

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

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

**REPLY COMMENTS
OF THE
FLORIDA INVESTOR-OWNED ELECTRIC UTILITIES:**

**Florida Power & Light Co.
Tampa Electric Co.
Progress Energy Florida, Inc.
Gulf Power Co.
Florida Public Utilities Co.**

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Executive Summary

There is no credible evidence in the record to support a finding that pole attachment access or rates are limiting broadband deployment, especially in those few pockets of the country that lack broadband access. This proceeding and the Commission's proposed rules have emphasized the interests of a very few stakeholders, to the potential detriment of what *should* be the Commission's central concern – the safety and reliability of critical electric infrastructure. The Florida IOUs urge the Commission to consider pole attachment issues with infrastructure safety and reliability as the top priority.

The make ready rules advocated by attachers in their comments are unnecessary, impractical, and unlawful. If the Commission is inclined to adopt make-ready deadlines at all, it should clearly limit the deadlines and remedies to make ready work within the communications space. This would enhance access predictability for all parties and avoid putting the Commission in the tenuous position of adopting or endorsing electric supply engineering standards.

The comments from attachers that downplay the significance of unauthorized attachments are dangerous and disingenuous. The Commission correctly observed in the FNPRM that unauthorized attachments threaten the safety and reliability of the electric system. The excuses offered by attachers for the alarming incidence of unauthorized attachments rely on unsupported allegations that utilities inflate or otherwise misreport the numbers of unauthorized attachments. Not only are the attachers' allegations in this regard wrong, but they also could be entirely avoided if attachers would participate in the very audit processes they attack. The Commission can help resolve the problem of unauthorized attachments through *less* regulation – by declining the invitation to interfere with unauthorized attachment provisions in pole attachment agreements.

There is no basis in fact or law for the Commission to entertain the ILECs' request to regulate the joint use relationship between electric utilities and ILECs. These relationships are based on infrastructure cost sharing; they are *not* (as some ILECs contend) merely more expensive versions of pole attachment agreements. In any event, as electric utilities and other commenters have explained *ad nauseum*, section 224 does not grant ILECs rights as an attachers either with respect to rates or access.

The Commission should decline the wireless carriers' request to "confirm" pole top access rights. The claimed right does not exist under the law, and it would unduly infringe on an electric utility's right to deny access for reasons of safety, reliability and generally applicable engineering purposes. Moreover, a presumption in favor of pole top access would be tantamount to adopting a national engineering standard – a step the Commission wisely declined to pursue in the FNPRM.

Finally, none of the comments submitted by attachers could legally justify the Commission's proposed reinterpreted telecom rate. Section 224(e) simply does not support the Commission's proposed cost-causation methodology for determining "cost" under the telecom rate.

Florida Power & Light Company (“FPL”), Tampa Electric Company (“TECO”), Progress Energy Florida, Inc. (“PEF”), Gulf Power Company (“Gulf”), and Florida Public Utilities Company (“FPU”) (collectively, the “Florida IOUs”) respectfully submit these reply comments concerning certain issues raised in the initial comments filed in response to the Further Notice of Proposed Rulemaking in the above-referenced docket.¹

I. INTRODUCTION

A. Pole Attachments are not an Impediment to Broadband Deployment.

Access to investor-owned electric utility poles is not impeding the deployment of broadband to the few pockets of America where broadband access currently is not available. If the primary goal of the National Broadband Plan truly is that “[e]very American should have affordable access to robust broadband service, and the means and skills to subscribe if they so choose,”² the FNPRM is poorly designed to achieve that goal. The Commission’s proposed access rules, if implemented, will benefit a few telecommunications carriers who intend to offer redundant broadband services to businesses in urban areas at the expense of the electric system safety and reliability.

The proposed access rules will not promote rural broadband deployment or even encourage the upgrade of existing facilities, which is often accomplished by overlashing fiber to the existing steel messenger – not through construction of a new attachment. As investor-owned electric utility commenters repeatedly have advised, the poles they own in rural areas (if any) are

¹ Order and Further Notice of Proposed Rulemaking, FCC 10-84 (Released May 20, 2010) (“Order & FNPRM”). The FNPRM was published separately from the Order in the Federal Register (75 Fed. Reg. 41,338 (July 15, 2010), as corrected 75 Fed. Reg. 45,590 (Aug. 3, 2010)). The Order was published as a Declaratory Ruling (75 Fed. Reg. 45,494 (Aug. 3, 2010)). For ease of reference, these comments will provide citations to the paragraph numbers as they appear in the May 20, 2010 Order & FNPRM.

² FCC, Connecting America: National Broadband Plan, at xiv (Mar. 2010), *available at* www.broadband.gov.

typically “clean” and require no make-ready prior to attachment. This assertion has not been contested by communications attachers. It speaks volumes that the chief proponents of the proposed access rules – the competitive telecommunications carriers – have expressed no real intention to reach the “unserved” portions of America. In fact, the chief proponents of the rules have not offered even a single, anecdotal example of an effort to reach an unserved area that was stymied by pole attachment access issues (let alone issues caused by investor-owned electric utilities).

The proposed new telecom rate is equally unlikely to promote rural broadband deployment or encourage the upgrade of existing facilities. The only potential beneficiaries of the Commission’s rate proposal are competitive telecommunications carriers who, oddly enough, seem far less interested in the rate than they are with access issues. There is a painfully obvious reason for this: recurring operating expenses are far less important to investment decisions than up-front capital expenses. At the sole broadband workshop held purportedly to address pole attachment issues prior to release of the National Broadband Plan (to which no electric utility pole owners were invited), there was not a single mention of pole attachment rates and only a passing mention of pole attachment access issues at all.³ Cable television operators, for their part, appear primarily interested in maintaining an artificially suppressed pole attachment rate. Because cable television operators already have built where the business case allows, access rules are of minimal interest.

Pole attachment policy is but a minor input in the overall broadband deployment calculation. Pole attachment policy, though, has a *major* impact on electric utility operations. It

³ Deployment – Wired (Aug. 12, 2009) Transcript at 5:19-6:11; 121:12-122:9, *available at* http://www.broadband.gov/docs/ws_02_deploy_wired_transcript.pdf National Broadband Plan Workshop).

is concerning, to say the least, that the Commission is entertaining a wholesale revision to the existing regulatory framework where there is minimal likelihood of positive broadband deployment impact, but maximum likelihood of negative impact to electric distribution systems and to electric customers. The actual risks far outweigh any potential marginal benefits.

B. This Proceeding Has Placed Far Too Much Weight on the Interests of a Very Few Stakeholders.

The genesis and evolution of this proceeding – specifically with respect to the access issues – is also of concern. The Commission’s consideration of access issues began after a single competitive telecommunications carrier, Fibertech Networks LLC, filed a petition for rulemaking in December 2005. Fibertech currently describes itself as “a high-quality provider of metro-based fiber optic transport services” with “one of the nation’s largest, independently owned metro-area fiber optic footprints in the United States.”⁴ According to Fibertech, it has built “metro-area networks strategically connecting local Telco central offices, carrier hotels, data centers, office parks and other high traffic locations.”⁵ If Fibertech was ever seeking to reach the few pockets of Americans who lack broadband access, it appears to have abandoned that mission.

In response to the Fibertech rulemaking petition, the Commission adopted a Notice of Proposed Rulemaking (“NPRM”) in November 2007 (published in the Federal Register in February 2008). Though the NPRM made passing reference to access issues, the unmistakable focus of the NPRM was the Commission’s tentative conclusion “that all categories of providers should pay the same pole attachment rate for all attachments used for broadband Internet access service” and “that the rate should be higher than the current cable rate, yet no greater than the

⁴ Fibertech Networks, “Fact Sheet” <http://www.fibertech.com/about-fibertech/fact-sheet/> (last visited Oct. 4, 2010).

⁵ *Id.*

telecommunications rate.”⁶ In fact, only two paragraphs of the entire NPRM were devoted to access issues and one of those two paragraphs sought comment on “practices of attachers that have the potential to adversely impact the safety and reliability of an integral component of our nation’s critical infrastructure, our electric power system.”⁷

Somehow, during the course of the NPRM comment and *ex parte* period, a few vocal competitive telecommunications carriers were able to convince the Commission – without evidence – that access to utility poles (presumably including investor-owned electric utility poles) – was an impediment to broadband deployment worthy of major policy overhaul. During this same period of time, and notwithstanding significant participation by investor-owned electric utilities, the Commission’s interest in protecting the “safety and reliability of an integral component of our nation’s critical infrastructure, our electric power system” waned. This dramatically shifting focus was apparent in the Commission’s National Broadband Plan for Our Future Notice of Inquiry, which asked: “to what extent do ... pole attachments ... stand as impediments to further broadband deployments where such deployments would be made by market participants in the absence of any government-funded programs?”⁸

Communications attachers, particularly competitive telecommunications carriers, seized upon this momentum and continued arguing – still without evidence – that pole attachment policy was slowing broadband deployment. Communications attachers likewise offered no evidence that any of their proposed changes to pole attachment policies would indeed *enhance* broadband deployment. Despite inquiry, no electric utility representatives were invited to

⁶ NPRM, ¶ 36.

⁷ NRPM, ¶¶ 37-38.

⁸ *In re National Broadband Plan for Our Future*, FCC 09-31, GN Docket No. 09-51 (April 8, 2009) (“NOI”), ¶ 50.

participate in the August 2009 broadband workshop scheduled to address pole attachment issues. When the Commission released the National Broadband Plan in March 2010, the reason for electric utility exclusion became clear: the “safety and reliability of an integral component of our nation’s critical infrastructure, our electric power system” (let alone the economic interests of electric utilities and their customers) was *not* part of the Plan.

C. The Commission Should Take a Fresh Look at its Approach to Pole Attachment Access Issues.

The FNPRM, which is largely a manifestation of Chapter 6 of the National Broadband Plan, proposes a major overhaul in both economic and operational aspects of pole attachments policy. Though the economic issues might fairly be addressed through written submissions and ex parte meetings, the operational issues – many of which are highly technical, complicated and variable – would be better addressed through interactive workshops involving the technical representatives of the various stakeholders. For example, the Commission proposes adoption of certain elements of various states’ pole attachment rules. But even these rules were the product of multiple workshops and careful examination of highly technical issues and the opportunity to balance the needs of all stakeholders (rather than policy being driven by a single goal, such as ubiquitous broadband deployment).

The Florida IOUs urge the Commission to appreciate the access issues for what they are: safety and reliability concerns. This was the Commission’s viewpoint upon adoption of the November 2007 NPRM and nothing has changed that should alter this viewpoint. If anything, “the safety and reliability of an integral component of our nation’s critical infrastructure, our electric power system” is even more important today than it was then. The Florida IOUs are keenly aware that the Commission appreciates: (1) that, with respect to access issues, electric utilities “are typically disinterested parties with only the best interest of the infrastructure at

heart”;⁹ (2) that electric utilities should have “final authority to make all judgments that relate directly to insufficient capacity or safety, reliability, and sound engineering”;¹⁰ and (3) that “the dangers presented by unauthorized attachments transcend the theoretical.”¹¹ But the Florida IOUs still believe the Commission may be attempting to do more than the law will allow, and more than electric distribution systems can tolerate without substantial threat to system safety and reliability -- all without any evidence these steps would actually enhance broadband deployment.

D. The Florida IOUs

The Florida IOUs are the five investor-owned electric utilities in Florida. As regulated electric utilities, their core mission is the provision of safe and reliable electric service to customers. Florida is the second largest state (by population) subject to the Commission’s pole attachment jurisdiction. For this reason, any rules imposed by the Commission disproportionately impact Florida as compared to other states. Each of the Florida IOUs owns a significant number of electric distribution poles. The Florida IOUs have participated in the underlying dockets prior to the release of the FNPRM in various ways, including the filing of comments and evidence and participation in the *ex parte* process (through written submissions and meetings), and hereby adopt and incorporate those submissions as if fully set forth herein.¹²

⁹ FNPRM, ¶ 68.

