

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

| | | |
|--|---|---------------------|
| In the Matter of |) | |
| |) | |
| Implementation of Section 224 of the Act |) | WT Docket No. 10-4 |
| |) | |
| A National Broadband Plan for Our Future |) | GN Docket No. 09-51 |
| |) | |
| |) | |
| |) | |

**OPPOSITION OF THE DAS FORUM (A MEMBERSHIP SECTION OF PCIA—THE
WIRELESS INFRASTRUCTURE ASSOCIATION) TO THE PETITION FOR
RECONSIDERATION OF THE COALITION OF CONCERNED UTILITIES**

I. INTRODUCTION AND SUMMARY

The DAS Forum, a membership section of PCIA – The Wireless Infrastructure Association (“DAS Forum”)¹ respectfully submits the following opposition in response to the Petition for Reconsideration (“Petition”) of the Federal Communications Commission’s (“FCC” or “Commission”) *Order*² in the above-captioned dockets filed by the Coalition of Concerned Utilities (“Coalition” or “Petitioner”).³ For the reasons below, we urge the Commission to deny the Petition.

The Pole Attachment proceeding benefits from a thorough and robust docket in which the issues have undergone multiple rounds of comments and consideration. The Commission’s

¹ The DAS Forum is a broad-based non-profit organization, dedicated to the development of the DAS component of the nation’s wireless network. It is the only national network of leaders focused exclusively on shaping the future of DAS as a viable complement to traditional macro cell sites and a solution to the deployment of wireless services in challenging environments. PCIA is the national trade association representing the wireless telecommunications infrastructure industry. PCIA seeks to facilitate the rapid and efficient deployment of widespread dependable communications networks across the country, consistent with the mandate of the Telecommunications Act of 1996.

² *In re* 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*, FCC 11-51 (Apr. 7, 2011) (“*April 7th Order*”).

³ Petition for Reconsideration of the Coalition of Concerned Utilities: Consumers Energy, Detroit Edison, FirstEnergy Corp., Hawaiian Electric Co., NSTAR, Pepco Holdings; WT Docket No. 10-4, GN Docket No. 09-51 (filed June 8, 2011) (“*Coalition Petition*”).

Order is based on sound reasoning and ample evidence drawn from the docket. The Coalition of Concerned Utilities' petition for reconsideration, however, fails to produce new arguments or evidence to warrant reconsideration of the Commission's well-reasoned *Order*. To ensure the goals of lowering costs, promoting competition and speeding deployment of broadband, the Commission should deny their petition.

Specifically, the remedies set forth in the *Order* render many of the Coalition's proposals regarding make-ready timelines unnecessary and moot. The Commission's *Order* with regards to make-ready rules strikes a balanced approach that will help prevent unnecessary delays in the attachment process. Additionally, the Commission should reject Petitioner's attempts to have new and replacement poles exempted from the make-ready timeline.

Further, in regard to making use of the poles themselves, the Commission should deny the Coalition's policy proposals that would inhibit the ability of attachers to use poles in the most efficient and effective ways possible. The Commission should deny the Petitioner's requests to allow pole owners to restrict the future use of boxing and extension arms for all attachers regardless of whether the pole owner has used those techniques in the past and to allow one joint owner to apply a more restrictive standard for space-saving techniques to all jointly owned poles. Pole owners should not be allowed to issue a blanket ban on pole top attachments, nor should they be allowed to ban attachment techniques that the pole owners use themselves regardless of single or joint ownership, and the Commission should confirm as much.

The Commission should not mandate attacher enrollment in electronic notification systems as these systems are not ubiquitous and the information is already readily available to the pole owner. Finally, the FCC should deny the Petitioner's request for clarification that pole owners are entitled to be reimbursed by the new attacher for moving existing attachments if the

existing attachers do not move their attachments in a timely manner because costs associated with moving existing attachments are clearly covered by pole owner established make-ready fees.

