BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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

To: Chief, Enforcement Bureau

REPLY OF PECO ENERGY COMPANY
TO RCN'S OPPOSITION TO PECO'S PETITION FOR RECONSIDERATION

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Dated: February 3, 2003

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Pursuant to Section 1.106 of the Commission's Rules,[2] PECO Energy Company ("PECO"), through its undersigned telecommunications counsel, hereby files this Reply to the Opposition of RCN Telecom Services of Pennsylvania, Inc. ("Opposition"), filed in the above captioned proceeding on January 27, 2003.

I. THE RATES CALCULATED BY PECO UTILIZING THE FCC'S FORMULA ARE JUST AND REASONABLE

RCN Telecom Services of Philadelphia ("RCN") argues that the "proper question to be asked is whether the rate resulting from the Bureau's application of the proration method yields a pole attachment rate that is within the 'just and reasonable' bounds set by Congress, *i.e.*, whether

[1] InfraSource Incorporated was originally named in this proceeding as Exelon Infrastructure Services, Inc. However, Exelon Infrastructure Services changed its name to InfraSource in January 2002.

[2] 47 C.F.R. § 1.106.

the rate set is not less than PECO's incremental costs nor more than its fully allocated costs."[3] This argument, however, was *specifically rejected* by both the DC Circuit and the Fifth Circuit nearly two decades ago.[4] Thus, RCN's assertions are incorrect as a matter of law, and must be summarily rejected.

A. A Fully Allocated Rate Is Still A Just And Reasonable Rate

The FCC's telecommunications formula is not designed to establish merely *a* just and reasonable rate, but rather purports to establish the *maximum* just and reasonable rate. The Bureau may not simply choose some number below the maximum and claim that because it is within the "zone" of reasonableness it is sufficient, nor may RCN ask the Bureau to do so now. The Fifth Circuit's decision in *Texas Power & Light* is directly on point in this respect. In that case, the utility challenged the FCC's calculation of several elements of the formula used to calculate a maximum cable rate, specifically objecting to the FCC's refusal to permit the utility to use normalization for its income tax expense. On appeal, the FCC argued that any error it committed in fixing the rate pursuant to the formula was "presumptively harmless" because: (1) the statute requires only that pole attachment rates fall within a zone of reasonableness; and (2) the total rate fixed in that case had not "been shown to be outside that zone."[5] The court firmly rejected this contention, stating that the FCC "is not permitted to 'luck out' with respect to its decision to set a certain rate; it may not arbitrarily choose any figure within the ephemeral zone of reasonableness and set the rate there."[6]

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[3] Opposition at 4.

[4] *Alabama Power Co. v. FCC*, 773 F.2d 362, 366 (DC Cir. 1985); *Texas Power & Light Co. v. FCC*, 784 F.2d 1265, 1269-1279 (5th Cir. 1986).

[5] *Texas Power & Light* at 1269.

[6] *Id.*

Similarly, the court in *Alabama Power* rejected the FCC's attempt to validate its erroneous calculation of the maximum rate. There, the FCC argued that "regardless of whatever mistakes it made in calculating the *maximum* rate ... its order cannot be disturbed absent a showing by [petitioner] that the Commission's rate is *below* the statutory minimum."[7] The court firmly rejected this rationale. In striking down the FCC's order, the court explained that the Commission's order focused on the maximum rate, which was the appropriate inquiry when addressing a claim by an attacher that a rate exceeds what is just and reasonable under the statute.[8] The validity of the order was thus to be judged on "whether the Commission in fact calculated what it sought to calculate" and whether the resulting rate "is what it claims to be - the maximum statutory rate."[9] This, however, it failed to do because the Commission excluded several expenses properly attributable to the cable attachers and thus includable in a fully allocated rate.[10]

With respect to PECO, the Bureau has similarly erred in calculating the depreciation element of the "maximum" rate under the FCC's telecommunications formula. By failing to calculate the maximum rate properly, the FCC's determination cannot, as RCN suggests, be "saved" even if one could posit that it falls somewhere within a "zone of reasonableness." Moreover, the maximum, fully allocated rate is still, *by definition*, a just and reasonable rate, and PECO is not required to charge any less than what it is due by statute and FCC precedent.

