

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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

COMMENTS OF TW TELECOM AND COMPTTEL

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tw telecom inc. (“TWTC”) and COMPTTEL hereby submit these comments in response to the public notice and Further Notice of Proposed Rulemaking (“FNPRM”) released in the above-referenced dockets.¹

I. INTRODUCTION AND SUMMARY

Revision of the pole attachment rules is long overdue. Utilities continue to exercise their market power to deny, delay and overprice access to poles, and telecommunications carriers continue to operate at a competitive disadvantage to cable companies whose attachment rates are much lower than those paid by telecommunications carriers. TWTC and COMPTTEL therefore welcome the initial action taken by the FCC in its Order and the rules proposed in the FNPRM to remedy these problems. The FCC should act expeditiously to adopt the proposals in the FNPRM subject to the modifications discussed herein. Additionally, any rules adopted pursuant to this

¹ See *Pleading Cycle Established for Proposed Rules Implementing Section 224 of the Act*, Public Notice, DA 10-1323 (rel. July 19, 2010); *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, FCC 10-84 (rel. May 20, 2010) (“FNPRM”).

FNPRM should apply equally to wireline *and* wireless carriers.² As the FCC reiterates in its FNPRM, wireless carriers have the same rights as wireline carriers to obtain access to poles, ducts, conduits and rights-of-way on just and reasonable terms.³

In the FNPRM, the FCC correctly asserts it has wide discretion to set the pole attachment rate applicable to telecommunications carrier attachers under Section 224(e). Rates yielded by the cable formula fall within the range of rates yielded by possible interpretations of Section 224(e). The FCC therefore has the discretion to set the telecommunications pole attachment rate equal to the current cable rate. This is the optimal approach in light of the substantial benefits associated with ensuring that competitors in the broadband market pay the same pole attachment rates. If the FCC decides not to adopt this approach, it could at least define the term “cost” under 224(e) as marginal cost “plus” an additional amount (which can be easily derived mathematically and allocated among attachers) needed to ensure that the rate yielded by the telecommunications carrier formula is not confiscatory.

In addition, TWTC and COMPTTEL strongly support the adoption of the five-stage make-ready timeline proposed in the FNPRM. Such a timeline is necessary to ensure that pole owners complete make-ready work in an expeditious manner and do not jeopardize the deployment of broadband services and facilities. In addition, the FCC should adopt a timeline for negotiating pole attachment contracts. Rules adopted in Oregon allowing PUC intervention after 90 days

² This includes wireless carriers’ right to attach to the tops of poles on just and reasonable terms.

³ See *FNPRM* n.153 (“We affirm the right of wireless telecommunications carriers to attach pursuant to section 224, and their right to attachment of fiber or other wired facilities is the same as other telecommunications carriers.”).

have passed from the commencement of negotiations provide an appropriate model for a federal rule.

TWTC and COMPTTEL also welcome the FCC's proposal to provide greater freedom to attachers to use third-party contractors. However, the FCC should enhance its proposal by permitting attachers to use contractors (1) from the beginning of the make-ready process (rather than delaying use of outside contractors until a utility has failed to meet make-ready timeline deadlines, as suggested in the FNPRM) and (2) on both non-incumbent LEC utility and incumbent LEC utility poles so long as the contractor has the "same qualifications, in terms of training, as the utilities' own workers."

Several other aspects of the pole attachment regime are partially, but not sufficiently, addressed in the FNPRM. To begin with, the record shows that utilities continue to insist on including in pole attachment agreements provisions that have been deemed unlawful by the FCC, and utilities often engage in other conduct that has been deemed unlawful by the FCC. The utilities apparently believe that they have little to lose by ignoring FCC decisions. The FCC can take several steps to help remedy this problem. *First*, as the FCC proposes in the FNPRM, it should explicitly permit attachers to recover compensatory damages as far back as the statute of limitations permits for violations of Section 224 and the FCC's rules. *Second*, the FCC should mandate that each utility post a pole attachment "model agreement" on its website and permit any attacher to opt into the model agreement. *Third*, the FCC should clarify and/or adopt new rules regarding the manner in which utilities may rebut the three- and five-attacher presumptions. In particular, if a utility wishes to rebut a presumption for the purpose of setting the rate applicable to a particular attacher, the utility should be required, to the extent possible, to restrict

its count or survey to those poles on which the attacher in question is actually attached or to which the attacher plans to attach.

The FCC should also adopt detailed rules governing unauthorized attachments. For example, the FCC should adopt rules governing the definition of unauthorized attachments. It should adopt separate rules governing the process that a utility must follow in addressing unauthorized attachments by those with and those without pole attachment agreements. The Commission should not, however, permit utilities to charge increased financial penalties for each unauthorized attachment. Any unauthorized attachment penalty should be proportionate to the harm suffered by the utility, and there is no reason to believe that the current rules fail to compensate utilities fully for unauthorized attachments.

Finally, as the FCC recognizes in the FNPRM, attachers often do not bring complaints before the FCC due to the expense and time involved and the uncertainty of success. To remedy this problem, the FCC should adopt expedited procedures for resolving disputes concerning obvious rule violations.

If adopted, these reforms would have enormously beneficial effects. Among other things, these reforms would reduce and equalize the costs competitors incur to acquire identical inputs for the deployment of broadband. They would also reduce the time it takes to deploy broadband facilities. It is hard to imagine more compelling bases for the adoption of new rules by the Commission. The sooner the Commission adopts these reforms, the sooner consumers and businesses will experience the benefits of a more efficient broadband marketplace.

II. THE FCC HAS THE AUTHORITY TO DEFINE THE TERM “COST” IN SECTIONS 224(e)(2) AND 224(e)(3) TO YIELD PRICES EQUAL TO OR SIMILAR TO THE CABLE RATE.

The FCC has the discretion to establish a new definition of “cost” under Section 224(e) that would produce a “just and reasonable” pole attachment rate for telecommunications carriers

at or near the current cable rate. As the FCC and courts have found, a telecommunications carrier rate at or near the cable rate both provides sufficient compensation to the pole owner and would promote the goals of broadband deployment and regulatory parity.

In the National Broadband Plan, the Commission identified pole access as a crucial input for the deployment of broadband networks,⁴ and it stressed that the rates for attachments should be as “low and as close to uniform as possible” to “support the goal of broadband deployment.”⁵ As the Commission recognized in the FNPRM, limiting “the distortions present in the current pole rental rates” will likely increase the availability of, and competition for, broadband services.⁶ Moreover, redefining the term “cost” for purposes of Section 224(e) to yield a telecommunications carrier rate close to parity with the cable rate will promote the policy objective established by Congressional directive in Section 706 that the Commission “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability.”⁷

⁴ FNPRM ¶ 6 (citing Omnibus Broadband Initiative, Federal Communications Commission, Connecting America: The National Broadband Plan, at 109 (2010) (“National Broadband Plan”)); *see also id.* ¶ 1 (“In this Order and Further Notice of Proposed Rulemaking, we begin the process of revising the Commission’s pole attachment rules to *lower the costs of telecommunications, cable and broadband deployment and to promote competition . . .*”) (emphasis added).

⁵ National Broadband Plan, Recommendation 6.1.

⁶ *See FNPRM* ¶ 118; *see also* National Broadband Plan, Recommendation 6.1 (explaining that applying different pole attachment rates “distorts attachers’ deployment decisions”).

⁷ Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996). The Commission may do so by “utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” *Id.*

The Commission is permitted to change its rules to pursue what it has determined are its valid policy goals. Federal courts have held that agencies have latitude to “select the policies deemed in the public interest,”⁸ which may change from time to time based upon the agency’s expert judgment.⁹ Indeed, an agency is *expected* to change its rules to pursue new policies as its experience and expertise evolve.¹⁰ Thus, while in the past the FCC relied on the same definition of “cost” in the telecommunications formula and cable formula, it may change course now and redefine “cost” in the telecommunications formula in order to promote its goals of broadband deployment and regulatory parity.

Section 224 provides the FCC with wide latitude in defining “cost” for the purpose of the telecommunications carrier rate formula. Subsections 224(e)(2) and (e)(3) provide no guidance as to how the agency should define costs.¹¹ The absence of such guidance suggests, particularly in contrast to the guidance provided in 224(d)(1),¹² that the Commission has the authority to

⁸ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

⁹ *Id.* at 852; *see also FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (explaining that the agency “need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one. It suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better[.]”) (emphasis added).

¹⁰ *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006).

¹¹ *See id.*

¹² *See* 47 U.S.C. § 224(d)(1) (“[A] rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole. . .”).

adopt any reasonable definition of the “cost” for purposes of the telecommunications carrier formula.¹³

As the FCC recognizes, the only other limitation on its discretion in interpreting cost under Section 224(e) is that the telecommunications carrier rate must not be confiscatory.¹⁴ But this is a very low bar to clear. As the Eleventh Circuit has held, any rate above the pole owner’s marginal costs is sufficient as long as pole access is not “rivalrous.”¹⁵

Given this substantial discretion, the FCC may select a rate somewhere along a very wide continuum of permissible cost definitions. At the low end, the FCC could adopt a definition of cost that would produce a rate sufficiently high to compensate a pole owner for its marginal costs. As the FCC recognizes, the Section 224(e) formula will provide compensation lower than the pole owner’s marginal costs if the definition of “cost” in Section 224(e) is set at marginal

¹³ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984) (“*Chevron*”) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the quest for the court is whether the agency’s answer is based on a permissible construction of the statute.”); see also *id.* (“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”) (citation omitted); *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (noting that “the whole point of *Chevron* is to leave the discretion provided by the ambiguities of the statute with the implementing agency” and that “[a]n initial agency interpretation is not instantly carved in stone”), *aff’d*, *Brand X v. FCC*, 435 F.3d 1053 (9th Cir. 2006).

¹⁴ See *FNPRM* ¶ 126.

