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July 9, 2001

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
12th Street Lobby, TW-A325
Washington, D.C. 20554

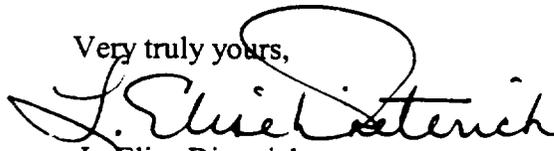
Re: *RCN v. PECO Energy Co. and Exelon Infrastructure
Services, PA No. 01-03.*

Dear Ms. Salas:

Enclosed for filing please find an original and five (5) copies of the Reply of RCN Telecom Services of Philadelphia, Inc. to the Responses of PECO Energy Company and Exelon Infrastructure Services, Inc., to RCN's Amended Complaint in the above captioned case.

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

Very truly yours,



L. Elise Dieterich

Counsel for RCN Telecom Services of
Philadelphia, Inc.

Enclosures

cc: Service List

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

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

REPLY OF RCN

TELECOM SERVICES OF PHILADELPHIA, INC.

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July 9, 2001

SUMMARY

RCN Telecom Services of Philadelphia, Inc. ("RCN") replies herein to two Responses to RCN's Amended Complaint concerning the pole attachment make-ready charges and practices of PECO Energy Company ("PECO") and its affiliate Exelon Infrastructure Services, Inc. ("EIS"). RCN, a competitive telecommunications carrier and cable overbuilder, is building its own fiber optic network in numerous suburban Philadelphia communities. To do so it must attach to thousands of utility poles owned and controlled by PECO. PECO's pole attachment fees are the subject of a pending complaint filed by RCN in March of 2001. In April RCN filed an Amended Complaint in which it alleged that PECO's charges for pole attachment make-ready work were unlawfully high, that PECO refused to provide any cost justification for the charges, and that PECO was unlawfully charging RCN to correct pre-existing safety-code violations on its poles. To date, RCN has paid PECO approximately \$9.7 million for make-ready work.

Based on the sworn statements of individuals experienced in the pole attachment field, RCN described its unsuccessful efforts to get PECO to justify its make-ready charges and alleged that about 25% of the PECO poles in the area in which RCN is building its system have existing safety-code violations for the correction of which PECO insists RCN must pay. RCN noted strong Commission precedent that utility pole owners are responsible for maintaining their poles in compliance with safety codes and that an attacher like RCN could not be charged for make-ready work necessary to bring an already non-compliant pole into compliance with applicable safety codes. RCN sought an order lowering the make-ready fees to a just and reasonable level, directing PECO to correct pre-existing safety-code violations without charging RCN, and determining suitable refunds and/or such other remedies as the Commission considered justified, including a retrospective audit of the state of the relevant poles and PECO's assessment of make-ready charges to prior attachers.

PECO and EIS, PECO's affiliated make-ready contractor, challenge the Commission's jurisdiction to address make-ready charges on the ground that make-ready work is not encompassed by section 224 of the Communications Act, but is instead a "competitive" market function. EIS also contends that, even though it is 95% owned by Exelon Corp., the ultimate parent of PECO, and is an affiliate of PECO, it is an "independent" company, not a utility, and thus is not covered by section 224 even if make-ready performed by a utility falls under the ambit of section 224. Both claim that RCN chose to use PECO for make-ready work rather than one of numerous independent contractors and is bound by its contracts with PECO. If any remedy is available to RCN, says PECO, it is to file suit in state court for breach of contract.

PECO also challenges RCN's claims about the extent of the existing safety-code violations. PECO argues that RCN has not submitted a *prima facie* case, and claims that its poles are maintained in accordance with safety-code standards. PECO also alleges that RCN's Amended Complaint should be dismissed because the pole attachment complaint rules do not permit such a filing. PECO objects to RCN's request for refunds for overcharges pre-dating the filing of the Amended Complaint, and contends that a retrospective audit of its make-ready revenues and practices is unnecessary and impractical. Finally, PECO improperly proffers an effort to supplement its earlier arguments concerning the level of its pole attachment fees, a matter fully briefed in the pleadings filed earlier.

None of PECO's arguments is correct. RCN's Amended Complaint fully complies with the requirement for a *prima facie* showing set forth in the pole attachment complaint rules, as well as with broader definitions in case law. RCN provided sworn statements from five experienced and knowledgeable individuals attesting to the prevalence of safety-code violations on PECO's poles. PECO's own Response reveals that it does not maintain records adequate to characterize the status of its poles, but nevertheless blandly asserts that the problems RCN has

identified do not exist. PECO's nitpicking criticisms of RCN's factual showing are factually erroneous and internally inconsistent. Neither comprehensive knowledge nor statistical sampling of pole data is required to make out a pole attachment *prima facie case*; personal knowledge of informed individuals is sufficient.

The record as it currently stands amply demonstrates that PECO does not know the condition of the poles to which RCN wishes to attach, nor when various prior attachments were made, nor whether such poles are in violation of existing NESC standards. PECO's administration of its poles falls below industry standards, and its claim that it does not bear primary responsibility for maintaining its poles in compliance with NESC's standards is inconsistent with Commission precedent and must be rejected out of hand. Nor is PECO correct that RCN is obligated to bring prior attachments into compliance with the current NESC. That is the obligation of prior attachers and/or PECO, the pole owner. Because RCN has provided a *prima facie* demonstration that approximately 25% of the \$9.7 million it has paid to PECO for make-ready work is attributable to pre-existing safety code violations which are PECO's responsibility, not that of RCN, a retrospective audit by PECO of the relevant poles, and the establishment of a refund period preceding the filing of RCN's Complaint, are fully justified. The contention that make-ready work is beyond the scope of section 224 is inconsistent with the plain language of the statute and is refuted by numerous prior pole attachment decisions in which the Commission has found to the contrary, such as *Cavalier Telephone, LLC v. Virginia Electric and Power Co.*¹ Nothing in the legislative history substantiates PECO's position. Similarly, the contention that the make-ready market is competitive and that the pole-owning utility and the attacher may be presumed to have entered into an arms-length contract ignores FCC precedent

¹ 15 FCC Rcd 9563 (2000), *app. rev'w. pending*.

and fails to consider the realities faced by RCN, *i.e.*, that to use any make-ready contractor other than PECO's own is simply not practical. In fact, RCN was not permitted by PECO to use any make-ready contractor other than EIS itself. To claim that EIS is not covered by section 224 because it is not itself a utility as defined in that section is to ignore that EIS is 95% owned by the same company that owns 100% of PECO. Moreover if utilities could evade their obligations under section 224 by the simple ruse of hiding behind nominally "separate" or "independent" entities, there would be created an opportunity for massive evasions of the law while poles, pole administration, rights-of-way, or other aspects of the subject matter addressed in section 224 were legally shifted to separate corporate entities.

RCN's filing of an Amended Complaint to address make-ready issues, after having filed an Initial Complaint dealing with the level of pole attachment fees, is entirely proper under the rules and the CSB's determination to accept the filing is fully justified. While RCN initially sought to negotiate both issues with PECO it soon became apparent that PECO refused even to consider any lowering of its license fees, but that useful discussions might occur concerning the make-ready issues. RCN accordingly filed its Initial Complaint after narrowing it to the pole license fee issue and sought in further discussions to negotiate an agreement on the make-ready dispute. Only when further meetings proved that the make-ready issues were also beyond private resolution did RCN seek a formal decision by filing an Amended Complaint. By proceeding in this fashion RCN sought to implement the Commissions's strong preference for negotiated settlements rather than for quick resort to litigation. Since both RCN and PECO are parties to both issues it is clearly prudent from the viewpoint of economy of effort to consider both issues in one consolidated proceeding. PECO's claims that it is prejudiced by doing so are highly speculative. The staff's Order accepting RCN's Amended Complaint is well within its discretion and is entirely reasonable.

PECO's illegitimate effort in its Response to RCN's Amended Complaint to buttress its defense of its pole license fees, a matter fully briefed in connection with the Initial Complaint, should not be countenanced, nor should EIS's odd request for a further opportunity to respond to the Amended Complaint. The simple fact is that PECO's prior defense of its pole attachment fees was, even accepting its own numbers, insufficient to justify the \$47.25 RCN has been paying for each pole. Moreover, the Commission's recent Order on Reconsideration² only underscored that PECO's reliance on an unsubstantiated figure of 3.02 attachers per pole in justifying its rates is simply not acceptable.

RCN is fully prepared to pay all legitimate make-ready fees and, since signing a pole attachment agreement with PECO almost 3 years ago, has never withheld payment as requested by PECO, even when RCN believed the charges excessive or legally improper. Like other new competitive entrants, RCN does not have the luxury of unlimited resources, nor, in the present climate, can it afford to wait years for this matter to be resolved. RCN urges the CSB to act quickly to determine RCN's legal rights in principle and then, if further proceedings are required to determine lawful prices or practices, to do so as quickly as possible. In this connection it is important for the Commission to establish substantial financial incentives for PECO to cooperate with the CSB and RCN to quickly resolve the dollar amounts of refunds and the establishment of forward-going charges.

² Consolidated Partial Order on Reconsideration of the Pole Attachment Rules, FCC 01-170, *rel.* May 25, 2001.

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REPLY OF RCN

TELECOM SERVICES OF PHILADELPHIA, INC.

On May 4 , 2001 RCN Telecom Services of Philadelphia, Inc. ("RCN") filed an Amended Complaint in the above-captioned matter concerning a variety of make-ready problems associated with RCN's access to utility poles owned by PECO Energy Company ("PECO"). PECO and Exelon Infrastructure Services, Inc. ("EIS"), collectively "PECO" or "Respondents," filed individual Responses on June 18, 2001.³

³ Respondents' Response would normally have been due 30 days beyond the filing date of the Amended Complaint, or by June 4th, 2001 pursuant to 47 C.F.R. § 1.1407. However, by Order released June 1, 2001, DA 01- 1339, *RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Co. and Exelon Infrastructure Services, Inc.*, the Chief, Cable Services Bureau, granted Respondents' request for a two week extension of time and approved the filing of RCN's Amended Complaint. While Respondents have chosen to file separate Responses — an issue which RCN addresses *infra* at 10-11 — RCN replies herein to both Responses.

In its Amended Complaint RCN raised three make-ready issues: (1) PECO's make-ready charges are excessive; (2) PECO has refused to justify its make-ready fees; and (3) PECO has improperly been charging RCN for make-ready work necessary to put PECO's poles into compliance with industry safety codes. RCN sought a Commission order (1) reducing PECO's make-ready fees to just and reasonable levels, (2) directing PECO to provide detailed invoices to RCN for make-ready charges, (3) barring PECO from charging RCN for curative make-ready, (4) compelling PECO to correct preexisting safety violations at its own expense and in a timely fashion, so as not to further delay RCN's attachments, (5) providing for refunds for past charges which are found to be unlawful, and (6) for such other relief, including the imposition of fines and forfeitures, as the Commission deems appropriate under the circumstances.

Respondents challenge the Commission's jurisdiction over make-ready charges and over EIS and urge the CSB to dismiss RCN's Amended Complaint on procedural grounds. No substantive effort is made to justify the level of PECO's make-ready charges. Instead, PECO argues that RCN was free to use any qualified contractor to do the work, agreed contractually to PECO's charges, and should not be able to "sign and sue." If any suit is justified, PECO claims, it should be a contract action in state court. PECO claims that RCN's Amended Complaint fails to present the required *prima facie* case with respect to the prevalence of safety violations on PECO's poles, denies that PECO bears the principal responsibility for correcting safety violations on its poles, and claims that the pre-existing safety violations RCN is being charged to correct are properly RCN's responsibility. EIS claims that it is beyond FCC jurisdiction because it is only 95% owned by Exelon Corporation, PECO's parent. Finally, harking back to the Initial

Complaint, PECO improperly seeks a second bite at buttressing its prior claim that its license fee calculations comply with Commission rules.

