

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)	RM-11293
)	
)	RM-11303
)	

**REPLY COMMENTS OF TIME WARNER TELECOM INC., ONE
COMMUNICATIONS CORP. AND COMPTEL**

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Time Warner Telecom Inc.¹ and One Communications Corp., and CompTel (“Joint Commenters”), by their attorneys, hereby file these reply comments in the above-referenced proceeding.

I. INTRODUCTION AND SUMMARY

As the Commission has correctly recognized, facilities-based providers of broadband internet access are critically dependent on pole attachments. It is not efficient or in some cases even possible for providers of broadband internet access to deploy their own poles. In the absence of any plausible threat to their control over essential facilities, utilities lack the incentive to provide access to poles on reasonable terms and conditions. It is the Commission, therefore,

¹ Time Warner Telecom Inc. amended its Certificate of Incorporation effective March 12, 2008 to change its name to tw telecom inc. in preparation for a broader name change that will be effective July 1, 2008. The company will continue to use and be known as Time Warner Telecom Inc., its trade name, until July 1, 2008.

that must dictate the terms and conditions under which utilities provide access to their poles. The manner in which the Commission addresses this issue will have a significant effect on the extent to which facilities-based service providers are able efficiently to deploy broadband service to residential and business customers in this country. As the record in this proceeding demonstrates, there are several critical areas in which the Commission's existing pole attachment regulatory regime requires wholesale reform or improvement. The Commission must also reject the utilities' attempt to diminish the effectiveness of the protections that exist today against unreasonable utility conduct.

First and foremost, as virtually every party to this proceeding including utilities, has recognized, the Commission must eliminate the unjustified differential in the rates yielded by the telecommunications service rate formula and the cable rate formula. Moreover, virtually every commenter agrees that the Commission has the authority to set a unified pole attachment rate for all providers of broadband internet access, whether provided alone or in conjunction with other services. Several utilities assert that the Commission lacks the authority to achieve a unified rate by reducing the current telecommunications service rate to the level of the cable rate, but those arguments have no merit. Utilities that take this position argue that relying on the nondiscrimination mandate in Section 224(e)(1) to lower the telecommunications carrier rate is an impermissible reading of the statute because it eviscerates the cost allocation formula provisions in Sections 224(e)(2) and (3). But this argument only has merit if the nondiscrimination mandate would *always* trump the cost allocation provisions. This would not be the case, however, if all attachers in an area were telecommunications service providers, hardly an implausible scenario.

It is also clear that it is sound policy to set the unified pole attachment rate at the level of the cable rate. As the cable companies and NCTA have explained, this Commission as well as federal and state courts have all concluded that the cable rate, combined with charges for make-ready work, fully compensate utilities for the incremental costs associated with providing access to poles. Requiring all providers of broadband internet access to pay the telecommunications service rate would simply result in an unjust enrichment to the utilities by transferring wealth from consumers of broadband service to utility shareholders. It is hard to see how this is consistent with the policy goal of universal deployment of broadband.

While the Commission must address the flaws in the regulated rates charged by utilities for pole access, it must also comprehensively reform its rules governing utilities' non-price conduct. The existing rules do not sufficiently limit the utilities' opportunities to act on their incentives to slow-roll and degrade pole access. First, the Commission should adopt the national rules governing engineering and safety practices proposed by Fibertech and the Joint Commenters. The utilities make a number of arguments in opposition to the adoption of such rules, none of which has merit. For example, the utilities argue that Section 224 does not grant the Commission the authority to ensure that utilities' non-price conduct is just and reasonable. But this assertion is obviously incorrect, since Section 224(b)(1) explicitly requires that the "terms and conditions" upon which utilities offer pole access are "just and reasonable."

The utilities also argue that it would be imprudent to establish national engineering and safety rules since each utility must have the flexibility to adapt its practices to local conditions. But the national rules proposed by Fibertech and the Joint Commenters in this proceeding are *presumptions* that a utility is free to rebut if local conditions warrant deviation from national norms. In any event, no utility in this proceeding has been able to point to a single example of a

local condition that would prevent it from complying with the safety and engineering practices and procedures proposed by competitors in this proceeding. Moreover, several states have now successfully implemented requirements like the ones proposed herein. There is simply no reason for the Commission to question the prudence and benefits of national presumptions in favor of time-limits for make-ready and survey work, access by certified third-party engineers to perform make-ready and survey work, third-party access to pole and conduit records and conduit facilities, and use of boxing and extension arms.

Second, the Commission should decline to adopt any of the numerous utility proposals that would only further degrade the quality and increase the cost of pole access. For example, there is no merit in utility arguments that the utilities' remedies for unauthorized attachments are insufficient. The record in this proceeding is not even clear that many unauthorized attachments exist. In any event, the Commission has already rejected the same financial penalties for unauthorized attachments proposed by the utilities in this proceeding. Unfortunately, the utilities have ignored these rulings and imposed unlawful and onerous penalties on attachers. Thus, rather than increase the penalties for unauthorized attachments, the Commission should codify as national rules its prior decisions in adjudications regarding the permissible level of penalties for unauthorized attachments, and it should require that utilities process new attachment requests while any dispute regarding unauthorized attachments is pending.

The Commission should also reject the utilities' expansive reading of their right to refuse access based on insufficient capacity. At least some utilities read the Eleventh Circuit's decision in *Southern Company v. FCC* to mean that utilities have the right to refuse any attachment requiring make-ready work. But the Eleventh Circuit held that the phrase "insufficient capacity" in Section 224(f)(2) is ambiguous and that the Commission has the discretion to determine its

meaning. In so doing, the Commission should adopt the Joint Cable Operators' proposal under which pole capacity is insufficient under Section 224(f)(2) only where space for new attachments cannot be made through reasonable make-ready construction, including change-outs and line rearrangements.

Finally, the Commission should reject the utilities' attempts to eliminate or diminish the effectiveness of other aspects of the existing regime governing non-price terms and conditions for pole attachments. The Commission should not modify its overlashing policy; third parties should continue to have the right to overlash onto existing attached equipment without the need to obtain prior utility approval or to pay a separate attachment fee. Nor should the Commission eliminate the sign and sue rule; the Joint Commenters' experience demonstrates that the sign-and-sue rule remains a critical protection against utilities' exploitation of their leverage in negotiating pole attachment agreements. In fact, the Commission should address this problem more effectively by expressly prohibiting utilities from demanding inclusion in attachment agreements of certain obviously unreasonable terms. In addition, the Commission should reject utilities' attempt to increase attachers' reporting and inspection obligations, since such obligations are unnecessary and inefficient.

II. THE OVERWHELMING MAJORITY OF COMMENTERS AGREE THAT THE COMMISSION CAN AND SHOULD ADOPT A UNIFIED RATE FOR POLE ATTACHMENTS USED TO PROVIDE BROADBAND INTERNET ACCESS.

The record in this proceeding reveals a virtual consensus among interested parties that the Commission has the authority to adopt a unified rate for all pole attachments used to provide broadband internet access. In addition, not surprisingly, all of the commenters that addressed the issue agree that adoption of a unified rate is sound public policy.

Commenters representing a wide range of interests concur that Section 224 and the case law interpreting that provision grant the Commission sufficient running room to eliminate the

differential between rates yielded by the current telecommunications service and cable rate formulas. *See, e.g.*, Alabama Power *et al.* Comments at 15; NCTA Comments 15; PacifiCorp *et al.* Comments at 15-16; MetroPCS Comments at 2; Florida Power & Light *et al.* Comments at 12-13; Concerned Utilities Comments at 37; Edison Comments at 98; Idaho Power Co. comments at 3-4; Qwest Comments at 3-4; USTA Comments at 11. Moreover, most of the parties that addressed this issue, including many utilities, concede that the Commission has the authority to accomplish this objective by reducing the rate currently paid by telecommunications service providers under Section 224(e) to the level of the cable rate. *See, e.g.*, Coalition of Concerned Utilities (“Concerned Utilities”) Comments at 37; Alabama Power *et al.* Comments at 13-14; Metro PCS Comments at 3; CTIA Comments at 16; CenturyTel Comments at 14. A small minority of utilities, however, argues that the Commission does not have the authority to achieve a unified rate by reducing the rate paid by telecommunications service providers to the level of the cable rate. These parties make two arguments in support of their position, neither of which has merit.

First, opponents of reducing the telecommunications service rate to the level of the cable rate assert that reliance on the nondiscrimination requirement in Section 224(e)(1) as a basis for requiring this outcome would make Section 224(e)(2) and (3) cost allocation formula provisions meaningless and useless. *See, e.g.*, Utilities Telecom Council Comments (“UTC”) at 15-16; Edison Electric Institute & Utilities Telecom Council (“Edison”) Comments at 99. For this argument to be correct, it must be the case that the nondiscrimination requirement would always cause the Commission to disregard the rates yielded by the Section 224(e)(2) and (3) cost allocation formulas. But this is not the case. For example, if all attachers on a pole or in a service area provided telecommunications services, they would all be subject to the rates yielded

by Section 224(e). In that case, the nondiscrimination provision in Section 224(e)(1) would merely require that the cost allocation provisions in Sections 224(e)(2) and (3) be applied uniformly to all such attachers. Nor is this an implausible scenario. All, or virtually all, attachers would in fact provide telecommunications service if the Commission were to deem the provision of VoIP service by cable operators to be a telecommunication service.

Second, UTC argues that reliance on the nondiscrimination requirement in Section 224(e)(1) to mandate equal pole attachment rates for providers of broadband internet access would conflict with Section 224(d), because that provision states that the cable rate applies only to attachments used “solely” to provide cable service. *See* UTC Comments at 16. But UTC concedes that the Commission has applied the cable rate under Section 224(b) to attachments used to provide both cable service and broadband internet access service. *See id.* at 97-98. Moreover, Section 224(e)(1) states that the regulations adopted by the Commission to implement Section 224(e) “shall ensure that a utility charges just, reasonable, and nondiscriminatory rates *for pole attachments.*” 47 U.S.C. § 224(e)(1) (emphasis added). The provision does not state that the regulations must ensure nondiscriminatory rates for all attachments subject to Section 224(e). The reference to rates “for pole attachments” is most naturally read to mean *all* pole attachments, including those by entities that do not provide telecommunications service. This conclusion is further supported by the express reference to “pole attachments used by telecommunications carriers to provide telecommunications service” in the first sentence of Section 224(e)(1). Congress obviously referred to attachments of telecommunications carriers explicitly when it wished to address them. The broader reference to “pole attachments” in the

second sentence of Section 224(e)(1) must therefore be interpreted to refer to attachments by cable systems as well as telecommunications carriers.²

Finally, there is broad agreement among commenters representing every relevant interest that it is sound policy to require that utilities charge the same rate to all providers of broadband internet access service. Utilities, cable companies, competitive telecommunications carriers and state representatives all agree on this fundamental point. *See, e.g.*, Concerned Utilities at 37; Florida Power & Light *et al.* Comments at 12; Edison Comments at 98; Ameren Services Company and Virginia Electric Power Company (“Ameren”) Comments at 19; UTC Comments at 13; AT&T Comments at 22-27; Qwest Comments at 1; CenturyTel Comments at 12-14; USTA Comments at 4-9; Verizon Comments at 6. Moreover, it is clear that eliminating the differential in input costs incurred by competitors in the provision of broadband internet access will enhance the efficiency of the broadband market, an outcome that advances the goals of Section 706. Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996). It should be clear, therefore, that the Commission can and should promptly adopt regulations implementing its tentative conclusion that all pole attachments used to provide broadband internet access must be subject to the same unified rate.