¹⁵ In *Ga. Power Co. v. Teleport Commc’ns. Atlanta, Inc.*, the Eleventh Circuit found that “in most cases, there is enough space on the existing utility pole network to accommodate the attaching entity’s needs without forcing the utilities to sacrifice anything.” 346 F.3d 1033, 1046 (11th Cir. 2003). In other words, the pole owner does not lose any opportunity costs from the government mandate to allow pole access. Therefore, the attachment rate need not provide any compensation to the pole owner for lost opportunity costs and only needs to cover the pole owner’s marginal costs to survive a takings challenge.

costs.¹⁶ To ensure that the pole owner receives sufficient compensation, the definition of cost must include an additional amount above marginal costs (a “plus” factor) which would be allocated among all attachers pursuant to the Section 224(e) formula. Once pole owners’ marginal costs are determined and the average number of attachers is calculated, this “plus” factor and the rate for each attaching entity can be ascertained mathematically. This marginal cost “plus” rate represents the permissible lower bound of the telecommunications rate. Such a rate would likely be lower than the rate currently yielded by the cable formula.

The FCC could also adopt the definition of “cost” that it proposed in the FNPRM. That definition would produce a rate above pole owners’ marginal costs because it includes costs that the pole owner incurs regardless of whether the attacher is on the pole. For example, the FCC proposes to include operating costs such as maintenance and administrative expenses, even though “the attacher might not be the cost causer with respect to all the operating costs.”¹⁷ This proposal would apparently yield rates that are sometimes somewhat higher and sometimes somewhat lower than the rate yielded by the current cable formula.

Lastly, the current telecommunications formula yields prices that are two to three times higher than the current cable rate.¹⁸ While TWTC and COMPTTEL believe that the prices yielded

¹⁶ See *FNPRM* ¶ 126.

¹⁷ *Id.* ¶ 138.

¹⁸ See *Ex Parte* Letter from Thomas Jones, Counsel to Time Warner Telecom Inc., to Marlene H. Dortch, Secretary, FCC, RM-11303, RM-11293, Attachment at 4 (Oct. 23, 2007).

by this formula violate the non-discrimination requirement of Section 224(e)(1),¹⁹ telecommunications carriers must currently pay this rate.²⁰

In sum, the Commission has the discretion under the statute to adopt a telecommunications carrier pole attachment formula that would consistently yield prices below or very close to the cable rate formula. In other words, the rates yielded by the current cable formula fall somewhere along the continuum of prices that the Commission has the authority to adopt under Section 224(e). It follows that the Commission has the authority to mandate that pole owners charge telecommunications carriers the rate yielded by the cable formula. Indeed, in light of the substantial policy benefits associated with setting the same price for competitors' pole attachments, the cable rate is the most appropriate of all of the rates along the continuum that could be mandated by the Commission under Section 224(e). This approach would clearly provide sufficient compensation to the pole owner as the courts have found that "any implementation of the Cable rate...provides for much more than marginal cost."²¹ Moreover, as the FCC observes in the FNPRM, the cable rate has been found to be "just, reasonable, and fully

¹⁹ See generally, White Paper attached to Letter from Thomas Jones, Counsel for Time Warner Telecom Inc., to Marlene H. Dortch, Secretary, FCC, RM-11293, RM-11303 (Jan. 16, 2007).

²⁰ As explained, the FCC can and should reduce this rate by changing its interpretation of "cost."

²¹ *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370 (11th Cir. 2002); see also *FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987) ("The FCC has evidently interpreted the statute to provide that when it reduces the contract rate for pole attachments, it may only reduce to the maximum rate allowed under the statute. ... The rate imposed by the Commission in this case was calculated according to the statutory formula for the determination of fully allocated cost...Appellees have not contended, nor could it seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory.").

compensatory.”²² There is no reason that this conclusion would also not apply to the attachment rates paid by telecommunications carriers as both cable and telecommunications attachments impose the same costs on the pole owner.

If the FCC declines to adopt this approach, it should at the very least adopt a telecommunications carrier formula that yields prices at the lower end of the permissible range described herein. That is, the Commission should adopt the marginal cost “plus” approach. Setting the lower bound of the telecommunications rate would promote broadband deployment and competition by lowering the attachment rates for telecommunications carriers. If the Commission is concerned that this methodology yields prices consistently below the cable rate, it should adjust the cable rate formula so that it yields prices that are equal to or similar to the marginal cost “plus” formula for telecommunications carrier attachments.

III. THE FCC SHOULD ADOPT, WITH MINOR MODIFICATIONS, ITS PROPOSED FIVE-STAGE ATTACHMENT TIMELINE AND PERMIT ATTACHERS TO USE QUALIFIED THIRD-PARTY CONTRACTORS WITHOUT RESTRICTION

TWTC and COMPTTEL strongly support the adoption of the attachment timeline proposed in the FNPRM.²³ As TWTC and others have explained, pole owners take many months to complete make-ready work and often refuse to agree to *any* deadlines in pole attachment contracts.²⁴ Even in those instances in which they agree in principle to meet a

²² FNPRM ¶ 141 & n.379 (citing *Florida Power Co.*, 480 U.S. 245).

²³ See FNPRM ¶¶ 31-45.

²⁴ See, e.g., *Ex Parte* Letter from Thomas Jones, Counsel to Time Warner Telecom Inc., to Marlene H. Dortch, Secretary, FCC, RM-11303, RM-11293, at 3 (May 10, 2006) (explaining that TWTC faces frequent and excessive make-ready delays that can last from several months to several years); Reply Comments of Time Warner Telecom, Inc., RM-11303, at 3 & Appendix:

deadline for completing make-ready work, utilities often miss such deadlines. Utilities also frequently deny attachers the right to use qualified third-party contractors. Attachers must therefore rely on the utilities' own workers, and when such workers are in high demand, requests for survey and make-ready work are often afforded the lowest priority.

Delays in the completion of make-ready work have real-world consequences to TWTC's and other attachers' business and their ability to deploy broadband services. If a utility is unable or unwilling to complete survey and make-ready work within a reasonable amount of time, attachers risk missing their commitments to their own customers and losing their customers' business. Adoption of the make-ready timeline proposed in the FNPRM, along with an unrestricted right for attachers to use *qualified* third-party contractors to perform make-ready work, would help ensure that competitors are able to quickly deploy broadband facilities and services, resulting in increased competition and lower prices for consumers.

A. Attachers Should Be Permitted To Use Third-Party Contractors From The Beginning Of The Five-Stage Make-Ready Timeline

While the make-ready timeline proposed in the FNPRM is generally sound, the FCC should not adopt its proposal to give attachers the right to use third-party contractors only after the utility has failed to meet its obligations under the proposed timeline.²⁵ Instead, attachers should have the right to use qualified third-party contractors from the beginning of the FCC's proposed five-stage make-ready timeline. Given that such qualified workers would be working

Declaration of Jeff Jarvis ¶¶ 4-5 (Mar. 1, 2006) (explaining that most pole attachment preparations are not complete until months or years after submission of an application for access); Comments of Fibertech, WC Dkt. No. 07-245, at 7-9 (filed Mar 8, 2009).

²⁵ See FNPRM ¶ 59.

only in the communications space and safety space below the area where the electrical lines are located on the pole, and not among the electric lines themselves, reliance on such workers should not raise serious safety concerns.

All of the available evidence weighs against adoption of the proposal in the FNPRM. Indeed, the FCC fails to explain why attachers should not be able to use third-party contractors to perform survey and make-ready work immediately. While utilities have objected to proposals which would allow the use of third-party contractors, those arguments do not support the proposal in the FNPRM.²⁶ Furthermore, the rule proposed in the FNPRM would substantially increase delays in the make-ready process. For example, if the utility notified an attacher on the 45th day of the make-ready performance period that it will be unable to complete (or even begin) the make-ready work by day 45, the make-ready work would likely not be completed for some time thereafter, and in no event could it be completed by the end of the 45-day period. It would likely take the attacher many days to schedule a third-party contractor, and additional days or weeks for the contractor to complete the project. Nor is it reasonable to expect an attacher to anticipate a utility's failure to meet the 45-day deadline. To do so, an attacher would need to spend a considerable amount of money to reserve the time of a third-party contractor "just in case" the utility fails to finish its work. Such a reservation of time is inefficient, and, in many cases, it would be impossible to secure.

²⁶ *See, e.g.*, Comments of Edison Electric Institute and Utilities Telecom Council, WC Dkt. No. 07-245, RM-11293, RM-11303, at 87-88 (Mar. 7, 2008); Comments of Pacificorp, Wisconsin Electric Power Co., and Wisconsin Public Service Corp., WC Dkt. No. 07-245, RM-11293, RM-11303, at 30-31 (Mar. 7, 2008); Comments of Florida Power & Light, Tampa Electric, and Progress Energy Florida, WC Dkt. No. 07-245, RM-11293, RM-11303, at 21 (Mar. 7, 2008).

Enabling attachers to use third-party contractors from the beginning of the make-ready process would also obviate the need for limits on the size of the attachment request that would qualify for the five-stage timeline.²⁷ As long as the attacher is willing to pay a contractor to perform the work in question, it can contract for additional work crews to finish a large attachment job without placing additional stress on the pole owner's own labor force.

If the FCC nevertheless decides not to grant attachers an unrestricted right to use third-party contractors, it should, at a minimum, mandate that pole owners notify attachers within the first five business days of the initiation of the survey (Stage 1) or performance periods (Stage 4) if the pole owner will be unable to complete either stage by the FCC's deadlines. This notice should trigger the right of an attacher to retain and use a third-party contractor to complete the work for that stage. The failure of the pole owner to either provide adequate notice or complete the work on time using its own workers would subject the pole owner to liability for damages, including compensatory damages as the FCC has proposed.²⁸

B. Attachers Should Be Able To Use Any Contractor That Has The “Same Qualifications, In Terms Of Training, As Utilities’ Own Workers.”

In the FNPRM, the FCC proposes that, (1) when attaching to poles of non-incumbent LEC utilities, attachers would be able to choose from “a list of approved and certified contractors, including any contractors that the utility itself uses,” but (2) when attaching to poles of incumbent LEC utilities, attachers would be permitted to choose any contractor with the

²⁷ See *FNPRM* ¶¶ 47-49.

²⁸ See *id.* ¶¶ 86-87.

“same qualifications, in terms of training, as the utility’s own workers.”²⁹ The FCC should not adopt this approach.

