

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Implementation of Section 224 of the Act

A National Broadband Plan for Our Future

WC Docket No. 07-245

GN Docket No. 09-51

COMMENTS OF VERIZON

Michael E. Glover
Of Counsel

Karen Zacharia
Rashann Duvall
VERIZON
1320 N. Courthouse Road
9th Floor
Arlington, VA 22201-2909
(703) 351-3179

James G. Pachulski
Law Offices of James Pachulski
TechNet Law Group, PC
6001 Montrose Road
Suite 509
Rockville, MD 20852
(301) 770-1235

Attorneys for Verizon

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Introduction and Summary

The Commission's top priority here should be to set a broadband attachment rate that applies uniformly to all broadband service providers and will facilitate negotiations between broadband service providers and utilities. The record amply demonstrates that some competing providers of broadband services are forced to pay widely varying rates for their attachments and that such variation discourages broadband deployment. The Commission has already relied upon its authority under Section 224 to set a broadband attachment rate at the cable rate level for cable companies that provide broadband services commingled with cable services. The Commission can rely on that same Section 224 authority (and does not need to await the outcome of its *Framework for Broadband Internet Service* proceeding) to set a broadband attachment rate that covers all other broadband service providers that provide broadband services commingled with other services, such as telecommunications services. Setting a uniform broadband attachment rate at the cable rate level would not only level the playing field, it would facilitate negotiations

¹ The Verizon companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

between broadband service providers and pole owners, and promote competitive deployment of broadband networks by all broadband services providers.

The Commission's next priority should be to adopt additional guidelines for the performance of make ready work. Such guidelines can help accelerate the performance of make ready work, but also accommodate individual circumstances and factors that are beyond the pole owners' control. The Commission should not, however, adopt hard and fast rules for the performance of make ready work because such work is not amenable to a "one size fits all" approach. Given the widely varying factors and conditions that affect the timing and performance of make ready work, firm rules would inevitably embroil the Commission in many disputes between pole attachers and pole owners.

Finally, the Commission should make only limited changes to its existing pole attachment complaint processes. These processes have generally been effective in resolving disputes informally without reaching a final decision. Any changes the Commission makes to these rules should be designed to encourage even more informal resolution of disputes and discourage unauthorized attachments.

I. THE COMMISSION SHOULD ADOPT A BROADBAND ATTACHMENT RATE THAT APPLIES TO ALL BROADBAND SERVICE PROVIDERS, INCLUDING INCUMBENT CARRIERS

Congress directed that "the Commission shall regulate" the justness and reasonableness of rates charged for pole attachments by *any provider of telecommunications service* and incumbent carriers, wireless carriers and competitive carriers are unquestionably providers of telecommunications service. The Commission has not only the authority, but the duty, to ensure that utilities charge just and reasonable attachment rates to all providers of telecommunications service, including incumbent carriers. Notwithstanding this Congressional directive, utilities are

continuing to charge attachment rates to incumbent carriers that far exceed any measure of justness and reasonableness. Utilities are charging Verizon's incumbent carriers attachment rates that are as much as *11 times* the attachment rates they are allowed to charge to cable companies. These excessive rates for equivalent pole attachments provided to cable companies are not justified and do not facilitate competitive broadband deployment.

The Commission can and should promote broadband deployment by establishing a broadband attachment rate to be charged to all cable companies and all providers of telecommunications services – including incumbent carriers, wireless carriers and competitive carriers. The Commission should continue to allow parties to negotiate their pole attachment agreements and should foster those negotiations by adopting the Commission's current cable attachment rate formula as the default rate formula for all broadband service attachments. The adoption of a broadband attachment rate would facilitate private negotiations between broadband service providers and pole owners and, if private negotiations are not successful, would facilitate resolution of pole attachment complaints. In addition, the adoption of a uniform broadband attachment rate would place all broadband service providers on a more level playing field with respect to the rates they pay for pole attachments and further promote the deployment of broadband services.

A. Utility Pole Owners Are Charging Unjust and Unreasonable Attachment Rates to Incumbent Carriers.

The fact that utility pole owners are charging exorbitant attachment rates to incumbent carriers is well documented. USTelecom provided to the Commission the results of its own broad survey regarding the rates paid by incumbent carriers to investor-owned utilities for pole attachments. USTelecom's survey showed that incumbent carriers are charged pole attachment

rates that are up to **14 times** greater than the cable rate and up to **9 times** greater than the competitive telecom rate.² These significant disparities confirm that the pole attachment rates charged to incumbent carriers are not just and reasonable.

Other industry participants have provided similar data on the disparity between the pole attachment rates charged to incumbent carriers and other attachers. For example, an Edison Electric Institute presentation indicated that the typical rate charged for incumbent carrier pole attachments was \$40.80, as compared to the cable rate of \$6.63 – a difference of more than 500 percent.³

Verizon's own experiences also confirm that the rates charged to incumbent carriers are not just and reasonable. For example, in Pennsylvania, a state not certified to regulate pole attachments, one electric utility is charging Verizon a pole attachment rate of \$96.36 under a joint use agreement.⁴ By contrast, this same utility's Commission-authorized cable attachment rate is only about \$8.70 per attachment.⁵ In other words, this electric utility is charging Verizon, as an incumbent carrier, an attachment rate that is **11 times** greater than the cable attachment rate.⁶ Moreover, as Mr. Slavin and Mr. Frisbie explain in their attached declaration, Verizon is

² See Comments of USTelecom, *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303 at 7-9 (March 7, 2008).

³ See Edison Electric Institute Presentation, *Pole Attachments 101*, p. 15 (attached as Exhibit 1).

⁴ See Declaration of Mr. James Slavin and Mr. Steven Frisbie ("Slavin/Frisbie Decl.") ¶ 15.

⁵ *Id.*

⁶ *Id.*

effectively paying 80 percent of this electric utility's total pole costs, even though Verizon's attachments occupy less than 8 percent of the usable space on these poles.⁷

Verizon's experience in Pennsylvania is not unique. In Virginia, another state not certified to regulate pole attachments, one electric utility is charging Verizon a pole attachment rate of \$47.21.⁸ By contrast, this same utility's Commission-authorized cable attachment rate is only about \$6.00.⁹ In other words, this electric utility is charging Verizon an attachment rate that is **7 times** greater than the cable attachment rate.¹⁰ Moreover, as Mr. Slavin and Mr. Frisbie explain in their attached declaration, Verizon is effectively paying approximately 55 percent of this electric utility's total pole costs, even though Verizon's attachments occupy less than 8 percent of the usable space on these poles.¹¹

B. The Commission Has the Authority and the Duty to Regulate the Attachment Rates Utility Pole Owners Charge to All Providers of Telecommunications Services, Including Incumbent Carriers, Wireless Carriers and Competitive Carriers.

The Act gives the Commission both the authority and the duty to regulate the attachment rates charged to all providers of telecommunications service, including incumbent carriers, wireless carriers and competitive carriers. Section 224(b)(1) states that the Commission "shall regulate the rates, terms, and conditions for *pole attachments* to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to

⁷ *Id.* ¶ 16.

⁸ *Id.* ¶ 19.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* ¶ 20.

hear and resolve complaints concerning such rates, terms, and conditions.”¹² Section 224(a)(4) defines “*pole attachment*” as meaning “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.”¹³ Read together, these two provisions require the Commission to ensure the justness and reasonableness of pole attachment rates charged to all providers of telecommunications service, including incumbent carriers, wireless carriers and competitive carriers.¹⁴

This reading of the Act tracks the Supreme Court’s reading of these very same provisions. In *National Cable & Telecomm Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002) (“*Gulf Power*”), the Court considered whether the Commission had authority to regulate pole attachment rates charged to cable television systems providing services other than cable television service. The Court found that “the Act requires the FCC to ‘regulate the rates, terms, and conditions for pole attachments,’ § 224(b), and defines these to include ‘any attachment by a cable television system,’ § 224(a)(4).”¹⁵ The Court then found that Section 224(b)’s broad grant of authority covers any attachment *by* an entity listed in Section 224(a).

No one disputes that a cable attached by a cable television company, which provides only cable television service, is an attachment “by a cable television system.” If one day its cable provides high-speed Internet access, in addition to cable television

¹² 47 U.S.C. § 224(b)(1) (emphasis supplied).

¹³ 47 U.S.C. § 224(a)(4) (emphasis supplied).

¹⁴ As noted in the *FNPRM* (§ 112), “[i]n prior orders, the Commission interpreted the exclusion of incumbent LECs from the term ‘telecommunications carrier’ (and from the corresponding statutory right to attach to utility poles) to mean that section 224 does not apply to attachment rates paid by incumbent LECs.” Although the Commission correctly determined that Section 224 does not give incumbent LECs *non-discriminatory access* rights to utility poles, Section 224 does give incumbent LECs the right to *just and reasonable rates, terms and conditions* for their pole attachments.

¹⁵ *Gulf Power*, 534 U.S. at 333.

service, the cable does not cease, at that instant, to be an attachment “by a cable television system.” The addition of a service does not change the character of the attaching entity – the entity the attachment is “by.” And this is what matters under the statute. . . . The word “by” still limits its pole attachments by who is doing the attaching, not by what is attached. . . . [A]n “attachment . . . by a cable television system” is still (entirely) an attachment “by” a cable television system whether or not it does other things as well.

Id. at 335. Under the Supreme Court’s reading of the Act, as long as the attaching entity is one that is listed in Section 224(a)(4), the Commission is required by Section 224(b) to regulate the rates, terms and conditions applied to that entity’s pole attachments.

This same reading applies with equal force to attachments *by* incumbent carriers. Section 224(a)(4) includes “any attachment *by* a . . . provider of telecommunications service.” Incumbent local exchange carriers are unquestionably “providers of telecommunications service” because they offer telecommunications for a fee directly to the public.¹⁶ Because an attachment *by* an incumbent carrier is an “attachment by . . . a provider of telecommunications service,” Section 224(b) requires the Commission to regulate the rates charged to incumbent carriers for pole attachments.

This reading of the Act is also consistent with the legislative history of Section 224. In the Conference Report accompanying the 1996 amendments to Section 224, Congress explained that the amendments are “intended to remedy the inequity of charges for pole attachments *among providers of telecommunications services.*”¹⁷ The Conference Report further states that the amendments “expand[] the definition of ‘pole attachment’ to include attachments by *all*

¹⁶ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15988-89 (1996).

¹⁷ H. R. Rep. No. 104-458, at 206 (emphasis supplied).

providers of telecommunications services.”¹⁸ A House Committee Report likewise states that the definition of “pole attachments” was expanded “to include attachments by all providers of telecommunications services” and “is intended to remedy the inequity for pole attachments among providers of telecommunications services.”¹⁹

Some parties argue that Section 224(b) does not include any authority for the Commission to regulate the rates charged incumbent carriers for their pole attachments. They note that Section 224 contains two rate formulas: Section 224(d) contains a rate formula for pole attachments by cable television systems solely to provide cable service and Section 224(e) contains a rate formula for telecommunications carriers (other than incumbent carriers) to provide telecommunications service. They argue that these two rate formulas somehow limit the scope of Section 224(b)’s broad grant of authority to regulate pole attachments. The Supreme Court has already considered and rejected this argument.

In *Gulf Power*, the Supreme Court found that “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.”²⁰ The Court concluded that “[t]he sum of the transactions addressed by the rate formulas -- § 224(d)(3) (attachments ‘used by a cable television system solely to provide cable service’) and § 224(e)(1) (attachments ‘used by telecommunications carriers to provide telecommunications services’) -- is less than the theoretical coverage of the Act as a whole.”²¹

¹⁸ *Id.* (emphasis supplied).

¹⁹ H. R. Rep. No. 104-204, at 92.

²⁰ *Gulf Power*, 534 U.S. at 335.

²¹ *Gulf Power*, 534 U.S. at 336.

Accordingly, “[t]he first two subsections are simply subsets of -- but not limitations upon -- the third.”²²

Other parties argue that Section 224(b) should be read to exclude incumbent carriers because the 1996 amendments added a definition of “telecommunications carrier” in Section 224(a)(5) that “does not include any incumbent local exchange carrier.” But this argument actually cuts the other way. If Congress had intended to exclude incumbent carriers from the broad scope of authority granted to the Commission under Section 224(b), Congress would have used the defined term “telecommunications carrier” to limit the scope of Section 224(b). Congress chose not to do so and instead used the broader term “pole attachment” that specifically includes “any attachment by a . . . provider of telecommunications service.”²³ An incumbent carrier is unquestionably a “provider of telecommunications service.”