² *See, e.g., Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 80 (2002) (explaining that the doctrine of *expressio unius exclusio alterius* means that “expressing one item of an associated group excludes another left unmentioned.”) (internal cites omitted); *id.* at 81 (“The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which are abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded”).

III. THE COMMISSION SHOULD SET THE UNIFIED RATE FOR POLE ATTACHMENTS USED TO PROVIDE BROADBAND INTERNET ACCESS SERVICE AT THE CABLE RATE

Numerous commenters in this proceeding, especially cable companies and NCTA, have explained at length why the cable attachment formula yields rates that are fully compensatory, just and reasonable. *See, e.g.*, NCTA Comments at 8-21; Comcast Comments at 12-18.

Decision after decision by the FCC, state regulatory commissions, federal courts and state courts have reached this conclusion. *See* NCTA Comments, App. A. Nevertheless, the utilities argue in their comments that even the telecommunications service cost allocation formula yields unreasonably low rates (*see, e.g.*, Concerned Utilities Comments at 11-23; Idaho Power Comments at 14; Edison Comments at 43; UTC Comments at 22) and that the cable rate results in a subsidy for those paying that rate (*see, e.g.*, Concerned Utilities Comments at 7-9; Idaho Power Comments at 6; American Electric Power Service Corp. (“AEPSC”) Comments at 19, 25; Edison Comments at 14, 36; 43-44; PacifiCorp *et al.* Comments at 16-18; UTC Comments at 20). There is no basis for these assertions.

Both the FCC and the vast majority of states that have exercised reverse preemption have determined that the cable rate fully compensates utilities for the cost of attachment. As the Joint Commenters explained in their initial comments, of the 13 states that have exercised reverse preemption, 11 have adopted a uniform rate, and, of those 11, most have adopted a rate formula that is identical to or similar to the cable rate formula. *See* Joint Commenters Comments at 8. In addition, many states have explicitly determined that the cable rate fully compensates utilities for the attachers’ use of the pole. *See id.* at 13-14.

In assessing the reasonableness and sufficiency of the rates yielded by the cable rate formula, it is critical to recognize that the make-ready charges that attachers pay fully compensate utilities for the one-time incremental costs associated with establishing an

attachment. This leaves only two other types of theoretical costs that might be recovered through annual pole attachment rates. First, a utility might incur an opportunity cost, because the attacher occupies a space on the pole that the utility could otherwise use for its own purposes. A utility owner would only incur an opportunity cost if pole space usage were, as the Eleventh Circuit put it, “rivalrous,” *i.e.*, the pole space used by third-party attachers could be used by the pole owner to provide other revenue-generating services.³ Pole access would be “rivalrous,” for example if the pole were full and the pole owner were precluded from offering revenue producing services because attachers were occupying all of the useable space. No utility has asserted that third party pole attachments in any way impede its ability to provide electricity or any other services.⁴ In any event, the utilities themselves argue that most poles have few attachers, yielding the obvious inference that there is plenty of room left on poles for utilities’ own attachments. *See AESPC et al.* Comments at 19. Thus, the Eleventh Circuit’s conclusions that pole attachment space is “non-rivalrous,” and that there is no opportunity cost associated with mandated pole access offerings continue to be correct. *See Alabama Power*, 311 F.3d at 1370. It is therefore hard to imagine what “revenue” a pole owner foregoes by allowing an attacher to attach at the cable rate other than monopoly rates that a pole owner could charge in the absence of regulation. But Congress itself has prohibited the collection of such rates by the terms of Section 224, and charging such rates is inefficient and harms consumer welfare. *See NCTA Comments*, App. B, Declaration of Dr. Michael D. Pelcovits, ¶¶ 24-31.

³ *See Alabama Power Co. v. FCC*, 311 F.3d 1357, 1369-70 (11th Cir. 2002) (“*Alabama Power*”). Of course, it is also worth noting that a pole owner can refuse to grant access if it does not have sufficient space left on the pole. *See* 47 U.S.C. § 224(f)(2).

⁴ Outlier conduct from unsafe attachers can harm other attachers as well as utilities. But such behavior can be addressed through enforcing safety rules, not by increasing the annual rental fee.

Utilities also might assert that they incur ongoing incremental costs caused by a pole attachment. But even though such ongoing costs are close to zero, the cable rate provides utilities with a rent equal to “a proportional share of *all* costs of the pole (both usable and unusable space).” Comcast Comments at 17 (emphasis added). As the Eleventh Circuit concluded, the cable rate provides for “much more than marginal cost.” *Alabama Power*, 311 F.2d at 1369.

Finally, it is worth noting that make-ready charges may well subsidize utilities’ capital expenditures. For example, if a new attacher is required to pay to strengthen a pole or to replace a pole that is nearing the end of its useful life, the pole owner benefits from these upgrades to its own infrastructure without paying a penny for such improvements. In this manner, utilities appear to avoid incurring substantial costs that they would have to incur otherwise, because poles age and must eventually be replaced regardless of whether third parties attach their equipment. These apparent cost savings and benefits are not taken into account when determining the appropriate recurring attachment rate. There is no basis, therefore, for concluding that existing cable or telecommunications service rates are unreasonably low or result in subsidies to attachers. In fact, all of the available evidence indicates that electric utility ratepayers are economically better off with multiple attachers to utility-owned poles, even at the cable rate, than would be the case in the absence of third party attachments.

IV. THE FCC SHOULD ADOPT RULES OF GENERAL APPLICABILITY REGARDING UTILITIES’ ENGINEERING AND RELATED PRACTICES

The Joint Commenters, Fibertech and others have advocated a series of nationally applicable practices for pole attachments in their comments in this proceeding and in prior filings. These include (1) permitting the use of boxing and extension arms in appropriate circumstances; (2) permitting attachers to perform conduit and record searches; (3) establishing

rules that regulate the timeframe for survey and make-ready work within approximately 60 days (the proposals vary slightly on the required time-frame) from the pole owner's acceptance of the pole attachment application; and (4) permitting the use of third-party contractors to perform such work. Under these proposals, if the pole owner is unable or unwilling to meet the proposed behavioral requirements, the Commission would presume that the utility's actions were unjust and unreasonable. However, as is the case with other pole attachment rules (*e.g.*, the half duct presumption and the number of attachers per pole), the utility would have the right to present evidence to rebut the presumption. Many states have adopted rules that are similar or identical to those proposed by competitors in this proceeding and utilities in those states have apparently had little trouble complying, demonstrating that such rules are appropriate on a national basis.

The utilities nevertheless argue that the FCC does not have the jurisdiction to adopt engineering standards, and, in any case, that the FCC should not establish nationwide rules, because each utility operates in a different geographic area, its pole network is subject to different stresses and conditions, and each requires flexibility to adjust to such variables. In other words, the utilities argue that they should have essentially unlimited discretion to set their own engineering practices, because what might be a safe practice for one utility, might not be a safe practice for another. None of these arguments has merit.

A. The FCC Has the Authority to Establish National Behavioral Rules Governing Pole Access Practices

Many utilities argue that the FCC does not have the authority to establish national rules regarding safety or pole attachment engineering practices like those proposed by the Joint Commenters, Fibertech, and others. They argue that the FCC's authority in this area is limited to determining whether utilities have applied their safety and engineering standards in a

nondiscriminatory manner under 224(f). *See* 47 U.S.C. § 224(f).⁵ The utilities assert further that nothing in Section 224 grants the Commission the authority to rule on whether such standards or the manner in which they are implemented are unjust or unreasonable and that only the states (even those that have not exercised reverse preemption) have such authority. *See Alabama Power et al.* Comments at 35-36.

This argument rests on a flawed reading of the statute. While the FCC, as the utilities argue, unquestionably has the authority under Section 224(f) to determine that a particular engineering practice or its application is discriminatory, this is not the limit of the FCC's authority. Section 224(b)(1) grants the Commission express authority to regulate the "rates terms and conditions for pole attachments to provide that such rates, terms and conditions are *just and reasonable.*" 47 U.S.C. § 224(b)(1) (emphasis added). The FCC has "exercised its jurisdiction in prior pole attachment complaint proceedings to determine whether a pole owner's adoption or application of specific engineering standards were *unjust and unreasonable,*"⁶ not merely discriminatory. Moreover, the Commission has "rejected the suggestion...that state and local regulators, rather than the Commission, have primary responsibility for determining

⁵ *See, e.g.,* Edison Comments at 64-65 ("The Commission's jurisdiction is limited to adjudication of disputes over whether a utility has applied its safety, reliability, and engineering standards in a non-discriminatory manner[.] The Commission's jurisdiction should not and does not extend to the content of such standards. The Commission has no jurisdiction to preempt or second-guess applicable state or local requirements.").

⁶ *Arkansas Cable Telecommunications Ass'n et al. v. Energy Arkansas*, Hearing Designation Order, 21 FCC Rcd 2158, ¶ 10 (EB 2006) (emphasis added) ("*Arkansas Cable*"); *id.* at n. 30 ("*See, e.g., Cable Television Association of Georgia v. Georgia Power Co.,* Order, 18 FCC Rcd 16333, ¶¶ 10-12 (EB 2003) (finding that certain proposed contract provisions were unjust and unreasonable, and rejecting the pole owner's contention that these provisions were necessary to prevent safety violations); *Newport News Cablevision, Ltd. Comm., Inc. v. Virginia Elec. and Power Co.,* Order, 7 FCC Rcd 2610, ¶¶ 15-16 (CCB 1992) (rejecting cable operator's claims that the pole owner's safety standards relating to guying and clearance were unreasonable).").

whether a utility’s engineering standards and practices are just and reasonable under section 224.” *Id.* ¶ 11. In fact, the FCC “has the jurisdiction to review and reject a challenged engineering standard or practice as unjust or unreasonable under section 224, even where the standard or practice complies with state or local requirements.” *Id.* As the FCC has recognized, if the FCC adopted the utilities’ argument that the FCC “lacks jurisdiction to determine the justness or reasonableness of the engineering standards a utility may impose on attachers [,] Section 224(b)(1) [would be robbed] of meaning.” *Id.* ¶ 12.

Nor is the FCC’s authority to ban or mandate particular engineering practices restricted to acting only through adjudication. As a general matter, an administrative agency has the authority to enforce statutory mandates in either individual adjudications or in rulemaking proceedings.⁷ The FCC’s past decision to primarily rely on case-by-case adjudications of non-price issues was not a mandate imposed by statute, but merely a policy preference which is now ripe for change. In its last pole attachment order in 2001, the FCC declined to adopt “separate or detailed regulations at this time for considering complaints about rates, terms and conditions for nondiscriminatory access”⁸ The FCC believed that it would be “prudent to gain experience through case by case adjudication to determine whether additional guiding principles or presumptions are necessary” *Id.* The FCC has now adjudicated dozens of pole attachment disputes, many of which related to utility engineering practices. *See, e.g., Arkansas Cable* n.30. In addition, numerous states , including California, Vermont, Connecticut, New York, Delaware

⁷ *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”).

