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McDERMOTT, WILL & EMERY

April 16, 2001

VIA MESSENGER

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

Re: RCN Telecom Services of Philadelphia, Inc. v. Exelon Corp. f/k/a PECO Energy Company
PA No. 01-003

Dear Ms. Salas:

Enclosed for filing in connection with the above-referenced matter on behalf of Exelon Corporation and PECO Energy Company, please find the originals and four copies of (1) Motion to Dismiss of Exelon Corporation and (2) Response to Complaint.

The Motion to Dismiss references the Declaration of John C. Halderman. The original Declaration of Mr. Halderman is attached to the Response, and a copy is attached to the Motion to Dismiss. We will supplement the Motion to Dismiss with an original Declaration of Mr. Halderman shortly.

Please return a file-stamped copy of these pleadings to our office with our courier.

Thank you for your attention to this matter.

Very truly yours,

Christine Gill

Christine M. Gill

Enclosures

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

In the Matter of	)	
	)	
RCN TELECOM SERVICES	)	**PA No. 01-003**
OF PHILADELPHIA, INC.	)	
	)	
v.	)	
	)	
EXELON CORP. f/k/a/	)	
PECO ENERGY COMPANY	)	

To: Cable Services Bureau

MOTION TO DISMISS OF
EXELON CORPORATION

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

Counsel for Respondent Exelon Corporation

Dated: April 16, 2001

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

In the Matter of	)	
	)	
RCN TELECOM SERVICES	)	**PA No. 01-003**
OF PHILADELPHIA, INC.	)	
	)	
v.	)	
	)	
EXELON CORP. f/k/a/	)	
PECO ENERGY COMPANY	)	

To: Cable Services Bureau

MOTION TO DISMISS OF EXELON CORPORATION

Exelon Corporation ("Exelon"), through its undersigned counsel, hereby files this Motion to Dismiss the Pole Attachment Complaint filed by RCN Telecom Services of Philadelphia, Inc. ("RCN") on March 16, 2001. Exelon files this Motion to Dismiss on the ground that it is not a properly named respondent and, thus, the Commission lacks jurisdiction over it.

1. The Complaint names "Exelon Corp., f/k/a PECO Energy Company" as the respondent. On its face, that caption is incorrect. Exelon was initially incorporated in February 1999 as a subsidiary of PECO Energy Company ("PECO").[1] However, pursuant to an October 2000 merger involving Exelon, PECO, and Unicom Corporation, Exelon became the holding company parent of PECO.[2] The merger was structured such that, first, Exelon

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1 Exelon SEC Form 10-K at 1 (filed Apr. 2, 2001).

2 Exelon SEC Form 10-K at 1 (filed Apr. 2, 2001).

and PECO engaged in a stock swap.[3] That transaction resulted in Exelon becoming the parent of PECO.[4] Unicom Corporation then merged with Exelon, with Exelon remaining as the surviving entity.[5] Unicom's subsidiaries, including Commonwealth Edison Company, became subsidiaries of Exelon.[6] Despite the change in corporate structure effected by the transactions, Exelon and PECO retained their names and remain ongoing concerns in those names.[7] Thus, Exelon was never "formerly known as" PECO Energy Company.

2. The overriding problem is that Exelon should not be in this lawsuit at all. As noted by the Supreme Court in *United States v. Bestfoods*, "It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries."[8] While the corporate veil may be pierced and the parent held liable for the actions of the subsidiary in certain very limited situations, such as when the corporate form is misused for wrongful purposes, none of those exceptions are present here.

3. Exelon is a holding company parent of PECO and numerous other companies, and neither owns nor administers the poles at issue in this case; the poles are owned and administered by PECO.[9] In fact, the poles at issue in this case have never been owned and administered by Exelon.[10] Also, the pole attachment agreement at issue in this case ("Agreement") was entered between PECO and RCN in August 1999.[11] Exelon was not a

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3 Exelon SEC Form 10-K at 1 (filed Apr. 2, 2001).

4 Exelon SEC Form 10-K at 1 (filed Apr. 2, 2001).

5 Exelon SEC Form 10-K at 1 (filed Apr. 2, 2001).

6 Exelon SEC Form 10-K at 1 (filed Apr. 2, 2001).

7 Halderman Declaration at ¶ 2.

8 *United States v. Best Foods*, 524 U.S. 51, 61 (1998) (quoting Douglas and Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929)).

9 Halderman Declaration at ¶ 3.

10 Halderman Declaration at ¶ 3.

11 Halderman Declaration at ¶ 3.

party to the Agreement and is not involved in administering it.[12] Accordingly, none of the alleged improprieties described by RCN involve Exelon; RCN's allegations regarding rate setting, negotiations, decisions, and administration of the Agreement pertain exclusively to PECO. Further, if the Commission grants RCN any remedy in this case (which Exelon does not believe it should), such remedy could only be implemented by PECO. In light of those facts, the only proper party is PECO. Thus, the Complaint should be dismissed with regard to Exelon.

WHEREFORE, THE PREMISES CONSIDERED, Exelon respectfully requests that the Commission dismiss the Complaint filed against it by RCN.

