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October 7, 2009

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

Re: ***Notice of Oral and Written Ex Parte Communications – WC Docket No. 07-245 ("Pole Attachment Proceeding"); GN Docket No. 09-29 ("Rural Broadband Strategy Proceeding"); GN Docket No. 09-51 ("National Broadband Plan Proceeding"); and WC Docket No. 09-154 ("VoIP Pole Attachment Rate Proceeding")***

Dear Ms. Dortch:

Please accept this letter, filed pursuant to Section 1.1206 of the Commission's Rules, as notice that on October 6, 2009, the undersigned attorneys along with two representatives of National Grid -- Joe Snyder, Manager of Telecommunications Attachments and Ed Kichline, Senior Counsel -- representing the Coalition of Concerned Utilities ("*Coalition*"),[1] met with: (i) Christine Kurth, Policy Director and Senior Counsel for Commissioner McDowell; (ii) Christi Shewman, Acting Legal Advisor for Wireline, Universal Service and Consumer Issues for Commissioner Baker; and (iii) William Dever, Albert Lewis, Marcus Maher and Jonathan Reel of the Wireline Competition Bureau and Rebekah Goodheart of the Media Bureau, as members of the Commission's Broadband Plan team. At the meetings, we distributed and discussed the following documents (copies attached):

- A one-page document, entitled "Proposal to Promote Broadband Competition;"
- A two-page document, entitled "Compromise Access Proposal;" and
- An Ex Parte letter dated May 1, 2009 from the *Coalition* to then-Acting Chairman Michael J. Copps, then-Commissioner Jonathan S. Adelstein,

[1] The Coalition for Concerned Utilities is composed of Allegheny Power, Baltimore Gas and Electric Co., Dayton Power and Light Co., FirstEnergy Corp., Kansas City Power and Light, National Grid, NSTAR and PPL.

and Commissioner Robert M. McDowell, explaining in detail serious concerns regarding make-ready deadlines and wireless access to the electric distribution system that were previously raised by the *Coalition* in these proceedings (inadvertently not distributed to Ms. Kurth).

Our discussions during these meetings focused on two issues: (1) ensuring that the pole attachment rates charged to attachers providing similar services are similar and non-discriminatory; and (2) enhancing access to electric utility poles without jeopardizing the safe and efficient operation of the utility distribution system.

Non-Discriminatory Rate Issues

We explained how Cable companies for many years have been provided an unfair competitive advantage over competitive local exchange carriers ("CLECs") by paying approximately one-half of the pole attachment rates required from CLECs under Section 224(e) of the Communications Act. The Voice over Internet Protocol ("VoIP") service provided by Cable companies is functionally equivalent to the circuit-switched telephone service provided by CLECs. As a policy matter, one industry providing the same service as another should not pay a more favorable rate.

We explained how Section 224(e) requires that any uniform attachment rate for Cable and CLEC attachments be set at least as high as the Section 224(e) Telecom rate. We also noted how some Cable entities have requested that the Commission "forbear" from applying the Telecom rate, which would be contrary to the requirements of the statute and bad public policy.

As we explained, in 1978 the Cable industry was in its infancy and Congress required pole attachment subsidies in order to help the industry develop and flourish. That goal has been accomplished and then some. The Cable industry has reached the point where no further subsidies at the expense of the electric utility industry and its ratepayers are justified or warranted. Nor is there any reason to believe that any continued subsidies would redound to the benefit or rural America, as claimed by the Cable industry.

For instance, Comcast is a $34.3 billion company with $2.5 billion in profits each year for the past three years. Comcast has no legitimate claim to continued government-mandated subsidies as a "nascent" company. Plus, there is no reason to expect that Comcast will take its pole attachment savings from its multiple urban and suburban systems and invest them in rural areas where the capital upgrade costs and limited potential revenues make it uneconomic for Comcast to deploy. It is the additional hard capital costs and limited revenue stream in rural America -- not "high" pole attachment fees -- that limit rural broadband penetration via Cable.

Unlike rate-regulated electric utilities, for which each dollar of revenues reduces utility revenue requirements and thus reduces electric rates, no one knows *what* the Cable industry does with its pole attachment subsidies. Electric ratepayers, many of whom do not subscribe to services offered by the Cable industry, should not be forced to continue to pay this outdated, unproductive and anticompetitive subsidy that uniquely benefits the Cable industry at the expense of its broadband competitors, the CLECs.

We explained that the legal arguments offered by Incumbent Local Exchange Carriers ("ILECs") that the FCC has jurisdiction over their pole attachment rates do not pass the statutory "laugh test." As even the ILEC industry has known for more than a decade, ILECs are specifically excluded from the federal Pole Attachment Act and have no right to a regulated pole attachment rate.

Equally important, we explained that if the Commission somehow were to ignore the statutory requirements and confer upon ILECs the same attachment rate as Cable companies and CLECs, the ILECs would receive an unfair regulatory advantage over their Cable and CLEC competitors. Many decades-old "joint-use" and ""joint ownership" relationships between ILECs and their fellow electric utility pole owners allow ILECs to avoid most of the pole change-out (*i.e.* replacement) and other make-ready costs incurred by more recent Cable companies and CLECs. Joint use/joint ownership agreements grant to ILECs preferential access to the lowest communications space on the poles and provide them sufficient space to expand without bearing anywhere near the pole change-out and other make-ready expenses that Cable companies and CLECs must incur after pole space is already used up. Moreover, as joint pole owners, ILECs are not subject to the same application, pre-inspection and post-inspection scrutiny as third party licensees like Cable companies and CLECs, which again saves the ILECs considerable money and allows them to upgrade their facilities much faster. Further, we pointed out that changing only one element – ILEC rates – would upset the balance of long-standing Joint Use/Joint Ownership Agreements and severely disadvantage electric utilities who relied on the rate element as only one part of an Agreement negotiated in good faith and at arm's length with their ILEC pole-owning partners.

Access to Electric Utility Poles

With respect to issues related to electric utility pole distribution systems, during our meetings we argued against the make-ready "shot clock" proposals raised by certain attachers and offered a compromise proposal by which attachers could receive reasonable access to electric pole distribution systems that works in harmony with electric utility operations. We explained that the *Coalition* supports the deployment of broadband services but cannot give preference to broadband services at the expense of the safe and reliable operation of the electric distribution system. The *Coalition's* proposal would provide communications attachers with non-discriminatory access to accommodate reasonable, "Non-Complex" attachment requests, keeping in mind State Department of Transportation, State Public Utility Commission and other

We also explained how wireless attachments in the electric space of the pole present a host of alarming and difficult issues for electric utility pole owners that do not exist for simple wireline attachments in the communications space. We explained the considerable time required for each electric utility pole owner to understand the significant risks associated with wireless attachments, to decide whether its particular distribution system and operations personnel can support such attachments, to develop standards (if feasible) to support such attachments, to work out agreements (if feasible) that may address the numerous additional concerns, and to analyze (if feasible) each new wireless attachment configuration that may be proposed. We explained that because of their complexity, electric utilities need to decide for themselves whether and, if so, how to accommodate wireless attachments. An across-the-board make-ready "shot clock" will not work for wireless attachments and will impair electric utility reliability and safety.

We also explained that if any "shot-clock" were to be imposed on electric utility make-ready, a "penalty buzzer" should also be imposed in order to combat the extensive number of unauthorized attachments that burden electric utility pole distribution systems.

The remainder of the *Coalition's* concerns with make-ready deadlines and other access issues are addressed in detail in the documents distributed during our meetings (copies of which are attached hereto).

We appreciate the Commission's interest in these important electric distribution system issues. Please feel free to contact the undersigned if you have any questions or require any additional information.

