

INTRODUCTION

UTC and EEI strongly support Chairman Genachowski's challenge to the Commission to, "ensure that our broadband infrastructure and services advance national purposes," including helping to deliver "cleaner energy at lower cost."⁴ Moreover, Commissioner Copps is correct to suggest that the Commission's policies should not be "putting all of this emphasis on broadband for the sake of broadband" but rather the Commission's goal should be to promote broadband as "the great enabler" for achieving the national goals of the Recovery Act as a whole.⁵ These statements are fully consistent with Congress's intent.⁶

The Commission should develop a broadband plan that broadly supports critical infrastructure as well as broadband.⁷ Many utilities filed comments in this proceeding to emphasize that pole attachments are *not* an impediment to broadband, and to suggest policies by which the Commission may encourage a partnership in pole attachments that promotes *both* broadband and critical infrastructure. This partnership would recognize the mutual dependence of utilities and communications service providers on the integrity of the underlying critical infrastructure that delivers both electric and communications services to the public at large. With the appropriate policies, safe and

⁴ Prepared Remarks on National Broadband Plan Process by Chairman Julius Genachowski FCC Open Meeting, Washington, D.C. (July 2, 2009).

⁵ Bench Remarks of Commissioner Michael J. Copps on Presentation of National Broadband Process, FCC Open Meeting, Washington, DC (July 2, 2009).

⁶ See ARRA Section 6001(k)(2)(D), directing the FCC to include as part of the national broadband plan "a plan for use of broadband infrastructure and services in advancing consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes."

⁷ Comments of Southern Company Services, Inc. at 18 ("Congress, the Department of Energy, and state governments and agencies have repeatedly made clear that the safety and reliability of the electric power grid is top priorities, and these priorities must not be compromised.")

reliable electric service and competitive communications markets can operate in harmony for the benefit of both electric and communications industries and the public. However, many of the current pole attachment policies undermine both electric utilities' ability to perform their core mission and the objective of promoting broadband competition. EEI and UTC continue to believe that so long as third party attachments are made in a manner that is consistent with the electric industry's core mission (i.e., to provide safe, reliable supply of electricity to customers at reasonable prices) and the costs of pole infrastructure are fairly allocated, it is in the interest of the electric industry to accommodate such attachments. Therefore, the Commission can encourage such a partnership between electric utilities and communications entities by eliminating rate subsidies and discouraging attachers from making unauthorized and unsafe attachments. This will help restore balance to its pole attachment regulations and will promote the integrity of critical infrastructure -- and in turn the reliability of the essential services, electric and communications, that are delivered over them.

The Commission should reject comments on the record in this proceeding, and in its current rulemaking on the regulations and policies governing pole attachments, that would undermine critical infrastructure by perpetuating or increasing rate subsidies, and by imposing a laundry list of additional mandatory access requirements that would interfere with the ability of pole owners to maintain the safety and integrity of their systems. Specifically, the Commission should not adopt the cable rate for all broadband attachments, and it should not adopt mandatory deadlines for make ready work, or presumptions with regard to pole top access, or presumptions about the overall safety of attachments that comply with the National Electric and Safety Code (NESC).

Nor should it further expand the scope of pole attachment regulations to apply to transmission facilities or to include broadband service providers that are not authorized cable television operators or telecommunications service providers.

I. Pole Attachments and Broadband

A. The Commission can promote broadband and critical infrastructure by fostering a partnership in pole attachments.

The Commission can promote *both* broadband and reliable critical infrastructure by fostering a partnership between utilities and communications attachers, as suggested in comments by utilities in this proceeding.⁸ Utilities and communications attachers both rely on the integrity of the underlying critical infrastructure that supports their respective electric and communications services. Owing to their mutual interest in critical infrastructure, both utilities and communications attachers should support policies that promote full cost recovery and ensure that attachments comply with all applicable permitting, engineering and safety requirements.

