

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

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

**THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION'S  
OPPOSITION TO PETITION FOR RECONSIDERATION  
OF THE COALITION OF CONCERNED UTILITIES**

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## **EXECUTIVE SUMMARY**

The National Broadband Plan recognized that there is a clear relationship between broadband deployment and access to poles. Simply put, the more expensive and time consuming it is to place facilities on poles, the less likely it is that companies will deploy or upgrade broadband facilities. Consequently, to promote broadband deployment, the National Broadband Plan recommended that the Commission establish attachment rates that are as low and as uniform as possible and that it establish new rules to govern the make-ready process to facilitate access to poles.

In the *2011 Pole Attachment Order*, the Commission endorsed the National Broadband Plan's analysis and took a number of steps to implement its recommendations. With respect to access to poles, the Commission adopted new requirements, including mandatory time frames to govern the make-ready process, that carefully balance the need for all parties to follow safe construction techniques with the policy goal of reducing barriers to broadband deployment.

The Coalition of Concerned Utilities, a group of large electric utilities, has sought reconsideration of the Commission's new make-ready rules. The utilities argue that the make-ready deadlines are unworkable and they request that the Commission adopt a variety of significant changes to those rules. The utilities also request that the Commission authorize utilities to impose increased penalties for alleged safety violations and that it adopt a variety of other measures designed to give utilities greater ability to deny, delay, or raise the cost of access by attaching parties.

The utilities' petition should be denied. The utilities participated fully in the rulemaking process and the Commission carefully considered their arguments in adopting the new rules. The petition rehashes all these arguments, but adds nothing that would compel a different result. On all of these issues, as NCTA explains in this opposition, the Commission got it right in the

*2011 Pole Attachment Order.* The new rules established by the Commission appropriately balance the safety and operational concerns raised by the utilities with the policy objective of trying to promote broadband by facilitating access to poles. Accordingly, the Commission should not make any of the changes requested by the utilities and should deny their petition for reconsideration.

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Pursuant to sections 1.429(f) and 1.4(b)(1) of the Commission's rules, the National Cable & Telecommunications Association (NCTA)<sup>1</sup> submits its opposition to the petition for reconsideration filed by the Coalition of Concerned Utilities on June 8, 2011, in the above-captioned matter.<sup>2</sup>

**INTRODUCTION**

In its recent *2011 Pole Attachment Order*, the Commission took action to accelerate the deployment of broadband consistent with the recommendations set out in the National Broadband Plan.<sup>3</sup> Specifically, the Commission adopted rules and policies to reduce the expense and time associated with attaching facilities to poles. Not surprisingly, utility company pole

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<sup>1</sup> NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service after investing over \$170 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

<sup>2</sup> Petition for Reconsideration of the Coalition of Concerned Utilities, WC Docket No. 07-245, GN Docket No. 09-51 (filed June 8, 2011) (Utilities Petition).

<sup>3</sup> *Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5241-45, ¶¶ 1-8 (2011) (*2011 Pole Attachment Order*); *Connecting America: The National Broadband Plan*, GN Docket No. 09-51, at 109-110, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296935A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf) (Omnibus Broadband Initiative, Mar. 16, 2010) (National Broadband Plan).

owners are opposed to rule changes that reduce the rates they can charge and require them to improve the process by which attachers obtain access to poles. The Coalition of Concerned Utilities, a group of large electric utilities, has sought reconsideration of the Commission's new rules. The utilities challenge the new deadlines the Commission has adopted for completion of the "make-ready" process, which prepares the poles for access by attachers, asserting that the deadlines are unworkable and seeking significant changes to those rules.<sup>4</sup> The utilities also request that the Commission authorize utilities to impose increased penalties for alleged safety violations and that it adopt a variety of other measures designed to give utilities greater ability to deny, delay, or raise the cost of access by attaching parties.<sup>5</sup>

As discussed more fully below, and just as in the rulemaking proceeding leading to the adoption of the rules, the utilities offer no persuasive arguments to support their request for reconsidering the rules. The Commission should deny the utilities' requested changes, making clear that utilities have the obligation to complete surveys, deliver estimates, and complete make-ready work in a timely manner. The new rules will accelerate the availability of broadband throughout the nation, and the utilities should not be allowed to thwart that goal by undoing the pole attachment access improvements that the Commission has adopted.

