

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20544**

Mediacom Communications Corporation)
Petition for Declaratory Ruling)
Concerning Indemnification Clauses)
In Pole Attachment Agreements) WC Docket 14-52

**MEDIACOM
REPLY COMMENTS**

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SUMMARY

Mediacom submits these reply comments in support of its request for a declaratory ruling reiterating that indemnification clauses in pole attachment agreements that impose asymmetric and non-reciprocal indemnification liability for negligence on attaching parties are not “just and reasonable” terms and conditions of attachment.

Clear Commission precedent in the Enforcement Bureau’s 2003 *Georgia Power* order holds that such a clause is an unreasonable term and condition of attachment. Despite the Commission’s straight-forward holding in *Georgia Power*, Alliant Energy Corporation, in Iowa state court tort litigation, refuses to accept the binding nature of the holding. In the Iowa tort case, Alliant is attempting to shift the liability risk for Alliant’s own negligence onto Mediacom under the terms of an asymmetric indemnification clause contained in Mediacom’s pole attachment agreement. Confirmation that *Georgia Power* indeed means what it says would truncate the pending tort action, avoid possibly years of unnecessary litigation, and expedite the injured worker’s family recovery for a horrendous accident.

But this issue is also larger than just that particular tort case. As demonstrated in their Comments, most electric utilities, not just Alliant, now take the same positions with regard to the invalidity of *Georgia Power*. The Commission should this opportunity to make perfectly clear to utilities and attachers alike that *Georgia Power* remains valid and of general applicability to the effect that asymmetric indemnification clauses are unreasonable and unenforceable.

The Commission should also again reject, as it fully did in *Georgia Power*, the utilities’ argument that asymmetric indemnification provisions are somehow appropriate because they face unusual liability risk from being forced to allow attachment by parties over which they have little or no operational control. While there can be no doubt that working on or near electric

power lines is a dangerous and sometimes deadly business, the danger and the risk is not minimized one bit by asymmetric indemnification. As correctly recognized by the Commission, under a reciprocal indemnification regime, an attacher is already fully responsible for its own misdeeds, and being forced to shoulder additional liability for the utility's misdeed adds nothing other than a shift in costs. Indeed, it is precisely because working near power lines is so dangerous that each party should be financially responsible for its own misconduct. Then, and only then, are the incentives to take all appropriate precautions adequately aligned with the entity actually in a position to take those precautions.

There is also absolutely no merit to the utilities' claim that asymmetric indemnification clauses should be honored because they have been freely bargained for. Not only is this claim contradicted by the experience of every attaching commenter in this proceeding, it is contradicted by the very legal context in which pole attachment agreements are negotiated. A non-reciprocal indemnification clause such as the one imposed on Mediacom by Alliant is never freely bargained for, but is acceded to only because the attacher is in an inferior bargaining situation. Indeed, such clauses should be seen as the successful effort by a party with a superior bargaining leverage to shift its entire liability risk on the inferior party.

Therefore, to remove any uncertainty, the Commission should confirm its holding in *Georgia Power* and issue a plain, unequivocal clarification that (1) that each party to a pole attachment agreement should be liable for, and only for, their own misconduct, and (2) indemnification clauses that impose any asymmetric indemnification liability risk on the attaching party are not "just and reasonable" terms and conditions of attachment.

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REPLY COMMENTS

Mediacom Communications Corporation (“Mediacom”) hereby submits these reply comments in support of its request for a declaratory ruling reiterating that indemnification clauses in pole attachment agreements between attachers and utility pole owners that impose asymmetric and non-reciprocal indemnification liability for negligence on the attaching parties are not “just and reasonable” terms and conditions of attachment, are contrary to Section 224(b)(1) of the Communications Act, and are unenforceable.¹

Introduction and Background

As previously discussed, Mediacom’s request for confirmation on the permissible scope of pole attachment indemnification clauses is primarily driven by its entanglement in Iowa state court tort litigation involving a deceased Mediacom employee fatally injured in 2011 while working on a defective pole owned by Alliant Energy/Interstate Power and Light Company (“Alliant”).² In that case, Alliant is attempting to shift the liability risk for Alliant’s own negligence onto Mediacom under the terms of an asymmetric indemnification clause contained

¹ 47 U.S.C. § 224(b)(1).

