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March 30, 2011

ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Ex Parte

Re: Notice of Ex Parte Communication: In the Matter of a National Broadband Plan for Our Future, GN Docket No. 09-51; and Pole Attachment Proceeding, WC Docket No. 07-245

Dear Ms. Dortch:

Please accept this letter as notification, pursuant to Section 1.1206 of the Federal Communications Commission's ("FCC") Rules, that on March 29, 2011 Andy Russell of Duke Energy, Thomas Kennedy and Tom Orvald of Florida Power & Light, Allen Bell of Georgia Power Company (an operating company subsidiary of Southern Company), Michael Rosenthal, of SouthernLINC Wireless (an affiliate of Southern Company), Aryeh Fishman of the Edison Electric Institute, and Sean B. Cunningham and Meghan Gruebner of Hunton & Williams LLP met separately with: (1) Bradley Gillen, Legal Advisor to Commissioner Baker; and (2) Zachary Katz, Legal Advisor to Chairman Genachowski, and the following Wireline Competition Bureau staff: Sharon Gillett, Bureau Chief, William Dever, Division Chief of the Competition Policy Division, Marcus Maher, Associate Bureau Chief, and Christi Shewman, Attorney Advisor.

During these meetings the parties expressed concern about reports regarding the contents of the draft pole attachment order on the Commission's tentative agenda for the April 7 open meeting. Those reports discuss, among other aspects of the draft order, a radical rule change that would create a right for ILECs to a regulated pole attachment rate at the level of the historic cable rate. This rule change was not only never clearly proposed in the record of this proceeding, but would also contradict the plain language of the Communications Act, harm broadband competition, and result in a windfall of several hundred million dollars or more for ILECs at the expense of electric consumers. We also discussed the statutory and policy problems associated with wireless pole-top access and access by non-qualified communications workers in the electric power supply. Our discussion included the following points.

The purported proposal to give the “low-end Telecom Rate” to ILECs was never clearly noticed and would, therefore, be procedurally improper.

The trade press and other sources are abuzz with reports that the Commission is considering new rules to create a right to regulated rates for ILEC attachments on electric utility poles and that such rate would be equivalent to the existing cable rate.¹ These reports contradict the Commission’s statement in its Further Notice of Proposed Rulemaking (FNPRM) in this proceeding that it “do[es] not propose specific rules in this Further Notice that would alter the Commission’s current approach to the regulation of pole attachments by incumbent LECs.”² The Commission’s “current approach” to the regulation of ILEC attachments is not to regulate them at all. The Commission’s only publicly noticed proposal to create a regulated rate for ILECs (the 2007 NPRM’s uniform rate proposal) was summarily abandoned by the FNPRM.³

These reports also contradict the Commission’s discussions in the record of what a rate for ILECs *could be if* the Commission had any authority to create such a rate: the Commission has never suggested it would (or could) give a cable-rate equivalent to the ILECs and, in fact, has only discussed various proposals for a rate substantially higher than the cable rate.⁴

Of course it would be procedurally improper for the Commission to issue a final rule on a matter that would have a major impact on the public interest without giving prior public notice of such change. To issue a rule creating a right to regulated rates for ILECs would have no procedural warrant. All the more so, making the rate thus created the same as the cable rate (or the proposed “low-end telecom rate”) has no basis in the record. We urge the Commission to remove from the final rule any proposed rule change that would run afoul of this basic principle of procedural fairness.

Many harmful consequences will result from creating a right to regulated rates for ILEC attachments.

In the unlikely event that such rumors are true, we would be obliged to inform the Commission of the consequences that would likely follow from such a decision. Specifically, if

¹ See, e.g., Lynn Stanton, *FCC Looks to Telcos to Return Pole Attachment Savings to Consumers*, TRDAILY, Mar. 23, 2011, at 5-6; Paul Kirby and Ted Gotsch, *FCC Plans to Consider Roaming Pole Attachment, Booster Items April 7*, TRDAILY, Mar. 17, 2011, at 1-4; see also Rebecca Arbogast and David Kaut, *FCC Eyes Pole-Attachment Order That Could Ease Telco Burdens; Utilities Opposed*, STIFEL NICOLAUS, Mar. 17, 2011.