⁸ *Amendment of Commission’s Rules and Policies Governing Pole Attachments et al.*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶ 45 (2001) (“*Pole Attachments Recon. Order*”).

and Maine among others have successfully imposed engineering and safety mandates on utilities, including the use of boxing and extension arms, deadlines for survey and make-ready work as well as mandates that utilities allow attachers to use qualified contractors to perform make-ready work. *See, e.g.,* Joint Commenters Comments at 26-29; Fibertech Comments at 12, 15, 17, 19-22. In sum, the Commission has always had the jurisdiction, and now has ample experience (and the benefit of state experience) to justify establishment of national rules governing safety and engineering practices.

B. The Record Supports The Conclusion That Most Utilities Can Comply With The Proposed National Rules

Utilities argue that, even if the FCC has jurisdiction to impose national rules governing the terms and conditions of pole access as proposed by the Joint Commenters, Fibertech and others, such rules are inappropriate and unnecessary. In support of this assertion, the utilities state that utilities must have the flexibility to adopt safety and engineering practices and policies based on their individual circumstances. This argument must now finally be rejected.

To begin with, as the Joint Commenters and others have repeated over and over in this proceeding, the proposed safety and engineering rules establish presumptions that a pole owner is free to rebut if its particular circumstances make compliance impossible or impractical. The proposal therefore accounts for the possibility that a pole owner's particular circumstances justify relieving the pole owner of compliance.

Moreover, the fact that some states have successfully implemented every single one of the engineering and safety requirements proposed in this proceeding by Fibertech or the Joint Commenters is powerful evidence that utilities in other areas should be able to comply with such regulations. In the past, the FCC has often relied on benchmarking the conduct and performance of one firm with market power to determine whether similarly-situated firms can achieve similar

levels of performance. The FCC has long regulated ILECs in this manner. The FCC understood that ILECs would have the incentive to provide low levels of performance to those parties that need access to their bottleneck facilities. Accordingly, when reviewing proposed ILEC mergers,⁹ RBOC Section 271 applications,¹⁰ and ILEC interconnection practices,¹¹ the FCC looked to the behavior of one ILEC to determine whether a particular level of performance could

⁹ *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee. for Consent to Transfer Control et al.*, Memorandum Opinion and Order, 14 FCC Rcd. 14712, ¶ 108 (1999) (“Given [their] incentives to resist competitive entry, independent LECs, absent collusion, are likely to adopt different defensive strategies to forestall competitive entry, and each particular strategy will reveal information to regulators and competitors. One incumbent LEC may claim, for example, that a particular form of interconnection is infeasible, while a second may resist the unbundling of a particular network element, and a third may oppose collocation of specific types of equipment in central offices. In such situations, the behavior of other major incumbent LECs can be used as benchmarks to evaluate the outlying incumbent’s claims.”).

¹⁰ For example, in its *New York 271 Order*, the FCC noted that Bell Atlantic was able to process order volumes much faster than BellSouth and Ameritech. This comparison provided evidence that Bell Atlantic’s systems were working in a non-discriminatory fashion. *See Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, ¶ 165 (1999) (“*New York 271 Order*”); *id.* n.508.

¹¹ For example, the FCC held in the *Local Competition Order* that interconnection at a particular point on ILEC A’s network creates a presumption that interconnection at a similar point is possible on ILEC B’s network. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 204 (1996) (“*Local Competition Order*”). In that same order, the FCC concluded that it was technically feasible for ILECs to provide access to OSS functionality in part because “several incumbent LECs, including NYNEX and Bell Atlantic, are already testing and operating interfaces that support limited [OSS] functions...” *Local Competition Order* ¶ 520. In 1998, the FCC requested comment on the feasibility of cageless collocation, because U.S. WEST “is currently offering a cageless collocation arrangement, and SBC is permitting competitive LECs to share collocation space.” *Deployment of Wireline Services Offering Advanced Telecommunications Capability et al.*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, ¶ 139 (1998). In a subsequent order the FCC ordered cageless collocation based on evidence that certain ILECs were providing the service. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of proposed rulemaking, 14 FCC Rcd 4761, ¶ 45 (1999) (holding that one ILEC’s deployment of a particular type of collocation establishes a rebuttable presumption that it is generally technically feasible for other incumbent LECs to provide the same collocation arrangement).

be reasonably imposed on all ILECs.¹² That same principle should apply to regulation of pole attachments to the extent that utilities are similarly-situated.

In any event, no utility pole owner has presented any evidence in this proceeding that its particular circumstances justify a refusal to comply with the practices advocated by the Fibertech and the Joint Commenters. For example, PacifiCorp argues that “[t]he FCC has also acknowledged that local factors, such as extreme temperatures, ice and snow accumulation, wind, and other weather conditions all affect a utility’s safety and engineering practices, particularly pole attachment policies.” *Pacificorp et al. Comments* at 26. But neither PacifiCorp or any other pole owner has even attempted to show that such conditions would prevent it from complying with the presumptions proposed in this proceeding. To the extent that utilities have argued that company-specific engineering standards or practices are tied to the specific needs of that particular utility (i.e., ground clearance), those standards and practices are not at issue in this proceeding.¹³

The utilities’ goal in making generalized and unsubstantiated claims regarding safety is simple--scare the FCC into believing that straightforward changes in utilities’ practices could

¹² As the FCC explains, in best-practice benchmarking, “a regulator compares behavior across a group of similarly situated, independent firms in order to identify the best practice employed by a firm.” *Application of GTE Corp., Transferor, and Bell Atlantic Corp. Transferee, For Consent to Transfer Control et al.*, Memorandum Opinion and Order, 15 FCC Rcd, 14032 ¶ 111 (2000) (“*Bell Atlantic/GTE Merger Order*”).

¹³ For example, Florida Power and Light argues that its particular practices and standards reflect the fact that its utility network must withstand frequent Hurricanes: “[o]ne example of these differences [from the NESC] is minimum grade clearance (the minimum height above ground, for mid span clearances, at which attachments must be made.)” *Florida Power & Light et al. Comments* at 8. But no party in this proceeding is advocating a general rule regarding ground clearance. *See also* Oncor Electric Delivery Company (“Oncor”) *Comments* at 8 (“while the NESC requires...15.5 feet of clearance over state roads...the Texas Department of Transportation requires 22 feet of clearance...[.]”).

cripple the utility grid. In reality, utilities simply would *prefer* not to adopt these practices. Utilities likely do not want to permit, for example, the use of qualified third parties to perform survey and make-ready work, because they would like to control the work themselves.¹⁴ Section 224 itself is designed to constrain utilities' ability to act in accordance with unjust, unreasonable or unreasonably discriminatory preferences. The only issue here is whether a pole owner can prove that the safety and engineering regulations proposed by Fibertech and the Joint Commenters are actually not practical or are unsafe in a particular situation. Absent such evidence, the pole owner should be required to comply with regulations that will yield substantial efficiencies for attachers and that will materially advance the promotion of broadband service to all Americans.

1. The Proposed Make-Ready and Survey Periods Are Reasonable

The utilities argue that the proposed timelines for survey and make-ready work are impractical, and that, in any event, utilities have no incentive to delay work associated with new attachments. *See, e.g.*, Florida Power IOUs Comments at 20; Edison Comments at 86; PacifiCorp. *et al.* Comments at 29; Concerned Utilities Comments at 84-86; Oncor Comments at 15; UTC Comments at 32. Again, the utilities' own behavior demonstrates that they are ready and able to perform make ready work within the time periods proposed by Fibertech and the Joint Commenters. For example, while Fibertech's and the Joint Commenters' proposed timeframe for make-ready work vary slightly, both have proposed that make-ready work be

¹⁴ Indeed, the utilities themselves seem to indicate that this is the case. *See The Problem with Pole Attachments*, Utilities Telecom Council White Paper, WC Dkt. No. 07-245, at 15 (filed Mar. 7, 2008) ("UTC White Paper") ("While utilities may allow third parties to perform [make ready and field surveys], most *prefer* to hire the contractor themselves. Alternatively, some utilities *prefer* to use their own workers to perform make ready and field surveys, rather than use third parties at all.") (emphasis added).

completed in approximately 60 days. UTC has stated in this proceeding that “most utilities reported that it usually takes 60 days or less” to complete make-ready work. *See* UTC White Paper at 17. Progress Energy of Florida even voluntarily agreed in its pole attachment agreement with TWTC to complete make ready-work within 60 days. *See TWTC/Progress Energy Pole Attachment Contract* § 3.06. This is so despite the fact Progress Energy of Florida argues in its comments in this proceeding that make-ready timelines are inappropriate.¹⁵

Furthermore, the fact that several states now require that make-ready and survey work be completed within a short time period supports a presumption that all utilities are capable of meeting these timelines.¹⁶ No utility operating in states in which short make-ready and survey periods are mandated has provided evidence that it has been unable to meet the timelines established by these states.

¹⁵ *See* Florida Power & Light *et al.* Comments at 20 (“While timelines might not be a problem for *small* jobs, the time to perform the make-ready work can vary significantly depending on many factors, some of which are beyond an electronic utility’s control[.]”) (emphasis added). As TWTC has explained elsewhere, the timelines and other practices proposed by attachers are merely presumptions which can be rebutted by the attacher. If the utility truly could not complete the make-ready work in time because of events “outside of the utilities” control, this evidence would go to whether the presumption was adequately rebutted.

¹⁶ Joint Commenters noted in their initial comments that the Maine PUC mandated that Verizon “complete all make-ready work within 45 days so long as pole replacement was not necessary.” *See* Joint Commenters Comments at 27 (citing *Oxford Networks Request for Commission Investigation into Verizon’s Practices and Acts Regarding Access to Utility Poles*, Docket No. 2005-486, 2006 Me. PUC LEXIS 390 *30 (Oct. 26, 2006) (“*Oxford Networks*”). Fibertech also cited to *Oxford Networks* for this same proposition. *See* Fibertech *et al.*, Comments at 21-22. It has subsequently come to the Joint Commenters’ attention that the portion of this decision relating to make ready time periods (but not the use of boxing and extension arms) was subject to a reconsideration order from Maine PUC. That order mandated that Verizon must complete make-ready work within 90 days so long as pole replacement was not necessary. *See Oxford Networks Request for Investigation into Verizon’s Practices and Acts Regarding Access to Utility Poles*, Docket No. 2005-486, 2007 Me. PUC LEXIS 63 *7 (Feb. 28, 2007).

