

*A Partnership Including
Professional Corporations*
600 13th Street, N.W.
Washington, D.C. 20005-3096
202-756-8000
Facsimile 202-756-8087
www.mwe.com

Christine M. Gill
Attorney at Law
cgill@mwe.com
202-756-8283

Boston
Chicago
London
Los Angeles
Miami
Moscow
New York
Orange County
St. Petersburg
Silicon Valley
Vilnius
Washington, D.C.

MCDERMOTT, WILL & EMERY

June 18, 2001

VIA HAND-DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

**Re: RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Company
and Exelon Infrastructure Services, Inc.
PA No. 01-003**

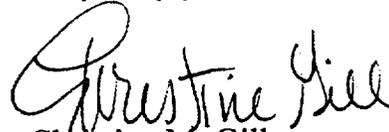
Dear Ms. Salas:

Enclosed for filing in connection with the above-referenced matter on behalf of PECO Energy Company and Exelon Infrastructure Services, Inc., please find the original and four copies of Response to Amended Complaint of PECO Energy Company and Response to Amended Complaint of Exelon Infrastructure Services, Inc. Please return file-stamped copies of these pleadings to our office with our courier.

The Response to Amended Complaint of PECO Energy Company references the Declaration of Michael A. Williams. A photocopy of the Declaration of Mr. Williams (received in our office via fax) is attached thereto. We will supplement the Response with an original Declaration of Mr. Williams shortly.

Thank you for your attention to this matter.

Very truly yours,


Christine M. Gill

Enclosures

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ERIDS 06C01

Ms. Magalie R. Salas
Federal Communications Commission
June 18, 2001
Page 2

cc: Kathleen Costello
Karen D. Cyr
L. Elise Dieterich
W. Kenneth Ferree
William L. Fishman
Marsha Gransee
John C. Halderman
William H. Johnson
Cheryl King
James P. McNulty
Louise Fink Smith

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

In the Matter of)	
)	
RCN TELECOM SERVICES OF PHILADELPHIA, INC.)	PA No. 01-003
)	
v.)	
)	
PECO ENERGY COMPANY and EXELON INFRASTRUCTURE SERVICES, INC.)	

To: Cable Services Bureau

**RESPONSE TO AMENDED COMPLAINT
OF PECO ENERGY COMPANY**

Shirley S. Fujimoto
Christine M. Gill
John R. Delmore
Erika E. Olsen
MCDERMOTT, WILL & EMERY
600 13th Street, N.W.
Washington, D.C. 20005-3096
202-756-8000

Counsel for Respondent PECO Energy Company

Dated: June 18, 2001

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EXECUTIVE SUMMARY

PECO Energy Company ("PECO") hereby responds to the allegations in the Amended Pole Attachment Complaint ("Amended Complaint") filed by RCN Telecom Services of Philadelphia, Inc. ("RCN") on May 4, 2001. The Amended Complaint follows RCN's initial Pole Attachment Complaint ("Complaint") in this case, which it filed against "Exelon Corp. f/k/a PECO Energy Company" on March 16, 2001. In the initial Complaint, RCN alleged that PECO's pole attachment fees were too high. PECO filed a Response denying the allegations of the initial Complaint on April 16, 2001.

The Amended Complaint incorporates the allegations of the initial Complaint and sets forth entirely new allegations regarding PECO's make-ready rates, practices, and policies. Specifically, RCN alleges that the make-ready charges it agreed to pay PECO were too high, that PECO is wrongfully withholding information regarding the internal cost structure of its pricing policy, and that PECO is improperly refusing to pay the cost of correcting alleged preexisting safety code violations caused by other attachers. PECO vigorously disputes RCN's claims and maintains that all of its make-ready rates, practices, and policies have always been legal, fair, and appropriate.

PECO and its make-ready subcontractor EIS of Pennsylvania, Inc., a subsidiary of Exelon Infrastructure Services ("EIS") have worked hard to enable RCN to build out its network as quickly as possible, and those efforts have been successful: PECO and RCN entered a pole attachment agreement in August 1999, and by April 2001 RCN was already attached to 9,446 poles and held permits for an additional 5,530. PECO is disappointed that now, after much of RCN's build-out has been completed, RCN is seeking to obtain millions of dollars in refunds and artificially lower make-ready rates for the future.

In this Response, PECO first contends that RCN's make-ready allegations should be dismissed as procedurally improper. The make-ready allegations are set forth for the first time in the Amended Complaint, but the pole attachment rules provide no authority for adding new

allegations in that manner. For that matter, PECO is not aware of any forum in which a complainant can add new allegations to a case on its own whim after the initial complaint and response stage has passed.

PECO next asserts that the Commission should not reduce its make-ready fees nor require it to provide a refund of them. First, make-ready contractors and make-ready rates are not covered by the Pole Attachments Act ("PAA") and, thus, the Commission lacks jurisdiction over them. One reason for this lack of jurisdiction is that the make-ready market has been open to competition since 1996, so RCN has been free to hire contractors other than PECO. Also, because utilities provide the same make-ready services as non-utility make-ready contractors, regulating only utilities' make-ready rates would deny them equal protection under the Fifth Amendment to the United States Constitution. Additionally, PECO's make-ready invoices constitute contracts for which the Commission is not authorized to rewrite or dictate the terms. Moreover, regulating utilities' make-ready rates may simply drive them away from the make-ready services market and thus reduce competition therein, a result fundamentally at odds with overall Commission policy.

RCN's contention that PECO is wrongfully withholding information regarding the internal cost structure of its pricing policy must also fail for lack of jurisdiction. If the Commission does not have jurisdiction over the rates charged by make-ready contractors, it cannot have jurisdiction to mandate the provision of information and records behind those rates.

RCN's next allegation is that PECO is improperly refusing to pay the cost of correcting alleged preexisting violations of the National Electrical Safety Code ("NESC") and PECO's own safety standards caused by other attachers. RCN fails to present evidence sufficient to establish a *prima facie* case for this allegation. First, it fails to define what it means by a preexisting violation. Also, RCN presents no credible or statistically valid evidence that PECO's poles are out of compliance with the NESC. PECO, in contrast, demonstrates that it has practices and policies in place which are designed to ensure that this is not the case, and that the make-ready

work in question was required by RCN's request to access PECO's poles. Additionally, PECO's make-ready policies are well in line with the Commission's pole attachment rules and policies. Forcing PECO to alter them to more greatly favor attachers would impermissibly tread upon Section 224(f)(2) of the PAA, which provides that utilities may deny access to their facilities "where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes."

In terms of remedies, RCN seeks, among other things, refunds dating back beyond the date it filed the Amended Complaint and even beyond the date it filed the initial Complaint. PECO, of course, does not believe RCN is entitled to any relief. If, *arguendo*, the Commission chooses to grant RCN any refunds, it should do so only from the date the Commission effectively accepted the Amended Complaint, June 1, 2001¹ or, at the earliest, the date the Amended Complaint was filed, May 4, 2001.

Finally, PECO takes this opportunity to refute RCN's claim, advanced in its Reply, that PECO's calculation of the telecommunications rate as implemented over the next five years is erroneous. PECO's calculation is fully consistent with the PAA and the Commission's interpretations thereof.

¹ In a June 1, 2001 *Order* issued in this case, the Commission voiced "serious concern" with the fact that RCN filed the Amended Complaint without obtaining leave of the Commission. However, the Commission decided to allow the proceeding to continue.

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

In the Matter of)	
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RCN TELECOM SERVICES OF PHILADELPHIA, INC.)	PA No. 01-003
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v.)	
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PECO ENERGY COMPANY)	
and)	
EXELON INFRASTRUCTURE SERVICES, INC.)	

To: Cable Services Bureau

**RESPONSE TO AMENDED COMPLAINT
OF PECO ENERGY COMPANY**

Respondent PECO Energy Company ("PECO"), through its undersigned counsel, hereby responds to the Amended Pole Attachment Complaint ("Amended Complaint") filed by RCN Telecom Services of Philadelphia, Inc. ("RCN") on May 4, 2001.

RCN raises several make-ready issues against PECO and Exelon Infrastructure Services, Inc. ("EIS"). Specifically, it alleges that the make-ready charges it agreed to pay PECO were too high, that PECO is wrongfully withholding information regarding the internal cost structure of its pricing policy, and that PECO is improperly refusing to pay the cost of correcting alleged preexisting safety code violations. These claims are unwarranted.

1. RCN's make-ready allegations must fail for numerous reasons. First, the allegations are asserted for the first time in the Amended Complaint, a tactic which is not permitted by the

Pole Attachments Act ("PAA") or its implementing regulations.² Second, with regard to contentions that PECO's make-ready fees are too high and its pricing structure insufficiently disclosed, the Commission lacks jurisdiction over such claims because they do not involve the rates, terms, and conditions for pole attachments which a utility solely controls; rather, the construction work needed to access those facilities is competitively available in the marketplace. Instead of wasting PECO's and the Commission's time and resources on these matters, RCN could have simply hired another make-ready contractor to perform the work. With regard to the assertion that PECO is improperly refusing to pay the cost of correcting alleged preexisting safety code violations, RCN does not present any credible evidence that such violations even existed and therefore it fails to meet its burden of establishing a prima facie case on this issue. Furthermore, PECO's policies with regard to correcting safety code violations have always been consonant with the NESC, the PAA and the Commission's policies.

2. Given that RCN portrays PECO's alleged wrongdoing as obvious and extremely severe -- it seeks actual damages of at least \$2,500,000 -- why has it waited nearly two years after it began using PECO to perform its make-ready work to raise these issues? RCN characterizes PECO as acting in "flagrant violation" of the Commission's rules,³ of engaging in "substantial and systemic overcharging,"⁴ and of levying "consciously unlawful" charges upon attachers over at least the last two years.⁵ Yet, through all that, RCN hired PECO time and again to perform its make-ready work despite the option of hiring other contractors. By its own estimate, RCN paid PECO approximately \$9,700,000 in make-ready fees before it got around to filing this Amended Complaint. It is curious that a company so aggressive with regard to building-out its network would be so passive with regard to protecting its business interests.

² 47 U.S.C. § 224 (1994 and Supp. IV 1998); 47 C.F.R. § 1.1401 *et seq.* (2000).

³ Amended Complaint at 17.

⁴ Amended Complaint at 19.

⁵ Amended Complaint at 20.

3. It is evident that RCN continued to employ PECO to perform its make-ready work because it was doing an outstanding job and meeting RCN's needs better than any other contractor it could hire. RCN's overriding concern was speed to market; it wanted to build out its network and pass as many homes as quickly as possible. PECO, working through its subcontractor EIS,⁶ performed RCN's make-ready at an exceptionally rapid rate. Having entered a pole attachment agreement with PECO in August 1999, by April 2001 RCN was already attached to approximately 9,446 poles (it currently holds attachment permits for 14,976 poles). This rapid build-out was enabled in part by the fact that PECO, through EIS, went well out of its way to help RCN. For example, EIS (1) increased its work force to accommodate RCN's huge make-ready requests; (2) met with RCN on a weekly basis through February 2001 to determine which poles RCN wanted to give priority; (3) provided RCN with schedules setting forth planned make-ready completion times; and (4) jointly previewed high-cost poles with RCN to see if less expensive make-ready was feasible.⁷

4. RCN obtained substantial value by utilizing PECO rather than other contractors. Now that much of its make-ready has been completed, however, RCN does not want to pay for the value it has already received. RCN's motivation for filing the Amended Complaint may lie in the potentially dimmer prospects for attaining the market penetration and profits than it anticipated in the heyday of its buildout. Moody's Investors Service recently cut the debt ratings

⁶ EIS is an infrastructure, management, construction, engineering and design firm that functions as a holding company for approximately forty-six construction firms either directly or through wholly-owned subsidiaries. One of these is EIS of Pennsylvania, Inc. ("EIS of PA"), which performs make-ready work for PECO as required by RCN. A full discussion of the corporate and contractual relationship between these companies is contained in the Response to Amended Complaint of Exelon Infrastructure Services, also filed in this case. For convenience, the term "EIS" as utilized herein refers to both EIS and EIS of PA as appropriate.

⁷ Williams Declaration at ¶ 15; Second Robinson Declaration at ¶ 9; See generally RCN Reply to PECO's Response to initial Complaint at 2, 22-23 ("... PECO has indeed cooperated well with RCN with respect to the mechanics of attachment ...").

on \$3 billion of RCN's debt securities, citing "slower network construction pace, higher than expected capital costs, thinly spread management and past missteps in execution."⁸ RCN also scrapped a highly desired plan to provide service to the city of Philadelphia (RCN blamed that decision on the Philadelphia City Council and was considering suing the city as of February 15, 2001).⁹ In short, RCN's future does not appear as bright as in years past and it is hence more motivated to institute tenuously grounded legal proceedings to gain any possible advantage.

I. PROCEDURAL POSTURE

5. RCN initially filed a Pole Attachment Complaint against "Exelon Corp. f/k/a PECO Energy Company" on March 16, 2001 alleging that PECO's pole attachment fees are too high. Exelon Corporation filed a Motion to Dismiss on April 16, 2001 because PECO, not Exelon, owns and controls the poles at issue in this case. Also on April 16, 2001, Exelon Corporation and PECO filed a joint Response in which they responded on the merits but requested that RCN be required to either refile the Complaint or file an amended complaint naming only PECO. RCN agreed to drop Exelon and subsequently filed the Amended Complaint, which names as Respondents PECO and EIS. The Amended Complaint incorporates by reference the initial pole attachment fee allegations and adds entirely new allegations concerning make-ready work.

6. As further discussed below, there are no procedural rules for responding to amended complaints in the pole attachment context. Although PECO advances the argument that RCN's new allegations are procedurally impermissible, it is also responding on the merits.¹⁰ Thus, PECO first asserts that the Commission should dismiss the Amended Complaint on procedural grounds. Should it do so, the initial Complaint, PECO's Response, and RCN's Reply would remain pending. If the Commission does not choose to dismiss the Amended Complaint on

⁸ Communications Daily, Mar. 8, 2001.

⁹ Ken Dilanian and Wendy Tanaka, *Princeton, NJ Cable-TV Firm Withdraws Proposal for Philadelphia Network*, The Philadelphia Inquirer, Feb. 15, 2001.

¹⁰ By responding on the merits, PECO does not consent to the Commission's jurisdiction or waive any rights to protest jurisdiction.

procedural grounds, it should rule in favor of PECO based on the substantive arguments set forth herein.

7. RCN's initial Complaint set forth its pole attachment rate allegations, and PECO fully responded to those allegations in its Response to Complaint. Although RCN incorporates the pole attachment rate allegations into its Amended Complaint, PECO will not completely re-print its Response to Complaint and resubmit all of its supporting evidence. Rather, it hereby incorporates by reference its entire Response to Complaint and all of its supporting evidence.¹¹ However, because RCN has reopened the door on its initial allegations, PECO takes this opportunity to respond to RCN's claim, advanced in its Reply, that PECO's calculation of the telecommunications rate is erroneous.¹²

8. PECO supports dismissal of the Amended Complaint as against EIS.

II. BACKGROUND

9. PECO is a public utility engaged in the transmission, distribution, and sale of electricity and natural gas to customers in southeastern Pennsylvania. It owns and controls the utility poles at issue in this proceeding. PECO entered a Pole Attachment Agreement ("the Agreement") with RCN on August 13, 1999. In approximately November 1999, PECO contracted with EIS to act as its make-ready subcontractor. Accordingly, rather than performing make-ready work itself, it subcontracts a large portion of the work to EIS.

10. PECO does not require companies with attachments to its poles to hire it to perform their make-ready work.¹³ Rather, they may hire any make-ready contractor that has sufficiently trained employees.¹⁴ This is in keeping with the *First Report and Order in In the Matter of*

¹¹ The awkwardness and inefficiency caused by filing amended complaints with new allegations is one reason the practice should be prohibited.

¹² RCN Reply at 16.

¹³ Williams Declaration at ¶ 2.

¹⁴ Williams Declaration at ¶ 3. This is in reference to make-ready work in the communications space of the pole. Generally for reasons of safety and the need to

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, in which the Commission opened the make-ready market to competition by ordering utilities to permit attachers to use the contractors of their choice for pole attachment make-ready work, so long as the contractor's employees are properly trained.¹⁵ Independent make-ready contractors in Pennsylvania include Henkels and McCoy, Encompass Services Corporation, Integrated Electrical Services, and Myr Group.

