

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

WC Docket No. 07-245
RM-11293
RM-11303

**REPLY COMMENTS OF VERIZON IN RESPONSE TO NOTICE OF
PROPOSED RULEMAKING**

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I. INTRODUCTION

There is widespread consensus that the existing regulatory regime for pole attachment rates distorts competition and undermines Section 706's goal of promoting the deployment of advanced communication services because it results in competing providers of broadband services paying widely varying rates for pole attachments.¹ To fix this broken system, the Commission should promptly exercise its statutory authority under Section 224(b)(1) and adopt a uniform rate for broadband attachments (which includes all attachments that are capable of providing broadband services) by *all* providers of telecommunications services, including incumbent LECs, and cable television systems. As AT&T's comments suggest, the implementation of this new rate formula would be facilitated if the Commission adopted a

¹ See, e.g., Comments of National Cable & Telecommunications Association, WC Docket No. 07-245 at 15 (Mar. 7, 2008); Comments of Knology, Inc., WC Docket No. 07-245 at 4 (Mar. 7, 2008); Comments of Time Warner Cable Inc., WC Docket No. 07-245 at 10-11 (Mar. 7, 2008) ("Time Warner Cable Comments"); Comments of Idaho Power Company, WC Docket No. 07-245 at 5 (Mar. 7, 2008); Comments of AT&T, WC Docket No. 07-245 at 10 (Mar. 7, 2008) ("AT&T Comments"); Comments of Verizon, WC Docket No. 07-245 at 3-6 (Mar. 7, 2008) ("Verizon Comments"); Comments of the United States Telecom Association, WC Docket No. 07-245 at 6-7 (Mar. 7, 2008) ("USTelecom Comments"); Reply Comments of Seth Cooper,

rebuttable presumption that all attachments by providers of telecommunications services and cable television systems that offer broadband services are broadband attachments.²

As Verizon's comments explain, the new rate formula for broadband attachments should produce the lowest possible rates that would bring about competitive parity between cable television systems while appropriately and equitably compensating pole owners for their pole attachment carrying costs.³ Consistent with these objectives, the Commission should reject calls to exclude broadband attachments by incumbent LECs from this rate formula. Any other result would perpetuate the current regulatory regime's harmful effects on competition and the deployment of broadband services. The Commission should also revise its rebuttable presumptions concerning poles and its pole cost methodology to ensure that pole attachment rates appropriately compensate pole owners while keeping pole attachment rates at equitable levels. The Commission should, however, reject any proposed revisions to the Commission's current pole cost methodology that would result in inequitable pole attachment rates.

The Commission should also clarify that incumbent LECs have the right to just and reasonable pole attachment rates, terms, and conditions and can file complaints before the Commission to enforce those rights. Verizon, AT&T, and USTelecom's Comments explain that many electric utilities have superior bargaining power and often abuse this leverage to force incumbent LECs to accept unreasonable pole attachment rates, terms, and conditions—all of which serve as obstacles to and create strong disincentives for deploying facilities necessary to provide broadband services.⁴ Absent the above clarification, this abuse will continue.

Director, Telecommunications & Information Technology Task Force American Legislative Exchange Council, WC Docket No. 07-245 at 1-2 (Apr. 1, 2008).

² See AT&T Comments at 16-18.

³ See Verizon Comments at 6.

⁴ See Verizon Comments at 16-17; USTelecom Comments at 7; AT&T Comments at 7.

Finally, the record demonstrates that the Commission should not adopt “one-size-fits-all” rules concerning the terms and conditions of access to poles.⁵⁶ Accordingly, as it has done in the past, the Commission should reject calls to regulate additional terms and conditions of access to poles and conduit.

II. DISCUSSION

A. The Commission Should Promptly Exercise Its Express Statutory Authority and Adopt a Uniform Rate Formula for Broadband Attachments.

1. Section 224(b)(1) Expressly Authorizes the Commission to Regulate Attachments by *All* Providers of Telecommunications Services and Cable Television Systems.