There is also no basis in the utilities' claim that they lack the incentive to slow roll make-ready work. The ILECs have a clear incentive to delay make-ready work as they obviously directly compete with cable companies and CLECs for voice, video and data service. The utilities' incentives are similar, if not identical to, the ILECs' to the extent that the utilities compete directly with telecommunications and cable companies in the provision of downstream service. For example, the FCC recently found that "616 public power entities offer some kind of broadband services, serving about 14 percent of total households in the United States."¹⁷ In addition, many of the parties that filed comments in this proceeding either work with utilities that provide telecommunications services or are themselves utilities provide such services themselves. For example, the goal of the Utilities Telecom Council ("UTC"), which filed comments in this proceeding, is to promote the telecommunications business of utilities.¹⁸ The Southern Company also filed comments in this proceeding. Southern Telecom, the communications subsidiary of Southern Company, asserts on its website that its access to Southern Company's rights of way provides it with a unique competitive advantage in deploying telecommunications networks.¹⁹ That competitive advantage is obviously greater where the

¹⁷ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, ¶ 128 (2006).

¹⁸ See Utilities Telecom Council, *About UTC* ("The Utilities Telecom Council (UTC) is a global trade association dedicated to creating a favorable business, regulatory, and technological environment for companies that own, manage, or provide critical telecommunications systems in support of their core business. Founded in 1948 to advocate for the allocation of additional radio spectrum for power utilities, UTC has evolved into a dynamic organization that represents electric, gas, and water utilities; natural gas pipelines; critical infrastructure companies; and other industry stakeholders."), at <http://www.utc.org/about-utc> (last visited Apr. 22, 2008).

¹⁹ See Southern Telecom, *Dark Fiber & Conduit* ("Additionally, fast direct access to Southern Company assets and to transmission and distribution rights of way help speed development of new points of service throughout the Southeast. For instance, use of an idle steam pipe network running under metropolitan Atlanta enabled Southern Telecom to lock in valuable real estate and

utility pole owner can slow roll competitive telecommunications carriers' access to rights of way, including poles.

Even utilities that do not provide telecommunications service or cable service would appear to have substantial incentives to slow roll the make-ready process. To begin with, utilities have an incentive to complete make-ready work for their own facilities before third-party facilities. In all events, if the pole owner adds unnecessary projects to make-ready work or completes make-ready work inefficiently, it can increase the charges for make ready imposed on attachers. Since such charges are unregulated and utilities have no obligation to provide cost justification for their make-ready work, this offers the pole owner a substantial opportunity to increase its revenues. The record in this proceeding is full of examples of this kind of conduct. *See, e.g.*, Fibertech Comments at 39; Declaration of Jeff Jarvis, attached to Joint Commenters Comments. The utilities have not offered any basis for concluding that they will stop engaging in this conduct absent regulation.

2. **The Commission Should Require Utilities To Allow Attachers to Hire Third-Party Contractors To Perform Make Ready And Survey Work**

Utilities argue that utilities should not be required to allow third-party contractors to perform make-ready and survey work, because this practice will endanger the safety of the

accelerate the permitting and construction process to better serve key buildings.”) at <http://www.southern-telecom.com/darkfiber.asp> (last visited Apr. 22, 2008); *see also* FPL FiberNet LLC, *Company History* (“FPL Group’s fiber-optic network was originally developed in the late 1980’s to provide internal telecommunications services to support company operations. In 1996, FPL began selling excess fiber-optic capacity along its network to the major telecommunications companies operating in Florida. FPL FiberNet, LLC acquired an existing 1,600-mile inter-city fiber network from Florida Power & Light. The company was launched in early 2000 to sell fiber-optic network capacity and dark fiber on a wholesale basis to local and long distance telephone companies, Internet Service Providers and other telecommunications companies in Florida.”), at <http://www.fplfiber.net/about/contents/overview.shtml> (last visited Apr. 22, 2008).

electrical grid. *See, e.g.,* Pacificorp *et al.* Comments at 30; Edison Comments at 87; Concerned Utilities Comments at 86-89; Florida Power & Light *et al.* Comments at 21. But there is no basis for this assertion.

To begin with, the utilities' own practices demonstrate that use of third-party contractors by attachers is a widespread practice. For example, the Utilities Telecom Council estimates that 34 percent of utilities permit licensees to hire third parties to perform field surveys and 22 percent permit licensees to hire third parties to perform make-ready work. *See* UTC White Paper at 16. Indeed, TWTC's pole attachment agreement with Duke permits TWTC to hire from a list of approved contractors to perform make-ready work.²⁰ In One Communications' experience, AEP permits the use of third-party contractors in, among other places, West Virginia. Utilities objecting to the practice of using qualified third-party contractors provide no basis for concluding that they are differently situated from Duke or other utilities that permit this practice.

Concerned Utilities, among others, asserts that third-party access could result in unqualified workers compromising the utilities' networks. *See* Concerned Utilities Comments at 87. But this is a straw man. Under the rules proposed by Fibertech's and supported by the Joint Commenters, the utility pole owner is free to establish standards for those working on its poles and can simply supply a list of pre-approved contractors. *See* Joint Commenters Comments at 18; Fibertech Networks *et al.* Comments at 25. If there is information about poles to which only the pole owner has access, the pole owner can obviously share that information with the qualified third-party technician. Presumably, utilities that rely on third-party contractors do this already.

²⁰ *See* Duke/TWTC Pole Attachment Agreement § 5.3(c) ("Upon notice pursuant to Exhibit A....Licensor shall proceed with additional Make Ready Work covered by the Make Ready Estimate, except to the extent that Licensee is permitted or required to contract directly with an approved contractor or engineering firm for Make Ready Work as provided in this Section 5.3.").

Some utilities go even further and argue that attachers should not be allowed to use qualified contractors, because the utility has the *sole right* to the labor of the allegedly limited number of qualified contractors. For example, Concerned Utilities argues that, “[i]f contractors that are certified to do this type of make ready work become less available to utilities because they are being called upon by attachers to do their work first (perhaps at a higher fee), operations could suffer because utilities would have a harder time obtaining the resources needed to complete the work....Another result of the labor shortage would be higher costs for utilities and their rate payers.”²¹ But the utilities do not cite to any section of the Communications Act or any other law that gives them the right to monopolize an entire class of *independent* contractors for their own business purposes. The Commission should therefore reject the Concerned Utilities proposal.

3. The Commission Should Require Utilities To Allow Access To Pole And Conduit Records

The utilities argue that access to pole and conduit records and access to conduits themselves is inappropriate, because of national security concerns. For example, Alabama Power argues, ominously, that examination of such records will “reveal sensitive information regarding exacting detail of electric distribution systems and electrical grids used to provide service to military, airports[.]...Such information in the hands of a terrorist or any other group or

²¹ Concerned Utilities Comments at 87-88. *See also* Florida Power & Light *et al.* Comments at 21 (“The Florida IOUs do not dispute that ‘owner approved contractors’ are capable of performing this work safely, including make ready work in the power supply space. However, this does not resolve the very real issue of resource diversion....Once qualified, these contractors are valuable resources. If they are being hired at will by CATVs and CLECs, there will be fewer such workers available to perform work needed to...provi[de] safe and reliable electric service[.]”).

individual intent on nefarious conduct could prove to be a disaster.” *Alabama Power et al.* Comments at 36. The Commission should disregard this crude scare tactic.

Regardless of whether the pole and conduit records contain sensitive information, the utilities do not, and cannot, provide any explanation as to why attackers are more likely to, inadvertently or intentionally, provide such information to bad actors. There is therefore no reason to think that utilities are a more trusted custodian of such information than a third party seeking access to poles or conduit.

Several utilities argue that access to conduit records or the physical inspection of manholes and conduit would cause the party seeking access to learn the identities of other service providers that occupy conduits. *See, e.g.,* UTC Comments at 33; Edison Comments at 90; PacifiCorp. *et al.* Comments at 31-32; Florida Power & Light *et al.* Comments at 22; Alabama Power *et al.* Comments at 35-36.. They argue further that such information is competitively sensitive and should not be disclosed to parties seeking conduit access. But, as Fibertech notes assuming that the attachments are correctly marked, anyone can simply tell by looking which companies have attached to the poles. *See* Fibertech Networks *et al.* Comments at 34. There is no reason that conduit occupants should be granted any more protection for their facilities than utilities. Moreover, AT&T apparently permits CLECs “to perform both conduit record searches and (except in Ohio) to use AT&T-approved contactors to perform the physical manhole inspection confirming the written records.” *Id.* at 37. Apparently many other utilities have adopted similar practices. *See id.* Such voluntary practices offer powerful support for the conclusion that mandated access to conduit records and to conduits themselves is reasonable.

4. **The Commission Should Require Utilities To Allow Attachers To Use Boxing And Extension Arms Where Appropriate**

Numerous utilities argue that the use of boxing and extension arms creates an untenable safety risk. *See, e.g.*, UTC Comments at 31; Oregon PUC Comments at 5; Edison Comments at 84-85; PacifiCorp *et al.* Comments at 27; Florida Power & Light *et al.* Comments at 18-19; Oncor Comments at 21; Concerned Utilities Comments at 81 This argument runs contrary to the utilities' own conduct and to common sense.

To begin with, the utilities themselves already employ boxing and extension arms in many circumstances. According to UTC, 46 percent of utilities permit extension arms, usually to avoid pole replacement or because there are obstructions that prevent a normal attachment. *See* UTC White Paper at 16. While Verizon has expressed the concern that use of boxing and extensions creates safety problems, many states in Verizon's region permit the use of boxing and extension arms. *See* Joint Commenters Comments at 26-28; Fibertech Networks *et al.* Comments at 17. Yet neither Verizon nor any other pole owner has presented has evidence that (1) it has had difficulty complying with these rules or (2) that the conditions in these states or the networks of the utilities in these states are especially amenable to the use of boxing or extension arms.

In any event, Fibertech's proposal accounts for any legitimate safety concerns associated with boxing and extension arms. As Fibertech argues, boxing would only be permitted under its proposal in those instances where compliance with the NESC would be met and if bucket trucks were available. *See* Fibertech Networks *et al.* Comments 16-17. In addition, to the extent that a particular pole owner asserts that it is unable to meet the NESC standards, it would be free to demonstrate that its particular circumstances make compliance unreasonable.

V. THE COMMISSION SHOULD DECLINE TO EXPAND UTILITIES' REMEDIES FOR UNAUTHORIZED ATTACHMENTS AND SHOULD ESTABLISH RESTRICTIONS TO LIMIT UTILITIES' OPPORTUNITIES TO ENGAGE IN SELF-HELP

Various electric utilities allege that the attachment of unauthorized facilities to their poles is a widespread problem, that the Commission's current remedies for such unauthorized attachments are inadequate, and that utilities should be given even greater discretion to assess penalties for such attachments. These sweeping claims are not supported by substantial evidence in the record of this proceeding.

Although some electric utilities contend that unauthorized attachments are a pervasive problem, estimates provided by other utilities indicate otherwise. For example, PPL Electric Utilities asserts that 57.1 percent of all cable attachments made to its poles during the period 2002 – 2006 were unauthorized. *See* AEPSC Comments at 14. Toledo Edison claims that 33 percent of the cable attachments on its poles in 2002 were unauthorized (*see* Concerned Utilities Comments at 74) and CenterPoint Energy reports that 34 percent of cable attachments that it has surveyed to date were unauthorized. *See* Edison Comments at 34. By contrast, Progress Energy states that its 2006 pole audit revealed that 6.18 percent of the attachments on its poles were unauthorized. *See* AEPSC Comments at 16. Duke Energy reports that 6.5 percent of cable attachments made to its poles between 2002 and 2006 in North and South Carolina were unauthorized. *See id.* at 13. Xcel Energy reports that 4.9 percent of the attachments made between 2002 and 2006 were unauthorized, (*see id.* at 18) and Wheeling Power states that an inventory it conducted indicated that only 2 percent of the attachments on its poles were unauthorized. *See id.* at 11, Table 1. In short, the evidence provided by the utilities regarding the incidence of unauthorized pole attachments is, at best, mixed.