To promote both broadband and critical infrastructure to serve the nation's interests, the Commission must restore balance to its pole attachment rules by eliminating pole attachment rate subsidies and deterring communications attachers from making unauthorized attachments and/or violating engineering and safety codes, as described below.⁹ UTC and EEI agree with Ameren and Virginia Electric Power which explained in their comments that, "[a] policy of infrastructure partnership requires that the Commission not see electric utilities merely as the providers of readily available

⁸ Comments of Ameren Services Company and Virginia Electric and Power Company at 6-9; Comments of UTC and EEI at 16-17.

⁹ Comments of Ameren and Virginia Electric and Power Company at 5.

infrastructure. Instead, electric utilities must be viewed as the custodians and guardians of that infrastructure for the benefit of all who use it.”¹⁰ To reiterate: pole attachments are not an impediment to broadband deployment; and UTC and EEI urge the Commission to foster a partnership in pole attachments with communications attachers by balancing its rules to promote the mutual interest of all in promoting *both* critical infrastructure and broadband deployment.

B. Pole attachments are not an impediment to broadband deployment

Comments on the record reject any implication that pole attachments are an impediment to broadband deployment.¹¹ The FCC has consistently concluded that broadband deployment is occurring on a reasonable and timely basis, and the Commission has never even mentioned pole attachments as a barrier to entry in any of its Section 706 reports.¹² Moreover, the Commission should reject comments suggesting that electric utilities lack incentives to facilitate timely and safe access to their poles. Utilities must approve or deny a pole attachment application within 45 days and provide non-discriminatory access for pole attachments by cable television operators and competitive telecommunications at rates terms and conditions that are just and reasonable. Aside from self-serving and misleading claims of delays by utilities that are largely unsubstantiated, the fact is that cable and telecommunications attachers have offered no factual evidence to support that their claims that widespread delays

¹⁰ *Id.* at 8.

¹¹ See NOI at ¶50 (inviting comment on the extent to which pole attachments represent an impediment to the deployment of broadband). See also Comments of Ameren Services Company and Virginia Electric and Power Company at 1; Comments of the Coalition of Concerned Utilities at 1-4; Comments of the National Rural Electric Cooperative Association at 9.

¹² Comments of Ameren Services Company and Virginia Electric and Power Company at 12.

resulting from current pole attachment permitting procedures have stalled the progress of broadband deployment. Pole attachments are, thus, far from being an impediment; instead they are a relatively quick and inexpensive means for broadband deployment.¹³

C. The Commission should protect critical infrastructure while promoting broadband.

1. The FCC should not set a unified broadband rate at the current cable rate.

Comments on the record underscore the need for more balanced pole attachment regulations.¹⁴ The Commission must eliminate rate subsidies within the existing formula that deny cost recovery to utilities. Not only do these subsidies short-change utilities and their rate payers, but they also distort the broadband market by providing a lower rate for attachments by cable television operators. In addition, these subsidy rates are a result of flawed presumptions in the telecom rate formula that result in higher rates in rural areas than in urbanized areas. By eliminating these and other explicit and implicit subsidies, the Commission can promote regulatory parity and rural broadband by providing a uniform rate for broadband attachments by CATV operators and CLECs in rural as well as urbanized areas.

The cable television industry continues to cling to its decades-old subsidy, despite the fact that it is long-past being a nascent industry and is now competing with telecommunications carriers by offering similar broadband services.¹⁵ In industry

¹³ See *also* Comments of UTC and EEI at 15.

¹⁴ Comments of Ameren and Virginia Electric and Power Company at 4.

¹⁵ For example, NCTA has reported that “119 million homes were passed by cable’s high-speed internet service in 2006, which represented 94 percent of all homes.” NCTA also reported that over three million households switched to cable telephone service in 2006, and the industry wide total is 9.5 million, which represents a more than 47 percent annual growth rate. See NCTA, 2007 Industry Overview at 11 and 17 (April 24, 2007) available at http://i.ncta.com/ncta_com/PDFs/NCTA_Annual_Report_04.24.07.pdf.

comments, cable companies warn against any increase in costs and resort to thinly-veiled threats of price increases for broadband, if the Commission eliminates their subsidized rate.¹⁶ Meanwhile, competitive telecommunications providers, including wireless providers argue that their attachments “should be subject to *as low of a rate as possible*” and that it should exclude the cost of the space of the pole occupied by any wireless equipment running vertically on the pole.¹⁷ These comments are disappointing because they do not reflect the goal of ensuring that the nation’s broadband infrastructure and services advance the broader national interests that both Chairman Genachowski and Commissioner Copps acknowledge. To the contrary, these comments display an unreasonable focus on simply lowering the costs of pole attachments without regard to issues of safety and reliability, both with respect to communications and electric infrastructure.

