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

In the Matter of)
)
Implementation of Section 224 of the Act; and) WC Docket No. 07-245
)
A National Broadband Plan for Our Future) GN Docket No. 09-51
)

**COMMENTS OF
LEVEL 3 COMMUNICATIONS, LLC
CONCERNING THE COMMISSION'S ORDER AND
FURTHER NOTICE OF PROPOSED
RULEMAKING**

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Dated: August 16, 2010

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EXECUTIVE SUMMARY

Level 3 is the operator of a global telecommunications network and the owner of approximately 194,000 pole attachments in the United States. Its comments in this proceeding focus on supporting the Commission's effort to reduce unreasonable pole attachment charges and discourage undue delay by pole owners, which are the two most important problems for prospective attaching parties.

While generally supporting the Commission's proposed new rule, which would implement an accelerated five-stage timeline for wireline pole attachments, Level 3 recommends that whenever an application is for less than 25 poles in a single application, the five-stage timeline should be viewed as excessive. Level 3 proposes that the Commission endorse the existence of fundamental obligation by utilities to implement an appropriate and timely process for pole access, irrespective of the timeline.

Level 3 supports the Commission's effort to unify the telecommunications and cable rates for pole attachments, to the extent possible under Section 224 of the Communications Act, as amended. In addition, Level 3 has observed that Appendix A of the Commission's Order and Further Notice of Proposed Rulemaking in this proceeding reveals that several utilities are not calculating the maximum telecommunications attachment rate in the manner that the Commission's staff seems to believe is correct. Part of the discrepancy may be the result of utilities calculating their own average number of attaching entities in a manner that increases the attaching parties' proportional allocation of the cost of unusable space. Level 3 requests that the Commission investigate the discrepancies identified in these Comments.

Level 3 believes that any pole owner should have the right to certify and approve the use of contract workers on its poles, but only if it is prepared to establish and maintain a certification

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and approval process that is valid. For those utilities that do not validly certify contractors to perform survey and make-ready work, attaching parties should be entitled to engage contractors whose workers have the same qualifications, in terms of training, as the pole owner's own workers and contractors.

Level 3 supports the Commission's effort to strengthen the remedies available to attaching parties, including an allowance for compensatory damages. However, Level 3 urges the Commission to reject changes to its rules that would waive the right to "sign and sue" over a pole attachment agreement when the attaching party has not given pole owner prior written notice of objection to its terms and conditions. Level 3 also proposes an arbitration process that would be more expeditious than a formal hearing, but would result in the publication of a final decision.

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Level 3 Communications, LLC (“Level 3”) submits these Comments in response to the Order and Further Notice of Proposed Rulemaking released on May 20, 2010.¹

I. INTRODUCTION.

Level 3 is the owner of an extensive global telecommunications network that spans more than 50,000 miles, linked to approximately 125 metropolitan networks that together comprise another 27,000 route miles. This advanced, high-capacity network is largely of Level 3’s own construction, and the land-based facilities are designed using underground facilities wherever possible. However, primarily due to its acquisition of other carriers that had previously constructed aerial facilities, Level 3 is also the owner of approximately 194,000 pole attachments in the United States. These attachments are found in both urban and rural areas, and all are used to provide telecommunications services, as that term is defined by Federal law.² Accordingly,

¹ *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, Order and Further Notice of Proposed Rulemaking, FCC 10-84 (rel. May 20, 2010) (“*Order & FNPRM*”).

² 47 U.S.C. § 153 (46).

Level 3 has a strong interest in pole attachments, and in seeing a successful outcome to the Commission's regulatory efforts in this area.

Chapter 6 of the *National Broadband Plan* has recognized the importance of the nation's public infrastructure, including existing utility poles, in achieving broadband development.³ As one of the largest competitive service providers in the communications marketplace, Level 3 plays an important role in achieving the Commission's goal of encouraging long-term expansion and innovation in the many industries spawned by the Internet. Also, Level 3 is a participant in the Broadband Technology Opportunities Program, receiving more than \$15.8 million to expand broadband access in six states. Its advanced network provides the platform for many innovative new broadband applications.

