concerning the rules and regulations governing pole attachments as they pertain to safety requirements and practices for such attachment by cable television operators and telecommunications carriers.

This Report will address the following:

- Cable operators are vitally interested in safe and reliable pole infrastructure throughout the country as well as in the safety of their employees, contractors, others who work on poles and the public.
- The most responsible, orderly and reasonable way to assure and improve safety and reliability of pole lines is by compliance with the safe construction, operation, maintenance and work rule requirements of the NESC.
- It is incorrect and very misleading for electric companies to characterize the NESC rules as “bare minimum” requirements.
- Cable attachers pay utilities make-ready fees to assure compliance with NESC standards and often use the same contractors for make-ready and maintenance as the utilities.
- It would be a mistake for the Commission to defer to all individual utility safety standards that are stricter than the NESC requirements with respect to cable attachments.

- Utilities frequently violate not only NESC standards but also their own safety and construction standards and blame the cable operator.
- Utilities often inflate the number of unauthorized attachments by retroactively counting as “unauthorized” cable equipment that was not required to be permitted under prior pole agreements and by updating and correcting faulty attachment records.
- Utility proposals to require advance permitting for overlashing are unnecessary and burdensome.

CABLE OPERATORS ARE VITALLY INTERESTED IN SAFE AND RELIABLE POLE INFRASTRUCTURE

4. Cable communications companies such as Comcast rely heavily on the poles of electric power utilities and ILECs to support critical infrastructure essential to the delivery of video, data and other communications services to customers. Comcast has pole attachment contracts and pays pole rents to hundreds of power and ILEC utilities across the United States to allow for the delivery of communications services. Comcast is vitally interested in safe and reliable pole infrastructure throughout the country. In my experience working with electric utilities, Comcast and other cable companies for over 40 years, the safety of pole plant for the cable companies’ own employees and contractors as well as for other pole workers and the public is an extremely important priority. Electric company comments criticizing the safety training and work practices of communications workers are significantly exaggerated in my experience. Of course, all electric and communications companies and their respective contractors certainly can benefit from continuous improvement in safety compliance. Similarly, because cable companies rely upon the pole network to deliver their services to customers, the reliability of that network is essential.

**THE MOST RESPONSIBLE, ORDERLY AND REASONABLE WAY TO ASSURE AND
IMPROVE SAFETY AND RELIABILITY OF POLE LINES IS BY COMPLIANCE
WITH THE NESC**

5. The NESC is a very thorough and comprehensive set of safety rules for the installation, maintenance and operation of overhead and underground electric supply and communications lines.¹ The NESC is presently revised every five years by eight working subcommittees composed of members from electric utility, telephone, cable, railroad, International Brotherhood of Electrical Workers (IBEW), electrical contractors, Institute of Electrical and Electronics Engineers (IEEE), National Society of Professional Engineers (NSPE), Rural Utilities Service (RUS), and many other affiliations. The NESC is the recognized American National Standard for Safety applicable to power and communications lines installation, operation and maintenance. The purpose of the NESC is stated in Section 1. Rule 010:

The purpose of these rules is the practical safeguarding of persons during the installation, operation, or maintenance of electric supply and communications lines and associated equipment. These rules contain the basic provisions that are considered necessary for the safety of employees and the public under the specified conditions. This Code is not intended as a design specification or as an instruction manual.

6. The NESC rules contain the basic provisions that are considered necessary for the safety of employees and the public under the specified conditions. Because the NESC is a “performance code” (not a “design specification”), individual attachers and utility pole owners follow construction standards in order to comply with the required facility clearances and separations as well as with materials strength requirements. Construction standards vary

¹ The current edition of the NESC is 2007. The NESC contains four “parts” and four “sections.” Part 2 contains “Safety Rules for the installation and maintenance of overhead electric supply and communication lines. Part 3 contains: “Safety Rules for the Installation and Maintenance of Underground Electric Supply and Communications lines.” Part 4 contains: “Rules for the Operation of Electric Supply and Communications lines and equipment.” The rules in Part 4 include rules for safe operation as well as safe work rules for both employees who work in the electric supply space on poles and employees who work in the communications space on poles.

considerably among utilities but all must meet NESC requirements. As explained by Allen Clapp, editor of the NESC Handbook:

The NESC addresses the matters required to effect reasonable and adequate safety in the construction, operation, and maintenance of electric supply and communications facilities. It is not intended to provide, and the rules do not provide, such detailed requirements as are needed for construction specifications. In many particulars, the rules do not require as substantial or as expensive construction as many companies have found it expedient or desirable to provide for service reliability or *reasons other than safety*.

In essence, the rules of the NESC give the basic requirements of construction that are necessary for safety. If the responsible party wishes to exceed these requirements for any reason, he may do so for his own purpose, *but need not do so for safety purposes*. For example, if the combination of required pole placement and overhead clearance requirements indicated that a 37.5 foot pole would be needed, a 40 foot pole could be used. Since poles are inventoried in 5 foot increments for economy purposes, the additional 2.5 feet of conductor attachment height would be for economy purposes; it is not required for safety. Thus, even though older editions of the Code sometimes used the word “minimum” for clearance or other requirements, the wording generally used in later editions is “not less than” to indicate the basic amount that is required for *safety* purposes.

Allen L. Clapp, NESC Handbook (Sixth Edition) (2006) pp. 4& 5 (emphasis added).

ELECTRIC COMPANIES MISCHARACTERIZE THE NESC RULES AS “MINIMAL” REQUIREMENTS

7. Utilities mischaracterize the NESC by suggesting that its safety standards are “minimal” standards that utilities would commonly be required to exceed in response to local conditions.²

Based on this incorrect premise, the utilities urge the Commission to “adopt a rebuttable presumption that all individual utilities’ design specifications, standards, and operation and maintenance requirements included as terms and conditions of pole attachment agreements are

² See Comments of Edison Electric Institute/Utilities Telecom Council (“EEI/UTC Comments”) at 68-70. Ala. Ga. Gulf et al at 41. An example of “local conditions” which do require special consideration of NESC Rules includes mining, agricultural and industrial activities if over-height equipment (greater than 14 feet) routinely operates under utility lines. Such local conditions would require utility lines to be higher than otherwise required by the NESC.

just and reasonable.”³ This is contrary to the intent of the NESC and it would be a serious mistake for the Commission to adopt the utilities’ proposal. In fact, if the pole owner applies such excessive requirements without exceptions to its own construction, they too will incur excessive and unnecessary costs.

8. “The [NESC] specifies what needs to be accomplished for safety, not how to accomplish it.”⁴ Thus, the NESC establishes what is presumed to be the sufficient safety standard in virtually all situations (i.e. separations between communications lines and power lines, spacing between communications facilities and transformers, street lights etc.). The design specifications, standards and requirements that utilities might tailor to local conditions are *not* normally intended to change the safety specifications of the NESC itself (which have been deemed safe by a collaboration of interested experts over decades of review) but only to set out how those NESC established standards might be most effectively and reasonably accomplished under the relevant local conditions. Nevertheless, utilities regularly misapply this “local condition” concept to specify changes to the NESC safety standards themselves. This is wrong -- individual utility decisions should be directed at *how* each company will accomplish *what* is to be achieved as required by the NESC.

9. The Utilities Telecom Counsel provides an example of how utilities misapply the NESC to impose burdens and costs on attachers purportedly to advance some local knowledge regarding “safety” when safety interests are not advanced at all.

[H]alf the utilities reported that they have had disputes with attachers over interpretation of the NESC. For example, a common dispute reported by utilities involved clearances, particularly the 40” communications worker safety space. The NESC specifies that the safety space should be 40 inches between the uppermost communications line and the lowest electric conductor. It also specifies that the safety space may be 30” in limited

³ EEI/UTC Comments at 70.

⁴ David J. Marne, National Electrical Safety Code 2007 Handbook at p. 3 (quoted by EEI/UTC Comments at n. 59.)

situations, and attachers have argued that utilities should allow 30” instead of 40” for the safety space. Ironically, this would provide less protection against electrocution to attachers’ own communications workers. This illustrates how the NESC can be subject to interpretation, and how utilities and attachers tend to differ on issues of cost and safety. It also illustrates why utilities need to maintain control over engineering surveys and make ready in order to ensure that their safety standards are followed.⁵

10. In my experience, disputes between attachers and utilities over the 40” or 30” spacing issue only arise when a utility simply refuses to permit 30” spacing in the “limited circumstances” *explicitly recognized* as safe by the NESC. One “limited circumstance” is in fact a very common circumstance where the cable company’s steel cable support strand and utility’s neutral wire are bonded to common grounds.⁶ As indicated by the UTC, some power companies still insist on 40” between cable and neutral even where the NESC standard that allows 30” spacing is satisfied. This common grounding of the companies’ facilities virtually eliminates the risk of injury in the event of worker accidental contact between the two wires, which is why the NESC recognizes that 30” is a safe clearance under these circumstances.⁷ The example provided by UTC illustrates how utilities commonly require a standard that is not necessary to achieve any legitimate safety related objective but will often require the change out of a pole (at the attacher’s cost and to the utility’s financial benefit).