11. Since PECO began subcontracting with EIS in approximately November 1999, it has followed a set procedure for companies that hire it as their make-ready contractor. First, the company must submit an attachment application to PECO.¹⁶ PECO forwards the application to EIS, which performs an engineering survey to, among other things, identify the scope of the required make-ready work, if any, and validate the feasibility of the desired route.¹⁷ EIS then completes an estimate of the cost of the make-ready work and provides that estimate to PECO.¹⁸ There may be some negotiation as to whether the prescribed make-ready work is necessary; RCN and EIS frequently go on "walk-outs" to jointly examine particular poles and often agree upon different, less expensive make-ready plans.¹⁹ PECO then generates an invoice reflecting the estimate and presents it to the potential attacher for acceptance or rejection.²⁰ If the potential

maintain control over the power grid, modifications to the electrical space can only be performed by PECO or companies it specifically authorizes.

¹⁵ In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd. 15499, 16083 (1996), *aff'd*, *Order on Reconsideration*, 14 FCC Rcd. 18049, 18079 (1999) ("*Interconnection Order*").

¹⁶ Second Robinson Declaration at ¶ 5.

¹⁷ Second Robinson Declaration at ¶ 5.

¹⁸ Second Robinson Declaration at ¶ 5.

¹⁹ Second Robinson Declaration at ¶ 9.

²⁰ Second Robinson Declaration at ¶ 5.

attacher accepts the proposed invoice, PECO will notify EIS to perform the work.²¹ After performance of the work, PECO will issue a permit for the new attachments.²²

12. When companies want to utilize an independent make-ready contractor, the above steps also apply, except the make-ready contractor, not PECO, presents an invoice of the proposed fees to the potential attacher for acceptance or rejection.²³

13. Because each make-ready invoice comprises a separate contract, RCN has no long-term make-ready obligation to PECO. However, RCN has consistently agreed to PECO's invoices and hired it to perform its make-ready work. For example, since January 2000 PECO has performed work for RCN pursuant to forty-eight invoices.²⁴

14. PECO does not allocate any make-ready costs to its general pole attachment rate calculation.²⁵ It does not recoup any of its make-ready costs through its pole attachment rates.²⁶ Rather, it recoups its make-ready costs (including EIS's fee) solely from the make-ready fee it charges potential attachers who hire it to perform the make-ready work.²⁷ As such, PECO does not realize a "double recovery" of its make-ready costs.

15. Contrary to the suggestion of RCN in the Amended Complaint,²⁸ PECO's make-ready fees are not designed to "handicap a competitor of its affiliated telecommunications

²¹ Second Robinson Declaration at ¶ 5.

²² Second Robinson Declaration at ¶ 5.

²³ Second Robinson Declaration at ¶ 6.

²⁴ Second Robinson Declaration at ¶ 10.

²⁵ Williams Declaration at ¶ 4.

²⁶ Williams Declaration at ¶ 4.

²⁷ Williams Declaration at ¶ 4.

²⁸ Amended Complaint at 16-17.

companies"²⁹ Its fees are designed solely to provide value in competitive make-ready services environment.³⁰

III. RESPONSE TO FACTUAL ALLEGATIONS

14. In this section of the Response, PECO addresses the individual factual allegations in the Amended Complaint. Because RCN failed to number its paragraphs, as is customary in pole complaints, PECO has labeled each based on the section in which it appears and the order it appears in that section. For example, the first paragraph of Section I of the Amended Complaint is labeled "Section I, 1st Paragraph." Footnotes are deemed included in the main text sentence to which they pertain, and are thus addressed in the discussion of that sentence.

15. **All Allegations Set Forth In Initial Complaint.** In response to the pole attachment rate allegations set forth in the initial Complaint and incorporated by reference in the Amended Complaint, PECO hereby incorporates by reference Section III of the Response to Complaint.

16. **Section I, 1st Paragraph.** PECO denies the first sentence. PECO admits the second sentence. The third sentence is denied. As to the fourth sentence, PECO denies it except to the extent that PECO subcontracts with affiliated entities to perform make ready work. The fifth sentence is denied, except that PECO has not provided make-ready costing data. The sixth sentence is denied.

17. **Section I, 2nd Paragraph.** The first sentence is denied. The second sentence is denied, except that corrective make ready work is sometimes required. PECO denies the third sentence except as follows: Where appropriate, PECO has agreed to determine which third-party on a pole has caused corrective make ready work to be required and to assess the make ready fees to that party.

18. **Section I, 3rd Paragraph.** PECO denies the first sentence. The second sentence is admitted, but PECO also notes that it responded to RCN's January 23, 2001 communication by

²⁹ Williams Declaration at ¶ 5.

³⁰ Williams Declaration at ¶ 5.

letter dated February 2, 2001 in order to facilitate the meeting held March 7, 2001. PECO admits the third sentence. The fourth sentence is denied, as PECO has no knowledge of RCN's motives. The fifth sentence is admitted. As to the sixth sentence, PECO admits that the meetings were held, but can neither admit nor deny the remainder of the sentence as it has no information regarding RCN's motivation. PECO denies the seventh paragraph.

19. **Section I, 4th Paragraph.** The allegations of this paragraph are denied.

20. **Section I, 5th Paragraph.** The allegations of this paragraph are denied.

21. **Section I, 6th Paragraph.** PECO admits the first sentence. The second sentence is not capable of admission or denial.

22. **Section II, 1st Paragraph.** PECO denies the first sentence of this paragraph. The second, third, fourth, fifth, and sixth sentences are denied as follows: EIS is an independent corporate entity that is 95% owned by Exelon Enterprises Company, LLC and 5% owned by diverse outside shareholders.³¹ Exelon Enterprises Company, LLC is 100% owned by Exelon Ventures Company, LLC. The sole member of Exelon Ventures Company, LLC is Exelon Corporation, the parent company of PECO.³² EIS is a holding company, which in turn owns, directly or through wholly-owned subsidiaries, forty-six separate infrastructure, management, construction, engineering and design companies, one of which is EIS of PA, the company which ultimately performed the make-ready work in this instance.³³

23. **Section III.** For this section, RCN incorporates Section III of its initial Complaint. PECO responded to the allegations of that section in paragraphs 32-35 of its Response to Complaint. Accordingly, PECO hereby incorporates by reference paragraphs 32-35 of its Response to Complaint.

³¹ Dikter Declaration at ¶ 2.

³² *Id.*

³³ *Id.*

24. **Sections IV and V.** Sections IV and V are the "Argument" and "Conclusion and Request for Relief" sections of the Amended Complaint and hence not amenable to addressing in an admit/deny manner. However, to the extent those sections contain factual allegations, PECO hereby issues a general denial regarding them unless otherwise specifically stated herein.

IV. ARGUMENT

A. Incorporation By Reference Of Prior Arguments

25. As noted above, RCN incorporates by reference in the Amended Complaint its pole attachment rate allegations. PECO set forth its arguments in opposition to those allegations in Section IV of its Response to Complaint. As noted above, it is herein incorporating by reference its Response to Complaint.

B. RCN's Make-Ready Allegations Should Be Dismissed As Procedurally Improper

26. RCN's make-ready allegations in Count II of the Amended Complaint are entirely new; they did not appear in any form in the initial Complaint. These new allegations are extensive, seeking relief "from make-ready charges which are discriminatory, excessive, unjust and unreasonable, from make-ready charges imposed on RCN for correcting existing violations of applicable industry codes and PECO's own construction standards, and for make-ready charges for which inadequate supporting data are provided."³⁴ The Commission should dismiss these new allegations as not authorized under the pole attachment rules.

27. In the Cable Services Bureau's June 1, 2001 *Order* in this case, it addressed this question and held that RCN could proceed with the Amended Complaint.³⁵ The *Order*, however, was issued in response to PECO's and EIS's request for an extension of time to respond to the Amended Complaint. The Bureau addressed the procedural appropriateness of the Amended

³⁴ Amended Complaint at 1-2.

³⁵ RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Company and Exelon Infrastructure Services, Inc., PA No. 01-003, *Order*, DA 01-1339, ¶¶ 4-5 (June 1, 2001).

Complaint *sua sponte*, and PECO has not had an opportunity to assert its position on the matter. Based on PECO's position, as set forth below, the Bureau should revisit its decision and dismiss the Amended Complaint as unauthorized.³⁶

28. The pole attachment rules provide no authority for adding new allegations through an amended complaint. RCN makes only a cursory two-sentence attempt at justifying its departure from the pole attachment rules, stating that raising its new allegations through the Amended Complaint is permissible because RCN and PECO are involved in both the initial pole attachment fee allegations and the new make-ready allegations.³⁷ RCN also notes that it "elected" not to raise the make-ready allegations in the initial Complaint because it was trying to negotiate a solution to those issues when the initial Complaint was filed, and appending them to this proceeding is administratively efficient.³⁸

29. RCN's sparse contentions cannot override the fact it is attempting a maneuver that is not only unauthorized in pole attachment proceedings, but is expressly prohibited in common carrier complaint proceedings and federal court cases. First, the pole attachment rules make no provision for adding new allegations through amendments to complaints, and PECO is not aware of any cases in which the Commission approved of the addition of new allegations. Not allowing new allegations is commensurate with the Commission's goal of having a streamlined

³⁶ Additionally, allowing RCN to proceed with the Amended Complaint may prejudice PECO and EIS. By filing an Amended Complaint rather than initiating a new proceeding, RCN is hoping to have its new allegations relate back to its initial Complaint for purposes of potential refunds. While PECO submits that no refund is due nor that any relation-back is appropriate, a potential refund of RCN's make-ready fees and related damages could, under relation-back, run from March 16, 2001 rather than May 4, 2001. The prejudice of this is exacerbated by the fact that RCN claims the refunds total millions of dollars.

³⁷ Amended Complaint at 4.

³⁸ Amended Complaint at 4.

pole attachment complaint process that "help[s] to resolve complaints . . . expeditiously."³⁹ If parties were allowed to amend complaints to add new allegations at will, they could do so continuously throughout the time a case was pending, necessitating the submission of new sets of responses and replies every time. That would inject delay, be unduly burdensome to respondents, and significantly complicate review by the Commission. Due to the lack of provisions for adding new allegations through amendments to complaints, RCN is strictly prohibited from doing so.

30. Also because the Commission's rule do not permit adding new allegations through amendments to complaints, the Bureau, in the June 1 *Order*, did not have discretion to allow RCN's Amended Complaint to proceed. Moreover, by allowing the Amended Complaint to proceed, the Bureau set bad precedent that others may follow, since there would be no penalty for completely disregarding the Commission's rules and existing procedures in this regard. This is unwarranted in this case and unwise as a matter of precedent.

31. For similar reasons the Commission adopted FCC Rule Section 1.727(h), which affirmatively prohibits adding new claims or requests for relief in amendments to formal complaints involving common carriers.⁴⁰ Section 1.727(h) was adopted for complaints filed under Section 208 of the Communications Act of 1934 to prevent complainants from adding new allegations late in a proceeding, because such cases must be decided within a set period of time from the filing of the initial complaint.⁴¹ By prohibiting new allegations, the Commission sought to avoid having to decide some claims more quickly than others.⁴² While the Commission has

³⁹ In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC Docket No. 78-144, *First Report and Order*, 68 F.C.C.2d 1585, 1586 (1978) ("*First Pole Attachment Order*").

⁴⁰ 47 C.F.R. § 1.727(h) (2000).

⁴¹ In the Matter of Implementation of the Telecommunications Act of 1996, CC Docket No. 96-238, *Report and Order*, 12 FCC Rcd. 22497, 22597-98 (1997).

⁴² *Id.* at 22597.

no strict time limit for deciding pole attachment complaints, the underlying policy of Section 1.727(h) is applicable. The goal of expediency combined with a need to give all issues fair and equal treatment militates in favor of having all the issues in a case presented in the initial complaint.

32. Another analogous rule is Federal Rule of Civil Procedure 15(a), which provides that in federal district court, pleadings (including complaints) cannot be amended once a responsive pleading has been served unless both parties consent or the court grants permission. This rule provides persuasive insight into what is deemed fair practice for the entire federal district court system. Were RCN in federal court, its attempt to significantly expand the scope of this proceeding on its own whim would be soundly rejected. There is no reason for the result to be different before the Commission.

C. The Commission Should Not Reduce PECO's Make-Ready Fees Or Require It To Provide A Refund To RCN

33. RCN alleges that the make-ready fees charged by PECO and EIS are "unlawfully high" because they appear to exceed the actual cost of performing the make-ready work.⁴³ As such, RCN requests that the Commission reduce PECO's fees to "just and reasonable levels" and order it to refund the amounts already paid by RCN over those levels.⁴⁴

34. RCN's claim must be rejected for several reasons. First, make-ready contractors and make-ready rates are not covered by the PAA and, thus, the Commission lacks jurisdiction over them. Without question, the Commission could not regulate the rates of a make-ready contractor such as Henkels and McCoy, one of PECO's competitors for the performance of make-ready work. Because non-utility independent contractors provide the same make-ready services as utilities, only regulating utilities' make-ready rates would deny utilities equal protection under the Fifth Amendment to the United States Constitution. Additionally, each make-ready invoice

⁴³ Amended Complaint at 8, 11.

⁴⁴ Amended Complaint at 2.

constitutes a freely entered contract, and the Commission is not authorized to dictate or rewrite the terms of such contracts. Finally, regulating utilities' make-ready rates may well accomplish nothing other than reducing competition in the make-ready services market by driving utilities away from it.

35. PECO is not aware of any pole attachment proceedings in which the Commission reduced a utility's make-ready rates in a competitive environment. To do so now and hence enter a new area of regulation would be flatly contrary to the Commission's current policy of avoiding unnecessary new regulation. In Chairman Michael Powell's opening statement to the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce on March 29, 2001, he discussed "directional guideposts" to which the Commission will adhere. As stated by Chairman Powell, those guideposts include the need to "be skeptical of regulatory intervention absent evidence of persistent trends or clear abuse" and to "shift from constantly expanding the bevy of permissive regulations to strong and effective enforcement of truly necessary ones." Another guidepost states that the Commission "will harness competition and market forces to drive efficient change and resist the temptation, as regulators, to meld markets in our image or the image of any particular industry player."

1. The Commission lacks jurisdiction over make-ready contractors.

36. PECO, of course, is a utility, and it owns the poles at issue in this case. However, when providing make-ready services, it is acting in the capacity of a make-ready contractor. The make-ready services it provides are the same services that could be provided by non-pole owning independent make-ready contractors. Thus, because the Commission does not have jurisdiction over non-pole owning independent make-ready contractors, it should not have jurisdiction over PECO with regard to *its* provision of make-ready services.⁴⁵

⁴⁵ The Commission's lack of jurisdiction over independent contractors is discussed in detail in the Response to Amended Complaint of Exelon Infrastructure Services.

37. If the Commission chooses to regulate PECO's make-ready rates (and, through the precedent it would establish, other utilities' rates for make ready), *it would be regulating only one group of make-ready service providers out of several in a competitive marketplace.* PECO and other utilities would be subject to rate regulation, but their independent make-ready contractor competitors would not. Such a result is not only unfair, but is also beyond the authority Congress gave the Commission under PAA.

2. The Commission lacks jurisdiction over the rates make-ready contractors charge for their services.

38. Pursuant to the PAA, the Commission's jurisdiction is limited to utilities' "rates, terms, and conditions for pole attachments."⁴⁶ Accordingly, the Commission cannot have jurisdiction over the rates make-ready contractors charge for their services, unless they can be categorized as a rate, term, or condition for a pole attachment. The language of the PAA, its purpose, its legislative history, and its implementing regulations all indicate that make-ready charges do not fit within the jurisdictional bounds of the Commission's authority over pole attachments.

39. The starting point for this analysis is the plain language of the PAA.⁴⁷ The Commission's jurisdiction is derived from Section 224(b)(1), which provides that "the Commission shall regulate the rates, terms, and conditions for pole attachments."⁴⁸ Section 224(b)(1) evidences the limited nature of the Commission's jurisdiction. The operative words in its grant of jurisdiction are "pole attachments"; the Commission has authority to regulate rates, terms, and conditions *for pole attachments*. It does not have authority to regulate rates *for make-ready work*, which is a separate process that precedes the pole attachment (in PECO's case, make-ready work is performed pursuant to invoices/contracts that are separate from the pole

⁴⁶ 47 U.S.C. § 224(b)(1) (1994).

⁴⁷ See, e.g., *Estate of Cowart v. Nicklos Drilling Co.*, 505 F. Supp. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of the statute . . .").

⁴⁸ 47 U.S.C. § 224(b)(1).

attachment agreement). Quite simply, at the time make-ready work is performed, the pole attachment does not yet exist and in fact may never exist. Make-ready work prepares the pole for the attachment, but it is not the attachment itself and does not guarantee that the attachment will actually be placed. Thus, because Section 224(b)(1) provides authority specifically "for pole attachments," it cannot be read to encompass rates of the separate product market of make-ready work.

