
**Before the
Federal Communications Commission
Washington, DC 20554**

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

To: The Commission

**COMMENTS OF THE DAS FORUM
A MEMBERSHIP SECTION OF PCIA–THE WIRELESS INFRASTRUCTURE ASSOCIATION**

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TABLE OF CONTENTS

SUMMARY ii

I. INTRODUCTION 1

II. THE COMMISSION MUST ADDRESS WIRELESS ATTACHMENT ISSUES
IN ORDER TO ACHIEVE THE NATION'S WIRELESS GOALS 2

 A. The Importance of DAS to Wireless Services and Broadband.....4

 B. The Use of DAS Has Increased But is Still Limited by Delays in the Pole Attachment
 Process.....6

III. WIRELESS ATTACHERS NEED ENUMERATED ATTACHMENT RIGHTS
IN ADDITION TO A PREDICTABLE TIMELINE..... 8

 A. The Right for Wireless Carriers to Attach Must Include a Responsibility of a Utility to
 Work to Provide Access for Wireless Attachments.....8

 1. Wireless Attachers Continue to Have No Guarantee of Access.....8

 2. The Commission Should Confirm the Right of Pole Top Access.....12

 B. The Commission Should Establish a Timeline for Wireless Attachments that Largely
 Mirrors the Proposed Wireline Timeline.....16

IV. THE COMMISSION MUST AFFIRM THAT WIRELESS ATTACHERS ARE
SUBJECT TO THE TELECOM RATE 20

V. CONCLUSION..... 25

SUMMARY

The Commission must act to ensure that wireless attachers are afforded timely and predictable access to utility infrastructure at just and reasonable rates, terms, and conditions as mandated by Section 224 of the Telecommunications Act. Distributed antenna systems (“DAS”) play a crucial role in the nation’s wireless infrastructure ecosystem. DAS is an essential input into a holistic strategy to achieve the nation’s wireless and broadband goals. Yet the deployment of DAS is often burdened and stifled by utility pole owners who refuse or significantly delay wireless attachments and impose monopoly rates.

DAS is deployed on existing infrastructure, such as utility poles, to improve capacity and coverage; enabling wireless services in previously unserved areas, and meeting capacity needs in areas of heavy usage. By utilizing existing infrastructure, DAS installations are one tool for deployment that can enable the wireless services that users demand while imposing a minimally impacting the community. Further, DAS can help relieve the current spectrum crunch; the network architecture enables a more efficient use of spectrum resources.

The Commission must act to eliminate the current disparity between the treat of wireless attachers and wireline attachers. The Commission must not allow utilities to issue blanket denials to attachers without citing any justification. Instead a denial should serve as a starting point for discussions on standards necessary to allow wireless attachments. Additionally, the effectiveness of DAS is maximized when the wireless attachment is placed on the pole top. The Commission has previously established that the pole top is “usable space” and should affirm, again, that wireless attachers have the right to attach to the pole top. To truly enable these rights, however, the Commission must also establish reasonable time frames and reasonable rates for wireless attachments.

The DAS Forum acknowledges that wireless attachments may be foreign to some utilities. Therefore, the DAS Forum understands that a utility may need time to work with the attacher to establish a standard that will govern wireless attachments. Accordingly, when a utility does not have a wireless attachment standard, the DAS Forum proposes a 90-day timeframe for the utility and wireless attacher to establish a standard for wireless attachments. Once a utility has established a standard for wireless attachments the timeline for wireless attachments should be consistent with the timeline for wireline attachments.

The Commission must affirm that wireless attachers are subject to the telecom rate and not monopoly rates. DAS Forum members report a wide disparity in the rate charged for wireless attachments, ranging from tens-of-dollars to over a thousand dollars per year. There is no justification for a utility to charge these illegal rates that are significantly above the regulated rate for wireless attachments. While a wireless attachment may occupy more space than a wired attachment, and therefore proposes that the wireless attachment rate should be equal to the telecom rate times that amount of usable space occupied above one foot. For the foregoing reasons, we urge the Commission to act to ensure that wireless attachers are afforded timely and predictable access to utility poles at just and reasonable rates.

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I. INTRODUCTION

The DAS Forum, a membership section of PCIA—The Wireless Infrastructure Association (“DAS Forum”)¹ respectfully submits the following comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) *Order and Further Notice of Proposed Rulemaking* in the above-captioned docket.² The DAS Forum takes this opportunity to emphasize the importance of developing efficient and predictable processes for the attachment of

¹ The DAS Forum is a broad-based non-profit organization, dedicated to the development of the DAS component of the nation’s wireless network. It is the only national network of leaders focused exclusively on shaping the future of DAS as a viable complement to traditional macro cell sites and a solution to the deployment of wireless services in challenging environments. PCIA is the trade association representing the wireless telecommunications infrastructure industry. PCIA seeks to facilitate the rapid and efficient deployment of widespread dependable communications networks across the country, consistent with the mandate of the Telecommunications Act of 1996.

² *In re: Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, Order and Further Notice of Proposed Rulemaking*, WC Docket No. 07-245, GN Docket No. 09-51 (May 20, 2010) (“*Order and FNPRM*”).

wireless telecommunications facilities to utility poles—attachments that comprise the bulk of the increasingly utilized outdoor distributed antenna systems (“DAS”).³

The record in this proceeding and other proceedings at the Commission demonstrate that DAS is an increasingly utilized tool of wireless infrastructure deployment when appropriate. The largest current obstacle to DAS deployment, and as a result the deployment of critical wireless services including wireless broadband, is the lack of timely access to utility poles at equitable rates; the Commission has the power to solve this problem and must do so as part of its mandate to remove barriers to broadband deployment.

