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

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

# COMMENTS OF METROPCS COMMUNICATIONS, INC.


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## SUMMARY

MetroPCS applauds the Commission's continuing focus on reforming its pole attachment regulations, with the objective of ensuring that the roll-out of new telecommunications technologies, and broadband in particular, to take optimal advantage of the existing infrastructure represented by utility poles. As a wireless carrier, the use of distributed antenna systems ("DAS systems") is crucial to MetroPCS' continued development, and it has found existing utility poles are one of the most viable options for deploying wireless services.

The Commission's overarching goal throughout this proceeding should, therefore, be to promote the expansion of existing and the entry of new wireless services by implementing rules that foster collocation of wireless communications facilities on this existing infrastructure in an efficient and time sensitive manner. Recommendations proposed herein by MetroPCS would assist the Commission in accomplishing this result, as MetroPCS has extensive experience installing small antennas on utility poles.

As to the Commission's proposal in the *Further Notice* to establish uniform rates, MetroPCS fully supports the proposal and recommends that the Commission also clarify that:

- a wireless carrier should pay the same per foot rate that any other attacher pays the pole owner;
- Pole-top placement of antennas by wireless carriers should be permitted without discrimination, supplemental charges or delay; and
- If a utility does not adopt the presumptive number of attaching parties, as allowed in the Commission's pole attachment rate formula, and instead conducts its own count, then the utility should be required to produce two rates--urbanized and non-urbanized--as would occur if the presumptive average numbers were used.

With respect to the Commission's proposal to improve access to poles, MetroPCS urges the Commission to improve wireless carrier access and adopt the Commission's proposed wired pole attachment timeline for wireless equipment. In addition, the Commission should clarify that

a utility should be required to perform a survey request within 45 days for a wireless carrier, even if the utility has no master agreement with the wireless carrier. The Commission should, among other things, also clarify, as discussed herein, that utilities do not have the discretion to frustrate the use of outside contractors.

Finally, as to pole attachment enforcement, MetroPCS encourages the Commission to adopt rules that would serve to minimize and resolve pole attachment disputes in a timely manner. MetroPCS recommends that utilities be required to allow attaching parties to "opt in" to existing pole agreements, including any agreements a utility has with wireless carriers. In addition, pole owners should be required to post all such agreements (including standard agreements) on their websites in a readily found location. Such agreements should be available to any attaching party to adopt, subject to state-specific pricing. Upon request of an attaching party, the pole owner should also make available, within 10 days of the request, all information the attaching party would need to potentially adopt an existing agreement the pole owner has with another attacher. Likewise, upon request, the pole owner should, at a minimum, be required to conform the agreement as may be necessary for the attachment.

Given the shortcomings with the current enforcement and complaint process discussed herein, the Commission needs to modify the process so that it resolves disputes in a time- and cost-sensitive manner. In particular, MetroPCS proposes that the pole attachment complaint rules be modified to accommodate the following procedure (which is somewhat similar to the arbitration procedure under 47 U.S.C. § 252(b)):

(1) Ninety (90) days after a pole owner receives a request for negotiations of a pole attachment agreement, the requesting party may file a complaint in which open issues associated with negotiations could be resolved through the complaint process;
(2) In order to minimize the significant costs of filing a complaint, the initial complaint filing requirements should be minimal and, like Section 252(b)(2)(a), only require that the complainant submit all relevant documents concerning the unresolved issues;

the position of each of the parties with respect to those issues; and any other issue discussed and resolved by the parties. The Commission should not require detailed briefing, affidavits and testimony be filed with the complaint; rather the submission of such information, if necessary, should be discussed during a scheduling conference before the Commission that is held after the complaint is filed;

(3) The pole owner should have an opportunity to respond 25 days after such a complaint is filed;

(4) The Commission should limit its consideration of the issues raised in the complaint or the response to the complaint; and

(5) The Commission should issue a written decision within six (6) months from the date the complaint is filed that resolves all open issues and requires that a completed agreement that reflects the resolved issues be submitted and approved by the Commission.

To reduce the incentive pole owners have to act unreasonably, MetroPCS fully supports the Commission's proposed amendment to section 1.1410 on compensatory damages. MetroPCS also recommends that certain aspects of the Commission's proposed changes to the sign and sue rule should not be adopted or, at a minimum, expanded. In particular, the Commission should not require the attacher, *during negotiations*, to provide to the pole owner written notice of objections to proposed terms, as a prerequisite to allowing these terms to be challenged as unreasonable in a later complaint proceeding. Under the proposed procedure, pole owners would have the ability and the incentive to make a "take-it-or-leave-it" demand that the attacher *withdraw its objection* prior to signing. This would be contrary to the sign and sue policy.

However, if such a notice provision is adopted, the pole owner should be required to provide a counter-notice setting forth all its defenses and counterarguments to the attacher's objection within 20 days of receiving such notice of such objections, as a prerequisite to raising those defenses and counterarguments in the complaint proceeding. In addition, the Commission should clarify that it would be *per se* unjust and unreasonable if a utility fails or refuses to sign an agreement or delay performance under the agreement because an attacher has issued a notice of objection.

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**COMMENTS OF METROPCS COMMUNICATIONS, INC.**

MetroPCS Communications, Inc. ("MetroPCS")[1] by and through its undersigned counsel, respectfully submits these Comments that generally support the Order and Further Notice of Proposed Rulemaking released on May 20, 2010 in the above-captioned proceedings.[2] In summary, MetroPCS believes the order represents a positive step forward toward realigning the pole attachment rules to promote the increased deployment of advanced broadband services. MetroPCS, however, believes the Commission should go further to incorporate certain procedural and other protections that have allowed competition to flourish for telecommunications services and modify shortcomings with its proposal that could possibly undermine this goal. In support, the following is shown:

## I. INTRODUCTION

As a preliminary matter, MetroPCS applauds the Commission's continuing focus on

[1] For purposes of these Comments, the term "MetroPCS" refers to MetroPCS Communications Inc. and all of its FCC-licensed subsidiaries.

