SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202)424-7500
FACSIMILE (202) 424-7643
WWW.SWIDLAW.COM

NEW YORK OFFICE
405 LEXINGTON AVENUE
NEW YORK, NY 10174
(212) 973-0111 FAX (212) 891-9598

March 16, 2001

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W., Rm. TW-A325
Washington, DC 20554

Re: ***RCN Telecom Services of Philadelphia, Inc. v. Exelon Corp. f/k/a PECO Energy Company, PA No. 01-***

Dear Ms. Salas:

Attached are an original and three (3) copies of the Pole Attachment Complaint of RCN Telecom Services of Philadelphia, Inc. ("RCN") against Exelon Corp. f/k/a PECO Energy Company ("PECO"), filed pursuant to section 224 of the Communications Act of 1934, as amended, and 47 C.F.R. § 1.1401, *et. seq.* By its undersigned counsel, RCN respectfully requests that the Commission accept as proper the enclosed Complaint and attachments and exhibits thereto, and commence a proceeding under its rules to investigate PECO's unjust and unreasonable pole attachment rates.

If you have any questions concerning this matter, please contact the undersigned.

Sincerely,

William L. Fishman
Peter A. Corea

Enclosure

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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-_____
	)	
	)	
EXELON CORP, f/k/a PECO ENERGY COMPANY	)	

To: Chief, Cable Services Bureau

POLE ATTACHMENT COMPLAINT

William L. Fishman
Peter A. Corea
SWIDLER BERLIN SHEREFF FRIEDMAN, LLC
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
Telephone: (202) 945-6986
Facsimile: (2102) 424-7645

Counsel for RCN Telecom Services of Philadelphia, Inc.

March 16, 2001

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	)	
EXELON CORP, f/k/a PECO ENERGY COMPANY	)	

To: Chief, Cable Services Bureau

POLE ATTACHMENT COMPLAINT

Complainant, RCN Telecom Services of Philadelphia, Inc. ("RCN"), pursuant to the provisions of section 224 of the Communications Act of 1934, as amended (the "Act"),[1] and section 1.1401 *et seq.* of the Commission's rules,[2] by the undersigned counsel, files this Pole Attachment Complaint ("Complaint") against Exelon Corp, f/k/a PECO Energy Company ("PECO").[3] RCN seeks relief from pole license fees which are discriminatory, excessive, unjust and unreasonable. Specifically, RCN seeks a Commission order (1) reducing PECO's pole licensing fees to reasonable levels, (2) providing for refunds for past charges which are found to

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[1] 47 U.S.C. § 224.

[2] 47 C.F.R. § 1.1401 *et seq.*

[3] Exelon Corp is the entity created by the merger of PECO Energy Co. and another entity described *infra.* For the sake of clarity this Complaint refers to the Respondent throughout as "PECO."

be unlawful, and (3) providing such other relief, including the imposition of fines and forfeitures, as the Commission deems appropriate under the circumstances. In support thereof, Complainant shows the following.

I. SUMMARY AND INTRODUCTION

RCN is a combined CLEC and cable overbuilder which is establishing a presence in the Philadelphia metropolitan area. In numerous suburban areas surrounding the city of Philadelphia RCN must distribute its fiber optic cable by attaching to the existing aerial infrastructure of a variety of utilities, including PECO, Verizon Pennsylvania, Inc., and Pennsylvania Power and Light. In August of 1999 RCN entered into a Pole Attachment Agreement with PECO governing the terms of its access to PECO's poles. That Agreement, which was offered to RCN on a take-it-or-leave it basis, requires RCN to pay PECO $9.21 annually for each pole license for cable services, and $47.25 for each pole license involving services other than cable services. Because RCN offers bundled services to all its subscribers,[4] PECO has been charging RCN at the higher rate for all of its attachments.[5] Since August of 1999 and through the end of February,

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[4] RCN has numerous subscribers who take only one of its services although most subscribe for more than one service.

[5] Pole Attachment Agreement, Exhibit 1 hereto, Exhibit C thereto. The Pole Attachment Agreement bears many of the telltale marks of market power abuse which are typical of utility pole attachment agreements. Among other instances of overreaching contained in the agreement, PECO reserves the right to terminate the agreement and any permit when, in its judgment, "such action is necessary to protect PECO Energy's interests." (Agr., ¶ 1). PECO is absolved of liability to RCN for any loss or damage to the Attachments, arising in any manner out of PECO's operations or its performance of make-ready work (Agr., ¶ 8); PECO is indemnified and held harmless by RCN for damages to property and to persons, including PECO employees, related to RCN's attachments, and "whether or not caused by "PECO Energy's contributory negligence, concurring negligence, active negligence and passive negligence... ." (Agr., ¶ 13). Stated more directly, RCN is obliged by the Agreement to indemnify PECO against its own negligence even

2001, RCN has applied for licenses for attachment to approximately 13,858 PECO poles. RCN is currently attached to approximately 9,446 PECO poles and has paid PECO approximately $341,434 for such licenses. RCN is awaiting approval of attachment applications for 4,412 additional poles.

RCN believes that the license fees charged by PECO are excessive, discriminatory, unjust and unreasonable. RCN has sought on several occasions to meet with PECO for the purpose of negotiating lower license fees. Except for a meeting which occurred in early March after RCN advised PECO of the imminence of the filing of a formal Complaint, PECO has consistently declined to meet with RCN to consider lowering or justifying its license fees. A substantial percentage of PECO's poles are carrying wiring of other non-PECO entities. On information and belief, these entities include cable companies, Verizon Pennsylvania, CLECs and municipal services wiring, such as fire alarm or similar services. In addition PECO's poles are carrying PECO's own communications wiring, and PECO communications subsidiaries' wiring.

On January 23, 2001, in anticipation of seeking relief from excessive and unlawful charges by filing a formal complaint at the FCC, RCN formally asked PECO to supply to it the data set forth in 47 C.F.R. § 1.1404(g)(1)-(13). As of this date, PECO has not done so, in violation of the 30-day deadline set forth in that section of the FCC's rules. Indeed, it simply ignored RCN's request. On March 7, 2001, RCN and PECO representatives met to discuss PECO's pole attachment prices and practices. At that meeting, as it has both orally and in

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concerning its own employees. Nor are the fees currently charged by PECO binding on it for any period of time. It may adjust its fees at any time (Agr., ¶ 10(c)).

writing on prior occasions, RCN raised two separate issues: the attachment license fees and PECO's make-ready fees and practices. It became apparent in that meeting that there was no realistic possibility of finding a negotiated solution to the license fee issue and RCN has accordingly filed this Complaint. The parties have agreed, however, to meet again in respect to the make-ready issues. If the make-ready issues cannot be satisfactorily resolved by negotiations, RCN will file a Supplement to this Complaint addressing those issues.

Accordingly, RCN seeks an order from the Commission directing PECO to lower its rates so that they are in line with its legitimate and prudent costs, to compel PECO to avoid discrimination in setting its pole license rates, and for such other and further relief as the Commission finds appropriate in light of the record to be compiled herein.

II. PARTIES

RCN, a Pennsylvania corporation with its principal place of business in Princeton, New Jersey, is a wholly owned subsidiary of RCN Corporation, Inc. ("RCN Corporation"), a CLEC formed to fulfill the new market opportunities created by the Telecommunications Act of 1996. RCN's Philadelphia area offices are located at 850 Rittenhouse Road, Trooper, PA 19403. Its telephone number there is (484) 399-8300; its facsimile number is (484) 399-8311. A detailed description of RCN Corporation appears in its Comments filed in the Commission's annual review of the status of competition in the MVPD industry.[6] As set forth in more detail therein, RCN Corporation offers bundled services to the public including local exchange and long

[6] *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Docket No. 00-132, *filed* September 8, 2000. Information on RCN is also available at its web page: http://www.RCN.com.

distance telephone service, high speed Internet access service, and broadband cable service. Through a variety of subsidiaries, including RCN, RCN Corporation operates in the metropolitan areas of Boston, New York City, Philadelphia, Washington, D.C., Chicago, Los Angeles, and San Francisco.

It does so by bundling telecommunications, broadband video, and high-speed internet access services and providing them over one of the most modern fiber optic and coaxial networks being built by any telecommunications or cable entity. RCN Corporation has raised billions of dollars and spent hundreds of millions of dollars to establish its business and to construct the first segments of its network. It currently has approximately one million service connections and passes 1.45 million homes. In the last year it has entered into numerous cable franchises and OVS agreements and its subscribership is growing constantly.[7]

RCN is certificated by the Pennsylvania PUC as a CLEC and offers telecommunications services to residential subscribers in the Philadelphia metropolitan area and elsewhere in the state of Pennsylvania. RCN's FCC-granted Philadelphia area OVS certification covers the City and 108 communities in the counties of Bucks, Chester, Delaware and Montgomery.[8] The Company recently determined, after more than two-and-a-half years of unsuccessful efforts, to terminate its efforts to negotiate an OVS agreement or cable franchise with the City of Philadelphia.

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[7] Updated financials for year end 2000 are available at http://biz.yahoo.com/prnews/010208/nj_rcn_4q_.html (last visited March 12, 2001).

[8] *RCN Telecom Services of Pennsylvania, Inc.*, DA 98-1153 *rel.* June 15, 1998 (Cable Services Bureau), lists separately each of the 108 communities included in the OVS certification.