II. WIRELESS ATTACHMENTS ARE AN ESSENTIAL ELEMENT IN ACHIEVING THE NATION’S WIRELESS GOALS THAT THE COMMISSION MUST ADDRESS

The National Broadband Plan identified as one of its “Goals for a High Performance America” that “[t]he United States should lead the world in mobile innovation, with the fastest and most extensive wireless networks of any nation.”⁴ Yet the *Plan* also recognized that this goal was not feasible without infrastructure deployment, noting that “[b]roadband is the great infrastructure challenge of the early 21st century.”⁵ To overcome this challenge, the *Plan* devoted an entire chapter to infrastructure deployment, urging the government to “take steps to improve utilization of existing infrastructure to ensure that network providers have easier access to poles, conduits, ducts and rights-of-way.”⁶ Regarding wireless attachments, the *Plan* also states that “the FCC should establish a timeline for the process of certifying wireless equipment

³ This document focuses exclusively on outdoor DAS, which is referred throughout simply as DAS.

⁴ FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 9 (Mar. 16, 2010) (“*National Broadband Plan*” or “*Plan*”).

⁵ *Id.* at XI.

⁶ *Id.* at 109.

for attachment”⁷ because “[w]ireless providers assert that negotiations with pole owners to attach wireless devices ‘often face a period of years in negotiating pole agreements As telecommunications providers, wireless providers have the right to attach to poles under Section 224 of the Act to provide service.”⁸

The Commission, through its *Order and FNPRM*, takes many steps to implement this plan for wired attachments through immediate “actions intended to lower the cost and improve the speed of access to utility poles”⁹ and by “seeking comment on how to improve access to essential infrastructure, and expedite the build-out of affordable broadband services as well as telecommunications and cable services.”¹⁰ While the *Order and FNPRM* seeks comment on “development of a timeline for the attachment of wireless facilities”¹¹ in support of achieving the *Plan*’s goals, it devotes a scant two paragraphs out of 160 to this subject despite the fact that the *Plan* places such an emphasis on America’s wireless future. Further, the *Order and FNPRM* largely ignores the robust and dynamic record on the importance of wireless attachments created in response to the Commission’s *2007 Notice*,¹² a record that demonstrates the complete feasibility of wireless attachments. Fortunately the Commission still has the opportunity to recognize the importance of wireless attachments through the instant proceeding. The Commission should take the same steps to ease access to poles, conduits and rights-of-way for

⁷ *Id.* at 111.

⁸ *Id.* at n. 25.

⁹ *Order and FNPRM* at ¶ 7.

¹⁰ *Id.* at ¶19.

¹¹ *Id.*

¹² *In re: Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, *Notice of Proposed Rulemaking*, 22 FCC Rcd 20195 (2007) (“*2007 Notice*”).

wireless attachers as it does for wireline attachers, which will in turn advance America's broadband future.

A. The Importance of DAS to Wireless Services and Broadband

DAS is a network architecture that supplements traditional macro-level wireless infrastructure siting, such as towers, through a series of spatially separated antenna nodes connected to a common source via a transport medium that provides wireless service within a geographic area or structure.¹³ In outdoor environments, DAS antennas are typically mounted on existing structures, primarily utility poles. The ability to provide improved wireless coverage, increased data and traffic capacity, and improved spectrum efficiency makes DAS an important element of national wireless infrastructure, broadband and public safety strategies.

The Commission and Congress have recognized a growing and significant deficit of spectrum sufficient for wireless service providers to meet future capacity and coverage demands, specifically for wireless broadband services.¹⁴ As a supplement to macro-level siting, DAS is a near-term solution to the dearth of spectrum for wireless communications and wireless broadband. DAS increases capacity and coverage through the use of many antennas, each with a

¹³ See <http://thedasforum.org/>, visited Aug. 10, 2010.

¹⁴ See Prepared Remarks of Chairman Julius Genachowski, FCC, *America's Mobile Broadband Future*, International CTIA Wireless I.T. & Entertainment 4 (Oct. 7, 2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293891A1.doc; *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, *Declaratory Ruling*, 24 F.C.C.R. 13994, 14032 (rel. Nov. 18, 2009) (Statement of Comm'r Robert M. McDowell) ("I fully agree that identifying additional bandwidth for long-term growth is a necessary and worthy endeavor . . ."); John Eggerton, Boucher: Finding More Wireless Spectrum key Congressional Priority, *Broad. & Cable*, Jan. 27, 2010, <http://www.broadcastingcable.com/article/446177-Boucher-Finding-More-Wireless-Spectrum-Key-Congressional-Priority.php> (reporting on an address delivered by House Commerce Committee Subcommittee on Communications, Technology, and the Internet Chairman Rick Boucher). The U.S. House of Representatives has passed legislation that would require the FCC and NTIA to conduct a spectrum inventory in order to identify spectrum that may be freed for commercial wireless use. Radio Spectrum Inventory Act, H.R. 3125, 111th Cong. (2009). It is pending in the Senate, which has a slightly different version of the House legislation. Radio Spectrum Inventory Act, S.649, 111th Cong. (2009).

relatively small and localized footprint. Utilizing many antennas with isolated signals allows each antenna in a given deployment to use the same spectrum bands.¹⁵

The Commission recognizes the public safety benefits provided by wireless pole attachments.¹⁶ Citizens and first responders alike reap these benefits. As the rate of wireline-to-wireless substitution grows and more consumers rely exclusively on mobile wireless devices for accessing emergency services, the need for ubiquitous wireless coverage grows, especially in residential areas.¹⁷ A recent survey by the National Emergency Number Association found that, of the 911 and emergency service agencies responding, 55% utilize wireless broadband services.¹⁸ The impact of DAS on public safety is clear—wireless access is critical for the public and first responders, and DAS serves this critical need with enhanced coverage and increased capacity.