[2] *In the Matter of Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking (rel. May 20, 2010) ("*Further Notice*").

reforming its pole attachment regulations, with the objective of ensuring that the roll-out of new telecommunications technologies, and broadband in particular, take optimal advantage of the existing infrastructure represented by utility poles. In the *Further Notice*, the Commission proposes a number of additional constructive steps toward this objective. In these Comments, MetroPCS will address a number of additional considerations which will maximize the benefit of the proposed changes and ensure that resistant pole owners cannot frustrate the ability of pole attachees from attaching to the pole owner's poles.

### A. Statement of Interest

MetroPCS provides commercial mobile radio service ("CMRS") service, targeting a mass market largely underserved by the larger national wireless carriers. MetroPCS offers attractively priced voice and data plans, starting as low as $40 per month, as well as other value-added services, such as mobile instant messaging, push email and mobile Internet browsing, providing meaningful competition to its larger competitors. As of June 30, 2010, MetroPCS has over 7.6 million subscribers and provides services in a number of major metropolitan areas across the United States. Further, MetroPCS has pioneered the use of distributed antenna systems ("DAS") to deploy service over a wide area and is in the process of upgrading its existing networks to Long-Term Evolution ("LTE").

The development and roll-out of a National Broadband Plan is one of the most important initiatives that the Commission will undertake in the next several years. As Chairman Julius Genachowski has observed:

> the President and Congress have entrusted the FCC with the responsibility of developing a National Broadband Plan[.] ….. Broadband is the great infrastructure challenge of our generation. It is to us what railroads, electricity,

> highways and telephones were to previous generations, a platform for commerce, for democratic engagement, and for helping address major national challenges.[3]

One of the most important paths to fulfillment of the National Broadband Plan will be to accord providers the maximum feasible ability to place new facilities in locations that will allow the most efficient, effective creation of this great broadband infrastructure.

Wireless services have been one of the Commission's great success stories for a number of years. As we face the future, and as the explosive consumer adoption of smart, Internet-capable wireless devices bears out, wireless is certain to be the spearhead for United States broadband infrastructure in the twenty-first century. Since both traditional wireless services and wireless Internet service providers ("WISPs") need locations to place wireless infrastructure, it is imperative that the Commission continue its efforts to facilitate access to existing utility poles for wireless as well as other providers. Further, as a late entrant to many metropolitan areas, MetroPCS can attest to the difficulty in securing traditional cell site locations. Not only are many cell cites already occupied, but zoning and permitting issues typically delay deployment of facilities by months if not years. Allowing greater pole attachment rights will speed deployment of broadband networks, especially by new entrants to the wireless market.

### B. Explanation of DAS Technology

Many cell sites for wireless antennas available to other carriers are not available to MetroPCS and other new entrants. For this reason, in many places, pole attachments are and will remain one of the only viable alternatives for allowing MetroPCS and other new entrants to rapidly introduce service and provide competition to existing wireless, wireline, and cable voice providers. MetroPCS collocates on existing cell antenna sites whenever possible, but because

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[3] Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission National Broadband Plan Workshop, August 6, 2009, eGovernment & Civic Engagement, *available at* http://www.fcc.gov/headlines.html.

space on existing sites has become a scarce resource, the use of DAS systems is crucial to MetroPCS's continued development. A DAS system "is a network of spatially separated antenna nodes connected to a common source via a transport medium that provides wireless service within a geographic area or structure. DAS antenna elevations are generally near the clutter level, and node installations are compact and low-power."[4] When installed outdoors, "small DAS antennas are typically mounted on existing vertical structures, such as lamp posts and utility distribution poles, to minimize visual or environmental impacts and to achieve a distributed architecture."[5]

In constructing its networks in places such as Philadelphia, New York and Boston, MetroPCS extensively used DAS systems because zoning issues and lack of suitable tower sites made DAS the only alternative in many areas within those locales. As discussed below, DAS systems are vitally dependent on the ability to locate DAS antennas on utility poles in many places, especially new markets. Because of this critical dependency, pole attachment rights for DAS providers are essential for their operations. Accordingly, MetroPCS has a strong interest in the rates, terms and conditions for such attachments. For this reason, MetroPCS has played an active role in the Commission's pole attachment proceedings,[6] as well as in pole attachment proceedings at the state level.[7]

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[4] *See* Comments of DAS Forum, WC Docket No. 07-245, RM-11293, RM-11303, at 1 (filed Mar. 7, 2008).

[5] *Id*. 1-2. *See* Letter from Charles A. Rohe, Counsel for MetroPCS Communications Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, RM-11293, RM-11303 at Exhibit A (filed Sep. 16, 2009) ("MetroPCS 9/16/09 *Ex Parte* Letter") (attaching Mike McCormack, Scott Goldman & Manish Jain, *Telecom Buzz, Distributed Antenna Systems*, JPMorgan North America Equity Research (Sept. 25, 2008) (describing DAS systems and providing comparisons to traditional tower systems).

[6] *See, e.g.*, MetroPCS 9/16/09 *Ex Parte* Letter; Letter from Charles A. Rohe, Counsel to MetroPCS Communications, Inc., to Marlene H. Dortch, Secretary, FCC, Docket No. 07-245, RM-11293, RM-11303 (filed Aug. 13, 2008) (notice of ex parte meeting with Commission staff

### C. Existing Poles are Often the Only Viable Alternative for DAS Installations.

As a new entrant competitive provider, MetroPCS must build-out and place its facilities in a substantial number of sites and, as a result, has become heavily dependent on DAS Systems and alternative cell site locations, such as utility poles. For a number of reasons, MetroPCS has found existing utility poles to be one of the most viable options for deploying its services. As more customers use wireless communications services throughout the nation, existing wireless carriers must install additional cell sites in their networks to handle the increasing traffic. When new cell sites are installed, it is often the case that some of them must be located in sensitive areas, such as residential neighborhoods and lands subject to special land use restrictions, to ensure adequate coverage.[8] In order to reduce the impact of cell sites in such areas, local governments increasingly require wireless carriers to collocate their facilities with existing cell sites and to blend their cell sites and antenna designs into existing infrastructure and landscapes, but suitable sites for this purpose have grown more and more scarce. Further, since a number of these sites are the result of cell splitting, *i.e.*, where a cell is broken down into smaller geographic areas, locating sites has become increasingly difficult, as the locations which will provide acceptable coverage have decreased.

