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May 7, 2001

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
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Washington, D.C. 20554

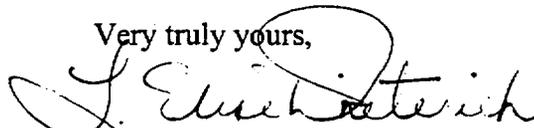
Re: *RCN v. PECO Energy Co. and Exelon Infrastructure
Services, PA No. 01-03.*

Dear Ms. Salas:

Enclosed please find an original and three (3) copies of the Reply of RCN Telecom Services of Philadelphia, Inc. to Response of PECO Energy Company for filing in the above captioned case.

Please date-stamp and return the enclosed extra copy of this filing. Any questions in connection with the foregoing should be directed to the undersigned.

Very truly yours,



L. Elise Dieterich

Counsel for RCN Telecom Services of
Philadelphia, Inc.

Enclosures

cc: Service List

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

In the Matter of)
)
RCN TELECOM SERVICES OF)
PHILADELPHIA, INC.)
)
v.) PA No. 01-03
)
PECO ENERGY COMPANY)
)
and)
)
EXELON INFRASTRUCTURE SERVICES, INC.)

**REPLY OF
RCN TELECOM SERVICES OF PHILADELPHIA, INC.
TO RESPONSE OF PECO ENERGY COMPANY**

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Philadelphia, Inc.

May 7, 2001

SUMMARY

RCN's Initial Complaint alleged that PECO's pole attachment rates were excessive, discriminatory, unjust and unreasonable.¹ In its Response, PECO denies that its rates are excessive or discriminatory, and claims that under the *Gulf Power II* decision the Commission lacks jurisdiction in this matter because RCN provides Internet services, that RCN is not entitled to the benefit of section 224 because it is certified to operate as an OVS, that PECO has cooperated with RCN, and that the attachment fees it charges RCN were contractually agreed to. Finally, PECO belatedly submits some of the data required by the Commission's rules and sets forth rate calculations.

In this Reply, RCN shows that, as made clear in the *Alabama Cable* case, the Commission has jurisdiction over, and its pole attachment rules continue to apply to, all attachers that provide either cable or telecommunications service, including those that provide Internet service. RCN also shows that it is not operating as an OVS in PECO territory and that, even if it were, it would remain entitled to the protections of section 224. RCN in this Reply refutes PECO's contention that rulemaking to create a new attachment rate for commingled services is necessary. Rather, to grant the relief requested in this proceeding the Commission need only establish a just and reasonable telecommunications attachment rate, applying the Commission's existing rules.

¹ RCN's Initial Complaint also named Exelon Corporation, f/k/a PECO Energy Company as a respondent. Exelon Corporation has moved to dismiss the Initial Complaint as to it, and RCN filed its opposition to that motion on April 30, 2001.

The data PECO has finally submitted to justify its claimed rate are erroneous and incomplete. Under PECO's own rate calculations, the charge to RCN would be \$32.13 instead of the \$47.25 that RCN has been charged. But PECO's figures have been improperly calculated and are too high, because PECO failed to properly apply the Commission's phase-in rules. Even accepting PECO's rate, the current charge to RCN properly calculated would be at most \$19.04, not \$47.25. PECO still has not provided all of the data required to support its claimed rate, however, and RCN requests the CSB to direct PECO to supply the missing information and, in the interim, limit the rates charged to RCN. Finally, any unlawfulness which the Commission finds in PECO's rates should lead to refunds retroactive to a date prior to the filing of the Initial Complaint.

RCN also takes issue with PECO's contention that the terms under which RCN has agreed to attach its wiring to PECO's poles were freely bargained for and, therefore, should be deemed binding notwithstanding the Commission's attachment rate rules. The facts as admitted by PECO in its Response clearly establish that PECO imposed on RCN its standard form pole attachment agreement, without any good faith negotiation of its terms. Moreover, Commission precedent, in the *Selkirk* case among others, establishes that the Commission can and should review PECO's claimed pole attachment rate and determine a just and reasonable rate consistent with section 224, notwithstanding the existence of a pole attachment agreement between the parties. Although PECO has indeed cooperated well with RCN with respect to the mechanics of attachment, such cooperation is irrelevant to the lawfulness *vel non* of its attachment fees and does not extend to its course of dealing with RCN concerning such fees.

PECO's argument that, because Verizon is not entitled to the protections of section 224, any discrimination in favor of Verizon is lawful, is illogical and unpersuasive. PECO may not discriminate between RCN and Verizon, or RCN and Comcast, another competitor. Therefore, RCN requests the Commission to require further information from PECO on the amount of vertical pole space allocated to Verizon and on the attachment rates charged to Comcast.

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**REPLY OF
RCN TELECOM SERVICES OF PHILADELPHIA, INC.
TO RESPONSE OF PECO ENERGY COMPANY**

RCN Telecom Services of Philadelphia, Inc. ("RCN"), Complainant in the above-captioned matter, hereby submits its Reply to the Response of Exelon Corporation ("Exelon") and PECO Energy Co. ("PECO") filed April 16, 2001.¹ RCN's Initial Complaint alleged that PECO's pole attachment rates were excessive, discriminatory, unjust and unreasonable. In its Response, PECO denies that its rates are excessive or discriminatory, claims that the

¹ RCN filed an Initial Complaint against Exelon, f/k/a PECO Energy Co. on March 16, 2001, raising the single issue of the lawfulness of the pole license fees PECO charges RCN for access to its poles. In a Motion to Dismiss filed on April 16, 2001, Exelon sought dismissal principally on the ground that Exelon was not a proper defendant. On May 1, 2001, RCN filed an Opposition to Exelon's Motion to Dismiss, and on May 4, 2001, RCN filed an Amended Complaint in which it substituted the above-captioned respondent for Exelon Corporation and added make-ready issues to its Initial Complaint.

Commission lacks jurisdiction under section 224 of the Communications Act² to adjudicate appropriate attachment rates because RCN provides services other than pure cable and pure telecommunications service, that RCN is not entitled to the benefit of section 224 because it is functioning as an OVS in the area in which it seeks to attach to PECO's poles, that PECO has fully cooperated with RCN to attach RCN's wires to PECO's poles, and that the attachment fees it charges RCN were contractually agreed to by RCN and should not be subject to subsequent revision. Finally, PECO submits some of the data required by the Commission's Pole Attachment rules and sets forth certain calculated rate levels in an effort to justify the current \$47.25 attachment fee.

In this Reply RCN will show that the Commission's jurisdiction under section 224 of the Act to adjudicate the present dispute is clear and that RCN, as an entity providing cable, cable modem and telecommunications services, is fully entitled to the benefits of section 224. The terms under which RCN has agreed to attach its wiring to PECO's poles are anything but freely agreed to, and precedent fully justifies the Commission in reviewing those terms to determine if they comply with the standards of section 224.

The pole attachment fees PECO currently charges RCN are not remotely justified by the data produced by PECO, and those data are inadequate, erroneous, and unreliable. While PECO has indeed cooperated well with RCN with respect to the mechanics of attachment, such cooperation is irrelevant to the lawfulness *vel non* of its attachment fees and does not extend to its course of dealing with RCN concerning such fees. Finally, RCN briefly reiterates herein that

² 47 U.S.C. § 224 ("Pole Attachment Act").

any unlawfulness which the Commission finds in PECO's rates should lead to refunds retroactive to a date prior to the filing of the Initial Complaint.

I. THE POLE ATTACHMENT FEES IMPOSED BY PECO ON RCN ARE FULLY SUBJECT TO SECTION 224 OF THE COMMUNICATIONS ACT AND THE FCC HAS PLENARY AUTHORITY AND JURISDICTION TO ADJUDICATE THE JUSTNESS AND REASONABLENESS OF SUCH FEES

PECO seeks to avoid Commission adjudication of its discriminatory, excessive, unjust, and unreasonable pole attachment rates by asserting, on various grounds, that the Commission lacks jurisdiction over RCN's complaint. As RCN shows below, each of the grounds proffered by PECO is clearly inapplicable. The Commission's jurisdiction in this matter to decide RCN's complaint, and to order PECO to reduce its unlawful pole attachment rates and refund amounts overcharged to RCN, is indisputable.

