

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

In the Matter of

Implementation of Section 224 of the Act

A National Broadband Plan for Our Future

WC Docket No. 07-245

GN Docket No. 09-51

**REPLY COMMENTS OF VERIZON**

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**Introduction and Summary**

The Commission should promptly adopt uniform attachment rates for all broadband service providers, including incumbent carriers, based on the Commission's cable rate formula. The comments filed in this proceeding amply demonstrate that the Commission has the legal authority and policy justification to ensure that all competing broadband service providers pay the same pole attachment rate at a level that will promote the deployment and affordability of broadband services. Not surprisingly, many electric utilities oppose any reduction to the pole attachment rates they charge today and suggest that the Commission instead increase the rates paid by many broadband service providers. There is simply no legal or policy justification for maintaining the unjust and unreasonable pole attachment rates electric utilities charge to incumbent carriers or allowing electric utilities to increase the rates they charge to other broadband service providers.

The Commission should also adopt additional timeframe guidelines for the performance of make ready work. The comments demonstrate that such guidelines can help accelerate the

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

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

Finally, the Commission's current complaint and mediation processes are successfully resolving disputes and only minor adjustments to those processes should be considered by the Commission. Several parties, however, recommend major changes to the Commission's existing processes and, in some cases, entirely new processes. These recommendations are solutions in search of a problem. Given the limited number of pole attachment disputes that have been brought to the Commission in recent years and the Commission's success in resolving those disputes, the Commission should decline to make any major changes to its complaint and mediation processes or to adopt any new processes.

**I. THE COMMENTS GENERALLY SUPPORT THE ADOPTION OF A BROADBAND ATTACHMENT RATE THAT APPLIES TO ALL BROADBAND SERVICE PROVIDERS, INCLUDING INCUMBENT CARRIERS**

As Verizon explained in its comments, Congress directed that "the Commission shall regulate" the justness and reasonableness of rates charged for pole attachments by *any provider of telecommunications service*, and incumbent carriers, wireless carriers and competitive carriers are unquestionably providers of telecommunications service. Verizon Comments at 2. This means that the Commission not only has the authority, but the duty, to ensure that utilities charge just and reasonable attachment rates to all providers of telecommunications service, including incumbent carriers.

Despite this Congressional directive, the comments confirm that utilities are continuing to charge high attachment rates to incumbent carriers that are not just and reasonable. These excessive rates for equivalent pole attachments provided to cable companies and other competitors are not justified and do not facilitate competitive broadband deployment.

With the exception of electric utilities and their associations, there is widespread agreement that the Commission can and should promote broadband deployment by establishing a broadband attachment rate to be charged to all cable companies and all providers of telecommunications services – including incumbent carriers, wireless carriers and competitive carriers. While parties should continue to negotiate their pole attachment agreements, the Commission should foster those negotiations by adopting the Commission’s current cable attachment rate formula as the default rate for all broadband service attachments. The adoption of a uniform broadband attachment rate would place all broadband service providers on a more level playing field with respect to the rates they pay for pole attachments and further promote the competitive deployment of broadband services.

**A. The Record Demonstrates That Utility Pole Owners Are Charging Unjust and Unreasonable Attachment Rates to Incumbent Carriers.**

There is ample evidence in the record that utility pole owners are charging unjust and unreasonable attachment rates to incumbent carriers. Verizon demonstrated in its comments that electric utilities are charging attachment rates that are as much as *11 times* greater than the cable attachment rate. Verizon Comments at 4. Verizon’s experiences are not unique.

CenturyLink “pays, on average, a per-attachment rate that is close to *five times* as high as what its cable competitors pay for the same attachments, and often it is even higher.”

CenturyLink Comments at 8. In addition, the Independent Telephone & Telecommunications

Alliance (ITTA) explained that “because the Commission has not yet reconciled its rules to reflect the statute that guarantees incumbent local exchange carriers (ILECs) just and reasonable rates, terms and conditions for their pole attachments [it has] frustrate[d] broadband deployment by enabling utility pole owners to levy exorbitant rates on ILECs.” ITTA Comments at 12. Furthermore, AT&T stated that as a result of higher pole attachment rates, “ILECs are paying approximately \$273 million to \$364 million per annum more in infrastructure costs than cable providers.” AT&T Comments at 2.

With the intense competition for broadband services provided by cable companies and competitive carriers, incumbent carriers cannot continue to absorb the unreasonably high pole attachment rates imposed by electric utilities. The Commission should help ensure that all broadband service providers compete on a level playing field by eliminating these unjustified disparities in pole attachment rates. The Commission can do so by adopting the Commission’s cable rate formula for setting the pole attachment rate for all broadband service providers.

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

Verizon explained in its comments that the Act gives the Commission both the authority and the duty to regulate the attachment rates charged to all providers of telecommunications service, including incumbent carriers, wireless carriers and competitive carriers. *See* Verizon Comments at 5-6. Section 224(b)(1) states that the Commission “shall regulate the rates, terms, and conditions for *pole attachments* to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints

concerning such rates, terms, and conditions.”<sup>2</sup> Section 224(a)(4) defines “*pole attachment*” as meaning “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.”<sup>3</sup> Read together, these two provisions require the Commission to ensure the justness and reasonableness of pole attachment rates charged to all providers of telecommunications service, including incumbent carriers, wireless carriers and competitive carriers.

Other parties likewise agree that the Act gives the Commission authority over the pole attachment rates electric utilities charge to incumbent carriers. For example, CenturyLink explained that “sections 224(b)(1) and 224(a) give any ‘provider of telecommunications service’ an independent right to pole attachments, and that the ‘just and reasonable’ standard for attachments applies to all telecommunications providers, ILECs among them.” CenturyLink Comments at 23. AT&T similarly argued that “[b]ecause ILECs are providers of telecommunications service, the authority conferred by Congress on the Commission to regulate pole-attachment rates, terms, and conditions under § 224(b) was expanded to comprise pole attachments by ILECs, not just telecommunications carriers.” AT&T Comments at 6. Qwest likewise argued that “Sections 224(b)(1) and 224(a)(4) . . . provide that all pole attachments, including those sought by ILECs, must be provisioned at rates, terms and conditions that are just and reasonable.” Qwest Comments at 2.

Not surprisingly, electric utilities claim that the Commission lacks authority to regulate the rates they charge to incumbent carriers. In an effort to retain the unreasonably high

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<sup>2</sup> 47 U.S.C. § 224(b)(1) (emphasis supplied).

<sup>3</sup> 47 U.S.C. § 224(a)(4) (emphasis supplied).

attachment rates they collect from incumbent carriers, they attempt to rewrite the statute to support their position. For example, the Edison Electric Institute (EEI) and the Utilities Telecom Council (UTC) argue that “the term ‘provider of telecommunications service’ in Section 224(a)(4) has the same meaning as the term ‘telecommunications carrier’ in Section 224(f).” EEI/UTC Comments at 79. This argument is not consistent with the statute.

Congress narrowed the Act’s definition of the term “telecommunications carrier” for purposes of the Section 224. Under Section 224(a)(5), “for purposes of this section, the term ‘telecommunications carrier’ (as defined in section 3 of this Act [47 USC § 153(44)] does not include any incumbent local exchange carrier as defined in section 251(h).” Had Congress intended for the terms “telecommunications carrier” and “provider of telecommunications service” to have the same meaning for purpose of Section 224, Congress would have included both terms in Section 224(a)(5). By excluding incumbent local exchange carriers from the term “telecommunications carrier” in Section 224, but not the term “provider of telecommunications service,” Congress indicated that the term “telecommunications carrier” has a narrower meaning than the term “provider of telecommunications service.”

Moreover, EEI/UTC’s argument that “the terms ‘telecommunications carriers’ and ‘providers of telecommunications service’ are used interchangeably” in Section 224 flies in the face of statutory construction principles. *See* EEI/UTC Comments at 80. As the Supreme Court explained in *Clay*, “[w]hen ‘Congress includes particular language in one section of a statute but omits it in another section of the same Act,’ we have recognized, ‘it is generally presumed that

Congress acts intentionally and purposely in the disparate inclusion or exclusion.”<sup>4</sup> If Congress had intended to exclude incumbent local exchange carriers from the broad scope of authority granted to the Commission under Section 224(b), Congress would have used the defined term “telecommunications carrier” to limit the scope of Section 224(b). Congress chose not to do so and instead used the broader term “pole attachment” that specifically includes “any attachment by a . . . provider of telecommunications service.” Congress’ deliberate use of the broader term “provider of telecommunications service” in some parts of Section 224 and the narrow term “telecommunications carrier” in other parts of Section 224 must be given full force and effect under the Supreme Court’s statutory construction principles.

Several electric utilities argue that the Commission should not interpret the Act as regulating the rates they charge to incumbent carriers because the Act does not regulate the rates incumbent carriers charge to electric utilities. *See* Coalition of Concerned Utilities Comments at 130. Even though the Commission has never regulated the attachment rates incumbent carriers charge to electric utilities, there is no evidence that incumbent carriers are charging unreasonable rates to electric utilities. This lack of evidence confirms the fact that electric utilities are able to negotiate reasonable attachment rates from incumbent carriers. By contrast, the record is replete with evidence that incumbent carriers are charged unreasonably high rates by electric utilities and that incumbent carriers have not been able to negotiate reasonable rates from electric utilities.

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<sup>4</sup> *See, e.g., Clay v. United States*, 537 U.S. 522, 528-29 (2003), *quoting Russello v. United States*, 464 U.S. 16, 23 (1983); *accord United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5<sup>th</sup> Cir. 1972).

Moreover, the fact that Congress chose not to authorize the Commission to regulate the attachment rates incumbent carriers charge to electric utilities does not entitle the Commission to disregard Congress' directive to regulate the attachment rates electric utilities charge to providers of telecommunications service. The Commission has the authority and the duty to regulate the attachment rates electric utilities charge to incumbent carriers, regardless of whether it has the parallel authority to regulate the attachment rates charged to electric utilities.

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

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

Many parties agree that setting a low, uniform attachment rate applicable to all providers of broadband services would accelerate the deployment of broadband services throughout the country and enhance competition for broadband services. Adopting the cable rate formula for pole attachments by cable television systems and all providers of telecommunications services who are offering broadband services commingled with other services will accelerate broadband deployment, place broadband competitors on a more level playing field and facilitate the negotiation of pole attachment agreements between utilities and broadband service providers. As

the American Cable Association (ACA) explained, “increasing cable operators’ existing pole attachment rate – whether to the telecom rate or some other rate higher than the current cable rate – will have a significant, detrimental impact on broadband adoption, especially in the smaller markets and rural areas service by ACA’s members.” ACA Comments at 4.

To ensure that the competitive playing field is level for all participants, the Commission should make clear that its broadband attachment rate applies to all providers of commingled broadband services, including incumbent carriers. If any broadband service provider is not able to negotiate a broadband attachment rate with the pole owner, it should be able to file a complaint with the Commission to resolve that issue. And the Commission’s complaint processes should be available to all broadband service providers, regardless of the form of contract they enter with the pole owner.