11. The NESC sets out a number of other spacing requirements that utilities will often exceed in their individual design specifications, purportedly to reflect local conditions or requirements. In my experience, many disagreements involve imposition of utility rules that exceed NESC requirements for facilities requiring less than 40” spacing. For example:

⁵ UTC Comments, attached White Paper at 16-17.

⁶ NESC Rule 235C1 and Table 235-5 fn 5.

⁷ Thirty inch spacing under common grounding circumstances is far safer than 40 inch spacing where facilities are not bonded to a common ground and, contrary to the UTC’s implication otherwise, communications and electric company workers are far safer under the stated conditions which allow the NESC 30 inch rule.

- Transformers -- 30” (NESC Rule 238A, Table 238-1 fn. 1);
- Street light brackets -- 20” and 4” depending on if the bracket is effectively grounded (NESC Rule 238C, Table 238-2);
- Street light power leads drip loops -- 12” and may be reduced to 3 inches for conditions specified (NESC Rule 238D and 238D EXCEPTION);
- Fiber optic and communications cables in the supply space -- 30” (NESC Rule 235C and Table 235-5 fn 5);
- Neutral conductors meeting Rule 230E1 -- 30” at poles; (NESC Rule 235C1 and Table 235-5 fn 5);
- Neutral conductors meeting Rule 230E1 -- 12” in spans between poles; (NESC Rule 235C2b1a EXCEPTION 1);
- Supply service drops of 0 to 750 volts to Communication service drops -- 12” (NESC Rule 235C1d EXCEPTION 3);
- Supply guy wires -- 6” (NESC Rule 235E1 and Table 235-6); and
- Communications messengers -- 12” except by agreement between parties. Spacing between cables in the span should be not less than 4” except by agreement between the parties (NESC Rule 235 H).

Each of the NESC spacing rules above are safe under the vast majority of conditions that exist in the United States. Utility requirements that insist on more spacing will in most cases be unnecessary for safety purposes and should *not* be “presumed” just and reasonable. Such stricter requirements should be presumed to be unjust and unreasonable unless the utility can demonstrate that the requirement is justified by unusual circumstances.⁸

⁸ Excessive utility spacing rules also negatively impact the efficient use of poles by pole owners and other attachers and are contrary to public policy for those reasons as well. Certain construction-related requirements of the NESC are basic requirements for safety which logically should be exceeded by initial construction. These include initial strength of poles, wires, and hardware. In practical application, if a material must be as strong or stronger than a calculated number, then standard materials will almost always be stronger than the basic requirement because standard manufactured items such as poles, bolts, cross arms etc. have predetermined basic strengths, lengths, diameters, etc. When an engineer must specify material which meets or exceeds basic requirements, the material specified will almost always exceed NESC basic requirements. Other NESC basic requirements such as those listed above which do not deteriorate or move as installations age or get affected by weather logically should be met, not necessarily exceeded.

12. It is irresponsible and not necessary for safety when pole owners require a pole to be replaced if communications attachments and supply space attachments can be arranged to meet, not exceed, the NESC spacing requirements. This assumes that the pole also meets other applicable NESC requirements such as strength. The safety of communication and electric supply workers depends much more on their complying with work rules in Part 4 of the NESC than more spacing between communication and supply facilities. It is good utilization of pole space to leave open any extra space not presently needed on the pole between the supply space and the communication space on a joint use pole. This approach promotes the efficient use of poles for all pole owners and attachers.

**CABLE ATTACHERS PAY UTILITIES MAKE-READY FEES TO ASSURE
COMPLIANCE WITH NESC STANDARDS AND OFTEN USE THE SAME
CONTRACTORS FOR MAKE-READY AND MAINTENANCE AS THE UTILITIES**

13. Utilities and EEI/UTC state that cable attachers construct and maintain facilities in violation of NESC requirements and are a threat to safety of workers and the public as well as to the reliability of network infrastructure.⁹ In my experience, these statements are commonly made by utilities but generally prove to be highly exaggerated. In fact, as described below, very often when such charges have been investigated it is the *utility* that has violated both the NESC and its own standards by installing or moving its own facilities too close to pre-existing communications facilities.

14. In addition to my own direct experience showing that utilities are often the cause of clearance and other violations that they blame on cable attachers, standard industry practices among attachers and utilities make it unlikely that cable attachers are the principal cause of clearance and other safety violations. Cable attachers have been required for decades by most

⁹ Coalition of Concerned Utilities Comments (“Utility Coalition”) at 71-72; EEI/UTC Comments at 39.

utilities to apply for permits before attaching to utility poles.¹⁰ Consequently, utilities require that poles be prepared where needed to accommodate a new cable attachment through make-ready at the cable operator's expense, including paying for any necessary rearrangements, pole changeouts, and post attachment inspections to ensure compliance with safety requirements. Once a cable attachment is made, there is typically no need for the cable operator to modify it. Most improvements in service over the past twenty years have been accomplished by overlashing comparatively light fiber to the pre-existing attached plant (for which the cable attacher paid the utility to ensure safety compliance). In addition, in many areas cable companies use the same engineering firms to perform make-ready and to maintain plant as the electric utility and the ILEC.

UTILITIES FREQUENTLY VIOLATE BOTH THE NESC AND THEIR OWN SAFETY STANDARDS AND BLAME THE CABLE OPERATOR

15. Oncor Electric Delivery Company's Initial Comments report the results of a safety audit performed between April 2004 and March 2006 during which over 102,500 poles with third party attachments were inspected. Oncor reports that the audit showed that these third party attachers had a violation rate of between 17 and 44 percent. In addition, Oncor reports that "[t]he Compliance Audit revealed that the vast majority of the existing violations, many of which consisted of overlashing and unauthorized attachments, were created by the third party attachers."¹¹ As described below, these findings are highly questionable based on my own investigation regarding Oncor's 2004-2006 Compliance Audit results for one cable operator

¹⁰ Although utilities claim that cable attachers are circumventing permitting by installing unauthorized attachments, this has not been my experience. In some cases utilities have not required that applications be submitted prior to a cable company making an attachment but such attachments cannot be characterized as "unauthorized." As discussed later, utility reports of finding significant unauthorized attachments are frequently the result of utilities applying new definitions retroactively to previously unlicensed drop line attachments and other apparatus (e.g. J-hooks, risers etc.), recordkeeping errors and the significant shift in pole ownership to electric utilities.

¹¹ Oncor Comments at 12; Id. Exhibit B (Kohrmann Declaration) at ¶¶18-19.

where I concluded that the vast majority of violations that I reviewed (and that were blamed on the cable operator) were caused by Oncor itself.

16. Oncor provided the results of its Compliance Audit to a cable operator that believed the results were incorrect. I was retained to review a sample of the inspected poles, which I did over the course of a day with Oncor and Utility Support Services, Inc. (“USS”)¹² representatives. We carefully reviewed a sample of 17 Oncor poles on which the cable company had been blamed for violations. Oncor/USS had ordered the cable company to pay for replacement of 12 of these poles, and to perform other cable work and to pay for other line rearrangements. However, on review, I found that Oncor had in fact caused *all* of the violations that necessitated any pole replacements. The vast majority of all other violations found on the reviewed poles had also been caused by Oncor. Further, the Oncor and USS inspectors simply ignored obvious, continuing violations caused by the ILEC involving insufficient clearance with power and roadway clearance -- even after I pointed out the violations to the inspectors. They explained that they were not inspecting the ILEC’s facilities, only those of the cable company.