However, the Company holds 26 local franchises, is currently operating in 10 of Philadelphia's suburbs,[9] and remains fully committed to building its system and offering service in the greater Philadelphia area. RCN has already invested substantial capital in the Philadelphia metropolitan area and has engaged in extensive preparation as it begins building its network and offering its bundled services. In the brief time it has been operating in certain of these suburban communities and in which it faces the heavily entrenched cable operator, RCN has already signed up thousands of subscribers.[10]

PECO operates as a public utility in the Philadelphia metropolitan area. It owns by far the largest number of utility poles in the region. Approximately three quarters of the utility poles needed by RCN to rollout its service in the Philadelphia Metropolitan area are owned by PECO. On information and belief, it is engaged principally in the production, purchase, transmission, distribution and sale of electricity and the distribution and sale of natural gas to residential, commercial industrial and wholesale customers. It is certificated by the Pennsylvania Public Utility Commission and is a transmitting utility and electric utility under the Federal Power Act.[11] By virtue of a recent merger with Unicom Corporation, it is now a wholly-owned

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[9] Folcroft, Eddystone and Ridley Township, Sharon Hill, Glenolden, Collingdale, Norwood, Prospect Park, Ridley Park and Upper Darby.

[10] Comcast Corporation ("Comcast") is the overwhelmingly dominant supplier of cable services in the City of Philadelphia and surrounding suburban areas and is one of the largest cable operators in the country, serving approximately 8.2 million subscribers. Comcast serves some 1.9 million subscribers in Philadelphia and surrounding areas.

[11] *See* PECO 10-K filed with the Securities and Exchange Commission on May 9, 2000, accessible at www.sec.gov/Archives/edgar/data/78100/00000950116-00-000725.txt (last visited March 12, 2001).

subsidiary of Exelon Corp. , an entity with a total value of approximately $31.8 billion, approximately 5 million customers and total annual revenues of approximately $12.4 billion. As such, it is one of the nation's largest electric utilities.[12] PECO itself has $13.1 billion in assets, $5.4 billion in annual revenue and 6,500 employees serving 1.5 million electric customers in the five-county Philadelphia region.[13] Its headquarters office is located at 2301 Market St., N3-3, Philadelphia, PA, 19101-8699. Telephone number: (215) 841-4000; facsimile number: (215) 841-5419.

PECO has numerous investments in telecommunications, some or all of which either compete with or could compete with RCN. In 1995 PECO formed PECO Hyperion Telecommunications, a partnership between PECO and Hyperion Telecommunications, Inc., a subsidiary of Adelphia Cable Company. The partnership is a CLEC and provides local phone service in the Philadelphia metropolitan region using a large-scale fiber optic cable-based network that currently extends over 700 miles.[14] On information and belief PECO/Hyperion's fiber optic cable is attached to PECO's poles. PECO also participates in the telecommunications industry through various affiliates.

These include Exelon Communications, which provides customized telecommunications packages and design, construction and management of distributed networks, and Exelon Infrastructure Services ("EIS"), which manages maintenance, construction and operation of

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[12] *See* www.peco.com/merger_update/press_releases.html (last visited March 12, 2001).

[13] *See* www.exeloninfrastructure.com/pr_060700.htm (last visited March 12, 2001).

[14] PECO Form 10-K, *supra*, at 18.

telecommunications and cable television systems.[15] EIS owns a number of contracting companies, including some which operate in the Philadelphia metropolitan region.[16] PECO is also engaged in the PCS industry through a partnership with AT&T Wireless PCS of Philadelphia, LLC. PECO owns 49% of the partnership. Service in the Philadelphia area was launched in October, 1997.[17]

Exelon Capital Partners, a venture capital subsidiary of Exelon Corporation, only recently announced a $50 million investment in Everest Broadband Networks. Everest, headquartered in Fort Lee New Jersey, provides high-speed internet access, long distance telephone service, and related broadband applications in multi-tenant commercial and residential buildings and hotels. It is "increasingly acknowledged as the fastest-growing provider of in-building broadband and user applications services to multi-tenant unit (MTU) buildings in North America."[18] In August of 2000 Everest acquired Metrocomm International Inc, a building telecommunications provider throughout the New York region.[19] RCN operates in MDUs in New York City; it has no knowledge whether Everest currently competes with it in the Philadelphia area, or plans to do so in the near future.

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[15] *See* PECO website identified *supra,* n.12.

[16] *See* www.exeloninfrastructure.com/pr_81099.htm; and www.peco.com/merger_update/company_profiles.html (last visited March 12, 2001).

[17] PECO Form 10-K, at 18.

[18] *See* http://biz.yahoo.com/bw/010103/nj_everest.html (last visited March 12, 2001).

[19] *Id.*

III. JURISDICTION

The Commission has jurisdiction of this action under section 224 of the Communications Act of 1934, as amended, and section 1.1401 *et seq.* of its rules. PECO owns and controls utility poles in Pennsylvania which are used for the purposes of wire communications. To the best of RCN's knowledge the poles encompassed by this Complaint are, with very few exceptions, wholly owned by PECO. Neither PECO nor its controlling parent Exelon is owned by any railroad, any person who is cooperatively organized or any person owned by the Federal Government or any state government.

The Commonwealth of Pennsylvania has not been certificated by the FCC as a state which regulates the rates, terms, or conditions of pole attachments in the manner required by section 224(c)(1) of the Communications Act.[20]

As set forth in Exhibit 3 hereto, RCN has attempted to negotiate license fees with PECO over a period of more than six months. PECO has declined to do so and it appears that further efforts on the part of RCN to achieve a negotiated settlement of the present dispute would be futile. Respondent has informed RCN that in its view the provision by RCN of Internet access services deprives the Commission of jurisdiction over the pole attachment rates charged by PECO. In its letter of November 8, 2000 to RCN's Terry Roberts, included in Exhibit 2 hereto, PECO claims that RCN's Internet access service "is not governed by the Telecommunications Act of 1996 and is therefore not governed by any rate structure." While inarticulately presented, it appears to be PECO's position – as it has been of other pole-owning utilities – that the

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[20] *See* Public Notice, "*States That Have Certified That They Regulate Pole Attachments*," 7 FCC Rcd 1498 (1992).

Eleventh Circuit's decision in *Gulf Power Co. v. FCC, (Gulf Power II)*,[21] deprives this Commission of jurisdiction to adjudicate the pole attachment rates imposed on RCN by PECO. As Mr. Roberts notes in his Statement, PECO reaffirmed this view in the March 7, 2001 meeting, describing its pole attachment license fees as purely a "market mechanism." The Cable Services Bureau rejected a similar argument presented to it recently, noting that the Eleventh Circuit's mandate has not yet issued and that further litigation in the matter is pending.[22] Now that the Supreme Court has agreed to review the Eleventh Circuit's decision, the continuing vitality of the Commission's jurisdiction is even more clear. It is also clear that PECO's position on the legal issue of the Commission's jurisdiction means that it is necessarily violating this Commission's injunction to pole owning utilities to negotiate in good faith.[23]

As noted above, PECO has declined to provide RCN with cost data to justify its license fees. Instead, it simply seeks to charge RCN a "market rate" unrelated to its costs. This Complaint thus presents to the Commission a relatively simple question of law and one of fact: the legal question is whether PECO can defy the Commission by refusing to conform to section 224 and the Commission's implementing rules and policies. If it cannot, the Commission must

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[21] 208 F.3d 1263 (11th Cir. 2000), *reh. den.* 226 F.3d 1220, *petition for cert. granted, in part, F.C.C. v. Gulf Power Co.*, 121 S.Ct. 879, 69 USLW 3383 (U.S. Jan 22, 2001) (NO. 00-843), *petition for cert. granted, in part, National Cable Television Ass'n., Inc. v. Gulf Power Co.*, 121 S.Ct. 879, 69 USLW 3383 (U.S. Jan 22, 2001) (NO. 00-832).

[22] *Alabama Cable Telecommunications Association v. Alabama Power Company*, 15 FCC Rcd. 17,346 (2000) ¶ 4.

[23] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd 4387 ¶ 86, n. 51 (corrected Aug. 21, 1987) ("We note ... that all parties are under an obligation to make good faith efforts to settle disputes. Failures to negotiate in good faith may lead to Commission-imposed sanctions.")

then determine the factual issue, *i.e.*, the relevant costs which underlie a lawful rate for attachment to PECO's poles pursuant to the pole attachment rules.

IV. ARGUMENT

COUNT I
PECO IS VIOLATING SECTION 224(b)(1) OF THE COMMUNICATIONS ACT BY CHARGING RCN EXCESSIVE AND DISCRIMINATORY RATES FOR POLE LICENSES.

Since passage of the original text of section 224 in 1978, the Commission has adopted numerous orders establishing the principles on which pole attachment rates are to be set.[24] The amendments to section 224 embedded in the Telecommunications Act of 1996 required the Commission to revisit and expand these principles to take account of the need for pole attachments by telecommunications companies as well as by cable companies.[25] Essentially, the Commission's current rules require that utilities base their licensing fees to attachers on their costs, calculated so far as possible on publicly available data and based on generic formulae set forth in the Commission's rules.[26] The Supreme Court has specifically upheld this approach.

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[24] *See Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, 68 FCC 2d 1585 (1978); Second Report and Order, 72 FCC 2d 59 (1979); Memorandum and Order, 77 FCC 2d 187 (1980), *aff'd, Monongahela Power Co. v. FCC*, 655 F. 2d 1254 (D.C. Cir. 1985)(per curiam); and *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387 (1987) (*"Pole Attachment Order"*). *See also, Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (1998) (*"Telecommunications Report and Order"*) and *Amendment of Rules and Policies Governing Pole Attachments*,15 FCC Rcd 6453 (2000) (*"Fourth Report and Order"*).

[25] *See* 47 U.S.C. § 224(e).

[26] *See Telecommunications Report and Order*, 13 FCC Rcd. 6777 (1998), ¶¶ 10-21; *Fourth Report and Order*, 15 FCC Rcd. 6453 (2000), ¶ 9.

FCC v. Florida Power Corporation, 480 U.S. 245, 254 (1987).