A. Commission Precedent Establishes That *Gulf Power II* Does Not Deprive the Commission of Jurisdiction

Disregarding clear Commission precedent, PECO asserts that the ruling of the United States Court of Appeals for the 11th Circuit in *Gulf Power II*,³ now under consideration for likely reversal by the Supreme Court, mandates that the Commission decline jurisdiction over RCN's complaint. As the Commission is well aware, the 11th Circuit in *Gulf Power II* held that the Commission lacks authority to regulate attachments for Internet service, and that Internet service qualifies neither as a cable nor as a telecommunications service under section 224 of the Act.⁴

³ *Gulf Power Co. et al. v. Federal Communications Commission*, 208 F.3d 1263, *reh. den.* 226 F.3d 1220 (11th Cir. 2000) ("*Gulf Power II*"), *cert. granted* 121 S.Ct. 879 (2000).

⁴ "Internet service does not meet the definition of either a cable service or a telecommunications service. Therefore, the Telecommunications Act of 1996 does not authorize

The rates mandated by section 224, the Court held, apply only when a entity provides cable or telecommunications services exclusively.⁵ This conclusion, if upheld, would result in the vast majority of competitive cable providers being excluded from the pro-competitive protections of section 224, because the economic survival of many competitors, like RCN, depends upon their ability to provide bundled services that include broadband Internet access service. Perhaps for this reason, the Commission has wisely declined to adopt prematurely the 11th Circuit's draconian ruling, and has held that it will continue to implement the Pole Attachment Act pursuant to its prior rulemaking, until such time as a final mandate is issued by the 11th Circuit, or the Court's ruling is affirmed. Confronted previously with precisely the same jurisdictional argument that PECO makes here, the Commission held:

Pending the issuance of a mandate from the Court, or a clarification of the Gulf Power II decision, we will continue to apply our pole attachment rules to all attachers who are either cable service or telecommunications services providers.⁶

We note, further, that relevant portions of the decision of the 11th Circuit in *Gulf Power II* are directly at odds with the decision of the 9th Circuit in *AT&T v. Portland*, wherein the 9th Circuit held that "to the extent that [a cable operator] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications services as defined in the

the FCC to regulate pole attachments for Internet service." *Id.* at 1278.

⁵ See *id.*, at fn. 32.

⁶ *Alabama Cable Telecommunications Assoc. v. Alabama Power Co.*, 15 FCC Rcd. 17346 (rel. Sept. 8, 2000) ("*Alabama Cable*"), at ¶ 4.

Communications Act."⁷ Therefore, the Commission retains clear jurisdiction to consider the proper pole attachment rate for RCN's telecommunications and cable facilities attached to PECO poles, notwithstanding the fact that RCN uses those same facilities to provide cable broadband Internet services.

B. PECO's Argument With Respect to RCN's OVS Certification Is Inapposite and Moot

1. RCN's Status as a Bundled Service Provider Does Not Affect the Commission's Jurisdiction

RCN acknowledges that the fiber optic and coaxial cable and associated appurtenances that it attaches to PECO's poles have the capability to provide multiple services, including cable, telecommunications, and high speed Internet access services. As indicated in the discussion above, the Commission's precedent recognizes that, absent a final federal court mandate to the contrary, the fact that a cable or telecommunications provider also provides Internet services over its facilities does not require the Commission to decline jurisdiction over the provider's complaint under section 224. PECO's argument, therefore, that the Commission lacks jurisdiction to hear RCN's complaint because RCN provides Internet services is simply wrong. Similarly erroneous is PECO's argument that RCN's status as a provider certified by the Commission to operate an OVS in various communities deprives the Commission of jurisdiction to hear RCN's pole attachment complaint.

⁷ *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000).

2. RCN Is Not Providing OVS Service In PECO's Territory

To begin with, PECO seeks to create an issue where there is none, because RCN is not operating as an OVS anywhere in PECO's territory, and is not using its attachments to PECO's poles to provide OVS services. Although RCN initially obtained OVS certification in the greater Philadelphia market, RCN is in fact operating as a cable provider in all of the communities where it currently provides or is establishing service. Letters on file with the Commission make clear that RCN has withdrawn its OVS certification for all of the communities in which it has attached or has requested licenses to attach to PECO poles.⁸ PECO acknowledges that RCN has withdrawn its OVS certification for Bristol Borough, Colwyn, Eddystone, Folcroft, Morton, Newton Borough, Newton Township, Ridley, and Sharon Hill. PECO apparently overlooked, however, RCN's February 2001 filing withdrawing its OVS certification for the boroughs of Collingdale, Darby, East Lansdowne, Glenolden, Lansdowne, Milbourne, Norwood, Parkside, Prospect Park, Ridley Park, Yeadon, and Westminster, and the townships of Darby, Tinicum, Upper Darby, and Lower Makefield.⁹ This comprises all of the communities in which RCN is attached or seeks attachment to PECO's poles. Accordingly, whether or not PECO is correct on the merits in arguing that the Commission lacks jurisdiction under section 224 to consider the propriety of pole attachment rates for an OVS, a point RCN does not concede, the question is utterly irrelevant to this case. This portion of PECO's Response appears, therefore, to be moot.

⁸ See Exhibit A hereto.

⁹ *Id.*

PECO seems to claim also that RCN's "regulatory status" as a provider certified by the FCC to operate an OVS, should it later choose to, in communities other than those where RCN is attached to PECO poles, defeats the Commission's jurisdiction to hear RCN's complaint regarding PECO's pole attachment rates in the communities where RCN currently operates as a cable provider. PECO cite no legal authority in support of this proposition, however, and such an argument runs counter to the intent of sections 224 and 653, and the pro-competitive purposes of the Telecommunications Act of 1996. PECO's contention that RCN's status as an OVS anywhere denies it the protections of section 224 even as to its cable and telecommunications attachments, is premised upon the same erroneous logic rejected by the Commission when it declined to adopt and apply the *Gulf Power II* ruling now on appeal to the Supreme Court. That RCN might use its facilities to provide, *inter alia*, OVS services no more negates its rights as a cable or telecommunications provider under section 224 than does the provision of Internet services using those same facilities.

C. RCN Acknowledges That, Because It Provides Telecommunications Services, the Telecommunications Attachment Rate Is Applicable to Its Facilities

RCN recognizes that, because its attachments are not used "solely" for cable services, those attachments, as of February 8, 2001, are subject to the now-higher telecommunications attachment rate, to be phased in over 5 years.¹⁰ Accordingly, PECO's discussion of the several possible combinations of services RCN might be offering is much ado about nothing.

¹⁰ 47 U.S.C. § 224(e)(1).

