

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

**In the Matter of**

<b>Implementation of Section 224 of the Act</b>	)	<b>WC Docket No. 07-245</b>
	)	
<b>A National Broadband Plan for Our Future</b>	)	<b>GN Docket No. 09-51</b>
	)	

**To: The Commission**

**COMMENTS  
OF THE  
COALITION OF CONCERNED UTILITIES**

**Allegheny Power  
Baltimore Gas and Electric Co.  
Dayton Power and Light Co.  
FirstEnergy Corp.  
National Grid  
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**Filed: August 16, 2010**

## SUMMARY OF ARGUMENT

The *Coalition* is hopeful that the serious concerns of the electric utility industry will be considered more carefully and treated more fairly by the full Commission during the course of this Further Notice than they were by the Commission staff in the National Broadband Plan.

The staff's recommendations in the National Broadband Plan were not based on a fair review of the extensive record in that proceeding. Instead of recognizing the electric industry's real-life, practical concerns about electric safety and reliability, the staff simply ignored them in favor of attachers proposals that were not well-founded, but apparently were more consistent with pre-determined goals, including rates for pole attachments that would be cheap without regard to real costs of service.

For decades, communications companies have attached their facilities to tens of millions of utility poles across the country without incurring the substantial cost and inconvenience of constructing and maintaining their own distribution systems. In return for making their internal distribution systems available to attachers, utilities have been "rewarded" with unfair and discriminatory pole attachment rates, countless unauthorized attachments, myriad safety violations and innumerable administrative burdens.

Broadband availability is an important national goal, to be sure, but the Commission's proposals, although well-intentioned, are largely unworkable in the real world of electric distribution systems. They would create far more problems than they would solve, including safety hazards for those working on electric poles, and would do little to promote broadband availability while sacrificing electric service reliability.

Electric utilities should not be required as a matter of public policy to jeopardize the safety and reliability of their systems or to subsidize the deployment of broadband or other

services for the benefit of third party communications companies under any conditions, much less ones that would have little practical benefit. Even if they made sense from practical and policy perspectives, most of the Commission's proposals exceed its statutory authority.

Virtually all of the Commission's proposals in this proceeding are based on the one-sided and dangerous proposals in the National Broadband Plan and are designed to expedite the attachment process, reduce attacher expenses and otherwise facilitate the attachment of communications facilities to utility poles.

Rather than endanger electric utility distribution systems and those who work on them, the *Coalition* urges the Commission to maximize the responsibilities of the beneficiaries of this process -- the attachers -- and minimize their dependence on electric utilities and others. Common sense suggests that desired results are achieved when the party seeking the result is directly involved.

**Make-Ready Deadlines.** The proposed make-ready deadlines are unworkable and unwise. They do not account for the numerous circumstances beyond a utility's control that would make compliance impossible. They would require utilities to favor communications company work over their own and would create a flood of disputes. It is also unfair to treat electric utility pole owners the same as ILEC pole owners that compete with the attaching entities. The record in this proceeding will be inadequate for the Commission to impose these deadlines on any electric utility, much less hundreds of electric utilities nationwide.

**Scheduling Make-Ready Work.** Electric utilities have little control over attachers and lack basic information necessary to coordinate and manage the movement of existing attacher facilities. This work solely benefits attachers and should be performed or controlled by the attachers themselves.

**Billing and Collecting.** Requiring electric utilities to obtain rearrangement cost statements from existing attachers, bill new attachers and dispense compensatory payments would be time-consuming and expensive, distract utilities from performing make-ready duties, and result in countless disputes. This

work should remain with the attachers themselves.

**Moving Attacher Facilities.** Pole owners should not be required to move attacher facilities. Electric utility and ILEC pole owners lack the expertise, training and equipment to move each other's facilities or those of municipalities and other entities, and they lack the authority to do so in any event. Their agreements with unions also often prevent such work.

**Wireless Attachments.** The record is insufficient for the Commission to establish make-ready deadlines for or otherwise mandate the attachment of wireless antennas. Each pole owner must have its questions answered to its satisfaction without being forced by the Commission to allow wireless attachments on its poles, particularly on pole tops.

**Outside Contractors.** The hiring of make-ready contractors by communications companies raises serious safety, liability and reliability concerns and should be disallowed. Communications companies lack the expertise and information necessary to perform sensitive design and make-ready work. The use of contractors as proposed also would violate collective bargaining agreements and disrupt the labor pool of contractors. Communications company contractors should not be permitted to work in the electric space or in the communication worker safety zone (*e.g.*, the safety space) on either utility or ILEC poles.

**Single Managing Utility.** Requiring the electric utility or ILEC pole owner to be a "managing utility" to deal with attaching entities on jointly-owned poles is unnecessary and impractical, and would improperly alter the joint ownership relationship. Further, the proposal fails to comprehend that sole-owned electric or sole-owned telephone poles are routinely encountered on fiber routes, and, as such, both owners almost always will be involved. This proposal should be rejected.

**Upfront Payments.** The Commission's proposal to allow attachers to pay make-ready costs in stages should be abandoned. Electric utilities are not banks available to finance attacher make-ready activities on demand, and the risk of nonpayment is too great.

**Posting Schedules of Charges.** Requiring the posting of make-ready fee schedules makes little sense, would not be useful to attachers and would create unnecessary disputes. It should be rejected. Fees charged for make-ready work depend on the requirements of each specific job, and cost and resource information changes constantly.

**Boxing and Extension Arms.** Pole owners must be free to modify their standards regarding attachment techniques over time as deemed necessary and appropriate.

**Pole Availability Databases.** The collection and maintenance of databases to identify the availability of pole space on every electric utility pole under FCC jurisdiction would be a colossal waste of resources and of little benefit to attachers.

**Dispute Resolution Procedures.** The current dispute resolution procedures work, since the vast majority of disputes are resolved amicably. The proposal to allow compensatory damages should be rejected since it would encourage attachers to create new disputes and to be less inclined to resolve old ones. To minimize additional disputes, attachers should file access complaints within 30 days, and refunds should accrue only as of the date of the complaint.

**Unauthorized Attachments.** The problem of unauthorized attachments is acute and significantly compromises electric system safety and reliability. Sanctions similar to those authorized in Oregon (\$50 - \$100 per unauthorized attachment in addition to back rentals for five years) are required to protect the integrity of the distribution system and to encourage attachers to act responsibly.

**Safety Violations.** Safety violation penalties are also needed to ensure compliance. The Commission should clarify that utilities may impose penalties for safety violations in the amount of \$200 per violation, again consistent with Oregon's rules.

**Telecom Rate.** The Commission’s proposed change to the telecom rate is a drastic departure from well-established cost causation principles and is inconsistent with the intent of Congress. The proposal to deny recovery of the “depreciation,” “taxes” and “rate of return” carrying charges attributable to capital costs is also unfounded because communications attachers add significantly to electric utility capital expenditures. This radical and unfounded proposal would cause the telecom rate to fall even lower than the cable rate and result in an unconstitutional taking.

To level the playing field and promote broadband services, the Commission should raise the attachment rate for commingled telecom/broadband service to a level higher than the Section 224(e) Telecommunications rate, thus effectively eliminating the one-sided and outdated cable-only pole attachment subsidy. Direct subsidies, not artificially low pole attachment rates, will promote broadband deployment to unserved areas.

**ILEC Rates.** ILECs have no statutory right to receive regulated pole attachments, and granting them such rights would create an uneven playing field in their favor to the detriment of other communications attachers and their electric utility joint use/joint ownership partners.

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Allegheny Power, Baltimore Gas and Electric Co., Dayton Power and Light Co., FirstEnergy Corp., National Grid, NSTAR, PPL Electric Utilities, South Dakota Electric Utilities, and Wisconsin Public Service Company (collectively, “the *Coalition of Concerned Utilities*” or “*Coalition*”), by their attorneys and pursuant to Sections 1.415 of the Rules of the Federal Communications Commission (“FCC” or “Commission”), 47 C.F.R. § 1.415, appreciate this opportunity to submit these Comments in response to the Further Notice of Proposed Rulemaking (“Further Notice”) released in this proceeding on May 20, 2010.<sup>1</sup>

**I. FOREWORD**

Millions of distribution poles constructed, owned and maintained by electric utilities are used to deliver electric service to hundreds of millions of consumers throughout the country.

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<sup>1</sup> *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), published in the Federal Register on July 15, 2010. 75 Fed. Reg. 41338. The Coalition is considering a separate response to the Order adopted in this same proceeding, published in the Federal Register on August 3, 2010, 75 Fed. Reg. 45494.

These same poles also are often used by numerous “guests” – cable, telecommunications, broadband and other attachers – as distribution systems to deploy their own services to their own customers.

As a result, two different industries with two different missions and visions now share the same physical plant for the distribution of different services: electric utilities own, operate and maintain it; communications companies use it.

The safe and efficient delivery of electric utility services is dependent upon a highly complex, interrelated series of processes. Electricity drives virtually all of the key components of modern life, yet most people outside the electric utility industry do not give it a passing thought until it is unavailable – when service is disrupted and our telecommunications, transportation, water and banking systems grind to a halt, and our homes, our businesses, and our daily routines, shut down. At that point, the unavailability of electric service is keenly felt by all.<sup>2</sup>

The *Coalition* urges the Commission to give great deference to electric utilities before imposing any new pole attachment regulations intended to benefit attachers but impacting adversely the sound operation of electric distribution systems. At a bare minimum, the *Coalition* is hopeful that the serious concerns of the electric utility industry will be considered more carefully and treated more fairly by the full Commission during the course of this Further Notice than they were by the Commission staff while developing its National Broadband Plan.

*Unfair Bias of the National Broadband Plan*

In the Further Notice, the Commission proposes a host of new pole attachment requirements, all with an eye toward promoting the deployment of broadband services as

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<sup>2</sup> Jason Makansi, *Lights Out: The Electricity Crisis, the Global Economy and What it Means to You*, (John Wiley & Sons, Inc. 2007).

recommended by the Commission staff in the National Broadband Plan.<sup>3</sup> Virtually all of these proposals are designed to expedite the attachment process, reduce attacher expenses and otherwise facilitate the attachment of communications facilities to utility poles.

Unfortunately, the staff's recommendations in the National Broadband Plan were not based on a fair review of the extensive record developed in that proceeding. Rather than objectively evaluating the record, the staff's recommendations were demonstrably one-sided and biased in favor of attachers. In its quest to promote broadband, the staff wholeheartedly endorsed widespread changes in the pole attachment rules recommended by the attacher community and blatantly ignored voluminous comments to the contrary by the electric utility industry.

While supporting the deployment of broadband nationwide, the electric utility industry implored the staff not to do so at the expense of the safe, reliable and efficient operation of electric utility distribution systems across the country – particularly in light of performance concerns regarding the electric distribution grid. Instead of addressing the electric industry's serious concerns, the staff simply ignored them in favor of the attachers' proposals that apparently were more consistent with the staff's pre-determined goals.

The staff presented a one-sided "wish list" for attachers as if it were noncontroversial and beyond debate. The many substantive comments and concerns of the electric utility industry were not even mentioned, let alone discussed or analyzed. They were simply ignored.

A color-coded copy of the footnotes cited by the staff to support the recommendations contained in Chapter 6 of its National Broadband Plan ("Infrastructure"), which addressed pole

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<sup>3</sup> Further Notice at ¶1; *See*, Omnibus Broadband Initiative, Federal Communications Commission, Connecting America: The National Broadband Plan (2010).

attachment issues, is attached.<sup>4</sup> Comments and presentations by the attacher community are highlighted in GREEN. Comments and presentations by the electric utility industry are highlighted in RED.

As is painfully clear, comments and presentations by cable companies, Competitive Local Exchange Carriers (“CLECs”), Incumbent Local Exchange Carriers (“ILECs”) and other representatives of those who attach to utility poles (*e.g.*, the National Cable & Telecommunications Association, NextG Networks, the American Cable Association, Time Warner Telecom, Bright House Networks, FiberNet, Kentucky Data Link, Crown Castle, DAS Forum, T-Mobile, Broadband & Wireless Pole Attachment Coalition, PCIA-The Wireless Infrastructure Association, Independent Telephone and Telecommunications Alliance, Level 3, Windstream, Qwest, Verizon, Sunesys and Fiber to the Home Council) are cited liberally in support of the staff’s recommendations. There are thirty-eight (**38**) citations to filings on behalf of attachers.

On the other hand, throughout the entirety of Chapter Six of the National Broadband Plan, there are only two (**2**) citations to comments and presentations on behalf of the electric utility industry. They are hardly substantive.<sup>5</sup>

Despite voluminous filings by electric utilities and their trade associations, the National Broadband Plan contains no analysis or discussion of competing viewpoints regarding Pole Attachments. There is not even any recognition that there is “another side of the story.” This could not have been the result of an administrative oversight; it had to be an intentional distortion of the record.

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<sup>4</sup> See, Color Coded Copy of Chapter Six Endnotes, attached hereto as **Exhibit A**.

<sup>5</sup> Footnote 16 cites a letter from Georgia Power explaining the reasons for make-ready delays, and footnote 32 cites a letter from the National Rural Electric Cooperative Association simply to identify the number of poles owned by cooperatives.

On April 26, 2010, before adoption of the Further Notice, the *Coalition* notified the Commission that the staff had ignored virtually all electric utility concerns in developing the pole attachment recommendations in the National Broadband Plan.<sup>6</sup> No response was received, and the full Commission has now embraced virtually all of the staff's recommendations as its own in the form of the proposals put forth in the Further Notice.

There is something amiss when Commission staff conducts an open notice-and-comment proceeding to gather information for the formulation of recommendations to the Commission and then completely ignores one whole side of the story. The problem is compounded when the Commission adopts the staff's recommendations as its own and then cites them as authority when proposing new rules.

Although one would never learn it from the National Broadband Plan or the Further Notice, electric utilities already have done far more than their fair share to facilitate the deployment of broadband services throughout the country. For decades, communications companies have attached their facilities to tens of millions of utility poles -- at artificial and extremely modest rates mandated by the Commission -- without incurring the substantial cost and inconvenience of constructing and maintaining their own distribution systems. Cable companies and CLECs simply "hop on board" at costs far below what they would have incurred had they been required to build-out their own systems.

In return for making their internal distribution systems available to attachers, utilities have been "rewarded" with unfair and discriminatory pole attachment rates, countless unauthorized attachments, myriad safety violations and innumerable administrative burdens

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<sup>6</sup> See, Letter to Marlene H. Dortch, Secretary, from Jack Richards, WC Docket 07-245 et seq., April 26, 2010, and attachments, including a list of the filings by the *Coalition of Concerned Utilities*, which, along with virtually all other filings by the electric utility industry, were ignored by the staff in developing the National Broadband Plan, attached hereto as **Exhibit B**.

incident to allowing other parties to use their poles. None of these serious concerns raised by the *Coalition* and others representing the electric utility industry is even mentioned in passing in the National Broadband Plan, yet in the Further Notice the Commission has adopted the staff's recommendations without reservation and proposed to revamp fundamentally the longstanding and successful relationship between attachers and electric utilities.

The staff in its National Broadband Plan and the Commission in its Further Notice have turned a deaf ear to utility concerns. Many of the Commission's proposals in this proceeding will create uncertainties, generate disputes, overwhelm utility and Commission resources, impact union agreements, and undermine the safety and integrity of electric distribution systems.

Many costs incurred by electric utilities in accommodating government-mandated attachments are not recouped under the Commission's current rate formula,<sup>7</sup> yet the Commission proposes to reduce the rates even further. Utilities today are often faced with more attacher requests than they can reasonably accommodate in due course, yet the Commission proposes to impose new and unreasonable timetables and deadlines for responding to attacher demands. Electric utilities and ILECs have worked together successfully for more than 100 years in developing millions of miles of joint use systems, yet the Commission asks whether these long-established relationships should be disturbed. Utilities and their unions have developed mutual arrangements to successfully operate and maintain the electric distribution network, yet the Commission proposes to undermine their existing contracts by interposing mandatory third-party contractors. In sum, while electric utilities work to maintain a safe and reliable system, the Commission proposes to advance broadband in ways that would aggravate the safety and

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<sup>7</sup> As discussed later, the Commission's current Pole Attachment regulations do not come close to allowing utilities to recover their marginal costs incurred in accommodating communications attachments (*i.e.*, all of the costs the utility incurs that it would not have incurred but for the attacher).

reliability concerns raised by the *Coalition* and summarily dismissed by the staff in developing the National Broadband Plan.

Collectively, if implemented, the proposals set forth in the Further Notice could have a dire impact on electric utility operations across the country. Many of them could be devastating to electric utilities.

*The Commission Lacks Expertise Regarding Electric Utility Distribution Plant*

It is no coincidence that Congress left to electric utilities the sole right to determine whether access to their poles, ducts, conduits or rights-of-way should be denied “for reasons of safety, reliability and generally applicable engineering purposes.”<sup>8</sup> This is the function of utilities, not the FCC.

The Commission is properly recognized as the expert federal agency in regulatory matters related to our nation’s communications policies. To our knowledge, however, the Commission is not recognized in any venue as an expert agency in matters related to the safe and efficient operation of the nation’s electric distribution systems.

Notwithstanding this limitation, and based almost exclusively on the staff’s one-sided recommendations in the National Broadband Plan, the Commission in this proceeding is seeking to regulate core aspects of the nation’s electric distribution system with the hope of promoting broadband deployment.

While the electric distribution network may be a cheap and convenient vehicle for cable and other communications companies to use as a platform for deploying their own services, its primary function is to support the safe and efficient distribution of electricity to consumers across the country. Broadband availability is an important national goal, to be sure, but the

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<sup>8</sup> 47 U.S.C. 224 (f)(2).

Commission's proposals, while well-intentioned, to a great extent are unworkable in the real world of electric distribution systems. As explained below, they would create far more problems than they solve, including safety hazards for those working on electric poles and the sacrifice of electric service reliability. After creating new problems, in the end these proposals would do very little to promote broadband availability. The electric utility industry should not be required as a matter of public policy to jeopardize the safety and reliability of its systems or to subsidize the deployment of broadband or other services for the benefit of third-party communications companies under any conditions, much less ones that would have little practical benefit.

Requiring electric utilities to allow the installation of communications attachments on their electric distribution poles pursuant to strict make-ready deadlines and other conditions raises far more risk and is much less advisable than establishing "shot clock" rules for wireless tower sitings.<sup>2</sup> Unconstructed tower sites do not carry lethal currents of electricity necessary to light, air-condition and heat homes and businesses throughout the country. As critical infrastructures, electric distribution systems are subject to stringent operating practices and conditions that cannot safely be disrupted to accommodate attachers in all instances.

Foisting communications facilities onto electric distribution poles can work to a limited extent if all parties are careful and the rules make sense, but it will never be an ideal fit. The safety-oriented, reliable and methodical work of an electric utility is incompatible in many ways with the hurry-up, for-profit incentive of the vast majority of attachers, and the electric distribution system itself is a dangerous and unwelcoming environment for other industries.

When balancing the competing interests in this proceeding, the Commission must give first priority to the public's interest in receiving safe and reliable electric services. Although the

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<sup>2</sup> See, *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, FCC 09-99 (rel. Nov. 18, 2009).

deployment of broadband nationwide is a laudable and important goal, the safety and reliability of critical electric infrastructure must be of absolute, paramount concern. All other goals must remain secondary.

High voltage electric lines are dangerous. Pole attachments are an extremely serious, critically important matter, with broad implications for the reliability of the nation's electric grid and the personal safety of those who work on or near poles, attachments and energized lines. The *Coalition* urges the Commission to exercise extreme caution in adopting any rule changes that could adversely affect the delivery of electric utility services or undermine the viability of the electric utility industry.

## II. INTRODUCTION

The *Coalition of Concerned Utilities* is composed of a diverse group of electric utility companies in terms of size, attachment relationships and operational characteristics. The following is a brief description of the *Coalition* members

**Allegheny Power** provides electric service to approximately 1.6 million customers throughout Pennsylvania, West Virginia, Virginia and Maryland. Allegheny Power operates through three regulated utilities doing business as West Penn Power Company, Monongahela Power Company, and The Potomac Edison Company. Allegheny Power altogether owns in whole or in part 1,600,000 electric distribution poles.<sup>10</sup>

**Baltimore Gas and Electric** provides electricity to more than 1.2 million customers throughout eight Maryland counties. Baltimore Gas and Electric jointly owns more than 382,089 electric distribution poles covering 2,300 square miles.<sup>11</sup>

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<sup>10</sup> <http://www.alleghenypower.com/> (last visited August 16, 2010).

<sup>11</sup> <http://www.bge.com/portal/site/bge/> (last visited August 16, 2010).

**The Dayton Power & Light Company** provides electricity to approximately 500,000 customers in 24 counties throughout West Central Ohio. Dayton Power & Light owns and maintains 322,629 electric distribution poles.<sup>12</sup>

**FirstEnergy** provides electric service to 4.5 million customers throughout 36,100 square miles of Ohio, Pennsylvania and New Jersey.<sup>13</sup> FirstEnergy provides this service to its customers through seven electric utility operating companies.<sup>14</sup> FirstEnergy owns, in whole or in part, 2,008,642 million utility poles.<sup>15</sup>

**National Grid** provides electricity to approximately 3.4 million customers across the Northeast U.S. (serving New York, Massachusetts, Rhode Island and New Hampshire). National Grid owns, in whole or in part, 2,303,700 electric distribution poles.<sup>16</sup>

**NSTAR** provides electricity to approximately 1.1 million customers throughout Massachusetts. NSTAR owns, in whole or in part, 388,000 electric distribution poles.<sup>17</sup>

**PPL Electric Utilities** provides electricity to about 1.4 million customers in Pennsylvania and owns 899,330 distribution poles.<sup>18</sup>

**South Dakota Electric Utilities** (Black Hills Corporation, Montana Dakota Utilities, Northwestern Energy, Northern States Power Company, d/b/a Xcel Energy, Otter Tail Power,

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<sup>12</sup> <http://www.waytogo.com/> (last visited August 16, 2010).

<sup>13</sup> <http://www.firstenergycorp.com/index.html> (last visited August 16, 2010).

<sup>14</sup> FirstEnergy's operating companies are Jersey Central Power and Light, Metropolitan Edison, Ohio Edison, Pennsylvania Electric Company, Pennsylvania Power Company, Cleveland Electric Illuminating Company, and Toledo Edison.

<sup>15</sup> These poles are owned and maintained by FirstEnergy subsidiaries. Penelec owns 496,104 poles; Met-Ed owns 340,239 poles; JCP&L owns 510,000 poles; The Illuminating Company owns 407,299 poles; Ohio Edison owns 751,900 poles; and Toledo Edison owns 255,000 poles.

<sup>16</sup> <http://www.nationalgridus.com/> (last visited August 16, 2010)(National Grid electric subsidiaries Granite State Electric Company, Massachusetts Electric Company, Nantucket Electric Company, Narragansett Electric Company, and Niagara Mohawk Power Corporation now all operate under the name National Grid).

<sup>17</sup> <http://www.nstaronline.com/residential/> (last visited August 16, 2010).

<sup>18</sup> <http://www.pplweb.com> (last visited August 16, 2010).

and MidAmerican Energy), provides electricity to approximately 400,000 customers throughout Montana and South Dakota.<sup>19</sup>

**Wisconsin Public Service** provides electricity to approximately 437,000 electric customers in Northeast and Central Wisconsin and Menominee, Michigan, using approximately 400,000 electric distribution poles.<sup>20</sup>

Altogether, the *Coalition of Concerned Utilities* serves more than 13 million electric customers in 13 states and owns, in whole or in part, approximately 8.5 million electric distribution poles. As the name implies, the *Coalition* is extremely concerned in regard to the Commission's proposals in this proceeding.

### III. ARGUMENT

#### A. The Proposed Make-Ready Deadlines Are Unworkable And Unwise

For the reasons explained in detail below, the *Coalition* recommends the following additions (underlined> and deletions (strike-throughs) to the new and amended rules proposed by the Commission regarding make-ready deadlines for access to poles, ducts, conduits and rights of way:

***§ 1.1403(b) Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice. [AMENDED]***

\* \* \* \*

*(b) Requests for access to a utility's poles, ducts, conduits, or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must explain the denial or grant of access conditioned on performance of make-ready in writing by the 45th day. The utility's explanation shall be specific, shall include all relevant evidence and information supporting its decision and shall explain how such evidence and information relate to a denial or conditional grant of access for reasons of lack of capacity, safety, reliability or engineering standards.*

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<sup>19</sup> <http://www.Northwesternenergy.com> (last visited August 16, 2010).

<sup>20</sup> <http://www.wisconsinpublicservice.com> (last visited August 16, 2010).

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**§ 1.1420 Timeline for access to poles, ducts, conduits, and rights of way. [NEW]**

(a) All time limits in this subsection are to be calculated according to section 1.4 of this title.

(b) A request for access triggers a requirement to perform the obligations in section 1.1403(b) within 45 days, including a survey and engineering analysis used to support a utility's decision. ~~If the utility fails to complete and deliver the survey to the requesting entity within 45 days after the request, the requesting entity may use a contractor to complete the survey and engineering analysis. The utility shall cooperate with the requesting entity in directing and supervising the authorized contractor.~~

~~(1) For poles, ducts, conduits, and rights of way owned by an incumbent LEC utility, the requesting entity shall use a contractor that has at least the same qualifications and training as the incumbent LEC's own workers that perform the same tasks.~~

~~(2) For poles, ducts, conduits, and rights of way owned by a non-incumbent LEC utility, the requesting entity shall use an authorized contractor.~~

~~(c) Within 14 days of providing a survey as required by section 1.1420(b), a utility shall tender an offer to perform all necessary make ready work, including an estimate of its charges.~~

~~(1) The requesting entity may accept a valid offer and make an initial payment upon receipt, or until the offer is withdrawn.~~

~~(2) The utility may withdraw an outstanding offer to perform make-ready work after 14 days.~~

~~(d) Upon receipt of payment, a utility shall notify immediately all attaching entities that may be affected by the project, and shall specify the date after which the utility or its agents become entitled to move the facilities of the attaching entity.~~

~~(1) The utility shall set a date for completion of make-ready no later than 45 days after the notice.~~

~~(2) The utility shall direct and coordinate the sequence and timing of rearrangement of facilities to afford each attaching entity a reasonable opportunity to use its own personnel to move its facilities.~~

~~(3) Completion of all make-ready work and final payment by the requesting entity shall complete the grant of requested access and all necessary authorization.~~

~~(e) If make-ready work is not completed by any other attaching entities as required by paragraph (d) above, the utility or its agent shall complete all necessary make-ready work.~~

~~(1) An incumbent local exchange carrier's facilities may be rearranged or replaced by the utility or its agents 45 days after the notice required in paragraph (d) above.~~

~~(2) A cable system operator's or telecommunications carrier's remaining facilities may be rearranged or replaced by the utility or its agents 60 days after the notice required by paragraph (d) above.~~

~~(f) If make-ready work is not completed in the time specified in paragraph (e)(2) above, the requesting entity may use a contractor to complete all necessary make-ready work. For poles owned by an incumbent LEC utility, the requesting entity shall use a contractor that has at least the same qualifications and training as the incumbent LEC's own workers that perform the same tasks. For poles owned by a non-incumbent LEC utility, the requesting entity shall use an authorized contractor.~~

~~\_\_\_\_\_ (1) The utility shall cooperate with the requesting entity in directing and supervising the contractor.~~

~~\_\_\_\_\_ (2) Upon completion of make ready, the requesting entity shall pay the utility for any outstanding expenses charged by the utility for expenses incurred to complete the make-ready.~~

~~\_\_\_\_\_ (3) Upon receipt of payment or establishment that no further payment is due, the utility shall confirm that the request for access is granted.~~

~~\_\_\_\_\_ (4) Once all make-ready work is performed and the request for access is granted, the requesting entity may use any contractor to install its facilities that has the same qualifications, in terms of training, as the utility's own workers, whether or not the contractor is authorized by the utility.~~

\* \* \*

The Commission proposes a new schedule of deadlines for each step of the attachment application process, along with a new list of responsibilities for utilities in overseeing and managing the process, as follows:

- (1) engineering survey - 45 days
- (2) make-ready estimate – 14 days
- (3) attacher acceptance of the estimate – 14 days
- (4) performance of make-ready – 45 days
- (5) if needed, multiparty coordination – 30 days<sup>21</sup>

In Step 4, the pole owner's notification must include a reminder that all attachers have 45 days to move, rearrange or remove any facilities as needed to perform the make-ready work and that, if they fail to do so, the utility or the new attacher, using authorized contractors, may move or remove any facilities that impede performance of make-ready.<sup>22</sup> After 45 days, the utility must move ILEC attachments as needed and, after 60 days must move other existing attachers to finish the project.<sup>23</sup> If make-ready work is not completed by other attaching entities, it would be the obligation of the utility or its agent (not the new attacher) to complete the work pursuant to the Commission's schedule.