As is well known, the 1996 amendments to section 224 of the Act introduced different cost formulas for cable operators, on the one hand, and telecommunications carriers, on the other.[27] This distinction, which contemplated a prospectively higher rate for telecommunications carriers, became effective only on February 8, 2001 and is to be phased in over a five year period.[28] PECO's Pole Attachment Agreement recognizes this distinction.[29] The discussion which follows does not emphasize this dichotomy in allowable pole attachment rates because PECO has supplied no cost justifications whatsoever for either of the rates which appear in its Pole Attachment Agreement. However, to the extent PECO's rates prior to the filing of this Complaint are subject to refund (see section V below), the lower, cable rate formula would be applicable to the period prior to February 8, 2001.

A PECO's Rates Are Subject to Section 224 of The Act And The Commission's Regulations And Decisions Adopted Thereunder.

PECO's argument that the Commission lacks jurisdiction to consider and rule on the pole attachment fees it is charging RCN is wholly unpersuasive, as the Commission itself has noted in rejecting similar arguments raised by other utilities. To avoid unduly repetitious argumentation, RCN relies upon the Commission's prior holding that its jurisdiction remains fully operative.[30] The subsequent grant of a writ of *certiorari* by the Supreme Court only strengthens the

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[27] 47 U.S.C. § 224 (e).

[28] 47 U.S.C. § 224 (e)(4).

[29] *See* Exhibit 1, at Exhibit C thereto.

[30] *See Alabama Cable, supra,* at n. 22.

Commission's position that its jurisdiction at this point is unimpaired by the Eleventh Circuit's decision in *Gulf Power II*. Until the Court has finally disposed of the legal issues presented in that litigation, the Commission is fully justified in continuing to assert its authority under section 224 of the Act to review pole attachment rates and practices and to enter such orders as it deems appropriate under the statute, its own rules, and its precedent.

B. PECO's Attachment Fees Are Excessive And Discriminatory

RCN, by virtue of its four-year history as a CLEC and cable overbuilder and its operation in numerous major metropolitan areas, is well acquainted with a range of utility pole license fees, and by virtue of that broad knowledge believes that PECO's pole license fee charge of $47.25 per pole is excessive and cannot be justified under the standards adopted by the FCC.

As set forth in its own letter of November 8, 2000, reproduced in Exhibit 2, and as reported in Exhibit 3, the Statement of Terry Roberts, Director of Access and Rights of Way for RCN, PECO unabashedly disavows any obligation to base its pole attachment rates on costs derived under the provisions of section 224 of the Act or the Commission's implementing rules and cases. According to Mr. Roberts, "At a meeting of RCN and PECO representatives which I attended on March 7, 2001, PECO informed RCN that its pole attachment fee of $47.25 was not based on any PECO costs, but was instead a 'market-based' rate. PECO indicated that it did not believe it was subject to the FCC's jurisdiction in regard to its pole attachment rates for RCN as a result of the Gulf Power II decision of the 11th Circuit Court of Appeals."[31] Mr. Roberts notes that PECO's license fee is by far the highest encountered anywhere by RCN. It is approximately

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[31] Exhibit 3, at 3-4.

12 times the license fee charged by Verizon Pennsylvania, Inc. and far in excess of the pole license fees encountered by RCN in a wide variety of communities over the prior four years of operation. Moreover the $47.25 license fee is more than five times the $9.21 charged by PECO for cable attachments. The wiring used by RCN to deliver its bundled CLEC, high-speed Internet access and broadband video services to the public is no larger or heavier physically than the wiring used by cable companies which provide only traditional cable service.

To be sure, beginning on February 8, 2001, an entity like RCN can be charged more for attachment of wiring which carries a mix of CLEC and cable services under section 224(e)(1) and (2) of the Act, but a charge five times greater is not justifiable by any known cost causing factor, nor by the formulas adopted by the Commission to effectuate section 224(e).[32] The burden of proof to justify its license fees falls on PECO under Commission precedent.[33] As noted, RCN has asked PECO to justify its pole attachment rate applied to RCN but PECO has declined to do so.

Nor is PECO's assertion that its rates are justified by the Pole Attachment Agreement entered into between the parties valid. "Due to the inherently superior bargaining position of the utility over the cable operator in negotiating the rates, terms and conditions for pole attachments, pole attachment rates cannot be held reasonable simply because they have been agreed to by a cable company." *Selkirk Communications, Inc. v. Florida Power & Light Co.*, 8 FCC Rcd. 387

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[32] *See* 47 C.F.R. § 1.1417.

[33] *See, e.g., Texas Utilities Electric Co. v. FCC*, 997 F. 2d 925, 936 (D.C .Cir. 1993). The Texas case arose prior to the 1996 amendments to the Pole Attachment Act. Nevertheless the Court's conclusion that higher rates for non-cable service requires justification remains valid.

(1993) ¶ 17 (CSB). Indeed, the Supreme Court itself has observed that the Pole Attachment Act was adopted "in response to arguments by cable operators that utility companies were exploiting their monopoly position by engaging in widespread overcharging." *FCC v. Florida Power Corp.*, *supra,* at 247.

The Commission has recently addressed a somewhat similar, albeit less egregious set of circumstances in *Cavalier Telephone, LLC v. Virginia Electric and Power Company.*[34] There the defendant utility, ("VEPCO") was charging the complainant pole attachment fees $36.00 for 1999, $37.00 for 2000, and a projected $38.00 for 2001. Upon reviewing the utility's costs and applying its formula, the Cable Services Bureau directed VEPCO to reduce its pole attachment fees to a maximum of $5.12 per pole per year.[35] VEPCO was also ordered to make refunds of past overcharges.[36]

As noted above, PECO is affiliated with a major telecommunications company, Hyperion, and through a partnership with that entity offers telecommunications services within its electric power service area. RCN has asked PECO to demonstrate that it charges its own affiliate the same prices it is charging RCN for pole license fees but PECO has declined to provide such information.[37] The Commission has found anticompetitive behavior by a pole

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[34] *Order and Request for Information*, 15 FCC Rcd 9563 (2000), and *Order*, 15 FCC Rcd 17,962 (2000) (*App. for Review pending*).

[35] *Order*, 15 FCC Rcd 17,962, at ¶ 3.

[36] *Id.*, at ¶ 4.

[37] Of course, even if PECO were charging its affiliate the same excessive fees it charges RCN the problem of unlawful discrimination would not disappear since an excessive charge to an affiliate can be partially or wholly recovered through ownership or by other collateral means.

owner to "magnify the unreasonableness" of certain requirements when the pole owner is in the same line of business as the attacher.[38] RCN has asked PECO to provide information about this potential issue of discrimination and PECO has declined to do so. At a minimum PECO should formally represent that it applies and collects the $47.25 rate uniformly to other attachers including cable companies, such as Comcast, which are not "pure" cable operators but which, like RCN, offer services other than the traditional cable services. PECO should also be required to represent that it is actually collecting and has continually collected its stated license fees from RCN's competitors. If discriminatory pricing exists in respect to other cable attachers it would be on its face a violation of section 224 and would severely inhibit the development of competitive cable offerings in the Philadelphia area by offering favorable terms to the incumbent.

The same nondiscriminatory principle should apply, of course, to telecom competition. Yet it appears that PECO does discriminate in favor of Verizon with respect to the attachment of its wiring to PECO's poles. Although PECO has declined to confirm to RCN that the ILEC is paying the same $47.25 annual pole attachment fee as is charged to RCN, PECO appears to grant Verizon the right to use more than 12 vertical inches of space on its poles, as compared with the space for one attachment assigned to RCN, and presumably to other CLECs. Although RCN prefers to have a full 12 inches of vertical separation, PECO often provides no more than 6 inches. *See* Exhibit 4 hereto, the Statement of Marvin Glidewell of RCN indicating that Verizon Pennsylvania does indeed appear to be allowed greater vertical space and that he has been told by PECO representatives that this arrangement is pursuant to an agreement between PECO and

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[38] *See Marcus Cable Associates v. Texas Utilities Electric Company,* 12 FCC Rcd 10362 (1997) ¶ 23.

Verizon. To the extent PECO is in fact charging Verizon the same $47.25 per pole that RCN is paying, but is allowing Verizon access to more vertical space on the pole than is accorded to RCN, there is a clear discrimination which is unlawful under section 224. If, for example, RCN's payment of $47.25 gives it the right to only one quarter or one half of the vertical space to which Verizon is entitled for its payment of $47.25, one approach to curing the unlawful discrimination introduced by such arrangements would be to reduce RCN's per pole fee to $11.81 or no more than $23.625, these figures being one quarter and one half, respectively of $47.25.

C. The Burden Is On PECO To Establish Its Costs

Because PECO has refused to provide RCN with any relevant cost data, RCN has no firm basis on which to estimate what a lawful attachment rate should be.[39] As set forth in Mr. Roberts' statement, RCN is currently attached to 9,446 poles, and has accordingly paid PECO $47.25 per year for each pole pro rata according to a semi-annual payment schedule. For some of these poles, RCN has paid for more than one year and for some less than one year. The total amount paid to date for such licenses is approximately $341,434. In the absence of relevant cost data RCN does not know what a lawful cost-based rate would be, but a first approximation might be the $3.97 per pole charged by Verizon Pennsylvania, or the $9.21 which PECO charges for cable-only attachments. A third approach is to average the fees RCN currently pays to other utilities. In comparison to the $341,434 paid to date, the total fees that RCN would have paid at

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[39] In *Alabama Cable Telecommunications Association, supra* at n. 22, the CSB said the following: "[W]e emphasize that it is never appropriate to withhold FERC Form 1 data and other essential data from an attacher... ." *Id.* at ¶ 8.

these alternative rates are as follows:[40]

TABLE I

Source	Rate	No. Poles	Ratio	Total
Verizon PA Rate	$3.97	9,446	.765	$28,680
PECO Cable Rate	$9.21	9,446	.765	$66,118
Average of Other Rates:[41]	$9.24	9,446	.765	$66,334
Average of Other Local Rates:[42]	$6.29	9,446	.765	$45,155

Unless and until PECO provides auditable and verifiable costs prepared in accordance with the Commission's cost formulae to justify a specific rate, RCN suggests that the Commission impose the lowest of these rates on PECO, or the $3.97 charged by Verizon Pennsylvania. The total fees to date would thus have been $28,680 rather than the $341,434 RCN has actually paid. This is appropriate as a device to provide PECO the incentive to set forth its own actual costs if they are high enough to justify fees higher than those suggested above.