Sincerely,

Thomas B. Magee
Jack Richards

Attachments

cc: Christine Kurth
Christi Shewman
William Dever
Albert Lewis
Marcus Maher
Jonathan Reel
Rebekah Goodheart

Attachment 1

KELLER AND HECKMAN LLP

PROPOSAL TO PROMOTE BROADBAND COMPETITION

Cable Should Pay the Same as CLECs for VoIP Attachments

- VoIP is the equivalent of circuit-switched telecom service
- Cable VoIP pays approximately one-half what CLECs pay
- Both should pay the same attachment rate
- Leveling the Cable VoIP and CLEC rates will promote voice/broadband competition

Statutory and Policy Reasons for at Least the Telecom Rate

- The CLEC rate is set by statute and may not lawfully be lowered (47 USC 224(e))
- Cable wants FCC to use forbearance authority to avoid (*i.e.*, ignore) this statutory requirement and *lower* the CLEC rate rather than *raise* the Cable VoIP rate
- Exercising forbearance would be bad public policy
    - Cable rate created in 1978 to spur development when Cable was in its "infancy"
    - Cable no longer in its "infancy"
        - Comcast is $34.3B company with $2.5B profits/year
    - The Cable rate is a subsidy
        - Cable does not pay its fair share of common (a/k/a "unusable") space costs required to place attachments 18 feet above ground
        - Rate actually should be higher than Telecom rate
        - Cable does not pay what system worth
    - Electric utility ratepayers, many of which do not use Cable, pay for this subsidy
    - All savings from a non-subsidy rate for Cable VoIP will be passed along to electric ratepayers because electric utility rates, unlike cable rates, are regulated

Rural America Lacks Broadband Because of High Capital Costs and Low Revenue Potential, not Pole Attachment Rates

- Huge windfall for Comcast urban and suburban systems not spent on rural deployment

ILEC Arguments for FCC Rate Jurisdiction do not Pass the Statutory Laugh Test and Would be Poor Public Policy

- The Act does not cover ILECs (which everyone has known for ten years)
- ILEC joint use/joint ownership relationship has huge benefits not provided to Cable and CLEC licensees

Submitted by: COALITION OF CONCERNED UTILITIES

Allegheny Power, Baltimore Gas and Electric Co.,
Dayton Power and Light Co., FirstEnergy Corp.,
Kansas City Power and Light, National Grid, NSTAR, PPL

Attachment 2

COMPROMISE ACCESS PROPOSAL

Mutual Goals:

1. **ASSURE PUBLIC AND WORKER SAFETY**
2. **MAINTAIN RELIABLE DISTRIBUTION OF ELECTRICITY**
3. **PROMOTE TIMELY ACCESS AND SHARED USE OF UTILITY POLES**
4. **SUPPORT THE DEPLOYMENT OF BROADBAND SERVICES**
5. **ESTABLISH MORE EQUITABLE POLE COST SHARING**

Continue to Change-Out Poles

Coalition members agree *to continue to change-out (i.e., replace) poles, except in unusual circumstances, to accommodate communications attachers* (even though not required by law).

Establish Timeframes for "Non-Complex Make-Ready"

Field surveys. Coalition members agree to complete field surveys of requested pole routes within 45 days of receipt of a completed application (for routes of less than 10 miles when total poles to be surveyed from all attachers in a 30-day period do not exceed 600). For routes greater than 10 miles in length or where more than 600 poles must be surveyed in a 30-day period, the parties will develop a mutually-acceptable schedule.

Non-Complex Make-Ready estimates within 15 days of field survey. Coalition members agree to complete and provide to applicant make-ready estimates for "Non-Complex Make-Ready" within 15 days of completion of the field survey (even though not required by law).

Non-Complex Make-Ready to be completed consistent with utility's own electric customer work. Following payment of make-ready costs, Coalition members agree to schedule and complete Non-Complex Make-Ready work in a manner that does not discriminate in favor of the utility's own needs or customer work, except in the case of emergency, safety and service-restoration work, work required by the State Department of Transportation, and deadlines established by the State Public Service Commission (even though not required by law).

"*Non-Complex Make-Ready*" is make-ready that does not involve: (i) a wireless antenna attachment; (ii) electric outages for commercial or industrial customers; or (iii) any wireline attachment when the make-ready work (if the make-ready work were approved) involves 250 or more poles, requires the change-out of 50 or more poles, or would result in a total of 100 or more pole change-outs (for both attachers and the utility) pending in the utility's construction schedule.

ILEC Obligations. To assure *Coalition* compliance with the above proposal, ILEC joint owner/joint users must perform to a like schedule. *Coalition* electric utility members cannot be held responsible for make-ready delays caused by ILEC joint owners/joint users.

Boxing, Extension Arms and Temporary Attachments

Utility pole owners must retain discretion whether to allow the very undesirable practice of boxing or extension arms. For utility pole owners that have previously consented to boxing of poles or use of an extension arm, *Coalition* owners agree to consider such capacity-expanding practice on a case-by-case basis to avoid a pole replacement.

Temporary attachments must comply with the National Electrical Safety Code ("NESC"). Temporary attachments violate the NESC if proper clearances cannot be met (NESC § 230.A.1.), and so cannot be used to resolve insufficient pole space issues.

Establish a "Penalty Buzzer"

$100 or five years' rental (whichever is greater) plus unpaid back rent (no more than five years if attachment date cannot be established) for each Unauthorized Attachment for which no application was filed and rental payments were not paid. In case of dispute, attachers must supply proof of attachment approval (*e.g.*, a pole license) within 60 days to avoid penalties.

Safety violations to be worked-out by parties without additional sanctions for violations (contrary to Coalition Comments). The responsible party pays for correction.

Normalize Rentals Paid By Cable and CLEC

Cable companies that offer VoIP service at a minimum should pay the same telecom attachment rate that the statute requires their CLEC competitors to pay for providing the same or similar services.

Submitted by: COALITION OF CONCERNED UTILITIES

Allegheny Power, Baltimore Gas and Electric Co.,
Dayton Power and Light Co., FirstEnergy Corp.,
Kansas City Power and Light, National Grid, NSTAR, PPL

Attachment 3

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May 1, 2009

Acting Chairman Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Robert M. McDowell
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Notice of Written Ex Parte Communication***
WC Docket No. 07-245 ("Pole Attachment Proceeding") and
GN Docket No. 09-29 ("Rural Broadband Strategy Proceeding")

Dear Chairman Copps and Commissioners Adelstein and McDowell:

On behalf of Allegheny Power, Baltimore Gas and Electric Co., Dayton Power and Light Co., FirstEnergy Corp., Kansas City Power and Light, National Grid, NSTAR and PPL (the "*Coalition of Concerned Utilities*"), this is in response to recent proposals by the Broadband & Wireless Pole Attachment Coalition ("BWPA") and Fibertech Networks, LLC and Kentucky Data Link, Inc. ("Fibertech/KDL") in the above captioned proceedings.[1] BWPA and Fibertech/KDL urge the Commission to expedite the provision of broadband service throughout the country – a concept the *Coalition* wholeheartedly supports – but at the expense of the safe, reliable and efficient operation of the nation's electric utility distribution systems, which the *Coalition* cannot abide and urges the Commission to soundly reject.

[1] Letter to Marlene Dortch, Secretary, FCC, from BWPA, dated February 23, 2009 ("February 23 BWPA Letter") and Letter to Marlene Dortch, Secretary, FCC, from most of the same companies that comprise the BWPA Coalition, dated March 27, 2009, ("March 27 BWPA Letter"); "Comments of Fibertech Networks, LLC and Kentucky Data Link, Inc.," Report on Rural Broadband Strategy and Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments (filed March 25, 2009) ("Fibertech/KDL Comments"). Collectively, these Comments may be referred to as "the Fibertech/KDL/BWPA proposals."

SUMMARY

There is more at stake here than just broadband. Collectively, *Coalition* members provide electric utility services to more than 14,200,000 customers and own, in whole or in part, more than 8,100,000 electric distribution poles. These Commission proceedings and Fibertech/KDL/BWPA's proposals directly impact the operation of the nation's electric utility grid and are of keen interest to the *Coalition*.

In seeking faster, easier and cheaper pole attachments, BWPA and Fibertech/KDL urge the Commission to assert itself into the daily decision-making processes of electric utilities across the country. They propose that utility pole owners cede control over core aspects of their electric distribution systems. They want priority service over the utilities' own electric customers. They want the Commission to impose on utilities expedited make-ready deadlines and severe operational constraints.

In the *Coalition's* view, these proposals would compromise the safety and integrity of electric distribution systems and seriously impair the ability of utilities to operate their systems safely, reliably and efficiently.

Many of these proposals would add to the epidemic number of safety violations caused by attachers and the vast number of unauthorized attachments already burdening utility poles. The serious problem of shoddy attacher workmanship – replete with huge bundles of coiled cables, wires duct-taped to poles and splices covered by garbage bags – also would increase.

The *Coalition* is concerned that Fibertech/KDL/BWPA "support" their proposals with inaccurate and misleading claims regarding the pole attachment proceedings in New York and Connecticut. They also fail to mention that other states have established far more reasonable pole attachment requirements than proposed by Fibertech/KDL/BWPA. Further, they misrepresent the scope and effect of a number of FCC rulings and make other unverified claims.