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<sup>21</sup> Further Notice at ¶¶31-45.

<sup>22</sup> Further Notice at ¶40.

<sup>23</sup> Further Notice at ¶43.

This make-ready proposal is unworkable and unwise and should be reconsidered by the Commission. The Commission should not insert itself into the daily decision-making processes of electric utilities across the country or impose specific rules, presumptions and guidelines forcing utilities to do work that should be done by attachers. The Commission should impose no deadlines relating to access and other non-price terms without considering the many differences among electric utility pole owners and the even greater differences between electric utility pole owners and ILEC pole owners. Justifiable causes of delay also should be recognized.

Imposing an artificial timeline makes little sense in the operational world of electric utilities and as a practical matter would be practically impossible to meet for many utilities. There are too many constraints outside of electric utility control, such as the volume of make-ready requests, weather conditions, service interruptions, local and state requirements, private property issues, environmental regulations, road construction, unauthorized attachments, the unresponsiveness of existing attachers, and the many delays caused by the new attacher itself.

Utility pole owners cannot cede control over core aspects of their electric distribution systems. Under the Commission's proposals, however, they would be required to perform the attachers' work and provide priority service to attachers above and beyond what they offer their own electric customers. These proposals would impair the ability of utilities to operate their systems safely, reliably and efficiently, in the best interests of their own consumers.

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

If utilities were required to comply with inflexible deadlines, their other work would suffer. Many utility jobs would not receive the priority they deserve, because utilities first would be required to serve attachers pursuant to a schedule set by the FCC. Utilities should not be penalized for taking the time needed to complete their own electric utility work safely and properly.

Artificial, generic deadlines are not necessary to facilitate broadband deployment. The existing FCC complaint process entitles attachers to seek relief on a case-by-case basis. In most cases this process has worked well and makes a great deal of sense, because each case requires a review of all relevant factors to determine whether the actions taken by either party were unreasonable. Hard and fast rules applicable across-the-board to all utilities ignore the unique operational characteristics of individual systems and intrude on utilities' discretion in satisfying their critical operational requirements.

The Commission's proposals fail to consider the legitimate interests of electric utilities, as well as the interests of State Public Utility Commissions and local regulators, many of which have imposed specific requirements of their own to ensure safe and reliable utility operations within their respective jurisdictions. Utilities are not free to ignore these requirements.

The FCC must reject outright the attacher's argument that they, not utilities, know best how to construct, operate and manage electric utility distribution systems. This notion is as dangerous as it is far-fetched. It should be soundly rejected by the Commission. While recognizing the rights of attachers under the Pole Attachment Act, utilities must be given the discretion to operate and maintain their systems as they see best in their sole, reasonable discretion.

**1. Artificial make-ready deadlines for communications attachments are inconsistent with the safe and orderly processing of work on electric distribution poles**

Electric utilities schedule their field forces well in advance to accommodate all of the electric utility, state department of transportation, communications company, and other work that is pending on their distribution poles. Many utilities establish a four-week rolling work schedule for engineering and field crews and publish it throughout the company. The first week is “locked down,” and nothing but emergency work can change it. New work entering the schedule is phased-in and typically does not start until week three or four.

Utilities need to receive basic information from attachers before they are able to schedule new make-ready work. A utility can begin to take action only after knowing how much make-ready is required, how much work the utility currently has, and how all of this work can be managed given the many other commitments of a utility’s operations department. Third-party attachers’ make-ready requests must be evaluated individually in each case and added to the utility’s continual mix of customer, maintenance and system improvement work, all of which needs to be completed in an orderly fashion in due course as determined by the utility.

Imposing artificial deadlines for the sole benefit of communications companies is inconsistent with a utility’s mission and the orderly scheduling of its work. It does not allow utilities to oversee and properly manage their work. They would be required to “respond to” rather than “plan for” this work, even though they have no advance knowledge of precisely what would be required by the communications companies.

Utilities do not have unlimited resources sitting idle while waiting for the next pole attachment application to arrive. Instead, utility crews and contractors are constantly at work, moving from place to place, responding to emergencies, balancing conflicting demands on their

time and resources and performing make-ready and other assignments as planned and coordinated in advance.

Every utility is operated differently. No utility can staff adequately for an unknown volume of make-ready engineering or construction work. None is in a position to respond “lickety-split” to every attacher request pursuant to an FCC-mandated schedule.

**2. Utilities should not be required to displace their own electric utility work to accommodate communications attachments**

In effect, the artificial deadlines proposed by the Commission elevate communications company work to “walk-in” status entitled to an immediate priority by every utility subject to FCC jurisdiction. This one-sided preference is inappropriate and inconsistent with utilities’ other responsibilities.

Utilities cannot perform any of their work in an unsafe or haphazard manner. Yet, the constraints imposed by inflexible deadlines would require utilities to reprioritize and delay work on behalf of their own electric customers in order to accommodate the demands of communications attachers. Utility operations personnel actually would be forced to perform third-party attacher work before the utility’s own electric work.

Under the Commission’s proposal, this priority would be awarded to communications companies despite what the State Public Utilities Commission and local authorities may require or what the electric utility and its customers may need. For example, make-ready deadlines may necessitate that an attacher’s communications work be scheduled before new load service could be provided to a housing, commercial or industrial development. A housing development, factory, hotel or apartment complex dependent on electric service would be required to wait in line for service while the communications companies move to the front of the line.

There is no telling how long this wait may last. For example, a single application to

attach to 200 poles could identify several months' worth of make-ready work. Engineering surveys alone would be difficult to complete within 45 days, especially when other attachment work continues to come in (perhaps also requesting hundreds of attachments) and the utility must respond to its other requirements as well.

Congress could not have envisioned that the FCC would require electric utilities to reprioritize their core workloads in order to grant priority status to communications attachers. Anytime inflexible deadlines are given more importance than efficient critical infrastructure work, there is the risk to the integrity of the distribution system. A utility should not be penalized by the FCC for taking the time necessary to complete its electric utility work properly. As an expert agency in communications regulation, the Commission is not positioned to make that kind of determination regarding the electric utility industry.

Section 224(f)(1) of the Act requires utilities to “provide cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”<sup>24</sup> This language prohibits discrimination; it does not envision utilities discriminating *in favor of* communications attachers at the expense of their own electric service customers.

If electric utilities were required to schedule and complete communications attachment work before their own work, there may be little incentive to continue what has become standard practice in the industry. Although not required to do so by FCC rules or the Pole Attachment Act,<sup>25</sup> utilities often replace poles for communications attachers in instances where insufficient capacity exists on the existing poles. Currently, electric utilities often allow communications

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<sup>24</sup> 47 U.S.C. § 224(f)(1).

<sup>25</sup> 47 U.S.C. § 224(f)(2) (an electric utility may deny access “where there is insufficient capacity.” *See also Southern Co. v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002).

attachers to pay for such pole replacements, even though the pole replacement process consumes a considerable amount of utility time and resources. Far easier from the utilities' perspective, especially if attachers were afforded a priority over the utility's own customers, may be to deny such requests altogether rather than attempting to accommodate the attachers through pole replacements.

**3. Electric utility pole owners do not compete with communications attachers and should not be subject to the same make-ready deadlines as ILEC pole owners**

Electric utility pole owners do not present the same anticompetitive threat to communications attachers as incumbent local exchange carriers ("ILECs"), because electric utilities, unlike ILECs, do not routinely compete with attachers in the provision of commercial telecommunications services. The great majority of electric utilities offer no commercial telecommunications services whatsoever. Furthermore, unlike ILECs, electric utilities have a higher and more compelling responsibility -- operating their electric distribution systems safely and reliably despite the close proximity of workers and others to high voltage, energized lines.<sup>26</sup>

Since electric utilities lack any competitive incentive to delay the make-ready process for communications attachers, they should not be subject to the same deadlines as ILEC pole owners. If make-ready deadlines are deemed to be useful to prevent anticompetitive activity, they should only be imposed, if at all, on ILEC pole owners alleged to be engaging in anticompetitive activity.

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<sup>26</sup> See 47 U.S.C. § 224(f)(2), which specifies that electric utility pole owners, in contrast to ILEC pole owners, may deny access to poles where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering reasons. See also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, at ¶1177 (1996) ("*Local Competition Order*") ("Nevertheless, we believe that section 224(f)(2) reflected Congress' acknowledgment that issues involving capacity, safety, reliability and engineering raise heightened concerns when electricity is involved, because electricity is inherently more dangerous than telecommunications services. Accordingly, although we determine that it is proper for non-electric utilities to raise these matters, they will be scrutinized very carefully, particularly when the parties concerned have a competitive relationship.").

**4. The proposed make-ready deadlines do not account for numerous circumstances beyond a pole owner's control**

For any given make-ready request, there are a vast number of circumstances beyond the utility's control that easily can impact the development of cost estimates and work schedules and impede the completion of pole attachment work. The Commission's proposed make-ready deadlines do not account for any of these circumstances, even though any one of them could make it impossible for a utility to meet the deadlines.

**Volume.** The sheer volume of a communications attacher applications can create delays. A single communications attacher application might seek permission to attach to 200 poles. Another attacher could submit a separate application for 300 poles within the same time period. A third attacher could submit a similar request. Several months' worth of make-ready work and field surveys for these types of large projects would be difficult if not impossible to complete within 45 days.

**Weather.** The weather can delay any project. Prompt restoration of electric service following a storm, hurricane, flood or other weather-related event must always be given a priority by electric utilities. All routine work stops while service restoration takes place. The weather outside the utility's service area also can cause delays, as electric utility crews have a long and proud tradition of providing mutual assistance to other utilities in other states experiencing emergency restorations. With key service staff out-of-state helping other utilities, workload requirements at the home utility must be adjusted accordingly.

**Service Interruptions.** The interruption of service to electric utility customers is required for certain make-ready work, such as when a pole supporting a transformer needs to be changed-out. The downtime is often scheduled in advance with customers. Industrial and

commercial customers can take several months to coordinate, since all manufacturing or other work being performed by the customer will need to be shut down during the interruption. Hospitals and other critical service providers also require special coordination. None of these customers should be required to put their operations on “hold” pending accommodation of communications attachers.

**Supplies.** With very large projects, obtaining sufficient materials such as brackets, connectors and poles, may take six to eight weeks, causing added delays. For example, although Allegheny is an efficient utility it took the company approximately one year of hard work to build a line into the Whitetail ski resort in Mercersburg, Pennsylvania. Even though the company was able to use a certain amount of existing lines, it was required to special order and replace poles and obtain necessary rights-of-way before the make-ready project could even be started. The proposed make-ready deadlines fail to recognize that sufficient construction materials are not always readily at hand.

**Contractors.** For large projects where there are insufficient internal resources available, utilities may be required to contract out some of the work. In such cases, a specification must be developed, a bid package must be sent, a pre-bid meeting must be held, questions from the contractors must be clarified, and a bid evaluation must be performed prior to awarding the contract. Once the contract is awarded the contractor must order materials and schedule crews needed to complete the work. It may take a minimum of six weeks and maybe eight or more before the contract is awarded, and then another two to four weeks before the crews are ready to begin work. Beginning from the time that a large application is received, it could be at least 12 weeks before a shovel is put in the ground to commence work, regardless of the Commission’s make-ready schedule.

**Local and State Requirements.** Cities, counties and State Departments of Transportation (“DOTs”) almost always require permits to perform make-ready work. Some municipalities require permits just to park a truck in a right-of-way. Local police officers are often needed and must be scheduled to direct and control traffic. DOT permits in some states can routinely take more than eight weeks to obtain. If the project lies in close proximity to or crosses a railroad line, utilities must arrange for railroad flagmen, which requires additional coordination. Adjusting facilities at railroad crossings and obtaining the necessary permissions from railroad companies can be a three to six month process. State DOT work also often must be given a priority and now that the federal stimulus package is rolling out, even more State DOT work is expected. Emergency work, safety work, and service work required by State DOTs cannot be put on the back burner while accommodating communications attachers.

**State PUC Requirements.** State Public Utility Commissions have imposed their own safety, reliability and service requirements on electric utilities. They, too, sometimes present conflicting demands on utility priorities. For instance, State PUCs often require (and electric customers expect) that electric utilities perform storm restoration work immediately and provide service to new customers within a certain amount of time. State PUCs also routinely establish reliability standards including response and restoration times for interruption of electric service. Utilities cannot ignore these types of demands while accommodating attacher requests.

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

For present purposes, we conclude that state and local requirements affecting attachments are entitled to deference even if the state has not sought to preempt federal regulations under

section 224(c). ... Regulated entities and other interested parties are familiar with existing state and local requirements and have adopted operating procedures and practices in reliance on those requirements. We believe it would be unduly disruptive to invalidate summarily all such local requirements. We thus agree with commenters who suggest that such state and local requirements should be presumed reasonable.<sup>27</sup>

Nothing has changed to justify a reversal in the Commission's long-standing policy of deferring to State PUC and local requirements affecting pole attachments.

**Private Property.** Property rights may not exist to authorize the attachments as requested by the attacher. For example, a guy wire may need to be installed on private property. If an easement is required, it is not reasonable to expect the utility pole owner to negotiate and obtain the easement, perform the real estate title work, and record the easement within a brief period of time. In some states adjoining landowners must give permission before certain pole work and tree trimming is allowed, and municipal tree wardens also may need to be consulted. Obtaining all of these clearances requires time.

**Environmental Concerns.** Special regulations apply when working near natural habitats of endangered species or other sensitive environmental areas. Utility construction in these types of areas may be limited to particular times of the year or to certain circumstances. Utilities are not free to ignore these requirements in an effort to accommodate attacher requests.

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

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<sup>27</sup> *Local Competition Order* at ¶1154.

are outside the utility's control and will not "go away" if the Commission imposes make-ready deadlines.

**Other Attachers.** The accommodation of new attachments often requires other attachers on the pole to move their facilities, which must take place before the new attachments may be affixed to the pole. The conduct of other attachers is beyond the pole owner's control. Possibilities for delay at the hands of other attachers are endless. They may not make themselves available for the ride-outs necessary to coordinate their rearrangements. They may not be responsive to new attachers or may provide unreasonably high make-ready costs estimates. They may be competing with new attachers and in no rush to do their share of the make-ready work to accommodate their competitors. It is also particularly difficult to coordinate with attachers that have no pole attachment workforce, such as fire departments, highway departments (*e.g.*, traffic control devices), school districts, police departments and others constrained by lack of budgets.<sup>28</sup> Until all of these kinds of make-ready issues are resolved, including costs and payment, the existing attacher is unlikely to move its attachment as required to make space for the new attacher.

**Unauthorized Attachments.** Unauthorized attachments are another problem. They create impediments and delay the make-ready process, since the issues regarding the unauthorized attachment must be resolved before any rearrangement work can take place. The owner of the unauthorized attachment must be identified, safety violations must be corrected and the unauthorized attacher must obtain the required permit from the pole owner before any new attacher can be accommodated.

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<sup>28</sup> Unlike the FCC, the State of Connecticut Department of Public Utility Control ("DPUC") had the authority to order a "collaborative effort" among attaching entities and required them to complete necessary transfers in 14 days. The FCC has no similar authority.

**Construction.** Work stoppages and road construction can delay pole attachment make-ready activity. These events, too, are outside the control of electric utilities yet would affect their ability to comply with any FCC-mandated make-ready deadlines.

**Attacher-Caused Delays.** The proposed attacher itself is often responsible for considerable delays in the attachment process. Poor planning, poor project management and poor coordination on the part of attachers create innumerable problems for utilities.

It is not unusual for new attachers to submit incomplete or incorrect applications. Inaccurate information can include incorrect height measurements, incorrect pole ownership, and other misinformation that of course delays the process. Newer attachers, like wireless companies and stimulus money recipients, are sometimes ignorant of the attachment process. Attachers also frequently change their routes in mid-course or challenge the owner's make-ready determinations. Resolving these and other administrative disputes takes time:

- Attachers sometimes cancel jobs after they have been approved by the utility, which unnecessarily consumes the utility's time and resources and prevents the utility from working on other projects.
- Attachers sometimes do not provide a prioritization list of the line segments that need to be completed, or they change priorities mid-stream.
- Attachers are often slow to accept the make-ready estimates and pay for the make-ready work.
- Attachers often have not obtained the necessary easements or municipal permits for the job.
- Attachers often do not take the time to participate in advance planning meetings with the utility pole owner and other affected attachers to discuss what needs to be done on any project, such as make-ready, permitting, and other operational requirements.
- Attachers often do not provide advance notice of larger projects or provide the funding resources needed to allow the utility to hire personnel necessary to gear up for large projects.

Because the facts pertaining to make-ready typically are varied and complex and unique to individual utilities, it is best to allow utilities to handle them on a case-by-case basis rather than through uniform and unworkable deadlines. Although well intentioned, make-ready deadlines would create innumerable problems and not accomplish the intended result.

**5. Utility operations are too complex and dangerous to impose make-ready deadlines nationwide**

Complex and important safety, engineering and operational issues undoubtedly will be touched on in the paper filings in this proceeding, but even after Comments and Reply Comments have been filed, the record will remain woefully inadequate for the Commission to adopt any of the proposed make-ready deadlines.

The Commission possesses no particular regulatory expertise regarding the safe and efficient operation of electric distribution systems. The importance of these issues will be impossible to grasp without a full investigation conducted by qualified electrical engineers or other experts dedicated to the task. Many of these issues differ from utility to utility and region to region, making even more problematic the Commission's imposition of these requirements across-the-board on hundreds of utilities located throughout the 30 states where the FCC has jurisdiction.

The State of Connecticut Department of Public Utility Control ("DPUC") went to great lengths to avoid a premature rush to judgment regarding these same kinds of issues. The record in that proceeding was extensive – far beyond the Commission's current proceeding – before any decision was made. It included a Technical Meeting, Prefiled Testimony, Rebuttal Testimony, Briefs, Reply Briefs, a Draft Decision, Exceptions to Draft Decision, Oral Argument on the Draft

Decision, and the Decision itself, which is currently on appeal.<sup>29</sup> The Commission has created no similar, detailed record in this proceeding.

Although the DPUC proceeding involved only *two* electric utilities and *two* ILECs, the DPUC established a Working Group and then an Engineering Subgroup, each composed of representatives from interested parties, to determine how the parties might best meet the make-ready deadlines. Three members of the DPUC Staff attended each meeting of these two groups, which met at least six times each.

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

The Commission, meanwhile, has created no Working Groups, Engineering Subgroups, Task Forces or Advisory Boards to address these complex technical issues. There have been no technical conferences, no breakout sessions, and no joint documents showing areas of agreement and disagreement.

The decisions in New York and Connecticut followed extensive technical review and analysis and affected only certain types of attachments to poles owned by a small number of electric utilities in each State. The Commission should not rely on a grossly more inadequate record to impose regulations that would affect hundreds of operationally distinct electric utilities across the country prior to fully analyzing their impact, including how they will affect the

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<sup>29</sup> See, *Southern New England Telephone Co. d/b/a/ AT&T Connecticut v. DPUC*, Connecticut Superior Court, Tax and Administrative Appeals Division, Docket No. CV-08-4017814-S (appeal filed June 13, 2008).

integrity of electric distribution systems and the ability of electric utilities to provide electric service safely and reliably.

**6. Other states, such as Vermont, Oregon, Utah and New Hampshire, have taken more reasonable approaches to make-ready deadlines**

Other states have considered these issues and established more reasonable make-ready deadlines than those proposed by the Commission. Vermont, for example, provides for a sliding scale that begins with at least 180 days to complete the make-ready estimate and perform make-ready work, “unless otherwise agreed by the various parties, and except for extraordinary circumstances and reasons beyond the Pole-Owner’s control.”<sup>30</sup>

In Oregon, if make-ready work requires more than 45 days to complete or if there are more than 50 poles in an application, the parties must negotiate a mutually acceptable longer period to complete the work.<sup>31</sup>

In Utah, pole owners must provide make-ready estimates for applications of 20 poles or less within 45 days, and must complete make-ready work within 120 days after the initial payment of the make-ready estimate. For applications greater than 20 poles but less than 300 (or .5% of the owner’s poles in Utah, whichever is lower), the make-ready estimate is due within 60 days and construction must be completed 120 days after payment. For applications greater than 300 (or .5%) but less than 3,000 (or 5%, whichever is lower), the make-ready estimate is due in 90 days and the time for construction is extended to 180 days after payment. For applications greater than that, the timeframes are negotiated. All applications within a single month are

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<sup>30</sup> Vermont Public Service Board, Rules 3.708 (B)(2), (C) and (E).

<sup>31</sup> See Oregon Administrative Rules §§ 860-028-0020(32), 860-028-0100(5), (7).

counted as a single application, and the pole owner has the flexibility of justifying longer timelines based on anticipated delays.<sup>32</sup>

Following a lengthy rulemaking proceeding, the New Hampshire PUC adopted pole attachment regulations that require most make-ready work to be completed by pole owners within 150 days following pre-payment of make-ready estimates, while the estimates themselves (for 200 poles or less) must be provided within 45 days after application.<sup>33</sup> This 195-day (150 + 45 = 195) make-ready deadline and other rulings by the New Hampshire PUC are consistent with recommendations made repeatedly by the *Coalition of Concerned Utilities* in this proceeding.<sup>34</sup>

These states have taken far different and better approaches to make-ready deadlines than the Commission. They have avoided “one size fits all” requirements by implementing varying deadlines based upon the different needs of the pole owners and attachers. These approaches are much more balanced and reasonable than the Commission’s proposed deadlines, and they are based on much more detailed record evidence than developed to date by the Commission in this proceeding.

## **7. Imposing unworkable deadlines will create a flood of disputes**

The imposition of make-ready deadlines will invite a host of disputes at the Commission whether deadlines were met and, if not, whether the pole owner was justified in not meeting them. The circumstances surrounding every case will be different, calling for a thorough examination of individual facts. Hard and fast rules that are inconsistent with electric utility

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<sup>32</sup> See Utah Administrative Code, § R746-345-3.C.

<sup>33</sup> See New Hampshire Code of Administrative Rules, Parts Puc 1303.12 and 1303.04.

<sup>34</sup> See e.g., Letter to Acting Chairman Michael J. Copps, Commissioner Jonathan S. Adelstein and Commissioner Robert M. McDowell from Thomas Magee and Jack Richards, attorneys for the *Coalition of Concerned Utilities*, dated May 1, 2009, filed in the Pole Attachment Proceeding, WC Docket No. 07-245 and Rural Broadband Strategy Proceeding, GN Docket No. 09-29.

operational requirements virtually guarantee that the Commission’s complaint docket will fill quickly with access disputes.

**B. If Deadlines Are Adopted, Measures Must Be Taken To Address Electric Utility Constraints**

Deadlines should not be adopted, but if they are, they must be carefully crafted to minimize damage to electric utility operations. The inherent incompatibility between the rapid deployment of communications attachments and the safe and efficient operation of electric distribution systems makes it critical for the Commission to tailor any make-ready deadlines to recognize electric utility operating constraints.

**1. The deadlines should not apply to any application that involves even a single pole change out**

On its face, the Commission’s proposed make-ready deadlines exclude pole replacements from the timeline.<sup>35</sup> However, many applications require that a certain number of the poles be replaced with taller poles to accommodate the proposed attachments. These applications cannot be “bifurcated.” If a required pole change-out is not made, the requested line cannot be activated unless the attacher decides to move its facilities underground at that location. Since pole replacements are time consuming and an integral part of the requested make-ready job, the Commission should clarify that any make-ready deadlines do not apply to applications that require any pole change outs.

**2. Attachers should provide advance notice of their build-out plans**

The Commission’s make-ready proposals seem to assume that electric utility workload is relatively steady, so that standardized make-ready deadlines can be easily accommodated in due

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<sup>35</sup> Further Notice at ¶32.

course. That is not the case in reality, since the amount of work facing utilities varies constantly. Communications make-ready work is no exception.

Attachment requests by communications companies can dramatically affect utility workload, and they typically come as a complete surprise to the electric utility pole owner. For larger projects, electric utilities often have neither the personnel to handle the extensive amount of new work themselves nor the resources to hire temporary personnel to complete it.

The burden should not be on utilities alone. If the scheduling of make-ready work is a serious concern to communications companies, they should be required to undertake some practical steps to move the process along. Communications attachers should be required to provide advance notice the locations they intend to build out, and they should commit in advance to fund the utility personnel needed to comply with their request. That way, electric utility pole owners will have some notice of the project and hopefully be positioned to allocate the time and resources necessary to accommodate the new work once it arrives. Utilities cannot be expected to hire expansive full-time staff and leave them idle pending receipt of the attachers' requests, especially since increasing amounts of utility resources are being devoted to Smart Grid deployment.

The total number and size of requests for make-ready within a certain period should be limited to an amount that is reasonable for the utility to process in light of its many other responsibilities. Attachers should not be permitted to "pop" their requests on utilities without notice, creating an otherwise foreseeable "emergency" for new service, and then complain that the utility is not acting quickly enough to accommodate their needs.

**3. Attachers should be required to schedule and organize advance planning meetings**

This entire make-ready process is designed to benefit attachers, not utilities. The Commission should maximize the responsibility of the applicant seeking the attachment and minimize its dependence on others. The attacher itself is the entity most keenly interested in obtaining access, and it should be required to do everything within its power to speed the process.

To process make-ready work in an orderly fashion, advance coordination is required. For projects in excess of 25 poles, attachers should be required to schedule and organize advance planning meetings. All affected entities should be required to attend.

Advance planning meetings will facilitate the entire process by allowing all interested parties to discuss and coordinate what needs to be done, including the necessary make-ready work and procurement of permits. The meetings will allow new attachers to learn about any operating constraints of concern to the electric utility pole owner and other attachers, and whether a different route may be less expensive or otherwise preferable.

Requiring attaching entities to take this administrative step to facilitate the process makes sense, because it expedites the process and maximizes the responsibility of the applicant that is most keenly interested in obtaining access while minimizing its dependence on others.

**4. The *Coalition's* make-ready proposal grants attachers nondiscriminatory access while addressing real world electric utility constraints**

The *Coalition's* original make-ready proposal, refined below, establishes timeframes for electric utilities to complete make-ready work. It takes into consideration the operational restraints on electric utilities and requires utilities to perform communications attacher work in a manner that does not discriminate in favor of the needs of the utility or its own customers.

The Coalition's make-ready proposal is non-discriminatory, cognizant of real-world operating constraints, and workable for all affected parties. It is a more reasonable, more workable proposal than the one proposed by the Commission.

**COALITION OF CONCERNED UTILITIES**  
**PROPOSED TIMEFRAMES FOR**  
**“NON-COMPLEX” MAKE-READY**

***Field surveys.*** Coalition members agree to complete field surveys of requested pole routes within 45 days of receipt of a completed application (for routes of less than 10 miles when total poles to be surveyed from all attachers in a 30-day period do not exceed 200-2000, depending on utility size and other workload constraints). For routes greater than 10 miles in length or where more than 200-2000 poles (depending on utility size and other workload constraints) must be surveyed in a 30-day period, the parties will develop a mutually-acceptable schedule.

***Non-Complex Make-Ready estimates within 15 days of field survey.*** Coalition members agree to complete and provide make-ready estimates for “Non-Complex Make-Ready” within 15 days of completion of the field survey.

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

***“Circuit Breaker.”*** In no event shall the electric utility pole owner be required in any given week to devote more than ten percent of its workforce to third-party work.

***“Non-Complex Make-Ready”*** is make-ready that does not involve: (i) a wireless antenna attachment; (ii) electric outages for commercial or industrial customers; or (iii) any wireline attachment when the make-ready work (if the make-ready work were approved) involves 250 or more poles or requires a change-out of any poles.

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

***Contractors and Cost Schedules.*** The Coalition will entertain attacher proposals regarding the hiring of make-ready contractors and the posting of make-ready costs.

**5. The *Coalition's* non-discrimination proposal can be tracked and verified**

Recognizing the *Coalition's* make-ready proposal is based on a commitment to perform third-party work “in a manner that does not discriminate in favor of the utility’s own needs or customer work,” the Commission seeks comment on the metrics and data that would be needed to evaluate compliance.<sup>36</sup>

Electric utilities maintain a variety of records that can be used to determine and compare the length of time to complete their own work and the work of communications companies. This type of information already is on hand for many utilities, because the state public utility commissions typically establish guidelines for responding in a timely fashion to customer service concerns.

Utilities possess or can develop information that reflects: (i) the average number of days before work starts in response to an attachment request; (ii) how many staff hours of attachment work are available to schedule for each type of work; (iii) the staff hours of attachment work scheduled as compared to utility work scheduled; and/or (iv) the number of crews assigned to attachment work as compared to utility work.

For many utilities, this information already can be found in the utility’s written work schedules, cycle time reports, work prioritization reports or other reports. Utilities also may be able to show compliance by demonstrating that they have scheduled communications company make-ready work as if the attacher were a rate paying customer.