The adoption of a more restrictive standard for the selection and use of third-party contractors on electrical utilities’ poles does not make sense. The FCC rejected the utilities’ argument that attachers’ use of third-party contractors will result in labor shortages which will in turn restrict utilities’ ability to perform maintenance on their electrical facilities.³⁰ Instead, the FCC’s justification for the proposed rule turns on the incentives of *incumbent LECs*. In particular, the FCC seems to believe that, because electrical utilities lack the incumbent LECs’ incentive to discriminate against competitors, it is reasonable to limit attachers’ right to use third-party contractors when attaching to non-incumbent LEC poles.³¹ But the evidence in the record indicates that electrical utilities are, if anything, less cooperative than incumbent LECs in accommodating third-party attachers. For example, the majority of pole attachment adjudications brought before the FCC in recent years has involved an allegation of unjust or unreasonable practices by an electrical utility, not an incumbent LEC.³² Additionally, electrical

²⁹ See *id.* ¶¶ 62, 65.

³⁰ See *id.* ¶ 63 (“We are unpersuaded by contentions from certain utilities that our decisions on outside contractors will lead to resource diversion of non-employee ‘resources,’ undercutting their ability to deliver traditional services. We emphasize that nothing in this proposal affects a utility’s control of its employees.”). In any event, even if the supply of qualified third-party contractors is meaningfully constrained, electrical utilities have never provided an explanation for why they are uniquely entitled to monopolize the labor of an entire class of independent contractors.

³¹ See *id.* ¶ 65 (“We view these risks as heightened in the context of incumbent LEC utility poles, where the new attacher typically will be a competitor of the incumbent LEC.”).

³² Between July 2002 and April 2010, the Commission addressed a total of 44 pole attachment complaints, including 30 complaints where the defendant was an electric/power company. The

utilities, unlike incumbent LECs, have not developed a course of dealing and history of leasing (e.g., UNEs and special access), or negotiating access to, bottleneck facilities under FCC supervision. Regulation of the terms of access to their facilities is simply not something electrical utilities deal with on a daily basis. It is therefore not surprising that they often fail to cooperate with third parties seeking to attach facilities to their poles.

Accordingly, the available evidence supports the adoption of the same third-party contractor rule for attachers to non-incumbent LEC utility poles and incumbent LEC utility poles. But even if the FCC declines to adopt this sensible approach, it should at least grant attachers the right to use third-party contractors on electrical utilities' poles under the "same qualifications" standard if the electrical utility either does not provide a list of contractors or the contractors on the list are unavailable or unable to complete the work in time to meet the schedule proposed in the FNPRM.

In addition, the FCC should adopt its proposal to permit attachers to pay utilities for make-ready work in stages and to withhold a portion of the payment until work is completed.³³ The fact that utilities typically demand, and are able to secure, payment up-front for make-ready work is a clear demonstration of the unequal bargaining power between attachers and pole

remaining 14 complaints included nine complaints where the defendant was solely an ILEC; two complaints where the respondents included both an ILEC and an electric/power company; and three complaints where the defendant was a cable company or an overbuilder. *See* FCC, Pole Attachment Complaints, at <http://www.fcc.gov/eb/mdrd/PoleAtt.html> (last visited Aug. 12, 2010).

³³ *See* FNPRM ¶ 70 ("Accordingly, we propose to adopt the Utah rule that applicants pay for make-ready work in stages, and may withhold a portion of the payment until the work is complete. In Utah, applicants trigger initiation of performance by paying one half the estimated cost; pay one quarter of the estimated cost midway through performance; and pay the remainder upon completion.").

owners, and it is particularly unreasonable given that utilities often significantly delay completion of make-ready work. In contrast, when TWTC offers bids for third-party contractors to perform make-ready work, contractors typically do not demand payment up-front. Rather, TWTC usually pays contractors in stages as the work is completed. Third-party contractors are subject to competition, and payment by installment is the scheme yielded by a competitive market. To simulate the effect of competitive pressure on the utilities' own workforce, the FCC should adopt its proposal to permit attachers to pay utilities in stages for make-ready work.

The FCC should also adopt its proposal that “utilities make available to attaching entities a schedule of common make-ready charges” to attachers.³⁴ In TWTC's experience, some utilities already post such charges or provide them upon request for certain types of work (e.g., for simple rearrangements), so it should not be difficult for others to do so as well. Some utilities make available upon request a standard hourly price for a two person truck-roll. To the extent that utilities do not currently provide a list of standard charges to competitors, they likely have internal accounting practices that would allow them to quickly and easily develop a list of such charges and to make the list publicly available. Any publicly posted charges should separately list the cost of labor and relevant categories of materials. The availability of such a schedule, along with the ability of competitors to use qualified third-party contractors without restriction, would go a long way toward ensuring that make-ready charges are just and reasonable and that make-ready work is completed in a timely manner.

³⁴ *See id.* ¶ 71.

C. The FCC Should Establish A Timeline For Utilities To Agree To A Pole Attachment Contract.

While the timeline for attaching facilities set forth in the FNPRM would increase the efficiency of the attaching process, the Commission's proposal does not address the delays that prospective attachers experience in negotiating pole attachment agreements. In TWTC's experience, utilities, particularly electric utilities, often do not exhibit any urgency to initiate or complete negotiations. Delays in negotiations are tantamount to a delay in access, and there is no reason why the FCC's rules should fail to account for delays in the negotiation process. Accordingly, the FCC should mandate that a utility complete the negotiation of a pole attachment agreement within a reasonable period of time once the utility receives an attacher's request for an agreement. Oregon's rules, which permit an attacher to petition the PUC within 90 days of making a request for a pole attachment contract with the utility, provide a suitable model for an FCC rule.³⁵

IV. THE FCC SHOULD CLARIFY AND STRENGTHEN ITS RULES TO PREVENT POLE OWNERS FROM IMPOSING UNJUST AND UNREASONABLE TERMS AND CONDITIONS ON ATTACHERS

As the FCC observes in the FNPRM, attachers often agree to illegal or unreasonable provisions and do not bring a complaint under the sign-and-sue rule because, among other things, the cost of challenging such provisions in litigation is extremely high.³⁶ TWTC has itself often had no choice but to agree to facially unreasonable or illegal provisions in pole attachment

³⁵ See Oregon Rules (attached hereto as Attachment A).

³⁶ See FNPRM ¶¶ 99-100.

contracts in order to obtain timely access to poles. The FCC should therefore take several concrete steps to remedy the imbalance of bargaining power between pole owners and attachers.

A. The FCC Should Ensure That Attachers Can Recover Compensatory Damages As Far Back As Is Permitted By The Statute Of Limitations.

In the FNPRM, the FCC recognizes that, in order ensure that attachers are compensated sufficiently for pole owners' violations of the Commission's rules, attachers should be permitted to recover compensatory damages where "a rate, term, or condition is found to be unjust or unreasonable" or if there is "an unlawful delay or denial of access."³⁷ The FCC has already held that compensatory damages are available.³⁸ Codifying this right in the Commission's rules would merely preserve and clarify the *status quo*, but it is nevertheless a helpful step. The FCC should also adopt its proposal that attachers be permitted to recover compensatory damages "going back as far as the applicable statute of limitations."³⁹ Such a rule would not only ensure that attachers are able to obtain full compensation from pole owners, but it would also provide a disincentive for pole owners to continue to flout the rules.

Without these clarifications and changes, attachers will, in most cases, continue to have no available remedy for their losses. It is doubtful that an attacher could obtain compensatory damages from a utility for violation of the FCC's rules from a court because courts have

³⁷ *Id.* ¶¶ 85-86.

³⁸ See *id.* n.234; see also *Salsgiver Communications v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 20536, ¶ 28 (2007) ("In *Mile Hi Cable Partners*, the Commission applied general contract principles prohibiting the enforcement of unreasonable penalties for breach of contract, and limited the utility to compensatory damages, where there was no specific record to support punitive damages.").

³⁹ *FNPRM* ¶ 88.

repeatedly found that there is no private right of action for damages for violations of Section 224.⁴⁰ At most, litigation in the courts offers an attacher the chance to obtain damages if the utility violates the terms of the attacher's contract with the utility. A court would not have the authority to decide if the provisions of the contract are "just and reasonable" or otherwise meet the requirements of Section 224 and the FCC's rules. Therefore, as a matter of basic fairness, the FCC should ensure that attachers can obtain compensatory damages in an enforcement proceeding before the FCC.

B. Attachers Should Be Able To Opt Into Model Pole Attachment Agreements.

To further curb utilities' ability to act on their incentive to impose illegal or unreasonable terms and conditions on attachers and to expedite pole attachment negotiations and dispute resolution, each utility should be required to post a model pole attachment contract on its website that any attacher can opt into. This is a mechanism used in several other contexts, including in Section 252(i) of the Communications Act, to reduce transaction costs where there is an asymmetry of bargaining power.⁴¹ It would have the same effect for pole attachments.

⁴⁰ *Virginia Electric & Power Co. v. Comcast of Virginia, Inc.*, Slip Copy, 2010 WL 916953, at *4 (E.D.Va. Mar. 8, 2010) (internal citations omitted). ("As the court in *Kansas City Power* stated, 'when Congress wishes to provide a private remedy, it knows how to do so.' There, as here, the Court 'is reluctant to imply a cause of action without evidence of congressional intent' and will not create an implied private cause of action under § 224 alone.") *Kansas City Power & Light Co. v. American Fiber Systems, Inc.*, 2003 WL 22757927, at *3 (D. Kan. Nov. 5, 2003) ("Congress created jurisdiction in the FCC to settle utility pole disputes and provided the States the option of preempting the FCC; Congress did not intend to create a private cause of action for damages.").

⁴¹ See 47 U.S.C. § 252(i).

The availability of easily comparable model agreements will also provide a way to benchmark the behavior of one utility against another. For example, if an attacher argues that it is unjust or unreasonable for a utility to fail to include a particular provision in a contract, and the utility responds that it is infeasible or unreasonably costly for the utility to do so, the attacher and the FCC can benchmark that utility's assertions against provisions in other utilities' model agreements. As the FCC has found in its incumbent LEC merger orders, this type of benchmarking can assist the FCC in monitoring hard-to-detect unjust and unreasonable behavior.⁴²

Additionally, to facilitate the development of model contracts, the FCC should publish a list of contract terms which the FCC has previously found, in either its rulemaking or adjudicatory orders, to be unjust and unreasonable. The FCC should also declare a number of additional utility practices to be unjust and unreasonable and include these practices on its published list of prohibited contract provisions.

