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December 4, 2008

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Errata

Re: *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 and RM-11303*

Dear Ms. Dortch:

Attached, please find the Comments of Edison Electric Institute and the Utilities Telecom Council, originally filed on March 7, 2008.

The resubmission is characterized as "errata, erratum or addendum" because it reflects rephrasing, reformatting and correction of typographical errors. Collectively, the non-substantive individual modifications increase the ease of review of the submission.

Please do not hesitate to contact the undersigned if you have any questions.

Respectfully submitted,

/s/ Sean B. Cunningham

Before the
Federal Communications Commission
Washington, DC 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
	)	

ERRATUM

COMMENTS OF THE EDISON ELECTRIC INSTITUTE AND THE UTILITIES TELECOM COUNCIL

EDISON ELECTRIC INSTITUTE

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March 7, 2008

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

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
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	)	RM-11303
	)	

COMMENTS OF THE EDISON ELECTRIC INSTITUTE AND THE UTILITIES TELECOM COUNCIL

Pursuant to sections 1.415 and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules, the Edison Electric Institute ("EEI"), on behalf of its member companies, and the Utilities Telecom Council ("UTC") hereby submit these Comments to address the questions and issues raised in the Commission's October 31, 2007 Notice of Proposed Rulemaking ("NPRM") regarding the amendment of the Commission's rules and policies governing pole attachments.

The Edison Electric Institute is the association of the United States investor-owned electric utilities and industry associates worldwide. Its U.S. members serve almost 95 percent of all customers served by the shareholder-owned segment of the U.S. industry, about 70 percent of all electricity customers, and generate about 70 percent of the electricity delivered in the U.S. EEI frequently represents its U.S. members before Federal agencies, courts, and Congress in matters of common concern, and has filed comments before the Commission in various

proceedings affecting the pole attachment interests of its members, who are subject to FCC and state pole attachment jurisdiction.

UTC is the international trade association for the telecommunications and information technology interests of electric, gas and water utilities and other critical infrastructure industries. Its members include large investor-owned utilities that serve millions of customers, as well as relatively small municipal and cooperatively organized utilities that may serve only a few thousand customers. All of its members have one thing in common: they own, operate or manage communications systems that support the safe and effective delivery of essential services to the public at large. Many of its utility members are subject to FCC or state pole attachment regulation, and UTC has participated in every pole attachment rulemaking at the FCC, as well as various state pole attachment proceedings. Moreover, pole attachments affect critical infrastructure, and UTC has advocated for rates and access rules that support critical infrastructure. As such, the members of UTC have a direct interest in the instant rulemaking.

EEI and UTC are pleased that the Commission has adopted the NPRM in the above-captioned proceeding to comprehensively consider appropriate changes to the implementation of section 224 of the Communications Act of 1934, as amended, 47 U.S.C. § 224. EEI and UTC believe it is appropriate to now reform the Commission's pole attachment rules to reflect the experience that utilities and attachers have had over nearly a decade since the Commission adopted these rules to implement the Telecommunications Act of 1996 ("the 1996 Act"), and the fact that the communications industry is no longer in its infancy.

Over the last decade it has become more apparent than ever, in light of the hurricanes and other catastrophic events, that electric utility infrastructure is critical to the interests of the nation

not only with respect the provision of electric service but also because all communications providers rely upon and benefit from this infrastructure.[1] With the last decade of experience, EEI and UTC believe that the existing pole attachment rules do not serve the Commission's objective to provide a level-playing field for all cable systems ("CATVs") and telecommunications carriers under the Commission's pole attachment jurisdiction (hereinafter, "jurisdictional attachers" or "jurisdictional attaching entities").[2] The Commission's current pole attachment rules do not sufficiently account for the importance of critical electric infrastructure, which EEI and UTC believes can undermine and distort competition among broadband providers by creating competition-distorting subsidies and perverse incentives for individual communications companies to seek unfair and unlawful competitive advantages against other communications companies. As discussed below, EEI and UTC also believe that the current regulatory framework undermines the electric utility industry's core mission: to provide safe, reliable electric service to its customers at reasonable prices.

EEI and UTC believe that the Commission can use this proceeding to advance competition between broadband service providers in a manner that is consistent with safety, reliability, and fair cost allocation. EEI and UTC strongly agree with Chairman Martin that "the

[1] In particular, critical electric infrastructure is important for communications not only as a source of electric power but also as a reliable physical network of poles, ducts, conduits, and rights of way for the deployment of communications wires and equipment.

[2] NPRM at ¶ 36. Because ILECs are expressly excluded from the definition of "telecommunications carrier" in Section 224(a), EEI and UTC uses the term "jurisdictional attachers" to mean only cable systems and non-ILEC telecommunications carriers.

safety and reliability of critical electric infrastructure is a paramount concern,"[3] and that "pole owners should be properly compensated for the use of their infrastructure by others," but that it is not appropriate for electric consumers to be "subsidizing any broadband companies." Chairman Martin is also correct that establishing regulatory parity between all providers of broadband services will help promote competition between providers of broadband services, but that establishing such parity should not come at the expense of pole owners or electric consumers.[4] As discussed below, EEI and UTC submit these comments to urge the Commission to revise its pole attachment rules to promote fair competition among broadband service providers while ensuring safety and reliability and full and fair allocation of the costs and responsibilities of critical electric infrastructure ownership and operation.

EXECUTIVE SUMMARY

State of Pole Attachments: EEI and UTC agree that the current state of pole attachments warrants the Commission to revise its current pole attachment rules, and in this section discuss how the current state of pole attachments undermines both the Commission's broadband policy goals under the statute and the electric industry's performance of its core mission to provide safe and reliable electric service to customers at reasonable prices. In addition to describing how the nature and scope of pole attachments have changed significantly in recent years, EEI and UTC

[3] EEI and UTC also appreciate that the Commission has also expressed concern for the "safety and reliability of an integral component of our nation's critical infrastructure, our electric power system." *See* 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, "Notice of Proposed Rulemaking" at ¶ 38, FCC-07-197 (2007).

[4] Statement of Chairman Kevin J. Martin, Re: Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Docket Nos. 07-245, RM-11293, RM-11303 (November 20, 2007).

discuss how critical electric infrastructure safety and reliability are matters affecting competition between broadband service providers, and also that electric utilities have come to shoulder a disproportionate and increasing share of the responsibilities for pole ownership.

Safety and Reliability of Critical Electric Infrastructure: EEI and UTC recommend that the Commission reform its pole attachment rules to allow greater flexibility for electric utilities to protect and maintain the safety and reliability of critical electric infrastructure, and to facilitate responsible use of such infrastructure by attaching entities. The Commission should clarify the limits of its jurisdiction over safety, reliability, and engineering standards and defer to state, local, and utility standards to ensure safety and reliability in a variety of operating conditions. The Commission should also clarify its notice regulations to require notice to utilities before attachments are made so there is opportunity for utilities to ensure that such attachments are made in compliance with applicable safety, reliability, and engineering requirements before approving and application for access. It is important for the Commission to allow utilities to include contractual terms and conditions sufficient to deter unauthorized and unsafe attachments, including specified, substantial penalties in addition to back rent. Additionally, the Commission should clarify its complaint procedure to expressly allow electric utilities to submit complaints for violations of the Commission's notice requirements. Finally, EEI and UTC strongly recommend that the Commission not adopt one-size-fits all access rules (such as the so called "best practices" advocated by Fibertech), which would inappropriately favor expedient access at the expense of safety, reliability, and engineering soundness.

Pole Attachment Rates: EEI and UTC recommend that the Commission eliminate competition-distorting rate subsidies and ensure full and fair cost allocation among all attachers.

In particular, EEI and UTC recommends the adoption of a single rate for all Commission-jurisdictional attaching entities under an improved version of the telecom formula, and recommends specific improvements in the way the telecom formula is implemented to reduce competition-distorting subsidies that are currently provided at the expense of electric consumers.

Incumbent Local Exchange Carrier Jurisdiction: EEI and UTC support the Commission's goal of providing "even-handed treatment" for all broadband competitors, including incumbent local exchange carriers ("ILECs"); however, pursuant to Section 224, ILECs do not have a right to regulated pole attachment rates.

COMMENTS

I. The State of Pole Attachments Undermines Both the Commission's Broadband Policy Goals and the Electric Industry's Mission to Provide Safe and Reliable Electric Service at Reasonable Prices

The NPRM seeks comment on the current state of pole attachments, ducts, conduits, and rights-of-way and the relationship between these facilities and competitive telecommunications markets.[5] The Commission specifically seeks data on the nature and scope of pole attachments and usage and price differences between various entities that provide similar communications services.[6] The Commission asks how these matters affect the "larger goals of the Act, " including competition for communications service delivery and the expansion of broadband

[5] NPRM at ¶ 13

[6] NPRM at ¶ 13

Internet access service.[7] The Commission also inquires about safety, reliability, and access matters, including unauthorized and unsafe attachments.[8]

In response to these inquiries, in this section EEI and UTC discuss how the current state of pole attachments undermines both the Commission's broadband policy goals and electric utilities' performance of their core mission: to provide safe and reliable electric service to customers at reasonable prices. In this regard, EEI and UTC describe in general the relationship between critical electric infrastructure and competitive markets for communications services. This section explains how the electric industry's interests in safety, reliability, and full and fair cost allocation are consistent with the Commission's goals of promoting broadband competition and expansion, and describes the relationship of electric utilities and communications attachers as users of the same critical electric infrastructure. It also describes the disproportionate and increasing responsibilities of electric utilities for pole ownership and maintenance.

Second, EEI and UTC discuss pole attachment usage and price data to show more specifically how the current state of pole attachments undermines competition and compromises electric utilities' ability to perform their core mission. In this regard, EEI and UTC demonstrate that safety and reliability are not merely "technical matters," but also affect competition. EEI and UTC also describe the nature and scope of pole attachments generally and discusses the widespread and serious problem of unauthorized and unsafe attachments. Further, EEI and UTC shows how a lack of coordination between communications attachers can cause both operational problems for electric utilities and slow deployment of broadband facilities. Additionally, EEI

[7] NPRM at ¶ 13

[8] NPRM at ¶¶ 37-38.

and UTC discuss pole attachment rates and rate subsidies and matters related to rate calculation, including the types of service offered by various entities, and numbers of attaching entities per pole.

Third, EEI and UTC discuss the relationship between ILECs and electric utilities under joint use and joint ownership agreements and shows why there is no need to subject ILEC attachments to the Commission's jurisdiction.

Finally, EEI and UTC provide a brief discussion of certain trends in state regulation of pole attachments.

A. Safe and reliable electric service and competitive communications markets that rely on the same critical infrastructure can operate in harmony for the benefit of both electric and communications industries and the public.

The relationship between electric distribution facilities and competitive communications markets is fundamentally a relationship of common use of these facilities by electric utilities and participants in competitive markets for communications services. Although electric utilities and communications service providers use the same physical network of poles, ducts, conduits, and rights of way, it is significant that electric utilities are not generally engaged in offering broadband services to the public on a commercial basis. To the extent utilities own or use broadband and other communications technologies, with rare exceptions, such use is only for purposes of electric grid operation and not to participate as providers or competitors in markets for communications services. At this time and for the foreseeable future, EEI and UTC believe that a substantial majority of electric utilities do not compete in, and do not have any apparent interest in competing in these markets. It is important for the Commission to recognize that, in

most cases, pole attachment service is not a separate "profit center" for electric utilities; rather, typically, the revenue received from pole attachment fees are a direct offset to a utility's overall revenue requirement in a traditional cost-of-service-based rate proceeding. Therefore, with respect to electric utilities, this is not a relationship between market participants seeking competitive advantage through control of access to needed facilities.

Safe and reliable electric service and competitive communications markets can operate in harmony for the benefit of both electric and communications industries and the public, but the current "state of pole attachments" undermines both the utilities' ability to perform their core mission and the Commission's objective of promoting broadband competition. EEI and UTC believe that, so long as third-party attachments are made in a manner that is consistent with the electric utilities' core mission (to provide safe, reliable supply of electricity to customers at reasonable prices) and the costs of the pole infrastructure are fully and fairly allocated, it is not contrary to the interest of the electric utility industry to accommodate such attachments.

Under the Commission's current regulatory framework, the benefits and responsibilities of pole use are misaligned by disproportionately allocating costs and responsibilities to electric utilities. Under current rate structures, jurisdictional attaching entities receive competition distorting subsidies to varying degrees. Current regulations provide perverse incentives for individual attachers to disregard basic notice and safety requirements and, thereby to seek unfair and unlawful competitive advantages against other, more responsible, competing attachers.

As further explained below, the current state of pole attachments undermines broadband competition and deployment in several ways. First, in a competitive market, each competitor bears the true costs of producing and delivering its product or service. Competitors, particularly

mature industries such as the cable and telephone companies, need not receive subsidies at the expense of another industry. For example, it is difficult to reasonably explain how the cable industry is still the "infant industry" it was considered to be in 1978, when Section 224 was first enacted.

Second, to ensure a level playing field for competitors, all jurisdictional attaching entities should pay the same, non-subsidized rate. As explained below, both the cable and telecom rates provide substantial, inappropriate subsidies at the expense of electric consumers. However, the cable rate provides an even greater subsidy because the cable rate, as the Commission acknowledges: "[w]e seek comment on the extent to which the current cable rate formula, whose space factor does not include common (*i.e.*, "unusable") space, results in a subsidized rate, and, if so, whether cable operators should continue to receive such subsidized pole attachment rates at the expense of electric consumers."[9] Simply stated, if one broadband provider pays a lower pole attachment rate, it achieves a competitive advantage over a broadband provider that pays a higher rate. In a competitive, non-subsidized market, each competitor would pay its full and fair share of the costs of access to critical electric infrastructure.

Third, the experience of EEI's members shows that individual communications companies comply with basic notice and safety requirements to varying degrees. EEI believes that inconsistent compliance by communications attachers with these requirements may provide additional competitive advantages to certain parties. The relative allocation of pole costs among attaching entities and the degree of compliance by attaching entities with notice, safety and engineering requirements can affect the competitiveness of various categories of

[9] NPRM at ¶ 19.

communications providers or of individual companies competing in specific markets. Any communications company that avoids notice, safety, and engineering requirements for the sake of expediency may, whether by design or neglect, gain a competitive advantage over a competitor in the same market that fully complies with the same requirements. Competitive advantages can include cost savings by avoiding engineering survey fees, non-payment of pole attachment fees unless and until caught, and, in some cases, faster time-to-market than their competitors.

Although the 1996 Act mandates that the Commission must promote the development of competitive markets for broadband communications services, EEI and UTC do not believe it even implicitly suggests that such development should be subsidized at the expense of electric consumers or carried out in a manner that may jeopardize the safety and reliability of the electric distribution infrastructure on which both electric and broadband customers depend for reliable service. To the contrary, in competitive broadband markets, jurisdictional attaching entities should not be allowed to ignore notice and safety requirements in order to gain advantages against competitors that comply with these requirements. EEI and UTC believe to ensure a level playing field for broadband competition, each communication service provider should comply with the same notice and safety requirements and bear its appropriate share of the costs of maintaining critical electric infrastructure.

However, under current Commission regulations and precedents, jurisdictional attachers often have insufficient incentive to comply with applicable notice and safety requirements or to coordinate with their competitors, and receive substantial rate subsidies at the expense of electric consumers under a two-tier system of subsidized rates. Specifically, inadequate notice

requirements and an unrealistically low cap on penalties utilities can charge for violations of notice and safety requirements have resulted in a widespread and serious problem of unauthorized and unsafe attachments. These attachments not only pose serious safety and reliability threats, but also provide a competitive advantage to companies that make attachments without complying with requirements that apply to all attachers. Failure by communications attachers to move or transfer their existing attachments in a timely manner can cause delays in access by other competitors.

B. Both Electric Utilities and Communications Attachers Require Access to Poles, Ducts, Conduits, and Rights of Way.

The Commission is correct that the electric power system is "an integral component of our nation's critical infrastructure,"[10] but should also recognize that utility poles, ducts, conduits, and rights-of-way are critical infrastructure not only for purposes of supplying electric power.[11] This critical infrastructure is also essential to supplying a physical network for communications services. Communications networks rely on electric utilities to provide electric delivery service with as few interruptions as possible.

To a large extent, both electric and communications providers require the same facilities to support their attachments. A cable system or competitive local exchange carrier ("CLEC") may occupy only one or two feet on an electric utility pole, but such attachments would be useless if the common portions of the pole were not in place. Communications providers, like

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[10] NPRM at ¶ 38.

[11] Without electric service, communications service fails. Although some communications facilities have back-up power, those facilities eventually fail if electric distribution is not restored.

electric utilities, must have poles that are of sufficient height to comply with applicable clearance requirements and otherwise comply with applicable safety and engineering requirements. Although different providers may occupy varying amounts of the so-called "usable" space (*i.e.*, the space in which attachments are directly made), both types of providers generally require poles that meet the same minimum ground clearance requirements. In other words, each provider that occupies space on the pole has an equivalent need for the common space on the pole. In addition to the common space on the pole that is misleadingly termed the "unusable space," the common space used by all attachers includes the communication worker safety space, which, as explained below in Part II, exists for the benefit of communications workers.[12] Thus, this physical infrastructure not only provides a space for individual attachments, but also a very valuable, interconnected, physical network necessary for reliable electric and communications services.

While electric utilities and communications companies have a common need for this critical infrastructure, these entities also have a common responsibility for this critical electric infrastructure since responsible use by both parties of utility infrastructure avoids the wasteful duplication of facilities on public or private rights-of-way and reduces costs and other impacts on

[12] The term "common space" is more accurate than "unusable space." The statute does not use the term "unusable space," but simply refers to "space . . . other than the usable space" (47 U.S.C. § 224(e)(2) (2005)) to distinguish the common space from the attachment space or "usable space," which is defined as "the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment." "Usable space" is not intended to suggest that the common space is somehow unnecessary. Rather, it is a narrow, technical term used to describe the space that is immediately usable for direct attachment. Indeed the statute acknowledges the need for the pole plant up to the "minimum grade level" in its definition of "usable space" as the space "which can be used for the attachment of wires, cables, and associated equipment." 47 U.S.C. § 224(d)(2).

consumers. As the Commission has stated, "[i]n the aftermath of Hurricane Katrina, Americans were reminded of the importance of reliable, readily available, and interoperable communications . . . ."[13] Thus, both electric and communications providers depend not only on the existence of pole infrastructure, but also on routine pole maintenance, including tree-trimming, right-of-way clearance, safety inspections, and compliance with applicable codes and standards for pole plant.

Also, significantly, when one or more poles are downed, both electric and communications providers depend on prompt repair or replacement of the damaged poles to ensure safe and reliable service. When the physical network provided by electric distribution infrastructure is damaged as a result of storms, vehicle impacts, or other causes, communications networks are severely disrupted until the electric infrastructure is restored. Both electric and communications providers depend on the prompt restoration of such pole infrastructure to ensure continuity of the respective services they provide to their customers, protect costly wireline plant and associated capital equipment, and comply with applicable ground clearance requirements. This necessity is reflected in one of the Commission's key homeland security strategic objectives: "Facilitate rapid restoration of the U.S. communications infrastructure and facilities after disruption by any cause."[14]

C. Electric Utilities Bear a Disproportionate and Growing Share of the Responsibilities of Pole Ownership.

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[13] Federal Communications Commission, Strategic Goals: Public Safety and Homeland Security, *available at* http://www.fcc.gov/homeland.