Moreover, the fact that Congress used the term “telecommunications carrier” in other parts of Section 224 to limit the scope of the Commission’s authority further confirms that Congress did not intend to so limit the scope of the Commission’s authority under Section 224(b). For example, Section 224(f)(1) provides that “[a] utility shall provide a cable television system or any telecommunications carrier with *nondiscriminatory access* to any pole, duct, conduit, or right-of-way owned or controlled by it.” 47 U.S.C. § 224(f)(1) (emphasis supplied). Congress’ use of the defined term “telecommunications carrier” in this section specifically

²² *Id.*

²³ The Commission itself acknowledged that “the term pole attachment is defined in terms of attachments by a ‘provider of telecommunications service’ not as an attachment by a ‘telecommunications carrier.’” *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777, ¶ 49 (1998) (subsequent history omitted) (“*1998 Implementation Order*”).

excludes incumbent carriers from the Commission’s authority to ensure that utilities provide nondiscriminatory access to their poles. By contrast, Congress used the broader term “provider of telecommunications service” to define the scope of the Commission’s authority to regulate the rates, terms and conditions of pole attachments. *See* 47 U.S.C. §§ 224(a)(4), 224(b). Congress’ deliberate use of the broader term “provider of telecommunications service” in some parts of Section 224 and the narrow term “telecommunications carrier” in other parts of Section 224 must be given full force and effect.²⁴

Section 224 of the Act requires the Commission to regulate the justness and reasonableness of the rates, terms and conditions applied to all pole attachments by any “provider of telecommunications service.” This term plainly includes incumbent carriers and entitles incumbent carriers to the same protection from unjust and unreasonable rates, terms and conditions of pole attachments that the Commission has afforded to cable television systems and competitive carriers. There is no basis for the Commission to conclude that Section 224(b) excludes incumbent carriers from the scope of its protections.

C. The Commission Should Adopt the Cable Rate Formula for Setting Broadband Attachment Rates Applicable to Cable Television Systems and All Providers of Telecommunications Services, Including Incumbent Carriers.

The Commission has already found that setting a low, uniform attachment rate applicable to all providers of broadband services would accelerate the deployment of broadband services throughout the country and enhance competition for broadband services. The Commission can carry out these findings by adopting the cable rate formula for pole attachments by cable

²⁴ *See, e.g., Clay v. United States*, 537 U.S. 522, 528-29 (2003) (“[w]hen ‘Congress includes particular language in one section of a statute but omits it in another section of the same Act,’ we have recognized, ‘it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion’”) (*quoting Russello v. United States*, 464 U.S. 16, 23 (1983)); *accord United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

television systems and all providers of telecommunications services who are offering broadband services commingled with other services. Setting a broadband attachment rate at the cable rate level will accelerate broadband deployment, place broadband competitors on a more level playing field and facilitate the negotiation of pole attachment agreements between utilities and broadband service providers.

1. **Setting Broadband Attachment Rates at the Cable Rate Level Will Promote the Deployment of Broadband Services and Provide a Level Playing Field for Competitors.**

The Commission has already determined that setting broadband attachment rates as low as possible would promote broadband deployment. In the Commission's National Broadband Plan, the Commission determined that "[t]he cost of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands."²⁵ The Commission then concluded that "[t]o support the goal of broadband deployment, rates for pole attachments should be as low . . . as possible."²⁶

It is also important for the Commission to treat all competitors equally in order to promote competitive deployment of broadband services and to ensure that consumers have the widest possible choices of broadband service providers. In its Broadband Plan, the Commission noted that "[a]pplying different rates based on whether the attacher is classified as a 'cable' or a 'telecommunications' company distorts attachers' deployment decisions" and "[t]his uncertainty may be deterring broadband providers that pay lower pole rates from extending their networks or

²⁵ FCC National Broadband Plan at 109 (2010).

²⁶ *Id.* at 110.

adding capabilities.”²⁷ The Commission then concluded that “rates for pole attachments should be as . . . close to uniform as possible.”²⁸

Setting broadband attachment rates at the cable rate level for all cable televisions systems and providers of telecommunications service would help level the competitive playing field and further the Commission’s long standing policy of “technological neutrality.” As the Commission explained in 2007, the “critical need to create even-handed treatment and incentives for broadband deployment would warrant the adoption of a uniform rate for all pole attachments used for broadband Internet access.”²⁹ It would also “further[] the Commission’s goal of developing a consistent regulatory framework across broadband platforms by regulating like services in a similar manner.”³⁰ In fact, utilities, cable companies and competitive telecommunications carriers agreed nearly three years ago that utilities should charge the same rate to all providers of broadband Internet access service.³¹

2. The Commission Has the Legal Authority to Set Broadband Attachment Rates at the Cable Rate Level for Broadband Services Commingled With Other Services.

The Commission has the authority and discretion to set broadband attachment rates at the cable rate level because the Act does not prescribe any particular formula for attachments that commingle broadband services with other services. As noted above, the Act sets forth two

²⁷ *Id.*

²⁸ *Id.*

²⁹ 2007 NPRM ¶ 36.

³⁰ *Id.*

³¹ *See, e.g.,* Time Warner Telecom *et al.* Comments at 5-14; Comments of Concerned Utilities at 37; Florida Power & Light *et al.* Comments at 12; Edison Comments at 97; CenturyTel Comments at 12-14.

specific rate formulas that apply in two specific situations. The first formula – the cable rate formula – applies to “any pole attachment used by a cable television system solely to provide cable service.” 47 U.S.C. § 224(d)(3). The second formula – the telecom rate formula – applies to “pole attachments used by telecommunications carriers to provide telecommunications services.” 47 U.S.C. § 224(e)(1). Neither of these formulas applies specifically to attachments used to provide broadband services commingled with other services.

The Commission has already determined that it has the discretion to apply the cable rate formula to any attachments not subject to the telecom rate formula. In its *1998 Implementation Order*, the Commission noted that “if the provision of Internet service over a cable television system is deemed to be neither ‘cable service’ nor ‘telecommunications service’ under the existing definitions, the Commission is still obligated under Section 224(b)(1) to ensure that the ‘rates, terms and conditions [for pole attachments] are just and reasonable,’ and, as Section 224(a)(4) states, a pole attachment includes ‘any attachments by a cable television system.’”³² The Commission then found that it “[did] not believe Congress intended to bar the Commission from determining that the Section 224(d) [cable] rate methodology also would be just and reasonable in situation where the Commission is not statutorily required to apply the higher Section 224(e) [telecom] rate.”³³ Based on this interpretation of the Act, the Commission adopted the cable rate formula for pole attachments by cable television systems used to provide broadband Internet access service commingled with cable service.³⁴

³² *1998 Implementation Order*, 13 FCC Rcd 6777, ¶ 34.

³³ *Id.*

³⁴ Even before the 1996 Act, the Commission applied the cable rate level to broadband non-video services commingled with cable service. In *Heritage Cablevision*

The Supreme Court upheld the Commission’s application of the cable rate formula to pole attachments by cable television systems used to provide broadband Internet access service commingled with cable service. In *Gulf Power*, the Court noted that “[i]t might have been thought prudent to provide set formulas for telecommunications service and ‘solely cable service,’ and to leave unmodified the FCC’s customary discretion in calculating a ‘just and reasonable’ rate for commingled services.”³⁵ The Court then concluded that “the subject matter here is technical, complex, and dynamic; and as a general rule, agencies have authority to fill gaps where the statutes are silent.”³⁶

The Commission has the authority and discretion to expand its prior ruling setting an attachment rate for broadband Internet access service commingled with cable service. The Commission can and should set a broadband attachment rate at the cable rate level for pole attachments used to provide broadband service commingled with telecommunications service. Broadband service, like Internet access, is not currently defined as a “telecommunications service.”³⁷ The Commission is therefore not bound to apply the telecom rate formula to

Associates of Dallas, L.P. v. Texas Elec. Util. Co., 6 FCC Rcd 7099 (1991), the pole owner was charging the cable company the cable rate for attachments used to provide traditional cable service and a higher rate for attachments used to provide broadband non-video data transmission services. The Commission held (¶ 32) that the pole owner “lawfully may not charge TCI different pole attachment rates depending on the type of service being provided over the equipment attached to its poles.” Seven years later, the Commission reaffirmed that the *Heritage* decision has not been “‘overruled’ by the passage of the 1996 Act insofar as it held that a cable system is entitled to a Commission-regulated rate for pole attachments that the cable system uses to provide commingled data and video.” *1998 Implementation Order*, ¶ 30.

³⁵ *Gulf Power*, 534 U.S. 339.

³⁶ *Id.*

³⁷ *Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry ¶ 21 (rel. June 17, 2010) (“[a]fter the Supreme Court affirmed the Commission’s

attachments used to provide broadband service commingled with telecommunications service. The Commission can instead apply the cable rate formula to broadband attachments by cable companies and all providers of telecommunications service because such commingled services fall outside the scope of Section 224(e).

Section 706 of the Act also supports the adoption of a broadband attachment rate set at the cable rate level for all providers of broadband services. As the Commission explained three years ago, “Section 706 of the 1996 Act directs [the Commission] to promote the deployment of broadband infrastructure, and this directive leads us to separate out those pole attachments that are used to offer broadband Internet access service from those used for other services.”³⁸ As a policy matter, the Commission “tentatively conclude[d] that the critical need to create even-handed treatment and incentives for broadband deployment would warrant the adoption of a uniform rate for all pole attachments used for broadband Internet access service.”³⁹ More recently, the Commission noted that “[i]n compliance with section 706, we will consider the proposals for Commission action set forth in the National Broadband Plan for ways to remove barriers to infrastructure investment and promote competition.”⁴⁰

authority to classify cable modem service, the Commission eliminated the resulting regulatory asymmetry between cable companies and other broadband Internet service providers by issuing follow-on orders that extended the information service classification to broadband Internet services offered over DSL and other wireline facilities, power lines, and wireless facilities”) (footnotes omitted). If the Commission were to classify broadband service as a “telecommunications service,” the Commission may be required to apply the higher telecom rate formula to all attachments used to provide broadband service.

³⁸ 2007 NPRM ¶ 36.

³⁹ *Id.*

⁴⁰ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such*

3. **Adopting a Broadband Attachment Rate at the Cable Rate Level Will Facilitate Negotiations Between Utilities and Broadband Service Providers and the Resolution of Rate Complaints.**

The Commission has consistently “encourage[d] parties to negotiate the rates, terms, and conditions of pole attachment agreements”⁴¹ and held that “negotiations between a utility and an attacher should continue to be the primary means by which pole attachment issues are resolved.”⁴² The Commission has also recognized that having a clear rate formula for pole attachments facilitates negotiations between utilities and attachers. In its *1998 Implementation Order*, the Commission “affirm[ed] [its] belief that the existing methodology for determining a presumptive maximum pole attachment rate . . . facilitates negotiation because the parties can predict an anticipated range for the pole attachment rate.”⁴³ Setting a broadband attachment rate at the cable rate level would likewise facilitate negotiations between utility pole owners and broadband service providers.

The Commission has also recognized that having a clear rate formula for pole attachments facilitates the resolution of complaints. As the Commission explained, “a formula encompassing these statutory directives of how pole owners should be compensated . . . assists the Commission when it addresses complaints.”⁴⁴ In a similar fashion, setting the cable rate

Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, Sixth Broadband Deployment Report, ¶ 7 (Jul. 20, 2010).

⁴¹ *1998 Implementation Order* ¶ 9.

⁴² *1998 Implementation Order* ¶ 11. The Commission allows parties to file complaints only where such negotiations fail. *See 1998 Implementation Order* ¶ 9 (“[a]lthough the Commission’s rules will serve as a backdrop to such negotiations, we intend the Commission’s enforcement mechanisms to be utilized only when good faith negotiations fail”).

⁴³ *1998 Implementation Order*, ¶ 16.