Other evidence in the record suggests that reports of high numbers of unauthorized attachments may well be overstated. Time Warner Cable, for example, cites instances in which a utility's faulty record-keeping caused the utility to seek payments for allegedly unauthorized attachments for which the cable company had in fact been paying rent for years. *See* Time Warner Cable, Inc. ("TWC") Comments at 55. In other cases, utilities effectively created "unauthorized" attachments by requiring attachers to obtain permits for equipment already on the poles that previously did not require such authorizations. In these circumstances, the pre-existing equipment that had been affixed in compliance with the utility's requirements at the time of attachment instantly became unauthorized attachments through no improper action by the pole user.²² The suggestion by some utilities that they should be given the discretion to assess greater penalties in the future as a way of deterring such "unauthorized" attachments is plainly meritless.

Even when electric utilities undertake an inventory of the equipment attached to their poles to identify unauthorized attachments, pole users have little assurance that the inspection has been conducted in an unbiased manner. Electric utilities typically contract periodically with third party auditors to perform such pole audits and compensate the auditors on the basis of a per-attachment fee. The pole auditors, thus, have a compelling economic incentive to maximize the number of attachments reported. Moreover, in TWTC's experience, utilities may calculate the number of unauthorized attachments to poles within an area by simply comparing, on a per-pole basis, the results of the contractor's pole survey with the number of attachments for which each pole user has obtained permits. Although the two surveys may have used quite different definitions of what constitutes a separate attachment, utilities may classify all of the difference

²² *See id.*; *see also* Comments of Knology, Inc. at 18 ("the unauthorized status is often the result of the utility's retroactive enforcement of a change in its attachment policies.").

between the two counts as unauthorized attachments. *See, e.g.*, AEPSC Comments at 19; Oncor Comments at 16-17; Edison Comments at 77-78.

As the foregoing discussion shows, the evidence submitted by the utilities themselves does not demonstrate that unauthorized pole attachments are a serious problem. Nonetheless, several utilities claim that the problem is so severe as to warrant expanding the remedies they may impose to penalize pole users for unauthorized attachments.²³ Ameren Services and Virginia Electric and Power assert that they should have the right to remove unauthorized attachments without notice to the attachers, (*see* Ameren Comments at 10) a move that would instantly disrupt cable and telephone service, including 9-1-1, for affected consumers. Other utilities allege that “an unrealistically low cap on penalties utilities can charge for violations of notice have [sic] resulted in a widespread and serious problem of unauthorized attachments.” AEPSC Comments at 12. Several electric utilities specifically seek authority to impose penalties for unauthorized attachments ranging from \$100 to \$500 *per pole* plus a charge of five times the annual rental fee for the current year. *See* Edison Comments at 79; *see also* Concerned Utilities Comments at 77-78.

These requests for an excessive and unreasonable expansion in pole attachment penalties ignore the fact that the Commission repeatedly has considered and rejected precisely the same penalty amounts in enforcement proceedings. The Enforcement Bureau, for example, recently

²³ As with so many of their arguments, the electric utilities overstate the safety risks of unauthorized attachments as a scare tactic to get the FCC to afford them greater discretion. If unauthorized attachments really presented the safety risk that utilities contend, the 57 percent unauthorized attachment rate on PPL Utilities’ poles would have severely compromised its system’s operations or caused multiple incidents of harm. PPL does not contend that either has occurred. Indeed, when utilities “discover” unauthorized attachments during their pole inventories, they typically do not require removal or modification of the attachments. To the contrary, it is simply a matter of money: they want payment. The safety concerns, while not entirely absent, are overlaid to generate a particular regulatory response.

rejected a \$250 penalty for each unauthorized attachment and confirmed that a utility may recover no more than compensatory damages for unauthorized attachments, absent specific record evidence that would support a greater penalty.²⁴ The Bureau’s finding is consistent with prior Commission holdings that a reasonable penalty for an unauthorized pole attachment is an amount equal to the rent owed for the period beginning on the date the equipment was attached plus interest.²⁵ In cases in which the date of attachment could not be determined, the Commission has concluded that a reasonable assessment is an amount equal to the annual pole attachment fee from “the number of years since the most recent inventory or five years, whichever is less.”²⁶

These well-settled Commission holdings rest on sound principles of contract law that prohibit the enforcement of unreasonable penalties for breach of contract.²⁷ The Commission’s general limitation to compensatory damages for unauthorized attachment penalties is also consistent with the Supreme Court’s admonition that,

²⁴ *Salsgiver Communications, Inc. v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 20536, ¶ 28 (EB 2007) (“*Salsgiver*”).

²⁵ *See Cable Television Association of Georgia v. Georgia Power Company*, Order, 18 FCC Rcd 16333, ¶ 22 (EB 2003).

²⁶ *Mile Hi Cable Partners v. Public Serv. Co. of Colo.*, Order, 15 FCC Rcd 11450, ¶ 14 (CSB 2000), *aff’d* 17 FCC Rcd 6268 (2002), *aff’d sub nom. Public Serv. Co. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003) (“*Mile Hi Bureau Order*”).

²⁷ *Mile Hi Cable Partners v. Public Serv. Co. of Colo.*, Order, 17 FCC Rcd 6268, ¶ 10 (2002), *aff’d sub nom. Public Serv. Co. v. FCC*, 328 F.3d 675 (D. C. Cir. 2003) (citing *Space Master International, Inc. v. City of Worcester*, 940 F.2d 16, 17-18 (1st Cir. 1991) citing *Priebe & Sons v. Unites States*, 332 U.S. 407, 411-414 (1947); *Restatement (Second) of Contracts* § 356 (1979 Main Vol.) (“Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.”); *Perino v. Jarvis*, 312 P.2d 108 (Colo. 1957)).

[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.²⁸

The mere existence of unauthorized attachments, without more, does not warrant the imposition of such enormous penalties. This is especially true when the "unauthorized" status is not a function of the pole attachers' practices, but rather those of the pole owner.

Rather than expanding the utilities' powers, the Commission should narrow the unilateral remedies available to utilities for allegedly unauthorized pole attachments. Utilities today often ignore the Commission's existing restrictions and seek to charge excessive penalties for unauthorized attachments.²⁹ Progress Energy and Oncor, for instance, both stated that their current pole attachment agreements impose a \$25 per attachment penalty for unauthorized attachments, (*see* Florida Power & Light *et al.* Comments at 12; Oncor Comments at 17) an amount that the FCC in prior enforcement decisions has declared unreasonable. *See, e.g., Mile Hi* Bureau Order ¶ 16. Other utilities also disregard Commission rulings, claiming that enforcement decisions are case-by-case adjudications and do not provide policies of general applicability, requiring attachers to fight the same battle over and over again.

In view of this record of utility practices that are abusive and clearly illegal, the Commission should establish national rules governing the remedies that a utility may assess for unauthorized pole attachments. Specifically, the Commission should codify its repeated rulings that utilities generally may recover only a compensatory amount for unauthorized pole

²⁸ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

²⁹ *See, e.g.,* TWC Comments at 56 (explaining that a utility claims that Time Warner Cable owes it 24 years of back pole rental, which exceeds the 5-year maximum imposed by several pole attachment enforcement decisions).

attachments (*i.e.*, an amount equal to the back rent owed for the period that the attachment was on the pole (not to exceed a period of five years or the time since the last pole inventory, whichever is less) plus interest at the rate prescribed by the Internal Revenue Service for income tax underpayments by individuals). 26 U.S.C. § 6621. In those rare circumstances when a utility believes an additional penalty should be assessed, the Commission should require the utility to seek that relief through a formal FCC complaint proceeding. Further, if the utility demonstrates that the attachments at issue are in fact unauthorized, the number of attachments had been accurately determined, and an additional assessment is warranted, the additional penalty amount should be paid to the United States Treasury, not the utility.

In addition to limiting a utility's financial remedies for unauthorized attachments, the Commission should also curb unreasonable enforcement tactics that utilities sometimes employ. For example, pole users in some cases may find it necessary to pay unreasonable amounts to resolve unauthorized attachment claims because utilities have the ability unilaterally to stop a pole user's construction of a broadband network – by refusing to process the user's permit requests for new attachments. The fact that the utility's claims ultimately may be shown to be without merit simply underscores the unreasonableness of the practice.

This proposed constraint on the utilities' permitting practices is both sound as a policy matter as well as consistent with the Act. Section 224 of the Act states that “a utility shall provide a cable television system . . . with nondiscriminatory access to any pole . . . owned or controlled by it.” 47 U.S.C. § 224(f)(1). The statute establishes only four explicit exceptions to that general mandate: “a utility providing electric service may deny a cable television system . . . access to its poles . . . on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.” 47 U.S.C. §

224(f)(2). Refusing to process *new* attachment requests due to a dispute over unauthorized attachments plainly does not qualify under any of those four exceptions. The Commission, therefore, should make clear that utilities must continue processing a pole user's new attachment requests while any dispute over unauthorized attachments is ongoing.

VI. THE COMMISSION SHOULD REJECT UTILITIES' EXPANSIVE READING OF THE ELEVENTH CIRCUIT'S DECISION IN THE *SOUTHERN* CASE

Under the statute and the Commission's rules, a utility may deny access to a pole if there is "insufficient capacity" to accommodate the proposed attachment. *Id.*; 47 C.F.R. § 1.1403(a). Several electric utilities ask the Commission to expand this limited exception to their obligation to provide access upon request. Specifically, the utilities seek to define "insufficient capacity" to mean "any instance in which make-ready (in the form of rearrangement or pole change-out) is necessary to accommodate a proposed attachment[.]" Alabama Power *et al.* Comments at 28. The utilities' proposal is clearly unreasonable and should be rejected. Instead, the Commission should adopt the proposal advanced by the Joint Cable Operators to ensure that utilities may deny access only when capacity on the poles in fact has been exhausted.

Because almost all requests for a new pole attachment require some rearrangement of the existing facilities on a pole, the impact on pole users of the utilities' proposed definition would be devastating. A utility could reject virtually any request for a new attachment simply because the attachment would require what might be an extremely minor rearrangement. As a result, the existing limited exception would be expanded to eclipse the utilities' primary obligation to offer reasonable, non-discriminatory access to their poles.

The electric utilities previously have attempted to gain a comparable expansion of their authority to deny pole attachment requests. The utilities argued before the Eleventh Circuit that "the language permitting utilities to deny access on the basis of 'insufficient capacity'

specifically entrusts the utilities with the power to determine when capacity is insufficient.”³⁰

The court rejected that reading of the statute, finding that “Petitioners’ construction of the Act, which claims that the utilities enjoy the unfettered discretion to determine when capacity is insufficient, is not supported by the Act’s text.” *Id.* at 1348. The court found, instead, that the Commission, *not* the utilities, has the discretion to determine when pole capacity is insufficient. The Eleventh Circuit reasoned that, because “the statute is silent on the scope and parameters of the term ‘insufficient capacity,’” (*id.*) the Commission has the authority to adopt a reasonable interpretation of the term.