¹⁰ FNPRM, ¶ 67.

¹¹ FNPRM, ¶ 91.

¹² *See, e.g.*, Comments of the Florida Investor-Owned Electric Utilities, WC Docket No. 07-245 & GN Docket No. 09-51 (Aug. 16, 2010) (“Florida IOU Comments”); *see also* Initial Comments of Florida Power & Light and Tampa Electric Regarding ILECs and Pole Attachment Rates, WC Docket No. 07-245 (Mar. 7, 2008); Initial Comments of Florida Power & Light, Tampa Electric, and Progress Energy Florida Regarding Safety and Reliability, WC Docket No. 07-245 (Mar. 7, 2008); Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power, WC Docket No. 07-245 (Mar. 7, 2008); Reply Comments of Florida Power

II. THE MAKE-READY RULES ADVOCATED BY ATTACHERS ARE UNNECESSARY, IMPRACTICAL AND UNLAWFUL.

A. The Goals of Predictability and Speed Can Be Accommodated Through Clear Rules Limiting Application of Deadlines to Make-Ready Within the Communications Space.

The push for strict make-ready deadlines appears to be almost exclusively driven by competitive telecommunications carrier interests. Cable television commenters, for their part, seem content with the status quo. Time Warner Cable, for example, stated: “the reality is that most utilities, pursuant to private contract terms or course of performance, allow attachment and complete necessary make-ready in far less time than the Commission proposes here.”¹³ Competitive telecommunications carrier commenters uniformly complain that make-ready delays lead to unpredictable costs and potential loss of customers. There is an easy way for the Commission to resolve these concerns (assuming they are valid in the first place): (1) clearly limit any proposed deadlines to make-ready work within the communications space; and (2) aggressively regulate the speed at which existing communications attachers perform make-ready work in the communications space.

If the Commission would clearly state that there are no deadlines for make-ready work in the electric supply space (*i.e.* rearrangement of electric facilities), this would provide guidance to

& Light, Tampa Electric, and Progress Energy Florida, WC Docket No. 07-245 (Apr. 22, 2008); Reply Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power, WC Docket No. 07-245 (Apr. 22, 2008). The Florida IOUs have participated in numerous *ex parte* meetings with Commissioners and staff. *See generally ex parte* notices filed in WC Docket 07-245. The Florida IOUs also submitted at least two lengthy, substantive letters responding to specific issues raised by other participants in the underlying proceedings. *See, e.g.*, Letter from Eric B. Langley and J. Russell Campbell to Marlene H. Dortch, WC Docket No. 07-245 (Nov. 20, 2008); Letter from Eric B. Langley and J. Russell Campbell to Marlene H. Dortch, WC Docket No. 07-245 (Apr. 13, 2009).

¹³ Time Warner Cable Comments, at p. 16.

communications providers on their deployment options.¹⁴ Communications providers could (a) re-route their aerial facilities to avoid supply space make-ready, (b) decide to use underground construction in areas where potentially time-consuming and expensive supply space make-ready is required for overhead/aerial construction, or (c) negotiate with the utility for a specific timeline based on the scope and complexity of the particular supply space make-ready work involved in the unique project.

This approach not only would provide clear guidance and concrete options to communications providers, but also would likely expedite supply space make-ready work for the most common projects. The percentage of poles requiring electric supply space make-ready work is relatively low, anyway.¹⁵

Several CLEC attachers contend that smaller make-ready projects should be subjected to shorter timelines, and that the timeframes proposed by the Commission could actually promote delay on smaller jobs by allowing, in every instance, at least 118 (and perhaps as many as 148) days from application to completion. For example, Level 3 states: “Moreover, Level 3 desires that the five-stage timeline proposed by the Commission not be construed as a ‘safe harbor’ for pole owners when an application involves only a small number of poles.”¹⁶ Similarly, NTELOS states: “by creating, in effect, an inflexible fixed schedule for all make-ready projects, the Commission’s timeline also threatens to delay smaller projects for which the entire

¹⁴ See Florida IOU Comments, at pp. 19-20.

¹⁵ For Gulf, this figure is 4.25%; for PEF and FPL, 10%; for TECO, it is 24%. See Second Declaration of Ben A. Bowen (Oct. 4, 2010) (“Second Bowen Declaration”), at ¶ 2 (attached hereto as Exhibit A); Second Declaration of Scott Freeburn (Oct. 4, 2010) (“Second Freeburn Declaration”), at ¶ 2 (attached hereto as Exhibit B); Second Declaration of Thomas J. Kennedy, P.E. (Oct. 4, 2010) (“Second Kennedy Declaration”), at ¶ 2 (attached hereto as Exhibit C); Second Declaration of Eric L. O’Brien (Oct. 4, 2010) (“Second O’Brien Declaration”), at ¶ 2 (attached hereto as Exhibit D).

¹⁶ Level 3 Comments, at p. 6.

length of the FCC’s proposed timeline is not necessary. . . .”¹⁷ Timelines for supply space make-ready work that are negotiated between the parties and specifically tailored to the unique characteristics of a particular job can accommodate these concerns.

The Commission can also aggressively regulate the speed and conditions of make-ready work by existing communications attachers within the communications space.¹⁸ For example, if the communications space make-ready solution for a prospective CLEC attacher (as shown by the survey) involves an ILEC and cable television attacher each moving its facilities one-foot down the pole, the Commission could allow the CLEC attacher to immediately retain a qualified contractor to move the existing communications facilities and make the new attachments *at the same time*. This would significantly increase the speed of deployment, and appropriately remove the electric utility pole owner from the equation from completion of the survey until the time for post-attachment inspection.

The Florida IOUs appreciate that there may be some complexities to this arrangement, such as ILEC union restrictions and jurisdiction over ILEC attachments. At a minimum, though, it would avoid a clear jurisdictional problem involving the electric supply space and would recognize that electric supply space make-ready is more dangerous, more complex and more time consuming than communications space make-ready work.

B. The Attachers’ Understanding of What Constitutes a Large Project are Completely Detached from Reality.

Several competitive telecommunications attachers argue that there should be no limitations at all on the size of applications subject to the Commission’s proposed timelines, or

¹⁷ NTELOS Comments, at p. 2 (no page numbers in original).

¹⁸ This assumes the Commission has jurisdiction to do so. This also presumes the electric utility pole owner will not be required to perform or manage the make-ready work in the communications space.

that the limitations should be so high as to render them meaningless.¹⁹ For example, Level 3 states:

Level 3 opposes any extension of the proposed five-stage timeline for applications involving large numbers of attachments. However, should the Commission decide that flexibility to extend the time frame is necessary, then in Level 3's opinion, the five-stage timeline proposed by the Commission is reasonable in cases of *applications up to 5 percent of the owner's poles or 3000 poles, whichever is greater.*²⁰

FPL and PEF have roughly 1.1 million poles in each of their systems.²¹ Five percent of a 1.1 million pole system is 55,000 poles. On a typical pole line, there are roughly 25 poles per linear mile.²² Under Level 3's proposal, the "extended" deadline would only apply when an attacher submitted applications to PEF or FPL to attach to 2,200 or more *miles* of pole line. This is greater than the distance from Miami, Florida to Washington, D.C and back.

It does not require any expertise in pole attachments to appreciate the impracticality of Level 3's proposal. There are two steps the Commission can take to help resolve the concerns presented by large projects. First, the Commission should – as urged by the Florida IOUs in their initial comments – respect contractual provisions and other operating procedures that limit the number of pole/applications allowed in a particular time period.²³ Second, the Commission should clarify that the Stage 4 deadline applies only to make-ready work within the communications space. In fact, if the Commission will adopt the proposal set forth in part II.A. above, and allow attachers to immediately retain contractors to rearrange existing

¹⁹ See e.g., Sunesys Comments, at pp. 11-13.

²⁰ Level 3 Comments, at p. 7 (emphasis added).

²¹ See Declaration of Thomas J. Kennedy, P.E., WC Docket No. 07-245 & GN Docket No. 09-51 (Aug. 16, 2010) ("Kennedy Declaration"), at ¶ 2; Declaration of Scott Freeburn, WC Docket No. 07-245 & GN Docket No. 09-51 (Aug. 13, 2010) ("Freeburn Declaration"), at ¶ 2.

²² Second O'Brien Declaration, at ¶ 2; Second Freeburn Declaration, at ¶ 3.

²³ Florida IOU Comments, at p. 14.

communications attachments and make new attachments at the same time, these large projects can be completed as fast as attachers desire. If Level 3 or any other communications attacher can marshal the resources to complete communications space make-ready work and attachment on a fiber loop from Miami, Florida to Washington, D.C. and back within 45 days, more power to them.

C. The Commission’s Proposed Rules Appropriately Allow an Electric Utility to Exclude Non-Utility Personnel from the Electric Supply Space.

The Florida IOUs, in their initial comments, voiced support for the Commission’s proposed rules and statements of policy regarding the use of outside contractors.²⁴ The proposed rules, as understood by the Florida IOUs, would allow an electric utility to exclude outside contractors from the electric supply space. This also necessarily meant that Stage 4 of the make-ready timeline does not apply to electric supply space make-ready, given that the remedy for inability to perform within the specified time period was the ability to retain an outside contractor to perform the work.²⁵

Some attachers appear to accept the Commission’s proposal for what it is. For example, in arguing that attachers should be allowed to use outside contractors from the outset of the access process (a proposal the Florida IOUs at least partially endorse, as set forth above), tw telecom and COMPTTEL state: “Given that such qualified workers would be working only in the communications space and safety space below the area where the electrical lines are located on the pole, and not among the electric lines themselves, reliance on such workers should not raise serious safety concerns.”²⁶ Other attachers are more reluctant. Fibertech, for example, asks the

²⁴ Florida IOU Comments, at p. 29.

²⁵ See Florida IOU Comments, at pp. 19-20.

²⁶ tw telecom and COMPTTEL Comments, at pp. 11-12.

Commission to “clarify” that contractors “should be permitted to perform make-ready work on the pole, wherever such work is required.”²⁷ MetroPCS “disagrees with” the Commission “allow[ing] a utility to prohibit the use of contractors for actual installation of equipment in instances in which the installers must work among electrical power lines.”²⁸

The approach taken by the Commission and supported (or at least accepted) by tw telecom and COMPTTEL is the better approach for at least two reasons. First, it properly recognizes the important distinction between the supply space and the communications space: the former contains un-insulated wires and other unprotected equipment that operates at lethal voltages; the latter does not. There are few, if any, instances in which an electric utility can or should be forced to allow non-utility personnel into the electric supply space – a point the Commission’s proposed rule respects. Second, it clearly signals that electric supply space make-ready is outside the ambit of the access timelines. Though competitive telecommunications attachers may view this as a “setback,” it actually increases predictability for planning purposes and paves the way for ad hoc negotiation of appropriate and case-specific electric supply space make-ready timelines (in those situations where the attacher chooses a route which involves electric supply space make-ready work).

D. An Executed Pole License Agreement is a Necessary Pre-Requisite to Processing a Permit Application.

At least one communications commenter argues that an attacher should be permitted to proceed with Stage 1 even without an executed agreement, based on the false assumption that protections like insurance and indemnity “are needed only for risks that arise in connection with

²⁷ Fibertech Comments, at p. 4.

²⁸ MetroPCS Comments, at pp. 14-15.

make-ready and attachment processes.”²⁹ Insurance and indemnity touch virtually all aspects of the relationship between a pole owner and an attaching entity. Indemnity provisions, for example, often apply to matters “in any way associated or connected with the performance of the obligations” in the agreement, or “in any way arising out of, related to, caused by or incident to this Agreement.”³⁰ This type of language undoubtedly covers all actions undertaken in connection with processing an application, including but not limited to the initial survey.

The suggestion that surveys should commence prior to execution of a pole license agreement also ignores reality. By the time an attacher submits an application packet, it should already have performed a ride-out of the prospective route and possibly even engaged in some preliminary survey work for purposes of strategic route selection. If an attacher does not take these steps (and instead submits a “blind” application based solely on facility maps), it is asking for delay. But in order to perform this practical pre-requisite, the attacher should already have executed a pole license agreement so that the pole owner is protected, and so that the attacher understands the pole owner’s standards, processes and application requirements.

