March 27, 2009

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, D.C. 20554

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:

INTRODUCTION

The Federal Communications Commission ("Commission") should expeditiously take the four actions requested herein to ensure that wireless and broadband deployment is no longer undermined by the actions of many utilities with respect to pole attachments. As the experiences of the signatory companies, or their members, indicate, deployment of new wireless and wireline broadband facilities are unnecessarily curtailed on a regular basis. The Commission issued its *Notice of Proposed Rulemaking* in the above-captioned docket more than a year ago,[1] but the delays associated with deploying wireless attachments on utility poles have been going on for over a decade. The Commission cannot hope to encourage wireless as the "third pipe" to broadband access if pole attachments take years to obtain. In short, the third pipe can't wait three years, or even one year, for pole attachment permits from pole owners**.** Yet, by taking the four straightforward actions described herein – none of which should be controversial (and all of which are entirely reasonable) – the Commission can take tremendous strides towards advancing wireless and broadband deployment.

It is well-settled that wireless telecommunications carriers are entitled to all of the protections of Section 224.[2] Equally importantly, for many years the Commission has recognized the benefits that flow from wireless carriers having access to utility poles for their attachments. In fact, in December 2004, the Wireless Bureau expressly stated as follows:

> Providing wireless carriers with access to existing utility poles facilitates the deployment of cell sites to improve the coverage and reliability of their wireless

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[1] *In re:* Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Dkt No. 07-245, RM-11293, RM-11303, *Notice of Proposed Rulemaking*, FCC 07-187, 22 FCC Rcd. 20195 (Nov. 20, 2007).

[2] *In re*: Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Dkt. No. 97-151, *Report and Order*, FCC 98-20, 13 FCC Rcd 6777 (Feb. 6, 1998) ("1998 Order"); *affirmed* National Cable Telecommunications Ass'n v. Gulf Power Co., 534 U.S. 327 (2002).

networks in a cost-efficient and environmentally friendly manner. Such deployment will promote public safety, enable wireless carriers to better provide telecommunications and broadband services, and increase competition and consumer welfare in these markets. [3]

Thus, the Commission recognizes that wireless pole attachments can enable providers to accomplish all of the following:

1. Expand wireless coverage and reliability
2. Advance public safety (e.g., E-911)
3. Provide additional broadband applications
4. Develop facilities with reduced visual obtrusiveness
5. Save costs (allowing further network development)

- Expanding Wireless Coverage and Reliability

In two different respects, pole attachments allow wireless coverage that otherwise may not be available. First, due to topographic, zoning or other impediments, there are many locations that simply cannot receive wireless service via towers or other types of wireless telecommunications facilities. Such areas can include the inside of residential homes and commercial buildings, tunnels, airports, office parks, wetlands, areas of rugged terrain, and many residential areas in general. Distribution poles are a valuable method of providing service for these notoriously coverage-challenged areas. In this way, utility attachments can alleviate the nagging problem of "dead spots" where wireless service is inconsistent or spotty.

In addition, wireless attachments can greatly increase network capacity, and thereby significantly improve the reliability of coverage. As more and more people use wireless devices, particularly "smartphones" and wireless broadband, additional antennas are needed to fulfill bandwidth demanded by these applications. Similar to where there is a lack of geographic coverage, more infrastructure is necessary where there is insufficient network capacity in an area, and often it is wireless attachments that provide the additional infrastructure required.

- Advancing Public Safety

The Commission has long recognized the critical public safety benefits of wireless service. In many cases, the ability of a person in distress to make an E-911 call, including both the voice communications and locating ability, can be the difference between life and death. Yet, it is obvious that such calls cannot be placed in areas without wireless coverage or in dead spots within areas that otherwise have wireless coverage. Residents may not know that their local

[3] Wireless Telecommunications Bureau Reminds Utility Pole Owners Of Their Obligations To Provide Wireless Telecommunications Providers With Access To Utility Poles At Reasonable Rates, DA-04-4046, *Public Notice*, 19 FCC Rcd 24930 (Dec. 23, 2004) ("*2004 Reminder Notice*").

service quality or the existence of dead spots in their area is a function of a utility waiting years to allow a pole attachment, but they do know they need their phone to work when placing an emergency call. Given that wireless pole attachments can greatly reduce the areas without wireless coverage as well as eliminate the dead spots in areas that otherwise have coverage, these pole attachments can themselves save many lives.