D. Rulemaking Is Unnecessary to Effectuate the Relief RCN Is Seeking

PECO's contention that the relief RCN seeks must be implemented by the Commission via rulemaking, rather than adjudication, also is a red herring, and misconstrues the gravamen of RCN's complaint. RCN does not seek to have the Commission invent a new pole attachment rate applicable to OVS or bundled service providers. Rather, RCN merely seeks enforcement of the existing telecommunications rate formula, which is applicable to RCN's attachments pursuant to the principle affirmed by the Commission in *Alabama Cable*: that, absent a final mandate in the *Gulf Power II* case and pending Supreme Court review, the provision of Internet services by a cable or telecommunications provider over a single set of facilities does not negate the Commission's jurisdiction to apply the pro-competitive protections of section 224 to that provider's telecommunications or cable attachments. The application of the existing telecommunications pole attachment rate formula clearly does not require rulemaking. Indeed, enforcement of existing rules is precisely what the Commission's adjudicatory complaint procedures are for.¹¹

In making its argument for rulemaking, as elsewhere in its response, PECO seeks to obfuscate the straightforward nature of RCN's request to the Commission. Despite PECO's assertion that this case presents "highly complex issues" requiring the Commission to determine "how to count the poles carrying commingled services, and how to allocate the cost and the basis

¹¹ PECO's citation to portions of Justice Scalia's concurring opinion in *Bowen v. Georgetown University Hospital, et al.*, 488 U.S. 204 (1988), adds little to its argument. At issue in that case was the distinction between retroactive and prospective rulemaking, not the distinction between agency rulemaking and adjudication.

for allocation, whether by traffic, customers, or revenues,"¹² RCN's case is, in fact, very simple. RCN asks the Commission to determine (1) that the telecommunications pole attachment rate under section 224 applies to its attachments to PECO's poles, and (2) what that rate should be, applying the existing formula for calculating telecommunications pole attachment rates prescribed by section 224 and the Commission's rules.¹³

II. PECO HAS FAILED TO JUSTIFY ITS CURRENT POLE ATTACHMENT FEES

In apparent recognition that it was not likely to be successful in arguing a lack of jurisdiction or that the nature of RCN's offerings bar it from relying on the provisions of section 224 of the Act, PECO contends at pp. 33-35 that it is entitled to charge RCN the so-called telecommunications rate pursuant to section 224(e)(1) of the Act. In this connection PECO provides, in Attachment A, a pole rate calculation allegedly based on the formula set forth in the Pole Attachment Complaint rules.¹⁴ Except for the period prior to February 8, 2001, RCN does not challenge PECO's assertion that it is the telecommunications rate to which RCN is subject. However the data presented in the pole rate calculation are deficient and incomplete in numerous

¹² PECO Response, at 26-27. Of course, under no circumstances would the attacher's "traffic, customers, or revenues" be relevant to the calculation of the proper pole attachment rate under section 224, which mandates "a just and reasonable pole attachment rate [that] assures a utility of recovery of not less than the incremental cost of providing pole attachments nor more than the fully allocated costs." *Texas Cable & Telecommunications Assoc., et al., v. Entergy Services, Inc.*, 14 FCC Rcd. 9138 (rel. June 9, 1999), at ¶ 5.

¹³ See generally, 47 C.F.R. § 1.1401, *et seq.*

¹⁴ 47 C.F.R. § 1.1417.

respects and cannot be the basis for determining what constitutes a just and reasonable rate under the provisions of section 224.

PECO claims that the following attachment fees are justified by its data:

Year 1:	\$32.13
Year 2:	38.68
Year 3:	45.23
Year 4:	51.78
Year 5:	58.35

Before analyzing the data on which these conclusions are based, it is worth noting that, even if RCN were to accept the data without any qualifications, the present \$47.25 attachment fee being charged to RCN would not be justified until year 4, or 2004. PECO does not address this issue. Indeed, based on RCN's current attachments, and assuming no growth whatever – an assumption contrary to fact – in the first year, *i.e.*, from February 8, 2001 to February 7, 2002, RCN would be overpaying PECO by approximately \$151,200.¹⁵ Table 1 of Exhibit B hereto carries out this calculation for three years, and shows that, by the end of the third year, RCN would have been overcharged a total of \$257,100 if it had to pay the \$47.25 fee for each of those years, instead of the telecommunications pole attachment rate PECO presents in its Attachment A.

Of course, these projected overpayments ignore growth, which in the case of RCN has been extremely rapid, and are therefore of little value other than to indicate what the magnitude of the overpayment would be without growth. Table 2 of Exhibit B contains a second calculation

¹⁵ Derived as follows: Issued attachment licenses (approximately 10,000) x [(\$47.25)-(\$32.13)] = \$151,200.

showing what the overpayment would be assuming a conservative rate of growth of 6,000 poles per year. The total approximate overpayment after three years in that scenario, comparing the rate at the current \$47.25 per pole with the rate set forth in PECO's Attachment A, is \$487,020. RCN understands that projecting future rates of growth is at best speculative, and does not suggest that any such estimate should be accepted as a parameter in finally calculating overpayments. Indeed, RCN seeks refunds only for prior and ongoing attachment fees coupled with a Commission decision as to what approach PECO must follow in setting future rates.

A. The Data Supplied By PECO Are Inadequate And Incomplete

In its letter of January 23, 2001, RCN asked PECO to produce the data pole-owning utilities are obligated to provide to attachers under section 1.1404 (g) of the rules.¹⁶ PECO disregarded that request, and provided no data whatsoever to RCN until it filed its Response containing the data in Attachment A. Even then it failed to submit all the information required by the pole attachment rules.¹⁷ Moreover the data submitted by PECO in Attachment A are incomplete on their face.¹⁸ Until PECO has supplied RCN (and the Bureau staff) with all the data required by the rules, no determination of what constitutes a just and lawful price can be

¹⁶ RCN first requested PECO to justify its pole attachment rates in the letter from Terry Roberts to M. A. Williams dated July 27, 2000, and attached to RCN's Initial Complaint as part of Exhibit 2.

¹⁷ For example, § 1.1404(j) requires that PECO provide its attacher with all the relevant pages from its FERC Form 1, to which PECO refers in its Attachment A but which has not been provided to RCN. The same rule goes on to specify that if the utility does not provide the data to the attacher, it must supply it to the FCC in responding to the complaint. PECO, however, has not yet provided complete information.

¹⁸ See, Argument II(B)(1) - (3), *infra*.

made. The CSB should therefore require PECO to supply all the data contemplated in the rules and to do so by a certain date. Inasmuch as it is apparent that RCN is being substantially overcharged even by reference to PECO's own data, this obligation should be imposed promptly.¹⁹

B. The Calculations Have Been Done Improperly or Inadequately

The Commission's Post-2001 Rate Making Report and Order ("*Post-2001 Order*")²⁰ sets out in detail how certain of the input data to a utility's cost presentation must be made. PECO appears to have ignored or misinterpreted certain of these principles.

1. Number of Attachers

In its Attachment A PECO claims that the average number of attachers is three. The *Post-2001 Order* specifies that utilities must justify the number of attachers used to allocate relevant costs.²¹ It also sets forth broad guidelines to narrow the latitude which each utility has in calculating such a number. Section 1.1417(d) similarly requires that a utility establish a presumptive average number of attachers for each of its rural, urban, and urbanized service areas.

¹⁹ Moreover, if PECO refuses to cooperate promptly and fully, the CSB should order PECO to charge RCN at the cable-only rate, *i.e.*, \$9.21, on an interim basis pending a final resolution of what constitutes a lawful rate.

²⁰ *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777 (1998) (subsequent history omitted).

²¹ *See, e.g., id.* at ¶¶ 78-79. (Upon request, a utility shall provide all attaching entities the methodology and information by which the presumption is determined.)

PECO has not provided so much as a one line explanation for the three attachers it assumes in presenting its calculations.

Section 1.1417(d)(3) provides that the presumptive average number of attachers may be challenged by an attaching entity by submitting information demonstrating why the utility's presumptive average is incorrect. As set forth in Exhibit C, Statement of Troy Stinson, attached hereto, the assumption that on average there are only three attachers is unlikely to be correct. As Mr. Stinson notes, on most of the poles in the area in which RCN is actively building out its system PECO has its own communications wiring, Comcast is present, Verizon, PECO-Adelphia, and usually one or two other CLEC or other attachers are to be found, including certain communications wiring used for governmental purposes.²² Conservatively, he estimates that on average there are 3.5 attachers on each pole in those areas where RCN is attached or is in the process of placing attachments. It is evident that allocating the costs properly attributable to telecommunications carriers among these 3.5 attachers, rather than among 3 attachers, would materially lower the fees that may be justifiable under the Commission's formula.²³

²² That such wiring can constitute a separate attacher for purposes of the rate calculations is clear from ¶ 54 of the *Post-2001 Order*.