#### **I. THE COMMISSION SHOULD NOT INCREASE PENALTIES**

The Commission's new approach to unauthorized attachments was adopted in direct response to utility concerns that some parties were building without authorization. The Commission's approach is measured: it refrains from adopting a rule, relaxes some earlier guidelines on the amount of penalties, and adopts the expectation that parties will negotiate contracts that include the necessary related provisions for advance notice to attachers, a fair

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<sup>4</sup> Utilities Petition at 3-15.

<sup>5</sup> *Id.* at 15-23.

opportunity to remedy violations, and a reasonable process for resolving factual disputes that may arise.<sup>6</sup> In their petition for reconsideration the utilities ask for a new rule permitting utilities to impose penalties for safety violations, regardless of contract terms, and for a rule presuming that responsibilities for safety violations should be assigned to attaching entities.<sup>7</sup> Both requests should be rejected.

The record in this proceeding does not support the requests. Rather, utilities themselves, such as Progress Energy, have admitted that “[m]ost licensees either construct their facilities in compliance with the [National Electrical Safety Code (NESC)] and Progress Energy specifications in the first instance or timely correct any violations found during post-attachment inspection.”<sup>8</sup> As NCTA previously demonstrated, claims by utilities regarding the scope of unauthorized attachments are contradicted by evidence submitted by other commenters at earlier stages of this proceeding, as well as by statements made by these same utilities to state regulators.<sup>9</sup> Florida Power and Light, for example, told the Florida Public Service Commission that unauthorized attachments were “almost non-existent.”<sup>10</sup> Progress Energy told the same commission that, after an extensive survey of its plant, it found “no apparent NESC violations involving third party attachments.”<sup>11</sup>

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<sup>6</sup> *2011 Pole Attachment Order*, 26 FCC Rcd at 5290-92, ¶¶ 113-118.

<sup>7</sup> Utilities Petition at 15-17.

<sup>8</sup> See Letter from Scott Freeburn, Manager, Joint Use, Progress Energy, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-245, at 2 (Mar. 7, 2011).

<sup>9</sup> Comments of the National Cable & Telecommunications Association, WC Docket No. 07-245, GN Docket No. 09-51, at 44-45 (Aug. 16, 2010) (NCTA Comments).

<sup>10</sup> *Id.* at 45 (citing Letter from John T. Butler, Senior Attorney, Florida Power and Light Company, to Blanca S. Bayó, Director, Division of the Commission Clerk and Administrative Services, Florida Public Service Commission, Docket No. 060198-E1, <http://www.psc.state.fl.us/library/filings/07/01933-07/01933-07.pdf>, at Storm Prep Initiatives 49 (Mar. 1, 2007)).

<sup>11</sup> Progress Energy Annual Reliability Report to FPSC, at 38, (Mar. 1, 2007) (report available at <http://www.psc.state.fl.us/library/filings/07/02092-07/02092-07.pdf> at page 1172 of 3458).

The utilities' proposed presumption that an "unauthorized" party is always the cause of safety violations is unsound. Since the pole owner always considers itself to be authorized, it would never take responsibility for violations it creates – and the record evidence is full of cases where the utility was at fault.<sup>12</sup> It is just as likely that non-compliance arises from the addition of electric facilities after cable has attached, rather than from the cable operator's attachment.<sup>13</sup> If adopted, the utilities' approach would also turn "safety" issues into a profit center or fodder for dispute and delay in broadband deployment.<sup>14</sup>

A far better approach is to continue to rely on operational processes and attachment agreements to address concerns over safety violations. Contrary to the utilities' sweeping attack on the qualifications and practices of communications companies,<sup>15</sup> cable operators have extensive training, decades of experience, and are responsible for constructing and maintaining plant passing well over 110 million homes that provides reliable, high quality video, broadband and voice services to their customers in an extremely competitive marketplace. Thus, they are

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<sup>12</sup> See Comments of Charter Communications, Inc., WC Docket No. 07-245, GN Docket No. 0-51, at 27-28 (Aug. 16, 2010) (Charter Comments); NCTA Comments at 42-47; *see also* Reply Comments of Comcast Corp., WC Docket No. 07-245, Ex. 3, Report of Michael T. Harrelson at 11-14 (Apr. 22, 2008) (showing that Onco's claim of massive violations were later demonstrated to be nearly entirely the fault of the utility, not the attaching party); Reply Comments of Time Warner Cable Inc., WC Docket No. 07-245, RMs 11293 and 11303, Ex. 3, Reply Decl. of Michael T. Harrelson at 6-27 (Apr. 22, 2008) (Time Warner Cable 2008 Reply Comments) (demonstrating a similar situation with Entergy).