II. THE COMMISSION SHOULD DENY PETITIONER'S MAKE-READY PROPOSALS BECAUSE REMEDIES ADDRESS PETITIONER'S CONCERNS

The Commission has taken numerous steps to accommodate the unique needs of pole owners with regard to make-ready issues, even where attachers disagreed with those policy choices. However, as the Commission aptly recognized, “in the absence of a [make-ready] timeline, pole attachments may be subject to excessive delays.”⁴ In order to balance competing interests the Commission has prescribed a number of remedies as a compromise measure to allow for flexibility in unique circumstances where the Commission’s ample make-ready timeline cannot be met. These remedies make the Petitioner’s proposals moot, and the Commission should decline to reconsider such proposals.

A. Lowering the Number of Poles Subject to Make-Ready Timelines Will Raise Barriers to the Rapid and Efficient Build Out of Broadband Networks

In its petition, the Coalition proposes many changes or additions to the make-ready timeline that will hinder its effectiveness and slow deployment. Specifically, the Coalition proposes reducing the number of attachment requests subject to deadlines from 300 to 100 at the lower limit, and from 3,000 to 500 at the upper limit for *all* attaching entities per month.⁵ Not only is this proposal in effect an unwarranted extension of the Commission’s timeline for Section 224 access as established in the *Order*,⁶ but it undermines the goals of expedited build out of telecommunications services, including broadband.

⁴ *April 7th Order* at ¶ 21.

⁵ *Coalition Petition* at 6.

⁶ *April 7th Order* at App. A §1.1410.

Further, the Coalition’s arguments on this issue are made moot by the sufficient remedies available in the event that make-ready work cannot be completed within the timeline. As the Commission established in the *Order*: “if a utility does not meet the deadline to complete a survey or make-ready established in the timeline, an attacher may hire contractors to complete the work in the communications space.”⁷ This remedy allows for the necessary survey and make-ready work to continue despite the utility’s inability to meet the Commission’s requirements. Additionally, the Commission crafted this remedy to account for the safety and reliability concerns of the utilities by requiring attachers to use pole owner approved contractors and to grant utilities the opportunity to have a representative “accompany and consult with attachers and its contractor prior to commencement of any make-ready work by contractor.”⁸

For pole top attachers “who are not able to avail themselves of the self-help remedy” described above,⁹ the Commission has also constructed a remedy that adequately addresses the utilities’ make-ready concerns. The rebuttable presumption created by the Commission requires pole owners to adequately illustrate the exigent, unforeseen circumstances causing their inability to comply with the make-ready timeline.¹⁰

Pole owners are also afforded an additional 30 days for pole top attachments and may extend the make-ready timeline by 15 days.¹¹ Because the make-ready deadline has already been extended, and because the sufficient remedies available in the event the extended deadline cannot be met, the Commission should not accept the Coalition’s proposals. The extended timeline allows ample time for pole owners to process attachment requests, and The DAS Forum opposes

⁷ *Id.* at ¶ 49.

⁸ *Id.*

⁹ *Id.* at ¶ 43

¹⁰ *April 7 Order* at App. A §1.1420(h) (stipulating the conditions of a valid deviation from the make-ready timeline and requiring a party “...that so deviates shall immediately notify, in writing, the cable operator or telecommunications carrier requesting attachment and other affected entities with existing attachments, and shall include the reason for and date and duration of the deviation.”).

¹¹ *Id.* at ¶ 22.

any effort to reduce the number of pole attachment requests subject to deadline or extend the deadline further.

B. The Commission Should Deny the Coalition’s Request to Delay the Effectiveness of the Order as it Contravenes the Core Purpose of this Proceeding and of the Broadband Acceleration Initiative.