²³ RCN is aware that Mr. Stinson's statement does not constitute in the formal sense a statistically valid sampling as required by § 1.1417(d)(3) and ¶ 79 of the *Post 2001-Order*. Had PECO responded to RCN's January 23, 2001 letter by promptly providing the data which now appears in Attachment A to its Response, RCN would have had sufficient time to conduct such a study. Since this Reply is due, however, only 20 days after the Response was filed, there simply has not been sufficient time to fulfill the requirement of a formal study. In any event, since PECO supplies, even in its Response, no data whatsoever to justify its claimed figure of 3 attachers, the burden remains on it to justify its claims, and it should not be allowed to shift the burden to RCN by the device of being nonresponsive in the first instance to its data production obligations.

2. PECO's Use of a Rate of Return of 11.23%

The *Post-2001 Order* specifies that if a utility is subject to a rate of return constraint, it must use that figure in calculating its costs. PECO uses 11.23% as the relevant number, but has ignored the provisions of section 1.1404(g)(10) which require that it provide a copy of the latest state PUC or court order establishing that rate as well as further information on the status of that determination.²⁴

3. PECO's Use of the Presumption of One Foot Per Attacher Is Contrary To The Only Evidence of Record

In doing its Attachment A calculations, PECO relies on the presumption that each attacher is assigned one foot of vertical space on its poles.²⁵ However, as in the case of other constituents of the pole attachment rules, the one foot presumption can be rebutted.²⁶ In the Statement of Marvin Glidewell attached to the Initial Complaint, RCN noted that it frequently is assigned less than one foot of vertical space.²⁷ There is nothing in PECO's response challenging this assertion and it must therefore be taken as established.²⁸ Clearly, if RCN is not getting the

²⁴ The overall carrying charge rate of 96.79% asserted by PECO also seems exceptionally high. Attachment A to PECO Response, at 2.

²⁵ See *Post-2001 Order*, at ¶ 22.

²⁶ See *Post-2001 Order*, at ¶¶ 90-91.

²⁷ Initial Complaint, Statement S-4 at ¶¶ 4-6 (Verizon in many instances has up to 24 inches of vertical pole space, but RCN is frequently assigned only 6 inches of vertical pole space.)

²⁸ In fact, PECO admits that Verizon is allowed to occupy more vertical space on PECO poles than does RCN. Response at 32 ("In some cases, Verizon may occupy more vertical inches of space on PECO's poles than RCN."); Declaration of Simona Robinson, at ¶ 6 ("Verizon . . . is generally allocated 12 inches of space on PECO's poles." (emphasis supplied)).

presumed one foot of vertical space, it is unlawful to charge RCN the same fee as other attachers who do receive such a space allocation. The principal issue under this heading, of course, is not discrimination among attachers but the equitable allocation of the vertical pole space to the attachers.

C. The Bureau Should Direct PECO to Supply All the Missing Data

It is apparent that PECO has provided an unacceptably incomplete response to RCN's Complaint, grudgingly supplying certain data but not the full panoply as required by the Commission's rules. In such circumstances the CSB should require that PECO provide all the missing information. Indeed, it must do so before it can render a final decision on the merits of RCN's Complaint. At the same time, RCN would urge the CSB to take some interim action to order an immediate reduction in the pole attachment fees so that PECO's refusal to abide by the Commission's rules does not impose on RCN any longer than necessary the continuing obligation to pay PECO's current unlawful pole attachment fee.

D. The Calculations Set Forth by PECO Are On Their Face Inconsistent With The Statute and The Applicable Rule

Apart from all the foregoing defects in the data supplied by PECO in Attachment A, it appears that the calculations have been done incorrectly. A review of PECO's calculations, based on the input data it provides, shows that it derived the five year phase-in of its maximum rate incorrectly. Page 3 of Attachment A indicates that to derive its year-by-year rate increases PECO calculated the difference between the maximum, or fully implemented rate for cable attachers under section 224(d), and the maximum fully implemented rate for telecom attachers,

divided that difference by 5 and then added the product of those calculations to the maximum cable rate.²⁹

This, however, is not consistent with section 224(e)(4) of the Act. The relevant figure is the difference between the pre-2001 cable rate and the maximum telecom rate, not the difference between the "fully implemented" cable rate calculated by PECO and the "fully implemented" telecom rate calculated by PECO. Even PECO recognizes that this is the correct approach in its own Response:

The maximum rate, however, will not be effective until February 8, 2006, as the Act required that the rate increase between the *pre-2001 cable rate* and the post-2001 telecommunications rate be phased in over a five year period. The incremental increase represents 20% of the difference between the *pre-2001 cable rate* and the maximum rate for telecommunications attachments.³⁰

If PECO had done the calculations correctly, and again assuming, which RCN does not, that the basic numbers used by PECO are correct, the year-to-year increase would then be calculated as the difference between PECO's prior cable rate of \$9.21 and its proposed new maximum telecommunications rate of \$58.35.³¹ This would produce the following fee schedule:

Year 1:	\$ 19.04
Year 2:	28.87

²⁹ Maximum telecom rate: \$58.35. Maximum cable rate: \$28.58. Difference: \$32.77, or \$6.55 per year over a five year period. This leads to the first year rate proposed by PECO of \$32.13, rising to \$58.35 in year five.

³⁰ PECO Response, at 34 (footnote omitted, emphasis supplied).

³¹ Maximum telecommunications rate of \$58.35 minus prior cable rate of \$9.21 is \$49.14. Divided by 5, the annual increase would be \$9.83. In the first year, therefore, the new rate would be \$9.21 plus \$9.83, or \$19.04.

Year 3:	38.70
Year 4:	48.53
Year 5:	58.36

If these were the lawful rates, in year one RCN has been overpaying by the difference between \$47.25 and \$19.04, or \$28.21 per attachment. For the sake of illustration, this would mean that, assuming 16,000 attachments,³² PECO is overcharging RCN in year one alone \$451,360.³³ As RCN has noted previously, there is an element of uncertainty in the number of attachments for which it has paid at any given moment, and the rate of annual increase can be known definitively only in retrospect. Accordingly, RCN does not claim that the \$451,360 figure is the correct overpayment for year 1, but only that it estimates the degree of overpayment to which RCN has been subjected. To further illustrate, RCN has carried these calculations out for three years in Table 3 of Exhibit B, which shows that the cumulative overcharge over three years in this scenario would be in excess of one million dollars. Clearly the CSB must seek further data from PECO, and then either calculate the overpayment itself, or enter an order setting forth the lawful rates and direct the parties to agree on the refunds to which RCN is entitled.³⁴

³² This assumption is based upon approximately 10,000 current attachments and a conservative estimated annual growth rate of 6,000 poles per year.

³³ See Table 3 of Exhibit B hereto.

³⁴ As set forth in its Initial Complaint, RCN believes that the appropriate period for which refunds are due antedates the filing of the Initial Complaint, and that prior to February 8, 2001 the only lawful attachment rate was the cable rate of \$9.21. See Initial Complaint at 19-23.

E. Even If PECO's Numbers Were Fully Justified, Correctly Calculated, And All The Requisite Supporting Documentation Had Been Filed, The Proposed Rates Would Still Be Below The Rate Currently Being Charged And Would Remain So Through Year Three

Even if all the required data had been supplied, and the cost support analysis were properly done, and the calculations were done correctly, the rates shown in PECO's Attachment A for years 1-3 are below the rate currently being charged. Accordingly, while PECO nowhere addresses the fact that its own Attachment A undercuts the lawfulness of its current price, that is the simple and unmistakable conclusion to be drawn from PECO's own data.