² See *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future* (hereinafter “FNPRM Proceeding”), Order and Further Notice of Proposed Rulemaking at para. 143, WC Docket No. 07-245, GN Docket 09-51 (2010), as corrected on Aug. 3, 2010 (“FPRM”).

³ FNPRM at para. 118 (“We decline to pursue the approach proposed by the *Pole Attachment Notice*”).

⁴ The FNPRM only seeks comment on two ILEC proposals, each of which would result in a rate substantially higher than the cable rate.

the Commission were to create a right of access for ILEC attachments on electric utility poles in this proceeding, six consequences could result:

1. Until overturned in Federal court (see # 6), the rule would result in a massive transfer of wealth—potentially several hundred million⁵ dollars *per year*—from electricity consumers to ILECs.
2. States that do not wish to see their electricity consumers fleeced for the benefit of ILECs will exercise their reverse preemption right under section 224(c), leaving the FCC with no pole attachment authority at all in those States.
3. The victory for ILECs could prove to be pyrrhic, because ILECs—who admit they have no statutory right of access—may be denied access to electric utility poles for new attachments, rendering the rule pointless. For example, because make-ready timelines are predicated on a right of access, ILECs would not be permitted to avail themselves of make-ready timelines for their attachments on electric poles. If nothing else, the uncertainty for joint use agreements created by such a rate ruling will delay and ultimately increase the attachers' costs for initial builds.
4. Broadband competition will be skewed because, in addition to achieving “parity” with their Cable and CLEC competitors, ILECs will achieve the additional competitive advantage of being able to charge electric utilities a far higher (unregulated) rate for electric attachments on ILEC poles.
5. To the extent the new low-end regulated rate would have any impact on broadband deployment and end-user broadband prices, it would constitute an untargeted, implicit subsidy in direct violation of section 254 of the Communications Act.
6. After lengthy and resource-intensive litigation, the rule would likely be overturned in Federal court because it is premised on the opposite of what the plain language of the statute says.

One consequence will not result: the policy goals of the NBP and FNPRM will not be furthered.

One consequence will *not* result: the stated policy goals of the National Broadband Plan and the FNPRM will not be furthered. The FNPRM's stated reasons for lowering pole attachment rates are to promote broadband deployment and reduce broadband end-user rates. Yet the record provides no evidence that lower rates will achieve these goals except various citations to the National Broadband Plan, which is merely a report to Congress with no evidentiary value

⁵ See Rebecca Arbogast and David Kaut, *FCC Eyes Pole-Attachment Order That Could Ease Telco Burdens; Utilities Opposed*, STIFEL NICOLAUS, Mar. 17, 2011 (stating that “we understand the savings to the incumbents could be in the several hundreds of millions of dollars industry-wide”). Southern Company alone estimates that the annual revenue impact of the rule on its operating companies could total \$50 million.

at all, adopted without even a vote by the Commissioners. Even assuming that lower rates for ILECs *could* advance these goals, whether they *do* advance them or not depends on whether it is in the interest of the ILECs themselves to apply their windfall gain to broadband deployment and lower broadband rates. According to *TRDaily*, an FCC official has warned that ILECs must “demonstrate how any significant potential reduction in pole attachment rates would provide a meaningful benefit to consumers, which could take the form of incremental broadband deployment and/or lower end-user rates.”⁶ However, the Commission has no authority to compel this outcome using its section 224 authority. No significant, verifiable, or enforceable gains for broadband deployment or broadband consumers will result from the ILECs’ coveted *several-hundred-million-dollar windfall*.