² *Maribel Romero v. Interstate Power and Light, Interstate Power and Light v. MCC Iowa LLC*, Iowa District Court for Johnson County, Case No. LACV 075505. The conservator of the employee and subsequently his estate brought a personal injury and wrongful death action in Iowa state court against Alliant asserting negligence due to the deteriorated condition of the pole. Based on an indemnification clause contained in the Mediacom-Alliant pole attachment agreement that Alliant contends requires Mediacom to defend and indemnify without regard to fault, Alliant filed a third party claim for indemnification against MCC Iowa, LLC, a subsidiary of Mediacom. By seeking to assert the indemnification clause, Alliant is taking the position that even if the court finds it to be wholly responsible for the wrongful death claim, it is entitled to shift that liability entirely to Mediacom.

in Mediacom's pole attachment agreement. The clarification Mediacom seeks here is intended to invalidate that clause to the extent Alliant is seeking to force Mediacom to bear the burden of Alliant's own negligence.

As discussed in detail below, clear Commission precedent in the Enforcement Bureau's 2003 *Cable Television Association of Georgia v. Georgia Power Co.* ("*Georgia Power*") order holds that such a clause is an unreasonable term and condition of attachment and contrary to federal policy as expressed in the Pole Act.³ Despite the Commission's straight-forward holding in *Georgia Power*, Alliant refuses to accept the binding nature of the FCC's interpretation of the Pole Act.⁴ Because of this fundamental, binary disagreement about the meaning of the holding in *Georgia Power*, and because that issue is central to relieving Mediacom from liability in the Iowa wrongful death case, confirmation here would truncate the pending tort action, avoid possibly years of unnecessary litigation, and expedite the injured worker's family recovery for a horrendous accident. As explained below, all that is required is for the Commission to confirm, once and for all, that *Georgia Power* means exactly what it says.

But this issue is also larger than just that particular tort case.⁵ Most electric utilities, not just Alliant, now take the same position with regard to the invalidity of *Georgia Power*. As confirmed by the comments of the various attaching parties and their trade associations, utilities now claim that the holding is entirely meaningless, and thus steadfastly demand that pole

³ 18 FCC Rcd 16333, ¶¶ 30-31 (Enf. Bur. 2003), *recon. denied* 18 FCC Rcd 222871 (Enf. Bur. 2003).

⁴ 47 U.S.C. § 224.

⁵ Contrary to the insinuations of Alliant and its siblings, Mediacom here is absolutely not asking the Commission to (1) step into the state court's shoes and resolve the underlying tort litigation, (2) to assign proportional liability in a case among the defending parties, (3) absolve Mediacom of any liability should the state court rule that it should bear full or partial responsibility in the case, (4) overrule state statutes or precedent as to how liability is apportioned among joint tortfeasors, (5) to set new precedent or create a new rule allowing or proscribing indemnification clauses altogether, (6) reopen the 2011 Pole Attachment rulemaking, or (7) ignore, minimize or in any way trivialize the risks associated with working near electrical distribution poles and equipment. Mediacom merely seeks definitive clarification that a pole owner should not be able to force an attacher to bear legal liability for the pole owner's misconduct.

agreements include such asymmetric indemnification language. And as borne out in their own comments, electric utilities have only become more and more brazen in making such arguments, and have been pushing harder and harder, with success, to lay off the entirety of their liability risk on the attachers.⁶

Therefore, Mediacom is dually motivated to seek clarification as to whether the holding in *Georgia Power*, the sole Commission precedent laying out the bounds of permissible indemnification clauses in pole attachment agreements, truly has legal meaning, or alternatively, as the electric utility industry argues, that holding is entirely distinguishable and limited only to the circumstances of that one particular case. This is a binary question that merely requires the Commission's attention to reiterate and confirm the validity of its earlier decision.⁷