F. All Attachment Fees Prior to Feb. 8, 2001 Should Have Been at the Cable Rate

As RCN noted in its Initial Complaint, PECO began charging RCN the higher of its two rates – the telecommunications rate – from the signing of the Pole Attachment Agreement in August of 1999. This is plainly unlawful under the statute³⁵ and applicable Commission precedent.³⁶ However there is nothing in PECO's Response which addresses this issue, and RCN will not argue that point again in this Reply, but instead rests on its Initial Complaint.

III. THE EXISTENCE OF A SIGNED POLE ATTACHMENT AGREEMENT SPECIFYING A FEE OF \$47.25 PER ATTACHMENT DOES NOT LIMIT RCN'S RIGHT TO SEEK A COMMISSION ORDER SPECIFYING A LOWER RATE

PECO contends that, despite the flaws described above, the Commission should give effect to the \$47.25 rate it has been charging RCN, based upon the pole attachment agreement

³⁵ 47 U.S.C. § 224 (e) (1).

³⁶ *Cavalier Telephone, LLC. v. Virginia Electric and Power Co.*, 15 FCC Rcd 9563 (2000) *app. for review pending*, at ¶ 21.

RCN signed. RCN already has explained the circumstances under which RCN signed that agreement. PECO's halfhearted attempt to characterize the pole attachment agreement between PECO and RCN as the product of arms' length negotiation between commercial parties of equal bargaining strength disregards Commission precedent on the issue and flies in the face of the factual circumstances that PECO itself recites.

A. The Fact That Rates Appear In A Pole Attachment Agreement Does Not Support A Finding That The Rates Are Reasonable

Commission precedent recognizes that:

Due to the inherently superior bargaining position of the utility over the cable operator in negotiating the rates, terms and conditions for pole attachment, pole attachment rates cannot be held reasonable simply because they have been agreed to by a cable company.³⁷

The Commission also has recognized that one purpose of section 224 was to address the unequal bargaining position of competitive providers *vis a vis* incumbent utilities: "Section 224, as originally enacted and as amended, acknowledges that parties in a pole attachment relationship do not have equal bargaining positions . . ."³⁸ The Commission has analogized the relationship between the pole-owning utilities and attachers to the relationship between an incumbent LEC and new entrants.³⁹ With regard to the latter relationship, the Commission has observed that new

³⁷ *Selkirk Communications, Inc. v. Florida Power & Light Co.*, 8 FCC Rcd. 387 (rel. Jan. 14, 1993), at ¶ 17. See also, *Post-2001 Order* at ¶ 21.

³⁸ Advice letter from CSB to Kelley Drye & Warren, dated Jan. 17, 1997, Exhibit D hereto.

³⁹*Id.* ("For purposes of this letter [examining the question whether a waiver of rights in a pole attachment agreement would be per se unreasonable under section 244] we think that the

competitors "seek to reduce the incumbent's subscribership and weaken the incumbent's dominant position in the market. . . . Thus, an incumbent LEC is likely to have scant, if any, economic incentive to reach agreement."⁴⁰ The analogy is particularly apposite here, given PECO's close corporate affiliation with companies in competition with RCN. Moreover, it is PECO's position that the pole attachment obligations imposed on it by section 224 effect a taking,⁴¹ and that the compensation it receives from attachers is inadequate.⁴² As such, it seems clear that PECO, like the ILECs, has "scant, if any, economic incentive to reach agreement."

B. PECO's Own Statement of the Facts Shows That No Negotiation of Its Terms Took Place

Even PECO's own recitation of the facts belies its attempt to characterize the pole attachment agreement signed by RCN as a commercial contract bargained for at arms' length. Although PECO makes much of RCN's status as among the largest and best funded competitive providers, PECO also makes clear that, because it rejected all of RCN's proposed changes, its

utility stands in a position vis-a-vis the competitive telecommunications provider seeking pole attachment agreements that is virtually indistinguishable from that of the incumbent LEC with respect to a new entrant seeking interconnection agreements under Sections 251 and 252 of the Act.")

⁴⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 1 FR 45476, FCC 96-325 at ¶ 141.

⁴¹ See PECO Response, at 19.

⁴² See PECO Response, at 1 ("The attachment rate negotiated with RCN, whether referred to as a market rate or otherwise, is not meant to constitute just compensation within the meaning of the Takings Clause of the Fifth Amendment to the United States Constitution. Respondents reserve all rights to obtain just compensation at the appropriate time and in an appropriate forum.")

agreement with RCN is a standard form agreement based upon the terms previously imposed by PECO on other, presumably smaller and weaker, competitors: "RCN had PECO's standard contract to review, which had already been executed by a number of similarly situated attachers. . . . RCN presented proposed changes to PECO's standard attachment agreement . . . [however,] in order to avoid a claim of discrimination, PECO did not want to give RCN different terms than it had given other attachers."⁴³ PECO freely admits that, although RCN sought changes to PECO's standard form pole attachment agreement, all such changes were rejected: "After giving careful consideration to RCN's request for changes, PECO decided not to accept them . . ."⁴⁴ Notably absent from PECO's recitation of the facts is any reference to PECO having offered any alternatives to the changes proposed by RCN, in an effort to compromise. The Declaration of Marie Furey states that her decision to reject all of RCN's proposed changes was reviewed by John Halderman, then PECO's Assistant General Counsel, and that Mr. Halderman agreed "that the requested changes . . . could not be accepted."⁴⁵ She states that PECO then rejected RCN's request that PECO state in writing its reasons for rejecting the changes, and next sent executable copies of the standard form agreement to RCN for execution,⁴⁶ thus effectively ending the negotiation process where it began – with PECO's standard terms.

⁴³ PECO Response, at 9.

⁴⁴ Declaration of Marie Furey, at ¶ 4, Attachment C to PECO Response.

⁴⁵ *Id.* at ¶ 5.

⁴⁶ *Id.*

PECO claims that "The fact that [RCN] had equal power in the negotiations is indicated by its billions of dollars in financing and readily available cash."⁴⁷ This is thoroughly illogical. RCN is in no position to duplicate PECO's local distribution plant for reasons of delay, environmental complications, and facility planning, and its bank balance is totally irrelevant to such impossibility. PECO relies on this argument, however, because it cannot point to a single concession that RCN gained in the negotiations. Indeed, the record reflects that no good faith negotiation between the parties ever occurred. Good faith negotiation implies an exchange of proposals between the parties toward a mutually agreeable compromise. Here, in contrast, RCN requested changes to PECO's standard form pole attachment, which PECO categorically rejected. Rather than offering alternative changes that it would find acceptable, PECO simply resubmitted its standard form agreement to RCN, which RCN then executed, recognizing that further attempts at negotiation would be fruitless and would cause additional costly delays.

IV. PECO'S CONTENTIONS THAT IT HAS COOPERATED WITH RCN TO GET RCN'S WIRING ON PECO'S POLES IS ERRONEOUS IN SOME RESPECTS AND IS IN ANY CASE IRRELEVANT TO THE LAWFULNESS OF THE POLE ATTACHMENT RATE

RCN's Initial Complaint is confined to one aspect of PECO's pole attachment fees: that PECO is charging RCN a pole attachment fee which is unlawful in that it exceeds the level permitted by section 224 of the Act, and is discriminatory as well. RCN nowhere raised an access to poles issue, nor did it accuse PECO of being generally uncooperative, or seeking to delay RCN's attachments. Nevertheless, PECO has alluded in various portions of its Response to its

⁴⁷ PECO Response, at 30.

willingness to work with RCN to get RCN's wiring on PECO's poles as quickly as feasible.⁴⁸

RCN does not disagree, although the question is irrelevant to the legal issues raised in the Complaint. Nevertheless, there are a few issues of noncooperation which do relate to the legality of the pole attachment fee issue and which require at least brief mention in this Reply.