As explained in the Comments of Verizon, AT&T and USTelecom, Section 224(b)(1) expressly authorizes the Commission to adopt a uniform rate formula for broadband attachments by *all* providers of telecommunications services (which includes incumbent LECs) and cable television systems.⁷ The contrary arguments made by some electric utilities, competitive LECs, and cable television systems lack merit. Indeed, Section 224(b)(1) makes plain that the Commission has the authority to “regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable.”⁸ Section 224(a)(4), defines the term “pole attachment” as “*any attachment by a . . . provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.*”⁹ There is no

⁵ See, e.g., *Verizon Comments* at 18-20; Comments of Ameren Services Co. and Virginia Electric Power Co., WC Docket No. 07-245 at 11-14 (Mar. 7, 2008) (“Ameren Comments”); Comments of Edison Electric Institute and Utilities Telecomcouncil, WC Docket No. 07-245 at 8, 83-91 (Mar. 7, 2008) (“EEI Comments”); Oncor Electric Delivery Company’s Initial Comments, WC Docket 07-245 at 3-5 (Mar. 7, 2008).

⁶ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1143 (1996) (“*Local Competition Order*”).

⁷ See *Verizon Comments* at 6-16; *USTelecom Comments* at 12-17; *AT&T Comments* at 25-33.

⁸ 47 U.S.C. § 224(b)(1).

⁹ 47 U.S.C. § 224(a)(4) (emphasis added).

dispute that an incumbent LEC is a “provider of telecommunications service.”¹⁰ Moreover, as previously explained in AT&T and Verizon’s Comments, the Supreme Court’s decision in *Gulf Power*, and Section 224’s legislative history confirm that Section 224(b)(1) grants the Commission general authority to regulate just and reasonable rates for pole attachments by all providers of telecommunications service and cable television systems.¹¹

The contrary argument advanced by some commenters—that Section 224(b)(1) precludes the Commission from regulating attachments by incumbent LECs—fails. Those commenters rely almost exclusively on Section 224(a)(5)’s definition of the term “telecommunications carrier” which excludes incumbent LECs.¹² But, as explained in Verizon’s Comments, the term “telecommunications carrier” *does not* appear in Section 224 (a)(4) or (b)(1), the two sections that make plain that the Commission has the authority to regulate the terms and conditions of pole attachments by “cable television system[s] or provider[s] of telecommunications service.”¹³ Nor is there any indication that Section 224(a)(5)’s narrow definition of the term “telecommunications carrier” limits the scope of the Commission’s express authority to regulate attachments by all providers of telecommunications service and cable television systems or the scope of the term “provider of telecommunications services.” Additionally, contrary to the claim of some commenters, there is no indication that the terms “provider of telecommunications service” and “telecommunications carrier” are interchangeable for purposes of Section 224.¹⁴

¹⁰ *See id.* § 153(46) (“The term ‘telecommunications service’ means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”).

¹¹ *See* AT&T Comments at 29-30; Verizon Comments at 12-14 (citing S. Rep. No. 104-230, at 206 (1996) (Conf. Rep.), and H.R. Rep. No. 104-204, pt.1, at 92 (1996) *as reprinted in* 1996 U.S.C.C.A.N. 10, 58).

¹² *See, e.g.*, EEI Comments at 110-12; Ameren Comments at 30-31.

¹³ 47 U.S.C. § 224(a)(4); *see* Verizon Comments at 10.

¹⁴ *See* Comments of Comcast Corp., WC Docket No. 07-245 at 49 (Mar. 7, 2008) (“Comcast Comments”); EEI Comments at 111.

Tellingly, the commenters making this claim do not provide a single cite to support their contrary contention.