Neither the jurisdictional nor the evidentiary claims withstand close review. Based on the record now before it, the Cable Services Bureau (“CSB”) has all the evidence it needs to grant RCN relief at least in principle from the unlawful make-ready charges imposed on it by PECO. Respondents’ more than 80 pages of argument, which look back to the old-fashioned “pigeon hole” concepts of common law pleading, simply refuse to come to grips with the level of PECO’s make-ready rates: not one sentence of those 80-plus pages attempts to justify the level of PECO’s make-ready charges, or to refute RCN’s claims that PECO’s make-ready charges exceed industry norms.⁴ Respondents offer neither internal cost support data, nor industry-wide data. Indeed, it is typical of PECO’s approach to this case that, while it admits to having no specific data about the attachment conditions on its own poles, PECO criticizes RCN for not having comprehensive data on such poles.

As RCN has previously noted, through the filing date of its Amended Complaint it has paid PECO more than \$9.7 million in make-ready charges. Expenditures of this magnitude are especially burdensome in an atmosphere of reduced availability of capital to new telecommunications and broadband overbuilders, and at a time when so many CLECs have fallen into bankruptcy or otherwise been unable to fulfill their business expectations.⁵ Funds unlawfully collected from RCN could be better deployed to enhance the build-out of RCN’s

⁴ See RCN Amended Complaint, at 8.

⁵ See, e.g., Yuki Noguchi, *Fiber-Optic Firms Facing Dark Days*, Wash. Post, June 23, 2001, at A01.

competitive telecom and broadband services so as to enlarge the geographic area in which the public has the benefits of competitive telephone, ISP and broadband services. Rapid action toward this end is therefore very much in the public interest and RCN requests that the CSB act on its Initial Complaint and Amended Complaint as quickly as possible.

I. SECTION 224 OF THE COMMUNICATIONS ACT PROVIDES THE FCC WITH FULL JURISDICTION AND AUTHORITY TO REVIEW THE LAWFULNESS OF PECO'S MAKE- READY CHARGES

PECO contends that section 224 of the Communications Act⁶ does not encompass a utility's make-ready charges because such charges are not a "rate, term, or condition" of pole attachments and as such are beyond the scope of the statute. This argument is consistent with PECO's claim in responding to the Initial Complaint that the FCC lacks jurisdiction over the license fees PECO charges RCN,⁷ but is no more persuasive than such earlier contentions. In fact, it flies in the face of numerous prior decisions of the CSB and of the Commission. The related contention that EIS is not subject to section 224 even though it is an affiliate of PECO because it is only 95% owned by the entity which owns PECO, is, if anything, even less persuasive.

⁶ 47 U.S.C. § 224.

⁷ PECO Response to Initial Complaint, at 17.

A. The FCC Has Full Authority To Regulate Make-Ready Charges

Although it is widely known that the utility industry believes the FCC's jurisdiction over pole attachments is limited by a variety of factors,⁸ PECO adds a page to the utilities' play book by making the bold assertion that the Commission lacks jurisdiction over make-ready charges and practices.⁹ Reduced to essentials, PECO argues that such make-ready activity is not a rate, term, or condition of an attachment, and is therefore beyond the literal language of section 224(b)(1). There are numerous fallacies in this argument.

First, PECO's interpretation of the statute is narrow and mechanistic. Because the provision of make-ready work is in so many cases part and parcel of the provision of pole attachments, it is logically incorrect that such work is outside the scope of the statute when performed by the utility which owns the poles. When PECO tells RCN that it can attach to a PECO pole only when it has satisfied certain preconditions involving the wiring already on the pole, that is, performed certain make-ready work, and PECO is prepared to provide such work, it is simple common sense that such work is an integral part of the process of procuring and using a pole attachment. PECO's assertion to the contrary is simply nonsensical. Stated another way, when a utility undertakes to provide services which it has found to be essential to permit an

⁸ See *Gulf Power v. FCC*, 208 F.3d 1324 (1999), *stayed pending Supreme Court review; pet'n for cert. granted sub nom FCC and U.S. v. Gulf Power Company, et al*, Jan. 22, 2001.

⁹ PECO Response, at 13-14.

attacher to have access to its poles, it is entirely reasonable to conclude that such activity falls well within the ambit of the provision of such attachment.¹⁰

PECO itself admits that section 224(b)(1) can be read to mean that the “Commission shall regulate the rates, terms, and conditions *for attaching to poles.*”¹¹ RCN agrees, and this should be sufficient to reject PECO’s strained reading of section 224. PECO’s citations to the legislative history of section 224 of the Act demonstrate nothing to the contrary. Statutes must be read with their overriding purpose in mind. *See, e.g., Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990) (when construing a statute the court considers the “provisions of the whole law” including “its object and policy”). There is no ambiguity in the statute. As noted above, make-ready charges are simply part of the attachment process. Even if there were an ambiguity in the statute, the Commission’s interpretation of its own organic law is entitled to

¹⁰ The intimate relationship between pole attachments and make-ready work is self-evident and can be illustrated in many ways. Among these is the recognition in the Commission’s decisions that make-ready work may be accounted for by a utility by including it in the license fee through an overall maintenance or similar account, or by charging attachers individually for specific work. Utilities may not, however, charge attachers through both devices for the same work. *See, e.g., Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd 4387 at ¶ 44 (1987). In the same Order, the Commission noted that it will give close scrutiny in individual complaint cases, *inter alia*, to “unreasonable make-ready costs.” *Id.*, at ¶ 76 n.44. PECO contends that its make-ready charges are not included in its license fees. PECO Response, Declaration of M. Williams at 2. However, it has not met its burden to “demonstrate that there is no double recovery in the fees.” *Cavalier Telephone, LLC v. Virginia Electric and Power Co.*, 15 FCC Rcd 9563 (CSB 2000), at ¶ 22. Moreover, PECO’s unsubstantiated assertion raises a number of questions which require further analysis, including how PECO recovers from its attachers for the costs of make-ready it does on its own initiative or where the responsible attacher has declined to make payment. Further, does PECO provide its administrative and overhead services rendered in connection with make-ready work at no cost to attachers?

¹¹ PECO Response, at 16 (emphasis in original).

considerable weight. *See Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-3 (1984) (if statute is ambiguous court must defer to any reasonable construction of the statute offered by the Commission.)¹² Indeed, given the expansive reading of the statute which the Commission and Department of Justice are urging on the Supreme Court in the pending pole attachment litigation,¹³ no further judicial authority need be marshaled here for the proposition that section 224 is to be broadly, rather than narrowly, construed.

In addition, of course, there are numerous prior cases in which the Commission has construed the statute to encompass make-ready charges, even if, in some such instances, it did not specifically address the issue of its legal authority to consider make-ready charges or practices because the respondent didn't challenge the Commission's authority. These proceedings are well known to the CSB, and RCN will not dwell on them at length.¹⁴ Reference should be made, however, to *Cavalier Telephone, LLC v. Virginia Electric and Power Co.*, 15

¹² *See also TRT Telecommunications Corp. v. FCC*, 876 F.2d 134, 146 (D.C. Cir. 1989).

¹³ *See Gulf Power v. FCC*, 208 F.3d 1324 (1999), stayed pending Supreme Court review; *pet'n for cert. granted sub nom FCC and U.S. v. Gulf Power Company, et al.*, Jan. 22, 2001.

¹⁴ *See, e.g.,* Notice of Proposed Rulemaking, *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 12 FCC 11725 (1997) at ¶ 5, defining the statutory term "incremental costs" appearing in § 224(d)(1) as including "pre-construction survey, engineering, make-ready and change-out costs incurred in preparing for cable attachments." (Emphasis added, footnote omitted.) To the same effect *see also* Order, *Implementation of Section 703 of the Telecommunications Act of 1996 Amendments and Additions to the Commission's Rules Governing Pole Attachments*, 11 FCC 9541 (1996) at ¶ 5. That the Commission considers make-ready charges an intimate element of pole attachment procedures is evident also in *Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453 at ¶ 7 (In arriving at an appropriate rate, attaching entity should not be charged twice for the same costs, "once for make-ready costs and again for the same costs" reported in the corresponding pole account.)

FCC Rcd 9563 (CSB 2000), *app. for review pending*, in which the Complainant contended that it was being charged a fully loaded labor rate for make-ready work through the utility's addition of a 10.5% "margin of error" surcharge. Finding that "the components of the surcharge remain a mystery and Respondent fails to provide any evidence that justifies the surcharge percentage," the CSB ordered the utility to calculate its actual make-ready costs and reimburse Cavalier for any excess charges. *Id.*, at ¶ 29.¹⁵

More broadly, the *Cavalier* decision held that an attacher may not be "required to reimburse a utility in excess of the actual costs of make-ready or pole change-out work necessitated by Complainant's attachment." *Id.*, at ¶ 12. Nor can an attacher be required to pay for the costs of other attachers' safety violations. *Id.*, at ¶¶ 13 and 16. Indeed, at ¶ 16 the CSB noted that the "Respondent must reimburse Complainant for any payments made to Respondent to correct other attachers' safety violations. It is up to Respondent to require other attachers to reimburse Respondent or otherwise pay for corrections of safety violations."

This precedent is germane to the present circumstances, and demonstrates that the Commission not only asserts jurisdiction over make-ready charges, but requires that they, like attachment fees, be based on the utility's costs, that such costs should not encompass the addition of unjustified "mark-ups," exactly what RCN alleges PECO is doing in this case and PECO has carefully not denied, and that one attacher may not be charged to correct the safety code violations created by the attachments of others.

¹⁵ In one of the formal ordering clauses, at ¶ 36, Respondent was ordered to "provide to Complainant (1) an explanation and documentation for all invoices for engineering, make-ready and similar work performed by Respondent on Complainant's behalf" and access to any relevant internal records.

Perhaps recognizing that the law is against it on this issue, PECO cites Chairman Powell's recent Congressional testimony alluding to the need to rely on market forces and to avoid expanding FCC regulation.¹⁶ RCN has no quarrel with this view but suggests that it is irrelevant to the present controversy because FCC jurisdiction over the provision of pole attachments by utilities is as clear in the law as it could be, as is the Commission's long-standing view that such jurisdiction encompasses make-ready controversies. Nothing in the testimony cited by PECO or, to RCN's knowledge, any other remarks the Chairman has made suggest that the Commission can abnegate or disregard the regulatory responsibilities Congress has already given it.

Because PECO has, in effect, refused to abide by the pole attachment rules in regard to its make-ready charges, the Response contains none of the data justifying PECO's make-ready fees, as it should have.¹⁷ Accordingly, the CSB should immediately issue an order compelling PECO to explain its charges, both in respect to the level of the charges, and the constituent elements on which they are based.¹⁸

¹⁶ PECO Response, at 14. RCN notes that Chairman Powell, in the same statement, promised "strong and effective enforcement of truly necessary" existing regulations, such as section 224.

¹⁷ 47 C.F.R. § 1.1404(k). *See also Alabama Cable Telecommunications Assoc., et al v. Alabama Power Company*, FCC 01-181 *rel.* May 25, 2001 at ¶ 4 ("If it has not already done so, a utility shall provide the required information in response to the Complaint.").

¹⁸ RCN does agree, however, that when a firm which is not a utility and is unaffiliated with a utility performs make-ready work the FCC has no jurisdiction over that entity or its charges because that entity, not being a utility as defined in subsection 224(a)(1), is not covered by the statute. That, however, is simply not the case in this proceeding and is accordingly irrelevant.

B. The FCC Has Full Authority Over EIS' Make-Ready Charges

Closely connected with PECO's contention that the Commission has no legal authority to review the lawfulness of make-ready charges and practices, is the contention that it has no jurisdiction over EIS.¹⁹ PECO and EIS contend that because EIS is only an affiliate of PECO, its charges and practices are beyond the Commission's reach. EIS is a wholly-owned subsidiary of Exelon Infrastructure Services, which in turn is 95% owned by Exelon Corporation, the entity which owns 100% of PECO.²⁰ It is simply absurd to suggest that because PECO's affiliate is 5% owned by interests other than Exelon and is not directly owned by, or the owner of PECO, it is beyond the Commission's reach as an integral part of a utility enterprise.