17. During the course of the field inspection, I learned from the Oncor/USS representatives how such significant errors in assigning responsibility for violations had been made. The representatives informed me that the standard they used for assigning “blame” to cable was whether there would be a clearance or other violation, which either would not exist or could not be corrected, for either Oncor or the ILEC *but for* the presence of the cable facility. Consequently, even when a preexisting cable attachment was in compliance, if a subsequent modification made by either Oncor or an ILEC resulted in creating a violation with a cable attachment, the cable company was deemed responsible. I objected that this was not a

¹² USS was the contractor hired by Oncor that actually performed the inspections and issued the violation reports.

permissible standard but the Oncor/USS representatives disagreed and stated that there would be no change in the assignment of blame for violations on that basis.

18. The Oncor and ILEC caused violations generally fell into the following categories, many of which are illustrated by photographs that I took during the field inspection and which are attached to this report:

- Oncor's improperly sagging secondary line is too close to compliant cable but Oncor/USS demands that cable pay to re-sag the secondary. Attached Photo 1.
- Oncor installs new transformers to serve a new customer and then installs a service riser a few inches either above or below, not 40" above, the cable company's existing and previously compliant attachment. In such cases, Oncor/USS blames the cable company for being out of compliance and orders it to pay thousands of dollars for a taller pole or to pay hundreds of dollars to extend the Oncor riser to the proper clearance. Id. Photo 2.
- Oncor installs a service drop too close to existing compliant cable and Oncor/USS blames cable and demands that it replace the pole. Id. Photo 3.
- Oncor installs transformer and service drop too close to existing compliant cable and then orders cable to pay to replace pole to resolve clearance issue. Id. Photo 4.
- Oncor improperly connected quadruplex line from the pole to serve a customer that is too close to existing compliant cable. ILEC has mid-span violation over roadway (15 feet). Oncor/USS directs cable to replace with taller pole to resolve Oncor and ILEC violations. Id. Photo 5.
- Oncor fiber affiliate installs its line between existing compliant cable and ILEC and in the process moves cable up the pole creating clearance violation with Oncor power. The cable attachment is not bolted back to the pole but simply hung on a J-hook. Oncor/USS blame cable for the violation and order it to pay to lower cable. Id. Photo 6.
- Oncor/USS agreed with the cable operator to remove cable from a pole with a mid-span violation. However, the ILEC located *below cable* at only 11.5 feet above ground was not cited for any violation (although I pointed out the problem to USS) and permitted to remain in its dangerous location.

19. While these findings relate specifically to the Compliance Audit conducted by Oncor/USS, I have reviewed safety inspection results in a number of other circumstances where

cable companies have questioned the accuracy of the electric companies' conclusions and the assignment of blame. These reviews demonstrate that the improper standard that Oncor/USS used to assign blame is a common practice among utilities. Consequently, in my opinion, the results reported in the Oncor Compliance Audit and other anecdotal statements by utilities that claim cable attachers are the cause of most safety violations are likely extremely exaggerated. It is far more likely that a significant percentage of the violations reported were caused by the utilities themselves.

UTILITIES OFTEN INFLATE THE NUMBER OF UNAUTHORIZED ATTACHMENTS BY RETROACTIVELY COUNTING AS “UNAUTHORIZED” CABLE EQUIPMENT THAT WAS NOT REQUIRED TO BE PERMITTED UNDER PRIOR POLE AGREEMENTS AND BY UPDATING FAULTY ATTACHMENT RECORDS

20. A large number of “unauthorized attachments” identified during electric company inventories are likely not unauthorized at all, but rather involve cable equipment allowed under the terms of earlier pole agreements without the need to obtain a separate license (e.g. drop poles, J-hooks within 12 inches of main attachment), and/or that are not properly characterized as attachments at all (risers, power supplies etc.). Another common problem is that pole attachment records have historically not been well maintained by either utilities or cable companies, particularly where cable systems have been sold. I am also aware of situations where cable companies have questioned the results of audits alleging unauthorized attachments and upon reviewing their own records produced the relevant pole permits that the pole owner had misplaced.

21. Utility claims that high unauthorized attachment rates indicate increasing risks of safety problems and infrastructure reliability issues are highly misleading. Since most reported unauthorized attachments are either drop lines (that previously did not require permits) or due to bad utility recordkeeping (were actually permitted but no one can “prove it” or has yet had the

opportunity to prove it), the likelihood is that most of the attachments have been safely in place for an extended period of time. Cable drop lines which are not energized and are extremely light are particularly unlikely to have any adverse affect on safety or reliability. Misleading anecdotes regarding safety issues purportedly caused by third party attachers include the claim that pole attachments cause accidents, “particularly with trucks snagging low-hanging communications lines and pulling them down.”¹³ The predominant arrangement of facilities on poles locates the ILEC at the lowest position. Consequently, except for lines with no attached ILEC cables, accidents that involve low hanging communications lines will likely be caused by the ILEC’s plant in violation of road clearance – and in the above example, even when I demonstrated and warned the electric utility of the low ILEC clearance, it did nothing to alert the ILEC or correct the violation.

UTILITY PROPOSALS TO REQUIRE PERMITTING FOR OVERLASHING ARE UNNECESSARY AND BURDENSOME

22. Based on a number of highly exaggerated and misleading reports on conditions in the field concerning safety violations and concern about excessive load, the utilities propose that the Commission allow utilities to require advance permitting for overlashing. Cable overlash is significantly lighter than the facilities of either the electric utility or ILEC attached to the poles and rarely causes any safety, load or sag concerns.¹⁴ To the extent that an issue exists in a particular situation, it can be identified during post-inspection and corrected by the cable

¹³ UTC Comments, White Paper at 20, 23.

¹⁴ In my experience third party attachments do not significantly increase the load on poles, and overlashing has only a very small incremental effect on the already attached strand and cable assembly. Overlashing typically is of fiber optic sheath—a very light weight material that is quite small in diameter. A common fiber optic cable is .59” diameter and weighs .05 pounds per foot. On the other hand, power lines, hardware for attaching lines to poles and power apparatus such as transformers, fused switches, lightning arrester assemblies, outdoor lights and many other power company attachments usually account for most of the weight and wind load on a pole because they have a larger cross sectional area and are attached to the top part of poles.

company. Imposing costly and time consuming advance permitting requirements on overlashing is unnecessary as recognized by the Commission on a number of other occasions.

23. A good example of the utilities' misleading characterizations concerning the impact of overlashing appears in the EEI/UTC comments. EEI/UTC provides detailed engineering tables purporting to demonstrate the significant load impact arising by overlashing from 1 to 4 cables to a strand.¹⁵ However, the loading examples are based on line angles of 3, 5, and 10 degrees, which are assumed *not to be guyed* to offset unbalanced loads caused by line tensions on the poles. The examples do not even include a straight pole line with zero degrees line angle, which is typically not guyed. In fact, cable operators are required by pole attachment agreements to provide guying to offset any unbalanced loads on poles caused by tension in their cables. If the angle poles illustrated in the EEI/UTC examples are guyed they will be much stronger than the pole alone. Guyed angle poles are pulled in two directions by the wires and cable tension and pulled in the third direction by the guy wires. The wires, cables and guy wires all have extra strength to help hold the pole in place when it is subjected to ice and wind loading.

¹⁵ EEI/UTC Comments at 22-30.

I declare under penalty of perjury that the preceding is true and correct.

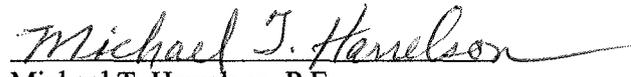

Michael T. Harrelson, P.E.

Photo 1



Note the excessive sag in the Oncor secondary, which should sag on a comparable arc to the Oncor wire above it, if properly installed. This is how Oncor installed the line (or subsequent weather impacted the line) causing the clearance violation with respect to cable company's cable below it.

Cable company cable

Photo 2



Oncor riser installed contrary to NESC just inches below cable company cable

Oncor riser installed contrary to NESC inches **below** cable company cable

Photo 3



Oncor installed its service drop too close to cable in violation of NESC.

Photo 4

Oncor installed riser and transformer too low on pole creating violations with cable company and ILEC. Oncor could remove old cross arms and raise its transformer and riser to establish proper clearance.

Old cross arms should be removed.

Cable company cable

ILEC cable in violation with Oncor riser.