Fibertech/KDL/BWPA include electric utility pole owners in the same anticompetitive claim with incumbent local exchange carriers ("ILECs"),[2] even though electric utilities, unlike ILECs, do not routinely compete with attachers in the provision of commercial telecommunications services. The great majority of electric utilities in fact offer no type of commercial telecommunications services whatsoever. Furthermore, unlike ILECs, electric

[2] February 23 BWPA Letter at 3 ("Moreover, some pole owners, such as ILECs and certain utilities that provide broadband and other telecommunications services, actually compete against prospective attachers. Thus, these pole owners have a **disincentive** to issue attachment permits. Needless to say, such companies generally do not wish to help facilitate their competitors' service." (emphasis in original). See also March 27 BWPA Letter at 7.

utilities have a higher and more compelling responsibility -- operating their electric distribution systems safety and reliably despite the close proximity of workers and others to energized lines.[3]

To say the least, the *Coalition of Concerned Utilities* takes serious exception to BWPA's claim that its proposals call for "straightforward actions ... none of which should be controversial (and all of which are entirely reasonable)."[4] In fact, BWPA's proposals are extremely controversial and not at all reasonable.

Interested parties have not been given a fair opportunity to analyze and comment on *any* of the more outlandish Fibertech/KDL/BWPA proposals, and the Commission has not proposed that *any* of them be incorporated into the FCC's rules. The record in this proceeding is woefully inadequate to adopt any of these proposals even if the Commission were inclined to assert jurisdiction in an area – the operation and maintenance of electric utility distribution systems – where it possesses no particular regulatory expertise.

Complex and important safety, engineering and operational issues have barely been touched on in these proceedings and have been developed not nearly to the point where the Commission could safely make a decision to impose Fibertech/KDL/BWPA's proposals on the electric utility industry.[5] Pole attachment decisions made by the states of New York and Connecticut, which BWPA misrepresents yet claims to rely upon, were made only after exhaustive, detailed and highly technical hearings and other proceedings. These decisions were not made in a vacuum. The records developed by these states far exceed anything to date conducted by the FCC, and those decisions affect only certain types of attachments to poles owned by a small number of electric utilities in each single State.

Until regulations are proposed, expert witnesses examined and detailed technical conferences convened, the Commission will not remotely be positioned to determine how Fibertech/KDL/BWPA's proposed constraints will affect the integrity of electric distribution

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[3] *See* 47 U.S.C. § 224(f)(2), which specifies that electric utility pole owners, in contrast to ILEC pole owners, may deny access to poles where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering reasons. *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, at ¶1177 (1996) ("*Local Competition Order*") ("Nevertheless, we believe that section 224(f)(2) reflected Congress' acknowledgment that issues involving capacity, safety, reliability and engineering raise heightened concerns when electricity is involved, because electricity is inherently more dangerous than telecommunications services. Accordingly, although we determine that it is proper for non-electric utilities to raise these matters, they will be scrutinized very carefully, particularly when the parties concerned have a competitive relationship.")

[4] March 27 BWPA Letter at 1.

[5] *See, e.g.*, Fibertech/KDL Comments at 14 ("The record in the pole attachment proceeding is complete. The FCC has before it the evidence presented in response to its Notice of Proposed Rulemaking addressing pole access issues, and the FCC is free to adopt pole access reforms at any time.")

systems and the ability of electric utilities to provide electric service safely and reliably throughout the country.

One size regulation does not fit all pole owners. It makes little sense for the Commission to impose on electric utilities specific rules, presumptions and guidelines relating to access and other non-price terms when such requirements fail to consider the many differences between electric utility pole owners and the even greater differences between electric utility pole owners and ILEC pole owners.

The existing FCC complaint process entitles attachers to seek whatever relief they believe is appropriate on a case-by-case basis. This process makes a great deal of sense, because each case requires a review of all relevant factors to determine whether the actions taken by either party were unreasonable. Hard and fast rules, presumptions and guidelines ignore the unique operational characteristics of electric utility systems and would allow attachers to violate the utilities' critical operational requirements.

The proposals raised by Fibertech/KDL/BWPA go to the heart of electric utility construction and operation. The adoption of any of these proposals as a presumptive nationwide standard would fail to consider the legitimate interests of electric utilities, as well as the interests of State Public Utility Commissions and local regulators, many of which have imposed specific requirements of their own to ensure the safe and reliable utility operations within their respective jurisdictions.

Behind each of these Fibertech/KDL/BWPA proposals is the concept that attachers, not utilities, know best how to construct and operate electric utility distribution systems and control how those systems are managed. This notion is contrary to the public interest and is as dangerous as it is far-fetched. It should be soundly rejected by the Commission.

RESPONSE

A. The Fibertech/KDL/BWPA Make-Ready Proposals Must Not Be Adopted Nationwide

Deciding for themselves that the number one priority for the nation's electric utilities should be to accommodate attacher requests, Fibertech/KDL propose that utility pole owners be required to prepare make-ready estimates within 45 days and complete make-ready work within another 45 days, with shorter time periods for smaller applications.[6] BWPA proposes 45 days for preparing the make-ready estimate and 60 or 90 days thereafter to complete the make-ready,

[6] Fibertech/KDL Comments at 12.

depending upon whether a pole replacement is required.[7] If these timeframes cannot be met, Fibertech/KDL/BWPA propose to allow attachers to hire contractors to perform field surveys and make-ready, and BWPA seeks to have monetary penalties imposed on the pole owners for failing to meet their deadlines.[8]

1. Artificial Deadlines Ignore the Realities of Utility Operations, Overlook the Potential Causes for Delay, Improperly Favor Attachers Over Utility Customers, Interfere With State PUC Service Requirements, and Would be Practically Impossible for Many Utilities to Meet

Imposing an artificial timeline makes little sense in the operational world of electric utilities, and 45-day, across-the-board field survey, design, cost estimate and make-ready deadlines would be practically impossible for utilities to meet.

The problem with artificial deadlines is that every utility is operated differently. No utility can staff adequately to respond in short timeframes to an unknown volume of make-ready engineering or construction requests. For these reasons, utilities are able to schedule make-ready only after knowing how much work is required by the attacher, how much work the utility currently has, and how all of this work can be managed given the other commitments of the utility's plant operations department. Third party attacher requests must be evaluated individually and added to the utility's continual mix of customer, maintenance and system improvement demands, all of which needs to be completed in an ordered fashion to protect the operation and integrity of the electric distribution system.

For example, if an attacher were to submit an application to attach to 1,000 poles (approximately 10 miles of fiber build-out), that single project could identify several months' worth of make-ready work. With very large projects, obtaining necessary workforce and materials can cause delay. Although Allegheny is an efficient utility, it took the company approximately one year to build a 12-mile line into the Whitetail ski resort in Mercersburg, Pennsylvania. Even though the company was able to use a certain amount of existing lines, it needed to special order and replace poles and obtain necessary rights-of-way before the make-ready project could be completed.

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[7] February 23 BWPA Letter at 7. BWPA proposes different make-ready deadlines for applications requiring pole replacements than for those that do not require pole replacements, but ignores the fact that electric utility pole owners are not required to replace poles to accommodate attachers. *See* 47 U.S.C. § 224(f)(2); *Southern Co. v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002).

[8] Fibertech/KDL Comments at 12; February 23 BWPA Letter at 7.

Field surveys alone for large projects are difficult to complete within 45 days. Field surveys require a detailed analysis of each pole to identify clearance issues, perform wind and ice loading analyses and evaluate other field-related conditions. The scope of make-ready can be identified only by completing the field survey and reviewing the anticipated workload with other pole owners and existing attachers. It is only after completion of the field survey and preparation and acceptance of the make-ready work scope, design and cost estimate, that such make-ready work even can be scheduled.

For any given make-ready request, there are a vast number of circumstances beyond the utility's control that can delay make-ready performance. Many of these are explained below.

The weather can delay any project, and not simply the weather where the utility is located. Electric utility crews often provide mutual assistance to other utilities in other states experiencing storm or emergency restorations. With staff out-of-state, workload requirements must be adjusted accordingly.

Electric customer interruptions (if required by the make-ready work) must be coordinated and scheduled with customers.