<sup>13</sup> For example, a utility can create a violation when it drops in a transformer or adds secondary power lines too close to an existing communications conductor, adds electric service risers without sufficient riser guard covers, or installs a street light without proper bonding, all of which are well known occurrences in the field. See Comments of the Virginia Cable Telecommunications Association, Case No. PUE-2011-00033, App. B, Aff. of Michael T. Harrelson at 13-18, [http://docket.scc.state.va.us/CyberDocs/Libraries/Default\\_Library/Common/frameviewdsp.asp?doc=112827&lib=CASEWEBP%5FLIB&mimetype=application%2Fpdf&rendition=ative](http://docket.scc.state.va.us/CyberDocs/Libraries/Default_Library/Common/frameviewdsp.asp?doc=112827&lib=CASEWEBP%5FLIB&mimetype=application%2Fpdf&rendition=ative) (June 22, 2011), (VCTA Harrelson Affidavit). Mr. Harrelson worked as an electrical engineer with Georgia Power for 28 years. The utilities also fail to offer a sound basis for presuming that safety violations are the responsibility of an attaching party that cannot locate the original license for attachment. Particularly for cable television, licenses were issued as much as 30 to 40 years ago, and it is typically the case that neither party's permit records are complete and the billing records are notoriously inaccurate. NCTA Comments at 46 and n.142 (citing Time Warner Cable 2008 Reply Comments at 49).

<sup>14</sup> See Charter Comments at 28-32 (recounting major delays and disputes arising in Oregon over assessments of penalties).

<sup>15</sup> Utilities Petition at 16 and n.27.

thoroughly invested in ensuring that pole attachments are compliant with the NESC and that pole plant is structurally sound.<sup>16</sup> At the operational level, if a utility becomes aware of actual non-compliance caused by an attacher, it can bring the issue to the attention of local system personnel in the ordinary course for prompt correction. Indeed, this is what routinely occurs in the field today. If more is required, it should be negotiated at the contractual level, where parties can address all related issues governing notice, audits, costs, opportunities to cure, and a reasonable process for resolving factual disputes. The Commission's preference for contract negotiations, subject to appeal, is especially appropriate here.

## **II. THE COMMISSION SHOULD RETAIN ITS MAKE-READY TIMELINES**

The Commission adopted make-ready timelines in response to record evidence of “excessive delays” and unpredictability that were frustrating attachers’ needs for “concrete business plans” and a “higher success rate their investors can depend on.”<sup>17</sup> The utilities request that the make-ready timelines be constrained significantly and their implementation postponed. These requests should be denied.

First, the utilities ask the Commission to lower the number of pole applications that are subject to the timelines.<sup>18</sup> The thresholds set forth in the new rules are scaled to be proportionate to the size of the pole owning utility, and they are based on state thresholds that the utilities cite favorably in their petition.<sup>19</sup> Some comparable state timetables have no limit on the number of

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<sup>16</sup> See VCTA Harrelson Affidavit at 6 ¶10 (“Every cable operator is vitally interested in safe and reliable pole infrastructure. In my experience working with electric utilities and cable companies for over 43 years, the safety of pole plant for the cable companies’ own employees and contractors, as well as for other pole workers and the public, is an extremely important priority.”).

<sup>17</sup> *2011 Pole Attachment Order*, 26 FCC Rcd at 5250-51, 5257, ¶¶ 21, 31.

<sup>18</sup> Utilities Petition at 6-7.

<sup>19</sup> Compare 47 C.F.R. § 1.1420(g) (setting 300 poles or 0.5 percent of the utility’s poles in a state as the cutoff between shorter and longer timelines) with Utilities Petition at 7 n.12 (citing the same pole number cutoffs used in Utah).

poles that are subject to the timelines.<sup>20</sup> There are multiple reasonable approaches a regulatory body could take, and the Commission has chosen one. There may well be circumstances where other timelines should apply – very short timelines for very small jobs or longer timelines for very large jobs.<sup>21</sup> However, the utilities have not provided any sufficient basis for altering the timelines that were adopted.<sup>22</sup> Given the importance of broadband deployment, the Commission acted properly in establishing clear expectations for the parties, and inviting them to negotiate should such expectations prove to be unworkable.