I. Existing Commission Precedent On The Scope Of Permissible Indemnification Clauses Should Simply Be Confirmed.

The issue raised in this proceeding can be resolved simply if the Commission confirms past precedent. Specifically, the Commission should make perfectly clear that the Enforcement

⁶ According to Xcel, Mediacom's request for a declaratory ruling is illegitimate because the issue could have been, but was not addressed in the context of the 2011 Pole Attachment proceeding. According to Xcel, none of the participating parties in that proceeding raised the question of the legitimacy of indemnity provisions in pole attachment agreements. Xcel Comments at 9. This assertion is actually not true – as noted by PCIA, wireless provider NextG actually did raise the issue. NextG Comments in WC Docket No. 07-245 at 6 (“[W]orking through this one issue often adds months to the contract negotiation process even though the Commission has clearly directed utilities to bargain in good faith and extend ‘just and reasonable terms’ to attachers.”); Opposition of NextG Networks, Inc. to Petition for Reconsideration of the Coalition of Concerned Utilities, WC Docket No. 07-245, at 20 (“[A] pole owner should not be excluded from liability for harm caused by its own negligence. NextG must regularly remind utilities that the Enforcement Bureau has found that a nonreciprocal indemnification clause in a pole agreement is unjust and unreasonable.”). To the extent the issue was not raised more extensively in the rule-making, it should have been unnecessary given the clear language of *Georgia Power* which, which as explained herein, is dispositive on the issue. Thus, the fact that the issue was raised in the 2011 Pole Attachment proceedings, but not mentioned in the Commission's Order, merely serves to reinforce the fact that the Commission saw no need to disturb the holding of *Georgia Power*.

⁷ Alliant complains that this issue is more appropriately handled in the context of a complaint proceeding under Section 1.1404 of the Commission rules, perhaps after a primary jurisdiction referral from the state trial court judge. Alliant Comments at 3. Mediacom certainly reserves the right to do so, as initiation and participation in this proceeding is not mutually exclusive with later filing a complaint. At this time, with a judge not yet assigned in the state court case, a primary jurisdiction referral request would be premature, and with the macro question as to the actual precedential validity of the holding in *Georgia Power* begging for resolution, this proceeding is the more appropriate and judicially economical procedural vehicle at this time to answer the question at hand.

Bureau's 2003 holding in *Georgia Power* remains valid and of general applicability to the effect that asymmetric indemnification clauses are unreasonable and unenforceable. The Commission should also reject the utilities' specious argument that the Cable Services Bureau 1997 order in *Marcus Cable* has any contrary effect.

1. Utilities should not be allowed to defy the holding in *Georgia Power*.

As confirmed by all the commenters, the Commission has directly addressed the permissible scope of "just and reasonable" indemnification clauses only once. In the *Georgia Power* order, the Enforcement Bureau explained:

8. Indemnities/Limits of Liability

30. The Cable Operators object to several aspects of the New Contract's provisions concerning indemnities/limits of liability, namely sections 8.1 (requiring the Cable Operators to indemnify Georgia Power from and against liability, but not vice versa), 8.2 (placing a six-month limitation on claims against Georgia Power), and 8.4 (allowing Georgia Power to control the defense of claims against the Cable Operators). Georgia Power's arguments in defense of these provisions miss the mark, and we find the provisions to be unreasonable.

31. As an initial matter, Georgia Power relies generally on the Cable Operators' allegedly poor safety practices as a justification for the challenged provisions, claiming that it should not be required to pay for damages it did not cause. As explained above, however, the record in this case does not support the safety defense. In any event, the Cable Operators do not contend that indemnification provisions generally are unreasonable; instead, they claim that these particular provisions are unreasonable. Second, Georgia Power argues that, because of mandatory access, a non-reciprocal indemnification provision is warranted given that the Cable Operators allegedly pose a "far greater, and unwanted, risk" to Georgia Power in the pole attachment process. A reciprocal indemnification provision, however, simply would result in each party assuming responsibility for losses occasioned by its own misconduct. Consequently, if Georgia Power is correct that the Cable Operators more frequently are the "bad actors," then the Cable Operators more frequently would be called upon to indemnify. Finally, Georgia Power offers no response to the Cable Operators' argument that they should not be forced to bring claims in a shorter period than required by law or to relinquish their right to defend

claims against them. We cannot discern any rational basis to support those contractual provisions.⁸