Some utility pole owners work cooperatively with DAS providers to facilitate the attachment of wireless antennas on poles, and there are many successful DAS deployments

¹⁵ See Comments of NextG Networks, WC Docket No. 07-245, RM-11293, RM-11303, at 3 & n.1 (filed Mar. 7, 2008) (“Capacity in cellular network comes, in general, from reusing spectrum. The greater the number of radiating elements, the more often spectrum can be reused and the more capacity the network will have.”).

¹⁶ *In re* Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers With Access to Utility Poles at Reasonable Rates, *Public Notice*, 19 FCC Rcd 24930 (Dec. 23, 2004) (“2004 Public Notice”) (“Providing wireless carriers with access to existing utility poles facilitates the deployment of cell sites to improve the coverage and reliability of their wireless networks in a cost-efficient and environmentally friendly manner. Such deployment will promote public safety, enable wireless carriers to better provide telecommunications and broadband services, and increase competition and consumer welfare in these markets.”).

¹⁷ STEPHEN J. BLUMBERG, PH. D. & JULIAN V. LUKE, NATIONAL CENTER FOR HEALTH STATISTICS, CENTERS FOR DISEASE CONTROL, WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JULY-DECEMBER 2009, at 1 (May 12, 2010), <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201005.pdf> (“One of every four American homes (24.5%) had wireless only telephones . . . during the last half of 2009—an increase of 1.8 percentage points since the first half of 2009.”).

¹⁸ National Emergency Number Association, 9-1-1 & Emergency Services Broadband Usage Survey, at 7 (Nov. 2009), http://www.nena.org/sites/default/files/Broadband%20Usage%20SurveySummary_11122009.pdf.

across the country. However, despite the noted benefits of DAS—facilitating wireless service in difficult-to-serve areas, improving spectrum efficiency, and enhancing public safety—some pole owners unnecessarily impede its deployment.

B. The Use of DAS Has Increased But is Still Limited by Delays in the Pole Attachment Process

The Commission has recognized the importance of DAS as a component of the nation’s wireless infrastructure that has the potential to increase innovation throughout the wireless ecosystem. In discussing ways to promote “innovations in tower siting and collocation” the Commission found:

DAS antennas may lend themselves to collocation due to their smaller size and weight, and if space on existing towers or other structures suitable for a DAS system can be found, it could be possible to eliminate certain expenses relating to tower construction as well as the related pre-construction environmental, aviation, and other regulatory reviews.¹⁹

The proceeding before us enables the Commission to ensure that utility poles—structures eminently suited for DAS deployment—can be used in order to enable the deployment of critically important wireless infrastructure.

The use of DAS has increased considerably since the *2007 Notice*. PCIA and the DAS Forum recently reported to the Commission that:

The use of DAS is growing as carriers continue to respond to the demand for wireless services. DAS networks are deployed by a variety of providers, including specialty DAS providers, traditional tower companies, and the carriers themselves, creating a competitive dynamic similar to that of macro-site infrastructure. Recent reports estimate that the DAS market is a \$500 million market with some 10,000 individual outdoor DAS nodes deployed.²⁰

¹⁹ *In re: Fostering Innovation and Investment in the Wireless Communications Market; A National Broadband Plan for Our Future*, WT Docket No. 09-66, GN Docket No. 09-51, *Notice of Inquiry*, 24 FCC Rcd 11322, 11339-40 (Aug. 27, 2009).

²⁰ Comments of PCIA and the DAS Forum, WT Docket No. 10-133, at 5 (filed Jul. 30, 2010).

Similarly CTIA reports that, “[t]he infrastructure segment also continues to develop and advance technologies that enhance coverage and capacity of the network. For example, the industry continues to utilize [DAS] and other smart antenna technologies to improve network coverage and provide increased capacity at large spectator events to handle increased voice and data traffic.”²¹

While DAS deployments are undoubtedly on the rise as a supplement to traditional macro-siting where appropriate, significant barriers to deployment still unnecessarily exist. DAS Forum members continue to report that protracted negotiations with utility companies over wireless attachments stymie infrastructure deployments. The increased use of DAS since the *2007 Notice* undercuts many utility arguments that wireless attachments are too difficult to implement on a broad scale. Indeed it proves that DAS deployment is completely feasible; utility claims of the overwhelming complexity of wireless attachments ring hollow in the face of the fact that it is being deployed in so many parts of the country right now.

The success of the DAS deployments despite utility-based barriers is not a reason for the Commission to remain passive but instead an opportunity for it to further the deployment of broadband as it is statutorily mandated to do. The Commission recently concluded that “broadband deployment to all Americans is not reasonable and timely.”²² As a result of this conclusion, the Commission is directed to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner

²¹ Comments of CTIA—The Wireless Association, WT Docket No. 10-133, at 19 (filed Jul. 30, 2010).

²² *In re: Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act, A National Broadband Plan for Our Future*, GN Docket Nos. 09-137, 09-51, *Sixth Broadband Deployment Report*, FCC 10-129 ¶ 2 (rel. July 20, 2010).

consistent with the public interest, convenience, and necessity . . . regulating methods that remove barriers to infrastructure investment.”²³ The Commission has the opportunity in this proceeding to do just that by prescribing efficient wireless attachment timelines and ensuring just rates for wireless attachments. The Commission recognized in a *Declaratory Ruling* that while macro wireless infrastructure was being deployed, it was not being deployed in a timely fashion and took steps to remove delays accordingly.²⁴ The Commission should do the same for DAS by removing access, timing and rate barriers to deployment.

III. WIRELESS ATTACHERS NEED ENUMERATED ATTACHMENT RIGHTS IN ADDITION TO A PREDICTABLE TIMELINE

A. The Right for Wireless Carriers to Attach Must Include a Responsibility of a Utility to Work to Provide Access for Wireless Attachments

1. Wireless Attachers Continue to Have No Guarantee of Access

The *Order and FNPRM* “affirm[s] the right of wireless telecommunications carriers to attach pursuant to section 224, and their right to attachment of fiber or other wired facilities is the same as other telecommunications carriers.”²⁵ While this is not a new position for the Commission—indeed it has held this position for a dozen years²⁶—it necessarily informs the framework under which the Commission should develop its rules for wireless attachments. We applaud the Commission’s goal “to bring regularity and predictability to attachment of wireless

²³ Pub. L. No. 104-104, § 706(a), 110 Stat. 56, 153 (reproduced in the notes under 47 U.S.C. § 157).