EIS claims to have an "independent" board, officers, and employees.²¹ With Exelon owning 95% of EIS through intermediate wholly-owned subsidiaries, the "independence" of EIS is likely to be quite limited. Even PECO's own employees recognize the artificiality of claiming that EIS is independent. Simona Robinson, at p. 2 of her Second Declaration, notes that if an attacher does not wish to use EIS but an "independent contractor," there are several available.²²

¹⁹ PECO Response, at 14; EIS Response, at 9.

²⁰ EIS Response, at 5.

²¹ EIS Response, Declaration of H. Dikter at p. 2.

²² *See also* Declaration of S. Robinson at p. 3 to the same effect. Indeed, Respondents themselves find it difficult to maintain the fiction that EIS is an independent entity. Although the independence of EIS is asserted throughout Respondents' arguments, *e.g.*, PECO Response at 9, and EIS Response at 5, EIS is characterized repeatedly as an affiliate of PECO. *See, e.g.*, EIS Response at 11. PECO also alludes to its [own] provision of make-ready services, Response at 14, to PECO's not requiring RCN to utilize PECO for make-ready, Response at 19, to the adverse effects of FCC regulation of "PECO's make-ready rates," Response at 19, and speaks of recouping its make-ready costs and its engagement to perform make-ready work, Response at 28.

Realistically, Respondents' claims about EIS' independence exalt form over substance, and would, if adopted as an operative principle, permit enormous mischief.²³ Even if it were the case – and it is not – that EIS itself were beyond the Commission's jurisdiction, PECO's contention would still be nonsensical because in this instance EIS is functioning as an agent or subcontractor of PECO. Again, if all that were necessary to shield utilities from section 224 is to create legalistic distinctions, the way would be open to massively evade the intent of the law.²⁴

The contention that regulating contractors doing make-ready work who are utility affiliates while leaving independent contractors unregulated would poison the market for such affiliated entities is both speculative and beside the point. Whether such asymmetrical regulation would have the effect about which PECO speculates is uncertain. Affiliated contractors like EIS enjoy tremendous advantages in working with utilities and attachers, as PECO acknowledges,²⁵ and whether such advantages would balance or overbalance the limits imposed by regulation is

²³ Utilities, for example, could shift ownership of their poles or rights of way into affiliates not directly in the vertical ownership chain, or having some small percentage of non-utility ownership and then seek to avoid application of section 224. Neither PECO nor EIS cites any case law to support such a proposition and the mere assertion that such a result can occur violates common sense.

²⁴ The imposition of “unbalanced regulatory requirements” on entities possessing market dominance is hardly novel. *See, e.g.*, 47 U.S.C. §§ 251-276, and 47 C.F.R. § 76.1503(c)(2)(B)(iv) imposing on OVS operators the obligation to share internal data with entities which may in some cases be deemed local competitors.

²⁵ PECO Response, at 3.

simply not knowable. But even if it did, the remedy is not to free an integral part of the utility from regulation; it is to ask Congress to change the law.²⁶

PECO also contends that if its affiliate's provision of make-ready services were subject to regulation while that of independent competitors were not, a 5th amendment violation would exist.²⁷ This argument is easily dismissed. It is clear that regulation need only provide the regulatee a reasonable opportunity to earn a fair return on its investment to pass constitutional muster.²⁸ Neither the Commission nor RCN expects PECO to provide make-ready services below cost, including a fair return on the capital invested in the provision of such services. For a regulated utility no more is constitutionally required.

PECO also objects to the application of section 224 to its provision of make-ready services on the ground that the Commission's license fee formula does not address make-ready charges and no rules exist for calculating lawful make-ready charges.²⁹ Neither point is persuasive. The statute sets forth the standards for determining what constitutes just, reasonable, and nondiscriminatory rates in section 224(d)(1), and make-ready rates are, as suggested above,

²⁶ Among the more trivial objections to FCC jurisdiction in Respondents' pleadings is the EIS contention that RCN has violated 47 C.F.R. § 1.1404(k) by not meeting with EIS. (EIS Response, at 18.) Inasmuch as EIS is no more and no less for present purposes than an affiliate or agent of PECO, this allegation is legally irrelevant. It bears noting, however, that EIS representatives did in fact participate in discussions concerning make-ready work and in two negotiating sessions with RCN and PECO, and make-ready charges were the subject matter of the meetings. See Appendix A hereto, Statement of Terry Roberts, at 1, and Appendix B, Statement of Marvin Glidewell, at 5.

²⁷ PECO Response, at 28.

²⁸ *Galveston Electric Co. v. City of Galveston*, 258 U.S. 388, 401 (1922).

²⁹ PECO Response, at 21.

included within the ambit of such rates. Nor is it necessary that there be a specific formula in existence to determine what constitutes a just and reasonable rate. The plethora of prior instances in which the issue of make-ready charges has been addressed should have put PECO on notice that its make-ready charges were subject to Commission review.

There is nothing in the cases cited by PECO to substantiate its claim that application of the statutory standards to make-ready charges would constitute unlawful retroactive rulemaking. In *Bowen v. Georgetown University Hospital*, 488 U.S. 204, the Court simply held that the Medicare Act under which the Secretary of HHS attempted by rule retroactively to deprive health care providers of certain Medicare payments did not authorize such retroactivity. Because the instant Complaint is, manifestly, an adjudication and not a rulemaking, the *Georgetown University* case, as well as others cited by PECO, is irrelevant for that reason as well.³⁰ Certainly

³⁰ Indeed, PECO's citation of the *Georgetown University* case exhibits a high degree of confusion. The language quoted in PECO's Response at 21 appears in the concurring, rather than majority, opinion. More importantly, the thought set forth in the quotation makes no sense at all and is plainly wrong. This is attributable to PECO's omission from the quotation of the important qualifying phrase "announced in an adjudication but" after the opening words "A rule of law." When fully and accurately quoted, the language cited by PECO announces the manifestly correct proposition that a rule of law with prospective effect only cannot be binding unless it was adopted in a proper rule making. This says nothing about the binding effect on future adjudications of a result adopted in a properly held adjudication and indeed the common law notion of *stare decisis* would suggest that such a result would be binding on a future case. Even if the inaccurately quoted language is taken at face value, it is simply not relevant to the present circumstances since it is addressed to "a rule of law with exclusively prospective effect..." But that is not what RCN seeks here: it seeks a simple adjudication under § 551(7) of the APA, 5 U.S.C. § 551(7), finding that rates previously charged by PECO to RCN were unlawful. There is no rulemaking element in this proposal; RCN is not seeking and is indifferent to, the development of a rule promulgated under § 551(4) of the APA governing make-ready charges. No rule is necessary; each case can be adjudged on its merits applying the statutory standards of § 224 (d)(1). To be sure, adjudications have retroactive effects – virtually by definition – but that does not invalidate them under the Communications Act, the APA, or any judicial holding known to RCN.

the Commission could have adopted a formula for judging the lawfulness of make-ready charges, but it was not obligated to do so, and the failure to do so does not in any way impair its ability to consider PECO's make-ready rates and practices. RCN has challenged the specific rates charged by PECO and EIS, and alleges that they are unlawfully high, excessive by industry standards, not accompanied, as they should be, by full justifications, and erroneous with respect to the correction of pre-existing safety-code violations. The lawfulness of the make-ready charges and PECO's refusal to provide detailed accounting for the charges can be adjudicated based on the data supplied in this record once PECO is compelled by CSB order to justify its charges based on costs and the applicable statutory standard. Provided only that the result complies with the statutory definition of a just and reasonable rate, no further procedures are necessary, and no procedural or constitutional challenges would be justified.³¹

II. THE FILING OF AN AMENDED COMPLAINT IS CONSISTENT WITH THE COMMISSION'S POLE ATTACHMENT RULES AND HAS BEEN APPROVED BY THE CABLE SERVICES BUREAU

PECO contends that RCN's filing of its make-ready charges in an amended complaint violates the pole attachment rules, and is unauthorized. However, there is no provision in the pole attachment complaint rules which can be fairly read to bar the filing of an amended complaint. Filing such an Amended Complaint in the present circumstances makes eminently

³¹ RCN notes with dismay that since PECO has chosen to straight-arm the Commission by providing not one word or datum of justification for its make-ready rates, further proceedings will be necessary to adjudicate the issue, such as those contemplated in 47 C.F.R. § 1.1411 and § 1.1409. The delays these proceedings will generate, and which were easily foreseeable by PECO in deciding not even to attempt to justify its rates, should weigh in the balance when the Commission considers the relative equities of the parties in reference to the fashioning of a remedy.

good sense, is consistent with the Commission's preference for negotiated settlements of pole attachment disputes, and causes no prejudice to Respondents. Even if all the foregoing were not true, the CSB staff has already considered the matter on its own motion, and approved RCN's filing.

A. Amended Complaints Are Consistent With The Rules

Inasmuch as the CSB has already approved the filing of RCN's Amended Complaint, even after criticizing RCN for failure to seek leave to make such a submission, it is not necessary to tarry long on PECO's argument. Nevertheless, so that the record adequately reflects RCN's response to PECO's request to disregard the Amended Complaint because it violates the rules, RCN submits a brief reply to PECO's allegations. There is nothing in the pole attachment rules which bars the filing of an amendment to a pending complaint. It is true that the rules set forth the specific kinds of filings which are contemplated, and provide that no others will be accepted.³² On the other hand, an amendment to a complaint can reasonably be considered in the nature of a supplement to a pending complaint, rather than, *e.g.*, an unauthorized answer to a reply, or any sort of motion for special relief, such as for discovery.³³

³² 47 C.F.R. § 1.1407.

³³ It is ironic that PECO and its parent Exelon, which pose as sticklers for procedural good behavior, have filed a Motion to Dismiss RCN's Initial Complaint — a motion of the sort forbidden by the pole attachment complaint rules. Indeed, even PECO appears to believe that the filing of an amended pole attachment complaint to remove Exelon as a party would be procedurally proper. *See* PECO Response, at 4.

PECO cites to section 1.727(h) of the rules,³⁴ which bars the filing of amended complaints in the context of common carrier complaints filed under section 208 of the Act. Far from buttressing PECO's argument, however, the presence of such a specific ban in the context of common carrier complaints merely highlights that when the Commission wishes to specifically bar amended complaints it knows how to do so, and plainly has not done so here. *Inclusio unius est exclusio alterius*. Moreover, there are specific reasons for barring amended complaints in the context of common carrier proceedings which are inapplicable to pole attachment complaints. These include the need to meet statutory deadlines imposed by sections 208, 260, 271 and 275 of the Act, none of which are applicable to pole attachment complaints.³⁵ In deciding to prohibit the filing of amended common carrier complaints the Commission noted that if such a prohibition is troublesome for a complainant, it has the option of filing suit in federal court under section 208 of the Act, invoking the substantive provisions of the Communications Act.³⁶ Pole attachment complainants do not have that option.

B. The Filing Of An Amended Complaint In This Proceeding Is Entirely Proper

Apart from the rules themselves, which are silent on the subject of amended complaints, there is every good reason to encourage such filings when doing so advances the Commission's

³⁴ 47 C.F.R. § 1.727(h).

³⁵ See *Implementation of the Telecommunications act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 12 FCC Rcd 22497 (1997) at ¶ 9.

³⁶ *Id.*, at ¶ 243.

important policy goal of encouraging negotiation and voluntary settlements.³⁷ As RCN has already indicated in its Amended Complaint, its difficulties with PECO were bifurcated after it became apparent in a meeting with PECO that progress might be made in negotiating make-ready charges but that no progress could be expected in regard to the level of the attachment fees.