More than one out of six American homes have now "cut the cord," replacing landlines exclusively with wireless phones, a percentage that has nearly tripled over three years.[4] As such, these citizens are relying on their wireless phone as their "home phone" and depend upon their wireless service to work in their residences to make E-911 calls. Effective pole attachment procedures can greatly aid in providing residential services.

- Providing Additional Broadband Applications

The efficient reuse of spectrum is a critical aspect of deploying wireless broadband services, which consume significantly more bandwidth than simple voice communications. Wireless attachments bring the infrastructure closer to the user to enable far greater spectrum reuse than would otherwise be possible, thereby leading to the availability of substantially more broadband capacity in an area. It is this capacity that allows users to experience the full benefits of mobile broadband and the associated public safety, economic and social benefits.

- Develop Facilities with Reduced Visual Obtrusiveness

Wireless pole attachments maximize the use of existing infrastructure, utilizing structures that the public is already accustomed to seeing. Because the wireless attachers are not creating new facilities, there is less overall physical impact on the landscape.

- Saving Costs (allowing further network development)

Making use of existing utility poles for wireless attachments can reduce the costs of network deployment when compared with the costs of other types of deployments, including deploying new poles in the right-of-way, which often is barred by zoning and other laws in any event. This allows for wireless providers to use the cost savings toward further developing their networks in other areas, expanding the provision of wireless services, and enabling wireless broadband as a viable alternative to other broadband options.

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Given these tremendous benefits, the Commission should ensure that the pole attachment process has a finite end to it and does not drag on indefinitely. By taking the following four actions, the Commission can greatly advance wireless and broadband deployment:

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[4] CENTER FOR DISEASE CONTROL, WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JANUARY-JUNE 2008 1 (2008), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200812.pdf.

- Establish a rebuttable presumption that attachments that comply with the National Electric Safety Code ("NESC"), as well as with all Commission and Occupational Safety & Health Administration ("OSHA") regulations, are safe;
- Adopt the Broadband & Wireless Pole Attachment Coalition's proposal to institute a time period for the issuance of pole attachment permits;[5]
- Confirm that wireless attachers have access to pole tops;
- Confirm that wireless attachments are entitled to regulated rates pursuant to applicable Commission cost-based formulas.

I. THE COMMISSION SHOULD ESTABLISH A REBUTTABLE PRESUMPTION THAT WIRELESS ATTACHMENTS ARE SAFE

The Commission should establish a rebuttable presumption that if a wireless attachment complies with the NESC, as well as with all Commission and OSHA regulations, the attachment is safe. Section 224 allows pole owners to deny an attachment "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[6] Unfortunately, utilities have frequently misused their rights under this statute to unjustly derail wireless attachments. Through blanket attachment rejections on purported "safety" grounds, some utilities have abused their statutory authority by declaring all wireless attachments unsafe without examining the individual merits and despite the proposed attachment's full compliance with the NESC and all applicable laws.[7] Utilities' blanket denials on safety grounds regarding fully lawful and NESC-compliant attachments undermine wireless deployment, and a rebuttable presumption that such code-compliant and lawful attachments are safe should greatly curb this anti-competitive utility practice.

There are established safety standards for wireless attachments. As the DAS Forum has previously discussed in this docket, the NESC "sets forth detailed requirements for the attachment of wireless antennas, including placing antennas on pole tops, and provides useful guidelines for separation requirements for equipment placed on poles."[8] As one expert in the field acknowledged, the NESC rules are sufficient to ensure safety.[9] In addition, OSHA has

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[5] Comments of Broadband & Wireless Pole Attachment Coalition, WC Docket No. 07-245 (Feb. 23, 2009) ("BWPA Proposal").