⁴⁴ *1998 Implementation Order*, ¶ 102.

formula for all broadband attachments would help resolve any complaints between utilities and broadband service providers.⁴⁵

In order to fully realize these benefits for negotiations and complaint resolution, the Commission should also make clear that the broadband attachment rate applies to all forms of contract between utilities and broadband service providers, including joint use agreements and joint ownership agreements.⁴⁶ In many cases, Verizon pays utilities for pole attachments pursuant to joint use and joint ownership agreements with utilities.⁴⁷ As explained above (at Section I.A.), the rates charged under these joint use agreements far exceed any measure of justness and reasonableness. There is no reason for the Commission to exempt attachment rates set forth in joint use agreements from any broadband rate formula adopted by the Commission. Regardless of whether the attachment rates are set forth in a license agreement, a joint use agreement, a tariff or some other form of contract, the Act requires that the rates be just and reasonable.

In the *FNPRM*, the Commission suggests that joint use and joint ownership agreements “provide more favorable terms and conditions to attaching incumbent LECs than competitive LECs and cable operators receive from electric companies under license agreements.”⁴⁸ The

⁴⁵ Not only does the Act require the Commission to regulate pole attachments rates charged to all “providers of telecommunications service,” the Act also requires the Commission to “adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates.” 47 U.S.C. § 224(b)(1). As a “provider of telecommunications service,” incumbent carriers are therefore entitled to file complaints with the Commission to challenge attachment rates (unless the state commission regulates such attachment rates).

⁴⁶ Exhibit 2 describes the various types of pole attachment agreements.

⁴⁷ See Slavin/Frisbie Decl. ¶¶ 7-14.

⁴⁸ *FNPRM* ¶ 145.

Commission then questions whether, in light of these more favorable terms and conditions, “reducing attachment rates for incumbent LECs or allowing them to pay the same rate would provide them with an unfair competitive advantage.”⁴⁹ The joint use agreements and joint ownership agreements that Verizon has entered with utilities do not provide significant financial benefits or more favorable terms and conditions because any benefits or favorable terms are offset by burdens and obligations.

The fundamental difference between a license agreement and a joint use or joint ownership agreement is that the latter generally imposes mutual obligations on both parties. For example, some joint use agreements may require Verizon and the utility to perform make ready work for each other at no charge.⁵⁰ While Verizon does benefit from having the utility perform make ready at no charge, that benefit is largely offset by the obligation to perform make ready for the utility at no charge.⁵¹ In most cases, Verizon performs more make ready work for the electric utility than the electric utility performs for Verizon.⁵² The existence of such additional terms in joint use or joint ownership agreements is not a basis for the Commission to exempt them from any rate formula set for broadband attachments.

If incumbent carriers are unsuccessful in negotiating broadband attachment rates with utilities under a joint use or joint ownership agreement, they should be able to file a complaint

⁴⁹ *Id.*

⁵⁰ *See* Slavin/Frisbie Decl. ¶¶ 22-23.

⁵¹ *Id.*

⁵² *Id.*

with the Commission.⁵³ The Commission's resolution of that complaint should be subject to the same clear rate formula applicable to any other broadband attachments. If in a particular case the utility believes there is some significant financial benefit in the terms and conditions of the joint use or joint ownership agreement, the Commission could consider evidence from the utility on that point. In Verizon's experience, however, it is unlikely that utilities would be able to produce such evidence.

4. **The Commission Does Not Need to Revise the Telecommunications Rate Formula.**

If the Commission sets a broadband attachment rate at the cable rate level for broadband attachments by cable television systems and providers of telecommunications services, the Commission should defer making changes to its telecom rate formula. Virtually all cable television systems and providers of telecommunications services offer broadband services commingled with other services and would therefore qualify for the broadband attachment rate.

With the adoption of a broadband attachment rate at the cable rate level for all broadband service providers, the telecom rate formula would likely have little remaining significance.

Broadband service providers would likely demand the lower broadband attachment rate if they

⁵³ Some electric utilities argue that "incumbent LECs may seek recourse at the state level if they believe rates are unreasonable." *FNPRM* ¶ 64. To the extent that a state remedy is available to challenge the rates in a joint use agreement, the Commission would lack jurisdiction to hear a complaint under Section 224. *See* 47 U.S.C. § 224(c)(1). However, even states that have certified to the Commission that they regulate pole attachment rates may not have jurisdiction over the rates charged to incumbent carriers. For example, the D.C. Public Service Commission only has authority over the rates charged to cable companies. *See* D.C. Code § 34-1253.03 (subsection (a) requires PSC to "regulate the rates, terms, and conditions for cable operators' use of existing utility company rights of way ..., including the using of existing utility poles and underground conduits in accordance with federal law and regulations, and shall ensure that all rates, terms, and conditions are just and reasonable"). There is therefore no reason to deny incumbent carriers' their rights to file complaints with the Commission challenging pole attachment rates as unjust and unreasonable.

are today paying the higher telecom rate. And to the extent a telecommunications carrier is not yet providing broadband service, the lower broadband attachment rate would provide some financial incentive for that carrier to upgrade its network facilities to offer broadband service.

D. The Commission Should Allow An Attaching Entity to Opt In To An Existing Pole Attachment Agreement Where Such Entity is Similarly Situated to a Party to the Pole Attachment Agreement.

The Commission seeks comment on a proposal that would allow any attaching entity, including incumbent LECs, to “opt in” to existing pole agreements.⁵⁴ Under this proposal, each pole owner would make each pole attachment, joint ownership, or joint use agreement publicly available, and attachers could opt in to those agreements, accepting all the terms and conditions of the agreement. While this proposal has some merit, it should only be available where the “opting in” entity is similarly situated to a party to the pole attachment agreement.

As a party to many joint use and joint ownership agreements, Verizon would welcome the opportunity to “opt in” to pole attachments agreements between the utility and other attachers. The availability of such an alternative would certainly help in negotiating more reasonable attachment rates under existing joint use and joint ownership agreements. And if such negotiations are not successful, Verizon could “opt in” to a pole attachment agreement and terminate the existing joint use or joint ownership agreement.

There are, however, some practical limitations with this proposal. For example, it would not be feasible for an ordinary attacher to “opt in” to a joint ownership agreement that is predicated on both parties having an ownership interest in each pole. In such a case, the “opting” party would be assuming an ownership interest in poles that is still held by another utility and therefore is not similarly situated with a party to the agreement. Nor would it be feasible for an

⁵⁴ *FNPRM* ¶ 147.

ordinary attacher to “opt in” to a joint use agreement that is predicated on each party owning some fixed number of poles in a geographic area. Again, the “opting” party would be assuming ownership interests in poles that are still owned by another utility and would not be similarly situated.

II. IF THE COMMISSION DECIDES TO ADOPT ADDITIONAL REGULATIONS GOVERNING ACCESS TO POLES, THE COMMISSION SHOULD CAREFULLY BALANCE THE ATTACHERS’ NEEDS FOR TIMELY ACCESS WITH THE NEEDS TO ENSURE THE SAFETY OF ALL POLE ATTACHMENTS

There is no dispute that timely access to poles, conduit, ducts, and rights of way is critical to the deployment of broadband services across the United States. Under the existing regulatory regime, the Commission has established firm deadlines for responding to pole applications and determined that make ready work should be completed in a timely, reasonable, non-discriminatory manner.⁵⁵ Nevertheless, pole owners and attachers would both benefit from additional regulatory guidance aimed at ensuring that make ready work is completed timely. As Verizon previously explained, one party’s make ready work (including that of the pole owner) may be delayed where other parties fail to complete their make ready work in a timely manner.⁵⁶ Establishing time frame guidelines for completing make ready work would address these timing issues and would also satisfy the Commission’s goals of expediting access to poles for new attachers.

However, any new regulation the Commission adopts for access to poles must carefully balance attachers’ needs for timely access and pole owners’ needs to ensure that attachments are

⁵⁵ See 47 C.F.R. § 1.1403(b); *Local Competition Order* ¶¶ 1156-57.

⁵⁶ See Verizon’s Opposition to Fibertech’s Petition for Rulemaking, RM 11303, at 5 (Jan. 30, 2006).

made safely. The make ready deadlines proposed in the *FNPRM* would not achieve this balance. As explained below, the proposed forty-five day deadline for pole owners to complete make ready work is much less than the actual time it typically takes to complete make ready work. Additionally, the type of firm deadlines contemplated in the *FNPRM* for make ready work would not provide the level of flexibility that is required given the numerous variables that can affect the time it takes to complete make ready work, many of which are outside of the control of pole owners and existing attachers. Accordingly, consistent with the Commission's current approach for regulating access to poles, any new regulation for the timing of make ready work should be in the form of guidelines rather than firm deadlines. Regardless of form, any new regulation governing the timing of make ready work should not hold pole owners or existing attachers responsible for delays that are attributable to factors beyond their control, such as adverse weather conditions, the actions or inactions of a third party, permitting requirements or work stoppages.

Next, the *FNPRM* proposes several rules that potentially might improve or expedite access to poles, such as requiring the use of outside contractors to perform make ready work and requiring a single owner to administer the process for jointly-owned poles.⁵⁷ As explained below, the additional proposals outlined in the *FNPRM* would not actually expedite access to poles, but would make it overly complicated. Accordingly, the Commission should not adopt these proposed rules. Instead, the Commission should adopt other measures, such as requiring that for jointly-owned and jointly-used poles, both joint owners or joint users, as well as the applicant, attend the same make ready survey. In many cases, this would reduce the time it takes

⁵⁷ *FNPRM* ¶¶ 70-74.

to respond to pole and conduit applications and provide make ready estimates by eliminating the need to reconcile the results of separate surveys.

A. The *FNPRM* Correctly Concludes That the Commission Should Retain the Existing Forty-Five Day Deadline for Responding to Applications for Access to Poles and Conduit (Stage 1 – Survey).

As the *FNPRM* acknowledges, existing record evidence demonstrates that pole owners generally “meet their obligation to approve or deny a request for pole access within 45 days.”⁵⁸ This is consistent with Verizon’s experience. In 2006, Verizon submitted evidence demonstrating that it generally met the existing forty-five day deadline for applications to obtain access to Verizon-owned poles in Massachusetts and Rhode Island.⁵⁹ Given this evidence that the existing forty-five day deadline is working, the Commission’s proposal to retain the existing forty-five day deadline is reasonable.⁶⁰

The existing forty-five day deadline strikes a careful balance between attachers’ needs for timely access to poles and pole owners’ needs to conduct surveys to ensure that new attachments can be installed safely.⁶¹ Nothing in the record demonstrates that the Commission’s decision to implement a forty-five day deadline was erroneous or has resulted in competitive harm. Accordingly, as the Commission concluded in its *FNPRM*, the existing forty-five day deadline should be retained.⁶²

⁵⁸ *FNPRM* ¶ 26.

⁵⁹ Verizon’s Opposition to Fibertech’s Petition for Rulemaking, Attachment B, Declaration of Gloria Harrington, ¶ 6 (Jan. 30, 2006) (“Harrington Decl.”).

⁶⁰ *FNPRM* ¶ 35.

⁶¹ See *Local Competition Order*, 11 FCC Rcd 15499 ¶ 1224 (1996); *Order on Reconsideration*, 14 FCC Rcd 18049, ¶¶ 117-119 (1999).

⁶² *FNPRM* ¶ 35.

In retaining the existing forty-five day deadline, the Commission should clarify that pole owners can “stop the clock” on the forty-five day deadline for applications that fail to provide critical information required to process the application or fail to include the required application processing or make survey ready fees. This is similar to the approach under New York’s Policy Statement.⁶³

Despite Verizon’s efforts to fully inform attachers about the application process, including providing detailed instructions and holding workshops on the application process, many attachers still submit pole applications that are missing critical information or contain incorrect critical information, or that fail to include any applicable application processing or make ready survey fees.⁶⁴ Where critical information is missing from an application or is incorrect, it may be impossible for Verizon to identify or locate its internal records for the poles included on an application.⁶⁵ Verizon is sometimes able to, and in fact does, fill in non-critical information that is missing from an application. However, it would be impossible for Verizon to correct each pole and conduit application that has incorrect or missing critical information.⁶⁶

The Commission should likewise clarify that pole owners can “stop the clock” on the forty-five day deadline when a new attacher fails to submit the required application processing fees or make ready survey fees with its application. Verizon requires upfront payment of

⁶³ See New York Public Service Commission Case 03-M-0432, *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement on Pole Attachments, Appendix A at 2 (Aug. 6, 2004) (“[i]f required pre-established information is missing, the clock will not start for the pole attachment process, provided the information is reasonably available to the Attacher”).

⁶⁴ See Declaration of Amy E. Sullivan at ¶¶ 9, 13, 15 (“Sullivan Decl.”).