²⁴ *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, *Declaratory Ruling*, 24 F.C.C.R. 13994 (rel. Nov. 18, 2009).

²⁵ *Order and FNPRM* at ¶ 52 n. 153.

²⁶ *Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd 6777, 6798-99 ¶¶ 39-41 (1998), *aff’d* NCTA v. Gulf Power, 534 U.S. 327, 340-42 (2002).

facilities”²⁷ yet the questions that the Commission raises in respect to wireless attachments underscore the most basic problem that wireless attachers face: there is no guarantee of attachment.²⁸

Section 224 of the Act allows utilities to deny a “telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.”²⁹ The record from the *2007 Notice* demonstrates that some utilities have—and DAS Forum members confirm that they continue—to use this “catch-all” provision as a means to deny access entirely, despite the fact that DAS installations have been deployed safely nationwide without incident. Through the *Order and FNPRM* the Commission implicitly recognizes that this problem exists. The Commission “particularly ask[s] utilities that have permitted wireless equipment to be installed on their poles to report their experience,” leading to the necessary corollary that there are utilities that *have not* permitted wireless equipment on their poles.³⁰ Yet the Commission does not propose rules that would take affirmative steps to address these blanket denials which limit DAS deployments.

The Commission, in the *Order and FNPRM*, “clarif[ies] that, where a utility has no master agreement with a carrier for wireless attachments requested, such as pole top attachments,

²⁷ *Order and FNPRM* at ¶ 53.

²⁸ Though attachments to utility poles are the primary focus of these comments, DAS Forum members have also indicated substantial difficulty accessing the ducts and conduits that utilities and municipalities use to string wire attachments. Section 224 defines a pole attachment as “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.” 47 U.S.C. § 224(a)(4) (2006). Accordingly we also ask the Commission to reconfirm wireless attachers’ rights to use these ducts and conduits.

²⁹ *Id.* at § 224(f)(2).

³⁰ *Order and FNPRM* at ¶ 53.

the utility may satisfy the requirement to respond with a written explanation of its concerns with regard to capacity, safety, reliability, or engineering standards.”³¹ It then goes on to “seek comment on whether we should require that the response be sufficiently detailed to serve as a basis for negotiating a master agreement, which would dictate a timely process for future attachments.”³² The answer to this should be beyond debate. If the utility’s response contains a denial based on these concerns and the response is neither sufficiently detailed nor serves as a basis for future negotiations, then the wireless attacher has no recourse at all despite the Commission’s affirmation of their right to attach. This in turn definitively prohibits the deployment of broadband that DAS and wireless attachments enable.

Any response by a utility denying a wireless pole attachment request must be sufficiently detailed to allow a wireless attacher to respond to the utility’s concerns in a way that would advance the attachment process. The Commission has declined to adopt the NESC as an attachment standard, instead leaving each utility to develop its own standards.³³ While DAS Forum members stand ready to work with utilities to develop wireless attachment standards that meet the utility’s specific needs, without the requirement of a detailed basis for denial of a wireless attachment request there is effectively no requirement that the utility work to develop any standard at all. Far too often it has been the case that a utility’s unsubstantiated denial on grounds of safety or reliability ends the negotiation process.³⁴ In cases where the utility does not

³¹ *Id.* at ¶ 52.

³² *Id.*

³³ *Id.* at ¶ 24.

³⁴ *See e.g.*, Comments of ExteNet Systems, Inc., WC Docket No. 07-245, RM-11293, RM-11303, 7 (filed Mar. 7, 2010) (“ExteNet Comments”); Reply Comments of NextG Networks, WC Docket No. 07-245, RM-11293, RM-11303, 6 (filed Apr. 22, 2008).

have a master standard for wireless attachments, the utility’s response to an initial request to attach must trigger an obligation for the utility to develop a standard by which wireless attachments can be completed.

Section 224, which provides that “the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable,”³⁵ provides the necessary legal authority—if not mandate—for the Commission to require the development of wireless attachment standards. There are no conditions less just or reasonable than refusing to agree to any terms or conditions at all. In the Order portion of the *Order and FNPRM*, the Commission mandated that utilities allow boxing and bracketing where the utility itself uses such attachment practices by providing a statutory interpretation of the term “insufficient capacity.”³⁶ The Commission explained its rationale for providing this statutory interpretation:

Utilization of existing infrastructure, rather than replacing it, is a fundamental principal underlying the Act. As discussed above, we find that our interpretation still ensures that “insufficient capacity” is given some meaning, while also, to the greatest extent possible, helping spur competition and promoting the deployment of communications technologies, consistent with the broad “pro competitive” purposes of the 1996 Act, as well as the more specific direction of section 706 of the 1996 Act that the Commission promote the deployment of advanced services “by utilizing, in a manner consistent with the public interest, convenience, and necessity, . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” Accordingly, we conclude that, where a pole can accommodate new attachments through boxing, bracketing, or similar attachment techniques, there is not “insufficient capacity” within the meaning of section 224(f)(2).³⁷

The same rationale holds true for why a utility cannot simply deny access without explanation under the shield of Section 224(f)(2). The Commission should interpret the statute to provide that “just and reasonable” terms and conditions of attachment for wireless facilities mandates

³⁵ 47 U.S.C. § 224(b)(1).

³⁶ *Order and FNPRM* at ¶¶ 8-16.

