

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of
A National Broadband Plan for Our Future

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GN Docket No. 09-51

REPLY COMMENTS OF ONCOR ELECTRIC DELIVERY COMPANY,
FLORIDA POWER & LIGHT COMPANY, TAMPA ELECTRIC COMPANY, AND
PROGRESS ENERGY FLORIDA, INC.

ATTORNEYS FOR:
ONCOR ELECTRIC DELIVERY COMPANY
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TAMPA ELECTRIC COMPANY
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Oncor Electric Delivery Company (“Oncor”), Florida Power & Light Company (“FPL”), Tampa Electric Company (“TECO”), and Progress Energy Florida, Inc. (“PEF”) (collectively “Oncor and the Florida IOUs”) respectfully submit these Reply Comments in connection with the Commission’s Notice of Inquiry, *In the Matter of A National Broadband Plan for Our Future*, GN Docket No. 09-51, 24 F.C.C.R. 4342, released on April 8, 2009 (the “National Broadband Plan NOI”).¹

I. Introduction.

Oncor and the Florida IOUs are four investor-owned electric utilities (“IOUs”) in Texas and Florida serving more than 9.8 million customers and owning more than 4.5 million distribution poles (nearly 2.7 million of which have one or more third-party attachments).²

The National Broadband Plan NOI asked “*to what extent ... pole attachments ... stand as impediments to further broadband deployments*, where such deployments would be made by market participants in the absence of any government-funded programs.”³ The answer is: they do not. Congressional and Commission pole attachment rules and policy have *facilitated* – rather than impeded – broadband deployment by mandating access at regulated (rather than

¹ As part of their Reply Comments, Oncor, FPL, TECO, and PEF expressly adopt and incorporate the following filings in *Implementation of Section 224 of the Act: Amendment to the Commission’s Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, WC Docket No. 07-245, RM-11293, RM-11303 (released Nov. 20, 2007) (the “NPRM”) as if set forth fully herein: (1) Oncor’s March 7, 2008 NPRM Comments (and exhibits thereto) (“Oncor NPRM Comments”); (2) Oncor’s April 22, 2008 NPRM Reply Comments (and exhibits thereto) (“Oncor NPRM Reply Comments”); (3) the Florida IOUs March 7, 2008 NPRM Comments (and exhibits thereto) Regarding Safety and Reliability (the “Florida IOUs NPRM Comments”); (4) FPL and TECO’s March 7, 2008 NPRM Comments (and exhibits thereto) Regarding ILECs and Pole Attachment Rates (“FPL & TECO NPRM Comments”); (5) the Florida IOUs April 22, 2008 NPRM Reply Comments (and exhibits thereto) (the “Florida IOUs NPRM Reply Comments”); (6) Oncor and the Florida IOUs Nov. 20, 2008 *Ex Parte* Letter in the NPRM (“Oncor & the Florida IOUs November 2008 *Ex Parte*”); and (7) Oncor and the Florida IOUs April 13, 2009 *Ex Parte* Letter in the NPRM (“Oncor & the Florida IOUs April 2009 *Ex Parte*”). To ensure a complete record, each of these documents is being filed with these reply comments as supporting materials.

² See Oncor NPRM Comments at pp. 1-2; Florida IOUs NPRM Comments at pp. 2-3.

³ *National Broadband Plan NOI* at ¶ 50 (emphases added).

market-driven) rates and by subjecting utilities to the Commission's complaint proceeding jurisdiction.⁴

Oncor and the Florida IOUs submit these Reply Comments specifically to address the pole attachment issues raised in the initial comments:

- **Access Deadlines:** "Timely" access does not mean unfettered access; hard-and-fast access deadlines are unworkable.
- **Insufficient Capacity:** The term "insufficient capacity" means what it says and has already been addressed by the Commission and the Eleventh Circuit.
- **Pole Top Access:** The Commission lacks jurisdiction to mandate pole top access; any rule of general applicability regarding pole top access threatens the safety and reliability of the distribution system.
- **NESC Presumption:** While NESC standards provide a good baseline, any "one-size-fits-all" approach to distribution safety and reliability standards is not viable.
- **Broadband Rates:** The Commission should unify the rates for CATV and CLEC wireline broadband attachments at the Telecom Rate with modified presumptions.