Despite this myopic focus on reducing attachment costs and increasing subsidies to communications attachers, the reality is that pole attachments represent a small fraction of the costs of broadband deployment; most of the cost of deploying a CATV system is associated with the equipment at the head-end. Moreover, there does not appear to be any indication that the CATV industry has ever passed on any savings

¹⁶ See Comments of Time Warner Cable at 23-25 (stating that “The Commission Should Not Amend Its Pole Attachment Rules in a Manner That Raises Broadband Infrastructure Costs.”); *and see* Comments of the National Cable and Telecommunications Association (threatening that “the higher pole attachment rates that some parties have proposed would increase the costs of broadband service and so would reduce demand for broadband, undermining the federal goals of increasing sustainable broadband adoption.”)

¹⁷ Comments of CTIA—the Wireless Association at 20. *See also* Comments of Time Warner Cable at 23 (warning the FCC not to “amend its pole attachment rules in a manner that raises broadband infrastructure costs.”) *and see* Comments of Cbeyond, Inc., Integra Telecom, Inc., One Communications Corp., and TW Telecom, Inc. at 20-21 (arguing that competitive telecommunications providers should pay pole attachment rates based on the cable rate formula for attachments used to provide broadband services.)

from pole attachments to its customers. For example, CATV rates nearly doubled over a ten-year period, which prompted state and federal regulators to adopt video franchise reforms.¹⁸ But only then did CATV rates level off. Thus, it appears that competition from telcos -- not CATV pole attachment subsidies -- has held down consumer rates for video and broadband services. The Commission should note that these same telcos were able to effectively compete on price and quality with CATV incumbents, despite paying higher pole attachment rates. Thus, it is absurd for the CATV industry to suggest that eliminating pole attachment subsidies will have any significant effect on the rates that consumers pay for video services.

Conversely, there are real long term benefits for both critical infrastructure and broadband deployment that will result, if the Commission eliminates pole attachment rate subsidies.¹⁹ A more realistic pole attachment rate would promote reinvestment in critical infrastructure. This would in turn provide more reliable electric and communications services, which provides dividends to the economy, public safety and national security. These long term benefits outweigh any speculative harm that could result from eliminating pole attachment rate subsidies, particularly with respect to

¹⁸ See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, Report on Cable Industry Prices, 21 FCC Rcd 15087 (2006). (finding that cable rates increased 93% over a five year period between 1995-2005.) *And see Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MB 06-311, 22 FCC Rcd 5101 (2007) (requiring local franchise authorities to approve video franchises to cable competitors within a reasonable time and prohibiting local franchising authorities from imposing unreasonable build-out requirements as a condition for awarding a video franchise to cable competitors.)

¹⁹ Comments of Ameren Services Company and Virginia Electric and Power Company at 9 (stating that “No doubt some broadband providers in this proceeding will argue that affordability demands that broadband subscription rates include a component that recovers the smallest possible pole attachment rental charge. Not only does such thinking perpetuate the adversarial climate between industries that ought to be allies, but also it works against the long term reliability of the infrastructure.”)

matured industry such as the cable industry. Again, the Commission must remain mindful of the larger national policy goals at stake.²⁰

The Commission is free to reform the CATV rate since the courts have largely upheld the current rate formula in deference to the FCC. No court has actually held that the current rate formula as a whole or with respect to its components is inherently correct. The Commission is therefore free to adopt a fairer rate for broadband attachments which eliminates continuing unwarranted subsidies to communications attachers. A uniform rate that is free of subsidies would be fairer to electric utilities and their ratepayers; and it would be fairer to CLECs who pay more than CATV operators for their broadband attachments. Thus, the Commission need not and should not adopt the cable rate for broadband attachments.

