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April 13, 2009

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Polices Governing Pole Attachments, WC Docket No. 07-245*

EX PARTE LETTER

Dear Ms. Dortch:

Please accept this letter in response to the recent submissions from the Broadband & Wireless Pole Attachment (“BWPA”) Coalition and Fibertech Networks, LLC (“Fibertech”).¹ These submissions (and the proposals therein) seek to elevate broadband speed-to-market over the safety and reliability of electric distribution systems. The submissions ask the Commission to impose strict make-ready deadlines on electric utility pole owners, yet gloss-over the fact that electric utilities are not required to perform make-ready in the first place. Because the Commission cannot compel electric utilities to perform make-ready, it cannot impose hard-and-fast deadlines for completion of that work as proposed by BWPA Coalition and Fibertech.

The strict make-ready deadlines proposed by BWPA Coalition and Fibertech are also unworkable and unnecessary because: (1) there is no evidence to support a claim of delay in such proportion and scope to justify a radical change in the Commission’s complaint-based resolution of access issues; (2) many make-ready delays are beyond the control of electric utility pole owners; (3) the deadlines conflict with the Commission’s existing notice rules; and (4) the deadlines could have the exact *opposite* of the intended effect. Further, the procedural aspects of the BWPA Coalition and Fibertech deadline proposals (i.e. what happens when deadlines cannot be met) are impractical, and unjustifiably punitive.

BWPA Coalition’s March 27, 2009 submission also asks the Commission to “confirm” that wireless telecom carriers have access to electric utility pole tops, and to establish a rebuttable presumption that wireless attachments are “safe.” Like the request to impose make-

¹ Specifically, this letter responds to the following: (1) BWPA Coalition’s February 23, 2009 Make-Ready Deadline Proposal; (2) Fibertech’s March 6, 2009 “Five Easy Ways To Increase Broadband Deployment”; (3) March 25, 2009 Comments of Fibertech and Kentucky Data Link, Inc. submitted in GN Docket Number. 09-29 and WC Docket Number 07-245; and (4) BWPA Coalition’s March 27, 2009 letter addressing wireless attachments.

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ready deadlines, the request to “confirm” pole top access is an invitation for error. As the Commission itself has previously noted, the underlying purpose of Section 224 is to assure that “*communications space* on utility poles” be made available at just and reasonable rates, terms and conditions.² In any event, the presumption sought by BWPA Coalition would usurp an electric utility’s discretion to adopt reasonable and non-discriminatory safety and reliability standards.

In addition to ill-conceived make-ready deadlines, Fibertech also urges several additional “ways” to increase broadband deployment which would run afoul of the Commission’s current complaint-based dispute resolution paradigm and jeopardize the safety and reliability of electric distribution systems.

This letter is submitted on behalf of Tampa Electric Company, Florida Power & Light Company, Progress Energy Florida and Oncor Electric Delivery Company (collectively the “Electric Utilities”). The Electric Utilities submitted comprehensive initial comments, reply comments, and record evidence (testimony and exhibits) in this proceeding. The Electric Utilities also have participated actively in the *ex parte* phase of this proceeding by (1) meeting with the offices of all five Commissioners, as well as the Wireline Competition Bureau and the Enforcement Bureau, between May and July 2008, and (2) submitting a written response (dated November 20, 2008) to the broadband rate proposals from AT&T/Verizon and USTA. The Electric Utilities remain engaged in this proceeding and concerned about its outcome. Though this proceeding presents many issues of importance to the Electric Utilities, this letter addresses only the recent submissions from BWPA Coalition and Fibertech.

To be clear, the Electric Utilities support the goal of broadband deployment. But the Electric Utilities do not support the means of broadband deployment suggested by BWPA Coalition and Fibertech, which would elevate communications speed-to-market over the safety and reliability of electric distribution systems.

Electric Utilities Are Not Required To Perform Make-Ready

Section 224(f)(2) of the Pole Attachment Act (part of the 1996 Amendments) provides:

[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.