Second, the utilities ask that the timelines apply based on the aggregate number of poles submitted in all applications received by the utilities each month.<sup>23</sup> Under this proposal, any one applicant could effectively exclude other attaching entities by submitting applications for a large number of poles. This would invite gamesmanship, such as one provider trying to delay another from reaching a desirable institutional customer. This is not a sound competitive policy.

Third, the utilities ask for timelines to be phased in, rather than becoming effective as scheduled.<sup>24</sup> However, the timelines as adopted already extend for nearly five months and cover the ordinary steps of the make-ready process: completing applications, surveys, and specifying

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<sup>20</sup> *DPUC Review of the State's Public Service Company Utility Pole Make-Ready Procedures – Phase I*, Docket No. 07-02-13, 2008 Conn. PUC LEXIS 90 (Ct. DPUC, Apr. 30, 2008); *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Case 03-M-0432, Order Adopting Policy Statement on Pole Attachments, <http://documents.dps.state.ny.us/public/Common/ViewDoc.aspx?DocRefId=%7BC0C4902C-7B96-4E20-936B-2174CE0621A7%7D> (NY PSC, Aug. 6, 2004).

<sup>21</sup> If the Commission were to make any changes in the timelines, NCTA believes that it may be appropriate to adopt faster timelines for very small applications, which can be important in short service extensions, such as to broadband anchor institutions. For example, the Verizon New England standard pole agreement treats any work involving six or fewer adjacent spans as routine maintenance. Verizon New England Inc. Pole Attachment Agreement, §7.2.1, available at [http://www22.verizon.com/wholesale/attachments/pcl/party\\_pole\\_agreement2.doc](http://www22.verizon.com/wholesale/attachments/pcl/party_pole_agreement2.doc).

<sup>22</sup> The Detroit Edison stimulus funding example cited by the utilities indicates that the volume at the level feared by the utilities is not typical—and yet in that case Detroit Edison was able to handle the unusual volume by locating and employing skilled contractors. Utilities Petition at 6 n.11.

<sup>23</sup> *Id.* at 6.

<sup>24</sup> *Id.* at 10-11.

any capacity, safety, reliability or engineering concerns; estimating and receiving payment for make-ready charges; and timely completing make-ready work, such as rearranging communications lines or raising electric lines.<sup>25</sup> The utilities do not identify any aspect of the make-ready process that they cannot do within the adopted timelines.<sup>26</sup> In any event, the Commission’s rules provide for a very practical result if utilities cannot make a deadline: the opportunity for qualified contractors to step in and do the work. Broadband deployment has been identified as an urgent priority at both the federal and state levels, and pole make-ready has been specifically identified as a critical barrier to that deployment.<sup>27</sup> The utilities should not be permitted to delay broadband deployment even if it is not *their* priority.

Finally, the utilities offer multiple scenarios for *potential* delay, but none of them justify “stopping the clock.” For example, the utilities wish to suspend timelines when there are “non-section 224” attachers, such as municipalities, fire departments and school districts, on the pole.<sup>28</sup> For decades electric utilities have made arrangements with these entities when they needed to replace poles and move lines for their own projects, such as increasing pole height to handle greater power loads, or relocating entire pole lines for road widening. Electric utilities have successfully managed pole lines even though they share poles with cooperatively owned telephone companies, municipalities, and others not directly regulated by the Commission. The utilities offer no evidence to explain why they cannot similarly coordinate with non-regulated

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<sup>25</sup> 47 C.F.R. § 1.1420(g).

<sup>26</sup> While the utilities place great emphasis on their need to determine whether to use existing crews or outside contractors, none of the utilities suggest that they do not utilize outside contractors or that such contractors are unable to safely perform survey or make-ready work. Utilities Petition at 10.