⁶⁵ See Sullivan Decl. ¶ 12.

⁶⁶ See Sullivan Decl. ¶ 14.

application processing fees and make ready surveys fees before processing a pole application. These upfront payments ensure that Verizon will be fully compensated for any work it performs in connection with an application, even if the applicant ultimately decides not to proceed with its application. Accordingly, it would be reasonable to permit pole owners to “stop the clock” on the forty-five day deadline until the applicant pays the necessary application processing and make ready survey fees.

The Commission should also clarify that pole owners will not be penalized for failing to meet the existing forty-five day deadline due to circumstances that are outside of their control. Pole owners cannot respond to pole or conduit applications until they have first completed a make ready survey to confirm that space is available (or can be made available) on each pole and that each new attachment can be made safely. However, a number of factors outside of the pole owners’ control can delay the performance of make ready surveys, such as adverse weather conditions, work stoppages, and the actions or inactions of the other pole owner.⁶⁷ Pole owners should be permitted to subtract any delays attributable to these factors in determining their compliance with the forty-five day deadline on a case-by-case basis.

B. Rather Than Establishing a Separate Interval for Preparing Make Ready Estimates (Stage 2 – Estimate), the Commission Should Extend the Time Frame for Completing Make Ready Work (Stage 4 – Performance).

The *FNPRM* proposes a separate fourteen day time frame for pole owners to provide attachers with an estimate of make ready work.⁶⁸ In Verizon’s experience, there is no need for an additional fourteen days to prepare make ready invoices. Verizon already generally provides

⁶⁷ See Sullivan Decl. ¶ 20.

⁶⁸ See *FNPRM* ¶ 38.

make ready estimates at the same time that it provides responses to pole or conduit access applications.⁶⁹ The fourteen day time frame proposed by the Commission for preparing make ready estimates would be better used by pole owners to complete make ready work.

If the Commission were to eliminate its proposed interval for preparing make ready invoices and add 15 days to the time frame for completing make ready work, the overall time frame proposed by the Commission – from submission of application to issuance of license – would remain essentially the same. The Commission’s proposal for Stage 1 (Survey) is 45 days, for Stage 3 (Attacher acceptance) is 14 days, and for Stage 5 (Multiparty coordination) is 30 days. If Stage 2 (Estimate) were eliminated and the Commission’s proposal for Stage 4 (Performance) were increased to 60 days, these four stages would total up to 150 days from submission of application to issuance of license, which is essentially the same overall total as the Commission’s initial proposal.⁷⁰

If the Commission adopts a separate deadline for submitting a make ready invoice, the Commission should not hold a single pole owner liable for delays attributable to factors outside of its control, such as adverse weather conditions, work stoppages, or other delays that affect the time it takes to complete make ready surveys – surveys that are required to prepare a make ready invoice. Additionally, for jointly-owned poles, one pole owner should not be held liable for the other pole owner’s failure to provide a timely make ready estimate. This is the right approach because co-pole owners are entirely separate entities and neither one has control over the other.

⁶⁹ See Sullivan Decl. ¶ 23.

⁷⁰ *FNPRM* ¶ 33 (“[d]epending on how long the applicant reviews the estimate, and whether the existing attachers complete their work in a timely manner, make-ready should be complete within a 105 to 149 day window after the utility receives a complete application for access”).

C. Fourteen Days Is Sufficient For Responding to and Fully Paying a Make Ready Invoice (Stage 3 – Acceptance).

Next, the *FNPRM* proposes a fourteen day deadline for attachers to accept and pay for make ready work.⁷¹ Because prospective attachers typically participate in Verizon’s make ready surveys and, therefore, have a general idea of the make ready work required, the proposed fourteen day deadline would provide attachers with more than enough time to review and discuss the proposed make ready estimate with the pole owner(s) and existing attachers, and submit the required payment. And, as the *FNPRM* acknowledges, a deadline for accepting make ready estimates would ensure that pole owners and existing attachers are not forced to “commit indefinitely to its make-ready proposal and estimate of charges” and would also “provide additional certainty.”⁷²

The proposed fourteen day deadline for acceptance and payment should include a requirement that attachers pay the invoiced make ready fees in full, unless otherwise agreed to by the parties. While the *FNPRM* contemplates a rule permitting the payment of make ready work in stages, such a rule would not expedite the completion of make ready work.⁷³ The *FNPRM* speculates that staggering make ready payments would create “incentives to perform make-ready work on schedule” because parties would not be fully compensated until they actually completed the required work.⁷⁴ However, as explained fully below, numerous circumstances outside of

⁷¹ *FNPRM* ¶ 39.

⁷² *Id.*

⁷³ *See FNPRM* ¶ 70.

⁷⁴ *Id.*

pole owners' control can delay the completion of make ready work. Permitting staggered make ready payments would not expedite the completion of make ready work in these situations.

A rule permitting staggered payments for make ready work would unreasonably expose pole owners and existing attachers to the risk of non-payment for the make ready work required to accommodate the new attacher. Make ready work is custom work for a particular attacher and that work cannot be resold to someone else if the attacher changes its mind. If the attacher does not pay in full for the requested make ready work, other attachers would bear the costs of that make ready work through higher attachment rates under the Commission's rate formulas.

In any event, Verizon's current practice of obtaining payment for make ready estimates does not fully recover Verizon's make ready costs up front. In most cases, Verizon's make ready estimates are less than Verizon's actual costs of performing the make ready work.⁷⁵ Where Verizon's actual costs are greater than the estimate paid by the attacher, Verizon bills the attacher a "true-up" charge to cover the difference between the actual costs and the estimate.⁷⁶ This "true-up" charge effectively staggers the attacher's payment for make ready work.

D. Any Commission Established Make Ready Time Frames Should Provide Sufficient Time to Complete Make Ready Work, Apply to All Attachers and Be Sufficiently Flexible (Stage 4 – Performance).

1. Consistent With the Existing Regulatory Regime, Any New Make Ready Intervals Should Be in the Form of Guidelines, Rather Than Firm Deadlines.

Numerous variables, many of which are outside of pole owners' control, can impact the time frames for completing make ready work.⁷⁷ These variables are one of the factors

⁷⁵ See Sullivan Decl. ¶ 26.

⁷⁶ *Id.*

⁷⁷ See Sullivan Decl. ¶ 34. See also 2008 Verizon Comments at 18.

underlying the Commission’s decision to regulate access to poles using guidelines rather than a specific set of rules that would apply to all situations. As the Commission explained in deciding on this approach to regulating access to poles, “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.”⁷⁸ Nothing has changed that would warrant a departure from the Commission’s current approach of using guidelines to govern the timely performance of make ready work.⁷⁹

Consistent with the Commission’s prior decision to regulate access to poles using guidelines, the Commission should not adopt firm “one size fits all” deadlines for make ready work. Instead, the Commission should develop new guidelines with recommended time frames for completing make ready work. This approach would provide the flexibility needed to “stop the clock” for the numerous variables that are outside of existing attachers and pole owners’ control that can impact the time it takes to complete make ready work. In fact, the Commission specifically acknowledged that “circumstances beyond a utility’s control may require prioritization, or otherwise warrant interrupting the timeline.”⁸⁰

Unlike many of the other steps associated with providing access to poles, the timing of completing make ready work can vary widely depending on a number of variables which can vary from region to region, and from job site to job site within the same region or state. As explained in Ms. Sullivan’s declaration, these variables can include, but are not limited to:

⁷⁸ *Local Competition Order* ¶ 1143.

⁷⁹ When an agency changes course, it must provide a “more detailed justification [for the change] than what would suffice for a new policy created on a blank slate” if – as would be true in this case – its “new policy rests upon factual findings that contradict those which underlay its prior policy” or its “prior policy has engendered serious reliance interests that must be taken into account.” *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

⁸⁰ *FNPRM* ¶ 51.

permitting requirements, rights of way and other property permissions; adverse weather conditions; work stoppages; equipment vendor delays; other attachers' delays; and significant changes to an application midstream.⁸¹ Ms. Sullivan's declaration provides more detailed descriptions of the prevalence of these variables and their potential impact on make ready time frames. Where one or more of these factors are present, make ready work can be delayed by anywhere from a few days to several months.⁸² Because many of these variables are outside of pole owners' and existing attachers' control, there is nothing that pole owners or existing attachers can do to plan for, eliminate or minimize these factors. Therefore, it is critical that any new regulatory regime governing make ready work be sufficiently flexible so that pole owners and existing attachers are not held liable for delays attributable to factors that are outside of their control. To that end, the Commission should develop guidelines that illustrate the types of factors for which it would be reasonable to "stop the clock" or otherwise adjust any recommended time frames that the Commission adopts for make ready work.

2. **At a Minimum, the Commission Should Provide Pole Owners With Sixty Days to Complete Make Ready Work.**

Any time frames the Commission recommends for completing make ready work for poles must provide pole owners, as well as existing attachers, with sufficient time to complete make ready work. For Verizon's poles, a minimum of sixty days from receipt of make ready payment, is closer to the actual time it typically takes to complete make ready work (and the steps associated with completing make ready work) where pole replacements are not required.⁸³

⁸¹ See Sullivan Decl. ¶¶ 34-43.

⁸² *Id.*

⁸³ See Sullivan Decl. ¶ 33.

For applications where pole replacements are required, the Commission proposes not to apply its proposed timeline.⁸⁴ This proposal is reasonable because pole replacement work is much more difficult and can require significantly longer periods of time to complete, and involves additional variables that are not present where pole replacement is not required.⁸⁵ The Commission should therefore make clear in its rules that applications requiring pole replacements are not subject to the recommended time frame for make ready work.

For Verizon's poles, it generally takes a minimum of sixty days from the receipt of payment to complete make ready work where no pole replacement is required.⁸⁶ This is generally true regardless of the number of poles at issue in an application.⁸⁷ Sixty days is typically required because of the numerous steps involved in completing make ready work, including providing at least sixty days notice to other existing attachers that may be required to perform make ready work to accommodate the new attacher.⁸⁸ Under the Commission's existing rules, pole owners are required to give existing attachers notice that they have sixty days to complete any required make ready work. In addition to this notification, pole owners must complete the engineering design to create a work order and coordinate make ready work with other attachers where make ready work for multiple parties must be sequenced.⁸⁹

⁸⁴ *FNPRM* ¶¶ 32-33.

⁸⁵ *See* Sullivan Decl. ¶¶ 44-45 (explaining the additional steps and work required where pole replacement is necessary).

⁸⁶ *See* Sullivan Decl. ¶ 33.

⁸⁷ *Id.*

⁸⁸ *See Local Competition Order* ¶¶ 1207, 1209.

⁸⁹ *See* Sullivan Decl. ¶¶ 31-32.

Adopting separate time frames based on the number of poles involved in the application is not necessary and would overly complicate the process. The number of poles involved in an application is not necessarily a good indicator of the time it will take to complete make ready work.⁹⁰ Thus, make ready work for an application involving 20 poles might require Verizon to lower cables on all 20 poles while an application involving 100 poles might require Verizon to lower cables on only two poles.

Any time frames the Commission deems appropriate for completing make ready work for poles should not extend to make ready work for conduit or ducts. To date, there is little, if any, record evidence of unreasonable delays in providing access to conduit or ducts. Accordingly, there is no basis for concluding that the existing regulatory regime is not providing timely access to conduit and ducts. Absent evidence of widespread delays in providing access to conduit, the Commission should reject proposals to adopt specific time frames for completing make ready work on conduit or duct access applications.

3. **Any Proposed Time Frames for Completing Make Ready Work Should Allow Exceptions for Applications Involving Unusually Large Numbers of Poles or Unreasonably Large Numbers of Applications.**

To ensure the effectiveness of any time frames the Commission recommends for completing make ready work, it is critical that any such time frames allow for case-by-case exceptions for situations where pole owners receive unusually large numbers of applications for a given geographic area or receive pole applications involving an unreasonably large number of poles. Significant spikes in the number of pole applications submitted or the number of poles included in those applications could make it impossible for pole owners to complete make ready

⁹⁰ See Sullivan Decl. ¶ 33.

work within any time frames that the Commission ultimately recommends. Pole owners cannot plan for these spikes in advance because they typically do not receive advance notice before large numbers of applications or applications involving an unusually large number of poles are submitted.