The Coalition suggests the need for additional “events” that will toll the make-ready timeline, including seasonal storms, government permitting, private property easements, preexisting safety violations, and inadequate route design by the attacher.¹² This issue was directly addressed by the Commission in its *Order*, when the FCC adopted its “good and sufficient cause” standard for tolling the timeline.¹³ Drawing upon the thorough docket in the proceeding, in which the Petitioners raised these same issues,¹⁴ the Commission specifically declined to apply the standard to the “routine or foreseeable events,” such as those listed in the petition.¹⁵ In the instance of seasonal storms, the existence of the Mutual Assistance Agreements¹⁶ indicates that seasonal storms, while unforeseeable in their precise occurrence, are planned and accounted for by utilities and should not affect the timeline.¹⁷

¹² See *Coalition Petition* at 11-15.

¹³ *April 7th Order* at ¶ 68.

¹⁴ See *In re* 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*, FCC-10-84 at 16 n. 107 (May 20, 2010) (“*May 20th Order*”) (citing Letter from Thomas Magee, Counsel for the Coalition of Concerned Utilities, to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245 at 5 (filed May 1, 2009)).

¹⁵ *April 7th Order* at ¶ 68 (noting that utilities may stop the clock for “to cope with an emergency that requires federal disaster relief” but not for “routine or foreseeable events such as repairing damage caused by routine seasonal storms; repositioning existing attachments; bringing poles up to code; alleged lack of resources; or awaiting resolution of regulatory proceedings, such as a state public utilities commission rulemaking, that affect pole attachments.”). The Coalition may use different terms than the *Order*, but the premise is the same – bringing poles up to code (i.e., pre-existing safety conditions); awaiting resolution of regulatory proceedings (i.e., government permits).

¹⁶ *Coalition Petition* at App. B.

¹⁷ See, e.g., Dominion, Inc., Press Release, *Dominion Virginia Power Expects 98 Percent of Storm Restoration Will Be Completed by Tonight*, Feb. 8, 2010, available at <http://dom.mediaroom.com/index.php?s=43&item=861> (noting that of 287,000 customers in Virginia who lost power, 271,000 had their power back within two days of the storm); NOVEC, Inc., Press Release, *NOVEC Continues to Restore Power to 2,000 Customers*, Feb. 8, 2010, available at http://www.novec.com/About_NOVEC/News_Release/nr020810.cfm (noting that of 45,000 customers who lost power, only 2,000 remained without two days later).

The Petitioners also urge the Commission to exempt pole owners from make-ready timelines to the extent that the work requires any non-telecommunications or cable attacher to move its facilities.¹⁸ The Commission already took up this issue, and in the absence of new information or arguments from the Coalition, should not reconsider its findings.

The Commission noted in its consideration of this issue that poles are not placed outside its authority simply because of “the presence of [a] non-regulated attachment.”¹⁹ As discussed in more detail below,²⁰ rearrangement of attachers who have not responded to the pole owners request within a reasonable time is a “traditional method of attachment”²¹ and part of make-ready work – the costs of which is recoverable from the new attacher through make-ready fees.²²

Under the remedies proposed by the Commission in the *Order*, if the pole owner is unable to reach an existing attacher in the communications space and thereby unable to rearrange the attachment to accommodate a new one, the new attacher may use pole-owner approved contractors to complete the make-ready work.²³ For pole top attachments, the pole owner has the opportunity to produce evidence of conditions that satisfy the requirements of the “good and sufficient cause” standard in order to toll the timeline.²⁴ The remedies render the Petitioner’s proposal moot.

III. POLE REPLACEMENTS AND NEW POLES INSTALLATIONS SHOULD BE SUBJECT TO MAKE-READY TIMELINES

¹⁸ *Coalition Petition* at 8.

¹⁹ *April 7th Order* at ¶ 94.

²⁰ *See infra* section V.

²¹ *April 7th Order* at ¶ 231 (“[A] pole does not have insufficient capacity where a request for attachment could be accommodated using traditional methods of attachment. Rearrangement of facilities on a pole is one of these methods, and nothing in the statute suggests that... rearrangement of facilities in the electric space should be treated differently from rearrangement of facilities in the communications space.”).