Change of Law. In TWTC's experience, utilities often refuse to agree to routine change of law provisions. In the absence of such provisions, utilities are likely under no obligation to

⁴² See *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 101 (1999) (noting that benchmarking is valuable to regulators and that "without the use of this tool, regulators would be forced, contrary to the 1996 Act and similar state laws, to engage in less efficient, more intrusive regulatory intervention in order to promote competition and secure quality service at reasonable rates for customers"); *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶ 127 (2000) (same).

reform their contracts if the FCC determines that a particular provision is illegal. To obtain the benefit of the FCC's ruling, an attacher without a change of law provision must bring a complaint before the FCC. Such an approach is extremely inefficient and has the effect of forcing competitors to comply with facially illegal provisions. Indeed, the utilities' position frustrates the FCC's enforcement of Section 224. The FCC should therefore deem a utility's refusal to agree to a change of law provision to be an unjust and unreasonable practice.

Non-Reciprocal Negligence Clauses. Utilities in many instances insist that TWTC assume liability for its acts of negligence while refusing to permit TWTC to recover damages caused by the utility's own acts of negligence. There can be no justification for the imposition of such a non-reciprocal duty, and the FCC should rule that the utilities' insistence upon such a provision constitutes an unjust or unreasonable practice.

C. The FCC Should Clarify Its Rules Governing The Process Utilities May Follow To Rebut The Three- And Five-Attacher Presumptions.

Attachers often utilize methodologies for rebutting the three- and five-attacher presumptions that yield an artificially low average number of attachers for purposes of the telecommunications carrier attachment rate. Attachers often have no practical ability to challenge these results because the relevant FCC rules are in some cases insufficiently clear, and the costs of undertaking a complete analysis of the utility's pole survey are generally very high. It makes sense therefore for the FCC to establish clearer rules governing the manner in which utilities may rebut the five- and three-attacher presumptions.⁴³

⁴³ Of course, to the extent that the FCC adopts rules which reduce the telecommunications rate so that is proximate or equal to the cable rate, disputes over the average number of attachers will diminish or disappear entirely.

First, the FCC must again reiterate its rule that, when counting the number of “attaching entities,” a utility must count *all* attaching entities on its poles, including *its own attachments* and attachments by government agencies.⁴⁴ As the FCC has explained, the definition of “attaching entities” sweeps broadly: “[t]he term ‘attaching entities’ includes, without limitation, and consistent with the Pole Attachment Act, any telecommunications carrier, incumbent or other local exchange carrier, cable operator, government agency, and any electric or other utility, whether or not the utility provides a telecommunications service to the public[.]”⁴⁵ Yet, utilities often do not count their own attachments when determining the average number of attachers.

Second, the FCC must also reiterate that, when rebutting the three- and five-attacher presumptions, the utility may only survey those poles with at least two attachers (i.e., the utility and a third-party attacher). The FCC has held that, when counting attaching entities, the FCC “include[s] the utility pole owner in the count, resulting in a minimum of two attaching entities being counted.”⁴⁶ In its *Teleport* order, the FCC specifically applied this rule to pole surveys for the purpose of determining the number of attaching entities. In that case, Georgia Power submitted a survey that contained fewer than two attachers per pole. The Enforcement Bureau rejected the survey, holding that “[w]e have already concluded that the minimum possible

⁴⁴ See 47 C.F.R. § 1.1417(b) (“All attaching entities attached to the pole shall be counted for purposes of apportioning the cost of unusable space”).

⁴⁵ *Amendment of Commission’s Rule and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶ 59 (2001) (“*Reconsideration Order*”).

⁴⁶ *Reconsideration Order* ¶ 60.

number of attachers to be used in the Telecom Formula is two.”⁴⁷ The full Commission upheld the Bureau’s rejection of the survey for failure to comply with the two attacher rule.⁴⁸

It has been TWTC’s experience that utilities routinely flout this rule. For example, in a recent pole attachment survey provided by Indiana Power and Light (“IPL”) to TWTC, 64 poles out of the 400 poles surveyed did not have any attacher other than IPL.⁴⁹ The inclusion of these poles substantially decreased the average number of attaching entities and drove up TWTC’s attachment rate under the telecommunications carrier formula. TWTC informed IPL that the survey was flawed, but IPL refused to redo the survey, asserting (incorrectly) that it was permitted under the FCC’s rules to count those poles on which IPL was the only attacher. Despite the clear flaws in IPL’s survey, TWTC signed the pole attachment agreement in question because its current agreement with IPL was about to expire, and the volume of attachments at issue was not large enough to justify TWTC incurring the cost to perform its own survey (which IPL might have rejected anyway) or to bring a complaint before the FCC. This experience reinforces the need for the Commission to once again publicize its rule that a utility may only survey those poles on which the utility and a third-party have established attachments.

Third, the FCC must clarify that, to the extent that utilities have data on the average number of attachers per pole to which an entity has actually attached facilities, the utility’s survey should only count poles on which the attacher has actually placed its facilities or to which

⁴⁷ *Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, Order, 16 FCC Rcd 20238, ¶ 11 (2001).

⁴⁸ *Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, Application for Review, Order on Review, 17 FCC Rcd 19859, ¶ 17 (2002) (“*Teleport*”).

⁴⁹ See Survey (attached hereto as Attachment B).

an attacher seeks to attach. If a utility does not have the information needed to perform an actual attachment survey, the utility should be required to utilize a “representative area” in which to conduct an attachment survey.⁵⁰ The FCC should mandate that, under the “representative area” test, the utility must, at a minimum, survey only those poles in the zip codes to which the attacher is attached or plans to attach. It should be the responsibility of the attacher to provide a list of zip codes where it has attachments or plans to attach. Once a pole owner that was unable to perform an actual attachment survey performs an audit of its poles, it should thereafter be required to perform an actual attachment survey if it wants to rebut the presumptions.

These rule clarifications are in accord with the FCC’s past precedent. The FCC first addressed how parties must calculate the average number of attachers in its *1998 Pole Attachment Order*.⁵¹ In that order, the FCC held that a utility must make a good faith effort to establish and update the number of attaching entities as needed.⁵² For example, the FCC understood that utilities generally perform field surveys of the poles “every three to seven years.”⁵³ Therefore, the FCC believed that, to the extent that the pole owner’s field surveys or

⁵⁰ It is worth noting that while the pole owners provide reams of data regarding allegedly unauthorized attachments from their pole audits, they seem unable or unwilling to use that same data to perform an actual attachment survey.

⁵¹ *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commissions Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, ¶¶ 74-79 (1998) (“1998 Order”).

⁵² *Id.* ¶ 78; *see also* 47 C.F.R. § 1.1417(d)(2) (“Each utility is required to exercise good faith in establishing and updating its presumptive average number of attachers.”).

⁵³ *1998 Order* ¶ 78.

audits provide actual information on the average number of attachers, such information should be used if the utility seeks to rebut the presumptions.

In its 2001 *Reconsideration Order*, the FCC established the three- and five-attacher presumptions for non-urbanized and urbanized areas, respectively.⁵⁴ The FCC also clarified that either the utility or the attacher could rebut the FCC’s presumptions or the other party’s data “with statistically valid survey data or actual data.”⁵⁵ Importantly, FCC stated that “the service area [used by the utility] must be *representative* of the area for which pole attachment rates are being set.”⁵⁶

The FCC provided guidance on the meaning of the “representative area” standard in the *Teleport* case. In *Teleport*, the FCC held that the survey “must reflect only those poles *in areas where the attacher is actually affixed*.”⁵⁷ Since *Teleport* was known to focus its entry on business customers located in urban areas, the FCC concluded that “this tends to support the use of a smaller, denser representative [service] area to calculate the average number of attachers.”⁵⁸ Unfortunately, this characterization of a “representative area” can yield unreliable results because it arguably permits inclusion in the survey of areas in which there are substantially fewer attachers per pole on average than the poles to which the attacher is actually attached or to which the attacher seeks to attach. For example, most of the poles to which TWTC has attached in

⁵⁴ See *Reconsideration Order* ¶¶ 62-68.

⁵⁵ *Id.* ¶ 70.

⁵⁶ *Id.* n.227 (emphasis added).

⁵⁷ *Teleport* ¶ 25 (citing *Recon. Order* n.227) (emphasis added).

⁵⁸ *Id.*

Kansas City (and this is true of other markets as well) have, on average, many more attachers per pole than poles even several blocks away because TWTC attaches along the main thoroughfares where many other companies are attached.

It is therefore significant that, in *Teleport*, the FCC also suggested a more accurate way of measuring the number of attachers per pole than the “representative area” test. The FCC found that Georgia Power’s survey was faulty because Georgia Power had failed to explain why it had included “poles to which Teleport is not attached” in its survey.⁵⁹ In other words, absent a compelling justification, the FCC signaled that the utility should *have surveyed only those poles to which Teleport was attached* in developing its average (i.e., perform an “actual attachment survey”).

It is likely that at least some utilities are able to perform an actual attachment survey without collecting additional data. It is not uncommon for utilities, as part of the survey performed for each pole attachment project, to gather information regarding the number of attachers on each pole to which the requesting party seeks to attach facilities. Where this is the case, the utilities have in their possession the information needed to conduct an actual attachment survey. They should be required to use such information if they seek to rebut the three- or five-attacher presumptions.

⁵⁹ *Id.*

V. THE COMMISSION SHOULD ADOPT MORE COMPREHENSIVE RULES GOVERNING UNAUTHORIZED ATTACHMENTS

The Commission has amassed substantial experience in resolving unauthorized attachment disputes.⁶⁰ Resolving those disputes through traditional pole attachment complaint proceedings, however, often takes years and frequently is extraordinarily expensive. Accordingly, it makes sense for the Commission to use its experience to develop more detailed and predictable rules governing unauthorized attachments.⁶¹

A. The FCC Should Establish Rules Defining Unauthorized Attachments

The Commission should begin by establishing rules that clarify the circumstances in which attachments can be deemed unauthorized by a utility. For example, an attachment should not be considered to be unauthorized for failure to meet relevant safety codes if, at the time it was affixed, the attachment complied with (1) the utility's applicable attachment procedures and (2) applicable safety codes. A pole owner should be required to notify an attacher of any relevant change in safety requirements, including those established by changes in state or federal law. The attacher should be required to bring its attachment into compliance with any new requirement within three months of notice provided by the utility.