In its Initial Complaint RCN recited the history of its efforts to get PECO to address the question of the lawfulness of PECO's pole attachment fee. While PECO puts its own spin on that history, there appears to be no dispute about the basic facts. Beginning in the summer of 2000 RCN attempted to get PECO to put into writing its justification for charging RCN the telecommunications rate for the period prior to February 8, 2001, and its justification for the level of that rate. PECO executives ignored a number of such requests, both written and oral, and in fact only addressed the matter in any substantive way in February, 2001, after RCN advised PECO that it was preparing to file a formal Pole Attachment Complaint.⁴⁹ In January, thoroughly frustrated by PECO's apparent unwillingness to address the issue seriously, RCN formally asked for the cost data outlined in section 1.1404(g) of the Commission's rules.⁵⁰ While, as PECO notes it did not ignore this letter, it did ignore the request for the data, producing some of it only as Attachment A to its April 16, 2001 Response. As noted above, the wrongful refusal to produce this data earlier has impaired RCN's ability to properly and fully respond to the many issues raised by PECO's submission. This constitutes not cooperation, but bad faith, and as such

⁴⁸ See, e.g., PECO Response at 10 and Declaration of Simona Robinson at ¶ 3.

⁴⁹ See Initial Complaint, at 9-10.

⁵⁰ Letter of January 23, 2001, reproduced in Initial Complaint, at Exhibit 2.

is a violation of the Commission's oft-repeated expectation that utilities would work in good faith with attachers to resolve issues.⁵¹ How a delay of some 5 months in stepping up to a serious discussion of RCN's concerns, and from January to April in producing some (but not all) of the required cost data, can be squared with a cooperative attitude, is not apparent to RCN.

This record of poor cooperation on the attachment issue should be considered relevant to RCN's request that the CSB order refunds for overcharges which occurred prior to the filing of a formal Complaint. It is obvious that while RCN made numerous efforts to seek discussion and a negotiated settlement, PECO simply disregarded RCN's concerns. PECO does not challenge RCN's assertion that repeated requests for a written response to its letter went unanswered for many months. If RCN's continuing effort to honor the Commission's preference for negotiation over confrontation is rewarded by a loss of pre-Complaint damages, few potential complainants will see continued efforts to bring a reluctant utility to the negotiating table as a very attractive prospect.

⁵¹ Perhaps seeking to suggest that RCN also has been uncooperative, PECO notes that it twice asked RCN to respond to a request for information about the services RCN was providing through its system. *See* PECO Response, Declaration of Simona Robinson at ¶ 5. But there is no parity between these two circumstances. PECO's obligation to provide attachment fee support data is set forth in the rules and is clear and unequivocal. While RCN would ordinarily respond to any inquiry in the normal course, it was apparent that PECO was simply seeking to assure itself that it was charging RCN the highest possible rates for its attachments. Since RCN was already paying the highest possible rate, and has nowhere objected to doing so in the period after February 8, 2001, its failure to respond did no damage to PECO's legitimate interests as a pole-owning utility.

V. PECO'S POLE ATTACHMENT FEES ARE DISCRIMINATORY BECAUSE OTHER ATTACHERS ARE EFFECTIVELY CHARGED A LOWER PRICE

A. PECO Discriminates In Favor Of Verizon

In its Initial Complaint RCN noted that, even if Verizon pays the same \$47.25 attachment fee that RCN is paying, there is nevertheless unlawful discrimination occurring because Verizon appears to be allocated more than the standard one foot of vertical space on PECO's poles, and RCN frequently is allocated less than one foot, often getting only six inches.⁵² In its Response, PECO in essence admits that Verizon may get more than the standard vertical spacing,⁵³ but contends that this cannot constitute unlawful discrimination because section 224(a)(5) excludes ILECs from the definition of a "telecommunications carrier" for purposes of that section. PECO is correct that ILECs may not invoke section 224 to secure space on a utility's pole, but this inability is logically and legally irrelevant to the question whether PECO can blatantly discriminate in favor of Verizon in assigning pole space at a uniform rate. Discrimination against the competitor *vis a vis* the incumbent cannot be countenanced under the Act. Surely Congress, in excluding ILECs from the scope of section 224, did not intend that the incumbents thereby receive rates preferential to those afforded competitors.

In addressing the question whether an ILEC would count as an attacher, the Commission has emphatically stated that it would, and that its inability to invoke section 224 to become an

⁵² Initial Complaint, at 16-17 and Exhibit 4 at ¶ 6.

⁵³ PECO Response, at 32 and Declaration of Simona Robinson at ¶ 6.

attacher was irrelevant.⁵⁴ As succinctly stated: "[A]ny pole owner providing telecommunications services, including an ILEC, should be counted as an attaching entity for the purposes of allocating the costs of unusable space under Section 224(e)(2)."⁵⁵ Similarly, if Verizon is an attacher on PECO's poles for purposes of calculating a lawful rate, PECO cannot discriminate in favor of Verizon in setting the rate, or in providing a more advantageous contractual provision for the same rate, than is available to any other attacher.

In this instance, PECO appears to be charging Verizon a pro rata rate, based on the total pole space allocated for Verizon's attachments, that is less than the pole attachment rate for competitive telecommunications providers that PECO claims is effective February 8, 2001. If PECO is profiting from the pole attachment rate it currently charges Verizon, then one must conclude that the telecommunications pole attachment rate it is charging RCN is inflated. If not, one can only conclude that PECO is subsidizing Verizon at the expense of competitive providers, with obvious anti-competitive consequences. And, in either event, it is obvious that charging Verizon for more space, at the same rate charged to competitors for less space, results in greater pro rata costs to the competitor than to the incumbent - a result clearly at odds with the pro-competitive purpose of section 224 and the Telecommunications Act of 1996 as a whole.

B. PECO Has Not Demonstrated That Comcast Pays The Same Attachment Fees As RCN

In making its generalized assertion that PECO does not discriminate in charging attachers

⁵⁴ See *Post-2001 Order*, at ¶¶ 48-51.

⁵⁵ *Id.*, at ¶ 50.

for access to its poles, PECO introduces the caveat that this applies only to those "similarly situated."⁵⁶ PECO suggests also that it has no obligation to tell RCN what other attachers are paying. As to the latter assertion, RCN disagrees that PECO has no such duty. It is inherent in its obligations as a public utility subject to section 224 of the Act to provide complete information about the rates, terms, and conditions negotiated with other attachers. Bland assertions that "similarly situated" attachers are treated alike can cover a multitude of potentially unlawful discriminations. Accordingly, RCN suggests that the CSB inquire of PECO as to the terms and conditions of Comcast's pole attachment fees so that an affirmative finding about PECO's practices can be made on the record.

VI. REFUNDS SHOULD BE ORDERED BACK TO THE DATE OF THE POLE ATTACHMENT AGREEMENT, OR AT LEAST TO THE DATE RCN FIRST SOUGHT TO ADDRESS THE ATTACHMENT RATE ISSUE

RCN's Initial Complaint sought refunds back to the summer of 2000, rather than to the date on which the Initial Complaint was actually filed.⁵⁷ PECO's Response objects to this request. The issue appears to be adequately briefed on both sides and RCN will rest on its initial discussion to justify its request. It remains only to add that PECO's contention that setting refunds for the period prior to the filing of the Complaint is somehow unlawful is nowhere supported in PECO's Response, and is in fact unsupportable.

⁵⁶ PECO Response, at 33.

⁵⁷ See Initial Complaint, at 19-23.

VII. CONCLUSION

At bottom, PECO's Response rests on jurisdictional arguments that the Commission already has decided, in past cases, in RCN's favor, and an incomplete effort to join on the main issue, *i.e.*, whether the \$47.25 attachment fee which RCN has been required to pay since August of 1999 is justified under section 224 of the Act, applicable Commission precedent, or Commission regulations. While PECO insists that it has "a legitimate legal basis for the rates negotiated with RCN on a good faith basis,"⁵⁸ the fact is that the rates were not negotiated and PECO does not, as demonstrated above, have a legitimate legal basis for them. Its Attachment A purporting to justify the \$47.25 rate has numerous deficiencies and fails to provide all the required supporting data and documentation required by the Commission's rules. It is striking that, even if one overlooks the numerous deficiencies in the data produced by PECO, PECO's own data indicate that it is not entitled to charge RCN a \$47.25 fee until 2004. Oddly, this gap is never even acknowledged by PECO, much less justified.