²² *April 7th Order* at ¶¶ 143, 185.

²³ *Id.* at ¶ 49.

²⁴ *Id.* at ¶ 68.

The Coalition asks the Commission to confirm that make-ready timelines do not apply to pole replacements of the new pole installations. However, because the Commission chose not to explicitly incorporate the Coalition's proposed pole replacement timeline exemption in its *Order*, the exemption does not apply.

In the May 2010 *Order* and *Further Notice of Proposed Rulemaking* in this proceeding,²⁵ the Commission only incorporated the Coalition's proposal to exclude pole replacement from its proposed five-step timeline.²⁶ Notably, the Commission also excluded wireless attachments from this timeline proposal, which it roundly overturned in its final adopted timeline.²⁷ Relying on the thorough docket, the Commission materially changed the final adopted make-ready timeline in the *Order* from its incarnation in the *Further Notice*, as evidenced by creation of a timeline for wireless attachments to pole tops.²⁸

Failing to apply the make-ready timeline to pole additions or replacements would slow the deployment of broadband by stopping the clock for large deployments due to a small percentage of pole replacements or new poles among the entire request. Especially in the case of DAS deployments, which require numerous small nodes scattered across multiple sites in a localized area to provide maximum coverage and capacity, delaying even one node for a protracted period of time can restrict consumer access to wireless services, including broadband.

The Commission also noted in its *Order* that pole owners derive a benefit from the expanded capacity of a new pole or pole replacements funded by the new attacher's make-ready

²⁵ See *May 20th Order*.

²⁶ *Id.* at ¶ 32.

²⁷ *April 7 Order* at ¶ 8 (discussing the adoption of the timeline for wireless attachments).

²⁸ *Id.*

fees.²⁹ Pole owners stand to benefit from the rules as stipulated in the *Order*, which further minimize any burden associated with pole additions or replacements.

IV. THE COMMISSION SHOULD MAINTAIN CONSISTENT, NON-DISCRIMINATORY TREATMENT OF ATTACHER'S USE OF SPACE-SAVING TECHNIQUES

As Congress noted, “owing to a variety of factors...there is often no practical alternative [for network deployment] except to utilize available space on existing poles.”³⁰ Recognizing how vital pole attachment space is to realizing the goals of the National Broadband Plan, one must also recognize how important it is to use these spaces to the greatest effect. The Commission must deny the Petitioner’s proposals that would prevent non-discriminatory, efficient use of existing pole space in order to advance this important national priority.

A. The Commission Should Deny the Petitioner’s Request to Allow Pole Owners to Restrict the Future Use of Boxing and Extension Arms for All Attachers Regardless of Whether the Pole Owner has Used Those Techniques in the Past

The Coalition requests the Commission allow pole owners to restrict the future use of boxing and extension arms for all attachers regardless of whether the pole owner has used these techniques in the past.³¹ In order to foster equity and consistency during the attachment process, the Commission should deny this request.

The Commission took up this issue directly in the *Order*, finding that “the relevant standards for purposes of determining a utility’s ‘existing practices’ (in regards to boxing and extension arm use) are those that a utility applies at the time of an attacher’s request to use a

²⁹ *April 7th Order* at ¶ 187 (“The utility therefore benefits from this situation in a number of ways, including its recovery upfront of all of the costs the third-party attacher causes it to incur. In particular, because poles typically come in standard sizes, the utility is likely to obtain, at no cost to itself, capacity above and beyond the additional foot of pole space needed to accommodate the typical third-party attachment. The utility benefits from the extra capacity because it can use that capacity to supply its own services, rent the capacity to other third-party attachers and realize additional revenues, and/or save or defer some of the cost of periodic pole replacement needed to provide its own service.”).

³⁰ *Id.* at ¶ 4.