As the *FNPRM* acknowledges, several states cap the number of applications or number of poles to which pole owners can reasonably be expected to provide access over a set time period.⁹¹ Consistent with the approach followed in these states, any time frames the Commission proposes should allow for case-by-case exceptions for unusually large numbers of applications received in a given geographic area (whether an entire state or a region within a state) of for applications involving a large number of poles. Because the number of poles varies widely from state to state, and from pole owner to pole owner, a nationwide cap on the number of applications all pole owners reasonably can be expected to process in a given month would not work. Similarly, a standard national cap on the number of poles for which pole owners can reasonably be expected to complete make ready work over a given period would not work. For example, in New York, Verizon owns about 1.1 million poles, and typically receives significantly more pole applications than the District of Columbia, where Verizon owns about 17,000 poles.⁹² It would not make sense to use the same caps for New York and the District of Columbia.

⁹¹ See *FNPRM* at 47-49.

⁹² See Sullivan Decl. ¶ 4.

4. **The Commission's Recommended Time Frames for Make Ready Work Should Apply to Both Wireline and Wireless Attachments.**

Any new time frames the Commission recommends for completing make ready work on poles should apply to both wireline and wireless attachments. Contrary to the view expressed in the *FNPRM*, make ready work for wireless attachments typically does not require substantially more time to complete than make ready work required to accommodate other types of attachments.⁹³ Moreover, today, the volume of applications to place wireless attachments on poles is relatively small compared to the number of applications seeking access to poles and conduits for other types of attachments. Based on the volume of applications to place wireless attachments on poles today, it would be reasonable to apply the same recommended make ready time frames to wireless and wireline attachments.

E. The *FNPRM*'s Additional Proposals for Expediting Access to Poles Would Complicate Rather than Facilitate Access to Poles, Conduit, Ducts, and Rights of Way.

In addition to proposing time frames for completing make ready work, the *FNPRM* proposes several other options for expediting pole access including requiring pole owners to make schedules of their make ready charges available and requiring a single pole owner for jointly-owned and jointly-used poles to be responsible for the process from end to end.⁹⁴ As explained below, these additional proposals would unnecessarily complicate, rather than facilitate, access to poles.⁹⁵ In addition, some of the proposed rules seek to address issues that

⁹³ See *FNPRM* ¶¶ 52-53. See also Sullivan Decl. ¶ 33.

⁹⁴ See *FNPRM* ¶¶ 72-73.

⁹⁵ In Section II.C. above, Verizon explains that the Commission should not adopt a rule permitting staggered payments for make ready work because this would not expedite access to poles and would unfairly expose pole owners to the risk of non-payment.

are best left up to the individual parties to decide. Accordingly, the Commission should not adopt these proposed rules. Instead, the Commission should look to other alternatives for expediting access to poles, such as requiring that co-pole owners as well as the applicant attend the same make ready survey, along with inviting existing attachers to attend.

1. **The Commission Should Require Pole Owners and the New Attacher to Participate in Joint Make Ready Surveys As a Better Way to Expedite Access to Poles.**

Instead of adopting the proposed rules for expediting access to poles, the Commission should adopt a rule requiring pole owners (or co-pole owners) and the new attacher to attend the same make ready survey. Existing attachers should also be invited to participate. Doing so would likely decrease some of the time required to process pole applications because it would ensure that all parties are using the same inputs concerning the height of the pole and existing attachments, the location of other facilities, and the condition of the pole. This would also give parties an opportunity to discuss their make ready determinations in real time, eliminating the need for multiple telephone calls and meetings to discuss the scope of required make ready work, which can result in delays in scheduling and performing make ready work.

In the case of Verizon's jointly-owned and jointly-used poles, Verizon and the co-pole owner (which is almost exclusively an electric company) often conduct separate make ready surveys. While Verizon expects its co-pole owners to attend its joint make ready surveys (and invites the applicant to attend the surveys), many electric company co-pole owners decline this invitation and instead choose to conduct their own make ready survey on another date.⁹⁶ Verizon has no control over its co-pole owners and for the most part lacks leverage to force them to

⁹⁶ See Sullivan Decl. ¶ 19.

participate in Verizon's make ready survey with the applicant.⁹⁷ As a result, for jointly-owned and jointly-used poles, both pole owners often conduct separate make ready surveys, and may be relying on different inputs for their make ready determinations, potentially leading to different make ready determinations.

Where both pole owners conduct separate surveys, it is often necessary for the pole owners to reconcile their respective make ready determinations. This reconciliation process can require several meetings or phone calls, and may require the co-pole owners to make an additional trip to the pole sites at issue.⁹⁸ The time spent on the reconciliation process would be significantly reduced if the Commission required that both pole owners participate in the same make ready survey with the applicant. This, in turn, would likely lead to faster responses to pole applications.

2. **Requiring Pole Owners to Publish Schedules of Common Make Ready Charges Would Not Expedite Access to Poles and is Unnecessary Given the Level of Transparency That Already Exists.**

The *FNPRM*'s proposed rule to require utilities to publish schedules of their make ready charges incorrectly presumes that this information is not already widely available.⁹⁹ This presumption is not supported by the record. Indeed, putting aside broad, unsupported allegations, there is no record evidence that pole owners routinely refuse to provide this information to attachers. In fact, many pole owners already voluntarily make this information available to attachers. Accordingly, a rule requiring pole owners to publish schedules of common make ready charges is not necessary.

⁹⁷ *Id.*

⁹⁸ *See* Sullivan Decl. ¶ 22.

⁹⁹ *See FNPRM* ¶ 71.

Today, some of Verizon's licensing agreements already include schedules of common make ready costs. In addition, in some states, Verizon gives attachers the option of entering into a licensing agreement that uses unit-based pricing (*i.e.* flat, fixed fees for certain types of work, regardless of the actual time and labor required) as opposed to actual cost pricing which can vary from pole site to pole site. Because unit-based pricing is standard from pole site to pole site, it provides more predictability in make ready costs than actual cost based pricing. Finally, upon request, Verizon provides prospective attachers with an average range of the costs to perform various types of make ready work in the area in which the poles or conduit of interest are located. Thus, there is no need for the Commission to adopt a rule requiring pole owners to publish schedules of make ready charges. To the extent that some pole owners do not already provide this information, the Commission should adopt guidelines encouraging pole owners to provide this information. However, those guidelines should make clear that the parties can decide how this information should be conveyed.

The Commission should also decline to adopt a rule requiring Commission approval of make ready charges. To ensure that pole owners are appropriately compensated for make ready work necessary to accommodate a new attacher, it is important that pole owners retain the ability to adjust their make ready charges to reflect changes in labor and material costs. Requiring prior Commission approval could make it difficult for pole owners to make these changes, which could result in pole owners performing make ready work at a loss until the proposed changes are approved.

Finally, the proposed rules for make ready charges would have no bearing on the reasonableness of a particular pole owner or existing attacher's make ready rates. To the extent that some attachers take issue with particular providers' make ready charges, those issues are

best addressed using the existing poles complaint process as well as any new dispute resolution process the Commission develops in connection with this proceeding. In many cases, the mere threat of filing a complaint can provide sufficient motivation for the parties to resolve disputes concerning make ready charges on their own.

3. **The Proposed Rules for Jointly-Owned Poles and Poles Subject to Joint Use Arrangements Would Complicate, Rather Than Expedite, Access to Poles.**

The *FNPRM* also proposes a rule that would require consolidating administrative authority in one managing utility for jointly owned poles.¹⁰⁰ This proposal incorrectly presumes that pole owners have the ability to control the actions of the other pole owner or existing attachers. This proposal also incorrectly presumes that delays are more likely to occur for jointly-owned poles than for poles that are owned by a single entity. The record does not support either presumption.

Make ready delays occur equally for jointly- or solely-owned poles. Designating the incumbent carrier as the administrative authority for jointly-owned poles would not resolve the timing and cooperation issues that Verizon and other incumbent carriers typically encounter for jointly-owned poles. Verizon cannot control the actions of the other owner or existing attachers and lacks leverage to force these other parties to complete the required work.¹⁰¹ Accordingly, there would be little benefit to a rule requiring that one pole owner administer all stages of the application and make ready process for jointly-owned poles. Moreover, it would be

¹⁰⁰ See *FNPRM* ¶ 72.

¹⁰¹ See Sullivan Decl. ¶¶ 41-43.

unreasonable to hold incumbent carriers responsible for inaction or unreasonable delays on the part of other parties.

In addition, nothing in the record supports the *FNPRM*'s presumptions that incumbent carriers can game joint use arrangements to interfere with the deployment activities of competitors. In joint use arrangements, an incumbent carrier owns some of the poles covered under the joint use arrangements and are simply attachers to other poles covered under the joint use arrangement.¹⁰² Under joint use arrangements, Verizon has no greater control over the utility pole owner than any other attacher. As a result, incumbent carriers cannot dictate how the utility pole owner processes applications or completes make ready work. Where the incumbent carrier is the pole owner, the existing rules already require incumbent carriers, like other pole owners, to provide non-discriminatory access to poles. Consistent with these rules, Verizon does not discriminate against its competitors with respect to processing applications or completing make ready work.¹⁰³ Accordingly, imposing additional restrictions on joint use agreements would not be justified.

F. The Commission Should Encourage, But Not Require, the Use of Outside Contractors for Make Ready Work.

The *FNPRM* also proposes a rule that would permit attachers to use outside contractors to perform make ready work that is not timely completed.¹⁰⁴ The Commission should not adopt this type of rule. First, unlike competitive carriers and cable companies, many incumbent carriers have unionized workforces and may be restricted from using outside

¹⁰² See Slavin/Frisbie Decl. ¶ 7.

¹⁰³ See Harrington Decl. ¶¶ 6-7, 26-27.

¹⁰⁴ See *FNPRM* ¶ 59.

contractors for make ready work pursuant to the terms of its labor agreements. Indeed, Verizon's incumbent carrier operations are unionized and Verizon's labor agreements typically restrict Verizon's ability to use outside contractors for make ready work. A rule requiring the use of outside contractors would conflict with the terms of those agreements.

Instead of a rule *requiring* the use of outside contractors, a better approach would be to adopt guidelines recommending that wherever feasible and not prohibited under existing labor agreements, pole owners and existing attachers allow outside contractors to perform make ready work that might otherwise take longer than the recommended make ready time frames to complete.

A rule requiring the use of outside contractors to perform make ready work would also unreasonably force attachers to give up control over their attachments. It is important that attachers and pole owners retain control over their attachments. The Cable Service Bureau previously considered and declined to require the use of a single contractor to perform make ready work on behalf of all attachers.¹⁰⁵ Consistent with that decision, the Commission should not adopt rules that would require the use of outside contractors for make ready work until it has fully explored less drastic measures for expediting the make ready process.

G. A National Database or Reporting Requirements Would Not Meaningfully Improve Access to Poles, Ducts, Conduits or Rights of Way.

A national database or reporting requirements would not meaningfully improve the process for accessing poles. This is because a national database and reporting requirements

¹⁰⁵ See *Cavalier v. Virginia Electric Power Co.*, 15 FCC Rcd 9563 ¶ 18 (2000) (“[w]hile we agree that the use of multi-party contractors is an efficient means to accomplish make-ready work, and we encourage Respondent to consider that alternative, we are not ready to order Respondent to proceed with that method”).

would only provide space availability, ownership and location information for a limited snapshot in time. This information alone would not eliminate the need to file applications, conduct make ready surveys or perform make ready work. A national database or reporting requirements also would not expedite responses to pole applications or access to poles because make ready surveys and make ready work would still be required.

If the Commission were to adopt reporting or database requirements, there is significant risk that parties with access to this information could decide to bypass the usual application process and place unauthorized, and potentially unsafe attachments in poles, ducts and conduits without the owners' knowledge. Additionally, in locations where licenses have been granted to other parties, the unauthorized attacher may prevent the licensee from attaching, occupying the licensee's space and potentially beating the licensee to market or preventing the licensee from serving its customers in a timely manner. Thus, the Commission should reject proposals to adopt a national database or reporting requirements. Instead, a better approach would be simply to require parties that own poles, ducts, conduits and rights of way to make location specific information available on request.