The Bureau's holding was perfectly straightforward and clear – each party to a pole attachment agreement should be liable for, and only for, their own misconduct, and therefore an indemnification clause that imposes any asymmetric, non-reciprocal indemnification liability risk on the attaching party is not a “just and reasonable” term and condition of attachment and not enforceable.⁹

Electric utilities continue to blatantly ignore the definitive precedent on this question announced in *Georgia Power*. Notwithstanding the Commission's plain instructions in *Georgia Power*, utility pole owners, and not just Alliant, continue to steadfastly insist on non-reciprocal indemnification clauses, claiming that the *Georgia Power* order does not really mean what it says. This position is laid transparent in their comments where the utilities make perfectly clear that they wholly reject the legitimacy and the meaning of the holding in *Georgia Power*. They claim, both here and in private negotiations for new attachment agreements, that the decision is entirely distinguishable, limited in scope, and unlawful.

According to Alliant, the holding in *Georgia Power* is merely *dicta*, and even if it is not, it certainly does not stand for the principle that any non-reciprocal indemnification commitments other than the particular clause at issue in *Georgia Power* are presumptively “unjust and

⁸ *Georgia Power* at ¶¶ 30-31.

⁹ For reasons explained in the Order and in the attaching parties' comments in this proceeding, logic and solid public policy easily justify this holding. Public policy should encourage a regime where a party is responsible for, and only for, acts that are under its direct control, especially misdeeds and for acts can cause serious and sometimes deadly injury. Only then are the incentives to minimize risk and injury properly aligned with the party best in position to minimize them. When, however, one party is able to shift liability risk to a counter-party in no position to minimize that risk, the result is not a reflection of efficiency or safety maximization, it is a reflection of one party with a superior bargaining position leveraging that position to pass liability costs off to the lesser party. That is a regime that the Commission should not bless.

unreasonable.”¹⁰ According to Xcel, the holding can be disregarding as the Enforcement Bureau was merely acting on delegated authority in a unique context where the utility “had not supported its allegation of poor safety practices.”¹¹ Oncor, Ameren and Westar are even more disdainfully dismissive” “the Commission’s determination that the indemnity provision at issue in *[Georgia Power]* was unreasonable was necessarily limited to the specific pole license agreement challenged by the cable operators in that proceeding, under the particular facts of that case, in a dispute between those parties only.”¹² Similarly, Southern Company claims that “The Commission’s decision in the *[Georgia Power]* case does not stand for the sweeping propositions asserted by Mediacom. . . the Commission’s determination that the indemnity provision at issue in *[Georgia Power]* was unreasonable was necessarily limited to the specific pole license agreement challenged by the cable operators in that proceeding, under the particular facts of that case.”¹³

As Mediacom and all the other attaching commenting parties explain, these arguments are not a revelation – they are the very same arguments routinely asserted by utilities in pole attachment agreement negotiations in an effort to justify their unbending insistence on such one-sided clauses. And it is not just cable operators that face these demands and arguments. PCIA indicates that their wireless provider members commonly face the very same intransigence in the context of negotiating agreements to install pole top antennas.¹⁴ Indeed, all the attaching commenters report having virtually no choice but to accept such clauses, as

¹⁰ Alliant Comments at 15.

¹¹ Xcel Comments at 6.

¹² Oncor Comments at 3-4.

¹³ Southern Company Comments at 3-4.

¹⁴ PCIA Comments at 3-4.

when they push back, utilities insist that inclusion of their exact non-reciprocal language is simply non-negotiable.

There is thus a binary conflict between the attachers' plain reading of the holding in *Georgia Power* and the utilities' arguments as to the invalidity of that holding. As the scope of liability between attacher and utility is a non-trivial question both in the pending litigation and in the larger context of most pole attachment negotiations, and as there is such a stark difference of opinion as to the validity of the holding in *Georgia Power*, a clear statement from the Commission confirming that holding is well warranted.