Some competitive telecommunications commenters suggest that delays in negotiating pole license agreements are partially to blame for deployment delays.³¹ This may be true. But it says nothing of *who* is causing those delays. In the experience of the Florida IOUs, new entrants (typically CLECs) seldom accept the standard agreement as proposed. Often the new entrants will propose changes to portions of the standard agreement which require review and approval by personnel not directly involved in joint use management. For example, where an attacher proposes changes to provisions addressing indemnity and insurance provisions, the proposed

²⁹ Level 3 Comments, at p. 8.

³⁰ Second Bowen Declaration, at ¶ 5; Second O’Brien Declaration, at ¶ 5.

³¹ See e.g. tw telecom and Comptel Comments, at p. 17.

changes usually must be reviewed not only by inside counsel but also by the company's risk management personnel to ensure consistency with company protocol and planning. Further, where an attacher proposes significant changes to a form of pole license agreement already executed by other similarly classified providers, the company often has concerns revolving around the non-discriminatory access obligation in section 224(f)(1). These concerns may require extensive attention from counsel. In short, these things take time, especially if attachers want electric utilities to seriously consider their proposed revisions.

Attachers, of course, are free to execute the agreements as proposed. The fact that an attacher chooses to demand substantial and substantive revisions that require the time and attention of numerous different business units (and sometimes inside and/or outside counsel) cannot be held against the pole owner, nor can it be an excuse to leave the pole owner unprotected for any portion of the access process. If the Commission is convinced (despite the lack of evidence) that delays in negotiating agreements are slowing broadband deployment, there are steps the Commission can take to expedite the process. First, the Commission can signal that standard contractual provisions used by the electric utility in other commercial contexts are presumptively reasonable. This would minimize the incidence of attachers nitpicking certain provisions (like indemnity and insurance) that are standard in other commercial contexts for the electric utility. Second, the Commission can establish time periods during which (1) a pole owner is expected to provide a proposed agreement, and (2) the parties should complete their negotiations. Though both of these time periods should be guidelines rather than hard deadlines, they will provide an additional layer of expectations to cover those few circumstances where attachers feel genuinely aggrieved by the transactional cost of acquiring a pole license agreement.

III. ATTACHING ENTITIES' EFFORTS TO DOWNPLAY THE SIGNIFICANCE OF UNAUTHORIZED ATTACHMENTS ARE DISINGENUOUS, IF NOT DANGEROUS.

Attaching entities seem to acknowledge in their comments – as the Commission acknowledges in the FNPRM – the importance of attachment processes designed to preserve the safety and reliability of pole infrastructure.³² The attaching entities nonetheless oppose meaningful unauthorized attachment penalties based on three main arguments: (1) that utility claims regarding unauthorized attachments are inconsistent with the utilities own state regulatory filings; (2) that the amount of unauthorized attachments revealed in audits are the result of record-keeping and audit errors; and (3) that unauthorized attachments are a necessary means to an end because of access delays. None of these arguments withstands even moderate scrutiny.

A. The Claims of Duplicity are Incorrect or Contrived.

NCTA alleges in at least three places that utilities (presumably meaning more than one utility) are reporting different numbers of unauthorized attachments to the Commission that they are reporting to state regulators.³³ This sweeping and bold allegation is supported by a *single* example from *one* utility, which happens to be erroneous. NCTA states:

³² FNPRM, ¶ 91; *see e.g.*, NCTA Comments, at p. 43 (“Cable attachers have a strong interest in ensuring that their attachments to poles are properly permitted and that all their facilities are compliant with applicable safety codes and will not be disrupted due to improper pole engineering practices.”); Charter Comments, at p. 26 (“Charter is committed to safety and grid integrity because without a reliable, safe and secure system of poles and related facilities, Charter would not be able to serve its customers.”); Comcast Comments, at pp. 33-34 (“Comcast and other attachers are vitally interested in maintaining properly authorized facilities that are in compliance with applicable safety codes. . . . Well maintained and compliant facilities provide for better, more reliable delivery of quality communications services, which in today’s competitive environment is essential to survival.”).

³³ NCTA Comments, at pp. v, 43, 44 (“Utility claims alleging the existence of vast numbers of unauthorized attachments are both grossly overstated and contradicted by the utilities’ own submissions made to state regulatory bodies in safety compliance dockets.”); (“Contrary to the image painted by utilities for this Commission, an image that contrasts sharply with that drawn for state regulatory bodies investigating service outages, attachers, as a rule,

For example, FP&L reported, “In 2006, audit results [of 20% of its plant inspected] indicate that unauthorized attachments (47) ... were almost nonexistent.” FP&L also reported that its “2007 audit results continue to show that FPL’s joint use processes and procedures, along with cooperation from joint pole owners and 3rd party attachers, indicate that joint use facilities are being properly maintained.” These reports contrast sharply with the 33,350 unauthorized attachments reported by FP&L in this proceeding for year 2006, the same year where FP&L reported 47 unauthorized attachments to the Florida Public Service Commission.³⁴

NCTA cannot bring itself to allow the facts to interfere with a good story. The 33,350 unauthorized attachments were reported by Progress Energy Florida, Inc. (“PEF”) – not Florida Power & Light Co. (“FPL”).³⁵

NCTA offers no citation for its allegation of “the 33,350 unauthorized attachments reported by FP&L in this proceeding for year 2006.” Perhaps NCTA was merely repeating the Commission’s mistake in the FNPRM. In paragraph 89 of the FNPRM, the Commission stated: “For example, Florida Power and Light reports finding 33,350 unauthorized attachments in an audit conducted in 2006.”³⁶ This statement cites to the Florida IOUs’ March 7, 2008 comments, which clearly identify the entity reporting 33,350 unauthorized attachments as Progress Energy Florida (PEF) – not FPL.³⁷ But given the fact that NCTA invested the effort to locate and review

comply with the permitting process.”); (“However, the number of unauthorized attachments reported in this proceeding not only vary dramatically among pole owners, as recognized by the Commission, they are contradicted by evidence submitted by other commenters at earlier stages of this proceeding as well as by statement made by these same utilities to state regulators in other contexts.”).

³⁴ *Id.* at p. 45.

³⁵ *See* Initial Comments of FPL, TECO, and PEF Regarding Safety and Reliability, at p. 12 (Mar. 7, 2008).

³⁶ FNPRM, ¶ 89 (citing *Id.*, at pp. 11-12).

³⁷ Initial Comments of FPL, TECO, and PEF Regarding Safety and Reliability, at p. 12 (Mar. 7, 2008) (“PEF’s last audit (conducted every five years, most recently in 2006) revealed 33,350 unauthorized attachments.”). Lest there be any confusion regarding *who* was reporting *what*, the very same paragraph states: “FPL audits its system on a five year revolving basis (20% per year). The 2007 audit revealed 1,798 unauthorized attachments.” *Id.*

substantial filings made by PEF, FPL and Gulf in the Florida Public Service Commission,³⁸ it would seem NCTA should have *at least* checked to see what FPL *actually* reported to the Commission. This is particularly true in light of the fact that this erroneous example was the *only* evidence cited to support its allegation of utility duplicity with respect to unauthorized attachments. Perhaps more to the point, FPL has always consistently reported its unauthorized attachment figures to the Florida Public Service Commission (“FPSC”).³⁹

B. Attacher Allegations of Poor Record-Keeping and Flawed Pole Audits are a Smokescreen.

Attaching entities do not dispute that unauthorized attachments exist, but instead allege that utilities’ unauthorized attachment figures are “exaggerated” or “inflated.”⁴⁰ Some of the alleged reasons include: (1) poor record-keeping; (2) changes in the definition of what constitutes an “attachment”; (3) pole ownership changes; (4) monetary incentives offered to contractors who perform audits; and (5) lack of opportunity to participate in audits. Even assuming these reasons are to blame for *some* unauthorized attachments revealed in a pole audit, they certainly do not account for *all* of the unauthorized attachments. More importantly, attachers completely gloss-over the fact that many pole license agreements contain “forgiveness”

³⁸ See NCTA Comments, at p. 45 n.136, 137, 138 & 139.

³⁹ FPL reported 1,798 attachments, based on 2007 audit data, in March 2008 to the FCC in this docket and to the FPSC. Kennedy Declaration of Thomas J. Kennedy, P.E., WC Docket No. 07-245 (Mar. 7, 2008), at ¶ 10 (“The FPSC requires FPL to submit an annual Storm Preparedness Report which includes the number of unauthorized attachments detected through our system audits. FPL audits its system on a five-year revolving basis (20% of the system per year). Based on the data collected in 2007 (for 20% of our system) and filed with the FPSC, there were 1,798 unauthorized attachments.”); FPL’s Status Report and Update of its Storm Preparedness Initiatives, FPSC Docket No. 060198-E1 (Update filed on Mar. 1, 2008), at 355 (discussing “2007 audit results”), 377 (“(F) Number of Unauthorized Attachments. 1798 (0.15%)”) available at <http://www.psc.state.fl.us/library/filings/08/01619-08/01619-08.pdf>.

⁴⁰ See, e.g., Charter Comments, at p. 27; Comcast Comments, at pp. 34-36 & n.106.

thresholds of 2% or more designed to account for the inevitable discrepancies that arise when counting hundreds of thousands of attachments.

Poor Record-Keeping. When presented with the results of an audit, attaching entities often demand to know the exact pole locations on which unauthorized attachments have been found. Though some utilities have electronic databases which can provide this level of detail, others do not. Moreover, attachers often balk when asked to share in the cost of the very type of audit required to provide the level of detail they demand after the audit. The allegation of poor record-keeping is even less meaningful considering attachers themselves often have poor records *of their own facilities*. Time Warner Cable admits: “In some case, TWC may not have complete permit records because such records were not provided by the prior owner of the cable system.”⁴¹ If attachers cannot tell utilities the locations of their attachments, how can attachers expect utilities to know the precise locations of each and every unauthorized attachment?

Any deficiencies in either party’s records can be counterbalanced through attacher participation in attachment audits. In fact, most – if not all – of the issues raised by attachers can be avoided simply by their participating in the audit. If a representative of the attacher rides with the audit contractor, the representative (properly equipped with the attacher’s system maps, which are often difficult to obtain from attachers) can provide real time input and feedback to the contractor, helping to ensure an accurate and complete count. Attachers are typically invited to audit “kickoff” meetings and asked for their input on audit protocol and opportunities to achieve mutual efficiencies and maximum accuracy. For example, prior to TECO’s most recent audit, it held a meeting with its attachers to discuss the methodology of the audit, and get the attachers’

⁴¹ Time Warner Cable Comments, at p. 33.

input.⁴² After this meeting and some follow-up information exchange and negotiation, all of TECO's participating attachers (except one) accepted the audit methodology and signed an audit reimbursement agreement.⁴³ Similarly, PEF is conducting a pre-audit meeting this month (October 2010) in preparation for the 2011 attachment audit.⁴⁴

Attachers are given every opportunity to raise issues they perceive to be a problem in audit procedure *before* the audit begins and immediately as audit data is created. Attachers sometimes prefer to sit on the sideline during the audit, only to later attack the results of the very audit they had an opportunity to shape. Unless an attacher is shut-out of the audit process, it has no legitimate room to complain about the results if it *chooses* not to participate in the process.

Change in Definition of "Attachment." The definition of what constitutes an "attachment" (for billing purposes and otherwise) is almost always set forth explicitly in the pole attachment agreement between the parties. The definition of what constitutes an attachment cannot, as some attachers suggest, be changed unilaterally by the pole owner from audit to audit. Specifically, some attachers complain that including service drop attachments within attachment counts can skew the results because service drops typically do not require a permit.⁴⁵ Though many electric utilities do not require an advance permit for a communications service drop attachments, most utilities require after-the-fact notification of service drop attachments.