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to discuss pole attachments); Comments of MetroPCS Communications, Inc. (filed Mar. 7, 2008).

[7] *See, e.g.*, MetroPCS 9/16/09 *Ex Parte* Letter at Exhibit B and Exhibit C (attaching Comments of MetroPCS New York, LLC, New York Public Service Commission Case 07-M-0741 (filed Sep. 10, 2007) and Reply Comments of MetroPCS New York, LLC, New York Public Service Commission Case 07-M-0741 (filed Sep. 24, 2007)).

[8] In some instances, additional facilities may not be available at existing sites other than poles. For example, MetroPCS understands that some jurisdictions limit the amount of space on rooftops available for wireless facilities.

In residential and other sensitive areas, utility poles and power transmission facilities are the most prevalent – and sometimes the only – existing infrastructure available to wireless carriers. Utility poles, therefore, present an extremely important option for deploying much-needed cell sites in a manner that will satisfy concerns of local governments and residents who would object to new or expanded wireless towers, but already have utility pole infrastructure in their neighborhoods. Furthermore, by avoiding the lengthy and costly siting disputes that often occur when new wireless towers or poles are constructed, collocation of antennas on existing distribution and transmission poles facilitates the rapid deployment of wireless services, including broadband.[9] The Commission's overarching goal throughout this proceeding should, therefore, be to promote the expansion of existing wireless services and the entry of new wireless services by implementing rules that foster collocation of wireless communications facilities on this existing infrastructure in an efficient and time sensitive manner.

Recommendations proposed herein by MetroPCS would assist the Commission in accomplishing this result, as MetroPCS has extensive experience installing small antennas on utility poles, having developed cell sites by that method in various metropolitan areas. In some areas, MetroPCS utilizes both distribution and transmission facilities pursuant to negotiated arrangements with pole owners. MetroPCS has also commenced the design and construction of a CMRS network in certain areas of the country that includes, among other things, attaching wireless communications facilities on utility poles belonging to multiple electric utilities and Incumbent Local Exchange Carriers ("ILECs" or "incumbent LECs"). However, because

[9] Moreover, DAS systems potentially allow a carrier to more rapidily increase capacity than traditional cell sites. A DAS system can be operated on a multicast basis until additional capacity is needed. Then, literally overnight, the system may be separated, increasing its capacity by double or more. This flexible functioning will become increasingly important as broadband continues to take hold.

MetroPCS is a relative latecomer to the competitive marketplace in the areas where it is authorized to operate, many of the cell sites available to other carriers are not available to MetroPCS due to space exhaustion. In these cases, utility poles are one of the few remaining alternatives which would allow MetroPCS to rapidly introduce service and provide competition to existing wireless providers.

The typical antenna used by MetroPCS on distribution poles is a 1.71 - 2.15 GHz Omni Directional antenna, enclosed in a white fiberglass radome. The equipment is approximately two inches wide and either twenty-six (26) or forty-eight (48) inches in length. MetroPCS antennas are usually clamped to the side of a utility pole and extend vertically, preferably upright at the top of the pole to maximize signal coverage. The base station itself may be located on a pad at the base of the pole or attached to the pole to lower the footprint of the site. DAS antennae are even smaller, and the equipment is considerably smaller than traditional base stations. It should be stressed that the large equipment consoles previously associated with wireless antennas are a thing of the past.

## II. THE COMMISSION SHOULD ADOPT THE RATE PROPOSAL SET FORTH IN THE *FURTHER NOTICE* AND REFINE IT FURTHER TO ASSURE THAT IT IS ECONOMICALLY SOUND

The approach to setting rates outlined in the *Further Notice* – which comes close to adopting a single rate for all pole attachments – should be approved. DAS providers have many attachments, so they and the public they serve are seriously disadvantaged by unreasonable and discriminatory attachment rates, as are wireline providers.

As the *Further Notice* recognizes, the Commission's current rules permit widely disparate pole attachment rates for identical burdens on the poles, based on arbitrary and outmoded regulatory distinctions. Cable operators, telecommunications providers and

incumbent LECs all pay different rates.[10] These rate disparities amount to discrimination which is not justified on the base of cost or any other economic basis – and which must not continue, especially since each of these service providers now compete in the broadband services market. As the National Broadband Plan recommends, the Commission should "establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with [s]ection 224 of the Communications Act of 1934, as amended, [(the "Act")] to promote broadband deployment."[11] The Plan specifically recognizes that "[a]pplying different rates based on whether the attacher is classified as a 'cable' or a 'telecommunications' company distorts attachers' deployment decisions."[12] Given the disputes over whether "cable" or "telecommunications" rates are applicable to broadband, voice over Internet protocol and wireless services, among others,[13] the Plan found that "[t]his uncertainty may be deterring broadband providers that pay lower pole rates from extending their networks or adding capabilities (such as high-capacity links to wireless towers)," due to the risk that a higher pole rental rate might be applied for their entire network.[14]

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[10] *See Further Notice*, ¶¶ 111-114.

[11] FCC, OMNIBUS BROADBAND INITIATIVE (OBI), CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, GN Docket No. 09-51, 109 (2010) ("National Broadband Plan").