[14] Federal Communications Commission, Strategic Goals: Public Safety and Homeland Security, *available at* http://www.fcc.gov/homeland.

Although both electric and communication providers both enjoy, to a large extent, similar benefits from the use of the same poles, the costs and operational responsibilities of ownership and maintenance fall disproportionately on electric utilities. This is due, in part, to the fact that virtually all of the poles used for communications attachments are owned by electric and telephone utilities, and in many cases, a growing majority of the poles are owned solely by the electric utility. More significantly, because they do not own poles and they receive subsidized access rates, jurisdictional communications attachers (*i.e.*, CATVs and CLECs) bear a disproportionately small share of the operational responsibilities and costs associated with owning and maintaining pole plant required for all attachers.

As an initial matter, electric utilities face the challenge of building and maintaining electric distribution infrastructure. This is a very resource and labor intensive enterprise, and EEI's and UTC's members have generally experienced increases in the costs of materials and labor. A 2007 study prepared for the Edison Foundation cites "[d]ramatically increased raw materials prices," as well as rising labor costs have contributed to an overall trend towards higher construction costs for the electric industry, including electric distribution.[15]

Electric utility pole owners have found that the increasing number, weight, and variety of communications pole attachments have resulted in a greater need for analysis of pole strength and loading, as well as make-ready work, before adding new attachments. This is because each additional wire and device attached or strung along a distribution network, including overlashed wires, adds physical stress to the poles in terms of weight, wind loading, and ice loading. The

[15] Marc W. Chupka and Gregory Basheda, *Rising Utility Construction Costs: Sources and Impacts*, prepared by the Brattle Group for the Edison Foundation (September 2007) at p. 1.

result of this is an extra layer of complexity for pole construction for the electric distribution system. It also increases the risk associated with pole ownership from the standpoint of reliability, safety, and maintenance.

Increases in the number and variety of pole attachments increase restoration times following natural disasters and other emergencies. When poles fall down as a result of storm damage or vehicle impacts, each attachment must be restored along with the new or repaired pole. Cable systems and CLECs are responsible for re-attaching their own equipment to poles in these situations. Nevertheless, each additional attachment, whether it be a wire, an antenna, a power supply, or other piece of equipment, adds time, difficulty, and safety hazards to the utility's task of untangling both the electric and communications equipment and restoring the pole.

EEI is aware that electric utilities have experienced increased costs associated with communications attachments. For example, electric utilities receive numerous telephone calls from citizens and public safety officers reporting downed wires. Frequently these wire-down calls are due to a downed cable wire, which the utility does not own and for which it is not responsible. Nevertheless, the utility must dispatch a line crew to the scene to ascertain what type of wire is down. These "false alarm" calls are very costly. A number of utilities report that third party wires down account for a substantial majority of all wire-down calls. A large Midwestern utility reports an average of between approximately 27,000 and 38,000 wire down calls in each of five years from 2003 to 2007. Of all those calls, an average of between 43 and 49 percent in each year turned out to be third-party wires. Other utilities report situations in which public safety officers have ordered utility personnel to remove third party wires from

roadways to prevent harm to the public, including one incident which resulted in the utility being sued for allegedly causing a loss of service.

The complexity of pole restoration is further multiplied when thousands of poles in a large utility system need to be replaced after a widespread natural disaster, such as a hurricane, ice storm, or earthquake. For example, during the 2004 hurricanes, according to a Department of Energy report, in Florida, "thousands of distribution poles and transformers had to be repaired or replaced. . . . Thousands of linemen and tree experts were brought in from other utilities to assist with the restoration efforts. The cost of the restoration effort is *astronomical*."[16]

D. Unauthorized Use of Pole Infrastructure and Pole Attachment Rate Subsidies Undermine Both Safe, Reliable Electric Service and Broadband Competition

1. The nature and scope of pole attachments has changed significantly in recent years and has resulted in new safety and reliability hazards, as well as additional responsibilities and increased costs for electric utilities.

The nature and scope of pole attachments by various providers has changed significantly in recent years and has resulted in increased costs, new safety and reliability hazards, and additional maintenance and administrative responsibilities for electric utilities. Section 224 defines "pole attachment" as "any attachment" by a cable system or a CLEC. Historically, a pole attachment typically consisted of a single coaxial cable or copper telephone wire affixed to a pole with a bolt and clamp, or located in an underground conduit or duct. More recently, apparently because of technology developments and deployment of various new communications

[16] DOE Office of Electricity Delivery and Energy Reliability and National Association of State Energy Officials, Report "Florida State's Energy Emergency Response to the 2004 Hurricanes," June 2005 at 22 (emphasis added). This report is available on the DOE website by accessing the appropriate link at http://www.oe.netl.doe.gov/outreach.aspx.

services, the number and variety of pole attachments has increased. According to a recent survey by UTC, the number of pole attachments licensed by utilities has increased significantly, especially within the past year, and some utilities have reported that the number of authorized attachments has more than *doubled* in the past year.

The variety of attachments can be roughly divided into horizontal and vertical attachments for illustrative purposes. Horizontally, new or modified attachments include an increasing number of overlashed wires, splicing boxes and fiber optic cable storage loops. Each of these attachments add significant surface area and weight to the existing load on the pole.[17] For example, overlashing, depending on the size and composition of the added wire, can significantly increase the wind and ice load. Figures 1, 2, and 3 show the impact of overlashing on utility poles. Figure 4 illustrates the different assumptions for each load designation, Light, Medium or Heavy (each load designation assumes different line angles, wind speeds, and radial ice). Depending on the load designation assumed, one cable attached to a "messenger" wire[18] increases load to a utility pole from a minimum of 6 percent to a maximum 15 percent, as indicated by Figures 1 and 2, above.[19] Overlashing a second cable to the same messenger

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[17] In addition to wind and ice factor, the added weight of an overlashing alone can cause physical changes in the pole infrastructure which, in turn, can cause serious safety and reliability hazards. For example, the added weight of an overlashed wire can cause the existing wire to sag, which can affect clearance and cause serious safety hazards, such as downed poles or electrical contact hazards created when passing trucks make contacts with sagging lines. Added weight may also cause poles to lean too far in a particular direction unless the pole is properly guyed and reinforced.

[18] The messenger is a wire used for the structural support of communications wires. The messenger itself is not used for the transmission of communications signals.

[19] As shown in Figures 1, 2, and 3, above, for one cable attached to a messenger wire, assuming a Light Loading Zone designation with minimum loading (3 degree line angle) increases load by 8

increases the load on a utility pole from a minimum 8 percent to a maximum 19 percent, once again depending on the load designation assumed, as shown by Figures 1 and 2, above.[20] Just as in the case of a new attachment, the utility needs to have an opportunity to perform an engineering analysis before the additional cable is overlashed.

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percent and assuming maximum loading (10 degree line angle) increases load to 15 percent. Assuming a Medium Loading Zone designation with minimum loading (3 degree line angle) increases load to 6 percent and assuming maximum loading (10 degree line angle) increases load to 11 percent. Assuming a Heavy Loading Zone designation with minimum loading (3 degree line angle) increases load to 8 percent and assuming maximum loading (10 degree line angle) increases load to 12 percent.

[20] As shown in Figures 1, 2, and 3, above, for two cables attached to a messenger wire, assuming a Light Loading Zone designation with minimum loading (3 degree line angle) increases load by 10 percent and assuming maximum loading (10 degree line angle) increases load to 19 percent. Assuming a Medium Loading Zone designation with minimum loading (3 degree line angle) increases load to 8 percent and assuming maximum loading (10 degree line angle) increases load to 15 percent. Assuming a Heavy Loading Zone designation with minimum loading (3 degree line angle) increases load to 11 percent and assuming maximum loading (10 degree line angle) increases load to 16 percent.

Figure 1

Light Loading Zone									
Wind Force									
Number of Cables		1		2		3		4	
Bundle Diameter		1.000	inch	1.501	inch	1.615	inch	2.050	inch
Wind Moment @ GL		4,725	lb. ft.	7,092	lb. ft.	7,631	lb. ft.	9,686	lb. ft.
% of Class 4 Pole		5.8%		8.7%		9.4%		11.9%	
Cable Tension Force - on Angle Structures									
Number of Cables		1		2		3		4	
Bundle Weight		0.282	lb/ft	0.443	lb/ft	0.604	lb/ft	0.765	lb/ft
Wire Tension		1,308	lbs	1,805	lbs	2,126	lbs	2,576	lbs
See notes below		(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)
Angle =	3	89	2.0%	123	2.7%	145	3.2%	175	3.9%
Angle =	5	148	3.3%	205	4.5%	241	5.3%	292	6.4%
Angle =	10	296	6.5%	409	9.0%	482	10.6%	584	12.9%
(1) Lateral force (lbs) X Load Factor at line angle from conductor tension at attachment height.									
(2) Lateral moment = (Lateral Force X height) as percentage of pole moment capacity.									

Composite Loading from Attachment (Wind Moment + Tension Moment)				
Number of Cables lashed to Messenger	**1 Cable**	**2 Cables**	**3 Cables**	**4 Cables**
Minimum Loading: 3 degree line angle (% of pole capacity)	**8%**	**11%**	**13%**	**16%**
Maximum Loading: 10 degree line angle (% of pole capacity)	**12%**	**18%**	**20%**	**25%**

Figure 2

Medium Loading Zone								
Wind Force								
Number of Cables	1		2		3		4	
Bundle Diameter	1.500	inch	2.001	inch	2.115	inch	2.550	inch
Wind Moment @ GL	3,150	lb. ft.	4,202	lb. ft.	4,442	lb. ft.	5,355	lb. ft.
% of Class 4 Pole	3.9%		5.1%		5.4%		6.6%	
Cable Tension Force - on Angle Structures								
Number of Cables	1		2		3		4	
Bundle Weight	0.671	lb/ft	0.987	lb/ft	1.184	lb/ft	1.479	lb/ft
Wire Tension	1,483	lbs	1,930	lbs	2,126	lbs	2,576	lbs
See notes below	(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)
Angle = 3	101	2.2%	131	2.9%	145	3.2%	175	3.9%
Angle = 5	168	3.7%	219	4.8%	241	5.3%	292	6.4%
Angle = 10	336	7.4%	437	9.6%	482	10.6%	584	12.9%
(1) Lateral force (lbs) X Load Factor at line angle from conductor tension at attachment height.								
(2) Lateral moment = (Lateral Force X height) as percentage of pole moment capacity.								

Composite Loading from Attachment (Wind Moment + Tension Moment)				
Number of Cables lashed to Messenger	**1 Cable**	**2 Cables**	**3 Cables**	**4 Cables**
Minimum Loading: 3 degree line angle (% of pole capacity)	**6%**	**8%**	**9%**	**10%**
Maximum Loading: 10 degree line angle (% of pole capacity)	**11%**	**15%**	**16%**	**19%**

Figure 3

Heavy Loading Zone								
Wind Force								
Number of Cables	1		2		3		4	
Bundle Diameter	2.000	inch	2.501	inch	2.615	inch	3.050	inch
Wind Moment @ GL	4,200	lb. ft.	5,252	lb. ft.	5,492	lb. ft.	6,405	lb. ft.
% of Class 4 Pole	5.1%		6.4%		6.7%		7.8%	
Cable Tension Force - on Angle Structures								
Number of Cables	1		2		3		4	
Bundle Weight	1.215	lb/ft	1.687	lb/ft	1.919	lb/ft	2.351	lb/ft
Wire Tension	1,951	lbs	2,435	lbs	2,765	lbs	3,214	lbs
See notes below	(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)
Angle = 3	133	2.9%	166	3.7%	188	4.2%	219	4.8%
Angle = 5	221	4.9%	276	6.1%	314	6.9%	365	8.0%
Angle = 10	442	9.8%	552	12.2%	627	13.8%	728	16.1%
(1) Lateral force (lbs) X Load Factor at line angle from conductor tension at attachment height.								
(2) Lateral moment = (Lateral Force X height) as percentage of pole moment capacity.								

Composite Loading from Attachment (Wind Moment + Tension Moment)				
Number of Cables lashed to Messenger	**1 Cable**	**2 Cables**	**3 Cables**	**4 Cables**
Minimum Loading: 3 degree line angle (% of pole capacity)	**8%**	**10%**	**11%**	**13%**
Maximum Loading: 10 degree line angle (% of pole capacity)	**15%**	**19%**	**21%**	**24%**

Figure 4

Light Loading Zone			
Temperature =	30 deg F	Radial Ice =	0"
Wind Force =	9 lb/sq. ft. => 59.3 mph		
Grade of Construction for Poles =	C		
Load Factor for Wind =	1.75		
Load Factor for conductor tension =	1.30		
Medium Loading Zone			
Temperature =	15 deg F	Radial Ice =	0.25"
Wind Force =	4 lb/sq. ft. => 39.5 mph		
Grade of Construction for Poles =	C		
Load Factor for Wind =	1.75		
Load Factor for conductor tension =	1.30		
Heavy Loading Zone			
Temperature =	0 deg F	Radial Ice =	0.5"
Wind Force =	4 lb/sq. ft. => 39.5 mph		
Grade of Construction for Poles =	C		
Load Factor for Wind =	1.75		
Load Factor for conductor tension =	1.30		
SpanMaster (Release 3.1) from CommScope was used to determine cable bundle diameter and wire (messenger) tension, using the following input:			
Messenger dia =	1/4"	Weight =	0.121 lb/ ft
Cable dia =	3/4"	Cable Weight =	0.161 lb/ ft
Span =	200 ft.	Sag =	1% of Span
Model Input			
Moment Capacity, 40' Class 4 pole =	81,600 lb. ft. at Ground line		
Attachment Height =	18 ft		
Basic Equation			
Moment @ Ground [lb.ft.) =	Force X Attachment Height		
Wind Force =	Span Length X Bundle Diameter/12 X Load Factor		
Wire Tension Force =	2 X Sine (line angle/2) X Wire Tension X Load Factor		

Vertically, there is a wide array of communications attachments that are distinct from ordinary cable and telephone wires, and occupy additional space other than the space occupied by such horizontal wires. These vertical attachments include service drops, risers, J-hooks, power supplies, and wireless antennas. Communications attachers also frequently make temporary attachments of stored equipment, such as spools of cable. CenterPoint Energy reports finding large, very heavy cable spools attached to poles.

Wireless attachments pose special operational and safety problems, including National Electrical Safety Code ("NESC") clearance issues and potential for worker exposure to radio frequency ("RF") exposure.[21] EEI and UTC member companies report that engineering studies show that both electric and communications wires are often close enough to pole-top wireless antennas to pose a safety hazard to utility and communications line workers. Electric utility workers generally are not trained to work with wireless equipment and do not have the capability of shutting down a wireless antenna for purposes of pole maintenance.

2. Unauthorized and Unsafe Attachments

The Commission sought comment on the prevalence of the practice of unauthorized attachments or attachments that have been installed without a lawful agreement.[22] A substantial and growing percentage of all Commission-regulated communications attachments on electric poles are unauthorized, *i.e.*, they have been made without notice to, or permission from, the

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[21] *See, e.g., In the Matter of Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields*, ET Docket No. 03-137, "Notice of Proposed Rulemaking" at ¶ 1, FCC 03-132 (2003) ("The potentially harmful effects of RF are well characterized as the result of excessive heating of biological tissue….").

[22] NPRM at ¶ 38.

utility. Unauthorized attachments may also violate applicable safety standards. Unauthorized and unsafe attachments pose significant safety and reliability hazards for electric utilities, including electrical contact hazards, excessive wind and ice load, and worker safety issues. These attachments also distort competitive parity by providing an additional subsidy and other competitive advantages to attaching entities that make such attachments. The growing number and variety of unauthorized attachments also can also complicate utility efforts to maintain poles and restore service disruptions, as recent natural disasters vividly illustrate.

Unauthorized attachments. An unauthorized attachment is an attachment made without application and approval from the utility pole owner. In some cases, these unauthorized attachments are made by a cable company or CLEC that has no pole attachment agreement with the utility. In other cases, the attaching entity has a master agreement with the utility, but has not received a permit allowing the individual attachment(s). Electric utilities typically grant a permit for a specified number of attachments on a specified set of poles. Ordinarily, if a prospective attaching entity seeks to make a set of attachments to a utility's poles, the attaching entity must enter into a pole attachment agreement with the utility. Before making specific attachments, the attaching entity must provide notice to the utility with certain information regarding the number and type of attachments and the specific poles to which the attachments will be made. The utility must have this information to be able to perform an engineering survey to determine whether it has sufficient capacity to accommodate the proposed attachments and what "make-ready" work is needed to insure that the attachments comply with applicable safety, reliability, and engineering requirements. If an attachment is made without prior notice, the utility cannot be assured that its facilities remain in compliance with these requirements. In addition to the

utilities' interest in maintaining safety and reliability, the electric utilities also have an economic interest in having timely notice of which attaching entities have how many attachments on which poles. Without this information, the utility cannot accurately calculate the proper amount owed by the attaching entity.

Recent utility industry inventories show a significant number of all attachments made by cable systems and CLECs are unauthorized. The electric utilities participating in a study conducted by UTC reported an average of eleven percent of all attachments currently on their poles were unauthorized, based on each utility's most recent pole attachment inventory. These figures include only attachments made by cable television systems and CLECs.[23] Based on the results of an audit currently in progress, CenterPoint Energy reports approximately 79,000 unreported cable TV attachments, accounting for over 34 percent of approximately 231,000 cable attachments surveyed to date.[24]

In some cases, the number of unauthorized attachments has increased significantly within recent years. PPL Electric Utilities reports that its most recent pole inventories from 2002-2006 show that 57.1 percent of all new CATV attachments and 30 percent of all new CLEC attachments installed on its poles since 2002 were made without application or notice to the utility.

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[23] Electric utilities have generally found significantly fewer unauthorized attachments made by ILECs and other non-jurisdictional attachers. To the extent there are unauthorized attachments made by ILECs, they are generally easy to identify, and electric utilities have generally had less difficulty in collecting back payments from ILECs pursuant to existing joint use or joint ownership agreements.

[24] CenterPoint began a system-wide audit in 2004, which was 71 percent complete at the time of this filing.

Entities that make unauthorized attachments receive an additional, unlawful subsidy. Under the statute and the Commission's regulations, jurisdictional attachers already receive a legally sanctioned subsidy in the form of pole attachment rates that do not allocate all of the costs of the infrastructure. In addition to this legal subsidy, some attaching entities also receive an unlawful subsidy in the form of "free" space occupied by unauthorized attachments. In addition to not paying rent for such attachments, the company that makes attachments without engaging in the normal application process or complying with applicable regulations achieves an additional competitive advantage over law-abiding competitors who comply with applicable requirements before making their attachments.

The full amount and effect of this subsidy is very difficult to quantify precisely, because of the nature of unauthorized attachments, which are made without notice to or authorization by the host utility. If a communications market participant has a significant number of unauthorized attachments, it pays no rent on those attachments unless and until those attachments are discovered by the utility and the utility is successful in litigation required to force disgorgement of back rent. In many cases, the utility is never able to determine exactly how long the unauthorized attachments have been in place. Even if the utility does recover the back rent, the attacher has nevertheless received the competitive advantage of premature access.