Similarly, the Commission should reject the claim that Sections 224(f) and (d) demonstrate that Congress did not intend to authorize the Commission to regulate the rates, terms and conditions for attachments by incumbent LECs, because those sections respectively grant cable television systems and telecommunications carriers, but not incumbent LECs, access rights to poles and conduit and do not require the Commission to apply either existing rate formula to attachments by incumbent LECs.¹⁵ First, neither Section 224(f) nor Section 224(d) has any bearing on whether Congress intended to grant the Commission authority to regulate pole attachments by incumbent LECs. Indeed, Sections 224(f) and (d) are wholly independent from Section 224(b)(1) and do not even reference Section 224(b)(1). Second, as fully explained in Verizon's Comments, in the same year that Congress expanded the scope of pole attachments covered under Section 224(b)(1)'s non-discrimination mandate to include pole attachments by any "provider of telecommunications service" and "cable television systems, Congress also added the definition of the term "telecommunications carrier."¹⁶ Congress' intentional use of these two wholly distinct terms in the same statute must be given full force and effect.¹⁷

Finally, the Commission should reject the claim that the Commission's *1998 Implementation Order* excludes incumbent LECs from any rate formulas the Commission adopts

¹⁵ See, e.g., Time Warner Cable Comments at 47-48; EEI Comments at 115-116.

¹⁶ See Verizon's Comments at 8-10.

¹⁷ See, e.g., *Clay v. United States*, 537 U.S. 522, 528-29 (2003) ("When 'Congress includes particular language in one section of a statute but omits it in another section of the same Act,' we have recognized, 'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); accord *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

under Section 224(b)(1).¹⁸ As explained in Verizon’s comments, the *1998 Implementation Order* expressly recognized that “the term pole attachment is defined in terms of attachments by a ‘provider of telecommunications service’ not as an attachment by a ‘telecommunications carrier,’” thereby supporting the argument that attachments by incumbent LECs are covered under Section 224(b)(1).¹⁹

In light of the above, and as Verizon, AT&T and USTelecom have previously explained, the Commission should promptly exercise its express statutory authority and adopt a uniform rate formula for broadband attachments by all providers of telecommunications services, including incumbent LECs, and cable television systems. Additionally, the Commission should develop a mechanism for efficiently implementing this rate formula by creating a rebuttable presumption that all pole attachments by providers of telecommunications services and cable television systems that offer broadband services are covered under this new rate formula. As explained in AT&T’s Comments, adopting such a rebuttable presumption is warranted because LECs and cable television systems that offer broadband services use the vast majority of their pole attachments to provide broadband services.²⁰ Absent such a presumption, pole owners and attachers would be forced to bear significant administrative burdens to determine which attachments were covered under the new rate formula, potentially serving as an obstacle to infrastructure development.

2. The Public Interest Would Be Served if Attachments by Incumbent LECS Were Covered Under the New Uniform Rate Formula For Broadband Attachments.

¹⁸ *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 Red 6777 (1998) (“*1998 Implementation Order*”); see Comcast Comments at 51; EEI Comments at 123-24; Ameren Comments at 35-37; Comments of PacifiCorp. *et al.*, WC Docket No. 07-245 at 6-7 (Mar. 7, 2008).

¹⁹ *1998 Implementation Order* ¶ 49.

²⁰ AT&T Comments at 16-17.

Despite claims to the contrary, there is no justification for excluding broadband attachments by incumbent LECs from the uniform rate formula the Commission ultimately adopts for broadband attachments. In today's marketplace, cable service providers vigorously compete with competitive and incumbent LECs to provide broadband services. Further, attachments by incumbent LECs do not create significantly greater costs than attachments by competitive LECs and cable television systems. Therefore, the current disparate regulatory treatment of attachments by incumbent LECs is not justified and should be eliminated through the adoption of a uniform rate formula for broadband attachments that covers broadband attachments by incumbent LECs, as well as broadband attachments by cable television systems and providers of telecommunications services.

Additionally, the public interest would not be served if the new uniform rate formula for broadband attachments excludes broadband attachments by incumbent LECs. The record demonstrates that under the existing regulatory regime, which does not regulate rates for attachments by incumbent LECs, incumbent LECs are generally forced to pay pole rental rates that are *at least two to three times* higher than the rental rates that competitive LECs and cable television systems pay.²¹ These unreasonable pole rental rates place incumbent LECs at a significant competitive disadvantage compared to other similarly-situated providers of broadband services and also create strong disincentives for deploying broadband services. Excluding attachments by incumbent LECs from the new uniform rate formula for broadband attachments would allow these harmful effects to continue to the detriment of consumers.