Additionally, a national database or reported data would not necessarily provide reliable data. Some of the parties that own and use rights of way, poles, ducts or conduit are not subject to the Commission's jurisdiction. For example, a significant percent of poles in the country have municipal attachments, such as street lights and alarm systems, and municipal telecommunications and video networks connecting municipal facilities. On some streets, there is a street light on every pole, and on other streets, there may be a street light on every other pole. Yet, because municipalities are outside of the Commission's jurisdiction, the Commission could not require municipalities to provide information about the location of their attachments or to

update a national database when they remove, relocate or modify their existing attachments or place new attachments. This would mean that the Commission, or potential attachers, would not have accurate or complete information for a substantial portion of utility poles. The same problem exists for ducts, conduit and rights of way.

There is also strong potential that a database or other reported data would become out of date. The status of poles, ducts, conduit, and rights of way is constantly in flux as new attachments are continuously made while old ones are removed. Absent a weekly or monthly reporting requirement or updates, which would be unduly burdensome, it would be impossible to keep track of these changes.

Establishing a nationwide database or reporting requirement would impose significant administrative burdens on the industry as well as the Commission. These burdens would significantly outweigh any potential benefits from a national database or reporting requirement. As the Commission previously acknowledged, there are “millions of utility poles and untold miles of conduit in the nation.”¹⁰⁶ Verizon’s incumbent carrier operations own about 5.2 million poles in twelve states plus the District of Columbia.¹⁰⁷ In order to implement a national database or reporting requirement, pole owners and attachers would need to incur significant expenses associated with purchasing the necessary software, and would then be required to expend significant resources to conduct poles surveys and/or transfer their existing records to the new database. Many companies have not yet transitioned their pole, conduit, duct and rights of way record to electronic formats, and would need to incur substantial expenses to convert their paper

¹⁰⁶ *Local Competition Order* ¶ 1143.

¹⁰⁷ *See Sullivan Decl.* ¶ 4.

records to electronic formats. For pole owners that own several hundred thousand or even several million poles, this process would be time consuming and could take several years to complete. Even where companies already use electronic programs to maintain pole, conduit, duct and rights of way records, that existing information would still need to be transferred to the new database, which would require significant time and resources. Finally, reviewing information for millions of poles, thousands of miles of ducts and conduits for which there is no demonstrated issue is not an efficient use of the Commission's or the industry's resources.

III. THE COMMISSION'S CURRENT COMPLAINT PROCESS IS WORKING EFFECTIVELY AND SHOULD ONLY BE MODIFIED TO PROMOTE INFORMAL RESOLUTION OF DISPUTES

In Verizon's experience, the Commission's current complaint process is effective in resolving pole attachment disputes. Any pole attachment complaints that have been brought against Verizon were resolved without a final decision by the Commission.¹⁰⁸

A. The Commission Should Continue to Encourage Informal Dispute Resolution Procedures, Including Mediation.

Although the Commission's pole attachment complaint rules and formal complaint rules do not require pre-complaint mediation, the Market Disputes Resolution Division of the Enforcement Bureau strongly encourages all parties to participate in its mediation process. The Division offers to help mediate a dispute, preferably before a pole attachment complaint is filed. According to the Division's website, "[t]he Division has had great success with its mediation efforts; many cases that would have been formal complaints have been resolved informally without further litigation with the help of [Market Disputes Resolution Division] staff."¹⁰⁹

¹⁰⁸ There is a recent complaint proceeding that is still pending before the Commission where the parties are actively engaged in settlement discussions.

¹⁰⁹ See <http://www.fcc.gov/eb/mdrd/> (last viewed on August 16, 2010).

The Commission should continue to require parties to attempt to resolve their dispute privately before filing a formal complaint. The *FNPRM* (§ 81) notes that the New York Public Service Commission requires that disputes be discussed at the intermediate level in a company before a formal complaint can be filed. The Commission's pole attachment rules already contain a similar requirement. Every pole attachment complaint must "include a brief summary of all steps taken to resolve the problem prior to filing" the complaint. 47 C.F.R. § 1404(k). If the complainant did not take steps to resolve the problem, the complaint must "state the reason(s) why it believed such step were fruitless." *Id.* These provisions appropriately require parties to attempt informal resolution of disputes before filing a complaint.

The Commission also proposes to eliminate the requirement to file a complaint within 30 days of a denial of access. *FNPRM* § 82. The Commission is concerned that such a short deadline "hinders informal resolution of disputes." *Id.* While the Commission's concern may be well founded, the Commission should modify the deadline, rather than eliminate it.

In a case where a party has been denied access, it is important to address the issue promptly. These fact-specific disputes are best resolved while memories are fresh and business records are readily available. Instead of setting no time frame for filing such a complaint, the Commission should revise the rule to indicate that the party must either request informal dispute resolution, pre-complaint mediation or file a complaint within 30 days. If any party objects to dispute resolution or mediation or if such dispute resolution or mediation is not successful, the complainant should then be required to file its complaint within 30 days. With these modifications, parties will be able to engage in informal processes for resolving the dispute.

B. The Commission Should Not Extend Remedies Prior to Notice of a Dispute.

The Commission proposes to revise its rules that limit the measurement of remedies from the date the complaint was filed and instead allow the remedies to be calculated consistent with the statute of limitations period. *FNPRM* ¶ 88. While there may be cases in which it would be appropriate to measure remedies prior to the filing of the complaint, it would not be appropriate to measure remedies for any period of time before the respondent has actual notice of a dispute.

The Commission notes two cases in which it measured damages for a period of time before the complaint was filed, but in each case the measure was from the time the respondent was given notice of the dispute. *See FNPRM* ¶ 84 n.231. Until the respondent has notice of a dispute, both parties are in agreement as to the terms of the contract and there is no injury. The respondent has no opportunity to avoid or mitigate the remedies prior to receiving notice of a dispute. The Commission should therefore modify its proposed rules to preclude remedies for any period of time prior to the respondent receiving actual notice of a dispute.

C. The Commission Should Increase Penalties for Unauthorized Attachments.

The Commission correctly notes that the problem of unauthorized attachments is not merely theoretical. *FNPRM* ¶ 91. Verizon has had attachers deliberately bypass the pole attachment application process and make unauthorized attachments in the middle of the night. The Commission's current penalties for unauthorized attachments were not stiff enough to deter these unauthorized attachments.

Unauthorized attachments are not just a problem for the pole owner; they can also harm other attachers. For example, an unauthorized attachment might be placed on a pole in the space that had just been licensed to another attacher. The new attacher will not be able to make its attachment while the unauthorized attachment occupies its licensed space and its network

deployment will be delayed until the unauthorized attachment issue is resolved. In addition, an unauthorized attachment may prevent the pole owners or other attachers from completing make ready work necessary for a new attacher to make its attachments. Again, resolving the unauthorized attachment issue will delay the new attacher's network deployment.

The Commission notes that the Oregon commission has implemented unauthorized attachment penalties of \$500 per pole, per year, for attachment of facilities without an agreement, and, for attachments without a permit, \$100 per pole plus five times the current annual rental fee per pole. These stiffer penalties could serve as a further deterrent to unauthorized attachments. However, in order to make these penalties effective, the Commission should incorporate them into its pole attachment rules and make clear that utilities can enforce them through the Commission's pole attachment complaint processes.

CONCLUSION

The Commission should adopt pole attachment rules that are consistent with Verizon's comments.

Respectfully submitted,



Karen Zacharia
Rashann Duvall
VERIZON
1320 North Courthouse Road
9th Floor
Arlington, VA 22201
(703) 351-3179

Michael E. Glover
Of Counsel

James G. Pachulski
Law Offices of James Pachulski
TechNet Law Group, PC
6001 Montrose Road
Suite 509
Rockville, MD 20852
(301) 770-1235

Attorneys for Verizon

August 16, 2010

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Implementation of Section 224 of the Act

A National Broadband Plan for Our Future

WC Docket No. 07-245

GN Docket No. 09-51

DECLARATION OF JAMES SLAVIN

AND

STEVEN R. FRISBIE

1. My name is James Slavin. My business address is One Verizon Way, Basking Ridge, NJ 07920. I am a Manager with Verizon's Engineering Staff. My current responsibilities include the negotiation and administration of joint use and joint ownership contracts. I am also responsible for the development of methods, procedures and policies pertaining to joint use and licensing for Verizon-owned poles and conduit.

2. I have been employed by Verizon for over 19 years. During my time with Verizon, I have held numerous positions in which I managed various aspects of Verizon's processes for providing access to poles and conduit. I received my Bachelors degree from Clarkson University in 1990.

3. My name is Steven R. Frisbie. My business address is Verizon, 600 Hidden Ridge Drive, Irving, Texas 75038. I am employed by Verizon as a Senior Consultant, Financial Planning & Analysis. My current responsibilities include calculating pole attachment rates under the Commission's rate formulas and performing

financial analyses of Verizon's joint use and joint ownership agreements with electric utilities as well as proposals made during negotiation of these agreements.

4. I have been employed by Verizon for twenty three years with various responsibilities in Finance. My prior duties included financial due diligence and fundamental planning. I received a Bachelor of Business Administration in Management in 1977 and a Masters in Business Administration from Angelo State University in 1991.

I. Purpose of Declaration

5. The purpose of our declaration is to show that Verizon is charged unreasonably high rates for attachments to poles owned by electric utilities. These rates are as much as 11 times higher than the rates these same electric utilities are allowed to charge cable companies for their attachments. In some cases, Verizon is paying up to 80 percent of the utilities' total pole costs even though Verizon's attachments only use about 8 percent of the usable space on these poles.

6. We also demonstrate that where Verizon is forced to pay unreasonably high attachment rates under joint use and joint ownership agreements, those high rates are not offset by other financial benefits in those agreements. Typically, the other financial terms of joint use and joint ownership agreements are mutual and impose offsetting benefits and burdens. In our experience, joint use and joint ownership agreements do not provide Verizon with significant financial benefits that offset the unreasonably high rates that Verizon is forced to pay electric utilities for pole attachments.

Joint Use and Joint Ownership Agreements

7. Verizon generally enters joint use agreements in municipal areas where Verizon solely owns a portion of the poles and the electric utility solely owns the rest of

the poles. These joint use agreements provide the rates, terms and conditions under which Verizon and the electric utility attach to each other's poles. Joint use agreements also govern the terms under which Verizon and the utility will perform make ready work and replace poles.

8. Footprint-wide, Verizon attaches to more than 3 million poles that are owned by electric utilities and covered by joint use agreements. About 69 percent of these poles are located in states not certified to regulate pole attachments.

9. Verizon is also a party to joint ownership agreements. Verizon generally enters joint ownership agreements in municipal areas where Verizon and the electric utility share ownership of poles to which Verizon and the electric utility are attached. Joint ownership agreements govern, for example, the terms under which Verizon and the utility will perform make ready work and replace poles. Verizon and the electric utility generally do not charge each other for attachments to their jointly owned poles.

10. In municipalities where Verizon is party to a joint ownership agreement, not all of the poles are necessarily jointly owned. Either Verizon or the electric utility may solely own poles in that municipality. Where Verizon needs to attach to a pole that is not jointly owned, but rather is solely owned by the electric utility, Verizon is generally charged an attachment rate for attaching to that pole under the joint ownership agreement.

11. Footprint-wide, Verizon attaches to more than 4 million poles that are covered by joint ownership agreements. About 17 percent of these poles are located in states not certified to regulate pole attachments.

12. Under either joint use or joint ownership agreements, Verizon is limited in its ability to negotiate reasonable attachment rates with the electric utility. This is

because the electric utility typically owns the majority share of the poles and Verizon owns a minority share of the poles. For example, historically, Verizon and an electric utility may have entered into a joint use agreement where Verizon was required to maintain forty percent ownership of the poles covered under the agreement. In recent years, the electric utilities' share of owned poles has been increasing and Verizon's share of owned poles has generally been decreasing. Thus, under many joint use agreements, Verizon may be falling short of the required ownership ratios. Verizon's declining share of owned poles has diminished Verizon's leverage in negotiating the rates, terms and conditions of joint use agreements.

13. The same situation occurs under joint ownership agreements. The number of poles that are solely owned by electric utilities in municipalities continues to grow faster than the number of poles that are solely owned by Verizon. This growing disparity in the relative ownership of poles has diminished Verizon's leverage in negotiating the rates, terms and conditions of joint ownership agreements

14. Although the terms and conditions vary from agreement to agreement, nearly all of them require Verizon to make payments each year based on the number of Verizon's pole attachments. Under some agreements, Verizon and the electric utilities pay each other for their respective attachments. Under other agreements, only Verizon pays the electric utility for its attachments. In either case, Verizon's payments under these joint use and joint ownership agreements can be divided by the number of poles to which Verizon is attached to determine the effective per pole attachment rate Verizon is paying to the electric utility.