² *Gulfstream Cablevision of Pinellas County, Inc. v. Florida Power Corp.*, 1985 FCC LEXIS 4123 ¶ 6 (Common Carrier Bureau 1985) (emphasis added).

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In rulemaking proceedings following the 1996 Amendments, the Commission (over objection from electric utilities) “require[d] a utility to take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs.”³ The Commission specifically defined “capacity expansion” to include steps taken “to rearrange or change out existing facilities at the expense of attaching parties in order to facilitate access” – in industry parlance, “make-ready.”⁴

On appeal, in *Southern Co. v. FCC*, the Eleventh Circuit reversed this part of the Commission’s rulemaking as “contrary to the plain language of § 224(f)(2).”⁵ The Eleventh Circuit noted with respect to Section 224(f)(2): “it is hard to see how this provision could have any independent meaning if utilities were required to expand capacity [*i.e.* perform make-ready] at the request of third parties.”⁶ Thus, any requirement that electric utilities complete make-ready within a specific period of time would be inconsistent with an electric utility’s right to refuse to perform make-ready *at all*.

If, on the other hand, BWPA Coalition and Fibertech envision these deadlines as applying only *after* a utility agrees to perform make-ready, then electric utilities will be less likely to agree to perform make-ready for fear of being unable to meet the deadlines (especially given the unreasonable deadlines, penalties and other consequences urged by BWPA Coalition and Fibertech). This would have the unwanted effect of actually *slowing* broadband deployment (assuming, as BWPA Coalition and Fibertech contend, that pole access is critical to broadband deployment).⁷

There Is Insufficient Evidence To Support Imposing Make-Ready Deadlines

BWPA Coalition and Fibertech claim that make-ready delays are a significant impediment to broadband deployment. These assertions are based on limited, non-specific, anecdotal, and unsupported allegations. Even if these unsupported allegations were deemed to be evidence (which they are not), it is still not sufficient evidence of a problem so pervasive or widespread to warrant a sea-change in the Commission’s current regulatory paradigm. In

³ *In the Matter of Implementation of the Local Competition Provisions In the Telecommunications Act of 1996*, Order on Reconsideration, 14 FCC Rcd. 18049, ¶ 51 (Oct. 20, 1999).

⁴ 14 FCC Rcd. 18049 at ¶ 53.

⁵ 293 F. 3d 1338, 1346 (11th Cir. 2002).

⁶ 293 F. 3d at 1346-47.

⁷ BWPA Coalition’s February 23, 2009 proposal implicitly acknowledges a pole owner’s right to refuse make-ready. *See* February 23, 2009 BWPA Proposal, p. 7 (“45 Days for Make-Ready Estimates – Except where a utility properly and timely denies a pole attachment application pursuant to 47 C.F.R. 1.1403”). But BWPA Coalition fails to explain (1) how a make-ready deadline can be enforced in light of this limitation, or (2) why an electric utility would agree to perform make-ready if missing the deadline would subject it to penalties, costs, and safety/reliability risk.

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lawyer-speak, BWPA Coalition and Fibertech (and any other entity seeking make-ready deadlines, for that matter) simply have not met their burden of proof.

Some Make-Ready Delays Are Beyond A Pole Owner's Control

BWPA Coalition and Fibertech speak as if electric utility pole owners are the sole impediment to timely access. This ignores two critical points: (1) other attachers (often competitors of the entity seeking access) have no incentive (in fact, they may have a *disincentive*) to work quickly if rearrangement or transfer to a new pole is part of the make-ready solution; and (2) the Commission's existing 60-day notice requirements (47 CFR § 1.1403(c)(1) & (3)) stand in the way of the aggressive make-ready deadlines proposed.⁸ If an existing attacher is unwilling to waive the 60-day notice requirement, there are portions of a make-ready job that cannot even *begin* within 60 days (which makes the 45 and 60 day deadlines impossible to meet, and makes the 90 day deadline very difficult to meet). A particular make-ready job might also require permits from a government agency or other entity such as Army Corps of Engineers, a state environmental agency, the county, or a railroad. Neither the pole owner nor existing communications attachers have control over the time it takes for such permits to issue.