2. The Commission should additionally confirm that *Marcus Cable* has no precedential bearing on the scope of permissible indemnification clauses.

Alliant and its utility siblings alternatively argue that the Cable Services Bureau's 1997 holding in *Marcus Cable Associates, L.P. v. Texas Utilities Electric Co.* ("*Marcus Cable*")¹⁵ is actually dispositive on this question, even though decided some six years prior to *Georgia Power*.¹⁶ At issue in *Marcus Cable* was a utility requirement that a cable operator attacher require its commercial customers, to the extent they were co-using attachments for telecommunications services instead of cable services, to indemnify the utility for any additional rental payments due as a result of the attachments being used for telecommunications as opposed to cable services. The Commission held such a requirement to be anticompetitive and an unreasonable term and condition of attachment. In so holding, the Bureau recognized the existence of a general indemnity clause in the underlying pole agreement, and stated that as the utility was already being indemnified by the attacher, additional indemnity from the attacher's customers would be unnecessary. Notably, the Bureau was not asked by any of the parties to

¹⁵ *Declaratory Ruling and Order*, 12 FCC Rcd 10362 (CSB 1997).

¹⁶ Alliant Comments at 15-16; Xcel Comments at 6-7; Southern Company Comments at 4-5; Oncor Comments at 4-5.

address, and indeed did not pass on, the reasonableness or validity of the underlying indemnity clause generally, let alone address the validity of an asymmetric and non-reciprocal indemnity clause. But according to the utilities, the mere fact that the Commission brought up the clause and did not spontaneously invalidate it means that the Commission tacitly approves of non-reciprocal indemnity provisions in any pole license agreements.¹⁷ Thus, according to the utilities, *Marcus Cable* is controlling precedent confirming the validity of clauses such as Alliant's.

This argument must be rejected for numerous reasons. First, as the reasonableness and validity of asymmetric indemnification clauses in pole attachment agreements was not presented, briefed, argued or addressed in *Marcus Cable*, the Bureau had no reason or opportunity in the context of that proceeding to even address the issue. That the Bureau acknowledged the existence of a general indemnification clause in the context of dismissing the utility's blatantly anticompetitive arguments cannot mean the Commission gave tacit, general approval to asymmetric indemnity clauses, much less that any binding precedent was actually made. Second, the cited language in *Marcus Cable* truly is *dicta* – a statement/observation not directly relevant to the substantive legal issue being decided – standing in sharp contrast to the specious claims by utilities attempting to mischaracterize the clear holding of *Georgia Power*. Third, assuming *arguendo* that *Marcus Cable* was precedential on the issue, it was decided well over six years prior to the decision in *Georgia Power*, and thus to the extent the two holdings directly contradict, legal convention resolves such conflict in favor of the later holding in *Georgia Power* invalidating such clauses. Finally, if there is any basis upon which *Marcus Cable* contradicts the

¹⁷ *Id.*

holding in *Georgia Power*, the Commission should take this opportunity to clarify the issue going forward by deciding once and for all that the *Georgia Power* holding actually controls.

3. **The Commission should again reject, as it fully did in *Georgia Power*, the utilities' argument that asymmetric indemnification provisions are somehow appropriate because they face unusual liability risk from being forced to allow attachment by parties over which they have little or no operational control.**

Notwithstanding that the Commission has already fully considered and rejected the argument, the electric utilities believe that they are entirely justified in utilizing asymmetric indemnity provisions in pole attachment agreements because of the inherently dangerous nature of their facilities and their involuntary relationship with attachers.¹⁸ Alliant complains that as it does not have full control over the activities of attachers working near dangerous high-voltage electricity lines, it must seek broad contractual indemnification for all liability, even that caused by its own negligent acts.¹⁹ It argues that when it is forced by regulation to rent space on its poles to third parties, it is exposed to potential liabilities that it would not normally face and which go well beyond those to which it would be exposed if pole access was limited just to the utility's own employees and contractors.²⁰ According to Oncor, Ameren and Westar, it is an issue exacerbated by third-party contractors working for the attaching entity, which if injured are more likely to sue the utility.²¹ Thus, the attacher should bear the responsibility for the incremental risk they add to the pole due to the presence of their facilities and their third-party

¹⁸ Alliant Comments at 7-9; Idaho Power Comments at 3-4; Xcel Comments at 2-9; Oncor Comments at 7-9.