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[40] The figures presented in Table 1 are intended to be illustrative only. Because RCN pays semi-annually and is constantly attaching to additional PECO poles, it has not yet paid PECO $446,323 for license fees, the total produced by multiplying $47.25 per pole by 9446 poles, but instead, as noted above, has to date paid only $341,434. Accordingly, the comparable figure must be reduced by the ratio of $341,434 / $446,323 (.765). The result achieved by this calculation provides a more meaningful comparison of what RCN would have paid PECO at the alternative rates listed above.

[41] Derived by averaging the following rates all of which RCN is currently paying: Verizon-PA.: $3.97; Verizon-MA: $9.60; ConEd (NY): $15.00; Ameritech: $4.90; Commonwealth Edison (Ill.): $15.00; PacBell: $4.28; PG&E: $11.96. *See* Exhibit 3 at 3.

[42] Derived from averaging other rates from Philadelphia area utilities: Verizon PA: $3.97; PPL: $7.88; Commonwealth Telephone: $3.50; GPU (Met Ed): $9.82. *See* Exhibit 3 at 3.

V. CONCLUSION AND REQUEST FOR RELIEF

RCN, as noted above, has raised each of these points with PECO, all to no avail. Whether motivated by the desire to handicap a competitor of its affiliated telecommunications companies, a desire to maximize the profitability of its real estate operations, or something else, the bottom line is that PECO is imposing pole attachment license charges on RCN which are in flagrant violation of the pole attachment law and the Commission's implementing rules, cases, and policies. When challenged, PECO refuses to provide back-up data for license fees.

Under the circumstances RCN respectfully requests that the Commission, after investigating the foregoing charges, issue an order providing such relief as it believes is justified. Such relief should include, at a minimum, the reduction of PECO's license fees to a just and reasonable level and the imposition of a requirement that PECO is to avoid all forms of discrimination.

RCN is aware that the Commission's pole attachment rules at 47 C.F.R. §1.1410 normally confine PECO's liability for refunds to the period following the date on which RCN filed this Complaint.[43] However, RCN respectfully suggests that application of that limitation in the circumstances of this case would be inconsistent with the broad mandate of the Pole Attachment Act, 47 U.S.C. § 224. On the contrary, in light of RCN's effort over a period of more

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[43] Section 1.1410, 47 C.F.R. § 1.1410 states that: "If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may: ... (c) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission *from the date that the complaint, as acceptable, was filed,* plus interest." (*Emphasis added*).

than six months to resolve this issue through negotiation, and PECO's bald denial of the Commission's authority to limit its rates as provided by law, imposition of the normal limitation on refund liability would have the effect of rewarding PECO for its lack of cooperation. Under such circumstances, the Commission would be fully justified in ordering a full refund of all moneys PECO unlawfully collected from RCN.

A. Limiting Refunds Is Contrary To The Purpose of Section 224

In the adopting of section 224, Congress directed the Commission to establish procedures that "minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television to the public." *Senate Report 95-580, 95th Cong., 1st Sess.*, 14 (1977). The Commission has ruled that its responsibility with respect to pole attachments "is to fashion a suitable remedy in light of the Congressional finding of utilities' monopoly power and possible abuse of bargaining power in setting pole attachment rates." *Cable Information Services, Inc. v. Appalachian Power Co.*, 81 FCC 2d 383 (1980), ¶ 27. However, strict application of the Commission's regulations barring refunds for the period prior to the filing date of a Complaint does not serve that mandate. The application of the Commission's refund limitation in the present dispute would permit PECO to retain hundreds of thousands of dollars collected unlawfully and that would otherwise be used to develop competitive cable service to the public. Accordingly, the Commission's rule is not only unsupported by the Congress' directive for the Commission to establish procedures that minimize the effects of unjust or unreasonable pole attachment practices, but is actually contrary to the Pole Attachment Act's purpose.

B. The Commission Should Order Full Refunds Under Section 1.1415

In the initial Order adopting pole attachment regulations, the Commission observed that it

adopted the rule allowing refunds back to the date of the complaint in order to avoid abuse and encourage early filing when rates are considered objectionable by the CATV operator. *Report and Order,* ¶ 45. In the Order, while declining to adopt more specific remedies for complainants, the Commission determined that "[t]he near plenary authority of proposed Section 1.1414 [now Sec. 1.1415], which gives the Commission authority to 'issue such orders and so conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice,' in conjunction with the provisions of proposed Sections 1.1411 and 1.1412 [now Sections 1.1412 and 1.1413], should be adequate to efficiently administer and enforce our pole attachment rules and orders." *Report and Order,* ¶ 48. As the Commission has noted in another context, "The injury flows from the date on which the violation first occurred and the Complainant should, in appropriate cases, be compensated accordingly."[44]

The Cable Services Bureau has construed Section 1.1415 to permit pre-complaint refunds in the recent past. In *Cable Texas v. Entergy Services*, 14 FCC Rcd 6647 (1999), the Bureau reasoned that although "Section 1.1410(c) provides for refunds which are *normally* the difference between the amount paid and 'the amount that would have been paid under the rate, term, or condition established by the Commission from the date that the complaint, as acceptable, was filed plus interest,' Section 1.1415 of the rules permits the Commission to 'issue other orders ... as will best conduce to ... the ends of justice.'" *Cable Texas,* ¶ 18 *(emphasis in*

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[44] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd 15822, 158 39 (1998) (footnote omitted). *See also EchoStar Communications Corporation v. Speedvision, et al.*, (CSB), File No. CSR 5364-P, FCC 01-50, *rel.* February 20, 2001.

original). The Bureau found that Complainant had paid unreasonable pole survey fees under protest because Respondent refused to process any more attachments until the fees were paid, and that the filing of the complaint was delayed because Complainant had accepted the Commission's preference for negotiated settlement in disputes. The Bureau ruled that "this is not the normal situation anticipated in Section 1.1410(c)" and for that reason, and "for reasons of justice" ordered a refund of the difference between the fees already paid and the reasonable amount determined by the Bureau, plus interest. *Cable Texas,* ¶ 19.

Here RCN has made diligent efforts since September of 2000 to resolve its dispute with PECO. At a minimum the refunds to which it is entitled should be retroactive to RCN's first effort to negotiate a solution. To the extent such a determination takes account of equities, RCN notes that it has always paid PECO's invoices in a timely fashion.

C. Waiver of Section 1.1410 Is Appropriate Under the Present Circumstances

In connection with RCN's request for refunds of all excessive payments made to PECO, the Commission has the discretion to waive the application of Section 1.1410 to the extent that it might limit refunds to the date of the filing of the complaint. Section 1.3 of the Commission's rules provides:

> The provisions of this chapter may be suspended, revoked, amended or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.

47 C.F.R. § 1.3. The Commission may waive its rules if particular facts would make strict compliance inconsistent with public interest. *Keller Communications v. Federal Communications Commission,* 130 F.3d 1073, 1076 (DC Cir. 1997). When regulating through

rules of general application, due process requires the use of waiver as a "safety valve" to avoid improper application of the rules. *WAIT Radio v. Federal Communications Commission*, 418 F.2d 1153, 1157 (DC Cir. 1969), *cert. den.*, 409 U.S. 1027 (1972). The Commission must give a "hard look" to waiver applications to assure that a general rule serving the public interest for a broad range of situations will not be rigidly applied where its application would not be in the public interest. *See BellSouth Corporation and BellSouth Wireless v. Federal Communications Commission*, 162 F.3d 1215, 1224 (DC Cir. 1999); *WAIT Radio, id.*

The Commission has also stated that it will waive the application of a regulation when the rule's underlying premise is shown to be invalid. *KCST-TV, Inc. v. Federal Communications Commission*, 699 F2d 1185 (DC Cir. 1983). As discussed above, permitting utility pole owners with coercive market power to keep fees collected through unjust and unreasonable rates, frustrates the Congressional directive requiring the Commission to prevent abuses which inhibit the development of cable service.

Accordingly, RCN respectfully seeks such relief as the Commission determines is appropriate in the premises.

Respectfully submitted,

RCN TELECOM SERVICES OF PHILADELPHIA, INC.

By: 

William L. Fishman
Peter A. Corea
SWIDLER BERLIN SHEREFF FRIEDMAN, LLC
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
Telephone: (202) 945-6986
Facsimile: (2102) 424-7645

Counsel to RCN Telecom Services of Philadelphia, Inc.

March 16, 2001.

EXHIBIT 1

POLE ATTACHMENT AGREEMENT

7/22/99 **Privileged & Confidential**

COPY

POLE ATTACHMENT AGREEMENT

THIS POLE ATTACHMENT AGREEMENT (this "Agreement") made as of this day of 8 | 13 1999, by and between PECO Energy Company, a Pennsylvania corporation, having its principal office at 2301 Market Street, Philadelphia, Pennsylvania 19103 ("PECO Energy"), and RCN Telecom Services of Philadelphia, a Pennsylvania corporation, having its principal office at 105 Carnegie Center, Princeton, New Jersey 08540 ("Attacher").

BACKGROUND

A. Attacher desires to attach aerial cables, wires and associated appurtenances ("Attachments") to certain PECO Energy poles.

B. PECO Energy is willing, to permit Attacher to make such Attachments to its poles to the extent it may lawfully do so, subject to the terms and conditions herein.

NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained, and intending to be legally bound, the parties hereto hereby agree as follows:

1. License. PECO Energy grants to Attacher a revocable, non-exclusive license to make attachments on PECO Energy poles, subject to the approval of an application and the issuance of a permit ("Permit") in accordance with the terms of this Agreement. PECO Energy reserves the right to terminate this agreement and any Permit in whole or in part when, in PECO Energy's judgment, such action is necessary to protect PECO Energy's interests.

2. Application Approval Procedure.

(a) For each Attachment desired in each municipality, Attacher shall submit an application in the form set forth in Exhibit A attached hereto or as may be subsequently amended. Such application shall be accompanied by a non-refundable application fee as specified on the application. As a part of each application, Attacher shall submit, in the quantity of copies required by PECO Energy, a detailed drawing showing the proposed location and manner of each Attachment included in the application. At the request of Attacher, PECO Energy will prepare said drawing at Attacher's expense.

(b) In addition to the aforementioned application fee, Attacher shall reimburse PECO Energy for all costs incurred by PECO Energy in processing the application, including, but not limited to, survey and engineering studies, costs in determining the availability and suitability of the pole space, whether or not the application is approved. Together with the application fee, Attacher shall pay PECO Energy a minimum of $1,000.00 advance deposit to cover estimated cost of review. If the deposit exceeds

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

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

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

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

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

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

4. Inspections. PECO Energy reserves the right to make periodic inspections and surveys of any part of Attacher's installations. PECO Energy will attempt to give Attacher reasonable notice of such inspections and surveys, except in those instances where, in the sole judgment of PECO Energy, safety considerations justify the need for such an inspection or survey without notice. Except in the case of an emergency, a representative of Attacher may accompany a PECO Energy's representative on inspections. Attacher shall reimburse PECO Energy for its pro-rata share of all expenses of such inspections and surveys. PECO Energy's right to make periodic inspections and surveys shall not relieve Attacher of any responsibility, obligation or liability assumed under this Agreement.

5. Franchise and Other Requirements. Attacher shall at all times have in effect all required franchises, licenses, approvals and consents from Federal, state and municipal authorities necessary to construct and operate its system. Attacher shall have the obligation to obtain any required additional rights-of-way or consents for the Attachments from property owners other than PECO Energy.

6. Relocations. Within ten (10) days after notice from PECO Energy, Attacher, at its expense, shall relocate, replace or renew any of the Attachments, or perform any other work in connection with the Attachments that may be directed by PECO Energy that may be required in the maintenance, replacement, removal or relocation of any facilities or equipment of PECO Energy or for the service needs of PECO Energy. PECO Energy reserves the right to perform such relocations or other work and Attacher shall reimburse PECO Energy for the cost thereof. Nothing in this Article shall relieve Attacher of the responsibility to promptly to repair, service and maintain its own facilities.

7. Damage. Attacher shall immediately report to PECO Energy or the applicable owner any damage to PECO Energy facilities or to the facilities of others using PECO Energy's poles arising out of the operations of Attacher. At option of PECO Energy or the applicable facility owner, Attacher shall at its cost, repair such damage forthwith, or reimburse such owner the cost of such repairs.

8. Limitation of Liability. PECO Energy shall not be liable to Attacher for any loss or damage to the Attachments, including without limitation the loss of or interference with service of the system, arising in any manner out of PECO Energy's operations or its performance of make-ready work. In no event shall PECO Energy be liable to Attacher for any punitive, indirect or consequential damages arising out of this Agreement, including without limitation, damages for lost profits.

9. Termination.

(a) Upon ten (10) days' advance written notice to PECO Energy, Attacher may remove its attachments in accordance with the procedures established by PECO Energy, provided, however, that if PECO Energy advises Attacher that such removal will interfere with PECO Energy's operations, Attacher shall delay such removal until

such time as is approved by PECO Energy. Such delay will have no effect on the validity of the Permit, or upon the rental charges computed hereunder.

(b) Attacher may terminate this Agreement or a Permit in whole or in part upon thirty (30) days' written notice to PECO Energy using the appropriate form specified in Exhibit D. No refund of any rental will be due on account of such surrender.

(c) Upon termination of this Agreement or the termination of any Approval granted hereunder, Attacher shall immediately begin to remove the Attachments at its own costs, from all poles of PECO Energy affected by such termination. If not so removed within thirty (30) days, PECO Energy shall have the right to remove them at the cost of Attacher and without any liability therefor.

10. Attachment Fees.

(a) Attacher shall pay PECO Energy an annual fee in the amount set forth in Exhibit C for each pole attachment made pursuant to this Agreement. Such fees shall be due and payable, without setoff, semi-annually in advance of the first day of February and the first day of August. Semi-annual rental payments shall be based upon the number of such pole attachments, for which Permits are in effect as of the first day of the month preceding the day on which such rental is payable.

(b) Attacher shall reimburse PECO Energy for any taxes, fees or other charges which PECO Energy is required or obligated to pay by reason of the Attachments.

(c) PECO Energy may at its option adjust the fees specified in Exhibit C. PECO Energy shall give written notice of such adjustment in the form of a revised Exhibit C to Attacher not less than sixty (60) days prior to any day on which semi-annual rental payments are due. References herein to Exhibit C shall be understood to refer to the latest revision thereof.

11. Billing and Default.

(a) Except as otherwise herein specifically provided, all amounts due PECO Energy under this Agreement shall be paid by Attacher within thirty (30) days after billing date. Attacher shall be considered in default if any amount is not paid to PECO Energy by the due date. In the event of default, PECO Energy shall assess a monthly one (1) percent finance charge to the outstanding balance, and PECO Energy may at its sole discretion terminate this Agreement with thirty (30) days written notice.

(b) If either party commences an action against the other party arising out of or in connection with this Agreement, the prevailing party shall be entitled to have and recover from the losing party reasonable attorneys' fees, costs of suit and discovery costs, including costs of appeals.

12. Unauthorized Occupancy.

(a) If Attacher should occupy any pole of PECO Energy without having first obtained a Permit in accordance with this Agreement, PECO Energy shall have the right, upon thirty (30) days' notice to Attacher to terminate this Agreement in its entirety. Prior to the effective termination date, Attacher shall remove all of its equipment, including but not limited to all Permitted Attachments, at the sole cost of Attacher. Upon the failure of Attacher to so remove said equipment, PECO Energy shall have th right to remove such equipment at Attacher's cost and expense.

(b) In addition, PECO Energy in its sole discretion shall have the right upon written notice to Attacher to impose a back rental charge on all unauthorized Attachments. The back rental charge for each unauthorized attachment shall be the product of the appropriate annual rental rate specified in the latest revision of Exhibit C, multiplied by the period of time beginning on the date of this Agreement and ending on the date when all such unauthorized attachments are removed.

13. Indemnification. Attacher shall indemnify, hold harmless and, at PECO Energy's option, defend, PECO Energy, its officers, agents and employees from and against any loss, damage, liability or cost (including without limitation reasonable attorneys' fees) for the following: (i) damage to property and injuries including death to all persons, including but not limited to employees of PECO Energy and employees of Attacher, which may arise out of, result from or in any manner be caused by or related to the erection, installation, maintenance, presence, use of removal of the Attachments upon or from PECO Energy's poles, whether or not caused by PECO Energy's negligence, including without limitation PECO Energy's contributory negligence, concurring negligence, active negligence and passive negligence; (ii) loss or infringement of copyright, libel, slander, or unauthorized use of information arising out of, resulting from or in any manner caused by or related to the operation or use of Attacher's system; (iii) Attacher's failure to secure required franchises, licenses, approvals and consents from Federal, state and municipal authorities and any necessary rights-of-way from owners of property; or (iv) infringement of patents with respect to the manufacture, use and operation of Attacher's equipment in combination with PECO Energy's equipment or otherwise. This paragraph shall survive termination of this Agreement.

14. Insurance. Attacher shall, when submitting an application hereunder, and annually thereafter, furnish to PECO Energy evidence satisfactory to PECO Energy of the following insurance in a form and by an insurance carrier acceptable to PECO Energy with not less than the limits stated, such insurance to be kept in force throughout the term of this Agreement:

> Workers' Compensation in the statutory amount and Employer's Liability Insurance with limits of not less than $1,000,000; Comprehensive General Liability Policy providing personal injury/bodily injury and property damage with a combined single limit of not less than $4,000,000 per occurrence. This insurance should include broad form contractual liability, completed operations, independent contractors and vehicle liability and name PECO Energy as

additional insured. Coverage shall also be primary to any other insurance carried by PECO Energy.

15. Bonding. At PECO Energy's request, Attacher shall furnish a surety bond in the amount of Attacher's annual attachment fees or $10,000, whichever is greater, guaranteeing the payment of any fees due under this Agreement or charges for work performed by PECO Energy hereunder.

16. Cost. Throughout this Agreement, "cost" shall be understood to comprise both direct and indirect costs, plus applicable overheads.

17. Waiver of Compliance. Failure of PECO Energy to enforce or insist upon compliance with any of the terms or conditions of this Agreement shall not constitute a waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in full force and effect.

18. Non-Exclusivity. Except as explicitly provided in a Permit, nothing contained herein shall be construed as affecting the rights or privileges previously or hereafter conferred by PECO Energy by contract or otherwise upon others not parties to this Agreement to use any poles covered by such Permits.

19. Additional Conditions. Nothing contained herein or in any Permit shall be construed to compel PECO Energy to acquire, construct, retain or maintain any pole or other facilities in any manner not required by its own service requirements. Permits issued hereunder shall be valid only for Attachment of PECO Energy approved cables and associated appurtenances to be operated by Attacher.

20. Notices. Any notice under this Agreement shall be in writing and sent certified mail, return receipt requested, postage prepaid, or by commercial overnight courier, to PECO Energy or to Attacher, as appropriate, at their respective addresses appearing in the first paragraph of this Agreement and, in the case of notice to Attacher, with a copy to John J. Jones, Esquire, Executive Vice President and General Counsel, RCN Corporation, 105 Carnegie Center, Princeton, New Jersey 08540.