[6] 47 U.S.C. § 224(f)(2).

[7] Initial Comments of NextG Networks, Inc., WC Docket No. 07-245 at 26-29 (Mar. 7, 2008) ("NextG Comments"); Reply Comments of ExteNet Systems, Inc., WC Docket No. 07-245, 2-3 (Apr. 22, 2008) ("ExteNet Comments"); Comments of The DAS Forum, WC Dkt. 07-245, 7-9 (Mar. 7, 2008) ("DAS Forum Comments").

[8] DAS Forum Comments at 8; *see also* NextG Comments at 26-28. The comments also point out that "many states have codified the NESC into law" and "[m]ost, if not all, utilities have either adopted the standard into their safety/construction guidelines or have incorporated the clearances into their own standards." DAS Forum Comments at 8.

[9] *See* Allen L. Clapp, NESC Handbook at 4 (5th Ed. 2001).

promulgated laws to ensure worker safety in dealing with wireless attachments,[10] and the Commission has its own regulations relating to RF exposure and safety.[11]

In addition, it is undisputed that wireless attachers spend substantial time, effort and resources to ensure that their attachments comply with all NESC standards as well as all OSHA and Commission rules and regulations, as providers have every incentive to ensure the durability of their network and their compliance with the NESC and applicable laws.[12] There is no evidence of wireless attachments that are fully lawful and NESC-compliant, yet somehow still unsafe.[13] Blanket safety denials, on the other hand, do pose a safety risk— particularly to a consumer in distress who cannot place an emergency call because of a dead zone that still exists as a result of a utility's delay in issuing a pole attachment permit.

Accordingly, a rebuttable presumption of safety for those attachments that meet the NESC, OSHA and Commission rules would greatly expand much needed pole access by forcing pole owners to base their decisions upon valid safety concerns.

Finally, a rebuttable presumption that wireless attachments are safe would not remove any of the utility's rights under the statute.[14] Should the utility have a legitimate safety concern about an attachment in a particular location, nothing would prevent a utility from exercising its statutory right to present such a claim. In this situation, however, the utility would need to take the step of proving why an attachment that complies with the applicable laws is nevertheless unsafe, thereby eliminating blanket "safety" denials. Wireless attachers have every incentive to ensure that their systems are safe and would be willing to work with utilities where the pole owner can show a legitimate safety claim.

II. SPECIFIC TIMELINES ARE NEEDED TO ENSURE THE VIABILITY OF WIRELESS POLE ATTACHMENTS

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[10] *See* 29 C.F.R. §§1910.97, 1910.268 (2008).

[11] *See* 47 C.F.R. § 1.1310; *see also* OET Bulletin No. 65 (Evaluating Compliance With FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields) (Aug. 1997).

[12] NextG Comments at 26; DAS Forum Comments at 5.

[13] NextG Comments at 26-29.

[14] The Commission has a long history of establishing rebuttable presumptions where appropriate, as it is in this case. *See, e.g., In re:* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Dkt. 05-265, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 07-143, 22 FCC Rcd. 15817, *In re:* Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, CC Dkt. 96-237, *Report and Order*, FCC 97-36, 12 FCC Rcd. 5470, 5552 (Feb. 7, 1997).

A Deadline for Issuance of Pole Attachments is Necessary and Feasible

The Commission should adopt the Broadband Wireless Pole Attachment ("BWPA") Proposal included in its February 23, 2008 filing.[15] The BWPA Proposal is reasonable and more generous to utilities than a number of the timelines already proposed in this proceeding. Moreover, the BWPA Proposal is more generous to utilities than the timelines already adopted in certified states such as New York and Connecticut. Simply put, and as discussed below, a timeline is both necessary and feasible.