Cities, counties and the State Department of Transportation ("DOT") almost always require permits to perform make-ready work. Municipalities require permits just to park a truck in a right-of-way. Local police officers are often required and must be scheduled to direct and control traffic. If the project lies in close proximity to or crosses a railroad line, the utilities must arrange for railroad flagmen, which requires additional coordination with the railroad company.

Property rights may not exist to authorize the attachments or required work if, for example, a guy wire is to be installed on private property. If an easement is required, it is not reasonable to expect the utility pole owner to negotiate and obtain the easement, perform the real estate title work, and record the easement within a short of time. In some states adjoining landowners must give permission before certain pole work and tree trimming is allowed, and municipal tree wardens also may need to be consulted.[9]

These are just a few examples of legitimate factors impacting the development of cost estimates and work schedules, which are outside the control of the electric utility and impede the rapid completion of pole attachment work.

State Department of Transportation work, including emergency work, safety related work, and service related work, often must be given priority over attacher requests. And

[9] *See, e.g.*, Conn. Gen. Stat. § 16-234.

Coalition members are bracing for considerably more State DOT work once the federal Stimulus package rolls out.

In many areas there is a shortage of qualified electric contractors. With limited availability of qualified electrical contractors, utilities are realizing delays in all electrical work, including third party make-ready.

In many cases, the accommodation of new attachment requests requires other attachers on the pole to move their facilities. This movement by other attaching entities must take place before affixing new attachments and again is largely beyond the pole owner's control. Unlike the FCC, the State of Connecticut Department of Public Utility Control ("DPUC") had the authority to order a "collaborative effort" among attaching entities and required them to complete necessary transfers in 14 days.[10] The FCC has no similar authority.

Not surprisingly, State Public Utility Commissions have imposed their own safety, reliability and service requirements on electric utilities. State PUCs often require that electric utilities perform storm restoration work or provide service to new customers within a certain amount of time. State PUCs routinely establish reliability standards which set response and restoration times for interruption of electric service.

The Commission has long understood these pressures on electric utilities and has shown understandable deference to these types of State PUC and local requirements. As stated in the *Local Competition Order*:

> For present purposes, we 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). ... Regulated entities and other interested parties are familiar with existing state and local requirements and have adopted operating procedures and practices in reliance on those requirements. We believe it would be unduly disruptive to invalidate summarily all such local requirements. We thus agree with commenters who suggest that such state and local requirements should be presumed reasonable.[11]

Imposing artificial deadlines on field surveys and make-ready work would force utility operations personnel to perform third-party communications attacher work before the utility's own electric work, despite what the State PUC may require or the utility may need. For

[10] State of Connecticut, Department of Public Utility Control, *DPUC Review of the State's Public Service Company Utility Pole Make-Ready Procedures – Phase I, Decision* (April 30, 2008) ("DPUC Decision"), at 18-19.
[11] *Local Competition Order* at ¶1154.

example, Fibertech's communications work would need to be scheduled before new load service could be provided to a new housing, commercial or industrial development, so that a factory, hotel or apartment complex would need to wait until Fibertech is served.

If utilities were forced to schedule and complete communications attacher work ahead of their own work, the spirit, if not the letter, of the Pole Attachment Act's nondiscrimination requirement would be violated. Section 224(f)(1) of the Act requires utilities to "provide cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[12] This language prohibits discrimination; it does not envision utilities discriminating *in favor of* communications attachers at the expense of their own electric service customers.

If electric utilities were required to schedule and complete communications attacher work before their own work, they may elect to reconsider what has become standard practice in the industry, whereby utilities often replace poles for communications attachers in instances where insufficient capacity exists on poles. Currently, electric utilities often allow communications attachers to pay for such pole replacements, even though the pole replacement process consumes a considerable amount of utility time and resources and is not required by the Pole Attachment Act.[13] Far easier from the utilities' perspective would be to deny all such requests rather than attempting to accommodate the attachers through pole replacements.

If scheduling make-ready work is a serious concern, communications attachers should undertake some practical steps themselves to help in the process. In particular, they should provide advance notice of where they intend to build out and commit to fund a base level of electric company resources that are available and dedicated to communication company work, so that electric utility pole owners are not surprised with unforeseen requests or limited by available resources. In addition, the number of requests for make-ready that may be submitted within a certain period of time should be limited to an amount that is reasonable for the utility to process in light of its many other responsibilities. Attachers should not be permitted to create an otherwise foreseeable "emergency" for new service and then complain that the utility is not acting quickly enough to accommodate it.

2. Other States Have Taken a More Reasonable Approach to Make-Ready Deadlines

While Fibertech/KDL/BWPA cite the New York and Connecticut make-ready deadlines,[14] they do not mention that not all states are in agreement with New York and

[12] 47 U.S.C. § 224(f)(1).
[13] 47 U.S.C. § 224(f)(2) (an electric utility may deny access "where there is insufficient capacity." *See also Southern Co. v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002).
[14] Fibertech/KDL Comments at 16; February 23 BWPA Letter at 8.

Connecticut even for wireline attachments. Other states have established more reasonable deadlines. Vermont, for example, provides for a sliding scale that begins with at least 180 days to complete the make-ready estimate and perform make-ready work, "unless otherwise agreed by the various parties, and except for extraordinary circumstances and reasons beyond the Pole-Owner's control."[15] In Oregon, if make-ready work requires more than 45 days to complete or if there are more than 50 poles in an application, the parties must negotiate a mutually acceptable longer period to complete the work.[16]

Different states therefore have taken different approaches to make-ready deadlines. They have avoided "one size fits all" by implementing varying deadlines based upon the different needs of the pole owners and attachers in their respective states.

3. Allowing Attachers to Hire Contractors Would Jeopardize Utility Operations, Increase Contractor Costs, Violate Collective Bargaining Agreements, Improperly Favor Attachers, and Do Little to Speed the Process

Fibertech/KDL propose that attachers be allowed to use utility-approved contractors to perform make-ready work when pole owners cannot meet the deadlines they propose.[17] BWPA proposes to use not only utility-approved contractors but also "any other contractor who has the same qualifications in terms of training as the utility's own workers," and suggests that the *Local Competition Order* already permits such hiring.[18]

The *Local Competition Order*, however, did not enable attachers to hire their own contractors to perform electrical make-ready work. Rather, it only enabled attachers to hire contractors to move communications facilities that are in proximity to electric lines, not to move the energized electric lines themselves. Energized electric facilities must be controlled by electric utility pole owners. Setting aside the fact that the Pole Attachment Act does not require utilities to move energized lines to accommodate attachers,[19] there are numerous reasons for this restriction.

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[15] Vermont Public Service Board, Rules 3.708 (B)(2), (C) and (E).
[16] *See* Oregon Administrative Rules §§ 860-028-0020(32), 860-028-0100(5), (7).
[17] Fibertech/KDL Comments at 12.
[18] February 23 BWPA Letter at 7, citing *Local Competition Order*, 11 FCC Rcd 15499, at 16083.
[19] 47 U.S.C. § 224(f)(2) (an electric utility may deny access "where there is insufficient capacity"). The *Local Competition Order* explained that increasing capacity means rearranging existing attachments or installing a new pole or duct. *Local Competition Order*, 11 FCC Rcd at ¶¶1161-1163. The U.S. Court of Appeals for the Eleventh Circuit ruled that electric utilities are not required to increase capacity in this manner. *Southern Co. v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002).

It is critical from an electric utility standpoint that utility pole owners have ultimate control over work done on their poles, including the hiring of contractors to perform electrical make-ready work on the poles. Utilities must be able to control the quality of the workforce and work being completed, including the timing of that work. Each job requires awareness and coordination with all other ongoing efforts. A communications company has no ability or expertise in the design or and management of electric work, and is certainly not positioned to safely supervise electrical work conducted on a utilities' poles or to coordinate with the electric utility's other ongoing efforts.

Performing make-ready work in the electric space on poles is far more hazardous and complex than installing communications cables outside of the electric space. If attachers – motivated by speed and not safety – were given free rein to hire their own contractors, the contractor selected may have little experience or a poor safety performance record. The contractor may be completely unfamiliar with the utility's construction standards and their work activities would have little or no competent oversight. Such contractors could injure themselves, create hazards to subsequent pole workers or the public at large, cause electrical outages or reliability concerns, damage facilities on the pole(s), and use defective or inferior equipment. Even if the contractor's work does not injure anyone, the shoddy work that can be expected could at the very least require a substantial rework and expense for the utility.