RCN urges the CSB to require further data from PECO and to actively review such data to determine the extent to which RCN has overpaid, and continues to overpay, for the vital pole attachments it needs to fulfill the procompetitive policies of the Telecommunications Act of 1996. It also urges the CSB to order PECO to provide some interim relief to RCN so that it need

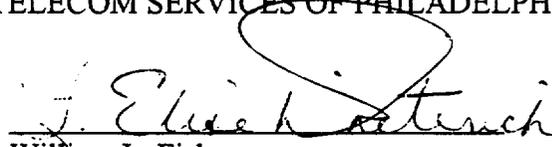
⁵⁸ PECO Response, at 39.

not continue to pay clearly unlawful rates while a final resolution of the lawful rate is under way.

Respectfully submitted,

RCN TELECOM SERVICES OF PHILADELPHIA, INC.

By:


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L. Elise Dieterich

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Counsel to RCN Telecom Services of Philadelphia, Inc.

May 7, 2001

A

**RCN LETTERS TO FCC
WITHDRAWING OVS CERTIFICATION
FOR CERTAIN PENNSYLVANIA COMMUNITIES**

(See Attached)

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

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February 7, 2001

VIA HAND DELIVERY

RECEIVED

FEB 7 2001

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals Building
445 12th Street, N.W.
Washington, D.C. 20554

Re: RCN Telecom Services, Inc.: Pennsylvania Open Video System

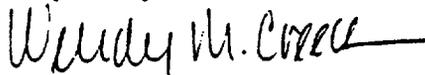
Dear Ms. Salas:

This letter is to advise the Commission that RCN Telecom Services, Inc. (f/k/a RCN Telecom Services of Philadelphia, Inc.) ("RCN"), has entered into cable franchise agreements with the boroughs of Collingdale, Darby, East Lansdowne, Glenolden, Landsdowne, Milbourne, Norwood, Parkside, Prospect Park, Ridley Park, and Yeadon and the townships of Darby, Tincicum and Upper Darby, in Delaware County, Pennsylvania, as well as Lower Makefield Township and Warminster Borough, in Bucks County, Pennsylvania, and, therefore, will provide video programming services to the residents of these communities over a cable system rather than its open video system ("OVS") in Pennsylvania. Accordingly, RCN hereby withdraws these locations as communities to be served by RCN's open video system pursuant to the FCC Form 1275 OVS certification filed with the Commission on October 2, 1998.

We would appreciate it if you would associate a copy of this letter with RCN's OVS certification file. For your convenience, we are enclosing an original and two (2) copies of this letter for that purpose.

Should you have any questions regarding this matter, please contact the undersigned.

Respectfully submitted,



Kathy L. Cooper
Wendy M. Creeden

Counsel for RCN Telecom Services, Inc.

cc: Office of the Cable Services Bureau
Mr. Steven A. Broeckaert
Mr. Scott Burnside
Philip Passanante, Esq.
Mr. Thomas Steel

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September 1, 1999

RECEIVED

SEP 01 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals Building
445 12th Street, N.W.
Washington, D.C. 20554

Re: RCN Telecom Services of Philadelphia, Inc.: Open Video System

Dear Ms. Salas:

This letter is to advise the Commission that RCN Telecom Services of Philadelphia, Inc. ("RCN"), has entered into cable franchise agreements with the cities of Colwyn, Eddystone, Folcroft, Morton, Ridley, Rutledge and Sharon Hill, in Delaware County, Pennsylvania, as well as Bristol Borough, Newtown Borough, and Newtown Township, in Bucks County, Pennsylvania, and, therefore, will provide video programming services to the residents of these cities over a cable system rather than its open video system ("OVS") in Pennsylvania. Accordingly, RCN hereby withdraws these cities as communities to be served by RCN's open video system pursuant to the FCC Form 1275 OVS certification filed with the Commission on June 5, 1998.

We would appreciate it if you would associate a copy of this letter with RCN's OVS certification file. For your convenience, we are enclosing an original and two (2) copies of this letter for that purpose.

Should you have any questions regarding this matter, please contact the undersigned.

Respectfully submitted,


Jean L. Kiddoo
Kathy L. Cooper

Counsel for RCN Telecom Services of Philadelphia, Inc.

cc: Office of the Cable Services Bureau
Mr. Steven A. Broeckaert
Mr. Scott Burnside
John Filipowicz, Esq.
Mr. George Duffy

COMPARISON OF ANNUAL POLE ATTACHMENT FEES

Table 1

10,000 Poles – No Growth			
	Current Rate of \$47.25	PECO Proposed Phase-In of \$58.35 Rate	Difference
Year 1	\$472,500	\$321,300 (@ \$32.13/pole)	\$151,200
Year 2	\$472,500	\$386,300 (@\$38.68/pole)	\$85,700
Year 3	\$472,500	\$452,300 (@ \$45.23/pole)	\$20,200

Total Difference = \$257,100

Table 2

10,000 Poles – Growth of 6,000/Yr.			
	Current Rate of \$47.25	PECO Proposed Phase-In of \$58.35 Rate	Difference
Year 1 (16,000 poles)	\$756,000	\$514,080 (@ \$32.13/pole)	\$241,920
Year 2 (22,000 poles)	\$1,039,500	\$850,960 (@ \$38.68/pole)	\$188,540
Year 3 (28,000 poles)	\$1,323,000	\$1,266,440 (@ \$45.23/pole)	\$56,560

Total Difference = \$487,020

Table 3

10,000 Poles – Growth of 6,000/Yr.			
	Current Rate of \$47.25	PECO Proposed Rate of \$58.35 Phased-In Per FCC Rules	Difference
Year 1 (16,000 poles)	\$756,000	\$304,640 (@ \$19.04/pole)	\$451,360
Year 2 (22,000 poles)	\$1,039,500	\$635,140 (@ \$28.87/pole)	\$404,360
Year 3 (28,000 poles)	\$1,323,000	\$1,083,600 (@ \$38.70/pole)	\$239,400

Total Difference = \$1,095,120

STATEMENT OF JONATHAN TROY STINSON

1. My name is Jonathan Troy Stinson. I am currently employed by RCN Telecom Services of Philadelphia, Inc., ("RCN") as Access and Rights-of-Way Engineer. My office is located at 850 Rittenhouse Road, Trooper, Pennsylvania, 19403. My work number is (484) 399- 8314. I have been with RCN since July, 2000. My professional experience and credentials are already a matter of record in this proceeding.
2. In its response to RCN's Initial Complaint PECO provides certain data in Attachment A in support of its current pole attachment fee of \$47.25. Among these is the presumptive use of three attachers per pole. My responsibilities include close review and inspection of PECO's poles in those areas in which RCN is actively building out its cable and telecommunications distribution plant, and I am quite familiar with the status of those poles, including their current status with respect to the number of and nature of existing attachments.
3. On the great majority of PECO poles in the area of concern to RCN, the following attachers may be found: PECO-Adelphia, Comcast, government wire services such as fire or police services, a variety of CLECs, and Verizon. I believe that PECO also has its own internal communications wiring on many of these poles and may also have some wiring used by the PECO-AT&T PCS enterprise. EIS may also have wiring on some of these poles. Of course, as RCN is attached to these poles it becomes an additional attacher.
4. Accordingly, while I have not conducted a statistically valid sampling of the relevant poles, I am quite certain, based on my close personal knowledge of the general situation, that an average figure of three attachers on these poles is too low. Based on my close personal knowledge of the relevant poles I would estimate that an average number of 3.5

attachers, including RCN, is more nearly correct and may even be too low.