According to the BWPA Proposal, a utility will have the following number of days from the submittal of an application to issue the pole attachment permit (i.e., complete the make-ready work):

- 105 days for poles where no pole replacement is necessary
- 135 days for poles where pole replacement is necessary

Any delays in payment by the attacher would extend the utility's deadline by the amount of the delay.[16]

Except where a utility properly and timely denies a pole attachment application pursuant to 47 C.F.R. 1.1403, a utility shall provide make-ready estimates to the attacher within 45 days after receipt of the attacher's application. A utility shall complete the make-ready work and issue the attachment permit within 60 days after receipt of the make-ready payment (for poles where no pole replacement is necessary), or 90 days after receipt of the make-ready payment (for poles where pole replacement is necessary). If a utility violates the rules (i.e., fails to complete the make-ready work and issue the pole attachment permit within the time period specified by the rules), the attacher may

> (a) perform the survey and/or make-ready work using a utility-approved independent contractor, or any other contractor who has the same qualifications in terms of training as the utility's own workers,[17] or
> (b) commence an expedited complaint proceeding under which the utility shall be liable to the attacher for attorneys' fees, and an amount equal to 1/100 of the total make-ready and survey charges multiplied by the amount of days the utility is late, unless the attacher can prove that actual damages exceed that amount.

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[15] *See* BWPA Proposal at 7-9.

[16] For example, if an attacher waits 20 days to make payment after receipt of the make-ready estimate, the utility shall have 125 days (and 155 days where pole replacement is necessary) from the date of the application to issue the permit.

[17] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* ("*Local Competition Order*"), First Report and Order, 11 FCC Rcd 15499, 16083 (Aug. 8, 1996) (utilities must permit an attacher to use any workers who meet the utilities' requirements for training).

In order to facilitate the use of this remedy and minimize the number of complaints filed with the Commission regarding delays, each utility should be required to provide a list of all contractors, if any, currently permitted to work on the utility's aerial plant.

Necessity of Instituting a Time Period

As discussed by the BWPA, there are multiple reasons supporting the adoption of the time line rules:

1. **Timely Access to Utility Poles is Critical to the Deployment of Broadband and Wireless Servic**e--As the Commission itself has recognized, it is beyond dispute that broadband and wireless providers need timely access to utility poles to provide their services.[18]

2. **Pole Owners Have No Incentive to Issue Attachment Permits, and in Many Instances They Even Have Incentives to Impede Such Access--** The Commission has found that utilities do not have any incentive to enter into pole attachment agreements.[19] Moreover, some pole owners, such as ILECs and certain utilities that provide broadband and other telecommunications services, compete against prospective attachers, and therefore actually may have a **disincentive** to issue attachment permits.

3. **Some Pole Owners Take Advantage of the Lack of a Specific Timeline in the Rules by Causing Delays in the Attachment Process**--As the record in this proceeding indicates, some pole owners fail to issue permits until a year or more after receipt of an application.[20]

4. **Pole Attachment Delays Derail and/or Delay Broadband and Wireless Deployment, While Also Harming Competition and Unfairly Tilting the Playing Field --** Some providers are forced to forego or curtail business because of pole owners' lengthy delays in connection with pole attachments.[21] At a minimum, significant delays in pole attachments greatly delay the provision of broadband and wireless services, which are entirely dependent on such attachments. Moreover, without timely access to poles, competition is also undermined because ILECs (and electric companies installing facilities for communications purposes) do not need to wait for a license.

5. **The Delays that Undermine Broadband and Wireless Deployment Will End**

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[18] 1998 Order at 6787-88 (¶ 17).

[19] *Id.* at 6789 (¶21).

[20] *See, e.g.*, Comments of Sunesys, LLC, RM-11303, 11 (Jan. 30, 2006) ("2006 Sunesys Comments") (delays of 15 months); DAS Forum Comments at 11 (delays of 3 years); Comments of T-Mobile USA, Inc., WC Dkt. 07-245, 2 (Mar. 7, 2008) (delays of 4 years).