¹⁹ Alliant Comments at 8 (“The provision shifts risk to the attaching party not only because activities on or near electric distribution and transmission lines are potentially dangerous and outside the control of the utility, but also because the involuntary nature of the agreement precludes a regulated electric utility from simply refusing access altogether or from raising the pole rental rate to account for the increased risk to the utility without the risk of near-certain litigation before the Commission.”)

²⁰ Alliant Comments at 9.

²¹ Oncor Comments at 7-8 (“But-for the presence of the communications attachments on the pole, this worker would never have been anywhere near Oncor’s transformer.”).

workers. Again, the attaching commenters confirm that these are exactly the same explanations attachers hear over and over again in negotiations with utilities as to why they cannot yield one bit on their asymmetric indemnification language.

There can be no doubt that working on or near electric power lines is a dangerous and sometimes deadly business. But as the Commission already held in *Georgia Power*, the danger and the risk is not minimized one bit by asymmetric indemnification. As correctly recognized by the Commission, under a reciprocal indemnification regime, an attacher is already fully responsible for its own misdeeds, and being forced to shoulder additional liability for the utility's misdeed adds nothing other than a shift in costs:

A reciprocal indemnification provision, however, simply would result in each party assuming responsibility for losses occasioned by its own misconduct. Consequently, if Georgia Power is correct that the Cable Operators more frequently are the "bad actors," then the Cable Operators more frequently would be called upon to indemnify.²²

Indeed, it is precisely because working near power lines is so dangerous that each party should be financially responsible for its own misconduct. Then, and only then, are the incentives to take all appropriate precautions adequately aligned with the entity actually in a position to take those precautions. Otherwise, if one party can shift all of the financial risk for its own acts to another, its incentive to take appropriate precautions and to reasonably maintain its poles is greatly diminished.

For these reasons, the Commission must reject the utilities' arguments that a "but for" liability regime is preferable.²³ Such a regime is nothing more than another way of rejecting reciprocal indemnification altogether by saying that the utility should never bear any liability at all, even when caused by its own bad acts.

²² *Georgia Power* at ¶ 31.

²³ *Oncor Comments* at 10.

There is also no merit to any claim that the Commission's 2011 Order,²⁴ to the extent it expanded attachers' self-help remedies and their use of third party contractors, has caused a heightened risk.²⁵ The self-help remedies the utilities complain about are only available if attachers use utility pre-approved contractors, and only if the utility is provided an opportunity to accompany and consult with the attacher and contractor before any work is done, and even then, the utility has final say to ensure that the work comports with capacity, safety, reliability and engineering practices. Moreover, if the attacher's contractor is negligent, a reciprocal indemnity clause fairly and reasonably protects the utility. Thus, any heightened risk is greatly exaggerated.

Ultimately, the legal system is well equipped to identify fault and assign liability among tortfeasors. To the extent cable operator attachers and/or their agents pose a greater risk, or should they or their contractors more frequently conduct misdeeds that cause injury, then they should indeed be fully on the hook for their actions. But to the extent a utility's misdeed is the cause, there is just no justification for forcing the attacher, with no ability to control the underlying injurious act, to bear the liability.²⁶

II. Arguments That Asymmetric Indemnification Clauses Are Freely Bargained For Belie The Entire Context In Which Attachment Agreements Are Negotiated.

There is absolutely no merit to the utilities' claim that asymmetric indemnification clauses should be honored because they have been freely bargained for. Alliant and its siblings each assert that asymmetric indemnity clauses are the result of arms-length negotiations in

²⁴ *Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) ("2011 Pole Order").

²⁵ Oncor Comments at 11.