Plain language

Supplementing our filed comments and our recent ex parte letter on the Commission’s lack to statutory authority to regulate ILEC attachments on electric poles, we explained to the staff why the terms “telecommunications carrier” and “provider of telecommunications services” are interchangeable for purposes of section 224. We pointed out that USTA’s recent ex parte presentation quotes only a portion of the definition of “telecommunications carrier” in section 224(a)(5). USTA substitutes an ellipsis for the critical phrase “as defined in section 3 of this Act.” Our hand-edited version of USTA’s “ellipsis slide” is attached along with a one-page document showing the full context of the section 224(a)(5) definition of “telecommunications carrier.”⁷

Attachment revenues offset electricity rates paid by electricity consumers.

We explained that revenues received by electric utilities for communications attachments offset the rates paid by electric consumers. Accordingly, “savings” realized by ILECs and their shareholders are gained at the expense of electric utility consumers. The attached excerpt from EEI’s comments provides further explanation of the electric utility ratemaking process.⁸

The legislative history of section 224 confirms that ILECs are not entitled to regulated pole attachment rates.

When originally enacted, the Pole Attachments Act of 1978 included two opposite groups of entities: (1) attachers, a group which was, until 1996, limited to “cable television operators;” and (2) pole owners, i.e., “utilities.”⁹ The term “utility” meant—and still means—both electric

⁶ Lynn Stanton, *FCC Looks to Telcos to Return Pole Attachment Savings to Consumers*, TRDAILY, Mar. 23, 2011, at 5.

⁷ See Attachments 1 and 2.

⁸ See Attachment 3.

⁹ See Cong. Rec. Vol. 23 (1977) at 35006, comments of Rep. Wirth (“H.R. 7442 will resolve a longstanding problem in the relationship of cable television companies on the one hand, and power and telephone utilities on the other.”).

and telephone utilities. The provision was intended to facilitate expansion of an “infant” cable television industry and, in 1996, a growing CLEC industry. There was no intention of allowing ILECs to claim pole attachment rights for themselves.

The Telecommunications Act of 1996 did nothing to bridge the inherent divide between attachers and utilities. The 1996 act expanded section 224 to encompass pole attachments by competitors to ILECs, but it did not grant pole attachment rights to ILECs themselves. For example, a Senate report on the legislation stated that the bill “includes revisions to section 224 of the 1934 Act to allow *competitors to the telephone companies* to obtain access to poles owned by utilities and telephone companies at rates that give the owners of poles a fair return on their investment.”¹⁰ Prior to the passage of the 1996 Act, “the telephone companies,” of course, could only mean the ILECs. Thus, it is clear that Congress intended to provide pole attachment rights to the ILECs’ competitors, not to the ILECs themselves.

We invite each Commissioner to follow Commissioner Powell’s example by respecting the plain language of the statute in this matter.

We noted that Commissioners have previously found that the plain language of section 224 cannot be stretched beyond the breaking point to achieve desired policy goals at the expense of electric utilities. For example, in the Commission’s 1999 Order on Reconsideration, the Commission concluded that “[t]he principle of nondiscrimination established by section 224(f)(1) requires a utility to take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs.”¹¹ The Commission’s conclusion on this point ignored the plain language of section 224(f)(2), which gives electric utilities the right to deny access for reasons of “insufficient capacity.” Commissioner Powell, a lone voice of support for the rule of law on this point, dissented. In *Southern Company v. FCC*,¹² the 11th Circuit overturned the Commission’s conclusion, citing Powell’s objection: “[i]f utilities are required to expand the capacity of their plant at the request of a third party, ‘it is hard to see how you can give section 224(f)(2) any meaning at all’”¹³ We invite each Commissioner to follow Commissioner Powell’s example in this proceeding by acknowledging that section 224(a)(5), if it means anything, excludes ILECs from all rights with respect to the poles of other utilities.

Wireless pole top “proposal” is procedurally improper and ignores serious safety and reliability concerns.

Here again, rumors abound that the Commission is poised to adopt a rule for which no prior notice was given: a mandate for utilities to require pole-top access for wireless attachments.

¹⁰ S. Rpt. 103-367 on S. 1822, Communications Act of 1995, July 24, 1995 (emphasis added).