For example, Gulf's standard pole attachment agreement provides:

(C) Licensee may attach service drops without obtaining a prior permit. Licensee shall ensure that such Attachments conform with Applicable Codes and Laws. Licensee shall not attach any service drops if make-ready work is required, until such make-ready work is complete. Gulf reserves the right to suspend this

⁴² Second O'Brien Declaration, at ¶ 3.

⁴³ *Id.*

⁴⁴ Second Freeburn Declaration, at ¶ 4.

⁴⁵ *See e.g.*, Charter comments, at p. 27.

provision if it determines that Licensee is not properly reporting the installation of service drops, as required in Section 4(D).

(D) Within seven (7) working days after the end of each quarter, Licensee shall submit an “Application and Permit for Service Drop Pole Attachment Exceptions” in accordance with Gulf’s Permit Application Process Manual.⁴⁶

This process allows the communications provider to serve a new customer quickly, without the need for an advance permit. It also allows the electric utility an opportunity to (1) analyze the loading impact of the service drop (if necessary); and (2) update its billing records. The fact that some attachers ignore their contractual service drop reporting obligations does not undermine – in fact it further supports – the need for a meaningful deterrent to unauthorized attachments.

Moreover, the definition of what constitutes an “attachment” for purposes of an audit is typically set forth in detail (consistent with existing pole attachment agreements) in the audit contractor’s scope of work document. As noted above, attachers are almost always given the opportunity to participate in shaping the parameters of the audit. At the very least attachers are invited to one or more meetings where they have an opportunity to raise concerns over *any* portion of the audit protocol, including but not limited to how an “attachment” is defined for purposes of the audit.

Pole Ownership Changes. Pole ownership changes can and do present record-keeping problems, but only to a very small extent. Most pole ownership changes are the result of an electric utility taking ownership of a pole location previously owned by an incumbent LEC. If the attachment records are not properly transferred, this can lead to dozens – but not hundreds or thousands – of potential unauthorized attachments during the next audit cycle. To the extent pole ownership changes result in discrepancies, these discrepancies are more than resolved through

⁴⁶ Second Bowen Declaration, at ¶ 4.

the “forgiveness” thresholds such as those in the PEF and Gulf pole license agreements.⁴⁷ Further, this is the very type of issue that can be avoided through attacher participation in the audit. If the attacher is riding with the audit contractor at the time a pole location is visited, and is armed with attacher’s records of permitted attachments, it can resolve the issue with the contractor in real time.

Monetary Incentives to Contractors. This is a perplexing basis for objection to unauthorized attachment penalties. It is as if attachers are saying the pole attachment audit process should be completely devoid of competitive and commercial norms. In situations where contractors have an incentive to accurately and completely count attachments, it may actually result in *reducing* the amounts paid by compliant attachers (attachers usually share in the cost of an audit performed to count their attachments). Attachers implicitly argue that, if contractors are given monetary incentives to detect unauthorized attachments, they will necessarily detect more of them. But this theory breaks down under analysis of the static accuracy rates typically set forth in an audit contractor’s statement of work. For example, the statement of work for FPL’s current audit requires a 97% accuracy rate.⁴⁸ Similarly, in Gulf’s most recent audit, the accuracy rate set forth in the statement of work was 97%⁴⁹ and for PEF 96%.⁵⁰ These accuracy rates are verified through quality control measures specifically set forth in the statement of work, and the accuracy requirements do not “float” based on unauthorized attachment results. Moreover, to the extent a contractor is inclined to count an attachment that does not exist (or should not be counted as an attachment), this too can be mitigated through attacher participation in the audit.

⁴⁷ Florida IOU Comments, at pp. 51-52.

⁴⁸ See Second Kennedy Declaration, at ¶ 3.

⁴⁹ Second Bowen Declaration, at ¶ 3.

⁵⁰ Second Freeburn Declaration, at ¶ 5.

For example, in FPL's audit process, the attacher participants verify the survey contractor work to their satisfaction that the 97% accuracy rate is being achieved.⁵¹

Lack of Opportunity to Participate in Audits. The Florida IOUs not only *allow* attacher participation in audits but also *urge* participation in audits. In the experience of the Florida IOUs, attacher participation improves the accuracy of the audit and reduces the incidence of disputes over audit results. If attachers are being shut-out of audits at all (and, importantly, no attacher has alleged even a single actual instance of being shut-out of an audit) it is not happening within the Florida IOUs' operating territories. Commission policy should discourage unauthorized attachments, and encourage attacher participation in the audit (which will improve accuracy and reduce disputes). Commission policy should not encourage attachers to watch the audit from afar and then later criticize or reject its results.

C. Unauthorized Attachments Are Not An Acceptable Means To An End.

Sunesys – unlike the cable television commenters – does not attempt to lay blame for unauthorized attachments on alleged record-keeping and audit errors. Instead, Sunesys contends that “in many instances involving unlawful attachments, parties have performed such attachments because the utility spent a year or more delaying approval of an application, and the attacher believed it had no choice.”⁵² Sunesys further speculates: “a substantial number of these [unauthorized] attachments are probably located on the poles of utilities who have acted in the most dilatory fashion with respect to allowing pole access.”⁵³ Though Sunesys's candor is refreshing, there are at least two fundamental problems with its argument.

⁵¹ See Second Kennedy Declaration, at ¶ 3.

⁵² Sunesys Comments, at p. 27.

⁵³ *Id.*

First, as the Florida IOUs and many other electric utility interests repeatedly have explained, the permitting process is designed primarily to ensure that third-party attachments do not compromise the safety and reliability of the electric distribution infrastructure.⁵⁴ Where attachers circumvent this process, it creates safety and reliability risks, as the Commission noted in the FNPRM:

Nevertheless, we believe the dangers presented by unauthorized attachments transcend the theoretical. True unauthorized attachments can compromise safety because they bypass even the most routine safeguards, such as verifying that the new attachment will not interfere with existing facilities, that adequate clearances are maintained, that the pole can safely bear the additional load, and that the attachment meets the appropriate safety requirements of the utility and the NESC.⁵⁵

Where an attacher makes an unauthorized attachment, it not only places the pole owner at risk (financial and operational) but also the public at large. The fact that attachers *knowingly* foist this risk upon the pole owner and the public is even more egregious. No delay caused by a pole owner or anyone else should excuse this behavior.

Second, Sunesys's argument presumes the pole owner – rather than existing communications attachers – are to blame for the delay. As recognized by the National Broadband Plan, and as addressed through certain rule proposals in the FNPRM, “[d]elays can also result from existing attachers’ action (or inaction) to move equipment to accommodate a new attacher, potentially a competitor. . . .”⁵⁶ Forcing pole owners to accept the risk of unauthorized attachments is not an acceptable solution to delay by an incumbent competitor.

⁵⁴ Florida IOU Comments, at 49 & n.146; *see also, e.g.* Comments of Alliance for Fair Pole Attachment Rules, at 73.

⁵⁵ FNPRM, ¶ 91.

⁵⁶ National Broadband Plan, at 129; *see also* FNPRM, ¶¶ 40-41 (“[W]e propose that the obligation to complete make-ready work in this timeframe extend not only to the utility, but also to existing attachers.”).

D. The Solution Is For Pole Owners To Enforce Reasonable Unauthorized Attachment Penalty Provisions In Pole Attachment Agreements.

The FNPRM mentioned as a “potential alternative to the Commission’s present penalty regime” a system “akin to the one adopted by the Oregon Public Utilities Commission.”⁵⁷ A number of communications commenters voiced opposition to Oregon’s system in their comments for a variety of reasons including but not limited to the fact that unauthorized attachment penalties are but one piece of a much larger pole attachment regulation puzzle addressed through Oregon’s regulations.⁵⁸ tw telecom argues for specific rules and processes addressing unauthorized attachments.⁵⁹ Though some of tw telecom’s ideas are worthy of discussion in the context of contractual requirements, they are not appropriate for detailed Commission rulemaking. Moreover, as Comcast noted in its comments, the Commission lacks plenary jurisdiction similar to that possessed by state regulatory commissions that regulate pole attachments.⁶⁰

To be clear, the Florida IOUs are not advocating for the adoption of Oregon’s unauthorized attachment penalty regime. The Florida IOUs believe that contracts between pole owners and attachers should address these matters, and that the Commission should refrain from either policing unauthorized attachments or prescribing specific penalties.

Specifically, the Florida IOUs request the following:

⁵⁷ FNPRM, ¶ 95.

⁵⁸ *See, e.g.*, Comcast Comments, p. 37 (“Initially, it should be noted that the Oregon PUC’s unauthorized attachment rules are only one piece of a broader pole attachment regulatory regime whereby the PUC involves itself in a vast array of field issues and policies that extend far beyond the Commission’s experience, resources and likely (on some matters) jurisdiction.”).

⁵⁹ tw telecom Comments, at pp. 27-34.

⁶⁰ Comcast Comments, at p. 37.

- The Commission’s policy statements regarding unauthorized attachments in the final order, if any, should reflect that an appropriate penalty will involve more than simply back rent plus interest.
- The Commission should explicitly vacate its decisions in *Mile Hi*, *CTAG* and *Salsgiver*, to the extent those decisions address contractual unauthorized attachment penalties.
- The Commission should avoid interfering with a pole owner’s efforts to enforce contractual penalty provisions addressing unauthorized attachments.

With the legitimate threat of meaningful penalties, and absent Commission decisions which undermine the ability to enforce meaningful penalties, the unauthorized attachment problem will correct itself.

E. Bright House’s Comments Are Inaccurate, Ironic and Misleading.

As support for its generic claim that unauthorized attachments “are exaggerated and cannot be accepted at face value,” Bright House relies on a single example involving TECO.⁶¹ There are at least three problems with Bright House’s approach. First, the allegations in Bright House’s comments are simply (but significantly) inaccurate. Second, it is ironic to say the least that Bright House – which holds itself out to the public as a conventional telephone company yet refuses to pay the pole attachment rate applicable to telecom service providers – would accuse any electric utility of a “willingness to litigate virtually any conceivable ambiguity involved in pole attachments.”⁶² Third, at a bare minimum, virtually all of what Bright House says in its comments regarding unauthorized attachments is the subject of an unresolved and pending state court dispute between TECO and Bright House.⁶³

⁶¹ Bright House Comments, pp. 28-33. TECO is the unnamed “investor-owned utility in Florida” mentioned in Bright House’s comments.

⁶² Bright House Comments, p. 2.

⁶³ Second O’Brien Declaration, at ¶ 4.

Bright House contends, for example, that it “became clear” during “the course of litigation” (the same litigation on which both parties presently await a ruling from the trial court) that the pole inspection program which discovered Bright House’s unauthorized attachments was “deeply flawed.”⁶⁴ The methodology of the inspection, though, was made known to Bright House *prior* to the inspection; this was not something Bright House learned for the first time during the litigation – a point Bright House at least appears to concede elsewhere in its comments.⁶⁵ Notably, Bright House was the *only* attaching entity who voiced any objection to the methodology ultimately employed by TECO in the pole audit.⁶⁶

Though it is tempting for TECO to rebut, item for item, the spurious contentions in Bright House’s comments, TECO also appreciates that these issues are better tried in state court (where they were, in fact, tried) than through comments and reply comments on matters of such grave importance to the industry stakeholders. Bright House itself concedes that unauthorized attachments are “fact-intensive” in nature. For that very reason, as the Florida IOUs have urged from the outset, the Commission’s best course of action is to avoid interfering with electric utilities’ right to enforce provisions of their pole attachment agreements addressing unauthorized attachments in state court – where “fact-intensive” issues can and should be raised and resolved.

IV. THE COMMISSION SHOULD DECLINE THE REQUEST TO REGULATE THE CONSIDERATION EXCHANGED BETWEEN ILECS AND ELECTRIC UTILITIES THROUGH JOINT USE AGREEMENTS.

In the FNPRM, the Commission noted the “statutory and policy complexities” associated with regulating the pole attachment rate paid by ILEC attachers.⁶⁷ The Commission nonetheless

⁶⁴ Bright House Comments, p. 29.