II. BACKGROUND.

Level 3 has successfully developed a worldwide network with primary reliance on buried conduits and cabling. Even in areas where utility poles exist, Level 3 believes that underground facilities are preferable, because of their resistance to damage from severe weather, motor vehicle accidents and vandalism. However, underground infrastructure is costly, and the expense of installing underground cabling and conduit for "last mile" and "middle mile" facilities in areas of low population sometimes cannot be justified.⁴ In some areas of the United States, there are simply too few potential customers per mile of network construction for underground installation to be economically feasible.⁵ These low population zones represent the

³ *Connecting America: The National Broadband Plan*, Federal Communications Commission (the "*National Broadband Plan*."), at 127 (2010) (<http://www.broadband.gov/plan>).

⁴ Level 3 applies the term "last mile" to local distribution networks and "middle mile" to the backhaul facilities that connect local distribution networks to remote Internet backbones and transport services.

⁵ See Michael J. Copps, Acting Chairman, Federal Communications Commission, *Bringing Broadband to Rural America*, Report on a Rural Broadband Strategy, at ¶ 113 (May 22, 2009) ("*Rural Broadband Report*") (discussing the costs of deploying broadband in rural areas).

precise areas in which broadband deployment is at its lowest levels.⁶ However, Level 3 has found that use of existing utility poles can open wide new areas to the prospect of broadband development. Accordingly, Level 3 strongly supports the Commission's regulatory agenda to improve access to utilities' owned and controlled distribution poles.

The Commission has correctly focused on unreasonable charges and undue delay by pole owners, as the two most important problems for prospective attaching parties. Level 3 is able to comment, on the basis of its own experience, that delay is a serious problem, and that the Commission's previous rules in that regard have not been adequate. Although several utilities have urged the Commission not to adopt a one-size-fits-all approach, Level 3 has experienced multiple occasions in which the period of time from the date of its application until make-ready work was completed has exceeded four months.⁷ Level 3 shares with utilities a general opposition to hard-and-fast rules, and would prefer not to be subject to a rigid approach, but it must be pointed out that sometimes a posted speed limit and a traffic cop are necessary. The Commission has previously required only that if an applicant's request for access to utility poles is not granted within 45 days, then the utility must confirm the denial in writing by the 45th day, with specificity.⁸ That vague standard has exposed attaching parties, including Level 3, to frequent delays. These delays raise the costs of construction, deprive attaching parties of predictability in their installation schedules and impede the delivery of advanced services to consumers.

⁶ *Id.* at ¶ 27 (stating that "broadband service in rural America is generally inadequate.")

⁷ *See, e.g.*, Comments of the Coalition of Concerned Utilities, WC Docket No. 07-245 *et al.*, at 80-81 (filed March 7, 2008) ("Coalition of Concerned Utilities Comments"); Comments of the Edison Electric Institute and the Utilities Telecom Council, WC Docket No. 07-245 *et al.*, at 73-76 (filed March 7, 2008) ("Edison Electric Institute Comments").

⁸ 47 C.F.R. § 1.1403(b).