Pole Attachment Rates Charged by Electric Utilities Under Joint Use and Joint Ownership Agreements

15. In most cases, the rates that Verizon is forced to pay electric utilities for pole attachments under joint use and joint ownership agreements are unreasonably high. For example, in Pennsylvania, a state not certified to regulate pole attachments, one electric utility is charging Verizon a pole attachment rate of \$96.36 under a joint use agreement. By contrast, we estimate that this same utility's Commission-authorized cable attachment rate is only about \$8.70 per attachment. In other words, this electric utility is charging Verizon an attachment rate that is *11 times* greater than the cable attachment rate.

16. To put these figures in perspective, it is useful to compare the attachment rate Verizon is charged to this electric utility's total pole costs. Based on accounting data on file with the Federal Energy Regulatory Commission ("FERC"), we estimate that this utility's total pole cost is approximately \$117.00. This means that Verizon is effectively paying about 80 percent of this electric utility's total pole costs. Verizon's attachments occupy only 12 inches of pole space, which is less than 8 percent of the usable space on these poles.

17. Verizon's experience in Pennsylvania is not unique. In Texas, another state not certified to regulate pole attachments, one electric utility is charging Verizon a pole attachment rate of \$38.52 per attachment. By contrast, we estimate that this same utility's Commission-authorized cable attachment rate is only about \$6.90 per attachment. In other words, this electric utility is charging Verizon an attachment rate that is nearly *6 times* greater than the cable attachment rate.

18. The rates charged to Verizon are a disproportionate share of this utility's total pole costs. According to FERC accounting data, we estimate that this utility's total pole costs are approximately \$92.00. Verizon is effectively paying about 35 percent of this electric utility's total pole costs, even though Verizon's attachments occupy less than 8 percent of the usable space on these poles.

19. Verizon has also been charged unreasonably high rates in Virginia, another state not certified to regulate pole attachments. One electric utility is charging Verizon a pole attachment rate of \$47.21 per attachment. By contrast, we estimate that this same utility's Commission-authorized cable attachment rate is only about \$6.00 per attachment. In other words, this electric utility is charging Verizon an attachment rate that is almost *8 times* greater than the cable attachment rate.

20. These rates are likewise a disproportionate share of this utility's total pole costs. According to FERC accounting data, we estimate that this utility's total pole costs are about \$81.00. Verizon is effectively paying approximately 55 percent of this electric utility's total pole costs, even though Verizon's attachments occupy less than 8 percent of the usable space on these poles.

21. The overall impact of the unreasonably high rates charged by electric utilities is staggering. In Verizon's ILEC footprint, Verizon is paying at least \$54 million more for pole attachments than it would pay if electric utilities charged Verizon no more than the Commission's cable rate.

Joint Use and Joint Ownership Agreements Do Not Provide Significant Financial Benefits.

22. As explained above, the rates charged under these joint use and joint ownership agreements are, in many cases, unreasonably high. In our experience, these agreements generally do not contain other terms and conditions that offset the financial burden of these high attachments rates. Typically, the other terms and conditions are mutual, imposing both benefits and burdens on Verizon. For example, if a joint use agreement provides for an electric utility to perform make ready work for Verizon at no charge, it would almost certainly require Verizon to perform make ready work for the electric utility at no charge.

23. These terms for “no charge” make ready work effectively offset each other, but do not make up for the unreasonably high attachment rates Verizon is forced to pay. In fact, in most cases, Verizon performs more make ready work at the request of the utility than the utility performs at the request of Verizon. This is because upgrades to an electric utility distribution network generally require more pole space, while upgrades to Verizon’s network generally do not require more pole space as fiber facilities can simply be overlashed to Verizon’s existing attachments. As a result, these mutual “no charge” make ready provisions are more of a burden for Verizon.

24. Another example of an offsetting burden is the requirement to remove the old pole when it is replaced with a new pole. Both joint use and joint ownership agreements typically require that the last party to transfer its facilities to the new pole is responsible for removing the old pole. Because transfers are normally performed in order

from the top of the pole and Verizon attaches at the bottom of the pole, Verizon is nearly always responsible for removing the old pole.

III. Conclusion

25. In many cases, Verizon is forced to pay unreasonably high attachment rates to utilities under the terms of joint use and joint ownership agreements. These agreements do not provide any significant financial benefits that offset the high attachment rates imposed on Verizon.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 16, 2010


James Slavin

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 12, 2010



Steven R. Frisbie

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Implementation of Section 224 of the Act

A National Broadband Plan for Our Future

WC Docket No. 07-245

GN Docket No. 09-51

DECLARATION OF AMY E. SULLIVAN

1. My name is Amy E. Sullivan. My business address is 33 Winter Street, Haverhill, Massachusetts. I am a Manager—Licensing Administration Group for Verizon. My current responsibilities include supervising the processing of pole attachment applications from conducting make ready surveys and issuing licenses after all required make ready work has been completed. In addition, I manage Verizon’s joint use and joint ownership arrangements with other utilities. In this capacity, I work extensively with electric utilities to process applications to attach to jointly-owned poles.

2. The purpose of my declaration is to describe Verizon’s processes for responding to pole or conduit access applications, preparing make ready estimates and performing make ready work. I also describe the minimum amount of time it typically takes for Verizon to complete these processes, as well as the numerous factors that can impact the time Verizon requires to complete the steps necessary to provide access to poles or conduit. Many of these factors are outside of Verizon’s control. I also explain that Verizon’s processes are designed to ensure that competitive providers receive reasonable, timely, non-discriminatory access to Verizon’s poles and conduit.

Extent of Verizon's Pole and Conduit Ownership Nationwide

3. To place Verizon's pole and conduit application processes into context, it is important to understand the volume of poles and miles of conduit that Verizon owns as well as the typical size of pole and conduit access applications.

4. As of December 2009, footprint-wide, Verizon solely owned and jointly owned the equivalent of about 5.2 million poles (with the joint owner typically being an electric company).¹ The number of poles that Verizon owns varies widely from state to state. In New York, Verizon owns approximately 1.1 million poles.² By contrast, in Delaware, Verizon owns approximately forty three thousand poles.³ And, in the District of Columbia, Verizon owns approximately seventeen thousand poles.⁴

5. In 2009, footprint-wide Verizon received about two thousand pole access applications. Typically, an application seeking access to Verizon's poles involves between two hundred and three hundred poles.

6. As of December 2009, footprint-wide Verizon owned approximately 92,000 kilometers of conduit.⁵ The kilometers of conduit that Verizon owns varies widely from state to state. In New York alone, Verizon owns approximately 23,000

¹ See letter from Ann Berkowitz, Verizon, to Marlene Dortch, FCC, in WC Docket No. 07-204 (March 24, 2010). For reporting purposes, each Verizon jointly-owned pole is reported as the equivalent of a half of one pole. For example, if Verizon had a joint ownership interest in 200 poles, Verizon reports an equivalent ownership of 100 poles.

² See *id.*

³ See *id.*

⁴ See *id.*

⁵ See *id.*

kilometers of conduit.⁶ By contrast, in Delaware, Verizon owns approximately 900 kilometers of conduit.⁷ In 2009, footprint-wide Verizon received more than four hundred applications for access to its conduit.

Responding to Poles and Conduit Access Applications/Performing Make Ready Surveys (Stage 1)

7. Under the Commission's existing rules, pole and conduit owners are required to respond to applications for access to poles and conduit within forty-five days of receipt.⁸ This deadline accurately reflects the time required to complete all of the steps associated with processing pole applications and completing the necessary make ready surveys to ensure that the new attachments can be made safely.

Filing of the Application for Access to Poles or Conduit

8. For Verizon's solely owned poles and Verizon-owned conduit, prospective attachers initiate the process by submitting applications to Verizon with the required application processing and make ready survey fees. Verizon's License Administration Group processes pole or conduit access applications on a first-come, first-served basis. Typically, applicants do not provide Verizon with advance notice before filing large applications.

9. Verizon's application processes may vary from state to state. Verizon's website provides detailed summaries of the application process for each state where

⁶ *See id.*

⁷ *See id.*

⁸ 47 C.F.R. § 1.1404(b).

Verizon owns poles.⁹ In addition to providing detailed summaries of the application process, in some states including Massachusetts, Rhode Island and New York, Verizon offers workshops to familiarize prospective attachers with the application process. Verizon's licensing staff is also available to answer any questions that prospective applicants have about the application process or required fees.

10. For Verizon's jointly-owned poles, the prospective attacher is typically required to submit an application to both pole owners. This is because each owner owns a percentage (often half of the pole) and controls part of the pole.

Processing the Application

11. Typically, within one to two business days after receiving a pole or conduit access application, Verizon's Licensing Administration Group reviews the application and searches Verizon's internal records on the poles or conduit at issue. Many of these records are still in paper form and must be searched manually.¹⁰ Generally, it takes one to three days for Verizon to locate its records on the poles or conduit included in an application.

⁹ See <http://www22.verizon.com/wholesale/business/poleconduit/ne/0,22262,ne,00.html> (describing the application process for Massachusetts and Rhode Island); <http://www22.verizon.com/wholesale/business/poleconduit/ctny/0,22262,ctny,00.html> (describing the application process for Verizon East: Connecticut and New York); <http://www22.verizon.com/wholesale/business/poleconduit/midatl/0,22262,atl,00.html> (describing the application process for Delaware, Washington, D.C., Maryland, New Jersey, Pennsylvania, Virginia); <http://www22.verizon.com/wholesale/business/poleconduit/west/0,22262,west,00.html> (describing the application process for California and Texas).

¹⁰ In many areas, Verizon has begun the process of converting its pole and conduit records to electronic formats. However, this process will take a number of years given sheer volume of poles and kilometers of conduit that Verizon owns as well as the costs and time required to complete this conversion.

12. Many applications seeking access to Verizon-owned poles or conduit provide incorrect, incomplete or otherwise unclear responses to the information requested on Verizon's application. Where the incorrect, incomplete, or unclear information is not required to begin processing the application, Verizon can begin processing the application, and in some case is actually able to provide or fix the information at issue. However, where the incorrect, incomplete or otherwise unclear information is critical (*i.e.* information required to locate or identify the specific poles or conduit at issue in the application), Verizon is unable to process the application until the applicant provides the corrected information.

13. Despite Verizon's detailed application instructions, many applicants provide incorrect pole identification numbers or conduit manhole location in their application (*i.e.* they transpose numbers within the pole identification number, or for jointly owned poles they provide the other owner's pole identification number).

14. Where an applicant fails to provide the correct pole identification number or conduit manhole location, Verizon's licensing staff is unable to provide this information given the sheer volume of poles and conduits and related records that Verizon maintains. The applicant is in the best position to provide this information because the applicant is most familiar with the specific location of the poles and conduit at issue in their applications.

15. Other critical errors and omissions in pole and conduit access applications can impact the time it takes for Verizon to process those applications. Specifically, some applicants fail to provide the necessary application processing fees or make ready survey fees. Verizon requires upfront payment of these fees to ensure that it

is compensated for the work associated with processing pole applications and completing make ready surveys. Other applicants fail to include all of the poles in a line in their applications. For example, an attacher may include ten out of fifteen poles on a street in its application. Where this occurs, it is necessary for the attacher to amend its application to include the omitted pole(s) or clarify that it is not seeking to attach to the omitted pole(s).

16. Where Verizon is unable to process an application due to missing or incorrect critical information, Verizon must wait for the applicant to make the necessary changes to its application. Typically, applicants take a few days to several weeks to make the necessary corrections or adjustments. Verizon has no control over when applicants make the required changes to an application.

Scheduling and Performing the Make Ready Survey

17. After completing the records search, Verizon schedules its make ready survey. The make ready survey is required to confirm the availability of space on the poles or in the conduit at issue also to determine the make ready work necessary to accommodate the new attacher. Verizon schedules make ready surveys on a first-come, first-served basis.

18. Typically, Verizon invites the applicant to participate in its make ready survey. Many applicants do in fact attend Verizon's make ready survey. Therefore, the date of Verizon's make ready survey is often dependent on the availability of the prospective attacher. Often, after Verizon has proposed a survey date, the prospective applicant responds that it is not available until a date that is several days to several weeks out from Verizon's proposed date.