⁶⁵ *Id.*

⁶⁶ Second O’Brien Declaration, at ¶ 4.

⁶⁷ FNPRM, ¶ 143.

asked that “commenters ... refresh the record regarding the questions raised regarding regulation of rates paid by incumbent LECs.”⁶⁸ The Florida IOUs have commented extensively on this issue in the past, and explained once again in their initial comments why the historical relationship between ILECs and electric utilities renders the idea of treating ILECs as attachers under section 224(b) not only statutorily incorrect, but also logically untenable.⁶⁹ Several ILEC commenters also addressed this issue. Many of these comments fundamentally mischaracterize the joint use relationships between ILECs and electric utilities and encourage rules which are not calculated to achieve the Commission’s end goal of broadband deployment.

A. Joint Use Agreements And Pole License Agreements Are Apples And Oranges.

Long before Congress first touched the issue of pole attachments, there were joint use agreements between incumbent telephone companies and electric utilities. The term “joint use” is not a euphemism, but instead a descriptive term. Joint use is not the “rental” of pole space; it is a contract that allows both parties to use each other’s pole in order to defray the collective cost of pole ownership. As explained before, most joint use agreements are based on the concept of parity of ownership (under which each party is supposed to own and maintain an agreed-upon share of jointly used poles). If both parties own their contractual share of poles, no money in annual rental payments changes hands. If a party owns less than its contractual share of poles, it typically pays the other party a per pole rate to defray the additional cost of ownership borne by

⁶⁸ *Id.*

⁶⁹ Florida IOU Comments, at pp. 72-75; *see also* Initial Comments of Florida Power & Light and Tampa Electric Regarding ILECs and Pole Attachment Rates, WC Docket No. 07-245 (Mar. 7, 2008), at pp. 2-11; Reply Comments of Florida Power & Light, Tampa Electric, and Progress Energy Florida, WC Docket No. 07-245 (Apr. 22, 2008), at pp. 14-19; Letter from Eric. B Langley and J. Russell Campbell to Marlene H. Dortch, WC Docket No. 07-245 (Nov. 20, 2008), at pp. 1-3; *see also* Comments of Alabama Power, Georgia Power, and Mississippi Power, WC Docket No. 07-245 (Mar. 7, 2008), at pp. 5-14; Reply Comments of Alabama Power, Georgia Power, and Mississippi Power, WC Docket No. 07-245 (Apr. 22, 2008), at pp. 3-14.

the party owning more than its contractual share of poles. In the words of CenturyLink (an ILEC): “Joint use agreements make economic sense given that both companies have trained personnel, equipment, and expertise to manage the dangerous business of attachments.”⁷⁰ Thus, when ILECs complain that their rental rates are higher than their competitors, they are completely glossing over the fundamental differences between joint use agreements (infrastructure cost sharing agreements) and pole license agreements (space rental agreements).⁷¹

1. AT&T’s Analogy Distorts the Relationship Between ILECs and Electric Utilities.

AT&T attempts to distort the relationship between ILECs and electric utilities through the following analogy:

This odd arrangement is as if the ILEC was paying a landlord for renting a small three-bedroom house and, one day, had to accept two strangers who didn’t pay the ILEC anything for the two bedrooms they use—they paid rent directly to the landlord—and the landlord wasn’t obligated to reduce the ILEC’s rent. In fact, that rent has been increasing over the years, while the two boarders’ rent has not.⁷²

This analogy suffers from at least one fundamental flaw: the electric utility and the ILEC are not a landlord and a tenant; they are two families with common lineage, each with its own vacation home, who enter into an agreement whereby each family gets to use both its own vacation home and the other family’s vacation home – thus having the benefit of two vacation homes for much less cost than outright ownership of both. The families may also rent out their respective homes, but as to each other they are not landlords or tenants, but “joint users.” ILECs and electric

⁷⁰ CenturyLink Comments, p. 16.

⁷¹ As Verizon correctly noted in its comments: “The fundamental difference between a license agreement and a joint use or joint ownership agreement is that the latter generally imposes mutual obligations on both parties.” Verizon Comments, p. 18. One of these “mutual obligations” is to either (a) own and maintain infrastructure for the mutual benefit of both parties, or (b) compensate the other for its excess cost of infrastructure ownership.

⁷² AT&T Comments, at p. 13.

utilities share the benefits (and burdens) of pole ownership across pole networks in order to lower their collective infrastructure cost.

Moreover, under AT&T's analogy, if the ILEC owned its contractual share of poles (which typically ranges from 40-50%), it would pay *nothing* in "rental" to the electric utility because the parties would be in parity of ownership. AT&T's analogy also neglects the fact that it charges and collects rent from third-party attachers on its joint use poles, regardless of the space occupied or amount paid through the adjustment rate by the electric utility joint user. The basic problem with *all* of the ILEC comments and positions is that they ignore ILEC pole ownership, instead acting as if ILECs are no different than a cable television company or competitive telecommunications provider – a fact completely belied by history and the record evidence in this proceeding.

2. ILEC Complaints About Comparative "Rates" Are Unreliable and Immaterial.

Similarly, when ILECs offer comparisons of "rates," their data are unreliable, if not entirely immaterial. As in multiple prior submissions, USTelecom complained that "on average, incumbent telephone companies pay eight times what cable companies pay to attach to poles owned by electric utilities in the states subject to Commission regulations."⁷³ This apples and oranges comparison ignores, among other things:

- that ILECs generally pay a per *pole* rate, rather than a per *attachment* rate;
- that ILECs typically occupy more pole capacity than cable companies;
- that the "rate" may, in fact, be paid only on a fraction of the electric utility poles to which the ILEC is attached; and
- that an ILEC's net rate per pole would be \$0 if it was in parity of ownership.

⁷³ USTelecom Comments, p. 2.

What ILECs are really saying when they complain about rates is that it costs more to own poles than it does to rent space – a point the electric utilities understand quite well.

B. ILECs Have Chosen Not to Invest Additional Capital in Pole Networks.

Several ILEC commenters complain that changes in relative pole ownership have negatively impacted their leverage in negotiating joint use agreements.⁷⁴ But, as noted in earlier filings by the Florida IOUs, the ILECs claims of dramatic changes in relative pole ownership are overblown and inaccurate.⁷⁵ Moreover, if changes in relative pole ownership were negatively impacting ILECs negotiation leverage, one would expect adjustment rates to be *increasing* relative to pole costs. The ILECs have offered no evidence to indicate that this is occurring.

To the extent relative pole ownership has changed, it is not through abuse or action of electric utilities. ILECs have shied away from the capital investment involved in pole ownership, and have forced increased infrastructure costs onto electric utilities and their customers.⁷⁶ ILECs seldom build new pole lines and often avoid changing-out poles that must be replaced due to damage or deterioration.⁷⁷ This deliberate trend towards avoiding the cost and responsibility of pole ownership should not garner ILECs additional rights under the law. One ILEC commenter notes:

In keeping with the spirit of cooperation that gave birth to joint use itself in the first place, the telephone companies could acquiesce to and accommodate the

⁷⁴ See, e.g., Verizon Comments, at p. 4 & attached Declaration of James Slavin and Steven R. Frisbie (Aug. 16, 2010), at ¶ 12.

⁷⁵ Initial Comments of Florida Power & Light and Tampa Electric Regarding ILECs and Pole Attachment Rates, at pp. 5-6; Reply Comments of Florida Power & Light, Tampa Electric, and Progress Energy Florida, at pp. 15-16; Comments of Alabama Power, Georgia Power, and Mississippi Power, (Mar. 7, 2008), at pp. 8-11.

⁷⁶ If it was more economical to own poles than to use space on utilities' poles, ILECs' pole ownership would be expanding rather than contracting.

⁷⁷ Comments of Alabama Power, Georgia Power, and Mississippi Power, (Mar. 7, 2008), at 9-10.

power industry's dominant pole ownership. It is therefore not reasonable to point to the imbalance of ownership today as the simple fault of the telephone industry.⁷⁸

Even accepting this assertion as true, it is also not reasonable to penalize electric utilities for the imbalance by requiring electric utilities to assume the full burden of infrastructure ownership costs.

C. The Bob Matter Consulting Comments Regarding ILEC Access to Poles Are Irrelevant and Factually Inaccurate.

Bob Matter Consulting argued in its comments that “the incumbent LEC needs to have access rights established by law...as access rights established via agreements can be taken away”⁷⁹ As support for this proposition, Bob Matter Consulting states:

Case in point, situation in Florida arose recently where in response to the incumbent LEC's rental rate complaint, the utility canceled the agreement and began invoking a process whereby the incumbent LEC was asked to remove over 50,000 contacts. Having millions of dollars invested in its aerial cables but having no access rights granted by law, once the agreement was canceled, the incumbent LEC was left completely at the mercy of the utility.⁸⁰

Not only is the point made by Bob Matter Consulting irrelevant to the issues before the Commission, but its “case in point” is factually inaccurate.⁸¹

1. The Point Is Irrelevant.

Though it never articulates a proposed solution, presumably Bob Matter Consulting is urging the Commission to address an ILEC's right of access to poles owned by electric utilities. There is a significant legal problem with this proposal: ILECs have no right of access under section 224(f)(1). No party to this proceeding contends otherwise. Under section 224(a)(5),

⁷⁸ Mahanger Consulting Reply Comments, (Sept. 13, 2010), at p. 6.

⁷⁹ Bob Matter Consulting Comments, at pp. 2 & 7 (no page numbers in original).

⁸⁰ *Id.*, at pp. 6-7.

⁸¹ Second Kennedy Declaration, at ¶ 4.

incumbent local exchange carriers are specifically excepted from the definition of “telecommunications carriers” for purposes of section 224.⁸² Under section 224(f)(1), it is *only* cable television systems and telecommunications carriers that enjoy a mandatory right of access. Though ILECs hang their rate relief hopes on a perceived distinction between the terms “provider of telecommunications service” and “telecommunications carrier” as those terms are used in section 224,⁸³ there is no such point of leverage (however weak) with respect to access rights. Even the ILECs have conceded this issue.⁸⁴

2. The “Case in Point” Is Factually Inaccurate.

Bob Matter Consulting does not identify which utility is the subject of the example, or when the example arose, other than to say it “arose recently” in Florida. Unless Bob Matter Consulting is referencing an electric cooperative or municipally-owned electric utility (neither of which seems likely given the Commission’s lack of jurisdiction over such entities), the Florida IOUs can only surmise this is a reference to a situation between FPL and an ILEC in its service territory (and former employer of Mr. Matter) in the 2002-04 time frame. If this is the case, there are several significant factual inaccuracies in the Bob Matter Consulting comments.⁸⁵

⁸² Section 224(a)(5) (“For purposes of this section, the term ‘telecommunications carrier’ (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.”).

⁸³ This is an odd basis, indeed, upon which to rest the jurisdictional argument given that a “telecommunications carrier” is defined to mean a “provider of telecommunications services” under 47 U.S.C. § 153(44). If an ILEC is not a “telecommunications carrier” for purposes of section 224 (a point on which all parties agree), then an ILEC cannot be a “provider of telecommunications services” for purposes of section 224.

⁸⁴ Verizon Comments, at pp. 9-10 (noting that section 224(f)(1) “specifically excludes incumbent carriers from the Commission’s authority to ensure that utilities provide nondiscriminatory access to their poles”); USTelecom Comments, at p. 5 (“In contrast, the access rights in Section 224(f) are extended to ‘telecommunications carriers,’ a term which is defined for this purpose to exclude ILECs.”).

⁸⁵ Second Kennedy Declaration, at ¶ 4.