In the attached Appendix A, Terry Roberts indicates that initially RCN drafted its complaint to encompass both the level of the attachment fees and the make-ready issues but after a March 7, 2001 meeting attended by representatives of PECO and RCN, decided to immediately file the pole attachment fee complaint because it was clear that there was no possibility of resolving the matter short of formal litigation. By contrast, it appeared that further discussion with PECO might lead to a negotiated resolution of the make-ready issues.³⁸ Accordingly, the latter were removed from the complaint as initially drafted and then filed subsequently as an amendment, when further discussions appeared to be at a dead-end.³⁹ This election to withhold some of the issues as to which further negotiations were to be held is fully consistent with, and indeed virtually dictated by, the Commission's strong policy favoring negotiated settlements. Were RCN to be penalized for having followed that course, future potential complainants would be less likely to persevere in private negotiations.

³⁷ See, e.g., Notice of Proposed Rulemaking, *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 12 FCC 11725 (1997) at ¶ 12.

³⁸ Cf. *Cable Texas, Inc. v. Entergy Services, Inc.*, 14 FCC Rcd 6647 (CSB 1999) at ¶ 19 ("The filing of the Complaint was delayed because CTX observed our preference for negotiated settlement of disputes.") (footnote omitted).

³⁹ Appendix A, Statement of Terry Roberts, at 2.

C. The CSB Staff Has Correctly Approved The Filing of RCN's Amended Complaint

Even if all the foregoing were not correct, the matter is moot since the CSB issued an order on June 1, 2001, approving the filing of RCN's Amended Complaint.⁴⁰ PECO notes that it was given no opportunity to address the issue and objects to the CSB's determination to accept the Amended Complaint. As RCN has demonstrated above, however, the CSB's determination is entirely sound, and well within its discretion to control the conduct of its own proceedings.⁴¹ It is difficult to see how the filing of a second initial Complaint would have made any significant difference to the Respondents. Moreover, requiring the filing of a new Complaint, followed by a motion to consolidate the two, would actually have required additional filings by all the parties, and burdened the staff with additional material which would not directly contribute to a quick substantive resolution of the disputes.⁴² As an administrative agency the Commission enjoys the flexibility to conduct its proceedings in a relatively informal fashion, provided only that it adheres to its organic statute, its own precedent, the Administrative Procedure Act,⁴³ and

⁴⁰ See n.3, *supra*.

⁴¹ While RCN fully supports the CSB Order, it, like PECO, would have liked an opportunity to address certain of the matters raised in the Order. The filing of an Amended Complaint, for example, was intended to be consistent with staff guidance rather than to disregard such guidance, as suggested in the Order.

⁴² It is ironic that Respondents, who emphasize the alleged "awkwardness and inefficiency" created by RCN's bifurcation of its Complaint, PECO Response, at 5, have seen fit to file two largely repetitious Responses to the Amended Complaint.

⁴³ 5 U.S.C. §§551 *et seq.*

applicable judicial precedent. PECO makes no allegation that any of these was violated by the CSB's decision to accept RCN's Amended Complaint, nor could it.

In fact, it is one of the most desirable aspects of administrative law that proceedings can be fashioned to a substantial degree on an *ad hoc* basis. While PECO seems unduly enamored of the common law pigeon-hole approach to litigation, the Commission need not fall into a frame of mind which is anathema to administrative litigation. As the CSB has previously observed, the pole attachment complaint process is intended to be "simple and expeditious."⁴⁴ PECO's comparison of the acceptability of an amended complaint here and under the Federal Rules of Civil Procedure is hardly persuasive. Even the Federal Rules, more flexible than common law pleading, are not necessarily a compelling precedent for the Commission to follow. Indeed, if the Federal Rules governed this proceeding RCN would have long since taken advantage of the pre-trial discovery provisions to obtain data from PECO's internal files, something which it cannot do in the present context unless and until the CSB authorizes the use of discovery. Under the Federal Rules, of course, as in the present context, the Court has wide discretion to fashion procedural rules to the exigencies of circumstances.⁴⁵ For all these reasons PECO's claim that an amended complaint would be barred in federal court because it has already served its Response is of little persuasive power in the present context.

⁴⁴ *Texas Cable and Telecommunications Assoc. v. GTE Southwest Incorporated*, 14 FCC Rcd 2975 (1999) at ¶ 11.

⁴⁵ *See Building Owners and Managers Assoc. v. FCC*, No. 99-1009 (D.C. Cir., July 6, 2001), *slip op.* at 5 (Communications Act directs the Commission to perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions).

The only substantive objection PECO can muster to the receipt of the Amended Complaint is the claim that it prejudices PECO because it creates the possibility of the refund period beginning to run from the date of the initial Complaint (March 16, 2001) rather than from the date the Amended Complaint was filed (May 4, 2001). RCN does indeed urge the CSB to order refunds at least back to the date of the Initial Complaint. However, this would not constitute prejudice to PECO since the filing of the Complaint in two parts, as explained above, was in lieu of initially raising all of RCN's concerns in the Complaint filed on March 16th, 2001. Moreover, RCN has asked the Commission to set the initial date for calculating refunds back to the time at which RCN initially raised its concerns with PECO.⁴⁶ If that relief were to be granted, the delay of some 49 days in filing the Amended Complaint would be irrelevant.

In sum, the filing of RCN's Complaint in two parts is consistent with the Commission's pole attachment complaint rules, respects the Commission's preference for negotiated solutions, introduces no prejudice to PECO, and is in every other respect preeminently sensible. The CSB's decision to accept the Amended Complaint is a sound exercise of the staff's discretion and PECO has failed to show the contrary.

III. AS A PRACTICAL MATTER RCN HAD NO CHOICE BUT TO AGREE TO PECO'S MAKE-READY TERMS

PECO premises much of its argument, both in regard to FCC jurisdiction, and in respect to the reasonableness of the charges levied by PECO for the work of its affiliate EIS, on the contention that RCN was free to hire any qualified make-ready contractor. Having chosen to use PECO's EIS, it is claimed, RCN is estopped to complain about the charges or the absence of cost

⁴⁶ See RCN Initial Complaint, at 22.

justification for the charges: if RCN didn't like PECO's and EIS' practices and prices, it could have simply hired another firm.⁴⁷ The first difficulty with this argument is that it is simply irrelevant. If section 224 governs the make-ready charges of PECO and/or its affiliate EIS, the fact that RCN could have gone elsewhere does not relieve Respondents of their legal obligations. More practically, PECO's argument blinks reality, which is that PECO threw various obstructions in the path of RCN's use of any other contractor, such as slowing down such work and requiring RCN to pay EIS to "check" the work done by another contractor.⁴⁸

A. RCN Had No Viable Alternative To Relying On PECO And EIS To Do Its Make-Ready Work

Much of PECO's argument against the imposition of pricing limits on EIS' charges is premised on the assertion that RCN, having freely chosen to use PECO and its affiliate EIS to do its make-ready work, should not now be heard to challenge the make-ready charges or practices of PECO and EIS. In a truly competitive marketplace there would be some sense to this argument, but the pole attachment marketplace is not at all free, and the proof is that RCN has found it impossible to efficiently use other contractors, even some it preferred, to do its make-ready work. As set forth in Appendix B hereto, the sworn statement of Marvin Glidewell, PECO effectively made it unfeasible for RCN to use any other contractor for its make-ready work:

⁴⁷ PECO Response, at 18.

⁴⁸ PECO also asks why RCN waited until it did to file a Complaint against PECO and EIS if it were unhappy with the charges. PECO Response, at 2. RCN is not aware that litigants are obligated to file suit immediately upon the commencement of difficulties, and public policy suggests that the contrary is true. Moreover, the record shows that RCN made initial efforts to address the make-ready issues many months before the Amended Complaint was filed, but could not get PECO to take such concerns seriously until RCN indicated that the filing of a formal complaint was imminent. *See* RCN Initial Complaint, at 4 and RCN Amended Complaint, at 3.

Although we understood that legally we had the right to hire another contractor, it was clear that doing so would lead to endless difficulties between that contractor and PECO in agreeing on the scope of the necessary work, the time frame in which such work would be initiated and finished, and the asserted need of PECO to review and inspect all such outside contractors' work before allowing RCN to attach.⁴⁹

As a result, notwithstanding its legal right to hire other qualified firms, RCN was, as a practical matter, compelled to use PECO and EIS. Even PECO suggests that RCN selected it for its ability to do the make-ready more quickly than other contractors.⁵⁰ Such superior speed relates to the unparalleled close relationship between PECO and EIS.

B. The Contention that RCN Is Bound By Its Contracts With PECO Is No More Persuasive In This Instance Than In Prior Proceedings

As RCN has previously noted,⁵¹ and as the Commission itself has found on numerous occasions,⁵² contracts entered into with pole-owning utilities respecting rates, charges, or practices, even if cast in the formality of arms-length contracts, are not to be so construed.

Attachers have little or no bargaining power, and the Commission accordingly reserves the right

⁴⁹Appendix B, Statement of Marvin Glidewell, at 1-2.

⁵⁰ PECO Response, at 19.

⁵¹ RCN Initial Complaint Reply, at 18-22.

⁵² See, e.g., *TCA Management Co, et al. v. Southwestern Public Service Co.*, 10 FCC Rcd 11832 at ¶ 15: "In enacting Section 224, Congress recognized the utilities' superior bargaining power in pole attachment matters. To remedy the effects of that superior bargaining power, Congress gave this Commission jurisdiction to hear and resolve complaints regarding pole attachment rates. The only prerequisites to our exercise of that jurisdiction are that the company providing the pole attachments be a 'utility' within Section 224's definition of that term and that no state regulate those attachments." (Footnotes omitted.) See also *Texas Cable & Telecommunications Association, et al. v. Entergy Services, Inc.*, 14 FCC Rcd 9138 (CSB 1999) at ¶ 12 (Commission has repeatedly affirmed the unequal bargaining power of the parties).

to review such arrangements to assure that the terms are lawful or to reform the terms if they are not lawful. In a related vein, PECO suggests that RCN take its make-ready charge and practice allegations to state court and present them as a contract claim.⁵³ But the rationale for the assertion of FCC jurisdiction over pole attachment agreements applies equally to make-ready contracts with utilities: such arrangements, which implicate broad public policy issues set forth in the Communications Act, are not readily justiciable in ordinary civil courts. In this instance, for example, RCN is not urging that PECO has violated the contractual provisions entered into for make-ready work. Rather, it is alleging that those provisions, which were essentially forced on RCN by virtue of PECO's ownership and control of an essential facility, are violative of section 224 of the Communications Act. No civil court is competent to adjudicate such claims, and if RCN had been unwise enough to bring such claims in state court, it would have faced a prompt motion to dismiss for failure to state a claim for which relief could be granted, on jurisdictional grounds, or on a theory of primary jurisdiction.⁵⁴

Finally, with respect to RCN's desire to know on what cost basis PECO and EIS are charging it for various make-ready services, it is striking that Respondents make no meaningful effort to justify the prices or to refute the build-up of such charges set forth in RCN's Amended

⁵³ PECO Response, at 33.

⁵⁴ See, e.g. *In the Matter of Marcus Cable Associates, LP v. Texas Utilities Electric Co.*, 12 FCC Rcd 10362 (1997), in which the Commission held that its authority over pole attachments 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 rates, terms, or conditions." (¶ 10). In this instance it is not the terms of the make-ready contract, but the rates, the justification for the rates, and PECO's attempt to upgrade its poles to NESC compliance at RCN's expense about which RCN is complaining in its Amended Complaint.

Complaint. They merely assert that such prices are beyond the Commission's jurisdiction and therefore need no justification or explanation. In such circumstances, RCN notes, its careful analysis of the charging approach, being unrefuted on the record, must be considered to be correct and a finding to that effect is appropriate.⁵⁵

IV. RCN'S AMENDED COMPLAINT MORE THAN MEETS THE REQUIREMENT TO PRESENT A *PRIMA FACIE* CASE

PECO alleges that the Amended Complaint fails to meet the pleading requirement of section 1.1409(b) in that it does not make a *prima facie* case concerning the prevalence of safety code violations on PECO's poles. PECO is simply ignoring the material provided in the sworn statements appended to the Amended Complaint, and misunderstands what constitutes a *prima facie* case.