40. The foregoing construction of Section 224(b)(1) is bolstered by looking at its language from a slightly different perspective. A pole attachment is, by definition, an attachment to a pole, so Section 224(b)(1) can alternately be read as "the Commission shall regulate the rates, terms, and conditions *for attaching to poles*." Taken from that angle, it becomes clear that Section 224(b)(1) is meant to encompass only the rates, terms, or conditions imposed by a utility with which an attacher must comply to utilize a pole. That would not include the make-ready process, because attachers separately negotiate make-ready arrangements and have options on how to accomplish this process. For example, due to competition in the make-ready services marketplace (discussed further below), attachers can hire independent make-ready contractors and pay their rates. Because the attacher's right to attach will not be conditional upon choosing the utility to do make-ready rates paying the rates charged for that service, those rates are not a "condition" for attaching to a pole, and hence not under the jurisdiction of the Commission.

41. Going beyond the jurisdictional roots provided by Section 224(b)(1), Sections 224(d) and (e) contain the PAA's provisions for determining what constitutes a "just and reasonable" rate.⁴⁹ These are the PAA's only sections for determining what constitutes a "just and reasonable" rate, and the plain language of both of them makes clear that they contemplate only *pole attachment rental* rates. Section 224(d)(3) states, "This subsection shall apply to the rate for any pole attachment used by a cable television system" Section 224(e)(1) provides, "The Commission shall . . . prescribe regulations . . . to govern the charges for pole attachments used

⁴⁹ 47 U.S.C. §§ 224(d) and (e) (1994 and Supp. IV 1998).

by telecommunications carriers" Further, the rate formula elements identified in 224(d) and (e) speak to the use of physical space on the pole used by an attacher, and are to totally unrelated to the costing elements for make-ready services.⁵⁰ Given that pole attachment rental rates are not the same thing as make-ready rates, there is no provision anywhere in the PAA for how to determine what constitutes a just and reasonable make-ready rate. That lack of guidance underscores the conclusion that the term "rate" as used in the PAA does not encompass make-ready rates.

42. The plain language of the statute indicates that the Commission does not have jurisdiction over make-ready rates, so the inquiry can end there.⁵¹ If the Commission is not persuaded by the plain language, however, the PAA's purpose also strongly supports that conclusion. The PAA was enacted by Congress in 1978 to address a perceived danger of monopoly pricing by utilities for access to the utilities' distribution poles by the then-fledgling cable television industry.⁵² It was designed to cure what Congress believed to be a "bottleneck" in the process of supplying consumers with access to cable television service. Although Congress expanded the FCC's jurisdiction to encompass telecommunications carriers through the Telecommunications Act of 1996,⁵³ the original purpose of the Act -- the intent to cure bottlenecks -- did not change.⁵⁴ Thus, a fundamental precept of the FCC's jurisdiction is that it only extends to facilities that constitute sole source market bottlenecks.

⁵⁰ For example, the term "usable" space in Section 224(d)(2) is defined as "the space above the minimum grade level which can be used for the attachment of wires...." 47 U.S.C. § 224(d)(2). Section 224(e)(2) requires the utility to apportion the cost of the unusable space on the pole among attachers. 47 U.S.C. § 224(e)(2).

⁵¹ See, e.g., *Estate of Cowart v. Nicklos Drilling Co.*, 505 F. Supp. 469, 475 (1992) (further inquiry into meaning of statute not generally necessary when plain language is clear).

⁵² *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987); *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000) ("*Gulf Power II*").

⁵³ 47 U.S.C. § 224(e)(1).

⁵⁴ *Gulf Power II*, 208 F.3d at 1275.

43. Unlike the pole attachment rates, terms, and conditions traditionally regulated by the Commission, make-ready work does not constitute a sole source market bottleneck in the cable television or telecommunications carrier supply chain. Utilities do not have a monopoly over the performance of make-ready work. In the *First Report and Order in In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, issued in August 1996, the Commission opened the make-ready market to competition by ordering utilities to permit attachers to use the contractors of their choice to perform attachment work so long as the contractor is properly trained.⁵⁵ If an attacher does not like the rates being charged by a make-ready contractor, it is free simply to hire another contractor.

44. The Commission has specifically recognized this open market for make-ready contractors and, in fact, based its rule on the ability of attachers to take advantage of it. In adopting the rule, the Commission set forth its underlying policy:

Allowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes over rates to be paid to the workers.⁵⁶

45. This policy makes clear that the Commission expects attachers to take advantage of the open market for make-ready contractors, not file complaints with the Commission. If an attacher does not like the rates charged or terms of service of one contractor, it can simply hire a different one. An attacher cannot dispute the rate charged by a utility or contractor any more credibly than can a consumer dispute the price charged by a department store for a shirt. The consumer does not file a lawsuit, he or she just goes to another store.

⁵⁵ *Interconnection Order*, 11 FCC Rcd. at 16083 (1996), *aff'd*, *Order on Reconsideration*, 14 FCC Rcd. 18049, 18079 (1999).

⁵⁶ *Interconnection Order*, 11 FCC Rcd. at 16083 (1996), *aff'd*, *Order on Reconsideration*, 14 FCC Rcd. 18049, 18079 (1999).

46. PECO does not require attachers to utilize PECO for the attachers' make-ready work.⁵⁷ While PECO does an excellent job through its subcontractor EIS (as RCN acknowledged)⁵⁸, consistent with the Commission's rules, PECO must allow attachers to utilize any contractor so long as the contractor's employees are properly trained.⁵⁹ RCN has been free to utilize contractors other than PECO all along, but has chosen not to.⁶⁰ One reason for that may be that PECO has completed RCN's make-ready work very rapidly, probably more so than other contractors could have. That speed was obviously of value to RCN, since it continued to engage PECO for its make-ready work.

47. Additionally, due to the competitive nature of the make-ready services marketplace, PECO and other utilities compete with independent make-ready contractors for customers. However, the PAA does not provide the Commission with jurisdiction over independent make-ready contractors because they are not utilities.⁶¹ If the Commission chooses to regulate PECO's make-ready rates (and, through the precedent it would establish, other utilities' rates for make ready), *it would be regulating only one group of make-ready service providers out of several in a competitive marketplace.* PECO and other utilities would be subject to rate regulation, but their independent make-ready contractor competitors would not. Such an absurd result exposes a fundamental flaw in any arguments in favor of make-ready rate regulation.

48. The PAA's legislative history also indicates that the statute does not provide jurisdiction over make-ready rates. First, Congress anticipated that the Commission would utilize publicly available information, such as that reported to the Federal Energy Regulatory

⁵⁷ Williams Declaration at ¶ 2-3.

⁵⁸ See RCN Reply to PECO's Response to Initial Complaint at 2, 22-23.

⁵⁹ Williams Declaration at ¶ 2-3.

⁶⁰ Williams Declaration at ¶ 2-3. Furthermore, RCN is a long-time player in the communications industry and is represented by experienced FCC counsel. Accordingly, it cannot be heard to explain that it did not understand its rights in this regard.

⁶¹ The Commission's lack of jurisdiction over independent contractors is discussed in detail in the Response to Amended Complaint of Exelon Infrastructure Services.

Commission ("FERC"), to determine just and reasonable rates.⁶² This is workable for determining pole attachment rates because many of their cost components are contained in the publicly available FERC Form 1. However, that methodology does not work at all for make-ready rates. Since this is a competitive service, how make-ready contractors develop the rates they charge is not publicly available, nor should it be. The very opposite is true; competitive pricing information is generally not shared publicly and the sharing of it among competitors can lead to violations of the antitrust laws.⁶³ Furthermore, there is no Commission formula for determining make-ready rates, as there is for pole attachment rates.⁶⁴ In fact, to prevent its competitors in the make-ready business from gaining an advantage, PECO seeks to keep the structure of its make-ready rates confidential.

49. An additional section of the PAA's legislative history discusses which items Congress envisioned constituting "terms and conditions for pole attachments." Senate Report 95-580 provides that "[s]uch terms and conditions usually include matters relating to inspections, extent and duration of licenses, liability for a portion of future capital costs, insurance, surety bonds, lease revocation, and like matters."⁶⁵ All of those items concern matters provided for in the typical pole attachment agreement which are directly related to the continuing use of the pole. Make-ready rates, on the other hand, are not provided for in the pole attachment agreement; they are set forth in make-ready invoices/contracts that are entirely separate from the attachment

⁶² S. Rep. No. 95-580, at 20-22, reprinted in 1978 U.S.C.C.A.N. at 128-130.

⁶³ See generally 15 U.S.C. § 1 (1994).

⁶⁴ Senate Report No. 95-580 did indicate that "additional costs" may encompass make-ready rates when they are incurred by the pole owner and recovered through pole rental fees. Further, the mention of make-ready in the Senate Report rests on the fundamental assumption that the utility pole-owner would be the monopoly provider of make-ready services. This is certainly not the case today. The Commission has made it clear that this industry is competitive, and that an attaching entity may use any qualified contractor to perform its make-ready work. As such, there is no economic rationale to provide for rate regulation in this area.

⁶⁵ S. Rep. No. 95-580, at 21, reprinted in 1978 U.S.C.C.A.N. at 129.

agreement. Additionally, they are not related to the continuing use of the pole, as they are incurred on a one-time basis *before* the attacher begins using the pole. Any remaining uncertainty as to whether make-ready rates might constitute "terms and conditions for pole attachments" should be resolved by the Senate Report's discussion of the phrase, which focused on *pole attachment* rates: "In any event, the fairness of any term or condition of a *CATV pole-leasing agreement* will have to be judged in relation to other contract provisions . . . and the particular *pole rate charges*"66

50. An additional indication that make-ready rates should not be deemed to be encompassed by Section 224(b)(1)'s "rates, terms, and conditions for pole attachments" is that the PAA's implementing regulations do not provide the Commission with formulas or other tools it would need to fairly regulate such rates. While the Commission has established comprehensive regulations to guide it in setting pole attachment rates, it has no regulations to guide it in setting make-ready rates. As discussed above, there is no statutory guidance either. Thus, ruling on make-ready rates at this point would require it to either formulate comprehensive, binding guidelines through a complaint proceeding or arbitrarily set rates in an *ad hoc* manner on a case-by-case basis. Taking either of those routes, however, would be impermissible. Should the Commission decide to venture into price regulation of a new industry segment, it would at a minimum, have to conduct a rulemaking.

51. As noted by the Supreme Court, the procedural short cut of formulating comprehensive, prospective, and binding rate-setting guidelines through a complaint proceeding is prohibited: "[A] rule of law with exclusively prospective effect, could not be accepted as binding (without new analysis) in subsequent adjudications, since it would constitute rulemaking and as such could only be achieved following prescribed rulemaking procedures."⁶⁷ Likewise,

⁶⁶ S. Rep. No. 95-580, at 21, reprinted in 1978 U.S.C.C.A.N. at 129.

⁶⁷ *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 221 (1988) (internal citations omitted).

the Supreme Court has observed that setting rates on a case-by-case *ad hoc* basis is also to be avoided, "[since an agency], unlike a court, does have the ability to make new law prospectively through the exercise of its rulemaking powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct."⁶⁸ Rather, the agency's function of "filling in the interstices" of the Act should be "performed, as much as possible, through [rulemakings]."⁶⁹

52. In accordance with the foregoing, because the Commission lacks regulations containing formulas or similar tools established through a rulemaking for evaluating make-ready rates, it cannot rule on them here. Any piecemeal rulings issued through complaint proceedings would be inherently arbitrary and capricious. Therefore, the PAA should not be read to provide the Commission with jurisdiction over make-ready rates.

3. The cases cited by RCN do not establish that the Commission has jurisdiction over make-ready rates or that such rates must be cost based.

53. With regard to jurisdiction, RCN cites *Newport News Cablevision, Ltd. Communications, Inc. v. Virginia Electric and Power Company*⁷⁰ for the proposition that Section 224(b)(1) encompasses make-ready charges.⁷¹ However, *Newport News Cablevision* addressed neither make-ready charges nor even jurisdiction over competitive services. Rather, it discussed a fee that Virginia Electric and Power Company ("Virginia Power") was charging to inspect attachments to its poles.⁷² The inspections were done to insure that attachments were safely placed and in accordance with Virginia Power's and Newport News Cablevision's pole attachment agreement.⁷³ The *Order* indicates that Virginia Power was performing the

⁶⁸ *Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

⁶⁹ *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952).

⁷⁰ *Newport News Cablevision, Ltd. Communications, Inc. v. Virginia Electric and Power Company*, PA 87-0006, *Order*, 7 FCC Rcd. 2610 (1992) ("*Newport News Cablevision*").

⁷¹ Amended Complaint at 8.

⁷² *Newport News Cablevision*, 7 FCC Rcd. at 2610.

⁷³ *Id.* at 2611.

inspections solely on its own accord, setting the price, and demanding that all attachers pay it.⁷⁴ The most obvious distinguishing characteristic of *Newport News Cablevision* is that inspections are wholly different from make-ready work. Additionally, make-ready charges result from a bilateral agreement between a potential attacher and a make-ready contractor. Although a potential attacher must eventually have make-ready performed for certain poles if it wishes to attach to them, it can choose among various make-ready contractors and select the one with the combination of rates and services it prefers. Thus, *Newport News Cablevision* addressed an entirely different subject than make-ready rates and, as such, does not support Commission jurisdiction over make-ready rates.

54. RCN next addresses what constitutes just and reasonable make-ready rates. It references *Mile Hi Cable Partners, L.P. v. Public Service Company of Colorado*⁷⁵ and *Cable Texas, Inc. v. Entergy Services, Inc.*⁷⁶ for the proposition that make-ready contractors can charge no more than their actual costs for performing make-ready work.⁷⁷ However, neither *Mile Hi Cable Partners* nor *Cable Texas* addressed competitive make-ready work. Rather, they addressed pole audits/surveys. In *Mile Hi Cable Partners*, the pole audit was conducted to identify unauthorized attachments.⁷⁸ In *Cable Texas*, it was conducted "for the purpose of computation of the correct rental fees due."⁷⁹ In both cases, the utility apparently performed the audit unilaterally, set the price for it, and billed all attachers. Unlike with make-ready work, the attachers had no say regarding whether the audit would be performed, who would perform it, or

⁷⁴ *Id.* at 2610.

⁷⁵ *Mile Hi Cable Partners, L.P. v. Public Service Company of Colorado*, PA 98-003, *Order*, 15 FCC Rcd. 11450 (2000) ("*Mile Hi Cable Partners*").

⁷⁶ *Cable Texas, Inc. v. Entergy Services, Inc.*, PA 97-006, *Order*, 14 FCC Rcd. 6647 (1999) ("*Cable Texas*").

⁷⁷ Amended Complaint at 8.

⁷⁸ *Mile Hi Cable Partners*, 15 FCC Rcd. at 11452.

⁷⁹ *Cable Texas*, 14 FCC Rcd. at 6649.

how much it would cost.⁸⁰ Moreover, neither *Mile Hi Cable Partners* nor *Cable Texas* stand for the proposition that utilities must bill pole audits at no more than actual cost. Rather, *Mile Hi Cable Partners* held only that audit charges must be "directly related" to the actual cost of conducting the audit.⁸¹ *Cable Texas* held only that if a utility hires an independent contractor to perform the audit, it must hire a contractor that charges "a competitive rate in consonance with the work to be done."⁸²

55. RCN cites *Texas Cable and Telecommunications Association v. GTE Southwest Incorporated*⁸³ in support of its statement that "a utility could separately charge administrative fees as long as the fees represented its actual costs in connection with a particular agreement."⁸⁴ In this instance, RCN's own statement reveals that its proffered authority has nothing to do with make-ready charges. "Administrative fees" and make-ready charges are different things; the administrative fees addressed in *Texas Cable and Telecommunications Association* were directly connected to the administration of a pole attachment agreement: (1) a "billing event" fee; (2) a "CATV Pole License Agreement" fee for the origination of a new pole license agreements; and (3) an "Assignment Agreement" fee for the assignment of pole license agreements.⁸⁵ These are fees that are imposed under a pole attachment agreement and consequently could be said to be a "term or condition" under the PAA. In contrast, make-ready charges are not tied to pole attachment agreements and thus do not constitute a rate, term, or condition of access. Rather, as stated previously, they are embodied in separate invoices specifically for the make-ready work.

⁸⁰ *Mile Hi Cable Partners*, 15 FCC Rcd. at 11451; *Cable Texas*, 14 FCC Rcd. at 6647.

⁸¹ *Mile Hi Cable Partners*, 15 FCC Rcd. at 11456.

⁸² *Cable Texas*, 14 FCC Rcd. at 6652.

⁸³ *Texas Cable and Telecommunications Association v. GTE Southwest Incorporated*, PA 96-006, *Order*, 14 FCC Rcd. 2975 (1999) ("*Texas Cable and Telecommunications Association*").