II. The Safety and Reliability of Electric Distribution Systems Must be the Cornerstone of Any National Broadband Deployment Plan.

Broadband deployment is important. But it cannot come at the expense of the safety and reliability of electric distribution systems. Electric utilities as a whole, and specifically Oncor and the Florida IOUs, have spent decades engineering, installing, and maintaining their distribution networks. They have developed, revised, and implemented processes and standards designed to preserve the safety and reliability of these distribution networks. Through these efforts, attaching entities have grown accustomed to exceptionally reliable infrastructure – a fact the attaching entities now seek to use against Oncor and the Florida IOUs by characterizing these processes and standards as "barriers" to broadband deployment.

⁴ The Commission's limited inquiry elicited comments from at least 21 broadband providers, most of whom reiterated their arguments/positions in the pending pole attachment *NPRM*.

The attaching entities fail to provide the Commission with sufficient evidence to support the sweeping change they request to the current, and long-standing, pole attachment access rules. The Commission has invited such evidence on multiple occasions. Yet, the attaching entities continue to rely on unspecific, anecdotal evidence (if any evidence at all) as being more important than the very real safety and reliability concerns associated with electric distribution networks – networks which, according to attaching entities (a/k/a broadband providers), are critical communications infrastructure.

A. “Timely Access” Does Not Mean “Unfettered Access.”

1. *Hard-and-Fast Access Deadlines Are Unworkable*

The safety and reliability of electric distribution systems is due, in part, to the FCC’s long-standing deference to the state and utility-specific standards that impact third-party attachments.⁵ This deference allows individual electric utilities to develop distribution systems capable of withstanding regional, state, and even county specific problems (*e.g.*, hurricanes, straight-line winds, tornadoes, ice-loading, flooding, soil variability, etc.) and implement procedures necessary to maintain these distribution systems in the face of these distinct issues.⁶ Circumventing this process by implementing generic policies such as Fibertower Corporation’s (“Fibertower”) “access shot clock,”⁷ Sunesys, LLC’s (“Sunesys”) access-deadline,⁸ or PCIA’s

⁵ See *Arkansas Cable Telecomms. Ass’n v. Entergy Arkansas, Inc.*, 21 F.C.C.R. 2158, 2161 (2006) (“In adopting rules governing pole attachments, the Commission expressly declined to establish a comprehensive set of engineering standards that would govern when a utility could deny access to its poles based on capacity, safety, reliability, or engineering concerns.”); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499, 16073 (1996) (“[W]e conclude that state and local requirements affecting attachments are entitled to deference even if the state has not sought to preempt federal regulations under section 224(c).”).

⁶ See Oncor *NPRM* Comments at pp. 3-17; Florida IOUs *NPRM* Comments at pp. 5-14, 19-21; Oncor *NPRM* Reply Comments at pp. 3-19; Florida IOUs *NPRM* Reply Comments at pp. 3-14; Oncor & the Florida IOUs April 2009 *Ex Parte* at pp. 1-5, 7-11.

⁷ See Fibertower Comments at p. 15.

“time period for pole attachment permits”⁹ would prevent Oncor and the Florida IOUs from carrying out one of their most fundamental tasks – designing and maintaining the safest and most reliable electric distribution system *for their unique footprint*.¹⁰

The attaching entities’ campaign for uniform access deadlines is consistent with their general theme of treating pole attachments as if they exist in a vacuum, immune to utility-specific safety and reliability issues. Fibertower goes so far as to press for a “‘shot clock’ setting a deadline by which ... an infrastructure owner *must accord physical access* – and suffer stern consequences if the deadline is not met[.]”¹¹ The FCC has previously declined to adopt such restrictive guidelines for make-ready work and should do so again.¹² Access deadlines would effectively sacrifice the safety and reliability of electric distribution systems for the sake of