**6. The clock should begin anew after attacher delays**

As explained above, there are numerous ways in which a company seeking attachment is itself responsible for delaying the make-ready process. These delays affect not only the

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<sup>36</sup> Further Notice at ¶42

requesting attacher but all of the other work that has been placed in the queue to be completed pursuant to an established work schedule.

If utility pole owners must comply with deadlines, the attaching entities -- as the beneficiaries of those deadlines -- should be required to participate in the process in a professional manner. To that end, any make-ready deadline clock should be restarted any time an attacher provides incomplete information, fails to cooperate with the pole owner or other attachers, changes any aspect of its make-ready request, or otherwise delays the process.

#### **7. Smaller requests do not justify shorter timeframes**

The Commission asks whether a shorter deadlines should be established if a smaller number of poles is affected.<sup>37</sup> This notion would require that certain work be given preferential treatment, which does not comport with the utility practice of devoting best efforts to all attachment projects based on the availability of resources.

The efficient operation of utilities requires that the workflow not be interrupted to accommodate miscellaneous special small projects. As a practical matter, scheduling, design and line departments of electric utilities are unable to monitor the size and difficulty of each pole request and then treat different jobs differently. All should be placed in the same queue.

Moreover, the process for smaller pole requests is often similar in terms of documentation and field review as larger projects. The process of conducting field surveys, assigning personnel, arranging for supplies, rolling trucks, etc., is not always directly correlated to the size of the request.

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<sup>37</sup> Further Notice at ¶50.

**C. Make-Ready Deadlines Are Inappropriate For Wireless Attachments And Electric Utility Conduit Installations**

The Commission asks whether the wired pole attachment timeline is appropriate for wireless equipment.<sup>38</sup> As explained below, make-ready deadlines are inappropriate for any wireless attachments.

**1. Wireless attachments on electric facilities are far more complex and should not be subject to any make-ready deadlines**

Wireless attachments in general are more complicated and technical, raising numerous additional operational and safety concerns than those associated with wire attachments. Unlike standard wireline attachments, wireless antennas come in all shapes, sizes, power levels and RF emissions, depending on a carrier's needs at a particular location. Wireless devices emit radio frequency energy that is subject to maximum permitted exposure regulations for workers and the public.

Wireless antennas also require the installation of a variety of accessory equipment on poles, such as cabinets, electric distribution panels, work receptacles, electric meters, work lights and wires running the entire length of the pole to connect the cabinet to the antenna.

Wireless antennas themselves take up much more space than standard wireline attachments. Plus, while the communications space on poles is often similar from one pole to the next, many wireless companies wish to attach to pole tops, in the area designated for electric facilities known as the electric supply space. Pole top designs can vary from pole to pole. Neither New York nor Connecticut, cited by the Commission in the Further Notice, established make-ready deadlines for wireless attachments.<sup>39</sup> The New York Public Service Commission

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<sup>38</sup> Further Notice at ¶52.

<sup>39</sup> State of Connecticut, Department of Public Utility Control, *DPUC Review of the State's Public Service Company Utility Pole Make-Ready Procedures – Phase I*, Decision (April 30, 2008) (“DPUC Decision”); New York Public Service Commission, *Order Adopting Policy Statement on Pole Attachments*, Case 03-M-0432 (August 6, 2004);

(“PSC”), in fact, went to considerable lengths to distinguish wireless from wireline attachments. The PSC recognized, for example, that unlike wireline attachers, wireless companies need not rely solely on utility poles to reach their customers:

Unlike telephone, cable and power facilities, which may only be attached to utility poles, wireless attachers have other options for attaching their facilities, such as buildings, existing towers, and newly constructed towers.”<sup>40</sup>

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

Since wireless attachments usually involve placing facilities above the power area of the pole, special attention must be given to safety because such facilities could fall over onto power lines in high wind conditions or in heavy wet snow conditions resulting in power outages. While National Grid allows wireless attachments, it has comprehensive safety standards and requirements for such attachments and reserves the right to refuse to put wireless attachments on its poles or increase the height of poles to accommodate wireless attachments.<sup>41</sup>

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

The Commission has never mandated access or required pole owners to allow wireless antennas on pole tops; it has merely rejected a request for a presumption that it would be reasonable for an electric utility to reserve such space for its own use. Far from guaranteeing wireless access to pole tops, the Commission specifically protected the rights of electric utilities

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New York Public Service Commission, *Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles*, Case 07-M-0741 (June 27, 2007) (“NY PSC Wireless Proceeding”).

<sup>40</sup> NY PSC Wireless Proceeding at 8.

<sup>41</sup> *Id.* at 10.

to deny such a pole top antenna attachment for capacity, safety, reliability or engineering reasons. As stated in a December 23, 2004 Wireless Bureau Notice:

“[W]e take this opportunity to reiterate that the Commission declined, in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Order on Reconsideration*, 14 FCC Rcd 18049, 18074 ¶72 (1999), to establish a presumption that space above what has traditionally been referred to as “communications space” on a pole may be reserved for utility use only. Thus, the only recognized limits to access for antenna placement by wireless telecommunications carriers are those contained in the statute: “where there is insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes.” 47 U.S.C. § 224(f)(2).”<sup>42</sup>

Installing wireless antennas on pole tops above energized electric facilities raises a host of safety, reliability and engineering concerns and requires much more careful analysis than placing wireline attachments in the designated communications space. Pole top attachments require workers to pass through and work above energized lines. During installation and afterward, the antennas and other equipment could fall onto energized electric facilities.

A fall could occur due to faulty installation, weather conditions, antenna equipment design defects or failure, swaying or falling trees or branches, automobile collisions with the pole or a variety of other reasons. An object falling on energized electric distribution wires can create electric faults, resulting in extended service outages and customer interruptions. Public safety also could be jeopardized if an energized electric line were to fall completely to the ground.

Countless other safety concerns arise as a result of wireless attachments on pole tops. For instance, the installation of grounded equipment close to high voltage phase conductors degrades

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<sup>42</sup> Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates, DA 04-4046, *Public Notice*, 19 FCC Rcd 24930 (Dec. 23, 2004).

the insulating value of the pole top assembly and increases the possibility of phase-to-ground faults during construction, operation and maintenance, creating additional worker safety concerns.

There may be municipal and county requirements governing wireless attachments, which may vary depending on the type and location of the attachment. Utilities routinely require attachers to demonstrate that they have satisfied these requirements before allowing wireless facilities to be attached to their poles.

Distributed antenna companies sometimes find themselves delayed in obtaining permits to use municipal rights-of-way because they seek to place their not-so-attractive antennas with unknown radiofrequency emissions in close proximity to residences and the general public. Such routine municipal reviews and permitting processes render any imposed utility make-ready schedules meaningless in the context of wireless attachments.

Wireless antenna installations are anything but standard and must be assessed on a case-by-case basis. Utility pole owners in general do not yet have enough experience with wireless attachments to satisfy their own questions as to safety, reliability and overall impact on the electric distribution system.

The record is insufficient in this proceeding for the Commission to mandate the attachment of wireless antenna under any and all circumstances. Pole owners are entitled to have their questions answered to their satisfaction before being forced to allow wireless attachments on their poles, particularly on pole tops.

Each utility should be entitled to determine for itself whether its own system will be available for wireless attachments. The following list of questions is not exhaustive, but it summarizes some of the unanswered issues and difficulties encountered by many utilities in

dealing with wireless attachments. It highlights why the record in this proceeding is inadequate for the Commission to mandate wireless attachments across-the-board.

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

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

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

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

**Worker Qualifications/Utility Oversight.** Who should perform the work? Who is qualified to perform this work? Is electric utility oversight required? If so, will the utility pole owner incur greater liability for mishaps because of such oversight? Given that wireless providers operate seven days per week, 24 hours per day, 365 days a year (7-24-365), to the extent wireless attachments require electric utility support must electric utility support be available 7-24-365?

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

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

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

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

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

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

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

**Recovery of Costs.** Determining whether it would be possible from a capacity, safety and engineering standpoint to grant an entity access to a utility's pole tops is time consuming and expensive. Utility pole owners would not need to engage in this analysis but for the request of

attaching entities. The Commission should clarify that any expenses incurred by an electric utility pole owner in determining whether a wireless attachment is feasible should be borne by the entity seeking such a determination, whether or not access is granted.

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

In short, the issue of wireless attachments – especially on pole tops – is not clear. There are many unanswered questions related to the government mandated placement of wireless attachments on utility pole tops or elsewhere on the poles. Utilities are entitled to address these issues to their satisfaction. The FCC should not apply any make-ready deadlines to wireless attachments.

**2. The deadlines should not apply to electric conduits, which are especially dangerous**

The Commission asks whether make-ready deadlines should be applied to other utility infrastructure such as ducts and conduits.<sup>43</sup> As explained below, the inherent dangers of energized underground electric facilities render make-ready deadlines impossible.

The Commission seems to be under the impression that “all underground conduit is equal.” It is not. Underground electric facilities are energized; underground ILEC facilities are not. Any determination on access to electric system’s underground networks (*i.e.*, conduit, manholes, handholes) must be reviewed separate and distinct from the ILEC’s underground

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<sup>43</sup> Further Notice at ¶54.

network. When considering any new rules, the Commission should keep in mind this fundamental difference between energized and non-energized manholes and conduits.

Unlike joint poles used in common by both electric utilities and ILECs, electric underground networks are physically separate from telephone underground networks. The hazards present in the confined space of the electric manhole are much different than in a telephone manhole.

Far greater precautions need to be taken when accessing confined spaces like manholes and conduit used to conduct electricity. More extensive training is required of anyone entering a manhole containing energized electric facilities, and electric utilities must ensure that whoever enters the manhole is properly trained. Someone lacking proper training to perform manhole surveys could be injured severely or killed.

As a result, access to electric manholes is permitted only by OSHA-qualified electric workers.<sup>44</sup> Few, if any, communications workers are OSHA-qualified to access an electric manhole.

Because of the liability and safety concerns, qualified electrical underground employees of the utility must be present whenever anyone enters enclosed energized facilities like manholes. Without utility supervision, contractors would have no knowledge of utility operations, plans or the status of electrical circuits, all of which can change at any time. On site inspectors also are needed to make determinations if conditions prohibit the work from being performed as designed (for example, if a duct is obstructed in a particular section and a different one must be assigned). The presence of third parties in manholes also compromises the integrity of the system because it provides more opportunity for damage to occur. For these reasons,

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<sup>44</sup> 29 C.F.R. § 1910.269.

supervision by electric utilities of manhole access not only makes common sense, it is required by OSHA regulations.<sup>45</sup>

The NESC does not allow communications and electric facilities to share the same duct, but they are allowed to share the same duct bank.<sup>46</sup> Electric utility duct banks usually have enough ducts to carry electric facilities and one extra duct. In the event of damage to existing electric cable or other service interruption, a spare duct allows the utility to restore service quickly by installing new electric cable in the spare duct while repairing the damaged facilities. This spare duct also may be needed to address future electric service needs of other customers.

If a communications company were occupying a spare duct, restoring service following damage to an existing electric cable would be more time consuming and expensive. The utility would need to pull its own damaged electric cables and then install new electric cables while dealing with the existing communications cables, thereby increasing the expense of correcting the electricity outage and significantly lengthening the duration of the outage. Having communications cables sharing the same conduit also would increase the liability of electric utilities if the electric utility were to burn out its own electric facilities, as occasionally happens, which could damage the communications facilities as well.

For all of these reasons, make-ready deadlines, if they are imposed at all, should not be applied to utility infrastructure such as ducts and conduits.

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<sup>45</sup> See 29 C.F.R. § 1910.146; 29 C.F.R. § 1910.269(e)(1)-(14); 29 C.F.R. § 1910.269(l)(1).

<sup>46</sup> NESC § 320.B.2. In addition to safety considerations, there is the practical reality that heat dissipated from an electric conductor within the same conduit could be detrimental to the communication cable.

**D. It Is Unsafe To Require Electric Utility Pole Owners To Cede Control Of Make-Ready Work To Communications Companies**

For the reasons explained in detail below, the *Coalition* recommends the following additions (underlined) and deletions (strike-throughs) to the new rules proposed by the Commission regarding the use of make-ready contractors by communications attachers:

**§ 1.1402 Definitions. [NEW]**

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*(o) The term authorized contractor means an independent contractor that is approved by a utility and is certified by the utility to perform field surveys, engineering analyses, or make-ready work, and includes any contractor that the utility itself employs to perform such work.*

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**1.1420 Timeline for access to poles, ducts, conduits, and rights of way. [NEW]**

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*(b)... If the utility fails to complete and deliver the survey to the requesting entity within 45 days after the request, the requesting entity may use a contractor to complete the survey and engineering analysis. The utility shall cooperate with the requesting entity in directing and supervising the authorized contractor.*

*\_\_\_\_\_ (1) For poles, ducts, conduits, and rights of way owned by an incumbent LEC utility, the requesting entity shall use a contractor that has at least the same qualifications and training as the incumbent LEC's own workers that perform the same tasks.*

*\_\_\_\_\_ (2) For poles, ducts, conduits, and rights of way owned by a non-incumbent LEC utility, the requesting entity shall use an authorized contractor.*

\* \* \* \*

*(f) If make-ready work is not completed in the time specified in paragraph (e)(2) above, the requesting entity may use a contractor to complete all necessary make-ready work. For poles owned by an incumbent LEC utility, the requesting entity shall use a contractor that has at least the same qualifications and training as the incumbent LEC's own workers that perform the same tasks. For poles owned by a non-incumbent LEC utility, the requesting entity shall use an authorized contractor.*

*\_\_\_\_\_ (1) The utility shall cooperate with the requesting entity in directing and supervising the contractor.*

\* \* \* \*

*(4) Once all make-ready work is performed and the request for access is granted, the requesting entity may use any contractor to install its facilities that has the same qualifications, in terms of training, and safety records, as the utility's own contractors (or workers in the absence of contractors) ~~workers~~, whether or not the contractor is authorized by the utility.*

\* \* \* \*

**1.1422 Contractors. [NEW]**

~~(a) Utilities shall make available~~

~~\_\_\_\_\_ (1) a list of authorized contractors; and~~

~~\_\_\_\_\_ (2) criteria and procedures for becoming an authorized contractor.~~

~~\_\_\_\_\_ (b) If a contractor has been hired according to conditions specified in §1.1420, a utility may direct and supervise an authorized contractor in cooperation with the requesting entity.~~

~~\_\_\_\_\_ (1) The attaching entity shall invite a utility representative to accompany the contractor and the utility representative may consult with the authorized contractor and the entity requesting access.~~

~~\_\_\_\_\_ (2) The representative of a non-incumbent LEC utility may make final determinations on a nondiscriminatory basis that relate directly to insufficient capacity or the safety, reliability, and sound engineering of the infrastructure.~~

\* \* \* \*

**1.1424 Exclusion from work among the electric lines. [NEW]**

~~(a) Utilities may exclude non-utility personnel from working among the electric lines on a utility pole, except workers with specialized communications equipment skills or training that the utility cannot duplicate which are necessary to add or maintain a pole attachment.~~

~~\_\_\_\_\_ (b) Utilities shall permit workers with specialized skills or training concerning communications equipment to work among the electric lines:~~

~~\_\_\_\_\_ (1) in concert with the utility's workforce; and~~

~~\_\_\_\_\_ (2) when the utility deems it safe.~~

\* \* \*

In short, the Commission proposes that attachers be permitted to use contractors that are approved and certified by the utility to perform surveys and communications make-ready work if a utility has failed to perform its obligations within the required timeline, or as otherwise agreed to by the utility.<sup>47</sup> Utilities must also permit communications workers with specialized communications equipment training to work in the electric space under certain conditions.

For the reasons stated below, these proposals should be rejected. Allowing communications attachers to hire outside contractors to perform field surveys and make-ready

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<sup>47</sup> Further Notice at ¶59.

work that electric utilities do not perform within artificial deadlines would require electric utilities to cede control over their electric distribution systems, substantially impairing the safety and reliability of those systems.

**1. Utilities will lose control over their distribution systems to the extent that third parties employ and control the activities of contractors**

Utility pole owners must have control over work done on their poles, including the hiring of contractors to perform make-ready work on the poles. Utility work does not occur in a vacuum. It must be coordinated and performed as efficiently as possible. To that end, utilities must be able to control the quality of work on their poles and the timing of that work.

Attacher-hired contractors would undermine the utility's control of its poles. Allowing outside contractors not under the directly control of utilities to perform make-ready would eliminate the utility's ability to review the impact of the proposed attachments on the utility and its plans for future development of the system. It may set the stage for widespread NESC violations.

If attachers were given free rein to hire contractors, the contractors might injure themselves and others, damage the pole, use defective or inferior equipment, and create safety problems for subsequent workers and for the public at large. Even if the contractor's work does not injure anyone, shoddy work could at the very least require a large amount of rework and expense by the utility. Requiring attachers to employ only contractors pre-approved by the utility is helpful, but would not fully resolve these liability issues.

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

**2. Attacher-hired contractors raise serious safety, liability and reliability concerns**

All utilities maintain poles long after make-ready is completed and must live with the consequences of any work that is not performed correctly. It is imperative that make-ready designers and line contractors be in direct contact with the pole owner, not with an attaching entity whose primary objective is to get on the pole as quickly and cheaply as possible.

Contractors hired by attachers owe their allegiance to the attacher paying them, not to the pole owner.

Installation and construction would suffer as a result of attacher-controlled contractors. Contractors hired by attachers may find it expedient to use non-standard construction methods and practices and may not maintain accurate records as required by the utility.

Electric customer relationships also may be undercut by attacher-controlled contractors. Unintended electric system interruptions can be expected if attacher-controlled contractors are permitted to work on the electric system.

**3. Many collective bargaining agreements are critical to the safe and efficient operation of the electric distribution system and prohibit or otherwise restrict the use of contractors to perform union work**

Many utilities like NSTAR are parties to collective bargaining agreements that prohibit the hiring of outside contractors in certain circumstances. Other agreements impose obligations on the utility to confer with the union before “outside contracting” is allowed, and some require the payment of overtime to union members when outside contractors are hired.

The relationships between pole owners and their unions have developed over decades and are critical to the safe and efficient operation of electric distribution facilities. The utility-union relationship must be honored to preserve this working relationship, and any requirement for

utilities to permit the hiring of contractors by attachers must carve out an exception for union activity.

**4. It is inappropriate to allow communications attachers to supervise design and make-ready work performed by a contractor**

Communications companies have no training or expertise in electric distribution system design and cannot responsibly manage the activities of outside contractors performing work on utility poles. For this reason alone, it would be inappropriate and dangerous to allow a communications attacher, through contractors, to perform field surveys and to make determinations about the capacity and integrity of an electric utility facility to support its communications attachments.

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

The pole distribution system is owned, operated and maintained by utilities. Not only do communications companies lack the expertise necessary to oversee these activities, they do not share the same long-term commitment of electric utilities in insuring that electric system work is performed to electric utility standards.

**5. Only the pole owner has the critical information necessary to properly complete make-ready work**

The pole owner alone has access to the necessary information regarding the rights of other attachers, their service needs, the utility’s own service needs, and projects that are underway that fundamentally affects the make-ready process.

The utility is the only entity with information regarding the rights of other attachers, the service needs of the other attachers, and the utility's own service needs. Only the pole owner will be aware of municipal public improvement projects or other work that could potentially impact the attacher's proposed work. For example, the utility may be back-feeding a line with a single feed, so that there would be no alternate route for the electricity needed to serve an entire community. The utility knows that work cannot be performed on that line until an alternate route becomes available, because it would compromise the sole source of electricity going to the community. That information must be conveyed by the utility to contractors under the control of the utility while performing work on that portion of the system. It cannot be delegated to attachers.

**6. Electric utility design engineers or construction supervisors are in short supply but nevertheless must oversee any make-ready work**

Even with utility-approved contractors, utilities would need to appoint design engineers or construction supervisors to review calculations and inspectors to oversee any contractor work. This oversight is needed not only to ensure work is done safely and in accordance with applicable standards, but because there are operational matters that may affect a make-ready project that only the utility itself is in a position to know.

Many utility design engineers and inspectors already are pressed for time. Even if allowing attachers to hire their own contractors were consistent with good utility engineering practices, in many cases it would not help attachers gain faster access to electric distribution systems. Attachers still would need to wait for design engineers and inspectors to become available to oversee and approve work in a particular area.

**7. Allowing attachers to hire make-ready contractors would disrupt the labor pool of contractors, which are in short supply in many areas.**

Another concern is the inevitable disruption that would occur in the labor pool for contractors, which is often in short supply in many areas. If contractors certified to do this type of make-ready work become less available to utilities because they are being called on by attachers to do their work first (perhaps at a higher fee), utility operations could suffer. Utilities could have a harder time obtaining the resources needed to complete their own work and would be prevented from meeting their other customer commitments and deadlines. At a minimum, anything that would threaten contractor availability and thus compromise the ability of electric utilities to restore power during emergency conditions would be a significant concern for State regulators.

**E. Electric Utility Pole Owners Should Retain Discretion Whether To Allow Communications Companies To Hire Make-Ready Contractors**

It is critical that utility pole owners have ultimate control over work done on their poles as well as work done on ILEC poles that affect electric utility facilities. Utilities must have discretion to disallow the hiring of make-ready contractors by communications companies as unsafe or inconsistent with the best operation of the distribution system.

As mentioned above, utilities also should be able to reject the use of contractors to the extent such hiring is prohibited or restricted by union agreements. Finally, to the extent that a utilities believes that outside contractors are permissible, the utilities should be allowed to reject any contractor that it deems to be unacceptable.

**F. Any Requirement To Allow Communications Companies To Hire Make-Ready Contractors Must Protect Electric Utility Workers, Electric Utility Pole Owners, And The Provision Of Electric Service**

For all of these reasons, it would be unwise to place communications companies in charge of electric utility make-ready activities through the use of outside contractors. If, despite the numerous compelling reasons to the contrary, the Commission decides to move forward with its proposal to allow attachers to hire their own contractors to perform design and make-ready work on electric utility poles, a number of safeguards should be implemented.

First, communications attachers should only be permitted to hire make-ready contractors if the pole owner determines that it cannot meet the deadlines itself. If the pole owner determines that it can meet the deadlines, attachers should not be free to hire make-ready contractors.

Second, if the make-ready deadlines are too onerous, a pole owner may decide up front that it cannot meet the deadlines. If so, it should be given the option of passing all design and make-ready work to the communications attacher, with appropriate supervision, thus relieving itself of the obligation to meet the deadlines itself.

Third, electric utility pole owners must be permitted to oversee any communications company contractor work with qualified field representatives under the direction and control of the electric utility. Even if the attachers' contractors were limited to the communications space on the pole, electric utilities must oversee and support those additional contract crews.

Fourth, since there is a shortage of qualified electric utility field representatives to oversee and support the attacher's contractor, pole owners should not be punished for delays caused by the lack of available field representatives. Although those performing this oversight and support may be a small in number, the required skills – knowledge of line construction, the electric company's standards, electric safety, electrical clearance and control authorization (e.g.

lock-out / tag-out requirements) – also are in short supply. Staffing is made even more difficult because of the variable workflow, the need to be responsive, and the expansive geographic area across which the work could occur. Construction contractors are no help because they provide crews, not supervisors.

Fifth, the cost for this utility oversight and support, as with any make-ready activity, must be paid for by the attacher, along with the costs associated with any other additional expenses incurred by the electric utility pole owner to accommodate a communications contractor.

Sixth, any attaching entity that hires a contractor must be required to indemnify the pole owner against any damage or injury that results from the work performed by the contractor and must correct any problems resulting from the contractor's work, such as the remediation of clearance issues and other safety violations.

Finally, both the communications company hiring the contractor and the contractor itself should be required to carry sufficient insurance to cover any damage or injury, along with a performance bond in an amount sufficient to cover the expense of correcting any harm that may be caused by the contractor.

**G. If Make-Ready Contractors Are Hired By Communications Companies, Operational Requirements Must Be Established**

In addition to the safeguards that must be in place before communications workers can hire make-ready contractors, certain operational logistics also must be established by the Commission.

**Written report.** The attacher must be required to notify the pole owner in writing of the contractor selected and must provide the contractor's work schedule, including weekly updates, and complete contact information.

**Crew.** The contractor must be required to report the size of its crews to the pole owner. Any additions to or deletions from the crew also should be duly reported as they occur.

**Materials.** The pole owner must be permitted make the final decision regarding who supplies the materials. If attacher-hired contractors are allowed to supply their own poles and equipment, the utility pole owner would lose control over the quality of the material used. Utilities work hard on developing standards for materials used throughout the system and employ personnel dedicated to implementing those standards. Allowing foreign poles and foreign equipment on the poles undermines the purpose of the standards.

**Pre-construction meetings.** The attacher must be required to convene and conduct a pre-construction meeting with all contractors and other affected attachers that allows the pole owner to provide field coordination input prior to start of any work.

**Status reports.** The attacher must be required to provide periodic written reports regarding the status of any work performed on the poles.

**Coordination.** Attacher-hired contractors must closely coordinate their work with the electric utility. Even a contractor working in the communications space may need to have a pole held or a guy added. An attacher trying to complete its work prior to the electric work may move the communications facilities too close to the electric space, creating a safety issue for the contractor, utility and the public. Other issues could easily arise during the course of the contractors' work and must be coordinated closely with the utility.

## **H. Any Joint Direction And Supervision of Contractors Should Be Optional**

The Commission proposes that utilities and prospective attachers may jointly direct and supervise contractors performing surveys and make-ready work.<sup>48</sup> This proposal, if implemented, should remain optional, since the multiple direction and supervision of contractors may create confusion, delay and safety concerns, not to mention increased potential liability for utility pole owners.

In the experience of *Coalition* members, a single project manager is required to manage contractor work. One central entity can oversee and control the project, obtain everyone's specifications, facilitate negotiations, and provide directions so that the work can get done. The job cannot safely be "split" between utilities and prospective attachers.

Multiple, overlapping direction and supervision of contractors is likely to create confusion, delays in the process and safety concerns. It should be avoided.

## **I. Attacher-Hired Contractors Must Be Confined To The Communications Space**

The Commission proposes to allow utilities to limit access by communications attachers and their contractors to the communications space and safety space on poles, both of which are located below the electric space.<sup>49</sup>

This proposed limitation is extremely important but does not go far enough. It must be revised to permit utility pole owners to prohibit access to the safety space.

Energized electric facilities must be controlled by electric utility pole owners. Performing make-ready work in the electric space on poles is far more hazardous and complex than installing communications cables outside of the electric space.

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<sup>48</sup> Further Notice at ¶166.

<sup>49</sup> Further Notice at ¶169.

A communications company has no ability or expertise in the design and/or management of electric work. It is not positioned to safely supervise electrical work conducted on a utilities' poles or to coordinate with the electric utility's other ongoing efforts.

Contractors in the electric space under the direction of communications companies could injure themselves, create hazards to pole workers or the public at large, cause electrical outages or reliability concerns, and damage electric facilities on the poles. For these and other reasons, some electric utilities like Wisconsin Public Service insist on performing all electrical make-ready work in-house and do not hire outside contractors under any circumstances.

The safety space, called the "Communications Worker Safety Zone" by the NESC,<sup>50</sup> is equally hazardous due to its proximity to the electric supply space. Under OSHA rules, it may not be accessed by any person except an electrically qualified contractor.<sup>51</sup> Work in the safety space requires the same qualifications as work in the electric space, and communications contractors should be excluded from the safety space for similar reasons.

#### **J. Determining The Eligibility Of Make-Ready Contractors Must Remain With The Electric Utility Pole Owner**

The Commission proposes to require utilities to post a list of contractors that the utility pole owner would approve for use by communications attachers and asks whether such a list should include a minimum number of contractors.<sup>52</sup> The Commission also asks whether the list should automatically include any contractors previously used by the utility for its own purposes,<sup>53</sup> and whether it should be presumed that contractors approved and certified by another

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<sup>50</sup> National Electrical Safety Code, C2-2007, at § 238.E.

<sup>51</sup> See 29 C.F.R. § 1910.269.

<sup>52</sup> Further Notice at ¶¶62, 64.

<sup>53</sup> Further Notice at ¶64.

utility (or multiple utilities) should be acceptable for make-ready work.<sup>54</sup> The Commission further proposes to require utilities to post the standards that it uses to evaluate contractors for approval.<sup>55</sup>

Electric utilities develop close working alliances with their contractors and should be allowed in their discretion to limit the number of electrical contractors authorized to perform work on their systems. Many utilities strive to establish “alliances” with a limited number of contractors for efficiency and to assure consistently safe and conforming work practices. Too many contractors could result in inconsistent practices, increased safety concerns and non-standard work. With fewer contractors, work rules and business practices are better understood, and utilities have higher assurance that the work will be performed as required.