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The *National Broadband Plan* acknowledges that to promote the deployment of broadband, rental rates for pole attachments should be as low as possible, and also as uniform as possible.⁹ The principal issue of uniformity is the stark discrepancy between rates paid by cable companies and telecommunications carriers. The problem is obvious: cable television companies now offer broadband services that are functionally equivalent to those of telecommunications providers. Moreover, in reading the filed comments of electric utilities, incumbent LECs, cable companies, competitive telecommunications providers and others who have expressed views in this and other dockets dealing with pole attachments, Level 3 has never found one that suggests it costs the pole owner less to accommodate a cable television wire than it does a wireline telecommunications attachment. The Commission now proposes a revised rule for establishing the maximum rate a telecommunications carrier can be charged for attachments.¹⁰ While precise uniformity may not be achieved by the new rule, the Commission's analysis shows that the difference between the cable and telecommunications rates would be much smaller than at present.¹¹ The Commission's proposal allows that if the low-end telecom rate is calculated to be less than the rate produced by the current cable formula, then the utility would be permitted to charge the higher of the two rates. Inasmuch as the Supreme Court has already ruled that the cable rate allows for recovery of the pole owner's fully allocated cost, there is support for the belief that the cable rate is just and reasonable.¹² Level 3 concurs with the Commission's conclusion.

⁹ *National Broadband Plan* at 110.

¹⁰ *Order & FNPRM* at ¶¶ 132-141.

¹¹ *Id.* at ¶ 141.

¹² *See FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987).

Complaints arising from disputes over pole attachments have been handled in recent years by the Commission's Enforcement Bureau. The staff of the Enforcement Bureau has made significant progress in speeding up the handling of complaints, largely through an expedited mediation process that is a welcome alternative to the lengthy formal complaint process. However, mediation almost always results in compromise, so an aggrieved attaching party cannot expect to prevail in all aspects of its challenges to a pole owner's rates, terms and conditions. Therefore, unless the pole owner's practices are especially egregious or costly to the attaching party, most attachers are unwilling to undertake the costs that mediation entails. Moreover, the costs of mediation may end up being wasted if the pole owner refuses to accept the mediator's findings, because mediation is not a final adjudication. Finally, there is the problem that mediation does not produce a formal record, and many of the problems are common to multiple pole owners. In other words, resolving a complaint with a pole owner by mediation does nothing to prevent the problem from being encountered again and again in each pole owner's territory. A more expeditious formal process that produces a precedent for future negotiations would bring substantial improvement to the Commission's regulatory scheme for pole attachments.

III. LEVEL 3'S RECOMMENDATIONS FOR REDUCTION OF DELAY.

- A. *The Commission should adopt its proposed five-stage timeline for wireline pole attachments, subject to a fundamental obligation of pole owners to implement an appropriate and timely process for pole access.***

The Commission's proposed new rule, which would implement a five-stage timeline for wireline pole attachments, represents a substantial improvement for attaching parties, who would benefit from the certainty of completion within a specific time frame. Even so, it must be noted that the total time comprised in the five-stage process could be as long as 148 days, which Level 3 believes would be overly generous in the case of many small attachment requests. In the *Order*

& *FNPRM*, the Commission considers proposals to extend the time line in cases where an application is for a very large number of requests.¹³ Two approaches the Commission is considering would be modeled on policies established by regulators in the States of Utah and Vermont.¹⁴ Level 3 believes the Utah and Vermont proposals are overly detailed and complicated. Moreover, the rulemakers in Utah and Vermont had the benefit of being able to consider the needs of easily identified pole owners and attaching parties in just their own states. By comparison, the FCC rules will apply to a much wider range of utilities, with much greater variability in the number of poles owned and in the utilities' staff resources.¹⁵

Level 3 desires to see pole owners given incentives to develop strategies for dealing with the inevitable fluctuations in the number of pole attachment applications. To that end, Level 3 supports an expansion of the use of pre-authorized and certified contractors for survey and make-ready work, as the Commission is proposing in the *Order & FNPRM*.¹⁶ To excuse pole owners from adherence to the five-stage timeline in cases of large applications would reward utilities that resist the Commission's urgings to make better use of contractors. Moreover, Level 3 desires that the five-stage timeline proposed by the Commission not be construed as a "safe harbor" for pole owners when an application involves only a small number of poles. Pole owners should have a fundamental obligation to provide a timely process for pole applications, irrespective of the five-stage timeline. Therefore, it is Level 3's recommendation that whenever

¹³ *Order & FNPRM* at ¶¶ 47-49.