- 1. Setting Broadband Attachment Rates at the Cable Rate Level Will Promote the Deployment of Broadband Services and Provide a Level Playing Field for Competitors, While Ensuring That Pole Owners Are Properly Compensated.**

The record in this proceeding supports the Commission’s determination that setting broadband attachment rates as low as possible would promote broadband deployment.

CenturyLink explained that “[a]rtificially high rates for ILEC attachments actively discourage broadband deployment in areas that otherwise could probably be economically served, and discourage network upgrades in areas already served, by adding to the costs of deployment and provision of service.” CenturyLink Comments at 11. Similarly, Charter stated that “pole attachment rates already are a major factor in determining whether Charter should serve a particular rural area.” Charter Comments at 6.

As Verizon explained in its comments (at 3), the Commission can best accomplish this objective by establishing broadband attachment rates at the level determined by the Commission's cable rate formula. Other parties to this proceeding support this approach. For example, CenturyLink agrees that "[t]he Commission should adopt the current cable rate for all broadband attachments." CenturyLink Comments at 4-5. Tw telecom and COMPTTEL argue that "in light of the substantial policy benefits associated with setting the same price for competitors' pole attachments, the cable rate is the most appropriate of all of the rates along the continuum that could be mandated by the Commission under Section 224(e)." tw telecom/COMPTTEL Comments at 8.

Moreover, Time Warner Cable pointed out in its comments that several states have already applied the Commission's cable rate formula (or something very close to it) to all pole attachments. For example, in New York, "there is one pole attachment rate, which applies to all attachments regardless of the type of company" and that rate is "based on the federal formula for cable television attachments."<sup>5</sup> In California, the Commission directed that "the rate prescribed . . . for cable television pole attachments should apply where a cable corporation uses its pole attachment to provide telecommunications services" and that "the same pole attachment rate provisions applicable to cable operators providing telecommunications services be extended to

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<sup>5</sup> *Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments and to Establish a Pole Attachment Rate for Competitive Local Exchange Companies, Order Granting in Part Petitions for Rehearing and/or Clarification*, Case No. 01-E-0026, Order Granting in Part Petitions for Rehearing and/or Clarification, 2002 N.Y. PUC LEXIS 306, at \*5 (N.Y. P.S.C. July 16, 2002). *See also Ordinary Tariff Filing of Rochester Gas and Electric Corporation to Revise Pole Attachment Rates for CATV and CLEC Attachments – Petition for Rehearing Filed by Cable Telecommunications Association*, Case No. 03-E-0059, Order Denying Petition for Reconsideration, 2003 N.Y. PUC LEXIS 551, at \*6 (Exh. 1, page 1 of 5) (N.Y.P.S.C. Oct. 1, 2003) ("[t]he Commission has decided to use the 'cable formula' to apply to both cable and telecommunications service attachments, because it results in a lesser rate and may help to foster competition").

all [Competitive Local Carriers], including those not owned by or affiliated with a cable corporation.”<sup>6</sup> Oregon, Utah and Alaska have likewise adopted the cable attachment rate as the single pole attachment rate for all types of attachments.<sup>7</sup>

There is also no reason to believe that applying the Commission’s cable rate formula would be harmful to electric utilities. At least one electric utility – Puget Sound Energy (PSE), which serves the corporate headquarters of Microsoft and Starbucks – is voluntarily charging the Commission’s cable rate to all attachers. As PSE explained in its comments, “PSE currently applies the existing cable rate formula, rather than the telecom rate formula, to entities that are not incumbent local exchange carriers (‘incumbent LECs’) on a per attachment basis. In fact, we currently apply this rate to all attaching entities, including incumbent LECs.” PSE Comments at 4.

Other electric utilities, however, oppose setting a broadband attachment rate under the Commission’s cable rate formula on the basis of their assertion that the cable rate formula is not compensatory. *See, e.g.*, Coalition of Concerned Utilities Comments at 113. This issue has already been resolved by the Supreme Court.

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<sup>6</sup> *Order Instituting Rulemaking on the Commission’s Own Motion Into Competition for Local Exchange Service*, Decision No. 98-10-058, 1998 Cal PUC LEXIS 879, at \*85-87 (Cal. P.U.C. Oct. 22, 1998). The cable attachment rate in California is “equal to 7.4% of [the utility’s] annual cost of ownership,” which is very similar to the Commission’s cable rate formula. *Id.* at \*88.

<sup>7</sup> *See Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment Use and Safety*, AR 506, Order No. 07-137 (OR PUC, April 10, 2007); Utah Admin. Code §§ r.746-345-1 – r.746-345-6 (2010); *Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations Adopted under 3 AAC 52.900 – 3 AAC 52*, Order No. 4, 2002 Alas. PUC LEXIS 489 (Alaska October 2, 2002).

In *Florida Power*, the Supreme Court found that “[t]he rate imposed by the Commission in this case was calculated according to the statutory formula for the determination of fully allocated cost.”<sup>8</sup> The Court then noted that “[a]ppellees have not contended, nor could it seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory.”<sup>9</sup> Based on these findings, the Court held “that the FCC regulatory order challenged below does not effect a taking of property under the *Fifth Amendment*.”<sup>10</sup> There is therefore no legitimate concern that applying the Commission’s cable rate formula to commingled broadband attachments would inadequately compensate electric utilities or cause them to subsidize broadband services.

**2. The Act Gives All Providers of Telecommunications Services, Including Incumbent Carriers, the Right to File a Complaint With the Commission To Challenge the Rates, Terms and Conditions of Pole Attachments in Any Form of Contract with an Electric Utility.**

As Verizon explained in its comments, the Commission has consistently “encourage[d] parties to negotiate the rates, terms, and conditions of pole attachment agreements”<sup>11</sup> and held that “negotiations between a utility and an attacher should continue to be the primary means by which pole attachment issues are resolved.”<sup>12</sup> *See* Verizon Comments at 16. And the

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<sup>8</sup> *Florida Power v. FCC*, 480 U.S. 245, 254 (1987).

<sup>9</sup> *Id.*

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

<sup>11</sup> *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777, ¶ 9 (1998) (subsequent history omitted) (“*1998 Implementation Order*”).

<sup>12</sup> *1998 Implementation Order* ¶ 11. The Commission allows parties to file complaints only where such negotiations fail. *See id.* ¶ 9 (“[a]lthough the Commission’s rules will serve as a backdrop to such negotiations, we intend the Commission’s enforcement mechanisms to be utilized only when good faith negotiations fail”).

Commission has recognized that having a clear rate formula for pole attachments facilitates negotiations and the resolution of complaints between utilities and attachers.<sup>13</sup> Bright House Networks explained that “[b]y providing a unitary rate in most if not all cases (because the cable rate will be the prevailing rate), the Commission will minimize disputes over rates caused by differentiated treatment of similar services under the pole rate formulas.” Bright House Networks Comments at 15.

If incumbent carriers are not able to reach agreement with electric utilities on just and reasonable attachment rates, the Act gives them the right to file a complaint and have the Commission determine just and reasonable attachment rates. Nothing in the Commission’s rules should prevent incumbent carriers from filing such complaints. As CenturyLink explained, “ILECs are dependent on electric utilities’ control over pole facilities and are unable to obtain reasonable rates through negotiation . . . ILECs commonly are forced to pay far more for pole attachments than their direct competitors.” CenturyLink Comments at 9. Accordingly, the Commission “should ensure that ILECs are able to use complaint procedures . . . just as other attachers can.” CenturyLink Comments at 35.

In order to fully realize these benefits for negotiations and complaint resolution, the Commission should also make clear that the broadband attachment rate applies to all forms of contract between utilities and broadband service providers, including joint use agreements and joint ownership agreements. Regardless of whether the attachment rates are set forth in a license agreement, a joint use agreement, a tariff or some other form of contract, the Act requires that the pole attachment rates be just and reasonable.

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<sup>13</sup> 1998 *Implementation Order* ¶ 102.

Some electric utilities argue that joint use agreements and joint ownership agreements provide incumbent carriers with benefits that supposedly offset the unreasonable rates charged by the electric utilities. But such supposed benefits are not a valid basis for denying incumbent carriers the statute's protection from unjust and unreasonable rates. The Commission's resolution of a complaint brought against a broadband attachment rate in a joint use agreement should be subject to the same clear rate formula applicable to any other broadband attachments.

If in a particular case the utility believes there is some significant financial benefit in the terms and conditions of the joint use agreement, the Commission could consider evidence from the utility on that point. However, joint use agreements and joint ownership agreements do not generally provide significant financial benefits, but rather impose financial burdens on incumbent carriers that effectively increase the unreasonable attachment rates that incumbent carriers pay to electric utilities for their attachments.

For example, the Coalition of Concerned Utilities argues that “[u]nlike pole attachment agreements, ILECs often are entitled to rent portions of their allocated space to other telecommunications attachers.” Coalition of Concerned Utilities Comments at 132. The Coalition is implying that the incumbent carrier can charge other attachers a higher rate for space on the pole than the cost the incumbent carrier is bearing for that same space on the pole. Under the typical joint ownership agreement, if the pole is placed by an electric utility, Verizon typically bears about 40 percent of the electric utility's pole costs, which are usually computed under a methodology that produces results far in excess of the costs computed under the Commission's rate formulas. In other words, Verizon is forced to bear the electric utility's costs

for the entire communications space, but is only able to charge a mere fraction of that cost to other attachers when they use that same space on the pole.<sup>14</sup>

The Coalition of Concerned Utilities also argues that “ILECs pay very little each year in make-ready expenses to accommodate their attachments on electric utility poles, while CLECs and Cable Company competitors pay far higher amounts.” Coalition of Concerned Utilities Comments at 135. But as Messrs. Slavin and Frisbie explain, the Coalition’s comparison is misleading in at least two respects. First, Verizon, as an incumbent carrier, has already built its network and therefore makes very few requests for make ready work on electric utility poles.<sup>15</sup> By contrast, competitive carriers and cable companies are continuing to expand the reach of their networks. They more frequently request “first time” attachments to utility poles and therefore require more make ready work than Verizon.<sup>16</sup>

Second, the Coalition’s comparison only considers the charges that incumbent carriers supposedly “pay” for make ready work that electric utilities perform on their behalf. That comparison does not consider the “costs” of make ready work that incumbent carriers, like Verizon, must bear for make ready performed at the request of electric utilities. For example, when an electric utility that is party to a joint ownership agreement with Verizon upgrades its network, that electric utility will likely notify Verizon that existing poles will need to be replaced with taller poles to accommodate the electric utility’s upgraded facilities. Under the typical joint ownership agreement, Verizon will participate in the replacement of the poles, transfer its

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<sup>14</sup> Reply Declaration of James Slavin and Steven R. Frisbie (“Slavin/Frisbie Reply Decl.”) ¶ 9.

<sup>15</sup> Slavin/Frisbie Reply Decl. ¶ 11.