[21] 2006 Sunesys Comments at 11; Comments of Indiana Fiber Works, RM-11303, 3 (Jan. 30, 2006).

Only if the Commission Imposes a Time Period on the Issuance of Pole Attachment Permits--Utilities have all the bargaining power with respect to pole attachments permits because they control the necessary facilities. Given this leverage and the incentives involved, one thing is certain: the delays will only end if the Commission institutes a time period for the issuance of pole attachment permits. Utilities know that, under the current system, providers cannot afford (from both a cost and delay standpoint) to file complaints each time a utility fails to act timely on an application.

6. **Timely Access to Pole Attachments Alleviate Safety Risk of "Dead Spots" –** As discussed above, wireless pole attachments can greatly reduce the areas without wireless coverage. Wireless pole attachments can also eliminate "dead spots" in areas that otherwise have coverage. When attachers have timely access to the full range of site types, including wireless pole attachments, they can rectify coverage gaps and provide better service. More than one out of six American homes have now "cut the cord," replacing landlines exclusively with wireless phones, a percentage that has nearly tripled over three years.[22] As such, these citizens are relying on their wireless phone as their "home phone" and depend upon their wireless service to work in their residences to make E-911 calls. Effective pole attachment procedures can greatly aid in providing residential services.

Feasibility of Instituting a Time Period

In addition to the multiple reasons supporting the need for time frames, there are multiple reasons demonstrating that they are feasible:

1. **Several States that Regulate Pole Attachments Have Already Instituted Time Periods, Proving that Such Deadlines Are Feasible--**A number of states, including New York[23] and Connecticut,[24] have already instituted time periods for the issuance of pole attachments. As the Connecticut DPUC (90 day deadline, 125 days for pole replacements) stated, a longer time period "is not reflective of today's customer-driven telecommunications market. Connecticut customers … deserve the most efficient delivery of services, and thus the process … must be streamlined."[25] But *all* consumers in the country deserve the efficient delivery of services. Not having a time period under the Commission's rules is at odds with

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[22] CENTER FOR DISEASE CONTROL, WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JANUARY-JUNE 2008 1 (2008), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200812.pdf.

[23] *See In re:* Commission Concerning Certain Pole Attachment Issues**,** *Order Adopting Policy Statement,* Case 03-M-0432, 2004 N.Y. PUC LEXIS 306 (N.Y.P.S.C. 2004) ("New York Order").

[24] *See* DPUC Review of the State's Public Service Company Utility Pole Make-Ready Procedures – Phase 1, *Decision*, Dkt. No. 07-02-13, 2008 Conn. PUC LEXIS 90 (Conn. P.U.C. 2008) ("Connecticut Order").

[25] *Id.* at *50.

today's customer-driven market, the Commission's broadband and wireless deployment goals, and the public's need for these services.

2. Some Utilities Routinely Issue Attachment Permits Promptly, Proving that a Reasonable Time Period Can Be Met

The disparity in the time periods for utilities to grant access to their poles is striking. Some utilities provide access within 3 months or less after receiving an application. Others take more than five times as long (i.e., over 15 months). Another utility takes approximately 4 years to complete the work. The difference in these times (varying from less than 3 months to 4 years) is not a safety issue. It is not an engineering or reliability issue.

3. The Commission's Cable Franchising Order Supports Adoption of a Time Limit Here

The Commission imposed a time limit for local governments to respond to cable applications because broadband deployment was being delayed, the process sometimes took a year or more, and complaints were not adequate remedies since they added additional delay and expense.[26] Those same findings apply to pole attachment applications. In fact, a stronger case exists for a time limit here because private entities are causing the delays, rather than local governments who generally want more competition, and because E-911 safety issues are involved here.