A. A *Prima Facie* Case Is One Which Is Sufficient To Shift The Burden Of Proof To The Respondent

Section 1.1409(b) of the rules requires that a Complaint contain a *prima facie* showing.⁵⁶ While the meaning of *prima facie* can vary from one context to another, the Commission has defined what it means in the pole attachment complaint context as a complaint which is timely filed, states the grounds given for denial of access, provides the reasons such grounds are unjust or unreasonable, and identifies the remedy sought. It must also be supported by the written

⁵⁵ PECO's Simona Robinson expresses skepticism about RCN's acquisition of PECO's or EIS' pricing information by mistake, as alleged by RCN. PECO Response, Second Declaration of Simona Robinson, at 3. Nevertheless, this is what happened and RCN's assertion is unrefuted on the record. RCN repeats its offer to make the data – which Ms. Robinson implies does not exist – available to the staff.

⁵⁶ See also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996), at ¶ 1223.

request for access, the utility's response, and available information supporting its position.⁵⁷

Making adjustments for the fact that the Amended Complaint does not address access issues, it is apparent that RCN has more than met the applicable pleading standard. In the instant context, RCN has supplied the basic information required, at least to the extent it is able to do so, and RCN's multiple sworn allegations are clearly entitled to serious consideration. Dismissal under such circumstances would not be remotely justified. This is particularly so in administering the pole attachment rules, because the disparity in the position of the respondent utility and the complainant attacher, and PECO's wholesale refusal even to address the merits of its charging structure, should be deemed to shift the risk of non-persuasion to PECO.

RCN has, as noted in the Amended Complaint,⁵⁸ virtually no access to PECO's costing data nor to PECO's pole data other than the limited information PECO provides when an individual license application is filed. Similarly, while RCN is one of the larger overbuilders in the U.S., it simply does not have the financial or manpower resources to conduct massive, systematic reviews of the status of PECO's poles, much less to review the history of such poles. Accordingly, it is entirely reasonable for RCN to present its concerns to the CSB through the

⁵⁷ *Id.* See also 47 C.F.R. §1.1409. More generally, as set forth in *Gencom Inc. v. FCC*, 832 F.2d 171 (D.C. Cir. 1987), in assessing whether a *prima facie* case has been made under section 309(d) of the Act, the FCC canvasses the pleadings and supporting affidavits for concrete factual assertions which, if proved in a subsequent hearing, would alter the Commission's public interest calculus. *Id.*, at 181. The FCC's inquiry is "much like that performed by a trial judge considering a motion for a directed verdict: if all the supporting facts alleged in the affidavits were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established." *Id.* See also, e.g., *Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988); *Citizens for Jazz v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985).

⁵⁸ RCN Amended Complaint, at 9, 11.

testimony of a series of individuals each of whom has considerable industry experience in the pole attachment field, and each of whom, from his or her individual perspective, has proffered sworn testimony about the level of make-ready charges, the status of PECO's poles and the prevalence of safety violations in the relevant communities. It is difficult to know how RCN can reasonably be expected to do more than it has done by way of presenting a case that justifies further Commission investigation or a decision on the merits. If attachers are to have reasonable opportunities to secure relief from the abusive practices of giant utilities like PECO, reliance on carefully crafted sworn statements such as those presented here is a necessity.

B. RCN Has Provided a *Prima Facie* Showing That Safety Violations Abound On PECO's Poles Within RCN's Construction Zone

It is noteworthy that, with its vastly larger resources, PECO chooses to attack RCN's showing only within very limited parameters. Faced with five sworn statements from RCN personnel with substantial experience and credentials in the pole attachment field, PECO contents itself with attacking a few isolated assertions. The cumulative weight of the sworn statements, however, stands as a compelling indictment of the pervasive safety problems which exist on PECO's poles in the communities where RCN is constructing its network. If the Commission were to require a complainant like RCN to conduct detailed, statistically valid samplings, and to review thousands or tens of thousands of individual poles, no complaints would be filed because attachers lack the resources to undertake such massive efforts. Here RCN has proffered reasonably detailed sworn statements from five knowledgeable individuals, none of whose professional credentials or knowledge of the local pole attachment market have been challenged in any way by Respondents, attesting to the prevalence of preexisting safety

violations, in the range of about 25% of the total PECO poles in the areas where RCN has surveyed the poles. This is sufficient to shift the burden to PECO, which, after all, owns the poles and is responsible for their administration, to refute RCN's allegations. Other than a bland and general denial, PECO makes no serious effort to do so.⁵⁹ RCN asserts that on this state of the record, its assertions must be taken as proved.

V. PRE-EXISTING SAFETY CODE VIOLATIONS ARE PECO'S RESPONSIBILITY, NOT THAT OF RCN OR ANY OTHER ATTACHER

A close reading of PECO's contentions dealing with the state of its utility poles, and its knowledge of the state of those poles, indicates that PECO lacks sufficient knowledge to make the sweeping assertions contained in its Response and in fact foreswears ultimate responsibility for the state of its poles.⁶⁰ It has no detailed record of individual poles' work history and cannot determine after the fact which edition of the NESC currently governs any individual pole's attachments or whether a new attachment would create a violation.⁶¹ This lack of knowledge is shocking and should be cause for concern in its own right, entirely apart from RCN's individual

⁵⁹ Nor is this an instance in which Respondents have the impossible task of proving a negative. If the administration of its poles were up to industry standards, PECO would be able to provide aggregate data with respect to the presence of safety violations, its program to address such violations in the future, and its past efforts to do so. Yet no such data, or even a description of any such program or policies, is offered. PECO merely "presumes" its poles are safety-code compliant (PECO Response, Declaration of M. Williams, at 1, *passim*) because it has heard nothing from its attachers to the contrary. In effect, PECO, the owner of some 430,000 poles, does not know what is on them, or the compliance of those poles with safety codes, or who is responsible for any violations which may exist. With all due restraint, this must be characterized as a shocking and very troubling admission.

⁶⁰ PECO admits, Response, at 42, that it has no detailed logs of all the work done on its poles.

⁶¹ PECO Response, at 43.

concerns. There is something ironic about a multibillion dollar utility which has few details about the history of its own physical plant, or what is currently attached to the poles, alleging that RCN should have conducted more thorough studies of the state of PECO's poles. Indeed, given the paucity of its knowledge about its own poles, it is odd that PECO is able to assert that, "In fact, PECO's poles do not suffer from a significant amount of pre-existing violations,"⁶² and "PECO adheres to the NESC..."⁶³

Moreover, the failure to accept responsibility for whatever safety violations exist on its poles simply contradicts the Commission's oft-repeated observation that utilities bear ultimate responsibility for what is attached to their poles.⁶⁴ Because RCN has already set forth the relevant case law in its Amended Complaint,⁶⁵ it will not burden the record with detailed citation here. Suffice it to note that Commission policy in this respect is very clear: it is the responsibility of the utility to police its poles, to correct preexisting violations, and only then to seek recovery of the costs of doing so from attachers who have attached illegally.⁶⁶ PECO's lack of pole

⁶² PECO Response, at 34-35.

⁶³ *Id.*, at 40. This mystery is partially illuminated by PECO's observation, Response at 41, that it "presumes" its poles comply with safety standards.

⁶⁴ *See, e.g., Cavalier Telephone, supra*, at ¶ 16.

⁶⁵ RCN Amended Complaint, at 13.

⁶⁶ *See, e.g., Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, 14 FCC Rcd 11599 at ¶ 19 ("It appears that a number of poles that need replacement violate NESC requirements prior to attachment by Time Warner and the violation of the NESC would not be caused by Time Warner's facilities. Correction of the pre-existing code violation is reasonably the responsibility of KCPL and only additional expenses incurred to accommodate Time Warner's attachment, to keep the pole within NESC standards should be borne by Time Warner."(footnote omitted)).

attachment records is also inconsistent with electric utility industry standards. As set forth in the Declaration of Ed Feloni, Appendix E hereto: “Given that the principal reason for the existence of the NESC is the safeguarding of persons, both lineworkers and the public, it is surprising and disturbing to learn that PECO appears to have very little data, and certainly not comprehensive data, about the status of its poles.”⁶⁷

In its Amended Complaint RCN alleged that PECO representatives had claimed on numerous occasions that PECO lacked budgetary resources to clean up any existing safety-code violations.⁶⁸ Nowhere in the Respondents’ Responses is this assertion denied. In effect, PECO admits that it has no funds allocated to the systematic inspection and removal of existing safety code violations. In yet another effort to evade responsibility for correcting existing safety code violations, PECO contends that what may appear to be such violations may actually not be, because the National Electrical Safety Code (“NESC”) permits conditions to continue to exist which, while in violation of the current code’s provisions, may have been compliant when they initially arose.⁶⁹ PECO complains that RCN has not taken this factor into account in its allegations about the prevalence of safety-code violations.⁷⁰

⁶⁷ Appendix E, Declaration of Edmund F. Feloni, P.E., at 4.

⁶⁸ See, e.g., RCN Amended Complaint, at 3.

⁶⁹ PECO Response, at 41.

⁷⁰ *Id.*, at 42. It is important that the entity with the principal responsibility for the state of PECO’s poles, that is PECO, bear the responsibility for knowing who and what is on its poles; it cannot evade that obligation by attempting to shift it to RCN. This is especially important in the context of the evolution of NESC safety standards. Certainly it is wholly unreasonable to expect RCN to know, or to determine, the history of PECO’s pole attachments. The Commission has particularly noted that selective application of safety standards is not permitted. *Cavalier*

Contrary to PECO's contentions, the RCN personnel who provided testimony in the Amended Complaint are quite familiar with the NESC Code and its provisions concerning the grandfathering of prior arrangements. As set forth in Appendix E hereto, the Declaration of Ed Feloni, PECO seriously misunderstands the NESC and its treatment of previous attachments:

Additionally, the NESC does not allow for perpetual safety violations. There is no provision for grandfathering of violations. Violations that are discovered are required to be remedied at that time, or within a reasonable amount of time. Accordingly, for PECO to claim, as it does, that it adheres (or, as put at 41, "presumes" adherence) to any edition of NESC is simply incorrect. The indisputable fact is that these conditions would be deemed violations of any edition of the NESC, and are therefore correctly characterized by the Statements as safety-code violations or pre-existing violations.⁷¹

Mr. Feloni also agrees that certain attachments observed by RCN personnel would constitute safety violations under any provision of the code and would require prompt correction.⁷²

Moreover, even if it is appropriate for RCN to bear some of the costs of correcting pre-existing safety violations where it is only the occasion of RCN's attachment which requires the pole to be made compliant with current NESC provisions, PECO would nevertheless be responsible for sharing such curative make-ready. As noted by the Commission in its Order on Reconsideration in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 18049 (1999): "A utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed

Telephone, supra, at ¶ 19. Nor can an attacher be charged for engineering work, such as assessing existing attachments, which prior attachers have not been asked to pay. *Id.*, at ¶ 23.

⁷¹ Appendix E, Declaration of Edmund F. Feloni, P.E., at 5.

⁷² *Id.*

to be sharing in the modification and will be responsible for its share of the modification cost.” *Id.*, at ¶ 16 (footnote omitted).⁷³ Accordingly, at a bare minimum PECO is responsible for some portion of these costs, yet they have all been charged to, and paid by, RCN.⁷⁴

Furthermore, the specific criticisms of certain of the sworn Statements are of little evidentiary value. They address relatively limited aspects of the Statements and are in any case inaccurate or misleading. For example, PECO alleges that the pole head sheets attached as an exhibit to Troy Stinson’s statement are unverified.⁷⁵ This is simply untrue. Mr. Stinson refers to the attachments, relies on them, and explains how they were created.⁷⁶ Appendix C hereto consists of his further Statement in respect to these sheets, affirming that he fully sponsors their accuracy. PECO claims that Mr. Stinson should have surveyed a larger number of poles. But as Mr. Stinson noted, he personally reviewed the status of the poles in certain communities of interest to RCN, amounting to some 2,758 poles.⁷⁷ Similarly, PECO alleges that details of the safety code violations were not provided. This simply overlooks the detail contained in the

⁷³ *See also*, ¶ 105 recognizing that utilities have certain updating obligations under NESC, and Appendix E, Declaration of Ed Feloni, at p. 7.