19. For Verizon's jointly-owned poles, Verizon also invites the other pole owner to attend a joint make ready survey. However, in many cases, the other pole owner declines to attend a joint make ready survey. Verizon cannot force the other pole owner to participate in a joint make ready survey and lacks leverage to expedite other owners' make ready survey.

20. Generally, for typical sized applications, it takes anywhere from a few days to a week to perform the make ready survey. However, the make ready survey can be delayed by numerous factors that are outside of the pole or conduit owners' control, including adverse weather conditions, permitting requirements or property permissions, and work stoppages. These factors can significantly increase the time required to complete make ready work. The need for pole replacement involves numerous additional step and introduces additional variables that can also increase the time required to complete make ready work.

21. In addition, significant changes to the scope of an application can require Verizon to restart the entire process. For example, if an applicant changes the proposed route for the attachments, or adds significantly more poles or miles of conduit, Verizon will need to conduct a new records search and schedule the make ready survey for some time after the records search has been completed. Verizon has no control over whether an applicant will make these types of significant midstream changes.

Make Ready Invoices (Stage 2) and Payment of Make Ready Estimate (Stage 3)

22. After the make ready survey is completed, Verizon's finalizes the make ready determination. For Verizon's jointly-owned poles as well as poles that are subject to joint use agreements, it is typically necessary for Verizon to reconcile its make ready

determinations with the other pole owners' make ready determination. The reconciliation process often requires several phone calls or in-person meetings, and may involve an additional visit to the pole sites at issue. As a result, it can take several weeks to reconcile make ready surveys. Verizon strives to complete the reconciliation process before responding to the application. However, where the other pole owner does not agree with Verizon's make ready determination, this may not be possible.

23. Using its make ready determinations (or reconciled make ready determinations), Verizon's License Administration Group prepares an estimate for the required make ready work. Verizon's make ready estimates provide detailed explanations of the work to be performed and the related costs. Typically, Verizon provides prospective attachers with a make ready estimate when Verizon responds to pole or conduit access applications, which is generally within the forty-five days of receiving a complete application. Applicants have opportunities to discuss Verizon's make ready determinations and make ready invoice.

24. Verizon takes several measures to ensure that its make ready charges are transparent. First, Verizon's make ready invoices provide detailed descriptions of the costs for each type of required work. Many of Verizon's pole licensing agreements already provide schedules of Verizon's make ready charges for common make ready work such as cable lowers. In some states, Verizon's licensing agreements allow attachers to pay for make ready work on a unit-cost basis, which means that attachers pay the same rate for the same type of make ready work, regardless of the actual time and labor required at a specific pole site. In addition, Verizon routinely receives and responds to requests for average ranges of the costs for common types of make ready work.

25. Before performing any make ready work, Verizon requires full payment of the make ready invoice. This ensures that Verizon is appropriately compensated for any make ready work it performs to accommodate the new attacher. Generally, applicants respond to and submit payment for Verizon's make ready invoice within several days to a week after receipt.

26. More often than not, where make ready work is billed on an actual cost basis, Verizon's initial make ready estimates are less than Verizon's actual costs of performing the make ready work. This is because Verizon has no way of precisely predicting the actual amount of time or labor required to complete make ready work. Where Verizon's actual costs are greater than the make ready costs the applicant paid, Verizon issues a "true-up" invoice that reflects the difference between the actual costs and the amount paid based on Verizon's estimate. In those rare situations where the actual costs exceed Verizon's make ready estimate, Verizon quickly issues a refund to the attacher.

Performing Make Ready Work (Stage 4) and Coordinating Make Ready Work With Existing Attachers or the Other Pole Owner (Stage 5)

27. Completing make ready work is a multi-step process that includes, but is not limited to, the following steps: (1) reconciling Verizon's make ready determinations with the other pole owners' make ready determinations (assuming this step was not completed before Verizon provided its own make ready estimate to the applicant); (2) notifying existing attachers of any make ready work they will be required to perform; (3) developing an engineering design for the make ready work; (4) obtaining any necessary rights of way, permits, or other permissions required to perform the make ready work; (5) scheduling the make ready work (which includes coordination of the schedules of

multiple attachers that may also be required to perform make ready work and assigning a work crew to the project) and (6) performing the make ready work. Because of the numerous steps involved, where non-pole replacement make ready work is required, Verizon typically requires at least sixty days from the date that make ready payment is received. Where even a single pole needs to be replaced, more than sixty days is typically required to perform pole replacement make ready work.

Reconciling Pole Owners' Respective Make Ready Determinations

28. As explained above, for jointly-owned poles and poles subject to joint-use arrangements, it is typically necessary for Verizon to reconcile its preliminary make ready determinations with the other pole owner's make ready determinations. In some cases, due to the lack of cooperation of the other pole owner, the reconciliation process does not take place until after Verizon has already provided the attacher with a make ready estimate based on Verizon's own make ready determinations. Where this is the case, the necessary notifications to existing attachers and scheduling of the make ready work is typically delayed until after the scope of required work has been confirmed.

Notifying Existing Attachers of the Required Make Ready Work

29. Consistent with the Commission's rules, Verizon is required to provide sixty days' notice to all other existing attachers who are required to perform make ready work.¹¹ Verizon typically provides this notice in writing within a week of receiving the applicant's make ready payment. Existing attachers can object to the proposed make ready work. Where this occurs, an additional one to two weeks may be required to resolve these issues.

¹¹ 47 C.F.R § 1.1403 (c).

30. After Verizon notifies existing attachers of the need to perform make ready work, the applicant generally deals with existing attachers directly and also pays existing attachers directly for their make ready work.

Developing the Engineering Design

31. Where Verizon is required to perform make ready work, Verizon's engineers must develop an engineering design to provide detailed instructions for the required make ready work, including the precise location for any cables to be lowered, or precise location for a new pole. It typically takes up to thirty days to complete the engineering design. For jobs involving unusually large numbers of poles or miles of conduit, or unusually complicated engineering design (including the need to move other equipment such as Fiber Distribution Hubs, terminals, and replacing one or more poles) developing the engineering design could require additional time.

Scheduling Make Ready Work

32. After the engineering design is complete, Verizon begins scheduling make ready work. Consistent with the Commission's existing rules, Verizon does not prioritize its own facilities work ahead of work necessary to accommodate competitors' attachments on Verizon's poles or conduit. In many cases, the scheduling of make ready work requires the coordination with the timing of other attachers' make ready work.

Performing Make Ready Work and Factors Impacting the Performance of Make Ready Work

33. Typically, where pole replacement is not required, it takes Verizon at least sixty days from the date that make ready payment is received to complete make ready work. For typical applications (usually involving no more than 300 poles), the actual number of poles or miles of conduit at issue does not significantly impact the time

required to complete make ready work. However, for unusually large applications more time may be required to complete the necessary make ready work. The type of attachment, whether wireline, or cable or antennae equipment, does not significantly impact the time required to complete make ready work.

34. Numerous factors outside of Verizon's control can impact the time it takes to perform make ready work. These factors include, but are not limited to, adverse weather conditions, municipal permitting requirements and property permissions or rights of way, the actions (or inaction) of existing attachers or the other pole owner, and work stoppages.

Adverse Weather Conditions

35. Because make ready work (as well as make ready surveys) for poles is performed outside, the time required to complete make ready work can be impacted by both routine and extreme weather conditions. Weather can also impact the timing of make ready work for conduit.

36. For example, snowstorms, flooding, tornados, hurricanes, and earthquakes can make it impossible to perform make ready work until the weather improves. Many of these types of weather conditions can also cause loss of electric, phone, or cable service to customers. Where weather conditions result in service outages, the priority, rightly so, is on restoring service to customers, which on average can take as much as two to four weeks depending on the scope of the service outages.

37. Because a significant percentage of make ready work on Verizon's poles is still performed using ladders rather than "bucket trucks," heavy rains, lightening storms, below freezing temperatures, light snow or icing, and high winds, can make it

necessary to reschedule make ready work because it would be unsafe to use a ladder in these conditions. For conduit, even light rain can make it necessary to pump excessive water from manholes before any make ready survey or make ready work can be performed in Verizon's conduit.

38. Depending on the severity of the weather condition and extent of any related service outages, adverse weather conditions can delay the performance of make ready work by a month or more.

Make Ready Permits, Property Permissions, and Rights of Way

39. In some areas, Verizon must obtain a permit in order to perform make ready work. In other areas, particularly urban locations, Verizon must obtain permission to access the pole or conduit site, such as pole sites located on or accessible only through private property or conduits located under privately owned buildings. It may also be necessary to obtain rights of way, a police detail for the worksite, or permission from the local transportation authority to divert traffic while the make ready work is being performed.

40. Where these types of permissions or permits are necessary, Verizon files the necessary paperwork as soon as possible. However, ultimately, Verizon has no control over when the necessary permissions, permits, or police details will be issued. Typically, it can take Verizon anywhere from several weeks to several months to obtain the necessary permits, permissions or rights of way. During this time, Verizon and other existing attachers are unable to start their make ready work, and typically are not able to schedule the make ready work until the necessary permissions or rights of way have been obtained.

Actions of Other Attachers or the Other Pole Owner

41. Verizon's poles and conduit often have multiple attachers, and as a result, it is often necessary to sequence each attachers' make ready work. While Verizon's attachments occupy the lowest position on the pole, Verizon's may be unable to perform its make ready work until the other pole owner or other attachers complete their make ready work. Other parties' actions can delay Verizon's make ready work by several months or even longer. Verizon lacks control over when other attachers perform their make ready work.

42. For example, to accommodate a new attacher, it may be necessary for a municipality to first lower or raise street lamps on a line of poles so that other attachers can make the necessary adjustments to their attachments. Municipalities do not typically budget for this type of work and often do not have a process in place to seek reimbursement for make ready work. Accordingly, additional coordination and time is required where municipalities must perform make ready work. Any delay on the part of the municipality could prevent Verizon or other attachers from raising or lowering their lines. Pole owners have no control over when the municipality, or any other attacher, completes the required make ready work. Where pole replacement is required, all attachers must wait for the pole owner to place the new pole, and then transfer their lines to the new pole in sequence. If one party fails timely to transfer its lines to the new pole, then the attachers immediately below that delaying attacher would be unable to transfer their lines to the new pole.

43. One attachers' make ready delays can also delay Verizon's issuance of a license to attach to Verizon's conduit or poles. This is because the new attacher cannot

safely attach to the pole until the make ready work required to accommodate the new attacher has been completed. As a result, even when an ILEC pole owner has timely completed its own make ready work, a license may not be issued until after all of the other existing attachers have completed the required make ready work.

Performing Make Ready Work Where Pole Replacement is Required

44. Where pole replacements are required, numerous additional steps are required to perform make ready work, including ordering and placing the new pole, and sequencing the transfer of lines to the new pole. These additional steps also introduce additional variables in the make ready process that can also impact the time required to complete the required make ready work. Accordingly, it would be appropriate not to make pole replacement make ready work subject to the same timeframes as non-pole replacement make ready work. Indeed, in contrast to make ready work where pole replacement is not required, pole replacement make ready work typically requires more than sixty days from receipt of make ready payment.

45. Where Verizon is the pole owner, Verizon strives to avoid pole replacement whenever possible. However, in some situations, pole replacement is unavoidable (*i.e.* situations where the new attacher cannot be accommodated by simply lowering Verizon's cables or raising the electric company's cables). Where Verizon is responsible for replacing the pole, Verizon orders the new pole from an outside vendor and must wait for the pole to arrive before the new pole can be placed. Verizon, like other pole owners, has no control over the availability of poles from outside vendors. Some outside vendors take between one to three weeks to deliver a new pole. Placing a single pole, including transferring the pole to the new location, can take up to a full day.

Where multiple pole replacements are required, the make ready work can take up to an additional day for each pole requiring replacement.

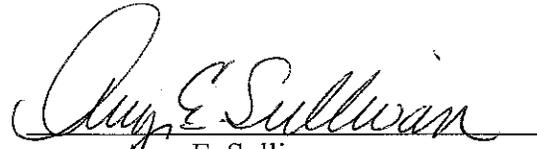
Issuance of the License

46. The final step in Verizon's process is the issuance of a license to attach to Verizon's poles or conduit. Verizon's licensing organization does not issue licenses to attach to Verizon-owned poles until *after* Verizon's required make ready work has been completed. This ensures that the new attachment is not placed on the pole until it is safe to do so.

47. This concludes my declaration.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August __, 2010


Amy E. Sullivan