¹¹ Order on Reconsideration, 14 FCC Rcd 18049, para. 51 (Oct. 20, 1999).

¹² *Southern Company v. FCC*, 293 F.3d 1338 (11th Cir. 2002).

¹³ *Id.* (quoting Order on Reconsideration, 14 FCC Rcd 18099, Powell, Comm’r, concurring in part and dissenting in part).

We explained why utilities should not be required to permit pole-top attachments. In particular, we explained that lightning hazards vary in different geographic areas. To illustrate this point, we showed to the staff the attached lightning density map based on data provided by the U.S. National Lightning Detection Network.¹⁴

Proposal to allow unqualified communications workers to access the electric power supply space renders meaningless the utility's 224(f)(2) rights and violates OSHA requirements.

Section 224(f)(2) gives the utility the right to “deny a cable television system or any telecommunications carrier access to its poles ... on a nondiscriminatory basis ... for reasons of safety” Access by a cable or telecommunications worker to work “among the power lines” certainly constitutes “access” to the utility’s poles. Failure to comply with applicable OSHA safety standards or other utility-specific safety standards is a nondiscriminatory criterion for denying access on the basis of safety. Accordingly, any requirement to allow non-electric-qualified workers in the power space would render meaningless the utility’s right to deny access under section 224(f)(2).

The FNPRM correctly clarifies that “[n]othing we propose ... supplants or modifies regulations by ... OSHA.”¹⁵ OSHA regulations require extensive training for all workers working on or near electric distribution facilities. The Commission should, therefore, reject any proposal to allow workers who are not specifically electric-qualified to work among the power lines. Qualifications and training for personnel working in close proximity to electric facilities are pervasively regulated by OSHA.¹⁶ Such regulations include work “on or directly associated with” electric “distribution lines and equipment.”¹⁷ Electric utilities are required to ensure that all personnel performing such work receive extensive training in safety-related work practices.¹⁸ OSHA interpretive rules have clarified that such regulations apply to workers “who are not electrical workers but whose work activity would require exposure to electrical hazards

¹⁴ See Attachment 4. Lightning data is available at http://gcmd.nasa.gov/records/GCMD_NLDN.html.

¹⁵ FNPRM at para. 24, citing Local Competition Order, 11 FCC Rcd at 16071-72, paras. 1151-52. The FNPRM also notes that its *Reconsideration Order* specifically acknowledged that “utilities’ requirements with respect to qualifications and training of individuals working in proximity to utility facilities flow from such codes and requirements as ... OSHA” Local Competition Reconsideration Order, 14 FCC Rcd at 18079, para. 87.

¹⁶ See generally 29 C.F.R. § 1910.269 (setting forth OSHA standard for “Electric Power Generation, Transmission, and Distribution”).

¹⁷ 29 C.F.R. § 1910.269(a)(1)(i).

¹⁸ 29 C.F.R. § 1910.269(a)(2)(i). For example, qualified workers must have training in the “use of special precautionary techniques, personal protective equipment, insulating and shielding materials, and insulated tools for working on *or near* exposed energized parts of electric equipment.” (Emphasis added).

associated with the ... distribution of electric power.”¹⁹ This restriction clearly encompasses communications workers who are working on or near electric distributions facilities such as poles. The Commission should, therefore, reject any proposal to allow non-electric qualified workers to enter the power space.

Regarding approval and certification of contract workers, the FNPRM proposes a more restrictive standard for electric utility pole owners than for ILEC pole owners. Specifically, the FNPRM would allow electric utilities to pre-approve the contractors the will permit to perform surveys and make-ready.²⁰ By contrast, the FNPRM proposes that, on ILEC poles, attachers be allowed to use any contractor that has the same qualifications as the utility’s own workers.