Finally, there is no merit to the claim that adopting a new rate formula for broadband attachments would throw existing licensing or joint use agreements into disarray. Like the two

²¹ See, e.g., Verizon Comments at 1-2, 5; USTelecom Comments at 7.

existing rate formulas, a uniform rate formula for broadband attachments would merely serve as a default rate. A new rate formula that includes incumbent LECs would simply provide incumbent LECs with the ability to challenge unreasonable pole attachment rates, terms and conditions.

B. The New Uniform Rate Formula for Broadband Attachments Should Achieve Competitive Parity Between All Providers of Broadband Services and Should Also Produce Equitable Pole Attachment Rates.

As explained in Verizon's Comments, the new uniform rate formula for broadband attachments should produce the lowest possible rates that would achieve competitive parity between all providers of telecommunications services and cable television systems while ensuring that pole owners are appropriately compensated for their pole costs.²² Consistent with these objectives, the Commission should modify its current rebuttable presumptions concerning pole height and the number of attachers per pole and its current pole cost methodology.

The Commission should, however, reject the modifications proposed by some electric utilities, including, but not limited to, suggestions that the Commission should abandon its current treatment of the communications worker safety space and the minimum required ground clearance, and its use of space allocation factors to calculate pole rental rates. Unlike the modifications recommended in these Reply Comments and AT&T's Comments, the modifications proposed by some electric utilities would significantly and unjustly increase the costs of pole attachments, and would therefore be inconsistent with Section 706's goal of promoting the deployment of broadband services.

1. The Commission Should Revise its Current Rebuttable Presumptions Concerning Pole Height and the Number of Attachers Per Pole.

Notwithstanding the fact that there is a significant difference between the average height of electric-utility-owned poles and the average height of incumbent-LEC-owned poles, the

Commission’s current rebuttable presumption is that the average pole height is 37.5 feet for all utilities. Consistent with AT&T’s Comments, the Commission should revise its presumption on average pole height.²³ However, any revisions to the existing presumption should reflect the differences between the average heights of poles owned by electric utilities and those owned by incumbent LECs.

Based on Verizon’s experience, the average height of incumbent-LEC-owned poles is only 35 feet tall, shorter than the current presumed height of 37.5 feet. Therefore, the Commission should revise its rebuttable presumption for the height of incumbent-LEC-owned poles to 35 feet. By contrast, electric utilities typically set poles that average 45 or 50 feet tall, with the excess height over 35 feet reserved for the sole use of the electric utility. Electric-utility-owned poles that are sixty or seventy feet tall are also becoming common. The current presumption does not reflect these industry trends. The Commission should therefore examine actual data concerning the average height of electric-utility-owned poles and set a new rebuttable presumption for electric-utility-owned poles based on that data.

Adopting a rebuttable presumption of four attachers per pole—a blend of the existing presumptions for rural and urban areas—would promote the deployment of broadband services in *all* areas and would also achieve efficiency and standardization. Moreover, as explained in AT&T’s Comments, an assumption of four attachers on a pole “better reflects actual conditions of pole usage.”²⁴ The data submitted by some of the electric utilities also supports adopting a rebuttable presumption of four attachers.²⁵

²² Verizon Comments at 6.

²³ See AT&T Comments at 19.

²⁴ AT&T Comments at 19.

²⁵ See Dominion Power Comments at 25 (acknowledging that “[i]n the case of Dominion Virginia Power and Amerens, the most common circumstance is that the pole is occupied by the

Additionally, the Commission should adopt a rebuttable presumption of four attachers per pole. Currently, the Commission presumes three attachers for poles in rural areas (electric, incumbent LEC, and cable) and five attachers for poles in densely populated urban areas (electric, incumbent LEC, cable, competitive LECs and governmental agencies). In rural areas, the presumption of three attachers produces higher pole rental rates than the presumption of five attachers for urban areas, creating a disincentive for the deployment of broadband services in rural areas.