⁸ See Sunesys Comments at pp. 2-12. Sunesys attempts to bootstrap its argument for FCC mandated access deadlines by referencing specific time periods adopted in just two non-Commission regulated states, New York and Connecticut. See *id.* at 10-12. Sunesys curiously asserts that any claim “that the Commission lacks the power to impose a time limit ... is frivolous.” *Id.* at p. 10. This approach is consistent with the approach taken by all attaching entities on this critical statutory issue: *ignore, pretend, and say it isn't so*. As UTC/EEI pointed out in their Initial Comments, the deadlines adopted by New York and Connecticut for make-ready have only applied to wireline attachments, not wireless attachments. See UTC/EEI Comments at p. 19, n.27. Moreover, if there are deadlines to be imposed, they should come from the states, which are in better position to balance interests given the unique history and characteristics of a particular area. Moreover, the states actually have authority over (and in fact regulate) the safety and reliability of electric distribution systems.

⁹ See PCIA Comments at p. 7.

¹⁰ Rules of general applicability cannot address meaningful differences between electric utilities’ geographic coverage areas or historical practices. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499, 16073 (1996) (“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.”); see also *supra* note 7.

¹¹ Fibertower Comments at p. 12 (emphases added).

¹² See *Petition of Cavalier Telephone LLC Pursuant to Section 252(E) 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 and Order, WC Docket No. 02-359, 18 F.C.C.R. 25887 at ¶¶ 140-142 (2003) (FCC refused to adopt requested make-ready deadline because it would have required Verizon to attempt to renegotiate potentially all of its pole attachment license agreements, imposing a potentially unreasonable burden on Verizon in the absence of evidence of discriminatory treatment toward Cavalier).

broadband “speed-to-market.” This would be a short-sighted policy with potentially dangerous consequences.

The fact that an attachers’ speed-to-market may be occasionally slowed by the permitting and make-ready process is an unavoidable by-product of structured processes designed to ensure the safety and reliability of electric distribution systems.¹³ Instead of challenging the processes as “unnecessary delays,” the attaching entities would be better served to fully cooperate and help protect the integrity of the very distribution systems upon which they rely for broadband deployment (among other services).

The issue of “timely-access” (as framed by the attaching entities) really boils down to whether electric utilities can or should be required to perform “make-ready” within a particular time period. Make-ready can be relatively simple under the best of circumstances but extremely complex in others. Make-ready can not always happen overnight or even in the 45 or 90 day periods urged by the Broadband & Wireless Pole Attachment Coalition and Fibertech Networks, LLC.¹⁴ Given variances in local conditions, there is no “cookie-cutter” make-ready solution. Imposing artificial deadlines and penalties on pole owners, when make-ready frequently depends on unique conditions as well as events and actions beyond the control of electric utilities, is unworkable and unfair.¹⁵ A single “one-size-fits-all” time period is unworkable, impractical,

¹³ Unlike ILEC pole owners, Oncor and the Florida IOUs are not in competition with the attaching entities and therefore have no motivation to unnecessarily delay the attachers’ access to poles or to market. *See* Oncor *NPRM* Comments at pp. 14-15. As such, Sunesys’s argument that “some pole owners, such as ILECs and certain utilities that provide broadband and other telecommunications services, actually compete against prospective attachers” is of such limited applicability to electric utilities that the Commission should not take it into account. *See* Sunesys Comments at p. 7.

¹⁴ *See* Oncor *NPRM* Comments at p. 15; Florida IOUs *NPRM* Comments at pp. 19-21; Oncor & the Florida IOUs April 2009 *Ex Parte* at pp. 1-5.

¹⁵ For example, make-ready work often requires moving or removing an existing attaching entity’s facilities. *See* Florida IOUs *NPRM* Reply Comments at p. 11-12. Section 1.1403(c)(1) of the Commission’s rules require utilities to provide 60 days notice to an attaching entity before moving or removing their facilities. *See* 47 C.F.R. § 1.1403(c)(1). If the existing attaching entity (often a competitor to the prospective attaching entity) is

short-sighted, and potentially dangerous for the communications industry, the electric industry, and the public.