First, Bob Matter Consulting states that “the utility canceled the agreement” in response to “the incumbent LEC’s rental rate complaint.” Neither part of this is true. The ILEC never filed any kind of “rental rate complaint.”⁸⁶ While it is true there was a contractual dispute and FPL initially terminated the agreement, FPL subsequently withdrew the termination of the agreement so the parties could continue normal business operations while resolving the dispute.⁸⁷

Second, Bob Matter Consulting states that the utility “began invoking a process whereby the incumbent LEC was asked to remove over 50,000 contacts.” FPL never asked the ILEC to remove its attachments. In fact, the joint use agreement (like many joint use agreements) does not provide for removal of attachments upon termination, but instead affects only future attachments.⁸⁸

Third, Bob Matter Consulting states that “the incumbent LEC was left completely at the mercy of the utility.” This is an ironic allegation considering that the ILEC was withholding payments from FPL (payments clearly due under the contract) as leverage to negotiate a reduced recovery and reduced rate.⁸⁹ Further, given that the ILEC was never asked to remove its attachments (and could not have been under the joint use agreement), it is hard to fathom how the ILEC felt as if it was “at the mercy” of FPL.

V. ATTACHERS’ COMMENTS ON THE COMMISSION’S PROPOSED SIGN AND SUE RULE FURTHER ILLUSTRATE THE NEED FOR THE TWEAKED NOTICE APPROACH PROPOSED BY THE FLORIDA IOUS.

In the FNPRM, the Commission proposed to retain the sign and sue rule, but modify it to require that attachers give the utility “notice, during contract negotiations, of the terms it

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

considers unreasonable or discriminatory.”⁹⁰ The Florida IOUs proposed to modify the sign and sue rule to require that “immediately prior to executing the pole attachment agreement” the attacher must “designate[] in writing the particular rate, term, or condition as subject to a Rule 1.1404(d) complaint, directly referring to the text of the pole attachment agreement in its final form” as “a prerequisite to filing a complaint challenging a rate, term, or condition in an executed agreement.”⁹¹ Several attaching entities objected to the Commission’s proposed notice requirement on the grounds that it would allow the utility to unreasonably delay access to poles by protracting negotiations.⁹² The concerns raised by these commenters demonstrate that the modification proposed by the Florida IOUs in their initial comments is the ideal approach.⁹³

A. The Florida IOUs’ Proposed Modification Ensures Good Faith.

Several commenters argue that the existing sign and sue rule ensures “leverage ... when negotiating contracts and is the primary reason pole owners negotiate in good faith.”⁹⁴ However, the Florida IOUs’ proposed revision to the sign and sue rule will ensure good faith on the part of both utilities *and* attachers.⁹⁵ The fear expressed by attachers is that utilities will see the notice, then attempt to delay or manipulate the negotiations to the attacher’s detriment.⁹⁶ This fear is

⁹⁰ FNPRM, ¶ 99.

⁹¹ Florida IOU Comments, at p. 56.

⁹² *See, e.g.* Comments of the American Cable Association, at pp. 10-11; Charter Comments, at p. 19; Level 3 Comments at p. 15 (“Delay is the principal weapon of pole owners, and it is their unreasonable delaying tactics that have brought attaching parties to the Commission for assistance on many occasions.”).

⁹³ Florida IOU Comments, at pp. 53-57.

⁹⁴ Charter Comments, at p. 18; *see also* Comments of the American Cable Association, at pp. 10-11; Level 3 Comments, at p. 15.

⁹⁵ Florida IOU Comments, at pp. 56-57.

⁹⁶ Comments of the American Cable Association, at pp. 10-11; Charter Comments, at p. 19; Level 3 Comments, at p. 15.

resolved by the Florida IOUs' recommendation that the attacher give notice as to specific provisions on the final form of the agreement.

A utility negotiating in good faith that receives notice of an attacher's objections under the Florida IOUs' recommended approach, at that late stage after all prior negotiations, has one final opportunity to re-negotiate the provision, or else execute the agreement with the understanding that a complaint proceeding is a possibility. If a utility receives a notice of an attacher's objections and responds instead in bad faith or takes unlawful action to try and force the attacher's hand, such actions would be transparent and easily ferreted out by the Commission in a complaint proceeding. In addition, during the course of negotiations, a utility that suspects notices may be forthcoming on the eve of executing the agreement has an incentive to try and resolve disputes: if it is forced to re-open negotiations at the last minute to try and resolve an attacher's notice, it is the *utility* who will be compromising something to convince the attacher that the notice is unnecessary. The utility will have to either compromise on the disagreeable provision at some point or else accept the possibility of complaint proceedings. The Florida IOUs' proposed notice provision gives both parties an incentive to negotiate on the front end, because neither gains anything by waiting until the end of the process.

B. The Florida IOUs' Proposed Modification Encourages Real Negotiation, Not Delay.

Though attachers argue "delay" as their primary concern with a notice provision in the sign and sue rule, the comments actually reveal that some attachers just do not want to be bothered by negotiations. Instead, they prefer to get something signed quickly, preserving the right to challenge any provision that later becomes inconvenient. Below are three examples of observations by attachers to that effect:

- The reason the sign and sue rule is necessary is that attaching parties cannot go on negotiating forever. If the pole owner reacts to the written notice of objection by refusing to sign the agreement, or by announcing that it will reopen negotiations on those issues, the attaching party will be faced with the very thing that the sign and sue rule was intended to prevent, which is delay.⁹⁷
- [C]able operators or telecom providers may need to sign an unreasonable pole attachment agreement because they cannot afford to be delayed by protracted negotiations or litigation before the Commission.⁹⁸
- It can be expected that the pole agreement negotiation process will grind to a halt while the utility reviews and responds to the potential attacher's notice of unreasonable/unlawful terms. And it can be expected that the utility response letter will attempt to detail why each and every identified term is not unreasonable/unlawful in the context of the specific negotiated agreement. The potential attacher, in turn, will not want the negotiation record to reflect that the utility's arguments went unanswered. And on it will go – with significant delays and a further polarization of the negotiating parties.⁹⁹

From the Florida IOUs' perspective, continued, good-faith negotiations to resolve a disagreement are not a "delay" -- they are the proper completion of the negotiation process. To the extent that a notice requirement encourages real, fruitful negotiations over a potentially disputed provision, it is a *success* not a burden. It also promotes the Commission's preference for negotiated agreements.

MetroPCS goes so far as to suggest that any time a utility refuses to execute an attachment agreement after notice, such action should be considered *per se* unreasonable.¹⁰⁰ Apparently, according to MetroPCS, the utility should bear the sole risk for the final, executed attachment agreement, despite admissions from attachers that they are sometimes willing to sign agreements just to shortcut negotiations. This exemplifies the Florida IOUs' overall point – that supporters of the sign and sue rule use it for purposes beyond protection of statutory rights.

⁹⁷ Level 3 Comments, at p. 15.

⁹⁸ American Cable Association, at p. 10.

⁹⁹ Comcast Comments, at p. 27.

¹⁰⁰ MetroPCS Comments, at p. 26.

Suppose an attacher gave notice that a provision was unreasonable when it clearly and explicitly had bargained to exchange its rights under that provision. Why should a utility be presumed to act unreasonably if it refuses to allow the attacher to avoid that bargained-for exchange? In such an instance the attacher is abusing the Commission's procedures in order to have its cake and eat it too. What incentive does the attacher have to act in good faith if there is no consequence to crying wolf?¹⁰¹ The Florida IOUs' proposal to require notice at the end of the negotiation process will encourage attachers to locate and resolve potentially disagreeable provisions, rather than waiting until the eleventh hour and risking re-opening of negotiations when the negotiation process should be concluding.

Charter at least admits that, if the Commission does not modify its proposed sign and sue rule as suggested by the Florida IOUs, attachers would respond by peppering all negotiations with "notice" so as to cover all contingencies, thereby effectively giving no notice at all:

Charter is very concerned that requiring formal written notice will create a new class of disputes during negotiations over what constitutes proper written notice under the Commission's rule. Indeed, attachers will feel compelled to memorialize every conceivable basis for complaint, which will be time-consuming, expensive and (most likely) unnecessary.¹⁰²

This admission only further supports requiring notice to the execution version of the agreement, as suggested by the Florida IOUs. The Commission's proposed notice requirement in the

¹⁰¹ Commenters repeat that there has been little litigation over sign and sue. The problem with sign and sue as it is currently formulated (and in the Commission's proposed formulation with the "as-applied exception") is that the *threat* that may be used by attachers improperly to avoid lawful provisions in their agreement, whenever it becomes convenient to do so. Sign and sue creates the threat of expensive litigation in two forums (justified or not), which attachers can then use to avoid the full effect of lawful agreement provisions.

¹⁰² Charter Comments, at p. 19; *see also* Comments of the American Cable Association, at p. 11 ("At the very least, the pole owner should be deemed to have constructive notice of the attacher's objection to a particular provision or provisions of an agreement if they were the subject of contentious negotiations.").

FNPRM leaves the door open for unnecessary paper wars that will not achieve – but in fact thwart – the Commission’s desired transparency.

VI. THE COMMISSION SHOULD DECLINE THE WIRELESS CARRIERS’ REQUEST TO “CONFIRM” RIGHTS THAT DO NOT EXIST.

The FNPRM does not propose any rules regarding, or otherwise address, wireless pole top antennae. Nonetheless, several wireless carriers ask the Commission to “confirm” or “clarify” that they have the right to make attachments to pole tops.¹⁰³ The wireless carriers’ collectively advance two arguments in support of their position: (1) that they are entitled to access any portion of the “usable space” on a pole they desire; and (2) that because pole top antenna can be safely attached to some pole tops, all utilities should be required to allow them. These arguments conflict with the law, would unduly restrict an electric utility’s right to deny access for reasons of safety and reliability, and would usurp an electric utility’s right to implement and enforce non-discriminatory standards. In any event, if the Commission is inclined to adopt any sort of rule regarding wireless pole top access, it should only be after a specific rule has been proposed and an opportunity has been provided for comment by all stakeholders.

A. Wireless Carriers Do Not Have the Right to Make Attachments Anywhere They Want.

DAS Forum argues in its comments: “Pole tops are unquestionably a part of the usable space on the pole, and therefore both Section 224 and the Commission’s regulations give

¹⁰³ See DAS Forum Comments, at p. 12 (“the Commission needs to reconfirm the pole top attachment rights of companies given the actions of many utilities”); MetroPCS Comments, at p. 11 (“Pole-top placement of antennas by wireless carriers should be permitted without discrimination, supplement charges or delay”); NextG Comments, at p. 20 (“The Commission should clarify that utilities may not have blanket prohibitions against pole top attachments for antennas”).

wireless providers the right to attach to pole tops.”¹⁰⁴ This shaky logic lacks support in either section 224 or the Commission’s regulations. The term “usable space” in Section 224 is used exclusively in conjunction with the space allocation provisions in Sections 224(d) & (e), which outline the parameters of the cable rate and telecom rate respectively.¹⁰⁵ The term “usable space” is notably absent from Section 224(f), which is the only provision of the statute devising any access rights.¹⁰⁶ The Commission’s regulations are similarly structured.¹⁰⁷

DAS Forum also leans heavily on the Wireless Telecommunications Bureau’s December 2004 Public Notice.¹⁰⁸ This Public Notice, contrary to DAS Forum’s contention, did not “confirm” pole top access rights. In fact, it merely stated that the Commission had previously declined to establish a presumption permitting utilities to categorically reserve for their own use “that space above what has been traditionally referred to as “communication space.”¹⁰⁹ The Notice *did* confirm that the statutory bases for denial of access -- insufficient capacity, safety, reliability, and generally applicable engineering purposes -- were “recognized limits to access for antenna placement by wireless telecommunications carriers.”¹¹⁰ But DAS Forum and other wireless carriers seek to gut these very “limits to access” by requesting a de facto presumption in favor of pole top attachments.

¹⁰⁴ DAS Forum Comments, at p. 14.

¹⁰⁵ See Section 224(d) & (e).

¹⁰⁶ See Section 224(f).

¹⁰⁷ Compare 47 CFR § 1.1403(a) (setting forth access rights and omitting any reference to the term “usable space”) with 47 CFR § 1.409(c) & (e) (using the term “usable space” exclusively in conjunction with the rate formulas).

¹⁰⁸ DAS Forum Comments, at pp. 14-15.