⁶⁰ See, e.g., *Mile Hi Cable Partners v. Pub. Serv. Co. of Colo.*, Order, 15 FCC Rcd 11450 (2000), *aff'd*, 17 FCC Rcd 6268 (FCC 2002), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003); see also *Salsgiver Communications, Inc. v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 20536 (2007); *Cable Television Ass'n of Georgia v. Georgia Power Co.*, Order, 18 FCC Rcd 16333 (2007).

⁶¹ As explained below, the Commission should adopt an expedited dispute resolution process to resolve disputes that develop even after the adoption of the rules described herein. That expedited dispute resolution process would also apply to other types of disputes that are suitable for expedited resolution.

It is also critical that the Commission reiterate that the following arrangements do not constitute unauthorized attachments: (1) overlashed cables, where the overlashing is accomplished pursuant to an agreement with a lawful attacher; and (2) the use of a lawfully attaching entity's fiber or cable strands including but not limited to leases and IRUs. The FCC has repeatedly found that these practices are lawful, impose minimal (and in the case of a fiber lease or IRU, zero) additional burdens on the pole and do not constitute additional attachments.⁶² There is no reason to disturb these findings.

B. The FCC Should Establish Detailed Rules Governing The Resolution Of Disputes Concerning Unauthorized Attachments

The Commission should also adopt comprehensive procedural rules governing the treatment of unauthorized attachments. Such rules should separately address situations in which contractual privity exists between the attacher and utility and situations in which such privity does not exist.

1. Resolution of Disputes Where Contractual Privity Exists

As USTA has acknowledged, “where contracts exist between the parties, unauthorized attachments are much more likely to be inadvertent.”⁶³ It is clear therefore that the Commission should prohibit self-help by the utility where the owner of purportedly unauthorized attachments maintains a valid agreement either with the pole owner or with a lawful attacher to the poles

⁶² *1998 Order* ¶ 68 (1998) (discussing overlashing); *id.* ¶ 73 (discussing the leasing of dark fiber); *Reconsideration Order* ¶ 75 (2001) (discussing third-party overlashing); *id.* ¶ 86 (discussing the leasing of dark fiber).

⁶³ *See* Letter from Jonathan Banks, Senior Vice President, Law & Policy, and Glenn T. Reynolds, Vice President, Policy, USTA, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-245, at 7 (Oct. 27, 2008).

(through a sublease or overlashing arrangement).⁶⁴ Exceptions to this prohibition can be made where the unauthorized attachment creates an emergency condition. However, most agreements contain a set of procedures for handling emergency pole conditions. In those cases, the relevant procedures set forth in the agreement should govern.⁶⁵

When the attaching party maintains a contractual relationship with the pole owner or an authorized attacher and the alleged unauthorized attachment does not impose an immediate threat to physical safety, the Commission should prohibit unilateral, self-help actions by the pole owner. The FCC should instead encourage the parties to reach a private resolution of disputes by adopting the following rules. *First*, when a utility alleges that an unauthorized attachment has been made by an attacher that maintains an attachment agreement with either the utility or a lawful attacher on the utility's poles, a utility should be prohibited from removing or rearranging the attachment until either: (1) the utility and the attacher agree to the removal or rearrangement, or (2) the Commission issues an order granting the utility authority to remove or rearrange the attachment. In all events, a utility should not be permitted to use a dispute concerning unauthorized attachments as a basis for refusing to process additional attachment requests by an attacher.

Second, where an allegedly unauthorized attachment creates an emergency condition and the pole attachment agreement between the attacher and the utility establishes procedures for handling emergency conditions, the utility has a contractual right to act in accordance with those

⁶⁴ An agreement should be considered valid only for the geographic area covered by the attacher's pole attachment agreement with the pole owner.

⁶⁵ For purposes of the Commission's pole attachment rules, the word "emergency" should be interpreted to mean "an immediate and demonstrable threat to physical safety."

procedures. In that case, the attacher and the utility should be deemed to have agreed to removal or rearrangement in accordance with the emergency procedures set forth in the pole attachment agreement.

Third, where an unauthorized attachment creates an emergency condition and the pole attachment agreement between the attacher and the utility does not contain procedures for handling emergency conditions, the utility should be required to make an effort to contact the attacher to resolve the emergency situation expeditiously. If the utility is unable to establish immediate contact with the attacher and an emergency condition exists, the utility should be given the authority to take any necessary and reasonable steps to resolve emergency conditions but, in doing so, should take all reasonable measures to avoid disruption of service to the attacher's customers.

Finally, the Commission should establish rules governing the process that a utility may follow if it believes that an attachment established by an attacher with contractual privity is unauthorized. A utility should be required to provide an attacher whose attachment the utility alleges is unauthorized the following information for each allegedly unauthorized attachment:

- the specific location of the pole;
- the date the unauthorized attachment was discovered;
- a digital photograph (either in electronic format or hard copy) of the unauthorized attachment;
- a detailed explanation of the reason why the attachment is deemed to be unauthorized; and
- a description of actions that the attacher must take to cause the attachment to become authorized.

After providing this information, the utility should be required to provide the attacher with at least 30 days to challenge the utility's findings in writing. If, after reviewing any challenges submitted by the attacher, the utility still believes that the attachments are

unauthorized, the utility may assess financial penalties as set forth in the pole attachment agreement for the unauthorized attachments.

2. Resolution of Disputes Where Contractual Privity Does Not Exist

Where there is contractual privity between the attacher and the pole owner, the pole owner knows the identity of and how to contact the attacher, and typically has a contractual procedure in place for handling emergencies that pose a threat to safety or the integrity of the pole network (including lawful attachments). None of those circumstances is present when the utility confronts an emergency condition that is caused by unauthorized attachments by entities having no contractual relationship with the utility. In the latter case, the pole owner should be given the authority to take any necessary and reasonable steps to immediately resolve the emergency condition.

Where unauthorized attachments do not create emergency conditions, the utility should make reasonable efforts to identify the unauthorized attacher. Where identification is possible, the utility should afford the unauthorized attacher 15 days to either: (1) remove the unauthorized attachments; or (2) begin the process of entering into a pole attachment agreement with the utility and curing the unauthorized status of the attachments. Of course, in the latter case, the unauthorized attacher: (1) would be required to take any necessary corrective action to bring its attachments into compliance with applicable NESC requirements and the pole owner's attachment policies; (2) may need to compensate the pole owner for certain make-ready charges; and (3) may be liable for unauthorized attachment penalties. Where identification of the attacher is not possible, the utility should conspicuously tag the attachments for removal. It should then wait 60 days before removing the unauthorized attachments. The utility should then be permitted to impose financial penalties in accordance with the guidelines discussed *infra*.

C. The FCC Should Not Increase The Permissible Penalties For Unauthorized Attachments

In the FNPRM, the Commission seeks comment on the adoption of a federal rule similar to the ones adopted in some states, most notably Oregon, under which utilities are permitted to charge fixed, non-cost based financial penalties for each unauthorized attachment. There is no basis for adopting such a regime.

The Commission observes in the FNPRM that the record in this proceeding does not support the assertion made by some utilities that unauthorized pole attachments are widespread.⁶⁶ As a result, it is not possible “to gauge with certainty the extent of the problem of unauthorized attachments.”⁶⁷ Indeed, the evidence filed in the record suggests that reports of high numbers of unauthorized attachments may well be overstated.⁶⁸ In some cases, utilities effectively created “unauthorized” attachments by requiring attachers to obtain permits for equipment already on the poles that previously did not require such authorizations.⁶⁹ In these circumstances, the pre-

⁶⁶ See *FNPRM* ¶¶ 89-90; see also Reply Comments of Time Warner Telecom, Inc., One Communications Corporation, and CompTel, WC Dkt. No. 07-245, RM-11293, RM-11303, at 28-29 (Apr. 22, 2008).

⁶⁷ *FNPRM* ¶ 91.

⁶⁸ Time Warner Cable, for example, cites instances in which a utility’s faulty record-keeping caused the utility to seek payments for allegedly unauthorized attachments for which the cable company had in fact been paying rent for years. See Comments of Time Warner Cable, Inc., WC Dkt. No 07-245, RM-11293, RM-11303, at 55 (Mar. 7, 2008).

⁶⁹ See *id.* at 54-55 (arguing “unauthorized” attachments are often based on utilities’ efforts to change historic pole attachment practices); see also Reply Comments of State Cable Associations, WC Dkt. No. 07-245, RM-11293, RM-11303, at 14-15 (Apr. 22, 2008) (explaining how historically, New York pole operators had not required permits for cable attachments to drop poles, yet now such attachments are considered “unauthorized”); Reply Comments of Comcast, WC Dkt. No 07-245, at 28-29 (Apr. 22, 2008) (describing a similar scenario with drop pole permits).

existing equipment that had been affixed in compliance with the utility's requirements at the time of attachment instantly became unauthorized attachments through no improper action by the attacher.⁷⁰ In other cases, a utility might deem an attachment to be "unauthorized" because it violates applicable safety regulations, but this would be inappropriate if the safety violation is caused by the pole owner's unilateral change in safety standards or is caused by changes made to other attachments on the pole.⁷¹ In all events, the record simply does not support the conclusion that attachments that can fairly be characterized as unauthorized are numerous enough to warrant the imposition of extra financial penalties such as those permitted under Oregon law.⁷² The procedures described herein for addressing unauthorized attachments sufficiently address any safety concerns that a utility may legitimately have with regard to unauthorized attachments.

If the FCC nevertheless chooses to adopt an unauthorized attachment penalty scheme similar to Oregon's, it must at least ensure that utilities do not have the incentive to over-count the number of unauthorized attachments. Therefore, to the extent a penalty for unauthorized attachments exceeds the actual damages suffered by a utility in a particular instance, the excess

⁷⁰ See *id.*; see also Comments of Knology, Inc., WC Dkt. No. 07-245, RM-11293, RM-11303, at 18 (Mar. 7, 2008) ("the unauthorized status is often the result of the utility's retroactive enforcement of a change in its attachment policies.") ("Knology 2008 Comments").

⁷¹ See *FNPRM* ¶ 96.