<sup>16</sup> *Id.*

facilities to the new taller pole and often remove the old pole. Verizon will bear most, if not all, of these make ready costs without reimbursement by the electric utility.<sup>17</sup> By contrast, competitive carriers and cable companies that rearrange their facilities in order to accommodate the electric utility's network expansion are entitled to full reimbursement of their make ready costs. *See* 47 U.S.C. § 224(i).<sup>18</sup>

**3. Verizon is Properly Applying the Commission's Telecom Rate Formula to Telecommunications Carriers Like Level 3.**

The Commission's current rules prescribe a different formula for calculating the rate to be applied to telecommunications carriers providing telecommunications services than the formula used for cable company attachments. Verizon is properly applying the Commission's formulas and issuing bills that apply the rates developed through those formulas.

Level 3 claims that Verizon charged an attachment rate for 2010 in Pennsylvania that exceeds the rate listed by the Commission in Appendix A of the Commission's *FNPRM*.<sup>19</sup> Level 3 Comments at 9. But as explained by Messrs. Slavin and Frisbie in their reply declaration, Level 3 is inappropriately comparing the Commission staff's calculations, which were based on

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<sup>17</sup> *Id.* ¶ 12.

<sup>18</sup> In their reply declaration, Messrs. Slavin and Frisbie address the other supposed benefits that the Coalition claims incumbent carriers receive from joint ownership and joint use agreements. Slavin/Frisbie Reply Decl. ¶¶ 13-20. Messrs. Slavin and Frisbie explain how each of these supposed benefits is actually a financial burden for the incumbent carrier.

<sup>19</sup> *See 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. 09-251 (May 20, 2010) ("*FNPRM*").

2007 financial data, with the rates Verizon billed for 2010.<sup>20</sup> The rates Verizon billed for 2010 must be based on financial data for 2009, not 2007.

The rates Verizon billed to Level 3 and other attachers for 2010 in Pennsylvania were based on Verizon's accounting data for the year 2009. In making the calculations, Verizon followed the Commission's formula and billed an urban telecom attachment rate of \$3.94.<sup>21</sup> Contrary to Level 3's assertions, Verizon is correctly charging competitive telecommunications carriers for pole attachments in Pennsylvania in accordance with the Commission's telecom rate formula.

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

The Commission proposed that each pole owner would make each pole attachment, joint ownership, or joint use agreement publicly available, and attachers could opt in to those agreements, accepting all the terms and conditions of the agreement. Verizon supported this proposal in its comments because the availability of an opt-in alternative would help in negotiating more reasonable attachment rates under existing joint use and joint ownership agreements. *See* Verizon Comments at 20. Verizon also noted that an attacher should only be able to opt-in to an agreement where it is similarly-situated to one of the parties to that agreement. *See id.*

ITTA notes that the Commission's opt-in proposal "implicates issues related to the age of an agreement into which an attacher could opt-in." ITTA Comments at 11. ITTA's concern is

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<sup>20</sup> Slavin/Frisbie Reply Decl. ¶ 22.

<sup>21</sup> *Id.* ¶ 23.

legitimate. The Commission has already addressed this concern with respect to interconnection agreements and should apply the same rules to opt-ins of pole attachment agreements. Section 51.809(c) of the Commission's rules requires incumbent local exchange carriers to make interconnection agreements available for adoption "for a reasonable period of time after the approved agreement is available for public inspection under Section 252(h) of the Act."<sup>22</sup> The Commission has expressly rejected the argument that an interconnection agreement should be available for "as long as the agreement remains in operation"<sup>23</sup> and has held that its reasonableness standard is based on the agreement's age, not its continuing operation.<sup>24</sup> There is no reason to treat opt-ins to pole attachment agreements differently than adoptions of interconnection agreements.

MetroPCS suggests that "[a] pole owner's agreements should be available to any attaching party to adopt, subject to state-specific pricing." MetroPCS Comments at 18. If MetroPCS is suggesting that a pole attachment agreement in one state should be available for opt-in in any other state "subject to state-specific pricing," the Commission should not adopt that suggestion. The Commission's rules do not permit such cross-state adoptions of interconnection agreements,<sup>25</sup> and the Commission should likewise not allow cross-state opt-ins of pole

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<sup>22</sup> 47 C.F.R. § 51.809(c).

<sup>23</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1306 (1996).

<sup>24</sup> *Id.* ¶¶ 1306, 1319.

<sup>25</sup> See 47 C.F.R. § 51.809(a) ("[a]n incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, ***upon the same rates, terms, and conditions as those provided in the agreement***") (emphasis supplied).

attachment agreements. Verizon's pole attachment agreements contain not only state-specific rates, but also state-specific processes and forms to be used for pole attachment applications. A pole attachment agreement in one state could not be readily implemented in another state because pole attachment processes vary across states in Verizon's footprint.

The Coalition of Concerned Utilities objects to the Commission's opt-in proposal "if it would allow an ILEC to reject its existing joint use relationship with an electric utility in favor of a third-party attacher arrangement." Coalition of Concerned Utilities Comments at 151.

According to the Coalition, "[i]f ILECs were granted pole attachment rights on electric utility poles, it would guarantee them regulated rates, terms and conditions for access to electric utility poles, but would confer no parallel rights on electric utilities with respect to ILEC-owned poles." *Id.* at 152. The Coalition's argument is based on the assumption that Commission's opt-in proposal is one-sided and would not allow an electric utility to opt in to an incumbent carrier's pole attachment agreement. The Commission's proposal contains no such limitation. Electric utilities, as attachers, would have the same ability to opt in to a pole attachment agreement with the pole owner as any other attacher.

**II. ANY TIMEFRAMES THE COMMISSION ADOPTS FOR PROVIDING ACCESS TO POLES SHOULD BE REASONABLE, SUFFICIENTLY FLEXIBLE, AND SHOULD APPLY TO ALL SECTION 224 POLE OWNERS AND ATTACHERS**

The Commission should adopt additional timeframe guidelines for the performance of make ready work. The comments demonstrate that such guidelines can help accelerate the performance of make ready work, but also accommodate individual circumstances and factors

that are beyond the pole owners' control.<sup>26</sup> The Commission should not, however, adopt hard and fast rules for the performance of make ready work because such work is not amenable to a "one size fits all" approach. Given the widely varying factors and conditions that affect the timing and performance of make ready work, firm rules would inevitably embroil the Commission in many disputes between pole attachers and pole owners.

The Commission's *FNPRM* already provides a comprehensive list of the major steps for which timeframes would be most beneficial. Contrary to the claims of some parties, there is no need to establish timeframes for any additional steps, including, but not limited to, the signing of pole attachment licensing agreements.<sup>27</sup> In addition, as several parties have explained, the record does not demonstrate that there is any need to, or that it would be appropriate to, apply make ready timeframes to applications for access to conduit or ducts.<sup>28</sup>

**A. Any Timeframes for Providing Access to Poles Should Be Flexible.**

Any make ready timeframes the Commission adopts should be flexible enough to account for the numerous variables that can significantly impact the time it takes to process pole access applications and complete make ready work. As the Coalition of Concerned Utilities explained, "[f]or any given make-ready request, there are a vast number of circumstances beyond the

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<sup>26</sup> See, e.g., Sunesys Comments at 2, 19; tw telecom/COMPTEL Comments at 11; Verizon Comments at 21; United States Telecom Association ("USTelecom") Comments at 18; AT&T Comments at 28; ACA Comments at 7; CTIA Comments at 6.

<sup>27</sup> See tw telecom/COMPTEL Comments at 17 (proposing that the Commission establish a timeframe for signing licensing agreements); Reply Declaration of Amy Sullivan ("Sullivan Reply Decl.") ¶¶ 6-7 (explaining that where pole licensing agreements are required, the negotiations for those agreements are typically completed in no more than [two] weeks, and that these negotiations can and often do occur while the attachers' pole access applications are being processed).

<sup>28</sup> See Verizon Comments at 32; APPA Comments at 25; Coalition of Concerned Utilities Comments at 43-45.

utility's control that easily can impact the development of cost estimates and work schedules and impede the completion of pole attachments." Coalition of Concerned Utilities Comments at 19. We Energies also explained that "flexibility in make-ready timelines must be maintained" because of, among other things, "the uncontrollable nature of the environment under which power companies operate and the effect that such an environment can have on our facilities, flexibility in make-ready timelines must be maintained." We Energies Comments at 2. Verizon and other parties have similarly demonstrated that flexibility is warranted because permitting requirements, deficiencies in pole access applications, and actions of joint pole owners, existing attachers can also significantly increase the time required to complete make ready work, process applications and perform make ready surveys.<sup>29</sup>

Given the numerous variables that can impact the timing of make ready work, the types of firm deadlines contemplated in the *FNPRM* would not provide the type of flexibility that providing access to poles requires. Instead the Commission should establish recommended timeframes for completing make ready work. Other parties have proposed a similar approach.<sup>30</sup>

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<sup>29</sup> See, e.g., EEI/UTC Comments at 18, 22 (noting that "[b]ecause no two projects are exactly the same, flexibility to adjust the timelines and meet the needs of each individual project is critical" and explaining that *inter alia* severe weather conditions, state and local regulatory proceedings, application deficiencies, and lack of cooperation from existing attachers can cause make ready delays); CenturyLink Comments at 30 (explaining that permitting requirements, weather delays, changes to an application midstream and deficient applications can cause delays); American Public Power Association (APPA) Comments at 23; National Rural Electric Cooperative Association (NRECA) Comments at 8-10; Ameren, *et al.* Comments at 4; Qwest Comments at 2; Florida Investor-Owned Electric Utilities Comments at 25-26; AT&T Comments at 28; Oncor Comments at 25-29; Verizon Comments at 28-30; Sunesys Comments at 15 (recognizing the importance of the need to stop the clock for extenuating circumstances such as force majeure events).

<sup>30</sup> See EEI/UTC Comments at 19 (recommending that any timeframes the Commission adopts "should only be used as targeted dates for pole owners and attaching entities to complete the make-ready process").

Recommended timeframes would allow the flexibility that providing access to poles requires while at the same time accomplishing the Commission's goals of improving the time it takes to obtain access to poles. And, unlike firm deadlines, recommended timeframes would be consistent with the Commission's prior decision to regulate access to poles using guidelines rather than "one-size-fits-all" rules.

In establishing timeframes for providing access to poles, the Commission should make clear that pole owners and existing attachers can stop the clock for delays attributable to circumstances outside of their control. Doing so would ensure that pole owners are not unfairly penalized for delays that are outside of their control. Based on numerous parties' comments, the circumstances that would warrant stopping the clock should include, at a minimum, adverse weather conditions, lack of cooperation from other entities, state and local regulatory proceedings or requirements, work stoppages, and mutual consent of the pole owners and the attachers.<sup>31</sup> Contrary to the suggestions of some parties, this list should be illustrative, rather than exhaustive, as it would be impossible to identify all of the types of circumstances for which stopping the clock would be justified.<sup>32</sup> It would also be impossible and inappropriate to limit the amount of additional time allowed for each factor. Indeed, due to regional differences, a

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<sup>31</sup> See EEI/UTC Comments at 22 (explaining that the make ready clock should be stopped for severe weather conditions, state and local regulatory proceedings, application deficiencies, attachers' failure to respond to pole owners' requests for additional information, lack of cooperation from existing attachers, and the need to correct existing safety violations); Alliance for Fair Pole Attachment Rules Comments at 19-22 (outlining numerous factors that would warrant stopping the clock including, but not limited to, delays on the part of existing attachers, adverse weather, and work stoppages);

<sup>32</sup> See Alliance for Fair Pole Attachment Rules Comments at 44; NRECA Comments at 10 (noting that "the Commission is not likely to be able to accurately predict all of the various circumstances or scenarios that would justify stopping the clock").

snowstorm in the northeast could cause greater delays in New York than in Pennsylvania. And, in many cases, more than one delay-causing factor may be present. Where this occurs, the interplay between several factors could result in additional delays that would not be present for each factor standing alone.