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[7] *Alabama Power* at 366 (italics in original).

[8] *Id.* at 366, 367.

[9] *Id.* at 367.

[10] In response to these cases, the FCC issued a Notice of Proposed Rulemaking which specifically addressed whether the FCC need only set a rate within the zone established by the statute, rather than a rate at the statutory maximum. The FCC specifically adopted an approach continuing to focus on the calculation of the *maximum* rate. *In re Amendment of Rules and*

B. PECO's Calculations Use Permissible Data and a Permissible Method To Calculate A Just And Reasonable Rate

In response to PECO's evidence that proration is not an established methodology, RCN asserts merely that it "has been accepted without controversy in past pole attachment proceedings."[11] For this proposition, however, RCN relies on the same precedent as the Bureau: *Nevada State Telecommunications Association v. Nevada Bell*, which was issued only 5 months ago.[12] As fully articulated by PECO in its Petition for Reconsideration,[13] *Nevada Bell* cannot serve to establish a standard of conduct for PECO to have followed prior to its issuance.

Moreover, the FCC itself has recently stated that the pole attachment formulas do "not specifically require the use of proration as a method to be used in the calculation of the net cost of a bare pole."[14] Given this precedent, it was reasonable for PECO to have calculated the depreciation element of the pole attachment formula using publicly available information in its FERC Form 1 and provided it in Attachment A to its Response to Complaint.[15] RCN never specifically challenged this calculation in its prior pleadings, and offers no evidence in its Opposition to counter PECO's assertion that the remaining life depreciation method is a standard utility accounting practice (which was approved for PECO's use by the Pennsylvania Public

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Policies Governing the Attachment of Cable Television Hardware to Utility Poles, CC Docket No. 86-212, *Report and Order*, 2 FCC Rcd. 4387 (1987).

[11] Response at 6.

[12] 17 FCC Rcd. 15,334 (2002).

[13] *RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Services*, CS Docket No. 01-003, *Petition for Reconsideration* (filed Jan. 17, 2003) ("Petition for Reconsideration").

[14] *In re Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, *Report and Order*, 15 FCC Rcd. 6453 (2000); Petition for Reconsideration at 5.

[15] *RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Services*, CS Docket No. 01-003, *Response to Complaint* (filed Apr. 16, 2001).

Utility Commission).[16] The Bureau, therefore, should have accepted PECO's calculation, and erred in prorating PECO's accumulated depreciation.

C. RCN's "Comparison" Data is Irrelevant

RCN claims that PECO's telecommunications rate is unjust and unreasonable because it differs from PECO's cable rate, from the rates charged by Verizon Pennsylvania, and from the rates ordered by the FCC in other pole attachment cases.[17] As to the difference between PECO's cable and telecommunications rate, this is clearly asking the Bureau to compare apples and oranges. By statute, different cost elements are used to calculate each rate, so of course they are different. As to the other "comparisons," the Pole Attachment Act and the FCC's implementing regulations do not provide for a "market comparison" in determining what constitutes a just and reasonable rate, and it would be arbitrary and capricious for the FCC to consider information which it is not permitted to consider under the statute.[18] What is just and reasonable for a specific pole-owning utility depends solely on that utility's expenses, whatever they may be. Accordingly, RCN's claim must be summarily rejected.

D. RCN's Argument That PECO Will Recover Its Net Cost Of A Bare Pole In Two Years Is Incorrect

RCN opines that PECO's calculated rates do not fall within the "zone of reasonableness" because they yield a rate that would purportedly permit PECO to recover the net cost of a pole in two years. PECO's overhead and maintenance costs, argues RCN, are also "simply implausible." These arguments fail for several reasons. First, RCN's argument must be rejected because, as noted above, a rate within the "zone of reasonableness" is not the goal of the FCC's statutory formula and is not the proper measure of the formula's outcome.

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[16] Petition for Reconsideration at 15.

[17] Response at 5-6.

Second, RCN's allegations boil down to its dissatisfaction with the FCC's formula, not PECO's depreciation calculation. For example, taking RCN's manufactured comparison calculation (net cost of a bare pole/(annual rate x number of attachers)), RCN complains that PECO will recover the net cost of a bare pole in less than 2 years. However, using RCN's same "formula" and substituting the Bureau's calculations from the *Phase I Order* ($40.84 net cost of a bare pole/$10.26 x 5 attachers), indicates that PECO would recover the Bureau's calculated net cost of a bare pole in less than *one* year. RCN's illustration, therefore, is flawed and proves absolutely nothing.