If attacher-hired contractors are allowed to supply their own poles and equipment, then the utility pole owner would lose control over the material used. Utilities work hard on standards, employing personnel dedicated to those standards. Allowing foreign poles and foreign equipment on the poles undermines the purpose of the standards, even if the equipment is not defective and inferior. For similar reasons the Ford Motor Company, for example, does not allow outside entities to supply equipment that goes into their automobiles.

Work on and redesign of utility systems requires update of electric utility management systems and design databases. This requires "authorized access" by personnel trained on the utility business systems. It is not a "willy-nilly" process performed at the leisure of outside contractors hired by attachers. Data must be inputted timely and accurately to assure accuracy of utility property records.

All utilities maintain poles long after make-ready is completed and must live with the consequences of any work that is not performed correctly. It is imperative that make-ready designers and line contractors be in close privity with the pole owner, not with an entity whose primary objective is to get on the pole as quickly as possible. Contractors hired by other attachers have their allegiance to the attacher paying them, not the pole owner.

No one should work on the electric distribution system without the full knowledge and consent of the utility, so that proper precautions can be taken when performing normal switching and maintenance. For example, if a line trips out of service because of some fault, the utility can

reclose the breaker remotely. But if the fault were caused by someone contacting an energized line, the last thing a utility wants to do is reenergize the line. This is just one small but important example of why electric utilities simply must maintain control over the contracted work process.

Even with utility-approved contractors, utilities would need to appoint design engineers to review calculations and inspectors (contract coordinators) to oversee and support contractor work. This is required not only to ensure that the work is done safely, in accordance with applicable standards and without impact to electric system operations, but also to support other, potentially hazardous, work activities, such as placing a "hold out" on system reclosures[20] or marking-up (de-energizing) circuits to provide a safe work environment.

The pole owner is the only entity with information regarding the rights of other attachers, their service needs and the utility's own service needs. Only the pole owner will be aware of municipal public improvement projects or other work that could potentially impact the attacher's proposed work on the pole. For example, the utility may be back feeding a line with a single feed, so that there would be no alternate route for the electricity needed to serve an entire community. The utility knows that work cannot be performed on that line until an alternate route becomes available as it would compromise the sole source of electricity going to the community. That information must be conveyed by the utility to whatever contractors may be interested in performing work on that portion of the system. The list of other items known only to the utility but potentially impacting a mark-ready project – *e.g.*, upgrade plans, line change-outs, personnel requirements – is endless.

The requirement that utility design engineers and inspectors oversee contractor work and work practices raises another timing constraint that would not be solved merely by allowing communications attachers to hire electric make-ready contractors. Contracted work requires the oversight and support of utility design engineers and utility contractor coordinators who must be available to perform such oversight and support work.

From a national security standpoint, this is no time (if there ever was one), to transfer control over electric distribution systems from electric utilities to outside contractors. State PUCs, the Federal Government and the public at large all expect electric utilities to have full control over every aspect of electricity distribution. The Fibertech/KDL/BWPA proposals would compromise that control.

Finally, even if permitted by the state PUC or by safe engineering practice, some utilities may be parties to collective bargaining agreements or otherwise be constrained by their relationships with unions, which may explicitly prohibit the hiring of outside contractors in

[20] Reclosers are electrical devices installed to re-energize electric circuits that have been interrupted with a fault (e.g. tree limb). Safe work practices would require placing a "hold out" on the reclosure to prevent re-energizing lines in the event of a worker contact.

certain circumstances, create obligations to confer with the union before "outside contracting" is allowed, or require the payment of overtime to union members when outside contractors are hired. Unions understandably become concerned when contractors are hired to perform company work. The relationship between some pole owners and their union workforce involves "give and take," and the extent to which contractors may be used is subject to careful negotiation.

It is for these and other reasons that some electric utilities insist on performing all electrical make-ready work in-house and do not hire outside contractors under any circumstances.

B. Wireless Attachments Are Far More Complex Than Wireline Attachments and Raise Different Safety, Reliability and Operational Concerns

BWPA asks the Commission to "[c]onfirm that wireless attachers have access to pole tops,"[21] and claims that the Commission requires utilities to allow such access.[22] BWPA recommends certain make-ready deadlines "based on the state laws of New York and Connecticut."[23] Fibertech/KDL/BWPA cite the New and Connecticut pole attachment proceedings as if all relevant issues already have been thoroughly aired in those state proceedings and need simply be applied by the Commission on the national level.

It is peculiar, however, that BWPA (composed primarily of wireless companies asking for make-ready deadlines and other "relief" for wireless attachments) does not mention that *neither New York nor Connecticut established make-ready deadlines for wireless attachments.*[24] If BWPA's proposals were based on the laws of New York and Connecticut, as BWPA claims, BWPA would have *no* make-ready deadlines to propose for wireless attachments, since neither state has adopted any such deadlines.

The New York Public Service Commission ("PSC"), in fact, went to considerable lengths to distinguish wireless attachments. The PSC recognized, for example, that unlike wireline attachers, wireless companies need not rely solely on utility poles to reach their customers:

> Unlike telephone, cable and power facilities, which may only be attached to utility poles, wireless attachers have other options for

[21] March 27 BWPA Letter, at 4.
[22] March 27 BWPA Letter at 10-11.
[23] February 23 BWPA Letter at 8.
[24] State of Connecticut, Department of Public Utility Control, *DPUC Review of the State's Public Service Company Utility Pole Make-Ready Procedures – Phase I*, Decision (April 30, 2008) ("DPUC Decision"); New York Public Service Commission, *Order Adopting Policy Statement on Pole Attachments,* Case 03-M-0432 (August 6, 2004); New York Public Service Commission, *Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles*, Case 07-M-0741 (June 27, 2007) ("NY PSC Wireless Proceeding").

> attaching their facilities, such as buildings, existing towers, and newly constructed towers."[25]

The New York PSC also recognized that wireless attachments raise additional safety concerns:

> Since wireless attachments usually involve placing facilities above the power area of the pole, special attention must be given to safety because such facilities could fall over onto power lines in high wind conditions or in heavy wet snow conditions resulting in power outages. While National Grid allows wireless attachments, it has comprehensive safety standards and requirements for such attachments and reserves the right to refuse to put wireless attachments on its poles or increase the height of poles to accommodate wireless attachments.[26]

What these jurisdictions understand and what BWPA fails to mention is that wireless attachments are far more complicated and raise a host of operational and safety concerns that wireline attachments do not. For these reasons, each utility must be entitled to make its own decision whether it is comfortable permitting wireless attachments on its electric distribution system and under what circumstances.

Unlike standard wireline attachments, wireless antennas come in all shapes, sizes, power levels and RF emissions, depending on a carrier's needs at a particular location. Wireless devices emit radio frequency energy that is subject to maximum permitted exposure regulations. There is also a variety of accessory equipment installed on poles along with the wireless antennas, such as cabinets, electric distribution panels, work receptacles, electric meters, work lights and wires running all the way up the pole to connect the cabinet to the antenna. Wireless antennas themselves take up much more space than standard wireline attachments. Plus, while the communications space on poles is often similar from one pole to the next, many wireless companies wish to attach to pole tops, in that area designated for electric facilities known as the electric supply space. Pole top designs can vary from pole to pole, and wireless attachments are more complicated, raising numerous additional operational and safety concerns on top of those associated with wire (fiber) attachments, as explained below.

BWPA asks the Commission to "confirm" that wireless attachers have access to pole tops,[27] claiming that the Commission's Reconsideration of the *Local Competition Order* requires

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[25] NY PSC Wireless Proceeding at 8.
[26] *Id.* at 10.
[27] March 27 BWPA Letter at 4.

utilities to allow such pole top access. BWPA argues that any utilities refusing to allow pole top access have "ignored" that ruling.[28]

BWPA is wrong. The Commission did not mandate access or require pole owners to allow wireless antennas on pole tops; it merely rejected a request for a presumption that it would be reasonable for an electric utility to reserve such space for its own use. Far from guaranteeing wireless access to pole tops, the Commission specifically protected the rights of electric utilities to deny such a pole top antenna attachment for capacity, safety, reliability or engineering reasons. As stated in a December 23, 2004 Wireless Bureau Notice:

> "[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 ¶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)."[29]

Placing wireless antennas on pole tops above energized electric facilities raises a host of safety, reliability and engineering concerns and requires much more careful analysis than wireline attachments in the communications space. Pole top attachments require workers to pass through and/or work above energized lines to install and maintain antennas and associated equipment. During installation or subsequently, the antennas or other equipment could fall on energized electric facilities. A fall could occur due to faulty installation, weather conditions, antenna equipment design defects or failure, swaying or falling trees or branches, automobile collisions with the pole or a variety of other reasons. An object falling on energized electric distribution wires can create electric faults, resulting in extended service outages and customer interruptions. Public safety also would be jeopardized if an energized electric line were to fall completely to the ground.