If the Commission adopts timeframe guidelines, the Commission should follow the lead of several states that do not hold pole owners accountable for failing to meet prescribed timelines where the delays are due to factors that are beyond the pole owner's control without attempting to prescribe an exhaustive list of such factors. Specifically, in New York, a pole owner is excused from meeting timelines for circumstances beyond the owner's control.<sup>33</sup> In Vermont, pole owners receive at least 180 days to complete make ready work "unless otherwise agreed by the various parties, and except for extraordinary circumstances and reasons beyond the Pole-Owner's control."<sup>34</sup> Likewise in Utah, pole owners have the flexibility of justifying longer timelines based on unanticipated delays.<sup>35</sup> None of these states uses an exhaustive list of the type of circumstances for which additional time may be warranted. There is no evidence that the flexibility provided under these states' timelines has undermined the ability of attachers to make timely attachments.

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<sup>33</sup> See New York Public Service Commission Case 03-M-0432, *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement on Pole Attachments, at 8 (Aug. 6, 2004) ("*New York Policy Statement*") ("the same timelines will apply to both processes unless circumstances beyond the Owner's control, other than resource problems, arise which will excuse meeting the timelines").

<sup>34</sup> See Vermont Public Service Board, Rules 3.708(B)(2), (C) and (E).

<sup>35</sup> See Utah Administrative Code, § R746-345-3.C.

**B. The Record Confirms That at Least Sixty Days Is a More Reasonable Timeframe for Completing Make Ready Work.**

The comments of CenturyLink, Verizon, and USTelecom make clear that forty-five days would not allow sufficient time for performing make ready work.<sup>36</sup> As Verizon has already explained, for Verizon-owned poles, it typically takes sixty days to complete make ready work where pole replacement is not required.<sup>37</sup> While some parties have indicated that they are able to complete make ready work in forty-five days or less, the experience of these parties does not justify adopting a deadline that many other providers find unreasonable.

As explained in Verizon's and USTelecom's comments, the Commission can, and should, establish a proposed timeframe for completing make ready work of sixty days without significantly increasing the total timeframe proposed in the *FNPRM*.<sup>38</sup> This can be done by consolidating the survey and make ready invoice into a single step, which would be subject to the existing forty-five day deadline for responding to complete pole applications.<sup>39</sup>

Permitting the pole owner sixty days to complete make ready work would satisfy the Commission's goals of improving access to poles. In fact, allowing sixty days for completing make ready work would still significantly reduce the time it takes to obtain access to poles for a significant number of applications. As explained in the *FNPRM*, "the performance of make-

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<sup>36</sup> See CenturyLink Comments at 30-31 (explaining that the timeframes proposed in the *FNPRM* are "unrealistic"); USTelecom Comments at 20 (explaining that make ready work where pole replacement is not required typically takes at least 60 days to complete); Verizon Comments at 30-32 (same); EEI/UTC Comments at 16 ("the FCC has proposed unrealistic and unreasonable timelines").

<sup>37</sup> See Verizon Comments at Sullivan Decl. ¶¶ 27, 33.

<sup>38</sup> See Verizon Comments at 26; USTelecom Comments at 20.

<sup>39</sup> See *id.* See also NTELOS Comments at 6-7 (explaining that the estimate and survey phases could be consolidated into a single step).

ready work can take . . . more than 90 days in 31 percent of cases.”<sup>40</sup> Thus, recommending sixty days for completing make ready would improve the timing of pole access for at least 30 percent of pole access applications. Contrary to the claims of some parties, recommending any timeframes for completing make ready work would not preclude pole owners from completing make ready work in less than sixty days. Nor would make ready timeframes create incentives for pole owners to take the maximum amount of time allowed for completing make ready work.<sup>41</sup> Indeed, nothing in the record demonstrates that more than sixty days (or even the proposed forty-five days) would result in competitive harm or undermine the Commission’s goals.

**C. The Commission Should Adopt Reasonable Region-Specific Caps for Any Timeframes It Adopts.**

Verizon and other parties have also demonstrated that it is critical that reasonable caps accompany any timeframes the Commission ultimately adopts.<sup>42</sup> As explained in Verizon’s and the Coalition of Concerned Utilities’ comments, pole owners have no control over the volume or size of applications they will receive over a given time period.<sup>43</sup> Absent reasonable caps, pole owners could become overwhelmed by unusually large numbers of applications or applications involving unusually large numbers of poles and would be unable to meet any make ready

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<sup>40</sup> *FNPRM* ¶ 26.

<sup>41</sup> *See, e.g.*, NTELOS Comments at 6 (misguidedly suggesting that the proposed timeframes “encourage each stage to be slowed to the maximum extent allowable”).

<sup>42</sup> *See* Coalition of Concerned Utilities Comments at 31 (“[t]he total number and size of requests for make-ready within a certain period should be limited to an amount that is reasonable for the utility to process in light of its many other responsibilities.”); CPS Energy Comments at 10.

<sup>43</sup> *See* Coalition of Concerned Utilities Comments at 31; Verizon Comments at 33.

timeframes that the Commission ultimately recommends. Using caps is, therefore, critical to the success of any make ready timelines the Commission ultimately recommends. There is no basis to believe that caps would undermine the Commission's goals of improving the timing of access to poles. As explained in Verizon's comments, because of regional differences, separate region-specific caps, rather than a single national cap, should be established.<sup>44</sup>

In addition to establishing caps, the Commission should encourage but not require attachers to provide utilities with advance notice of large requests. Such information would assist pole owners with planning for and performing make ready work. New York already encourages attachers to provide pole owners with this type of advance notification.<sup>45</sup> At least two CLECs have acknowledged that it would be reasonable for the Commission to encourage attachers to provide this type of advance notification.<sup>46</sup>

**D. Consistent With the *FNPRM*'s Tentative Conclusion, the Commission Should Not Apply Make Ready Timeframes to Applications Requiring Pole Replacements.**

Regardless of the timeframe that the Commission ultimately recommends for make ready work, the Commission should adopt the *FNPRM*'s conclusion to exclude applications requiring pole replacements from any make ready timeframes that the Commission ultimately adopts. As explained in numerous comments, pole replacements require significantly more time and labor than other types of make ready work and also involve more steps, introducing the potential for

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<sup>44</sup> See Verizon Comments at 33.

<sup>45</sup> See *New York Policy Statement*, Appendix A at 1 (“[a]ttachers shall notify Pole Owners of know upcoming significant projects in advance of submitting applications”).

<sup>46</sup> See Sunesys Comments at 14; Level 3 Comments at 7.

additional delays that are outside of pole owners' control.<sup>47</sup> Therefore, it is reasonable to exclude applications requiring pole replacement from the pole access timeframes the Commission ultimately adopts.

Today, many pole owners strive to accommodate new attachers without pole replacement. Regardless of the timeframes involved, pole owners have no incentive to force unnecessary pole replacements to accommodate attachers. Accordingly, excluding applications requiring pole replacements from any timeframes the Commission adopts would not undermine the Commission's goals of improving the timing of access to poles.

**E. The Commission Should Reject Proposals to Adopt Separate Timeframes for Incumbent Carrier Pole Owners or For Smaller-Sized Pole Applications.**

Some parties misguidedly propose that the Commission should adopt separate, timeframes for ILEC pole owners, wireless attachments, and smaller sized applications (*i.e.* applications involving twenty-five or fewer poles).<sup>48</sup> As explained below, these proposals are based on unsupported allegations that do not provide a legitimate basis for adopting these proposals. In addition, these proposals could not be administered as easily as a single set of timeframes that cover all applications where pole replacement is not required. Accordingly, the Commission should reject these proposals.

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<sup>47</sup> See, *e.g.*, Coalition of the Concerned Utilities Comments at 30; Verizon Comments at 31.

<sup>48</sup> See, *e.g.*, Coalition of Concerned Utilities Comments at 19 (“[s]ince electric utilities lack any competitive incentive to delay the make-ready process for communications attachers, they should not be subject to the same deadlines as ILEC pole owners.”); Level 3 Comments at 5, 7 (explaining that the timeframes proposed in the NPRM are “overly generous in the case of many small attachment requests” and proposing that for attachments with less than twenty-five poles, steps one through four should be completed within 75 days).

There is no evidence that ILECs take longer to complete make ready work for competitive providers than other types of pole owners. Nor is there any evidence that ILECs intentionally delay make ready work for competitive providers. In fact, the record demonstrates that the exact opposite is true. For example, Verizon has previously demonstrated that it often completes make ready work for other parties faster than it completes its own make ready work.<sup>49</sup> And the comments of tw telecom and COMPTTEL acknowledge that incumbent carriers are actually more cooperative in accommodating third party attachers than electric companies are.<sup>50</sup>

In addition, there is no evidence that an application with fewer poles will require less time to complete make ready work than an application with more poles. As the EEI and UTC explained in their comments, “[t]he FCC should not simply assume that because an attaching entity seeks access for a limited number of attachments or to a small percentage of a utility’s poles that a utility can automatically process the request and complete make-ready work in proportionately less time.” EEI/UTC Comments at 25. The Coalition of Concerned Utilities has likewise explained that “[t]he process of conducting field surveys, assigning personnel, arranging for supplies, rolling trucks, etc. is not always directly correlated to the size of the request.” Coalition of Concerned Utilities Comments at 35. And as explained in Ms. Sullivan’s declaration, for applications involving fewer than 300 poles, the type of make ready work required typically has a greater impact on the time it takes to complete make ready work than the

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<sup>49</sup> See Comments of Verizon, *Petition for Rulemaking of Fibertech Networks, LLC*, RM-11303 at Attachment B, Declaration of Gloria Harrington, ¶¶ 6-7 (Jan. 30, 2006) (“Harrington Decl.”).

<sup>50</sup> See, e.g., tw telecom/COMPTTEL Comments at 14 (“the evidence in the record indicates that electrical utilities are, if anything, less cooperative than incumbent LECs in accommodating third-party attachers”).

size of the application or type of attachment.<sup>51</sup> Accordingly, there is no legitimate basis in the record for adopting shorter timeframes for applications with a limited number of poles.