21. Force Majeure. Either party hereto shall be excused from performance hereunder, other than the obligation to make payments of amounts already due, and shall not be liable for damages or otherwise if, to the extent that the party is unable to perform by any act, event, cause or condition that is beyond the party's reasonable control, and that by the exercise of reasonable diligence the party is unable to overcome or prevent, including but not limited to the following: accidents, strikes,

lockouts, fire, floods, acts of civil or military authorities, theft, vandalism, misuse or insurrection. The party failing to fulfill its obligations shall immediately notify the other party indicating the cause and expected duration of such failure. In the event the Force Majeure event continues for thirty (30) days beyond the required time of performance, the affected party may, at its option, terminate this Agreement upon notice to the other party.

22. Severability. If any of the provisions of the Agreement shall be invalid or unenforceable, such invalidity or unenforceability shall not invalidate or render unenforceable the entire Agreement, but rather the entire Agreement shall be construed as if not containing the particular invalid or unenforceable provisions or provisions, and the rights and obligations of the parties shall be construed and enforced accordingly.

23. Assignment. Neither this Agreement nor any interest herein, nor any Permit granted hereunder, shall be assigned, sublet or transferred by Attacher without the prior written authorization of PECO Energy.

24. Governing Law. This Agreement shall be construed under and in accordance with the laws of the Commonwealth of Pennsylvania. All legal actions instituted by attached under this Agreement must be filed in Philadelphia, Pennsylvania.

25. Entire Agreement. This Agreement, and the documents referred to therein, contain the entire agreement and understanding between PECO Energy and Attacher as to the subject matter of the Agreement, and merges and supersedes all prior agreements, commitments, representations, and discussions between PECO Energy and the Attacher pertaining to this Agreement. No modification or amendment of this Agreement will be binding unless agreed to in writing by the parties.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed the day and year first above written.

PECO ENERGY COMPANY

BY: _____

Manager, Real Estate & Facilities

RCN TELECOM SERVICES OF PHILADELPHIA

BY: _____

Title: Pres TNOG

EXHIBIT A

APPLICATION

APPLICATION FOR JOINT USE OF PECO ENERGY FACILITIES

DATE OF APPLICATION: _____

DO YOU HAVE A SIGNED JOINT USE AGREEMENT ON FILE WITH PECO ENERGY? Y / N

NAME OF COMPANY OR INDIVIDUAL

NAME: _____

ADDRESS: _____

CITY: _____ STATE: _____ ZIP: _____

NAME OF CONTACT PERSON: _____ PHONE ( ) _____

MUNICIPALITY: _____
(A permit application is required for each municipality where the facilities are located)

FACILITIES: ( ) Pole Attachments Number of poles _____

( ) Duct approximate number of feet _____

PURPOSE: Voice _____ Audio/Video _____
Data _____ Other _____ (specify) _____

APPLICATION FEE ENCLOSED: $_____ (See Rate Schedule Below)

1 - 5 Poles	$ 50.00 Fee
6 - 10 Poles	$100.00 Fee
11 or more Poles	$250.00 Fee
ALL DUCT REQUESTS	$250.00 Fee

NOTE: DEPOSIT REQUIRED - $1,000.00 (to be applied to costs of survey and/or make-ready work)

POLE RENTAL BILLING ADDRESS (IF DIFFERENT FROM ABOVE)

NAME: _____

ADDRESS: _____

CITY: _____ STATE: _____ ZIP: _____

Instructions For Application

(A) Read and complete the entire Application and sign in the appropriate places.
(B) Enclose a list of the poles or duct locations (or both) along with a check for the required Application and Deposit Fees as indicated above to:

PECO ENERGY COMPANY
Attn.: M. A. Williams, Manager
Real Estate & Facilities, N3-3
2301 Market St.
Philadelphia, PA 19103

111401v02

GENERAL INFORMATION
Concerning The
Application Process

(1) Upon receipt of this application, the request will be forwarded to the appropriate location for an ENGINEERING and SURVEY review.

(2) You will be supplied with a cost for our ENGINEERING and SURVEY to review the request. This cost will vary with the complexity of the request. You will be required to pay this cost whether or not you elect to proceed with the request.

(3) If PECO facilities need to be relocated to accommodate your request, you will be supplied with a cost for MAKE READY, which you will be required to pay if you elect to continue with the request.

(4) The invoice for the cost of ENGINEERING and SURVEY will be due and payable upon receipt. Invoices outstanding for more than 30 days will be declared delinquent and no additional applications will be accepted until the invoice is paid in full. Advance deposits will be credited to cost of engineering/survey with excess, if any, applied to make-ready work, if applicable.

(5) After receiving the invoice for the cost of the MAKE READY, you will have the option to accept the costs and authorize PECO to proceed with the application OR reject the costs and cancel the application.

(6) Should you decide to amend your application for reasons not resulting from PECO's field survey, your application will be canceled and you must resubmit for joint use of PECO's facilities.

(7) If you accept the cost and authorize PECO to proceed with the application, we will release the Make Ready work to our construction work management upon receipt of the payment. Payment must be received within 60 days of the date of the invoice. After that time, the application will be canceled and if you want to continue with the application at a later date, a new application will be required.

(8) Upon receipt of the payment authorizing PECO to proceed, PECO will prepare and mail our standard "Pole Attachment Agreement", in duplicate. You must sign both copies in the proper location, and return both copies to this office.

(9) PECO will complete any required make ready work and return one fully executed copy of the "Pole Attachment Agreement" to you for your records. At this time, PECO will issue a permit, which will permit you to begin work. **The permit must be available on site for inspection during construction.**

(10) It is understood that the applicant CANNOT attach to any PECO poles or utilize any PECO duct until a permit is issued.

(11) Applicant will identify their cable on every pole with a PECO approved cable tag.

(12) This application will remain in effect for sixty (60) days.

Applicant hereby acknowledges to have read and understood this application, agrees to comply with the application procedures described above and to pay in full the Engineering and Survey fees and understands the initial application fee is non-refundable.

_____ _____

Date Signed *Applicant's Signature*

*Title:*_____

EXHIBIT B

PERMIT

PERMIT

FOR JOINT USE OF
PECO ENERGY FACILITIES

PERMIT NO.

Control Number:
W.O. #

In accordance with the "Application for Joint Use of PECO Energy Facilities" dated
and submitted by , a permit to attach to facilities as outlined in
the application for **Twp.,** **County, Pa.**, on **Road,**
is hereby granted for the following facilities:

_____ PECO owned poles

PECO ENERGY COMPANY

By:_____

Date:_____

This permit is void if not exercised within ninety (90) days from the date granted.

THIS PERMIT MUST BE AVAILABLE ON SITE FOR INSPECTION DURING CONSTRUCTION.

EXHIBIT C

ATTACHMENT FEES

Rental Rates	$47.25 annual per pole attachment other than CATV
	$ 9.21 annual per pole attachment for CATV
	If facilities are overlashed over CATV facilities, the non-CATV rate shall be charged. All overlashed carriers will be considered an additional attacher for purposes of allocating costs of usable and unusable space.

NOTE: Rental rates are subject to change at any time upon notice not less than 60 days prior to any rental due date.

EXHIBIT D

NOTICE OF REMOVAL BY ATTACHER

Date:_____

PECO Energy Company

In accordance with the terms of Agreement dated _____, please be advised that we intend to remove our attachments from the following poles between _____, 19__ and _____, 19__.

Pole Number	Pole Location	Permit Number

ATTACHER

BY:_____

Notice No. _____

Total Poles Discontinued this Notice: _____

Poles Previously Vacated: _____

Total Poles Vacated to Date: _____

EXHIBIT 2

PRIOR CORRESPONDENCE

100 Lake Street
Dallas, PA 18612
1.800.RING.RCN
Fax (570) 674-1505

July 27, 2000

M.A. Williams, Manager
PECO ENERGY COMPANY
Real Estate & Facilities
2301 Market Street
Philadelphia, PA 19103

Dear Mr. Williams

I am writing you in response to the recent invoice RCN has received from PECO ENERGY COMPANY dated July 6, 2000, in the amount of $35,957.13. RCN and PECO ENERGY COMPANY entered into a Pole Attachment Agreement dated August 13, 1999. That agreement reflects annual attachment rates of $9.21 for cable attachments and $47.25 for telecommunications attachments, the latter described as "non-CATV providers." RCN does not agree with this rate structure and believes it is unlawful. As you may know, RCN is a franchised cable company although we also provide telecommunications services. If the cable rate were applied to the total of 1522 attachments covered by your invoice, the total due would be $14,017.62. In our opinion, based on the present circumstances, that is the maximum PECO can lawfully charge RCN for the attachments in question. In fact, if the $9.21 CATV rate cannot be justified under applicable pole attachment rules, even that amount may be unlawfully high.

More specifically, it is our view that PECO cannot, at present, charge two separate rates for CATV and non-CATV attachments. Section 224 (e) (1) governs the rates for pole attachments used in the provision of telecommunications services, including single attachments used jointly to provide both cable and telecommunications service. This section also sets forth a transition schedule for implementation of the new rate formula for telecommunications carriers. Until the effective date of the new formula governing telecommunications attachments, the existing pole attachment rate methodology of cable services is applicable to both cable television systems and telecommunications carriers. Beginning in February of 2001, the increased fees may be charged for telecommunications but must be phased in equally over a five-year period. While the FCC has expressed this view many times, it did so most recently in Cavalier Telephone, LLC v. Virginia Electric and Power Company, DA 00-1250, released June 7, 2000. In that decision the Cable Services Bureau stated the following:

"21. Complainant alleges that Respondent is charging an unreasonable annual pole attachment fee of $36.00 per pole in 1999, $37.00 in 2000 and a projected $38.00 in 2001. Respondent is charging cable companies approximately $5.00 per pole and other Virginia utilities are charging Complainant approximately $4.00 per pole. The 1996 Act amended the Pole Attachment Act in several important respects. Section 703(6) of the 1996 Act added a new Subsection 224(d)(3), that expanded the scope of Section 224 by applying the pole attachment rate formula to rates for pole attachments made by telecommunications carriers in addition to cable systems, until a separate methodology becomes effective for telecommunications carriers after February 8, 2001. Our current formula applies to attachments made by cable systems and telecommunications carriers providing telecommunications services until February 8, 2001." (Footnotes omitted).