There Are Procedural Problems With The Make-Ready Deadline Proposals

BWPA Coalition and Fibertech propose a 45-day deadline for completion of make-ready estimates.⁹ Fibertech even claims that "the FCC already requires" completion of a make-ready estimate within 45 days. This is absolutely untrue. The only 45-day requirement in the Commission's rules states: "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."¹⁰

BWPA Coalition and Fibertech also suggest that they be allowed to hire utility-approved contractors to perform the make-ready survey and make-ready work if the utility is unable to meet the deadlines.¹¹ While this suggestion might seem harmless at first blush, it actually presents a serious diversion of resources issue for the Electric Utilities.¹² In their Initial Comments Regarding Safety and Reliability, the Florida IOUs stated:

⁸ See *Salsgiver Communications, Inc. v. North Pittsburgh Telephone Co.*, 22 FCC Rcd. 20536, ¶ 27 (Enforcement Bureau 2007) (finding unreasonable a contract provision which constricted the 60-day notice requirement in 47 CFR § 1.1403).

⁹ February 23, 2009 BWPA Coalition Proposal, p. 7; March 6, 2009 Fibertech Proposal, ¶ 1; March 27, 2009 Comments of Fibertech and KDL, p. 12.

¹⁰ 47 C.F.R. § 1.1403(b).

¹¹ February 23, 2009 BWPA Coalition Proposal, p. 7; March 6, 2009 Fibertech Proposal, ¶ 1.

¹² The diversion of resources is most pronounced with respect to the actual make-ready work itself. Third-party contractors already perform a great deal of the survey work for the electric utilities.

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The Florida IOUs do not dispute that “owner-approved contractors” are capable of performing this work safely, including make ready work in the power supply space. However, this does not resolve the very real issue of resource diversion. Any contractor the Florida IOUs would approve to work in the power supply space would have to be a qualified power worker. Becoming a qualified power worker involves training and investment on the part of an electric utility.... Once qualified, these contractors are valuable resources. If they are being hired at will by CATVs and CLECs, there will be fewer such workers available to perform work needed to achieve the core mission of the Florida IOUs - provision of safe and reliable electric service to its customers.¹³

In the alternative, BWPA Coalition proposes an “expedited complaint proceeding” under which the electric utility must pay the attacher’s attorney fees, plus 1% of the make-ready charges for each day the utility is late.¹⁴ The Electric Utilities support the idea of an expedited complaint proceeding; make-ready disputes – because they are inherently fact-specific – should continue to be resolved on a case-by-case basis. But the Electric Utilities strongly object to the one-sided fee-shifting and penalty provisions suggested by BWPA Coalition for at least two reasons.

First, fee-shifting and penalty provisions would run afoul of the Commission’s existing complaint proceeding rules and put the Commission in the role of assessing “damages” when its principal role (and statutory charge) is to determine whether rates, terms and conditions are “just and reasonable.”¹⁵ Second, the Commission’s existing rules already allow for penalties and forfeiture in extreme situations where merited by the specific facts of a particular case as fleshed-out in a complaint proceeding.¹⁶

¹³ Initial Comment of Florida IOUs Regarding Safety and Reliability, p. 21 (citing Declaration of Kristina L. Angiulli, ¶ 14, attached as Exhibit 2 to Initial Comments).

¹⁴ February 23, 2009 BWPA Coalition Proposal, p. 7; March 27, 2009 BWPA Coalition letter, p. 6.

¹⁵ See generally 47 C.F.R. § 1.1401 *et seq.*; 47 U.S.C. § 224(b)(1).

¹⁶ See 47 CFR §1.1413 (allowing the Commission to impose penalties, forfeiture or other additional remedies in certain situations); 47 U.S.C. § 503(b)(5); see also *Knology, Inc. v. Georgia Power Co.*, 18 FCC Rcd. 24615, ¶ 65 (2003) (“[T]his Memorandum Opinion and Order constitutes a Citation against Georgia Power Company, pursuant to section 503(b)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(5), for violations of section 224 of the Communications Act of 1934, as amended, 47 U.S.C. § 224. ... Subsequent violations of this type may lead to initiation of a monetary forfeiture proceeding against Georgia Power Company”).