2. The Commission Should Revise Its Existing Formula for Determining Pole Costs To Ensure That Pole Rental Rates Remain Equitable.

AT&T's Comments correctly explain that the Commission's existing formula for calculating pole costs can result in pole owners being overcompensated because it includes the costs of *all* poles in calculating pole costs and because pole owners to calculate pole rental rates without subtracting capital reimbursements or expenses that are not directly associated with the costs of the shared pole. As explained in AT&T's Comments, it is unreasonable to require attachers that do not have an ownership interest in a pole to help defray the costs of constructing a pole designed primarily to meet an electric utility's own need for a taller pole or increased pole strength.²⁶ Indeed, as AT&T's Comments explain, attachers should not be expected to defray the costs of replacing wood poles with significantly more expensive steel and concrete poles, or poles significantly higher than 45 feet, as these types of poles are generally constructed to serve the needs of the electric utility and not those of attachers.²⁷ Additionally, attachers should not be forced to defray costs that pole owners have already received capital reimbursements for or those

electric utility, an ILEC joint user, and two linear attaching entities, usually a cable company and a CLEC.”)

²⁶ AT&T Comments at 20.

²⁷ *See id.* at 20-21.

costs that are exclusively related to the conduct of the pole owner's own business or maintenance of the pole owner's own facilities.

Further, many of the rate formulas proposed by electric utilities improperly view the unusable space on a pole from a "costs-avoided" or "value-to-attacher" perspective.²⁸ The Commission should once again reject this type of "fair market value" view in favor of the current historical cost methodology.²⁹

3. The Commission Should Continue Treating the Safety Space As Usable Space and the Minimum Required Ground Clearance As Unusable Space.

The Commission has already concluded that the safety space (the forty inches required under the National Electrical Standards Code (NESC) between attachments in the electric utility space and the telecommunications providers space) is "usable and used [only] by the electric utility"³⁰ and that the eighteen feet of ground clearance required under the NESC is unusable space because it cannot be used to carry cable between poles. Contrary to the claims of some commenters, there is no reason for the Commission to adopt a different approach for either type of space. Although historically attachers have been allowed to install certain ancillary equipment in the ground clearance space, this ancillary equipment is in unusable space. Thus, this equipment should not be considered as occupying usable space for pole rental rates designed to compensate pole owners for occupied usable space.

The existing formulas are designed to ensure that pole owners recover the fully allocated cost of poles in annual rental rates. Pole owners would be overcompensated if they were

²⁸ See Comments of Coalition of Concerned Utilities, WC Docket No. 07-245 at 28-29 (Mar. 7, 2008).

²⁹ *Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶¶16-17 (2001).

³⁰ *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, ¶ 22 (2000).

permitted to charge additional rent for ancillary equipment placed in the minimum ground clearance space.

4. The Commission Should Reaffirm That Pole Owners' Attachments Should Be Counted For Purposes of Calculating Pole Rental Rates and That Pole Rental Rates Should Be Based on Space Allocation Factors.

The Commission should reject suggestions that pole owners' attachments should be excluded for purposes of calculating pole rental rates. As the Commission has previously explained, "[t]here is no indication from the statutory language or legislative history [for Section 224] that any particular attaching entity should not be counted."³¹ The Commission has also noted that "this conclusion is supported by Section 224(g) which requires that a utility providing telecommunications services impute to its costs of providing service an amount equal to the rate for which it would be liable under Section 224."³² Any other approach would unjustly increase pole rental costs, and would therefore be inconsistent with the goals of Section 706.

Similarly, the continued use of space allocation factors to calculate pole rental rates is the better approach because that approach equitably allocates pole costs based on each attacher's actual space usage. Any other approach would unjustly force incumbent LECs, competitive LECs, and cable television systems to bear costs that are disproportionate to their actual pole space usage.