³⁷ *Id.* at ¶ 16 (citations omitted).

that the utilities must work in good faith to develop an attachment standard for wireless facilities if they do not have one already in place. By doing so the Commission would remove a major barrier to the deployment of wireless infrastructure necessary to further wireless broadband services and it would provide meaning to any discussion about the timelines for wireless attachments.

2. The Commission Should Confirm the Right of Pole Top Access

The tremendous benefits of wireless attachments are undeniable. The use of utility distribution poles in public right-of-way offers a visually-unobtrusive way to deploy networks in environments in which a “cell tower” may be infeasible. Additionally, the relative ubiquity of utility distribution poles in many suburbs and “exurbs” provides a platform on which to place facilities that provide coverage and capacity improvements that wireless users demand. But for wireless attachments to be beneficial, pole top access is also needed on some poles. Wireless attachers already have under the law the same right to use pole tops as other portions of the pole; however, the Commission needs to reconfirm the pole top attachment rights of companies given the actions of many utilities.

Pole-top access is essential to leverage existing infrastructure and spectrum resources efficiently. Pole-top installations are typically at the optimal elevation for DAS antennas. If the antennas are lower, the coverage footprint will be too small, and the provider will be forced to install additional antenna nodes to achieve the same coverage.³⁸ The installation of additional nodes increases the cost of the deployment and requires additional antenna infrastructure that

³⁸ See Comments of MetroPCS, WC Docket No. 07-245, RM-11293, RM-11303, at 6 (filed Mar. 7, 2008) (“*MetroPCS Comments*”); Comments of the DAS Forum, WC Docket No. 07-245, RM-11293, RM-11303, at 11–12; Comments of CTIA, WC Docket No. 07-245, RM-11293, RM-11303, at 12 (filed Mar. 7, 2008) (“*CTIA Comments*”); *NextG Comments* at 3.

would otherwise be unnecessary.³⁹ Despite the reality that the law mandates access to utility poles for telecommunications facilities attachments—including wireless equipment—the ability to locate DAS antennas and related node equipment on poles, and especially antennas on pole tops, is persistently challenged by pole owners.⁴⁰ By limiting pole top access utilities are requiring that providers utilize more infrastructure at the same time when local restrictions are making it even more difficult to deploy it. The City of San Francisco, for example, is currently considering “ban[ning] the construction of new utility poles solely for the purpose of installing antennas.”⁴¹ The best policy is to make the most of existing infrastructure.

As discussed previously herein, Section 224 provides wireless telecommunications providers with access to utility poles. Moreover, it is clear under both the statute and the Commission’s regulations that the pole space on which a provider may attach its equipment is the “usable space.”⁴² The usable space is defined as “the space above the minimum grade level [on

³⁹ Letter from PCIA—The Wireless Infrastructure Association and The DAS Forum, to Connecticut Department of Public Utility Control, at 3–4 (Apr. 23, 2009), [http://www.dpuc.state.ct.us/dockcurr.nsf/8e6fc37a54110e3e852576190052b64d/20dce5d12e27c1ce852575a100693eaf/\\$FILE/PCIA%20DAS%20Forum%20CT%20DPUC%20interrogatory%20responses%204%2023%2009.pdf](http://www.dpuc.state.ct.us/dockcurr.nsf/8e6fc37a54110e3e852576190052b64d/20dce5d12e27c1ce852575a100693eaf/$FILE/PCIA%20DAS%20Forum%20CT%20DPUC%20interrogatory%20responses%204%2023%2009.pdf) (“Theoretically, in flat terrain without any “clutter” (radiofrequency “absorbers” and “reflectors” such as trees and buildings), the reduced height of the communications space mounting represents a squaring of the number of antennas required to provide uniform coverage over a given area. For example, instead of four (4) antennas at the pole top, sixteen (16) antennas would be required in the communications space.”

⁴⁰ See Reply Comments of Utilities Telecoms Council and Edison Electric Institute, GN Docket No. 09-51, WC Docket No. 07-245, at 56 (filed July 21, 2009) (asserting that the Commission “should reject requests that the Commission establish a rebuttable presumption favoring access for pole top antennas”); Comments of Edison Electric Institute and Utility Telecom Council, WC Docket No. 07-245, RM-11293, RM 11303, at 59 (filed Mar. 7, 2008) (arguing that the Commission “should not adopt a set of one-size-fits-all access rules that would inappropriately favor expedient [wireless attachment] access”).

⁴¹ Phil Goldstein, *San Francisco Proposes Ordinance to Block Ugly Cell Towers*, FIERCE WIRELESS (Aug. 13, 2010) available at: <http://www.fiercewireless.com/story/san-francisco-proposes-ordinance-block-cell-towers-based-looks/2010-08-13>.

⁴² 47 U.S.C. § 224; 47 C.F.R. § 1.1402(c).

the pole] which can be used for the attachment of wires, cables, and associated equipment.”⁴³

Pole top is space that is above the minimum grade level on the pole (in fact, it is, by definition, the very top of the pole) and it can be used for the attachment of wires, cables and associated equipment.⁴⁴

Pole tops are unquestionably a part of the usable space on the pole, and therefore both Section 224 and the Commission’s regulations give wireless providers the right to attach to pole tops. Indeed, the NESC contains specific provisions governing attachment of wireless devices to the pole top, and thus confirms that pole top attachment is safe and viable.⁴⁵ The NESC’s analysis of pole-top attachments addresses and affirms their safety and soundness.

When utilities nevertheless challenged the right of wireless providers to use the pole tops in 1999, the Commission properly rejected their position.⁴⁶ But many utilities ignored this ruling and continued to refuse to permit access to the pole tops.⁴⁷ Accordingly, wireless providers once again were forced to ask the Commission for reconfirmation of their right to use pole tops, which they received in the 2004 Wireless Bureau Reminder:

Recently, wireless carriers have alleged that they have been denied access to utility poles for the placement of wireless antennas on pole tops. ... [W]e take this opportunity to reiterate that the

⁴³ 47 U.S.C. § 224; 47 C.F.R. § 1.1402(c).