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Electric Utilities Should Retain Discretion to Prohibit Pole Top Attachments

BWPA Coalition's March 27, 2009 submission asks the Commission to "confirm" that wireless telecom carriers have access to pole tops, and to establish a presumption that such attachments are "safe." These requests are at odds with the law, and with an electric utility's discretion to adopt non-discriminatory safety and reliability standards.

BWPA Coalition claims "wireless attachers already have under the law the same right to use pole tops as other portions of the pole," and bases its claim on the premise that "[p]ole tops are unquestionably part of the usable space on the pole."¹⁷ But this shaky logic lacks support in either the Pole Attachment Act or the Commission's regulations. The term "usable space" in the Pole Attachment Act is used *exclusively* in conjunction with the space allocation provisions in Sections 224(d) & (e), which outline the parameters of the cable rate and telecom rate respectively. The term "usable space" is notably absent from Section 224(f), which is the *only* provision of the statute devising any access rights. The Commission's regulations are, not surprisingly, similarly structured.¹⁸

BWPA Coalition also leans heavily on the Wireless Telecommunications Bureau's December 2004 Public Notice.¹⁹ This Public Notice, contrary to BWPA Coalition's contention, did not "confirm" pole top access rights. In fact, it merely stated that the Commission had previously declined to establish a presumption permitting utilities to categorically reserve for their own use "that space above what traditionally has been referred to as "communication space."²⁰ The Notice *did* confirm that the statutory bases for denial of access — insufficient capacity, safety, reliability, and generally applicable engineering purposes — were "recognized limits to access for antenna placement by wireless telecommunications carriers."²¹ But BWPA Coalition seeks to gut these very "limits to access" by requesting a presumption that all wireless pole top attachments are "safe."

Further, while the Commission may have declined to adopt a categorical presumption that the space above the "communications space" is off-limits to communications attachers, the Commission has on several occasions properly tied its jurisdictional limitations to the "communications space." For example, the Commission has stated:

¹⁷ March 27, 2009 BWPA Coalition letter, pp. 9-10.

¹⁸ See 47 C.F.R. § 1.1403(a) & (b) (defining a utility's access obligations but with absolutely no reference to the term "usable space").

¹⁹ See March 27, 2009 BWPA Coalition letter, pp.10-11.

²⁰ *Wireless Telecommunications Bureau "Reminder,"* Public Notice, 19 FCC Rcd. 24930 (Dec. 23, 2004).

²¹ *Id.*

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[O]ur role is to begin only where space on a utility pole has been designated and is actually being used for communications services by wire or cable.... In other words, where a utility owns or controls a pole on which there has been no designation of communications space, jurisdiction to require access will not lie.²²

Similarly, the Commission has observed that the “underlying purpose” of Section 224 is “to assure that *communications space* on utility poles be made available to cable television systems at ‘just and reasonable rates and under just and reasonable terms and conditions.’”²³

The mere fact that *some* utilities allow pole top attachments does not mean the Commission should require *all* utilities to allow it. As set forth in the comments and evidence submitted by numerous electric utilities in this proceeding, there are legitimate — if not persuasive — safety and reliability reasons for disallowing wireless pole top attachments.²⁴ So long as an electric utility is applying any prohibition in a non-discriminatory manner, the Commission should not interfere with an individual utility’s discretion on this important issue of safety and reliability.²⁵

Other Problems With Fibertech’s “Ways” To Increase Broadband Deployment

In addition to seeking onerous, inflexible make-ready deadlines which are antithetical to maintaining a safe and reliable electric distribution system, Fibertech’s submissions also ask the Commission to take other measures which would reject the spirit of fact-based adjudication, and would jeopardize an electric utility’s ability to maintain system reliability.

a. “Codify Key Precedents” = Bad Idea

The Commission’s decisions in complaint proceedings are based on the specific facts and circumstances in a particular case. The holding in one case may be completely inapplicable to

²² *Cable Information Services, Inc. v. Appalachian Power Company*, 1980 FCC LEXIS 410, ¶ 22 (FCC 1980); see also *David Bailey v. Mississippi Power & Light Company*, 1985 FCC LEXIS 2617 (“Since MPLC has designated communications space on its poles and has permitted Fayette Cable to utilize this space for CATV attachments, the necessary nexus exists for the Commission to exercise jurisdiction over MPLC’s pole attachment practices.”).