**III. THE RECORD CONFIRMS THAT THE COMMISSION SHOULD NOT ADOPT THE OTHER POLE ACCESS RULES PROPOSED IN THE *FNPRM* AND SHOULD LIKEWISE REJECT SIMILAR POLE ACCESS PROPOSALS RAISED IN THE COMMENTS**

**A. Requiring Pole Owners to Take on Additional Responsibility for the Process is Unjustified and Would Be Unduly Burdensome to Pole Owners.**

There is no basis for requiring a single pole owner to manage access to jointly owned poles or requiring pole owners to serve as “middle man” for processing make ready payments between the new attacher and existing attachers. In fact, there is no evidence that a single pole owner would be more successful than new attachers at ensuring that existing attachers or co-pole owners timely complete the steps required to provide access to poles. As Verizon and others have explained, pole owners have no control over and cannot force other parties to complete the steps required to provide access to poles.<sup>52</sup> Thus, pole owners are in no different position than the new attacher with respect to the make ready work of third parties. And, as the Coalition of Concerned Utilities explained, “[t]he insertion of a new middle man into the process is likely to slow down-not speed up-the make-ready process.”<sup>53</sup> Qwest has likewise explained that the *FNPRM*’s proposal to designate a managing utility for jointly-owned poles “could actually

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<sup>51</sup> See Verizon Comments at Sullivan Decl. ¶ 33.

<sup>52</sup> See Coalition of Concerned Utilities Comments at 65 (“[e]lectric utility pole owners, in fact, have little control over existing attachers and cannot ensure the timely rearrangement and transfer of existing attachments owned by third parties.”); Verizon Comments at 38; Oncor Comments at 25.

<sup>53</sup> Coalition of Concerned Utilities Comments at 68.

lengthen the make-ready work process.”<sup>54</sup> Accordingly, it makes little sense to designate a single pole owner to serve as the “middle man” between the new attacher and existing attachers or a joint pole owner.

In addition, the proposed rule would significantly increase the time and expense associated with providing access to poles. *See* EEI/UTC Comments at 40. In fact, one electric utility has estimated that a rule requiring one owner to administer access for jointly-owned poles would increase its costs by as much as several hundred thousand dollars. *See* Idaho Power Comments at 11. And, contrary to the claims of some parties, today, pole owners are not already required to designate a managing utility for jointly owned poles.<sup>55</sup>

**B. Data Reporting Requirements for Poles and Conduit Would Be Unduly Burdensome and Would Provide Little Benefit.**

Numerous parties agree that the administrative burdens associated with mandatory data reporting requirements for poles and conduit would substantially outweigh any minimal benefit that these requirements could potentially provide.<sup>56</sup> The same is true for the proposed national database requirements. As several parties have explained, there are simply too many poles in

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<sup>54</sup> Qwest Comments at 3.

<sup>55</sup> *See* Commonwealth of Massachusetts, Department of Telecommunications and Cable (“MA DTC”) Comments at 4 (suggesting that “current practice in Massachusetts is to designate a managing utility for jointly owned poles. . .”). *Compare to* Sullivan Reply Decl. ¶ 14 (clarifying that in Massachusetts, Verizon and other pole owners do not designate a managing utility for jointly-owned poles).

<sup>56</sup> *See, e.g.,* EEI/UTC Comments at 27 (noting that the proposed data reporting requirements would “force utilities to devote significant resources and expense without providing any corresponding benefit to the negotiation process or the resolution of pole attachment disputes”); CenturyLink Comments at 35; APPA Comments at 29; NRECA Comments at 18.

the country and any such records would quickly become dated and would be costly to maintain.<sup>57</sup>

In addition, the proposed data reporting and data maintenance requirement would be difficult to enforce, and many attachers would not even be subject to this requirement (*e.g.*, municipal attachers) because they fall outside of the Commission's jurisdiction.<sup>58</sup> Finally, several comments explain that requiring pole owners to make this data publicly available could pose potential national security and safety issues.<sup>59</sup>

The record further confirms that reporting requirements would unjustifiably increase pole owners' costs and would also be incredibly time consuming. For example, EEI collected data from its members "indicating that it would take several years and cost hundreds of millions of dollars in the aggregate for utilities to gather the additional information." EEI/UTC Comments at 31. These costs would be particularly burdensome to smaller pole owning entities, including electric utilities and ILECs that serve primarily rural areas.<sup>60</sup> Given these potential issues and costs, it does not make sense to adopt the proposed data reporting requirements. Instead, the Commission should make clear that pole owners should continue to provide prospective attachers with data on specific poles upon request.

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<sup>57</sup> See, *e.g.*, NRECA Comments at 18; Verizon Comments at 42; USTelecom Comments at 24-25.

<sup>58</sup> NRECA Comments at 19.

<sup>59</sup> See Alliant Energy Comments of at 6; EEI/UTC Comments at 28-29; CenturyLink Comments at 34.

<sup>60</sup> See CenturyLink Comments at 34.

**C. Reporting Requirements for Make Ready Charges and Decisions Concerning Boxing and Extension Arms Would Not Provide Any Real Benefit.**

**1. Decisions Concerning Boxing and Extension Arms.**

Requiring pole owners to make available records for *all* of their decisions on boxing and extension arms would be unduly burdensome and would not provide any real benefit to attachers. As Verizon has previously explained, the appropriateness of boxing and extension arms varies from location to location and is dependent on the conditions of each pole site.<sup>61</sup> As a result, the fact that a pole at one site is boxed does not mean that it is appropriate to box a pole at a completely different site. Accordingly, data on pole owners' decisions concerning boxing and extension arms would not have any meaning outside of the specific attachment and pole for which that decision was made. And, given the large volumes of poles in the country, it would be administratively burdensome to maintain data on each decision that a pole owner has ever made concerning the use of boxing and extension arms.

Rather than requiring pole owners to make detailed records about *all* of their decisions regarding boxing and extension arms, the better approach would be to encourage pole owners and prospective attachers to consider the use of boxing and extensions arms during the application survey. This approach would ensure that pole owners are not overwhelmed by administrative reporting requirements, while at the same time ensuring that attachers have access to the information they may need to consider the use of boxing and extension arms.

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<sup>61</sup> See Harrington Decl. ¶ 10.

## 2. Schedules of Make Ready Charges.

Several parties have demonstrated that make ready work varies widely from site to site and as a result, there are few, if any, “common charges.”<sup>62</sup> As a result, a schedule of common make ready charges may not necessarily cover all of the make ready work that is performed today, and would not necessarily provide any real benefit to attachers. At least one CLEC has acknowledged that “attachers do not need a list of schedule of charges” and suggested that instead it would be more useful for pole owners to provide attachers with detailed make ready estimates – something that many pole owners already do.<sup>63</sup> Accordingly, consistent with Sunesys’ comments, the Commission should encourage pole owners to continue providing detailed make ready estimates to attachers.

### **D. Rules Requiring the Use of Third Party Contractors Could Conflict With Collective Bargaining Agreements and Would Unreasonably Strip Pole Owners of the Right to Control Their Attachments.**

As explained in Verizon’s and US Telecom’s comments, many ILECs have entered into labor agreements that restrict or entirely prohibit the use of outside contractors for the utility’s own make ready work.<sup>64</sup> However, this issue is not specific to ILECs. Indeed, as the Coalition of Concerned Utilities explained, “[m]any utilities like NSTAR are parties to collective bargaining agreements that prohibit the hiring of outside contractors in certain circumstances.” Coalition of Concerned Utilities Comments at 49. The Massachusetts Department of

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<sup>62</sup> See, e.g., Verizon Comments at 36; USTelecom Comments at 23-24; Alliant Energy Comments at 5; Coalition of the Alliance for Fair Pole Attachment Rules Comments at 53; Ameren Comments at 21; Coalition of Concerned Utilities Comments at 78; ITTA Comments at 5.

<sup>63</sup> Sunesys Comments at 20.

<sup>64</sup> See Verizon Comments at 39-40; USTelecom Comments at 21-22.

Telecommunications and Cable likewise acknowledged that “collective-bargaining agreements, entered into by utilities, often preclude the use of outside contractors on their facilities.” MA DTC Comments at 3. Given these labor agreements, it makes no sense for the Commission to adopt a rule that may conflict with these agreements and the collective bargaining process.

The Commission should likewise reject extreme proposals that would give new attachers an automatic, immediate right to use third-party contractors to perform make ready work.<sup>65</sup> Like the *FNPRM*'s proposed rule, this type of proposal may create conflicts with many labor agreements. In addition, this proposal would unreasonably strip pole owners of their right to control their own attachments without any specific-findings of unreasonable delays on the pole owner. As several parties have explained, it is important that parties retain control over their own attachments.<sup>66</sup> For example, Qwest explained that “[a] pole owner is the only party aware of the big picture regarding the pole” and that pole owners are “in the best position to ensure the safety and security of all attachments on its pole.”<sup>67</sup> Pole owners should not lose the right to control their attachments absent a case-specific finding of unreasonable delays. Instead, the better approach is to encourage pole owners to use third party contractors whenever possible to satisfy any make ready timeframes the Commission ultimately adopts.

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<sup>65</sup> See, e.g., tw telecom/COMPTTEL Comments at 13 (proposing that the Commission give attachers an automatic right to use third party contractors at the start of the process).

<sup>66</sup> See Coalition of Concerned Utilities Comments at 48 (“[u]tility pole owners must have control over work done on their poles.”).

<sup>67</sup> Qwest Comments at 11.

**E. Staggered Make Ready Payments Would Not Improve Access to Poles.**

Several parties have demonstrated that requiring staggered make ready payments would not meaningfully improve access to poles and instead would unreasonably subject pole owners to the risk of nonpayment.<sup>68</sup> As explained in Verizon's comments, staggered make ready payments would not provide any incentive for completing make ready work faster because the timing of make ready work is often determined by numerous factors that are outside of pole owners' control.<sup>69</sup> Instead, as other parties have explained, staggered make payments would penalize pole owners for delays outside of their control and increase the risk of non-payment.<sup>70</sup>

**F. The Commission Should Reject Proposals That Would Require the Use of Temporary Attachments.**

Some parties misguidedly suggested that the Commission should require pole owners to allow the use of temporary attachments where pole owners or existing attachers are unable to complete make ready work within any make ready timeframes the Commission ultimately adopts.<sup>71</sup> The Commission should reject these proposals.

As explained in Ms. Sullivan's reply declaration, temporary attachments increase the time and expense of all parties and can also hinder the completion of the required make ready work.<sup>72</sup> Before temporary attachments can be placed, an additional make ready survey is required to identify the location for the temporary attachment. Depending on the temporary

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<sup>68</sup> See Sunesys Comments at 9 and 19; Alliant Energy Comments at 5; Idaho Power Comments at 10; NRECA Comments at 16.

<sup>69</sup> See Verizon Comments at 28.

<sup>70</sup> NRECA Comments at 16; Idaho Power Comments at 9-10.

<sup>71</sup> See NTELOS Comments at 7; Fiber Technologies Comments at 8.

<sup>72</sup> See Sullivan Reply Decl. ¶ 8.

attachment location and the method used to place the temporary attachment, temporary attachments can actually hinder the completion of the required make ready work.<sup>73</sup> Finally, pole owners would have no assurance that attachers will actually convert their temporary attachments to permanent ones.<sup>74</sup> And, while a temporary attachment remains on a pole, the space occupied by that attachment is not available to other potential attachers and could delay the competitive deployment of broadband networks by other potential attachers.<sup>75</sup> Accordingly, it would be inappropriate for the Commission to require the use of temporary attachments. However, parties should remain free to agree to allow temporary attachments on specific poles.