⁸⁴ Amended Complaint at 11.

⁸⁵ *Texas Cable and Telecommunications Association*, 14 FCC Rcd. at 2975.

56. Finally, RCN references *Cavalier Telephone, LLC v. Virginia Electric and Power Company*,⁸⁶ which discusses a 10.5% "margin of error" surcharge that Virginia Power attached to all of its make-ready bills.⁸⁷ RCN argues that the surcharge, which was struck by the Commission, is "essentially indistinguishable" from the administrative fee that PECO realizes on its make-ready work.⁸⁸ The factor that differentiates *Cavalier Telephone* from the instant case is that Cavalier Telephone alleged that Virginia Power "refused to allow it to use third party contractors for make-ready work."⁸⁹ Accordingly, as with the cases distinguished above, Cavalier Telephone was allegedly faced with a situation in which Virginia Power was charging it a fee that Cavalier Telephone had no way of avoiding. Thus, *Cavalier Telephone* was decided in a fundamentally different context than this case.

4. The Commission should not require PECO to provide information regarding the internal cost structure of its pricing policy.

57. RCN claims that PECO has wrongfully "refused to provide RCN with its relevant costs or with detailed explanations for its make-ready charges" and asks the Commission to order PECO to "provide to RCN relevant portions of its make-ready records both for prior work and on an ongoing basis in connection with the attachment of facilities under the Agreement."⁹⁰ This claim must fail for lack of jurisdiction. As explained above, the Commission does not have jurisdiction over the rates charged by make-ready contractors. As such, it cannot have jurisdiction to mandate the provision of information and records behind those rates. Contractors do not generally have to provide underlying documentation on unregulated charges for competitive services. PECO considers such information proprietary and as a matter of policy

⁸⁶ *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, PA 99-005, *Order and Request For Information*, 15 FCC Rcd. 9563 (2000) ("*Cavalier Telephone*").

⁸⁷ Amended Complaint at 10.

⁸⁸ Amended Complaint at 10.

⁸⁹ *Cavalier Telephone*, 15 FCC Rcd. at 9571-72.

⁹⁰ Amended Complaint at 3, 16.

does not disclose it to attachers out of concern of aiding its competitors in the make-ready business.

58. With regard to this particular case, PECO has been presenting RCN with proposed invoices for make-ready charges before beginning the work or obligating RCN to pay for it. If RCN has been unhappy with PECO's refusal to provide its underlying pricing structure, RCN should have hired other contractors. Certainly RCN was savvy enough to guard its own interests; at the time it negotiated the Agreement in August 1999, it had built out networks in several cities, had revenues of approximately \$245 million per year, and had approximately \$2.3 billion in readily available cash.⁹¹ Its current *ex post facto* demands for information behind prior invoices are at odds with their implicit terms that such information would not be provided and are also beyond the Commission's jurisdiction. Its demand for information on future invoices is also beyond the Commission's jurisdiction.

59. In support of its position, RCN references *Cavalier Telephone*, in which the Commission ordered Virginia Power to divulge information and records pertaining to: (1) Virginia Power's denial of access to Cavalier Telephone and (2) fees for possibly unnecessary engineering survey work, make-ready work, and "similar work."⁹² In that case, apparently, Cavalier Telephone had no choice but to use Virginia Power for all of those items. As such, because Cavalier Telephone was forced to pay what Virginia Power was charging, Virginia Power was required to substantiate and justify its charges. That is a completely different situation than what is present in this case, because RCN does not have to use PECO's services and pay its charges. Thus, *Cavalier Telephone* cannot serve as precedent for this issue.

60. Perhaps realizing that its position has no support in the law, RCN attempts to inflame the Commission by inaccurately and gratuitously commenting that by refusing to provide

⁹¹ RCN Press Release dated February 5, 1999, available at <http://www.rcn.com/investor/press/02-99/02-05-99/2-5-99.html>; RCN Press Release dated July 30, 1999, available at <http://www.rcn.com/investor/press/07-99/07-30-99/07-30-99.html>.

⁹² *Cavalier Telephone*, 15 FCC Rcd. at 9573, 9578.

detailed information on its cost structure, PECO is telling RCN to "pay the fee or stay off the pole."⁹³ This comment makes no sense. Of course any necessary make-ready must be performed before PECO will grant access to a pole, but RCN does not have to pay PECO's charges. It can hire any qualified make-ready contractor and pay that contractor's charges. Additionally, RCN's comment mischaracterizes PECO's attitude toward RCN. Rather than being hostile and uncooperative, PECO has gone to great lengths to accommodate RCN and speed the build out of its network.⁹⁴

5. PECO Should Not Be Required To Provide The Cable Services Bureau With Records On How It Has Accounted For Make-Ready Revenue.

61. Apparently in connection with its allegation that PECO's make-ready charges are too high, RCN contends that PECO should "be directed to advise the Cable Services Bureau ("CSB") about the sum of make-ready charges it has collected over a period of perhaps 5-7 years, and to indicate how it has accounted for such revenue."⁹⁵ RCN offers no reason as to why PECO should be required to provide this information, and in fact provides absolutely no discussion on the matter. All it provides is an unexplained citation to several paragraphs in *Cavalier Telephone* that address Cavalier Telephone's concerns with the way Virginia Power recorded its make-ready revenue.⁹⁶ In that case, Cavalier Telephone had alleged specific injuries pertaining directly to specific accounting practices of Virginia Power that it claimed necessitated an examination of those practices.⁹⁷ Cavalier Telephone made detailed and complicated allegations regarding

⁹³ Amended Complaint at 7.

⁹⁴ RN itself acknowledged this in its Reply to PECO's Response to the initial Complaint, stating that "PECO has indeed cooperated well with RCN with respect to the mechanics of attachment" RCN Reply at 2; *see also* RCN Reply at 22-23.

⁹⁵ Amended Complaint at 18-19.

⁹⁶ Amended Complaint at 19.

⁹⁷ *Cavalier Telephone*, 15 FCC Rcd. at 9575-77.

Virginia Power's practice of recording make-ready reimbursements as capital contributions in aid of construction.⁹⁸

62. RCN's request must first fail for lack of jurisdiction. As explained above, the Commission does not have jurisdiction over rates charged by make-ready contractors. As such, it cannot have jurisdiction to mandate the provision of information and records behind those rates. Contractors generally do not have to provide underlying documentation on unregulated charges for competitive services. Additionally, unlike in *Cavalier Telephone*, RCN makes no allegations regarding recording make-ready reimbursements as capital contributions in aid of construction. Thus, RCN's request in this regard is at best a fishing expedition and at worst an attempt to harass PECO. It is doubtful that a demand that PECO provide accounting records going back seven years, over three times longer than it has even had a pole attachment agreement with RCN, would be justifiable under any circumstances. It certainly cannot be deemed justifiable when RCN has failed to provide even a single sentence of explanation as why such a demand is warranted. Thus, this request must be rejected.

PECO would additionally note that it does not recoup any of its make-ready costs through its pole attachment rates.⁹⁹ Rather, it recoups its make-ready costs (including EIS's fee) solely from the make-ready fee it charges potential attachers who hire it to perform the make-ready work.¹⁰⁰ As such, PECO does not realize a "double recovery" of its make-ready costs.

6. Regulating PECO's make-ready rates would deny it equal protection under the Fifth Amendment to the United States Constitution.

63. The Commission will deny PECO's constitutional right to equal protection if it chooses to regulate its make-ready rates in a competitive market. The Fourteenth Amendment to the United States Constitution protects individuals and commercial entities from arbitrary

⁹⁸ *Id.*

⁹⁹ Williams Declaration at ¶ 4.

¹⁰⁰ Williams Declaration at ¶ 4.

statutory and regulatory classifications.¹⁰¹ When cases are brought against federal agencies, the equal protection principles of the Fourteenth Amendment are invoked through the Due Process Clause of the Fifth Amendment to the United States Constitution.¹⁰² In the sphere of commercial and economic regulation, statutes and regulations that apply to some groups but not others must be rationally related to legitimate government objectives.¹⁰³ To determine whether a challenged classification is rationally related to a legitimate government objective, the first question is whether the underlying regulation has a legitimate purpose.¹⁰⁴ If so, the next question is whether the classification reasonably promotes that purpose.¹⁰⁵

64. In this case, both PECO and independent make-ready contractors provide make-ready services and compete for the same customers. However, regulating PECO's make-ready rates through the PAA will not result in regulation of independent contractor's rates or even set precedent for such regulation, because the Commission does not have jurisdiction over them. Independent contractors would continue to operate unencumbered by regulation. Thus, such regulation would, without a legitimate basis, distinguish between PECO and independent make-ready contractors. That would fail an equal protection analysis.

65. With regard to the first prong of an equal protection analysis, whether the underlying regulation would have a legitimate purpose, the answer is no. As discussed above, there is no legitimate reason to regulate make-ready rates in a competitive market. Utilities and independent contractors operate on a level playing field, and attachers have equal access to both. If an attacher finds a utility's rates too high, it can simply utilize an independent contractor, and vice-versa. Even if the Commission could somehow find that regulation of make-ready rates serves a

¹⁰¹ U.S. Const. amend. XIV.

¹⁰² *Markham v. White*, 172 F.3d 486, 491 (7th Cir. 1999).

¹⁰³ *Women Involved In Farm Economics v. U.S. Dep't of Agric.*, 876 F.2d 994, 1004 (D.C. Cir. 1989).

¹⁰⁴ *Western & Southern Life Ins. Co. v. State Bd. Of Equalization*, 451 U.S. 648, 668 (1981).

¹⁰⁵ *Id.*

legitimate purpose, such regulation would fail the second prong of an equal protection analysis, which is whether the classification reasonably promotes the legitimate purpose. Singling out PECO (and utilities generally through the precedent such a ruling would effect) for rate regulation when utilities and independent contractors both serve the same function, compete with each other, and operate on a level playing field could not promote any conceivable legitimate purpose.

66. The Commission does not have jurisdiction over independent make-ready contractors, so it cannot avoid an equal protection violation by regulating their make-ready rates as well as PECO's and other utilities' rates. Thus, the only way to avoid violating PECO's and other utilities' right to equal protection is to refrain from regulating their rates when they undertake make-ready work.

7. The invoices between PECO and RCN constitute lawful contracts which cannot be administratively or unilaterally revised.

67. Each make-ready task that PECO performed for RCN was done pursuant to mutually agreed upon invoices which constituted lawful contracts that cannot be administratively modified by the Commission or unilaterally modified by RCN. Likewise, neither the Commission nor RCN can prospectively restrict the terms of these contracts by setting a ceiling on PECO's future make-ready rates. As explained above, contractor's make-ready rates do not constitute rates, terms or conditions for pole attachments, so the PAA does not authorize the Commission to override them. Rather, it must respect them as binding contractual terms.

68. Binding express contracts are created by either oral or written language establishing parties' mutual assent to be bound, combined with consideration supporting their promises.¹⁰⁶ Thus, invoices and work orders that contain those elements must be treated as contracts. For example, in *Marlen C. Robb & Son Boatyard & Marina v. The Vessel Bristol*, the plaintiff

¹⁰⁶ See generally Calamari & Perillo, *The Law of Contracts*, § 1-12 (3rd ed. 1987).

repaired defendant's boat pursuant to a work order agreed upon by the parties.¹⁰⁷ The defendant subsequently tried to avoid paying for the repairs, but the U.S. District Court for the Eastern District of North Carolina held that an express contract was evidenced by the work order, conversations leading up to the work order, a note specifying what was to be done, and the completion of the work.¹⁰⁸

69. In this case, PECO provided RCN with an invoice containing an estimate of the cost of the make-ready work for each job.¹⁰⁹ Since January 2000, it has presented RCN with, and performed work pursuant to, forty-eight invoices.¹¹⁰ RCN had the option of accepting or rejecting each proposed invoice, and in fact often did "walk-outs" with EIS to particular poles to review the need for proposed work to them and possibly negotiate down the estimated cost.¹¹¹ If RCN accepted the proposed invoice, it would pay it. PECO would then notify its subcontractor EIS to perform the work.¹¹² This process clearly demonstrates that PECO's invoices contained the elements of an express contract. Thus, RCN is bound to follow, and the Commission is bound to recognize, their validity and binding nature.

70. RCN is now attempting to unilaterally modify, or have the Commission administratively modify, the rate for make-ready work contained in no less than forty-eight contracts. However, it is a matter of hornbook law that one party to a contract cannot unilaterally modify it; modification of a contract can only be accomplished if both parties

¹⁰⁷ *Marlen C. Robb & Son Boatyard & Marina v. The Vessel Bristol*, 893 F. Supp. 526 (D.N.C. 1994).

¹⁰⁸ *Id.* at 538; *see also Isbell v. Travis Electric Co.*, No. M1999-00052-COA-R3-CV, 2000 Tenn. App. LEXIS 809, at * 25 (Ct. App. Tenn. Dec. 13, 2000) ("Each of the work orders sent to Mr. Isbell constituted separate contracts for specific jobs . . .").

¹⁰⁹ Second Robinson Declaration at ¶ 5.

¹¹⁰ Second Robinson Declaration at ¶ 10.

¹¹¹ Second Robinson Declaration at ¶ 9.

¹¹² Second Robinson Declaration at ¶ 5.

consent and the change is supported by additional consideration.¹¹³ With regard to the Commission administratively modifying the contract, such action is directly analogous to a court modifying a contract, which is generally prohibited. As stated in *Corbin on Contracts*, "the courts do not make a contract for the parties and . . . the parties must be content to perform and to receive performance in accordance with whatever agreement they themselves chose to form."¹¹⁴ Thus, because PECO has not consented to modification of the make-ready rate contained in the invoices, neither RCN nor the Commission can modify them. Likewise, the Commission cannot order prospective restrictions by setting a ceiling on PECO's future make-ready rates.

71. In addition to the foregoing, modifying the terms of PECO's invoices would be poor policy and set bad precedent. Parties to make-ready agreements negotiate at arms' length with the expectation that each will fulfill its requisite obligations. Permitting RCN to bypass the well-established strictures of the common law by obtaining relief from the Commission would fundamentally undermine that expectation and threaten the stability of future make-ready transactions. RCN's practice of "signing and suing" or "building and suing" should not be sanctioned as an acceptable way of doing business.

8. Regulating utilities' make-ready rates may reduce competition in the make-ready market.

72. The make-ready services market is comprised of both utilities and independent make-ready contractors. This works out well for attachers, as it provides them with more options in terms of companies they can hire to perform their make-ready work. There may be some "features" a utility can provide that an independent contractor cannot (such as speed in performing the make-ready), and vice-versa. The presence of both utilities and independent contractors also increases price competition by virtue of there being more competitors in the market.

¹¹³ See, e.g., *Kreutzer v. Monterey County Herald Co.*, 747 A.2d 358, 362 (PA 2000); *Wilcox v. Regester*, 207 A.2d 817, 821 (PA 1965).

¹¹⁴ 5 *Corbin on Contracts* § 24.19 (Revised ed. 1998).

73. A decision to regulate the make-ready rates of utilities could force them out of the market. By having a ceiling placed on what they can charge, they may be forced to charge rates at which making a profit is prohibited or virtually impossible. Should that occur, they will have little motivation for continuing to provide make-ready services. If they cease providing those services, independent make-ready contractors may raise their prices due to the decrease in competition. Additionally, attachers will lose the benefit of being able to turn to utilities for what may be the fastest make-ready turn-around (as in the case of PECO). In fact, that problem may be exacerbated if independent contractors realize an influx of work due to a utility leaving the market; an increase in the amount of work a contractor has queued up will require attachers to wait longer for their particular jobs to be reached.

74. In accordance with the foregoing, having utilities in the make-ready services market clearly results in numerous benefits to attachers. Because regulating utilities' make-ready rates could result in them exiting the market and thus cause consumers to lose those benefits, the Commission should refrain from regulation.

9. RCN's make-ready rate allegations raise only state law contract issues appropriate only for state court.

75. As demonstrated above, the make-ready rate allegations raised by RCN are not within the Commission's jurisdiction. At most, they raise only state law breach of contract claims that can be litigated only in state court. Even in cases directly involving pole attachment contracts, the Commission has stated, "The Commission's authority under Section 224 'does not supplant that of the local jurisdiction when the issue between the parties is a breach of contract not involving unjust or unreasonable contractual terms, rates or conditions.'"¹¹⁵ In the first instance in which the Commission lacks jurisdiction over the contracts involved, a state court remedy is appropriate.

¹¹⁵ *Kansas City Cable Partners*, 14 FCC Rcd. at 11601-02 (quoting *Marcus Cable Associates, L.P. v. Texas Utilities Electric Company*, PA 96-002, *Declaratory Ruling and Order*, 12 FCC Rcd. 10362, 10365-66 (1997)).