As an example of how hidden subsidies arise with respect to unauthorized pole attachments, consider two jurisdictional attaching entities, Broadband-A and Broadband-B, each of which has 100,000 attachments on Electric Utility's poles over a three-year period. During all three years, all of Broadband-A's attachments have permits, but 5,000 (*i.e.*, 5 percent) of Broadband-B's attachments are unauthorized. Assume an attachment rate is $15 per attachment

per year.[25] Broadband-A pays $15 per attachment per year for each of its 100,000 attachments, all of which are permitted, for a total of $4,500,000 over three years. Meanwhile, Broadband-B pays rent for only its 95,000 permitted attachments, for a total of $4,275,000 in three years. It pays nothing for the additional 5,000 attachments. Thus, Broadband-B enjoys an additional subsidy of $225,000, *i.e.*, a five percent "discount" relative to its competitor. This discount does not include any additional funds Broadband-B "saves" by not paying for make-ready costs required to make its attachments comply with applicable safety codes, or the competitive advantage Broadband-B achieves by deploying its attachments more quickly than Broadband-A might have been able to do. Although there is a possibility that the utility will identify the unauthorized attachments and obtain payment of back rent, it may take up to five years before identifying such attachments and additional time to for litigation in state court (and possibly before the Commission), with uncertain results. Broadband-B gains the time-value of its windfall savings during this period.

In the experience of most of EEI's and UTC's member companies, unauthorized attachments are found to be made much more commonly by cable systems and CLECs, and less commonly by ILECs. To the extent there are any unauthorized attachments by ILECs, the existing joint use system has provided adequate remedies. Not every cable system or CLEC engages in such unlawful behavior to the same extent, and some do not at all. However, it appears that a significant number of cable systems and CLECs may be achieving a subsidy benefit not enjoyed by many of their competitors.

[25] This attachment rate is a purely hypothetical rate given only for purposes of calculating this example. It is not intended to represent any actual, average, or proposed rate.

Unsafe attachments. In addition to the basic problem of unauthorized attachments, electric utilities also face a significant problem with violations of safety codes and related requirements caused by unsafe jurisdictional pole attachments. Due to the nature of electric distribution facilities, the installation and maintenance of pole attachments are subject to numerous federal, state, local, and industry codes and standards for safety, reliability, and sound engineering.[26] These violations are often caused by unauthorized attachments, but sometimes result from actions in violation of a permit issued for an authorized attachment. Such violations pose a significant threat to safety of both electric workers, communications workers, and the public, as well as to electric reliability. As further discussed in Part II of these comments, the solution to this problem is not for the Commission to establish its own safety requirements or to assume jurisdiction for enforcement; rather, utilities should be given greater flexibility to include safety requirements and related penalties as terms and conditions of pole attachment agreements.

An electric utility typically conducts a pole attachment inventory at intervals of several years. A five-year cycle is common. In the course of these inventories, utilities often discover unidentified attachments that have been made in violation of applicable safety codes, or permitted attachments that have been subsequently modified by an attaching entity in a manner

[26] Certain Federal regulations and state statutes directly address construction activity in the vicinity of overhead electric lines, and violators are subject to criminal penalties and civil liabilities. These laws apply to employers, contractors, owners and any other parties or persons responsible for or engaged in construction activities. Examples include TEX. HEALTH & SAFETY CODE ANN. § 752.004 (2007) (prohibiting construction activity if such work creates the possibility that anything – including a worker, tool, piece of machinery, etc. – may come within *six* (6) feet of an energized overhead high voltage power line) and 29 C.F.R. §§ 1910.180, 1910.333, 1926.416, 1926.417 and 1926.550 (2007) (Occupational Safety & Health Administration ("OSHA") regulations providing, among other things, that cranes and other similar pieces of equipment capable of movement during operation must maintain a minimum distance of *ten* (10) feet from high voltage electric lines).

that has resulted in a safety violation. According to UTC survey data, thirteen percent of all third-party attachments are in violation of code. In more than one case litigated before the Commission, utilities have presented evidence of thousands of violations of the NESC and industry standards.[27] As in the case of unauthorized attachments, it appears that jurisdictional attaching entities have little incentive to comply with safety requirements.

Economic incentives for unauthorized and unsafe attachments. The principle reason why there are so many unauthorized, unsafe, and unidentified attachments is simple. Cable systems and CLECs have a significant economic incentive to deploy large numbers of attachments as quickly as possible, since providing communications services is their top priority, not electric safety and reliability. Moreover, cable and CLEC line workers are often contractors paid on a per attachment basis, which results in an emphasis on speed and quantity of installed attachments.

Under current Commission precedents and regulations, it is very difficult for electric utilities to deter cable systems and CLECs from making unlawful and unsafe attachments. It appears that some cable systems and CLECs have apparently made a rational calculation that the competitive advantage they gain against other communications companies by not following the rules is worth the potential risk of harming their own workers' health or of paying back charges and modest penalties at some undetermined time in the future.

"*Double Wood" and "Stub Poles."* Utilities often must replace their existing poles with new poles for a variety of reasons, including to relocate for road-widening projects, to replace

[27] *See*, *i.e.*, In the matter of The Cable Television Ass'n of Ga., et al., v. Georgia Power Co., DA-03-2613, "Order" at ¶ 12 (Aug. 8, 2003); Arkansas Cable Telecomm. Ass'n, et al. v. Entergy Ark., Inc., DA-06-494, "Hearing and Designation Order" at ¶ 18 (March 2, 2006) (describing issues to be addressed, including safety-related matters).

damaged poles, and, in some cases, to increase pole capacity to accommodate new communications attachments. During the time period in which the transfer of existing electric and communications attachments is taking place, the new pole is set side-by-side with the old pole. The old pole is sawed off above the communications line, creating a "stub pole," which is left in the field because the communication companies did not remove or relocate their lines during normal construction timelines. This situation, referred to as "double wood," is permissible only on a temporary basis. Once the new pole is built and the electric wires are in place, all attaching communications entities are obliged, upon notice, to transfer their facilities to the new pole. Due to safety codes, right-of-way limitations, and other restrictions under state and local laws, the old pole cannot permanently remain next to the new pole.

Under Section 224(h) and the Commission's regulations, whenever a utility needs to build a new pole, it must provide 60-days notice to attaching entities to give those entities an opportunity to move their attached facilities from the old pole to the new pole.[28] Notice is typically given to each communications attacher according to the order of the attachments on the pole. Because of the tension of the wires, the uppermost attachment must be moved first to avoid the need to cut the wires attached in lower positions.

The problem for utilities is that when the utility gives notice to one of the communications attachers, the notice is frequently simply ignored, resulting in a period of double wood "limbo" in which the utility is required under local law to remove the old pole, but cannot do so until the communications attachers have all transferred their facilities. Progress Energy reports that its 2006 joint use pole attachment audit identified thousands of stub poles, including

[28] 47 C.F.R. § 1.1403(c) (2007).

4,919 stub poles with un-transferred CATV attachments. In each case, Progress Energy had notified the communication attachers on the stub poles in February 2007, but these attachers still have not removed or transferred their lines.

This situation causes significant operational and safety problems for electric utilities. Many of these existing stub poles are rotten and in very poor condition. In this condition, some have fallen over while others remain standing because the phone and cable lines are the only things supporting it. Many other stub poles now reside very close to road ways and create safety hazards for cars and pedestrians as well as a liability for Progress Energy and the attaching entity. EEI and UTC members also report that their workers have had to make multiple trips ("truck rolls"), at significant cost to the utility, to inspect stub poles and determine whether the communications lines have been moved. If there were no communications attachments, the "double wood limbo" situation would not exist, because the utility ordinarily transfers all of its wires at the same time.

This situation also potentially causes a problem for a communications provider that seeks to comply with the utility's request that its communications wire be transferred, but cannot do so because another communications provider with a wire at a higher point on the stub pole refuses to respond to the utility's notice. In such a case, the utility has no ability to force competing communications providers to coordinate with each other in the transfer of their communications facilities to a new pole.

3. Type of Service and Unidentified Attachments

An "unidentified attachment" is a cable system attachment originally used solely to provide cable service, but with respect to which the cable system has not yet notified the electric

utility that such attachment is being used to provide communications services. In such cases, the cable system continues to pay the lower cable rate, despite being obliged under the Commission's regulations to give notice to the utility of the change in the nature of the service provided. The category of unidentified attachments includes situations in which the cable system itself offers the telecommunications service, or in which the cable system leases a portion of its capacity to a third-party provider of telecommunications services. EEI and UTC recognize that there are a variety of technologies and services used to provide telephone service, including several types of voice over internet protocol ("VoIP") service.

It is generally impossible for electric utilities to determine with any precision how many unidentified attachments exist in their service territory, precisely because the type of service offered using such attachments have not been identified by the attaching entity. However, EEI and UTC are aware that numerous electric utilities have experienced situations in which a cable system represents to the utility that the cable system does not use its pole attachments for anything other than cable service, but at the same time the cable system heavily promotes (through television advertising, billboards, mailers, and other means) "triple play" bundled offerings of cable, internet, and telephone service.

The existence of two different rate formulas for different historical categories of jurisdictional pole attachers perpetuates the problem of unidentified attachments. The opportunity to continue paying at a lower rate creates a strong incentive for a cable system not to disclose the nature of the service it provides. If there were only one rate formula for all Commission-jurisdictional attachers, there would be no incentive for cable providers that begin providing telecommunications service to avoid giving timely notice to electric utilities.

4. Substantial and Increasing Rate Subsidies

Currently, both cable systems and CLECs receive substantial subsidies at the expense of electric consumers through rates that do not fully and fairly allocate the utility's costs. Because there are two different subsidy rates and cable systems receive a larger subsidy than CLECs. These rate subsidies continue to distort competition by generally creating artificial economic signals for jurisdictional attachers and more specifically by discriminating among different categories of competitor. The cable formula provides a substantial subsidy to an industry that EEI and UTC believe is no longer a struggling "infant" industry as the cable industry was thought to be when the cable when the Pole Attachment Act first became law in 1978. The CLEC formula provides less of a subsidy than the cable formula, but nevertheless is substantial because it does not fully and fairly allocate the costs of the common space (*i.e.*, only two-thirds of the so-called "unusable" space are allocated among all attaching entities, and the communications safety space it allocated entirely to the electric utility). Additionally, inaccurate presumptions (*e.g.*, the inflated presumptive number of attaching entities) in the implementation of the CLEC rate further distort competition.

The statutory Cable formula is inherently a subsidy formula that does not achieve full cost allocation because it does not divide the cost of the common space equally among all attachers. Instead, the cable attacher pays only a small portion of the entire cost of the pole, based only on the percentage of usable space it occupies. This approach disregards that the cable attacher, like any other user of the pole, needs the common space to maintain a sufficient ground clearance as is required by applicable safety codes such as the NESC.

The Commission should recognize that, as a matter of logic, the fact that the statute

provides for two different formulas (merely on the basis of what type of communications service, as defined by the 1996 Act, is provided over the attached wire) shows that the cable formula provides a subsidy. Otherwise, there would have been no reason for Congress to distinguish between the cable and CLEC formulas. In fact, the legislative history of the Pole Attachment Act expressly acknowledges that the cable rate was intended to subsidize an "infant industry." A House Committee report accompanying legislation that ultimately became the basis of the 1996 Act characterized the cable formula as providing "cable companies a more favorable rate for attachment than other telecommunications service providers," and made clear that "[t]he beneficial rate to cable companies was established to spur the growth of the cable industry, *which in 1978 was in its infancy*."[29] It is abundantly clear at this time that the cable industry is no longer an infant industry, and should not be subsidized at the expense of electric consumers. Also, as explained below in Part III, the Commission has ample statutory authority to eliminate the cable rate due to cable industry's widespread participation in markets for broadband information services and telecommunications services.

5. The Commission's presumed numbers of attaching entities per pole are too high, resulting in a subsidy at the expense of electric consumers, and such presumptive numbers should therefore be reduced to three for both urban and rural areas.

Even as the number, variety, and weight of attachments has increased, the number of "attaching *entities*" per pole has remained well below the presumptive averages used by the Commission in calculating the CLEC rate. The evidence and rationales cited by the Commission in the 2001 Consolidated Partial Order on Reconsideration in favor of urban (five) and rural

[29] H. Rpt. 104-204, Committee on Commerce Report to Accompany H.R. 1555, the Communications Act of 1995 (July 24, 1995) (emphasis added).

(three) presumptions are no longer applicable.[30] In that Order, the Commission premised its urban presumption of five on the fact that "[a]dvanced telecommunications capability is being deployed throughout the country" and "competitive services are increasing."[31] The number, variety, and weight, and surface area of attachments are all increasing, but the number of attaching "entities" has remained relatively stable. In most cases, the entities that are deploying advanced equipment are the same entities that are already on the pole.

EEI and UTC are aware of numerous utilities reporting an average of fewer than three attaching entities per pole in both rural and urban areas. For example, CenterPoint Energy, whose entire service area (Houston, Texas) is urban, reports an average of 2.66 attaching entities (including CenterPoint Energy) per pole on poles with third-party attachments, with three or fewer entities on over 90 percent of those poles, and five or more entities on less than one percent.[32] Furthermore, respondents to the UTC survey reported that 76 percent of their poles in urban areas had three or fewer attachments. These averages include the pole owner utility itself,

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[30] In the Matter of Amendment of the Commission's Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket Nos. 97-98 and 97-151, "Consolidated Partial Order on Reconsideration" at ¶¶ 71-72, FCC 01-170, 16 FCC Rcd 12103 (2001) ("Consolidated Partial Reconsideration Order"). In the Consolidated Partial Reconsideration Order, the Commission explained that, based on the record before it, it would "establish presumptive range numbers" for non-urbanized (*i.e.*, less than 50,000 population) and urbanized (*i.e.*, 50,000 or greater population) areas of three attaching entities and five attaching entities, respectively. With respect to non-urbanized areas, the Commision expected that poles and conduits would include electric, telephone, and cable attachers. *See* Consolidated Parial Reconsideration Order at ¶ 71. In urbanized areas, the Commission expected that poles and conduits would include electric, telephone, cable, competitive telecommunications service provider, and government agency attachers. *See* id. at ¶ 72.

[31] Consolidated Partial Reconsideration Order at ¶ 72.

[32] These numbers include unauthorized attachments.

as well as jurisdictional pole attachers, and ILECs. These averages are calculated to reflect only poles that have third party attachments. If all poles owned by the utility were included, the average numbers would be even lower, because electric utilities typically have many electric-only poles (*i.e.*, with no third-party attachments).

There are several reasons why the number of attaching entities per pole is lower than than might otherwise be expected, even if electric-only poles are excluded. Simply stated, not every joint use pole has one or more of each kind of attachment. For example, EEI and UTC member companies report that typically only a small percentage of their poles have government attachments, such as traffic light signals or fiber networks for public schools. CenterPoint Energy identifies fewer than 11,300 government attachments out of more than 800,000 total attachments, or less than 1.5 percent. Accordingly, as discussed further below, government attachments make very little difference in any calculation of the average number of attaching entities per pole. The number of wireless attaching entities per pole is relatively small because wireless attachments are not made on every pole.

Furthermore, not every pole that has a cable attachment also has an ILEC attachment, or vice versa. In some areas, the poles have only utility and cable attachments, because ILECs have chosen to bury their lines underground. In some rural areas that are not served by cable systems, there are many poles with ILEC attachments but no cable attachments. Similarly, not every pole that has a cable or ILEC attachment also has a CLEC attachment. Also, joint use poles along major roadways generally have more attaching entities, while joint use poles along secondary roads often have fewer attaching entities.

E. There is No Need for the Commission to Regulate Privately Negotiated Joint Use and Joint Ownership Agreements with ILECs.

In response to the Commission's inquiries regarding changes in "bargaining power" for ILECs and whether "pole attachment rates" paid by incumbent LECs could affect the vitality of competition to deliver telecommunications, video services, and broadband Internet access service,[33] EEI and UTC describe below the context and character of the existing commercial relationships between electric utilities and ILECs as pole owning utilities.

As a threshhold matter, and as EEI and UTC explain in Part IV of these comments, section 224 of the Communications Act expressly excludes ILECs from the category of entities eligible for attachment rights under section 224. Any attempt by the FCC to assert this jurisdiction contrary to its authority would result in a chaotic situation in which some entities would argue that numerous privately negotiated joint use and joint ownership agreements have been abrogated, that laws of numerous states and localities that regulate the rates, terms, and conditions of joint use and joint ownership agreements are no longer valid, and would arguably and unfairly leave electric utilities to pay non-reciprocal rates to ILECs for electric attachments on ILEC poles.

There is also no need for federal regulation of ILEC attachments. The policy bases for the ILEC exclusion remain valid. ILECs still own significant numbers of poles. For example, CenterPoint Energy, which serves Houston, Texas, reports that it owns slightly fewer than 60 percent of joint use poles, compared to slightly more than 40 percent owned by its ILEC counterparts. In recent decades, and particularly within the past few years in some cases, the

[33] NPRM at ¶ 15.

percentage of poles owned by the most electric utilities has increased. Xcel Energy reports an average of 73 percent electric and 27 percent ILEC across all of its operating companies.

While the ownership percentage was previously closer to parity, the trend has been toward a higher percentage of poles being owned by the electric utility. Significantly, however, in at least a few cases, the shift towards ILECs owning fewer poles had already taken place *before* Congress amended the Pole Attachment Act in 1996 to include telecommunications carriers other than ILECs. For example, Duke Energy reports that the percentage of poles owned by its Carolinas operating company relative to ILECs increased by only 1.4 percent between 1995 and 2007, changing from 78.1 percent in 1995 to 79.4 percent in 2007, compared to 21.9 percent and 20.6 percent ILEC ownership respectively. CenterPoint Energy reports that the number of joint use poles it owns has *decreased* over the past 23 years, from 59.5 percent to 58.2 percent in 2007, compared to 40.5 percent and 41.8 percent for ILECs, respectively.[34]

Also, joint use and joint ownership agreements still provide a legal framework for establishing the amount of compensation exchanged between electric utilities and ILECs and related rights and responsibilities. There is no need for the Commission to pre-empt the longstanding, existing system of joint use and joint ownership agreements between electric utilities and ILECs. These agreements are freely negotiated and entered into by large, sophisticated parties that are both pole owners. Because of the distinct characteristics of joint use and joint ownership arrangements, application of the Commission's pole attachment regulations to such arrangements is unnecessary and would be very difficult to implement.

[34] This data is from a CenterPoint Energy system-wide audit commenced in 2004, which was 71 percent complete at the time of this filing.

The NPRM specifically cites proposals for "purely procedural" or "non-rate formula" approaches to joint use agreements between electric utilities and ILECs.