Utilities are entitled to wide discretion in determining who may work on their distribution systems. While it is possible to establish a list of qualified contractors, the operational and safety needs of electric utility pole owners demand that the utility retain sole control over the number and type of any contractors that may appear on the list.

Contractor lists should not automatically include any contractors previously used by the utility for its own purposes or contractors that were approved and certified by another utility (or multiple utilities). The fact that a contractor was previously used by a utility does not necessarily mean that the contractor should be automatically approved for future work, since the contractor may have been responsible for safety incidents, exercised poor controls or otherwise performed in an unsatisfactory manner. Additionally, key personnel also may have been lost or reassigned since the last work was performed. Recent OSHA citation or poor Insurance Carrier Indices also should disqualify any contractor from being “acceptable” despite having previously worked for a

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<sup>54</sup> Further Notice at ¶64.

<sup>55</sup> Further Notice at ¶62.

utility. Apart from safety considerations, some contractors are hired only out of necessity during major storms or outage events to quickly restore power but are not routinely assigned work by the utility during normal periods. Those contractors should not automatically be eligible for future work. Finally, as mentioned above, some utilities have a strong and justifiable interest in minimizing the number of contractors authorized to work on their systems and should be entitled to limit the list in their discretion.

For similar reasons, it is not helpful to require utilities to post the standards they use to evaluate contractors. Each contractor must be evaluated individually on a case-by-case basis with due consideration for the scope of the work that must be performed. Utility standards sometimes change with respect to cost controls, safety and quality. Those factors, too, affect a utility's choice of contractor. In addition, some of the evaluation criteria may be too broad and leave room for debate and arguments. If prior experience is a requirement, for instance, there may be disputes about the quality or sufficiency of that prior experience.

**K. Electric Facilities On Poles Owned By ILECs Require The Same Oversight As If They Were Installed On Electric Utility-Owned Poles**

**1. Communications company contractors hired to work on ILEC poles cannot be permitted to work on electric facilities**

For ILEC-owned poles, the Commission proposes that attachers be entitled to use any contractor for surveys or make-ready work that has the “same qualifications, in terms of training, as the utility's own workers.”<sup>56</sup>

The Commission should clarify this proposal with respect to the many ILEC poles that contain electric facilities. Communications company contractors should not be permitted to

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<sup>56</sup> Further Notice at ¶65.

work in the electric space or the safety space under any circumstances, whether the facilities are located on utility or ILEC-owned poles.

For any pole with inherently dangerous electric facilities attached, only qualified electric contractors may perform design and make-ready work on or near the electric facilities themselves. Each job requires awareness and coordination with all other ongoing efforts. A communications company has no ability or expertise in the design or management of electric work and is not positioned to work near the electric utility's facilities or coordinate other ongoing efforts.

Any contractors hired to perform electric work must be approved by the electric utility, even if the electric facilities are on an ILEC pole. Not only are special skills required to work on these facilities, but any contractor that performs such work must be provided access to, and receive training to use, the electric utility's various internal business systems that monitor and control work on the electric system.

Any contractors hired by attachers to perform communications attachment design and make-ready work on ILEC-owned poles (as well as electric-owned poles) should be certified as competent by a qualified engineering firm, to ensure that they understand electric system design and operations, pole loading, NESC and other engineering considerations, and that the contractor can be relied upon to perform the design and make-ready work properly.

**2. Electric utilities need final decision-making authority on all matters affecting electric utility facilities on any poles, including ILEC-owned poles**

On electric utility-owned poles, the Commission proposes that attachers hiring contractors to perform survey and make-ready work invite a utility representative to accompany and observe the contractor. The electric utility would have final decision-making power on

issues relating to insufficient capacity, safety, reliability and sound engineering.<sup>57</sup> On ILEC-owned poles, the Commission proposes that attachers hiring contractors to perform survey and make-ready work invite an ILEC representative to accompany and observe the contractor, but the ILEC would not have final decision-making power.<sup>58</sup>

As mentioned above, it is critical that utility pole owners have ultimate control over work done not only on their own poles and but also on ILEC poles that affect the electric utility facilities attached to those poles. Electric utilities need to have the same final say on issues relating to insufficient capacity or safety, reliability, and sound engineering principles regardless of where their facilities are located.

The Commission's proposal, if adopted, should reflect this need for ultimate utility authority over its electric facilities, even if located on ILEC-owned poles.

**L. Electric Utilities Need Full Discretion Whether To Allow Communications Workers In The Electric Supply Space**

The FCC proposes that utilities permit contract personnel with specialized communications equipment training or skills that the utility cannot duplicate to perform work in and around the power lines, including work with wireless antenna equipment. The FCC proposes that any such work be performed in concert with the utility's workforce and when the utility deems it safe.<sup>59</sup>

The Commission should clarify that this proposal would apply only if the electric utility first has deemed it safe to allow the installation of wireless antennas or other communications

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<sup>57</sup> Further Notice at ¶67.

<sup>58</sup> Further Notice at ¶68.

<sup>59</sup> Further Notice at ¶69.

equipment in the electric space. Without a determination by the affected utility that wireless antenna may be installed in the electric space, the question of contractor access is moot.

In addition, if this proposal were implemented, it should be conditioned to reflect that work may be done in the electric space only under circumstances that both the utility and attaching entity deem safe. For example, a utility should have full discretion to reject this proposal if it believes that the presence of any communications company employees or contractors in the supply space would be unsafe or hazardous or that the person is unqualified in the utility's judgment.

This proposal also should be modified to eliminate any notion that the electric utility and communications attacher will be "acting in concert." Such language may suggest, from a liability standpoint, that there is some link or joint venture arrangement between the two entities.

Finally, the proposal should specify that any work must be performed in a manner ultimately acceptable to the electric utility pole owner.

**M. The Existing Rule Regarding The Post-Make-Ready Installation Of Communications Attachments Should Be Revised**

The Commission proposes to retain, for the post-make-ready attachment of facilities, the existing standard of "same qualifications, in terms of training, as the utilities' own workers," and to deny utilities the right to influence the attacher's selection of a contractor.<sup>60</sup>

This standard should be clarified to establish as a standard the "same qualifications, in terms of training, and safety records, as the utility's own contractors (or workers in the absence of contractors)." This would eliminate any suggestion that the standard could include a worker

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<sup>60</sup> Further Notice at ¶60.

that may have a poor safety record, since electric utility can decline to authorize any contractor that has a poor safety record or is otherwise unacceptable to the utility.

Unfortunately, contractors hired by communications companies often appear to be chosen based on cost and not on qualifications. As a result, they often fail to understand even the most basic information necessary to perform their jobs safely on electric poles. Contractors hired by communications companies often do not know the voltages on a pole, the maximum safe approach distances, or the applicable safety codes and requirements. They often do not even know what a stringing table is, which means they are unable to pull their cables to specified tensions.

To remedy this problem, the Commission should allow pole owners to establish a method to ensure that the contractor actually does possess the required qualifications and experience. For example, utilities should be able to require that the contractor receive a written certification from an electrical engineering firm that the contractor is qualified to work on poles with electrical facilities attached.

**N. Pole Owners Should Not Be Required To Perform The Communications Company's Make-Ready Work**

For the reasons explained in detail below, the *Coalition* recommends the following additions (underlined) and deletions (strike-throughs) to the new rules proposed by the Commission regarding the performance of the communications companies' make-ready work by pole owners:

***§ 1.1420 Timeline for access to poles, ducts, conduits, and rights of way. [NEW]***

\* \* \* \*

~~———(c) Within 14 days of providing a survey as required by section 1.1420(b), a utility shall tender an offer to perform all necessary make-ready work, including an estimate of its charges.~~

~~(1) The requesting entity may accept a valid offer and make an initial payment upon receipt, or until the offer is withdrawn.~~

~~(2) The utility may withdraw an outstanding offer to perform make ready work after 14 days.~~

~~(d) Upon receipt of payment, a utility shall notify immediately all attaching entities that may be affected by the project, and shall specify the date after which the utility or its agents become entitled to move the facilities of the attaching entity.~~

~~(1) The utility shall set a date for completion of make ready no later than 45 days after the notice.~~

~~(2) The utility shall direct and coordinate the sequence and timing of rearrangement of facilities to afford each attaching entity a reasonable opportunity to use its own personnel to move its facilities.~~

~~(3) Completion of all make ready work and final payment by the requesting entity shall complete the grant of requested access and all necessary authorization.~~

~~(e) If make ready work is not completed by any other attaching entities as required by paragraph (d) above, the utility or its agent shall complete all necessary make ready work.~~

~~(1) An incumbent local exchange carrier's facilities may be rearranged or replaced by the utility or its agents 45 days after the notice required in paragraph (d) above.~~

~~(2) A cable system operator's or telecommunications carrier's remaining facilities may be rearranged or replaced by the utility or its agents 60 days after the notice required by paragraph (d) above.~~

\* \* \* \*

(f) \* \* \* \*

~~(2) Upon completion of make ready, the requesting entity shall pay the utility for any outstanding expenses charged by the utility for expenses incurred to complete the make ready.~~

~~(3) Upon receipt of payment or establishment that no further payment is due, the utility shall confirm that the request for access is granted.~~

### **1.1428 Administration of pole attachment requests. [NEW]**

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~~(c) The managing pole owner shall:~~

~~(1) collect from each existing attacher a statement of any costs attributable to rearrangement of the existing attacher's facilities to accommodate a new attacher.~~

~~(2) bill the new attacher for these costs, plus any expenses the managing pole owner incurs in its role as clearinghouse; and~~

~~(3) disburse compensatory payment to the existing attachers.~~

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These proposals would require electric utilities to perform make-ready and other work that is should be performed by the communications attacher itself. They should be rejected.

**1. Pole owners should not be responsible for scheduling the sequence for attaching entities to move their facilities during make-ready**

The Commission proposes to require pole owners to coordinate and schedule the sequence for existing attaching entities to move their facilities to accommodate new attachments.<sup>61</sup> Because the pole owner has “privity” with both the existing and new attachers, the Commission seems to believe that electric utilities have leverage over attachers and are better positioned to require compliance.<sup>62</sup>

Electric utility pole owners, in fact, have little control over existing attachers and cannot ensure the timely rearrangement and transfer of existing attachments owned by third parties. Besides, the rearrangement and transfer of existing attachments benefits only the new attacher and should be the sole responsibility of the new attacher. The utility should not be required to perform the new attacher’s own make-ready work.

One unfortunate example of the lack of control that utilities have over this process is the proliferation of so-called “double wood” conditions, whereby a utility pole owner replaces a rotted or dangerous pole and asks attachers to transfer their facilities to the new pole by a certain date. Very often, the process works poorly.

Attachers often do not move their facilities as scheduled, so the utility pole owner is forced to install the new pole next to the old pole, cut off the top of the old pole so that it can transfer its electric facilities to the new pole, and then leave the communications wires of existing attachers on the original pole. A “double wood” condition results because the new pole has now been installed alongside the shortened old pole, so that two poles sit side-by-side creating an eyesore and increased risk of injury because the occupants of a vehicle will suffer

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<sup>61</sup> Further Notice at ¶¶ 40, 43, 73 and Appendix B proposed rule 1.1420(d)(2).

<sup>62</sup> Further Notice at ¶73.

more injury striking two poles than when hitting a single pole. This “double wood” problem is of keen concern to homeowners and PUCs across the country.

“Double wood” conditions are caused by the inability or unwillingness of communications attachers to transfer their facilities on time. To communications attachers, this type of transfer work is considered to be a low priority, since it adds costs without generating revenues and their customers remain in service despite the presence of two poles. Electric utilities often have to wait years for existing attachers to transfer their attachments from the old pole to the new one. In many cases, they do not transfer their facilities at all.

Just as electric utility pole owners are powerless to prevent these “double-wood” conditions, so too they are powerless to require existing attachers to move their facilities in accordance with any kind of schedule. Not only do pole owners lack the authority to require the rearrangement and transfer of attacher facilities, they lack the basic information necessary to establish a schedule. Utility pole owner are not privy to any information regarding the attaching entities’ workloads or personnel necessary to schedule rearrangement work.

Equally important, the new attacher – as the sole beneficiary of the rearrangement and transfer of existing attachments – should have sole responsibility for coordinating the process. The utility should not be required to act as the de facto agent for the new attacher or to perform the attacher’s make-ready work on its behalf. The new attacher is better positioned to and should perform the work itself.

**2. Pole owners are not bill collectors and should not be required to perform this service for the benefit of new attachers**

The Commission proposes to require the managing utility of jointly-owned poles to collect rearrangement cost statements from existing attachers, bill the new attacher for these costs and disperse compensatory payments to the existing attachers.<sup>63</sup>

This proposal places pole owners again in the position of performing work for new attachers that the new attachers should be doing themselves. It is as counterproductive as it is unfair, and it should be rejected.

The amount of coordination and administrative work required just to keep track of the work that is done and to disburse payments to existing attachers would be considerable. Electric utility pole owners are not staffed for this kind of operation.

To comply with this requirement, utility pole owners would be required to perform the following tasks, among others:

- Notify each existing attacher of required work;
- Solicit detailed cost estimates from each existing attacher (which may be subject to reconciliation after work completion);
- Create separate invoices to cover the expenses incurred by each existing attacher, attaching supporting info for each of those invoices, and forward these invoices and supporting documents to the new attacher;
- Determine how much the pole owner should be compensated for its role as a clearinghouse;
- Prepare and deliver an invoice to cover those clearinghouse costs;
- Receive and post payments from the new attacher for each existing attacher and for clearinghouse expenses;
- Notify existing attachers to proceed with work;
- Forward payments by the new attacher to the existing attachers; and
- Respond to and resolve potentially endless disputes each step of the way.

To insert the pole owner as a “middle man” in the attachers’ billing processes would be time-consuming and expensive, and there is no reason to believe that it would make the process

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<sup>63</sup> Further Notice at ¶73 and Exhibit B proposed rule 1.1.428(c).

run as let alone more smoothly than the current system. Disputes regarding proposed make-ready expenses and invoice amounts will not cease just because the pole owner has been interposed as a middle man. Attaching entities will not stop bickering with each other regarding costs, timing and causation, just because a utility is involved.

Electric utilities have no particular expertise in refereeing any of these disputes, and they would have no ability to enforce their determinations in any event. The insertion of a new middle man into the process is likely to slow down – not speed up – the make-ready process, because a new layer of administration would make the transactions more complex, not simpler.

Requiring utilities to collect statements regarding rearrangement costs, bill the new attacher for these costs and disburse compensatory payments to the existing attachers will generate a host of new, time-consuming responsibilities for utilities. It will distract existing utility resources from the important task of performing make-ready for other attachers and unduly interfere with the utility's prime responsibility of operating and maintaining the electric distribution system. It will also create countless disputes about whether the work was estimated properly and the utility's costs properly passed through.

Performing these middle-man duties on behalf of the attaching entities may actually subject electric utilities to additional liability, since a court may find that they are acting in the role of agent for or otherwise on behalf of the attaching entity.

Utility pole owners will have no greater success in coordinating rearrangements and reimbursements for new attachers than the new attachers themselves, and all of this extra work by utility pole owners would likely be counterproductive in any event. Pole owners need not and should not be “put in the middle” of disputes between a proposed attacher and an existing

attacher. Nor is it appropriate or fair to subject utilities to increased liability and new administrative responsibilities that benefit only the new attacher.

As the sole beneficiary of the rearrangement and transfer of existing attachments, the new attacher should have sole responsibility for the process. The utility should not be interposed as an unnecessary new middleman. The new attacher is better positioned to and should perform this work itself.

**3. The company seeking attachment, not the pole owner, should be required to coordinate this rearrangement/transfer work and reimbursements**

Since the new attacher is the party most keenly interested in obtaining access, it should be solely responsible for coordinating the movement of other attachers, as typically occurs now. As with all of its make-ready proposals, the FCC should seek to maximize the responsibilities of the beneficiary of this process – the applicant seeking the attachment – and minimize its dependence on others.

In order to facilitate these rearrangements, the attaching entity should be required to designate a project manager. The project manager should be required to arrange for an upfront coordination meeting with all of the parties for purposes of establishing a plan and schedule for the project. If properly planned and executed, this type of approach will shorten the cycle time for all involved.

When existing attachers are unreasonably slow to act, they should be subject to sanctions. As an incentive for existing attachers to move, the new attacher should be empowered to bring complaints at the Commission against delinquent cable and CLEC attachers.

Neither Section 224 nor any other provision of the Communications Act grants the Commission authority to require electric utilities to perform these third-party coordination and reimbursement functions. Section 224 requires utilities to provide access to cable companies and

CLECs and permits the Commission to adjudicate pole attachments disputes. It does not authorize the Commission to create and impose new administrative functions that pole owners must perform for the sole benefit of attaching entities fully capable of performing those same functions themselves at their own expense.

#### **4. Pole owners should not be required to move other attachers' facilities**

The Commission proposes to require electric utility pole owners to move ILEC, CLEC, cable and other attachments if the attachers do not move the facilities on time.<sup>64</sup> Their failure to do so would subject them to liability if make-ready deadlines were not met and a denial of access complaint were filed.

Many joint use and joint ownership agreements do not allow ILECs and electric utilities to move each others' facilities. ILECs lack the qualification and expertise to move electric facilities, and unsafe and hazardous conditions may be created if ILECs were allowed to move electric facilities. Electric utilities likewise lack the expertise, training or equipment to move many types of ILEC and other communications attachments (*e.g.*, electric utilities do not routinely splice fiber optic cable, nor do they transfer cable on corner poles). Requiring electric utilities and ILECs to move each others' facilities and other attachers' facilities creates additional liability if the work is not performed properly.

Many union agreements between electric utilities and electrical workers and between ILECs and communications workers actually prevent ILECs and electric utilities from moving each others' facilities. Other union agreements place severe restrictions on these kinds of activities, including requiring the payment of wages to union workers if such work is performed by another party.

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<sup>64</sup> Further Notice at ¶43 and Exhibit B proposed rule 1.1420(e).

Pole owners often have no right to move municipal facilities. These facilities, too, may not be “touched” by utilities.

Finally, the Commission has no jurisdiction to require utilities to move attacher facilities. As explained above, the Communications Act does not authorize the Commission to create and impose new functions that electric utility pole owners must perform solely for the benefit of attaching entities capable of performing those functions themselves.

Requiring electric utilities and ILECs to move each others’ facilities also overreaches the FCC’s jurisdiction in the Pole Attachment Act, which allows the Commission to regulate only the relationship between pole owners and their cable company and CLEC third-party attachers.

The Commission is not authorized by the Act to regulate the relationship between electric utility and ILEC pole owners themselves, or between pole owners and other attaching entities such as municipalities. The Commission’s proposal that pole owners move other attachers’ facilities, including those of other pole owners and municipalities, would do just that.

#### **5. Pole owners must be fully compensated for any costs they incur in the make-ready process**

The Commission’s make-ready proposals would create significant additional costs for electric utility pole owners. If implemented, utilities should be entitled to pass through all of these new costs directly to attachers as a separate charge from the annual rental fee, just as make-ready expenses currently are passed through to attachers.

Coordinating the rearrangement and reimbursement of attacher facilities is, in fact, make-ready work for which the utility should be entitled to bill separately. In addition, if a utility pole owner is required to coordinate rearrangements and reimbursements, the utility should be permitted to outsource that task to a separate entity. In that event, the utility should be able to

bill attachers directly for those outsourced services, plus a reasonable mark-up for the electric utility's time and resources required for oversight.

**O. Establishing A Single Managing Utility Among Joint Pole Owners Would Be Impractical, Unnecessary, Ineffective, And Improperly Alter The Joint Ownership Relationship**

For the reasons explained in detail below, the *Coalition* recommends the following additions (underlined) and deletions (strike-throughs) to the new rule proposed by the Commission to establish a single managing utility among joint pole owners:

***1.1428 Administration of pole attachment requests. [NEW]***

~~(a) Where a pole is jointly owned by more than one utility:~~

~~(1) the owners shall designate a single owner to manage requests for pole attachment; and~~

~~(2) each owner shall make publicly available the identity of the managing utility for its poles.~~

~~——(b) Requesting entities shall not be required to interact with an owner other than the single managing pole owner.~~

~~(c) The managing pole owner shall:~~

~~(1) collect from each existing attacher a statement of any costs attributable to rearrangement of the existing attacher's facilities to accommodate a new attacher.~~

~~(2) bill the new attacher for these costs, plus any expenses the managing pole owner incurs in its role as clearinghouse; and~~

~~(3) disburse compensatory payment to the existing attachers.~~

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In short, the Commission proposes to require that only one utility on jointly-owned poles be designated as the managing utility to deal with attaching entities on attachment-related issues.<sup>65</sup>

This proposal should be abandoned. It would be unworkable in many respects, trample on existing joint owner rights and responsibilities, and provide little benefit to attaching entities. Furthermore, it exceeds the Commission's existing statutory authority. As a practical matter, one

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<sup>65</sup> Further Notice at ¶72.

utility should not be expected to delegate to the other all responsibility for “managing” a pole that is critical to the success of both utilities.

Joint ownership agreements were developed to balance the benefits and responsibilities of pole ownership between pole owners. Under joint ownership, each of the two pole owners is responsible for managing and maintaining its own equipment and any responsibilities associated with its ownership of the pole. Requiring that a single utility be solely responsible for managing the pole would place significant new administrative burdens on the managing entity while upsetting the balance of contractual obligations between the parties and undermining existing agreements.

The two different types of pole owners (electric and communications) are engaged in different businesses and operate independently. It makes no sense and would be unsafe as a practical matter to require one entity to engage in decisions affecting the other’s business through unilateral control of the jointly owned pole distribution system.

The two pole owners do not possess enough knowledge of each other’s operations, and one joint owner may not place the same priority on certain items as does the other. The nature of electric distribution service, for example, makes electric utilities extremely safety conscious regarding work that takes place in or near the power space. If the electric utility were a non-managing joint owner, it would be difficult to make sure that the managing joint owner is similarly focused on electric distribution safety issues.

Unworkable liabilities also would be created. Since both the electric utility and ILEC are owners of the pole, one pole owner may be completely exposed as a result of conduct by the other managing entity. Liability problems also could arise for either party if it has no agreement

or privity with the attacher. Non-managing pole owners would lose all oversight and control over the pole and be unable to take steps to minimize their liability.

There are other practical obstacles to this proposal, as well. Since an ILEC has no expertise in electric utility design and operations, it would be unable to ensure that the electric utility's standards are being met. For the same reason, the ILEC cannot develop an electric utility's work scope and cost estimate for make-ready or defend the electric utility's cost estimates, if it were inclined to defend another utility's costs at all. If both pole owners were entitled to attachment fees, one owner would have to create records in the business systems of the other, and one owner would have to trust the other to collect and reimburse the appropriate amount.

Setting aside the operational impossibilities, this proposal would likely do little to expedite attachments in any event. Attachers typically have to work with two pole owners for most jobs anyway. Solely-owned poles are often sprinkled throughout the service area that joint pole owners share in common. For National Grid, for example, approximately 40 percent of the poles located in upstate New York are solely-owned, and ten percent of its poles in New England are solely-owned. It is an exception that attachment applications involving jointly owned poles do not include at least some solely-owned poles. As a result, two utilities would be involved in the deployment even if only one managed particular poles in the system.

In any event, the attacher must coordinate with the electric utility any work that affects the electric distribution facilities. The ILEC, even if designated the "managing utility," would be unable to perform that function on behalf of electric utilities.

The existing process for attachers on jointly-owned poles is not particularly difficult. Each pole owner is responsible for managing its own business. Each owner requires a separate

attachment agreement with the attaching entity, and attachment fees are negotiated and collected separately. The Applicant applies to each pole owner and each pole owner processes the attachment request. Determination of what make-ready work is required is mutually agreed upon by the pole owners and then each pole owner proceeds to estimate, invoice, collect payment, perform the work and issue individual authorizations (licenses). Each pole owner keeps its own records and bills for its own costs.

Joint owners of poles have worked together over decades to make the process efficient for attachers. Proving that the existing system works, the cable television industry has successfully built out its extensive networks even though dealing with two joint owners. It is clearly a process that has succeeded.

In this joint ownership process, the applicant, not the joint pole owners, should remain responsible for any coordination that may be required between the pole owners. With joint ownership make-ready, as with make-ready applicable to joint use poles, the Commission should seek to maximize the responsibility of the applicant seeking the attachment rather than place additional burdens on third parties. Since the attacher itself is the entity most keenly interested in obtaining access, it has more incentive to obtain whatever coordination is required between pole owners.

Finally, as with other Commission proposals, the FCC has no authority to regulate the joint ownership relationship or to mandate a single managing utility. The Communications Act does not authorize the Commission to create and impose new functions that electric utility pole owners must perform for the sole benefit of attaching entities. Requiring joint pole owners to change their relationship to accommodate an attacher is the regulation of joint ownership itself,

which far exceeds the Commission's authority in the Pole Attachment Act to regulate the relationship between pole owners and their cable company and CLEC third-party attachers.

**P. Make-Ready Expenses Should Be Paid In Advance**

For the reasons explained in detail below, the *Coalition* recommends the following additions (underlined) and deletions (strike-throughs) to the new rule proposing to establish a schedule for the payment of make-ready expenses:

***1.1426 Charges for access and make-ready. [NEW]***

\* \* \* \*

*(b) Payment for 100% of make-ready charges is due prior to make-ready performance, unless the pole owner and attacher establish a different schedule.in the following increments:*

~~—————(1) payment of 50 percent of estimated charges requires the recipient utility to begin make ready performance.~~

~~—————(2) payment of 25 percent of estimated charges is due 22 days after the first payment.~~

~~—————(3) payment of remaining make-ready charges is due when access is granted.~~

\* \* \*

Rather than sanctioning the current practice of paying upfront for make-ready expenses, the Commission proposes to allow attachers to pay for make-ready expenses in stages, with 50 percent due before any work is done, 25 percent due 22 days after work begins, and the final 25 percent when access is granted.<sup>66</sup>

**1. Utility pole owners are not banks that finance attacher make-ready expenses**

The standard practice among *Coalition* members and most other utilities is to require payment for customer construction projects in advance, so that full payment for all estimated job costs is received before any field work is commenced. One *Coalition* member employs a

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<sup>66</sup> Further Notice at ¶70.

floating escrow account with one of its largest attachers to allow for expedited approval and payment of make-ready fees.

This practice of requiring up-front payment of make-ready expenses is consistent with the way that utilities charge for other customer work. As with other customer work, it is often difficult if not impossible to collect for make-ready work after it is completed. Attachers too often lose contracts for new business, change routes, go out of business, change ownership, or experience other difficulties that cause make-ready costs to remain unpaid long after the work has been completed. It also is not uncommon for communications companies to make late payments in excess of 90 days, and sometimes much longer.

Electric utility pole owners should not be required to serve as banks that are designed to finance attacher make-ready projects. The current practice of requiring payment of 100% of estimated make-ready expenses up front is reasonable and should be retained.

**2. The schedule for make-ready payments, if adopted, should be optional**

If any schedule for make-ready payments is established, it should be optional. Requiring that payments be made in stages would create additional paperwork and complexity and introduce new levels of uncertainty into the make-ready process. Utilities and attachers both should have to agree that the schedule makes sense before it is employed.

**3. Make-ready work should cease if payments are not timely made**

If a make-ready payment schedule is adopted, the Commission should clarify that utilities may discontinue make-ready work if any of the payments is not made on time. If payments are not timely made, the delinquent attacher should be required to go back to the end of the line and wait until other jobs are completed before their work will recommence.

In addition, the Commission should clarify that if the parties accept this schedule of make-ready payments the final 25% payment must be made upon the grant of access, since actual

access may occur much later. Final payment also must account for any variance between the estimated costs and the actual costs incurred during the process.

**Q. Posting Schedules Of Make-Ready Charges Are Largely Unnecessary And Meaningless, And Will Create Disputes**

For the reasons explained in detail below, the *Coalition* recommends the following additions (underlined) and deletions (strike-throughs) to the new rule proposing to require utilities to post a schedule of make-ready charges:

***1.1426 Charges for access and make-ready. [NEW]***

~~(a) Utilities shall make available to attaching entities a schedule of common make-ready charges.~~

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In the text of the Further Notice, the Commission proposes that utility pole owners be required to post schedules of common make-ready charges, such as “engineering assessments” and “pole construction.”<sup>67</sup> A requirement to post make-ready fee schedules makes little sense for many electric utilities, however, because the fees charged for make-ready depend on the requirements of each specific job. Utility business systems also are not static and must be continually updated with new cost and resource information. It would be impossible to provide the detail necessary to cover every possible scenario, and the fees themselves will change from time to time.

For example, at any given time, the costs associated with pole replacements depends upon the size of pole and what is on it, so make-ready charges to replace a pole could range from \$800 to \$6,000 or more. Material costs are tied to supplier costs, which vary with time. Direct and indirect labor costs also vary and must be updated independent of material costs. Most

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<sup>67</sup> Further Notice at ¶71.

utility work management systems are dynamic and recognize that pricing can vary because of “behind the scene” system updates (*e.g.* labor overheads) and other fluctuations.