The Eleventh Circuit’s decision makes clear that the Commission may adopt rules defining “insufficient capacity” so as to ensure that a utility may not deny access to its poles unless capacity in fact has been exhausted. In that case, the court upheld the Commission’s requirement that a utility must have a *bona fide* development plan before it may reserve space on a pole, stating that “the FCC must have some way of assessing whether these [utility-related] needs are *bona fide*.” (*id.*). The court further concluded that the FCC acted reasonably in ruling that a utility may not claim insufficient capacity when it has unused “reserve space” available on its poles. *Id.* at 1349.

In establishing rules to define “insufficient capacity,” the Commission should give maximum effect to the utilities’ access obligations that were at the heart of the 1996 amendments to section 224. When a utility denies a request for access to its poles, the affected cable operator or telecommunications carrier typically has no other realistic alternative for deploying its facilities since, as courts have recognized, the cost of installing new poles would be

³⁰ *Southern Company v. FCC*, 293 F.3d 1338, 1347 (11th Cir. 2002).

“prohibitive.”³¹ Moreover, a utility’s denial of access to even a small subset of its poles could stop entire neighborhoods from receiving broadband services and prevent consumers from having competitive alternatives in video or telecommunications services. In light of the importance of the access obligations to the construction and maintenance of broadband networks, any exceptions to those obligations should be narrowly construed.

Simply stated, a utility should be required to implement all reasonable methods of accommodating additional attachments before it may claim insufficient capacity. Accordingly, the Commission should adopt the Joint Cable Operators’ proposal under which “pole capacity is insufficient under Section 224(f)(2) and 1.1403(a) of the Commission’s rules only when space for new attachments cannot be made through reasonable make-ready construction by way of pole change-outs and line rearrangements.”³² Consistent with its prohibition against a utility’s unreasonable reservation of space, the Commission should make clear that a utility must undertake every safe and reasonable method for maximizing the use of space on a pole before it may deny access on the basis of insufficient capacity.

In addition, the Commission should specify that the methods for expanding available capacity on a pole include boxing or bracketing (*i.e.*, the use of extension arms), and any other

³¹ *Id.* at 1341 (“The start up costs of constructing an entirely new set of poles and other distribution facilities for cable television cables are prohibitive, and when coupled with the difficulties of obtaining regulatory approval for a distinct set of utility poles, the barriers to such construction are insurmountable.”); *see also National Cable & Telecommunications Ass’n v. Gulf Power*, 534 U.S. 327, 330 (2002) (“Since the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They 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.”); *Alabama Power Co.*, 311 F.3d at 1362 (“In the view of Congress, the costs of erecting an entirely new set of poles would have created an insurmountable burden on cable companies.”).

³² *Ex Parte* Presentation of Christopher A. Fedeli, counsel to the Florida Cable & Telecommunications Association *et al.* to Marlene H. Dortch, Secretary, FCC, RM-11303, at 1 (Mar. 21, 2006).

safe and reasonable methods. Many utilities currently use or permit the use of brackets or boxing³³ and the National Electrical Safety Code sanctions this practice.³⁴ Further, the Enforcement Bureau recently declared a utility's prohibition against boxing to be unreasonable. In that case, the Bureau rejected the utility's claims that boxing was unsafe and made it difficult for utility workers to climb poles on the grounds that the allegations were "unsupported by specific facts or analysis, and [were] undermined by the evidence of some boxing on [the utility's] poles." *Salsgiver* ¶ 21.

The *Southern Company* decision emphasizes the Commission's authority to determine when a utility may use the "insufficient capacity" exception to deny access to a utility pole, duct, conduit, or right-of-way. The Commission should use that authority to adopt rules that maximize the efficient use of the pole, minimize the circumstances when access reasonably may be denied, and promote the construction, expansion and improvement of telecommunications, cable, and broadband networks.

VII. THE FCC SHOULD NOT CHANGE ITS OVERLASHING POLICIES

Utilities raise several arguments regarding overlashing, all of which have already been rejected by the FCC. Utilities argue that (1) overlashing increases the cost of maintaining poles

³³ See, e.g., Concerned Utilities Comments at 82 (acknowledging that some of the coalition members permit boxing and the use of extension arms); Verizon Comments at 19 (acknowledging the use of boxing and extension arms); PacifiCorp, *et al.* Comments at 27 (acknowledging the use of boxing and extension arms).

³⁴ See *Oxford Order* *30 ("Neither the NESC nor the Blue Book prohibit or restrict boxing. On the contrary, the Blue Book contains information illustrating how to properly box a pole. Moreover, the Blue Book (section 3.2) specifies that the 12-inch separation requirement between cables at the pole may be measured diagonally when the cables are on the opposite sides of the poles as long as the minimum 4 inch separation between bolts is maintained. The measurement of the 12-inch minimum separation requirement diagonally (rather than vertically as required by Verizon) results in additional space on the pole.").

because of the overlashed facility increases the load on the pole;³⁵ and an overlasher should therefore be considered a separate attacher and should pay a separate, additional fee directly to the pole owner,³⁶ and (2) a party should not be permitted to overlash without prior pole owner authorization.³⁷ The utilities present no new support for these arguments, and the Commission should reject them as it has in the past.

Overlashing provides important public interest benefits “because it maximizes the usable space capability on a pole [and]...is an important element in promoting the policies of Section 224 and 257 to provide diversity of services over existing facilities, fostering the availability of telecommunications services to communities, and increasing opportunities for competition in the marketplace.”³⁸ While recognizing these benefits, the FCC balanced its promotion of overlashing with its recognition of utilities’ “concerns regarding engineering specifications and arranging for access and notification.” *See id.* ¶ 60. The result is a regulatory regime that

³⁵ *See, e.g.*, Edison Comments at 23 (...overlashing, depending on the size and composition of the added wire, can significantly increase the wind and ice load.”); Oncor Comments at 19 (“[overlashing] presents a new burden on poles which raises safety, reliability, capacity and engineering concerns.”).

³⁶ *See, e.g.*, Edison Comments at 109 (“...the Commission should require that each overlashing should be counted as an additional attachment for which the attaching entity must pay a separate, additional rate. If the overlashing belongs to the owner of the existing attachment, such existing attachers should pay an additional fee. Likewise, if the overlashing belongs to a party other than the owner of the existing attachment, either the existing attacher or the overlasher should pay the additional fee for such additional attachment.”).

³⁷ *See id.* at 73 (“an application for permission should be required for each new, individual attachment under the Commission’s jurisdiction, including overlashing of existing wires and any other modification to an existing attachment.”); *see also* Ameren Comments at 9; Oncor Comments at 20; UTC Comments at 37.

³⁸ *See also 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*, 13 FCC Rcd 6777, ¶¶ 60, 62 (1998) (“*Telecom Order*”).

includes both robust overlashing rights for third parties as well provisions protecting utilities' rights to ensure the safety and viability of their physical infrastructure. The utilities have offered no basis in this proceeding for concluding that this regime is deficient in any way.

A. Overlashers Should Not Pay An Additional Fee Or Be Treated As Separate Attachers

Several utilities argue that each overlasher should pay an additional recurring pole attachment fee and should be treated as a separate attaching entity, because “overlashed attachments impose[] substantial wind and ice loading burdens on electric utility poles.” Comment at 109. This is a *non sequitur*. It may or may not be true that overlashing materially increases the load on poles in some circumstances. However, make-ready charges already compensate utilities for any increased costs caused by overlashing. Any additional recurring pole attachment fee would simply constitute an unjustified wealth transfer to utilities.

The Commission has already reached exactly this conclusion. In ruling on Duquesne Light's petition for reconsideration of the *Local Competition Order* in which Duquesne made essentially the same arguments made by utilities in this proceeding,³⁹ the Commission held that the “burden” created by overlashing (e.g., typically only additional weight) can be compensated for by “make-ready charges to the pole structure, including pole change out, to meet the needs of the NESC.” *Id.* ¶ 28. The FCC later reaffirmed this conclusion,⁴⁰ and it has been applied in

³⁹ Duquesne Light argued that “overlashing an attachment will increase the loading on the pole, especially during adverse icy and windy weather conditions... This increase in loading, Duquesne Light argues, necessitates the charging of an additional fee for the overlashed cable, as well as treatment of the overlap as a separate attachment.” *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, ¶ 27 (2000).

⁴⁰ *See Pole Attachments Recon. Order* ¶ 77 (“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 pile structure, including pole change-out, to meet the strength requirements of the NESC. For example, if the addition of overlashed wires the an existing attachment causes

subsequent pole attachment adjudications.⁴¹ There is no reason for the FCC to reverse itself here.

Moreover, an overlasher is not treated as a separate attacher under the Commission's rules because "an overlashing entity does not occupy additional space on the pole." *Pole Attachments Recon. Order* ¶ 58. Overlashing does not result in the deployment of any new physical attachments to the pole such as brackets or other facilities attached to the pole. Overlashing only requires a slight change to a pre-existing attachment. The utilities have provided no evidence to reverse this conclusion, nor could they given that overlashed competitive telecommunications carrier and cable company fiber cables are often extremely narrow and, when properly overlashed, take up little or no additional space. The overlashed cable is secured to the host cable with a thin wire tightly wrapped around the two cables without any additional physical attachments to the pole itself.

B. Attachers Should Not Be Required To Obtain Approval From A Pole Owner Prior To Overlashing

Utilities also have offered no justification for requiring attachers to obtain pole owner approval before overlashing. The FCC has on at least three separate occasions declined to grant utilities pre-approval rights for overlashing.⁴² A pre-approval process would substantially

an excessive weight to be added to the pole requiring additional support or causes the cable sag to increase to a point below safety standards, then the attacher must pay the make-ready changes to increase the height or strength of the pole.").

⁴¹ See *Kansas City Cable Partners v. Kansas City Power & Light*, Consolidated Order, 14 FCC Rcd 11599 (CSB 1999) (dispute over the number of poles which must be replaced, at Time Warner Cable's expense, due to additional attachments and overlashing by Time Warner Cable exceeding NESC guidelines for wind and ice loading).

⁴² See *id.* ¶ 75 ("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

diminish the benefits of overlashing, because it would delay an otherwise relatively quick process for deploying telecommunications facilities, including those needed to provide broadband internet access service. In any event, a pre-approval requirement for overlashing makes no sense because there are no circumstances in which overlashing would be unsafe assuming the appropriate make-ready work is performed. Indeed, while the utilities spill much ink describing the additional ice and wind loading purportedly caused by overlashing (*see, e.g.*, Edison Comments at 29-30), the utilities never discuss the fact that ice and wind loading issues are fully addressed by strengthening the pole in the make-ready process.