Reciprocal compensation under joint use and joint ownership agreements. It is difficult to compare the reciprocal compensation arrangements under electric-ILEC joint use and joint ownership agreements with regulated rates under pole attachment agreements between electric utilities and Commission-jurisdictional attachers. Typically, a joint use agreement between the electric utility and the ILEC provides for the rates, terms and conditions for ILEC attachments of telephone wires on electric poles and, conversely, for electric utility attachments of electric wires on telephone poles. Under such agreement, each pole is wholly owned by either the electric utility or the telephone utility. Under a joint ownership agreement, each entity has a percentage ownership in all of the poles subject to the agreements. Joint use and joint ownership agreements are privately negotiated, confidential agreements, the terms of which are not publicly available. EEI and UTC generally understand that the amount paid by an ILEC to an electric utility varies widely according to a variety of circumstances, including variations in the rights, benefits, and responsibilities allocated to each party, the length of time since the agreement was revised, and varying obligations under state and local laws. EEI and UTC member companies report that, in some cases, joint use agreements have been in place for decades, with no change in the amount of compensation paid by the utility. Duke Energy, for example, reports that one of its joint use agreements provides for a $3.00 per pole annual rental fee.[35] In other cases, these agreements have been renegotiated to reflect increased pole costs. In still other cases, the ILEC

[35] *See Duke Power Co. v. United Tel.-Southeast*, No. 2001-MO-024 (S.C., April 24, 2001).

and electric utility are "at parity," meaning that each party owns an agreed upon number of poles, and no fee is paid by either party.

There are many reasons for the differences between joint use and joint ownership fees and Commission-regulated pole attachment rates. Joint use and joint ownership agreements are generally very different from ordinary, Commission-jurisdictional pole attachment agreements in important respects. First, both joint use and joint ownership agreements are typically based on contractually allocated space, not on space occupied, which provides greater value and flexibility to the ILEC than it would have if it paid only on the basis of space occupied. In many cases, joint use agreements allocate 2 to 3 feet of space to the ILEC, but the ILEC may occupy only 2 feet of space in many cases. By comparison, CATVs and CLECs generally occupy only 1 foot of space.

Second, many joint use and joint ownership agreements have been in effect for many years, or even decades in some cases. In some of these cases, the rate is a "stated rate" with no formula to account for increased costs. In some cases, after many years (or, in some cases, decades) these historic agreements have recently been renegotiated to reflect increased costs, resulting in seemingly substantial rate increases.

Third, joint use and joint ownership agreements inherently reflect that fact that each party has an ownership interest in the pole plant. These agreements, because they involve ownership of public utility assets, are pervasively regulated under state and local laws and regulations applicable to utility franchises. Some localities mandate pole parity agreements or otherwise restrict ownership proportions. It would be very difficult, if not impossible, for the Commission to regulate pole attachment rates within the context of such agreements without becoming

embroiled in disputes over ownership interests and raising issues of pre-emption of state contract laws.

Fourth, electric-ILEC joint agreements impose a mutual obligation. The electric utility has obligations toward its ILEC tenant, and the ILEC tenant has the same obligations toward its electric utility tenant. In some cases, despite owning a portion of the pole plant, the ILECs rely upon the electric utility to perform pole maintenance and restoration, as well as to ensure compliance with applicable safety codes other regulatory requirements.

F. State regulation issues

The NPRM notes that eighteen states and the District of Columbia have certified that they regulate pole attachments. However, for the first time since the 1980's, it appears that this number could grow significantly.[36] For example, since the NPRM was issued, New Hampshire has certified that it regulates pole attachments, which increases the number of "reverse-preemption" jurisdictions to 20 jurisdictions.[37] Similarly, in 2007, Arkansas passed legislation authorizing its state regulatory commissions to regulate pole attachments.[38] Among the factors driving these state regulatory efforts are concerns regarding rate subsidies under existing federal pole attachment regulation.

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[36] NPRM at ¶ 4.

[37] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, "Certification of State-Law Regulation of Utility Pole Attachments Pursuant to 47 U.S.C. § 1.1414" (filed January 31, 2008); *New Hampshire Joins States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 07-245, "Public Notice", DA 08-450 (2008).

[38] *See* ARK. CODE ANN. §§ 23-4-1001 to 23-4-1006 (2007).

Regardless of whether states have reverse preempted the Commission for purposes of regulating pole attachment rates, most or all states do regulate safety, reliability, and engineering matters that affect poles attachments. For example, many states have laws codifying the NESC (or variants thereof), and many states regulate safe working practices in the vicinity of high voltage lines.[39] These are discussed in greater detail in Part II of these comments below. Among states that have certified that they regulate pole attachment rates, terms, and conditions, Oregon provides a useful model (also discussed in Part II) for how to deter unidentified and unsafe attachments through stricter notice requirements and substantial penalties.

II. The Commission should allow greater flexibility for electric utilities to protect and maintain the safety and reliability of critical electric infrastructure.

EEI and UTC agree with Chairman Martin that "the safety and reliability of critical electric infrastructure is a paramount concern" and that the Commission's work on telecommunications reliability "should not come at the expense of other public safety systems."[40] Safety, reliability, and sound engineering are the foundation of each electric utility's business and of its discharge of its duties to the public. Each electric utility's mandate as a public utility under state laws is to provide electric power to consumers safely and without interruption at

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[39] *See*, *e.g.*, ARIZ. REV. STAT. §§ 40-360.41 to 40-360.45 (2008); DEL. CODE ANN. tit. 16 § 7401B (2008); ME. REV. STAT. ANN. tit. 35-A §§ 751-761 (2007); MD. CODE ANN. LAB. & EMP. §§ 6-101 to 6-110 (2007); MO. REV. STAT. §§ 319.075-319.090 (2007); N.C. GEN. STAT. §§ 95-229.5 to 95-225.39 (2007); S.D. CODIFIED LAWS § 49-32-10 to 49-32-17 (2007); TEX. HEALTH & SAFETY CODE ANN. § 752.001-752.008; VA. CODE ANN. §§ 59-1-406 to 59-1-414 (2007); WYO. STAT. ANN. §§ 37-3-301 to 37-3-306 (2007).

[40] Statement of Chairman Kevin J. Martin, *Re: 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, October 31, 2007.

every minute of every day of the year. Electric utilities and communications attachers alike have a responsibility to comply with homeland security requirements. Any failure by communications attachers to observe basic requirements of notice, safety, or sound engineering represents a potential breach of critical infrastructure integrity, safety, reliability, and homeland security.

As explained above, it is not contrary to the interest of the electric industry to accommodate communications attachments, so long as such attachments do not interfere with safety and reliability, and are paid for at rates that reflect a full and fair allocation of pole costs.[41] To avoid threats to safety and reliability, these attachments must be made in a transparent and orderly manner in compliance with all applicable notice, safety, reliability, and engineering requirements and standards. The Pole Attachment Act itself acknowledges that safety, reliability, capacity, and sound engineering limit the right of access. Protection of safe and reliable electric service is also consistent with, and even favorable towards, promoting broadband deployment or competition in broadband markets.

It is therefore very appropriate for the Commission to seek comment on and address in a Final Rule "practices of attachers that have the potential to adversely impact the safety and reliability of an integral component of our nation's critical infrastructure, our electric power system."[42] It is also important for the Commission to evaluate whether its existing enforcement

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[41] The Pole Attachment Act provides for access by cable television systems and providers of telecommunications services to utility distribution poles. It is in the interest of the electric utility industry to accommodate these attachments, provided they are consistent with the utility's primary mission: providing safe and reliable power to its electric customers at reasonable rates. Under the Act, there is no absolute right to attach. On the contrary, as explained further below, Congress expressly provided that the utility may deny access for reasons of capacity, safety, reliability, and generally applicable engineering purposes.

[42] NPRM at ¶ 38

mechanisms are sufficient to address any unlawful practices by attachers and ensure the safety and reliability of critical infrastructure. In this regard, the Commission should examine the various jurisdictional and regulatory issues related to the development of specific enforceable safety requirements for pole attachments.[43]

A. The Commission's Existing Enforcement Mechanisms Should Be Reformed to Ensure Electric Safety and Reliability and Enhance Broadband Competition

The Commission's existing pole attachment regulations and enforcement mechanisms, in certain significant respects, undermine both the safety and reliability of the nation's critical electric power infrastructure and the vitality of broadband competition among jurisdictional attaching entities that provide communications services. These regulations and mechanisms should, therefore, be modified to better align with the Commission's twin goals of protecting critical infrastructure and enhancing competition between communications service providers.

Currently, the Commission uses a case-by-case approach to resolve disputes over terms and conditions of privately negotiated pole attachment agreements, and to guide its resolution of these disputes the Commission has adopted a variety of presumptions and guidelines, and built up a body of precedent. However, the problem is that many of the presumptions, guidelines, and precedents do not reflect the realities of providing safe, reliable electric power service and have created perverse incentives for jurisdictional communications attachers to engage in unreasonable and dangerous practices that undermine both the security of critical infrastructure and broadband competition. These general rules and presumptions should be revised to provide

[43] NPRM at ¶ 38.

adequate operational flexibility to electric utilities and to eliminate competition-distorting incentives for communications competitors to engage in dangerous and unlawful behavior.

Electric utility practices and standards vary significantly from company to company due to differences in geography, climate, state and local regulatory requirements, and operational needs. However, the Commission's regulations and some recent precedents do not provide utilities sufficient operational flexibility to protect the safety and reliability of their electric systems under varying local conditions. The Commission's regulations do not provide for sufficient deference to the expertise of states, localities, and utilities regarding the content and application of standards for safety, reliability, and engineering matters, including capacity and reliability regulations. Although the Commission has, for the most part, deferred to states and local regulations and industry standards,[44] recent precedents have dangerously limited the extent to which utilities may rely on state and local regulations, NESC rules, and good utility practice adapted to local conditions without punitive interference by the Commission.[45] As explained in

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[44] *See*, *i.e.*, *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, "Order on Reconsideration" at ¶ 87, FCC 99-266 (1999) (declining to adopt minimum skills and performance requirements for technicians, because "utilities' requirements with respect to qualifications and training of individuals working in proximity to utility facilities flow from such codes and requirements as the NESC and OSHA …" and some utilities have stricter requirements than NESC or OSHA) ("Local Competition Reconsideration Order"); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-235, 11 FCC Rcd 15499 at ¶ 1145 (1996) ("Local Competition Order") ("[o]ur determination not to prescribe numerous specific rules is supported by acknowledgements in the relevant national industry codes that no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment").

[45] *Knology, Inc. v. Ga. Power Co.,* 18 FCC Rcd 24615 (2003); *Cavalier Telephone v. Virginia Elec. & Power Co.*, 15 FCC Rcd 9563, 9579, ¶ 42, *vacated by settlement*, 17 FCC Rcd 24414 (2002).

detail below, the Commission should not adopt a set of one-size-fits-all access rules that would inappropriately favor expedient access at the expense of safety, reliability, and engineering soundness upon which not only electric service, but also communications networks, depend. On the contrary, the Commission should clarify the limits of its jurisdiction over such standards and adopt a robust rule of deference in favor of state, local, and utility safety, reliability, and engineering standards.

Second, the Commission's regulations are particularly inadequate with regard to notice, penalties, and enforcement. As explained below, the Commission's notice regulation is ambiguous and insufficient to ensure timely notice from jurisdictional attachers to utilities before attachments are made. Such ambiguity contributes to a regulatory climate in which many attaching entities seem to feel emboldened to make attachments without providing any notice to the utility, therefore, depriving the utility of the opportunity to ensure that such attachments are made in compliance with applicable safety, reliability, and engineering requirements.

Third, the Commission's regulations do not provide for penalties for unauthorized attachments or violations of safety requirements and the Commission's precedents have unreasonably deprived utilities of the ability to establish sufficiently deterrent penalty provisions in pole attachment agreements. By contrast, some states, such as Oregon, have adopted regulations allowing substantial penalties which have reduced unauthorized attachments.

Fourth, the Commission's complaint procedure does not specifically contemplate complaints by electric utilities against jurisdictional communications attachers for unauthorized

attachments or violations of the Commission's notice requirements. As explained below, although electric utilities generally do not seek to file complaints before the Commission,[46] the Commission's regulations should expressly allow electric utilities the option of doing so and, in any event, should not limit the definition of "complaint" to complaints by attaching entities against utilities.

B. Specific Improvements to the Commission's Regulations Can Enhance Competition and Protect Safety and Reliability within the Context of Privately Negotiated Pole Attachment Agreements

There are a number of improvements the Commission can make to its pole attachment regulations to protect the safety and reliability of the nation's critical infrastructure and enhance competition among broadband providers. Specifically, EEI and UTC recommend the following improvements to the Commission's current regulations with respect to communications attachments under its jurisdiction: (1) establish a rule of deference to state, Federal, industry-wide, and utility-specific standards for safety, reliability, engineering, and capacity to ensure safety and reliability in a variety of operating conditions; (2) establish clearer and stricter notice requirements for attaching entities, including on-going certification regarding the type of service provided over the attachment; (3) allow utilities to include contractual terms and conditions sufficient to deter unauthorized, unsafe, and unidentified attachments, including substantial penalties; and (4) clarify that the complaint procedure includes complaints by utilities against attaching entities for violations of notice and safety requirements by attachers and complaints by

[46] EEI and UTC are aware of only one complaint filed with the Commission by an electric utility. *See In the Matter of Centerpoint Energy Houston Electric, LLC v. Texas Cable Partners, L.P.*, File No. EB04-MD-009, "Revised Complaint" (filed July 16, 2004), *dismissed*, "Memorandum Opinion and Order" (2006).

jurisdictional attaching entities against other jurisdictional attaching entities for attachment practices that affect timely access by the complainant.

1. The Commission should defer to state and local regulators and utilities with regard to safety, reliability, and engineering standards

The Commission correctly observes that section 224(f)(2) of the Pole Attachment Act gives the utility a right to deny access on a nondiscriminatory basis "for reasons of capacity, safety, and generally applicable engineering purposes."[47] Considerable expertise in electric safety and related electric utility regulatory matters are needed to make judgments of whether a matter of capacity, safety, engineering standards, or a related matter of electric reliability, is serious enough to warrant denial of access or the imposition of conditions necessary to prevent a hazard. However, the Commission has historically acknowledged its lack of expertise in matters of safety and engineering.[48] For example, the Commission has repeatedly declined to adopt its

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[47] NPRM at ¶ 38.

[48] Prior to the enactment of the Pole Attachment Act of 1978, a representative of the Commission testified that the Commission lacks expertise in "utility regulation" and argued that such matters would be better handled by the states. *See* H.R. REP. NO. 95-721, at pp. 5-6 (Oct. 19, 1977). As recounted in the Report submitted by the House Committee on Interstate and Foreign Commerce: "The FCC witness testified further that the Commission believes that if the creation of a regulatory forum is necessary for the resolution of pole attachment disputes, such a forum would be most appropriately lodged with the states. The Commission bases its position on the belief that the resolution of such matters involves the need for expertise with respect to not only telephone company regulation but also power company regulation. The FCC does not have such expertise and if one adds the necessity to understand local problems, it would be preferable, according to the Commission, to decentralize such regulation rather than to centralize it within a Federal agency." *Id.* At the same time, President Carter's Office of Telecommunications Policy commented: "We do not believe the FCC should be delegated general jurisdiction over the facilities of electric companies and other noncommunications utilities. Jurisdiction over cable television companies and telephone companies does not necessarily imply the FCC needs or has the expertise required for specific jurisdiction over all suppliers of pole and conduit space, including electric utility companies." *Id.* at p. 11.

own generic standards for safety and reliability, choosing instead to evaluate standards as they are applied on a case-by-case basis.[49] Furthermore, the Commission has also generally deferred to state, local and industry standards.[50] Accordingly, EEI and UTC strongly urge the Commission to defer to state and local regulations and industry standards in these matters.

Deference to state regulations. Such deference is consistent with the text and legislative history of the statute. Section 224 provides for access to utility infrastructure and authorizes the Commission to provide that pole attachment rates, terms and conditions are just and reasonable. However, this authority applies only where a utility grants access to an attaching entity. The utility may deny access for reasons of capacity, safety, or generally applicable engineering standards. These matters are all within the residual police powers of the states, and are in fact

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[49] *See*, *e.g.*, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-235, 11 FCC Rcd 15499 at ¶ 1145 (1996) ("Local Competition Order") (stating that "[o]ur determination not to prescribe numerous specific rules is supported by acknowledgements in the relevant national industry codes that no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment").

[50] *See*, *e.g.*, *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, "Order on Reconsideration" at ¶ 87, FCC 99-266 (1999) (declining to adopt minimum skills and performance requirements for technicians, because "utilities' requirements with respect to qualifications and training of individuals working in proximity to utility facilities flow from such codes and requirements as the NESC and OSHA …" and some utilities have stricter requirements than NESC or OSHA.) ("Local Competition Reconsideration Order"); Local Competition Order at ¶ 1145 ("[o]ur determination not to prescribe numerous specific rules is supported by acknowledgements in the relevant national industry codes that no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment").

regulated by the states, including states that have not reverse preempted the Commission by filing a certification under section 224(c).[51]

The Pole Attachment Act was not intended to result in federal preemption of the entire field of state and local regulations pertaining to capacity, safety, reliability, and engineering. Instead, the statute was intended to fill gaps only with respect to matters that were not directly regulated by some states, namely pole attachment rates and terms and conditions.[52] 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 as between jurisdictional communications attachers. 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. States and localities are better situated

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[51] Local Competition Order at ¶ 6 (stating that the "Commission will presume state and local requirements affecting pole attachments to be reasonable, and are entitled deference even if the state has not sought to preempt federal regulations under section 224(c)").

[52] Communications Act Amendments of 1978, S. REP. NO. 95-580, at 123 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 124 (stating that FCC's regulatory authority over pole attachments is "strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems"). The Senate Commerce, Science, and Transportation Committee Report on the amendments described the local nature of pole attachment regulation: "The Committee considers the matter of CATV pole attachments to be essentially local in nature, and that the various state and local regulatory bodies which regulate other practices of telephone and electric utilities are better equipped to regulate CATV pole attachments. Regulation should be vested with those persons or agencies most familiar with the local environment within which utilities and cable television systems operate. It is only because such state or local regulation currently does not widely exist that Federal supplemental regulation is justified." S. REP. NO. 95-580, at 123. In addition, the Committee explained that the Federal role was to fill any gap over rate-setting in the absence of state and local government regulation. The Committee Report stated: "[I]n the absence of regulation by these state and local authorities of CATV pole attachments, the Federal Communications Commission should fill the regulatory vacuum to assure that rates, terms, and conditions otherwise free of governmental scrutiny are assessed on a just and reasonable basis." *Id.*

than Federal regulators to understand and balance the interests of utility and communications consumers in determining content of standards.

Many state laws, including those of states that have not reverse preempted the Commission, apply to pole attachment safety and reliability issues. Examples include state occupational safety and health laws, high voltage line acts, and storm-hardening regulations.[53] However, in some recent cases, the Commission has asserted jurisdiction to preempt the content of state or industry safety standards.[54] In at least one case that EEI and UTC are aware of, utilities have presented evidence of over 15,000 violations of the NESC and industry standards of various types and levels of severity, but the Commission simply disregarded the evidence, finding that such violations were not sufficiently "widespread and egregious."[55] The

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[53] *See*, *i.e.*, ARIZ. REV. STAT. §§ 40-360.41 to 40-360.45 (high voltage line safety); CPUC General Order No. 95 (overhead electric line construction); DEL. CODE ANN. tit. 16 § 7401B (high voltage line safety); IDAPA § 31.11.01, Rule 101 (2007) (safety and accident reporting rules); ILL. ADMIN. CODE §§ 305.10-305.130 (2007) (construction of electric power and communications lines); FLA. ADMIN. CODE ANN. r. 25-6.0345 (storm hardening rules); ME. REV. STAT. ANN. tit. 35-A §§ 754-761 (high voltage line safety); MD. CODE ANN. LAB. & EMP. §§ 6-101 to 6-110 (high voltage line safety); MO. REV. STAT. §§ 319.075-319.90 (high voltage line safety) and MO. CODE REGS. ANN. tit. 4 § 240-18.010 (2007) (safety standards for electric utilities); N.C. GEN. STAT. §§ 95-229.5 to 95-229.13 (high voltage line safety) and N.C. ADMIN. CODE tit. 4 § 11.R8-26 (safety rules and regulations); Oregon Admin. R. 860-024-000 to 860-024-0050 (2007) (safety standards); S.D. CODIFIED LAWS §§ 49-32-10 to 49-32-17 (high voltage line safety); TEX. HEALTH & SAFETY CODE ANN. §§ 752.001-752.008 (high voltage line safety); VA. CODE ANN. §§ 59-1-406 to 59-1-414 (high voltage line safety); UTAH ADMIN. CODE § 746-310-5 (2007) (design, construction, and operation); WYO. STAT. ANN. §§ 37-3-301 to 37-3-306 (high voltage line safety).