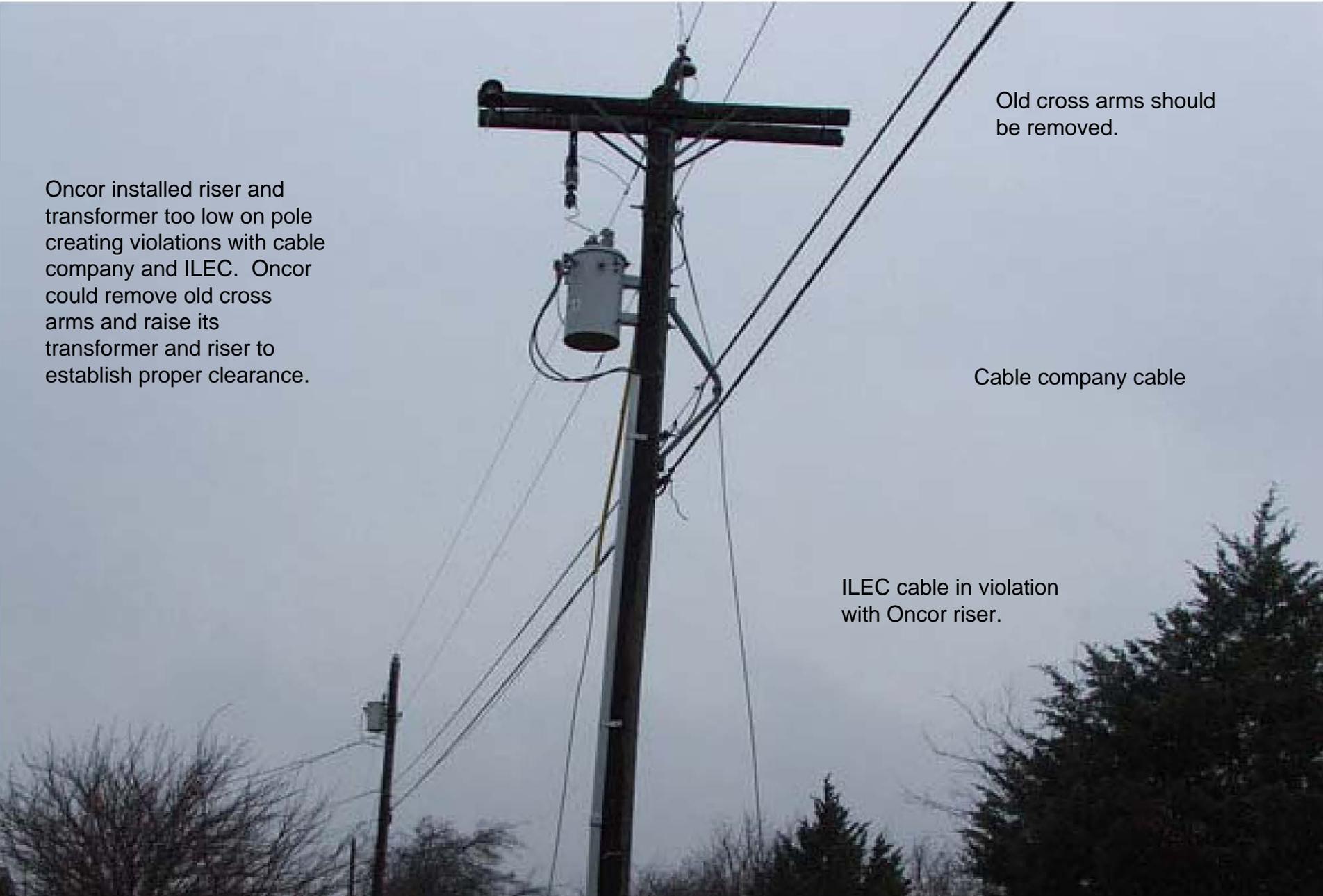


Photo 5

ILEC drops with mid span violation at under 15 feet above the driveway and attached **above power on the adjacent pole.**

Cable company cable

Once quadruplex sagging below cable company cable

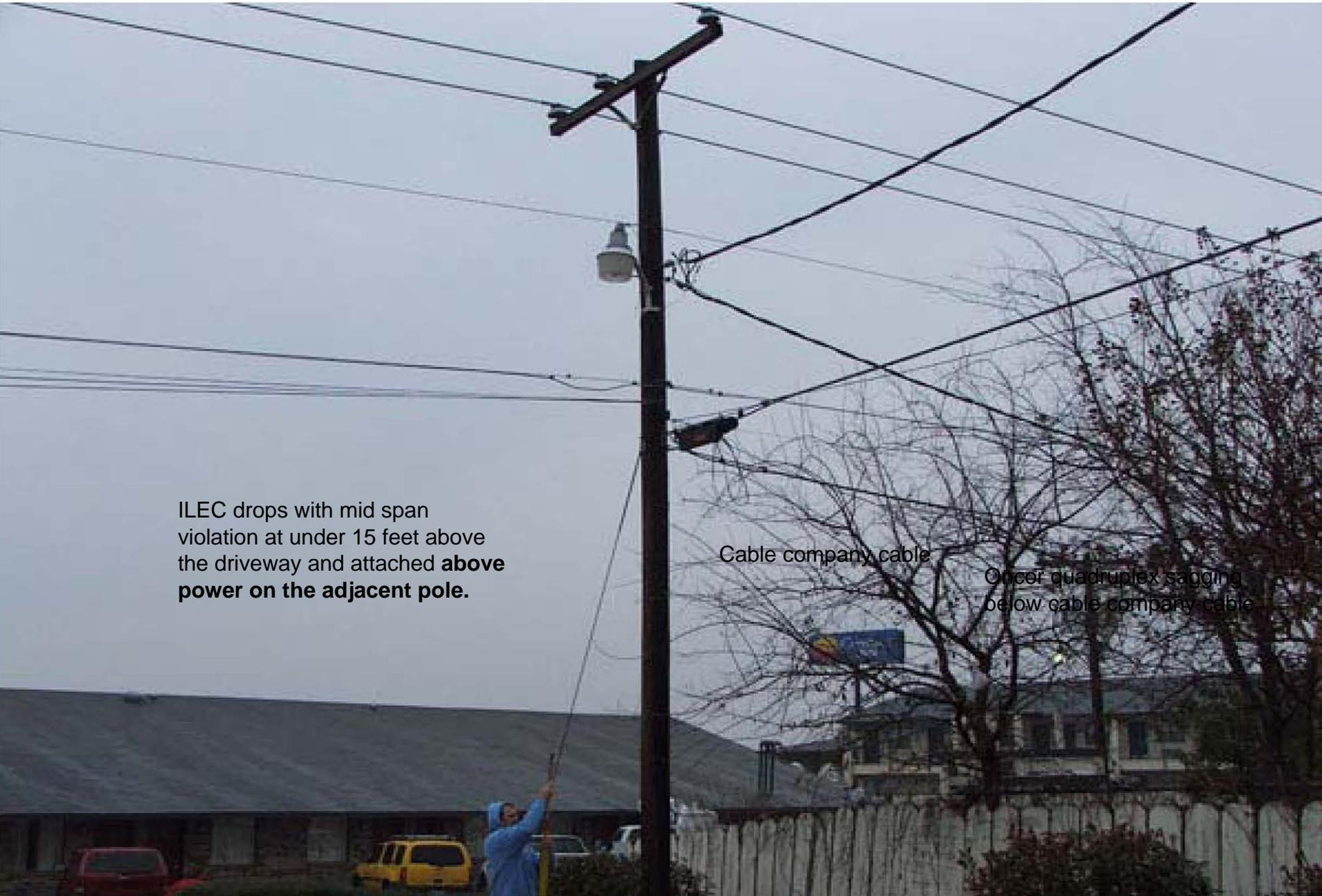
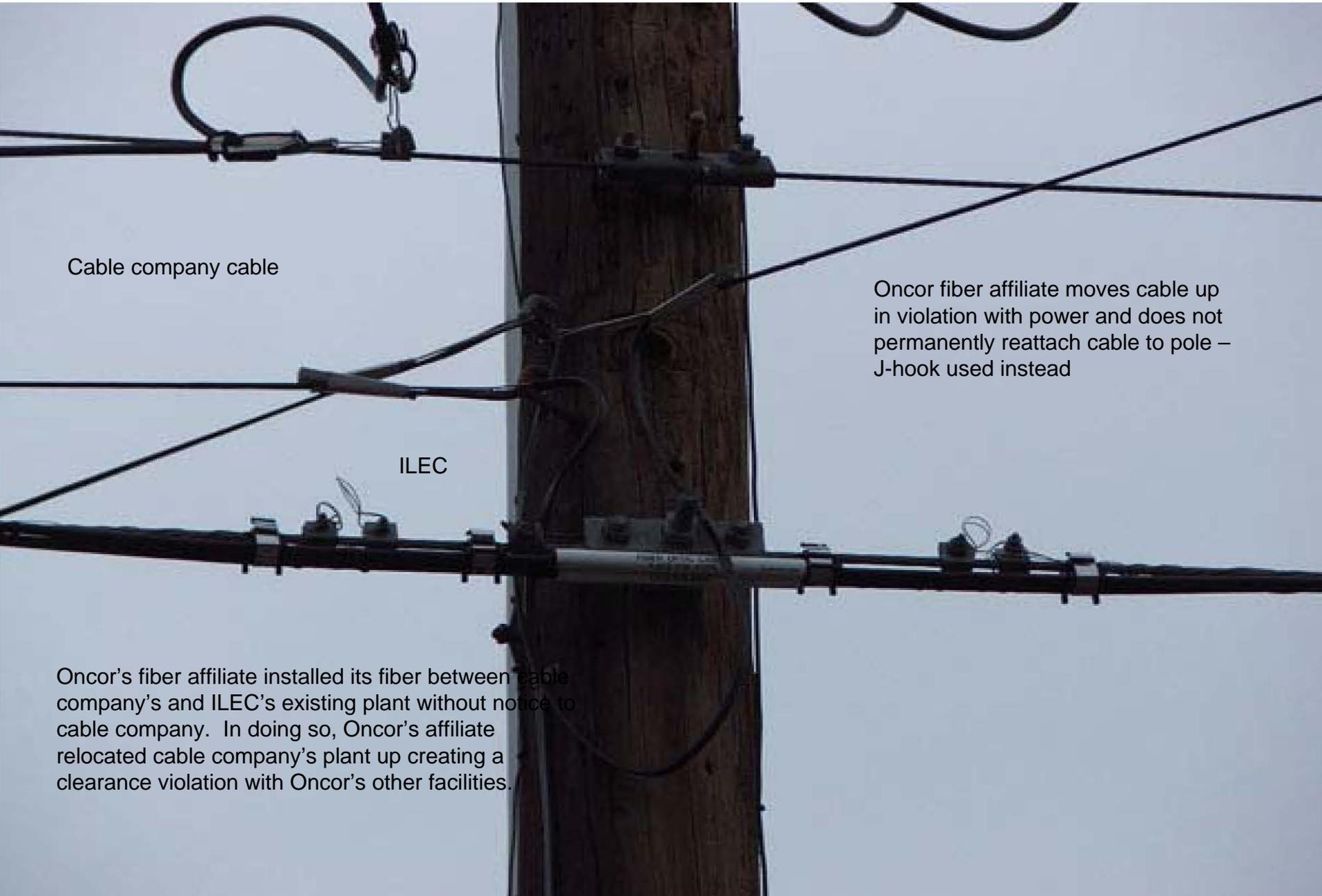