⁷⁴ Interspersed through Respondents’ Response are subtle accusations about RCN’s motives in bringing this Complaint. *See, e.g.*, PECO Response at 2 (contending that RCN has been “aggressive about building-out its network [but] passive with regard to protecting its business interests”). Apart from the irrelevance of such asides, RCN reiterates that it has been trying for some 9 months to get PECO to seriously address these issues, and in spite of PECO’s failure to do so, and the many millions of dollars at issue, RCN has never refused to pay PECO’s make-ready invoices.

⁷⁵ PECO Response, at 35.

⁷⁶ Amended Complaint, Statement of Troy Stinson, at 2.

⁷⁷ Appendix C hereto, Statement of Troy Stinson, at 1.

Sworn Statements of Marvin Glidewell, Troy Stinson, and Arthur Russell.⁷⁸ PECO claims that RCN cannot point to any instances in which it has been delayed by an existing attacher's refusal to pay to correct safety violations attributable to its attachment.⁷⁹ But the explanation for this is simple: RCN has been paying for all identified safety code violations, no matter who is responsible, because PECO has insisted on that procedure.⁸⁰

Equally erroneous is the allegation that RCN's evidence contains hearsay.⁸¹ But perhaps the most trivial of PECO's objections to RCN's sworn statements is that they were supplied by RCN employees and accordingly should be disregarded.⁸² This observation, disqualifying testimony of a party's employees, is truly breathtaking in scope. Clearly, it is patent nonsense, and if it were not, would equally disqualify all of PECO's sworn statements on the same ground. Taken as a whole, PECO's responses to RCN's factual allegations are nothing more than inconsequential and highly selective nitpicking displaying little understanding of the law of evidence in an administrative context. Indeed, apart from the specific criticisms leveled by

⁷⁸ See Amended Complaint, Statements of Marvin Glidewell, at 5-7, Troy Stinson at 1-4, and Arthur Russell, at 2. Mr. Glidewell offered to make available a videotape to substantiate his allegations concerning the status of poles in the town of Folcroft (Glidewell Statement, at 6). RCN will be happy to make that tape available to staff for its review.

⁷⁹ PECO Response at 46.

⁸⁰ RCN Amended Complaint, Statement of Troy Stinson at 2-3.

⁸¹ PECO Response, at 36 and 46. The alleged "hearsay" discussed in PECO Response at 46 is simply not hearsay at all. Mr. Stinson is reporting on what Mr. Williams said in his presence. It is offered to establish what Mr. Williams said, not what other attachers will do when asked to pay to correct attachments.

⁸² PECO Response, at 39. Of course, the status of a party offering views is relevant to the weight to be given such testimony.

PECO against RCN's various sworn statements, it is worth noting that PECO's own evidence fully confirms the major thrust of the various RCN statements, *i.e.*, that PECO does not know which attachers are on which poles, or when such attachments were made, or whether they constitute safety violations.⁸³

VI. COST DATA SUPPLIED BY PECO IN ITS RESPONSE TO THE INITIAL COMPLAINT WAS ERRONEOUS AND INADEQUATE. PECO'S ATTEMPT TO BUTTRESS ITS EARLIER SHOWING IN ITS RESPONSE TO THE AMENDED COMPLAINT IS PROCEDURALLY IMPROPER AND SUBSTANTIVELY UNPERSUASIVE

PECO's Response concludes with an effort to strengthen its earlier filing in which it sought to persuade the CSB that its pole attachment license fees were lawful. PECO had contended that its license fee of \$47.25 per year per pole was justified by its costs.⁸⁴ As RCN noted in its Reply to PECO's earlier Response, the very data supplied by PECO demonstrated that its costs would justify a license fee of only \$32.13.⁸⁵ Moreover, noted RCN, even this level was unjustified because PECO had misapplied the Commission's pole attachment cost formula.⁸⁶ PECO now seeks to buttress its showing by arguing that it has correctly applied the formula. RCN continues to assert that PECO has not applied the formula correctly, and its second attempt to justify its cost calculation is no more persuasive than its first.

⁸³ Compare RCN Amended Complaint, Statement of M. Glidewell at 5-7 with PECO Response, Declaration of M. Williams at 4, ¶ 12.

⁸⁴ PECO Initial Response at 34.

⁸⁵ RCN Initial Complaint Reply, at 16, fn. 29.

⁸⁶ *Id.*, at 17.

A. PECO's Attempt To Reargue An Issue Raised and Addressed In The Initial Complaint Is Procedurally Improper And Should Be Stricken

Although PECO has dwelled at great length on the alleged procedural improprieties of RCN's filing of an Amended Complaint, it is apparently not loath itself to violate the rules by taking a second bite at the apple with respect to an issue raised and fully addressed by the parties in the Initial Complaint. This constitutes an obvious violation of the spirit of the Commission's rules and should not be countenanced. The fact that RCN incorporated by reference the Initial Complaint in its Amended Complaint does not in any way reopen the issue addressed in that Complaint — the level of attachment license fees; it merely sought to clarify that RCN intended its Initial and Amended Complaint to be addressed concurrently and on a unitary basis.⁸⁷ In no way did that incorporation present an opportunity either for RCN or for PECO to reargue matters already presented in the Initial Complaint. Certainly RCN did not do so, and PECO's attempt to slide in further argument which is relevant only to the license fee issue is improper and should not be permitted. RCN therefore suggests that, to preserve the integrity of its processes, the CSB not only disregard but also strike that portion of PECO's Response. In any event, PECO's second attempt to justify its erroneous calculation is no more persuasive than the first.

B. PECO's Further Effort To Justify Its License Fee Charges Is Unpersuasive. Indeed, the Commission's Recently Revised Rules Will Only Lower What Is A Lawful Rate

In addition, PECO seeks to justify its reliance on a claimed figure of 3 attachers per pole to calculate the allocation of pole costs to each attacher.⁸⁸ RCN demonstrated in its Initial

⁸⁷ *Supra*, at 15-18, RCN has explained why doing so is proper in the premises.

⁸⁸ PECO Initial Response, at 34.

Complaint Reply, however, that a minimum of 3.5 attachers per pole was a more accurate estimate.⁸⁹ Subsequently, the Commission released its Consolidated Partial Order on Reconsideration of the Pole Attachment Rules.⁹⁰ In that Order, the Commission revised its rules to specify that in urbanized areas like those in which RCN is building its suburban Philadelphia facilities, the presumptive number of attachers is 5, with the burden on the utility to rebut the presumption.⁹¹ PECO makes no effort to rebut that number, but instead confines itself to suggesting that RCN's estimate of 3.5 attachers per pole is more nearly accurate than the presumptive 5 attachers in the revised rules.⁹² However, Mr. Stinson's sworn statement in RCN's Initial Complaint Reply indicates that 3.5 attachers is a minimum number.⁹³ The burden of rebutting the presumptive number is on the utility, and PECO has not even attempted to do so.⁹⁴ Accordingly, it appears that the appropriate number to use in calculating PECO's per-attacher costs is 5 attachers per pole. Doing so, of course, would even further reduce the cost-based charges to RCN, as set forth in detail in Terry Roberts' Statement, Appendix A hereto, at 3.

⁸⁹ RCN Initial Complaint Reply, at 13.

⁹⁰ *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of The Telecommunications Act of 1996*, FCC 01-170, *rel.* May 25, 2001.

⁹¹ *Id.*, at ¶ 72.

⁹² PECO Response, at 58.

⁹³ RCN Initial Complaint Reply, at Ex. C, pp. 1-2.

⁹⁴ Consolidated Partial Order, *supra*, at ¶¶ 66-68.

VII. INTERIM REFUNDS ARE JUSTIFIED ON THE PRESENT RECORD

PECO objects to RCN's request for a determination that interim refunds are appropriate in the present circumstances.⁹⁵ It objects also to RCN's request that it be required to retrospectively review its make-ready billings to RCN and other attachers to assure that unlawful make-ready charges have not been previously billed to any attacher.⁹⁶ In light of the substantial overcharging which is revealed on this record, RCN believes that such relief, and such obligations, are entirely appropriate. However, these are matters of equitable relief and are certainly within the CSB's discretion to grant, in whole or in part, to suit the ends of justice. Nevertheless, it is startling to learn that PECO literally does not know who or what is on its poles, or when any such attachments were made, and that it cannot readily and efficiently access its records to determine what attachers have been charged over the last 5 to 7 years.⁹⁷ Utilities with the kind of market power enjoyed by PECO should not be allowed to evade their responsibilities to justify the lawfulness of their charges by claiming to lack comprehensive records. If, on the other hand, it truly does not have such records, another kind of issue is presented, one of administrative competence. As stated by Mr. Feloni:

PECO's policy is disturbing for a number of reasons. Although there are thousands of electric utilities operating in the U.S., and not all of them adhere strictly at all times and in all locations to the NESC, I am surprised to learn that a

⁹⁵ PECO Response, at 55.

⁹⁶ *Id.*, at 51.

⁹⁷ Indeed, the sworn statements of Susan Snow and Arthur Russell, attached to RCN's Amended Complaint, suggest that PECO's massive ignorance about the status of its poles may be attributable not simply to poor record keeping but to the practice of charging attachers for make-ready work but failing to do it.

major utility like PECO, operating in a major, densely-populated region like suburban Philadelphia, does not maintain full information about what is on its poles, when the existing attachments were put on the poles, and who did the attachments.⁹⁸

VIII. CONCLUSION

The CSB now has before it the initial pleadings addressing two pole attachment issues: the level of PECO's pole attachment license fees, and the level of PECO's make-ready charges. It is unfortunate that PECO has chosen to burden the staff and RCN with over 80 pages of material which never addresses the heart of the pricing issue and makes a variety of legal assertions that disregard settled precedent.⁹⁹ As RCN has previously noted, it has already spent some \$ 9.7 million for access to PECO's poles, and expects that figure to rise as time passes. In its Response, PECO notes that EIS has gone to some lengths to meet RCN's need for rapid build out of its system and that RCN has expressed no dissatisfaction with the degree of cooperation exhibited by PECO and EIS in effectuating RCN's attachment applications and make-ready work.

RCN reaffirms that it is satisfied with these aspects of the make-ready work and hopes that it and PECO can continue to work together cooperatively to provide RCN access to PECO facilities. But that is irrelevant to the disposition of the issues which RCN has raised in its Initial and Amended Complaints and in no way mitigates the damage which PECO's unlawful charges and practices have imposed on RCN. Lying behind the multitudinous details at stake in this

⁹⁸ Appendix E, Declaration of Edmund F. Feloni, P.E., at 3-4.

⁹⁹ The suggestion in EIS' Response at 22-23 (and on a second 22 following 23) that RCN's allegations are frivolous and warrant sanctions is totally unjustified and offensive. RCN will not respond in kind.

dispute between a classic monopolist utility which owns an essential facility, and a classic new telecommunications entity seeking to build out competitive facilities, is the question whether section 224 and the Commission's implementing rules and policies can be relied upon to eliminate, or at least minimize, PECO's attempts to impose unlawful charges on RCN.