[54] *See Arkansas Cable Telecommunications Association v. Entergy Arkansas*, DA 06-494, at ¶ 11 (March 2, 2006) (confirming that the Commission has "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.").

[55] *In the matter of The Cable Television Association of Georgia, et al., v. Georgia Power Company*, DA-03-2613, Order at ¶ 12 (August 8, 2003).

Commission should recognize that each and every safety violation adds to the cumulative risk to worker safety and service reliability, as well as to the costs, maintenance, and administrative work of the Commission. Moreover, a single serious violation could result in a serious injury or fatality, or a significant reliability incident.

EEI and UTC strongly urge the Commission to clarify and acknowledge in the Final Rule the limits of its jurisdiction with respect to matters of capacity, safety, reliability, and engineering. Specifically, the Commission should expressly acknowledge that it does not have authority to pre-empt state and local regulations of capacity, safety, reliability and engineering matters relating to pole attachments. It should therefore establish a non-rebuttable presumption that such regulations are just and reasonable and may be included as terms and conditions of pole attachment agreements.

Deference to Federal regulations. Similarly, the Commission lacks authority to pre-empt applicable Federal standards and regulations. Electric utilities are subject to numerous Federal regulations that affect the installation and maintenance of pole attachments.[56] The Commission's authority also does not supersede safety regulations by other Federal agencies. Accordingly, the Commission should clarify that compliance with other Federal regulations is just and reasonable.

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[56] For example, electric utilities are subject to OSHA workplace safety rules, including a number of requirements applicable to power generation, transmission, and distribution companies. *See* 29 C.F.R. § 1910.269 (2007). In addition, the Federal Energy Regulatory Commission ("FERC") has approved, as mandatory and enforceable pursuant to the authority provided to it by Congress in the Energy Policy Act of 2005, a number of electric reliability standards, several of which affect the physical configuration of utility equipment. Finally, electric utilities are subject to numerous other Federal regulations, including those promulgated by the Environmental Protection Agency under various environmental statutes, and the United States Department of Transportation. All of these Federal requirements directly or indirectly impact the installation and maintenance of pole attachments.

NESC safe harbor. The Commission should modify its regulations to establish a presumption that the requirements of the NESC are just and reasonable and may be included in a pole attachment agreement as terms or conditions of access.[57] The NESC is an industry-wide set of general standards developed through a collaborative process which includes representatives of the utility and communications industries. The NESC is not, however, intended to be a one-size-fits-all standard. As explained below, the NESC itself acknowledges that local conditions may vary and that a utility should also be allowed, and even expected, to establish its own design specifications and specific requirements to meet local conditions. Accordingly, utilities should at least be able to rely on the NESC without concern that the Commission will find particular NESC requirements unjust and unreasonable.

Deference to utility-specific design specifications and standards. In addition to the NESC, utilities have adopted design specifications, additional standards, and procedures to accommodate local variations in weather, geography, regulatory requirements, or operational requirements. Engineering standards vary from region to region, and utility to utility, for a variety of reasons, including climate, geography, and state and local regulatory requirements. The NESC Handbook states,

> Where the local conditions differ in some particular way from those specified in the NESC, it is the responsibility of the appropriate party to recognize the differences in conditions with

[57] EEI and UTC does not suggest that the Commission attempt to codify the NESC. The Commission should not attempt to assert jurisdiction over the content of the NESC or any other code or standard for electric capacity, safety, reliability, or engineering. Acknowledging the NESC as a safe harbor does not mean that the FCC has any authority or role in determining the content of the NESC or any other code or standard for electric capacity, safety, reliability, or engineering. Rather, EEI and UTC requests that the Commission simply clarify that reliance on the NESC as a minimum standard is presumed to be just and reasonable.

> actions that constitute good practice under such differing conditions. Such practice may be reflected in the design of the installation, the construction practices, the maintenance practices, the operating practices, or some combination of the above, as applicable for the given local conditions.[58]

Hence, the NESC sets forth general rules, and the Commission has acknowledged that it does not dictate design specifications for every situation or every type of proposed pole attachment.[59] Accordingly, the NESC provides: "For all particulars not specified in these rules, construction and maintenance should be done in accordance with accepted good practice for the given local conditions known at the time by those responsible for the construction and maintenance of the communication or supply lines and equipment."[60] Accepted good practice may vary significantly in different local conditions.

EEI and UTC urge the Commission to adopt a rebuttable presumption that an individual utility's design specifications, standards, and operation and maintenance requirements included as terms and conditions of pole attachment agreements are just and reasonable. The Commission's regulations should provide that such presumption is rebuttable only on a showing by the attaching entity of clear and convincing evidence that the utility is (1) willfully and

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[58] Allen L. Clapp, NESC Handbook (Sixth Edition) (2006), commentary on NESC Rule 010 (Purpose), p.3.

[59] "These rules contain the basic provisions that are considered necessary for the safety of employees and the public under the specified conditions. This Code is not intended as a design specification or an instruction manual." National Electrical Safety Code C2-2007, Rule 010 at p. 1 (2007). *See also* David J. Marne, National Electrical Safety Code 2007 Handbook at p. 3 ("The Code is not intended to be a design manual. The Code specifies what needs to be accomplished for safety, not how to accomplish it"); 1996 First Report and Order at ¶ 1149 (stating that "[u]niversally accepted codes such as the NESC do not attempt to prescribe specific requirements applicable to each attachment request and neither shall we").

[60] National Electrical Safety Code C2-2007, Rule 012C at p. 1 (2007).

knowingly discriminating against an attaching entity in favor of another attaching entity that is in competition with the complainant or, (2) in the case of a utility that provides similar communications services to the public for a fee, that the utility is willfully and knowingly attempting to provide itself a competitive advantage in the market for such communications services.

2. The Commission should clarify and strengthen notice requirements

Clearer and stricter notice requirements for all jurisdictional attachments, including modifications to such attachments, are needed to ensure the safety, reliability, and engineering soundness of electric infrastructure and competitive parity among jurisdictional communications attachers. The Pole Attachment Act provides for access by jurisdictional attaching entities to certain utility distribution facilities.[61] However, this statute clearly acknowledges that, in the case of electric utility infrastructure, access by such attachers is subordinate to considerations of safety, reliability, and engineering soundness, including pole capacity. Pursuant to the statute, an electric utility may only deny access "on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[62]

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[61] The Act requires that "a utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1).

[62] 47 U.S.C. § 224(f)(2) states: "Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."

The utility's statutory right to deny access is meaningless if attaching entities are able to make attachments without prior notice to and authorization from the utility or without giving the utility sufficient time to evaluate the capacity, safety, reliability, and engineering impacts of a proposed attachment. It is generally not practicable for a utility to exercise its right to deny access after an attachment is already in place, for two main reasons. First, a utility cannot remove an attachment unless and until it knows that the attachment is on one of its poles. In the case of unauthorized attachments, the utility does not know about the attachment until it discovers the attachment in the course of an inventory. This is because each utility maintains a large network of poles and utilities typically conduct inventories on a five-year cycle.[63] Since unauthorized attachments are made without giving notice to the utility, it is impossible and impracticable for any utility to maintain real-time data on such attachments. Second, once an unauthorized attachment is discovered, a utility generally does not remove the attachment except in case of an imminent safety hazard, because the utility does not want to disrupt communications services for cable and CLEC customers (who are almost always also customers of the utility).

As a matter of safety, reliability, and common sense, the utility should have advance notice to able to study the impacts of the proposed attachment. Without advance notice, the attachment could pose a significant safety hazard which may not be discovered for months or years after the attachment is made. It is far more difficult and costly for all parties involved to

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[63] *See*, *i.e.* KEMA INC., *Technical Report: Post Hurricane Wilma Engineering Analysis Final Report,* at p. 51 (January 12, 2006) (indicating that Florida Power & Light "performs a pole attachment audit on five-year basis covering the entire service area").

move or modify an attachment found in violation of a safety requirement than to ensure safety compliance and engineering soundness in the first instance.

The Commission should clarify its regulations to clearly require an attacher to make a written request for access and obtain written permission from the utility before making an attachment or modifying an existing attachment. The Commission's current pole attachment notice regulation require that requests for access "must be in writing," but the language of the regulation does not explicitly state that an attacher must actually make such a request to the utility pole owner or that it must do so before making an attachment.[64]

Given the fact that large numbers of attachments are made without permission or in violation of safety requirements, notice and 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. Modifications or additions to existing attachments may overload an existing structure and an engineering analysis may need to be performed before the modification is made. EEI and UTC strongly believe not only should the attaching entity make a request but such entity should also provide to the utility pole owner accurate and appropriate data regarding each proposed attachment. Without sufficient data the electric utility cannot perform a proper engineering analysis that is necessary to ensure the reliability and safety of the electric distribution system.

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[64] 47 C.F.R § 1.1403(b) states: "Requests for access to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards."

Finally, the Commission should not impose any one-size-fits-all deadline for how long a utility may take to perform the needed impacts analyses. Consistent with its statutory right to deny access for reasons of safety, engineering, and capacity, a utility's specific safety, reliability, and operational requirements must take precedence over the needs of third-party attachers.

Overlashing. The Commission should modify its regulations to require notice to, and permission from, the utility before overlashing. Such notice and permit requirement should apply to existing permit holders, regardless of whether a prospective overlashing is made by the permit holder itself or by an additional party seeking to overlash the permit holder's existing attachment. Under current precedent, the Commission does not appear to favor contractual provisions requiring prior notification and approval of overlashing.[65] However, an overlashed wire constitutes a true attachment as much as does any existing attachment. Just as an existing wire is "attached" to the pole by means of a bolt or bracket that is in direct contact with the pole, so an overlashed wire is "attached" by means of the existing hardware along with the existing wire. As discussed in Part I, like any other attachment, overlashing significantly changes the load profile of the pole, including wind shear and ice loading factors.[66] Accordingly, the

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[65] *In the matter of The Cable Television Association of Georgia, et al., v. Georgia Power Company*, DA-03-2613, Order at ¶ 13 (August 8, 2003), citing *In the Matter of Amendment of the Commission's Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket Nos. 97-98 and 97-151, "Consolidated Partial Order on Reconsideration" at ¶ 75, FCC 01-170, 16 FCC Rcd 12103 (2001) ("Consolidated Reconsideration Order") (stating that "neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment.").

[66] As discussed in Part III, overlashers should also be required to pay an additional fee for overlashing.

Commission's regulation should require the prospective overlasher to provide notice to the utility and receive permission from the utility before overlashing.

Notice regarding type of service offered. In addition to notice before making, or physically modifying, an attachment, the Commission should clarify its current requirement that cable operators "notify pole owners upon offering telecommunications services"[67] to include a rebuttable presumption that all cable operator attachments are used to provided telecommunications services. If the Commission adopts a single rate for all broadband providers, it should likewise establish a rebuttable presumption that all attachments used by any jurisdictional attacher are used for broadband attachments.

Annual certification. To maintain safety and to ensure fair treatment of all attachers, a utility must know how many attachments each attacher has made, and what type of service the attachment is being used for. Currently, as explained in Part I, the problem of unauthorized, unsafe, and unidentified attachments is rampant. Merely clarifying the notice requirement prospectively will not be sufficient by itself to identify and bring into compliance all of the existing non-compliant attachments. To ensure a full accounting of existing attachments, and to provide additional certainty and accountability going forward, each attacher should 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

[67] 47 C.F.R § 1.403(e) ("Cable operators must notify pole owners upon offering telecommunications services").

attachments. The report should be filed within 180 days of the effective date of the final rule and annually thereafter.

3. The Commission should modify its regulations to deter unauthorized attachments and other violations by jurisdictional attaching entities

Penalties. In order to encourage lawful attachments to poles, the Commission should revise its regulations to allow utilities to impose penalties sufficient to deter attachers from making unauthorized attachments, violating safety requirements, failing to transfer facilities in a timely manner, or failing to notify the utility of a change in service. The Commission has acknowledged that penalties for unauthorized attachments "are not *per se* unreasonable" and the "penalty may exceed the annual pole attachment rate."[68] Under current Commission precedent, a utility may not charge a penalty greater than five times the annual rent.[69] EEI and UTC strongly believe this "penalty" is not only insufficient, but is also, in fact, not a penalty at all in most cases. At best, the five-times limit typically allows the utility only to collect back rent. Electric utility inventories are typically completed in a five year cycle. Thus, it may take up to five years for the utility to discover the unauthorized attachment, and the utility then has no way to determine exactly how long the unauthorized attachment was made. In the interim, the attaching

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[68] *In the matter of The Cable Television Association of Georgia, et al., v. Georgia Power Company*, DA-03-2613, Order at ¶ 22, citing *Mile Hi Cable Partners, L.P. v. Public Service Co. of Colo.*, Order, 15 FCC Rcd 11450, 11457, ¶ 10 (Cable Servs. Bur. 2000) ("*Mile Hi Bureau Order*"), *review denied*, 17 FCC Rcd 6268 (2002) ("*Mile Hi Commission Order*"), *review denied sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

[69] *Public Serv. Co. of Colorado v. FCC,* 328 F.3d 675 (2003) (affirming *Mile Hi Cable Partners, L.P. v. Public Service Co. of Colorado*, 17 FCC Rcd 6268, at ¶ 14 (2002) (holding that "a reasonable penalty for unauthorized attachments will not exceed an amount approximately equal to the annual pole attachment fee for the number of years since the most recent inventory or five years, whichever is less, plus interest…").

entity is a "free rider" on the utility's infrastructure. If the worst consequence to the unauthorized attacher is that it will be required to pay back rent, it has little or no incentive to seek a permit for its unauthorized attachment. Indeed, back rent in itself is not punitive or a "penalty."[70]

A policy of forbidding a utility to include an adequately deterrent penalty provision in a pole attachment agreement not only undermines safety and reliability, but is also economically inefficient, contrary to competitive parity because it creates an incentive to seek an illegal windfall. A communications attacher that is willing to violate the law does not pay the appropriate regulated rates for its pole attachments and thereby gains a competitive advantage over law-abiding competitors.

A lack of adequate deterrence of "free rider" conduct is also unjust and unreasonable. The Pole Attachment Act requires the Commission to ensure that pole attachment rates, terms, and conditions are just and reasonable. Under the "just and reasonable" standard, an agency is required to consider the interests of the utility.[71] A rate, term or condition that is confiscatory is unjust and unreasonable. The Commission therefore has an obligation to ensure that it does not

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[70] *In the matter of The Cable Television Association of Georgia, et al., v. Georgia Power Company*, DA-03-2613, "Order" at ¶ 12 (August 8, 2003) (focuses on the fact issue of when the last inspection took place: "a hard-and-fast rule requiring back rent to the date of the last inspection could grossly overcompensate Georgia Power if an unauthorized attachment were installed long after the last inspection" "if the use of actual attachment dates is not practical, a reasonable maximum period could be included to ensure that the back rent assessment is not reasonable).

[71] *See FPC v. Hope Natural Gas*, 320 U.S. 591 (1944); *Bluefield Water Works & Improvement Co. v. Public Service Commission*, 262 U.S. 679 (1923).

allow a confiscation to take place by preventing a utility to deter theft, conversion, and trespass by unauthorized attachers.

The purpose of a penalty is to deter unlawful behavior from occurring in the first place, and not to provide a revenue stream for utility. If the penalty is large enough, the attacher does not have an economic incentive to violate the Commission's notice regulations or applicable safety requirements. Lower penalties may be appropriate in cases where the attacher cooperates with the utility. All penalties should be distinct from and additional to any ascertainable amounts of back rent due.

The Commission should consider that the state of Oregon has provided an example of effective use of penalties to reduce the number of unauthorized attachments. Oregon pole attachment regulations authorize pole owners to impose sanctions for having no contract (up to $500 per pole), for having no permit (up to $100 per pole plus five times annual rent if the violation is reported by the owner in an inspection in which the attacher has declined to participate), and for violation of other duties (up to $200 per pole), including safety violations.[72] EEI and UTC are aware that, since Oregon adopted substantial penalty requirements in 2001, many previously unauthorized attachments have been identified and authorized, and fewer unauthorized attachments have been made. For example, a major Oregon electric utility, Portland General Electric Company, reports that the Oregon penalty regulations have substantially improved its ability to deter both unauthorized attachments and violations of safety requirements.

[72] OR. ADMIN. R. § 860-028-0120 to 860-028-0160 (2008).

Based on the success of Oregon's experience, EEI and UTC recommend that the Commission establish that the following penalties are just and reasonable:

- Penalties for unauthorized attachments:
  __ a flat sanction of $500 per pole for licensees without a contract (Oregon rule);
  __ where the licensee does not have a permit, five times the current annual rental fee if the violation is self-reported by the attaching entity or found through a joint inspection process, with an additional sanction of $100 per pole if the violation is found by the pole owner (Oregon rule);

- Penalties for safety violations:
  __ for safety violations, $200 per pole plus the actual costs of correcting certain serious violations (Oregon rule);
  __ if unauthorized attachment is in violation of safety requirement, rebuttable presumption that the attacher is responsible for the violation; and
  __ allow utility to impose an enforceable time limit for correcting violations, with additional penalties for failing to correct violations by the deadline; and
  __ in addition to these penalties, in the case of safety violations that create an imminently hazardous condition on the pole, the owner may fix and also recover incurred costs if the licensee does not respond promptly.

- Penalties for unidentified telecom attachments (*i.e.*, otherwise authorized attachments used by a cable system to provide telecommunications without notifying the utility of the type of service provided):
  __ five times the difference between the cable rate and the applicable (*i.e.*, telecom or "broadband") rate if the violation is self-reported or found through a joint inspection process, with an additional sanction of $100 per pole if the violation is found by pole owner.

- All penalties should be adjusted for inflation.

Bond and deposit requirements. Consistent with the recommendations above regarding penalties, the Commission should also clarify that under its regulations a utility may include a performance bond or cash deposit requirement in a pole attachment agreement.

4. The complaint process should be clarified to include complaints by electric utilities and complaints by attaching entities against other attaching entities

EEI and UTC believe that, in most cases, the best means of resolving disputes between utilities and attaching entities is through private negotiations and implementation of contractual provisions by the parties to pole attachment agreements. Nevertheless, utilities should also 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. Section 224 clearly contemplates complaints by any party, including utilities. However, the Commission's current regulations do not provide for complaints by utilities against attaching entities. The definition of "complaint" in the Commission's regulations should be revised to expressly include complaints by utilities against attaching entities regarding unauthorized attachments and other violations of the Commission's notice requirements.