[12] *Id*. The Plan further notes that "[t]he impact of these rates can be particularly acute in rural areas, where there often are more poles per mile than households." *Id*. at 110 (citing, *e.g.*, ACA Comments in re National Broadband Plan NOI, at 8-9 (filed Jun. 8, 2009); Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Docket No. 07-245, Report and Order, 15 FCC Rcd 6453, 6507-08, ¶ 118 (2000) (*2000 Fee Order*) ("The Commission has recognized that small systems serve areas that are far less densely populated areas than the areas served by large operators. A small rural operator might serve half of the homes along a road with only 20 homes per mile, but might need 30 poles to reach those 10 subscribers.")).

[13] *See Further Notice*, ¶ 115.

[14] National Broadband Plan at 110-11.

For these reasons, MetroPCS fully supports the Commission's proposed approach in the *Further Notice* that would require utilities to "calculate the low-end telecom rate and the rate yielded by the current cable formula, and charge whichever is higher."[15] As the *Further Notice* recognizes, "the cable rate formula has been upheld by the courts as just, reasonable, and fully compensatory, and would result in greater rate parity between telecommunications and cable attachers."[16] Moreover, MetroPCS agrees that adoption of this approach would "promote communications competition and the deployment of 'advanced telecommunications capability.'"[17] Further, imposing a uniform rate would be "readily administrable" and would minimize disputes over the classification of services under the Commission's current rate formulas.[18]

Along with establishing a uniform rate, MetroPCS urges the Commission to clarify that: (1) the rate may be assessed solely based on the amount of usable pole space the attachment utilizes; and (2) the rate should be no different based on the types of service the attaching party provides over its equipment that is attached to a pole or where the attachment is placed on the pole. As to the location on the pole, a wireless provider's attachment at the top of a utility pole does nothing to increase the pole owner's costs. Indeed, if anything, pole-top attachments *reduce* operating expenses for the pole owner and other attaching parties because the pole owner's employees will not need to "climb over" antennas to reach other cables or facilities, and so will have far fewer occasions to coordinate their maintenance activities with the wireless carrier. Further, attaching at the top of the pole leaves the rest of the pole available for other

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[15] *Further Notice*, ¶ 141.

[16] *Id*. (footnote omitted).

[17] *Id*. (footnote omitted).

[18] *Id*.

users with more traditional wireline attachments, which are typically not suited to the top of the pole. For this reason, attaching at the top of the pole gives the pole owner *more* revenue with no consumption of the space that is traditionally considered "useable."[19] Hence, there is no reason to charge more for attachment at the top of the pole, and in fact, a lower rate may be appropriate.

Finally, if a utility does not adopt the presumptive number of attaching parties, as allowed in the Commission's formula, and instead conducts its own count, then it should be required to produce two average rates—urbanized and non-urbanized—as would occur if the presumptive number was used.[20] Some utilities with large numbers of poles in rural areas have adopted the tactic of conducting their own count of attaching entities over their entire service territory. This has the effect of lowering the average number of attaching parties in urban areas and forcing on attaching parties a larger share of the unusable space costs. This is nothing more than regulatory gamesmanship. Regardless of whether the presumptive formula is used, the Commission has determined that it is just and reasonable to have different allocations of unusable space costs for urbanized and non-urbanized areas, as reflected in its rules. The Commission must require that different utilities apply the formula in a consistent manner. Accordingly, in amending the Commission's rules, MetroPCS urges Commission to expressly clarify that:

- A wireless carrier should pay the same per foot rate that any other attacher pays the pole owner regardless of whether they attach at the top of the pole or somewhere else;

[19] Because it makes economic sense for pole owners to allow pole-top attachments, the pole owners' refusals to do so can only be assumed to result from anticompetitive motives rather than legitimate reasons. Thus, the Commission should find that any denial of attachments of wireless attachments to the top of a pole, or denial of any specific type of antenna that has previously been approved by the same utility, is presumptively unreasonable, subject to rebuttal on a case-by-case basis.

[20] *See* 47 C.F.R. § 1.1418.

- Pole-top placement of antennas by wireless carriers should be permitted without discrimination, supplemental charges or delay; and
- If a utility does not adopt the presumptive number of attaching parties, as allowed in the Commission's pole attachment rate formula, and instead conducts its own count, then the utility should be required to produce two rates--urbanized and non-urbanized--as would occur if the presumptive average numbers were used.

## III. THE COMMISSION MUST IMPROVE WIRELESS CARRIER ACCESS TO POLE ATTACHMENTS

In the *Further Notice,* the Commission has proposed a number of specific measures for improving the regulatory regime for pole attachments. A number of these proposals are clearly sound, and MetroPCS fully supports them and urges the Commission to adopt them quickly and, in doing so, make clear that they extend to wireless providers, subject to specific recommendations for further improvement made below. These measures include the proposed wired pole attachment timeline, the proposal to require utilities to allow the use of contractors in specified circumstances, and the proposal to consolidate administration of attachment applications when poles are jointly owned by two utilities.

### A. The Proposed Wired Pole Attachment Timeline is Appropriate for Wireless Equipment

In the *Further Notice,* the Commission proposes to require a fixed timeline for the processing and provisioning of wired pole attachment requests, and asks whether the same timeline is appropriate for wireless pole attachment requests.[21] The short answer is yes; no convincing reason has ever been given for differential treatment, and parity between wired and wireless providers is essential to maintaining a level playing field. To be sure, the technical needs of wired and wireless providers vary somewhat, but these can be addressed within the same timetable, as further discussed below.

[21] *Further Notice,* ¶¶ 31-45 & 52.

### 1. In response to a request to attach wireless equipment to a pole, a utility should be required to perform a survey within 45 days, even if the utility has no master agreement with the wireless carrier

The Commission's present rule[22] requires a master agreement between the utility and the wireless carrier, and permits a utility to satisfy its legal obligation by providing an "explanation of its concerns" within 45 days of a survey request. This rule requesting a master agreement be in place, however, is not workable and will lead to needless and anticompetitive delay. First, the mere "explanation of its concerns" is susceptible of abuse by the utility. What is needed is an express rule that the utility shall perform a requested survey within the 45 days whether or not a wireless carrier currently has a master agreement, so that the wireless provider is quickly informed by the utility whether space is available, and if so, the provider may expeditiously begin the next stages of the timeline. If not, the wireless provider needs to make alternative plans promptly. The utility's concerns should be detailed and actionable (*e.g.*, if the following actions/investments are made, a specified amount of capacity would be available).