C. The Commission Should Clarify That Incumbent LECs Can Use the Commission's Complaint Process to Enforce Their Right to Reasonable Rates, Terms and Conditions.

In addition to including broadband attachments by incumbent LECs in the new rate formula, it is equally critical that the Commission clarify that incumbent LECs have the same right as competitive LECs, wireless providers, and cable television systems to file complaints

³¹ 1998 Implementation Order ¶ 50.

³² *Id.* ¶ 51.

before the Commission to enforce their right to reasonable pole attachment rates, terms, and conditions for poles in which they lack an ownership interest. This clarification would further the Commission's goals of promoting competition and encouraging the deployment of broadband services. Moreover, the Commission's authority to regulate the rates, terms, and conditions of pole attachments by incumbent LECs would be meaningless if incumbent LECs could not file complaints to enforce their right to reasonable pole attachment rates, terms, and conditions.

The Commission should reject the claim that, because many incumbent LECs own some poles, incumbent LECs do not need access to the Commission's complaint process to enforce their right to reasonable pole attachment rates, terms, and conditions for poles in which they lack an ownership interest. The Comments of Verizon, USTelecom, and AT&T demonstrate that the electric utilities' status as majority pole owners has given them superior bargaining power over incumbent LECs, and that many electric utilities abuse this power to force incumbent LECs to accept unreasonable pole attachment rates, terms, and conditions.³³ Absent a regulatory solution that allows incumbent LECs to challenge agreements that they are forced to sign, this abuse will continue.

Similarly, the Commission should reject the argument that joint use agreements provide incumbent LECs sufficient protection from unreasonable rates, terms, and conditions.³⁴ Many

³³ See Verizon Comments at 17; AT&T Comments at 9; USTelecom Comments at 7.

³⁴ Some of the commenters suggesting that joint use agreements provide incumbent LECs sufficient protection from unreasonable pole attachment rates, terms, and conditions improperly conflate joint use agreements with joint ownership agreements. See, e.g., EEI Comments at 50-53; Comcast Comments at 24-30; Time Warner Cable Comments at 12-18. Joint use agreements are different in nature from joint ownership agreements and provide fewer benefits. Joint use agreements involve poles that are *solely* owned by either an incumbent LEC or an electric utility. By contrast, joint ownership agreements involve poles that are *jointly* owned by an incumbent LEC and electric utility. Because both parties to a joint ownership agreement own a portion of each pole covered under that agreement, this type of agreement provides benefits that are not

joint use agreements subject incumbent LECs to onerous audit and inspection requirements, and termination and security provisions. Additionally, many joint use agreements require incumbent LECs to pay excessive pole attachment rates that are disproportionate to the space that attachments by incumbent LECs occupy on poles—rates that significantly overcompensate electric utilities for the costs of carrying attachments by incumbent LECs. As explained in Verizon’s Comments, electric utilities have no incentive to renegotiate the terms of these agreements, and have little incentive to maintain joint use agreements with incumbent LECs.³⁵

D. Additional Regulation of the Terms and Conditions of Access to Poles and Conduit is Unwarranted.

Many commenters oppose further regulation of the terms and conditions of access to poles and conduit.³⁶ As the Commission previously concluded, “the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis” because “there are simply too many variables to permit any other approach with respect to access to the millions of utility poles and untold miles of conduit in the nation.”³⁷ Therefore, the Commission chose to establish general guidelines rather than specific rules to govern access to poles and conduit. The record demonstrates that these guidelines ensure timely, non-discriminatory access to poles and conduit. Accordingly, the Commission should stand by its current approach and again reject calls to adopt specific “one-size-fits-all” rules concerning the terms and conditions of access to poles and conduit.

available under joint use arrangements. For example, parties to a joint ownership agreement do not pay pole rental fees, generally do not need to obtain prior approval from the other party before installing attachments, and normally are not required to pay for make-ready work.

³⁵ See Verizon Comments at 17.