⁷² As with so many of their arguments, the electric utilities overstate the safety risks of unauthorized attachments as a scare tactic to get the FCC to afford them greater discretion. If unauthorized attachments really presented the safety risk that utilities contend, the 57 percent unauthorized attachment rate on PPL Utilities' poles would have severely compromised its system's operations or caused multiple incidents of harm. See Comments of PPL Electric Utilities Corporation *et al.*, WC Dkt. No. 07-245, RM-11293, RM-11303, at 15 (Mar. 7, 2008). PPL does not contend that either has occurred. To the contrary, it is simply a matter of money: they want payment. The safety concerns, while not entirely absent, are overplayed to generate a particular regulatory response.

penalty should be paid to the FCC. In this way, the FCC could establish a deterrent against unauthorized penalties while eliminating the utility's incentive to inflate the number of unauthorized attachments. Such payments to the FCC can take the form of forfeitures imposed on attachers that "willfully" and "repeatedly" place unauthorized attachments.⁷³ The FCC has traditionally turned to forfeitures to create a disincentive against bad behavior when the payment of compensatory damages is insufficient, and it makes sense to do so here.⁷⁴

VI. THE FCC SHOULD ADOPT AN EXPEDITED DISPUTE RESOLUTION PROCESS FOR POLE ATTACHMENT COMPLAINTS

Under current FCC procedures, pole attachment complaints often take years to resolve and are, as mentioned, extraordinarily expensive to litigate. The time and expense required to seek a remedy from the FCC often force attachers to accept the utilities' unreasonable practices.⁷⁵ The Commission should therefore develop a streamlined, expedited process for resolving certain relatively uncomplicated disputes.

⁷³ See, e.g., 47 U.S.C. § 503(b)(1) (allowing forfeitures for those who "willfully or repeatedly" fail to comply with license terms, provisions of the Act, or FCC rules or regulations).

⁷⁴ For example, under the slamming rules, the slamming carrier must pay compensation to the slammed carrier who then pays a portion of that amount to the slammed customer, making both the slammed carrier and customer whole. *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 et al.*, First Order on Reconsideration, 15 FCC Rcd 8158, ¶ 17 (2000). A customer that "willfully" and "repeatedly" violates the slamming rules may be subject to a substantial forfeiture. See, e.g., *Silv Communication Inc.*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 5178, ¶¶ 18-19 (2010) (issuing a forfeiture of \$1,480,000 after a finding that Silv Communication "willfully and repeatedly" slammed customers over a two-year period).

⁷⁵ See Knology 2008 Comments at 9 & n.16 (indicating the problems with lengthy and expensive pole attachment complaint procedures and observing that "for those pole attachment complaints filed with the FCC after enactment of the Telecommunications Act of 1996, the average time between the date a complaint was filed and the date that a decision on the merits. . . was released is 687 days").

A. Utilities Should Be Required To Provide Information Necessary For The Prompt Escalation Of Problems

In TWTC's experience, many problems can be resolved if the attacher can simply discuss the matter with a utility employee with sufficient authority to address the problems.

Accordingly, the FCC should mandate that utilities publish or provide to all attachers with which the utility has signed a pole attachment agreement an "escalation list" setting forth the contact information of utility employees with decision-making authority regarding all matters concerning pole attachments. In this way, the attacher would be able to escalate a problem to the proper utility employee when problems arise, and, TWTC believes, many issues that might otherwise turn into disputes can be quickly resolved.

B. The FCC Should Adopt Expedited Dispute Resolution Procedures For Pole Attachments

Unfortunately, not all problems can be resolved on an informal basis between the parties. At the same time, many such problems are straightforward and can be resolved by application of established FCC rules or policies (this would be especially true if the FCC adopts the rule changes described in these comments). The Commission should therefore establish a simple, expedited process for addressing such disputes.

The Commission should establish a non-exclusive list of subject matter areas that could be addressed in expedited dispute resolution. Disputes eligible for expedited procedures should involve limited factual inquiry and should concern conduct that is governed by existing Commission rules and precedent. The list of issues that meet these criteria include, *but are not limited to*, those concerning whether (1) attachments are unauthorized; (2) whether a pole owner's "model" agreement contains any terms or conditions which the FCC has previously

found to be unlawful; and (3) the utility employed a valid methodology to calculate the average number of attachers.⁷⁶

The Commission should clarify that a party remains free to utilize the process set forth in Section 1.404 of the Commission's rules for any pole attachment dispute that falls under the Commission's jurisdiction, including disputes that may be considered under expedited procedures. Where a dispute is eligible for expedited procedures, either party should be free to invoke the expedited process. If neither party does so, the Section 1.404 procedures would apply. The expedited dispute resolution procedures should be available to utilities and attachers that have an attachment agreement either with the utility or a lawful attacher.

The Commission should design the expedited process so as to significantly reduce the costs of resolving pole attachment disputes. The Commission should require that each party submit a single written presentation to the Enforcement Bureau that includes a statement of issues and a proposed resolution. The parties would then be required to participate in an in-person mediation session with Commission staff within 30 days of their written submissions. If the mediation session does not result in resolution of the dispute within 15 days of the in-person meeting, the Bureau would then notify the parties whether the dispute qualifies as eligible for accelerated resolution. If the Bureau determines that the dispute does qualify, it would have 60 days from the arbitration date to issue a written decision that disposes of the controversy.⁷⁷ Any

⁷⁶ These two matters are by no means an exhaustive list of matters that could be handled by an expedited complaint process.

⁷⁷ If the dispute involved both a disagreement about whether the attacher has an agreement with the pole owner and, if so, whether the attachments at issue are lawful, the written decision by the Bureau would need to reach the latter issue only if it first concluded that there was an enforceable pole attachment agreement between the parties.

such decision would be subject to review by the full Commission. As with appeals of Bureau decisions of cases filed in the accelerated docket, the full Commission would have to rule on the Bureau decision within, at most, 30 days after final comments on the Bureau decision are filed.⁷⁸ The certainty that the Bureau will issue a decision within a prescribed, short period of time is critical to the effectiveness of this dispute resolution process. Indeed, that certainty will provide a powerful incentive for parties to resolve disputes privately without seeking expedited FCC intervention in the first instance in order to avoid the risk of a prompt adverse ruling.

VII. CONCLUSION

For the foregoing reasons, the FCC should change its pole attachment rules as explained herein.

⁷⁸ See 47 C.F.R. § 1.730(i).

ATTACHMENT A

deviation is just, fair and reasonable.

Stat. Auth.: ORS 183, 756, 757 & 759

Stats. Implemented: ORS 756.040, 757.035, 757.270 - 290, 759.045 & 759.650 - 675

Hist.: PUC 3-2007, f. & cert. ef. 4-16-07

860-028-0060

Attachment Contracts

(1) Any entity requiring pole attachments to serve customers should be allowed to use utility poles, ducts, conduits, rights-of-way, manholes, handholes, or other similar facilities jointly, as much as practicable.

(2) To facilitate the joint use of poles, entities must execute contracts establishing the rates, terms, and conditions of pole use in accordance with OAR 860-028-0120. Government entities are not required to execute contracts.

(3) Parties must negotiate pole attachment contracts in good faith.

(4) Unless expressly prohibited by contract, the last effective contract between the parties will continue in effect until a new contract between the parties goes into effect.

Stat. Auth.: ORS 183, 756, 757 & 759

Stats. Implemented: ORS 756.040, 757.035, 757.270 - 290, 759.045 & 759.650 - 675

Hist.: PUC 3-2007, f. & cert. ef. 4-16-07

860-028-0070

Resolution of Disputes for Proposed New or Amended Contractual Provisions

(1) This rule applies to a complaint alleging a violation of ORS 757.273, 757.276, 757.279, 757.282, 759.655, 759.660, or 759.665.

(2) In addition to the generally applicable hearing procedures contained in OAR chapter 860, divisions 011 through 014, the procedures set forth in this rule shall apply to a complaint that an existing or proposed contract is unjust and unreasonable.

(3) The party filing a complaint under this rule is the "complainant." The other party to the contract, against whom the complaint is filed, is the "respondent."

(4) Before a complaint is filed with the Commission, one party must request, in writing, negotiations for a new or amended attachment agreement from the other party.

(5) Ninety (90) calendar days after one party receives a request for negotiation from another party, either party may file with the Commission for a proceeding under ORS 757.279 or 759.660.

(6) The complaint must contain each of the following:

(a) Proof that a request for negotiation was received at least 90 calendar days earlier. The complainant

must specify the attempts at negotiation or other methods of dispute resolution undertaken since the date of receipt of the request and indicate that the parties have been unable to resolve the dispute.

(b) A statement of the specific attachment rates, terms and conditions that are claimed to be unjust or unreasonable.

(c) A description of the complainant's position on the unresolved provisions.

(d) A proposed agreement addressing all issues, including those on which the parties have reached agreement and those that are in dispute.

(e) All information available as of the date the complaint is filed with the Commission that the complainant relied upon to support its claims:

(A) In cases in which the Commission's review of a rate is required, the complaint must provide all data and information in support of its allegations, in accordance with the administrative rules set forth to evaluate the disputed rental rate.

(B) If the licensee is the party submitting the complaint, the licensee must request the data and information required by this rule from the owner. The owner must supply the licensee the information required in this rule, as applicable, within 30 calendar days of the receipt of the request. The licensee must submit this information with its complaint.

(C) If the owner does not provide the data and information required by this rule after a request by the licensee, the licensee must include a statement indicating the steps taken to obtain the information from the owner, including the dates of all requests.

(D) No complaint by a licensee will be dismissed because the owner has failed to provide the applicable data and information required under paragraph (6)(e)(B) of this rule.

(7) Within 30 calendar days of receiving a copy of the complaint, the respondent must file its response with the Commission, addressing in detail each claim raised in the complaint and a description of the respondent's position on the unresolved provisions.

(8) If the Commission determines after a hearing that a rate, term or condition that is the subject of the complaint is not just, fair, and reasonable, it may reject the proposed rate, term or condition and may prescribe a just and reasonable rate, term or condition.

Stat. Auth.: ORS 183, 756, 757 & 759

Stats. Implemented: ORS 756.040, 757.035, 757.270 - 290, 759.045 & 759.650 - 675

Hist.: PUC 3-2007, f. & cert. ef. 4-16-07

860-028-0080

Costs of Hearing in Attachment Contract Disputes

(1) When the Commission issues an order in an attachment contract dispute that applies to a consumer-owned utility, as defined by ORS 757.270, the order must also provide for payment by the parties of the cost of the hearing.