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[28] March 27 BWPA Letter at 10-11.

[29] 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).

Countless other safety concerns arise as a result of wireless attachments on pole tops. For instance, the installation of grounded equipment close to high voltage phase conductors degrades the insulating value of the pole top assembly and increases the possibility of phase-to-ground faults during construction, operations and maintenance, thus creating additional worker safety concerns.

There also may be municipal and county requirements regarding wireless attachments, which may vary depending upon what type of attachment is requested and where. Distributed antenna companies sometimes find themselves considerably delayed in obtaining permits to use municipal rights-of-way because they seek to place their not-so-attractive antennas with unknown radiofrequency emissions so close to residences and the general public. Such routine municipal reviews and permitting render any imposed utility make-ready schedules meaningless. Utilities routinely require attachers to demonstrate that the local municipality has approved installation of attacher facilities in the public right-of-way prior to allowing facilities to be attached. Wireless antenna installations, therefore, are anything but standard and must be assessed on a case-by-case basis.

Utility pole owners do not yet have enough experience with wireless attachments, and the record is far from established in this proceeding, to allow wireless antenna attachments across-the-board and under any and all circumstances. Owners are entitled to have their questions answered to their satisfaction before being forced to allow them on their poles, particularly on pole tops, and each utility should be entitled to determine for itself whether their own system can support such attachments. The following list of questions is not exhaustive, but it summarizes some of the difficulties encountered by utilities in dealing with wireless attachment requests, and explains how the record in this proceeding is far from sufficient.

Electric Service Reliability. Many Public Service Commissions that regulate utility electric service have expressed growing concerns with electricity reliability. How will wireless attachments affect reliability? What is the potential that wireless equipment will fall onto or otherwise interfere with energized facilities? How will restoration times be affected?

Operational Ramifications. What are the operational ramifications of permitting attachments in the power space? Will there be any adverse impact on electric system reliability? Will there be any impact on electric system operations and maintenance? How does it affect climbing clearances? How will electric utility activity be limited by such attachments? What are the performance standards associated with these attachments? How much routine maintenance is required? Who performs the maintenance and how will it affect utility operations? What qualified workforce is available to the wireless attacher seven days per week, 24 hours per day and 365 days per year (7-24-365) to assure prompt response to maintain these attachments? What response times can the wireless attacher assure pole owners of? What kind of notification is required? What are the additional liability issues? Are there tree trimming requirements to maintain line of sight for the wireless antenna?

Radio-Frequency ("RF") Concerns. How serious are the health effects to utility crews? How dangerous are the antennas that the carrier is proposing to install? Will RF warning signs need to be posted? Are RF detection meters required? Is an on/off switch required? How will the utility's linemen and attachers' communications workers be trained? Who will pay for that training? How will contractors and mutual assistance responding workers be provided training (*e.g.*, out-of-state workers responding to a major storm)?

OSHA Requirements. What are the OSHA implications of locating wireless transmitters and receivers on utility poles? To what extent is training required for all workers (*e.g.*, ILEC, CLEC, CATV, municipal, electric company) that have potential to work in close proximity to the installed wireless devices? Will the wireless attacher shoulder responsibility and cost to training all such workers? How does it affect climbing clearances? How much does the fall hazard increase if this additional equipment is located in the power space? Is additional fall protection equipment required? How much does the fall hazard increase if this additional equipment is located in the power space? Is additional fall protection equipment required?

Worker Qualifications/Utility Oversight. Who is qualified to perform this work? Who should perform the work? Is electric utility oversight required? If so, will the utility pole owner incur greater liability for mishaps because of such oversight? Given that wireless providers operate seven days per week, 24 hours per day (7-24), to the extent wireless attachments require electric utility support then must electric utility support be available 7-24?

Utility Liability. What is the potential liability to electric utilities in allowing non-utility access to and use of electric utility space for RF purposes? To what extent may utilities be held responsible for damages related to access and use of pole top antennas?

Emergency Restorations. In addition to RF and OSHA training, what other training is required to restore wireless attachments during emergencies? How would emergency restorations be handled? Who performs the work? Are those people qualified? What kind of notification is required? What additional liability issues may be created? What training is required to ensure non-interference with wireless facilities?

Capacity Concerns. From an engineering standpoint, is there sufficient room at the top of the utility's poles to accommodate wireless attachments? Some utilities have installed energized lines across the tops of its poles. To what extent will necessary utility uses of the poles be blocked if wireless attachments are permitted?

Wind and Ice Loading. What are the wind and ice loading considerations with respect to the proposed wireless attachments? Will stronger or taller poles be required?

Interference Issues. Equipment will need to be tested to ensure that it does not interfere with SCADA and other utility radio communications.

Prototype. In order to help determine whether wireless attachments can be safety deployed in the utility's electric space, the utility may need to construct a prototype distribution pole with different wireless antennas on top. Who pays for the development and testing of such a pole?

Easements/Rights-of-Way/Local Municipal Approval. Many (if not most) franchises granted to electric utilities permit attachments only by entities that have obtained city or county permission to use those rights-of-way, and many (if not most) utility easements do not establish ingress or egress rights on private property. To what extent has the entity seeking to install wireless attachments obtained permission from landowners and appropriate authorities to attach its wireless antennas and other facilities to the utility's facilities? Do wireless facilities conform to local zoning (ordinances)?

Recovery of Costs. Resolving these issues of whether it would be possible from a capacity, safety and engineering standpoint to grant an entity access to a utility's pole tops is time consuming and expensive. Utility pole owners would not need to engage in this analysis but for the request of attaching entities. The Commission therefore should clarify that any expenses incurred by an electric utility pole owner to determine whether a wireless attachment is feasible should be borne by the entity seeking such a determination, whether access is granted or not.

Other Installed Equipment. Even if all other questions can be answered to the satisfaction of an individual electric utility, are there certain poles that should not have wireless antenna attachments, such as junction poles, poles with multiple primary voltage circuits, poles with switches, regulators, transformers, reclosers, etc.?

In short, the issue of wireless attachments – especially pole top attachments – is not nearly as clear as Fibertech/KDL/BWPA would have the Commission believe. There are many unanswered questions related to the government mandated placement of wireless attachments on utility pole tops or elsewhere on the poles. The Commission in particular should reject any requests for mandatory pole top access rights.

C. The Record is Woefully Inadequate to Establish Make-Ready Deadlines.

The Commission's record is woefully inadequate to conclude that the Fibertech/KDL/BWPA proposals should be adopted. The State of Connecticut Department of Public Utility Control ("DPUC") went to great lengths to avoid a premature rush to judgment. The record was extensive. It included a Technical Meeting, Prefiled Testimony, Rebuttal

Testimony, Briefs, Reply Briefs, a Draft Decision, Exceptions to Draft Decision, Oral Argument on the Draft Decision, and the Decision itself, which is currently on appeal.[30]

To determine how the parties might meet the make-ready deadlines, the DPUC established a Working Group and then an Engineering Subgroup, each composed of representatives from interested parties. Three members of the DPUC Staff attended each meeting of these two groups, which already have met approximately six times each. Even though the DPUC Decision was issued more than one year ago, in April 2008, the work of these two groups continues. And the DPUC proceeding involved only *two* electric utility and *two* ILEC pole owners, not the entire pole owning community subject to FCC pole attachment jurisdiction nationwide.

The New York proceeding, which predated Connecticut's by several years, also was quite involved. New York Public Service Commission Staff convened and was present at technical conferences, collaborative sessions and various break-out sessions. The proceeding also required a joint document showing areas of agreement and disagreement and recommendations, Staff recommendations, Comments on Staff's recommendations, Staff's final recommendations, and comments on the Final Recommendations.

Fibertech/KDL/BWPA would have the Commission impose regulations that would affect hundreds of operationally distinct electric utility pole owners across the country prior to fully analyzing their impact. Their request for such ill-considered decision making should be denied.

D. Boxing and Extension Arms Must Be Subject to Rigorous Utility Scrutiny if Allowed at All

Fibertech/KDL ask the Commission to require pole owners to allow boxing and extension arms by attachers if such a practice has ever been allowed previously.[31] In other words, the exception should dictate the rule.