III. THE COMMISSION SHOULD CONFIRM POLE TOP ACCESS

The tremendous benefits of wireless attachments are undeniable. As discussed above, the use of utility distribution poles in public rights-of-way offers a visually-unobstrusive way to deploy networks in environments in which a "cell tower" may be infeasible. Additionally, the relative ubiquity of utility distribution poles in many suburbs and "exurbs" provides a platform on which to place facilities that provide coverage and capacity improvements that wireless users demand. But for wireless attachments to be beneficial, pole top access is also needed on some poles. As discussed herein, wireless attachers already have under the law the same right to use pole tops as other portions of the pole; however, the Commission needs to reconfirm the pole top attachment rights of companies given the actions of many utilities.

As an initial matter, many wireless providers already have some pole top attachments because a number of utilities recognize their obligations to allow such access. And, by utilizing the pole tops, wireless providers are able to (1) greatly improve their coverage, (2) reduce their costs (and therefore their charges to the public), and (3) reduce the number of pole attachments they need (thus, also minimizing the physical impact on the surrounding community).

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[26] *See generally In re:* Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd. 5101 (Mar. 5, 2007).

Unfortunately, however, some utilities continue to automatically deny pole top access. The Commission therefore needs to confirm wireless providers' rights with respect to such access.

As discussed previously herein, Section 224 provides wireless telecommunications providers with access to utility poles. Moreover, it is clear under both the statute and the Commission's regulations that the pole space on which a provider may attach its equipment is the "usable space."[27] The usable space is defined as "the space above the minimum grade level [on the pole] which can be used for the attachment of wires, cables, and associated equipment."[28] Pole top is space that is above the minimum grade level on the pole (in fact, it is, by definition, the very top of the pole) and it can be used for the attachment of wires, cables and associated equipment.[29]

Pole tops are unquestionably a part of the usable space on the pole, and therefore both Section 224 and the Commission's regulations give wireless providers the right to attach to pole tops. Indeed, the NESC contains specific provisions governing attachment of wireless devices to the pole top, and thus confirms that pole top attachment is safe and viable.[30] The NESC's analysis of pole-top attachments addresses and affirms their safety and soundness.

When utilities nevertheless challenged the right of wireless providers to use the pole tops in 1999, the Commission properly rejected their position.[31] But many utilities ignored this ruling and continued to refuse to permit access to the pole tops.[32] Accordingly, wireless providers once again were forced to ask the Commission for reconfirmation of their right to use pole tops, which reconfirmation they received in the 2004 Wireless Bureau Reminder, which provides as follows:

> Recently, wireless carriers have alleged that they have been denied access to utility poles for the placement of wireless antennas on pole tops. … [W]e take this opportunity to reiterate that the Commission declined, in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Order on Reconsideration*, 14 FCC Rcd 18049, 18074 ¶

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[27] 47 U.S.C. § 224; 47 C.F.R. § 1.1402(c).

[28] 47 U.S.C. § 224; 47 C.F.R. § 1.1402(c).

[29] ExteNet Comments at 5.

[30] For example, NESC Rule 235I governs "[c]learances in any direction from supply line conductors to communication antennas located in the supply space [*i.e.*, pole top] attached to the same supporting structure." Similarly, NESC Rule 239H controls the "[r]equirements for vertical communication conductors passing through supply space on jointly used structures." NESC Rule 235I(1) further requires that "[c]ommunications antennas located in the supply space shall be installed and maintained only by personnel authorized and qualified to work in the supply space…"

[31] *In re:* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *Order on Reconsideration*, 14 FCC Rcd 18049, 18074 ¶ 72 (Oct. 20, 1999).

[32] ExteNet Comments at 7; Initial Comments of CTIA—The Wireless Association, WC Dkt. No. 02-245, 8 (Mar. 7, 2008).