The Commission's regulations currently define "complaint" as "a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers *alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way* in violation of this subpart *and/or that a rate, term, or condition for a pole attachment is not just and reasonable*."[73] This definition is inappropriately one-sided in favor of attaching entities because it is expressly limited to complaints regarding alleged denials of access by a utility or regarding allegedly

[73] 47 C.F.R. § 1.1401(d) (emphasis added). Although the Commission's regulations define the term "complainant" to include utilities (1.401(e)) and the term "respondent" to include a cable operator or telecommunications carrier (1.401(f)), EEI and UTC are not aware of a situation in which a utility would need to or be able to file a complaint as the term "complaint" is narrowly defined.

unjust and unreasonable rates, terms, or conditions in a pole attachment agreement. It does not include complaints by a utility against an attaching entity for unauthorized attachments or other violations of Commission notice requirements. Significantly, this one-sided definition is not consistent with the plain language of the Pole Attachment Act, which provides that the Commission "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions."[74] A violation of a term or condition relating to unauthorized attachments or other notice issues is certainly a matter concerning such term or condition.

C. Proposed "best practices" should not be mandated

EEI and UTC strongly urge the Commission not to mandate one-size-fits-all requirements or so-called "best practices." In implementing the 1996 Act the Commission declined to "regulate specific techniques for pole and conduit modification."[75] Additionally, Congress has expressly provided that utilities can deny access for reasons of capacity, safety, reliability and generally accepted engineering practices.[76] The Commission fundamentally rejected a one-size-fits all best practices approach when it implemented the pole attachment access provisions of the 1996 Act, where the Commission recognized that "there are simply too many variables to permit any other approach with respect to access to the millions of utility poles

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[74] 47 U.S.C. § 224(b)(1). Furthermore, *Webster's Third New International Dictionary* (2002) defines "concerning" to mean "relating to: regarding, respecting, about."

[75] NPRM at ¶ 37.

[76] 47 U.S.C. § 224(f)(2).

and untold miles of conduit in the nation."[77] The imposition of generic rules that do not adequately take into account engineering, capacity, safety and reliability concerns would compromise the safety, reliability and security of critical electric infrastructure. Imposition of such rules would also contradict section 224(f)(2) and intrude on state jurisdiction.[78] Non-discrimination does not dictate that all utilities must adopt the same practices.

Utilities are justifiably reluctant to allow attachers to make attachment to drop poles without prior licensing, hire their own contractors for surveys and make-ready, enter manholes without supervision, or inspect records themselves. In the past, the Commission has respected the inherently dangerous nature of pole attachments, particularly in proximity to power lines and has also recognized that electric utilities provide services essential to the public at large.[79] EEI and UTC believe the Commission should continue to recognize these serious safety hazards and not adopt rules that could endanger workers and the public.

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[77] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96098, First Report and Order, 11 FCC Rcd. 15499, 16068 ¶ 1143 (1996) ("Local Competition Order").

[78] *See In the Matter of Petition for Rulemaking of Fibertech Networks, LLC*, Docket No. RM - 11303, Comments of American Electric Power Service Corporation, Duke Energy Corporation and Wisconsin Electric Power Company WPS Resources Corporation, and Xcel Energy at pp. 5-7 (filed Jan. 30, 2006) (hereinafter "Comments of American Electric Power, *et al.*") (explaining that Congress gave the FCC narrow authority and should not intrude on state jurisdiction over electric reliability); and *In the Matter of Petition for Rulemaking of Fibertech Networks, LLC*, Docket No. RM - 11303, Comments of Ameren Corporation, Florida Power and Light Company, Pacificorp, Public Service Electric & Gas Company, Southern California Edison Company, Tampa Electric Company and Virginia Electric and Power Company at pp. 10-13 (filed Jan. 30, 2006) (stating that state jurisdiction applies to electric safety, reliability and engineering and that the Commission should refrain from creating potential conflicts with standards and jurisdiction by regulating in these areas).

[79] *Implementation of Section 309(j) and 397 of the Communications Act*, 15 FCC Rcd. 22,709 at ¶ 5 (2000).

Boxing and Extension Arms. The overwhelming majority of electric utilities rarely, if ever, allow boxing and extension arms due to serious safety and operational concerns.[80] Fibertech's listed factors are not the only ones that must be considered to ensure public safety and electric reliability when determining whether boxing and extension arms should be allowed.[81] Factors such as the age and size of the pole must be considered and a full pole loading analysis must be conducted as well.

Further, boxing and extension arms should be permitted only if they comply with the NESC and utility standards and operational requirements. For example, Western Massachusetts Electric Company (WMECO) opposes boxing and extension arms, explaining that extension arms do not comply with the NESC requirement of 40-inch vertical separation between communications and electric lines and create climbing hazards for utility linemen.[82] WMECO also indicates that:

> attachers have used lag bolts to attach extension arms rather than through bolts. These lag bolts do not go 'through' the pole and do not provide the mechanical strength that a through bolt does. Cable tension, as well as wind and ice loading, can easily cause extension arms secured with lag bolts to fall down, thereby posing a hazard to utility workers and the general public.[83]

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[80] According to UTC survey data, almost all utilities reported that they do not allow boxing and extension arms. Some utilities allow them in limited circumstances.

[81] *In the Matter of Petition for Rulemaking of Fibertech Networks, LLC*, Docket No. RM-11303, "Petition for Rulemaking of Fibertech Networks" at pp.13-16 (filed December 7, 2005).

[82] *In the Matter of Petition for Rulemaking of Fibertech Networks, LLC*, Docket No. RM - 11303, Comments of the Western Massachusetts Electric Company at p. 2 (filed Jan. 30, 2006).

[83] *Id.* at 3.

EEI and UTC agree with Verizon that boxing "greatly complicates pole replacements, removals, and the cable transfers required when performing pole replacements."[84] Further, Verizon stated that extension arms "make it more difficult for a technician to access and work on the attachment immediately above and below the bracket" and therefore Verizon does not allow extension arms to be used "merely to increase the capacity on the pole."[85] Additionally, many electric utilities report that boxing severely complicates pole replacement, because the width of the box adds to the gap between the old pole and new pole, which must be set alongside the old pole while all attached wires are transferred.

Shorter Survey and Make-Ready Time Periods. Mandating a 30-day requirement for utilities to complete surveys and a 45-day after payment requirement for completion of make ready work would inappropriately give a priority to communications attachments over utility maintenance and operations and compromise critical infrastructure. This proposal fails to take into account variables that can affect the time requirement to conduct a survey and perform make-ready work, such as the size of the build-out or regional differences. Additionally, the FCC has declined to impose 45-day deadlines for make-ready work in the past.[86]

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[84] *In the Matter of Petition for Rulemaking of Fibertech Networks, LLC*, Docket No. RM - 11303, Comments of Verizon at p. 3 (filed Jan. 30, 2006) (hereinafter "Comments of Verizon").

[85] Comments of Verizon at p. 3.

[86] *Petition of Cavalier Telephone LLC Pursuant to Section 252(E)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Arbitration,* Memorandum Opinion & Order, WC Docket No. 02-359, 18 FCC Rcd. 25887 at ¶¶ 140-142 (2003).

Use of Contractors for Field Surveys and Make-Ready. While EEI and UTC recognize the interest in expediency with respect to facilities-based deployment and is committed to supporting reasonable expectations for pole attachment access, utilities simply cannot delegate the responsibility for approving surveys and make-ready to attaching entities. Utilities are primarily liable for the consequences of pole attachment violations and have a duty to their customers to ensure the reliability of the essential services they provide. Utilities 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.

Requiring utilities to allow third-party surveys and make-ready work would go far beyond current Commission rules requiring utilities to allow qualified third-party workers to make attachments. Such a requirement would inappropriately allow contractors greater discretion than is currently given to third-party workers making attachments and could adversely affect critical infrastructure. Significantly, this requirement would also conflict with state jurisdiction over the reliability of electric distribution facilities. For example, many states regulate work on or in the vicinity of high voltage lines.[87] Contractors would also have an inherent conflict of interest, since they would be agents of the attaching entities, which would negate section 224(f)(2). EEI and UTC urge the Commission to not require utilities to use third-

[87] *See i.e.*, ARIZ. REV. STAT. §§ 40-360.41 to 40-360.45 (2008); DEL. CODE ANN. tit. 16 § 7401B (2008); ME. REV. STAT. ANN. tit. 35-A §§ 751-761 (2007); MD. CODE ANN. LAB. & EMP. §§ 6-101 to 6-110 (2007); MO. REV. STAT. §§ 319.075-319.090 (2007); N.C. GEN. STAT. §§ 95-229.5 to 95-225.39 (2007); S.D. CODIFIED LAWS § 49-32-10 to 49-32-17 (2007); TEX. HEALTH & SAFETY CODE ANN. § 752.001-752.008 (2007); VA. CODE ANN. §§ 59-1-406 to 59-1-414 (2007); WYO. STAT. ANN. §§ 37-3-301 to 37-3-306 (2007).

party contractors to approve surveys and make-ready, but rather to allow utilities the ability to do so on a voluntary basis.

Use of Contractors for Unsupervised Manhole Work. The Commission should not impose a rule requiring unsupervised access to manholes. EEI and UTC believe that case-by-case review through the complaint process is the proper forum in which to address the reasonableness of the terms and conditions of manhole access. There are safety issues, particularly given the risks of electrocution or flooding, that must be considered when evaluating the terms and conditions of manhole access.[88] Reliability and security are also concerns due to the potential for damage to electric facilities in a confined space. EEI and UTC urge the Commission to proceed cautiously and continue to review the terms and conditions of supervised access to manholes on a case-by-case basis. EEI and UTC also respectfully request that the Commission clarify that attaching entities are responsible for the costs of supervised access into manholes because these costs arise due to the pole attachments and would not otherwise be incurred by the utilities.

Drop Lines Without Prior Licensing. EEI and UTC oppose the granting of a license exemption for communications attachments for communications drop lines on drop poles. An electric drop pole (or service pole or lift pole) is a limited-use pole (or poles), situated between a utility's overhead distribution circuit and a customer's point-of-service, installed for the purpose of elevating the customer's electric service line. Utilities may decide to offer such an exemption on a non-discriminatory basis, but the FCC should not impose such an exemption by rule.

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[88] Physical access to manholes must be supervised by the utility to ensure compliance with all applicable safety rules, including OSHA regulations regarding worker qualifications for manholes, correct use of personal protective equipment (PPE), and proper procedure for securing the manholes upon entry and exit.

Prevailing industry practice treats drop poles the same as other poles for pole attachment purposes, which is consistent with the NESC. Some drop poles support primary voltage conductors and others support secondary voltage conductors, which constitute a potential danger to pole workers and the public. Also, licensing is required by some utilities before drop lines may be attached to a pole. EEI and UTC therefore recommend that the Commission not adopt a rule that would exempt drop poles from the licensing process.

Access to Records and Manhole Surveys. In its Petition for Rulemaking, Fibertech Networks, LLC ("Fibertech") asked the Commission to require utilities to allow CLECs to conduct conduit record searches and physical manhole surveys.[89] Fibertech also asked the Commission to regulate the fees that utilities charge for searches and surveys and to require utilities to allow CLECs to observe the surveys and searches when they are conducted by the utility at the CLEC's request.[90]

As explained above, unrestricted access to manholes by non-utility personnel presents serious safety, reliability, and homeland security hazards. EEI and UTC strongly believe that the Commission should not mandate access by third parties to these facilities. In order to allow for the consideration of the circumstances in each instance, the terms and conditions for access to manholes should remain subject to application and review on a case-by-case basis. Generally granting unrestricted access to these areas by third-party attachers would not be reasonable because of safety and reliability concerns.

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[89] *In the Matter of Petition for Rulemaking of Fibertech Networks, LLC*, RM-11303, "Petition for Rulemaking of Fibertech Networks" at p. 28 (filed December 7, 2005).

[90] *Id.*

With regard to access to records and manhole survey data, utilities should not be required to provide attachers access to this critical energy infrastructure information. The release of such information could endanger the safety and operation of energy production and delivery systems across the country. For that reason, existing law bars utilities from releasing some information about system infrastructure.[91] Although attachers need access to pole location and conduit availability information, attachers do not need access to more detailed records or manhole survey data in order to place their attachments or conduit. The Commission has previously stated that pole owners may charge attachers for only the actual costs incurred in order to provide this information.[92] Because utilities are responsible for the protection of their critical electric infrastructure information and for complying with laws restricting access to information about energy infrastructure, they must not be placed in a position of conflict by Commission rules regarding release of the information.

The Commission should allow utilities to impose reasonable conditions on the release of information related to their facilities to protect the confidentiality of critical electric infrastructure information and to comply with homeland security regulations.[93]

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[91] Certain critical infrastructure information is protected under Federal law, and other state and local restrictions may apply. *See* Protected Critical Infrastructure Information, 6 C.F.R. §§ 29.1-29.9 (2007).

[92] These requirements have already been applied in a complaint proceeding in the context of up-front fees for make-ready. *Cable Television Assoc. of Georgia v. Georgia Power Company*, PA 01-002, Order, 19 FCC Rcd. 16,333 at ¶ 20 (2003).

[93] *See* 6 C.F.R. part 29 (2007).

III. Pole Attachment Rates Should Be Reformed to Eliminate Competition-Distorting Subsidies and to Ensure Full and Fair Cost Allocation Among All Attachers

The Commission can enhance competition in communications markets by ensuring that pole attachment rates fully allocate the growing costs of critical electric infrastructure. Under its statutory authority, the Commission should ensure full cost allocation by eliminating rates subsidies to the extent possible. In this regard, the Commission is therefore correct to acknowledge the fact that the cable rate is a subsidy rate and to seek comment on "whether cable operators should continue to receive such subsidized pole attachment rates at the expense of electric consumers."[94] However, as discussed in Part I of these comments, the existing pole attachment rate formula for telecommunications carriers also results in a subsidy to attachers at the expense of electric utility customers. Thus, it is also appropriate that the Commission seeks comment on the "contours of our flexibility to interpret section 224" and, specifically, whether "cable operators should continue to qualify for the cable rate where they offer multiple services," whether all telecommunications carriers must pay the "telecom rate" regardless of what other services they offer, and whether the Commission can establish a unified rate for both cable systems and telecommunications carriers where both offer broadband internet service.[95]

Similar to subsidies stemming from the cable formula, the telecom formula, as currently implemented by the Commission, also results in a rate subsidy for CLECs at the expense of electric customers. The actual rate that results from the telecom formula depends in large measure on the data inputs and presumptions used in calculating the formula. As further

[94] NPRM at ¶ 19.

[95] NPRM at ¶¶ 17-21.

explained below, the Commission's current implementation of the telecom formula results in a substantial subsidy due to the cumulative effect of several unrealistic or otherwise faulty presumptions regarding the allocation of safety space, the number of attachers on the pole, and other issues.

Neither the text nor the legislative history of the 1996 Act compel the conclusion that the telecom formula was intended to provide such a subsidy. Although the cable rate is clearly a subsidy rate, section 224 simply requires the Commission to regulate pole attachment rates, terms and conditions to ensure that they are just and reasonable. Under existing precedents, the Commission has broad discretion to determine how to implement the statutory formulas to ensure a just and reasonable rate, and therefore has the legal authority to correct these presumptions to largely eliminate the subsidy provided by the telecom formula as currently implemented.[96]

EEI and UTC urge the Commission to exercise its broad discretion over the interpretation and implementation of the existing statutory telecom formula to craft new regulations to eliminate the subsidy.[97] To achieve these objectives in a manner that is consistent with the electric utilities' fulfillment of their core mission, EEI and UTC urge the Commission to apply

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[96] *Nat'l Cable Television Assoc. v. Gulf Power Co.*, 534 U.S. 327 at 339 (2002) ("As it was in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the subject matter here is technical, complex, and dynamic; and as a general rule, agencies have authority to fill gaps where the statutes are silent, *id.*, at 843-844. It might have been thought prudent to provide set formulas for telecommunications service and 'solely cable service,' and to leave unmodified the FCC's customary discretion in calculating a 'just and reasonable' rate for commingled service.") ("*NCTA v. Gulf Power*")

[97] EEI and UTC has urged, and continues to urge, Congress not only to eliminate the cable formula but also to clarify the telecom formula to ensure that it does not result in a subsidy.

the statutory telecommunications' formula ("telecom formula") to all jurisdictional pole attachments and modify the implementation of the telecom formula to eliminate, to the extent possible, the subsidies that result from the existing formulas as currently implemented.

The Commission has authority to impose a single rate formula on all CATVs and CLECs. EEI is aware that the cable and telephone industries are converging and that the cable industry is no longer an "infant industry." The rate formula therefore should not be limited to broadband, but should apply to all CATV and CLEC attachments, regardless of the service provided. However, the Commission cannot extend such formula to attachments that are not under its jurisdiction under the statute, including ILEC attachments and attachments that are not used for either cable or telecommunications service.

The Commission does not have authority to establish a single rate formula that would result in a rate lower than what would result from the telecom formula. The current telecom rate formula, as implemented, results in a subsidy to CLECs at the expense of electric consumers. The Commission should make certain relatively modest improvements to the implementation of the telecom formula that would be consistent with the statute. Correcting faulty presumptions and otherwise improving the implementation of the telecom rate would minimize the subsidy effect of the telecom rate formula. Specifically, pole attachment rates for any regulated attachment should accurately reflect actual space allocation and the number of attachers on the pole, and the cost of the communications workers safety space should be allocated to communications attachers.

A. The Commission has authority to establish a single rate formula for all jurisdictional pole attachments

The Commission sought comment on the proposal for a single rate formula and on "the statutory limits, if any, to unifying the pole attachment rate paid by both cable systems and telecommunications carriers when their pole attachments are used to provide broadband Internet access service."[98] EEI and UTC support the principle that all jurisdictional pole attachments used for broadband Internet access service "should be subject to a single rate, regardless of the platform over which those services are provided . . . ."[99] As explained below, the Commission has ample authority to apply the telecom formula to all jurisdictional attachments and to make improvements to the implementation of the telecom formula to reduce the subsidy effect of the formula. Pursuant to this authority, EEI and UTC urge the Commission to clarify its single rate formula proposal to ensure that (1) the formula cannot result in a rate lower than the rate that would result from the CLEC rate; (2) the rate formula is presumed to apply to all jurisdictional attachments; and (3) the Commission not apply the rate formula to attachments by any entity that is not under the Commission's jurisdiction under section 224, including any ILEC or other entity that is neither a cable system nor a telecommunications carrier as defined by the Pole Attachment Act.

1. The Commission has the legal authority to provide for a single rate

The Commission seeks comment on "whether cable operators should continue to qualify for the cable rate where they offer multiple services in addition to cable service" and tentatively

[98] NPRM at ¶ 21.

[99] NPRM at ¶ 2.

concludes that a single rate should apply to all providers of providers of broadband services.[100] The Commission also seeks comment on "the advantages and disadvantages of a unitary rate for all providers of broadband Internet access service, and, as discussed below, the appropriate level of such rate."[101]

EEI and UTC agree with the Commission that the "once-clear distinction between 'cable television systems' and 'telecommunications carriers' has blurred as each type of company enters markets for the delivery of services historically associated with each other."[102] To reflect the reality of technological and regulatory convergence of jurisdictional pole attachers, the Commission should apply a single rate formula to all such attachers.