<sup>27</sup> See e.g., National Broadband Plan at 109-112; Vermont S. 78, Act 53c, <http://www.leg.state.vt.us/docs/2012/Acts/ACT053.pdf> (2011); Hawaii HB 1342, [http://www.capitol.hawaii.gov/session2011/bills/HB1342\\_SD2\\_.pdf](http://www.capitol.hawaii.gov/session2011/bills/HB1342_SD2_.pdf) (2011).

<sup>28</sup> Utilities Petition at 7-8.

entities in the ordinary course when attaching parties request access to poles.<sup>29</sup> As another example, the utilities ask to stop the clock if they find a safety violation, so that they can first resolve disputes over causation and cost responsibility.<sup>30</sup> The NESC provides that if a violation “could reasonably be expected to endanger life or property,” it should be “promptly repaired.”<sup>31</sup> However, most cases of pre-existing non-compliance will be technical – the NESC requires them to be recorded until correct, but the work can proceed. Alternatively, utilities are capable of fixing the problem and allocating cost responsibility later. There is no basis for automatically stopping the clock under these circumstances.<sup>32</sup>

Rather than presenting hypothetical problems and declaring everything to be impossible, the utilities should give the new rules a chance to operate. The utilities historically have expressed hyperbolic opposition to the Commission’s efforts to implement pole attachment

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<sup>29</sup> The utilities also warn that third party attachers might be slow to cooperate in the make-ready process for another attacher. *Id.* at 7 n. 13. However, pole attachment agreements routinely require attachers to move on request, and the utilities present no evidence to demonstrate that other attachers, rather than the pole owners, cause delays in the make-ready process.

<sup>30</sup> *Id.* at 14.

<sup>31</sup> NESC Rule 214 sets forth the circumstances in which non-compliance (described as “defects” in the rule) must be “promptly repaired, disconnected, or isolated” as well as the circumstances in which non-compliance may be recorded for later correction. Only “defects that could reasonably be expected to endanger life or property” must be promptly repaired. NESC Rule 214(5). Other defects can exist provided that the minimum approach distances set forth in NESC Table 431-1 are still met. Work can proceed where such defects exist as long as the work would not worsen the defect. NESC Interpretation IR548 (Mar. 26, 2009) (“If adding a new item, replacing an existing item, or rearranging existing items would not, in itself, either (1) create a structural, clearance, or grounding non-conformance; or (2) worsen an existing nonconformance, then the addition, replacement or alteration can be performed, but the other corrective work must be scheduled and accomplished under Rules 214A4 and A5.”).

<sup>32</sup> The utilities also wish to suspend timelines for getting permits, parking trucks, hiring police escorts, or installing guys. Utilities Petition at 13. Such routine matters have been included in existing processes for years. The utilities also ask to stop the clock if, during the pre-construction survey, the utility determines that make-ready work will be necessary. *Id.* at 15. The point of every pre-construction survey is to identify where make-ready work will be required. If an existing attacher needs to be moved to accommodate an applicant’s proposed attachment, or electric lines need to be raised, then the pole owner will so designate and, under the new rules, the applicant has 14 days to negotiate less costly solutions, accept and pay the charges. If an applicant has to reroute and apply for other poles, the rules already provide that the clock will restart. Therefore, the rules already address the utilities concerns on this point.

policies that reflect the benefits of technological innovations.<sup>33</sup> The utilities' current petition clearly illustrates that they do not regard pole attachment applications as worthy of receiving prompt action. The Commission's new rules confirm that utilities have the obligation to complete surveys, deliver estimates, and complete make-ready work, such as rearranging communications lines or raising electric lines, in a timely manner, and the Commission should reject the utilities' request to reconsider these rules. As is the case today, when circumstances arise warranting them, exceptions can be negotiated and disputes can be resolved.<sup>34</sup> The Commission should deny the requested changes, affirm the rules, and allow them to take effect so that parties can gain experience under the new regime. If there are significant problems that arise in the field, as opposed to theoretical potential issues raised in pleadings, the Commission can revisit portions of the rules on a case-by-case basis or in a later rulemaking as needed.