J.

In light of the foregoing, RCN believes that the rate charged by PECO for RCN attachments is incorrect and, at a minimum, an adjustment is necessary to reduce the listed fee of $47.25 to $9.21 per attachment.

As you no doubt know, any rate charged by a pole owner must be just and reasonable, and must be based on an allocation of specified overall costs. While neither the cable rate of $9.21 nor the higher rate of $47.25 has been justified in any way by PECO, and RCN reserves the right to challenge either on the basis of the requirement that they be just and reasonable, a difference as striking as that between these two rates gives every indication of being excessive and impractical to justify.

Nevertheless, I invite you to present to me how both rates were derived, on what basis you believe you are entitled to charge RCN the higher rate at this time, and to provide any other views which you believe are relevant to this matter. It is our intention to pay PECO timely for use of your poles, and accordingly we would like to resolve this matter at the earliest possible time. Present invoices will be paid in full with an anticipated future adjustment.

Should you wish to discuss this further I can be reached at 570.674.1801

Sincerely

Terry Roberts, RCDD
Director, Access and Rights-of-Way
RCN Corp.

cc: W. Waldron
M. Glidewell
T. Wyllie
S. Burnside
W. Fishman

East Mountain Corporate Center
100 Baltimore Drive
Wilkes-Barre, PA 18702

10/31/2000

Mr. Craig Adams
Vice President, Contract and Supply Management
PECO Energy Co.
Central Stores Building
1060 W. Swedesford Rd.
Berwyn, Pa. 19312

Dear Mr. Adams

My name is Terry Roberts, Director of Access and Rights of Way for RCN. In early September I sent a letter to Mr. M.A. Williams, Manager of Estate and Facilities for PECO Energy Co. This letter was sent to Mr. Williams detailing objections RCN has with recently received pole attachment invoices. In that letter we contended that RCN cannot, at present, be charged more then other current attachers under provisions of the "Telecommunications Act of 1996, Section 224 (e) (1). This section governs charges for pole attachments, and indicates that the rates for video and telecommunications providers are required to be the same until a new rate formula takes effect in Feb. 2001, at which time increases can be introduced over a five-year time frame. This is detailed in my letter to Mr. Williams and I have taken the liberty to attach that letter for your review. We also referred to a recent decision of the FCC's Cable Services Bureau in Cavalier Telephone vs. Virginia Power and Electric Company.

I called Mr. Williams several times from 9/21/2000 to 9/25/2000, as I did not receive a response to my letter. When Mr. Williams did contact me on 9/25/2000, his response was RCN has signed a Pole Attachment Agreement and the rates are defined in that agreement. I reviewed the points in my letter as to pole attachment rates. When it became clear that we were at an impasse, I requested Mr. Williams to please state his response in writing to me. That was on 9/25/2000 or more than five weeks ago and we have no written reply.

Mr. Adams, please believe me that everyone at RCN views this as a very serious issue that requires immediate attention at PECO Energy. If RCN does not receive a substantive written response to this letter within ten days more formal action will be initiated. Swift and responsive action will be determinative of the path we take from this point forward and I would welcome the opportunity to discuss this issue in greater detail. I can be contacted at 570.270.1801.

Sincerely,

Terry Roberts, RCDD
Director, Access and Rights of Way
RCN

cc: Marvin Glidewell, RCN
Wayne Waldron, RCN
Scott Burnside, RCN
William Fishman, SBSF
Timothy Wyllie, RCN
M.A. Williams, PECO

PECO

An Exelon Company

Craig L. Adams
Vice President
Contractor & Supply Management

PECO Energy Company
1060 W. Swedesford Road
Berwyn, PA 19312

Telephone 610.648.7800
Fax 610.648.7738
www.pecoenergy.com
craig.adams@exeloncorp.com

November 8, 2000

Terry Roberts, RCDD
Director, Access & Rights of Way
RCN
East Mountain Corporate Center
100 Baltimore Drive
Wilkes-Barre, PA 18702

Dear Mr. Roberts:

I am in receipt of your letter dated October 31, 2000 and have reviewed your issue. As I understand, RCN executed a Pole Attachment Agreement with us on August 13, 1999 wherein you agreed to a rate per attachment per pole. You now wish to pay the rate that a CATV Company pays. The rate that you are now paying is the same rate that is charged all other telecommunication companies.

As I understand it, your company provides bundled communications services (in addition to CATV) which include Internet access which is not governed by the Telecommunications Act of 1996 and is therefore not governed by any rate structure. It is our belief that you are paying a consistently-applied market rate that is appropriate for the whole spectrum of services you provide to your customers via our facilities.

I hope this addresses your issue. If you have any further questions, please feel free to contact me.

Sincerely,

Scott Burnside
Senior Vice President
Regulatory & Government Affairs

100 Lake Street
Dallas, PA 18612
(570) 675-6201
Fax (570) 675-6128

January 23, 2001

John C. Halderman, Esq.
Assistant General Counsel
PECO Energy Company
2301 Market Street
Philadelphia, Pennsylvania 19101-8699

Dear Mr. Halderman:

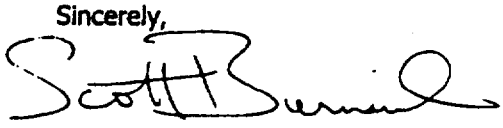
RCN signed a Pole Access Agreement with PECO on August 13, 1999. Under the terms of that Agreement, we have paid PECO $11.5 million for attachment fees and make-ready work. Currently, RCN has attached to 9,446 poles and we anticipate the need for attachments to an additional 14,000 poles during this year. The Agreement required RCN to pay $9.21 annually for each cable television attachment and $47.25 annually for attachments other than cable.

These rates are, in our view, unreasonable and unlawful under Section 224 of the Communications Act and the FCC's corresponding regulations. On a number of occasions, RCN has attempted to enter a dialogue with PECO personnel concerning the annual pole attachment fees and costs for make-ready work. We have requested cost justification and specific information as to which corporate entity is doing the make-ready, its relationship to PECO, and whether similar fees are being charged to PECO's own affiliates. In addition, we have expressed concern about make-ready work which may have been charged improperly to RCN or which was paid for but not executed.

As you can see from the attachments to this letter, RCN wrote to Mr. Williams on two occasions but received no written response from him whatsoever. Numerous telephone calls were placed to Mr. Williams and on September 25, 2000, Mr. Williams finally agreed to speak with us but refused to discuss any specifics of our issues. We asked Mr. Williams to respond to our letter in writing; he has not done so. On October 31, 2000, RCN wrote to Mr. Craig Adams raising the same issues. Mr. Adams did respond briefly but his letter similarly evidenced an unwillingness to discuss the issues in any substantive way. On November 27, 2000, Ms. Simona Robinson responded addressing certain make-ready charges but similarly failed to grapple with the major issues we have raised.

I am growing concerned and frustrated by your company's pattern of behavior with respect to these matters. We have tried to initiate negotiations in a reasonable, business-like manner, without success. Therefore, pursuant to Section 1.404(g)(1)-(13) of the FCC rules, 47 CFR Section 1.1404(g)(1)-(13) that PECO provide us with company data as set forth therein. In addition, I am making one more request for a meeting with the appropriate PECO personnel so that we may resolve the differences between our two companies. I would appreciate hearing from you by February 9, 2001.

Sincerely,



SB/dr

EXHIBIT 3

STATEMENT OF TERRY ROBERTS

1. My name is Terry Roberts. I am Director of Access and Rights of Way for RCN Corp. My office is located at 100 Baltimore Drive, Wilkes-Barre PA. My telephone number is 570-270-1801. I have been with RCN and its predecessor CTEC Company since 1980. I am a Registered Communications Distribution Designer (RCDD) and have been a member of the Building Industry Consultants Service International (BICSI) for over 16 years. My responsibilities include assisting all RCN markets in access and rights of way issues. This includes working with local and state governments, other communications companies, rights-of-way and easement owners, and pole and conduit-owning utilities. Prior to 1980 I held positions in numerous engineering firms performing outside plant engineering functions in New York, Indiana, Kentucky, Florida and Illinois. I have been involved in the telecommunications business for over 25 years and have 16 years experience dealing with utility poles, attachments and construction functions. Prior to my present position at RCN I was Director of Network Operations managing all markets.

2. In my position at RCN I interface and assist RCN rights-of-way and engineering personnel in all RCN's markets, from San Francisco and Los Angeles to Chicago, New York and Boston. As a result I am generally familiar with the process of attaching to utility poles, the variations that exist among regions, and the prices charged for pole access and for required make-ready or change-out work.

3. To distribute its fiber optic and coaxial network RCN is required to attach to thousands of

utility poles in the Philadelphia metropolitan area, some three quarters of which are owned by PECO. The remainder, with very limited exceptions, are owned by Verizon Pennsylvania. Pole attachment costs are far more critical to RCN than to most other CLECs because RCN's business plan is to target service to the ordinary residential subscriber rather than to high volume commercial subscribers. Where another CLEC may be willing to pay very high pole attachment costs because it needs access only to a limited number, such excessive fees are crippling for RCN since it needs access to many tens of thousands of poles in a metropolitan area.