2. ***“Insufficient Capacity” Is an Important Exception to the Mandatory Access Provision.***

With respect to pole capacity, Fibertower argues that “putative ‘insufficient capacity’ on poles is largely a fiction” and that removing “the reference to ‘insufficient capacity’ in Section 224(f)(2) to bring utility pole regulations into a posture similar to telephone poles would help to resolve [Fibertower’s perceived] problem.”¹⁶ First, the Commission does not have jurisdiction to re-write a statute. Second, removing the term “insufficient capacity” would require electric utilities to perform make-ready at the whim of attachers and could create innumerable safety and reliability problems. The notion that pole owners are akin to on-call make-ready contractors for attaching entities has already been addressed by both the Commission and the Eleventh Circuit.¹⁷ The notion of “insufficient capacity” is real and is in the statute for good reason.

After the Commission, in earlier rulemakings, required utilities “to take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs,” the Eleventh Circuit, in *Southern Co. v. FCC*, held that the Commission’s position was “contrary to the plain language of § 224(f)(2).”¹⁸ Specifically, the Eleventh Circuit noted that Section 224(f)(2) “carved out” an exception to the general rule that a utility had to make its electric plant available to third-party attachers and stated that “it is hard to

unwilling to move itself or waive the Commission-imposed notice period, there are portions of the make-ready work that cannot even begin within 60 days. See Florida IOUs *NPRM* Reply Comments at p. 11-12.

¹⁶ See Fibertower Comments at p. 16.

¹⁷ See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Radio Service Providers*, CC Docket No. 96-98, 14 F.C.C.R. 18049, ¶ 51 (1999); *Order on Reconsideration*, 14 F.C.C.R. 18049, ¶ 53 (Oct. 20, 1999); *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002); *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002).

¹⁸ *Southern Co.*, 293 F.3d at 1346.

see how this provision could have any independent meaning if utilities were required to expand capacity at the request of third parties.”¹⁹ In *Alabama Power Co. v. FCC*, the Eleventh Circuit equated the “full capacity” pole with the concepts captured in § 224(f)(2): “Congress contemplated a scenario in which poles would reach full capacity when it created a statutory exception to the forced-attachment regime.”²⁰

The attaching entities must come to grips with the fact that “insufficient capacity” means what it says.

B. Pole Top Access Should Remain a Utility-Specific Decision.

PCIA suggests in its comments that the FCC should “[c]onfirm[] that wireless attachers have access to pole tops.”²¹ There is nothing to “confirm,” though. First, the FCC lacks jurisdiction to mandate pole top access.²² Second, any rule of general applicability regarding pole top access threatens the safety and reliability of the distribution system.²³

1. Pole Tops Are Outside the Commission’s Jurisdiction.

Congress’s initial decision, in 1978, to allow the Commission to exercise a certain level of jurisdiction over the facilities owned by electric utilities was based on the fact that some electric utilities had decided to “participate in the provision of communications space on [their] utility poles.”²⁴ The Commission, relying on the legislative history of Section 224, has previously stated:²⁵

¹⁹ *Id.* at 1346-47.

²⁰ *Alabama Power*, 311 F.3d at 1370.

²¹ See PCIA Comments at p. 7.

²² See Florida IOUs *NPRM* Comments at pp. 14-18; Oncor & the Florida IOUs April 2009 *Ex Parte* at pp. 6-7.

²³ See *id.*

²⁴ S. Rep. No. 580, 95th Cong., 1st Sess., at 15 (1977). Specifically, Congress explained that the Commission may regulate an electric utility’s pole attachment arrangements when: (1) the electric utility “shares its poles with a telephone company or other communications entity; and (2) a cable television systems shares the