²³ *Gulfstream Cablevision of Pinellas County, Inc. v. Florida Power Corp.*, 1985 FCC LEXIS 4123, ¶ 6 (Common Carrier Bureau 1985).

²⁴ See, e.g. Initial Comments of Florida IOUs Regarding Safety and Reliability, pp. 16-17 (citing Declaration of Kristina Angiulli, ¶ 11; Declaration of Thomas Kennedy, ¶ 11); Initial Comments of Alabama Power, Georgia Power, Gulf Power and Mississippi Power pp. 34-35 (citing Declaration of Keith Reese, ¶ 6).

²⁵ BWPA Coalition claims that utilization of pole tops “reduce[s] their costs (and therefore their charges to the public).” March 27, 2009 BWPA Coalition letter, p. 9. This is yet another example of the unsupported – if not facially questionable – assertions pervading the recent submissions from BWPA Coalition and Fibertech.

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the next. This is particularly true with respect to make-ready disputes, where there are numerous variables in the equation. Fibertech's request to "codify key precedents" would be akin to seeking "codification" of a court's determination that a cell tower is a nuisance – it may be the right result in some cases, but not in others. Section 224 attachers should remain free to argue the persuasive value of prior decisions; electric utilities should remain equally free to argue why those decisions are inapplicable under the facts of a specific case.²⁶

Fibertech also overstates the United States Supreme Court's holding with respect to wireless attachments in *NCTA v. Gulf Power Co.* The specific issue in that case was framed by the Court as follows: "Are some attachments by *wireless telecommunications providers* – those, presumably, which are composed of distinctively wireless equipment – excluded from the coverage of the [Pole Attachment] Act?"²⁷ Importantly, the Court did not extend Section 224 protections to all pole attachments "*used to provide wireless telecommunications service*" (as claimed by Fibertech). Instead, the court spoke only to pole attachments made "*by wireless telecommunications providers.*" This is an important distinction because some attachments "*used to provide*" wireless telecommunications service are not actually made "*by*" a wireless telecommunications carrier. The mandatory access requirement in Section 224(f)(1) extends only to "a cable television system or any telecommunications carrier." Whether Fibertech's word-play is deliberate or simply careless, the Commission need not (and should not) "codify" the holding in *NCTA v. Gulf Power*. It stands on its own.

²⁶ Fibertech specifically asks the Commission to "codify" the holdings in *Salsgiver Communications, Inc. v. North Pittsburgh Telephone, LLC*, 22 FCC Rcd. 20536 (Enforcement Bureau 2007), and *Cavalier Telephone, LLC v. Virginia Elec. & Power Co.*, 15 FCC Rcd. 9563 (Cable Services Bureau 2000), as they relate to the practices of boxing and bracketing. But Fibertech neglects to disclose several important details about these decisions. First, in *Salsgiver*, the Enforcement Bureau specifically said of its holding: "Our decision here is limited to and by the record in this case. In some future adjudication or rulemaking, the Commission could, on the basis of a different record, decide to allow restrictions on boxing." 22 FCC Rcd. at 20543 n. 62. Second, the *Cavalier Telephone* decision relied-upon by Fibertech was vacated in its entirety and specifically stripped of its precedential value in *Cavalier Telephone, LLC v. Virginia Elec. & Power Co.*, 17 FCC Rcd. 24414 (Enforcement Bureau 2002). This is not the only place where Fibertech plays fast-and-loose with the facts. Fibertech states in its March 25, 2009 Comments that "there is no evidence in the pole attachment proceeding record to support" the safety concerns raised by pole owners in connection with boxing and bracketing. (March 25, 2009 Comments of Fibertech and KDL, pp. 15-16). But the Electric Utilities themselves submitted considerable testimony on this very subject, explaining the safety and reliability consequences of the practices Fibertech seeks to "codify." See Initial Comments of Florida IOUs Regarding Safety and Reliability, pp. 18-19 (citing Declaration of Kristina Angiulli, ¶ 12; Declaration of Scott Freeburn, ¶ 11; and Declaration of Thomas Kennedy, ¶ 12); Initial Comments of Oncor, pp. 19-21 (citing Declaration of Larry Kohrmann, ¶¶ 24-26); Reply Comments of Florida IOUs, pp. 10-11 (citing Second Declaration of Thomas Kennedy, ¶ 6; Second Declaration of Kristina Angiulli, ¶ 6).