Like many other new competitive entrants, the market climate faced by RCN is at present difficult, with many new entrants falling by the wayside, venture and investment capital having largely dried up, and widespread concerns about the viability of competitive broadband and telecom services. RCN recognizes that this sort of consideration is not directly relevant to the merits of its Complaint. It is, however, relevant to the equity and the propriety of a rapid disposition of this proceeding. Notwithstanding PECO's inappropriate, unseemly, wildly speculative and totally undocumented allegations about RCN's motives for bringing this complaint, RCN is continuing the build out of its suburban Philadelphia system, using capital already committed to the enterprise. It is only common sense, however, that access to rapid and effective regulatory intervention is essential for an entity like RCN, which must rely on the essential monopoly facilities of a vastly larger corporate entity. Indeed, rapid and effective action in this proceeding, as in other pole attachment cases, serves as an important signal to the utility

industry that the sorts of overreaching demonstrated in this case will be addressed and remedied promptly.¹⁰⁰

Respectfully submitted,

RCN Telecom Services of Philadelphia, Inc.

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Date: July 9, 2001

¹⁰⁰ At the second p.22 of its Response, EIS asks the Commission to grant it a further opportunity to “fully respond” to the Amended Complaint if the latter is not dismissed. Such a request is difficult to address since it is cryptic, unexplained, and seemingly gratuitous. In any event, it is plainly improper. EIS had, and exercised, its opportunity to respond to RCN’s Amended Complaint.

APPENDIX A

STATEMENT OF TERRY ROBERTS

1. My name is Terry Roberts. I have provided two prior sworn Statements in this proceeding, one in RCN's Initial Complaint, and another in its Amended Complaint. My credentials are therefore a matter of record in this proceeding.
2. In my capacity as Director of Access and Rights of Way for RCN Corporation, and together with other RCN employees, I have participated in a number of meetings in the period March through April, 2001, with PECO Energy Company ("PECO") and Exelon Infrastructure Services, Inc. ("EIS"), its affiliate. The purpose of these meetings was to discuss and attempt to resolve a number of problems which had arisen in PECO's administration of its pole attachment program.
3. The first of these meetings occurred on March 7, 2001. RCN and PECO personnel discussed both the level of PECO's attachment license fees and make-ready issues. After some discussion it became clear that PECO was not willing to consider adjusting its attachment fee level, or even to discuss it. On the other hand, the parties did agree that further discussions might help to resolve, or at least to clarify, various make-ready issues, and accordingly they agreed to further discussions on that issue.
4. Such further discussions on the subject of PECO's make-ready rates and practices occurred on March 14, 2001 and April 5, 2001. At both meetings two representatives of EIS participated, as well as PECO staff. The EIS representatives were M. Sassano and G. Hutchison.
5. Prior to the first meeting with PECO, RCN had prepared a formal pole access complaint which addressed both the level of PECO's attachment fees, and a variety of make-ready issues.

Following that meeting, when it became clear that there was no possibility of resolving the license fee issue by further discussion, but that make-ready questions might yet be resolved, RCN made the decision to revise the Pole Attachment Complaint to address only the attachment fee issue. This revision was completed thereafter and the Complaint, now referred to as the Initial Complaint, was filed on March 16, 2001.

6. When further discussion on make-ready issues failed to produce any meaningful progress, RCN determined that the make-ready issues should be promptly submitted to the FCC, which was done in an Amended Complaint, on May 4, 2001.

7. The statement in the Response of EIS, filed with the FCC on June 18, 2001, that EIS and RCN “had no occasion to meet,”¹ and the implication that no such meeting took place, are erroneous or misleading. As indicated above, RCN did meet with EIS’ representatives, together with PECO personnel, on two separate occasions to discuss make-ready issues including excessive make-ready charges, make-ready work performance, pre-existing code violations on poles, and quality of personnel performing field duties.

8. The recent FCC ruling that requires PECO to recalculate the Pole Attachment Rate Calculation using five (5) attachers versus the three (3) that PECO previously used would result in a substantial reduction in the 5-year phase-in rate asserted by PECO. The 5-year phase-in rate as presented in PECO’s Response to the Initial Pole Complaint dated April 16, 2001, at Attachment A, indicates the rate would rise to \$58.35 at the end of five (5) years. By

¹ EIS Response, at 5.

recalculating the formula using five (5) attachers, the 5-year phase-in rate would rise to only \$38.82 per attachment, as follows:

Unusable Space Formula:

$$\begin{aligned} \text{Pole Unusable Space} &= \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{Pole Height}} \times \frac{\text{Net Cost of Pole}}{\# \text{ of Attachers}} \times \text{CCR} \\ &= \frac{2}{3} \times \frac{24}{37.5} \times \frac{\$356.85}{5} \times 96.79\% \\ &= \$29.62 \text{ Unusable Space Charge} \end{aligned}$$

-Usable Space Formula:

$$\begin{aligned} \text{Pole Usable Space} &= \frac{\text{Space Occupied}}{\text{Usable Space}} \times \frac{\text{Usable Space}}{\text{Pole Height}} \times \text{Net Cost} \times \text{CCR} \\ &= \frac{1.0}{13.52} \times \frac{13.5}{37.5} \times \$356.85 \times 96.79\% \\ &= \$9.20 \text{ Usable Space Charge} \end{aligned}$$

\$29.62 Unusable Space Charge
+ 9.20 Usable Space Charge
\$38.82 Phased-In Rate at end of 5 years

Although the calculations above use PECO's figures, and simply substitute five (5) attachers for three (3), I note that PECO has used the FCC's presumptive figures for usable space, unusable space, and pole height, rather than an actual figure based upon the height of, and allocation of space on, PECO's own poles. Also, in my experience, the carrying charge rate of 96.79% asserted by PECO is exceptionally high.

9. As PECO has stated, not only do they not know the condition of their poles, but also they do not know who is attached to their poles or when the attachment occurred. This lack of knowledge only reinforces the position that PECO must use the FCC presumption of five (5)

attachers in the urbanized area where PECO operates. This results in a substantial reduction in the pole rental rate claimed by PECO to be proper. Furthermore, the 5-year phased-in increases in the rate must commence at the current, \$9.20 cable rate.

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


Terry Roberts

Date: July 9, 2001

APPENDIX B

STATEMENT OF MARVIN GLIDEWELL

1. My name is Marvin Glidewell and I have previously given a sworn statement in this proceeding. My credentials are therefore a matter of record.
2. I have reviewed the Responses of PECO Energy Company ("PECO") and Exelon Infrastructure Services ("EIS"), filed in this proceeding on June 4, 2001. In those Responses it is suggested that RCN could have used a number of make-ready contractors other than EIS for its make-ready work on PECO poles, and simply chose to use PECO, principally because PECO, using EIS, was able to get RCN on PECO's poles faster than any other contractor.¹ The implication is that RCN's use of PECO was entirely voluntary and RCN should not now be permitted to complain about PECO's prices. In 1999, EIS represented itself as PECO and as PECO's sole designated make-ready work manager. At no time did EIS or PECO suggest to RCN that any option was available to utilize an independent contractor to perform electric make-ready rearrangement work on PECO facilities.
3. In fact, RCN had little real choice in the selection of a make-ready contractor. Although we understood that legally we may have had the right to hire another contractor, it was clear that doing so would lead to endless difficulties between that contractor and PECO in agreeing on the scope of the necessary work, the time frame in which such work would be initiated and finished, and the asserted need of PECO to review and inspect all such outside contractors' work before allowing RCN to attach.

¹ See PECO Response, at 3.

4. RCN engaged an outside contractor known as Map Masters, Inc., to assist RCN in evaluating the condition of certain poles in regard to the extent of the need for make-ready construction work. By letter dated 9-24-1999 EIS, PECO's designated make-ready manager, agreed to accept Map Masters' work because they were not able to meet RCN's volume requirements but with the condition that they do approximately half of all surveys. The result of those pole surveys was conveyed to PECO in an effort to hasten the process of performing make-ready work. PECO, however, declined to accept the pole surveys done by Map Masters, unless it inspected the relevant poles itself, and charged RCN for such inspections. As a result, it turned out to be the case that using Map Masters added to RCN's costs by PECO imposing a review fee of \$8.50 per pole.

5. At p. 37 of its Response, PECO seeks to diminish the weight of my statement that approximately half the poles involved in an invoice for the town of Folcroft which required make-ready displayed safety-code violations. PECO alludes to my "undescribed 'inspection'" (PECO Response, at 37 n. 131). My "inspection" consisted of my personal tour of the poles in issue and visual inspection of them. As someone with many years practical experience with pole construction issues, especially attachment of wiring to poles, I can determine the situation on any individual pole relatively quickly and easily, and that is what I did in the town of Folcroft. Moreover, inasmuch as I personally examined all the poles requiring make-ready, it would seem that such personal review is more reliable and credible than the sort of statistical sampling that PECO alleges is lacking.

6. PECO also claims that my testimony is limited to Folcroft.² This is not correct. Paragraph 3 of my statement describes the area covered, including portions of five separate counties. The very next paragraph indicates that the number of aerial plant violations is “far beyond anything I have previously encountered anywhere and can fairly be described as ‘massive.’” Clearly, this observation is not limited to Folcroft, and I reaffirm here that my description of the state of PECO’s NESC code compliance applies, in somewhat varying degree, to all the towns in which RCN is building out its distribution wiring.

7. EIS’ Response claims that RCN has not alleged that it had meetings with EIS to discuss pole attachment make-ready issues.³ This is untrue. As set forth in my Statement submitted on May 4th, 2001, I attended a meeting in the fall of 1999 with PECO and EIS representatives in which RCN attempted to get some relief from PECO in regard to PECO’s practice of charging RCN to correct preexisting violations on PECO poles to which RCN wished to attach.⁴

8. PECO also alleges that RCN does not provide particulars on the safety code violations alleged to exist.⁵ This is also incorrect. In my prior Statement I described specific (and rather serious) safety code violations in Folcroft.⁶

²PECO Response, at 37.

³ EIS Response, at 18.

⁴ RCN Amended Complaint, Statement of Marvin Glidewell at 5, ¶ 10.

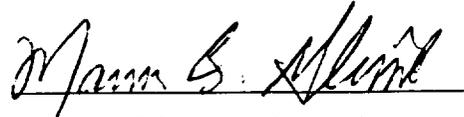
⁵ PECO Response, at 35.

⁶ RCN Amended Complaint, Glidewell Statement at 6, ¶ 11.

9. PECO claims that only Ms. Snow's and Mr. Stinson's Statements support the claim that "about 46%" of PECO's poles requiring make-ready work have preexisting NESC violations.⁷ This overlooks my observation that from my personal inspection of the poles involved in one invoice for Folcroft, "approximately half" of the poles requiring make-ready "had existing code violations when RCN applied for attachment licenses."⁸

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

Date: July 9, 2001



Marvin Glidewell

⁷ PECO Response, at 38.

⁸ RCN Amended Complaint, Glidewell Statement at 6, ¶ 11.

APPENDIX C

STATEMENT OF JONATHAN TROY STINSON

1. My name is Jonathan Troy Stinson. I have previously provided sworn statements in this proceeding and my credentials are therefore a matter of record.
2. I have reviewed the Response to RCN's Amended Complaint filed by PECO Energy Company ("PECO") and by Exelon Infrastructure Services, Inc. ("EIS") on June 4, 2001. The Response of PECO contains criticisms of the statement given by me in connection with the Amended Complaint. This Statement is provided to refute the erroneous or misleading response of PECO to my prior statement concerning make-ready work.
3. PECO observes that my prior Statement is inapplicable to RCN's contention that up to half of the PECO poles to which RCN wishes to attach and which require make-ready require such make-ready to cure pre-existing safety-code violations.¹ This observation mystifies me entirely. It was and is my testimony that in the towns whose pole data I reviewed personally, and not all 430,000 of PECO's poles, 2,758 out of a total of approximately 8,924 poles needed make-ready and of these 1,251 had pre-existing safety code violations, or on average 45% of the total poles requiring make-ready.² I did not "cherry pick" the 9 towns with specific make-ready data supplied in Appendix B to my Statement; these were communities for which I happened already to have the data. To further refute PECO's allegation that I "cherry picked" these communities, they were chosen to demonstrate the percentage of violations over a differing geographic area

¹ PECO Response, at 38.