Second, there should be no requirement that a utility have a master agreement with a carrier for wireless attachments requested before the utility performs the requested survey. Space may be unavailable on the requested poles of the utility to accommodate the request or the cost to make it available may be prohibitive. If this is the case, it is best for both parties to know quickly and upfront rather than waste time and resources on a master agreement that turns out to be pointless. Thus, it is proper, as the Commission suggests, to require, *even when there is no master agreement in place*, that the utility nevertheless reply within the 45-day period with a written explanation of any "concerns with regard to capacity, safety, reliability, or engineering standards" relating to pole attachment and that it do so in "sufficient detail[] to serve as the basis

[22] *Id.*, ¶¶ 52 & 35.

for negotiating a master agreement, which would dictate a timely process for future attachments."[23]

Contrary to the phantom concerns raised[24] by some utilities, equipment differences between wired and wireless providers (and among individual wireless providers) can readily be accommodated within the proposed timetable. As the Commission notes, while wireless provider requests may be more complicated in some respects than wired provider requests, they are also less complicated and burdensome in other respects. For example, multiparty notice and coordination issues are far less important for wireless requests since the rearrangement of cables on multiple poles is not required. Similarly, DAS providers attach to relatively few poles, while wired providers attach to every pole along a given route.[25] Further, weight wind load and other concerns are considerably less complicated.

If a wireless carrier proposes to attach an antenna on a pole and that type or a similar version of such type of an antenna has previously been used on the same utility's pole, there should be no issue as to the suitability of that equipment for the same type of pole. If, on the other hand, the equipment to be attached is not similar to other equipment previously attached to the pole equipment, it is reasonable for the pole owner to require that it be provided with a sample of the antenna(s) – but by the same token, the pole owner must be responsible for timely examination of the equipment and feedback to the requesting carrier. In particular, the pole owner should be required to examine the submitted sample for any safety or engineering concerns during the period allowed for identification of make-ready work, or at least within 30

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[23] *Id.*, ¶ 52.

[24] *Id.*

[25] *Further Notice*, ¶ 53 (explaining that wireless carriers using a DCS system "attach to relatively few poles compared to cable operators and wireline carriers that attach to every pole that their network passes.").

days of the date on which the sample antenna is provided to the utility for examination. This is quite feasible under ordinary testing procedures and will prevent the pole owner from interposing undue delay.[26]

Finally, while a wireless carrier may agree to pay the costs of the survey it requests the utility to perform, the Commission needs to make clear that (1) the costs the utility assesses the wireless carrier must be reasonable; (2) the utility must provide sufficient documentation supporting its costs for the survey so that the wireless carrier may make a determination of whether such assessed costs are reasonable (rather than excessive and anticompetitive); and (3) such charges must not be any higher than the pole owner has charged anyone else for the survey.

### B. Utilities Should Not Have the Discretion to Frustrate the Use of Outside Contractors

The Commission also proposes to adopt rules to allow attachers to use independent contractors to perform engineering assessments, surveys and make-ready work, where the utility is unable to meet the timeline using its own personnel. For ILECs, the rules would permit the use of any contractor that has the "same qualifications, in terms of training, as the utilities[’] own workers."[27] For electrical utilities, the Commission would allow them to require that contractors be "approved and certified" in advance.[28] However, the Commission would limit the discretion of a utility in certifying and approving contractors by requiring it to post lists of approved contractors, including contractors used by the utility itself, and to apply its standards for evaluating contractors for certification and approval in a nondiscriminatory fashion. At the same time, the Commission would allow a utility to prohibit the use of contractors for actual installation of equipment in instances in which the installers must work among electrical power

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[26] *Id.*, ¶ 52; *see also* MetroPCS 9/16/09 *Ex Parte* Letter at 7.

[27] *Id.*, ¶ 65 (internal quotes and footnote omitted).

[28] *Id.*, ¶ 61.

lines unless they have specialized skills not available to the utility.[29] MetroPCS generally supports the use of contractors and disagrees with the limitation on their use for actual installation.

First, for survey and make ready work, contractors that already perform this type of work for the utility should be available to wireless carriers to perform this type of work without further certification requirements. This is implicit in the Commission's proposal for ILECs; by definition, the contractors on ILEC uses must be deemed to have the "same qualifications" as its own personnel, since the contractors *are* the utility's' personnel for this purpose if the utility itself uses them. Similarly, for electrical utilities, it is contemplated that the list of pre-approved contractors include those used by the utility itself. In both cases, the Commission should clarify that no further steps are needed to certify or approve such a contractor if already used by the utility.

Separately, the Commission should make clear that for installations, if a wireless carrier consents to using a utility's specified personnel or contractor to install or work with wireless antenna equipment above or among power lines, the utility should not be allowed to require additional personnel or contractors to work with such antenna equipment. By definition, personnel and contractors used by the utility do not require yet another layer of on-site utility supervision and so requiring additional personnel or contractors would merely impose unnecessary costs on the wireless attacher without a countervailing benefit. It is not clear why the Commission is making a distinction between ILECs and electric utilities in this regard. Although each contractor may have to be qualified to work around the specific type of facility, there is nothing inherently different between contractors hired by the utility and those same contractors being hired by the attaching party. By making such a distinction, the Commission allows electric utilities to delay installing attachments. Since electric utilities are now in the process of rolling out broadband services, such an ability to discriminate will frustrate the goals

[29] *Id.*, ¶¶ 61-65, 69.

of the National Broadband Plan.

### C. The Commission's Proposal to Consolidate Administration of Attachment Applications When Poles are Jointly Owned By Two Utilities Should Be Adopted.