⁴⁴ ExteNet Comments at 5.

⁴⁵ For example, NESC Rule 235I governs “[c]learances in any direction from supply line conductors to communication antennas located in the supply space [*i.e.*, pole top] attached to the same supporting structure.” Similarly, NESC Rule 239H controls the “[r]equirements for vertical communication conductors passing through supply space on jointly used structures.” NESC Rule 235I(1) further requires that “[c]ommunications antennas located in the supply space shall be installed and maintained only by personnel authorized and qualified to work in the supply space...”

⁴⁶ *In re: 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 (Oct. 20, 1999).

⁴⁷ ExteNet Comments at 7; Comments of CTIA—The Wireless Association, WC Dkt. No. 02-245, 8 (Mar. 7, 2008).

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).⁴⁸

Thus, pursuant to Section 224 and the Commission's rules, and the 2004 Wireless Bureau Reminder, it is clear that a utility can only deny access to requested usable space, including (the pole top) "on a non-discriminatory basis where there is insufficient capacity, and for reasons of safety, reliability and generally applicable engineering purposes."⁴⁹ Yet, even today many utilities still refuse to grant access to pole tops. Accordingly, the Commission needs to ensure in this proceeding that it clearly reconfirms for the third time (with severe consequences for utilities if they continue to disregard the law) that request for pole top usage should be treated like any other request for access to usable space on the pole, and can only be denied where there is insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes that are explained in detail.

In addition, the Commission should also clarify that the law does not permit utilities to charge a higher rate for pole top access than for any other portion of the pole, and any attempt to charge such a higher rate is illegal. Under Section 224 and the Commission's regulations, the charge for usable space on the pole is determined by how much space is used, not by where such space is located.

⁴⁸ 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) ("*2004 Reminder Notice*").

⁴⁹ 47 U.S.C. §224(f)(2)

B. The Commission Should Establish a Timeline for Wireless Attachments that Largely Mirrors the Proposed Wireline Timeline

The lack of a predictable timeline is a major factor affecting the deployment of DAS; both in terms of speed to market and capital expenditures. For example a DAS Forum member reports that in one jurisdiction, due to extensive delays from the utility provider in reviewing its applications, the DAS provider has incurred over two years of rent for a hub site location that it could not use (at a total cost of about \$60,000), and that it had to apply for three extensions of a special use permit, at a total cost of approximately \$7,000 per extension. Given the fixed capital expenditure budgets that wireless providers face for network deployments, the \$81,000 spent as a result of delays undoubtedly prevented other service deployments. Chairman Genachowski has also taken note of the unnecessary costs associated with wireless pole attachments, stating that “[w]ireless 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.”⁵⁰ The Commission can correct such problems through a standardized process for attachment.

Throughout the docket created from the *2007 Notice* the utilities have consistently objected to the Commission’s involvement in the wireless attachment process because of purported “safety, reliability and engineering concerns.”⁵¹ For example, in typically bombastic language, the Coalition of Concerned Utilities asserts that “[t]he Commission should reject the self-serving and dangerous proposals of wireless companies for make-ready deadlines,

⁵⁰ Mobile Broadband: A 21st Century Plan for U.S. Competitiveness, Innovation and Job Creation, New America Foundation, Washington, D.C., Feb. 24, 2010.

⁵¹ See *id.* at ¶¶ 52-53 and the accompanying footnotes.

mandatory pole top access and the emasculation of electric utility standards. . . . The record to date is grossly inadequate for the Commission to appreciate the seriousness of this issue or to impose these types of risky requirements.”⁵² While wireless attachments may pose *different* questions than wired attachments, the inflated claims that such attachments are “dangerous” or “risky” are belied by the fact that DAS is currently being deployed safely nationwide. As the DAS Forum has noted in this docket, “utility pole owners often cite unfounded safety and reliability concerns, *despite recognized safety standards and the lack of scientific or even anecdotal evidence of safety problems* with existing wireless attachments.”⁵³ The utilities’ claims are a red-herring that disguise their lack of incentive to deal with wireless attachers in a timely manner, if at all.

Creating a master agreement with a utility that has not previously allowed wireless attachments, if the utility is willing to create one at all, is the most time-consuming element of the wireless attachment process because it involves negotiating all of the elements that deal directly with the utility’s engineering and safety concerns. The DAS Forum recognizes this fact and therefore proposes the following timelines in response to the *Order and FNPRM’s* solicitation of comments for a timeline for wireless attachments.

A Timeline for Wireless Attachment When the Utility Has Not Previously Adopted Standards For Wireless Attachments:

- **Step One (45 days total): Request for wireless attachment.** After the wireless attacher submits an application for pole access, the pole owner must respond within 10 days to a wireless attacher either granting the request or stating that it has further concerns. If a utility has further concerns that prevent it from granting access it must

⁵² Letter from Jack Richards, Counsel for Coalition of Concerned Utilities, to Julius Genachowski, Chairman, FCC, WC Docket Nos. 07-245, 09-154, GN Docket Nos. 09-29, 09-51, 3 (filed Feb. 26, 2010).

⁵³ Letter from Michael D. Saperstein, Jr., Director of Gov’t Affairs, PCIA—The Wireless Infrastructure Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245 (filed Apr. 19, 2010) (emphasis added).

respond enumerating any and all specific concerns related to engineering, safety and reliability within 35 days of its initial response, which is day 45 of the entire process. The detail in this response must be sufficient to facilitate further negotiations between the attacher and the utility to develop a master agreement, as proposed by the Commission.⁵⁴

- **Step Two (45 days): Wireless attacher and utility collaborate.** Once the wireless attacher has received the utility’s detailed response, the attacher and utility have 45 days to collaborate on specific engineering standards that meet the utility’s concerns. This timeframe is reasonable given the fact that many different attachment standards currently exist nationwide that have facilitated deployments of DAS in all regions of the country. The DAS provider brings a wealth of experience in suggesting reasonable standards that have been successfully implemented elsewhere. Concurrent with the development of the engineering standard, the wireless attacher and utility will collaborate to develop a master agreement that addresses the other specific remaining issues related to the proposed installation.