[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.²⁶

Under this precedent, the Commission has no authority to require an electric utility to grant access to space on its poles that is not being used for communications functions. This is consistent with the “underlying purpose” of Section 224: “to assure that *communications space* on utility poles be made available to cable systems at ‘just and reasonable rates, and under just and reasonable terms and conditions.’”²⁷ By characterizing Section 224 as conferring authority only over the terms and conditions associated with “the communications space on utility poles,” the Commission has recognized that its pole attachment authority is limited in scope to the space designated by the utility for communications.²⁸ Thus, the Commission has no jurisdiction to require utilities to grant access for wireless pole top attachments where the utilities have not previously designated pole tops for communications purposes.²⁹

2. *Presumptive Pole Top Access Unduly Restricts a Utility’s Ability to Deny Access for Safety, Reliability, and Engineering Concerns.*

Even if the Commission did have the jurisdiction to adopt a presumption allowing pole top access (*i.e.* outside the “communications space”) for wireless attachments, it should refrain

communications space on the pole with the telephone utility or other communications entity, or occupies the communications space alone.” *Id.*; see also Florida IOUs *NPRM* Comments at pp. 15-16.

²⁵ *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 1585, 1593 (1978).

²⁶ *In the Matter of Cable Information Services, Inc. v. Appalachian Power Co.*, 81 F.C.C.2d 383, ¶ 22 & n.8 (1980) (emphasis added); see also *In the Matter of David Bailey v. Mississippi Power & Light Co.*, 1985 F.C.C. 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.”).

²⁷ *In the Matter of Gulfstream Cablevision of Pinellas County, Inc. v. Florida Power Corp.*, 1985 F.C.C. LEXIS 4123 at *4 (citing S. Rep. No. 95-580) (emphasis added).

²⁸ See Florida IOUs *NPRM* Comments at pp. 15-16.

²⁹ See *id.*

from exercising that jurisdiction, as it could unduly restrict a utility's ability to deny access for reasons of safety, reliability, and engineering concerns under Section 224(f)(2). At a minimum, communications attachments in the power supply space (which includes pole tops) would make it more dangerous for employees to work in the power supply space due to the additional congestion; present danger to communications workers who may not be accustomed to working in close proximity to lethal voltages; necessitate further, time consuming safety precautions when working around such attachments (delaying restoration time) and substantially increase the wind loading on that pole.³⁰

While these issues can (and sometimes are) resolved, the decision to allow such attachments should remain within the discretion of the individual electric utility, subject to the non-discriminatory access requirement in Section 224(f)(1).

C. The NESC Should Not Serve as a Ceiling for Pole Attachment Construction Standards.

PCIA and others request that the FCC establish a rebuttable presumption that attachments that comply with the National Electric Safety Code ("NESC") are safe.³¹ While the NESC provides a good baseline for safety standards, it should not serve as the ceiling for pole attachment construction standards³² and was never intended to address independent reliability issues.³³

³⁰ *See id.* at pp. 16-17. For example, the static moment (stress) caused by windloading of an object attached at the top of a 45 foot pole would subject the pole to more than twice the stress caused by wind if the same object was attached at a height of 16 feet. *See id.*

³¹ *See, e.g.,* PCIA Comments at p. 7.

³² *See* Oncor *NPRM* Comments at pp. 4-10; Florida IOUs *NPRM* Comments at pp. 5-10; Florida IOUs *NPRM* Reply Comments at pp. 3-5.

³³ While "safety" and "reliability" have some overlap, they sometimes also implicate different concerns. A practice can be "safe," but compromise reliability; a practice can be "reliable," but compromise safety. Though these terms are often used in tandem, they are not one and the same. Importantly, section 224(f)(2) uses *both* terms. Presumably, Congress used both terms for a reason. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001)

For starters, the NESC is not a construction manual. Safety and reliability issues not addressed by the NESC must be accounted for when constructing or maintaining an electric distribution system. For example, reliability concerns – independent from safety considerations – may warrant standards that exceed the NESC. This position is supported by the express language of Section 1.010 of the NESC:

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.³⁴

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.³⁵

After the extraordinary 2004 and 2005 hurricane seasons, the Florida Public Service Commission (“FPSC”) undertook a multi-pronged approach to improve the electric infrastructure in Florida. The result was new Storm Hardening Rules which require electric utilities to submit Storm Hardening Plans for approval by the FPSC.³⁶ Under the FPSC’s Storm Hardening Rules

(recognizing the Court’s duty to “give effect, if possible, to every clause and word of a statute” and reluctance to “treat statutory terms as surplusage in any setting”).