Instead of requiring electric utilities to liberalize access to the power space on their poles in line with the proposed standard for access to ILEC poles, the Alliance urges the Commission to do the opposite: apply the same, equally restrictive standard that applies to electric poles to ILEC poles that have attached electric power facilities. More specifically, the electric utility that owns the electric facilities, either on the electric utility’s own pole or on the ILEC’s pole, should have the exclusive right to determine whether a contractor is qualified to enter the power space. Electricity is electricity whether the electric facilities are attached to an IOU-owned pole or an ILEC-owned pole. The experience of the Alliance companies confirms that power space access granted by ILEC pole owners to insufficiently qualified workers can, and has, caused serious safety and reliability hazards, including more than one recent case of poles catching on fire.²¹ In light of such experience, the Commission is absolutely correct to conclude that “[c]rucial judgments about safety, capacity, and engineering are made during surveys and make-ready, and we find the utilities’ concerns reasonable.”²² Accordingly, the Commission should: (1) apply the same standard to electric power supply space access on any pole to which electric distribution facilities are attached; and (2) clarify that the electric utility should be the arbiter for access qualifications with respect to all such poles on which its own facilities are attached, regardless of whether the pole is owned by the electric utility itself or an ILEC.

* * *

In light of the foregoing, we urge the Commission not to create a regulated rate for ILEC attachments. Instead, the Commission should reaffirm its finding in the 1998 pole attachment Report and Order: “[b]ecause, for purposes of Section 224, an ILEC is a utility but is not a

¹⁹ OSHA, Standard Interpretation on Training Requirements for Employees Who Perform Non-Electric Work on Electrical Equipment, 1910.269(a)(2)(i); 1910.269(a)(2)(ii); 1910.269(x), (May 17, 2002) *available at* < http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=24120&p_table=INTERPRETATIONS>.

²⁰ FNPRM at para. 62.

²¹ For example, Progress Energy reports two recent cases in which errors made by non-electric-qualified contractors working in the vicinity of electric wires on ILEC-owned poles directly resulted in poles catching on fire.

²² FNPRM at para. 61.

telecommunications carrier ... *the ILEC has no rights under Section 224 with respect to the poles of other utilities.*²³ Also, in the interest of the safety and reliability of the nation's electric power systems, we urge the Commission to reject mandates for pole-top access and access to the electric power supply space by unqualified communications workers.

This notice has been filed in accordance with Section 1.1206(b) of the FCC's Rules, and one electronic copy of this notice is being filed in the above-referenced docket.

Please do not hesitate to contact the undersigned if you have any questions.

Sincerely,

/s/ Sean B. Cunningham
Sean B. Cunningham

Counsel for the Alliance for Fair Pole Attachment Rules

Attachments

cc: William Dever
Bradley Gillen
Sharon Gillett
Zachary Katz
Marcus Maher
Christi Shewman

²³ *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order at para. 5, FCC 98-20 (1998) ("1998 Report and Order") (emphasis added).

ATTACHMENT 1

USTA's Selected Quotations from :

Section 224

(a)(4) The term “pole attachment” means any attachment by a cable television system or **provider of telecommunications service**...

(a)(5) For purposes of this section, the term “**telecommunications carrier**”...does not include any incumbent local exchange carrier...

...?

ATTACHMENT 2

**For Purposes of Section 224,
“Telecommunications Carrier” = “Provider of Telecommunications Services”**

“For purposes of this section, the term ‘telecommunications carrier’ (as defined in section 3 of this Act) does not include any incumbent local exchange carrier”

— Communications Act, § 224(a)(5)

“TELECOMMUNICATIONS CARRIER.—The term ‘telecommunications carrier’ **means any provider of telecommunications services, except** that such term does not include **aggregators** of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.”

— Communications Act, § 3(44)

I.e.,

“For purposes of this section, the term ‘telecommunications carrier’ [“mean[ing] any provider of telecommunications services, except ... aggregators] does not include any incumbent local exchange carrier”

— Communications Act, § 224(a)(5) with § 3(44) text

•
•

An ILEC is not a “provider of telecommunications services” for purposes of section 224 any more than it is a “telecommunications carrier.” As the Commission concluded:

“Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier ... **the ILEC has no rights under Section 224 with respect to the poles of other utilities.**”

— Pole Attachment Report and Order (1998)¹

¹ In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Report and Order at para. 5, FCC 98-20 (1998) (“1998 Report and Order”) (emphasis added).