Once the master agreement is in place using the timeframe above, or if the utility and the wireless attacher have an existing master agreement for attachment, the timeline for wireline attachments proposed by the Commission should then govern wireless attachments. Though the actual attachment process for wireless attachments may be different from that of wired attachments, the development of the master agreement and engineering standards will clearly define all roles, responsibilities and procedures necessary for attachment. In this respect, the 45 day timeframe that the Commission has proposed for performance of the attachments⁵⁵ is inherently reasonable. The Commission has recognized that “[a]ttachment of wireless equipment may complicate engineering analyses, but may also avoid the multi-party notice and coordination issues that characterize rearrangement of wired facilities. Also, wireless carriers using [DAS] attach to relatively few poles. . . .”⁵⁶ Even if the actual attachment of a wireless facility is a more time-consuming process, this is offset by the elements the Commission notes.

⁵⁴ *Order and FNPRM* at ¶ 52. See *supra*, Section III(A) for a description of why a detailed response is paramount.

⁵⁵ *Id.* at ¶¶ 40-42.

⁵⁶ *Id.* at ¶ 53.

Pole replacements are sometimes necessary to accommodate wireless attachments, and we ask the Commission to reconsider its current exclusion of a timeline for pole replacements.⁵⁷ Without a timeframe that encapsulates this frequent scenario for wireless attachments, the make-ready process for wireless attachments to new poles is rife for delay and abuse in contravention of the Commission’s goal to “bring regularity and predictability to the attachment of wireless facilities.”⁵⁸

In situations where a pole replacement is required, the DAS Forum and others have previously proposed that an additional thirty days for performance is reasonable.⁵⁹ This standard exceeds that of New York (which provides zero additional days for performance)⁶⁰ and Connecticut (which provides twenty additional days).⁶¹ Given that the *National Broadband Plan* cites both of these states’ make-ready timelines as models for an enhanced pole attachment process,⁶² the Commission relies on these guidelines to some extent itself,⁶³ and the timeline we proposed exceeds that contemplated in either state, we submit that this proposed timeframe for situations involving pole replacement is more than reasonable. While neither New York nor Connecticut specifically addresses wireless attachments in their make-ready timeframes, this has

⁵⁷ *Id.* at ¶ 32.

⁵⁸ *Id.* at ¶ 53.

⁵⁹ See Ex Parte of the Broadband & Wireless Pole Attachment Coalition, WC Docket No. 07-245, RM-11293, RM-11303 at 7 (filed Feb. 23, 2009).

⁶⁰ See *In re: Commission Concerning Certain Pole Attachment Issues, Order Adopting Policy Statement*, Case 03-M-0432, 2004 N.Y. PUC LEXIS 306 (N.Y.P.S.C. 2004).

⁶¹ See DPUC Review of the State’s Public Service Company Utility Pole Make-Ready Procedures – Phase 1, *Decision*, Dkt. No. 07-02-13, 2008 Conn. PUC LEXIS 90 (Conn. P.U.C. 2008).

⁶² *National Broadband Plan* at 111.

⁶³ See *Order & FNPRM* at ¶¶ 31-32.

no bearing on the amount of time it takes to replace a pole, which would be the same whether the attachment on the new pole is wired or wireless. The establishment of a make-ready timeframe for pole replacements is critical for a predictable and efficient process.

DAS attachments also generally include wired attachments, typically consisting of fiber that runs between wireless attachments. The Commission has recognized that for these attachments, the “right to attachment of fiber or other wired facilities is the same as other telecommunications carriers.”⁶⁴ As such, it would greatly enhance the predictability and efficiency of the deployment process to have both the wired and wireless attachments that a DAS provider deploys on the same timeframes.⁶⁵

Developing a standardized timeframe for wireless attachments as described above, including the timeframes for a master agreement, pole replacements and accompanying wired attachments would in turn allow for the timely and cost effective deployment of wireless broadband. We urge the Commission to act accordingly.

IV. THE COMMISSION MUST AFFIRM THAT WIRELESS ATTACHERS ARE SUBJECT TO THE TELECOM RATE

It should be well settled that wireless attachers attach at the Commission’s telecommunications rate, but DAS Forum members report that they are instead forced to pay monopoly rates for their attachments with complete disregard for the Commission’s formula. While the Commission devotes an extensive segment of its *Order and FNPRM* to the question of

⁶⁴ *Id.* at ¶ 52 n. 153.

⁶⁵ We note, in response to the Commission’s question of how to address unforeseen complications that may delay a deployment, that the master agreements developed between utilities and DAS providers typically include provisions via a *force majeure* clause that contemplates when “stopping the clock” on a deployment is necessary. We do not believe an additional provision is necessary in the Commission’s rules given the contractual nature of these agreements. *Id.* at ¶ 51.

what the appropriate attachment rate should be for telecommunications and cable providers, the Commission fails to address the issue of rates for wireless attachments despite having raised it in its *2007 Notice*, creating confusion of what should be settled policy in the process.⁶⁶

In 1998, the Commission held that wireless telecommunications providers are entitled to the same protections under Section 224 as all other telecommunications providers.⁶⁷ In 2002, the Supreme Court affirmed this determination.⁶⁸ Yet, even after the Commission's ruling and the Supreme Court's affirmation, many utilities continue to take the indefensible position in negotiations with wireless providers that such providers are not entitled to the protections of Section 224, including the right to access utility poles at reasonable rates.