¹⁴ *Id.*

¹⁵ The Commission's rules, implementing Section 224 of the Communications Act of 1934, as amended, 47 U.S.C. § 224 ("Section 224"), apply in all but the 19 states and the District of Columbia that have certified that they regulate pole attachments. *States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, DA 10-893 (rel. May 19, 2010).

¹⁶ *Order & FNPRM* at ¶¶ 55-65; see discussion of utilities' allowance of contractors at Section V.A, below.

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an application is for less than 25 poles in a single application, the five-stage timeline should be viewed as excessive, except in unusual circumstances. For such small attachment applications, Stages 1 through 4 should almost always be completed within a combined time frame of 75 days.

Level 3 opposes any extension of the proposed five-stage timeline for applications involving large numbers of attachments. However, should the Commission decide that flexibility to extend the time frame is necessary, then in Level 3's opinion, the five-stage timeline proposed by the Commission is reasonable in cases of applications up to 5 percent of the owner's poles or 3000 poles, whichever is greater. Pole owners could reasonably be allowed to aggregate applications from more than one attaching party in demonstrating that their process is timely. Level 3 also believes it is reasonable for the Commission to adopt a rule that applicants must give advance notice to pole owners of impending large applications, and pole owners must give notice to applicants that pending workload is in excess of the utility's usual processing capabilities. Any relaxation of the five-stage timeline proposed by the Commission on a case-by-case basis, whether for large applications or any other reason, should be dependent on the utility having implemented a valid and expeditious process for involving contractors in make-ready and survey work.

Level 3's final recommendation with respect to the time line is that attaching parties should have the right to proceed with Stage 1, the survey of pole availability, before completion of a master pole attachment agreement, provided that the attaching party agrees to make payment in advance of the pole owner's standard costs for the survey.¹⁷ Receiving, reviewing, negotiating and signing a master pole attachment agreement often represents a large part of the delay that

¹⁷ Level 3 must emphasize that it is not suggesting that a pole attachment applicant should always be required to pay for survey work in advance, but only when a master pole attachment agreement has not yet been executed.

applicants experience. Moreover, it is the urgency of moving forward with the survey that often forces an attaching party to accept unreasonable terms in the agreement. Utilities obviously have a need to ensure they will be paid for the survey work, which is ordinarily achieved by entering into a master agreement, but that need for financial security would be accomplished by the advance payment.¹⁸ Moreover, the utility has a need to impose various other reasonable requirements on attaching parties, such as insurance and indemnities, but such protections are needed only for risks that arise in connection with make-ready and attachment processes. In short, Level 3 believes there is no reason to delay the commencement of Stage 1 (the survey phase) while a master agreement is being finalized.

IV. LEVEL 3'S RECOMMENDATIONS FOR IMPROVEMENT OF RATE REGULATIONS.

- A. *The Commission should be aware that some utilities charge substantially more than the telecom rates that the Commission sets forth as just and reasonable, and the Commission should investigate these apparent discrepancies.***

The *Order & FNPRM* includes an Appendix setting forth the Commission staff's calculation of pole attachment rates, based on the cable rate formula, the telecom rate formula, and the telecom formula as it would exist under the Commission's new proposed formula.¹⁹ For many, including Level 3, these calculations were very revealing. Level 3 has never filed a formal complaint over pole attachment rates, and has assumed that pole owners charge the maximum pole rental rates after properly applying the formulas set forth in the Commission's rules. Attempts to apply the formulas for verification purposes are difficult, because most attaching parties have little experience with the source documents from which data is taken, or with the calculation methodology. Carriers that have tried to apply the formulas have been

¹⁹ *Order & FNPRM* at Appendix A.

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confronted with some uncertainty as to its details, and absent filing a pole attachment complaint, there has previously been no way of knowing exactly how the Commission staff would calculate the maximum rate under the applicable formula.