### **III. THE COMMISSION SHOULD RETAIN AUTHORITY OVER DISCRIMINATION IN POLE REPLACEMENTS**

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The utilities ask the Commission to declare that pole replacements are beyond Commission jurisdiction, and therefore no rules or timelines may apply where a pole replacement is required.<sup>35</sup> The utilities assert that pole replacements constitute expansions of capacity, and the Commission cannot mandate the construction of new capacity.<sup>36</sup> While the utilities may be correct that there are circumstances where the Commission is precluded from

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<sup>33</sup> For example, as the Commission sought to facilitate the upgrade of existing cable plant with fiber optic cable without long make-ready delays, some of these same petitioners raised supposed "safety" concerns and warned of "poles being damaged, or even snapping in two at the point of attachment" because of fiber additions. *See, e.g.*, Comments of Ohio Edison Company [now known as FirstEnergy Corp.], CC Docket No. 97-151, at 24-25 (Sept. 26, 1997); Comments of The Electric Utilities Coalition, CC Docket No. 97-151, at 8 (Sept. 26, 1997). Contrary to the utilities' claims, fiber overloading did not bring down the electric grid or lead to widespread safety issues. Instead, it enabled the successful deployment of hybrid fiber-coaxial networks and the delivery of broadband, high speed Internet, and competitive voice services.

<sup>34</sup> VCTA Harrelson Affidavit at ¶¶ 31, 55 (citing examples of utilities and cable operators working together to correct safety issues, and stressing the importance of cooperation among all parties).

<sup>35</sup> Utilities Petition at 9.

<sup>36</sup> *Id.* (citing *Southern Co. v. FCC*, 202 F.3d 1338, 1347 (11<sup>th</sup> Cir. 2002)).

“mandating the construction of capacity,” this in no way precludes the Commission from ensuring that the utilities do not wrongfully use the pole replacement process to deny attachers access to poles. Under section 224(f)(2) of the Communications Act, the Commission must ensure that utilities’ claims of insufficient capacity on existing poles are legitimate, and that utilities do not discriminate in denying access where such insufficient capacity is found to exist.<sup>37</sup> As a result, the Commission should not accept the utilities’ invitation to declare itself without authority to address pole replacements.<sup>38</sup>

#### **IV. THE COMMISSION SHOULD REJECT THE UTILITIES’ OTHER PROPOSALS**

The utilities object to the Commission’s improvement of the pole attachment application process by eliminating duplicative permitting processes and charges for jointly owned poles.<sup>39</sup> The utilities argue that there is no way for one joint owner to make responsible decisions concerning the make-ready work necessary to accommodate an attachment on a jointly-owned pole.<sup>40</sup> Yet this is precisely the process that has been in place for years.<sup>41</sup> In Connecticut, AT&T managed pole attachments for several of the state’s electric utilities until last year.<sup>42</sup> When AT&T turned management back to the utilities, the state commission called for streamlined

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<sup>37</sup> 47 U.S.C. § 224(f)(2) (stating that an electric utility may deny a cable operator access to poles where there is insufficient capacity, but only on a non-discriminatory basis).

<sup>38</sup> If, on the other hand, the Commission believes that it is constrained in addressing pole replacements, then it is even more important that it retain its current rules on boxing and extension arms—two techniques that help alleviate the need to replace poles.

<sup>39</sup> Utilities Petition at 22; *2011 Pole Attachment Order*, 26 FCC Rcd at 5278-79, ¶ 84 (finding “utility procedures requiring attachers to undergo a duplicative permitting or payment process to be unjust and unreasonable”).

<sup>40</sup> Utilities Petition at 22 and n.43.

<sup>41</sup> Utilities and local exchange carrier (LEC) pole owners have a wide variety of ownership and management arrangements. Sometimes the LEC is administering the communications space on the poles. Sometimes the utility administers the pole with the LECs as a licensee. Sometimes poles are jointly owned but the parties take lead responsibility for different geographic areas.

<sup>42</sup> *See Application of the Connecticut Light & Power Company to Amend Its Rate Schedules*, Docket No. 09-12-05, Decision, at 125-26 (Ct. DPUC, June 30, 2010) (“AT&T has historically acted as CL&P’s agent (as well as on its own behalf) in administering and processing third party pole attachments, including administration of pole attachment agreements, which contain certain terms and conditions that third party attachers agree upon when they attach their facilities to one or more poles.”).

administration to reduce redundancies in process and cost.<sup>43</sup> The Commission's finding with respect to duplicate processes for jointly-owned poles is consistent with best practices in the industry and the Connecticut commission's findings.