76. RCN's claims regarding make-ready rates stem solely from the make-ready invoices, which, as explained above, constituted at least forty-eight separate contracts. The fact that the contracts in this case arose in the pole attachment context does not change the fundamental nature RCN's claim. Thus, if RCN has a dispute with PECO regarding these contracts, its claims are for "breach of contract not involving unjust or unreasonable contractual terms, rates or conditions for pole attachments" and as such are appropriate only for state court.

D. The Commission Should Not Alter PECO's Make-Ready Practices and Policies Nor Require It To Issue A Make-Ready Refund

77. RCN contends that PECO is improperly refusing to immediately pay the cost of correcting alleged preexisting safety code violations caused by other attachers.¹¹⁶ It alleges that nearly 25% of PECO's poles suffer from preexisting violations, and, as such, situations have arisen in which it has had to pay PECO to correct them.¹¹⁷ RCN demands that PECO immediately perform make-ready at a new attacher's behest and seeks a refund of money it already paid to correct alleged preexisting violations. In connection therewith, RCN also demands that PECO review its make-ready records or review its poles in person.¹¹⁸

78. RCN's requested relief is unwarranted and appears to be little more than a thinly veiled attempt to get PECO to subsidize its buildout. Moreover, RCN's claims should be dismissed for (1) lack of credible evidence regarding preexisting violations and (2) defective and unreliable evidence.

79. First, RCN has failed to meet its burden of establishing a *prima facie* case¹¹⁹ because its evidence fails to establish that it was charged for correcting actual "preexisting violations" or that a significant percentage of PECO's poles suffer from such violations. In fact, PECO's poles

¹¹⁶ Amended Complaint at 12-15.

¹¹⁷ Amended Complaint at 14-15.

¹¹⁸ Amended Complaint at 2, 18.

¹¹⁹ 47 C.F.R. § 1.1409(b) (2000).

do not suffer from a significant amount of preexisting violations. The make-ready work involved was necessitated by RCN's request to attach to the poles. Furthermore, PECO's make-ready policies are well in line with the Commission's rules. Forcing PECO to alter those policies would impermissibly tread upon Section 224(f)(2) of the PAA, which provides that utilities may deny access to their facilities "where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes."¹²⁰

1. RCN's fails to establish a *prima facie* case.

80. RCN fails to meet its burden of establishing a *prima facie* case regarding PECO's make-ready practices and policies.¹²¹ A close examination of that claim reveals that it is based on unquantified observations of a few RCN employees, a review conducted by an RCN employee of poles in a few townships more than likely cherry-picked by RCN, and a handful of unsworn and unverified pole head detail sheets. None of these items establish that a significant number of PECO's poles are in violation of the NESC or that RCN has been charged for correcting violations caused by other attachers.

a. RCN does not explain what it means by preexisting safety violations.

81. RCN has not presented any evidence of what it is referring to as a preexisting safety violation that it allegedly paid to correct.¹²² As explained further below, "preexisting violation" is a term of art that refers to an attachment that is not in compliance with the current edition of the National Electrical Safety Code ("NESC") *nor* any applicable previous editions.¹²³ Generally, if pole attachments are in compliance with a previous edition of the NESC that was in

¹²⁰ 47 U.S.C. § 224(f)(2) (2000).

¹²¹ 47 C.F.R. § 1.1409(b)

¹²² See Amended Complaint at 2.

¹²³ See National Electrical Safety Code § 1.013.B (1997 ed.).

effect when the pole was initially raised, they will be deemed grandfathered for purposes of the current edition.¹²⁴

82. It is impossible to tell from RCN's evidence whether the claimed "preexisting violations" are in fact situations where poles are grandfathered, because RCN avoids that important distinction entirely. RCN, of course, has the initial burden of proving its case, which includes establishing that its evidence will, if true, support only its proposition and not also some other proposition that would not give rise to liability.¹²⁵ However, because RCN's material evidence, even if taken as true, does not foreclose a conclusion that would not give rise to liability, its evidence does not prove its case. As such, RCN has not met its evidentiary burden and, therefore, its make-ready claims cannot stand.

b. RCN's evidence is defective and unreliable.

83. RCN's evidence is rife with unsupported statements, hearsay, and other problems that render it entirely unreliable. The basis of RCN's claim is its assertion that "up to approximately half of PECO's poles, depending on the area, require make-ready work, and, on average, about 46% of these poles are out of compliance with safety codes."¹²⁶ In other words, RCN claims that nearly 25% of PECO's poles contain NESC violations. These figures cannot survive close examination. As an initial matter, none of this testimony is presented in the form of a formally conducted statistical survey and analysis, which the Commission requires for evidence of this nature. For that reason alone it must be disregarded.

84. With regard to not providing a statistically reliable sample, the Commission has indicated that statistical samplings are permitted in lieu of comprehensive reviews in pole

¹²⁴ National Electrical Safety Code § 1.013.B (1997 ed.).

¹²⁵ See, e.g., *NLRB v. Patrick Plaza Dodge, Inc.*, 522 F.2d 804, 809 (4th Cir. 1975) ("Evidence that points equally in two directions points in neither, and therefore cannot satisfy the burden of proof.").

¹²⁶ Amended Complaint at 14.

attachment proceedings so long as they meet the standards of FCC Rule Section 1.363(a).¹²⁷ Section 1.363(a) provides, among other things, that statistical studies must "be described in a summary statement, with . . . a comprehensive delineation of the assumptions made, the study plan utilized and the procedures undertaken."¹²⁸ Additionally, "[t]he formulas used for statistical estimates, standard errors and test statistics, [and] the description of statistical tests" must be "set forth clearly"¹²⁹ In short, Section 1.363(a) contemplates submission of a formally conducted statistical survey and analysis that is up to professional standards. RCN's figures are certainly not the result of a comprehensive review, and none are presented in the form of a proper statistical sampling. Thus, they must be disregarded.

85. There are additional reasons that RCN's evidence must be disregarded even aside from the lack of a proper statistical sampling. RCN's foundational claim that "up to approximately half" of PECO's poles require make-ready work is derived in part from the statement of Susan Snow, a Right-of-Way Access Manager for RCN who used to work at PECO, that "some 30-60% of PECO's poles require make-ready"¹³⁰ Ms. Snow, however, fails to explain how she arrived at those percentages. Further, the fact that a pole requires make-ready does not mean that this work is necessary to correct violations. As explained below, this work is likely only necessary because RCN wishes to attach to these poles. Marvin Glidewell, RCN's Director of Engineering and Construction, weighs in on the matter, but his testimony is limited to poles in the town of Folcroft.¹³¹ The only other even vaguely quantified testimony comes from

¹²⁷ In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, Docket No. 78-144, *Memorandum Opinion and Second Report and Order*, 72 FCC 2d. 59, 69 (1979).

¹²⁸ 47 C.F.R. 1.363(a) (2000).

¹²⁹ 47 C.F.R. 1.363(a).

¹³⁰ Snow Declaration at ¶ 8 (attached to Amended Complaint).

¹³¹ Glidewell Declaration at ¶ 11 (attached to Amended Complaint). Glidewell testifies that from his undescribed "inspection" of poles in Folcroft, "approximately half had existing code violations."

Jonathan Troy Stinson, another RCN employee, who compared the total number of poles to which RCN is attached to the total number of poles to which it is attached that required make-ready work, and determined that 32% of those poles needed make-ready work.¹³² His calculation of 32% is far less than the "approximately half of PECO's poles" indicated in the Amended Complaint, and, in any event, deals only with those poles to which RCN is attached (approximately 9,500); it does not describe PECO's poles overall (approximately 430,000), as RCN purports to do in the Amended Complaint. Thus, the very foundation of RCN's claim, that approximately 50% of all of PECO's poles require make-ready work, is unsustainable.

86. The next level of RCN's claim, that "about 46%" of PECO's poles that require make-ready work have preexisting NESC violations, is similarly unsupported. All the record contains are statements by Ms. Snow and Mr. Stinson. Ms. Snow states that of the poles that require make-ready, "between a quarter and a half of those require make-ready due to pre-existing violations."¹³³ Again, however, she fails to tell us how she arrived at those percentages or what is meant by her use of the term "pre-existing violation". Mr. Stinson states that based on his sampling of 2,758 poles to which RCN is attached (or plans to be attached), "on average 45%" of poles to which RCN has attachments (or plans to have attachments) had preexisting violations.¹³⁴ However, Mr. Stinson's review is inapplicable to RCN's argument because it focuses exclusively on poles to which RCN is attached or plans to attach.¹³⁵ RCN's argument, on the other hand, purports to address *all* of PECO's poles.

87. Even limiting application of Mr. Stinson's review to poles pertaining to RCN, it falls short because it utilized neither a comprehensive analysis nor a statistically reliable sample. With regard to not performing a comprehensive analysis, out of thirty-three municipalities in

¹³² Stinson Declaration at ¶ 3 n.3 (attached to Amended Complaint).

¹³³ Snow Declaration at ¶ 8 (attached to Amended Complaint).

¹³⁴ Stinson Declaration at ¶ 3 (attached to Amended Complaint).

¹³⁵ Stinson Declaration at ¶ 3 (attached to Amended Complaint).

which RCN is attached (or plans to attach) to poles that required make-ready, Mr. Stinson reviewed only nine.¹³⁶ Because Mr. Stinson provides no explanation of how he chose this small sampling, he may well have cherry-picked those townships with an unusually high amount of make-ready which could be due to circumstances other than "preexisting violations." Moreover, the fallacy of this sampling being used to characterize all of PECO's poles is indicated by the fact that Mr. Stinson reviewed only 2,758 poles out of approximately 430,000.

88. Mr. Stinson's pole review does not even begin to approach the requirements of Section 1.363(a) and therefore must be rejected. Mr. Stinson, an engineer and presumably not a statistician, provides only a one paragraph discussion of his pole review and a chart showing the townships in which he conducted it.¹³⁷ Even though Mr. Stinson evaluated only .06 percent of PECO's poles, there is no indication, contrary to Section 1.363(a), that a study plan or formal procedures were crafted to ensure the accuracy or validity of such a tiny sampling (if such a tiny sampling could ever be accurate and valid). There is also no indication that Mr. Stinson employed any "formulas used for statistical estimates" or determined standard errors, both required by Section 1.363(a). Mr. Stinson provides no clue as to why he reported on only nine municipalities out of thirty-three, or why these nine are somehow representative of all thirty-three. Also, the review is undermined by the fact that Mr. Stinson is an RCN employee and, hence, not a disinterested witness. Thus, due to these patent defects, the Commission must disregard his review.

89. Finally, RCN submits six pole head detail sheets that, according to Mr. Stinson, demonstrate preexisting violations "in a multitude of cases."¹³⁸ The veracity of these sheets is completely unknown because they are unsworn and unverified. Although they are submitted

¹³⁶ Stinson Declaration, Appendix B (attached to Amended Complaint). The underlying assertion that there are thirty-three municipalities in which RCN is attached (or plans to attach) to poles that required make-ready work is according to Mr. Stinson.

¹³⁷ Stinson Declaration at ¶ 3 (attached to Amended Complaint).

¹³⁸ Stinson Declaration at ¶ 2 and Appendix A (attached to Amended Complaint).

through Mr. Stinson's declaration, there is no indication that Mr. Stinson himself filled them out or had any control over the person who did. In fact, although each sheet has specific blanks for the surveyor (presumably the person who fills them out) to sign and date them, none of them are signed and only one is dated.¹³⁹ Additionally, six sheets out of the thousands that were completed for RCN's poles hardly establishes "a multitude" of preexisting violations. In light of these problems, the Commission should disregard the sheets.

2. PECO follows policies and procedures to ensure its poles are in compliance with NESC requirements.

90. RCN's failure to establish a *prima facie* case is enough, standing alone, to deny its make-ready allegations. While PECO cannot state with absolute certainty that none of its poles contain preexisting violations, the policies and practices explained below demonstrate that the likelihood of preexisting violations is low.

91. The purpose of the NESC is "the practical safeguarding of persons during the installation, operation, or maintenance of electric supply and communications lines and associated equipment."¹⁴⁰ It is published by the Institute of Electrical and Electronics Engineers and contains "the basic provisions that are considered necessary for the safety of employees and the public under the specified conditions."¹⁴¹ PECO adheres to the NESC and, additionally, to its own design standards. PECO's own standards are based on the NESC but in some ways are more strict in order to provide the ability to access the facilities for the construction, operation, or maintenance of the PECO electrical equipment located on the poles or to reflect site specific conditions.¹⁴²

¹³⁹ Stinson Declaration, Appendix A (attached to Amended Complaint).

¹⁴⁰ National Electrical Safety Code § 1.010 (1997 ed.).

¹⁴¹ National Electrical Safety Code § 1.010 (1997 ed.).

¹⁴² In the interest of brevity, references to the NESC encompass both the NESC and PECO's own standards unless the context of the sentence indicates otherwise.

92. PECO's pole management policies are designed at a minimum to ensure compliance with the requirements of the NESC while recognizing the complexity of the real-world environment in which its employees, third-party attachers, and independent contractors must work. When the pole is first installed, it is installed in compliance with the then current NESC. This is reflected in the fact that all attachments made by its employees and independent contractors are done in compliance with the NESC.¹⁴³ Every time PECO maintains its poles, they are either put back in the same grandfathered status or upgraded to the current NESC. Also, its pole attachment agreements require third-party attachers and their independent contractors to comply with the NESC and PECO's standards (paragraph 3 in the Agreement with RCN).¹⁴⁴ Accordingly, based on its consistently applied standard policies and practices, PECO presumes that its poles are in compliance with all applicable safety standards.

93. Determining whether a pole is actually out of compliance with the NESC generally requires a multifaceted analysis which is beyond the scope of this pleading. A basic rule immediately applicable to this proceeding, however, is the NESC's "grandfathering" provision: existing installations that comply with the prior applicable editions of the NESC generally do not need to be modified to meet the latest edition of it (new editions are published every several years; the 1997 NESC is the latest edition).¹⁴⁵ Accordingly, with regard to adding new, or modifying existing, attachments to a pole, the NESC provides that *the pole* will remain in compliance so long as it is in compliance with *either* (1) the current NESC (now 1997); (2) the edition in effect when the pole was first raised; or (3) an applicable edition published after the pole was first raised. Related to this principle is the rule that when attachments are added, altered, or replaced, *the existing attachments* do not need to be modified if the resulting installation will be in compliance with *either* (1) the current NESC (now 1997); (2) the edition in

¹⁴³ Williams Declaration at ¶ 13.

¹⁴⁴ Williams Declaration at ¶ 13.

¹⁴⁵ National Electrical Safety Code § 1.013.B (1997 ed.).

effect when the pole was first raised; or (3) an applicable edition published after the pole was first raised.

94. In accordance with the foregoing, the term "preexisting violation" has a very precise definition. It refers to an attachment that is not in compliance with either the current NESC (now 1997) or any applicable previous editions.¹⁴⁶ Therefore, a pole can be out of compliance with the current NESC (now 1997), but still *in compliance* with the applicable NESC (an earlier edition). PECO believes that RCN could be confused, and that the majority of the purported "preexisting violations" claimed by RCN are indeed grandfathered poles, not preexisting violations.

95. Although the NESC provides the option of adhering to the requirements of a previous NESC edition to maintain compliance when a new attachment is made, in practice that is difficult to do. In order to do so, one would need very detailed records (frequently spanning over dozens of years) of everything that has happened and been done to a pole (*e.g.*, when it was installed, every instance that it was touched and what was done to it, etc.). PECO keeps various databases on its poles; however, it does not maintain detailed logs of all work done on its poles, and nor is it required to do so. Therefore, in the absence of detailed historical records of a particular pole, it would be extremely difficult, labor-intensive, and costly (if even possible) to determine the applicable edition of the NESC.¹⁴⁷

96. Nevertheless, PECO's practice and procedure of always installing in compliance with the NESC, and maintaining grandfathered status when the pole is worked on, or upgrading to current code when necessary, ensures that its pole plant is maintained in conformance with NESC requirements. For example, if a pole needs to be rebuilt or reconstructed after being knocked down (*i.e.*, by a storm or a car) PECO will rebuild or reconstruct it either exactly as it

¹⁴⁶ See National Electrical Safety Code § 1.013.B (1997 ed.).

¹⁴⁷ Williams Declaration at ¶¶ 8, 12.

was before (which can be presumed to have been in compliance with the NESC) or in accordance with the current NESC (now 1997).