Posting schedules of make-ready fees is unnecessary. Most utilities already routinely provide attachers with estimates that specify anticipated make-ready charges. If make-ready estimates for one route are too expensive, attachers have access to information sufficient to determine whether an alternative route may be preferable. Itemized bills for make-ready work also are routinely provided. Finally, attachers usually have enough experience already to understand the expected make-ready costs.

Confidentiality is a concern, since many make-ready contractors would not want their fees to be posted online. Plus, fees charged by contractors often are negotiated separately, vary depending upon the volume of work, and change with the passage of time. Utilities would also not want certain labor or equipment costs posted on-line as it would hurt their competitive ability to bid these costs from contractors or supplies in the future.

Finally, any requirement that utility pole owners post schedules of make-ready charges will create numerous disputes for the Commission regarding the sufficiency and accuracy of the schedule, how the posted rates should apply, and whether circumstances for any particular case justify deviation from the posted rates.

Should the Commission decide to proceed with such a requirement despite these problems, the following clarifications should be made:

- The posted costs would be based only on average costs and used only to provide attachers with an order of magnitude of what costs might be incurred. Utilities cannot be held to these costs as if they were guarantees, because the variables for every single job will render the final cost different from any posted rate.
- The costs posted would be good only for the specified date, since the next day the cost for the same item may vary because of any number of circumstances (*e.g.*, changes in the overhead adder for employee indirect costs, increases in rates specified in labor

agreements, routine changes in material costs). Utilities have developed their business systems to be interactive, enabling them to reflect changes and updates in costs as they occur.

- Any such schedule is by necessity incomplete and cannot be deemed all-inclusive. For example, any posted schedule would not include traffic control costs, costs for police details or flag men, outage costs, travel time, truck accessibility, underground utilities, weather, customer-related issues, safety contingencies, variations caused by existing pole attachments, vegetation issues, or any other variables required by the field conditions, soil conditions, different standards and materials, and other circumstances.
- Finally, the costs associated with creating such a schedule and revising it periodically should be passed through to attachers each year on a pro-rata basis as make-ready costs directly attributable to them.

**R. Pole Owners Must Be Entitled To Establish Limits On Boxing, Extension Arms And Other Attachment Techniques For All Poles That They Own In Whole Or In Part**

In light of the Commission's new requirement that utilities allow attachers to use the same attachment techniques that the utility itself uses in similar circumstances, comment is sought on the effect of a utility changing its practices on boxing, extension arms and other attachment techniques, and how these standards should be applied when poles are jointly-owned.<sup>68</sup>

The Commission should clarify that pole owners in joint ownership or joint use relationships are free to modify their standards regarding boxing, extension arms or other attachment techniques over time as deemed necessary and appropriate by the utility. Attachers must be required to comply with such changes beginning on the date they become effective, as long as they are applied in a non-discriminatory manner.

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<sup>68</sup> Further Notice at ¶¶ 9, 74.

Regarding jointly-owned poles, the electric utility and the ILEC each has the right to establish its own standards and practices applicable to the use of each pole that is jointly owned, consistent with safety, reliability and generally accepted engineering practices.

In joint ownership agreements, each owner is entitled to consent in advance to any form of third-party use, so that any contemplated attachment technique must be approved by both pole owners. Thus, if one owner does not approve of boxing in a certain circumstance, then the other joint owner must comply with that restriction. The Commission's rules regarding attachment techniques likewise should recognize that either joint owner may establish limits on the use of boxing, extension arms, or other attachment techniques applicable to all jointly owned poles.

**S. The Commission Should Not Require The Collection And Maintenance Of Information Regarding The Availability Of Pole Space On Every Electric Utility Pole**

Although not proposing a specific new rule, the Commission asks whether it would be helpful to maintain an open database regarding pole ownership, pole location and attachments on a pole.<sup>69</sup> As explained below, the Commission should reject this notion.

The Commission lacks statutory authority to impose such a requirement. Even if the opposite were true, such a database would be hugely expensive to establish and maintain and would be almost completely useless to attaching entities. It would be of no practical assistance in deploying broadband service.

**1. The FCC lacks jurisdiction to require pole owners to collect this information**

As explained above, neither Section 224 nor any other provision of the Communications Act grants the Commission authority to require electric utilities to collect and maintain new data

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<sup>69</sup> Further Notice at ¶75.

about their pole distribution systems. Section 224 requires utilities to provide access to cable companies and CLECs and permits the Commission to adjudicate pole attachments disputes, but it does not authorize the Commission to create and impose substantial new administrative functions that electric utility pole owners must perform for the sole benefit of attaching entities.

**2. Existing utility records do not contain information about available pole space**

Existing records of electric utilities do not include information regarding space available on poles to accommodate new attachments. Many electric utilities do not retain records on the attachment activities of their ILEC joint use or joint owner partner and cannot determine the number or location of those attachments. As for third-party attachments, most utilities only record what company is attached, not the position of the attachment on the pole.

Even with respect to electric utility attachments, many utility pole owners simply record the facilities that are attached, not precisely where they were attached.

The National Joint Use Notification System (“NJUNS”) is simply an attachment transfer notification and management system. NJUNS does not record available pole space on poles and would be of no assistance in creating any kind of “available space” database.

For all these reasons, there is no way for electric utility poles owners to determine available pole space using existing pole records.

**3. Conducting a survey to determine available pole space would be extremely expensive and time consuming**

Collecting information sufficient to determine whether space is available on poles sufficient to accommodate new communications attachments would require a complete field audit of all utility poles system-wide, including the physical measurement of the location and distance between each of the facilities on every pole.

After the field audit, all of the data collected in the field would need to be manually evaluated based on the applicable standards, codes and field conditions in order to determine the “available space” (however that would be defined) on that particular pole. Attachments that are not in compliance with applicable safety and construction standards would need to be corrected or otherwise accounted for before the “available space” on those poles could be determined.

To provide a rough estimate of the enormity of this task, we can use National Grid as an example. National Grid owns 2.5 million poles. A survey rate of 50,000 poles per month would be a fast pace for a company of that size, but even at such a rate it would take four years to complete this initial survey, using a dozen or more data collectors working full time and a sizable back-office team that must merge the data into the utility’s internal records and resolve discrepancies. Because any survey should be coordinated with joint pole owners and the major attachers, the process would become even more complex and the production rate may be decreased substantially.

Coalition members estimate that the cost of conducting such an audit would be between \$20-\$40 per pole. At an average of \$30 per pole, the four-year survey of National Grid’s 2.5 million poles would cost \$75,000,000. At the end of this four-year survey, most of the data collected already would be dated.

**4. Maintaining such a database would be extremely expensive and time consuming**

Even if one were to assume that the initial survey provided current and usable information regarding available pole space, the maintenance of that database would be impossible without continuous additional surveys.

The amount of available space on electric utility poles changes constantly. ILEC and third-party attachers often add to or otherwise modify their attachments without informing the

utility pole owner. Utilities also are unable to record the countless unauthorized attachments routinely placed on their poles outside the required application process. Following storms and other emergencies, poles themselves are often replaced (sometimes with taller poles), requiring the reattachment of facilities at perhaps different locations.

Even if all attaching entities began reporting accurately all of their new attachments and modifications, asset management systems would need to be adjusted to allow for these new data fields. Existing pole design, licensing practices and field assessment procedures would need to be revised to require this kind of information to be recorded and maintained. Additional business system modifications would be required to allow for an electronic interface.

Maintaining an accurate database of available pole space would not be practical, possible or helpful. The initial database would immediately be hugely expensive, immediately outdated and of no reliable use in determining locations for future attachments. The only way to maintain the accuracy of such data would be to conduct continuous audits of pole plant attachments, and these continuing audits would be as expensive, time-consuming and disruptive as the initial audits.

**5. A database containing available pole space would be of no benefit to electric utility pole owners**

Information regarding available pole space on electric utility poles is not needed by any *Coalition* member for the safe and reliable distribution of electric service. Electric utilities already know where their electric circuits are located. Knowing how high on the pole communications lines are attached to utility poles is of no benefit to the electric utility.

Collecting this new information actually could be harmful to electric utilities, because it will create data integrity issues, requiring ongoing and costly reconciliations of all information systems in an effort to assure that they match.

Because this information is not required to provide service or manage/operate the electric system, no Coalition member currently collects it. If such information is mandated by the Commission, attachers should be required to pay all expenses related to creating, maintaining and updating it.

**6. A database containing available pole space would be of little benefit to prospective attachers**

Even if the availability of space on poles could be collected and maintained, that information alone is insufficient to determine whether a pole can accommodate additional attachments.

In addition to calculating required NESC clearances, the size and weight of any proposed attachments must be determined and compared to the existing load before any poles would be available for attachment. A pole loading analysis may need to be performed.

Field survey work would be required to review the poles and the routes of the cable installation, to verify existing attachments and to determine whether anything has changed that would affect the attachments, such as elevations, the installation of driveways, road work in the right-of-way, new ditches, etc., before installation of any new attachments.

In short, distribution poles must be analyzed on a case-by-case basis, and decisions regarding where attachments can be placed cannot be made based simply on the “available space” that may be identified in a utility’s database.

**7. The existing process for determining access to poles already works**

It is unclear why the Commission feels the existing process does not work. Utilities currently provide attachers with standards that indicate when a pole can and cannot receive attachments. Using these standards, attachers can easily determine with a field visit and engineering work whether a pole is available for attachment.

As with so much of this make-ready process, the Commission should seek to maximize the responsibility of the applicant seeking the attachment and minimize its dependence on others. The attacher itself is the entity most keenly interested in obtaining access and should be required to do everything within its power to speed the process.

**8. Information regarding electric utility pole distribution systems is confidential**

Electric utilities already are deeply concerned with maintaining the security of their distribution systems without posting key information about their systems on some electronic database, much less a nationwide database that is publicly available.

In this post-9/11 world, threats by cyber and other terrorists are a constant concern. A would-be terrorist, for example, could use the database to target a pole line in a remote location that is loaded with electrical circuits and telecommunications attachments and cause a serious disruption in electric and telephone services. Disclosing the location of attachments near sensitive facilities, like airports, government buildings and military facilities, also is a serious concern.

There are competitive concerns, as well. Disclosing the location of attachments on utility pole distribution systems would reveal proprietary information and show where communications companies are deploying their services. Competitors would have an easy roadmap for tracking their competition's deployments and responding accordingly.

Electric utilities currently have developed internal safeguards limiting the distribution of utility-specific information. Even personnel within utilities often are prevented from accessing certain confidential information regarding the distribution system. To mandate that utilities provide the public at large with maps of or other information regarding the system would be irresponsible and dangerous.

Consistent with current FCC policy, many utility pole owners already provide maps on a confidential basis to attaching entities who request and pay for this information. The system works, and there is no need to change it by mandating the creation of public databases.

**9. Requiring utilities to maintain databases will result in disputes at the commission regarding the sufficiency of each database**

There is no reason to believe that a database of purportedly available space will be accepted without question by attachers. Requiring utilities to maintain databases will generate countless disputes between the parties and complaints at the Commission regarding the sufficiency of each database and perhaps of each data entry.

**T. Attaching Entities Should Be Responsible For Monitoring The Success Of Make-Ready Timelines**

Although not proposing new rules, the Commission seeks information that it can use to monitor whether its make-ready rules, if adopted, would actually be expediting pole access. It also asks how best to collect that information.<sup>70</sup>

Attachers themselves have full knowledge of make-ready timeframes and pricing practices. Since they would be the beneficiaries of any such rules, and they should bear the burden of assembling this information and paying for it.

Utilities, on the other hand, would not benefit at all from these practices. To the extent electric pole owners are burdened, they should be permitted to establish an account that captures these costs and directly allocates them to the attachers.

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<sup>70</sup> Further Notice at ¶77.

**U. Attachers Must Bear Their Share Of The Burden To Relieve Access Difficulties**

The entire process of submitting attachment applications and performing make-ready is designed to benefit attachers, not utilities. For this reason, the Commission should seek to maximize the responsibility of the applicant seeking the attachment and minimize its dependence on others. Much of this process is within the control of the attachers. They should be required to improve the process by providing advance notice of their build-out plans, scheduling and conducting advance planning meetings for their make-ready, coordinating the movement of other attachers to accommodate their new attachments, reimbursing existing attachers for their costs of rearranging existing facilities to accommodate the new attacher, coordinating communications between the two owners when the attacher's request involves poles that are jointly owned, determining the availability of poles for their proposed attachments, and performing any other task within their power to facilitate the process.

**V. Revisions To Dispute Resolution Procedures Are Unnecessary And Would Radically Increase The Number Of Complaints For The Commission To Resolve**

For the reasons explained in detail below, the *Coalition* recommends the following additions (underlined> and deletions (strike-throughs) to the rules proposed by the Commission revising the dispute resolution procedures:

**§ 1.1404 Complaint. [AMENDED]**

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*(d) The complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable system operator or telecommunications carrier and the utility. If the complainant contends that a rate, term, or condition in an executed pole attachment agreement is unjust and unreasonable, it shall attach to its complaint evidence documenting that the complainant provided written notice to the respondent, during negotiation of the agreement, that the complainant considered the rate, term, or condition unjust and unreasonable, and the basis for that conclusion. Proof of such notice to the respondent shall be a prerequisite to filing a complaint challenging a rate, term, or condition in an executed agreement, except where the*

complainant establishes that the rate, term, or condition was not unjust and unreasonable on its face, but only as applied by the respondent, and it could not reasonably have anticipated that the challenged rate, term, or condition would be applied or interpreted in such an unjust and unreasonable manner. If there is no present pole attachment agreement, the complaint shall contain:

(1) A statement that the utility uses or controls poles, ducts, or conduits used or designated, in whole or in part, for wire communication; and

(2) A statement that the cable television system operator or telecommunications carrier currently has attachments on the poles, ducts, conduits, or rights-of-way.

\* \* \* \*

(m) In a case where a cable television system operator or telecommunications carrier claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. § 224(f), the complaint shall be filed within 30 days of such denial. ~~I~~n addition to meeting the other requirements of this section, the complaint shall include the data and information necessary to support the claim, including:

(1) The reasons given for the denial of access to the utility's poles, ducts, conduits and rights-of-way;

(2) The basis for the complainant's claim that the denial of access is improper;

(3) The remedy sought by the complainant;

(4) A copy of the written request to the utility for access to its poles, ducts, conduits or rights-of-way; and

(5) A copy of the utility's response to the written request including all information given by the utility to support its denial of access. A complaint alleging improper denial of access will not be dismissed if the complainant is unable to obtain a utility's written response, or if the utility denies the complainant any other information needed to establish a prima facie case.

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#### **1.1410 Remedies. [REVISED]**

(1) If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

(a) Terminate the unjust and unreasonable rate, term, or condition;

(b) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission; and

(c) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission from the date that the complaint, as acceptable, was filed, plus interest, ~~consistent with the applicable statute of limitations; and~~

~~(d) Order an award of compensatory damages, consistent with the applicable statute of limitations.~~

~~(2) If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or unreasonably delayed, it may:~~

~~(a) Order that access be permitted within a specified time frame and in accordance with specified rates, terms and conditions; and~~  
~~(b) Order an award of compensatory damages, consistent with the applicable statute of limitations.~~

\* \* \*

Many of these proposals will create far more disputes than they will resolve, and they will delay, not expedite, their resolution.

**1. The vast majority of attachment disputes are resolved amicably without commission intervention**

The Commission's suggestions for modifying the complaint and enforcement procedures are proposed solutions in need of a problem. There are hundreds of electric utilities whose poles are subject to the existing FCC complaint procedures, but very few electric utilities have been singled out in complaints over the years as delaying attacher access to their poles. *Coalition* members, for their part, report that the vast majority of issues and disputes they may have with communications attachers are currently being resolved amicably. *Coalition* members report that regulatory complaints are non-existent or infrequent.

As the Commission notes, electric utility pole owners do not by and large compete with communications attachers and have no inherent incentive to delay access to pole distribution facilities.<sup>71</sup> From an electric utility standpoint, there is no real enforcement problem that needs to be resolved.

If the Commission believes that ILEC pole owners constitute a competitive threat and have been delaying access, any regulations should be directed at ILEC pole owners, not electric utilities.

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<sup>71</sup> Further Notice at ¶68 (“In contrast to the vast majority of electric utilities or similar pole owners, as discussed above, incumbent LECs are usually in direct competition with at least one of the new attacher’s services, and the incumbent LEC may have strong incentives to frustrate and delay attachment.”).

**2. Offering attaching entities the prospect of “compensatory damages” will invite a huge number of new pole attachment complaints**

The expense and administrative burdens of prosecuting and defending a pole attachment complaint, like any lawsuit, discourages the filing of complaints and encourages attaching entities and pole owners alike to resolve their differences. The incentive of communications attachers to reach a reasonable accommodation with pole owners or a speedy resolution will be eroded if the Commission were to authorize the award of compensatory damages to attachers.

Compensatory damages will be seen as a potential bonus by attachers, encouraging them to create new disputes and to be less inclined to resolve old ones. With nothing to lose and much to gain, attachers can be expected to file one complaint after another, asking the Commission to resolve disputes in their favor and award them compensatory damages.

Not only will the number of complaints dramatically increase, their complexity will be exacerbated by the potential for compensatory damages. Any award of compensatory damages would require a thorough analysis of exactly what has been lost (revenues, profits, time, etc.). The number of complaints seeking compensatory damages also can be expected to increase with each new regulation the Commission promulgates, with attachers claiming that it has not been followed in some way by utilities.

Pole attachment disputes involve technically complex issues and detailed facts. Records at many utilities are voluminous, and discovery can be extremely burdensome. Sufficient time must be allocated to examine the facts and engineering associated with each complaint, and in many cases the FCC would need to hire qualified electrical engineers just to have the technical expertise necessary to pass a fair judgment. For the vast majority of existing disputes that otherwise would have been resolved quickly and amicably under the current system,

Commission involvement and the promise of compensatory damages will simply delay resolution.

Compensatory damages would be a heavy-handed remedy under these circumstances, and enforcement likely would be considered unwarranted and inequitable by electric utility pole owners. Compensatory damages, combined with onerous make-ready deadlines, confiscatory attachment rates, and other new burdens, may have a profoundly negative effect on the existing relationship between electric utility pole owners and communications attachers. It is ill-advised to take a relationship that to date has worked remarkably well (despite isolated instances cited by attachers), and sour that relationship with heavy-handed and one-sided enforcement sanctions.

**3. The current 30-day deadline for denial of access complaints should be retained**

The Commission should reconsider its proposal to eliminate the 30-day deadline for filing a denial of access complaint.<sup>72</sup>

The Commission cites the “premature filing of complaints” as one rationale for extending this deadline. Very few access complaints have been filed, however, and certainly not enough to warrant any significant effort to reduce them. The 30-day deadline does not lead to the filing of unwanted, premature complaints.

The Commission also states that the existing rule “hinders informal resolution of disputes.” The very opposite has been true, however, in the *Coalition’s* experience. If the Commission were to allow attachers the flexibility to file a denial of access complaint at any time, it would make them less likely to resolve access issues in a timely manner (within 30 days). To the contrary, the attacher would suffer no penalty by prolonging the matter indefinitely. This is particularly true if compensatory damages also were available. In fact, with the hope of

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<sup>72</sup> Further Notice at ¶82.

compensatory damages, it may be worthwhile for an attachers to extend the dispute simply to compound the damages it can claim to have suffered.

Pole attachment disputes can be complex and fact-intensive. Allowing complaints to be filed long after access is denied also would create a substantial risk that relevant records will be lost or otherwise unavailable.

In short, if the 30-day deadline is eliminated, the Commission can expect to see more complaints, not fewer, and they will take longer to resolve. Neither result will facilitate broadband deployment.

**4. Attachers should not recover rate refunds dating back years before a complaint is filed**

As with the proposal to eliminate the 30-day deadline for filing denial of access complaints, permitting attachers to recover refunds dating back years before a complaint is filed would eliminate any incentive for them to resolve rate issues in a timely manner. Rate disputes will drag on indefinitely, and the amount potentially to be refunded will grow proportionately, so the dispute will increase in significance the longer the matter remains unresolved.

The existing rule effectively requires the parties to resolve rate disputes early on, before they become unmanageable. Eliminating this limitation on rate refunds would result in more complaints being filed, with no particular benefit to either party.

**W. Appropriate Unauthorized Attachment Penalties Are Long Overdue**

The Commission proposes no new rules but seeks additional comment on practical and lawful means of increasing compliance through the use of more substantial unauthorized attachment penalties.<sup>73</sup> The Commission raises as one potential alternative a system of penalties

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<sup>73</sup> Further Notice at ¶94.

for unauthorized attachments akin to the one adopted by the Oregon Public Utilities Commission (Oregon Commission).<sup>74</sup>

**1. The safe and efficient operation of electric distribution systems must be of paramount concern**

Almost 100 years, long before the construction and operation of cable companies and CLECs, electric utilities and ILECs began to work together to create an extensive aerial pole distribution system to deliver both electric and telephone service. Decades of work and cooperative efforts by both ILECs and electric utilities have resulted in a multi-million mile system that transverses the country and is both safe and efficient.

**a) The competitive environment for communications services has compromised the safety and reliability of electric distribution systems**

Today, competitive dynamics in the communications world challenge the safe and efficient distribution of electricity over poles. Cable companies, CLECs and ILECs all compete for telephone and Internet customers, while cable companies and ILECs (and satellite providers) compete for video customers as well. All are providing broadband services.

In today's competitive environment, speed to market and cost cutting are the forces driving the rollout of new communication services. Electric system safety, reliability and efficiency, on the other hand, are alien to this environment.

Construction crews hired by cable companies and telephone companies often are paid to string cables over utility poles in a manner that rewards speed but not safety. Distance covered, not quality of work, is the prime objective. The faster they string cable, the more they get paid.

Communications attachers often appear to be poorly trained with respect to NESC compliance. They take shortcuts that make their jobs easier but do not conform with established

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<sup>74</sup> Further Notice at ¶95.

safety and construction practices. Unlike electric companies, many cable companies, CLECs and emerging telecommunication service providers do not have established safety programs or qualified engineering and safety departments.

Minimal oversight of work contracted by attachers is not unusual. As a result, *Coalition* members have encountered countless NESC clearance violations caused by attachers, improper pole guying, ungrounded messenger wires and other equipment, excessive overlashing, improper use of boxing and extension arms, improper installation of equipment, improper hole drilling, the displacement and damage of utility equipment, customer outages, and a host of additional safety violations and poor construction practices. Huge bundles of coiled cables, wires duct-taped to poles and splices covered by garbage bags are not uncommon, causing an eyesore certainly but also wind and ice-loading concerns.

In short, contractors hired by cable companies, CLECs and ILECs cannot be depended on to keep the electric distribution system operating safely and reliably. The Commission's regulations do not provide adequate enforcement mechanisms to allow electric utility pole owners to police even the most basic of construction requirements.

Granting unfettered low cost access to electric utility infrastructure with no mechanisms to punish bad behavior has enabled cable operators and CLECs to hire contractors of dubious qualifications. The contractors operate with little field oversight and create flagrant violations of good engineering practices and safety codes. They make attachments to numerous utility poles without complying with the utility's permitting process or even providing notification of those attachments. These irresponsible practices and violations are degrading utility infrastructure, reducing service reliability and continuity, and increasing the risk, liability and costs for pole owners and their ratepayers.

Easy access to electric distribution systems should not come at the expense of safety and reliability. The Commission's regulations should promote responsible behavior on the part of those who are granted mandatory access.

A government agency that carefully enforces the pole attachment rights of communications companies should take equal interest in enforcing their pole attachment duties and responsibilities as well. To that end, the Commission should adopt the safety and operational proposals recommended in the *Coalition's* Comments, including compliance with utility safety and operations requirements, attacher inspections, unauthorized attachment penalties, safety violation penalties, presumptions regarding safety violations, Imposition Costs, and greater attacher oversight.

**b) Unauthorized attachments by communications attachers are widespread and dangerous**

Upon receiving an attachment application, utility pole owners pre-inspect facilities to determine whether (i) the new attachments will interfere with existing facilities, (ii) existing attachments must be moved in order to provide adequate clearances, (iii) the pole can withstand the additional "load" created by the new attachments, (iv) the pole must be replaced ("changed-out") to accommodate the new attachments, and (v) additional NESC and utility construction standards are being met.

Following this analysis, an estimate is given to the applicant that explains all of the actions that must be taken by the pole owner to make the pole ready for the new attachments. Only upon completion of this "make-ready" work is the attacher permitted to install its facilities. Finally, utilities often perform a "post-inspection" to determine whether the attachers have installed their facilities correctly.

None of these safeguards can be performed if an attacher takes it upon itself to place attachments on poles without going through the permit application process. By making unauthorized attachments, attachers put attachments on poles whenever and wherever they like with no regard for pole loading, ice and wind loading, clearance issues, compliance with utility operational requirements, NESC compliance, or any other engineering or operational constraint. In addition, of course, attachers employing unauthorized attachments also manage to avoid being subject to annual attachment fees.

The temptation of communications attachers to neglect or purposefully avoid the permit application process apparently is irresistible. The problem is acute and significantly compromises electric system safety and reliability. Importantly, it is not only pole owners that are harmed by this unlawful practice – ethical, compliant, communications attachers also can have their attachments endangered or rendered non-compliant.<sup>75</sup> Plus, unlike legitimate attachers, their competitors avoid paying rental fees and thereby receive an unfair competitive advantage.

To cite but one example, an audit performed in 2002 by Toledo Edison (a FirstEnergy operating company) found a 29% unauthorized attachment rate for telephone attachments, and a 33% unauthorized attachment rate for cable companies.

Time Warner Cable urges the Commission to reject the utilities’ “trumped-up charges” that cable operators and other attachers create unsafe conditions and make attachments without

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<sup>75</sup> Attachers not only fail to notify utility pole owners of their attachment activity, they often fail even to notify electric utilities when their systems change owners. This lapse has occurred despite specific contractual obligations to execute assignment agreements. Pole owners sometimes find out about the transfer only when their annual rental or other bills are returned.

authorization.<sup>76</sup> This comes from the same industry that argues “Congress has given the Commission no role whatsoever in protecting electric ratepayers.”<sup>77</sup>

Such attitudes are appalling to *Coalition* members, but it is indicative of the cable industry’s cavalier approach to this issue. Electric utilities have no reason to fabricate claims of pole loading, clearance violations, or any other unsafe conditions. Violations of the National Electrical Safety Code are valid cause for concern by utilities across the country. Worker safety, the integrity of the pole line and the reliability of the electric system are at the heart of electric utility concerns.

Time Warner Cable asserts that in its experience, “utility claims of ‘unlawful’ and ‘unauthorized’ attachments are largely a byproduct of poor utility recordkeeping or utilities’ sudden reversal of accepted attachment practices.”<sup>78</sup> This claim is as insulting to utilities as it is inflammatory.<sup>79</sup> While utility recordkeeping like any recordkeeping is not always 100%, it is well known throughout the utility and communications industries that electric utilities’ records are far superior to attachers’ records in accuracy and reliability.

These pole systems are, first and foremost, utility assets owned by utilities. Owners have an inherent need to know their assets inside and out. Attachers have only a self-serving interest

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<sup>76</sup> *Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Comments of Time Warner Cable at iv (filed Mar. 7, 2008).

<sup>77</sup> *Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Comments of the National Cable Telecommunications Association at 12 (filed Mar. 7, 2008).

<sup>78</sup> *Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Time Warner Cable Comments at iv (filed Mar. 7, 2008).

<sup>79</sup> Based on its record to date, Time Warner Cable is in an odd position to be casting aspersions on utility pole owners in any event. Time Warner Telecom (“TWTC”) apparently overlashed cable company facilities and leased dark fiber for years in a number of cities throughout the country, in order to provide telecom service. Yet, strangely, neither TWTC nor the cable company apparently notified the utility pole owners of this practice so the higher telecom rate could be charged. The cable company that was involved with TWTC in this arrangement was Time Warner Cable. See *Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Comments of the Coalition of Concerned Utilities at 41-44 (filed Mar. 7, 2008).

in their wires, with considerably less interest in accurate recordkeeping and virtually no interest in the poles themselves.

The Commission's existing enforcement mechanisms are inadequate to ensure that attaching entities comply with the permit application process so critical to the safety and reliability of electric distribution systems. As a direct result, unauthorized attachments are rampant.

Many utilities follow the FCC's guidance in the *Mile Hi Cable* order,<sup>80</sup> which permits the utility to recover only unpaid rentals on unauthorized attachments for five years or from the date of the last audit, whichever is less.