¹⁰⁹ Wireless Telecommunications Bureau “Reminder,” Public Notice, 19 FCC Rcd. 24930 (Dec. 23, 2004).

¹¹⁰ *Id.*

Further, while the Commission previously may have declined to adopt a categorical presumption that the space above the “communications space” is off-limits to communications attachers, the Commission has on several occasions properly recognized that its jurisdiction is limited to the “communications space.” For example, the Commission has stated:

[O]ur role is to begin only where space on a utility pole has been designated and is actually being used for communications services by wire or cable.... In other words, where a utility owns or controls a pole on which there has been no designation of communications space, jurisdiction to require access will not lie.¹¹¹

Similarly, the Commission has observed that the “underlying purpose” of Section 224 is “to assure that *communications space* on utility poles be made available to cable television systems at ‘just and reasonable rates, and under just and reasonable terms and conditions.’”¹¹² The Commission has specifically avoided the very rule now requested by the wireless carriers, and for good reason – it would unduly constrain an electric utility’s right to implement and enforce non-discriminatory access standards.

B. The Commission Cannot Require Electric Utilities to Allow Pole Top Attachments.

The issue of *whether* telecom carriers have a right to make wireless antenna attachments on utility poles has been resolved.¹¹³ The issue of *where* wireless carriers should be allowed to make such attachments is not the proper province of the Commission. No one can credibly dispute that an electric utility is entitled to implement and enforce attachment standards and

¹¹¹ *Cable Information Services, Inc. v. Appalachian Power Company*, 1980 FCC LEXIS 410, ¶ 22 (FCC 1980); *see also David Bailey v. Mississippi Power & Light Company*, 1985 FCC LEXIS 2617 (“Since MPLC has designated communications space on its poles and has permitted Fayette Cable to utilize this space for CATV attachments, the necessary nexus exists for the Commission to exercise jurisdiction over MPLC’s pole attachment practices.”).

¹¹² *Gulfstream Cablevision of Pinellas County, Inc. v. Florida Power Corp.*, 1985 FCC LEXIS 4123, ¶ 6 (Common Carrier Bureau 1985) (emphasis added).

¹¹³ *Nat’l Cable & Telecomm. Ass’n v Gulf Power*, 534 U.S. 327, 341 (2002).

procedures, so long as access is being granted (subject to the limitations under section 224(f)(2)) and so long as the standards and procedures are being enforced in a non-discriminatory fashion. For example, an electric utility might have standards and procedures that require a wireline attacher to make its attachment one-foot above the highest existing communications attachment, even if the attachment could be made 18” above the highest communications attachment or one-foot below the lowest existing communications attachment without violating the NESC. Such standards and procedures are common, and are designed to address various safety, reliability and operational issues which vary from utility to utility.

The issue of wireless attachments is no different. Wireless carriers are not being denied access to poles; they are merely being told, in some instances, that their preferred position on the pole cannot be accommodated. The fact that some wireless carriers view pole tops as more convenient and more advantageous (a position belied by the same carriers’ position with respect to pole top attachment rental rates) is inconsequential. Similarly, the fact that some pole owners allow wireless pole top attachments and that pole top attachments *can* be made consistent with the NESC does not mean the Commission should require *all* utilities to allow it. NextG, for example, relies heavily on this argument to support its position.¹¹⁴ But as explained by many electric utilities in this proceeding, third-party attachments standards often exceed the requirements of the NESC. Accepting NextG’s argument would be tantamount to adopting a national engineering standard – a step the Commission specifically and wisely declined to take in the FNPRM.¹¹⁵

¹¹⁴ See NextG Comments, at pp. 21-22.

¹¹⁵ See FNPRM, ¶ 24 (“For the same reasons the Commission gave in 1996, we do not propose to adopt or endorse national engineering standards, however.”).

Electric utilities have set forth legitimate safety, reliability and operational reasons for restricting wireless antenna attachments to the communications space. So long as an electric utility is applying its standards in a non-discriminatory manner, the Commission should not interfere with an individual utility's discretion on this important issue.

VII. ATTACHERS CANNOT JUSTIFY THE PROPOSED NEW TELECOM RATE UNDER SECTION 224 OR SOUND ECONOMIC PRINCIPLES.

The Florida IOUs explained at length in their initial comments why the Commission's proposed reinterpretation of the telecom rate is unwise and unlawful.¹¹⁶ The Florida IOUs will not repeat that analysis here, but instead focuses on certain specific comments made by other parties. Section 224 does not support limiting attachment rates to merely the incremental cost of an attachment (the "cost-causation" principle), but rather envisions that attachers share in the full, allocated cost of the poles to which they attach.

A. Cost-Causation Approach is Not Supported by Section 224.

Several communications commenters support the Commission's proposal to exclude capital costs from the telecom rate on the theory of cost-causation.¹¹⁷ Attempts to insert cost-causation principles into section 224(e) are misplaced. The Florida IOUs explained in their comments that cost-causation is inappropriate for the telecom rate because it is contrary to the intent of the statute, according to both the plain language and legislative history.¹¹⁸ First, as to the plain language of the statute, no commenter could explain why costs associated with unusable space – space the attachers undoubtedly content exists regardless of attachers – would be included in a formula based on cost-causation. Such an interpretation would render section

¹¹⁶ Florida IOU Comments, at pp. 57-68.

¹¹⁷ *See, e.g.*, NCTA Comments, at pp. 9-11; Charter Cooments, at pp. 2-3.

¹¹⁸ Florida IOU Comments, at pp. 57-68.

224(e) internally conflicting insofar as 224(e) explicitly allocates “the cost of providing space ... other than the usable space.”¹¹⁹ Nor did any commenter hazard a guess as to why Congress would include a specific provision foretelling higher telecom rates (section 224(e)(4)), if Congress intended for telecom rates to be the same as the cable rate (or lower). Finally, no commenter offered a reasoned explanation as to why section 224(e) refers to the cost of “space” rather than the cost of “attachments” if costs were intended to be linked directly to attachments instead of to the cost of space on the pole itself. The Florida IOUs submit that the reason no commenter made a defensible case of the cost-causation approach under the plain language of the statute is because such an interpretation is implausible.

The Florida IOUs pointed out in their comments that the legislative history makes clear that Congress considered the new telecom rate “fully allocated” and understood that all attachers benefit from the pole.¹²⁰ Bright House argued that, because these statements were made in the context of a specific amendment not adopted, cost-causation is actually consistent with the legislative intent of section 224(e).¹²¹ There are at least three significant flaws with this strained argument.

First, the language ultimately included in the statute becomes the statute. The fact that language was not ultimately included does not render the legislative history explaining what was at issue at the time useless. In fact, this type of argument by inference highlights the truth. No commenter was able to cite *any* legislative history *at all* showing that Congress was even considering, discussing, or otherwise contemplated that capital costs be excluded from the rate, or that the new rate be derived from costs which could be associated directly with the

¹¹⁹ Section 224(e)(2).

¹²⁰ Florida IOU Comments, at pp. 61-63.

¹²¹ Comments of Bright House Networks, at pp. 18-19.

incremental burden of a new attachment. The only legislative history that indicates Congress' thoughts on this question is language that undeniably *rejects* a cost-causation theory.¹²²

Second, there was no precedent for excluding capital costs at the time Congress was fashioning the new telecom rate. The Commission's historical treatment of the "cost" allocation under section 224(d), even if not directly controlling, must at least be considered as the reasonable context under which Congress was working.¹²³ If Congress intended to overturn this settled historical treatment, it would have said so.

¹²² Compare H. REP. NO. 104-458 (1996) (Conf. Rep. on S 652) ("The new provision directs the Commission to regulate pole attachment rates based on a "fully allocated cost" formula. In prescribing pole attachment rates, the Commission shall: (1) recognize that the entire pole, duct, conduit, or right-of-way **other than the usable space** is of equal benefit to all entities attaching to the pole and therefore **apportion the cost of the space other than the usable space** equally among all such attachments; (2) recognize that the **usable space** is of proportional benefit to all entities attaching to the pole, duct, conduit, or right-of-way and therefore **apportion the cost of the usable space according to the percentage of usable space required for each entity;**") with § 224(e)(2)-(3) ("(2) A utility shall **apportion the cost of providing space** on a pole, duct, conduit, or right-of-way **other than the usable space** among entities so that such apportionment equals two-thirds of the costs of providing **space** other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities. (3) A utility shall **apportion the cost of providing usable space** among all entities **according to the percentage of usable space required for each entity.**") (emphasis added throughout). The *only* substantive difference between the language in the legislative history and the final § 224(e)(2)-(3) is the two-thirds apportionment for unusable space as opposed to the full apportionment suggested in the House Amendment. Any argument that this discussion should be considered irrelevant to § 224(e)(2)-(3) is untenable. If Bright House cannot see the similarities between the House Report and the language actually included in section 224(e), then its problem is more than its usual penchant for hyperbole – it is a fundamental reading comprehension problem. See Bright House Reply Comments, pp. 8-9 (accusing the Florida IOUs of a "whopper" of an error and "misrepresentation to the Commission" for citing the House Report as evidence of the intent behind section 224(e)).

¹²³ *Wilderness Watch v. United States Forest Service*, 143 F. Supp. 2d 1186, 1205 (D.Mont. 2000) ("In construing a statute, courts 'presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.' This includes knowledge of applicable administrative regulations.") (quoting *United States v. Hunter*, 101 F.3d 82, 85 (9th Cir. 1996) (quoting *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-5 (1988) and citing *Marchese v. Shearson Hayden Stone, Inc.*, 822 F.2d 876, 878 (9th Cir. 1987) ("Congress may choose to address this question directly in the future, but for now it is proper for this court to presume that Congress was aware of the existing administrative regulations and interpretations each time it

Third, the legislative history makes clear that one of the guiding principles behind section 224(e) is that all parties benefit from the pole. Congress made a very specific choice to include non-usable space in the section 224(e) formula, and additionally, fashioned section 224(e) around “space” rather than “attachments.” Section 224(e) states:

A utility shall apportion **the cost of providing space on a pole**, duct, conduit, or right-of-way **other than the usable space** among entities so that such apportionment equals two-thirds of the **costs of providing space other than the usable space** that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

A utility shall apportion the **cost of providing usable space** among all entities according to the percentage of usable space required for each entity.¹²⁴

Neither subsection (2) nor (3) includes the word “attachment.” How is it possible for a utility to “provid[e] space on a pole” without the capital expense of the pole? Congress went out of its way *not* to connect “cost” with “attachment” in section 224(e), employing language requiring that the utility be compensated for the cost of providing space (*i.e.* pole costs). Congress could not have made the distinction between the telecom rate and section 224(d)’s “additional costs of providing pole attachments” more clear.

Attachers refuse to acknowledge this clear distinction, and instead argue that because section 224(e) did not employ the language “the sum of the operating expenses and actual capital costs” from section 224(d), it should be “presumed that Congress act[ed] intentionally and purposely in the disparate ... exclusion.”¹²⁵ This argument is self-defeating because Congress

reauthorized the Act.”)); *see also, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 157 (2000) (explaining that “consistency of the [agency’s] prior position is significant” because it “provides important context to Congress’ enactment”).

¹²⁴ § 224(e)(2) & (3) (emphasis added).

¹²⁵ Time Warner Cable Comments, at pp. 9-10 (“For where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

used the phrase “additional costs of providing pole attachments” to describe the lower-bound section 224(d) rate, but *did not* include this phrase in section 224(e). This necessarily requires the conclusion that Congress did not write the telecom rate to measure incremental cost. At a minimum, under attachers’ own rule of statutory construction, the Commission’s proposed reinterpretation of the telecom rate fails as a matter of law.

B. NCTA’s Proposed Revisions to Presumptions Must be Proposed in a Separate Rulemaking That Also Addresses the Communications Worker Safety Zone.