There are many legitimate reasons why some utilities prohibit boxing and extension arms. In their eyes, the use of extension arms or boxing of poles undermines good construction practice. These types of construction techniques, in their view, compromise worker safety, system reliability and efficient system operation and as such need to be reviewed on a case-by-case basis as appropriate.

Boxing makes it more difficult to change-out poles. In effect this short term cost savings for the attacher has long term cost implications for pole owners. If attachments are located on

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[30] *See, Southern New England Telephone Co. d/b/a/ AT&T Connecticut v. DPUC*, Connecticut Superior Court, Tax and Administrative Appeals Division, Docket No. CV-08-4017814-S (appeal filed June 13, 2008).
[31] Fibertech/KDL Comments at 12.

only one side of a pole, replacing the pole and transferring the attachments is much easier, since the new pole can be installed next to the one being replaced. With boxing, however, the new pole must be inserted between the wires on both sides of the existing pole. This procedure is more costly and time consuming, creates additional safety hazards, and risks damaging the communications facilities that are currently attached. This risk is particularly high if the new pole has a larger diameter than the existing "boxed" space.

Both boxing and extension arms make it more difficult and hazardous for climbers to access the pole. Boxing results in wire attachments on two sides of a pole, thereby obstructing the climbing space on the pole.

Extension arms go beyond the vertical space on the pole thus creating a potential climbing hazard. Climbing problems are exacerbated during storms and in other inclement weather when it is more likely that poles will have to be climbed for purposes of emergency maintenance and service restoration. Extension arms also make it more difficult for those in bucket trucks to access poles because they extend out from the pole.

Extension arms cause pole loading concerns, too. The cantilever effect of projecting out from the pole results in an extraordinary amount of weight and load being concentrated in a specific area. This concentration is particularly acute when wind and ice loading is factored in.

Finally, boxing can compromise the integrity of a pole if holes are drilled one side of the pole that are too close to the holes on the other. Poles often break where attachments are located because the poles at those locations begin to resemble "swiss cheese." This is a particular problem in areas prone to high winds.

An additional concern is that a large amount of the boxing and extension arms currently on *Coalition* member poles have been placed there by attachers without the consent of the pole owner. As a result, while boxing and extension arms may be prohibited by contract, the use of boxing and extension arms historically has been impossible to police or prevent and remains to some extent uncontrolled. While highly objectionable today, the situation will become intolerable in the future if Fibertech/KDL's proposals are adopted.

Given these serious concerns with boxing and extension arms, it is little wonder that some *Coalition* members prohibit it altogether and others permit it only in limited quantities. The fact that boxing and extension arms may have been made without owner authorization or allowed by exception should not be interpreted to mean that it is a responsible or safe method under all circumstances. Pole owners need to retain the discretion to review each pole design and each proposed distribution route to determine whether boxing or extension arms should be allowed in its judgment. To grant an attaching entity global permission to box poles or attach extension arms simply because the utility pole owner has permitted it on other occasions would

drastically add to the potential problems identified above. Forcing pole owners to compromise their entire distribution systems by allowing this practice in all cases is unreasonable.

At the very least, the Commission should clarify that pole owners are entitled to prohibit boxing and extension arms going forward, as long as that prohibition is enforced in a nondiscriminatory manner. Cost alone should not be the determining factor in deciding whether boxing or extension arms should be permitted. Rather, engineering standards, safety, system reliability and facility access should be determinative.

In addition, for safety purposes, the Commission should clarify that it would be reasonable for any pole owner permitting boxing or extension arms to require that all unused bundled, coiled or other cables or wires be removed entirely from the pole before boxing or extension arms will be permitted.

Finally, the *Coalition* notes that boxing or extension arms constitute an expansion of pole capacity under Section 224(f)(2) of the Pole Attachment Act, as confirmed by the 11th Circuit Court of Appeals. As such, the Commission should clarify that electric utilities may not be required to permit the practices.[32] Electric utilities also are entitled under the Act to prohibit the widespread use of boxing and extension arms if inconsistent with safety, system reliability or generally accepted engineering practices.[33]

E. There Is No Such Thing As "An NESC-Compliant Temporary Attachment," and They Should Not Be Permitted

Fibertech/KDL ask the Commission to allow attachers to use "NESC-compliant temporary attachments" if pole owners cannot meet the proposed make-ready deadlines.[34] Unfortunately for Fibertech/KDL, however, there is no such thing as an NESC-compliant temporary attachment of the sort they would like.

The NESC contains certain provisions allowing for temporary attachments in case of emergency (and implicitly to *existing* attachments), but the provision of new telecommunications service to a customer is not deemed an emergency under the NESC. Consistent with the NESC, the Connecticut DPUC Decision clarifies that temporary attachments are permitted only in the case of emergencies: "In the opinion of the Department, [temporary] attachments should only occur in those cases involving the emergency restoration of services. It should not be used as a means to provide for the expedited attachments of facilities by any entity."[35]

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[32] 47 U.S.C. § 224(f)(2); *Southern Co. v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002).
[33] 47 U.S.C. § 224(f)(2).
[34] Fibertech/KDL Comments at 12.
[35] DPUC Decision at 14.

In addition to safety and reliability issues, temporary attachments raise operational headaches for utilities, resulting in additional administration and oversight. Temporary attachments also would open up electric systems for rampant abuse by attaching entities. If temporary attachments were permitted, pole owners would need to inspect the temporary attachment, do a follow-up inspection to see the extent to which make-ready is required, and then do post-construction inspection once the attachment becomes "permanent." All of this processes, of course, would create an incentive for attachers not to report temporary attachments just as they often currently fail to report service drop and other attachments.

Speed to market has proven to be a much greater concern for many attachers than proper installations. Once service is provided using a temporary attachment, attachers have little incentive to come back later to do it right. Just as the attachers' huge bundles of coiled cable, duct-taped wires and splices covered by garbage bags have become a common sight in many neighborhoods, so, too, would "temporary attachments."

F. Utility Safety Standards, Operations Manuals and Design Specifications, as Well As State and Local Requirements Must be Honored by Attachers

Fibertech/KDL/BWPA propose that the Commission establish a rebuttable presumption that attachments complying with the requirements of the National Electrical Safety Code ("NESC"), the Occupational Safety and Health Administration ("OSHA"), the FCC and other codes be deemed safe and permitted as a matter of law.[36] This request would require that electric utility pole owners seeking to apply any standard that differs or exceeds these standards to demonstrate that their requirements are necessary and appropriate in each case.

In short, Fibertech/KDL/BWPA seek permission to install their facilities in a manner that ignores: (i) the safety standards adopted by electric utilities to ensure that their particular system remains safe; (ii) utility design specifications and instruction manuals; and (iii) state and local requirements. Fibertech/KDL/BWPA seeks to avoid these bothersome requirements despite the facts that every other attaching entity, including the pole owner itself, must comply with them, and in the eyes of the utilities they are essential to the safe, efficient and proper operation of the distribution system. Instead, Fibertech/KDL/BWPA seek to reject these well established requirements and to impose on electric utilities nationwide a "lowest common denominator" standard for all systems.

The NESC clearly states it is not a design standard; rather the NESC is a minimum standard solely to assure safety. The NESC makes no accounting for operational efficiency, system reliability or other utility-specific safety requirements. To address these shortcomings,

[36] Fibertech/KDL Comments at 13; March 27 BWPA Letter at 4.

pole owner design and construction standards have been developed (and are now longstanding) in order to assure not only safety, but efficient and reliable network operations as well.

The Commission already has addressed and rejected the same proposals raised anew by Fibertech/KDL/BWPA. Electric utility pole and conduit distribution systems are at least as hazardous and complex today as they always have been, and the need for utility-specific requirements, as articulated by the Commission in the *Local Competition Order*, has not changed.