What Appendix A of the *Order & FNPRM* reveals is that several electric utilities are not calculating the maximum rate in the manner that the Commission staff seems to believe is correct. As a nationwide carrier, Level 3 has pole attachment agreements with several of the electric utilities and incumbent LECs identified in Appendix A of the *Order & FNPRM*, and three of the electric utilities and one of the ILECs are now charging Level 3 substantially more than the maximum rate calculated by the staff, as set forth in Figure 1, below. The following chart identifies the discrepancies:

Figure 1

Company Name	Urban Telecom		Non-Urban Telecom		Single
	<u>Rate (5 attachers)</u>		<u>Rate (3 attachers)</u>		<u>Rate</u>
	FCC Calculation	Level 3 Actual	FCC Calculation	Level 3 Actual	Level 3 Actual
Gulf Power	\$ 9.54		\$14.38		\$40.60
Georgia Power	\$ 9.54	\$13.70	\$14.42		
Tampa Electric	\$ 12.46		\$18.71		BEGIN CONFIDENTIAL - END CONFIDENTIAL
Verizon PA	\$ 3.26	\$ 3.94	\$ 4.92		

Based on the actual annual fees, per attachment, being charged in 2010 to Level 3, Gulf Power, Georgia Power, Tampa Electric and Verizon (Pennsylvania) are all charging significantly more than the maximum rate calculated by the Commission staff. To the best of Level 3’s knowledge, Gulf Power and Tampa Electric do not offer separate urban and non-urban rates, and the single rates they are charging Level 3 are obviously higher than any of the rates calculated by the Commission’s staff. In Georgia Power’s territory, Level 3 is being charged a rental rate for

urbanized attachments that is higher than the maximum rate calculated for that category by the Commission's staff.²⁰ Verizon's urbanized rate in Pennsylvania is not as starkly different as the three electric companies' rates, but is still significantly higher than the Commission's staff calculation. If the discrepancies for these four pole owners are typical of what would be found around the country, it is clear that as a rate regulator, the Commission's policies are not functioning properly.

A small part of the difference between rates calculated by certain pole owners and the Commission staff, as shown in Figure 1, may be attributable to pole owners using their own presumptions to allocate unusable space under the telecom formula element. The presumption for the "number of attaching entities" is set forth in the Commission's rules, and in their calculations set forth in Appendix A of the *Order & FNPRM* the Commission staff has assumed that the utilities use the two presumptive averages of 5 attaching entities (urbanized) and 3 attaching entities (non-urbanized).²¹ The Commission's rules permit utilities to conduct their own pole surveys and calculate the average number of attaching entities for their own service areas, rather than using the Commission's presumptive averages.²² However, it has been Level 3's experience that some of the utilities that calculate their own averages are combining their urban and non-urban pole data to develop a single rate. This practice allows the low number of attaching entities in rural areas to pull down the overall average, thereby increasing the attaching parties' proportional allocation of the cost of unusable space, and producing a somewhat higher attachment rate. While Level 3 considers that practice to be a violation of the Commission's rules, it probably cannot explain the very large difference in rates revealed in Figure 1, above.

²⁰ Level 3 has no non-urbanized attachments in Georgia Power's territory.

²¹ 47 C.F.R. § 1.1417.

²² *Id.* at § 1.1417(d).

Level 3 believes that the Commission should clarify that under its rules, pole owners must offer rates for urbanized and non-urbanized service areas, using either the presumptive averages provided in the rules, or by conducting their own valid investigations that establish actual averages on a urbanized and non-urbanized basis. Moreover, Level 3 believes that the Commission should recognize that its rate setting process, which is based on complaints filed by attaching parties, has not eliminated over-charging, as evidenced by the data presented in Figure 1, above. With such clear evidence that the Section 224 and the Commission's rules are being ignored in some cases, the Commission should initiate an investigation of overcharging by utilities. The investigation should require utilities to submit the actual rental rates they are charging, and Commission staff should compare those rates to their own calculations of the statutory maximums.