In the *Further Notice*, the Commission also proposes to address the inefficiency and waste that exists where two utilities jointly own a pole and each of them insists that a prospective attacher obtain its permission before attaching. This state of affairs is needlessly duplicative, wasting time, money and the resources of one or the other utility, as well as the attacher. To address this problem, the Commission proposes to require in such cases that the two utilities designate (and publicly identify) one of them as the managing utility for pole attachment purposes. The attacher would need only to deal with the managing utility, not both, and only the managing utility's consent would be needed to make the attachment.[30]

MetroPCS fully supports this proposal. The practice of some joint utility owners today results in waste and inefficiency – as well as the potential loss of time in serving a market – that cannot be justified. Accordingly, the Commission's proposal to require one of them to serve as a single point-of-contact is sound and should be adopted.

## IV. THE COMMISSION SHOULD ADOPT REQUIREMENTS TO MINIMIZE AND RESOLVE POLE ATTACHMENT DISPUTES

### A. A Wireless Carrier Should Be Able to Adopt Any Pole Attachment Agreement the Utility Has Entered into with Another Wireless Carrier

In *Gulf Power*, the United States Supreme Court found that under Section 224, Commission's authority to regulate pole attachments extends to all types of pole attachments for wireline and wireless telecommunications carriers.[31] Exercising this authority, MetroPCS recommends that the Commission require utilities to allow attaching parties to "opt-in" to

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[30] *Further Notice*, ¶ 72.

[31] *National Cable & Telecommunications Assoc. v. Gulf Power*, 534 U.S. 327, 340-42 (2002).

existing pole attachment agreements, including any agreements a utility has with wireless carriers.

### 1. Pole attachment agreements should be publicly available and posted on the pole owner's websites

NCTA made a somewhat similar proposal.[32] As NCTA explained, by allowing third parties to opt-into an agreement a pole owner has with an existing pole attacher, pole owners will not be adversely impacted if such third parties are allowed to attach to the pole owner's poles at the same rates, terms, and conditions between the pole owner and the existing attacher.[33] To implement this proposal, the Commission would also need to establish a rule that requires a pole owner to make publicly available its standard pole attachment agreement and each pole attachment agreement the pole owner has with other parties that allows them to attach to the pole owner's poles. To ensure that pole owners do not frustrate access to such agreements by making it difficult to access them for possible adoption, MetroPCS recommends that pole owners post all such agreements on their websites in a section specifically entitled "Pole Attachment Agreements" so that the agreements can be found readily (and not buried) on the pole owner's website. Adopting this proposal would serve to reduce transaction costs and disputes associated with entering into pole attachment agreements. The adoption of this requirement would also provide other public interest benefits. For example, by requiring that agreements be publicly available on websites, courts, federal and state regulators and competitors will be able to perform comparative practices analysis to set industry standards and policy, detect and deter discriminatory or unreasonable behavior, and promote competition.

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[32] *See Further Notice*, ¶ 147 (discussing NTCA's "opt-in" proposal).

[33] Reply Comments of the National Cable and Telecommunications Association, WC Docket No. 07-245, RM-11303, RM-11293, at 21 (filed Apr. 22, 2008).

A similar provision exists in Section 252(i) of the Act.[34] Carriers can decide to opt-into an existing agreement pursuant to Section 252(i) or negotiate an entirely new agreement, depending on the circumstances. This efficient process has minimized costs and accelerated deployment. A similar requirement here would end up with similar pro-competitive benefits.

#### 2. Upon request of a wireless provider, a utility should be required to amend the agreements the wireless carrier seeks to adopt to address any concerns with the wireless attachments

A pole owner's agreements should be available to any attaching party to adopt, subject to state-specific pricing. In this connection, the Commission should require that upon request of an attaching party, pole owners make available within 10 days of the request all information the attaching party would need to potentially adopt an existing agreement the pole owner has with another attacher. Moreover, upon request, the pole owner should, at a minimum, be required to adjust the agreements as necessary to reflect differences in space used, *e.g.*, 1 foot or 2 feet, and make any modifications requested to conform the agreement for the wireless attachment. Disputes over opt-in, rates, terms, conditions, and practices, as well as over nondiscriminatory enforcement of contractual provisions, would be resolved by the Commission as proposed below.

### B. For Open Issues Associated with the Negotiations of Rates, Terms and Conditions in a Pole Attachment Agreement Between a Pole Owner and Attacher, the Commission Should Impose Procedural Rules That are Similar to the Rules That Apply to Section 252 Arbitrations

The significance of timely access to utility poles cannot be overstated. The Commission has even recognized that protracted negotiations with pole owners impedes competition by pressuring attachers with a Hobson's choice, to "choose between unfavorable and inefficient

[34] 47 U.S.C. § 252(i).

terms on the one hand or delayed entry and, thus, a weaker position in the market on the other."[35] Courts have even acknowledged that timely access is important in holding that the "utility is statutorily required to grant prompt, nondiscriminatory access and may not erect unreasonable barriers or engage in unreasonable delaying tactics."[36] Yet utilities, especially electric utilities, frequently employ discriminatory practices that considerably delay a wireless carrier from accessing and installing its attachments to the utility's poles at just and reasonable rates. As T-Mobile explained, "[d]elays in enforcement have a disproportionately adverse impact on the highly competitive wireless industry, where the ability to rapidly expand service and maximize quality of coverage are basic market expectations."[37]

#### 1. The FCC's current mediation and complaint processes are not suitable to resolve all pole attachment disputes

The enforcement procedures that exist today are *not designed to resolve all pole attachment disputes in a timely and efficient manner*. It is widely known that the current Commission processes for resolving pole attachment complaints may be unfruitful if mediated because pole owners refuse to make reasonable concessions, and mediation does not result in a mandate. Indeed, while the Commission "endorse[s] negotiated agreements, and [recommends] mediation to parties that reach an impasse,"[38] there is no guarantee that mediation will result in a negotiated settlement and the entire mediation endeavor, albeit admirable, could be fruitless and delay complaint efforts that would at least resolve the issues, although at some future and

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[35] *Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777, ¶ 17 (1998) (subsequent history omitted).