The ruling in *Mile Hi Cable*, however, does not allow utilities to impose penalties to help prevent unauthorized attachments. Instead, the limited amount authorized in that order actually *encourages* attachers to continue making unauthorized attachments because the worst that can happen to attachers if they get caught is that they will be required to pay the rentals that they would have been required to pay in the first instance. Since perhaps more often than not they are not caught, it often "pays" to make unauthorized attachments.

The same problem exists with safety violations caused by attachers. The FCC has issued no guidance as to whether utilities are entitled to charge penalties for safety violations, and none of the *Coalition* Members currently assess any such penalties. As a result, utilities lack a "stick" necessary to enforce compliance with safety and other requirements. In effect, there is an inherent incentive to "short-cut" proper reviews and construction procedures, thus avoiding costs. At best, the offending party pays only the cost to bring the safety issue(s) into compliance,

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<sup>80</sup> *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colorado*, 14 FCC Rcd 3244 (1999).

and only if and when such non-compliance is identified and corrective action is required by the utility.

Some attachers have been intentionally abusing the pole attachment and joint use processes for years, and utilities have been unable to stop them. Sanctions are required to protect the integrity of the distribution system and to encourage attachers to act responsibly.

Attacher abuses endanger the public, jeopardize the reliability of electric distribution systems, including other attachers' operations, waste precious utility resources by diverting them from core electric service activities, and cause utilities to under-recover for rental payments that to begin with have historically been unreasonably low..

To ensure the safety and reliability of electric distribution systems and to help remedy prior abuses by attaching entities, the *Coalition* requests that the Commission confirm that the requirements identified in the sections below may be imposed by electric utility pole owners.

**2. A modified version of the Oregon penalty provisions should be adopted**

The Commission seeks comment on whether utility pole owners should be entitled to impose unauthorized attachment penalties such as those in effect in the State of Oregon, as proposed by the *Coalition of Concerned Utilities* and others.<sup>81</sup>

Utility pole owners should be free to impose meaningful penalties to combat the epidemic of unauthorized attachments that many utilities have experienced. In order to minimize disputes, the penalties should be adjusted to encourage attachers to participate in any audits conducted by the pole owners. The *Coalition* proposes that the Commission permit utilities to charge unauthorized attachment sanctions in the following amounts:

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<sup>81</sup> Further Notice at ¶¶94-97.

- \$100 per unauthorized attachment plus 5 years annual rental if an unauthorized attachment is found and the attacher has not participated in a required audit;
- \$50 per unauthorized attachment plus 5 years annual rental if the attacher does participate in the audit or identifies the unauthorized attachment on its own.

These sanctions are not unreasonable, since they simply encourage attachers to comply with the critically important permit application process, which they should have been complying with as a matter of course in the first place. They are also consistent with the unauthorized attachment sanction provisions currently in effect in the State of Oregon.<sup>82</sup>

Oregon’s sanctions provisions have been highly effective in nearly eliminating the large numbers of unauthorized attachments in that State. Portland General Electric, for example, reports an extraordinary drop in the rate of unauthorized attachments from 30% to 1% following its imposition of unauthorized attachment penalties.<sup>83</sup>

**3. Utilities should be permitted to impose other requirements necessary to ensure the safety and reliability of electric distribution systems**

**Safety Codes.** The Commission should allow electric utilities to require attachers to comply with industry standard safety and operational guidelines, such as the NESC, the National Electrical Code (“NEC”), and the Blue Book - Manual of Construction Procedures (“Blue Book”), published by Telcordia Technologies Inc.

**Utility Safety and Operational Requirements.** Electric utilities should be permitted to require attachers to comply with the utilities’ own internal safety and operational requirements, including construction standards. This type of operational discretion properly belongs with utilities, not with attachers or the FCC. Utility safety and operating procedures often supplement

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<sup>82</sup> Or. Admin. R. § 860-028-0140(2) (2008).

<sup>83</sup> See Portland General Electric PowerPoint attached hereto as **Exhibit C**.

safety codes by detailing the specifications that attachers must follow in order to operate safely in and around the utility's own electric facilities. They include longstanding safety requirements that are tailored to each utility system and provide instructions on how to comport with that utility's standard practices. It is essential for the safe, efficient and reliable operation of the electric system that attachers comply with each utility's specific operating procedures and requirements.

**Inspections.** Utilities should be allowed to require attachers to inspect their facilities at regular intervals and to provide an annual certification from an officer of the company that all of their attachments were installed correctly and currently comply with NESC and other requirements. In this way, attachers will be required to police themselves and their contractors and remove some of the burden on electric utilities caused by their attachments.

More specifically, attachers should be required to perform code compliance inspections of 20% of their attachments each year, at their own cost. Attachers should provide to the Pole Owners documentation, attested to by an officer of the attacher, showing which of their pole attachments have been inspected each year and are safety compliant. Attachers should correct all noncompliant attachments at their own cost, and serious violations should be corrected within ten (10) days of notification.

**Safety Violation Penalties.** The Commission should clarify that utility pole owners may impose penalties for safety violations in the amount of \$200 per violation, again consistent with Oregon's rules.<sup>84</sup>

**Presumption of Safety Violation.** In order to address safety violations that attaching entities seek to avoid, utility pole owners should be entitled to establish a rebuttable presumption

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<sup>84</sup> Or. Admin. R. § 860-028-0150(1)-(2) (2008).

that an unauthorized attachment that is in violation of a safety requirement is the attachment that caused the violation.

**Imposition Costs.** The Commission should clarify that utility pole owners are entitled to be compensated for the considerable strain imposed on their limited internal resources when they are required to perform tasks that attaching entities should have performed but did not, such as correcting safety violations, rearranging facilities to accommodate new attachers, transferring facilities to replacement poles as needed, and removing attachments when required.

In order to encourage attachers to do what they are supposed to do and to compensate utility pole owners when they do not, the *Coalition* urges the Commission to clarify that utilities may charge “Imposition Costs” when they are required to do work that attachers have failed or neglected to do. These Imposition Costs should be equal to all costs incurred by the utility, including the cost of materials and equipment, fully loaded direct and indirect labor, engineering, supervision and overhead, plus an additional 50% as an incentive to require the attacher to do work it should have done in the first place.

**Attacher Oversight.** Attachers should be required to provide better oversight of their workers and contractors to ensure that these personnel are qualified to work near electric distribution systems, and that they understand and comply with the NESC, the Occupational Safety and Health Act, the utility’s own safety and operational specifications and other safety codes. Attachers should be required to prequalify contractors and workers on that basis, create a written compliance program to assure contractor and worker qualifications and training, and provide continuing oversight to ensure compliance.

Attachers should be required to make available to Pole Owners upon request a copy of all written compliance programs, along with information pertaining to their prequalification and

oversight activity. Workers or contractors found in violation of these requirements should be prohibited from performing any work until all of the requirements have been met.

**X. The Proposed Revisions To The “Sign And Sue” Rules Will Assist The Parties In Resolving Disputes Before They Reach The FCC**

For the reasons explained in detail below, the *Coalition* recommends no changes to the rule proposed by the Commission revising the “sign and sue” rules:

**§ 1.1404 Complaint. [AMENDED]**

\* \* \* \*

*(d) The complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable system operator or telecommunications carrier and the utility. If the complainant contends that a rate, term, or condition in an executed pole attachment agreement is unjust and unreasonable, it shall attach to its complaint evidence documenting that the complainant provided written notice to the respondent, during negotiation of the agreement, that the complainant considered the rate, term, or condition unjust and unreasonable, and the basis for that conclusion. Proof of such notice to the respondent shall be a prerequisite to filing a complaint challenging a rate, term, or condition in an executed agreement, except where the complainant establishes that the rate, term, or condition was not unjust and unreasonable on its face, but only as applied by the respondent, and it could not reasonably have anticipated that the challenged rate, term, or condition would be applied or interpreted in such an unjust and unreasonable manner. If there is no present pole attachment agreement, the complaint shall contain:*

*(1) A statement that the utility uses or controls poles, ducts, or conduits used or designated, in whole or in part, for wire communication; and*

*(2) A statement that the cable television system operator or telecommunications carrier currently has attachments on the poles, ducts, conduits, or rights-of-way.*

\* \* \*

Copied below is the rule proposed by the Commission revising the “sign and sue” rules, along with additions (underlined> and deletions (strike-throughs) recommended by the *Coalition*:

**§ 1.1404 Complaint. [AMENDED]**

\* \* \* \*

*(d) The complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable system operator or telecommunications carrier and the utility. If the complainant contends that a rate, term, or condition in an executed pole attachment agreement is unjust and unreasonable, it shall attach to its complaint evidence documenting that the complainant provided written notice to the respondent, during negotiation of the agreement, that*

*the complainant considered the rate, term, or condition unjust and unreasonable, and the basis for that conclusion. Proof of such notice to the respondent shall be a prerequisite to filing a complaint challenging a rate, term, or condition in an executed agreement, except where the complainant establishes that the rate, term, or condition was not unjust and unreasonable on its face, but only as applied by the respondent, and it could not reasonably have anticipated that the challenged rate, term, or condition would be applied or interpreted in such an unjust and unreasonable manner...*

\* \* \*

The Commission proposes to modify the so-called “sign and sue” rule, so that the attacher, during contract negotiations, must provide written notice to the pole owner of any contract provisions it considers unreasonable as a prerequisite for bringing a complaint challenging those provisions, unless the attacher could not have anticipated that the utility would apply the challenged provision in an unreasonable manner.<sup>85</sup>

Requiring attachers to notify pole owners in writing that they consider certain contract provisions to be unreasonable will highlight issues in dispute and take some of the guesswork out of the negotiation process.

The *Coalition* agrees with the proposal and believes that it could minimize surprises and promote resolution of certain conflicts at the negotiation level, thus reducing the Commission’s role. Attachers should be required to engage in good faith negotiations to resolve any issues or concerns before any claims can be raised at the FCC.

#### **Y. The FCC’s Drastic Reduction In The Telecom Rate Is Unfounded And Unwarranted**

For the reasons explained in detail below, the *Coalition* recommends the following additions (underlined> and deletions (strike-throughs) to the new rule proposed by the Commission to reduce the current attachment rate for telecommunications attachments:

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<sup>85</sup> Further Notice at ¶¶107-108.

**1.1409 Commission consideration of the complaint. [REVISED]**

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(e) With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, ~~the maximum just and reasonable rate shall be the higher of: (i) the rate yielded by section 1.1409(e)(1) of this Part or (ii) the rate yielded by the following formula shall apply:~~

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[ \begin{array}{c} \text{Maintenance and Administrative} \\ \text{Carrying Charge Rate} \end{array} \right]$$

$$\text{Where Space Factor} = \left[ \frac{\left( \frac{\text{Space}}{\text{Occupied}} \right) + \left( \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right]$$

\* \* \*

The Commission proposes to lower the existing Telecom rate by removing three of the five so-called “carrying charges” from the calculation of costs for which the pole owner can be reimbursed under the rate formula. The Commission would retain the “administrative” and “maintenance” carrying charges, but remove the “depreciation,” “taxes” and “rate of return” carrying charges.<sup>86</sup>

The FCC’s proposed change to the Telecom rate is a radical departure in pole attachment rate regulation and is inconsistent with the intent of Congress as well as cost causation principles. It would cause the Telecom rate to be even lower than the existing cable rate for many if not most utilities and would subject the Commission to legal challenge that the formula denies utilities’ just compensation and results in an unconstitutional taking. It should be rejected.

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<sup>86</sup> Further Notice at ¶¶128-141.

**1. Congress did not distinguish between the costs used in the cable and telecom rate formulas**

Since enactment of the Telecommunications Act of 1996, the Commission has interpreted Sections 224(d) and 224(e) of the Pole Attachment Act as simply providing for different allocations of the same costs. Now, for the first time, the Commission proposes a new Telecom formula on the assumption that the costs specified in Section 224(d) are somehow different from the costs specified in Section 224(e).<sup>87</sup>

This underlying assumption is inconsistent with what Congress intended. The Commission has no statutory authority to treat the Section 224(d) and 224(e) costs differently.

Section 224(d)(1) identifies the relevant costs as “the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.”<sup>88</sup> Sections 224(e)(2) and 224(e)(3) mention only the “cost of providing space” on a pole and provide formulas for allocating those costs attributable to the unusable and usable portions of the pole, respectively.<sup>89</sup> The Section 224(e)(3) portion of the Telecom formula allocates costs attributable to the usable space on the pole in the same way as Section 224(d) allocates costs attributable to the entire pole.

Contrary to the Commission’s assumption that the costs specified in Section 224(d) and 224(e) are different, the legislative history of the Pole Attachment Act indicates that Congress intended these costs to be the same. It nowhere indicates that Congress sought to modify the costs used to calculate the Telecom rate, as one would expect if the Commission’s proposal were justified.

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<sup>87</sup> Further Notice at ¶128.

<sup>88</sup> 47 U.S.C. § 224(d)(1).

<sup>89</sup> 47 U.S.C. §§ 224(e)(2), (3).

The Conference Committee Report from the 1996 Telecommunications Act states that the section 224(e)(2) rate establishes a new formula for telecom carriers for the unusable space on the pole.<sup>90</sup> The Report makes no mention that the 224(e)(3) rate establishes a new formula for the usable space. The assumption, therefore, is that the Telecom rate formula for the usable space on the pole is the same as the Cable rate for the entire pole. Since Congress did not distinguish between the costs specified in Sections 224(d) and 224(e), the costs that are specified in Sections 224(d) and 224(e) must be the same.

Congress, therefore, fully intended that the “cost of providing space” specified in the Section 224(e) Telecom rate is the same cost as the “sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit or right-of-way” specified in the 224(d) Cable rate.

This conclusion is further borne out by the provision Section 224(e)(4) of the Act, which envisioned that the Telecom rate will be higher than the Cable rate by providing that increases must be phased-in over five years.<sup>91</sup> The rate recalculations in Appendix A of the May 20 Order indicate that the proposed Telecom rate would be substantially *lower* than the Cable rate for many electric utilities, including several *Coalition* members. Other *Coalition* members also have verified that the proposed Telecom rate as applied to their utilities would be lower than their Cable rate as well. The increases envisioned by Section 224(e)(4), therefore, would not occur for many if not all electric utilities using the Commission’s novel interpretation of “costs.”

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<sup>90</sup> Telecommunications Act of 1996 Conference Report, S.Rep. 104-23 at 90 (Feb. 1, 1996).

<sup>91</sup> 47 U.S.C. § 224(e)(4).

**2. Removing the carrying charges associated with capital expenditures (depreciation, taxes and return) for the telecom rate is inconsistent with cost causation principles**

The Commission recognizes that, under traditional ratemaking principles, rates are intended to recover both operating expenses and capital costs, including a rate of return. The Commission’s decision to exclude recovery of the “depreciation,” “taxes” and “rate of return” carrying charges attributable to capital costs, however, is based upon the conclusion that “most, if not all, of the past investment in an existing pole would have been incurred regardless of the demand for attachments other than the owner’s attachments.”<sup>92</sup>

This is a mistaken assumption. Communications attachers demonstrably add significantly to electric utility capital expenditures.

To begin with, electric utilities must install taller poles than they need for their own purposes in order to accommodate communications attachers.

*Coalition* members were surveyed to compare the poles that they currently install to the poles that they would install if they knew that they would be the only attacher. The four *Coalition* members that responded all indicated that they install poles that are taller than they would need for their own purposes if they were the only attacher.

- BGE currently installs 40-foot, Class 4 poles, but would install 35-foot, Class 4 poles if it knew that it would be the only attacher.
- DP&L currently installs 40-foot, Class 5 poles, but would install 35-foot, Class 5 poles if it knew that it would be the only attacher.
- PPL currently installs 45-foot, Class 3 poles, but would install 40-foot, Class 3 poles if it knew that it would be the only attacher.
- Wisconsin Public Service currently installs 45-foot, Class 5 poles, but would install 40-foot, Class 5 poles if it knew that it would be the only attacher.

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<sup>92</sup> Further Notice at ¶135.

The Commission seems skeptical of this reality, speculating that taller poles “typically would be not be installed in advance purely to accommodate possible telecommunications carrier or cable attachers,” and claiming that it “seems more likely that utilities would install poles based on an assessment of their own needs, and, to the extent that future attachments could not be accommodated on such poles, leave it to the new attacher to pay the cost of the new pole, to the extent that one is installed.”<sup>93</sup> In sum, it seems the Commission expects utilities knowingly to install poles that are too short to accommodate the inevitable attacher requests, then replace the entire pole system with a larger one at attacher expense.

Contrary to the Commission’s assumption, each of the four utilities responding to our survey explained that the reason they install taller poles than they need for their own purposes is to accommodate potential communications attachers. For electric utilities, it makes no sense to install shorter poles with the knowledge that those poles may need to be replaced with a taller pole upon a request for attachment by a third party. The disruption to utility operations would be too great if they were required to replace every pole with a taller one every time an attacher sought to attach to it. The installation by electric utilities of taller poles than they need for themselves is simply one more way in which utilities with no fanfare have helped communications attachers reach their customers with as little inconvenience and expense as possible. Since utilities are not legally required to replace poles to accommodate attachers, under the Commission’s assumption utilities could grind broadband deployment to a halt by installing short poles in the first place and refusing to upgrade them to taller poles upon request by an attacher.

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<sup>93</sup> Further Notice at n. 365.

Apart from having to install poles that are taller than needed for electric utility purposes alone, communications attachers cause electric utilities to incur substantial other capital expenditures, including the following:

- Poles must be replaced more often because of the additional load and pole damage caused by communications attachers. Attachers drill holes in and sometimes through the pole, and their facilities add considerable loading to the pole during winter storms, high winds and other weather events.
- Unlike many electric wires, communications cables do not break when a tree falls on them, so it is the communications attachments – not the electric lines – that bring down poles in storms.
- Garbage trucks or other vehicles pull down the communications lines, not the electric lines, and in the process pull down the poles with them.
- When poles are changed out that already have many communication companies attached, the pole change out is more difficult, takes longer and increases capital costs.
- When an electric utility must install certain additional equipment like transformers and risers on an existing pole, the pole often must be changed out because there is insufficient space or strength on the pole, which would not be the case if the communication companies were not also attached.

These additional capital expenditures are substantial, and they would not be incurred by electric utility pole owners but for the need to accommodate communications attachers.

In addition to these substantial incremental capital expenditures, communications companies of course benefit from the utility's entire capital expenditures on all of the pole plant to which they are attached. This is true because if the pole were not constructed, there would be nothing on which the communications company could attach its facilities.

Communications companies benefit tremendously by all capital expenditures of electric utilities attributable to attached poles and are themselves responsible for increasing those capital expenditures considerably. It is inconsistent with cost causation principles and traditional

ratemaking principles to deny electric utilities the right to recover “depreciation,” “taxes” and “rate of return” carrying charges attributable to capital expenditures.

**3. The proposed telecom rate does not allow utilities to recover their costs and is therefore an unconstitutional taking**

The Commission asks whether the proposed telecom rate would be compensatory and lead to adequate cost recovery.<sup>94</sup> The answer is “no.”

The proposed telecom rate does not come close to allowing utilities to recover their marginal costs incurred in accommodating communications attachments (*i.e.*, all of the costs the utility incurs that it would not have incurred but for the attacher). “Make-ready” costs, which are reimbursable, are only the very beginning of a long list of costs incurred by electric utilities in accommodating communications attachments, including but not limited to: (i) constructing pole distribution systems that are taller and more expensive than the utilities need for their own purposes; (ii) replacing those poles more often than they otherwise would have to; (iii) employing teams of pole attachment personnel to manage attachments; (iv) employing countless other utility employees who devote substantial time to providing operational, engineering, legal and management support but are not employed full time to manage attachments; (v) developing recordkeeping systems, work management systems, billing systems and notification systems; (vi) negotiating contracts with attachers; (vii) complying with regulatory and safety code requirements for attachers; (viii) satisfying increased insurance requirements; (ix) dealing with increased liability issues; and (x) employing legal counsel to provide advice regarding contracting and regulatory requirements (not to mention participating in FCC rulemaking proceedings related to attachments).

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<sup>94</sup> Further Notice at ¶142.

These costs, unlike make-ready costs, are not directly recoverable by utility pole owners, and only a small fraction is recoverable as part of the Commission's proposed telecom rate and existing cable rate formulas. Further, these types of costs are incurred by utilities when attachers perform in the manner in which they are supposed to perform under the Commission's rules. In the real world, unfortunately, attachers routinely do not perform as required by the Commission's and other applicable rules. As a result, electric utilities are often forced to do some of the attachers' work themselves. None of these costs is recoverable.

The proposed telecom rate, like the existing cable rate, is insufficient to allow electric utilities to recover all of the costs they would not have incurred but for the obligation to provide communications attachers access to their poles. The Commission's proposed new Telecom rate, therefore, likely qualifies as an unconstitutional taking.

**Z. The Commission Should Level The Playing Field Between Cable Companies And CLECs By Raising The Cable Rate At Least As High As The Existing Telecom Rate**

Cable operators recognize that the rate they pay for attaching to poles owned by electric utilities and incumbent local exchange carriers ("ILECs") is far lower than the attachment rate paid by CLECs.<sup>95</sup> This unfair favoritism has been in effect since enactment of the Telecommunications Act of 1996.<sup>96</sup>

The cable industry's solution to this disparity is to support (reluctantly, it seems) a uniform broadband rate based on the very low Cable-only attachment rate currently applicable

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<sup>95</sup> See, e.g., *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Comments of the National Cable Telecommunications Association at 35 (June 8, 2009) ("NCTA Broadband NOI Comments").

<sup>96</sup> See, Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996). See also, 47 U.S.C. §§ 224(d), (e).

only to cable television systems.<sup>97</sup> This very low Cable-only rate, they claim, will promote broadband development by reducing costs.<sup>98</sup>

As explained below, making the artificially low, subsidized Cable-only rate available to broadband providers would do precious little to promote broadband or VoIP development, is poor public policy, and is impossible for the Commission to implement in any event because the Pole Attachment Act prohibits any uniform cable/CLEC broadband rate that is lower than the existing Telecom rate. In the same way, the Act prohibits any uniform attachment rate for VoIP and circuit-switched voice services that is lower than the existing telecom rate.

A far better solution for promoting broadband development and the spread of VoIP and circuit-switched telephone services, which the cable industry itself seems to recognize,<sup>99</sup> is to eliminate government-sponsored subsidies (like the one-sided and outdated cable-only pole attachment subsidy) at least in the 92% of the country where broadband currently exists. At the same time, the Commission should level the playing field among competitive broadband and telephone service providers and provide direct subsidies (rather than rate subsidies financed by electric utility consumers) to those actually providing broadband and competitive telephone service to unserved areas.

**1. NCTA itself supports eliminating subsidies so that competition alone can spur broadband deployment**

The National Cable Telecommunications Association (“NCTA”) best explains how providing subsidies to areas where competition already exists is counterproductive. NCTA recommends eliminating subsidies in these areas because competition alone will spur deployment and better service:

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<sup>97</sup> NCTA Broadband NOI Comments at 35.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 26.

Moreover, unlike the case in many other nations that have relied heavily on government subsidies, most areas of the United States already are served by at least two vigorously competitive providers. This means not simply that it is less urgent to subsidize deployment in those areas but that it would be counterproductive to do so. As noted above – and as the rapid ongoing deployment and upgrading of broadband facilities by cable operators and telephone companies confirms – competition among facilities-based providers itself spurs further deployment and upgrades.<sup>100</sup>

**2. The existing cable-only attachment rate is a colossal and unfair subsidy financed by electric utility ratepayers and favoring the cable industry at the expense of CLECs**

Electric utility ratepayers currently subsidize the cable industry with artificially low Cable-only pole attachment rates to the astounding tune of approximately \$10 million per year for every 500,000 attachments that cable companies affix to electric utility poles.<sup>101</sup> CLECs also receive a subsidy by electric ratepayers under the Commission's current rate scheme, but not nearly as much as cable companies.

There is no public policy or other reason for this disparity in pole attachment subsidies to continue. Cable companies and CLECs now offer the same video, voice and Internet services. The cable industry's VoIP service is at least the functional equivalent of circuit-switched telephone service. To the extent that any entity is providing circuit-switched or VoIP telephone services, it should pay the same pole attachment rate as other entities that provide telephone services.<sup>102</sup>

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<sup>100</sup> *Id.*

<sup>101</sup> *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Comments of the Coalition of Concerned Utilities at 3 (June 8, 2009).

<sup>102</sup> *See Petition of American Electric Power Service Corporation, et al. For Declaratory Ruling that the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over Internet Protocol Service*, WC Docket No. 09-154, Comments of the Coalition of Concerned Utilities (filed Sept. 24, 2009).

The *Coalition* supports NCTA's arguments: the best way to promote broadband competition is to level the playing field among broadband service providers by eliminating subsidies where broadband currently is available. By extension, the cable industry's blatant VoIP attachment subsidy should be eliminated for the same reason.

To that end, the cable industry's colossal pole attachment subsidy should be terminated immediately and the gross disparity in pole attachment rates between cable operators and CLECs should be eliminated.

### **3. The cable industry does not need or deserve any subsidies**

The artificially low Cable-only attachment rate served its purpose long ago and is now an antiquated, unproductive and unfair mechanism whereby the electric utility industry, which is under its own pressures to reduce rates, subsidizes highly profitable, multi-billion dollar cable companies whose businesses are expanding rapidly.

This was not the intent of Congress when the cable-only pole attachment subsidy was created. Instead, Congress explained that cable companies were furnished with a low pole attachment rate in 1978 in order "to spur the growth of the cable industry, which in 1978 was in its infancy."<sup>103</sup>

To put it mildly, the cable industry is no longer in its infancy. "CATV" companies have transformed themselves into communications giants, offering not only cable television service, but also video on demand, broadband Internet access and telephone services. They have even entered the wireless broadband market.<sup>104</sup> At this late date, it is inappropriate to allow the cable

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<sup>103</sup> H.R. Rep. No. 104-204, at 91 (1995).

<sup>104</sup> See, Mike Regoway, *Comcast Sets Portland WiMAX Plans*, *The Oregonian*, June 29, 2009, available at [http://www.oregonlive.com/business/index.ssf/2009/06/comcast\\_sets\\_portland\\_wimax\\_pl.html](http://www.oregonlive.com/business/index.ssf/2009/06/comcast_sets_portland_wimax_pl.html) (last visited August 16, 2010). The article notes that Comcast began offering wireless Internet access to customers in the Portland area on June 30, 2009, piggybacking on Clearwire's WiMAX network. Comcast invested \$1 billion in Clearwire, helping fund plans for a national WiMAX rollout. Portland was the first city to get Comcast's new wireless service,

and telephone industries to “piggy back” on electric utility poles without paying a full attachment rate that fairly reflects the benefits they receive (and the costs they save) when they deploy their attachments via someone else’s distribution poles.

Comcast, the largest cable company in the country, boasts a market capitalization of some \$27.3 billion.<sup>105</sup> It has 23.2 million cable customers, 16.4 million Internet access customers and 8.1 million voice customers.<sup>106</sup> Comcast has attracted enough voice customers that it recently supplanted Qwest as the third-largest residential phone provider in the nation.<sup>107</sup> In 2009 the company reported revenue of \$35.8 billion and income of \$3.6 billion.<sup>108</sup> In the first half of 2010, Comcast’s revenue was \$18.7 billion, an increase from \$17.8 billion during the first half of 2009.<sup>109</sup> This is not a company that should be receiving rate subsidies created years ago to benefit a cable industry then in its infancy.

Not only are these attachers’ subscriber numbers growing, the rates that they charge subscribers for their services are higher now than ever. While the average monthly bill for cable’s expanded basic programming package in 1998 was approximately \$26.13, Comcast’s average revenue per customer today is \$118 per month (more than four times as high) and growing.<sup>110</sup> The “triple play” of video, broadband and voice generates average monthly

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but the company has added WiMAX service in several other cities, including Houston (*see, Comcast launches 3G, 4G service in Houston*, Houston Business Journal, May 5, 2010, available at <http://www.bizjournals.com/boston/othercities/houston/stories/2010/05/03/daily35.html> (last visited August 16, 2010)).

<sup>105</sup> Yahoo Finance, <http://finance.yahoo.com/q?s=CMCSA&reco=1>, (last visited August 16, 2010).

<sup>106</sup> <http://www.comcast.com/corporate/about/pressroom/corporateoverview/corporateoverview.html>, (last visited August 16, 2010).

<sup>107</sup> See, <http://www.dslreports.com/shownews/Comcast-Now-Third-Largest-Phone-Company-101317> (last visited August 16, 2010).

<sup>108</sup> Comcast Corporation Form 10-K for fiscal year ended December 31, 2009, p. 1.