Photo 6



Cable company cable

Oncor fiber affiliate moves cable up in violation with power and does not permanently reattach cable to pole – J-hook used instead

ILEC

Oncor's fiber affiliate installed its fiber between cable company's and ILEC's existing plant without notice to cable company. In doing so, Oncor's affiliate relocated cable company's plant up creating a clearance violation with Oncor's other facilities.

EXHIBIT 3

Attachment 1

CURRICULUM VITAE

M. T. (MICKEY) HARRELSON

M. T. (Mickey) Harrelson

P. O. Box 432

McRae, GA 31055

Phone: (912) 568-1504

Cell: (229) 860-1300

Fax: (912) 568-1502

Registered Professional Engineer (Electrical) GA#10724 (1976)

Registered Professional Engineer (Electrical) FL #51788 (1997)

EDUCATION: B.S. Industrial Engineering (Co-op) GA TECH, 1970

WORK EXPERIENCE:

- 1959- Worked part-time with Harrelson Electric Co., owned by my father.
- 1963 W. T. Harrelson, doing residential, commercial, & industrial electrical and repair work in McRae, GA.
- Dec. 1963- Co-op student of Georgia Power Co. in Electric Distribution Operating,
Mar. 1970 McRae, GA, & Commercial Sales, North Atlanta.
- Apr. 1970- Lieutenant in U. S. Army Air Defense, Minneapolis, MINN, & Yong Son,
Jan. 1972 KOREA. Served as Battery Commander, Korea. Military Status:
Inactive, Army Reserves; Rank: Captain.
- Feb. 1972- Operating Engineer, Brunswick, Georgia Power Co.; Designing,
June 1974 operating, and maintaining distribution system and operating transmission system.
- June 1974- Senior Commercial Marketing Engineer, Brunswick. Selling wise use of
Feb. 1976 electricity to new and existing commercial customers in Brunswick area.
This included lighting design to I.E.S. standards, and consultations regarding the National Electrical Code.
- Feb. 1976- Operating Engineer, St. Simons Island, Ga. Power; Designing, operating,
June 1978 & maintaining distribution system & operating transmission system.
- June 1978- District Engineer; Supervised engineering and operation of Brunswick
May 1986 District of Ga. Power Co., including Kingsland Operating Headquarters.

- May 1986- Sept. 1989 Area Manager, McRae, Ga. Power Co; Restructure McRae, Eastman, Hazlehurst into area operation, and supervise and coordinate all company activities in the area.
- Sept. 1989- April 1992 District Power Delivery Manager, Milledgeville District; Manager of Engineering, Construction, & Maintenance of the electric distribution system and operation of the transmission & distribution system.

Note: During 28 years with Georgia Power Company, I was involved with claims, damage and accident investigations. From 1978 through 1992, I was in charge of these activities at my location.

- April 1,1992 Resigned from Georgia Power Company, Reason for leaving: Early retirement incentive package gave excellent opportunity to pursue independent consulting engineer goals.
- April 1,1992 to present Electric Utility Consulting Engineer.
 Investigated accidents and testified in matters involving the National Electrical Safety Code, OSHA regulations, utility company safety manuals, employee training courses, accepted good work practices, and the National Electrical Code. These cases have involved electrical contact, flash, and burn injuries, collisions with poles and guy wires, falls from poles, etc., hydraulic oil fires, crushing injuries, property losses from fires, stray voltage, etc. The companies involved have been electric, telephone, cable TV, and product manufacturing companies.
- I do management consulting and safety and engineering training for electric cooperatives, engineering consulting companies and private industry
- I do electric power line inspections for electric cooperatives as required by the Rural Utility Service.
- I inspect power lines and communications lines built jointly for National Electrical Safety Code compliance. I teach N.E.S.C. compliance and train field engineers and technicians in joint use compliance.

OTHER COURSES AND SEMINARS:

- 1974 13 weeks Commercial Sales Training by Ga. Power Co., including interior & exterior lighting design, & National Electrical Code.
- 1975 1 week General Electric Outdoor Lighting School, Hendersonville, NC.
- 1976 8 weeks Electric Operations Training by Ga. Power Co.
- 1977 1 week Principles of Leadership Training, Ga. Power Co.
- 1979 1 week Basic Management Training by Ga. Power Co.
- 1980-1985 Served as "Leader" of Engineering Dept Quality Circle.

- 1981 1 week Communications-General Training by Ga. Power Co.
- 1982 1 week Human Relations Skills Training by Ga. Power Co.
- 1987 3 days Interpersonal Skills Seminar by Ga. Power Co.
- 1988 1 week Management Grid School, Mobile, AL, Training by Southern Co.
- 1988 13 weeks Community Leadership Class sponsored by University of GA Cooperative Extension Service and Telfair County.
- 1989 1 week Negotiating Edge Seminar, Athens, GA., Training by Ga. Power Co. and Susan Wise
- 1989 Basic Economic Development Course, GA Institute of Technology
- 1990 3 months- Committee assignment (met bi-weekly) to formulate Ga. Power Company Guarantee Policy
- 1991 6 months-Committee assignment (met bi-weekly) to develop "District Operations Performance Measurement" facilitated by Ernst & Young Co.
- 1991 3 months-Committee assignment (met bi-weekly) to assess Georgia Power Company Marketing Dept Readiness for Incentive pay.
- 1992 1 week advanced Negotiating Skills Seminar, Peachtree City, Training by Ga. Power Co. & The Executive Speaker, Inc.
- 1992 1 day IEEE Seminar on 1993 National Electrical Safety Code
- 1993 2 day NRECA Safety Accreditation Team Training & Testing Seminar
- 1994 3 day Seminar-The Development & Application of the National Electrical Safety Code by Allen Clapp
- 1995 2 day ILCI (International Loss Control Institute, Inc.) Seminar on accident investigation
- 1996 1 day IEEE Seminar - "Changes in me 1997 NESC."
- 1997 3 day Seminar - "Application of 1997 NESC."