[36] *See, Southern Co. v. FCC*, 313 F.3d 574, 583 (D.C. Cir. 2002).

[37] Comments of T-Mobile USA, Inc. WC Docket No. 07-235, RM-11293, & RM 11303 at 8 (filed Mar. 7, 2008).

[38] *See Further Notice*, ¶ 23 (footnote omitted). at The Enforcement Bureau offers to mediate disputes over pole attachments access, among others, as a public service.

unknown date. Moreover, as the Commission recognized, "[s]ettlement satisfies the criteria of speed and individual analysis, but has one significant drawback: it establishes no precedent for others to follow."[39]

The only other alternative to mediation is the formal complaint process, which is an unreasonably lengthy, expensive and complicated undertaking. In the *Further Notice*, the Commission expressly recognizes that: (1) it "can be lengthy and expensive, which may deter parties from pursuing some cases"; (2) "current remedies are largely prospective, and also may act to deter the pursuit of legitimate claims"; (3) "some issues appear to remain subject to dispute even when formal complaints lead to controlling precedents"; and (4) "even when a precedent is established and acknowledged, the result may seem unwise to parties that had no say in the case, yet are bound by the result;"[40] Moreover, there is no certainty of when the matter may be resolved.

Given these shortcomings with the current enforcement and complaint process, a modified approach is warranted. Specifically, the process must resolve disputes in a time- and cost-sensitive manner. Such an approach/process is abundantly necessary when requesting attachers are attempting to finalize a pole attachment agreement with a pole owner, and open issues exist after negotiation efforts have been exhausted. While the "sign and sue" rule provides recourse if an agreement is signed before all open issues are resolved, any complaints filed under this rule need to be concluded in a timely fashion. The Commission's sign and sue policy has provided attaching parties with their only relief when confronted with an onerous attachment agreement, but it still has resulted in uncertainty as to how open issues will eventually be

[39] *See Further Notice*, ¶ 23 (citing National Broadband Plan at 112). The requirement that all agreements be made public and allowing others to opt in to such agreements may allow settlements to have broader ranging implications and benefits.

[40] *See id.* (footnotes omitted).

resolved. It is MetroPCS's belief that such uncertainty has impeded investment and facility deployment of potential attachers.

### 2. The arbitration procedures under Section 252 provide a procedural framework the Commission should emulate to resolve open issues associated with pole attachment agreements that pole owners and attachers cannot resolve through negotiations

As a modified approach, MetroPCS proposes that the Commission modify the complaint rules so that open issues associated with pole attachment agreements that parties have either not resolved or are disputed provisions under the sign and sue rule, will be resolved in a time-sensitive and cost effective process. In particular, MetroPCS proposes that the Commission adopt rules that emulate the arbitration process under 47 U.S.C. § 252(b), which has been an effective, albeit not perfect, process for resolving disputes associated with interconnection agreements between Competitive Local Exchange Carriers ("CLECs") and ILECs, along with creating precedent that minimizes the need for future disputes on a similar topic.

In particular, MetroPCS proposes that the pole attachment complaint rules be modified so that the following procedure is afforded under them:

(1) Ninety (90) days after a pole owner receives a request for negotiations of a pole attachment agreement, the requesting party may file a complaint in which open issues associated with negotiations could be resolved through the complaint process;

(2) In order to minimize the significant costs of filing a complaint, the initial complaint filing requirements should be minimal and, like Section 252(b)(2)(a), only require that the complainant submit all relevant documents concerning the unresolved issues; the position of each of the parties with respect to those issues; and any other issue discussed and resolved by the parties. The Commission should not require detailed briefing, affidavits and testimony be filed with the complaint; rather the submission of such information, if necessary, should be discussed during a scheduling conference before the Commission that is held after the complaint is filed;

(3) The pole owner should have an opportunity to respond 25 days after such a complaint is filed;

(4) The Commission should limit its consideration of the issues raised in the complaint or the response to the complaint; and

(5) The Commission should issue a written decision within six (6) months from the date the complaint is filed that resolves all open issues and requires that a completed agreement that reflects the resolved issues be submitted and approved by the Commission.[41]

### 3. The Commission should adopt its proposed rule which specifies that compensatory damages may be awarded

For the reasons provided in the Further Notice, MetroPCS fully supports the Commission's proposed amendment to Section 1.1410 that would specify that "compensatory damages may be awarded where an unlawful denial or delay of access is established, or a rate, term, or condition is found to be unjust or unreasonable."[42] As the Commission observed, "[b]ecause the current rule provides no monetary remedy for a delay or denial of access, utilities have little disincentive to refrain from conduct that obstructs or delays access."[43] To cure this problem, the Commission should award compensatory damages for unlawful delays or denials of access because the threat of having to pay compensatory damages would provide an important incentive to pole owners to be more reasonable and not obstruct access. Moreover, as the Commission recognized, an award of compensatory damages would allow the attacher to be "'made whole'"[44] for the delay it suffered as a result of the pole owners unreasonable position.

MetroPCS also supports the Commission's proposal "that section 1.1410 [of its rules] be amended to provide for an award for compensatory damages where a pole owners rate, term, or

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[41] Section 252(b)(4)(C) of the Act, states that the state commission "shall conclude the resolution of any unresolved issues not later than 9 months [or approximately 270 days] after the date on which the local exchange carrier received the request [to negotiate] under this section." Since MetroPCS proposes that the parties negotiate for 90 days before a complaint is filed, a decision should be rendered by the Commission 180 days, *i.e.*, 6 months, after the complaint is filed with the Commission. The Commission should also consider whether it can impose a similar requirement on those states that handle pole attachments, rather than the Commission.

[42] *Further Notice,* ¶ 86.