2. The Commission should not impose additional access requirements and presumptions.

As utilities have explained on the record, pole attachments must be made in compliance with all engineering and safety codes.²¹ In that regard, so called “best practices” -- which would require utilities to allow attachers to use short cuts -- are inappropriate and would contradict Section 224(f)(2) of the Communications Act.²² In addition, these best practices would prescribe a detailed laundry list of requirements and presumptions with regard to access that the Commission expressly decided to

²⁰ See NOI at ¶ 63 (citing the Recovery Act § 6001(k)(2)(D))(recognizing that the Recovery Act “requires the Commission to develop a national broadband plan that includes .a plan for the use of broadband infrastructure and services in advancing. a series of public policy goals.”)

²¹ Comments of Ameren Services Company and Virginia Electric and Power Company at 10. See also Comments of National Rural Electric Cooperative Association at 10-11.

²² See 47 U.S.C. §224(f)(2)(granting utilities the discretion to deny access for pole attachments on a non-discriminatory basis for reasons of insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.)

avoid in recognition that there are “simply too many variables” to “prescribe numerous specific rules” for pole attachments.²³ Therefore, in comments on the record, utilities have uniformly opposed such best practices.²⁴

a. No mandatory deadlines for make ready

UTC and EEI oppose comments that urge the Commission to impose mandatory deadlines for make ready.²⁵ These comments provide no basis other than their own unsubstantiated claims of delays or that some states have imposed such deadlines. Moreover, the Commission’s existing rules already provide a 45 day deadline for approving or denying an application, and the terms and conditions for access can always be reviewed in a complaint proceeding. Hence, there is no “gaping hole” in the rules that require the imposition of make ready deadlines, nor is there sufficient evidence of widespread delays that would justify considering such relief.

As UTC and EEI’s initial comments explained, make ready is a complex process involving multiple parties and varying in terms of size of the project, the type of attachment and the local geographic conditions.²⁶ The time required can vary due to any number of factors. In any event, utilities have every incentive to complete make ready, because it improves critical infrastructure. Moreover, utilities do usually complete make ready within a reasonable time period. Even Sunesys acknowledges this in its

²³ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd. 15499, 16068 at ¶1143 (1996).

²⁴ See Comments of Ameren Services Company and Virginia Electric and Power Company at 11; Comments of National Rural Electric Cooperative Association at 10-11; Comments of Southern Company Services, Inc at 17-18; and Comments of the Coalition of Concerned Utilities at 4.

²⁵ Comments of Sunesys, LLC at 2-12; and Comments of PCIA—The Wireless Infrastructure Association and the DAS Forum (A membership Section of PCIA) at 7.

²⁶ Comments of UTC and EEI at 18-19.

comments.²⁷ The Commission should therefore not impose arbitrary deadlines that could undermine the safety and reliability of critical infrastructure.

Even though some states have instituted deadlines -- that says nothing about whether the FCC could or should adopt one-size-fits-all rules on a national basis, as well.²⁸ UTC and EEI believe that the states and localities are better positioned to make these kind of decisions based on regional circumstances. This is consistent with the structure of Section 224, which gives the states primary jurisdiction over pole attachments. Therefore, it would be inappropriate for the Commission to impose a nationwide requirement that ignores regional considerations.

Finally in reply to the comments of Sunesys, the FCC's Cable Franchising Order has no applicability in the context of pole attachments.²⁹ First, the Commission clearly had jurisdiction to impose deadlines in that context; whereas here deadlines would contradict Section 224(f)(2) of the Communications Act. Second, the Commission was legitimately concerned that some local franchise authorities were impeding competition with cable incumbents, which fueled a movement across the country by states to displace local franchise authority jurisdiction. Here there is no evidentiary basis to support deadlines for make ready. Hence, there is no comparison between the FCC's Cable Franchising Order and the mandatory deadlines for make ready sought here.

²⁷ Comments of Sunesys, LLC at 12 (stating that "some utilities routinely issue pole attachment permits promptly.")