72 (1999), to establish a presumption that space above what has traditionally been referred to as "communications space" on a pole may be reserved for utility use only. Thus, the only recognized limits to access for antenna placement by wireless telecommunications carriers are those contained in the statute: "where there is insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes." 47 U.S.C. § 224(f)(2).[33]

Thus, pursuant to Section 224 and the Commission's rules, and the 2004 Wireless Bureau Reminder, it is clear that a utility can only deny access to requested usable space, including (the pole top) "on a non-discriminatory basis where there is insufficient capacity, and for reasons of safety, reliability and generally applicable engineering purposes."[34] Yet, even today many utilities still refuse to grant access to pole tops. Accordingly, the Commission needs to ensure in this proceeding that it clearly reconfirms for the third time (with severe consequences for utilities if they continue to disregard the law) that request for pole top usage should be treated like any other request for use of usable space on the pole, and can only be denied where there is insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes.

In addition, the Commission should also clarify that the law does not permit utilities to charge a higher rate for pole top access than for any other portion of the pole, and any attempt to charge such a higher rate is illegal. Under Section 224 and the Commission's regulations, the charge for usable space on the pole is determined by how much space is used, not by where such space is located.

IV. WIRELESS POLE ATTACHMENTS ARE ENTITLED TO REGULATED RATES

Regardless of whether or how the Commission addresses some of the other pole attachment rate issues raised in this docket, the Commission should re-affirm that wireless equipment attachments are entitled to the same regulated rental rate formula as applies to other attaching entitles providing the same services (whether it be cable, telecommunications, broadband, or otherwise).[35]

In 1998, this Commission held that wireless telecommunications providers are entitled to the same protections under Section 224 as all other telecommunications providers.[36] In 2002, the Supreme Court affirmed this determination.[37] Yet, even after the Commission's ruling, and the Supreme Court's affirmation, many utilities continue to take the indefensible position in negotiations with wireless providers that such providers are not entitled to the protections of Section 224, including the right to access utility poles at reasonable rates.

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[33] *2004 Reminder Notice*.

[34] 47 U.S.C. §224(f)(2)

[35] The parties to this filing do not take a position regarding any other rate issue raised in this docket, including but not limited to issues of whether the Commission can or should adopt a "broadband" rate.

[36] 1998 Order at 6798-99 (¶¶ 39-41).

[37] *National Cable Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002).

In light of some utilities' failure to abide by these rulings, wireless providers had no choice but to raise this issue once again with the Commission to seek reconfirmation of a ruling that had already been confirmed by the Supreme Court. As a result, the *2004 Reminder Notice* once again confirmed wireless providers' rights to the protections of Section 224, including the right to receive reasonable pole attachment rates.[38] In a public notice entitled "Wireless Telecommunications Bureau Reminds Utility Pole Owners Of Their Obligations To Provide Wireless Telecommunications Providers With Access To Utility Poles At Reasonable Rates (the "2004 Wireless Bureau Reminder")," the Bureau stated as follows with respect to pole attachment rates for wireless providers:

> The Wireless Telecommunications Bureau reiterates the obligation to provide wireless telecommunications providers with access to utility poles at reasonable rates pursuant to section 224 of the Communications Act, 47 U.S.C. § 224. In *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rule and Policies Governing Pole Attachments, Report and Order*, 13 FCC Rcd 6777, 6798-99 ¶¶ 39-41 (1998), the Commission determined that wireless telecommunications providers are entitled to the benefits and protections of section 224 for the attachment to utility poles of antennas or antenna clusters and associated equipment. The Supreme Court affirmed this determination in *National Cable Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002).
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> In addition, section 224 and the Commission's rules do not allow pole access fees to be levied against wireless carriers in addition to the statutory pole rental rate…. Such overcharges or denial of access for wireless pole attachments may have serious anticompetitive effects on telecommunications competition.[39]

Notwithstanding this unambiguous reminder of utilities' obligations, some utilities continue to flout the rules and ignore their obligations with respect to pole attachment rates for wireless providers.[40] These utilities apparently are not concerned about the "serious anticompetitive effects" of such overcharges.[41] But the Commission certainly should be. Accordingly, the Commission needs to ensure in this proceeding that it clearly reconfirms for the third time (with severe consequences for utilities if they once again flout the law) that wireless providers are entitled to the same pole attachment rates as all other attaching entities providing the same services (whether it be cable, telecommunications, broadband, or otherwise).