[43] *Id.*

[44] *Id*.

condition for pole attachments is found to be unjust or unreasonable."[45] The Commission properly recognizes that while refunds are available under the current rule for excessive payments an attacher made to a pole owner for rental rates or make-ready fees, refunds "do[] not compensate the attacher for unreasonable terms and conditions of attachment that do not involve payments to the pole owner."[46]

### C. Certain Aspects of the Commission's Proposed Changes to the Sign and Sue Rule Should Not Be Adopted or, at a Minimum, Expanded

Under the existing Commission "sign and sue" rule, attachers are protected to some extent from the monopoly power of the pole owners. Absent the rule, a pole owner could impose unjust and unreasonable terms in an attachment agreement on a "take-it-or-leave-it" basis, so that the attacher would have to choose between accepting unjust and unreasonable – and unlawful – terms or be completely deprived of access to an essential facility. By reserving to the attacher the ability to ultimately seek a Commission determination of whether terms are unjust and unreasonable, the existing rule allows the attacher to be assured of access to the poles while knowing that the pole owner will not ultimately be able to enforce unjust and unreasonable terms against it.

It is important to note, as the Commission does,[47] that this procedure does *not* allow the attacher to "cherry pick" terms. The attacher cannot, as the pole owners have suggested, simply sign the agreement and then disavow terms it disagrees with. Only if the Commission ultimately determines that terms are unjust and unreasonable can the attacher avoid those terms – and this is

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[45] *Id.*, ¶ 87.

[46] *Further Notice*, ¶ 87.

[47] *Id.*, ¶ 106.

only proper since such terms are unlawful under the Act.[48] An attacher is not incented to complain to the Commission about a term it disagrees with unless the attacher believes that there is a good chance that the Commission will, in fact, rule that the term is unjust and unreasonable, because the cost of complaining to the Commission is not insignificant. Accordingly, the present "sign and sue" rule protects attachers from unlawful terms imposed by the monopoly power of the pole owners in a carefully tailored manner that does *not*, contrary to the pole owners' complaints, open the door for abuse by attachers.

The Commission, however, proposes one change to this procedure which at first glance appears merely procedural, but in practice would eviscerate the rule. This change would require the attacher, *during negotiations*, to provide to the pole owner written notice of objections to proposed terms, as a prerequisite to allowing these terms to be challenged as unreasonable in a later complaint proceeding.[49] The Commission proposes this change in order to "promote efforts by attachers and utilities to negotiate innovative and beneficial solutions to contested contract issues."[50] Presumably, the notion is that by giving the pole owner a heads-up that the attacher considers a provision unreasonable, the pole owner is given an incentive to be more reasonable. It is unclear why the Commission believes that the pole owner would have more incentive to be reasonable during negotiations when provided the attacher's objections than it would have in the course of settlement negotiations in a complaint proceeding.

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[48] Moreover, as the Commission notes, the pole owner may show under existing rules that a term that appears not just and reasonable, taken in isolation, may nevertheless be just and reasonable when it has been exchanged for a "*quid pro quo*" that provides an offsetting benefit to the attacher. *Id*., ¶ 106.

[49] The Commission excepts from its proposed rule, as it should, when the provision is not facially unreasonable, but is applied by the pole owner in such a manner as to make it unreasonable. *Id*., ¶ 108.

[50] *Id*., ¶ 107.

In fact, the opposite is true: under the proposed procedure, pole owners would have the ability and the incentive to make a "take-it-or-leave-it" demand that the attacher *withdraw its objection* prior to signing. Having withdrawn the objection, the attacher may be foreclosed from raising the objection to the Commission. In short, the proposed procedure would simply give back to the pole owner the unfair bargaining power to impose unreasonable terms – and make them stick – that the "sign and sue" rule was meant to take away.[51] The Commission should not adopt this unwise proposal.

In the event that the Commission believes, nevertheless, that something along these lines should be adopted to give the pole owner notice of objections prior to the filing of a formal complaint, it should at least clarify that an attacher may comply with this procedure by providing a list of open issues at the *end* (or close to the end) of negotiations. The utility can then sign the deal on the table knowing that the provisions are subject to review and will not be able to arrive at other pretexts for prolonging the negotiations in response to the objection notice.[52]

However, in fairness, if the Commission does adopt such a provision, it should also require the pole owner to put its legal cards on the table as well. Thus, the pole owner should be required to provide a counter-notice setting forth all its defenses and counterarguments to the

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[51] Nor can it be said that under the current regime, pole owners are deprived of fair notice of an attacher's position that a provision is unreasonable. Notice obligations of this kind are sometimes imposed when information asymmetries exist between the parties (most notably in consumer contracts). However, no such asymmetry exists here. Pole owners are just as able as attachers to determine whether, under Commission rules and precedents, a proposed term is likely to be ruled unreasonable. Moreover, pole owners will generally understand informally in the give and take of negotiations when an attacher finds a provision substantively unreasonable even if the attacher has not prepared a formal legal analysis showing that it is likely to prevail in a complaint proceeding. It should not be up to attachers to give legal advice or formal legal analyses to pole owners.

[52] Of course, if the utility does decide at that point to be reasonable, there is nothing to stop it from quickly offering – as an *alternative* to be decided upon by the attacher and not as a "take-it-or-leave-it" proposition – a provision that is more reasonable than the one to which the attacher objects.

attacher's objection within 20 days of receiving such notice of such objections, as a prerequisite to raising those defenses and counterarguments in the complaint proceeding and should be estopped from raising any new issues in defense to a complaint. In other words, the rules should prohibit the utility from raising defenses or counterarguments other than those contained in its responsive counter-notice should the attacher file a complaint.

Finally, if the Commission does adopt rules giving effect to such a proposal, it must expressly clarify that it would be *per se* unjust and unreasonable if a utility fails or refuses to sign an agreement or delay performance under the agreement because an attacher has issued a notice of objection. Without such protection, the rule would leave the pole owner free to abuse the process in the take-it-or-leave it manner described above.

## V. CONCLUSION

For the foregoing reasons, MetroPSC respectfully requests that the Commission adopt rules in this proceeding consistent with the recommendations and proposals made herein.

Respectfully submitted,

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