A pre-approval requirement would also run counter to the underlying logic of the pole attachment regulatory regime. Utilities have no incentive to permit overlashing just as they have no incentive to provide access to their poles at reasonable rates. Utilities that are given the right to prohibit overlashing absent prior approval will likely reject the request in most or all cases unless the overlasher agrees to make unreasonable extra payments to the pole owner. Congress sought to constrain exactly this kind of conduct when it mandated in Section 224 that utilities permit telecommunications carriers to attach to their poles unless there is “insufficient capacity” or where rejection is justified “for reasons of safety, reliability and generally applicable engineering standards.” 47 U.S.C. § 224(f)(2). None of the utilities has shown that any of these reasons would justify prior approval or denial of overlashing assuming that the appropriate make-ready work is performed.⁴³

than the approval obtained for the host attachment”) (citing *Local Competition Order* ¶¶ 1161-64; *Telecom Order* ¶ 68).

⁴³ Indeed, Edison Electric justifies preapproval simply because overlashing increases the load on the pole: “overlashing significantly changes the load profile of the pole including wind shear and ice loading factors.” Edison Comments at 74-75.

In any event, many of the concerns raised by utilities regarding the increased burden on poles purportedly caused by overlashing could be addressed by establishing a simple notification requirement to ensure that cables are overlashed safely. The Commission already allows utilities to require notice from overlashers. *See Pole Attachment Recon Order* ¶ 82. The Commission’s existing requirements adequately protect utilities, and no additional requirements (and in particular, no additional pole attachment application process) are necessary. In all events, however, such notification must not give utilities the right to delay, deny or insist upon unreasonable conditions for overlashing either by an existing attacher or by a third party.

VIII. THE FCC SHOULD RETAIN AND STRENGTHEN THE SIGN AND SUE RULE

In an apparent attempt to increase further their leverage in negotiating pole attachment contracts, the utilities argue that the FCC should eliminate the sign and sue rule, adopt a presumption that all terms contained in executed pole attachment contracts are reasonable, and clarify that a utility may include a performance bond or cash deposit requirement in a pole attachment agreement. The Commission need not even address these arguments and, in all events, should reject them.

As an initial matter, it does not appear that the FCC has requested comment on whether the sign and sue rule should be retained. Rather, the Commission invited comment on whether it should adopt new “contours” to a number of rules regarding pole attachment contracts, including the sign and sue rule *See NPRM* n.110; *Pacific Corp. et al. Comments* at 32. An agency provides adequate notice as to an issue if it is a “logical outgrowth” from the issues addressed in a notice seeking comments.⁴⁴ It is a stretch, to say the least, to assert that *eliminating* a rule is a

⁴⁴ *See Sierra Club v. Costle*, 657 F.2d 298, 352 (D.C. Cir. 1981).

natural outgrowth of a request for comments as to whether the “contours” of a rule should be modified.⁴⁵

In any event, the conditions that led the FCC to adopt the sign-and-sue rule in the first place are still present today. The premise of the sign-and-sue provision, indeed, the entire premise of the pole attachment regulation first adopted in 1978, is that there is unequal bargaining power between the pole owner and attacher. *See Telecom Order* ¶ 21.⁴⁶ The sign-and-sue rule, like the right to access the poles themselves, was meant to equalize this bargaining position.⁴⁷ While many more communications and cable service providers entered the market in

⁴⁵ *See Shell Oil Co. v. E.P.A.*, 950 F.2d 741, 751 (D.C. Cir.1991) (holding that comments anticipating a profound shift in emphasis between the proposed and final rules were not sufficient to provide adequate notice, where the agency did not expressly or impliedly propose that shift); *National Black Media Coalition v. F.C.C.*, 791 F.2d 1016, 1023 (2d Cir. 1986) (holding that statements in the FCC's notice indicating that the agency was considering changes to non-technical requirements of its minority preference policy did not fairly apprise parties of the final rule's abandonment of these non-technical requirements, and anticipation by commenters of the final rule did not cure the notice's inadequacy); *see also Small Refiner Lead Phase-Down Task Force v. E.P.A.*, 705 F.2d 506, 546-47 (D.C. Cir. 1983) (while the final rule may “differ in some particulars” from the proposed rule, “if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal.”); *Sierra Club v. Costle*, 657 F.2d 298, 352 (D.C. Cir. 1981) (the “logical outgrowth” test allows “incremental changes” from the proposals highlighted and discussed during the notice and comment period).

⁴⁶ *See also* Declaration of Steven Hamula on behalf of FiberNet ¶ 2, attached hereto as App. A (“The parties to pole attachment agreements do not approach potential negotiations with an equal bargaining position. Quite the contrary, pole owners continue to use their monopoly position and resulting market power to require contract terms and conditions that provide an extraordinary amount of protection for the pole owner without providing equal protection for a competitor like FiberNet seeking attachment authority.”) (“*Hamula Declaration*”).

⁴⁷ If the parties had equal bargaining positions, Section 224 itself arguably would not have been necessary. Where telecommunications carriers or cable operators are forced to enter agreements to obtain timely access to poles (*i.e.*, they lack the time necessary to litigate a pole attachment complaint at the FCC *prior to* attaching), the elimination of the sign and sue rule would effectively deny the FCC the authority to review the terms of pole attachment agreements entered into by parties with dramatically unequal bargaining positions. This would eviscerate the goals and protections of section 224. Indeed, it is questionable whether the FCC would have the

recent years, including the utilities themselves, utilities continue to possess a monopoly over poles and conduits. No utility has argued to the contrary. Therefore, the sign and sue rule remains necessary.

Utilities nevertheless argue that the sign-and-sue rule is unnecessary because “the sign-and-sue rule was adopted to address concerns that pole owners would force ‘take-it-or-leave-it’ terms on attaching entities and thereby deny prompt access to poles [but] the reality is that attaching entities are sophisticated contracting parties and well aware of their rights under the Pole attachment Act and the FCC’s rules.” *Pacific Corp. et al*, Comments at 33. But even a “sophisticated” purchaser has no leverage when negotiating with a monopolist. As FiberNet explains, “the pole attachment agreements...are essentially ‘take it or leave it’ type template agreements that leave no room for meaningful negotiation.” *Hamula Declaration* ¶ 8. In those instances where a utility does engage in negotiations, the process can take an unreasonably long time, sometimes six months or more. Much of the time spent on negotiations includes discussion of the utilities onerous demands, including utilities’ insistence on inclusion in agreements of provisions that have already been deemed unlawful by the FCC.

A. Utilities’ Continued Attempts To Force Attachers To Sign Illegal Contract Provisions Demonstrates That The Sign And Sue Rule Remains Necessary

Utilities’ insistence that attachers sign agreements containing provisions that the Commission has deemed unlawful proves the continued need for the sign-and-sue provision.⁴⁸

authority to ignore or derogate its statutory obligations to ensure that pole attachment rates, terms, and conditions are just, reasonable, and nondiscriminatory.

⁴⁸ In fact, Indiana-Michigan Power is currently demanding from TWTC a contract provision that would seem to have the effect of eliminating TWTC’s sign and sue right itself. The contract provision is as follows: “Both parties acknowledge that, prior to negotiation of this Agreement, the parties carefully reviewed all relevant provisions of state and federal statutes and regulations relating to the regulation of Owner’s facilities, and that the negotiations freely conducted herein

For example, utilities continue to demand unlawful penalty provisions. Duke recently insisted upon charging TWTC \$70 for each unauthorized attachment. In that case, TWTC was able to negotiate to have this provision removed. However, because TWTC needed immediate access to Duke's poles, it likely would have signed the contract even if Duke did not remove the offending provision.

Similarly, TWTC has encountered substantial difficulty in negotiating reciprocal *force majeure* clauses even though the FCC has explicitly ruled that the imposition of non-reciprocal *force majeure* clauses is unlawful.⁴⁹ For example, despite substantially limiting its own liability in its contract, Progress Energy refused to include a *force majeure* clause in its pole attachment agreement with TWTC. TWTC had no choice but to sign the agreement. In addition, TWTC is currently negotiating to enter into an agreement with Alabama Power Company ("APC"). This new agreement is to be based on an agreement previously signed between APC and a coalition of cable companies. That earlier agreement did not contain a reciprocal *force majeure* clause. APC has similarly refused to include such a clause in its agreement with TWTC. Given that TWTC needs access to APC's poles, it, like the cable companies who signed the earlier agreement, may be forced to sign its contract without a reciprocal *force majeure* clause. The sign and sue rule provides vital protection to attachers that find themselves in this situation. Moreover, in the

were undertaken without duress and with full knowledge of any rights either party may have pursuant to such state or federal law. Both parties believe the fees charged herein to be in compliance with any applicable state or federal law. Each and every provision of this Agreement is considered an essential exchange of consideration hereto." See Draft Indiana-Michigan Power Pole Attachment Agreement § 23.

⁴⁹ *The Cable Television Association of Georgia v. Georgia Power Company*, Order, 18 FCC Rcd 16333, ¶ 34 (2003) ("CTA/GA Power Order") ("In the event, for example, that a pole is rendered unusable because of inclement weather, the Cable Operators should be no more responsible for paying rental for unusable pole space than Georgia Power should be responsible in damages for the fact that the pole is unusable.").

absence of the sign-and-sue rule, each of these disagreements would have resulted in a pole attachment complaint proceeding at the FCC. Indeed, the Commission in that circumstance would be flooded with formal complaints because attachers would be unwilling to enter into pole attachment agreements that they could not challenge at the FCC. The sign-and-sue rule thus provides administrative benefits by reducing the number of complaints brought to the Commission (*i.e.* only those unreasonable terms and conditions that the utilities actually seek to enforce are litigated before the FCC).

B. The Sign And Sue Rule Is Not An Impediment to Good Faith Negotiations

Finally, several utilities assert that the sign-and-sue rule is an impediment to good faith negotiation for access to poles. But there is no basis for this assertion.

For example, Pacific Corp. argues that the sign-and-sue rule “dispenses with any need for the attaching entity to negotiate in good faith because the attaching entity can merely disavow any provisions with which it agrees at a later date and seek modification of the agreement through the FCC’s pole attachment complaint process.” Pacific Corp. *et al.* Comments at 33. There is no basis for this assertion. Adjudicating pole attachment complaints can cost hundreds of thousands of dollars. Such litigation costs often exceed the charges due under a pole attachment agreement or, more to the point, the money that an attacher might save if the unlawful provision is eliminated from the contract. Attachers therefore have powerful incentives to negotiate an agreement that does not include provisions that need to be litigated in the future. For this reason, the sign and sue rule does not diminish attachers’ incentive to engage in good faith negotiations with utilities. But the rules remain necessary in light of pole owners’ monopoly control over those facilities.

C. The FCC Should Prohibit Certain Contractual Clauses Routinely Demanded By Utilities.

In the Joint Commenters' experience, utilities repeatedly attempt to impose the same discriminatory and unreasonable terms and conditions on attachers. To the extent that the FCC has not yet declared such provisions unlawful, it should do so here. In this way, the Commission could strengthen the protections against utilities' exploitation of their leverage in pole attachment agreement negotiations.