² RCN Amended Complaint, Statement of Troy Stinson, at 2.

and differing points in time. In my current position at RCN and my previous experience as a contract designer working primarily for PECO Energy, I have years of experience in viewing PECO's aerial facilities and have no reservations in discussing their condition. My day-to-day familiarity with the area in which RCN is building out its system led me to state, and I reaffirm, that there is no reason to think these results are not representative of the condition of PECO poles in the area in which RCN plans to build.³

4. Finally, PECO attacks the reliability of the pole head sheets attached to my Statement in Appendix A.⁴ So that the record is clear, I prepared these sheets from data supplied by PECO's survey contractor and Map Masters, Inc. To my personal knowledge, they accurately describe the condition of the identified poles as of the date of the initial survey. Moreover, to my personal knowledge, they are representative of the condition of PECO poles in the towns in which RCN is building out its distribution plant.

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

Date: July 9, 2001


Jonathan Frey Stinson

³ *Id.*

⁴ PECO Response, at 40.

APPENDIX D

STATEMENT OF SUSAN SNOW

1. My name is Susan Snow and I have previously given a sworn statement in this proceeding.
My credentials are therefore a matter of record.
2. In my capacity as PECO Energy Co.'s joint use administrator before joining RCN in 1999, I was frequently asked by proposed attachers about performing the make-ready work themselves. I was instructed to inform them that it was not permitted for safety reasons and that PECO or its contractor must complete all make-ready work on PECO facilities.

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

Date: July 9, 2001



Susan Snow

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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

DECLARATION OF EDMUND F. FELONI, P.E.

I, Edmund F. Feloni, do hereby state as follows for my Declaration:

BACKGROUND AND QUALIFICATIONS

1. I am employed by Consulting Engineers Group, Inc., as Principal Engineer located at 565 Central Street in Holliston, Massachusetts. My special expertise is in the specification and integration of high voltage electrical systems and large-scale communications infrastructure into electric utilities, large transportation agencies and industrial complexes. I also specialize in the design and modification of electric distribution/supply substations and underground/overhead electric circuits and Fiber Optic/Hard Wire telecommunications wire and equipment.
2. I have consulted extensively to investor-owned utilities, municipal electric utilities, cable television companies, telecommunications companies, Internet service providers and colleges/universities on a variety of electrical, construction, safety and telecommunications issues.

3. I also have worked extensively with numerous telecommunications companies on various rights-of-way access issues. I am knowledgeable about the National Electric Safety Code ("NESC"), its history, purposes, and practical application in the field. I have addressed numerous NESC safety and clearance issues for clients, and have developed construction standards for several telecommunications and cable television companies. I have provided design/construction plans and supervision for overhead and underground cable crossings for railroads, bridges, rivers, interstate and local highways, secondary roads, wetlands and private developments. These crossings entailed aerial facilities, directional boring, and manhole and duct systems.

4. Much of the work described in Paragraphs 1-3 has involved large-scale aerial and underground support structure access and engineering issues.

5. While beginning my career as a utility consulting engineer and as an electric utility operations superintendent, I have 20 years of experience in the electric utility and communications industries, and aerial and underground plant issues, and am a registered Professional Engineer in six (6) states.

6. At RCN's request, I have reviewed PECO Energy Company ("PECO")'s Response of June 18, 2001 to an Amended Pole Attachment Complaint filed by RCN Telecom Services of Philadelphia, Inc. ("RCN") on May 4, 2001 in FCC Docket No. PA-01-003. I have also reviewed RCN's Amended Complaint and the Statements attached thereto.

PURPOSE OF DECLARATION

7. The purpose of this Declaration is to address a number of issues raised in the submissions of both PECO and RCN in connection with RCN's Amended Complaint in the above-captioned proceeding. Specifically, I would like to provide my perspective on some of the important

engineering and operational issues that have been raised in the case.

8. In its Response PECO describes the “grandfathering” policies applicable to the NESC (Response, at 40-41). PECO states that a pole will be deemed to be in compliance with NESC if the attachments on it comply with the current code (1997), the code as it existed when the pole was raised, or any applicable intermediate code (Response at 42-3). PECO explains that a pole configuration which was compliant when constructed, but which is no longer compliant with the latest edition of the NESC, does not constitute a violation of the code.

9. PECO’s policy, it says, is to require RCN to do and pay for any work necessary to assure that, after RCN is attached to a particular pole, that pole will be compliant with the latest edition of the NESC. This policy is required, PECO explains, because it does not have adequate data on its poles so as to be able to determine when any particular existing attachment was placed on the pole, and therefore which intermediate edition of the Code would be applicable. As a default, therefore, it simply requires RCN to pay for all work necessary to assure the pole is compliant with the currently applicable code (Response, at 44). PECO claims that in such situations it is inappropriate to speak of a “pre-existing violation” because the pole may in fact be compliant, if only PECO knew which edition of the NESC was applicable to the existing attachments.

10. PECO’s policy is disturbing for a number of reasons. Although there are thousands of electric utilities operating in the U.S., and not all of them adhere strictly at all times and in all locations to the NESC, I am surprised to learn that a major utility like PECO, operating in a major, densely-populated region like suburban Philadelphia, does not maintain full information about what is on its poles, when the existing attachments were put on the poles, and who did the

attachments. Given that the principal reason for the existence of the NESC is the safeguarding of persons, both lineworkers and the public, it is surprising and disturbing to learn that PECO appears to have very little data, and certainly not comprehensive data, about the status of its poles.

11. PECO's lack of systemic information is not consistent with standard electric utility practice. Indeed, while PECO correctly emphasizes that it bears primary and ultimate responsibility for the provision of electric service, it appears to me inconsistent for PECO to admit that it is largely unaware of the particular pole configurations, and their history. This is not standard practice in the electric utility industry.

12. Apart from that, it appears that PECO is routinely requiring RCN to do make-ready which may actually not be necessary, or, if it is, is the responsibility of PECO or other attachers. PECO's policy penalizes RCN, or any other current attacher-applicant, for PECO's inadequate pole attachment records. Further, PECO's policy appears designed to bring the PECO pole stock up to spec at no cost to PECO and without requiring PECO to exercise its fundamental, continuous and industry-standard responsibility as the pole owner to monitor its poles and bring prior attachers into compliance.

13. I have reviewed the examples of safety code violations set forth in the sworn Statements of Marvin Glidewell and Troy Stinson. Each has witnessed instances where existing open wire secondaries are less than 10" from communications facilities, PECO fiber is in the safety zone and less than 2" from a neutral, and electrical secondary wires are 8" below communications cables at mid-span.

14. Assuming that the facts they allege with respect to certain PECO poles are correct, there is no edition of the NESC which would permit such circumstances to be deemed compliant regardless what edition would be applicable based on the date the attachments were made. The NESC has never allowed for negative clearances between electric wires and facilities and communications wires and facilities. Additionally, the NESC does not allow for perpetual safety violations. There is no provision for grandfathering of violations. Violations that are discovered are required to be remedied at that time, or within a reasonable amount of time. Accordingly, for PECO to claim, as it does, that it adheres (or, as put at 41, “presumes” adherence) to any edition of NESC is simply incorrect. The indisputable fact is that these conditions would be deemed violations of any edition of the NESC, and are therefore correctly characterized by the Statements as safety-code violations or pre-existing violations.

15. I believe that PECO is misinterpreting the Application of the NESC with respect to new and existing facilities (Section 013). The NESC requires all new attachments to be placed in conformance with the applicable edition of the Code at the time of installation. PECO asserts that it does not require a complete upgrade or rearrangement of existing facilities that were installed under an earlier edition of the NESC unless the structure's strength, clearances, or other requirements are compromised with respect to the earlier version. This is correct under NESC.

16. PECO indicates, however, at page 41, paragraph 93, that a pole and its attachments will be in compliance if they comply with “(1) the current NESC (now 1997); (2) the edition in effect when the pole was first raised; (3) an applicable edition published after the pole was first raised.”

17. In actuality, the rules for existing installations are quite specific, and do not rest on a pole's installation or *raising* date. The NESC, Section 013, paragraph 3, states that an existing installation does not have to be modified due to the addition of new facilities, and will be considered to be in compliance, if it meets one of the following: “ *(a) the rules that were in effect at the time of the original installation, or (b) the rules in effect in a subsequent edition to which the installation has been previously brought into compliance, or (c) the rules of this edition in accordance with rule 013B1.*” (Emphasis added.) The NESC does not tie installations to pole raising dates, and does not “grandfather” violations of attachments to the date of a pole's raising. Further, versions of the code prior to the 1997 edition required *greater* separation between electric facilities and communications facilities than is required under the 1997 code. Therefore, in those instances where clearances are less than current spec, it is a violation regardless of the edition.

18. With respect to make-ready, it is also true that in very many instances when a new attacher wishes to put its facilities on a pole, a certain amount of rearrangement is required to assure that all attachments – the prior ones and the new one, are in accordance with NESC requirements. It is frequently not practical or possible to allocate the cost of this work according to a scientific formula, since judgment may be required and reasonable people may differ as to what is equitable. In my experience in such situations, the normal and reasonable practice is for the utility, the prospective attacher, and the existing attachers to agree on some mutually acceptable allocation of costs. It would thus be consistent with industry practice for PECO, RCN, and any existing attachers whose attachments cannot be determined to be compliant with the

current or an applicable prior edition of NESC, as required, to share the make-ready costs on some reasonable basis, taking into account the present condition of the pole, the extent of the existing non-compliance with the latest NESC edition, and what work is necessary to make space for RCN's facilities on the pole.

19. However, I have not previously encountered a situation in which there are large numbers and high percentages of poles which could not be deemed compliant with the latest NESC, or any prior code, and the utility simply insists that the new attacher bear the entire cost of putting the pole, including all the pre-existing attachments which may be code violations, and the new attachment into compliance with the latest edition of the NESC.

20. In effect, PECO is requiring RCN to clean up pre-existing safety violations of other parties in order to bring its poles into compliance with the 1997 NESC. This is not reasonable and is not consistent with industry practice.

21. As mentioned above, in the make-ready process, where an existing attacher moves to make space for a new party, it is the new party that must pay the costs of the existing party to make that move. In contrast, it is not the new attacher's responsibility to rectify and pay for pre-existing safety violations of other parties.

22. While there are cases in which a minor clearance or other similar issue attributable to the pre-existing party can be easily remedied during the new-attacher make-ready process without significant additional expense, there are many other situations where the pre-existing safety violation cannot be so easily remedied. In the first case, it may make sense for the minor

violation just to be corrected. In the second case, it is not the newcomer's responsibility, but that of the attached party.

23. Similarly, it is unreasonable to hold up the new attachment until the pre-existing attacher corrects its own violation, especially where the pole owner is not actively attempting to compel these corrections.

24. PECO has the right and the muscle through its Pole Attachment Agreement to force other parties in violation of the NESC to relocate their facilities within ten (10) days (Pole Attachment Agreement, Paragraph 6), or PECO can perform the relocation at the other parties' expense. As such, PECO should enforce its Agreement on behalf of RCN when existing, non-PECO violations are found and communicated to PECO by RCN or anyone else. Normal industry practice requires that PECO compel prior attachers to correct and pay for existing violations and should charge RCN only for make ready work necessary to make space for RCN on the poles.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.



Edmund F. Feloni, P.E.

Date: July 9, 2001

CERTIFICATE OF SERVICE

In accordance with the provisions of section 1.1401 *et seq.* of the FCC's rules, the foregoing Reply of RCN Telecom Services of Philadelphia, Inc. was served this 9th day of July, 2001, on the following by hand delivery* and first-class U.S. mail, postage-paid:

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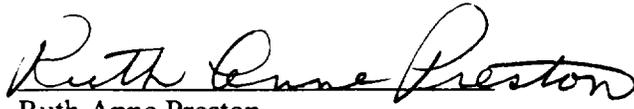
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