³⁶ See, e.g., *id.* at 18-20; Ameren Comments at 11-14; EEI Comments at 8, 83-91; Comments of Oncor Electric Delivery Company’s Initial Comments, WC Docket 07-245 at 3-5 (Mar. 7, 2008).

³⁷ *Local Competition Order* ¶ 1143.

1. The Commission Should Not Abandon its Current Approach Concerning the Terms and Conditions of Access to Poles and Conduit.

The record demonstrates that additional regulation of the terms and conditions of access to poles is unnecessary. Indeed, the Commission’s existing guidelines already require pole owners to provide timely, non-discriminatory access to poles and conduit.³⁸ In those limited circumstances where a pole owner fails to comply with the existing guidelines, the Commission’s complaint process provides attachers and would-be attachers with prompt, inexpensive recourse.³⁹

Moreover, the vast majority of commenters agree that Fibertech’s proposed rules would compromise pole owners’ responsibilities to ensure the safety and reliability of poles and conduit.⁴⁰ Further, many state and local governments and commercial agreements already require attachers to comply with widely accepted industry safety standards and guidelines (*i.e.* the NESC, the National Electrical Code, Telecordia’s Blue Book—Manual of Construction Procedures) and to conduct code inspections at regular intervals. Accordingly, it is unnecessary for the Commission to adopt rules imposing these same requirements on attachers.

Additionally, Fibertech’s claims are based primarily on meritless assertions, many of which are directed at Verizon, that fail to demonstrate the need for more specific rules concerning the terms and conditions of access to poles and conduit. For example, Fibertech’s Comments incorrectly assert that Verizon intentionally manipulates the make-ready process to harm competitors.⁴¹ Verizon’s Opposition to Fibertech’s Petition for a Rulemaking previously

³⁸ See Verizon Comments at 18.

³⁹ Contrary to Fibertech’s assertions, the complaint process is not “expensive, cumbersome, and inherently too slow.” Comments of Fibertech Networks, LLC and Kentucky Data Connect, Inc., WC Docket No. 07-245 at i and 9 (Mar. 7, 2008) (“Fibertech Comments”). In many cases the mere threat of a complaint is enough to prompt rapid resolution between the parties.

⁴⁰ See, *e.g.*, EEI Comments at 83; Verizon Comments at 19-20.

⁴¹ See Fibertech Comments at 33-34.

explained that Verizon typically provides access to poles and conduit on a timely basis.⁴² Delays in this process, which are infrequent, are often attributable to delays on the part of the entity that jointly owns poles with Verizon. This is particularly true in Fibertech's territory, where Verizon has experienced significant difficulty in obtaining necessary information from some co-owners.

Moreover, Verizon does not intentionally withhold conduit records from would-be attachers or intentionally provide misleading information about the availability of conduit space.⁴³ Nor does Verizon use safety-compliance as a means of delaying access to poles and conduits or require attachers to pay for unnecessary make-ready work.⁴⁴ Despite Fibertech's contrary assertions, such requirements and the associated make-ready work are necessary to protect poles and conduit, existing attachments, and pole and conduit workers.

Fibertech's Comments also incorrectly assert that pole owners discriminate against attachers by applying different standards to competitors' attachments than they apply to their own.⁴⁵ As Verizon has already explained, Verizon's attachments are subject to the same standards as those of other attachers.⁴⁶ For example, where the use of boxing and extension arms is precluded for safety reasons, Verizon does not use those methods for its own attachments.⁴⁷ But, where boxing and extension arms can be used without violating applicable safety codes, Verizon allows Fibertech and other attachers to use boxing and extension arms.⁴⁸ The fact that

⁴² See Verizon's Opposition to Fibertech's Petition for Rulemaking, Docket No. RM-11303, at 4-6 (Jan. 30, 2006) Declaration of Gloria Harrington, ¶¶ 7, 25-28 and Exhibits 1 and 2, attached to Verizon's Opposition to Fibertech's Petition for Rulemaking ("Harrington Declaration").

⁴³ See Harrington Declaration ¶¶ 26, 29.

⁴⁴ See *id.* ¶ 10.