**IV. THE COMMISSION'S CURRENT COMPLAINT AND MEDIATION PROCESSES ARE WORKING EFFECTIVELY AND SHOULD ONLY BE MODIFIED TO ENOURAGE MORE INFORMAL RESOLUTION OF DISPUTES, RATHER THAN FORMAL LITIGATION**

Several parties confirm Verizon's experience that the Commission's current complaint process is effective in resolving pole attachment disputes without reaching a formal complaint decision. These parties acknowledge the effectiveness of both private dispute resolution as well as the Commission's mediation process.

Other parties criticize the Commission's mediation processes, but their criticisms merely reflect a misunderstanding of mediation. The mediation process is intended to facilitate the resolution of disputes through voluntary agreements between the parties. It is not intended to produce – and, indeed, cannot produce – decisions or precedents.

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<sup>73</sup> See *id.* ¶ 11.

<sup>74</sup> See *id.* ¶ 13.

<sup>75</sup> See *id.* ¶ 12.

Several parties also propose changes to the Commission's complaint process beyond those included in the *FNPRM*. While many of these proposals are supposedly intended to produce quick decisions on formal complaints, they are not well suited to the fact-intensive and complex issues involved in most pole attachment disputes.

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

As Verizon explained in its comments (at 43), the Commission's mediation process has "had great success" and "many cases that would have been formal complaints have been resolved informally without further litigation." Members of the Coalition of Concerned Utilities likewise "report that the vast majority of issues and disputes they may have with communications attachers are currently being resolved amicably" and that "regulatory complaints are non-existent or infrequent." Coalition of Concerned Utilities Comments at 90.

Several parties criticize the Commission's mediation procedures, but their criticisms simply reflect a misunderstanding of how mediation works. For example, tw telecom and COMPTTEL recommend that parties "be required to participate in an in-person mediation session with Commission staff." tw telecom/COMPTTEL Comments at 36. Mediation is a voluntary process intended to produce a voluntary agreement to resolve the parties' disputes. Requiring an unwilling party to participate in mediation would be contrary to the voluntary nature of mediation and would not likely produce a resolution of the parties' dispute.

Level 3 asserts that "mediation almost always results in compromise, so an aggrieved attaching party cannot expect to prevail in all aspects of its challenges to a pole owner's rates, terms and conditions." Level 3 Comments at 5. It has been and continues to be the Commission's policy to encourage pole owners and prospective attachers to reach agreement on

the rates, terms and conditions of pole attachments. Compromise on the part of both negotiating parties is critical to reaching agreement and encouraging compromise through mediation is fully consistent with the Commission's policy. Moreover, there is no assurance that an attaching party will prevail in all aspects of its challenges if it proceeds with litigation. The Commission's decision on a formal complaint may reflect a "compromise" of each party's litigation position.

A few parties object to the fact that mediations are "off the record" and establish no precedent.<sup>76</sup> Where a dispute is resolved through the Commission's mediation process, the negotiations and the ultimate resolution of the dispute are confidential. In fact, the confidentiality of the Commission's mediation process is critical to the resolution of disputes. It is unlikely that the Commission's mediation process would be as successful if the Commission were to require the publication of each dispute resolution.

Several parties claim that the Commission's mediation process has no timelines and recommend that the Commission impose one.<sup>77</sup> The Commission's mediation process does have timelines that each party controls. The Commission's staff continues to mediate only as long as all parties agree to continue the mediation. If any party determines that it no longer wishes to participate in the mediation, the Commission's staff terminates the mediation and allows the

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<sup>76</sup> See, e.g., Comcast Comments at 32 ("private settlements of disputes do not establish precedent that other attachers can rely upon to protect their rights"); Level 3 Comments at 5 ("mediation does not produce a formal record").

<sup>77</sup> See, e.g., Charter Comments at 23 ("since the mediation process is 'informal' there are no timeframes governing the process"); T-Mobile Comments at 15 ("T-Mobile, therefore, suggests a formal mediation period of 45 days from the date of denial"); Comcast Comments at 30 ("[t]he current Commission policy of strongly encouraging mediation as a prerequisite to filing a complaint often ends up delaying resolution because there are no established timeframes for completing such mediation"); NCTA Comments at 51 ("encouragement of unbounded pre-complaint mediation, with no fixed time for resolving the underlying dispute . . . has created delays").

formal complaint process to proceed. There is therefore no need for the Commission to impose any artificial deadline on the Commission's mediation process.

MetroPCS claims that "there is no guarantee that mediation will result in a negotiated settlement." MetroPCS Comments at 19. While that observation is certainly true, there is also no guarantee that litigating a complaint will result in a favorable result for an attachor. These uncertainties must be weighed as the attachor decides whether to pursue mediation, on a voluntary basis, or proceed with a formal complaint. Notwithstanding this uncertainty, the Commission's own experience shows that its mediation process has "had great success."

The Commission should continue to encourage parties to participate voluntarily in the Commission's mediation processes for pole attachment disputes. Voluntarily negotiated resolutions of these disputes are fully consistent with the Commission's policy of encouraging negotiated agreements governing the rates, terms and conditions of pole attachments.

**B. The Commission Should Ensure that Denial of Access Disputes Are Resolved Promptly.**

The Commission's proposal to eliminate the requirement to file a complaint within 30 days of a denial of access is based on the Commission's concern that such a short deadline "hinders informal resolution of disputes." *FNPRM* ¶ 82. But, as Verizon explained in its comments, eliminating the deadline altogether may delay the filing of access complaints to the point where memories are no longer fresh and business records are no longer readily available. *See Verizon Comments* at 44. The Coalition of Concerned Utilities likewise noted that "[p]ole attachment disputes can be complex and fact-intensive" and that "[a]llowing complaints to be filed long after access is denied also would create a substantial risk that relevant records will be lost or otherwise unavailable." *Coalition of Concerned Utilities Comments* at 92.

To ensure that denial of access disputes are resolved promptly, Verizon recommended that the Commission revise its proposed rule to indicate that the attacher must either request informal dispute resolution, pre-complaint mediation or file a complaint within 30 days of the denial of access.<sup>78</sup> Several parties suggested similar modifications to the Commission's proposal.<sup>79</sup> Under either Verizon's recommendation or these other parties' recommendations, attachers and pole owners would be able to engage in informal processes for resolving the dispute, while ensuring that the dispute is resolved promptly after the denial of access.

Sunesys argues that the time limit for filing an access complaint should be eliminated because "it is often unclear under the current rules when the denial of access even occurs" when "a utility simply fail[s] to perform make-ready work for exceedingly long periods of time." Sunesys Comments at 22. This concern would largely be addressed by the Commission's proposal to establish timeframe guidelines for the completion of make ready work. Moreover, there is no reason to allow attachers to wait indefinitely to resolve access complaints simply because it may be difficult for them to pinpoint the moment that access was denied. Because

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<sup>78</sup> Verizon Comments at 44. If any party objects to dispute resolution or mediation or if such dispute resolution or mediation is not successful, the complainant should then be required to file its complaint within 30 days.

<sup>79</sup> For example, EEI and UTC recommend that the Commission "modify Section 1.1404(m), to allow an attaching entity to submit a notice to the FCC during the 30-day period following a denial of access indicating that the attaching entity is, in good faith, trying to resolve the dispute with the pole owner." EEI/UTC Comments at 53. Similarly, the Florida Investor-Owned Utilities recommend that the Commission's proposed rule "include an alternative that the potential complainant may file within 10 days of the cessation or termination of informal dispute resolution procedures, but not more than 60 days after the denial at issue." Florida Investor-Owned Utilities Comments at 42.

“situations involving the denial of access are often complex and fact-intensive,”<sup>80</sup> they require prompt resolution.

**C. The Commission Should Not Encourage Filing Complaints by Extending Remedies Prior to Notice of a Dispute.**

Although the Commission is considering whether to allow remedies to be calculated consistent with the statute of limitations period,<sup>81</sup> Verizon explained why it would not be appropriate to measure remedies for any period of time before the respondent has actual notice of a dispute. Until the respondent has notice of a dispute, both parties are in agreement as to the terms of the contract and there is no injury to be remedied.

Charter proposes “that the refund reach back five years, or back to the date of the applicable statute of limitations, whichever is more.” Charter Comments at 25. If the statute of limitations prescribes the period of time for which damages can be awarded, the Commission cannot award damages for periods of time *prior to* that statutory period. Moreover, lengthening the damages period significantly would likely create incentives for attachers to delay filing complaints in order to run up their potential damage awards. As CTIA explained, “it would be unjust and inequitable were the Commission to . . . creat[e] unchecked incentives for attachers to file spurious complaints.” CTIA Comments at 15.

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<sup>80</sup> Charter Comments at 24.

<sup>81</sup> See *FNPRM* ¶ 88.

**D. The Commission Should Not Make Incumbent Carriers and Communications Attachers Subject to Compensatory Damages If Electric Utilities Are Excluded From Such Damages.**

The electric utilities are nearly unanimous in their opposition to the Commission's proposal to make compensatory damages available to successful complainants.<sup>82</sup> Several electric utilities also argue that the Commission should only make such damages available from incumbent carriers and communications attachers.<sup>83</sup> Such an asymmetrical rule would not be workable.

Electric utilities, as joint owners or joint users, are often necessary and indispensable parties to pole attachment complaints. But complainants may not bother to name electric utilities as respondents if they can receive compensatory damages from the incumbent pole owner, but not the electric utility. And even if the electric utility were named as a respondent, it may not have the same incentive to resolve the complaint as the "common carrier" respondents where it is not at risk for compensatory damages. If the Commission adopts a rule providing compensatory damages for pole attachment complaints, that rule should apply to all pole owners and attachers and should not exclude electric utilities.

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<sup>82</sup> See, e.g., EEI/UTC Comments at 43 ("nothing in the Section [224] explicitly gives the FCC authority to award compensatory damages in pole attachment disputes"); NRECA Comments at 20 ("the FCC has no legal authority to require utilities to pay compensatory damages to attachers for violations of its pole attachment rules"); The Alliance for Fair Pole Attachment Rules Comments at 71 ("[n]either section 224 nor the Communications Act otherwise authorized the Commission to assess damages against an electric utility pole owner").

<sup>83</sup> See, e.g., The Alliance for Fair Pole Attachment Rules Comments at 70 ("[a]lthough the Commission has no authority to award damages against pole owners under section 224, it has ample authority under section 207 to award damages against ILEC pole owners, ILEC attachers, and any other 'common carriers'"); Florida Investor-Owned Utilities Comments at 47.

**E. The Commission Should Increase Penalties for Unauthorized Attachments.**

The evidence in this proceeding confirms the Commission’s conclusions that the problem of unauthorized attachments is not merely theoretical.<sup>84</sup> For example, NRECA reported that “[a]n overwhelming majority – 87% of responding Electric Cooperatives – reported finding unauthorized attachments.” NRECA Comments at 21. Similarly, Oncor discovered over 31,000 unauthorized attachments by 24 attachers during its 2007-2008 surveys. Oncor Comments at 48.

In order to address this problem, pole owners generally support stiffer penalties for unauthorized attachments.<sup>85</sup> In order to make these penalties effective, the Commission should incorporate them into its pole attachment rules and make clear that utilities can enforce them through the Commission’s pole attachment complaint processes.