MEMBERSHIPS AND AFFILIATIONS:

- 1970-present Member, Georgia Tech Alumni Association
- 1974-present Member, Georgia & National Society of Professional Engineers
- 1978-1986 Member, Glynn County GA Electrical Inspection Board
- 1992-present Member, Telfair Co. Chamber of Commerce
- 1992-present Member, Institute of Electrical & Electronics Engineers (IEEE)
- 1993-2002 Board Member, Telfair County Industrial Development Authority
- 1993-2002 Member, Illuminating Engineering Society of North America (IECNA)
- 1993-present Rural Electric Safety Accreditation Program (RESAP) certified accreditation inspector
- 1994-present Member, National Fire Protection Association

TESTIMONY BY MICHAEL T. HARRELSON, P. E.

- 1. 10-3-07 Florida Public Service Commission
Storm Hardening docket 070301** Testimony

John Seiver
Davis Wright Tremaine L.L.P.
1919 Pennsylvania AVE, NW – Suite 200
Washington, D.C. 20006

- 2. 9-18-07 Florida Public Service Commission
Storm Hardening docket 070301** Deposition Testimony

John Seiver
Davis Wright Tremaine L.L.P.
1919 Pennsylvania AVE, NW – Suite 200
Washington, D.C. 20006

- 3. 2007 Florida Public Service Commission
Storm Hardening dockets** Written Testimony

Maria Browne
Davis Wright Tremaine L.L.P.
1919 Pennsylvania AVE, NW – Suite 200
Washington, D.C. 20006

- 4. 4-27 FCTA, et. al vs. Gulf Power Company
& 5-1-06 Before the FCC** Testimony

John Seiver
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania AVE, NW – Suite 200
Washington, D.C. 20006

- 5. 3-31-06 FCTA, et. al vs. Gulf Power Company
Before the FCC** Written Testimony

John Seiver
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania AVE, NW – Suite 200
Washington, D.C. 20006

6. **3-16-06 & 3-21-06** **FCTA, et. al vs. Gulf Power Company Before the FCC** Deposition Testimony
- John Seiver
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania AVE, NW – Suite 200
Washington, D.C. 20006
7. **3-13-06** **Comcast of Arkansas v. Entergy Arkansas Before the FCC** Deposition Testimony
- John D. Thomas
Hogan & Hartson LLP
555 Thirteenth ST, NW
Washington, D.C. 20004
8. **4-16-05** **Louisiana Public Service Commission For LCTA** Written Testimony
- John D. Thomas
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Ave., NW - Suite 200
Washington, D.C. 34358
9. **2-15-05** **CTA Arkansas vs. Entergy** FCC Written Testimony
- John D. Thomas -- *for Plaintiff*
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Ave., NW - Suite 200
Washington, D.C. 34358
10. **1-10-05** **Clinton vs. Florida Keys Electrical Cooperative, Inc.** Deposition & Trial
Sixteenth Judicial Circuit Court in and for Monroe Co., Florida
- | | |
|---------------------------------------|--|
| Eric Peterson -- <i>For Defendant</i> | H. Clay Roberts -- Plaintiff |
| Peterson Benard | Proenza, Roberts, Hurst, P.A. |
| P. O. Drawer 15700 | 2900 W 28 th Terrace, Suite 700West |
| Palm Beach, FL 33416 | Miami, Florida 33133 |
11. **12-03-04** **MEAG vs. Goodman** Testified at Hearing
- Mr. Robert Wilmot -- *For Plaintiff*
P. O. Draw 1287
Tifton, GA 31793
- MEAG Power Company right-of-way encroachment suit to clear transmission line right-of-way of mobile homes.
12. **10-22-04** **Caldwell vs. Howard Industries, No. 4:03-cv-198-3** Deposition
United States District Court, Middle District of Georgia, Columbus Division

Lester Tate -- *For Plaintiff*
Akin & Tate
P. O. Box 878
Cartersville, GA 30120

William T. Mitchell, Defense
Cruser & Mitchell, LLP
3500 Parkway Lane
Norcross, GA 30092

12. 6-23-04 Comcast Cable vs. Pacificorp Deposition

Angela W. Adams -- *For Claimant*
Ballard Spahr Andrews & Ingersoll, LLP
One Utah Center, Suite 600
201 Main Street
Salt Lake City, Utah 84111-2221

13. 6-8-04 Saffold vs. Aldrich Rent-All Deposition

Heather B. Bush -- *For Defendant*
Peterson Bernard
1550 Southern Boulevard, Suite 300
West Palm Beach, Florida 33416

14. 9-04-03 Perkins v. Georgia Power Company and Altec Deposition

Attorneys Langston Bass and Hugh McNatt *Defendant*
State Court Candler Co., GA

Contractor Lineman contacted 27,000 volts hand-to-hand. He was not wearing rubber gloves. He lost both arms. He sued Altec for inadequate bucket truck design and GA Power for inadequate planning and supervising of work. *Settled out of Court.*

15. 5-02-03 McKeown v. CHELCO, et al Deposition & Trial

Attorney Alan E. Horkey -- *For Defendant*
700 S Palofex Street, Suite 170
Pensacola, Florida 32501
Circuit Court, Walton Co., FL

A teen-aged boy hit power pole with pick-up truck in rain on a curve. He had a severe head injury. He sued electric co-op, claimed they should have moved the pole since it had been hit twice before. Pole location complied with code and DOT guidelines. *Jury verdict gave court cost only to plaintiff.*

16. 11-09-01 Duffie vs. Clay Electric Co-op & Cox Cable et al Deposition & Arbitration

Attorney Craig Cooley -- *For Defendant*
200 East Robinson Street, Suite 555
Orlando, Florida 32801
Circuit Court Alachua Co., FL

A motorcycle rider hit a power line which fell across a U. S. Highway. A contributing factor was that a Cox Cable anchor had been improperly installed. This allowed a Clay Electric Co-op pole to break in four pieces. *Settled at arbitration by Clay, Cox and two Cox sub-contractors.*

17. 12-13-00 Darley vs. Amusements of America, Inc. Deposition

Attorney Robert R. Gunn -- *For Defendant*
P. O. Box 1606
Macon, GA 31202
State Court, Bibb County, GA

A young man got electric shock when he took hold of a metal rail on the platform of an amusement ride. *Settled*

18. 11-21-00 Causey vs. Okefenoke REMC Deposition

Attorney Mark Barber -- *For Defendant*
136 N Fairground Street, Suite 100
Marietta, GA 30060
Superior Court, Brantley Co., GA

An onlooker was killed by burning transformer oil. He was watching a lineman attempt to stop an oil leak when the explosion and fire occurred. *Settled*

19. 10-18-00 Malin vs. McElmurray & Oellerich Electrical Service Deposition & Trial

Attorney David Bell -- *For Plaintiff*
P.O. Box 1011
Augusta, GA 30903
Superior Court, Richmond Co., GA

A young man was killed while cleaning pipes in a milking barn when he touched a light fixture which was not grounded. *Jury verdict for \$1,000,000.00*

20. 10-04-00 Moses vs. Bill's Dollar Store, et al Deposition & Trial

Attorney David Bell -- *For Plaintiff*
P.O. Box 1011
Augusta, GA 30903
State Court, Gwinnett Co., GA

A gas company employee was killed when he touched a metal rack which held an air conditioning unit. The unit was not grounded. *Settled*

21. 1-25-00 Byrd vs. Glades Electric Co-op Deposition

Attorney Robert Swartz -- *For Defendant*
Ft. Lauderdale, Florida
Circuit Court, Glades Co., FL

A flatbed truck crane operator was killed when he put the steel cable into a 7200-volt line. He jumped clear of the truck, then attempted to get in the cab and was electrocuted. *Settled*.