³¹ *Coalition Petition* at 19 (“[T]he Coalition requests the Commission rule on reconsideration that to the extent a utility disallows any wireless antenna of any type, including its own, to be installed on pole tops, it should be entitled to disallow any such proposed installation by a communications attacher.” (emphasis omitted)).

particular attachment technique—*not the standards that a utility wishes to apply going forward*.³² To avoid discrimination, the pole owner, regardless of individual or joint ownership, must allow attachers to use the same space-saving techniques that it uses at the time of the attachment request.

Furthermore, the Coalition offers no new persuasive evidence as to why the Commission should allow pole owners to limit the use of these techniques from when this issue was first raised in their Petition for Reconsideration of the May 2010 *Order* and *Further Notice*.³³ To maintain equity and consistency in boxing and extension arm use, the Commission should deny the petitioner's request to allow pole owners to restrict the future use of boxing and extension arms for all attachers regardless of whether the pole owner has used these techniques in the past.

B. The Commission Should Not Allow One Joint Owner to Apply a More Restrictive Standard for Space-Saving Techniques to All Jointly Owned Poles

The Coalition asks the Commission to allow one joint owner to apply the more restrictive standard as between the owners for boxing and extension arms to all jointly owned poles.³⁴ Once again, the Petitioner declines to provide any new evidence for why the Commission should adopt this proposal, and as such the Commission should not reconsider the policy.

In the *Order*, the Commission correctly found that agreement between joint pole owners and the application of a single standard is necessary to avoiding unjust and unreasonable duplicative processes.³⁵ In this case, both owners should be in agreement over the standard applied to the use of boxing and extension arms. However, it is important to note that the

³² *April 7th Order* at ¶ 227 (emphasis and parenthetical added).

³³ See Petition for Reconsideration of the Coalition of Concerned Utilities, *et al.*; WC Docket 07-245; GN Docket 09-51 at 4-5 (filed Sep. 2, 2010).

³⁴ *Coalition Petition* at 23.

³⁵ *April 7th Order* at ¶ 84 (suggesting that to avoid these problems "...might involve, for example, joint owners establishing a single administrative contact point for all pole attachment applications--or joint owners agreeing, and informing the attacher, that one of the owners will be the attacher's point of contact for a specific pole attachment application....").

Commission allows joint owners to *agree* to adopt the more restrictive standards.³⁶ Concurrence between joint pole owners will ultimately avoid confusion and delays in the attachment process, and therefore the Commission should deny the proposal that one joint owner can apply the more restrictive standard as between the owners for boxing and extension arms to all jointly owned poles.

V. THE COMMISSION SHOULD DENY PETITIONER'S REQUEST TO RECONSIDER BLANKET BANS ON POLE TOP ATTACHMENTS

Wireless technology is a line of sight technology that requires antenna to be placed at an elevation above the surrounding clutter. Pole top access is essential to effectively leverage existing infrastructure and spectrum resources. Without access to this space, DAS Forum members confirm that it would take three times or more antennas in the communications space to achieve the same coverage and signal quality as pole top antennas for a given deployment.³⁷ As such, the Commission must reject the Petitioner's proposed blanket ban on pole top attachments.

The Coalition requests the FCC to rule that a pole owner should be permitted to disallow any wireless attachment of any type to utilize the pole top if the utility does not allow its own wireless antennas on the pole top. This proposal is predicated on the recognition that a wireless attacher's right to attach to pole tops is the same as its right to attach to any other part of the pole. However, adopting the Petitioner's proposal would allow utilities to skirt the requirements of the *Order* and the Act.

Section 224(f)(1) of the Act affords telecommunications attachers the right to non-discriminatory access to poles save for "reasons of safety, reliability and generally applicable engineering purposes." Further, as the *Order* clarified, any denial of a request to

³⁶ *April 7th Order* at ¶ 228.

³⁷ *See, e.g.*, Letter from Brian Regan, Director, Government Relations, PCIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245 (filed Mar. 2, 2011).

attach is subject to the specificity requirements of Section 1.1403(b), including denials for pole top attachments.³⁸ Pole owners must not be allowed to skirt the requirements of the *Order* and of the Act by simply casting the Commission's well-reasoned prohibition on blanket pole top attachment bans in a different light. The Coalition's proposal is a blanket ban on wireless pole top attachments and therefore should be denied by the Commission.