²⁷ 534 U.S. 327, 340 (emphasis added).

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b. “Require Compliance with Objective Safety Standards” = Threat to Reliability

Fibertech continues to urge that an electric utility’s overhead distribution standards begin and end with “safety.” Safety is indeed paramount. But there are some overhead distribution standards that have far more to do with *reliability*. Importantly, the Pole Attachment Act allows an electric utility to deny access on a non-discriminatory basis “where there is insufficient capacity and for reasons of safety, *reliability* and generally applicable engineering purposes.”²⁸ “Reliability” is a stand-alone basis for denying access under the statute.

This issue is important to the Electric Utilities for several reasons. First, an electric utility must retain control of its own overhead distribution construction standards. The standards applicable to third-party attachments are merely part-in-parcel of an electric utility’s comprehensive overhead distribution construction standards, which are the product of *many* factors, including a utility’s history, experiences, work-force, climate, geography, and materials, to name a few.²⁹ As the Commission noted in the initial rulemakings following the 1996 Act:

In addition to operating under federal, state and local requirements, a utility normally will have its own operating standards that dictate conditions of access. Utilities have developed their own individual standards and incorporated them into pole attachment agreements because industry-wide standards and applicable legal requirements are too general to take into account all of the variables that can arise.³⁰

This statement is as accurate now as it was in 1996.

Second, Fibertech’s request would conflict with state regulators’ authority over matters of electric safety and reliability. The Florida Storm Hardening docket is an excellent example. Following the extraordinary 2004 and 2005 hurricane seasons, the Florida Public Service Commission (“FPSC”) under took a multi-pronged approach to improve the electric infrastructure in Florida. The FPSC ultimately adopted rules requiring electric utilities to submit Storm Hardening Plans for approval. The rules provide, in pertinent part:

Attachment Standards and Procedures: As part of its storm hardening plan, each utility shall maintain written safety, reliability, pole loading capacity, and engineering standards and

²⁸ 47 U.S.C. § 224(f)(2).

²⁹ See Initial Comments of Florida IOUs, pp. 6-7 (citing Declaration of Kristina L. Angiulli, ¶ 5; Declaration of Scott Freeburn, ¶ 5); Initial Comments of Oncor pp. 6-8 (citing Declaration of Larry Kohrmann, ¶¶ 10-13).

³⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order 11 FCC Red. 15499, 16073 (1996).

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procedures for attachments by others to the utility's electric transmission and distribution poles (Attachment Standards and Procedures). The Attachment Standards and Procedures *shall meet or exceed* the edition of the National Electric Safety Code that is applicable ... so as to assure, as far as is reasonably practicable, that third-party facilities attached to electric transmission and distribution poles do not impair electric safety, adequacy, or pole reliability; do not exceed pole loading capacity; and are constructed, installed, maintained, and operated in accordance with generally accepted engineering practices for the utility's service territory.³¹