<sup>109</sup> Comcast Corporation Form 10-Q for period ending June 30, 2010, p. 3

<sup>110</sup> Comcast Corporation Form 10-K for fiscal year ending December 31, 2009 at 25. The average monthly total revenue per video customer increased from \$102 in 2007 and \$95 in 2006.

revenues for Comcast of approximately \$150 per customer (nearly six times as high).<sup>111</sup> These figures continue to increase.<sup>112</sup>

Comcast revenue has increased from \$25 billion in 2006 to \$30.9 billion in 2007, to \$34.3 billion in 2008, and \$35.8 billion in 2009, while net income (profits) held steady at the astounding level of approximately \$2.5 billion for 2006 through 2008 before jumping to \$3.6 billion in 2009.<sup>113</sup>

Chairman Genachowski has stated that “*Wireless providers also face red tape and needless barriers, which slow deployment and increase the costs of investment. The costs of obtaining permits and leasing pole attachments and rights of way can amount to 20 percent of fiber deployment, which is necessary for wireless networks as well as wired networks.*”<sup>114</sup> That statement is far off target. In reality, pole attachment leasing adds very little to the cost of fiber deployment.

For comparison purposes, Comcast’s average monthly revenue per subscriber is \$118.00 per month,<sup>115</sup> while pole attachments cost Comcast roughly \$0.62 per month per pole to rent from the local electric utility.<sup>116</sup> The cost of pole attachment rentals alone is only 0.53% ( $\$0.62 \div \$118 = 0.53\%$ ), an amount that is miniscule considering the enormous benefits that gigantic companies like Comcast receive by gaining access to a pole distribution system that they need not construct or maintain but nevertheless can use to deliver their services.

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<sup>111</sup> Comcast Corporation Form 10-K for fiscal year ending December 31, 2009 at 25.

<sup>112</sup> Comcast Corporation Form 10-Q for period ending June 30, 2010, p. 3.

<sup>113</sup> Comcast Corporation Form 10-K for fiscal year ending December 31, 2009 at 20.

<sup>114</sup> “Mobile Broadband: A 21<sup>st</sup> Century Plan for U.S. Competitiveness, Innovation and Job Creation,” New America Foundation, Washington, D.C., February 24, 2010.

<sup>115</sup> Comcast Corporation Form 10-K for fiscal year ending December 31, 2009 at 25. The average monthly total revenue per video customer increased from \$102 in 2007 to \$111 in 2008.

<sup>116</sup> Cable operators currently pay 7.4% of an electric utility's total annual pole costs. Assuming annual pole costs of \$100/pole (\$300 net cost of a bare pole X 33% carrying charges = \$100/pole), then the annual rental rate per pole is \$7.40, and the monthly rental rate is \$0.62 ( $\$7.40 \div 12 = \$0.62$ ).

Meanwhile, Comcast pays attachment rates of just a few dollars per pole per year. Any objective analysis shows that the cable pole attachment rate is a government-mandated bargain for the cable industry. At this late date in the evolution of the cable industry, however, an artificially low pole attachment rate for Comcast and other cable operators is an unjustified gift at the expense of the electric utility industry and its ratepayers, not to mention the CLECs with which they compete.

To the extent that some kind of government mandated subsidies were appropriate to jump-start the cable industry in the early days of pole attachments, those days are long gone. Yet Comcast and other media giants continue to get access to the most basic and essential component of “their” pole distribution systems for an artificially low fee that ill-serves the nation’s electric utilities and their consumers. To make matters worse, the Commission now proposes to reduce the rate even further.

**4. There is no reason to believe that low pole attachment rates will stimulate the provision of VoIP or other broadband service to rural America**

Unlike the profit-generating incentives in place with communications companies, traditional electric utility cost of service proceedings require utilities to include all revenues from pole attachments as an offset to their revenue requirements. In that way, revenues collected from pole attachments are passed through to electric utility ratepayers dollar-for-dollar in the form of reduced overall rates. For this reason, electric utilities do not have the same profit-making motive with respect to pole attachments as do cable and telecommunications companies.

In contrast, no one really knows what cable operators do with their pole attachment subsidy dollars. In the urban, suburban and other areas where they currently provide service, cable operators receive tens of millions of dollars in subsidies per year from electric utility

ratepayers. With average revenues of \$110/month (\$1,320/year) per subscriber,<sup>117</sup> granting cable operators access to fully constructed pole distribution corridors at the miniscule rate of a few dollars per pole per year saves them huge amounts of money.

There is no reason to believe that cable operators will take the tens of millions that they save on pole attachments in urban and suburban systems, where customers and revenues are abundant, and miraculously invest that money in rural areas where customers and potential revenues are scarce, and there is little chance that they will receive an adequate return on their investment.<sup>118</sup> That, of course, is the reason why these areas have no VoIP telephone or wireline broadband service today.

As evidenced by the Declaration of a rural cable operator who testified last year in a pole attachment rulemaking proceeding before the Arkansas Public Service Commission, the primary reason the cable industry does not deploy high speed broadband or VoIP service in rural areas is the enormous expense associated with head-end equipment installation and system upgrades – not the relatively minute costs associated with pole attachment rentals.<sup>119</sup>

Cox Communications' Executive Vice President and Chief Strategy and Product Officer Dallas Clement confirmed last year that pole attachment rates have little if anything to do with the cable industry's failure to deploy VoIP or high speed broadband services in rural areas. According to his comments, there are a number of reasons why rural areas do not have high speed broadband service: first and foremost, because of the large capital expenditures, second,

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<sup>117</sup> Comcast Corporation Form 10-K for fiscal year ending December 31, 2009 at 25.

<sup>118</sup> The same argument applies if the Commission were to require building owners to subsidize the rent that cable companies pay for office space. While this savings may help cable operator bottom lines, there is no reason to believe they will invest those savings to provide broadband service to sparsely-populated rural America.

<sup>119</sup> See, June 5, 2008, *Ex Parte* Communication filed by the *Coalition* in the Pole Attachment Proceeding, which is a letter describing the Declaration of Dennis R. Krumblis of Buford Media Group LLC ("Buford"), submitted by the Arkansas Cable Telecommunications Association last year in an ongoing proceeding before the Arkansas Public Service Commission.

because average revenues may not be sufficient, and only third because of higher operating expenses.<sup>120</sup> When he identified the higher operating costs associated with rural broadband deployment, he did not even mention pole attachment costs.<sup>121</sup>

**5. Rural broadband investment will occur only with targeted subsidies to cover up-front capital costs**

Since the costs associated with system construction, head-end equipment and system upgrades are the primary impediment to VoIP and broadband development in rural areas, the best solution to promoting deployment in unserved rural areas is to provide targeted subsidies to cover associated capital costs.

NCTA itself recognizes the need for targeted subsidies. Rather than continuing subsidies in areas where broadband already exists, NCTA calls for targeted subsidies to unserved areas:

But targeting subsidies and financial incentives to geographic areas where the marketplace is not currently working – areas that remain *unserved* by any broadband facilities – would be a sensible and effective way to increase deployment and availability of broadband in this country. It would use government resources to achieve an important policy objective without wasting substantial sums of money and without undermining the benefits of marketplace competition. NCTA has encouraged NTIA and RUS to distribute funding to unserved areas and, as discussed below, the Commission should consider how it can adapt the USF program in this way as well.<sup>122</sup>

NCTA advocates Universal Service Fund reform to “enable the commission to direct funding to those areas where no provider otherwise would invest in broadband facilities.”<sup>123</sup>

NCTA notes that “[w]hile market forces brought multiple broadband networks to most areas of

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<sup>120</sup> See transcript of the FCC’s National Broadband Plan Workshop, Deployment – Wired, August 12, 2009, at 80 (“[I]n order of priority, I’d say it’s the CAPEX to get there. Then it’s what’s the average revenue out of that home? And that’s sort of the second issue. And then the third issue is the cost to support.”)

<sup>121</sup> See *id.*, at 76-82.

<sup>122</sup> NCTA Broadband NOI Comments at 27 (emphasis in original).

<sup>123</sup> *Id.* at 29.

the country, some areas are so remote or sparsely populated that no provider has been willing to make the necessary investment.”<sup>124</sup>

NCTA’s request, therefore, is that subsidies be eliminated in the 92 percent of the country where broadband already exists<sup>125</sup> and targeted to the eight percent of the country where it does not. Continued pole attachment rate subsidies covering 100% of the country subject to FCC jurisdiction do not fit that bill.

Providing colossal pole attachment subsidies to gigantic cable television companies in the urban and suburban areas that they already serve makes no sense at all. Not only does VoIP and broadband already exist in those areas, continued rate subsidies are unlikely to increase VoIP and broadband investment in unserved rural areas, where there actually may be a broadband deployment problem.

Subsidizing one industry (cable) more than another (CLECs) with artificially low attachment rates not only disadvantages the disfavored industry, it distorts the market for existing and future telephone and broadband services and reduces the competition that NCTA itself understands is necessary to spur the development of those services.<sup>126</sup>

**6. The Commission has no authority to reduce the telecommunications attachment rate for CLEC attachers or cable companies providing telecommunications services**

CLECs (and cable operators, reluctantly) urge the Commission to reduce the pole attachment rate for Section 224 broadband attachments to the artificially low, grossly subsidized Cable-only rate. Time Warner Cable claims that “there is a broad consensus (which includes

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<sup>124</sup> *Id.* at 32.

<sup>125</sup> *Id.* at ii. (“the cable industry alone now makes high-speed Internet service available to over 92 percent of American households”).

<sup>126</sup> *See Id.* at 26.

many pole owners) that the Commission possesses the statutory authority to apply the cable rate to CLECs in this circumstance.”<sup>127</sup>

Contrary to Time Warner Cable’s claim, the vast majority of electric utility pole owners in fact agree with the *Coalition* that the Commission is statutorily required to establish the attachment rate for commingled telecom/broadband Internet service at or higher than the Section 224(e) Telecommunications rate.<sup>128</sup> Even if extending cable’s unproductive and unfair subsidy to CLECs made any sense from a policy perspective (which it does not), Time Warner Cable is wrong as a matter of law in arguing that the Commission possesses the necessary statutory authority to do so.

The Section 224(e)(1) Telecom attachment rate specifies the rate to be charged by “telecommunications carriers to provide telecommunications services.”<sup>129</sup> This plain statutory language makes it clear that if a CLEC provides telecommunications service, it must at least be

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<sup>127</sup> *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Comments of Time Warner Cable at 25 (June 8, 2009).

<sup>128</sup> *See, Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Comments of the Edison Electric Institute and Utilities Telecom Council at 97 (filed Mar. 7, 2008)(“[T]he Commission has jurisdiction to increase the rate paid by cable systems to at least the same rate as the telecom rate. In any event, a single rate cannot be lower than the telecom rate.”); Comments of the Utilities Telecom Council at 15 (“[B]roadband attachments by telecommunications carriers and cable telephony providers must also be subject to the telecommunications rate by virtue of the underlying use of the attachment for telecommunications services. Anything less than the telecommunications rate would frustrate Congress’s intent in Section 224(e).”); Reply Comments of Florida Power & Light, Tampa Electric and Progress Energy Florida, at 20 (“Section 224(e) obligates telecom carriers to pay the telecom rate regardless of what other services they may be providing through their attachments. Charging anything less than the telecom rate for CATV broadband attachments would continue to put CLEC broadband providers at a competitive disadvantage.”); Reply Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power, at 2 (“If the Commission wants to unify the rate for CLEC and CATV broadband attachments, there is only one way to do it – at the telecom rate. Section 224(e) requires this result.”); Reply Comments of American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services, Inc., PPL Electric Utilities Corporation, Progress Energy, Southern Company, and Xcel Energy Services, Inc., at 3 (strongly endorsing Edison Electric Company and Utilities Telecom Counsel Reply Comments).

<sup>129</sup> 47 U.S.C. § 224(e)(1).

assessed the Telecom attachment rate.<sup>130</sup> Adding broadband to the telecommunications service offering does not entitle the CLEC to a lower cable rate.

The Section 224(d) Cable-only attachment rate is altogether different, because it applies to “a cable system solely to provide cable service.”<sup>131</sup> The Commission therefore is not required to assess the Section 224(d) Cable-only rate if a cable operator provides VoIP or broadband in addition to cable service.

The Supreme Court agrees with this analysis. In *Gulf Power II*, the Court reviewed and affirmed the FCC’s decision to apply the Section 224(d) Cable-only rate for a cable system providing cable service comingled with Internet service but specifically recognized that the FCC could have chosen a different (and higher) rate had it wanted to.<sup>132</sup> Both the Commission and the Court, however, recognized no such flexibility with respect to the Section 224(e) Telecommunications rate. It is fixed and invariable for the provision of telecommunications services by telecommunications carriers. In its Order, the Commission recognized that the Section 224(e) Telecom rate is a mandatory rate, noting that “a cable television system providing Internet service over a comingled facility is not a telecommunications carrier subject to the revised rate mandated by Section 224(e) by virtue of providing Internet service.”<sup>133</sup> The Commission left no doubt that a cable operator providing telecommunications service must pay the higher, mandated Section 224(e) Telecommunications rate:

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<sup>130</sup> *Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Comments of the Coalition of Concerned Utilities at 7-12 (March 7, 2008). As explained by the *Coalition*, this telecom rate itself represents an enormous subsidy for CLEC attachers, but it is considerably better than the colossal subsidy provided by the cable-only rate.

<sup>131</sup> 47 U.S.C. § 224(d) (emphasis added).

<sup>132</sup> *National Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002) (“*Gulf Power II*”).

<sup>133</sup> *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, at ¶33 (1998) (emphasis added).

We note that in the one case where Congress affirmatively wanted a higher rate for a particular service offered by a cable system, it provided for one in section 224(e). In requiring that the Section 224(d) rate apply to any pole attachment used 'solely to provide cable service,' we do not believe Congress intended to bar the Commission from determining that the Section 224(d) rate methodology also would be just and reasonable in situations where the Commission is not statutorily required to apply the higher Section 224(e) rate.<sup>134</sup>

On review, the Supreme Court found “sensible” the FCC’s analysis that if Internet service were telecommunications, the mandatory Section 224(e) Telecommunications rate would apply to a cable operator providing Internet service.<sup>135</sup>

The Court not only affirmed the Commission’s analysis, on its own motion it concluded that the Section 224(e) rate is a mandatory rate that must apply to telecommunications carriers providing telecommunications services: “If the FCC should reverse its decision that Internet services are not telecommunications, only its choice of rate, and not its assertion of jurisdiction, would be implicated by the reversal.”<sup>136</sup> The Court therefore recognized that if telecom services were being provided the attachment rate would change from the Cable-only rate to the Telecom rate because Section 224(e) requires a telecommunications carrier providing telecommunications service to be charged the Section 224(e) Telecommunications rate.

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<sup>134</sup> *Id.* at ¶34 (emphasis added). The Commission even requires cable operators to notify utility pole owners when they start providing telecommunications service:

We also disagree with utility pole owners that submit that all cable operators should be "presumed to be telecommunications carriers" and therefore charged at the higher rate unless the cable operator certifies to the Commission that it is not "offering" telecommunications services. We think that a certification process would add a burden that manifests no benefit. We believe the need for the pole owner to be notified is met by requiring the cable operator to provide notice to the pole owner when it begins providing telecommunication services. The rule we adopt in this Order will reflect this required notification.

*Id.* at ¶35 (footnotes omitted).

<sup>135</sup> *Gulf Power II*, 534 U.S. at 337.

<sup>136</sup> *Gulf Power II*, 534 U.S. at 338.

The FCC and Supreme Court agreed that if a cable operator or CLEC provides telecommunications service, that entity must pay the Telecommunications attachment rate. Therefore, a uniform attachment rate applicable both to CLECs providing circuit-switched telephone service and to cable operators providing VoIP must be set at least at the statutorily required Telecommunications rate.

While the Telecom rate is the minimum rate that can be charged to a cable operator or CLEC providing telecommunications, there is nothing in the Commission's or Court's analysis that prevents the Commission from approving a rate higher than the Telecom rate when such an entity provides broadband service in addition to telecommunications service. It makes intuitive sense that when *more* than telecom service is provided, *more* – not *less* – than the Telecom rate should be charged.

The Commission lawfully and as a matter of public policy can prescribe a higher rate for both cable operators and CLECs providing more than telecom services that is in line with the rate endorsed by the City of Seattle and the Washington State courts and proposed by the *Coalition* in the Pole Attachment Proceeding. A rate higher than the Telecom rate for more than telecom services would provide a much fairer allocation of costs and eliminate the subsidies for cable operators and CLECs alike.<sup>137</sup>

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<sup>137</sup> See, Reply Comments of the Coalition of Concerned Utilities in the Broadband NOI Proceeding, at 13-14 (filed July 21, 2009). See also, *Coalition* Comments in the Pole Attachment Proceeding at 26-28, 39-41. As stated in those Comments:

A rate for commingled telecommunications and broadband service that is higher than the rate for telecommunications service alone makes sense as a "surcharge" on the basic rate paid by a telecommunications carrier providing telecommunications service. The telecommunications carrier providing telecommunications service is still being charged the telecommunications rate, but the surcharge applies to its added provision of broadband services.

*Id.* at 39.

**AA. Other States Have Adopted Much More Reasonable Pole Attachment Rates**

In response to the Commission’s request for comment on alternative proposals for the telecom rate,<sup>138</sup> the *Coalition* proposes for the reasons stated below that the rate formula established by the City of Seattle that was blessed by the Washington state courts should be adopted.

The pole attachment rates established by some State Public Service Commissions, like those in Delaware, Indiana and Maine, require cable and telecom attachers to pay a fairer and higher percentage of electric utility pole costs than the FCC telecom rate formula (let alone the FCC cable rate formula). The formula adopted by the City of Seattle also allows for greater cost recovery.

Unlike the FCC’s approach, all of these approaches recognize the inherent value of the electric utilities’ pole distribution systems to the attachers, as well as the costs that the attachers avoided by not being required to construct pole distribution systems of their own.

The formula adopted by the City of Seattle, like the FCC Telecom Rate, Delaware Rate, Maine Rate, Indiana Rate, and the U.S. House of Representatives formula, allocates costs associated with “assigned” (*i.e.*, usable) space and “common” (*i.e.*, unusable) space separately. Like Delaware, Maine and Indiana, the City of Seattle recognizes that the 40-inch communication worker safety zone is required by the NESC to separate communications attachments from electric attachments appropriately should be considered part of the “common space” on poles. The NESC, in fact, refers to this the 40-inch safety space as the

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<sup>138</sup> Further Notice at ¶139.

“communication worker safety zone,” reflecting that the entire purpose of this 40-inch space on the pole is to protect communication workers.<sup>139</sup>

On a presumptive 37.5-foot pole, therefore, the Seattle Rate presumes the assigned space to be 10 feet and the common space to be 27.5 feet. Like Delaware and Indiana, the costs associated with the common space on the poles are shared equally among all attachers. The costs associated with the assigned space are allocated based on the percentage of that space that is used by the attacher. Thus, on a pole with a presumed height of 37.5 feet and three attachers, each attacher would be required to contribute 27.1% to the annual costs of owning and operating the poles.

Washington State courts have found Seattle’s allocation of costs to be perfectly reasonable.<sup>140</sup> Following a lengthy trial (TCI Cablevision, predecessor-in-interest to Comcast, called 12 witnesses), the Washington State court found that Seattle’s allocation of the costs associated with the pole’s support space equally among all attaching entities was “eminently reasonable.”<sup>141</sup> The court noted that such an allocation “is based on the rationale that each user uses and benefits from the support space equally,” which the court recognized as “an accepted costs accounting methodology.”<sup>142</sup> The court concluded that “[t]here is no reasonable rationale why a profit making enterprise, such as TCI, should earn a profit by using the City’s infrastructure without paying a full share of the costs.”<sup>143</sup>

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<sup>139</sup> See NESC § 238.E.

<sup>140</sup> See *TCI Cablevision of Washington, Inc. v. City of Seattle*, No. 97-2-02395-5SEA, Findings of Fact, Conclusions of Law and Judgment (May 20, 1998, J. Learned, Washington Sup. Ct., King County) (attached hereto at **Exhibit D**).

<sup>141</sup> *Id.*, Conclusion of Law No. 27, slip op. at 21.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*, Conclusions of Law Nos. 28-29 and 56, slip op. at 21, 25.

The court also accepted Seattle’s equal allocation of the costs associated with the four-foot “communications worker safety zone”<sup>144</sup> among attachers because “it is primarily for the safety of the non-electric attachments that the 4-foot safety clearance space exists.”<sup>145</sup> The court, in fact, concluded that it would be reasonable to allocate all of the four-foot safety space to attachers other than Seattle City Light,<sup>146</sup> which is how the Delaware PSC allocates those costs.

The court explicitly rejected the FCC’s cost allocation methodology: “The FCC methodology for setting pole attachment rental rates is not the measure of reason; it was the result of Congressional compromises and developed with the purpose and intent of helping a fledgling cable television industry, which is no longer a fledgling industry.”<sup>147</sup> The court found that Seattle’s cost allocation methodology already benefited the cable company, “because the expense of owning a portion of the poles or the expense of building its own set of poles is greater than the expense of renting space from Seattle.”<sup>148</sup>

Applying the formulas discussed above, the following table lists the percentage of annual pole-related costs that utility pole owners can recover from each atacher under each formula, assuming three attachers per pole and a 37.5 foot average pole height.

	<b>FCC Cable</b>	<b>FCC Telecom</b>	<b>Delaware</b>	<b>Maine</b>	<b>Indiana</b>	<b>Seattle</b>
<b>% of Annual Pole Costs Allocated to Each Attacher</b>	7.4%	16.9%	30.2%	32.4% (telco) 23.0% (cable)	31.25%*	27.1%

\* assumes 40-foot pole

<sup>144</sup> See NESC § 238.E.

<sup>145</sup> *TCI Cablevision of Washington, Inc.*, Conclusions of Law Nos. 35-37, slip op. at 22.

<sup>146</sup> *Id.*, Conclusion of Law No. 35, slip op. at 22.

<sup>147</sup> *Id.*, Conclusion of Law No. 47, slip op. at 24.

<sup>148</sup> *Id.*, Conclusion of Law No. 54, slip op. at 25.

The FCC rates fall far below what these other states and the Washington State Superior Courts have found to be reasonable and necessary to avoid unfair subsidies to attaching entities. The FCC's proposed new Telecom Rate would allocated 16.9% of a much smaller amount of costs and therefore be even worse.

**BB. ILECs Are Not Entitled To Regulated Rates**

In response to the Commission's request to refresh the record concerning the regulation of pole attachments by ILECs,<sup>149</sup> the *Coalition* states emphatically that ILECs do not have any statutory right to regulated pole attachments. To grant them such rights would create an uneven playing field in their favor to the detriment of other communications attachers and their electric utility joint use/joint ownership partners.

If ILECs were granted pole attachment rights on electric utility poles, it would create a one-way street by guaranteeing regulated rates, terms and conditions to ILECs for access to electric utility poles but confer no parallel rights on electric utilities with respect to ILEC-owned poles. Electric utilities would be left to fend for themselves in their attempts to gain much needed access to ILEC-owned poles, since bargaining power no longer would be equal.

Because electric utilities are vitally dependent upon ILECs for access to ILEC poles, this disparity in pole attachment rights would provide the ILECs with enormous, unfair leverage. ILECs could restrict electric utility access to ILEC poles and demand that electric utilities pay outrageously high attachment rates and other fees. They could require electric utilities to set all new poles, replace ILEC poles, maintain ILEC facilities, monitor and correct ILEC safety violations, surrender space needed for electric attachments, and otherwise hinder the ability of electric utilities to provide service to their customers in a safe and reliable manner.

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<sup>149</sup> Further Notice at ¶143.

**1. Joint use and joint ownership arrangements are fundamentally different from pole attachment agreements**

ILECs share the use of their poles with electric utilities -- and in turn electric utilities share the use of their poles with ILECs -- pursuant to well established joint use arrangements which were originally established almost 100 years ago.

ILECs do not simply attach to electric utility poles as do cable companies and competitive local exchange carriers (“CLECs”). Unlike cable companies and CLECs, which do not own their own distribution poles, ILECs do own and control millions of distribution poles across the country. Cable companies, CLECs -- *and electric utilities* -- rely on access to ILEC-owned poles in order to distribute their respective services to consumers.

Under a cable or CLEC pole attachment agreement, an attacher is dependent on the pole owner for access to its customers (since the attacher controls no poles of its own). The pole owner is not similarly dependent on the attacher.

In a joint use arrangement, however, both parties are dependent on the other for access to customers, because both parties are pole owners in their own right.<sup>150</sup> As a result, a natural governor limits abuse in any joint use arrangement by either party. Since each party is dependent upon access to the other’s poles, each is motivated to treat the other in a fair and nondiscriminatory manner on mutually acceptable terms and conditions.

This mutual dependency explains why joint use agreements contain vastly different terms and conditions than pole attachment agreements. Pursuant to most joint use agreements, each party is expected to set an equal number (or a defined percentage) of new poles, inspect and

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<sup>150</sup> Congress has been aware of the special relationship between electric and telephone utilities since enactment of the 1978 Pole Attachment Act. The Senate Report notes that approximately 70% of poles owned by electric or telephone utilities are subject to joint use arrangements. S. Rep. No. 95-580, at 12 (1977).

replace the poles when they become defective, and expend the necessary resources to maintain those poles. Because of this mutual dependency, joint use agreements, unlike pole attachment agreements, often require that the agreement stay in effect for all existing attachments, even after the term of the agreement has expired.

Unlike pole attachment agreements, joint use agreements often provide for a sharing of pole costs based on a much more reasonable allocation of costs than current FCC rules require third parties to pay.<sup>151</sup> Such commercial terms were established through arms-length negotiations, and this arrangement makes eminent sense (since each party is reliant on access to the other's poles) and is part of the shared access concept that has been at the heart of joint use contracts for decades.<sup>152</sup>

Requiring both parties to share pole costs is mutually satisfactory because each party otherwise would be required to incur far greater costs by setting its own lines of duplicative poles. Moreover, without joint use the public would be burdened unnecessarily by dual poles on rights of way and private easements throughout the country.

Pursuant to many joint use agreements entered into by Coalition members and their ILEC partners, the ILEC is allocated between 2-3 feet of space on the pole for its attachments, and the electric utility is allocated 4.5-8 feet due to safety and operational requirements. Other joint use agreements may be designed so that neither party pays rental fees to the other unless one party owns a deficient number of poles. Unlike pole attachment agreements, ILECs often are entitled to rent portions of their allocated space to other telecommunications attachers. Joint use

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<sup>151</sup> In some joint use agreements, for example, the annual rental that each party must pay to the other recognizes the disparity in the gross amount of usable space allocated to each party by basing pole rentals on a defined and specified ratio. However, both parties are required to share equally in the costs attributable to the unusable space on the pole, which can account for the majority of pole costs.

contracts also often specify which pole owner will pay for stronger or taller poles that may be required by one of the parties or by a government entity.

An alternate ILEC and electric company arrangement is the “joint ownership” relationship, a contracted sharing of the full cost of the jointly owned and operated pole plant. As discussed later, several of the Coalition members operate through joint use arrangements with their ILECs. Under this form of agreement, the electric utility and ILEC both maintain an ownership interest in each pole that they share. The “joint ownership” relationship, however, usually involves far more coordination between the pole owners with respect to third-party attachments and the maintenance and other activities associated with the poles.

For example, in some joint ownership arrangements, a third-party attacher may need to obtain a permit to attach from both pole owners, each of which will have separate and distinct attachment agreements, installation standards, work practices, labor agreements, and other concerns. Unlike joint users, joint owners often coordinate to varying degrees daily operations such as survey and make-ready work, installation inspections and pole change outs.

Sometimes, joint owners will agree to divide responsibilities for the poles so that one owner will be the “custodian” of some poles and the other owner will be the “custodian” of the others. Although these “custodial” requirements can vary, in some cases third-party licensing is covered by the custodian, along with other maintenance, management, inspection, replacement and administrative activities associated with the pole, although those costs are often shared.

In general, much more than joint use arrangements, joint ownership arrangements are dependent upon having a cooperative working relationship. It is more analogous to a marriage than to a landlord/tenant relationship. Each jointly-owned pole is a potential point of contention.

The ILEC arguments completely ignore the substantial differences between pole attachment and joint use arrangements. By not recognizing these differences, they paint a false picture of the relationship between electric utilities and ILECs and attempt to mislead the Commission into substituting a third party-type pole attachment regime for well established and publicly beneficial joint use arrangements.

**2. Joint use and joint ownership rates are different than pole attachment rates because they are based on an entirely different relationship that provides significant benefits to ILECs**

By virtue of their status as a pole owner, ILECs receive a whole host of advantages that third-party attachers like cable companies and CLECs do not enjoy. As a result, permitting ILECs to receive the same rate as cable companies and CLECs would be grossly unfair to the cable companies and CLECs (as well as to electric utilities). A brief, non-exclusive list of some of the unique benefits received by ILECs, which are not available to third-party attachers in traditional pole attachment agreements, follows.