In light of some utilities' failure to abide by these rulings, wireless providers had no choice but to raise this issue once again with the Commission to seek reconfirmation of a ruling that had already been confirmed by the Supreme Court. As a result, the *2004 Reminder Notice* once again confirmed wireless providers' rights to the protections of Section 224, including the right to receive reasonable pole attachment rates.⁶⁹ In a public notice entitled "Wireless Telecommunications Bureau Reminds Utility Pole Owners Of Their Obligations To Provide Wireless Telecommunications Providers With Access To Utility Poles At Reasonable Rates" the Bureau stated as follows with respect to pole attachment rates for wireless providers:

The Wireless Telecommunications Bureau reiterates the obligation to provide wireless telecommunications providers with access to utility poles at reasonable rates pursuant to section 224 of the Communications Act, 47 U.S.C. § 224. In *Implementation of Section 703(e) of the*

⁶⁶ *2007 Notice* at ¶ 20 (“[A]re wireless carriers entitled to attach equipment at the subsection (e) telecom rate, or do their attachments differ to such an extent that another rate would be more reasonable?”).

⁶⁷ 1998 Order at 6798-99 (¶¶ 39-41).

⁶⁸ *National Cable Telecommunications Ass’n v. Gulf Power Co.*, 534 U.S. 327 (2002).

⁶⁹ *2004 Reminder Notice*.

Telecommunications Act of 1996; Amendment of the Commission's Rule and Policies Governing Pole Attachments, Report and Order, 13 FCC Rcd 6777, 6798-99 ¶¶ 39-41 (1998), the Commission determined that wireless telecommunications providers are entitled to the benefits and protections of section 224 for the attachment to utility poles of antennas or antenna clusters and associated equipment. The Supreme Court affirmed this determination in *National Cable Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002).

In addition, section 224 and the Commission's rules do not allow pole access fees to be levied against wireless carriers in addition to the statutory pole rental rate.... Such overcharges or denial of access for wireless pole attachments may have serious anticompetitive effects on telecommunications competition.⁷⁰

The DAS Forum first reported in its initial comments to the *2007 Notice* that “one DAS Forum member is paying a monopoly rate of \$2,875 per pole per year to a utility while another nearby utility in the same state that recognizes its obligation charges a regulated rate of only about \$10 per pole per year for wireless equipment attachments.”⁷¹ These comments also report that “other DAS Forum members report being charged monopoly rates ranging from two to twenty times greater than the utility's regulated telecommunications rate.”⁷² While the number of DAS deployments may have increased since the *2007 Notice*, the illegally inflated rates DAS Forum members are forced to pay for wireless attachments unfortunately have remained the same. Indeed the problem has been exacerbated by the Commission's question as to what the appropriate rate should be despite having already determined it multiple times.

The *National Broadband Plan* recognizes the disparity between the rates charged for different pole attachments, and the consequential impact on deployment.⁷³ The rates charged for wireless attachments are at times prohibitively high, despite the fact that wireless attachments are

⁷⁰ *Id.*

⁷¹ *DAS Forum Comments* at 10.

⁷² *Id.*

⁷³ *National Broadband Plan* at 110–11.

subject to the regulated rate. The Commission should adopt the telecommunications rate for wireless attachments adjusted based upon any additional usable space over one foot that a wireless attachment occupies.

Many utility pole owners set rates for wireless attachments based on criteria other than reasonable cost recovery as embodied in the telecommunications rate. In some instances the annual rate represents a significant portion of the cost of installing a new utility pole. Inflated rates can rise to the level of an effective prohibition to attaching to existing poles by making such attachments economically unfeasible.

Some utility pole owners attempt to justify inflated rates for wireless attachments because, among other things, they utilize the pole top. Utility pole owners argue that this justifies a premium because the pole top is a scarce space—each pole only has one top. As the DAS Forum has pointed out, all attachments occupy space on a pole to the exclusion of any other attachment—the location on the pole is irrelevant.⁷⁴ Additionally, because there are many poles in any given area, there may be many available pole tops for a given deployment.

The *National Broadband Plan* recommends: “The FCC should establish rental rates for pole attachments that are as low and close to uniform as possible”⁷⁵ In the effort to move towards a low, uniform rate for pole attachments, the DAS Forum encourages the Commission to apply the telecommunications rate as the base rate for wireless attachments. This standard rate is computed based on an assumption of one-foot of use. The DAS Forum concedes that wireless attachments may require more than one foot of usable space. Accordingly, the

⁷⁴ *DAS Forum Comments* at 14.

⁷⁵ *National Broadband Plan* at 110.

telecommunications rate should be increased by a multiple of the amount of feet of usable space that the wireless attachment occupies.

By statute, the rate charged to pole attachers must be just, reasonable, and based on the costs of adding the attachment.⁷⁶ Like other attachments, wireless attachments should not constitute an additional revenue stream for the utility pole owners. A low, uniform rate for wireless attachments will further ensure that the deployment of DAS is not unnecessarily impeded. The Commission, in its discussion of the disparities between the cable rate and the telecom rate, found that a mere \$3 difference between the two rates amounted to a disparity of hundreds of millions of dollars.⁷⁷ While DAS deployments are not as widespread, the fact that wireless attachers typically pay two to twenty times the *telecom* rate (and in some cases more than 100 times the telecom rate) the costs of necessary wireless infrastructure deployment becomes a true barrier to broadband deployment. Accordingly, we ask the Commission to again reconfirm that wireless attachments are subject to the telecom rate.

⁷⁶ 47 U.S.C. § 224 (b)(1).

⁷⁷ *Order and FNPRM* at ¶ 116.

V. CONCLUSION

For the foregoing reasons we request that the Commission guarantee that wireless attachers have timely and predictable access to utility infrastructure at just and reasonable rates, terms, and conditions as mandated by Section 224 of the Telecommunications Act.

Respectfully submitted,

**THE DAS FORUM, A MEMBERSHIP SECTION OF
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