Moreover, given that RCN's dissatisfaction is with the non-depreciation portion of the rate (administrative and overhead), RCN's argument is beyond the scope of PECO's reconsideration request. Moreover, the depreciation rate for poles is typically the smallest component of the carrying charge, because of the long life of the asset. Any variance in the depreciation elements of the carrying charge will do little to address RCN's general discontentment with the carrying charge.

Finally, it is perfectly logical and permissible for PECO to have employed proration for its accumulated deferred taxes. This element is not accounted for separately and is not necessarily directly related to poles. Accumulated depreciation, however, can be directly calculated as demonstrated in Exhibit 4 to the Declaration of Alan Cohn, and also bears a direct relationship to the poles in question.

II. PECO'S ALTERNATE CALCULATIONS ARE PROCEDURALLY PROPER

Congress contemplated that the FCC could use publicly available information to determine many portions of the pole attachment rate. FCC precedent bears this out, and the

[18] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983).

Commission has relied upon both FERC Form 1 data and data prepared for other regulatory forums in its calculations.[19] Nothing obligated the FCC to look solely at FERC Form 1 information in this case; accordingly, it is entirely proper for PECO to submit calculations based on data prepared for the Pennsylvania Public Utility Commission, as the FCC should have taken notice of this information when issuing its *Phase I Order*. PECO's Allocated Distribution Method also relies on FERC Form 1 data, and should be considered by the Bureau.

Even assuming, *arguendo*, that PECO's alternate calculations are "facts not previously presented,"[20] it is also clear, as discussed above and in PECO's Petition, that the earliest the Bureau could have been said to have announced its new proration "standard" is *Nevada Bell*. Accordingly, PECO could not have addressed the issue before this time, and is entitled to address it on Reconsideration. Moreover, if the Bureau does intend to establish proration as the "standard," it serves the public interest to fully consider all of PECO's arguments and alternate methodologies. Finally, even if the Bureau chooses not to rely on the ultimate rates reached by PECO's alternate methodologies, they still serve to provide a vivid illustration of how grossly inaccurate the result is when the proration methodology is employed.

III. THE FCC'S IMPOSITION OF PRORATION VIOLATES THE APA, AND AT THE VERY LEAST THE FCC HAS FAILED TO PROVIDE ADEQUATE NOTICE OF ITS INTERPRETATION OF ITS OWN RULES

RCN argues that the imposition of the proration method does not violate the Administrative Procedure Act because "PECO is free to calculate its pole attachment rates in any manner it deems reasonable...provided only that the rate chosen falls within the 'just and

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[19] *See, e.g., Group W Cable v. Wisconsin Electric Power Co.*, PA 82-0062, 82-0071, 82-0070, 1985 FCC LEXIS 3476 (Apr. 9, 1985).

[20] 47 C.F.R. § 1.106(c).

reasonable' boundaries set by Congress and the PAA."[21] The Bureau's pronouncement, however, dictates the manner in which the depreciation element of the telecommunications formula is calculated, which it then used to ostensibly produce the *maximum* pole attachment rate based on fully allocated costs. This clearly establishes an obligation on the part of PECO to prorate the depreciation element, which should have been established through a rulemaking under the APA. Even assuming for the sake of argument that proration is not a substantive rule, at a *minimum* the Bureau is required to provide sufficient notice to its regulatees as to its interpretation of the FCC's rules and the behavior required thereunder. This it failed to do.

IV. RCN MISCONSTRUES THE BURDEN SHIFTING MECHANISMS OF THE TELECOM ORDER AND THE RECONSIDERATION ORDER

RCN asserts that PECO failed to carry its initial burden to rebut the presumptions of 3 or 5 attaching entities under the FCC's *Reconsideration Order*.[22] This argument, however, misconstrues burdens assigned both under the *Telecom Order* and the *Reconsideration Order* with respect to establishing the average number of attaching entities. Under the *Telecom Order*, utilities were permitted to calculate an average number of attaching entities according to the records already available to them.[23] Under the *Reconsideration Order*, utilities had the *option* of developing their own number, or utilizing the FCC's presumptions.[24] PECO developed an average based on its internal records *prior* to the issuance of the *Reconsideration Order*, and

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[21] Opposition at 7.