Respectfully submitted,

Exelon Corporation

By: _____

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

Its Attorneys

Dated: April 16, 2001

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12 Halderman Declaration at ¶ 3.

ATTACHMENT A

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

In the Matter of	)	
	)	
RCN TELECOM SERVICES	)	**PA No. 01-003**
OF PHILADELPHIA, INC.	)	
	)	
v.	)	
	)	
EXELON CORP. f/k/a/	)	
PECO ENERGY COMPANY	)	

DECLARATION OF
JOHN C. HALDERMAN

I, John C. Halderman, pursuant to FCC Rule Sections 1.16 and 1.1407, hereby declare as follows:

1. I am an individual over the age of 18 and serve as Assistant General Counsel for Exelon Business Services Group. In that capacity, I am familiar with Exelon Corporation ("Exelon"). I am also familiar with the facts of this case and have actual knowledge of the facts discussed in this declaration.

2. Exelon was incorporated in February 1999 as a subsidiary of PECO Energy Company ("PECO"). However, through a merger involving Exelon, PECO, and Unicom Corporation in October 2000, Exelon became the holding company parent of PECO. The merger first involved a stock swap between Exelon and PECO Energy Company. Through that transaction, Exelon became the parent of PECO. Unicom Corporation then merged into Exelon, with Exelon as the surviving entity (Exelon became the parent of Unicom's subsidiaries, including Commonwealth Edison Company). Despite the merger

transactions, Exelon and PECO both retained their names and remained ongoing concerns under those names. Exelon has never been known as PECO Energy Company.

3. Exelon does not own, administer, or control the utility poles at issue in this case. It has never owned, administered, or controlled the utility poles at issue in this case. Rather, the poles are owned and controlled by PECO. Also, Exelon was not involved in negotiating the pole attachment agreement between PECO and RCN Telecom Services of Philadelphia ("RCN") dated August 13, 1999 ("the Agreement"). Nor is Exelon currently involved with administering the Agreement or in any continuing dialogue between PECO and RCN over the pole attachment rate being charged to RCN. Those matters are purely within the purview of PECO.

4. I have reviewed the Response to Complaint and Motion to Dismiss of Exelon, and to the best of my knowledge and belief, all the facts stated in those pleadings with regard to Exelon are true and correct.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 12, 2001 at Philadelphia, Pennsylvania.

John C. Halderman, Declarant

CERTIFICATE OF SERVICE

I, Jane Aguilard, hereby certify that on this 16th day of April, 2001, a single copy of the foregoing "Motion to Dismiss of Exelon Corporation" was served on the following as indicated:

By Messenger

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

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

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

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

By U.S. Mail

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

Louise Fink Smith
Pennsylvania Public Utility Commission
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U.S. Nuclear Regulatory Commission
1 White Flint North
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Rockville, MD 20852-2738

William L. Fishman
Peter A. Corea
Swidler Berlin Shereff Friedman, L.L.C.
3000 K. Street, N.W., Suite 300
Washington, DC 20007-5116

Jane Aguilard

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

In the Matter of	)	
	)	
RCN TELECOM SERVICES	)	**PA No. 01-003**
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v.	)	
	)	
EXELON CORP. f/k/a/	)	
PECO ENERGY COMPANY	)	

To: Cable Services Bureau

RESPONSE TO COMPLAINT

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

Counsel for Respondents Exelon Corporation
and PECO Energy Company

Dated: April 16, 2001

TABLE OF CONTENTS

Attachments

EXECUTIVE SUMMARY

Exelon Corporation ("Exelon") and PECO Energy Company ("PECO") (collectively "Respondents") hereby respond to the allegations set forth against them by RCN Telecom Services of Philadelphia, Inc. ("RCN"). RCN's core claim is that the pole attachment rate of $47.25 per pole that it voluntarily agreed to pay PECO is too high. Respondents vigorously dispute that claim and maintain that the rate is legal, non-discriminatory, and charged to RCN in good faith. The Pole Attachments Act ("PAA") simply does not mandate regulated rates for companies like RCN that utilize pole attachments to provide service over an Open Video System ("OVS"), to provide Internet access, or to provide various combinations of different services.

As an initial matter, RCN has filed its Complaint against the wrong party. The Complaint names "Exelon Corporation f/k/a PECO Energy Company," which is incorrect in itself because Exelon has never been known as "PECO Energy Company." More importantly, though, naming only Exelon is jurisdictionally fatal because it does not own, control, or have any involvement with the poles at issue in this case. Rather, the poles are owned, controlled, and administered by PECO, a subsidiary of Exelon. Because parent companies cannot generally be liable for the actions of their subsidiaries, Exelon is filing a Motion to Dismiss along with this Response. In the event that motion is not granted, Respondents are jointly filing this Response.

PECO has gone to great lengths to work with RCN to enable it to build-out its network as quickly as possible. The initial negotiations leading to the pole attachment agreement between PECO and RCN proceeded relatively quickly, taking a little under two months. Once the agreement was entered, PECO approved RCN's attachment applications and performed make-ready work quickly. Also, among other things, PECO's make-ready contractor increased its

work force to expedite the large amount of work required by RCN, and meets with it every week to make sure its priorities are being addressed.