97. When third-party attachers such as RCN approach PECO to attach to its poles, PECO requires them to perform any make-ready work necessary to ensure the pole stays in compliance with the NESC, *i.e.*, to ensure that their new attachment does not result in the pole becoming out of compliance. As discussed *supra*, because PECO does not maintain a detailed record of a pole's work history is either required or maintained, it is nearly impossible to determine after the fact which edition of the NESC currently affects a pole and whether the new attachment would result in a violation to that particular edition. Therefore, PECO takes the straightforward, reasonable approach of requiring new attachers to adhere to the most recent edition of the NESC. Notably, PECO also follows this approach for its own attachments to its poles, *i.e.*, if the pole being worked on cannot be returned to its grandfathered status, it is upgraded to the current NESC. Because PECO maintains its poles in compliance with the NESC, but for RCN wishing to attach to the poles, PECO would not be required to upgrade its poles to the 1997 NESC.

3. PECO's make-ready practices and policies are consistent with the prudent management of its poles, the PAA, and Commission precedent.

98. PECO's pole management policies and practices are consistent with the prudent management of its poles, the PAA, and Commission precedent. PECO's primary mission is the reliable delivery of electricity and natural gas to nearly two million customers. In order to reconcile that mission with the demands of the PAA, PECO has crafted pole management practices and policies over many years consistent with providing safe and reliable electric service.

99. Providing electric power and other forms of energy has become a tremendously complicated business on all levels, as demonstrated by situations ranging from the shortages of supply in California to underground explosions blowing off manhole covers in Washington, D.C. Managing an electric grid is not simple in concept or execution, but is the product of many

interrelated and constantly shifting factors. The price of missteps, needless to say, can be enormous. The bottom line is that only utilities (and to the extent mandated by law, state and federal energy agencies), should have a controlling hand in utility resource allocation. Utilities have been providing power for over a hundred years, and, quite simply, they know how it is done. Accordingly, their chosen practices and policies must be given due weight.

100. The basis of PECO's make-ready policies is that it will not allow a new attachment on a pole prior to the performance of all necessary make-ready.¹⁴⁸ As in RCN's case, if a pole to which RCN wishes to attach would lose its grandfathered status and/or the grandfathered status would be affected by RCN attaching to the pole, PECO requests that RCN do the necessary make-ready to bring the pole up to the current NESC. This is not make-ready to cure pre-existing violations. This is work required because "but for" RCN's presence, no work would be required to upgrade the pole. However, if in the course of determining what make-ready work is necessary for a new attachment, PECO learns of a preexisting NESC violation that requires make-ready, it will investigate the violation to determine who caused it.¹⁴⁹ If PECO caused the violation, it will perform the make-ready within a reasonable time period, giving it priority in accordance with its other maintenance priorities.¹⁵⁰ If another attacher caused the violation, PECO will contact the attacher that caused the violation and require it to undertake corrective measures.¹⁵¹ PECO expects the attacher causing the violation to make the correction or pay PECO to do so within a reasonable period of time.¹⁵² It expects this process would take no longer than three to four months.¹⁵³ If the potential new attacher does not want to wait for an

¹⁴⁸ Williams Declaration at ¶ 8.

¹⁴⁹ Williams Declaration at ¶ 9.

¹⁵⁰ Williams Declaration at ¶ 9.

¹⁵¹ Williams Declaration at ¶ 9.

¹⁵² Williams Declaration at ¶ 9.

¹⁵³ Williams Declaration at ¶ 9.

existing attacher to either make the correction or pay PECO to do so, the new attacher has the option of paying for the correction itself.¹⁵⁴

101. Given the above, by necessity PECO appropriately prioritizes make-ready work. So as to fit it appropriately into work schedules that are already crowded with tasks necessary to ensure the safe, reliable provision of electricity and natural gas. That is PECO's core function, and requirements that force it to compromise its performance in that regard run the risk of jeopardizing the reliable and safe delivery of electricity and natural gas to its customers. Such requirements may also create conflicts with regulations or orders of other agencies. For example, an entire section of Pennsylvania's regulations are dedicated to electricity reliability standards.¹⁵⁵ Also, as a result of the October 2000 merger involving PECO, Exelon Corporation, and Unicom Corporation, PECO had to enter a merger settlement agreement which requires it to meet certain reliability benchmarks.¹⁵⁶ Failure to meet the benchmarks will result in a formal investigation by the Pennsylvania Public Utility Commission.¹⁵⁷

102. In connection with compelling attachers that cause violations to correct them in a timely manner, attachers are legally obligated under the pole attachment rules to pay for make-ready which they cause.¹⁵⁸ Accordingly, they are implicitly obligated to make such corrections in a timely manner. Additionally, PECO's pole attachments agreement obligate attachers to place attachments in conformity with the NESC, thus giving it legal recourse to compel attachers to make timely corrections.¹⁵⁹

¹⁵⁴ Williams Declaration at ¶ 9.

¹⁵⁵ 52 Pennsylvania Code § 57.191 *et seq.* (1998).

¹⁵⁶ Merger Agreement at ¶ 23.

¹⁵⁷ Merger Agreement at ¶ 28.

¹⁵⁸ In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd. 15499, 16096 (1997).

¹⁵⁹ Clause 3 in PECO's pole attachment agreement with RCN.

103. RCN claims that attachers causing preexisting violations will "no doubt" take "many years" to make payment and thus greatly hinder its build-out are unsupported by any empirical evidence.¹⁶⁰ RCN cannot point to any situation in which this has been the case. It offers only the spare and unfounded speculation of its own Mr. Glidewell and Mr. Stinson that PECO's policy will produce "very long" and "extreme" delays.¹⁶¹ Mr. Stinson relates a purported conversation between himself and Mike Williams, PECO's Director of Real Estate and Facilities, in which, according to Mr. Stinson, Mr. Williams "went on to ask how quickly RCN thought its competitors would respond by paying for violations, knowing that not paying would delay RCN's entry into the market."¹⁶² This statement must be disregarded; even if Mr. Stinson is a mind reader, the statement is hearsay.

104. RCN's claim that attachers will take "many years" to pay for the make-ready is also legally unpersuasive. Because attachers who cause violations have a duty to pay for make-ready pursuant to both the pole attachment rules and PECO's pole attachment agreements, they implicitly have a duty to do so within a reasonable time frame. In making its decisions, the Commission should not presume that companies will breach that duty. Rather, like courts, it must presume that companies will obey the law absent compelling evidence to the contrary.¹⁶³

105. In the *Consolidated Order in Kansas City Cable Partners v. Kansas City Power & Light Company*, the Commission ruled that utilities were responsible for correcting preexisting violations and the new attacher could not be forced to pay the costs.¹⁶⁴ In this case, RCN has not even established that true preexisting violations existed. Further, that decision did not require utilities to do so within any specific time period and did not address whether they could seek

¹⁶⁰ Amended Complaint at 15.

¹⁶¹ Glidewell Declaration at ¶ 15 (attached to Amended Complaint); Stinson Declaration at ¶ 5 (attached to Amended Complaint).

¹⁶² Stinson Declaration at ¶ 4 (attached to Amended Complaint).

¹⁶³ See, e.g., *C.C. Port, Ltd. v. Davis-Penn Mortgage Co.*, 61 F.3d 288, 290 (5th Cir. 1995).

¹⁶⁴ *Kansas City Cable Partners*, 14 FCC Rcd. at 11606-07.

payment from the causer of the violation before performing the make-ready work. PECO's policy would simply require the causer of any violation to pay for any work to correct the violation.

106. In the June 2000 order in *Cavalier Telephone*, the Commission indicated that utilities should correct preexisting violations within a reasonable time after being requested to do so by a qualifying new attacher.¹⁶⁵ Upon doing so, the utility could seek reimbursement from the causer of the violation.¹⁶⁶ *Cavalier Telephone*, however, leaves open several critical considerations. First, it did not discuss exactly what type of "preexisting violation" was under consideration in that case. As discussed above, "preexisting violation" is a term of art that is generally not capable of simple application. Given what PECO reasonably believes is the case regarding its pole plant, *Cavalier Telephone* has little application to it in that regard. Also properly left open was just what constitutes a reasonable time period. In *Cavalier Telephone*, Virginia Power allegedly told Cavalier Telephone that it could either wait up to five years for Virginia Power to correct preexisting violations or pay for correcting the violation itself.¹⁶⁷ Virginia Power allegedly also took the position that it was "not required to ensure that other attachers pay their share of correcting safety violations."¹⁶⁸ The Commission found the particular terms of Virginia Power's policy to be "unacceptable," but did not attempt to dictate exactly what policies would be deemed acceptable.¹⁶⁹ It did not prohibit utilities from seeking payment from the attacher causing the violation before performing the make-ready, it only prohibited taking an unreasonably long time, *i.e.*, five years, to do so. And the Commission did not prohibit utilities from giving potential attachers the option of paying for the make-ready

¹⁶⁵ *Cavalier Telephone*, 15 FCC Rcd. at 11606-07.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

themselves and then collecting the reimbursement payment, it only prohibited them from forcing attachers to do so. In short, the Commission has recognized that utilities have highly important public service obligations and, accordingly, has wisely given them significant leeway in crafting their policies. PECO's policy is within the broad bounds of *Cavalier Telephone*.

4. Section 224(f)(2) prohibits the Commission from forcing PECO to alter its make-ready policies.

107. RCN's failure to establish a *prima facie* case is enough, standing alone, to deny its make-ready allegations. Section 224(f)(2)¹⁷⁰ of the PAA prevents the Commission from requiring PECO to pay for and perform make-ready work immediately, rather than first seeking correction from the attacher causing the violation (a process that should take approximately three to four months). Pursuant to Section 224(f)(2), utilities may deny access to their facilities "where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes." This section gives PECO complete discretion to require that make-ready be performed before a new attacher comes to a pole. Otherwise, PECO's ability to ensure the integrity of its poles could be detrimentally affected. That could compromise the safety of persons working on the poles as well as the general public, and also affect its overall ability to provide reliable electric service.

108. The legislative history behind the PAA clearly demonstrates the priority Congress placed on maintaining the ability of utilities to fulfill their core mission of safely and reliably providing power. Congress was careful to point out that although cable television companies were being provided access to utilities' poles, cable television companies' rights in that regard remained subject to the "higher priority that exists for the maintenance of telephone and electric service."¹⁷¹ Also, Senator Hollings, the PAA's sponsor in the Senate, stated "Of ultimate concern . . . will be the effect that any legislation will have on the interests of the consumer, and by

¹⁷⁰ 47 U.S.C. § 224(f)(2) (2000).

¹⁷¹ S. Rep. No. 95-580, at 19.

'consumer' I mean not only the cable television subscriber, but the consumer of electric power, telephone, and other public services."¹⁷²

109. Additionally, the Commission was cognizant of Congress' concern with ensuring the safe and reliable provision of electricity when it promulgated regulations implementing the 1996 amendments to the PAA. In the *First Report and Order in Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, the Commission observed that "Section 224(f)(2) reflected Congress' acknowledgement that issues involving capacity, safety, reliability and engineering raise heightened concerns when electricity is involved, because electricity is inherently more dangerous than telecommunications services."¹⁷³

110. It is currently more important than ever that the Commission accord due weight to Section 224(f)(2) in this instance. As poles have become more and more crowded with attachments, the need to keep those attachments in compliance with the NESC and thus adequately provide for the safety of persons working on the poles and the general public has become more pronounced. PECO's make-ready policy is designed to ensure that such compliance is maintained. As such, Section 224(f)(2) clearly protects PECO's policy of denying access to poles requiring make-ready until such work is performed.

111. In this case, PECO has limited resources and its principal mission is ensuring the safe and reliable provision of electricity and natural gas. As such, it is entitled to prioritize its resources in accordance with that goal, and in the case of third parties, it will insist that the party take responsibility for correcting it. PECO cannot be required to deviate from its normal pole maintenance practices and immediately make the corrections itself on an attacher's route and timetable. The amount of time this will delay a new attachment is likely to be minimal, assuming (as the Commission must) that attachers will react in a timely manner when notified of

¹⁷² 123 Cong. Rec. 12974 (1977).

¹⁷³ In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, *First Report and Order*, 11 FCC Rcd. 15499, 16081 (1996).

violations they caused. Forcing PECO to immediately allocate its resources toward correcting the attachment itself, rather than ensuring the safety and reliability of its network, would infringe upon the discretion it has pursuant to Section 224(f)(2).

112. RCN may argue that the need to perform make-ready before allowing new attachers is not protected by Section 224(f)(2) because PECO can simply pay for the make-ready itself and thus eliminate any safety or reliability concerns. However, the Commission cannot read a condition into Section 224(f)(2) that in effect says: as long as any problem is "capable of being fixed by the utility spending money," Section 224(f)(2) will not apply. Almost any problem associated with "safety, reliability, and generally applicable engineering purposes" can be solved by unlimited spending on it. Such an exception would render Section 224(f)(2) meaningless and turn utilities into unlimited infrastructure development funds for cable television and telecommunications companies.

5. RCN's demand that PECO review its records or survey its poles is ill-conceived, overbroad and unduly cumbersome.

113. RCN requests that the Commission order PECO to refund any fees it paid to correct preexisting safety code violations caused by other attachers. To determine the extent to which such fees were allegedly erroneously paid, if at all, RCN demands that PECO review its records or, if that does not provide the needed information, comprehensively survey all of its poles.¹⁷⁴ PECO does not believe RCN is entitled to any relief because, as explained above: (1) RCN has failed to establish a *prima facie* case; (2) PECO's make-ready practices and policies are in line with the law; and (4) PECO's make-ready practices and policies are protected by Section 224(f)(2). In addition to these fatal defects, the demand is ill-conceived, overbroad, and unduly cumbersome.

114. RCN first asks that PECO evaluate its records, presumably regarding the poles to which RCN is already attached. However, it also states that if those records are not adequate to

¹⁷⁴ Amended Complaint at 18.

determine the origin of make-ready charges, PECO should "comprehensively" survey "all its poles" in order to "be in a position to refund to RCN (and to other attachers) funds unlawfully collected for corrective make-ready work."¹⁷⁵ In other words, RCN first asks PECO to use one method to undertake a somewhat limited review that would benefit only RCN. If PECO cannot do that, RCN demands that PECO use another method, but this time to conduct a far broader review that would benefit RCN *and* every other attacher to PECO's poles. The Commission obviously cannot impose such an unwarranted order upon PECO.

115. As explained above, a conclusive determination of the status of a particular pole is complicated by the age of the pole, the number of attachments, and changes that have been made over the years.¹⁷⁶ PECO does not, and is not required to, keep detailed logs of all work activities conducted in relation to a particular pole. These factors affect, among other things, the number of different NESC editions that could be applicable to each pole. It would be an extremely time consuming, burdensome, and expensive process to determine *after the fact* if a true preexisting code violation occurred on a pole.¹⁷⁷ At best, it could only be done prospectively to determine whether a violation *currently* exists on a pole.¹⁷⁸ Because of this, in regard to the approximately 9,500 poles to which RCN is already attached, it would be virtually impossible in most instances to reconstruct the pole's history and determine exactly how it looked before RCN attached to it.¹⁷⁹ If the Commission were to decide that PECO should undertake such an exercise -- and PECO does not believe it should -- RCN should be required to pay for any work it wants undertaken in this regard. Furthermore, PECO could not guarantee that any such exercise would produce meaningful information.

¹⁷⁵ Amended Complaint at 18.

¹⁷⁶ Williams Declaration at ¶ 8.

¹⁷⁷ Williams Declaration at ¶ 12.

¹⁷⁸ Williams Declaration at ¶ 12.

¹⁷⁹ Williams Declaration at ¶ 12.

116. Also, RCN's request that PECO "comprehensively" survey "all its poles" is absurd. The poles for which RCN has already paid for make-ready work comprise only a small fraction of PECO's 430,000 poles.¹⁸⁰ If RCN's goal is to be reimbursed for allegedly erroneous make-ready charges, there is absolutely no reason to survey poles other than those for which it already paid make-ready charges. It would be entirely unnecessary, unreasonably speculative, and impossible from a practical standpoint for PECO to prospectively survey all of its poles, or even all of its poles for which RCN has future attachment plans. PECO and its ratepayers should not be required to bear the expense of surveying poles to which RCN may never attach.

E. RCN's Arguments For Refund, Forfeiture, And Interim Payment Lack Merit

1. Any refunds should be calculated as of June 1, 2001 or, at the earliest, May 4, 2001.

117. As discussed in PECO's initial Response, the Commission has recognized that damage awards must be calculated from the date that the complaint, as acceptable, was filed.¹⁸¹ In this case, however, RCN has submitted not only a complaint, but an amended complaint as well. RCN incorporates its request for damages from the initial complaint in the amended complaint, and once again asks that the Commission also impose forfeitures on PECO. PECO denies that RCN is entitled to any damages, but should the Commission chose to order a refund, it should do so only from the date that the Commission effectively accepted the Amended Complaint, June 1, 2001 or, at the earliest, the date of the Amended Complaint itself, May 4, 2001, for all of RCN's allegations including those made in its original complaint.