³⁴ NESC Rule 1.010 (emphasis added).

³⁵ NESC Rule 1.012 (emphasis added). Furthermore, the NESC Handbook provides:

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 actions that constitute good practice under such different 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. ... The NESC is a performance code, not a set of design specifications. The NESC construction rules specify *what* is to be performed, not *how* it is to be accomplished.

NESC Handbook, commentary on NESC Section 1, Rule 010 (Purpose), p. 3-4.

³⁶ See Florida IOUs *NPRM* Comments at pp. 3-5.

the NESC is a *minimum* standard.³⁷ As such, the Storm Hardening Plans submitted by the Florida IOUs contain standards (applicable to third-party attachment and overhead construction generally) that exceed the NESC.³⁸ The Florida Department of Transportation (in whose rights-of-way many electric utility poles are placed) also has guidelines that exceed the NESC.³⁹

Similarly, a few of Oncor's Standards and Specifications exceed those set forth in the NESC.⁴⁰ These more stringent standards are not only reflected in Oncor's Joint Use Standards, but also throughout its other Overhead and Underground Distribution Construction Standards.⁴¹ In addition, Texas' rulemaking bodies often require more stringent standards.⁴² Third-party attachment standards are merely a subset of an electric utility's overhead distribution standards, and cannot be isolated from the bigger picture of overhead distribution safety and reliability.

³⁷ The Storm Hardening 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. *See* Fla. Admin. Code, Rule 25-06.0342(5).

³⁸ *See* Florida IOUs *NPRM* Comments at pp. 5-10. For example, FPL's Storm Hardening Plan contains extreme wind loading construction for all critical infrastructure, new construction, major planned work, relocation projects, and daily work activities, whereas the NESC requires only Grade C. *See id.* at pp. 6-8. TECO's Storm Hardening Plan contains Grade B construction with extreme wind loading projects. *See id.*

³⁹ *See id.* at p. 8. One example of these differences is minimum grade clearance (the minimum height above ground, for mid-span clearances, at which attachments can be made). *See id.*

⁴⁰ *See* Oncor *NPRM* Comments at pp. 4-10.

⁴¹ *See id.* at pp. 6-7. For example, while the NESC permits clearance from the highest communication attachment to the lowest electrical supply to be 30" for grounded neutrals (Rule 230.E.1), Oncor requires 40" of clearance in all circumstances. Oncor's mandate that 40" clearance exist at all times with regard to the neutrals provides added safety and reliability. *See id.* at p. 7. Also, while the NESC recognizes an exception permitting a grounded neutral to be at a 12" mid-span clearance to communication cables, Oncor's Standards and Specifications require 30" mid-span clearance for a grounded neutral and communications cable at all times. *See id.*

⁴² *See id.* at p. 8. For example, with regard to vertical clearances above ground, the NESC requires insulated communications conductors to maintain a vertical clearance of 15.5 feet above roads, streets and other areas subject to truck traffic. *See id.* By contrast, the Texas Department of Transportation's 2005 Utility Accommodation Policy, Section 21.41, requires a minimum clearance of 18 feet above highways for communication and cable television lines. *See id.* In addition, while the NESC requires the same 15.5 feet of clearance over state roads for power neutrals meeting Rule 230.E.1, the Texas Department of Transportation requires 22 feet of clearance above its state roads and highways. *See id.* This increase in required clearance is aimed at maintaining the safety and reliability of Texas roads for the public, just as Oncor's Standards do for the electric infrastructure. *See id.*

Section 224 was never intended to grant the Commission authority to micro-manage safety, reliability, or engineering of electric distribution systems. Section 224(f) devises no specific jurisdiction in the Commission with regard to safety or reliability, unlike the language set forth in Section 224(b) which explicitly vests the Commission with the authority “to regulate rates, terms, and conditions” (the language of contract).⁴³ Matters of safety and reliability are best addressed by individual utility standards in concert with a utility’s state regulatory commission.⁴⁴ As such, any “one-size-fits-all” approach to electric distribution safety and reliability standards – like those proposed by attaching entities in this docket – is not viable.