²⁸ *But see* Comments of Sunesys, LLC at 10-11 (citing deadlines in various states in support of FCC adoption of nationwide deadlines.)

²⁹ *Id.* at 11, *citing Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MB 06-311, 22 FCC Rcd 5101 (2007) ("Cable Franchising Order").

- b. No presumptions regarding pole top access and occupied space for wireless attachments.

UTC and EEI oppose comments that urge the Commission to adopt presumptions for wireless attachments with regard to pole top access and the amount of space used by wireless equipment.³⁰ Pole top access raises unique safety and engineering issues. Moreover, wireless attachments are unique and come in many shapes, sizes and configurations. These issues are described in further detail in UTC and EEI's comments on the record in the FCC's pole attachment proceeding.³¹ By contrast, comments that support these presumptions ignore potential safety and loading hazards, and fail to justify the need for such presumptions. Thus, presumptions with regard to pole top access and the amount of occupied space are unrealistic and inappropriate.

- c. No presumptions for compliance with the National Electric Safety Code or other guidelines.

UTC and EEI oppose comments that urge the Commission to adopt a rebuttable presumption that attachments complying with the National Electric Safety Code (NESC) as well as Commission and Occupational Safety & Health Administration (OSHA) regulations are safe. As the NESC itself disclaims, "[t]his Code is not intended as a design specification or as an instruction manual."³² Instead, the NESC only represents a framework for pole attachments. In addition, other utility, federal, state and local standards also apply. These issues are more fully addressed in UTC and EEI's reply

³⁰ See Comments of CTIA – the Wireless Association at 20; and Comments of PCIA—The Wireless Infrastructure Association and the DAS Forum (A membership Section of PCIA) at 7.

³¹ Comments of the Edison Electric Institute and the Utilities Telecom Council in WC Docket No. 07-245 at 31 (filed March 7, 2008).

³² National Electrical Safety Code 2007 Edition at 1.

comments in the Commission's pole attachment proceeding.³³ At bottom, the comments supporting these presumptions fail to address other important regulations governing the safety of pole attachments, and fail to justify why well-founded federal, state and local safety standards should be set aside. Therefore, the Commission should not adopt presumptions with regard to compliance with National Electric Safety Code or other guidelines.

3. The Commission should not expand the scope of pole attachment regulations.

In addition to rejecting so called "best practices" and other additional access requirements and presumptions, the Commission should also reject comments that urge the Commission to expand the scope of pole attachments to apply to transmission facilities or to expand eligibility to include broadband providers that are not cable television operators or competitive telecommunications service providers.³⁴ The Commission does not have the authority to expand the scope of pole attachments in this way. Section 224 of the Communications Act of 1934 only makes cable television operators and non-ILEC telecommunications service providers eligible to obtain pole attachments. Similarly, the courts have found that Commission's jurisdiction does not extend to transmission facilities.³⁵ Therefore, the Commission lacks the authority to expand pole attachment regulation to apply to interstate transmission facilities or to

³³ Reply Comments of the Edison Electric Institute and the Utilities Telecom Council in WC Docket No. 07-245 at 61 (filed Apr. 22, 2008).

³⁴ Comments of Clearwire Corporation at 10; Comments of Fibertower Corporation at 13; Comments of the Wireless Communications Association International, Inc. at 27; and Comments of the Wireless Internet Service Provider Association at 21

³⁵ *Southern Co. v. FCC*, 293 F.3d 1338, 1345 (2002)(holding that "[t]he text of the statute, coupled with the presence of this reverse-preemption clause, make it plain that the Act's coverage was intended to be limited to the utilities' local distribution facilities, and was not to extend to the general regulation of interstate transmission towers and plant.")

make broadband providers that are not also cable television operators and telecommunications service providers eligible for pole attachments under Section 224 of the Communications Act of 1934.

CONCLUSION

WHEREFORE, the premises considered, UTC and EEI respectfully request that the Commission act as requested herein. Specifically, the Commission should adopt pole attachment reforms that promote broadband deployment by encouraging partnerships between electric utilities and attaching entities that promote investment in, rather than extraction of value from poles, ducts, conduit and rights-of-way.

Respectfully submitted,

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