> 1143. We conclude that the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis. We discuss below the forum for such resolutions. The record makes clear that there are simply too many variables to permit any other approach with respect to access to the millions of utility poles and untold miles of conduit in the nation.
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> 1147. ... the introduction to the NESC states that the code "is not intended as a design specification or an instruction manual." Indeed, utilities typically impose requirements more stringent than those prescribed by NESC and other industry codes. In some cases stricter requirements and restrictions are dictated by federal, state, or local law. Potentially applicable federal regulations include rules promulgated by the Federal Energy Regulatory Commission ("FERC") and by the Occupational Safety and Health Administration ("OSHA"). Various restrictions can apply at the state level as well. Some local requirements governing zoning, aesthetics, or road clearances impose more stringent or more specific requirements than those of the national industry codes or of federal or state law.
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> 1148. 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. A utility's individual standards cover not simply its policy with respect to attachments, but all aspects of its business. Standards vary between companies and across different regions of the country based on the experiences of each utility and on local conditions. As Duquesne notes, the

provision of electricity is the result of varied engineering factors that continue to evolve. Because there is no fixed manner in which to provide electricity, there is no way to develop an exhaustive list of specific safety and reliability standards. In addition, increasing competition in the provision of electricity is forcing electric utilities to engineer their systems more precisely, in a way that is tailored to meet the specific needs of the electric company and its customers. As a result, each utility has developed its own internal operating standards to suit its individual needs and experiences.

1149. The record contains numerous factors that may vary from region to region, necessitating different operating procedures particularly with respect to attachments. Extreme temperatures, ice and snow accumulation, wind, and other weather conditions all affect a utility's safety and engineering practices. In some instances, machinery used by local industries requires higher than normal clearances. Particular utility work methods and equipment may require specific separations between attachments and may restrict the height of the poles that a utility will use. The installation and maintenance of underground facilities raise distinct safety and reliability concerns. It is important that such variables be taken into account when drafting pole attachment agreements and considering an individual attachment request. The number of variables makes it impossible to identify and account for them all for purposes of prescribing uniform standards and requirements. Universally accepted codes such as the NESC do not attempt to prescribe specific requirements applicable to each attachment request and neither shall we.

1150. We are sensitive to concerns of cable operators and telecommunications carriers regarding utility-imposed restrictions that could be used unreasonably to prevent access. We note in particular that a utility that itself is engaged in video programming or telecommunications services has the ability and the incentive to use its control over distribution facilities to its own competitive advantage. A number of utilities have obtained, or are seeking, the right and ability to provide telecommunications or video programming services. We agree, however, with Duquesne that the best safeguard is not the adoption of a comprehensive set of substantive engineering standards, but the establishment of procedures that will require utilities to justify any conditions they place on access. These procedures are outlined in section E below.

> In the next two sections, we set forth rules of general applicability and broader guidelines relating to specific issues that are intended to govern access negotiations between the parties.[37]

The Commission has long recognized that electric utility distribution systems cannot be safely and reliably operated if utilities have no discretion in implementing technical standards that they deem appropriate. All electric utility pole owners have design and construction standards which apply not only to attacher facilities but also to pole owner facilities. These technical and construction standards manuals are inches thick, and are unique to each utility with respect to the manner of construction, material requirements, local weather, soil, terrain and other conditions. They represent the utilities' application of decades of experience and practice and support the utility's effort to apply consistent work practices.

The utilities' management and their own workers are required to comply with these requirements, as are attachers. To allow certain attachers not to comply with these requirements would undermine the concept of a "standard," and upset the history and culture of each electric utility. In effect, Fibertech/KDL/BWPA are proposing that the FCC force utilities to cede control over their own systems and jeopardize the operational reliability of the systems and the safety of workers and the public.

To require each utility to justify through "rebuttal" each and every of its variances from the NESC, OSHA or any other code would be a ridiculous and counterproductive undertaking. It makes far more sense for electric utility pole owners to address any modifications of the standards suggested by attachers on a case-by-case basis, as currently occurs.

If Fibertech/KDL/BWPA believe that it is too burdensome for them to comply with different operational constraints imposed by different electric utilities, they at least should be aware that these constraints are there for legitimate reasons. They are applied uniformly to all attaching entities.

If attachers choose to attach to an electric utility's pole distribution system, they take that system as they find it, and they must comply with their host utility's rules and requirements. Their situation is not unlike construction work in and around schools, hospitals, fire houses or any other facilities that have their own special rules in place for good reason.

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[37] *Local Competition Order*, 11 FCC Rcd 15499, at ¶¶ 1143, 1147-1150 (footnotes omitted).

G. The Fibertech/KDL/BWPA Website Posting Requirements Should Be Rejected

Fibertech/KDL urge the Commission to require pole owners to post maps identifying the locations of poles and all other local distribution facilities, to post agreements and to post fee schedules for make-ready work, among other things.[38] All of these proposed posting requirements should be rejected, because they are largely unnecessary, make little sense for many utilities, impose unrecovered costs on the utility without utility benefit, violate utility rights to proprietary information, and, in the case of map posting, raise national security concerns.

1. Posting Agreements Discourages Flexible Negotiations, Betrays Confidential Information, Violates Proprietary Rights, and is Unnecessary

Pole attachment agreements are the result of extensive negotiations between the pole owner and attaching parties. As with all contract negotiations, agreements are reached following significant give-and-take from both sides, even considering the requirement not to discriminate among attaching entities. This give-and-take differs from attacher to attacher, so that the terms of one attacher's agreement may not work identically for another. Requiring pole owners and all attachers to adhere to the same agreement would eliminate this necessary flexibility and impede the discretion available to both parties in the negotiations.

There are also privacy and proprietary concerns related to the posting of agreements online. These agreements are not public property. Many pole attachment agreements contain confidential provisions that should not be posted for all to see. And utility pole owners often spend considerable sums of money to create and revise pole attachment agreements. Posting them on a website would disclose to the whole world contract provisions that utilities paid to draft and negotiate to completion.

The posting requirement is largely unnecessary in any event, since those entities that need an agreement can negotiate one. Utilities typically are happy to provide a template agreement to begin the process, and many attachers often offer their own template as well during the process of negotiation. Should an attacher believe that another attacher has been given more favorable terms of access, it may file a request for mediation or a complaint and ask the Commission to investigate.

[38] Fibertech/KDL Comments at 13-14.

2. Posting Make-Ready Fee Schedules Makes Little Sense, Would Disclose Confidential Contractor Information, and is Unnecessary

A requirement to post make-ready fee schedules makes little sense for many electric utilities, because the fees charged for make-ready work depend on the requirements of each specific job and utility business systems are continually updated with cost and resource information. It would be impossible to provide the detail necessary to cover every possible scenario, and the fees themselves change from time to time. For example, at any given time, the costs associated with pole replacements depends upon the size of pole and what is on it, so make-ready charges to replace a pole could range from $800 to $6,000. Material costs are tied to supplier costs which vary. Direct and indirect labor costs are updated independent of material costs. Most utility estimating and work management systems are dynamic and pricing can vary because of "behind the scene" system updates (e.g. labor overheads).

Posting make-ready fees is also unnecessary. Most utilities already provide attachers with estimates that specify anticipated make-ready charges. If make-ready estimates for one route are too expensive, attachers have access to information sufficient to determine whether an alternative route would be preferable. Itemized bills for make-ready work are also routinely provided.

Confidential information remains a concern, since many make-ready contractors would not want their fees to be posted online. Plus, fees charged by contractors are often negotiated separately and vary depending upon the volume of work Make ready fees, like other fees, also vary with the passage of time.

3. Posting Maps of Electric Distribution Systems Raises National Security Concerns and is Unnecessary

Fibertech/KDL/BWPA's disinterest in electric utility safety and operational concerns is perhaps nowhere more apparent than in their proposal that electric utilities be forced to post maps of their distribution systems online for all to see.

Electric utilities already have enough concerns with maintaining the security of their distribution systems without posting their system maps online. In this post-9/11 world, threats by cyber and other terrorists is a constant concern.

Internal safeguards limit the distribution of utility-specific information, so that even personnel within utilities often are prevented from accessing certain confidential information. To request that utilities provide the public at large with maps of utility distribution system is irresponsible and dangerous.

Many utility pole owners already provide on a confidential basis maps to attaching entities who request and pay for this information. Current FCC policy is this information is to be provided on request at attacher cost. There is no need to change this system.

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The *Coalition of Concerned Utilities* appreciates and supports the Commission's efforts to expedite the provision of broadband service throughout the country. The pole attachment proposals recommended by Fibertech/KDL/BWPA, however, are not the answer. The Commission must reject their proposals and ensure that the safe and efficient operation of the nation's electric utility distribution systems is protected and preserved under all circumstances.

Your attention to this matter is appreciated. Should you have any questions or require any additional information, please feel free to contact the undersigned.

Sincerely,

Thomas Magee

Jack Richards /TM

Jack Richards

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