**a) Make-ready costs are often reduced as a result of initial coordination.**

Most joint use and joint ownership agreements contain mechanisms under which the entity initially planning to construct a pole line will notify the other party and offer the opportunity to attach. If the other party seeks to attach, the pole line as originally designed and installed will be of sufficient height and strength to accommodate both parties. This historically has minimized the make-ready work that often occurs with cable and CLEC proposals to attach to already constructed poles.

Unlike CLECs and Cable Companies, therefore, ILECs are not charged for application fees, pole inspections and project engineering costs that the later attachers need to pay.

The attached make-ready cost data show that ILECs pay very little each year in make-ready expenses to accommodate their attachments on electric utility poles, while CLECs) and Cable Company competitors pay far higher amounts.

The attached information, supplied by PPL Electric Utilities (“PPL”) and covering the three-year period from 2006-2008, indicates that:

- (1) CLECs incur 12 times more in make-ready costs per year than ILECs.
- (2) Cable Companies incur nine (9) times more in make-ready costs per year than ILECs.
- (3) CLECs pay on average \$11.61 per existing attached pole per year in make-ready expenses.
- (4) Cable Companies pay on average \$0.99 per existing attached pole per year in make-ready expenses.
- (5) ILECs pay on average \$0.11 per existing attached pole per year in make-ready expenses.

ILECs therefore incur \$11.50 less per pole ( $\$11.61 - \$0.11$ ) in annual make-ready expenses than their CLEC competitors, and \$0.88 less per pole ( $\$0.99 - \$0.11$ ) than their Cable Company competitors. Although CLECs and Cable Companies expend comparable total dollar amounts per year in make-ready costs, Cable Company have been incurring those costs for many more years so that their networks are far larger than existing CLEC networks.

At least two conclusions follow from this make-ready cost data.

First, granting ILECs the same low attachment rate that is paid by CLECs, as the ILECs are demanding, would give ILECs a huge financial advantage over their CLEC competitors. It would be inequitable to allow ILECs to pay the same very low, subsidized attachment rate paid by CLECs (*e.g.*, \$15 per pole per year) when their CLEC competitors must pay \$11.50 per pole per year in addition to the \$15 per pole per year, for a total of \$26.50 per pole per year.

The second conclusion to draw from this make-ready cost data is that, at this stage in the build-out of Cable plant and CLEC plant, Cable Companies also have a considerable advantage over their CLEC competitors. CLECs pay \$10.62 ( $\$11.61 - \$0.99$ ) more per pole in annual make-

ready expenses than do Cable Companies. This gross disparity exists (and likely has existed since CLECs began offering service) at a time when Cable Companies pay an extremely low, subsidized pole attachment rate that is roughly one-half the attachment rate paid by CLECs.

**b) ILECs need not seek approval from the electric utility pole owner to make attachments**

Cable companies and CLECs are usually required to obtain advance approval from at least one pole owner (and usually two in joint ownership situations) before installing new attachments. ILECs, on the other hand, typically are not subject to that requirement. ILECs are not required to request make-ready engineering when attaching to poles owned by electric utilities, since they have their own engineers to perform appropriate calculations. Verizon and AT&T, for instance, have been installing new fiber as part of their FIOS and U-Verse video services roll-outs without such an impediment under longstanding Joint Use Agreements. Unlike cable companies and CLECs, their rights as pole owners entitle them to roll out these services with very little oversight by their fellow pole owners.

**c) ILECs need not incur the costs associated with post inspections as cable companies and CLECs are often required to incur**

Since ILECs often need not obtain utility pole owner approval for their attachments, these requirements are not applicable.

**d) Electric utilities often obtain rights-of-way for ILECs**

In many joint use and joint ownership agreements, the party which owns or is the “custodian” of the pole often is required to obtain rights-of-way, highway permits and other authorizations on behalf of both parties to the joint use or joint ownership agreement. Since electric utilities are currently responsible for setting most new poles, electric utilities are performing this task on behalf of ILECs far more than ILECs do so for electric utilities. Cable companies and CLECs are required to get their own.

**e) Joint use and joint ownership agreements often entitle ILECs to a certain number of feet on the pole, regardless of whether they have a current need for that space**

Cable companies and CLECs generally rent only the one-foot of space on the pole that they currently need. Joint use and joint ownership agreements often entitle ILECs to a certain number of feet on the pole, regardless of whether they have a current need for that space. With the extra space available under joint use, ILECs can expand their facilities with greater ease, plan for emergencies and future needs, and have less need to incur the cost of changing out a pole to meet their requirements.

**f) ILECs are given preferential locations on the poles**

Because they are provided the option to attach before other attaching entities, ILECs are allowed to select the preferred attachment height on the pole, which typically is the lowest allowable communications space on the pole. This allows for easier access to the pole.

**g) ILECs avoid relocation and rearrangement costs**

Pursuant to some joint use and joint ownership agreements, ILECs are not required to pay for the relocation of electric company facilities when poles must be rearranged to accommodate the ILECs attachments.<sup>153</sup> In contrast, third-party pole attachment agreements with cable companies and CLECs require the cable company or CLEC to pay to relocate both the ILEC and electric company.

**h) ILECs have other rights on joint-ownership poles**

ILEC joint owners often have the same rights as the electric utility on jointly-owned poles. They execute agreements with the attachers, they approve and deny access, they charge rental fees, they have a say in where the pole is placed, and they are not required to notify the

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<sup>153</sup> In these agreements, electric companies do not need to pay for the relocation of ILEC facilities either, but the costs associated with relocating electric facilities is much greater.

utility when adding attachments to a pole. The ILEC does not pay an annual fee for attachments, but does pay for ownership and maintenance based on its ownership percentage in the pole. In turn, the electric utility shares in many of the pole expenses incurred by the ILEC. The ILEC also owns some of its own poles on a 100% basis, and may install its own poles as needed. The ILEC is notified of all pole work on the electric utility's system and provided the opportunity to take joint ownership; whereas attachers are only notified if already attached to a pole on which work is being performed.

**i) Billing for work on the poles is sometimes based upon outdated and relatively inexpensive cost schedule**

Many joint use agreements specify the costs that each pole owner will charge the other for certain tasks. Since many of these agreements are very old, the charges specified in these schedules are low relative to current charges, and since ILECs have ceded most joint use responsibilities to electric utilities, they benefit disproportionately from these outdated charges. CLECs and Cable Companies, in contrast, pay current rates.

**3. The Pole Attachment Act prohibits the Commission from mandating ILEC attachment rates**

The Commission lacks any statutory authority to regulate joint use rates.

USTelecom and its ILEC members rest their arguments for FCC regulation on the mistaken notion that Congress, at the time that it enacted the Telecommunications Act of 1996, intended to draw some indelibly fine, hitherto undiscovered distinction between the terms "telecommunications carrier" and "provider of telecommunications services." Claiming that providers of telecommunications services are not *really* telecommunications carriers, the Petition seeks to persuade the Commission that Congress intended to confer different rights and obligations upon the two different entities within the context of pole attachments.

This self-serving notion is contrary to the language of the Act, the legislative history of the Act, the FCC's interpretation of the Act, and the ILECs' own interpretation of the Act for more than a decade. It also defies common sense. As has been clear to everyone for the past fourteen years, Congress used the two terms interchangeably and intended that they be treated as synonyms. ILECs are not entitled to government mandated pole attachment rates.

The ILECs' attempt to explain that Congress somehow intended to treat "telecommunications carriers" differently than "providers of telecommunications services" is belied by the clear, unequivocal language of the statute itself:

The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.<sup>154</sup>

The term "telecommunications carrier," therefore, is defined in the Communications Act as "*any provider of telecommunications services*" (except for aggregators of telecommunications services). An entity, therefore, cannot be a provider of telecommunications services without also being a telecommunications carrier. Except in the limited case where an entity qualifies as an aggregator of telecommunications services, the two phrases are absolutely synonymous.

ILECs are not aggregators of telecommunications services; that phrase applies only to Section 226 of the Act (Telephone Operator Services),<sup>155</sup> which has no bearing on the pole

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<sup>154</sup> 47 U.S.C. § 153(44).

<sup>155</sup> 47 U.S.C. § 226.

attachment provisions of Section 224. For pole attachment purposes, therefore, the terms “telecommunications carrier” and “provider of telecommunications services” are synonyms.<sup>156</sup>

The ILECs assert that Congress did *not* intend to grant ILECs any rights to attach to electric distribution poles but *did* intend to grant ILECs full rights to insist on regulated rates, terms and conditions for such attachments. Had Congress intended such a bizarre anomaly, it is safe to assume that some explanation (or even passing recognition) of it would have occurred in the legislative history of the 1996 Act. But no such explanation exists. Instead, Congress unequivocally defined “telecommunications carriers” as “providers of telecommunications services” and specifically exempted them from the panoply of pole attachment rights conferred on CLECs and cable companies.

Similarly, it makes little sense that Congress granted ILECs rights to regulated pole attachment rates but failed to “drop the other shoe” by specifying an applicable rate. Section 224 provides the rates for cable-only attachments and for attachments by “telecommunications carriers,” but not for attachments by ILECs or “providers of telecommunications services.” Neglecting to specify such a rate would have been a glaring omission indeed, yet Congress did even not recognize such an omission, much less explain it.

Another unexplained oddity is that, in the ILECs’ view, the FCC was granted jurisdiction to regulate attachments by ILECs *to their own poles*. Section 224 defines a “pole attachment” as an attachment by a “provider of telecommunications services” to poles, ducts, conduits or rights-

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<sup>156</sup> The fact that Congress used these terms interchangeably is evidenced by Senate Bill S. 652, which used the term “telecommunications carriers,” and included within that term cable television systems which specified that the Commission must ensure that utilities charge just, reasonable and nondiscriminatory rates to “telecommunications carriers,” and included within that term cable television systems which “provide telecommunications services.” Certain cable systems, therefore, which are “providers of telecommunications services” were also considered to be “telecommunications carriers” that were entitled to regulated rates. *See* S. Rep. No. 104-23, at 40, 86-87 (1995).

of-way owned or controlled by a “utility.”<sup>157</sup> The term “utility” is defined to include ILECs.<sup>158</sup> Accordingly, the ILECs’ unique interpretation of Section 224 requires the Commission to regulate ILEC attachments to their own poles. Once again, this oddity is not recognized in any way let alone explained by Congress.

The fact that the ILECs’ interpretation of ILEC pole attachment rights defies the language of the statute and makes little sense in any context may explain why no ILEC or other interested party raised this far-fetched theory at any other time since enactment of the 1996 Telecommunications Act. In August 1996, the FCC promulgated regulations to implement the 1996 Telecommunications Act.<sup>159</sup> Those regulations extended pole attachment rights to “telecommunications carriers” only. The phrase “provider of telecommunications services” is not mentioned in the regulations at all.<sup>160</sup>

When promulgating these regulations, it understandably never occurred to the Commission that a distinction should be drawn between the two phrases, since Congress never drew any such distinction in the statute nor did the ILECs raise it at the time. In fact, the Commission believed its regulations to be so non-controversial that it decided that they were self-implementing and that proposed rules were unnecessary.<sup>161</sup>

Because the Commission’s regulations employ only the phrase “telecommunications carrier,” they draw no distinction between “access” granted to “telecommunications carriers” and

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<sup>157</sup> 47 U.S.C. § 224(a)(4).

<sup>158</sup> 47 U.S.C. § 224(a)(1).

<sup>159</sup> Implementation of Section 703 of the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd 9541 (1996) (“August 1996 Report and Order”).

<sup>160</sup> See 47 C.F.R. §§ 1.1401 *et seq.*

<sup>161</sup> August 1996 Report and Order at ¶2 (“We are revising these rules without providing prior public notice and an opportunity for comment because the rule modifications do not involve discretionary action on the part of the Commission but rather, simply conform our rules to the applicable provisions of the 1996 Act.”).

“regulated rates, terms and conditions” granted to “providers of telecommunications services.” Section 1.1401, for instance, combines the two different rights and grants them to “telecommunications carriers” by stating that the rules are designed “to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable.”<sup>162</sup>

The Commission’s entire pole attachment complaint process is open only to “telecommunications carriers” without any mention whatsoever of “providers of telecommunications services.” Section 1.1402(d), for example, defines “complaint” as the filing by “a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or any association of telecommunications carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable.”<sup>163</sup> Section 1.1404(d)(1) provides that “[t]he complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable system operator or telecommunications carrier and the utility.”<sup>164</sup> Section 1.1404(d)(2) provides that the complaint should be accompanied by a “statement that the cable television system operator or telecommunications carrier currently has attachments on the poles, ducts, conduits or rights-of-way.”<sup>165</sup> Throughout Title 47 of the Code of Federal Regulations, no FCC pole attachment rules grant any unique rights to “providers of telecommunications services.”

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<sup>162</sup> 47 C.F.R. § 1.1401.

<sup>163</sup> 47 C.F.R. § 1.1402(d).

<sup>164</sup> 47 C.F.R. § 1.1404(d)(1).

<sup>165</sup> 47 C.F.R. § 1.1404(d)(2).

Although fourteen years ago the FCC's regulations clearly granted pole attachment rights only to "telecommunications carriers" without mentioning "providers of telecommunications services," not a single reconsideration of these regulations was requested by USTelecom or any ILEC.

One would certainly think that USTelecom or an individual ILEC whose pole attachment rights had been completely abrogated by the FCC would at least have sought prompt reconsideration of the FCC's regulations since, as USTelecom and the ILECs now explain, they were so far off base from what Congress actually had intended. The fact that they did not is clear and convincing evidence that neither USTelecom nor any ILEC ever believed that ILECs had any such rights. USTelecom's Petition, therefore, is a patently insincere, recent concoction by the ILECs' national trade association to rewrite the statute as well as the FCC's implementation of it.<sup>166</sup>

USTelecom claims repeatedly that Congress desired to constrain "utilities" from imposing unreasonable rates, terms and conditions,<sup>167</sup> but forgets that Congress expressly included ILECs in the definition of "utilities" under Section 224.<sup>168</sup> In that way, Congress recognized that ILEC pole owners and electric utility pole owners were similarly situated for pole attachment purposes. Congress viewed all utility pole owners, electric utilities and ILECs alike, as having the potential to abuse their positions by denying access to attachers, charging unreasonable rates or imposing unreasonable terms and conditions. Indeed, the potential for

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<sup>166</sup> No member of Congress voiced any objection to the FCC's regulations. Certainly, if Congress intended the FCC to grant pole attachment rights to ILECs, the FCC's elimination of those rights would have caused an uproar.

<sup>167</sup> USTelecom Petition at 4-5, 10.

<sup>168</sup> 47 U.S.C. § 224(a)(1).

abuse by “monopoly” pole owners appears to have been the prime motivation for the entire statutory pole attachment program.<sup>169</sup>

**4. Commission jurisdiction over rates and other aspects of joint use would require a grant of authority by Congress and is not warranted in any event**

The ILECs have voiced competitive concerns that they need benefits of regulated pole attachment rates, terms and conditions, to compete with CLECs and cable companies. The ILECs ignore the fact, however, that ILECs, CLECs and cable companies are different entities and hold different competitive positions.

Unlike ILECs, the CLECs and cable companies do not own their own distribution poles. CLECs, in fact, do not own many of the other facilities that ILECs own that are necessary for CLEC operations, such as local loops, local and tandem switches, interoffice transmission facilities, network interface devices, signaling and call-related database facilities, operations support systems functions, and operator and directory assistance facilities. For that reason, the FCC required ILECs to grant CLECs nondiscriminatory access to these network elements on an unbundled basis.<sup>170</sup> In that sense, ILEC-owned distribution poles are no different than the other ILEC facilities that are made available to CLECs.

That being said, if the ILECs believe that existing pole attachment regulations place them at a disadvantage with respect to CLECs and cable companies, the solution is to require the CLECs and cable companies to pay for their fair share of the costs of owning and maintaining

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<sup>169</sup> *Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103 (citing S. Rep. No. 95-580 at 121, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1977), reprinted in 1978 U.S.C.C.A.N. 109); see also *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) (recognizing that Congress enacted the Pole Attachment Act “as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service.”).

<sup>170</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499 (Aug. 8, 1996).

the ILEC and electric utility distribution systems, not to make a bad situation worse by granting ILECs pole attachment rights similar to CLECs and cable companies.

CLECs, cable companies and other attachers do not bear the expense of setting and maintaining poles, but nevertheless enjoy full use of these poles to provide service to their customers. Because CLECs and cable companies do not need to build their own pole distribution systems, they save an enormous amount of money by relying on their government-guaranteed access to and use of the pole distribution systems of others. It would not be unreasonable to require them to pay a more appropriate share of the costs for one of the key components of their networks: their pole distribution system.

Instead, the burden of owning and maintaining the pole distribution systems on which CLECs and cable operators depend falls in large part on electric utilities and ILECs. This burden already has increased considerably for electric utilities in recent years as some ILECs have failed to pay their fair share and pull their own weight in a joint use environment. Rather than imposing additional one-sided requirements on electric utilities, a better way of reversing these inequities is to require all attachers to pay a more equitable share of pole costs. Such a division of pole costs would recognize the value of the pole distribution system to each of the attachers, and require each of them to pay for a share of the costs based on that value.

#### **5. Joint use should continue to be subject to negotiated rates**

Since joint use rates between electric utility and ILEC pole owners have been negotiated in a free market for many decades, the Commission should refrain from interfering with the process.

ILEC rates and access to electric owned poles is one of many key provisions in a negotiated agreement that defines the current longstanding relationship between electric utilities

and ILECs. To impose a change to one provision without consideration to the entire arrangement clearly would create an imbalance not contemplated in the contract.

The existing electric utility/ILEC relationship, developed by mutual agreement of the parties over a century of shared use, is based on sharing the benefits and obligations of pole ownership. Although each existing relationship is different, having developed over time to address local issues, existing agreements in general contemplate the sharing pole costs and work responsibilities, including pole sets and maintenance, permitting, tree trimming, rights-of-way and administration. If an ILEC were to receive a lower, regulated-rate than what it currently pays, the negotiated balance defined within the agreement – as well as the existing electric utility/ILEC joint use and ownership relationship itself – would be undermined and effectively destroyed.

Why own a pole at all when the electric company must make space available at a small fraction of the cost of ownership? ILECs would likely abandon joint ownership of poles in favor of attachments under subsidized rates. The electric utility would see an immediate increase in its capital costs for poles of 80 to 100%, with only minimal revenue increases.

Over the long-term, virtually all poles may well be converted to sole ownership by the electric utility. Pole attachment revenues from ILECs would increase but clearly would not offset the utility's increased costs of pole ownership.

Furthermore, and presumably dispositive of the issue, if ILECs were to receive government mandated rates pursuant to their strained reading of the Pole Attachment Act, the attachment rates for electric utilities – the ILECs' joint use partners for decades – would be left unregulated. Eliminating ILECs from a negotiated rate, while continuing to subject electric utilities to an “open marketplace,” would upset the balance negotiated with respect to the

multitude of issues contained within the joint ownership and joint use agreements and undoubtedly result in rapidly escalating rates for electric utilities with no end in sight. ILECs would be protected; electric utilities would not. What is currently a longstanding, well-defined working relationship between ILECs and electric companies would be voided.

The FCC is ill equipped statutorily or otherwise to make any determinations regarding the many issues raised above regarding the complex interrelationships between pole owners. A much more expansive proceeding would be required to support any FCC rulemaking regarding allocation of pole ownership, costs and responsibilities, liabilities, etc.

In addition, many states already have jurisdiction over joint use/joint ownership agreements, so that any disputes regarding the proper implementation of those agreements can be resolved by State Public Utility Commissions. Any proposal to allow the FCC to regulate this relationship risks creation of unworkable competing regulatory schemes.

**6. ILECs have used their leverage in joint use and joint ownership relationships to abdicate their joint use responsibilities**

Over the past several years, as the wireline business has contracted,<sup>171</sup> some ILEC joint use partners have gradually disassociated themselves from equitable participation in joint use, relying instead on the electric utility to set most of the poles, obtain necessary permits, provide emergency responses, restore pole lines after storms, police the system and ensure safe operation. During this period, some ILECs have largely refrained from making necessary and appropriate capital improvements to their pole lines. Moreover, many ILECs no longer own equipment necessary to perform work on taller poles. The result, of course, is that electric utilities have been forced by the ILECs to bear the overwhelming burden of joint use.

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<sup>171</sup> Arshad Mohammed, *Verizon Loses Land-Line Customers, Profit*, Washington Post at D5 (Aug. 2, 2006).

Although the joint use contracts between some *Coalition* members and their ILEC partners in many cases do not establish a specific percentage of poles that each party is required to own, they affirm the intention and obligation of both parties to set and own joint use poles. In fact, some agreements do express the intention that the parties strive towards equal ownership. Over the past several years, however, ILECs often have failed to honor this obligation, forcing some electric utilities to set and replace up to 90% of all new poles. This gross imbalance has resulted in these electric utilities processing up to *nine times* as many applications for attachment, conducting up to *nine times* as much engineering work, and performing up to *nine times* as much make-ready work to accommodate ILEC attachments than ILECs are required to incur in accommodating electric utility attachments. All of this is occurring in a joint use environment that USTelecom claims is somehow “abusive” to ILECs.

Over the years, the ILECs have dramatically scaled back their joint use programs, all to the detriment of electric utilities. They are not prepared to move quickly, or to respond to emergency situations. They have cut their internal resources supporting joint use and have reduced their joint use staffing. They sometimes use electric utility employees as their default contractors.

Not only have the ILECs been failing to set their fair share of new poles, they have not been transferring their attachments to new facilities in a timely manner when necessary, creating a significant “double wood” problem (whereby two poles unnecessarily stand side-by-side to support all attaching entities). Some *Coalition* members have been forced by the ILECs to bear a disproportionate amount of the expense required to clear new space and perform routine tree trimming and pole inspections.

In addition, the ILECs have installed far more unauthorized attachments than electric utilities. The ILECs often have failed to submit necessary applications or even notifications for new attachments that are made in the field. This fact may explain in part why some ILECs have resisted efforts by utilities to perform pole audits to determine ownership of attachments and poles. Rather than fully cooperate in such audits, ILECs have refused to participate, refused to pay their fair share of audit costs, refused to accept the results of audits and failed to recognize and be responsible for their fair share of pole ownership and attachments. ILECs are also overloading poles and creating clearance violations.

The ILECs' scaling back of routine joint use maintenance and operations has had serious consequences. For example, Andy Blood, a 25-year-old former lineman for Xcel Energy in Denver, was paralyzed following the collapse of a rotted pole that was owned by Qwest Communications.<sup>172</sup> Mr. Blood was dismantling wooden cross-arms as part of efforts to remove a 50-foot Qwest telephone pole in Adams County, Colorado when the pole broke six inches below the ground, dropping Mr. Blood 25 feet and fracturing his spine.<sup>173</sup> A Denver jury found that Qwest had "willfully and wantonly" failed to properly inspect and repair the pole and ordered Qwest to pay \$39 million – \$18 million in punitive damages and \$21.5 million in compensatory damages.<sup>174</sup> A Denver District Court judge then more than tripled the punitive damages to increase the total award to \$84 million after noting that Qwest had failed to inspect, maintain and repair its poles even while the case was pending:

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<sup>172</sup> Andy Vuong, *Judge Triples Qwest Fine for Paralyzed Lineman*, Denver Post, Sept. 6, 2007 (available at [http://www.denverpost.com/business/ci\\_6818622](http://www.denverpost.com/business/ci_6818622))(last visited March 3, 2008).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*; Andrew Oh-Willeke, *Qwest Ordered to Pay \$84 Million to Injured Lineman*, Colorado Confidential, Sept. 20, 2007 (available at <http://www.coloradoconfidential.org/showDiary.do?diaryId=2782>)(last visited March 3, 2008).

[Qwest] continued the behavior or repeated the action which is the subject of this litigation (failure to inspect, maintain, and repair its poles) during the pendency of this case and that such behavior posed a substantial risk of harm to Plaintiff's or another person or persons. The magnitude of the potential harm to others during the pendency of the case justifies the increase of exemplary damages to an amount equal to three times the actual damages awarded by the jury in this case.<sup>175</sup>

In sum, ironically, it is the ILECs – more than the electric utilities as claimed by USTelecom—which have been shirking their joint use responsibilities. Having no regard for the unfair burden they already have placed on their electric utility joint use partners, the ILECs now seek to abandon the entire joint use concept altogether by asking the Commission to confer phantom pole attachment rights upon them. This request should be rejected outright.

*Coalition* members can ill afford to bear additional ILEC expenses, nor should they be required to do so. Joint use is the responsibility of all pole owners, not just electric utilities. The rates that electric utilities may charge its business and retail customers are regulated. As a result, electric utilities cannot simply recover all expenses by blithely passing them along to ratepayers. At the same time, electric utility regulators have focused increasingly on the reliability of electric distribution systems. Electric utilities, therefore, must improve and maintain their electric distribution system at the same time that their ILEC partners routinely neglect their joint use duties and require electric utilities to bear a far greater share of joint use expenses.

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<sup>175</sup> *Blood, Andrew et al v. Qwest Serv. Corp.*, Case No. 2005-CV-6972 (Denver Dist. Ct. Sept. 4, 2007)(Attached hereto as **Exhibit E**). See also, Andy Vuong, *Judge Triples Qwest Fine for Paralyzed Lineman*, Denver Post, Sept. 6, 2007 (available at [http://www.denverpost.com/business/ci\\_6818622](http://www.denverpost.com/business/ci_6818622))(last visited March 3, 2008).

**7. ILECs, cable companies and CLECs cannot be allowed to opt-in to each other's joint use and pole attachment agreements unless such an arrangement is acceptable to the electric utility pole owner**

The Commission seeks comment on a proposal by NCTA whereby any attaching entity, including incumbent LECs, would be permitted to “opt in” to existing pole agreements.<sup>176</sup> This proposal should be rejected.

As an initial matter, Pole attachment and joint use agreements with the various attaching entities are not public information and should not be disclosed. Equally important, all of these agreements were negotiated separately to address the unique needs and circumstances of the negotiating parties. What works or is fair for one attaching entity may not work or be fair for another. In addition, many older agreements are not up to date or otherwise suitable for use by other attachers.

This proposal is particularly objectionable if it would allow an ILEC to reject its existing joint use relationship with an electric utility in favor of a third-party attacher arrangement. As explained above, the substantial differences in rights and responsibilities between joint use agreements and third-party attachment agreements renders such a proposal unworkable.

The consequences of allowing ILECs to “opt-in” to a third-party licensee attachment agreement would be far-reaching. It would create confusion among the parties. For example, it is uncertain what would happen to the existing pole plant owned by the ILECs. The electric utility or some other entity could be forced to buy the existing pole plant at some indeterminate price. If the ILEC were to retain ownership of those poles, the rights and obligations of the electric utility would be subject to question.

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<sup>176</sup> Further Notice at ¶147.

One-sided attachment rights for ILECs would undercut electric utility access to ILEC poles without any kind of oversight.

If ILECs were granted pole attachment rights on electric utility poles, it would guarantee them regulated rates, terms and conditions for access to electric utility poles, but would confer no parallel rights on electric utilities with respect to ILEC-owned poles. Because electric utilities are vitally dependent upon ILECs for access to a great number of ILEC poles, this disparity in pole attachment rights would provide the ILECs with enormous, unfair leverage. ILECs could restrict electric utility access to ILEC poles and demand that electric utilities pay outrageously high attachment rates and other fees. They could require electric utilities to set all new poles, replace ILEC poles, maintain ILEC facilities, monitor and correct ILEC safety violations, surrender space needed for electric attachments, and otherwise hinder the ability of electric utilities to provide service to their customers in a safe and reliable manner.

The dissolution of the joint use arrangement in favor of a third-party licensing arrangement would be unworkable in other respects too. ILEC jointly-used facilities are subject to a detailed Operating Routine between the parties, which raises questions as to future operating processes for joint poles. The administrative costs and time delays in the attachment of electric and ILEC facilities to each other's poles would increase. Electric utilities would lose any investment the ILECs currently make in new pole plant. If ILECs were to operate as pole owners for some poles and as third-party attachers for others, it would be confusing and cumbersome to keep straight which attachments are which. Things such as transfers and emergency work would be difficult to bill appropriately.

These and other issues prohibit incumbent ILECs from "opting in" to existing pole agreements.

**IV. CONCLUSION**

**WHEREFORE, THE PREMISES CONSIDERED**, the *Coalition of Concerned Utilities* urges the Commission to act in a manner consistent with the views expressed herein.

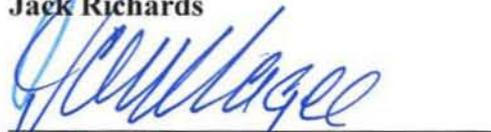
Respectfully Submitted,

**COALITION OF CONCERNED UTILITIES**

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Baltimore Gas and Electric Co.  
Dayton Power and Light Co.  
FirstEnergy Corp.  
National Grid  
NSTAR  
PPL Electric Utilities  
South Dakota Electric Utilities  
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