B. Level 3 supports the Commission's effort to unify the telecom and cable rates for pole attachments, and recommends approval of the proposal set forth in the Order & FNPRM.

The Commission's present rules contain an arbitrary distinction between the maximum rate a cable company and a telecommunications carrier can be required to pay for pole attachments. This distinction is one of the most significant problems in the Commission's pole attachment regulatory scheme. As the service offerings of cable television companies and telecommunications carriers have become more similar, the unfairness of this distinction has become stark. The *National Broadband Plan* has made clear that the rates for pole attachment should be low and as close to uniform as possible, in order to "support the goal of broadband development."²³ Level 3 believes that the long-term goal of the Commission should be to fully unify the two rate scheme, perhaps through new legislation. However, the problem is immediate,

²³ *National Broadband Plan*, Recommendation 6.1 at 128.

as many commenters in the Commission's pole attachment proceedings have agreed.²⁴ In that context, the Commission has proposed a reasonable solution by revising the definition of "costs" for purposes of Section 224(e). Level 3 notes that the cable rate has been upheld by the Supreme Court as fully compensatory of the electric utility's costs.²⁵ Therefore, by guaranteeing under the proposed new rules that the maximum telecom rate of any utility would never be lower than the cable rate, and given that utilities are permitted to charge up to the maximum rate, the Commission ensures that electric utilities are not required to subsidize telecommunications attachers.²⁶

V. LEVEL 3'S RECOMMENDATION ON USE OF CONTRACTORS.

- A. *To perform pole surveys and make-ready work, the Commission should require that all pole owners allow attaching parties to engage contractors who have the same qualifications, in terms of training, as the utilities' own workers.***

There are many cases in which pole owners maintain reasonable lists of approved contractors to perform surveys and make-ready work, usually listing nearly all of the reputable vendors who provide services in the utility's territory. In such cases, Level 3 has never known of a case in which it desired to have different contractors perform its work than the ones approved by the utility. Where problems have arisen are cases in which the utility provides a very short list of vendors or no list at all. Moreover, Level 3 rejects the notion that the risk of unfair and unreasonable conduct of utilities in regard to the approval and certification of contract workers is greater when the pole owner is an incumbent LEC than when it is an electric utility.²⁷ In Level

²⁴ See, e.g., *Order & FNPRM* at ¶ 116 (discussing comments from cable commenters); Coalition of Concerned Utilities Comments at 37-44; Edison Electric Institute Comments at 95-100.

²⁵ *FCC v. Florida Power Corp.*, 480 U.S. at 254.

²⁶ *Order & FNPRM* at ¶ 141.

²⁷ See e.g., *Order & FNPRM* at ¶ 65 (stating that risks of unreasonable pole owner conduct in regard to the approval and certification of contractors are "heightened in the context of incumbent LEC utility poles, where the new attacher typically will be a competitor of the incumbent LEC.").

3's experience, the opposite is more often true. Electric utilities and their employees often display a general hostility toward the concept of sharing pole space with competitive telecommunications providers, as displayed by onerous non-negotiable terms and conditions in pole attachments and uncooperative day-to-day interactions at the employee level and in policy matters. Accordingly, it is somewhat perplexing to see the Commission propose rules for approval and certification of contract workers that provide fewer protections for attaching parties when the pole owner is an electric utility. Most notably, the Commission proposes to allow electric utilities (and non-incumbent LECS) to pre-approve contractors to perform surveys and make-ready work. By comparison, incumbent LECs must allow surveys or make-ready work to be performed by any contractor who has the same qualifications, in terms of training, as the utility's own workers, without requirement for pre-approval.²⁸ Level 3 has seen no valid evidence that the risk of unreasonable conduct regarding pole attachments is any less if the pole is owned by an electric utility.