VI. THE COMMISSION SHOULD DENY THE PETITIONER'S ATTACHER REARRANGEMENT PROPOSALS

The Coalition proposes mandating that all attachers participate in electronic notification systems that are only available in select areas of the country, and further that pole owners be entitled to reimbursement from new attachers if existing attachers do not move their equipment in a timely manner. Both proposals are unnecessary and will inhibit the deployment of wireless services, and therefore should be rejected.

A. The Commission Should Not Mandate Attacher Enrollment in Electronic Notification Systems

The Coalition proposes mandating attachers to participation in NJUNS or a similar electronic notification system in response to the *Order's* requirement that utilities "notify immediately and in writing all known entities with existing attachments that may be affected by the planned make-ready."³⁹ However, these systems are not available nationwide and could potentially add delay and expense to the make-ready process.⁴⁰

Most, if not all, of the information necessary to contact and coordinate with attachers should be readily available to the pole owners as part of their normal operations. Mandating an electronic notification system will delay wireless deployment without significant benefits to

³⁸ April 7th Order at ¶ 48.

³⁹ April 7 Order at ¶ 60.

⁴⁰ See NJUNS, Inc., www.NJUNS.com, last visited Aug. 10, 2011 (homepage displays a map showing that the NJUNS systems are active in only half of the United States).

either pole owners or attachers. The Commission should not require attachers to enroll in such notification programs, and instead allow attachers and pole owners to negotiate on the use of such systems as part of their master agreements.

B. Costs Associated with Moving Existing Attachments are Clearly Covered by Pole Owner Established Make-Ready Fees

The Coalition urges the Commission to specify that pole owners are entitled to be reimbursed by the new attacher for moving existing attachments if the existing attachers do not move their attachments in a timely manner. This is clearly part of make-ready costs, defined by the Commission as “capital costs which would not have been incurred ‘but for’ the pole attachment demand.”⁴¹ As noted in the *Order*, pole owners recover these costs as part of their make-ready fees.⁴² These make-ready fees obviate any need for the Commission to require reimbursement from a new attacher as the pole owners currently have the ability to do so through existing fees.

Finally, Petitioners urge the Commission to exempt pole owners from liability for damages resulting from rearrangements or relocations required by the new rules.⁴³ However, to ensure the greatest freedom and flexibility to adapt to unique business situations, allocation of liability is best left to the attachment agreement so that pole owners and attachers can properly plan for contingencies.

⁴¹ *April 7th Order* at 62, n. 426.

⁴² *April 7th Order* at ¶ 143 (“This is consistent with the Commission’s existing approach in the make-ready context, where a pole owner recovers the entire associated capital costs through make-ready fees. For example, if rearrangement or bracketing is performed to accommodate a new attachment, the new attacher is responsible for those costs. Likewise, a pole owner recovers the entire capital cost of a new pole through make-ready charges from the new attacher when a new pole is installed to enable the attachment.”).

⁴³ *Coalition Petition* at 21.

VII. CONCLUSION

For the foregoing reasons, The DAS Forum urges Commission to deny the Coalition of Concerned Utilities' Petition in order to further the goals of lowering costs, promoting competition and speeding deployment of broadband.

Respectfully submitted,

THE DAS FORUM (A MEMBERSHIP SECTION
OF PCIA – THE WIRELESS INFRASTRUCTURE
ASSOCIATION)

By: /s/ Michael T. N. Fitch
Michael T. N. Fitch
President and CEO

Jonathan Campbell
Government Affairs Counsel

PCIA – THE WIRELESS
INFRASTRUCTURE ASSOCIATION
901 N. Washington Street, Suite 600
Alexandria, VA 22314
(703) 739-0300

August 10, 2011