²⁶ And none of this is changed by the fact that utilities are required by regulation to allow access for attachment. While a utility may not allow any third party to attach to its poles absent regulation, this does not mean that an attacher should be required to bear all the liability risk from attachment. Both parties, pole owner and attacher, regardless of regulatory mandated access, should bear the full extent of liability for their own actions, but no more.

which each party has made concessions to the other in order to reach mutually acceptable terms. According to Alliant, such provisions are “critical components” which are integrated with other provisions in an agreement to allocate risk among the parties.²⁷ Invalidating such provision would be inequitable and cause considerable uncertainty for insurers and regulated utilities nationwide.²⁸ Oncor, Ameren and Westar claim that such provisions are “must have” items in any pole attachment agreement contract, forcing them to “give” on other provisions in the negotiation process.²⁹

The Southern Company, contrary to the stated experience of the attaching commenters and trade association on the record in this proceeding, claims that the indemnity provision proposed by a pole owner is seldom left undisturbed by the licensee during the negotiation process.³⁰ This is certainly news to the attaching party commenters, which all report that utilities simply will not negotiate the inclusion of their standard, one-sided language. Not only is this claim contradicted by the experience of every attaching commenter in this proceeding, it is contradicted by the very legal context in which pole attachment agreements are negotiated.

It is well recognized that the parties to a pole attachment agreement negotiation just are not in the position of equals. Congress explained that due to their exclusive control over essential pole facilities, utilities enjoy superior bargaining power “over cable operators in negotiating the rates, terms and conditions for pole attachments,” and hence mandated access on reasonable terms and condition is warranted.³¹ Congress thus directed the Commission to ensure that the rates, terms and conditions of pole attachments are just and reasonable notwithstanding

²⁷ Alliant Energy Comments at 3.

²⁸ Alliant Energy Comments at 18-19.

²⁹ Oncor Comments at 12-13.

³⁰ Southern Company Comments at 17.

³¹ *Id.* at 121.

utilities' "inherently superior bargaining position."³² The Commission too has acknowledged that because utilities have disproportionate power over pole access and the pole attachment negotiation process, regulations are required to ensure that attachers are not forced to execute agreements containing unjust and unreasonable terms.³³ The Commission further acknowledged the potential for pole owners to exercise their power and force attachers to accept unreasonable provisions by adopting and maintaining the "sign and sue" rule.³⁴ Just as with all the other terms that are negotiated between attacher and utility, this unevenness in bargaining position certainly infects provisions assigning liability risk between the parties.

Thus, a non-reciprocal indemnification clause such as the one imposed on Mediacom by Alliant is never freely bargained for, but is acceded to by the attacher only because it is in an inferior bargaining situation.³⁵ Indeed, such clauses should be seen as the successful effort by a party with a superior bargaining leverage to shift its entire liability risk on the inferior party. While not as transparent or direct as an excessive attachment rental rate, the result is exactly the same, the attacher ends up bearing the utilities' costs, costs it otherwise would not agree to bear were the parties in a more equal bargaining position. The Commission must confirm that such clauses are an unreasonable term and condition of attachment.

³² *Selkirk Commc'ns, Inc. v. Florida Power & Light Co.*, Order, 8 FCC Red 387, ¶ 17 (1993).

³³ *2011 Pole Order* at ¶ 4 (2011) (recognizing that access to existing poles is essential for network deployment and that public utilities have a monopoly of the pole attachment infrastructure.).

³⁴ *Id.* at ¶¶ 119-125 (declining to modify the "sign and sue" rule to require attachers to provide written notice during contract negotiations of provisions to which they objected as a prerequisite to bringing a later complaint).

³⁵ Unlike in a normal commercial setting where opposing parties will bargain without one having disproportionate leverage, the pole owner here imposes an exceptionally onerous requirement — asymmetric indemnification liability and a refusal to provide reciprocal assurances — that no party would undertake except where it lacked any alternative.

III. The Existence Of An Attacher's Casualty Insurance Coverage Should Have No Bearing.

Alliant argues that asymmetric indemnification does not harm Mediacom or other attachers because they all have extensive liability insurance to cover that additional risk stemming from being required to additionally indemnify utilities for their own misdeeds.³⁶ According to Alliant, Mediacom really should not complain as the additional liability risk and cost is really only borne by the insurance company.