Under penalty of perjury I declare that the foregoing is true and correct to the best of my knowledge, information and belief.


Troy Stinson

May 7, 2001

Exhibit D

FCC ADVICE LETTER TO KELLEY, DRYE & WARREN

(See Attached)



Federal Communications Commission
Washington, D.C. 20554

January 17, 1997

DA 97-131

Released: January 17, 1997

Danny E. Adams, Esq.
Kelley Drye & Warren LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036

Dear Mr. Adams:

This letter is in response to your request for a letter ruling on an interpretation of Section 224 of the Communications Act of 1934, as amended.¹ Specifically, you seek an opinion as to whether it would be unreasonable *per se* under Section 224(b) for a covered utility to demand a requesting telecommunications company, as a condition of entering into a pole attachment agreement, to waive all legal rights and remedies under Section 224.

Your letter provides a hypothetical involving negotiations between a telecommunications carrier and a utility over the terms of a proposed pole attachment agreement. In your example, the parties have agreed to all issues, except for the inclusion of the following clause:

By execution of the Agreement by its duly authorized representative, Licensee hereby accepts that the relationship of the parties shall be governed exclusively by this Agreement and Licensee waives any and all jurisdiction of federal, state or local regulatory authorities over the terms and conditions of this Agreement, access to Licensor's facilities, or any other matter respecting attachments to licensor's facilities, including without limitation the fees, charges or rent due hereunder, for a period of ten years from the effective date. In the event that Licensee seeks relief from or alteration of any term or condition of this Agreement in whole or in part on the basis of any alleged jurisdiction of federal, state, or local regulatory authority, this Agreement shall immediately terminate and Licensee agrees that it shall promptly remove all its attachments from Licensor's facilities.

Section 224 was enacted in 1978 in response to concerns raised by cable operators regarding unfair utility pole attachment practices. The intent was to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public. Amendments to Section 224 in the Telecommunications Act of 1996

¹ 47 U.S.C. § 224

(1996 Act)² were designed to address similar concerns arising from the anticipated entry of competitive telecommunications providers. Section 224, as originally enacted and as amended, acknowledges that parties in a pole attachment relationship do not have equal bargaining positions, and that the potential for barriers to competitive entry emanating from the lack of access or unreasonable rates is significant.

Section 224(b)(1) states that "[s]ubject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms and conditions for pole attachments to provide that such rates, terms and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms and conditions." The provisions of Section 224(c) indicates that the Commission shall not regulate such rates, terms or conditions "where such matters are regulated by a State." Aside from this one exception, there is no other indication that the Commission need not regulate these issues

In *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 ("Interconnection Order")*, the Commission interpreted Section 224(f)(1) as a "directive" that requires a utility to "grant telecommunications carriers and cable operators nondiscriminatory access to all poles, ducts, conduits, and rights-of-way owned or controlled by the utility."³ The Commission explained that Section 224(f)(1) "seeks to ensure that no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields."⁴

The 1996 Act also added Section 251 to the Communications Act. Section 251(b)(4) requires each local exchange carrier (LEC) "to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224."⁵ Together, Sections 224 and 251 indicate a Congressional intent that access responsibilities apply to LECs in the same fashion that they do to utilities.

The Commission has previously indicated a preference for negotiations in the pole attachment context, however we also anticipate that negotiations for access and the resulting rates, terms and conditions will be conducted in good faith.⁶ As you have noted in your letter,

² Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 et. Seq.

³ 61 FR 45476, FCC 96-325 at para. 1123 (released August 8, 1996) (slip op.).

⁴ *Id.*

⁵ 47 U.S.C. § 251(b)(4).

⁶ *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 4 FCC Rcd 468, 472 (1989).

covered utilities are required by law to comply with Section 224. You further suggest that such utilities should not be able to escape that obligation by forcing the users which the law is meant to protect to waive all their protective rights. We agree.

In the *Interconnection Order*, the Commission considered a situation analogous to your hypothetical. Discussing the Section 251 requirement that incumbent LECs provide interconnection to new entrants, the Commission observed that new entrants have little to offer the incumbent. Rather, these new competitors "seek to reduce the incumbent's subscribership and weaken the incumbent's dominant position in the market. . . . Thus, an incumbent LEC is likely to have scant, if any, economic incentive to reach agreement."⁸

In that context, the Commission determined that a request by an incumbent that a new entrant contractually waive its legal rights or remedies could constitute a violation of the duty to negotiate in good faith imposed by Sections 251(c)(1) and 252.⁹

We reject the general contention that a request by a party that another party limit its legal remedies as part of a negotiated agreement will in all cases constitute a violation of the duty to negotiate in good faith. A party may voluntarily agree to limit its legal rights or remedies in order to obtain a valuable concession from another party. *In some circumstances, however, a party may violate this statutory provision by demanding that another waive its legal rights. . . . [W]e find that it is a per se failure to negotiate in good faith for a party to refuse to include in an agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules. Refusing to permit a party to include such a provision would be tantamount to forcing a party to waive its legal rights in the future.*⁷

For the purposes of this letter, we think that the utility stands in a position *vis-a-vis* the competitive telecommunications provider seeking pole attachment agreements that is virtually indistinguishable from that of the incumbent LEC with respect to a new entrant seeking interconnection agreements under Sections 251 and 252 of the Act. We think it is contrary to the statute for a party to be pressured, as a condition of an agreement, to waive all its legal rights and remedies provided under the law. Efforts to compel such waivers constitute

Interconnection Order at para. 141.

⁸ Section 251(c)(1) requires incumbent LECs to negotiate interconnection agreements in good faith in accordance with Section 252. Section 252 sets our procedures for the negotiation, arbitration, and approval of interconnection agreements. 47 U.S.C. §§ 251(c)(1) and 252.

⁹ *Interconnection Order* at para. 152 (emphasis added).

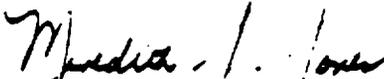
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impermissible attempts to subvert the Congressional intent underlying Section 224.¹⁰

Upon review of your hypothetical, and our past statements regarding good faith negotiations, we conclude that demanding a clause like the one you described would be unreasonable *per se*, and a provision adopted as a result of such an unreasonable demand would be unenforceable as a matter of law.¹¹

We trust that this letter helps to clarify the rights provided and the responsibilities imposed by Section 224.

Sincerely,


Meredith J. Jones
Chief
Cable Services Bureau

¹⁰ See, e.g. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 222 (1986) ("If [a] regulatory statute is otherwise within the powers of Congress, . . . its application may not be defeated by private contractual provisions.").

¹¹ Invalidating the offending clause would not necessarily invalidate the other provisions of the agreement 47 C.F.R. § 1.1410 (1995).

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
RCN TELECOM SERVICES OF)
PHILADELPHIA, INC.)
)
v.)
)
PECO ENERGY COMPANY)
)
and)
)
EXELON INFRASTRUCTURE SERVICES, INC.)

PA No. 01-03

STATEMENT

My name is Scott Burnside. I am Sr. Vice President, Regulatory and Government Affairs for RCN Corporation. I have reviewed the foregoing Reply of RCN Telecom Services of Philadelphia, Inc. in its entirety and affirm, under penalty of perjury that, to the best of my knowledge, information and belief, it is true and correct.



Scott Burnside

May 7, 2001

CERTIFICATE OF SERVICE

I, hereby certify that on the 7th day of May, 2001 copies of the foregoing Reply of RCN Telecom Services of Philadelphia, Inc. to Response of PECO Energy Company was sent via first class U.S. mail, postage-paid to the following parties.

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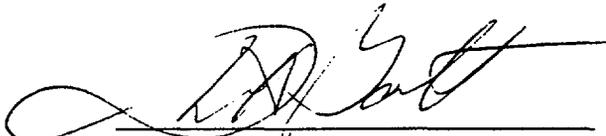
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