(2) The cost of the hearing includes, but is not limited to, the cost of Commission employee time, the use of facilities, and other costs incurred. The rates will be set at cost. Upon request of a party, and no more than once every 60 days, the Commission will provide to the parties the costs incurred to date in the proceeding.

(3) The Joint-Use Association is not considered a party for purposes of this rule when participating in a case as an advisor to the Commission.

(4) The Commission will allocate costs in a manner that it considers equitable. The following factors will be considered in allocating costs:

(a) Whether the party unreasonably burdened the record or delayed the proceeding;

(b) Merits of the party's positions throughout the course of the proceeding; and

(c) Other factors that the Commission deems relevant.

Stat. Auth.: ORS 183, 756, 757 & 759

Stats. Implemented: ORS 756.040, 757.279 & 759.660

Hist.: PUC 3-2007, f. & cert. ef. 4-16-07

860-028-0100

Application Process for New or Modified Attachments

(1) As used in this rule, "applicant" does not include a government entity.

(2) An applicant requesting a new or modified attachment must submit an application providing the following information in writing or electronically to the owner:

(a) Information for contacting the applicant.

(b) The pole owner may require the applicant to provide the following technical information:

(A) Location of identifying pole or conduit for which the attachment is requested;

(B) The amount of space requested;

(C) The number and type of attachment for each pole or conduit;

(D) Physical characteristics of attachments;

(E) Attachment location on pole;

(F) Description of installation;

(G) Proposed route; and

(H) Proposed schedule for construction.

ATTACHMENT B

Number of Attaching Entities

Results of System-Wide Random Audit Conducted Summer 2007

Stop No.	Map Section	Pole No.	Total Entities	IPL	Telephone	Cable/F.O.	Comments
1	P88-K	52	1	1	0	0	
2	M29-G	36	2	1	0	1	
3	M29-K	84	2	1	0	1	
4	M29-S	123	1	1	0	0	
5	M14-V	14	1	1	0	0	
6	M23-A	60	1	1	0	0	no pole tag
7	M15-Z	126	1	1	0	0	
8	M08-S	30	3	1	1	1	no pole tag
9	M09-P	1	2	1	0	1	
10	M09-H	9	2	1	0	1	
11	M09-L	62	2	1	0	1	
12	M09-F	264	1	1	0	0	
13	M02-S	281	3	1	1	1	
14	M02-K	84	3	1	1	1	
15	M28-U	10	3	1	2	0	
16	M28-E	168	1	1	0	0	
17	M20-X	52	2	1	0	1	
18	M12-U	35	1	1	0	0	
19	M12-G	14	1	1	0	0	
20	776--	38	2	1	1	0	
21	778--	38	1	1	0	0	
22	811--	258					light pole
23	811--	129	3	1	1	1	
24	816--	242	4	1	1	2	
25	817--	13	3	1	1	1	
26	824--	18	2	1	1	0	
27	796--	32	2	1	0	1	
28	797-A	16	2	1	0	1	
29	801-B	31	2	1	0	1	
30	800--	102	3	1	1	1	
31	771C-	35	2	1	0	1	
32	741DA	100	2	1	0	1	
33	767-A	14	3	1	1	1	
34	737--	81	3	1	1	1	
35	678--	69	1	1	0	0	
36	648-B	38	3	1	1	1	
37	706--	627	4	1	2	1	
38	735-A	570	4	1	1	2	
39	732--	208	3	1	1	1	
40	731--	210	2	1	0	1	
41	732--	97	2	1	0	1	
42	672-B	291	2	1	0	1	
43	644-B	17	2	1	1	0	
44	643-B	106	3	1	0	2	
45	642-B	175	3	1	1	1	
46	613-B	220	1	1	0	0	
47	641-B	85	2	1	0	1	
48	671-A	126	3	1	1	1	
49	701-A	43	3	1	1	1	
50	700-A	15	2	1	0	1	
51	729--	707	3	1	1	1	
52	758--	212	3	1	1	1	

Number of Attaching Entities
Results of System-Wide Random Audit Conducted Summer 2007

Stop No.	Map Section	Pole No.	Total Entities	IPL	Telephone	Cable/F.O.	Comments
53	758--	32	1	1	0	0	
54	758--	3	4	1	2	1	
55	758--	418	3	1	1	1	
56	757--	204	3	1	1	1	
57	727--	189	2	1	0	1	
58	726--	64	3	1	1	1	no pole tag
59	696-A	110	3	1	1	1	
60	696-A	113	3	1	1	1	
61	697-B	276					light pole
62	668-A	171	2	1	1	0	
63	639-B	227	3	1	1	1	
64	637-A	340	3	1	1	1	
65	636-B	80	3	1	1	1	
66	664-B	27	2	1	0	1	
67	755--	70	3	1	1	1	
68	753--	10	2	1	0	1	
69	782-A	61	3	1	1	1	
70	811--	293	3	1	1	1	
71	779--	23	2	1	1	0	
72	743--	82	3	1	1	1	
73	771YA	143	3	1	1	1	
74	771VB	173	1	1	0	0	
75	771TA	20	1	1	0	0	
76	741VA	11	3	1	2	0	
77	741X-	170	2	1	0	1	
78	653-B	544	2	1	0	1	
79	652--	35	3	1	2	0	
80	624-B	149	2	1	1	0	
81	625-B	119					pole not there
82	628--	194	2	1	0	1	
83	625-A	305	5	1	1	3	
84	595-B	9	1	1	0	0	
85	555-B	47	3	1	1	1	
86	554-B	91	3	1	1	1	
87	525-A	222	3	1	1	1	
88	456-B	104	4	1	0	3	
89	456-B	174	3	1	1	1	
90	456-B	95	3	1	0	2	
91	498-A	128	6	1	3	2	
92	459-B	88	3	1	1	1	
93	460-B	270	3	1	1	1	
94	461-B	118	3	1	1	1	
95	462-B	131	3	1	1	1	
96	462-B	79	3	1	1	1	
97	463-B	15	3	1	1	1	
98	464-B	155	5	1	1	3	no pole tag
99	465-B	1142	3	1	1	1	
100	503-A	483	2	1	0	1	
101	503-A	202	2	1	0	1	
102	501-A	47	2	1	0	1	
103	499-A	209	3	1	1	1	
104	527-A	410	5	1	1	3	

Number of Attaching Entities

Results of System-Wide Random Audit Conducted Summer 2007

Stop No.	Map Section	Pole No.	Total Entities	IPL	Telephone	Cable/F.O.	Comments
105	529-B	174	3	1	1	1	
106	560-A	124	3	1	1	1	
107	561-A	132	4	1	2	1	
108	562-B	52	3	1	1	1	
109	562-B	594	3	1	1	1	
110	564-B	41	3	1	1	1	
111	564-B	546	2	1	1	0	
112	536-B	714	3	1	2	0	
113	506-B	521	3	1	1	1	
114	506-B	325	4	1	1	2	
115	506-A	217	3	1	1	1	
116	507-A	716	3	1	1	1	
117	466-A	183	2	1	1	0	
118	435-A	564	4	1	2	1	
119	405-A	379	1	1	0	0	
120	365-B	162	4	1	2	1	
121	334-B	115	3	1	1	1	
122	335-B	396	1	1	0	0	no pole tag
123	365-A	27	3	1	1	1	
124	365-A	174	4	1	2	1	
125	365-A	127	3	1	1	1	
126	365-A	137	3	1	1	1	
127	336-A	181	1	1	0	0	
128	307-B	65	4	1	1	2	
129	268-A	29	3	1	1	1	pole steps on pole
130	269-A	9	3	1	1	1	
131	240--	259	2	1	0	1	
132	240--	256	2	1	0	1	
133	240--	98	4	1	2	1	
134	269-B	20	3	1	1	1	
135	312--	181	3	1	1	1	
136	342--	96	3	1	1	1	
137	344-A	22	1	1	0	0	
138	346-A	1	2	1	1	0	
139	346-A	68	3	1	1	1	
140	348--	264	3	1	1	1	
141	280-B	55	2	1	0	1	
142	316--	13	2	1	0	1	
143	316--	139	3	1	1	1	
144	276--	45	2	1	0	1	
145	274--	54	2	1	0	1	
146	246-B	104	2	1	0	1	
147	249-A	304	2	1	0	1	
148	218-B	106	2	1	0	1	
149	216-B	60	1	1	0	0	
150	244--	288	3	1	1	1	
151	243--	65	3	1	1	1	
152	309-B	101	3	1	1	1	
153	338-A	9	4	1	2	1	
154	337-B	85	7	1	2	4	
155	366-A	181	2	1	0	1	
156	366-A	641	3	1	1	1	

Number of Attaching Entities

Results of System-Wide Random Audit Conducted Summer 2007

Stop No.	Map Section	Pole No.	Total Entities	IPL	Telephone	Cable/F.O.	Comments
157	406-A	61	3	1	1	1	
158	407-A	149	2	1	0	1	
159	407-A	67	3	1	1	1	
160	367-B	266	1	1	0	0	mis-labeled as 250
161	368-B	133	1	1	0	0	
162	368-A	164	2	1	0	1	
163	369-A	539	3	1	1	1	
164	369-B	36	3	1	1	1	
165	411-A	372	1	1	0	0	
166	410-B	191	5	1	2	2	
167	409-B	102	3	1	1	1	
168	439-A	156	3	1	1	1	
169	438-A	183	6	1	4	1	
170	438-A	122	3	1	1	1	
171	437-A	198	2	1	1	0	
172	406-B	247	3	1	1	1	
173	436-A	189	3	1	1	1	
174	438-B	178	1	1	0	0	
175	438-B	219	2	1	1	0	
176	467-B	235	5	1	1	3	
177	468-B	155	5	1	2	2	
178	508-A	370	2	1	1	0	
179	507-B	275	3	1	1	1	
180	508-B	19	3	1	1	1	
181	537-A	288	7	1	1	6	
182	567-A	212	1	1	0	0	
183	567-A	934	2	1	0	1	
184	567-B	51	4	1	2	1	no pole tag
185	569-B	373	1	1	0	0	
186	609-A	165	3	1	1	1	
187	570-A	19	4	1	2	1	no pole tag
188	540-B	66	1	1	0	0	
189	539-B	129	3	1	1	1	
190	540-A	563	2	1	1	0	
191	510-B	133	3	1	1	1	
192	510-A	185	4	1	2	1	
193	511-A	600	4	1	2	1	
194	509-A	659	2	1	1	0	
195	442-B	288	1	1	0	0	
196	441-B	184	3	1	1	1	
197	411-B	237	3	1	1	1	
198	413-B	218	3	1	1	1	
199	413-B	239	3	1	1	1	
200	442-B	302	3	1	1	1	
201	443-B	428	2	1	0	1	
202	473-A	90	4	1	2	1	
203	474-B	281	3	1	0	2	
204	445-B	547	1	1	0	0	
205	446-B	45	6	1	1	4	
206	417-A	7	2	1	1	0	
207	377-B	27	1	1	0	0	
208	381-A	189	2	1	0	1	