III. A Unified Broadband Rate Should Apply to All CATV and CLEC Wireline Broadband Attachments.

A. The Commission Should Consolidate All CATV and CLEC Wireline Attachments at the Telecom Rate With Modified Presumptions.

Most CATV and CLEC attachers (including wireless attachers) urge the Commission to create a new broadband rate based on the current subsidized cable formula.⁴⁵ As discussed extensively in their previous filings,⁴⁶ Oncor and the Florida IOUs agree that all *wireline* attachments within the Commission’s jurisdiction used for broadband should be subject to the

⁴³ Similarly, Section 224(c) requires no “certification” that a state regulate access, as it does for “rates, terms, and conditions.”

⁴⁴ See Oncor *NPRM* Comments at pp. 4-10; Florida IOUs *NPRM* Comments at pp. 3-10; Florida IOUs *NPRM* Reply Comments at pp. 3-12.

⁴⁵ See, e.g., CBeyond, Inc., Integra Telecom., Inc., One Communications Corp. and TW Telecom, Inc. Comments at pp. 20-21 (the Commission should ensure that “all pole attachments used to provide broadband Internet access are subject to a single, unified rate ... yielded by the FCC’s existing cable formula”); National Cable & Telecommunications Association Comments at pp. 35-36 (the Commission should “set a formula that enables all broadband providers to pay rates established under the existing cable rate formula”); PCIA Comments at p. 7 (the Commission should confirm “that wireless attachments are entitled to regulated rates pursuant to applicable Commission cost-based formulas”); Time Warner Cable, Inc. Comments at pp. 24-25 (the Commission should establish that “cable operators may continue to pay the existing cable rate for pole attachments used in connection with broadband services”).

⁴⁶ See FPL & TECO *NPRM* Comments at pp. 11-17; Florida IOUs *NPRM* Reply Comments at pp. 20-23.

same rate: that rate being the Telecom Rate with modified presumptions.⁴⁷ Charging anything less than the Telecom Rate for CATV broadband attachments would continue to put CLEC broadband providers at a competitive disadvantage as CLECs are “bound” to the Section 224(e) rate whereas CATVs are not “bound” to the Section 224(d) rate.

Comptel contends that telecommunications carriers providing broadband are at a “significant disadvantage” because “pole owners are permitted to charge telecommunications carriers a substantially higher rate than they charge cable operators.”⁴⁸ However, any “disadvantage” to Comptel or others in paying the Telecom Rate is more attributable to the fact that CATVs continue to enjoy the Cable Rate; notwithstanding their diversification of services beyond solely “cable service” – rather than the rate designed by Congress to account for the reality that the “unusable space on a pole is of equal benefit to all attaching entities” (the Telecom Rate).

Oncor and the Florida IOUs agree that using two different rates for identical attachments is counterintuitive.⁴⁹ The solution for unifying the rate paid by CATV and CLEC attachments is to move the rate paid by broadband-providing CATVs to the Telecom Rate, not to move the rate paid by CLECs down to the subsidized Cable Rate established by Congress in 1978 to help then-fledgling CATVs.⁵⁰ Section 224(e) requires this result by obligating telecom carriers to pay the Telecom Rate regardless of what other services they may be providing through their attachments.

⁴⁷ This would bring virtually all CATV and CLEC attachments, which are physically identical for the most part, to the same rate and would eliminate billing disputes, level the playing field between CATVs and CLECs, and resolve the contentious Voice Over Internet Protocol (“VOIP”) debate that has mired parties in litigation for years.

⁴⁸ See Comptel Comments at pp. 23-24.

⁴⁹ Oncor and the Florida IOUs agree with the Commission’s recognition that “the once-clear distinction between ‘cable television systems’ and ‘telecommunications carriers’ has blurred as each type of company enters markets for delivery of services historically associated with the other.” *NPRM*, ¶ 5.