The utilities also ask for several clarifications on pole administration matters without offering any evidence in support of its requests, likely because these issues are adequately addressed today either in existing pole attachment agreements or general practice. For example, the utilities ask for mandatory participation by attachers in a utility's electronic notification system, including the National Joint Use Notification System (NJUNS).<sup>44</sup> The utilities do not provide any evidence that attaching entities are unwilling to participate in such systems, or that notices could not be disseminated by e-mail. The utilities also ask the Commission to clarify that utilities should be paid for transferring facilities and shielded from liability in the event they damage facilities that are transferred.<sup>45</sup> Today's pole attachment agreements adequately address these issues with required non-recurring charges for work performed by the utilities and broad indemnification provisions.<sup>46</sup>

## **V. THE COMMISSION SHOULD RETAIN ITS REFUND RULE**

In the *2011 Pole Attachment Order* the Commission revised section 1.1410(a)(3) of its rules regarding refunds or payments of rates that are determined to be unjust or unreasonable to make monetary relief available consistent with governing statutes of limitation, rather than

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<sup>43</sup> *Id.* at 140, 192 (“CL&P shall initiate discussions with AT&T to resolve the issue of double billing for pole attachment administration of jointly-owned poles.”).

<sup>44</sup> Utilities Petition at 19.

<sup>45</sup> *Id.* at 20.

<sup>46</sup> Such indemnity terms often contain specific allocations of responsibility. For example, they may hold a utility responsible for gross negligence or willful misconduct when the utility is moving third party equipment. The utilities' request to override all such clauses by rule should not be adopted.

limiting such relief as starting on the date that the complaint was filed.<sup>47</sup> The utilities claim that this extension of relief is unfair because the parties never had an expectation of pre-complaint relief prior to the *2011 Pole Attachment Order*.<sup>48</sup> In fact, as the Commission explained in the *2010 Pole Attachment FNPRM*, such relief has never been barred: the Commission previously has awarded pre-complaint refunds for disputes over pole access and attachment rates.<sup>49</sup> Prior to the *2011 Pole Attachment Order*, the Commission's rules did not preclude relief predating a complaint, but instead provided that remedies would "normally" be measured from the date of the complaint.<sup>50</sup> Now the rules provide that remedies will "normally" be measured using applicable statutes of limitations.<sup>51</sup>

### **CONCLUSION**

The utilities have not demonstrated that the portions of the Commission's order that they challenge should be reconsidered. They have not shown that the Commission's decisions were premised on a material error or omission. For the most part, all that the utilities have done is to rehash old arguments and repeat warnings about safety that have been shown to be specious. The little new information they cite does not reflect changes in circumstance or facts unknown to the petitioners, and does not warrant Commission review. Instead of challenging the

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<sup>47</sup> *2011 Pole Attachment Order*, 26 FCC Rcd at 5289, ¶ 110.

<sup>48</sup> Utilities Petition at 24.

<sup>49</sup> *Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11901-02, ¶88 and n.231 (2010) (*2010 Pole Attachment FNPRM*) (citing *Knology, Inc. v. Georgia Power Co.*, File No. PA 01-006, Memorandum Opinion and Order, 18 FCC Rcd 24615, 24639, ¶ 57 (2003), and *Cable Texas, Inc. v. Entergy Serv., Inc.*, File No. PA 97-006, Order, 14 FCC Rcd 6647, 6653-54, ¶¶ 18-19 (Cable Serv. Bur. 1999)); see also *TeleCable of Piedmont, Inc. v. Duke Power Company*, CC Docket No. 95-93, PAs 90-0003, 91-0001, 91-0002, Hearing Designation Order, 10 FCC Rcd 10898, 10899, ¶ 9 (Comm. Car. Bur. 1995).

<sup>50</sup> 47 C.F.R. § 1.410(c) (2009).

<sup>51</sup> The utilities also claim that the revised rule will discourage attachers from attempting to resolve disputes in a timely manner. Utilities Petition at 23. The Commission has already considered and rejected this contention. *2011 Pole Attachment Order*, 26 FCC Rcd at 5289, ¶ 111 ("We find the arguments offered by these opponents to be unpersuasive.").

Commission's order, the utilities should focus on better accommodating facilities deployment in today's broadband world. The Commission should deny the utilities' petition.

Respectfully submitted,

**/s/ Rick Chessen**

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