4. The pole license fees charged by PECO are the highest of any current market where RCN provides services or has explored providing services. When RCN signed a Pole Attachment Agreement with PECO in August of 1999, it had no ability to negotiate the terms of the agreement due to start-of-service time constraints and our need to begin construction and engineering. The annual PECO pole attachment rate of $47.25 for telecommunications service and $9.21 for pure cable service are among the highest I have ever encountered. The $47.25 rate, which RCN pays for each of its attachments, is over three times higher than that of the next highest utility company. In New York City Consolidated Edison charges RCN $15.00 per pole. Our pole attachment agreements with most LECs contain attachment fees in the single digit numbers. In suburban Philadelphia we pay Verizon Pennsylvania $3.97. In New York City we pay Verizon of New York $8.97. In Massachusetts we pay Verizon-New England $9.60 per pole, and in Chicago we pay Ameritech $4.90. Time Warner Cable charges us $8.97 per pole in Queens. In Chicago we pay Commonwealth Edison, a company owned by PECO's

parent Exelon, $15.00 per pole.

5. RCN currently holds attachment licenses from PECO for 9,446 poles for which it has paid PECO $341,434 and has pending applications for another 4,411.[1]

6. In sum, our present annual pole license fees are as follows:

Company	Annual Pole License Fee
Verizon of Massachusetts	$9.60
Verizon of New York	$8.97
Verizon of Pennsylvania	$3.97
Ameritech (Chicago)	$4.90
Commonwealth Telephone	$3.50
Verizon New Jersey	$4.74
PacBell (San Francisco)	$4.28
Consolidated Edison (New York City)	$15.00
Commonwealth Edison (Chicago)	$15.00
Time Warner Cable (New York City)	$8.97
PG&E (San Francisco)	$11.96
PPL (Allentown)	$7.88
GPU (MetEd)	$9.82
PECO	$47.25

I understand that there may be minor variations in underlying costs from one utility to another, or from region to region, but it seems unlikely that such legitimate variations can

[1] Because these numbers continuously change and the fees are paid semi-annually the foregoing should be considered only approximations as of any particular date.

account for the striking disparity between PECO, on the one hand, and the other LEC and power utilities listed above. On the contrary, it is apparent that PECO's charges are excessive by industry standards.

7. Since September of 2000, RCN has attempted to resolve this issue informally, to no avail.[2] At a meeting of RCN and PECO representatives which I attended on March 7, 2001, PECO informed RCN that its pole attachment fee of $47.25 was not based on any PECO costs, but was instead a "market-based" rate. PECO indicated that it did not believe it was subject to the FCC's jurisdiction in regard to its pole attachment rates for RCN as a result of the Gulf Power II decision of the 11th Circuit Court of Appeals.

8. RCN, as a CLEC and a cable overbuilder, necessarily functions in a highly competitive marketplace and one in which facilities costs are a major component of the total capital costs of introducing the new competition contemplated by the Telecom Act of 1996. PECO's pole license fees are excessive when measured by industry-wide experience . Such excessive costs add materially to RCN's capital expenses and both deter and delay competitive entry.

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

Terry Roberts

March 12, 2001

Terry Roberts

[2] My letter of July 27, 2000 which is reproduced in Exhibit 2, was not sent to PECO until early September of 2000 because its dispatch to PECO was delayed for issuance of a check.

EXHIBIT 4

STATEMENT OF MARVIN GLIDEWELL

1. My name is Marvin Glidewell. I am currently employed by RCN Telecom Services of Philadelphia, Inc. ("RCN") as Director of Engineering and Construction. My office is located at 850 Rittenhouse Rd., Trooper, Pa., 19403. My work Number is (484) 399-8461. This Statement is given in connection with a Complaint being filed by RCN against PECO Energy Company.

2. I have been with RCN since 1998. My responsibilities include Management of the Philadelphia Technology Network Development Group. This group consists of personnel dedicated to the engineering, right-of-way access, and construction of the RCN Network. Prior to 1998, I was employed by Phase One Communications from 1987 to 1998 as the owner. Phase One provided telecommunications services to cable, telephone and power companies. Prior to Phase One I worked at Storer Cable Communications doing installation, commercial wiring, and RF design, and at two other engineering firms. In each of these positions my primary work involved attachment of wiring to existing aerial utility plant. I have been involved in the cable/telephone/utility industry since 1979. During these years I worked with a number of utilities, including the following: PECO Energy, GPU Energy, PSEG, Sprint, Bell Atlantic, Delmarva Power & Light, and Virginia Power & Light.

3. My responsibilities include the supervision of, and occasional participation in, securing appropriate pole attachment rights from the pole-owning utilities in the Philadelphia metropolitan area in which RCN is actively building its fiber optic and coaxial cable system. RCN is currently engineering and constructing a telecommunication network that could eventually reach 3,000 plant miles, covering portions of Montgomery, Delaware, Bucks, Philadelphia, and Chester counties. RCN may eventually require attachment to as many as 126,000 poles. Within our proposed service area the local phone company is Verizon Pennsylvania, Inc. and the local power company is PECO Energy. There is no joint pole ownership in this region. Approximately 75% of the poles in our service area

are owned by PECO Energy. The other 25% are owned by Verizon. In round numbers, therefore, we anticipate having to attach to approximately 94,500 PECO poles. As this region has grown, the available space on these poles has diminished. Having dealt with numerous utility companies in my career I can say that PECO Energy has presented the most difficult pole attachment issues I have ever encountered. More specifically, the number of existing violations on PECO's aerial facilities is far beyond anything I have previously encountered anywhere.

4. For a CLEC/cable overbuilder like RCN building its own facilities-based network, it is essential to rely on existing distribution facilities, such as utility poles or conduit because the construction of wholly new facilities would make the build-out costs prohibitive. In the Philadelphia region RCN relies principally on aerial distribution using existing poles. Utility poles are generally divided into three distinct spaces: at the top is the supply space, which contains electrical transmission wires. In the middle is a safety zone or neutral zone and below that is the communications space. Telephone attachments are placed at the bottom of the communications space, and are followed by cable (if present) and then CLEC fiber optic attachments which are typically placed at the top of the communications space. This is done pursuant to the National Electric Safety Code, the National Electric Code, and in the case of Verizon, the Telcordia Blue Book.[1] In addition, PECO has adopted its own construction code. The separations between power and communications wiring and the clearances mandated within each group of wires are intended to put life-threatening electrical power supply wires as high above the street as possible and in a designated area so that anyone working on the poles knows in advance where these wires will be found. The middle space is intended to be a buffer zone and then the lowest wiring – that closest to the street – is communications wire which generally has a little current passing through it. Applicable codes also specify certain vertical spacing separations between groups of wires and within groups. Verizon requires 12 inches of vertical separation between communications wiring on its own poles and

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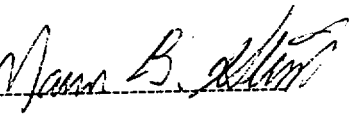
[1] *See e.g.*, Telcordia Bluebook Manual of Construction Procedures, section 3 (clearances).

RCN prefers to have such a separation. PECO, however, frequently attaches CLEC communications wiring on its poles with only 6 inches of separation.

5. RCN signed a Pole Attachment Agreement with PECO in August of 1999. It has already received licenses to attach to approximately 9446 of PECO's poles and has applications pending as of this time to attach to an additional 4411.

6. While I do not have knowledge of the conditions on each and every one of the PECO poles for which RCN holds an attachment license, I do have general knowledge of the condition of those poles, the identity of other attachers, and the physical arrangements which can be seen from visual inspection. Based on that knowledge, I can say quite confidently that on most PECO poles I have observed where Verizon Pennsylvania is attached, Verizon is accorded more space than is RCN under the terms of its Pole Attachment Agreement with PECO. In many instances Verizon appears to have up to 24 inches of vertical pole space. I have been advised on a number of occasions by PECO personnel that this is pursuant to an intercarrier agreement between PECO and Verizon by which Verizon is entitled to 24 inches of vertical pole space. On the other hand, RCN is frequently assigned only 6 inches of vertical space. RCN pays PECO make-ready to provide 12 inches of vertical separation for RCN's wiring but PECO's contractor, E.I.S., often places the strand at only 6 inches of separation.

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

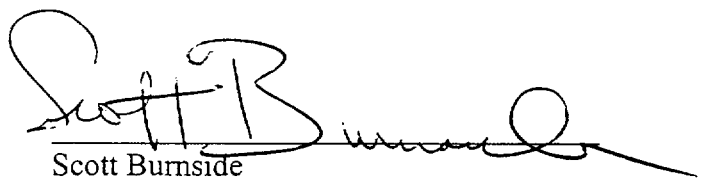
RCN Representative  March 16, 2001

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

In the Matter of	)	
	)	
RCN TELECOM SERVICES OF PHILADELPHIA, INC.	)	
	)	
v.	)	PA No. 01-_____
	)	
EXELON CORP, f/k/a PECO ENERGY COMPANY	)	

STATEMENT

My name is Scott Burnside. I am Senior Vice President of RCN Telecom Services, Inc. I have reviewed the foregoing Complaint of RCN Telecom Services of Philadelphia, Inc. I am personally familiar with the circumstances set forth in the Complaint. I declare, under penalty of perjury, that the information set forth in the Complaint is true and correct to the best of my knowledge, information and belief.



Scott Burnside

March 16, 2001

370942.1

CERTIFICATE OF SERVICE

In accordance with the provisions of Section 1.1401 *et seq.* of the FCC's rules, the foregoing Complaint of RCN Telecom Services of Philadelphia, Inc., was served this 16th day of March, 2001, on the following by first class U.S. mail, postage-paid.

John Halderman
Exelon Corp
2301 Market Street, N3-3
Philadelphia, PA 19101-8699

Michael Williams
Exelon Corp
2301 Market Street, N3-3
Philadelphia, PA 19101-8699

Deborah Lathen
Chief, Cable Services Bureau
Federal Communications Commission
445 12th Street, SW, Room 3-C740
Washington, D.C. 20554

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

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

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