ATTACHMENT 3

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)	
)	WC Docket No. 07-245
)	
Implementation of Section 224 of the Act;)	RM - 11293
Amendment of the Commission's Rules and)	
Policies Governing Pole Attachments)	RM - 11303
)	

REPLY COMMENTS OF THE EDISON ELECTRIC INSTITUTE
AND THE UTILITIES TELECOM COUNCIL

EDISON ELECTRIC INSTITUTE

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April 22, 2008

only three attaching parties on each pole that hosts third-party attachments. The LPSC staff is proposing to continue to use its pole attachment formula adopted in 1980, which recognizes that the pole costs associated with the communications worker safety space should be shared by all parties.⁶¹

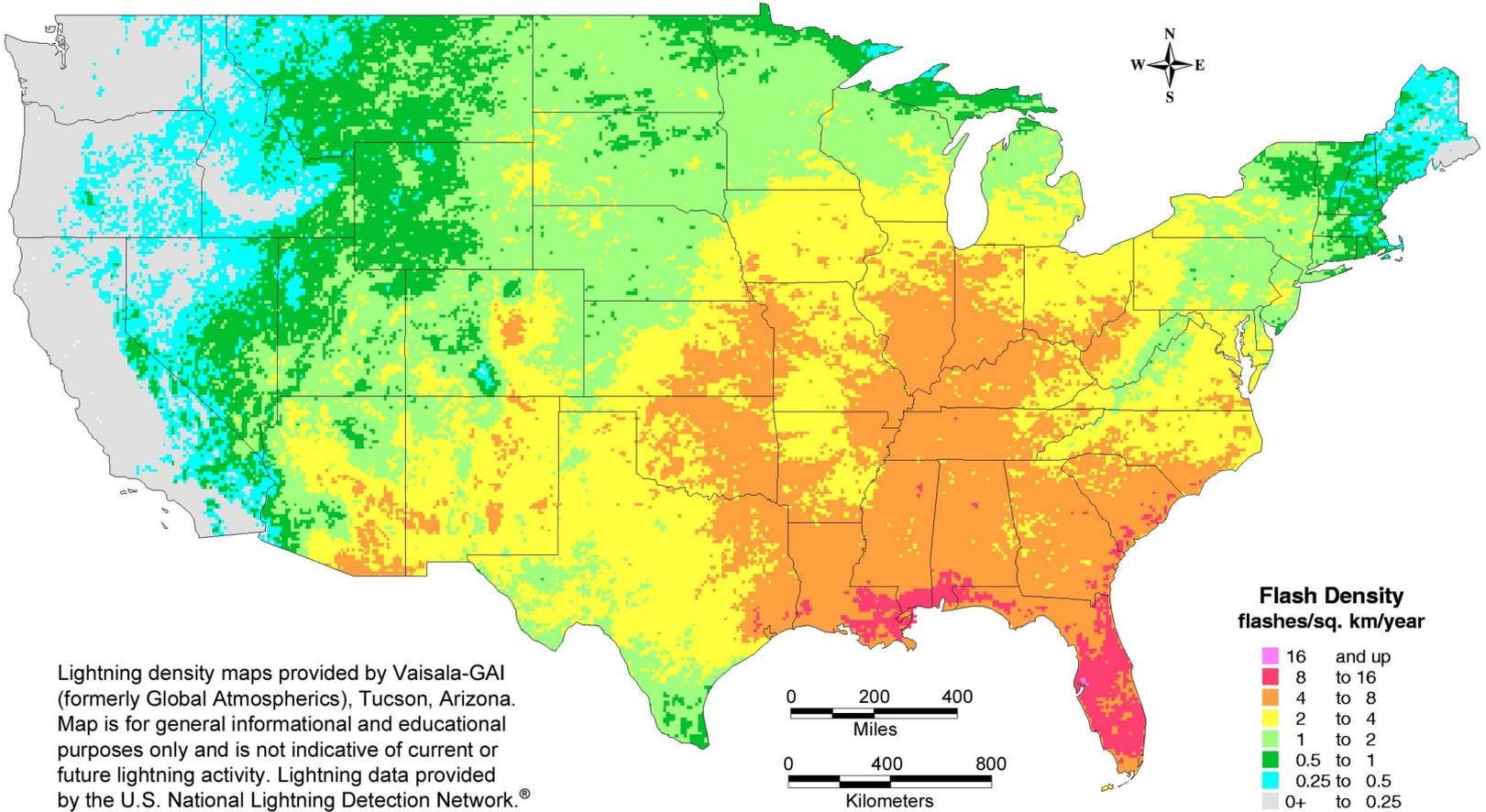
4. Pole attachment revenues generally offset electric rates and are not a separate profit center for the benefit of shareholders.