118. The Commission has indicated that the proper method for raising new issues in a pole attachment proceeding is either (1) to file a separate complaint dedicated to those issues or

¹⁸⁰ RCN has attachment permits for only 3% of PECO's poles, and far less than that actually required make-ready work.

¹⁸¹ 47 C.F.R. § 1.1410 (2000); RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Company, PA 01-003, *Order*, DA 01-1339, ¶ 2 (June 1, 2001).

(2) to file an amended complaint with leave of the Commission that would *supersede and moot* the original complaint and restart the pleading cycle.¹⁸² RCN chose a path somewhere in the middle, without the leave of the Commission, by filing an amended complaint that was insufficient to completely supersede the previous complaint but purported to incorporate it by reference.

119. As argued above, the Amended Complaint is procedurally improper and the Commission should reconsider its *sua sponte* decision to permit the pleading. Rather, the FCC should dismiss the Amended Complaint outright. In the event of dismissal, it is clear that any subsequent complaint made by RCN pertaining to these make-ready issues would be a separate, stand alone proceeding that would restart the pleading cycle. Refunds, if any, in that instance would be calculated from the date of the new complaint, and would not relate back to the filings submitted in this case. The Commission's rules do not provide for a relation back in such a situation, and as a separate complaint the Commission's rules on the issue are clear. Refunds are calculated from the date that the complaint, as acceptable, was filed.

120. If, however, the Commission chooses not to dismiss the amended complaint, RCN's procedural impropriety should not unjustly benefit it. Although RCN "incorporated" by reference its previous claims and the Cable Services Bureau has indicated that it intends to treat the multiple filings in the instant matter as one case, the circumstances more closely resemble the second scenario outlined above for asserting additional claims in which an amended complaint supersedes and moots the prior complaint. With respect to its initial claims for pole attachment fees, therefore, the date of the Amended Complaint, May 4, 2001, is the earliest date from which a refund, if any, should be calculated. RCN is not entitled gain the benefit of its choice to disregard Commission guidance offered on the proper method for addressing the issues it raises in its Amended Complaint by bifurcating its requests for relief.

¹⁸² RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Company, PA 01-003, Order, DA 01-1339 (June 1, 2001).

121. Further, with respect to the claims for a refund of make-ready fees, RCN's claims were only announced in its Amended Complaint. The make-ready allegations constitute a wholly distinct claim, and the FCC's rules do not provide for relation back to an initial complaint under these circumstances. May 4, 2001 is therefore the earliest date from which any refund on the make-ready charges should be calculated.

122. In fact, June 1, 2001 would be the most appropriate date from which to calculate a refund if the Commission chooses to award damages on any of RCN's claims. The Commission's rules indicate that a refund may be awarded from the date of the complaint, "*as acceptable*," was filed. The Amended Complaint was essentially a rogue pleading unauthorized by the Commission and subject to dismissal. As such, the Amended Complaint was not "acceptable" until the Bureau determined in its June 1, 2001 order to permit the filing and treat all pleadings in one proceeding. As illustrated above, the Commission should use the date of the Amended Complaint to measure damages, if any, and the date upon which the Amended Complaint became acceptable was June 1, 2001.

2. The Commission should not impose a forfeiture upon Respondents.

123. RCN's renewed request that forfeiture be assessed against PECO should be denied. RCN has put forth no additional circumstances in its Amended Complaint that would justify the extraordinary remedy RCN suggests. As demonstrated above, PECO's fees as a make-ready contractor do not fall within the Commission's jurisdiction under the PAA. PECO has acted in good faith, and the claims put forth by RCN are, if anything, standard contract disputes that do not warrant the extraordinary measure of the FCC's imposition of fines or forfeiture. RCN's broad request for relief offers no substantial support for the proposition that forfeiture is warranted and none exists elsewhere in the record.

3. The Commission should not grant RCN's request for an interim refund.

124. RCN's request for an interim payment subject to a "true up" upon further review is supported neither by law nor by fact. First, PECO does not believe RCN is entitled to any refund of make-ready fees. If however, the Commission chooses to award damages, RCN's request for interim relief should be soundly rejected. RCN gives no legal support for the proposition that an interim damages payment is appropriate and PECO is unaware of any case in which such a request has been granted by the Commission. Rather, damages, if any, represent adequate compensation when awarded after a final determination of the appropriate level of liability. The Commission is also authorized to award interest on the damage amount, which adequately compensates a party for the time that lapses between the date of entitlement and the date of payment, and serves the function of making them whole without the necessity of funds needlessly changing hands multiple times.

125. As a factual matter, RCN has alleged no facts that would warrant interim relief of any kind. Viewing this request in the nature of a preliminary injunction for the sake of argument, RCN has not alleged that it would suffer any immediate and irreparable harm that would necessitate the provision of immediate funds.

F. PECO's Rate Calculations Are Correct

1. The 5-year Telecommunications Rate Calculation is Correct.

126. As noted above, RCN incorporated the pole attachment rate allegations of its initial Complaint into its Amended Complaint. Accordingly, it has reopened the door for further response to those allegations. In this pleading, PECO does not set forth new arguments as to why RCN's pole attachment rate allegations are incorrect. However, it takes the opportunity to respond to RCN's claim, advanced in its Reply, that PECO's calculation of the telecommunications rate as implemented over the next five years is erroneous.¹⁸³

¹⁸³ RCN Reply at 16.

127. As an initial matter, RCN consistently misidentifies the current rate of \$47.25 as a "telecom" rate charged by PECO and uses that figure to project its speculative damages over the next five years. The identified rate of \$47.25 is not a telecom rate, but rather a market rate based on the character of RCN's commingled traffic including Internet service. In the alternative, however, PECO asserted that it is entitled to the telecommunications rate as calculated in attachment A to its initial Response.

128. RCN, however, claims that PECO's calculation of the telecommunications rate as implemented over the next five years under 47 U.S.C. § 224(e) is erroneous due to the fact that it calculates the year-to-year adjustment by utilizing the difference between the maximum cable rate and the maximum telecommunications rate rather than PECO's current cable rate and the maximum telecommunications rate.¹⁸⁴ PECO's approach, however, is fully consistent with the PAA and the Commission's interpretations thereof.

129. The PAA requires only that "the increase in the rates for pole attachments ... shall be phased in equal annual increments over a period of 5 years" No further guidance is provided. PECO's methodology does just what the statute prescribes, providing a phase in equal increments over the specified five year time frame from the maximum cable rate to the maximum telecommunications rate.

130. Structurally, Section 224(e) builds on and refers to the cable rate as set forth in Section 224(d)(1). Section 224(d)(1) calculates the presumptive maximum cable rate applicable to cable television systems and telecommunications providers prior to February 8, 2001. The maximum rate under Section 224(d)(1) is the only rate that is present in Section 224, and as such it compels the use of the maximum cable rate as the appropriate standard from which to calculate the five year phase in of the telecommunications rate.

131. Under the cable formula, PECO has calculated its maximum permissible rate to be \$28.58, which is just and reasonable by definition under the PAA. PECO's \$9.21 rate, then, is

¹⁸⁴ RCN Reply at 16.

more than just and reasonable, and represents tremendous savings to cable-only attachers. If the phased-in telecommunications rate were intended to be based on the "as charged" rate rather than the statutorily prescribed presumptive maximum rate, it would have effectively motivated the pole owner to charge the maximum cable rate prior to February 8, 2001 to ensure that it could maximize its returns over the phase in period. If this were the case, pole owners who have been charging less than that which is statutorily permitted will be penalized for having been more than reasonable in the past. This could not have been the intended result.

2. PECO Correctly Calculated the Presumptive Number of 3 Attaching Entities.

132. Again, because RCN has reopened the door on its initial allegations by incorporating them by reference in its Amended Complaint, PECO is therefore addressing RCN's allegations that it has failed to correctly calculate the presumptive number of attaching entities for purposes of its pole attachment rate calculations. Additionally, during the pendency of the current proceeding, the Commission issued its *Consolidated Partial Order on Reconsideration* in Docket Nos. 97-98 and 97-115. As such, PECO addresses this order to the extent that it may impact the present controversy and the Commission's decision thereon.

133. Prior to the effective date of the most recent pole attachment order,¹⁸⁵ the Commission had clearly delegated the task of determining the average number of attaching entities for use in the FCC's pole attachment formula to the utility. The Commission noted in doing so that its decision represented the "most efficient and expeditious manner" of developing this information, and that it was the utility that possessed the "familiarity and expertise" in this area to develop the presumptive number of attachers properly.¹⁸⁶ As such, the Commission

¹⁸⁵ In the Matter of the Amendment of Rules and Policies Governing Pole Attachments, CS Docket Nos. 97-98 and 97-115, *Consolidated Partial Order on Reconsideration*, FCC 01-170 (May 25, 2001) (effective 30 days from date of publication in Federal Register).

¹⁸⁶ In the Matter of the Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd. 6777, 6812-13 (1998).

required each utility to determine the presumptive average number of attaching entities based on "the information it possesses."¹⁸⁷

134. PECO developed its presumptive number of attachers according to the Commission's mandate and did so in good faith based on the information in its possession relevant to the inquiry. Its calculations resulted in a presumptive number of 2.33 based on its internal database maintained on the a number of attachments billed and the number of electric attachments present in relation to the number of PECO's poles. Recognizing a delay in the update of database information for new permits and a reasonable margin of error due to potential illegal attachments, PECO calculated a presumptive average of 3.02 and employed this number in its rate calculations.

135. RCN has failed to adequately rebut the presumptive number of attaching entities developed by PECO in good faith and under direction from the FCC's *Post 2001-Order*. The cursory and unsupported observations of Jonathan T. Stinson¹⁸⁸ are admittedly not a statistically valid survey.¹⁸⁹ Mr. Stinson only supports his assertions with his "close personal knowledge of the general situation."¹⁹⁰ This is clearly inadequate to constitute effective or even reliable rebuttal evidence. As such, the presumptive number of 3 attaching entities should be employed to all calculations made for the period of time preceding the effective date of the *Consolidated Partial Order on Reconsideration*.

¹⁸⁷ *Id.*

¹⁸⁸ Reply at Exhibit C.

¹⁸⁹ Reply at n. 23, Exhibit C ¶ 4; *See also*, In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, Docket No. 78-114, *Memorandum Opinion and Order and Second Report and Order*, 72 FCC 2d 59, 69 (1979); In the Matter of the Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd. 6777, 6812-13 (1998); 47 C.F.R. § 1.363(a).

¹⁹⁰ Reply at Exhibit C ¶ 4.

136. Prior to the effective date of the *Consolidated Partial Order on Reconsideration*, PECO has not been required to develop actual data or a statistically sound survey in order to justify its calculations. The new order shifts this burden to the utility in the first instance in order to rebut the newly imposed FCC presumption of 5 attaching entities for urbanized areas and 3 attaching entities in non-urbanized areas for use in the pole attachment formula after the effective date of the *Consolidated Partial Order on Reconsideration*.¹⁹¹ This action marks an unwarranted shift in policy and an enormous shift in the burden placed on the utility in this respect. Obviously, as it has not previously been required to do so, PECO has not had the opportunity to develop a statistically valid survey as defined in section 1.363(a) of the Commission's rules in order to rebut the presumptive number of attaching entities as defined in the *Consolidated Partial Order on Reconsideration*. Therefore, should the Commission choose to make a prospective order in this case that incorporates the *Consolidated Partial Order on Reconsideration*, PECO is entitled to be given the time to develop its rebuttal data. In the interim, the Commission should continue to employ PECO's current, validly calculated presumption of 3 attaching entities, or, at the very least, employ RCN's estimated 3.5 attaching entities until a reasonable time has been permitted for PECO to develop its rebuttal under the new requirement.

3. RCN Should Be Required to Supply Information Relevant to the Rate Calculations

137. While RCN claims that the information that PECO has utilized in Attachment A to its Response is deficient, PECO notes that the information necessary to calculate the appropriate rate for RCN's attachments is lacking in this instance. In order to more effectively facilitate the rate calculations at issue, several facts pertaining to RCN's practices and services

¹⁹¹ PECO does not intend through this discussion to waive any rights to directly challenge the Commission's *Consolidated Partial Order on Reconsideration* in CS Docket Nos. 97-98 and 97-115 (May 25, 2001), under the Administrative Procedure Act or on any other ground in this proceeding or elsewhere.

should be disclosed. Specific information as to the type and nature of service carried over each attachment should be provided to the Commission and PECO, including the combination of service provided. That is, RCN should specifically identify when an attachment is providing cable only, telecommunications only, combined cable and telecommunications, combined telecommunications, cable and Internet services, Internet only and Internet and cable service attachments. Without this information, neither the Commission nor PECO can accurately determine when RCN should be charged the cable rate, the telecommunications rate, or a market rate. RCN should also be required to disclose its status as a reseller of these services, (when it is providing service by reselling the services of other providers) in order to determine when RCN is functioning as a facilities or a non-facilities based carrier. Finally, while RCN indicates that it is not currently utilizing its attachments to provide Open Video System services, this most likely will not be the case for all of the poles to which RCN projects that it will be required to attach. As argued in PECO's initial Response to Complaint, an OVS is definitionally excluded from the protection due to cable television systems under § 224. RCN should therefore be required to disclose when an attachment is part of an Open Video System.

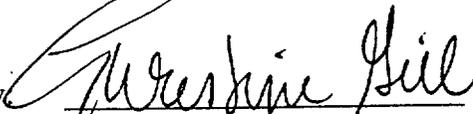
V. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, PECO respectfully requests that the Commission dismiss RCN's make-ready allegations or otherwise rule in PECO's favor in accordance with the foregoing arguments.

Respectfully submitted,

PECO ENERGY COMPANY

By:



Shirley S. Fujimoto

Christine M. Gill

John R. Delmore

Erika E. Olsen

MCDERMOTT, WILL & EMERY

600 13th Street, N.W.

Washington, D.C. 20005-3096

202-756-8000

Its Attorneys

Dated: June 18, 2001

INDEX TO ATTACHMENTS

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

In the Matter of)	
)	
RCN TELECOM SERVICES OF PHILADELPHIA, INC.)	PA No. 01-003
)	
v.)	
)	
PECO ENERGY COMPANY and EXELON INFRASTRUCTURE SERVICES, INC.)	

**DECLARATION OF
HARVEY DIKTER**

I, Harvey Dikter, pursuant to FCC Rule Sections 1.16 and 1.1407, hereby declare as follows:

1. I am an individual over the age of 18 and am employed by Exelon Infrastructure Services ("EIS") as General Counsel. I am familiar with the facts of this case and have actual knowledge of the facts discussed in this declaration

2. EIS is an infrastructure services company that has operations in several regions of the United States. It is not a utility. EIS is an independent corporate entity, that is 95% owned by Exelon Enterprises Company, LLC and 5% owned by diverse outside shareholders. Exelon Enterprises Company, LLC is 100% owned by Exelon Ventures Company, LLC. The sole member of Exelon Ventures Company, LLC is Exelon Corporation, the parent company of PECO Energy Company ("PECO"). EIS is a holding

company, which in turn owns, directly or through wholly-owned subsidiaries, 46 separate infrastructure, management, construction, engineering and design companies, one of which is EIS of Pennsylvania, Inc. ("EIS of PA"), the company which ultimately performed the make-ready work in this instance. Although EIS is a member of the Exelon Corporation family of companies, it has its own board, officers, and employees and functions as an independent entity.

3. Neither EIS nor EIS of PA owns, administers, or controls the utility poles at issue in this case, and has never done so. Rather, the poles are owned and controlled by PECO. Toward that end, EIS has no say in PECO's policies regarding access to the poles or the performance of curative make-ready on preexisting pole attachment violations. EIS also has no say over how much information PECO provides to attachers regarding the internal cost structure of its pricing policy.

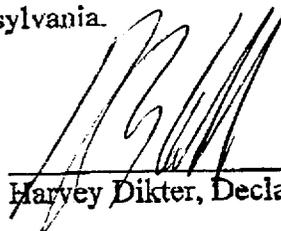
4. PECO itself generally does not perform pole attachment make-ready work on its poles. Rather, it subcontracts that work to an independent company that performs make-ready work, such as EIS. PECO has been subcontracting its make-ready work to EIS's subsidiary, EIS of PA, since approximately November 1999. For projects in which EIS of PA is serving as PECO's make-ready subcontractor, neither EIS nor EIS of PA have contracts with the attacher for the performance of the make-ready work. Rather, EIS of PA charges PECO for the make-ready work, and PECO then invoices the attacher. At no time do EIS of PA's charges go directly to the attacher.