22. 9-10-99 Scruggs vs. Georgia Power Company Deposition

Attorney Rowland Dye -- *For Defendant*
P. O. Box 2426

Augusta, GA 30903
State Court, Georgia

A truck hit a low power line service which had been previously hit by an over-height load of hay. *Settled.*

23. 3-12-97 Price vs. City of Thomasville Deposition & Trial

Attorney Hugh McNatt -- *For Defendant*
Vidalia, GA
Federal Court, Albany, GA

A contractor lineman was badly burned and electric shocked when he lost control of a large wire and violated several other safe-work practices. *Settled.*

24. 12-06-96 Dennard vs. Altec Deposition

Attorney Lester Tate -- *For Plaintiff*
P. O. Box 878
Cartersville, GA 30120

A lineman's hand was crushed when it was caught between the control lever of his bucket truck and the bottom of a transformer. The control levers were poorly designed. *Settled.*

25. 7-17-96 Raulerson vs. Okefenoke REMC Deposition

Attorney Richard Rumrell -- *For Defendant*
One Hundred BLDG, Suite 250
Jacksonville, FL 32256
Circuit Court, Duval Co., FL

A laborer was killed when the electric meter pole he was setting contacted a 14,400-volt power line. Telephone drop wires and cable television were a factor in making the power line lower. *Settled.*

26. 7-02-96 McCoy vs. Coach & Campers of Atlanta Deposition

Attorney Nikolai Makarenko, Jr. -- *For Defendant*
100 Galleria Parkway, Suite 1510
Atlanta, GA 30309
State Court, Dekalb Co, GA

A customer separated his shoulder when the RV home shocked him. He was on the ladder on back, touched a grounded chain link fence and fell. The electric circuit to the RV was not grounded. *Settled.*

27. 6-07-96 Habeishi vs. Greystone Power Corp. Deposition & Trial

Attorneys Tisinger, Tisinger, Vance & Greer -- *For Defendant*
P.O. Box 2069
Carrollton, GA 30117
Federal Court, Northern District, GA

The electric power was off to a traffic signal because an electrical connection failed. It had been made improperly by Fulton County Traffic Dept. Two cars collided in the intersection killing both wives of the two drivers. *Jury Verdict \$7,000,000.00!*

28. 5-16-96 Crossin vs. Central Illinois Light Co. Deposition

Attorney Richard Glisson - *For Plaintiff*
837 South Fourth Street
Springfield, Illinois 62705
Circuit Court, Sahgamon Co., Illinois

A lineman was electrically shocked when he disconnected a ground wire at the top of a joint transmission and distribution pole. A transformer was connected to the pole ground. The ground was burned open before it connected to the distribution neutral. *Settled.*

29. 3-16-95 Lockhart vs. TCI Cable & BellSouth Deposition & Trial

Attorney M. Francis Stubbs - *For Plaintiff*
P. O. Box 9
Reidsville, GA 30453
Superior Court, Toombs Co., GA

A young man was killed when he struck a TCI guy wire with his neck while riding a motorcycle. The guy wire was abandoned but not maintained in a safe condition. The young man was violating the law by riding off the roadway. *Jury Verdict Defendant's Verdict.*

30. 9-21-94 Vandevender vs. Klein Tools, Inc. Deposition & Arbitration

Attorney Michael Smith - *For Defendant*
240Third ST
Macon, GA 31201
Federal Court, Middle District, GA

A truck operator was badly shocked and burned when he removed his rubber gloves and touched a bucket truck while a hot 7200-volt line was on the ground nearby. He sued Klein Tool Company claiming the grip used broke the wire allowing it to fall. *Arbitration-Defendant's ruling 2 to 1.*

31. 8-24-94 Underwood vs. Georgia Power Company Deposition

Attorney Rowland Dye — *For Defendant*
P.O. Box 2426
Augusta, GA 30903
State Court, Emanuel Co., GA

A laborer attempted to use a 20-foot re-bar to unclog a grain bin auger. He contacted a 7200-volt. power line with the metal bar and lost one arm and had serious burns. He claimed the line was too close. The line complied with the NESC. *Settled.*

32. 4-20-93 Buckner vs. Colquitt Electric Co-op Deposition

Attorney John Austin — *For Defendant*
400 Perimeter Center Terrace, Suite 1050
Atlanta, GA 30346
Superior Court, Colquitt Co, GA

A laborer was shocked and fell from a pecan tree. He was using a 20-foot long aluminum pole to knock pecans from the limbs. *Settled.*

33. 8-05-90 Lockett vs. Georgia Power Company

Deposition & Trial

Attorney Hugh McNatt — *For Defendant*
Vidalia, GA
Superior Court, Telfair Co., GA

Three laborers were raising an aluminum extension ladder under a 7200-volt power line. One was killed, one shocked, one was not hurt. The power line complied with the NESC. *Jury Verdict paid funeral expenses only.*

EXHIBIT 4

APPENDIX OF COMMISSION AUTHORITY REJECTING UTILITY SAFETY ARGUMENTS

- *Arkansas Cable Telecomms. Ass'n v. Entergy Arkansas, Inc.*, Hearing Designation Order, DA 06-494, 21 FCC Rcd 2158 at ¶¶ 8-12 (Enf. Bur. 2006) (rejecting Entergy's contention that the Commission lacks jurisdiction to decide whether Entergy's application of engineering standards is unjust and unreasonable under Section 224(f)).

- *Cable Television Ass'n of Georgia v. Georgia Power Co.*, Order, DA 03-2613, 18 FCC Rcd 16333 (Enf. Bur. 2003) at:
 - ¶¶ 11-12 (rejecting Georgia Power's "safety defense," stating: "Georgia Power contends that the terms and conditions of [Georgia Power's new pole attachment agreement] are warranted in light of the numerous violations of safety and prudent engineering procedures that the Cable Operators have committed. ... While we emphatically share Georgia Power's concern about safety, the record does not support its assertions that the host of new contract provisions are necessary to preserve safe operations. As an initial matter we are struck by the fact the Georgia Power did not emphasize during the course of negotiations regarding the New Contract its grave concerns about the Cable Operators' purported failure to adhere to safety standards. Georgia Power undoubtedly would have explained its reasoning to the Cable Operators. Moreover ... [Georgia Power's] exhibits relating to safety fall short of establishing a record of recent safety violations by the Cable Operators to justify the terms of the New Contract. Indeed, Georgia Power cannot point definitively point to a single incident of property damage or personal injury caused by one of the Cable Operators. ... [W]e do not have a record in this case on which to find that [safety] violations are as recent, widespread and egregious as Georgia Power claims, or that the contract provisions Georgia Power has proposed were justified in preventing such violations from recurring.");

 - ¶¶ 21-22 (rejecting Georgia Power's unauthorized attachment fee, which it attempted to justify based on claims that unauthorized attachments "pose significant safety hazards, because loading calculations will not have incorporated the additional weight on poles.");

 - ¶ 31 (rejecting Georgia Power's indemnity and limitations of liability contract provisions, which Georgia Power claimed were justified because of "the Cable Operators' alleged poor safety practices."); and

 - ¶ 32 (rejecting Georgia's Power's *force majeure* contract provision, which Georgia Power attempted to justify on the basis of "safety, reliability and engineering concerns.");

- *Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, FCC 03-292, 18 FCC Rcd 24615 (2003) at:
 - ¶ 40 (ordering refunds for pole change-out costs necessitated by the safety violation of other attachers improperly imposed on Knology); and

¶ 42 (rejecting Georgia Power’s pre-make-ready inspection charges, which Georgia Power attempted to justify on the basis of “compliance with safety codes.”).

- *Public Serv. Co. of Colorado v. FCC*, 328 F.3d 675, 680 (D.C. Cir. 2003) (“Contrary to PSCo’s suggestion, the FCC’s decision did take into account PSCo’s safety concerns.... [The Commission] reasonably concluded that TCI’s exclusive liability for hazards related to its attachments, and the detrimental effect that unsafe attachments would have on its own services, offer adequate incentives to heed the pertinent safety codes.”).
- *Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, Order and Request for Information, DA 00-1250, 15 FCC Rcd 9563 at ¶¶ 10, 19 (Cable Services Bur. 2000) (where utility claimed that “every practice and policy it employs is absolutely necessary for the safe and reliable delivery of electric power to its customers,” the Commission ordered the utility to “cease and desist from selectively enforcing safety standards or unreasonably changing the safety standards to which [Cavalier] must adhere.” The utility was ordered to permit the use of boxing and extension arms because the utility used the same techniques, yet denied Cavalier permission to do so on the basis of safety concerns), *vacated by settlement*, 17 FCC Rcd 24414 (2002).
- *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, Consolidated Order, DA 99-1376, 14 FCC Rcd 11599 at ¶ 11 (Cable Services Bur. 1999) (“The utility may rely on the NESC 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.”).
- *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colorado*, Order, DA 00-1476, 15 FCC Rcd 11450 at ¶¶ 12-13 (Cable Services Bur. 2000) (rejecting utility attempt to impose unauthorized attachment penalty fee on the basis of “supposed safety risks,” stating: “An unauthorized attachment provides no benefit to [Attacher] with regard to safety. [Attacher] is under the same obligation to make its attachments safely and incurs the same liability for any safety violations for unauthorized attachments as it does for authorized ones. Any compromise to the integrity of the pole jeopardizes [Attacher’s] installation and service as it does to that of [PSCo.]”) and ¶ 19 (permitting after-the-fact notification of attachments on drop poles).
- *Cable Texas, Inc. v. Entergy Servs., Inc.*, Order, DA 99-751, 14 FCC Rcd 6647 at ¶ 12 (Cable Services Bur. 1999) (rejecting Entergy’s exorbitant charges for a field count performed by two engineers, which Entergy claimed were needed due to “safety concerns.”).
- *Marcus Cable Assocs., L.P. v. Texas Utilities Elec.Co.*, Declaratory Ruling and Order, DA 97-1527, 12 FCC Rcd 10362 at ¶¶ 17-20 (Cable Services Bur. 1997) (rejecting an attempt by TU Electric to require Marcus Cable’s non-video customers to execute an indemnification and release, which the utility attempted to justify based on claims that “TU Electric bears a higher risk of liability with data transmission services than with traditional video services.”).