Several parties oppose the imposition of stiffer penalties for unauthorized attachments, but their arguments are without merit. For example, tw telecom and COMPTTEL argue that “the record in this proceeding does not support the assertion made by some utilities that unauthorized pole attachments are widespread.” tw telecom/COMPTTEL Comments at 32. The record before the Commission speaks for itself and contains ample evidence of unauthorized attachments. But the Commission does not need to wait until the problem of unauthorized attachments is “widespread” before it adopts stiffer penalties. As the EEI and UTC explained, “even one

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<sup>84</sup> FNPRM ¶ 91.

<sup>85</sup> See, e.g., Coalition of Concerned Utilities Comments at 100 (“[u]tility pole owners should be free to impose meaningful penalties to combat the epidemic of unauthorized attachments that many utilities have experienced”); ITTA Comments at 10 (“penalties [for unauthorized attachments] should be sufficiently significant to discourage intentional ‘bad behavior’”).

unauthorized attachment can create serious safety problems and allow an attaching entity to obtain an unlawful competitive advantage.” EEI/UTC Comments at 58.

**F. The Commission Should Not Adopt the Alternative Processes Proposed by Several Parties.**

Several parties have proposed their own processes and procedures for resolving pole attachment disputes and complaints. As explained below, these alternative processes and procedures are unnecessary and unwarranted. The Commission should not adopt them.

MetroPCS, for example, proposes that the Commission “adopt rules that emulate the arbitration process under 47 U.S.C. § 252(b).” MetroPCS Comments at 21. MetroPCS offers no explanation of how these arbitration rules would be better than the Commission’s current rules for handling pole attachment complaints. Moreover, the Section 252(b) arbitration process does not necessarily result in prompt rulings, particularly where a rate is at issue. The one time the Commission was tasked with rate-setting in the § 252 context, it took the Bureau 28 *months* to issue its *initial* decision on rates and another 20 *months* to issue further rulings clarifying its initial decision.<sup>86</sup>

AT&T makes a similar proposal. AT&T recommends that the Commission adopt “procedures akin to those used for mediation in the § 252 ICA process for issues arising from negotiating or implementing pole-attachment agreements” but “[i]nstead of using state commissions, however, the Commission can require utilities and attachers to submit disputes to

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<sup>86</sup> See *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 17722 (2003); *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, 20 FCC Rcd 5279 (2005).

an existing commercial arbitration-mediation organization, such as the American Arbitration Association (AAA).” AT&T Comments at 22. There is no legal or policy basis for the Commission to adopt AT&T’s proposal.

First, the Commission has no legal authority to mandate that carriers engage in commercial arbitration under the Federal Arbitration Act (FAA). As the Supreme Court has repeatedly held, commercial arbitration is “‘a matter of consent, not coercion.’”<sup>87</sup> That is because “arbitrators derive their authority to resolve disputes *only because the parties have agreed* in advance to submit such grievances to arbitration.”<sup>88</sup> Mandated commercial arbitration is an oxymoron, and flatly prohibited by the FAA. Indeed, when a state commission, exercising its authority under § 252 over interconnection agreements, sought to mandate private arbitration of disputes between an incumbent local exchange carrier and a competitive local exchange carrier, a federal district court flatly rejected that effort, holding that, while arbitration is permissible when it is “optional and voluntary,” mandating arbitration “conflicts with the 1996 Act” and “contravenes the principles underlying” the FAA.<sup>89</sup>

Second, the Commission does not have the authority to delegate its adjudicatory functions to a private body. Section 224 authorizes the Commission to “regulate the rates, terms, and conditions for pole attachments” and to “adopt procedures necessary and appropriate to hear

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<sup>87</sup> *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (quoting *Volt Info. Scis., Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989)).

<sup>88</sup> *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-49 (1986) (emphasis supplied).

<sup>89</sup> *Verizon New York Inc. v. Covad Communications Co.*, No. 1:04-CV-265 GLS/DRH, 2006 WL 278281, at \*4-\*7 (N.D.N.Y. Feb. 3, 2006).

and resolve complaints concerning such rates, terms, and conditions.”<sup>90</sup> The Commission can only delegate its authority to hear Section 224 complaints to “a panel of commissioners, an individual commissioner, an employee board or an individual employee.”<sup>91</sup> The Commission does not have the authority to delegate Section 224 complaints to a private organization, such as the American Arbitration Association.

CTIA and T-Mobile propose that the Commission allow attachers to request resolution of access-related disputes on a timeline and under procedures such as those already established in the Enforcement Bureau’s accelerated docket. *See* CTIA Comments at 12-13; T-Mobile Comments at 14.<sup>92</sup> The Commission should not adopt this proposal because pole attachment disputes are not well suited to the Commission’s accelerated docket procedures. The Commission’s accelerated docket is only available where “the issues in the proceeding appear suited for decision under the constraints of the Accelerated Docket” and in making that determination, the Commission staff considers “the number of distinct issues raised in a proceeding” and “the likely complexity of the necessary discovery.”<sup>93</sup> Because access complaints tend to raise complex issues and are very fact intensive, they do not lend themselves to the Commission’s accelerated docket procedures.

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<sup>90</sup> 47 U.S.C. § 224(b)(1).

<sup>91</sup> 47 U.S.C. § 155(c).

<sup>92</sup> Sunesys makes a similar proposal for an expedited complaint procedure. *See* Sunesys Comments at 24 (“if during the pendency of the dispute the attacher has not been issued a pole attachment license by the utility (because the dispute involves whether or how the attachment can be made), the following expedited procedures should apply: a respondent shall have 15 days from the date the complaint was filed within which to file a response, and the complainant shall have 7 days from the date the response was filed within which to file a reply”).

<sup>93</sup> 47 C.F.R. § 1.730(e).

## CONCLUSION

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

Respectfully submitted,

Michael E. Glover  
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Attorneys for Verizon

October 4, 2010

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

In the Matter of

Implementation of Section 224 of the Act

A National Broadband Plan for Our Future

WC Docket No. 07-245

GN Docket No. 09-51

**REPLY DECLARATION OF JAMES SLAVIN**

**AND**

**STEVEN R. FRISBIE**

1. My name is James Slavin. I am the same James Slavin who filed a declaration in this proceeding on August 16, 2010.
2. My name is Steven R. Frisbie. I am the same Steven R. Frisbie who filed a declaration in this proceeding on August 16, 2010.

**I. Purpose of Reply Declaration**

3. The purpose of our reply declaration is to respond to specific assertions by several electric utility representatives that joint use and joint ownership agreements contain significant financial benefits for incumbent carriers. We show that Verizon is forced to pay unreasonably high attachment rates under joint use and joint ownership agreements and those high rates are not offset by other financial benefits in those agreements. Typically, those other financial terms of joint use and joint ownership agreements are mutual and impose offsetting benefits and burdens. In our experience, joint use and joint ownership agreements do not provide Verizon with significant

financial benefits that offset the often unreasonably high rates that Verizon is forced to pay electric utilities for pole attachments.

4. We also respond to Level 3's assertions that Verizon Pennsylvania Inc. is charging attachment rates that exceed the Commission's authorized rate levels. As we show below, Level 3 makes an invalid comparison between the Commission's rate calculations on 2007 data and the rates Verizon charged to Level 3 in 2010. The attachment rates Verizon charged for 2010 are consistent with the Commission's rate formulas and based on 2009 data.

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

5. As we explained in our declaration, the rates charged under joint use and joint ownership agreements are, in many cases, unreasonably high. The Coalition of Concerned Utilities ("Coalition") suggests that these high rates are offset by other financial benefits that incumbent carriers receive under these agreements. In our experience, these agreements generally do not contain other terms and conditions that offset the financial burden of these high attachments rates. In fact, the other terms and conditions often impose disproportionate burdens on Verizon.

6. The Coalition makes several specific assertions about so-called financial benefits that incumbent carriers like Verizon derive from joint use and joint ownership agreements. We address each of these assertions and show how these so-called financial benefits are actually financial burdens to Verizon.

7. The Coalition claims that "[u]nlike pole attachment agreements, ILECs often are entitled to rent portions of their allocated space to other telecommunications

attachers.” Coalition Comments at 132. The implication of the Coalition’s assertion is that the incumbent carrier can charge other attachers a higher rate for space on the pole than the incumbent carrier is paying to the electric utility for that space on the pole. In virtually all cases, just the opposite is true.

8. Under joint ownership agreements, Verizon is often forced to bear the cost of the entire communications space of the pole – typically about 40 percent of the total pole costs – even if Verizon only needs a foot of space, or about 7.4 percent of the usable space on the pole. Moreover, under the typical joint ownership agreement, if the pole was placed by the electric utility, Verizon’s share of the electric utility’s pole costs are computed under a methodology that produces results far in excess of the costs computed under the Commission’s rate formulas.

9. If the joint ownership agreement allows Verizon to charge another attacher for attaching to the pole, Verizon will only be able to charge the Commission’s cable rate or telecom rate, depending on the attacher. That rate will in nearly all cases be far below the electric utility’s costs borne by Verizon for that same space. In other words, Verizon is forced to share the electric utility costs for the entire communications space on the electric utility’s poles, but is only able to charge a mere fraction of that shared cost to other attachers.

10. The Coalition also asserts that “ILECs pay very little each year in make-ready expenses to accommodate their attachments on electric utility poles, while CLECs and Cable Company competitors pay far higher amounts.” Coalition Comments at 135. The Coalition’s comparison is misleading in at least two respects.

11. First, in comparison to competitive carriers and cable companies, Verizon, as an incumbent carrier, makes very few requests for make ready work on electric utility poles. Verizon's network is already largely built out and Verizon has already attached to most of the electric utility poles to which it needs to attach. Verizon does not very often request to attach to utility poles to which it is not already attached. By contrast, competitive carriers and cable companies are continuing to expand the reach of their networks. These competitors more frequently request "first time" attachments to utility poles and therefore require more make ready work than Verizon.

12. Second, the Coalition's comparison only considers the charges that incumbent carriers supposedly "pay" for make ready work on their behalf. That comparison does not consider the "costs" of make ready work that incumbent carriers, like Verizon, must bear for make ready performed at the request of electric utilities. For example, when an electric utility that is party to a joint ownership agreement with Verizon upgrades its network, that electric utility will likely notify Verizon that existing poles will need to be replaced with taller poles to accommodate the electric utility's upgraded facilities. Under the typical joint ownership agreement, Verizon will participate in the replacement of the poles, transfer its facilities to the new taller pole and often remove the old pole. Verizon will bear most, if not all, of these make ready costs without reimbursement by the electric utility.

13. By contrast, competitive carriers and cable companies that rearrange their facilities in order to accommodate the electric utilities' network expansion are entitled to full reimbursement of their make-ready costs. *See* 47 U.S.C. § 224(i). The unreimbursed

make ready costs that Verizon often bears to accommodate the network expansion of electric utilities makes the effective rate Verizon pays for attachments even higher.