⁵⁰ If the Commission’s goal is to level the competitive playing field, any single rate adopted to cover broadband attachments cannot be lower than the existing Telecom Rate. Otherwise, cable television systems that offer broadband, but not telecom service, will pay a lower rate than their telecom carrier competitors while offering

Section 224 establishes statutory parameters for two different rates – and two rates only. One rate applies to an attachment by a cable television system “used solely to provide cable services.”⁵¹ The other rate applies to attachments by (a) cable television systems used to provide telecom services, and (b) telecom carriers.⁵² In *NCTA v. Gulf Power*, however, the U.S. Supreme Court said: “Congress did indeed prescribe two formulas for ‘just and reasonable’ rates in two specific categories; but nothing about the text of §§ 224(d) and (e), and nothing about the structure of the Act, suggest that these are the exclusive rates allowed.”⁵³ Thus, the Commission can exercise its third rate power (as referred in *NCTA v. Gulf Power*) over CATV attachments used to provide broadband, and set that third rate at the Telecom Rate (to obtain regulatory parity with CLECs who also provide broadband, but who are statutorily wed to the section 224(e) Telecom Rate).

B. The Single Broadband Rate Should Not Apply to Wireless Attachments.

Multiple attaching entities suggest that any single rate should apply to all broadband attachments, including *wireless* attachments.⁵⁴ Oncor and the Florida IOUs disagree. The size, shape, construction and burden of wireless attachments (as compared to wireline attachments) are too varied to adopt and implement any uniform formulaic approach.⁵⁵ As a result, wireless

functionally identical services. See FPL & TECO *NPRM* Comments at pp. 13-14; Florida IOUs *NPRM* Reply Comments at pp. 20-22.

⁵¹ See 42 U.S.C. §224(d) & (e).

⁵² See *id.*

⁵³ *Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 335 (2002).

⁵⁴ See CBeyond, Inc., Integra Telecom, Inc., One Communications Corp. & TW Telecom Comments at pp. 20-21; Clearwire Corporation Comments at p. 9; Comptel Comments at pp. 23-24; CTIA – The Wireless Association Comments at pp. 19-20; Fibertower Comments at pp. 13-16; Level 3 Communications, LLC Comments at pp. 17-18; National Cable & Telecommunications Association Comments at pp. 35-36; PCIA Comments at p. 7; Windstream Communications, Inc. Comments at pp. 18-21; Wireless Communications Association International, Inc. Comments at pp. 27-28.

⁵⁵ See FPL & TECO *NPRM* Comments at p. 17; Florida IOUs *NPRM* Reply Comments at p. 22.

attachers have numerous options, such as buildings, wireless towers, billboards, water towers, and virtually any other structure.

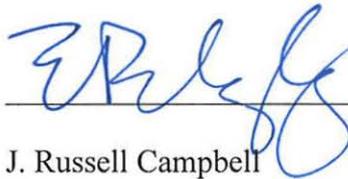
Furthermore, there has not been a showing of any need for a universal formulaic approach to wireless attachment rates. Private negotiations appear to be working just fine. The policy rationale which may support a uniform formulaic approach to wireline attachments simply does not exist for wireless attachments, nor does Section 224 require such an approach.

IV. Conclusion.

Oncor and the Florida IOUs request that the Commission: (1) refrain from adopting hard-and-fast pole attachment access deadlines; (2) decline the invitation to re-interpret the term “insufficient capacity” in Section 224(f)(2); (3) refrain from adopting any rule of general applicability regarding pole top access; (4) refrain from adopting any rebuttable presumption that establishes the NESC as a “ceiling” for electric distribution standards; (5) move all wireline CATV and CLEC broadband attachments to the Telecom Rate (with modified presumptions); and (6) refrain from adopting any uniform, formulaic approach for wireless attachments.

Oncor and the Florida IOUs appreciate the opportunity to comment on these critical matters and look forward to continued involvement in this proceeding.

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