Level 3 believes that any pole owner should have the right to certify and approve the use of contract workers on its poles, but only if it is prepared to establish and maintain a certification and approval process that is valid. Any list of approved contractors that does not include most of the established, reputable vendors in the state should be suspect. If there is no list, or if the list does not include most of the vendors that persons knowledgeable in the industry would reasonably expect to find providing pole surveys and make-ready services in the relevant geographic area, an attaching party should be entitled to engage contractors whose workers have the same qualifications, in terms of training, as the pole owner's own workers and contractors. Whether the pole owner is an electric utility or an incumbent LEC should not be a factor.

²⁸ *Order & FNPRM* at ¶¶ 62 & 65.

VI. LEVEL 3'S RECOMMENDATION FOR IMPROVEMENT OF ADJUDICATION AND REMEDIES.

- A. *The Commission should reject changes to its rules that waive the right to “sign and sue” over a pole attachment agreement when the attaching party has not given pole owner prior written notice of objection to its terms and conditions.***

Under current Commission rules, attaching parties have the right to execute a pole attachment agreement with a utility and then later file a complaint that alleges some provision of that agreement is not just and reasonable.²⁹ Level 3 acknowledges that this so-called “sign and sue” rule has been controversial. Utilities point out that it is hypothetically possible for an attaching party to engage in a negotiation with the pole owner, accept some concession in exchange for giving in on another point, sign the agreement, and then file a complaint to escape enforcement of everything it conceded to the utility.³⁰ Such arguments rely on an erroneous assumption that most pole owners are engaging in meaningful negotiation of their agreements. Utilities are the owners of monopoly facilities, and in Level 3’s experience, most will make only token concessions to the standard terms of their agreements. Attaching parties often do not sign the agreements because they have reached accord on significant provisions, but rather that they can no longer delay their construction while negotiations drag on. Pole attachments are heavily regulated utility assets. Congress has placed on the Commission the obligation to “regulate the rates, terms and conditions for pole attachments to provide that such rates, terms and conditions are just and reasonable.”³¹ There is no exception in the law for terms and conditions forced down the throats of attaching parties by pole owners with unequal bargaining power. In any

²⁹ *Order & FNPRM* at ¶ 99.

³⁰ *See, e.g.*, comments of numerous pole owners cited in the *Order & FNPRM* at ¶ 102, n. 276. *See also, e.g.*, Edison Electric Institute Comments 109-110.

³¹ 47 U.S.C. § 224(b)(1).

case, the Commission has stated that where a *quid pro quo* is established, the Commission will not disturb the bargained-for package of provisions.³² That statement by Commission is enough.

The Commission has proposed amending its rules to require attaching parties to provide a utility with written notice of objections to a provision in a proposed pole attachment agreement during contract negotiations, as a prerequisite for later bringing a complaint challenging that provision.³³ Such a change in policy would emasculate the sign and sue rule, and should not be adopted.

Delay is the principal weapon of pole owners, and it is their unreasonable delaying tactics that have brought attaching parties to the Commission for assistance on many occasions.³⁴ The Commission's proposed rule change assumes that pole owners will proceed to sign a pole attachment agreement after receiving from the attaching party a written notice of objection to a provision. Level 3 believes that assumption is wrong. The reason the sign and sue rule is necessary is that attaching parties cannot go on negotiating forever. If the pole owner reacts to the written notice of objection by refusing to sign the agreement, or by announcing that it will reopen negotiations on those issues, the attaching party will be faced with the very thing that the sign and sue rule was intended to prevent, which is delay.

Level 3 believes that the best policy would be for the Commission to withdraw the proposed rule change that would require a written notice of objections. However, if the Commission decides to proceed with that change, then some protections must be added to

³² *Order & FNPRM* at ¶ 105.

³³ *Id.* at ¶ 107. The Commission has proposed an exception when the provision is not unreasonable on its face, but is later applied by the utility in a manner that is unjust and unreasonable and such application was not reasonably anticipated. *Id.* at ¶ 108.