It is well within the Commission's statutory authority to apply a single rate formula to all jurisdictional pole attachments, provided that such rate formula is the same as the telecom rate formula. As explained below, the Commission has discretion to increase the rate paid by cable systems to at least the same rate as the telecom rate. In any event, a single rate cannot be lower than the telecom rate.

Section 224(d)(3) provides that the cable formula "shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service." Thus, when a cable system uses a pole attachment to provide services other than cable service, the cable formula need not apply. If the cable system provides telecommunications services in addition to cable service, its attachments are then subject to the telecom formula. If the cable system does

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[100] NPRM at ¶ 9.

[101] NPRM at ¶ 22.

[102] NPRM at ¶ 14.

not provide telecommunications service but provides some other type of service, such as information service, neither formula is binding on the Commission. Instead, in this alternative situation, the Commission is required only to ensure that the resulting rate is just and reasonable. As the Supreme Court held in *NCTA v. Gulf Power Company*, the Pole Attachment Act covers attachments for broadband internet service if, and only if, they are made by either a cable system or a provider of telecommunications services.[103] Thus, for commingled cable and broadband service, the Commission has discretion to choose a broadband rate. However, if the Commission establishes a single formula applicable to all jurisdictional attaching entities, such single formula cannot be a formula that would result in a rate lower than the current CLEC formula rate.

The Commission further seeks comment on "whether all telecommunications carriers must pay the telecom rate, regardless of what other services they may provide over their attachments."[104] The statute provides a rate formula for all telecommunications carriers under section 224(e). As the Commission acknowledges, the telecommunications rate formula applies to any telecommunications carrier that provides telecommunications services. Therefore, any single rate formula that includes telecommunications carriers must therefore be the same as, and certainly not lower than, the CLEC rate formula.

Additionally, the Commission is correct to "question [Time-Warner Telecom]'s assertion that the cable rate should apply to all pole attachments, particularly because… the cable rate does not include an allocation of the cost of unusable space."[105] Under the statute, any

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[103] *NCTA v. Gulf Power*, 534 U.S. 327 at 339.

[104] NPRM at ¶ 20.

[105] NPRM at ¶ 22.

telecommunications carrier, including any cable system that provides telecommunications service, is subject to the telecom formula. Accordingly, the Commission does not have authority to apply the cable formula to any entity that is a jurisdictional provider of telecommunications services. Time-Warner Telecom ("TWTC") asks the Commission to "use its broad authority to apply the cable rate to all pole attachments."[106] TWTC argues that "section 224(e)(1) mandates that rates must be nondiscriminatory, and that where cost allocation guidelines yield discriminatory rates the nondiscrimination mandate trumps the cost allocation guidelines."[107] In effect, TWTC asks the Commission to read only the second sentence of (e)(1) and ignore the rest of subsection (e). Subsection (e) directs the Commission to establish a rate "in accordance with this subsection" for pole attachments used by "telecommunications carriers to provide telecommunications services." Any entity that falls within this category, including any cable system that provides telecommunications services, is therefore subject to the rate provided in subsection (e) (*i.e.*, the "telecom" rate). Subsections (e)(2) and (e)(3) distinguish between the costs of usable space and the costs of "other than usable" space. Under (e)(2), two-thirds of the cost of the common (*i.e.*, "other than usable") space must be allocated equally among all attaching entities. Based on the clear text of the statute, the Commission has no authority to adopt TWTC's proposal to apply the cable rate to all broadband providers.

2. The formula should apply to all jurisdictional attachments

EEI and UTC strongly believe that a single rate formula should apply to <u>all</u> jurisdictional attachments, regardless of the type of telecommunications service provided over the attachment.

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[106] NPRM at ¶ 21.

[107] NPRM at ¶ 21.

Moreover, the formula should not be limited to broadband. As noted above, EEI and UTC agree with the Commission that the distinction between cable systems and telecommunications service providers is no longer clear. This is especially true from the perspective of an electric utility, which has no way of knowing with certainty what type of service a cable system is providing over its attachments unless the cable system provides notice to such utility. In many cases, the only "notice" the utility receives is in the form of advertisements stating the cable provider now offers telephone service in the general area. To provide a level playing field for all broadband competitors and to eliminate disputes over what type of service is provided, the Commission should presume that all cable TV attachments are used to provide services subject to the single rate formula.

3. No FCC rate formula can apply to non-jurisdictional entities

The Commission's single rate formula cannot apply to any ILECs or any other non-jurisdictional attacher, such as an entity that provides only internet service. The single rate formula also cannot apply to attachments that are not subject to FCC jurisdiction under section 224. As explained in Part IV of these comments, ILECs are not providers of telecommunications services for purposes of section 224 and their attachments on electric utility poles are therefore not subject to the Commission's jurisdiction. A statutory change would be required to enable the Commission to extend a regulated rate formula to cover ILEC attachments.[108]

[108] EEI and UTC has advocated for, and will continue to advocate for, such a legislative change to provide a full-cost-allocation rate for all providers of cable and telephone service, but it cannot support the assertion of jurisdiction where no statutory authority for such jurisdiction currently exists.

EEI and UTC therefore urge the Commission to clarify that the single rate formula would apply only to entities that fall within the only two categories that qualify for regulated rate treatment under section 224, namely cable television systems and providers of telecommunications services. Any entity that is neither a cable television system nor a provider of telecommunications services, but nevertheless provides broadband internet access service using attachments to utility poles, does not qualify for regulated rate treatment under section 224. The Commission should therefore clarify that any information-service-only attachments (including attachments by stand-alone wireless information service providers) are not eligible. To subject these non-jurisdictional attachments to FCC regulation would require a statutory change.

B. The Commission should modify the implementation of the telecommunications rate formula to reduce competition-distorting subsidies

Applying the telecommunications formula to all jurisdictional attachments will not, by itself, eliminate subsidies currently afforded to attaching entities at the expense of electric consumers. The Commission must also change the manner in which the formula is implemented. The Commission is therefore correct to seek comment on "the extent of the Commission's ability to modify how the cable and telecom rates are applied."[109] In this regard, the Commission has considerable discretion under existing statutory authority to improve the way the telecommunications rate formula is implemented to eliminate or at least significantly reduce competition-distorting subsidies.

[109] NPRM at ¶ 20.

As explained in Part I, experience shows several of the presumptions the Commission uses in applying the telecom formula are inaccurate. In examining the extent of the Commission's authority to modify the implementation of these rates, EEI and UTC recommend that the Commission specifically modify these presumptions to ensure that they no longer result in competition-distorting subsidies at the expense of electric consumers. EEI and UTC acknowledge that general rules and presumptions can be useful in rate calculations, provided they reflect actual conditions and do not favor the interests of communications attachers at the expense of the utilities. However, under current regulations, many of the presumptions are unrealistic in a manner that results in substantial subsidies to jurisdictional attachers at the expense of the host utilities. As discussed further below, to eliminate such subsidies, EEI and UTC urge the Commission to make the following modifications to the presumptions and general rules relied upon in calculating pole attachment rates under the telecommunications formula: (1) allocate the communications worker safety zone space to common (*i.e.*, "unusable") space to require communications attachers, whose workers the safety zone was created to protect, to pay for an equal share of the cost of that space; (2) lower the presumed numbers of rural and urban attaching entities to reflect actual prevailing conditions; (3) do not count the utility as an "attaching entity" in calculating the allocation of common space; (4) ensure that space allocation reflects the number of attachments; (5) clarify that space allocations for special types of attachments must reflect the full amount of space occupied; (6) establish a presumption that executed pole attachment agreements are just and reasonable to avoid the "sign and sue" problem.

1. The communications worker safety zone space should be allocated to common space

Currently the FCC presumes that the 40-inch communication worker safety zone is usable space, used by the electric utility. Thus the electric utility must pay for the entire portion of pole costs attributable to the safety space. However, the communication worker safety zone, as its name indicates, exists for the safety of communications workers who need to access the pole to maintain their communications attachments. The NESC Handbook states that "[t]he communications worker safety zone is only needed if the communication utility chooses to use communication work rules and equipment."[110] Due to the presence of communications wires in close proximity to energized electric supply wires, the safety zone is needed to prevent accidental contact between the electric wires and the communications wires (*i.e.*, due to ice loading) and to provide headroom for communications workers and.[111] Electric utility linemen are highly trained to work with and around energized wires, and thus would not need a special safety space in the absence of communications attachments. Communications companies choose to save money by not training their workers to work in close proximity to energized facilities. Thus, if there were no communications attachments, there would be no communications worker safety zone. Accordingly, this space should be regarded as common space, and divided equally among all attachers.[112]

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[110] Allen L. Clapp, NESC Handbook (Sixth Edition), commentary on NESC Rule 235C (Vertical Clearance Between Line Conductors) at p. 416.

[111] Id. at p. 417.

[112] *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, "Report and Order" at ¶¶ 21-22, FCC 98-20 13 FCC Rcd 6777 (1998).

2. The utility should not be counted as an "attaching entity" in calculating the allocation of common space

In determining the number of attaching entities on a utility pole, the Commission should include only entities that have "pole attachments" as defined by section 224. Thus, the Commission should only include attachments made by cable systems and CLECs, not attachments made by ILECs, governmental entities, or by the utility itself.

Under the Commission's current regulations, the term "attaching entity" includes the utility with respect to its own pole. This regulation is inconsistent with the plain language of the statutory definition of "pole attachment" as any attachment by "a cable television system or provider of telecommunications services to a pole, duct, conduit, or right-of-way owned or controlled by a utility." Section 224(e)(1) provides that, under the telecom formula, a utility must apportion the cost of the common space ("space other than usable space") "among entities" so that the apportionment equals two-thirds of the cost that would be allocated "under an equal apportionment of such costs among all attaching entities." The term "attaching" should be read in terms of the subject matter of section 224, which is "pole attachments" as defined in section 224(a)(4). An "attaching entity" for purposes of section 224, therefore, is an entity that makes a jurisdictional "pole attachment" to the exclusion of other entities that use the same pole. Accordingly, EEI and UTC urge the Commission to strike the definition of "attaching entity" in 1.1402(m) and replace it with the following: "[t]he term attaching entity means a cable system operator or provider of telecommunications services with a pole attachment as defined in subsection 1.1402(b)."

Indeed, if the Commission were to include ILECs (which are non-jurisdictional) in counting the number of attaching entities, it should nevertheless exclude government entities.

State and local governments typically do not pay a fee for their attachments. Instead state and local governments simply exercise their eminent domain power to occupy whatever space they need on the pole. This government entity use of pole space thus, in effect, constitutes a tax on the electric utility. The most effective way to ensure that each attaching entity bears its fair share of this additional tax would be to exclude government entities in determining the number of attaching entities.

The statutory telecommunications formula already more than sufficiently takes into account the utility's use of the common space on the pole. Under the statutory telecommunications formula, the utility is already required to pay for one third of the cost of the common space, while the remaining two-thirds are allocated among the entities that make jurisdictional pole attachments. This is the reason why the telecommunications formula allocates only two-thirds of the costs of common space to "attaching entities" (*i.e.*, to entities that make jurisdictional pole attachments). The utility should not be required to pay twice: once for its one-third of the cost of unusable space, and again for an equal share of the remaining two-thirds. To avoid this "double jeopardy" result, the Commission should not count the utility in calculating the average number of attaching entities per pole.

3. The Commission should establish a presumption of three attaching entities per pole for all areas and eliminate the distinction between rural and urban.

The Commission's current regulations have rebuttable presumptions regarding the number of attaching entities. These presumed numbers should be modified because experience demonstrates that they are too high and therefore result in a significant distorting effect on pole attachment rates. For "urbanized" areas, defined as areas having 50,000 or greater population,

the Commission's presumptive average is five, except that if any part of the utility's service area within the state is designated as urban, then all of that service area shall is deemed urban for purposes of determining the presumptive average number of attaching entities.[113] The purpose of a presumption should be to reflect as accurately as possible the average number of "attaching entities" as referenced in the telecommunications formula language of section 224(e). However, as explained in Part I, utilities generally have an average of fewer than three attaching entities per pole, in both rural and urban areas. The presumptive average of five for urban areas thus far exceeds the actual averages for many utilities.

Accordingly, the Commission should eliminate the distinction between rural and urban and establish a new presumptive number of three attaching entities per pole for all areas. In the experience of most electric utilities, the number of attaching entities does not vary substantially between rural and urban areas. EEI and UTC recommend that the Commission significantly lower the urban presumption to three, and eliminate the distinction between urban and rural. Using the same presumption for both urban and rural will eliminate disputes over the which parts of a utility's service area are urban and which are rural. Using the same presumption will also put rural attaching entities on a level playing field, instead of giving a special incentive to urban attachers in the form of a lower rate.

Assuming the Commission agree with EEI and UTC that the electric utility should not be counted as an attaching entity, EEI and UTC recommend that the presumptive number of attaching entities should be two for both urban and rural. Though it would be inappropriate for

[113] 47 C.F.R. § 1.1417.

the Commission to continue to include the utility in calculating the number of attaching entities, under these circumstances, the presumptive number should be three for both urban and rural.

4. Space allocation should reflect the number of attachments

The Commission's regulations should be revised to clarify that all attachments of whatever kind made by a jurisdictional attaching entity should be taken into account in determining the amount of usable space allocated to the entity. This is consistent with the statute because Section 224(a)(4) defines a "pole attachment" as "any attachment" by a jurisdictional attacher. Section 224(e)(3) requires that, under the telecom formula, the cost of providing usable space be apportioned "according to the percentage of usable space required for each entity." In the case of an attachment of an ordinary wire, the space required includes the clearance space between each attachment. However, in the case of an attachment of any additional device or equipment, the Commission should allow a utility to take into account all additional space "required" for such device or equipment in calculating rates. For example, pole attachment rates should include space used for risers, J-hooks, power supplies, and any additional items that occupy space on the pole.

As discussed in Part I, overlashed attachments imposed substantial wind and ice loading burdens on electric utility poles. Accordingly, 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.

5. Executed pole attachment agreements should be presumed just and reasonable to avoid the "sign and sue" problem

The Commission is right to seek comment on whether certain "rules regarding pole attachment complaints . . . may have had the unintended consequence of discouraging pre-complaint mediation."[114] In particular, the Commission notes that "under current Commission rules, an attacher may execute a pole attachment agreement with a utility, and then later file a complaint challenging the lawfulness of a provision of that agreement."[115] To encourage pre-complaint mediation, the Commission should adopt a presumption that an executed pole attachment agreement is just and reasonable.

IV. ILECs Do Not Have a Right to Regulated Pole Attachment Rates

The NPRM correctly states that, pursuant to section 706 of the 1996 Act, there is a critical need to create "even-handed treatment" for all broadband competitors, including ILECs.[116] However, the Commission's discretion to implement its broadband competition policy goals is strictly limited by the "extent of its authority" to regulate pole attachment rates for ILECs and whether section 224 confers rights on ILECs to regulation of the rates they pay for pole attachments.[117] More specifically, the parameters of the Commission's authority pursuant to section 224 are based on whether the terms "telecommunications carrier" and "provider of

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[114] NPRM, Regulatory Flexibility Analysis at ¶ 36.

[115] Id.

[116] NPRM at ¶ 36.

[117] NPRM at ¶¶ 3, 23.

telecommunications service" refer to different groups and whether "access" and "rates, terms, and conditions" are severable rights.

EEI and UTC do not believe there is any dispute that the term "telecommunications carrier," as defined by section 224, excludes ILECs.[118] Therefore, the answers to these questions of statutory authority turn on whether, for purposes of section 224, the term "provider of telecommunications service" is broader than the term "telecommunications carrier" and, more specifically, whether the term "provider of telecommunications service" is broad enough to include both telecommunications carriers and ILECs. If the two terms refer to the same group of entities, the rights to regulated rates, terms, conditions, and access all apply only to telecommunications carriers, and none of these rights apply to ILECs.

The plain text and structure of section 224, the plain text and structure of the Communications Act as a whole, and the legislative history of section 224, all show that the terms "provider of telecommunications service" and "telecommunications carrier" are interchangeable. In addition to the identical content of these two terms, the text and structure of section 224 also show that rates, terms, and conditions are not severable from the right of access

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[118] *See*, *i.e.* 47 U.S.C. § 224(a)(5)(2005); 47 C.F.R. § 1.402(h) (2007*); Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, "Notice of Proposed Rulemaking" at ¶ 6 (2007) ("NPRM"); *United States Telecom Association Petition for Rulemaking, In the Matter of the Petition of the United States Telecomm Association for a Rulemaking to Amend Pole Attachment Rate Regulations and Complaint Procedures*, RM No. 11293, at p. 5 (filed Oct. 11, 2005); BellSouth Comments in Support of US Telecom Petition for Rulemaking, *In the Matter of the Petition of the United States Telecomm Association for a Rulemaking to Amend Pole Attachment Rate Regulations and Complaint Procedures*, RM No. 11293, at p. 7 (filed December 2, 2005); Reply Comments of USTA, *In the Matter of the Petition of the United States Telecomm Association for a Rulemaking to Amend Pole Attachment Rate Regulations and Complaint Procedures*, RM No. 11293, at p. 3 (filed December 19, 2005).

under section 224(f). Moreover, no reading of Section 706 "in conjunction with" section 224 can override the plain text of section 224.

Even if the statute were ambiguous, and it is not, it would be arbitrary and capricious for the Commission to reverse ten years of regulatory practice and draw a novel, unsubstantiated, and unsubstantiable distinction between providers of telecommunications services and telecommunications carriers. No Federal court has directly ruled on these questions, but Federal court decisions have consistently used the relevant terms interchangeably. Furthermore, the Commission has consistently and repeatedly stated that ILECs are excluded from section 224 rights and used the terms "telecommunications carrier and "provider of telecommunications services" interchangeably. Notably, the NPRM itself also uses the terms interchangeably, asking "whether all telecommunications carriers must pay the telecom rate, regardless of what other services they may provide over their attachments."[119]

The Commission also lacks substantial evidence to extend pole attachment rights to ILECs. As further explained in Part I of these comments, the policy bases for excluding ILECs in 1996 remain valid today. Even the ILECs themselves have expressly acknowledged the exclusion in numerous filings made before the Commission.

A. Congress has addressed the issue directly, and has precluded ILECs from obtaining regulated pole attachment rates

The standard for judging an agency's statutory interpretations is set forth in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). The analysis under *Chevron* is a two-pronged inquiry. The first is whether "Congress has directly addressed the precise question at issue." If

[119] NPRM at ¶ 20.

so, the inquiry is at an end, and the agency (or a reviewing court) must "give effect to the unambiguously expressed intent of Congress."[120] If, however, the statute is "silent or ambiguous with respect to the specific issue," then the question is whether an agency's interpretation is based on a "permissible construction of the statute."[121] An agency's interpretation is permissible if it is "reasonable."[122]

Congress has clearly addressed the issue raised by the Commission, and has expressly precluded ILECs from receiving regulated pole attachment rates. This is evident from both the plain language and the legislative history of section 224. Even if section 224 were not clear, ILECs still would not be permitted to receive regulated pole attachment rates because such a reading of the statute would be unreasonable. Indeed, this is confirmed by years of Commission precedent on this very issue, and by multiple court decisions addressing the scope of section 224.