[22] Response at 8; *In re Amendment of Rules and Policies Governing Pole Attachments*, CS Dockets 97-98, 97-151, *Consolidated Partial Order on Reconsideration*, 16 FCC Rcd. 12103 (2001), *aff'd sub nom. Southern Co. Services, Inc. v. FCC*, 2002 U.S. App. LEXIS 26444 (DC Cir. 2002).

[23] *In re Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd. 6777 (1998) ("*Telecom Order*").

never elected to use the FCC's presumptions once they became available.[25] Rather, the Bureau imposed the presumptions despite the fact that record evidence indicated that the parties differed with respect to their estimates by approximately 0.5 attachers. Given that the FCC had record evidence proffered by both parties, neither of which even approached the FCC's chosen number, it was inappropriate and unnecessary for the FCC to impose the presumptive numbers of 3 and 5 attaching entities.

V. PECO'S REQUEST FOR RECONSIDERATION REGARDING THE ACCEPTANCE OF RCN'S AMENDED COMPLAINT IS PROPER

RCN maintains that PECO's argument that the Amended Complaint is procedurally deficient is not procedurally proper for two reasons: (1) the Bureau did not address this argument in the *Phase I Order*; and (2) the Bureau "ruled" on this issue in an Order released June 1, 2001 ("June 1 Order"), and that PECO was required to file any petitions for reconsideration within thirty days of that date. Neither contention has merit.

RCN's first argument is easily dispatched. PECO is entitled to file a Petition for Reconsideration where there has been a material error *or omission*.[26] Failing to address PECO's argument that the Amended Complaint should have been rejected constituted such an omission. As to RCN's second contention, the June 1 Order did not rule on PECO's objection to the filing

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[24] *In re Amendment of Rules and Policies Governing Pole Attachments, In re Implementation of Section 703(e) of the Telecommunications Act of 1996,* CS Docket Nos. 97-98, 97-151, *Consolidated Partial Order on Reconsideration*, 16 FCC Rcd. 12103 (2001).

[25] PECO also notes that the *Reconsideration Order* was issued in the middle of the second pleading cycle in this controversy related to RCN's Amended Complaint. Moreover, for nearly the duration of the complaint, PECO and a number of utilities were pursuing an appeal of the *Reconsideration Order* in the DC Circuit that was only recently resolved. *Southern Co. Services, Inc. v. FCC*, 2002 U.S. App. LEXIS 26444 (DC Cir. 2002).

[26] *In re American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint*, File No. SAT-PDR-1999803-00077, *Memorandum Opinion and Order*, 15 FCC Rcd. 15448, 15450-51 (2000).

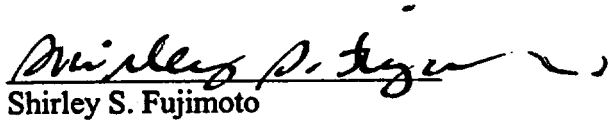
of the Amended Complaint; rather, the impetus for the Order was a motion for extension of time filed by PECO and InfraSource. An examination of the ordering clauses shows that the Commission formally ruled only on the extension of time. Additionally, even if the Bureau had formally ruled on the propriety of inclusion of make-ready claims via an Amended Complaint, the FCC rules clearly provide that petitions for reconsideration of interlocutory orders will not be entertained.[27] Thus, PECO's argument, as raised in a petition for reconsideration of a final order (the *Phase I Order*), was timely.

VI. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, PECO respectfully requests that the Bureau consider this Reply and the prior Petition for Reconsideration of the *Phase I Order* and to proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

PECO ENERGY COMPANY

By: 

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Dated: February 3, 2003

[27] 47 C.F.R. 1.106(a)(1).

CERTIFICATE OF SERVICE

I, Gloria Smith, do hereby certify that on this 3rd day of February 2003, a copy of the foregoing "Petition for Reconsideration," was mailed via U.S. Mail, postage prepaid to each of the following:

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