5. RCN Telecom Services of Philadelphia ("RCN") hired PECO to perform make-ready work on PECO's poles. EIS of PA performs RCN's make-ready work as PECO's subcontractor. Neither EIS nor EIS of PA has any contracts with RCN for the performance of this make-ready work. Rather, EIS of PA charges PECO, which in turn invoices RCN.

6. From EIS's standpoint, RCN's primary concern with its buildout appeared to be speed. EIS was under the impression that RCN wanted to "pass" as many homes as possible as quickly as possible. Accordingly, EIS of PA worked as diligently and efficiently as reasonably possible to accommodate RCN's needs.

7. I have reviewed the Response to Amended Complaint of Exelon Infrastructure Services, Inc., and to the best of my knowledge and belief, all the facts stated therein are true and correct.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 15, 2001 at Wilmington, Pennsylvania.



A handwritten signature in black ink, appearing to read "Harvey Dikter", is written over a horizontal line.

Harvey Dikter, Declarant

**Before the
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In the Matter of)	
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RCN TELECOM SERVICES OF PHILADELPHIA, INC.)	PA No. 01-003
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v.)	
)	
PECO ENERGY COMPANY)	
and)	
EXELON INFRASTRUCTURE SERVICES, INC.)	

**SECOND DECLARATION OF
SIMONA S. ROBINSON**

I, Simona S. Robinson, pursuant to FCC Rule Sections 1.16 and 1.1407, hereby declare as follows:

1. I am an individual over the age of 18 and am employed by PECO Energy Company ("PECO") in its Real Estate & Facilities division. My job title is Joint Use Administrator, and my position entails managing the day-to-day process of reviewing and approving applications for attachments to PECO's poles. In addition, I oversee the make-ready work and attachment process. I am familiar with the facts of this case, including the pole attachment agreement between PECO and RCN Telecom Services of Philadelphia ("RCN"). I have actual knowledge of the facts and exhibits discussed in this declaration.

2. PECO has approximately 430,000 poles. RCN has been issued permits to attach to 14,976 of those poles.

3. Companies that have pole attachment agreements with PECO are not required to hire it to perform make-ready work on its poles. Rather, they may hire any make-ready contractor that has employees properly qualified to work on the poles, *i.e.*, that have at least the minimum of the level of training that PECO requires its own employees to have.

4. If the attacher hires PECO to perform the make-ready work, the work will be performed by Exelon Infrastructure Services of Pennsylvania ("EIS"), a subsidiary of Exelon Infrastructure Services and PECO's make-ready subcontractor. If the attacher wishes to use an independent make-ready contractor, there are several such contractors in Pennsylvania, including Henkels and McCoy, Encompass Services Corp., Integrated Electrical Services, and Myr Group.

5. If an attacher wishes to make attachments to PECO's poles, and hire PECO to perform the make-ready work, the process, in summary, is as follows:

- a. The attacher submits an attachment application to PECO.
- b. PECO forwards the application to EIS to perform an engineering survey, which includes identifying the scope of the make-ready work required, if any, and validating the feasibility of the route.
- c. EIS will prepare an estimate of the costs for completing the make-ready work based on its survey and provide that estimate to PECO. PECO, in turn, will generate an invoice reflecting the estimate and present it to the attacher for acceptance or rejection. Each attachment application results in a separate invoice.
- d. If the attacher accepts the fees and pays the invoice, PECO will notify EIS to perform the work.
- e. EIS will schedule and perform the make ready work.
- f. Upon notification to PECO that the work is complete, PECO will issue a permit to place new attachments on the poles.

6. If an attacher wishes to make attachments to PECO's poles, and hire an independent make-ready contractor to perform the make-ready work, the process, in summary, is as follows:

- a. The attacher submits an attachment application to PECO.
- b. PECO forwards the application to EIS to perform an engineering survey, which includes identifying the scope of the make-ready work required, if any, and validating the feasibility of the route.
- c. The attacher's chosen contractor will perform the make-ready.
- d. Upon notification to PECO by the attacher that the work is complete, PECO will issue a permit to place new attachments on the poles.

7. When an attacher chooses to hire PECO to perform its make-ready work, PECO provides it with a final proposed make-ready fee. It does not provide the details of its underlying pricing structure and all the separate components that go into its fee. PECO does not believe it is legally obligated to provide that information and, additionally, believes that making it freely available might aid its and EIS's competitors for make-ready work in gaining a competitive advantage.

8. In the Declaration of Susan Snow attached to the Amended Complaint, Ms. Snow states in paragraph 6 that "RCN was sent Exelon's pricing tools in error." This is also referenced in the Declaration of Terry Roberts attached to the Amended Complaint, where the "pricing tools" are described in paragraph 5 as "a make-ready charge spreadsheet involving another attacher which was mistakenly sent to RCN." I have no idea how RCN could have "mistakenly" obtained PECO's or EIS's pricing information in that manner, because neither EIS nor PECO sends out that information to *any* attachers.

9. Although RCN has had no obligation to do so, it has thus far chosen PECO to do all of its make-ready work. RCN hires PECO to do its make-ready work on a "job-

by-job" basis, with each job generally encompassing multiple poles, so RCN is not locked into any long-term contract or similar obligation with PECO. Rather, it can begin using independent make-ready contractors at any time (except it cannot switch contractors for an application that has been processed). PECO appreciates that RCN has consistently chosen it over other make-ready contractors, and PECO is motivated to assist it in building out its network as quickly as reasonably possible. Toward that end, PECO quickly processes RCN's applications for attachments and takes other steps to assist RCN in meeting its build-out schedule. For example:

- a. To ensure that RCN's build-out schedule is being met, EIS has increased its work force and, until, February 2001, met with RCN once per week to determine which poles RCN wanted to give priority.
- b. For poles where make-ready work may involve unusually high costs, often due to pole change outs for additional height, transformer moves, and primary moves, EIS and RCN undertake joint walk-outs to the poles to determine if a less expensive method is feasible.

10. Since January 2000, RCN has paid PECO approximately \$8.9 million in make-ready fees. Also since that time, PECO has performed make-ready work for RCN pursuant to forty-eight separate invoices.

I declare under penalty of perjury that the foregoing is true and correct. Executed
on June 15, 2001 at Philadelphia, Pennsylvania.



Simona S. Robinson, Declarant

**Before the
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RCN TELECOM SERVICES OF PHILADELPHIA, INC.)	PA No. 01-003
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**DECLARATION OF
MICHAEL A. WILLIAMS**

I, Michael A. Williams, pursuant to FCC Rule Sections 1.16 and 1.1407, hereby declare as follows:

1. I am an individual over the age of 18 and am employed by PECO Energy Company ("PECO") in its Real Estate & Facilities division. My job title is Director, Real Estate & Facilities, PECO Energy Company. I am familiar with the facts of this case, including the pole attachment agreement between PECO and RCN Telecom Services of Philadelphia ("RCN"). I have actual knowledge of the facts and exhibits discussed in this declaration.

2. During the time PECO has been doing make-ready work for RCN, PECO has permitted other companies with pole attachment agreements with it to have the option of hiring contractors other than PECO to do the telecom portion of the make-ready work.

However, PECO would prefer to perform all the make-ready work to sure that it is performed properly. When an attacher decides to hire PECO to do its make-ready work, PECO does not generally perform the work itself due to the volume of the work. Rather, it subcontracts a large portion of the work to Exelon Infrastructure Services of Pennsylvania ("EIS"), a subsidiary of Exelon Infrastructure Services. EIS does an initial review of the poles to determine a make-ready cost estimate for PECO (*i.e.*, what EIS will charge PECO plus PECO's costs), and PECO then prepares an invoice for the attacher based on that information. The attacher then pays PECO directly.

3. Some companies that have pole attachment agreements with PECO have negotiated the right to hire a make-ready contractor with employees that are qualified to work on the poles to complete the telecom portion of the make-ready work. In other words, that have employees that have at least the minimum of the level of training that PECO requires its own employees to have.

4. PECO recoups its make-ready costs (including EIS's fee) solely from the fee it charges the attacher. It does not allocate any make-ready costs to its general pole attachment rate calculation. In other words, PECO does not recoup make-ready costs through its pole attachment rates.

5. In the Amended Complaint, RCN suggests that PECO's make-ready fees are designed to "handicap a competitor of its affiliated telecommunications companies" That is not true; PECO's make-ready fees are not designed to "handicap" any companies, but to provide value in a competitive environment.

6. PECO's make-ready fees are designed to recover its and EIS's costs and provide PECO with appropriate levels of profitability for these services. PECO has always

considered its make-ready fees and policies to be in accordance with the Pole Attachments Act and the FCC's regulations.

7. During the time PECO has been doing make-ready work for RCN, PECO's policy has been to pay for the make-ready work to be done to a pole if one of PECO's attachments is out of compliance with the National Electrical Safety Code ("NESC"). In many instances, however, it is the placement of a new attachment on the pole that triggers the requirement that the pole be modified for NESC compliance. For example, in some circumstances the present attachments to the pole are in compliance with the NESC, but the new attacher would be causing the existing attachments to be out of compliance, so PECO would expect the new attacher to pay the make-ready fees.

8. It is PECO's policy to have all of its poles in compliance with the NESC. What determines compliance with the NESC, however, can only be determined on a pole-by-pole basis by having a complete record of the installation and subsequent history of work on a particular pole. Since the amount of time and effort involved in determining the exact NESC status of a particular pole is extraordinary, and may not even be possible to accomplish, it is PECO's policy to require new attachers to simply bring the pole into compliance with the most current edition of the NESC.

9. If one of PECO's attachments is out of compliance with the NESC, PECO would either correct the violation itself or subcontract to correct it. However, if an attachment is out of compliance with the NESC due to action of another attacher (for example, if a third-party attacher improperly attached a strand), PECO's policy, during the time it has been doing make-ready work for RCN, was to require the attacher causing the problem to be responsible for correcting it. This means that PECO policy would be to contact the attacher and require it to undertake corrective measures by making the correction itself or through a non-utility make-ready contractor, or by paying PECO to

perform the work involved. That process would likely take no more than three to four months. Alternatively, the new attacher could expedite the process by paying the make-ready fee on behalf of the out-of-compliance attacher.

10. PECO believes that its curative make-ready policies are in full compliance with the Pole Attachments Act and the Commission's regulations.

11. PECO strives to fix all violations of which it is aware as soon as reasonably possible. When PECO becomes aware of an out-of-compliance attachment, it schedules the problem to be fixed. The severity of the problem, generally measured by the danger it presents, dictates how quickly it will be fixed. However, given the size of PECO's electric network and the demands such a large network places on its resources, it is impossible to fix all problems immediately.

12. In terms of comprehensively reviewing PECO's poles for possible out-of-compliance attachments, it is virtually impossible to do that based solely on records. PECO would have to examine each pole in person. However, because PECO has approximately 430,000 poles, comprehensively evaluating all of its poles for out-of-compliance attachments would be extraordinarily expensive for its ratepayers and virtually impossible from a standpoint of time and resource allocation. For that matter, even limiting such a survey to all the poles to which RCN may prospectively attach would be extraordinarily expensive and virtually impossible from a standpoint of time and resource allocation (in the Amended Complaint, RCN estimates it may eventually attach to approximately 94,500 poles). Additionally, such a review could only tell PECO whether the pole currently has third-party attachments that are out of compliance with the NESC's spacing requirements. It would be extraordinarily difficult, based on PECO's records, to do a historical reconstruction of whether a pole was out of compliance *before* RCN or another third-party attached to it.

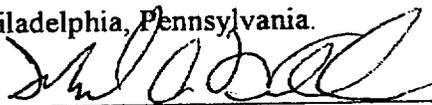
13. PECO strongly disagrees with RCN's estimate that nearly 25% of its poles contain out-of-compliance attachments. PECO's policy is to erect all its poles, and place all its attachments on its poles, in accordance with the NESC. With regard to other companies placing attachments on PECO's poles, a standard clause in PECO's pole attachment (attached as Exhibit A) agreements is a requirement that attachers comply with the NESC.

14. In the Declaration of Marvin Glidewell attached to the Amended Complaint, Mr. Glidewell discusses a situation in which ~~he~~^{he} says RCN paid for make-ready work for a particular pole, but as of March 21, 2001 the make-ready had not been performed. To my knowledge RCN had not brought this situation to PECO's attention. PECO and its subcontractor EIS strive to perform RCN's make-ready in a timely manner. When PECO and EIS become aware of such cases, they act to correct them as soon as reasonably possible.

15. With regard to generally performing RCN's make-ready work in a timely manner, I would note that EIS increased its workforce to accommodate RCN's needs. It also provided RCN with schedules of its planned make-ready work, reports of those poles for which make-ready had been completed, and reports of when the paperwork associated with make-ready had been completed.

16. I have reviewed the Response to Amended Complaint of PECO Energy Company, and to the best of my knowledge and belief, all the facts stated therein are true and correct.

17. I declare under penalty of perjury that the foregoing is true and correct. Executed on June 18, 2001 at Philadelphia, Pennsylvania.



Michael A. Williams, Declarant

EXHIBIT A

the cost of review, the excess may be applied to the cost of make-ready work or will be refunded if no make-ready work is required.

c) If facilities of PECO Energy or others must be rearranged or relocated, or other work done, to make ready for the requested Attachment, Attacher shall be responsible for the cost of such make-ready work. Prior to the start of make-ready work, PECO Energy may require Attacher to pay the costs of such work. Attacher shall send notice to, and obtain any required consents from, other attachers or occupiers of the poles regarding rearrangement of their facilities.

(d) After completion of its review of the application, PECO Energy shall notify Attacher whether the application has been approved or denied. Upon approval of the application, payment of required deposits, and completion of any necessary make-ready work, PECO Energy shall issue a Permit substantially in the form attached hereto as Exhibit B. PECO Energy may include in the Permit such conditions as it deems appropriate.

(e) The Permit when issued shall be accompanied by a bill for rental for each pole to which an Attachment is authorized at the rate specified in Exhibit C attached hereto, pro-rated for the fraction of the year between the date of issuance of the Permit and the date of the next regular semi-annual billing specified in Section 10 hereof. If the costs incurred by PECO Energy in application review and make-ready work are greater than the amounts deposited by Attacher to cover those costs, PECO Energy shall bill for the excess costs.

(f) PECO Energy, or at PECO Energy's discretion, PECO Energy's approved contractor, will install Attachments for Attacher at Attacher's cost on facilities or property of PECO Energy, in accordance with and subject to the provisions of this Agreement and the Permit. PECO Energy may, at its discretion, allow Attacher to install Attachments. The Permit shall terminate if approved Attachments are not made within ninety (90) days from the date of approval of the Permit, unless a written waiver of this provision is granted by PECO Energy or unless such delay is caused by PECO Energy. In the event of such termination, PECO Energy shall have the right to retain any fees or charges paid to PECO Energy on account of such Permit.

3. Construction Specifications. When Attacher is approved to perform work, Attacher shall install, construct, maintain, and remove in accordance with the regulations and specifications of the National Electric Safety Code, latest Edition, or any amendments or revisions thereof, in compliance with any applicable rules, regulations or orders now in effect or hereafter issued by any Federal or state commission or any other public authority having jurisdiction, and in conformity with the requirements of PECO Energy. Such requirements may include but not be limited to approval by PECO Energy of contractors, methods, and hardware to be used by Attacher and establishment by PECO Energy of procedures to be followed by employees and contractors of Attacher when working on PECO Energy property. Attacher shall place identifying markers on its Attachments at each pole in a manner acceptable to PECO Energy.

CERTIFICATE OF SERVICE

I, Gloria Smith, hereby certify that on this 18th day of June, 2001, a single copy of the foregoing "Response to Amended Complaint of PECO Energy Company" was served on the following as indicated:

By Messenger

W. Kenneth Ferree
Chief, Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C740
Washington, D.C. 20554

Kathleen Costello
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C830
Washington, D.C. 20554

William H. Johnson
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C830
Washington, D.C. 20554

Cheryl King
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C830
Washington, D.C. 20554

William L. Fishman
L. Elise Dieterich
Swidler Berlin Shereff Friedman, L.L.C.
3000 K. Street, N.W., Suite 300
Washington, D.C. 20007-5116

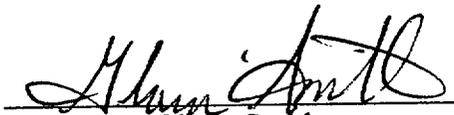
By U.S. Mail

James P. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Louise Fink Smith
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Karen D. Cyr, General Counsel
U.S. Nuclear Regulatory Commission
1 White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738

Marsha Gransee
Office of General Counsel
Federal Energy Regulatory Commission
888 First Street, N.E., Room 10D-01
Washington, D.C. 20426


Gloria Smith
Legal Secretary