Comcast mistakenly argues that the Cable Rate does not subsidize cable attachers at the expense of electric consumers because pole revenues benefit utility shareholders, not customers.⁶² This claim shows a fundamental misunderstanding of utility ratemaking. Providing pole attachment access is not a separate profit center for utilities. Pole attachment revenues simply offset rates paid by consumers. Retail electricity rates for the use of distribution facilities (including poles, ducts, conduits, and rights of way) are generally determined on the basis of capital costs, operation and maintenance costs, and a return on equity. Retail rates are heavily regulated by state public utility commissions. Even in states that have adopted rate caps, rate freezes, or retail competition, a utility's costs and revenues are all taken into account in subsequent rate proceedings that affect how future rates are determined. Over time, therefore, pole attachment rates that do not provide for a full and fair cost allocation directly affect the cost basis underlying regulated rates. Accordingly, in determining the extent to which the Cable Rate provides a subsidy at the expense of electric consumers, EEI and UTC urge the Commission to acknowledge that the Cable Rate subsidy is borne entirely by electric ratepayers.

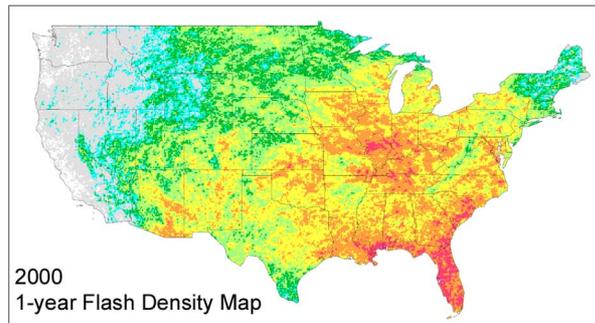
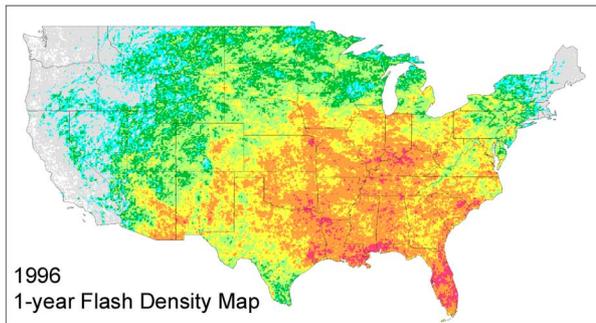
⁶¹ See Louisiana Proposal.

⁶² Comcast Comments at 16.

ATTACHMENT 4



Lightning density maps provided by Vaisala-GAI (formerly Global Atmospheric), Tucson, Arizona. Map is for general informational and educational purposes only and is not indicative of current or future lightning activity. Lightning data provided by the U.S. National Lightning Detection Network.®



The 5-year Flash Density Map shows the average amount of lightning recorded in 1996–2000. The average amount of lightning that occurs in any given area varies significantly from year to year, as shown in the annual maps for 1996 and 2000.