14. Another claim by the Coalition is that “[c]able companies and CLECs are usually required to obtain advance approval from at least one pole owner (and usually two in joint ownership situations) before installing new attachments” and that “ILECs, on the other hand, typically are not subject to that requirement.” Coalition Comments at 136. This comparison is also misleading. Where Verizon makes new attachments, it is typically by overloading its existing facilities. Neither competitive carriers, cable companies, nor incumbent carriers are required to obtain “advance approval” to overload their own facilities.

15. The Coalition also asserts that “[i]n many joint use and joint ownership agreements, the party which owns or is the ‘custodian’ of the pole often is required to obtain rights-of-way, highway permits and other authorizations on behalf of both parties to the joint use or joint ownership agreement” while “[c]able companies and CLECs are required to get their own.” Coalition Comments at 136. This claim is not consistent with our experience with rights-of-way. In general, when either Verizon or an electric utility obtains a right-of-way, highway permit or other authorization, that right, permit or authorization is generally broad enough to cover not only the pole owners, but also the cable companies and competitive carriers that attach to the poles. It would be a rare exception where a competitive carrier or cable company would need to obtain its own separate right, permit or authorization.

16. Another assertion by the Coalition is that “[c]able companies and CLECs generally rent only the one-foot of space on the pole that they currently need” while

“[j]oint use and joint ownership agreements often entitle ILECs to a certain number of feet on the pole, regardless of whether they have a current need for that space.” Coalition Comments at 137. Rather than a financial benefit, this allocation of more space to incumbent carriers is a financial burden.

17. Verizon typically needs only one foot of space on an electric utility pole, which equates to about 7.4 percent of the usable space on a typical pole. Many joint ownership and joint use agreements, however, require Verizon to bear 40 percent or more of the utility’s total cost of the pole. Moreover, the so-called “extra space” that is supposedly available to incumbent carriers is rarely, if ever, needed by Verizon. As we explained above, Verizon can typically expand its network facilities by overlashing its existing facilities within the same one-foot of space.

18. The Coalition also asserts that “[b]ecause [incumbent carriers] are provided the option to attach before other attaching entities, ILECs are allowed to select the preferred attachment height on the pole, which typically is the lowest allowable communications space on the pole.” Coalition Comments at 137. But the fact that incumbent carriers like Verizon typically attach at the lowest position on the pole is not necessarily a choice, but rather the result of standard construction practices that predate third party attachments. The lowest position on the pole does not insulate Verizon from having to rearrange its facilities in order to accommodate new attachments. Where Verizon can move its attachments to an even lower position to accommodate a new attacher, Verizon will perform such make ready work.

19. Moreover, the lowest position on the pole can be more costly because it places Verizon’s facilities in a more vulnerable location. At the lowest attachment

height, Verizon's facilities that span a roadway are more susceptible to damage from oversized vehicles than attachments at higher positions. The loading caused by an ice storm may cause Verizon's facilities to sag two or three feet more than the next highest attachment.

20. The Coalition also asserts that "[m]any joint use agreements specify the costs that each pole owner will charge the other for certain tasks" and that "the charges specified in these schedules are low relative to current charges" while "CLECs and Cable Companies, in contrast, pay current rates." Coalition Comments at 138. In our experience, the electric utility charges specified in joint ownership and joint use agreements are frequently updated to current levels. In some cases, these agreements themselves contain formulas and methodologies for updating costs. In other cases, the electric utilities unilaterally update their charges to current levels.

**Verizon is Charging Pole Attachment Rates to Level 3 That Are Consistent with the Commission's Rate Formulas.**

21. Level 3 claims that Verizon Pennsylvania Inc. charged an attachment rate for 2010 that exceeds the rate listed by the Commission in Appendix A of the Commission's *FNPRM*. As we explain below, Verizon has not overcharged Level 3 for pole attachments in Pennsylvania. Verizon correctly follows the Commission's rate formulas to calculate the pole attachment rates charged to Level 3 and other attachers.

22. Level 3 is making an apples-to-oranges comparison. The Commission staff's calculations were based on 2007 financial data, which would have been used for setting attachment rates for the year 2008. Level 3 then attempts to compare the staff's calculation to the rates Verizon billed for 2010. The rates Verizon billed for 2010 must

be based on financial data for 2009, not 2007. Level 3 is therefore making an inappropriate comparison.

23. For 2010, the rates Verizon billed to Level 3 and other attachers in Pennsylvania were based on Verizon's accounting data for the year 2009. In making the calculations, Verizon followed the Commission's formula and rebutted the Commission's presumed pole height of 37.5 feet. Verizon's actual data show the average pole height in Pennsylvania to be 34.46 feet. Based on the Commission's formula and Verizon's actual data for 2009, Verizon calculated and billed an urban telecom attachment rate of \$3.94 for 2010. Verizon also calculated a non-urban telecom attachment rate of \$5.94 for 2010, but that rate was not applicable to, or billed for, any of Level 3's attachments.

### **III. Conclusion**

24. In many cases, Verizon is forced to pay unreasonably high attachment rates to utilities under the terms of joint use and joint ownership agreements. These agreements do not provide any significant financial benefits that offset the high attachment rates imposed on Verizon. In addition, Verizon correctly follows the Commission attachment rate formulas and bills attachers at rates that are consistent with those formulas.

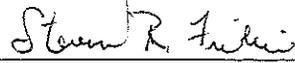
I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 2, 2010

  
\_\_\_\_\_  
James Slavin

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

Executed on October 1, 2010



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Steven R. Frisbie

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

In the Matter of

Implementation of Section 224 of the Act

A National Broadband Plan for Our Future

WC Docket No. 07-245

GN Docket No. 09-51

**REPLY DECLARATION OF AMY E. SULLIVAN**

1. My name is Amy E. Sullivan. I am the same Amy Sullivan who filed a declaration in this proceeding on August 16, 2010.

2. My initial declaration described Verizon's processes for responding to and completing make ready work for pole applications. Specifically, I explained that it typically takes Verizon at least 60 days to complete non-pole replacement make ready work, absent any extenuating circumstances that are outside of Verizon's control.<sup>1</sup> My declaration also explained that the timing of make ready work is subject to numerous variables that are outside of pole owners' control, including but not limited to adverse weather conditions, permitting requirements, and the actions of other parties.<sup>2</sup>

**Purpose of Reply Declaration**

3. The purpose of my reply declaration is to respond to some of the additional proposals raised in the comments filed in this proceeding. Specifically, I discuss the issues with proposals to: (1) establish additional timelines for other steps

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<sup>1</sup> See Verizon Comments at Sullivan Decl. ¶ 33.

<sup>2</sup> See *id.* ¶¶ 35-43.

associated with providing access to poles; and (2) require the use of temporary attachments. As I explain below, these proposals would complicate rather than facilitate access to poles.

4. My reply declaration also addresses claims that a single managing entity is already used for jointly-owned poles in some jurisdictions. As explained below, these claims misrepresent the facts.

#### Timelines for Executing Pole Attachment Licensing Agreements

5. Some parties have proposed that in addition to the timelines outlined in the *FNPRM*, the Commission should also establish separate timelines for the execution of pole attachment licensing agreements.<sup>3</sup> It is unnecessary to establish a separate timeline for this step.

6. Verizon's pole attachment licensing agreements outline the attacher's and pole owner's respective responsibilities, including, but not limited to, the payment of make ready fees. The fact that an entity has not yet executed a pole attachment licensing agreement with Verizon does not interfere with Verizon's processing of that entity's applications. In fact, Verizon processes applications from prospective attachers that have not yet signed a pole attachment licensing agreement within the existing forty-five day timeframe for responding to applications.

7. In many areas, Verizon uses standardized pole attachment licensing agreements. Generally, the execution of these standardized agreements does not involve significant negotiations and the executed agreements do not vary significantly from licensee to licensee. Typically, it takes two weeks for prospective attachers to execute a

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<sup>3</sup> See tw telecom/COMPTEL Comments at 17.

pole attachment licensing agreement with Verizon. This two week period runs concurrently with Verizon's processing of the prospective attacher's application(s).

Temporary attachments

8. Several parties proposed that the Commission adopt a rule requiring pole owners to permit the use of temporary attachments. However, the use of temporary attachments would essentially double the work required and would present numerous issues that would complicate rather than facilitate access to poles. A rule requiring the use of temporary attachments could result in increased unauthorized attachments.

9. Where temporary attachments are used, an additional make ready survey is necessary to identify the method and potential location of the temporary attachment. In addition, separate engineering plans would need to be drafted just for the temporary attachment. And, to ensure the safety of the pole and other attachments, temporary attachments ultimately need to be converted to permanent attachments. As a result, work crews need to be dispatched to place the temporary attachment, and again to convert the temporary attachment to a permanent one.

10. Because field conditions change constantly, it would be impossible to identify a potential location for a temporary attachment in advance of the determination that a temporary attachment was appropriate. As a result, the field survey for a temporary attachment could not be conducted at the same time as the field survey for the permanent attachment.

11. If extension arms are used to make temporary attachments in order to maintain the required separation between lines, the temporary attachment may interfere with make ready work. Because extension arms jut out from the pole by several inches,

they can inhibit the movement of cables. For example, if attachments above a temporary attachment need to be lowered to make room for the permanent attachment, the bracket may inhibit the movement of those attachments and the completion of the make ready work. The same problem exists for attachments immediately below a bracket that need to be raised.

12. In addition, temporary attachments would make space unavailable to other attachers. This is because both the temporary location and the permanent location, which is more space than is actually required for the attachment, would be unavailable to other potential attachers. As a result, until the temporary attachment is moved and converted to a permanent attachment, Verizon may have to deny new applications on the grounds that there is insufficient space on the pole.

13. Finally, pole owners would not have any real assurance that the attacher would timely convert the attachment to a permanent attachment. Once an attacher is up on the pole with temporary attachments, that attacher would have little incentive to convert its temporary attachments to permanent attachments. Monitoring the status of temporary attachments would require significant resources that are better devoted to processing pole applications and completing make ready work.

#### Claims Concerning the Use of a Single Administrator for Jointly-Owned Poles

14. One party has claimed that in Massachusetts, a single administrator is already designated jointly-owned poles.<sup>4</sup> I am not aware of any jurisdiction in Verizon's footprint, including Massachusetts, where pole owners are required to designate a single party administrator for jointly-owned poles. In fact, today, for Verizon's jointly-owned

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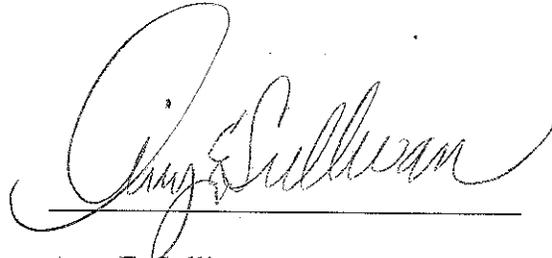
<sup>4</sup> See Commonwealth of Massachusetts, Department of Telecommunications and Cable Comments at 4.

poles in Massachusetts, attachers submit a separate application to each pole owner and each pole owner completes its own make ready survey, prepares its own make ready estimate and bills its own make ready charges. Each pole owner also completes its own make ready work.

15. This concludes my declaration.

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

September 30, 2010

A handwritten signature in cursive script, reading "Amy E. Sullivan", written over a horizontal line.

Amy E. Sullivan