⁴⁵ See Fibertech Comments at 8, 12.

⁴⁶ See Harrington Declaration ¶¶ 10-14.

⁴⁷ See *id.*

⁴⁸ See *id.*

applicable safety codes and factors unique to each pole site may preclude the use of boxing and extension arms at some sites does not constitute unlawful discrimination.

2. The Commission Should Not Adopt Rules Concerning Unauthorized Attachments or Compliance With Applicable Safety Requirements.

Unauthorized pole attachments⁴⁹ and safety code violations are not as pervasive as EEI's Comments suggest.⁵⁰ Moreover, many of the so-called "unauthorized attachments" actually result from the actions of pole owners rather than attachers. For example, electric utilities often replace a pole owned by another entity (referred to as pole change-outs) and attach the facilities of attachers to the new pole, without notifying attachers or the owner of the replaced pole. Additionally, many electric utilities set new poles within an existing pole line and add existing attachments in that line to the new pole without notifying attachers. Verizon's experience has also been that many electric utilities overestimate the number of so-called "unauthorized attachments" due to inaccurate pole records that do not reflect notices and permits for new attachments, incorrectly list an entity that does not have facilities on a pole as an attacher, or include poles that no longer exist or have been sold to another entity.

To the extent that unauthorized attachments exist, commercial agreements, rather than regulation, are the better means of addressing them. Indeed, many joint use and pole attachment agreements require audits every five years and subject unauthorized attachments to a five-year back-rent penalty.⁵¹ Several electric utilities incorrectly assert that back-rent penalties encourage unauthorized attachments because "the worst that can happen to attachers if they get caught is

⁴⁹ The Commission's *NPRM* defines the term "unauthorized attachment" as an attachment installed without a lawful agreement or without the required application or approval. *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 22 FCC Rcd 20195, ¶ 38 (2007) ("*NPRM*").

⁵⁰ See EEI Comments at 32-39.

⁵¹ See EEI Comments at 38, 71, 77.

that they will be required to pay the rentals that they would have been required to pay in the first instance.”⁵² This is simply untrue. Under many back-rent provisions, the attacher is required to pay back-rent for a period of five years, regardless of how long the unauthorized attachment was on the pole. As a result, many unauthorized attachment penalties are significantly greater than any rents that would have been paid if the attachment was authorized. Indeed, as the Commission has previously explained “a hard-and-fast rule requiring back rent to the date of the last inspection could grossly overcompensate [the electric utility] if an unauthorized attachment were installed long after the last inspection.”⁵³

Accordingly, the Commission should reject EEI’s request that the Commission allow pole owners to file complaints before the Commission against attachers that have made unauthorized attachments or violated applicable safety requirements.⁵⁴ The Commission should also reject EEI’s request that the Commission adopt rules imposing fines for unauthorized attachments and safety violations, or in the alternative, endorse such fines.⁵⁵ Similarly, the Commission should decline to adopt inspection or certification requirements. These types of rules are unnecessary and would impose burdensome, costly requirements on attachers and would therefore conflict with Section 706’s goal of promoting the deployment of broadband services. Pole owners, however, should remain free to impose such fines in their negotiated agreements, provided that those fines are reasonable.

Finally, because pole attachments are used to provide critical communications services, including emergency 911 services, the Commission should not grant pole owners the right to

⁵² Coalition Comments at 75; EEI Comments at 77.

⁵³ *The Cable Television Association of Georgia, et. al., v. Georgia Power Company*, 18 FCC Rcd 16333, ¶ 22 (2003).

⁵⁴ *See id.* at 81.

⁵⁵ *See id.* at 79-80.

remove unauthorized attachments or attachments violating applicable safety rules, standards or guidelines without first notifying attachers.

III. CONCLUSION

For the foregoing reasons, the Commission should adopt a uniform rate formula for broadband attachments by *all* providers of telecommunications services and cable television systems and should also clarify or modify its rules consistent with Verizon's Comments and Reply Comments.

Respectfully submitted,

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