Under the FPSC's Storm Hardening Rules, the NESC is a *minimum* standard. The Rules require that third party attachment standards "meet or exceed" the NESC, which clearly contemplates that standards may (and in some cases, should) be stricter than those set forth in the NESC. The Storm Hardening Plans submitted by the Florida IOUs in fact contain standards (applicable to third party attachment and overhead construction, generally) which exceed the NESC. Similarly, Texas law – applicable to Oncor Electric Delivery — also recognizes the NESC as a *mandatory* (i.e. minimum) standard.³²

Moreover, the NESC is a *safety* code. It is not a construction manual or design specification. This point is made clearly in the NESC itself:

These rules contain the basic provisions that are considered necessary for the safety of employees and the public under the specified conditions. *This code is not intended as a design specification or as an instruction manual.*³³

While compliance with the NESC might sufficiently protect employees and the public "under the specified conditions," it would not necessarily protect the reliability of the electric distribution system or comport with generally applicable engineering principles in a given area or for a given system.

³¹ Fla. Admin. Code, Rule 25-06.0342(5) (emphasis added).

³² See Public Utilities Commission of Texas, Chapter 25, Subchapter E(d) (Each electric utility *shall* construct, install, operate, and maintain its plant, structures, equipment, and lines in accordance with the NESC, among other standards."); see also Public Utility Regulatory Act, § 38.004 ("Notwithstanding any other law, a transmission or distribution line ... *must* be constructed, operated, and maintained, as to clearances, in the manner described by the National Electrical Safety Code").

³³ NESC Section 010 (emphasis added)

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c. *Web Postings = Information in the Wrong Hands*

Fibertech's submissions ask the Commission to require electric utilities to post a number of pieces of information on-line, including "maps identifying the specific location of all facilities allocated, in whole or in part, to local distribution."³⁴ This is a potentially disastrous requirement, which could lead to sensitive infrastructure information falling into the wrong hands. Although any party conceivably could map the system over time (assuming they knew what they were looking for), the consolidation of this data in one easy-to-access location increases the risk of vandalism, tampering or terrorism to an electric utility's distribution system. Many electric utilities do not even allow state or local government to have access to this type of system-wide data.³⁵ When maps of certain portions of the system are provided to third-parties, those third-parties are usually required to execute non-disclosure agreements.³⁶

Conclusion

Broadband deployment is, indeed, important. But broadband deployment cannot come at the expense of safe and reliable electric distribution systems. The aggressive make-ready deadlines proposed by BWPA Coalition and Fibertech are a threat to safety and reliability, especially where make-ready projects are large in scale, where other communications attackers may have anti-competitive motives, and where electric utilities are strangled by the realities of weather, restoration priorities, and the Commission's existing notice requirements. In any event, the Commission need not even reach this issue because it cannot require electric utilities to perform make-ready *at all* – let alone within any particular time frame.

The Electric Utilities greatly appreciate the Commission's attention to these matters, and look forward to further dialogue in an effort to reach sensible solutions that (1) comport with the Pole Attachment Act, (2) respect an electric utility's discretion in connection with its overhead distribution construction standards, and (3) operate to preserve – rather than interfere with – the safety and reliability of electric distribution systems.

³⁴ See March 6, 2009 Fibertech Proposal, ¶ 4; March 25, 2009 Comments of Fibertech and KDL, pp. 13-14.

³⁵ See, e.g., Initial Comments of Florida IOUs pp. 22-23; Reply Comments of Florida IOUs, p. 9 (citing Second Declaration of Kristina Angiulli, ¶ 3; Second Declaration of Scott Freeburn, ¶ 6); Reply Comments of Alabama Power, Gulf Power, Georgia Power and Mississippi Power, pp. 14-16; (citing Second Declaration of Donald W. Boyd, ¶¶ 4-6).

³⁶ See Reply Comments of Florida IOUs p. 9; (citing Second Declaration of Kristina Angiulli, ¶ 3; Second Declaration of Scott Freeburn, ¶ 6); Reply Comments of Alabama Power, Gulf Power, Georgia Power and Mississippi Power, pp. 14-16; (citing Second Declaration of Donald W. Boyd, ¶¶ 4-6).

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Respectfully submitted,



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J. Russell Campbell

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