Section 224(a)(5) provides that, for purposes of regulated pole attachments under section 224, "the term 'telecommunications carrier' (as defined in Section 3 of this Act) does not include any incumbent local exchange carrier as defined in Section 251(h)." Section 224, both on its face and in the context of the Communications Act as a whole, demonstrates that the term "telecommunications carrier" is synonymous with the term "provider of telecommunications service," and that ILECs therefore are precluded from obtaining regulated pole attachment rates under section 224. The arguments in favor of granting ILECs the right to regulated pole attachment rates focus narrowly on the phrase "provider of telecommunications service" in

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[120] 467 U.S. at 843.

[121] *Id.*

[122] *Id.* at 844.

section 224(a)(4). However, those arguments ignore language in other parts of section 224, as well as other parts of the Communications Act, that not only places the phrase "provider of telecommunications service" in the appropriate context, but also demonstrates conclusively that the phrase does not encompass ILECs.[123]

1. Section 224 treats the terms "telecommunications carrier" and "provider of telecommunications service" as synonymous and it is clear from the structure of Section 224 that access is not severable from rates, terms, and conditions

The text and structure of section 224 show in several ways that the section applies to a single group of eligible entities. First, section 224 uses a variety of terms to generally refer to the same set of eligible entities. If Congress had intended the term "provider of telecommunications service" to have a different meaning it would have used the term in other parts of Section 224 where regulated rates, terms, and conditions are addressed, but the section uses the exact term "provider of telecommunications service" only once. In all other portions of Section 224, Congress uses the term "telecommunications carrier" by itself or in conjunction with such phrases as "provide any telecommunications services" and "provide telecommunications

[123] The Supreme Court has consistently recognized that "context is important in the quest for a word's meaning, and that statutory construction . . . is a holistic endeavor." Indeed, a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme -- because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Koons Buick Pontiac GMC v. Bradley Nigh*, 543 U.S. 50, 60 (2004).

services."[124] This also indicates that Congress intended the terms "telecommunications carrier" and "provider of telecommunications service" to be interchangeable with one another.

Section 224(f)(1) provides for access by any "telecommunications carrier" to any utility pole, duct, conduit, or right-of-way. Section 224(f)(2), however, allows an electric utility to "deny … any telecommunications carrier" such access for reasons of safety, reliability and generally applicable engineering purposes. The proposition that ILECs have rights pursuant to the statute to regulated rates, terms, and conditions, but not to access, leads to the absurd conclusion that the language of Section 224(f)(2) regarding safety, reliability and engineering would not apply to otherwise-regulated ILEC attachments. If this were the case, ILECs would technically have no right of access and electric utilities would likewise have no right to deny existing access for reasons of safety, reliability, and engineering.

Section 224(c), relating to state regulation of pole attachments, shows that the right of access is closely tied to the right to regulated rates, terms and conditions. Section 224(c)(1) provides that the Commission has no jurisdiction over "rates, terms, and conditions, *or access* to poles . . . as provided in subsection (f)" where "such matters" are regulated by a state (emphasis added). However, Section 224(c) refers three times in paragraph (2) and once again in paragraph (3) to such states as those which regulate "rates, terms, and conditions" without separately enumerating "access." Congress had no need to repeat the term "access" in (c)(2)-(3) because it is clear from the context that rates, terms and conditions are inextricably tied to access. To

[124] *See*, *i.e.*, Sections 224(d)(3) (applying the cable rate during a transition period to "any telecommunications carrier"); 224(e)(1) (applying the telecommunications rate to "telecommunications carriers to provide telecommunications services").

maintain that access is severable would lead to the absurd conclusion that a state could regulate rates, terms, and conditions without regulating access.

In sum, when read in its entirety, Section 224 treats the terms "telecommunications carriers" and "providers of telecommunications service" interchangeably and access as inseparable from rates, terms, and conditions. This means that a "provider of telecommunications service" is a "telecommunications carrier" subject to the limitations of Section 224(a)(5), and that ILECs, therefore, are not entitled to regulated pole attachment rates, terms, and conditions separate from access rights under Section 224.

2. The Communications Act as a whole shows that the terms "telecommunications carrier" and "provider of telecommunications service" are interchangeable for purposes of Section 224

It is appropriate to interpret the scope of "provider of telecommunications service" by reading it not only in light of the entirety of Section 224, but also in light of the other provisions of the Communications Act. This is evident most clearly in the manner in which telecommunications carrier is defined in Section 3. Specifically, Section 3(44) defines a "telecommunications carrier", in relevant part, as "*any* provider of telecommunications service."[125] The term "any" is commonly defined as "one or some indiscriminately of whatever kind."[126] This confirms the interpretation of Section 224 outlined above -- that the term "provider of telecommunications service" in Section 224(a)(4) is synonymous with

[125] Emphasis added.

[126] *Webster's Third New International Dictionary* (2002) definition of "any."

"telecommunications carrier" for purposes of establishing the right to regulated pole attachment rates.

3. The general policy directive of section 706 cannot override the specific language of section 224.

Section 224 can reasonably be read "in conjunction with" section 706's directive to promote broadband deployment. For example, as explained in section (B) of these comments, the Commission has authority to establish a uniform rate for broadband attachments that are under the Commission's jurisdiction. However, there are limits to how broadly the language of Section 224 can be interpreted to accommodate the general policy of Section 706. A general statutory directive cannot be used to override a specific limitation provided for in the same statute.[127] Accordingly, the general language of Section 706 cannot control the plain and specific language of section 224, which expressly excludes ILECs from the definition of telecommunications carrier.

4. The legislative history of Section 224 confirms that ILECs are not entitled to regulated pole attachment rates

As originally enacted, Section 224 divided the world in half. On one side were "cable television operators," and on the other side were "utilities."[128] The statute defines "utility" to include both electric and telephone utilities. The provision was intended to grant cable television companies broader access to customers, and thus to facilitate the expansion of the cable

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[127] *NCTA v. Gulf Power Co.*, 534 U.S. 327 at 335 (2002) (explaining that "specific statutory language should control more general language when there is a conflict between the two").

[128] *See*, *i.e.*, Congressional Record Vol. 23 (1977) at 35006, comments of Rep. Wirth ("H.R. 7442 will resolve a longstanding problem in the relationship of cable television companies on the one hand, and power and telephone utilities on the other.").

television industry. However, there was no intention of allowing ILECs to claim pole attachment rights for themselves.

The Telecommunications Act of 1996 expanded Section 224 to encompass pole attachments by competitors to ILECs, but did not grant pole attachment rights to ILECs themselves. For example, a Senate report on the legislation stated that the bill "includes revisions to section 224 of the 1934 Act to allow *competitors to the telephone companies* to obtain access to poles owned by utilities and telephone companies at rates that give the owners of poles a fair return on their investment."[129] Thus, the 1996 Act clearly did not contemplate allowing ILECs themselves to obtain any pole attachment rights.

5. Federal Court decisions have interpreted the 1996 Act to exclude ILECs as entities entitled to regulated rates, terms, and conditions under Section 224

The Federal Courts have stated that the 1996 Act sought to provide telecommunications carriers the protections previously afforded to cable television. Several U.S. Court of Appeals decisions have summarized Congress's rationale for the passage of the 1996 Act as the need to grant telecommunications carriers rights to utilities' poles at regulated rates.[130] These prior

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[129] S. Rpt. 103-367 on S. 1822, Communications Act of 1995, July 24, 1995 (emphasis added).

[130] *See*, *i.e. Southern Co. v. FCC*, 293 F.3d 1338 at 1342 fn. 1 (11th Cir. 2002) (emphasis added) (stating that Congress recognized that "utilities would lose the incentive to voluntarily enter in pole attachment agreements with *telecommunications and cable television companies* that were now their competitors" and noting that the 1996 Act "added *telecommunications carriers*" to the entities entitled to regulated rates, terms, and conditions."); *Southern Co. Serv. v. FCC*, 313 F.3d 574 at 576-77 (D.C. Cir. 2002) (stating that the Pole Attachment Act was passed to prevent utilities "usually electric and telephone service companies" from denying access to cable television operators and indicating that the 1996 Act granted the same protections to attachments made by providers of telecommunications services."); *Gulf Power Co. v. FCC,* 208 F.3d 1263 at 1266-168 (11th Cir. 2000), *rev'd, NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002)

decisions have also used terms such as "telecommunications service providers," "telecommunications carriers," "telecommunications companies," and "providers of telecommunications services" interchangeably when referring to telecommunications carriers.[131] These decisions illustrate that courts have consistently read Section 224 to exclude ILECs from the scope of entities entitled to the protections of Section 224, including the regulated rates established thereunder. It would be unreasonable for the Commission to adopt a reading of Section 224 that permits ILECs to receive such rates.

B. Interpreting Section 224 to permit ILECs to obtain regulated pole attachment rates would be arbitrary and capricious, particularly in light of the Commission's consistent rulings to the contrary

The Supreme Court has consistently held that an agency may not depart from prior precedent on the same issue without a rational basis, and without a comprehensive and valid explanation for its reasons for doing so. As the Court explained in *Atchison v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973), an agency has a "duty to explain its departure from prior

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(stating that the 1996 Act gave "providers of cable and telecommunications services" rights to attach to "power and telephone company" poles and that "telecommunications carriers" had asked Congress to grant them rights to poles owned by utilities, so Congress passed the 1996 Act to "give entities providing *telecommunications and cable television service* the right to "nondiscriminatory access" to utility poles").

[131] *See*, e.g *Georgia Power Co. v. Teleport Comm. Atlanta, Inc.*, 346 F.3d 1033 at 1036 (11th Cir. 2003) (stating that the 1996 Act extended the FCC's jurisdiction over utility pole attachments to "telecommunications providers" to mandate access to "telecommunications service providers", that access for "telecommunications companies" was a new development in the act and that the Telecommunications Act "charged [the FCC] with creating a new telecommunications formula to set attachment rates for *telecommunications attachers* (emphasis added)); *US West Comm. v. Oregon Pub. Util. Comm'n*, 224 F. 3d 1049 at 1051 (9th Cir. 2000) (stating that "[t]he Telecommunications Act of 1996 … is designed to foster competition in local and long distance telephone markets by neutralizing the competitive advantage inherent in incumbent carriers' ownership of the physical networks required to supply telecommunication services.").

norms."[132] According to the Court, "[w]hatever the ground for the departure from prior norms . . . it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate."[133]

There is no reason for the Commission to depart from its long-standing precedent in this proceeding. Clearly, ILECs have been consistently excluded from the entities entitled to regulated pole attachment rates and other rights under Section 224 in both the Commission's regulations and its orders. Furthermore, the Commission has not articulated a clear or rational basis for reversing its prior decisions on this issue. Indeed, in light of the clear statutory directives to the Commission in Section 224, it would be nearly impossible for the Commission to adequately support on the basis of the record a reversal of its prior positions without such a holding being deemed arbitrary and capricious. Accordingly, the Commission should uphold its precedent and continue to interpret Section 224 as excluding ILECs from the entities entitled to the protections of Section 224.

The Commission has repeatedly and consistently interpreted Section 224, as amended by the 1996 Act, as excluding ILECs from the entities entitled to the protections of Section 224. The Commission's regulations on pole attachments expressly exclude ILECs. The Commission's regulations equate the terms "telecommunications carrier" and "provider of telecommunications services," expressly acknowledge the statutory exclusion of ILECs from the definition of telecommunications carrier, and do not separate the right of access from eligibility

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[132] 412 U.S. at 808.

[133] *Id.*

for regulated rates, terms, and conditions.[134] Further, the orders implementing and interpreting the 1996 Act consistently state that ILECs are excluded from Section 224's protections, and equate the terms "telecommunications carriers" and "provider of telecommunications services."[135] The NPRM itself recognizes that ILECs are excluded from the definition of telecommunications carriers and are not entitled to regulated rates, terms, and conditions.[136] For the Commission to now interpret the 1996 Act as including ILECs in the group of entities entitled to regulated pole attachment rate, terms, and conditions under Section 224 would be arbitrary and capricious.

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[134] *See*, *i.e.* 47 C.F.R. §§ 1.403(a) and 1.404 (2007; *Compare* 47 C.F.R. § 1.402(b) *with* 47 C.F.R. § 1.402(e).

[135] *See*, *i.e.* *In the Matter of Implementation of Section 703 of the Telecommunications Act of 1996,* CS Docket No. 96-166, "Order" at ¶ 3 & 6, FCC 96-327, 11 FCC Rcd 9541 (1996) ("Implementation Order") ("1996 Act amendments seek to ensure that "telecommunications carriers" have access to poles, ducts, conduits and right-of-way owned or controlled by utilities"); *In the Matter of Amendment of the Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, "Report and Order" at ¶¶ 4-5, FCC 00-116, 15 FCC Rcd 6453 (2000) ("2000 Report and Order") (stating that the scope of Section 224 was expanded by "applying the Cable Formula to rates for pole attachments made by telecommunications carriers"); *In the Matter of Amendment of the Commission's Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket Nos. 97-98 and 97-151, "Consolidated Partial Order on Reconsideration" at ¶ 1, FCC 01-170, 16 FCC Rcd 12103 (2001) ("Consolidated Reconsideration Order") (stating that Section 224(a)(5) excludes ILEC pole attachments from the "requirements for just and reasonable rates, terms and conditions"); *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, "Report and Order" at ¶ 4, FCC 98-20 13 FCC Rcd 6777 (1998) ("1998 Report and Order"), *aff'd in part, rev'd in part, Gulf Power v. FCC,* 208 F.3d 1263 (11th Cir. 2000), *rev'd & remanded*, *NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002) (stating that the 1996 Act amended Section 224 to extend the protections previously afforded only to cable television operators to telecommunications carriers).

[136] *See* NPRM at ¶ 6.

The Commission has also stated that Congress intended to exclude ILECs from the entities entitled to regulated rates and other protections under Section 224. In the 1998 Report and Order the Commission stated that it was consistent with congressional intent to exclude ILECs because "[t]he 1996 Act…specifically excluded incumbent local exchange carriers … from the definition of telecommunications carriers with rights as pole attachers."[137] Further, the Commission's orders have equated the terms "telecommunications carrier" and "provider of telecommunications service."[138] The Commission's orders implementing the 1996 Act's changes to Section 224 have not interpreted the term "telecommunications carrier" to be narrower in scope than the term "provider of telecommunications service."

C. ILEC statements in a prior pole attachment proceeding further confirm that ILEC attachments are not entitled to regulated pole attachment rates.

Comments filed by ILECs in the docket leading to the 1998 Report and Order acknowledge the plain meaning of the statute, the legislative history, and the Commission's prior interpretations as excluding ILECs from inclusion as a "provider of telecommunications service" under Section 224(a)(4). In this proceeding the Bell Atlantic Companies ("Bell Atlantic"), SBC Communications, Inc. ("SBC"), Ameritech, and the United States Telephone Association

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[137] 1998 Report and Order at ¶ 5; *see, e.g.* 1998 Report and Order at ¶ 19 (stating that "Congress … directed that that the cable operator rate …govern pole attachments by a telecommunications carrier"); *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, "Order on Reconsideration" at ¶ 18, FCC 99-266 (1999) ("Local Competition Reconsideration Order") (stating that "Congress added telecommunications carriers as beneficiaries of the Commission's oversight of pole attachments").

[138] *See*, *i.e.* Implementation Order at ¶ 7; 1998 Report and Order at ¶ 19; 2000 Report and Order at ¶ 5.

("USTA") argued that Section 224 of the Act specifically excluded ILECs and ILEC attachments were not included in the definition of "pole attachment" under Section 224(a)(4). While the Commission decided to include ILEC attachments for purposes of allocating the costs of the other than usable space, the Commission did not do so because ILECs were providers of telecommunications service or their attachments were pole attachments, but rather because it interpreted the phrase "attaching entity" to encompass a broader group of entities and ultimately included all utilities even though they are not pole attachers entitled to regulated rates.

In this proceeding, ILECs and the USTA clearly understood that the terms telecommunications carrier and provider of telecommunications services were interchangeable and that the Commission interpreted Section 224 to exclude ILECs from the entities entitled to the regulated rates, terms, and conditions. These entities argued that the ILECs were not attaching entities for purposes of Section 224 and that Commission orders had interpreted Section 224 to exclude ILECs since they were excluded from the definition of telecommunications carriers.[139] Bell Atlantic even argued that the Section 224(a)(5) exclusion

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[139] *See*, *i.e.* Comments of Bell Atlantic, *Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, at pp. 5-6 (filed September 26, 1997) ("Bell Atlantic Comments CS Docket No. 97-151") (stating that "the Act defines a 'pole attachment' as 'any attachment by a cable television system or provider of telecommunications service,' but specifically exempts incumbent local exchange carriers from the definition of a telecommunications carrier."); Comments of SBC Communications Inc., *Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, at p. 21 (filed September 26, 1997) ("SBC Comments CS Docket No. 97-151") (arguing that ILECs should not be attaching entities indicating that the NPRM in the proceeding noted "that the definition of 'telecommunications carrier' … excludes ILECs and that 'pole attachment' therefore does not include an ILEC attachment and stating that "the plain language of § 224 precludes ILEC's from being treated as attaching entities."); Comments of Ameritech, *Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies*

should not be read narrowly.[140] They also indicated that all utilities should be treated equally under Section 224.[141] It is evident from the statements made by ILECs in this proceeding that even they did not question the exclusion of ILECs from the entities entitled to regulated rates under Section 224.[142]

Governing Pole Attachments, CS Docket No. 97-151, at p. 11 (filed September 26, 1997) ("Ameritech Comments CS Docket No. 97-151"). (stating that "[t]he plain language of Section 224(e)(1), coupled with the definition of 'attachment' in Section 224(a)(4) and the exclusion of the ILEC from the definition of 'telecommunications carrier' for purposes of Section 224 requires that ILECs should not be counted as attaching parties.").

[140] "Those who urge the Commission to treat ILEC as an attaching entity suggest that the Commission should read narrowly the exclusion of ILECs in Section 224(a)(5) from the definition of a telecommunications provider so as to impose on ILECs all of the burdens of Section 224 but to withhold any of its protections." Reply Comments of Bell Atlantic, *Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, at p. 21 (filed October 21, 1997).

[141] *See*, *i.e.* Bell Atlantic Comments CS Docket No. 97-151 at p. 6 (stating that "the Commission may not treat ILECs as attaching entities for purposes of allocating the costs of other than usable space, but not other pole owners such as electric utility companies."); Ameritech Comments CS Docket No. 97-151 at p. 12 (arguing that "[i]f the electric utility is not included, there is no rational reason to include the ILEC."); Comments of the United States Telephone Association, *Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, at p. 11 (filed September 26, 1997) ("USTA Comments CS Docket No. 97-151") (stating that "the Commission inappropriately singles out incumbent LECs .. as attaching entities for purposes of apportioning the costs of the other than usable space, yet does not include electric utilities, or any other type of Section 224-defined "utility"); Reply Comments of the United States Telephone Association, *Implementation of Section 703(e) of the Telecommunications Act of 1996/Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, at pp. 7-9 (filed October 21, 1997) (stating that if the Commission is going to treat any Section 224-defined utility as an attaching entity, then it should treat all utilities similarly.").

[142] *See id*.

IV. CONCLUSION

WHEREFORE, EEI and UTC respectfully request that the Commission consider these Comments and ensure that any future Commission action ordered as a result of this proceeding is consistent with them.

Respectfully submitted,

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