³⁴ *See, e.g.*, Petition of Fibertech Networks, L.L.C. for Rulemaking, RM-11303, at 1 (filed Dec. 7, 2005); Comments of MetroPCS Communications, Inc., WC Docket No. 07-245 *et al.*, at 8-9 (filed March 7, 2008).

prevent the sign and sue rule from being rendered a nullity. One such protection might be for the Commission to clarify in its Order that a utility's refusal to sign an agreement or any subsequent delay by the pole owner in finalizing the agreement or performing any of its obligations under the agreement because an attaching party has issued a written notice of dispute will be construed as *per se* unjust and unreasonable.

B. The Commission should express its intention to award compensatory damages when a pole owner is found to have engaged in unlawful denial or delay of access or established rates, terms, or conditions that are unjust or unreasonable.

As the Commission has stated, “the only consequence a utility engaging in [unjust or unreasonable] conduct is likely to face in a complaint proceeding is a Commission order requiring the utility to provide the access it was obligated to grant in the first place.”³⁵ This, of course, speaks to the deterrent effect that compensatory damages would have on unjust and unreasonable conduct, and the Commission's analysis is absolutely correct. However, Level 3 would like to add that compensatory damages would also empower more carriers to assert their rights, in which case adherence to Section 224 and the Commission's rules would be more effectively policed. Although the Commission's *Order & FNPRM* is an important step toward better regulation, the Commission's pole attachment regulatory scheme is largely complaint-driven, with most guidelines coming from adjudications, rather than rules. Attaching parties that believe they have been unlawfully delayed in access to poles, or subjected to rates, terms and conditions that are unreasonable, now bear an unreasonable share of the risk in a challenge to a utility's rate, term or condition. The possible recovery is simply too small, compared to the costs

³⁵ *Order & FNPRM* at ¶ 86.

of bringing the complaint and the ever-present possibility of an outcome that is not completely favorable.

C. The Commission should adopt an expedited dispute resolution process that results in a published decision.

It is Level 3's belief that the Commission's present voluntary mediation process, which operates in conjunction with a traditional formal complaint procedure, has not produced satisfactory results in many cases. As discussed above, mediation does not produce a formal record, so decisions are not precedent-setting, and the investment of time and resources by the parties and the Commission staff have a very limited benefit. Level 3 proposes that the Commission adopt a form of arbitration for pole attachment disputes that pole owners and attachers are not able to resolve between themselves. The elements of such a process should include:

(1) Whenever a pole attachment application, including the negotiation of a master pole attachment agreement has been pending for 90 days or more without resolution, the applicant should be allowed to file a complaint and request for arbitration to resolve all open issues;

(2) In the initial complaint and arbitration request, the Commission's requirements should be streamlined. The rules should not require the detailed briefing, affidavits and pre-filed testimony normally required in a formal complaint under the Commission's rules;

(3) The pole owner should have an opportunity to respond within 25 days after the filing of a complaint and arbitration request;

(4) The arbitrator should limit his or her consideration to the issues raised in the attaching party's complaint and the utility's reply;

(5) The arbitrator's decision should be published within 180 days following the date the complaint is filed; and

(6) Pending a final resolution in the arbitration, an applicant should be entitled to proceed with pole attachments under the standard terms offered by the utility. A utility's refusal to process attachment applications under its customary policies while the arbitration is pending should be construed as *per se* unjust and unreasonable.

VII. SUMMARY AND CONCLUSION

Level 3 acknowledges that the *Order & FNPRM* introduces substantial new clarity to the Commission's pole attachment regulatory policies. Moreover, if the Commission's proposals set forth in the *Order & FNPRM* are implemented promptly, they will substantially lower the cost of pole attachments and reduce delays in deploying new broadband infrastructure. The modifications to the proposed rules suggested in these Comments, would further improve the Commission's regulatory scheme for pole attachments.

Respectfully submitted,

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Dated: August 16, 2010