For example, TWTC has had substantial difficulty negotiating simple change-of-law provisions with a severability clause (i.e., under which the rest of an agreement remains valid even if one or more provisions are deemed unlawful). Specifically, Indiana-Michigan Power has refused to include such a provision in its pole attachment agreement with TWTC. Indiana-Michigan asserts that, if any provision of the agreement is declared unlawful, the party *against whom the ruling was made* should have the right to declare the entire agreement null and void.⁵⁰ Thus, under this proposed provision, if an attacher successfully challenges the lawfulness of a provision of a pole attachment agreement, the utility can simply declare the rest of the agreement null and void, and furthermore, could insist that the attacher remove its facilities from the utility's poles. This is obviously both unreasonable and inefficient. To prevent utilities from insisting on such a provision in the future, the Commission should declare unlawful any attempt by utilities to demand a clause terminating the entire contract if a single provision is declared unlawful.

⁵⁰ See Draft Indiana-Michigan Power Pole Attachment Agreement § 23 (“To the extent that either party may challenge any provision of this Agreement as a violation of state or federal law and is successful, then upon the sole option of the party to which such determination adversely affects, this Agreement shall terminate effective as of such determination. Upon such termination both parties shall enter into negotiations for a new agreement in compliance with such determination.”).

The FCC should also ensure that attachers gain the right to insist on reasonable contract assignment provision in pole attachment agreements and that such provisions are expeditiously enforced. Many agreements require consent of the utility to assign the agreement, but do not provide a time period within which approval will be granted. When advised of the FCC decision in *Cable Television Ass'n of Georgia v Georgia Power* case that, “absent extraordinary circumstances,” a utility must “grant its consent expeditiously,” (*CTA/GA Power Order* ¶ 37) utilities still drag their feet, sometimes indefinitely if they believe that the agreement at issue disadvantages them. The FCC should therefore hold that contracts with assignment provisions should be assigned within 60 days unless the utility can show why its consent was not “unreasonably withheld.”

Lastly, the manner in which utilities impose bonding requirements is often discriminatory and should be reformed. All of TWTC’s agreements require the posting of a bond as a payment and performance guarantee. The bond must remain in place for the entire term of the agreement and is often subject to increase as the utility deems reasonably necessary.⁵¹ Utilities generally refuse to include in pole attachment agreements provisions that reduce or eliminate the bond requirements if the attacher has a good credit profile and has consistently paid its attachment fee on time. But without a reduction in bonding requirements, an attacher’s capital is unnecessarily encumbered and may not be deployed for more productive uses. As FiberNet explains, these excessive bonding and credit provisions “effectively serve to make it as burdensome as possible to obtain the critical access to pole attachments that is necessary in order for FiberNet to provide

⁵¹ The amount of many of the bonds is usually based on the number of attachments or an amount equal to two years or more of annual attachment fees. Some agreements contain a minimum bond amount of anywhere from \$10,000 to \$30,000. For smaller carriers or carriers entering into a new market, the minimums can be unreasonably large and can frustrate competitive entry.

competitive telecommunications and broadband services to end user customers.” *Hamula Declaration* ¶ 7. Of course, if there were a competitive pole market, utilities would compete for attachers with good credit just like banks compete to get the customer with the best credit rating by lowering their credit card rate or offering other incentives.

Given the utilities’ unjust bond conditions, utilities should be required to accept provisions that reduce the amount of the bond once good credit and regular payment has been established. Accordingly, a utility’s refusal to include such a “de-escalation” clause in its contract should be presumed to be unjust and unreasonable unless the utility can demonstrate why such a clause was inappropriate in that circumstance.

IX. THE COMMISSION SHOULD NOT IMPOSE FURTHER REPORTING AND INSPECTION REQUIREMENTS ON ATTACHERS

The Coalition of Concerned Utilities states that “[u]tilities should be allowed to require attachers to inspect their facilities at regular intervals and to provide an annual certification from an officer of the company that all of their attachments were installed correctly by their contractors and currently comply with NESC and other requirements[.]” Concerned Utilities Comments at 77. EEI and UTC similarly propose that each attacher “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 type of service provided using that attachment. The report should be signed by a senior officer of the cable or telecommunications company at the level of director or higher who is responsible for pole attachments.” Edison Comments at 76. These proposals would require the needless expenditure of substantial resources and, consequently, should be rejected.

As a threshold matter, the utilities currently perform their own periodic inspections of their poles and are instructed to recover the costs incurred in those inspections from attachers

through the recurring annual pole attachment rates.⁵² The utilities proposing the additional inspections do not suggest that they would use the results obtained from the attacher-conducted inspections in lieu of their own inspections. To the contrary, the utilities emphasize in their comments their responsibility for maintaining control over their distribution systems. For example, EEI/UTC expressly state that “[u]tilities cannot delegate the approval of surveys and make-ready work to third party contractors and they should not be required to relinquish this amount of control over their own property.” Edison Comments at 87. Thus, it would appear that the proposed attacher-conducted inspections would simply duplicate the current efforts of the utilities and require pole users to absorb the cost of both.

Moreover, the utilities’ proposal would require multiple inspections of the same poles each year. If, for example, there were five attachers on a pole, five separate inspections would be conducted every year. The performance of a single inspection, the costs of which are shared among all attachers, is a more efficient and cost-effective method of maintaining accurate information about the utility pole system. The utility, as the owner of the facilities, is the appropriate entity to conduct that inspection in a reasonable and cost-effective manner.⁵³ Attachers should not be forced to duplicate tasks that the utility should be performing in its normal course of business. The Commission, therefore, should reject the utilities’ proposal to require multiple costly inspections of their poles.

⁵² The Enforcement Bureau has stated that “costs attendant to routine inspections of poles, which benefit all attachers, should be included in the maintenance costs account and allocated to each attacher in accordance with the Commission’s formula.” *CTA/GA Power Order* ¶ 16; *see also Cable Texas v. Entergy Services Inc.*, Order, 14 FCC Rcd 6647, ¶ 13 (1999); *Newport News Cablevision v. Virginia Electric and Power Co.*, Order, 7 FCC Rcd 2610, ¶ 8 (1992).

⁵³ A pole owner is required to keep any costs imposed on an attacher to reasonable levels. *See Salsgiver* ¶ 2 (citing to *Cable Texas, Inc. v. Entergy Services, Inc.*, Order, 14 FCC Rcd 6647, ¶ 14 (CSB 1999)).

X. THERE IS NO NEED TO ADDRESS UTILITIES' RIGHT TO FILE COMPLAINTS AGAINST ATTACHERS

EEI and UTC propose that “utilities should [] have the opportunity to file a complaint with the Commission regarding unauthorized attachments and other violations of the Commission’s notice requirements by attaching entities.” Edison Comments at 81. They seek a revision in the definition of “complaint” in the Commission’s regulations to permit this proposal. However, the revision is unnecessary because the current form of the Commission’s rules already permits utilities to file pole attachment complaints with the Commission.

It is always preferable to resolve disputes through negotiations, rather than litigation. When a complaint proceeding becomes necessary, however, the expertise developed by the Commission in over 30 years of pole attachment regulation promotes the fair and equitable resolution of pole attachment disputes. When utilities seek recourse against an attacher in a forum other than the FCC, they tend to file their complaints as contract claims with state courts. State courts, while certainly capable of resolving disputes, lack an intimate experience with pole attachment regulation that would allow them to appreciate the full impact of their decision on federal communications policy. Accordingly, utilities, like attachers, should bring disputes over pole attachment rates, terms, and conditions to the Commission rather than to state courts for resolution.

The Commission has the statutory authority to hear utility pole attachment complaints. Section 224 requires the Commission to “adopt procedures necessary and appropriate to hear and resolve complaints concerning [pole attachment] rates, terms, and conditions” (47 U.S.C. § 224 (b)(1)) without regard to the identity of the complainants. The Commission’s current rules reflect that authority in that they do not prohibit utilities from filing pole attachment complaints. The Commission’s rules define “complainant” to include “a utility” or “an association of

utilities” who files a complaint (47 C.F.R § 1.1402 (e)) and the definition of “complaint” includes a filing “by . . . a utility [or] an association of utilities.” *Id.* § 1.1402 (d). Indeed, on June 29, 2004, a utility, CenterPoint Energy Houston Electric, LLC, filed a pole attachment complaint against Time Warner Cable⁵⁴ under the Commission’s current rules. Although the rules require the complaint to “state with specificity the pole attachment rate, term or condition which is claimed to be unjust or unreasonable,” (47 C.F.R. § 1.1404 (e)) this could equally apply to a condition that an attacher seeks to impose on a utility. Because existing rules already permit utilities to file pole attachment complaints with the Commission, there is no need for a change in the rules.

XI. CONCLUSION

For the foregoing reasons, the Joint Commenters’ recommendations regarding pole attachment regulations should be adopted.

⁵⁴ *CenterPoint Energy Houston Electric, LLC v. Texas and Kansas City Cable Partners, L.P. d/b/a Time Warner Cable*, Complaint, EB-04-MD-009 (filed June 29, 2004).

/s/

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April 22, 2008

APPENDIX A

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

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

Declaration of Steven Hamula

I, Steven Hamula, declare as follows:

1. I am employed by FiberNet, LLC (“FiberNet”), a One Communications company, as the Director of Regulatory Affairs. FiberNet is a facilities-base competitive local exchange carrier that operates primarily in West Virginia, but also provides telecommunications service to end user customers located in Pennsylvania, Maryland and Ohio.

2. In my capacity as the Director of Regulatory Affairs, I have coordinated the submittal of FiberNet’s requests for pole attachment and conduit agreements with both incumbent local exchange carriers and electric utilities.

3. As a facilities-based competitive telecommunications provider, timely and non-discriminatory access to utility poles, ducts, conduits and rights-of-way is critical to FiberNet’s ability to provide telecommunications and broadband service to its end user customers.

4. In this proceeding, the question has been raised as to whether the Commission should adopt certain limitations on the ability of an attacher to execute a pole attachment agreement and later file a complaint challenging the lawfulness of a

provision of that agreement.

5. Based upon FiberNet's experience, any proposed rule seeking to eliminate or otherwise inhibit the ability of attachers to formally complain about unreasonable terms and conditions in pole attachment agreements would not only be ill-advised, but would also unfairly inhibit FiberNet's ability to provide competitive telecommunications services to its end user customers on a prospective basis.

6. The parties to pole attachment agreements do not approach potential negotiations with an equal bargaining position. Quite the contrary, pole owners continue to use their monopoly position and resulting market power to require contract terms and conditions that provide an extraordinary amount of protection for the pole owner without providing equal protection for a competitor like FiberNet seeking attachment authority.

7. In FiberNet's experience, it is commonplace for pole attachment contract terms to include advance payment and deposit provisions, surety bond and/or letter of credit requirements, and excessive insurance obligations that effectively serve to make it as burdensome as possible to obtain the critical access to pole attachments that is necessary in order for FiberNet to provide competitive telecommunications and broadband services to end user customers.

8. The pole attachment agreements proposed by both incumbent local exchange carriers and power companies are essentially "take it or leave it" type template agreements that leave little or no room for meaningful negotiation. During the process of requesting, negotiating and eventually executing a pole attachment agreement, all of the leverage and advantage is with the involved utility and none is with the telecommunications provider seeking attachment to the utility's poles.

I declare under penalty of perjury that the foregoing is true to the best of my
knowledge and belief.

4-21-2008
Date


STEVEN HAMULA