NCTA argues that the Commission’s presumptions regarding pole height and number of attaching entities should be altered.¹²⁶ Though NCTA may indeed be correct that changes to those presumptions are warranted, such changes should only be made pursuant to a specific rule proposal from the Commission and an opportunity for all stakeholders to comment and submit relevant data. NCTA’s proposed changes, though, ignore the presumption in most obvious need of revision – the usable space presumption, which currently includes the Communications Worker Safety Zone (a/k/a “safety space”). Every pole with both communications and electric facilities must have safety space (usually 40 inches), the entire cost of which is currently included as “usable space” in the rate formula and allocated to the utility.¹²⁷ The safety space on electric utility poles is only necessary because of communications attachers. At a minimum, the Commission should treat the safety space as unusable space so that electric utilities are not bearing the full cost of providing the space.

That presumption is much stronger when, as here, the comparison is between two subsections of the same section of a statute.”) (citations omitted).

¹²⁶ NCTA Comments, at pp. 22-23.

¹²⁷ The Florida IOUs support the Comments of the Edison Electric Institute and the Utilities Telecom Council on this point. EEI Comments, at p. 75.

C. Level 3's Comments Should be Disregarded.

Level 3's comments regarding the rate issues both surprised and confused the Florida IOUs. Level 3 indicated that it believed "overcharging" was occurring, and asked the Commission to open an investigation into this matter.¹²⁸ First, Level 3's statements are not intended to further the discussion regarding the new proposals contained in the FNPRM. The Commission should not endorse these theatrics. If Level 3 has a problem with the rates it is being charged, it should either contact the utilities in question to discuss Level 3's concerns (Level 3 openly admits it does not understand how the rate calculation works and made no attempt to investigate before publishing its thoughts) or file a complaint with the Commission. Level 3's comments ignore the fact that pole attachment rates are not mandatory; they apply when parties fail to reach agreement on negotiated rates. The apparent claim by Level 3 that its charges exceed the telecom rate conveniently omits any explanation about the parties' negotiations, rendering the discussion uselessly incomplete in addition to being irrelevant to the Commission's inquiry.

VIII. CONCLUSION

The Florida IOUs urge the Commission to take a fresh look at pole attachment issues, considering the success of broadband deployment to date and taking into account input from all stakeholders. In considering changes to the pole attachment regulations, the Commission should never lose sight of the potential effect on electric reliability and safety. The Commission must also limit its actions to those within its statutory authority, and set pole attachment rates in a manner consistent with the intent of section 224.

¹²⁸ Level 3 Comments, at pp. 8-11.

For the most part, the commenters urging the Commission to enact expansive changes to pole attachment regulation are looking at the issues with a narrow perspective. Competitive telecommunications carriers seek to attach as quickly as possible, for the least cost. The first limitation to this perspective is that they do not appear focused on offering services to the small percentage of the population that currently lacks broadband access (and certainly have not told the Commission this is their focus). The second limitation to this perspective is that they do not share the same commitment to preserving the safety and reliability of the pole network. The Commission correctly noted that “communications attachers wish to roll out service as quickly as possible, and consequently do not have the same incentives to maintain the safety and reliability of the infrastructure as the utilities themselves would.”¹²⁹ Electric utilities, on the other hand “are typically disinterested parties with only the best interest of the infrastructure at heart.”¹³⁰ The Florida IOUs encourage the Commission to weigh the insight of the various commenters with these strengths and weaknesses in mind.

The Florida IOUs appreciate the opportunity to provide these reply comments, and look forward to continued involvement in this important proceeding.

Respectfully submitted,

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¹²⁹ FNPRM, ¶ 67.

¹³⁰ FNPRM, ¶ 68.

EXHIBIT A

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

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

SECOND DECLARATION OF BEN A. BOWEN

1. My name is Ben A. Bowen. I am currently employed at Gulf Power Company ("Gulf") as a Senior Project Services Specialist. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity as joint use administrator for Gulf. I am the same Ben Bowen who submitted a declaration in support of comments filed by Alabama Power, Georgia Power, Gulf Power and Mississippi Power in this docket in March 2008, and comments filed by Gulf and the four other investor-owned electric utilities in Florida ("Florida IOUs") in August 2010. I offer this testimony in support of the reply comments filed by Gulf and the Florida IOUs in response to the FNPRM.

2. The percentage of Gulf's poles which require electric supply space make ready is 4.25%.

3. In Gulf's most recent audit, the accuracy rate set forth in the statement of work was 97%. Prior to commencing an audit, attachers are given written notice and an opportunity to participate in the audit by riding with the audit contractor.

4. Gulf's standard pole attachment agreement provides:

(C) Licensee may attach service drops without obtaining a prior permit. Licensee shall ensure that such Attachments conform with Applicable Codes and Laws. Licensee shall not attach any service drops if make-ready work is required, until such make-ready work is complete. Gulf reserves the right to suspend this

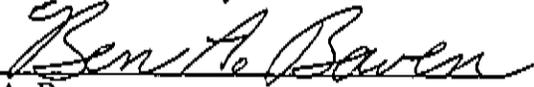
provision if it determines that Licensee is not properly reporting the installation of service drops, as required in Section 4(D).

(D) Within seven (7) working days after the end of each quarter, Licensee shall submit an "Application and Permit for Service Drop Pole Attachment Exceptions" in accordance with Gulf's Permit Application Process Manual.

5. Gulf's indemnity provision in its standard pole attachment agreement applies to matters "in any way associated or connected with the performance of the obligations" in the agreement.

6. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on the 4th day of October 2010.



Ben A. Bowen
Senior Project Services Specialist
Gulf Power Company

EXHIBIT B

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

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

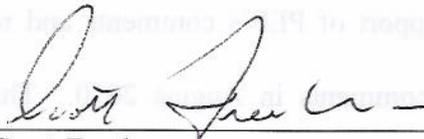
1. My name is Scott Freeburn. I am currently employed at Progress Energy Florida, Inc. (“PEF”) as Manager of Joint Use and Locates. I am the same Scott Freeburn that submitted declarations in support of PEF’s comments and reply comments in this docket in March and April 2008, and comments in August 2010. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity as Manager of Joint Use and Locates for PEF. I offer this testimony in support of the reply comments filed by PEF and the other four investor-owned electric utilities in Florida in response to the FNPRM.
2. The percentage of PEF’s poles which require electric supply space make ready is approximately 10%.
3. On a typical pole line, there are roughly 25 poles per linear mile. Though the actual number of poles per mile will vary (sometimes significantly) from place to place, 25 poles/mile is a good system-wide average.
4. PEF encourages attachers to participate in its audit process. PEF is having a pre-audit meeting in October 2010 for the 2011 attachment audit. PEF will supply each communication

company a booklet with pictures that outlines what an attachment is and how many attachments per pole depending on the spacing of the attachments. The PEF audit will also include a full time project manager who communicates with the communications companies at each step of the audit to inform them of results as they are processed.

5. PEF's recent request for proposals for the attachment audit vendor requires a minimum overall accuracy level per county of 96%. The RFP states: "Progress Energy will inspect work performed and reserves the right to require the re-inventory, at the contractor's own cost and expense, of all or a portion of the work performed where 96% accuracy is not maintained."

6. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on the 4th day of October, 2010.



Scott Freeburn
Joint Use Manager and Locates
Progress Energy Florida

EXHIBIT C

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

In the Matter of)	WC Docket No. 07-245
)	
Implementation of Section 224 of the Act;)	GN Docket No. 09-51
A National Broadband Plan for Our Future)	
)	
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SECOND DECLARATION OF THOMAS J. KENNEDY, P.E.

1. My name is Thomas J. Kennedy. I am currently employed by Florida Power & Light Company (“FPL”) as Principal Regulatory Affairs Analyst in the Distribution Business Unit. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity at FPL. I am the same Thomas J. Kennedy who submitted declarations in support of FPL’s comments and reply comments in this docket in March and April 2008, and in support of FPL’s comments in this docket in August, 2010. I offer this testimony in support of the reply comments filed by FPL and the other four investor-owned electric utilities in Florida in response to the FNPRM.

2. The percentage of FPL’s poles which require electric supply space make ready is approximately 10%.

3. The statement of work for FPL’s current audit requires a 97% accuracy rate. During FPL’s audit process, the participants (power, telephone, CATV, telecom) verify the survey contractor work, to their satisfaction that the 97% accuracy rate is being achieved.

4. I have read the comments by Bob Matter Consulting filed in this docket in August 2010, and believe that they could be referring to FPL in the following statement:

Case in point, situation in Florida arose recently where in response to the incumbent LEC's rental rate complaint, the utility canceled the agreement and began invoking a process whereby the incumbent LEC was asked to remove over 50,000 contacts. Having millions of dollars invested in its aerial cables but having no access rights granted by law, once the agreement was canceled, the incumbent LEC was left completely at the mercy of the utility.¹

If Bob Matter Consulting is referring to FPL, its comments about these events are factually inaccurate. The ILEC never filed any kind of "rental rate complaint." Though there was a contractual dispute and FPL initially terminated the agreement, FPL subsequently withdrew the termination of the agreement (in writing) so the parties could continue normal business operations while resolving the dispute. FPL never asked the ILEC to remove its attachments. In fact, the joint use agreement (like many joint use agreements) does not provide for removal of attachments upon termination, but instead affects only future attachments. In actuality, the dispute arose in large part because the ILEC was withholding payments from FPL (payments clearly due under the contract) as leverage to negotiate a reduced recovery and reduced rate.

5. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on the 4th day of October, 2010.



Thomas J. Kennedy
Principal Regulatory Affairs Analyst
Florida Power & Light Company

¹ Bob Matter Consulting Comments, pp. 6-7.

EXHIBIT D

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

In the Matter of)	WC Docket No. 07-245
)	
Implementation of Section 224 of the Act; A National Broadband Plan for Our Future)	GN Docket No. 09-51
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SECOND DECLARATION OF ERIC L. O'BRIEN

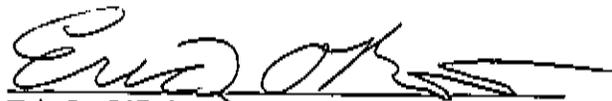
1. My name is Eric L. O'Brien. I am currently employed at Tampa Electric Company ("TECO"), as Administrator, Joint Use Contracts. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity as Joint Use Supervisor for TECO. I am the same Eric O'Brien who submitted comments in this proceeding in August 2010. I offer this testimony in support of the reply comments filed by TECO and the other four investor-owned electric utilities in Florida in response to the FNPRM.
2. The percentage of TECO's poles which require electric supply space make ready is approximately 24%. On a typical pole line, there are roughly 25 poles per linear mile. Though the actual number of poles per mile will vary (sometimes significantly) from place to place, 25 poles/mile is a good system-wide average.
3. TECO encourages attachers to participate in its audit process. Prior to the most recent audit, TECO held a meeting with its attachers to discuss the methodology of the audit, and get the attachers' input. After this meeting and some follow-up information exchange and negotiation, all of TECO's participating attachers except Bright House Networks accepted the audit methodology and signed an audit reimbursement agreement.

4. I have read the comments filed by Bright House in this docket in August 2010, and I believe that TECO is the unnamed “investor-owned utility in Florida” mentioned in Bright House’s comments.¹ Much of what Bright House says in its comments regarding unauthorized attachments is the subject of an unresolved and pending state court dispute between TECO and Bright House. Bright House and TECO are presently awaiting a ruling from the trial court in this state court action. Bright House contends, for example, that it “became clear” during “the course of litigation” that the pole inspection program which discovered Bright House’s unauthorized attachments was “deeply flawed.” The methodology of the inspection, though, was made known to Bright House prior to the inspection; this was not something Bright House learned for the first time during the litigation. As noted above, Bright House was the only attaching entity who voiced any objection to the methodology ultimately employed by TECO in the pole audit.

5. TECO’s indemnity provision in its standard pole attachment agreement applies to matters “in any way arising out of, related to, caused by or incident to this Agreement.”

6. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on the 4th day of October, 2010.



Eric L. O'Brien
Joint Use Supervisor
Tampa Electric Company

¹ Bright House Comments, pp. 28-33.