This argument must be rejected as it ignores several fundamental factors about commercial casualty insurance. Additional casualty insurance (especially that needed to further cover a third party in addition to the insured) is never costless, and Mediacom certainly faces higher insurance rates due to its expanded indemnification obligations. This is compounded by the fact that Alliant is only one of several utilities with which Mediacom has been forced to accept asymmetric indemnification provisions. Were Mediacom not forced to indemnify several utilities for their own misdeeds, its insurance costs would undoubtedly be less.

Additionally, the fact that Mediacom has insurance coverage does not mean that it faces no additional liability risk. Mediacom, as is common throughout the industry, has casualty insurance that incorporates not insignificant deductible amounts. Not only will Mediacom almost always be out-of-pocket on any claim, it could be faced with liability that does not meet the deductible limit, or even face liability for an injury that is simply not covered by the policy. For all these reasons, Mediacom always faces additional cost and risk due to being forced to accept the utilities asymmetric indemnification clauses, and regardless of any insurance coverage it might have.

³⁶ Alliant Energy Comments at 3-4.

IV. State Law Does Not Conflict With The Commission's Rule.

Some of the utility commenters ask the Commission to defer here as they claim this issue should be solely a matter of state law. According to Oncor, states have each developed their own, differing legal regimes regarding fault allocation, resulting in widely varying approaches for allocating fault and liability.³⁷ Southern Company proffers a 10-page treatise reciting just about every state law addressing comparative liability among tortfeasors for the purposes of asserting that the Commission should avoid issuing a ruling here in the name of comity.³⁸

The state deference argument should be rejected. To the extent that states have decided upon a range of mechanisms for assigning comparative fault and liability, the policies behind such rules are certainly not served by the utilities' preferred scheme where, regardless of the particular state regime, all of the assigned liability is, by contract, 100 percent shifted to attachers. Such a result does not honor state fault allocation laws and policies one bit; it is nothing more than a full end-run around those rules. The better regime, if one is truly interested in honoring the plethora of ways states allocate fault and liability, is to ensure that each party is fully responsible, after fault and liability have been assigned in accordance with state law, for its own, but only its own assigned fault and liability. Thus, far from supporting the utilities arguments that asymmetric indemnification, the plethora of state rules mandates permitting just the opposite, only reciprocal indemnification.

Finally, contrary to the claims by Southern Company that states that regulate attachments and that have looked at this question have rejected asymmetric indemnification,³⁹ many states in fact have just such rules. While Minnesota requires pole agreements to contain indemnification

³⁷ Oncor Comments at 5-7. UTC Comments at 1.

³⁸ Southern Company Comments at 6-16.

³⁹ Southern Company Comments at 19-20.

provisions, it explicitly but prohibits indemnification of a utility's bad acts: "Nothing contained in this section relieves the public utility company from liability for the negligence of the public utility company or anyone acting under its direction and control."⁴⁰ Illinois similarly requires that "CATV operators cannot be required in any pole attachment agreements to indemnify the electric utilities or telecommunications carriers from the negligence of electric utilities or telecommunications carriers."⁴¹ Finally, the Kentucky Public Service Commission has fully rejected such "hold harmless clauses" in pole attachment agreements requiring cable operators to indemnify and maintain insurance against the liability of the utility.⁴²

⁴⁰ Minn. Stat. Ann. § 238.40(a)(2) (2004).

⁴¹ 83 Ill. Adm. Code 315.60

⁴² Admin. Case No, 251, The Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments (Ky. PSC Aug 12, 1982)

CONCLUSION

For the foregoing reasons, to remove any uncertainty, the Commission should issue a plain, unequivocal clarification that (1) that each party to a pole attachment agreement should be liable for, and only for, their own misconduct, and (2) indemnification clauses that impose any asymmetric indemnification liability risk on the attaching party are not “just and reasonable” terms and conditions of attachment, and therefore are therefore contrary to Section 224(b)(1) of the Communications Act.

Respectfully submitted,

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