Number of Attaching Entities

Results of System-Wide Random Audit Conducted Summer 2007

Stop No.	Map Section	Pole No.	Total Entities	IPL	Telephone	Cable/F.O.	Comments
209	381AB	74	2	1	1	0	no pole tag
210	378-B	4	3	1	1	1	no pole tag
211	418-A	217	3	1	1	1	
212	417-B	28	3	1	1	1	
213	446-A	52	3	1	1	1	
214	446-B	345	1	1	0	0	
215	475-A	273	2	1	0	1	
216	477-A	259	2	1	0	1	
217	477-B	214	1	1	0	0	
218	479-B	37	2	1	1	0	
219	451-B	180	2	1	0	1	
220	451-B	38	2	1	0	1	
221	381-A	216	2	1	0	1	
222	251BB	223	1	1	0	0	
223	251EA	177	2	1	0	1	
224	281C-	165	3	1	1	1	
225	281C-	82	3	1	1	1	
226	281C-	84	3	1	1	1	
227	281C-	129	2	1	0	1	
228	321C-	44	3	1	1	2	
229	351D-	446	2	1	0	1	
230	321E-	155	3	1	1	1	
231	321G-	319	3	1	1	1	
232	251KB	19	2	1	0	1	
233	251KA	5	1	1	0	0	
234	251KB	11	2	1	0	1	
235	321HA	211	2	1	0	1	
236	351F-	141	3	1	1	1	
237	421E-	749	1	1	0	0	
238	381E-	314	3	1	0	2	
239	421GA	2	1	1	0	0	
240	451E-	336	1	1	0	0	
241	451CA	51	2	1	0	1	
242	451AB	151	3	1	1	1	
243	481BB	517	3	1	1	1	
244	481AA	89	2	1	0	1	
245	520--	289	3	1	1	1	
246	521A-	33	3	1	0	2	
247	521--	127	3	1	1	1	
248	551A-	76	5	1	2	2	
249	551C-	88	2	1	0	1	
250	581E-	11	2	1	1	0	
251	581F-	39	3	1	1	1	
252	521GA	174	3	1	1	1	
253	521EB	109	3	1	1	1	
254	521C-	55	2	1	0	1	
255	521A-	243	3	1	1	1	
256	521A-	63	2	1	0	1	
257	521A-	10	2	1	0	1	
258	551--	107	3	1	1	1	
259	520--	113	3	1	1	1	
260	478-B	277	3	1	1	1	

Number of Attaching Entities

Results of System-Wide Random Audit Conducted Summer 2007

Stop No.	Map Section	Pole No.	Total Entities	IPL	Telephone	Cable/F.O.	Comments
261	516-A	350	1	1	0	0	
262	517-A	19	4	1	2	1	no pole tag
263	546-A	327	1	1	0	0	
264	515-B	206	4	1	2	1	
265	512-A	70	3	1	1	1	
266	512-A	184	5	1	3	1	
267	510-B	338	3	1	1	1	
268	540-A	274	2	1	0	1	
269	541-A	3	3	1	1	1	
270	541-A	365	5	1	0	4	
271	513-B	78	3	1	1	1	
272	514-B	95	3	1	1	1	
273	514-B	16	2	1	0	1	
274	543-A	329	3	1	1	1	
275	542-A	280	3	1	1	1	
276	544-B	334	3	1	1	1	
277	545-B	135	2	1	0	1	
278	543-B	115	3	1	1	1	no pole tag
279	573-A	89	6	1	4	1	
280	574-A	222	2	1	1	0	
281	572-B	80	3	1	1	1	
282	610-A	168	2	1	0	1	
283	611-B	51	3	1	1	1	no pole tag
284	608-B	332	2	1	1	0	
285	608-A	174	1	1	0	0	
286	607-A	257	3	1	1	1	no pole tag
287	606-A	236	3	1	1	1	no pole tag
288	605-B	12	1	1	0	0	
289	602-B	316	2	1	0	1	
290	561-A	605	2	1	0	1	
291	561-A	608	1	1	0	0	
292	532-A	712	1	1	0	0	
293	502-B	463					pole not there
294	502-B	178	4	1	1	2	
295	532-A	479	1	1	0	0	
296	531-A	406	3	1	1	1	no pole tag
297	530-B	303	1	1	0	0	
298	528-B	65	3	1	1	1	
299	528-B	169	4	1	1	2	
300	526-B	15	3	1	1	1	
301	555-A	292	3	1	1	1	no pole tag
302	553-B	151	2	1	0	1	no pole tag
303	553-A	129	3	1	1	1	
304	523-B	72	3	1	1	1	
305	523-B	78	5	1	1	3	
306	523-A	95	2	1	0	1	
307	493-B	179	3	1	0	2	
308	492-B	165	2	1	0	1	
309	522-B	414	4	1	1	2	
310	521ZB	3	3	1	1	1	
311	591WB	56	3	1	1	1	
312	551XB	162	1	1	0	0	

Number of Attaching Entities

Results of System-Wide Random Audit Conducted Summer 2007

Stop No.	Map Section	Pole No.	Total Entities	IPL	Telephone	Cable/F.O.	Comments
313	551XB	87	1	1	0	0	
314	551UA	52	2	1	1	0	no pole tag
315	551VA	88	2	1	0	1	
316	521WB	250	2	1	0	1	
317	491YB	16	5	1	2	2	
318	491VA	10	2	1	0	1	
319	451WB	177	3	1	1	1	
320	451YB	107	1	1	0	0	
321	454-A	132	4	1	2	1	
322	425-B	20	2	1	0	1	
323	425-B	175	2	1	0	1	
324	429-B	72	2	1	1	0	
325	430-B	197	2	1	0	1	no pole tag
326	432-B	200	5	1	2	2	
327	402-B	51	1	1	0	0	
328	431-A	32	4	1	1	2	
329	428-A	61	2	1	1	0	
330	427-A	89	3	1	1	1	
331	425-A	132	2	1	0	1	
332	325-A	159	2	1	0	1	
333	327-A	79	2	1	0	1	
334	327-A	81	2	1	0	1	
335	327-A	29	5	1	1	3	
336	300-B	14	4	1	1	2	
337	301-B	233					light pole
338	301-B	138	3	1	1	1	no pole tag
339	332-A	129	3	1	1	1	
340	330-B	93	3	1	1	1	
341	400-A	222	3	1	1	1	
342	326-B	233	1	1	0	0	
343	395-A	41	1	1	0	0	
344	395-A	15	2	1	0	1	
345	394-B	424	3	1	1	1	
346	425-A	71	3	1	1	1	
347	423-B	207	1	1	0	0	
348	391-B	457					light pole
349	391-B	226	2	1	0	1	
350	421WA	102	3	1	1	1	
351	388-B	216	3	1	1	1	
352	421WA	92	3	1	1	1	
353	421VA	37	2	1	1	0	
354	388-B	216	2	1	1	0	
355	389-A	10	2	1	0	1	no pole tag
356	351XA	2	2	1	0	1	
357	351WA	213					pole not there
358	351VB	35	3	1	1	1	
359	351UB	13	1	1	0	0	
360	351SB	5	1	1	0	0	
361	251UA	4	2	1	1	0	
362	221VB	65	3	1	1	1	
363	251Z-	27	3	1	1	1	
364	294--	49	3	1	1	1	

Number of Attaching Entities
Results of System-Wide Random Audit Conducted Summer 2007

Stop No.	Map Section	Pole No.	Total Entities	IPL	Telephone	Cable/F.O.	Comments
365	295-A	16	2	1	0	1	
366	258-B	16	2	1	0	1	
367	230-A	132	3	1	1	1	
368	257--	76	3	1	1	1	
369	160-A	32	3	1	1	1	
370	203-B	96					light pole
371	206-B	423	1	1	0	0	
372	206-B	408	3	1	1	1	mis-labeled as 69
373	206-A	48	2	1	0	1	
374	167-B	171	4	1	2	1	
375	168--	438	2	1	0	1	
376	171-A	232	3	1	0	2	
377	171-A	52	3	1	0	2	
378	143-B	137	2	1	1	0	
379	141-B	27	3	1	1	1	
380	167-B	46	4	1	2	1	
381	165-B	129	3	1	1	1	
382	101-A	9	3	1	1	1	
383	158-A	101	2	1	1	0	
384	195-A	67	2	1	1	0	
385	195-B	50	1	1	0	0	
386	195-B	17	1	1	0	0	
387	225-B	192	1	1	0	0	
388	253--	242	2	1	0	1	
389	222--	58	3	1	1	1	
390	223--	102	3	1	1	1	
391	192--	71	3	1	1	1	
392	191YA	123	2	1	1	0	
393	151UA	54	1	1	0	0	
394	121PB	10	1	1	0	0	
395	091NB	16	1	1	0	0	
396	061NA	8	1	1	0	0	
397	031JA	12	1	1	0	0	
398	061EA	18	2	1	0	1	
399	061BB	22	2	1	0	1	
<u>Extras</u>							
401	133-B	33	4	1	1	2	
402	202-A	202	2	1	0	1	
403	233-B	128	3	1	1	1	
404	528-B	361	3	1	1	1	
405	559-B	718	1	1	0	0	
406	665-B	125	2	1	0	1	
407	727--	297	3	1	1	1	
408	741VA	61	2	1	1	0	
409	653-B	125	4	1	2	1	

Average 2.565