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[38] *2004 Reminder Notice*.

[39] *Id.*

[40] CTIA Comments at 7-8.

[40] Comments of The Wireless Communications Association International, WC Docket No. 07-245, 3-5 (Mar. 7, 2008).

[41] CTIA Comments at 7-8.

Given that the Commission has already decided wireless providers' rights to regulated rates multiple times, and the Supreme Court has confirmed the Commission's holding, utilities' attempts to reargue this issue once again – wholly ignoring that it has already been resolved -- should be dismissed out-of-hand. The Commission should take steps to ensure that all utilities understand their obligations here, and similarly understand that they will face serious consequences if they continue to disregard the law.[42]

In addition, the utilities' argument that because wireless attachments are slightly different from a typical wireline attachment they somehow impose different or greater costs is factually unsupported and was already rejected by the Commission. In the 2000 Report and Order, the Commission rejected arguments by utilities that when attachments impose different weight or wind loading factors they should be subject to different rates because they impose different burdens.[43] In so doing, the Commission recognized that such issues are engineering matters that relate at most to the need for make-ready, and utilities already directly recover make-ready costs from wireless providers.[44] The Commission also held that allowing rate increases based on variations in weight or type of attachment could lead to double recovery. The Commission noted, for example, that utilities already recover costs associated with labor, materials and expenses incurred in association with maintenance of overhead distribution facilities.[45] The same rationale applies with equal force to attachments of wireless equipment. While there is no evidence supporting claims of additional costs, to the extent there were costs, they would be recovered through make-ready or existing carrying charges.

Finally, consistent with prior precedent, the Commission should clarify that the per-foot formula wireless providers are charged for attachments should not include a charge for vertical runs that do not prevent such pole space from being used for other providers or by the pole owner.[46] Otherwise, utilities could charge the wireless provider and another provider for the same space on the pole, thereby receiving a double recovery for that space. Nothing in Section 224 or the Commission's regulations contemplate the utility receiving such a double recovery, and the clear import of the rules is against such an aberrational result. Similarly, the State of Utah has already made it clear that for purposes of determining a wireless attacher's rate, "[t]he

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[42] *See* ExteNet Comments at 7-8. Some utilities claim they need to charge higher pole attachment rates to wireless providers because the up-front costs are greater. But this argument is specious because wireless providers pay separately for initial make-ready work, so the utilities are already made whole for this work. Also, certain utilities claim that wireless attachments are too varied to have a fixed pole attachment rate. This argument is similarly disingenuous. First, charges for wireless attachments are based on how much of the pole is used, so any variations in space usage should not matter as they are taken into account in the charge. Second, many utilities have no problem determining the correct charges for wireless attachments, and do not attempt to skirt the rules, or claim that variations in wireless attachments permit them from determining the appropriate rate.

[43] *In re:* Amendment of Rules and Policies Regarding Pole Attachments, *Report & Order*, 15 FCC Rcd. 6453 ¶¶ 27-30 (2000).

[44] *Id.* ¶28.

[45] *Id.* ¶30.

[46] *See Texas Cablevision Co. v. Southwestern Electric Power Co.*, 1985 FCC LEXIS 3818 at ¶ 6 (1985).

space used by a wireless provider [will not be considered to] include any of the length of a vertically placed cable, wire, conduit, antenna, or other facility unless the vertically placed cable, wire, conduit, antenna, or other facility prevents another attaching entity from placing a pole attachment in the usable space of the pole."[47] The Commission should confirm that the federal law on this issue is the same as Utah's, which is the only reasonable approach to the matter, and prevents utilities from obtaining a windfall. Indeed, charges for vertical wiring today by some pole owners has led to prohibitively high pole attachment charges to wireless providers, to the detriment of everyone but the utility that reaps the windfall.

CONCLUSION

For the foregoing reasons, we respectfully request the Commission to expediently adopt the proposals contained herein.

Respectfully submitted,

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