- *Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, DA 96-325, 11 FCC Rcd 15499 (1996) at:

¶ 1158 (the Commission rejected the electric utility claims that they could unilaterally establish safety and engineering standards, stating: “we reject the contention of some utilities that they are the primary arbiters of ... concerns [about capacity, safety, reliability or engineering] or that their determinations should be presumed reasonable.”) and

¶ 1176 (the assessment of issues of capacity, safety, reliability and engineering must be done in a nondiscriminatory manner).

- *Tele-Communications, Inc. v. South Carolina Elec. & Gas Co.*, Memorandum Opinion and Order, 1985 FCC LEXIS 3470 (1985) at:

¶ 5 (“Where, as here, safety violations are alleged to have been caused by a cable company over a period of years, and the utility does not seek to remove the pole attachments until receiving notification that the CATV operator intends to file a rate complaint, a bona fide question of retaliation exists.”);

¶ 6 (“the utility did not exhaust the remedies contemplated by the [pole attachment] agreement, and in accord with standard industry practice, to remedy alleged safety violations, but rather invoked the termination clause.”);

¶ 7 (“the utility has failed to offer any evidence to show that TCI’s alleged violations have caused any harm, or present an immediate danger to its employees or customers. ... [O]ne can only conclude that SCE&G’s sudden decision to terminate the agreement was in response to TCI’s announced intention to file a rate complaint.”); and

¶ 8 (“since we have found SCE&G’s actions unreasonable, we will order it to process *additional pole attachment applications immediately and to cease and desist from* attempts to terminate its pole attachment agreement with TCI.”).

- *Whitney Cablevision of Indiana, Ltd. v. Southern Indiana Gas & Elec. Co.*, 1984 FCC LEXIS 1679 (Common Carrier Bur. 1984) at:

¶ 6 (“Where safety violations are alleged to have been caused by a cable company over a period of years, and the utility does not seek to remove the pole attachments until receiving indications that the cable company intends to file a rate complaint, a bona fide question of retaliation exists. ... Whitney has shown a reasonable likelihood of success on its claim that the termination provision in the pole attachment agreement was unjustly invoked.”); and

¶ 7 (“the utility supplied no evidence to show that Whitney’s alleged violations present an immediate danger to its employees or to the public.”).

* * * * *

EXHIBIT 5

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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)	
)	

DECLARATION OF JOHN DETWEILER
APRIL 22, 2008

I, John Detweiler, do hereby state:

1. I am Construction Manager for Comcast of SouthEastern Pennsylvania LLC (“Comcast”). I am responsible for outside plant construction and maintenance, including pole attachment matters, for Central PA Region- Capitol System. I have served in this capacity since 2001.
2. With regard to pole attachments, I am involved in reviewing and reconciling reports of unauthorized attachments that are periodically received from utility companies within my region of responsibility, including from PPL Electric Utilities (“PPL”).
3. Since 2001 I have been involved in a number of pole inventory audits with PPL. Unlike other utilities with whom I am aware (for example, Verizon in the same areas), PPL does not provide any advance notice regarding its inventories to attachers. As a result, Comcast is not permitted to accompany PPL’s contractors on the inventories and

to work through errors and discrepancies that are identified by those contractors before such errors appear on “unauthorized attachment” reports issued by PPL. In this regard, PPL charges either \$30 or \$50 per unauthorized attachment, depending on the particular portion of its service area involved. Following receipt of a PPL unauthorized attachment report by Comcast, the procedure is for Comcast to review the inspected poles and to report back to PPL with errors or other issues that justify revisions to the initial unauthorized attachment report. It is not unusual for Comcast to reverse a large percentage of the initial unauthorized classifications once the situation is reviewed and to receive sizable refunds of the penalties assessed by PPL (see below regarding a \$59,000 refund in one small community, which is by no means unique):

4. I have been through this process at least 47 times with PPL and, although each report and follow-up can involve a number of different circumstances and considerations, I have found that certain errors show up consistently in the PPL reports that would substantially inflate its discovery of “unauthorized attachments”:

- PPL changed its definition of attachment and then applied the new definition retroactively to previously compliant facilities. For example, for many years PPL did not consider a second facility located within 6 inches of the primary attachment as an additional attachment. During the past six years PPL has changed that policy and now counts such facilities as second attachments (although Comcast pays for 12 inches of space on the pole). Another example of PPL changing requirements applies to applications for “guy poles.” Prior to 1999, PPL did not require applications for these but then changed its policy. As a result, if an inventory discovers such an unlicensed attachment (even if it was installed

legally prior to 1999) PPL will classify it as unauthorized and assess the \$30 to \$50 penalty.

- During the 2000 to 2003 time period Comcast was engaged in significant rebuild activity in PPL territory. One standard procedure during rebuilds is to place a temporary j-hook attachment on the poles with the old cable attached, the new cable will be placed on the existing attachment. Once the upgrade is complete the old cable on the j-hook will be removed. While this is clearly a transitory process resulting in a single permanent attachment following the equipment wreck out, when PPL inventoried such situations it would charge Comcast with unauthorized attachments for the temporary attachments and assess the \$30 to \$50 penalty.
- PPL regularly installs a new pole adjacent to an aging existing pole (often within a few feet) that has a licensed Comcast attachment. The new pole is given a new pole number and no automatic credit or authorization is given for the authorized Comcast attachment that was removed from the adjacent pole. Often these pole transfers occur without notice to Comcast so no new application is filed for the new pole as PPL requires (but attachment rent continues to be paid on the original pole that no longer exists). Yet, when PPL conducts an inventory it will treat the Comcast attachment on the new pole as unauthorized – and the penalty will be assessed.
- Based on my experience with PPL and interaction with other Comcast representatives that have responsibilities concerning PPL pole attachments, PPL's share of poles has grown steadily over time. Often PPL acquires poles that were

previously owned by the local ILEC with whom Comcast had an attachment agreement and paid attachment rents. I understand that no notice of these transactions is given to Comcast. When PPL inventories the acquired poles for attachments it will not recognize Comcast's ILEC permits and will treat the attachment as unauthorized and charge the penalty. I understand that, typically, the ILEC pole records will not have been adjusted to delete the acquired pole so Comcast will also be paying rent to the ILEC while being assessed unauthorized attachment penalties on the very same pole by PPL.

- PPL contractors have informed me during inventory reviews that if there is any attachment on a pole that they cannot identify they simply assign it to the cable operator. This approach leads to many errors and (if caught on review) unauthorized attachment penalties will be reversed.

5. Each of the factors above contributes substantially to erroneous PPL unauthorized attachment reports and demands for penalties. Where Comcast has the opportunity to conduct a pole by pole review, many of these penalty charges are subsequently reversed. For example, in May 2002 PPL issued Comcast a refund of \$59,000 arising from errors in the East Pennsboro pole inventory. To put this in perspective the East Pennsboro cable system has approximately 3,057 pole attachments.

6. Based on my experience over the years, the percentages of unauthorized cable attachments reported by PPL in its comments appear to be seriously overstated.

While the PPL survey information does not give any information on how or where the

data was gathered, it certainly is not representative of the areas where Comcast attaches to PPL poles in my experience.

I declare under penalty of perjury that the foregoing is true and correct.



John Detweiler