The Commission should dismiss RCN's Complaint for lack of jurisdiction because the PAA only provides the Commission with jurisdiction over pole attachments utilized by a cable television system to provide cable service, by a telecommunications carrier to provide telecommunications services, and, arguably, by an entity providing cable service and telecommunications service. It does not, however, provide jurisdiction over attachments used for any other reasons, including other combinations of services. Such a reading is premised on a narrow interpretation of the PAA, which the Commission must take given its legislative history and because it effects a taking of property. RCN markets itself as a provider of open video system (OVS) services, internet services and telecommunications services but so far has refused to divulge exactly what combinations of services it provides over its attachments to PECO's poles. Under any of RCN's combinations of services, however, the Commission lacks jurisdiction to impose rates under the PAA.

If the Commission does not dismiss the Complaint for lack of jurisdiction, RCN's demand for a lower rate should be denied because the present rate was reached through good faith negotiations. The PAA and the Commission place a high value on private negotiations, and despite RCN's efforts to label itself a victim of one-sided bargaining, it came to the table with equal bargaining power. At the time PECO and RCN negotiated the pole attachment agreement, RCN had built-out networks and negotiated attachment agreements in several cities, had revenues of approximately $245 million per year, and had approximately $2.3 billion in available cash.

Also if the Commission does not dismiss the Complaint for lack of jurisdiction, RCN's "claims" of discrimination should be denied. Respondents find RCN's casual allegations of discrimination especially offensive due to the fact that RCN presents absolutely no relevant evidence in support of them. In essence, RCN just wants the Commission to investigate whether PECO *might* be discriminating. However, because the burden of proof is on RCN, not the Commission or Respondents, this allegation cannot stand.

As a final alternative argument, if the Commission does not dismiss or otherwise deny the Complaint, the Commission should apply the telecommunications rate to any of RCN's attachments that it deems encompassed by the PAA. However, RCN's request for a refund of fees paid prior to the date of the Complaint should be denied. Such a refund would be contrary to the Commission's rules, and no facts exist which warrant a waiver. If, however, the Commission grants relief of this nature, it should only grant such relief from the date RCN refiles or amends its Complaint to name the proper respondent. Even if the Commission does not require RCN to refile or amend the Complaint, it should grant relief only from April 16, 2001, the earliest date RCN could have theoretically refiled or amended the Complaint to name the proper respondent.

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

In the Matter of	)	
	)	
RCN TELECOM SERVICES	)	**PA No. 01-003**
OF PHILADELPHIA, INC.	)	
	)	
v.	)	
	)	
EXELON CORP. f/k/a/	)	
PECO ENERGY COMPANY	)	

To: Cable Services Bureau

RESPONSE TO COMPLAINT

Pursuant to FCC Rule Section 1.1407,[1] Exelon Corporation ("Exelon") and PECO Energy Company ("PECO") (collectively "Respondents"), through their undersigned counsel, hereby respond to the Pole Attachment Complaint filed by RCN Telecom Services of Philadelphia, Inc. ("RCN") on March 16, 2001. RCN advances one core position in this proceeding: that the pole attachment rate of $47.25 per pole that it voluntarily agreed to pay PECO is too high. Respondents vigorously dispute that claim and maintain that the rate is legal, non-discriminatory, and charged to RCN in good faith.[2]

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1 47 C.F.R. § 1.1407 (2000).

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

1. RCN's Complaint must fail for several reasons. First, the Federal Communications Commission ("FCC" or "Commission") lacks jurisdiction over this matter because RCN's pole attachments fall outside the coverage of the Pole Attachments Act ("PAA").[3] The PAA must be interpreted narrowly, as it contains no language expressly authorizing jurisdiction over pole attachments used to provide service over an Open Video System ("OVS"), to provide Internet access, or to provide various combinations of different services, as RCN apparently does.[4] While that alone is sufficient ground for dismissal, because PECO and RCN arrived at the rate through good faith negotiations in August 1999, RCN cannot now be heard to demand that the Commission rewrite the contract between the parties and, even more egregiously, order a massive refund of the amounts it paid Respondents. Additionally, Respondents dispute RCN's inflammatory discrimination allegations, which quickly prove to be baseless.

I. PARTIES

2. RCN filed this case against "Exelon Corp. f/k/a PECO Energy Company." However, Exelon is the holding company parent of PECO, has never been "formerly known as" PECO Energy Company as stated by RCN, did not enter into a pole attachment agreement with RCN, and does not own the utility poles at issue in this case.[5] Thus, Exelon has been improperly named as the Respondent and the Commission lacks jurisdiction over it. As noted by the Supreme Court in *United States v. Bestfoods*, "It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its

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3 47 U.S.C. § 224 (1994 and Supp. IV 1998).

4 Despite repeated requests, RCN has so far failed to divulge to PECO exactly what services it provides over its attachments to PECO's poles. However, based on RCN's description of its activities, PECO believes in good faith that none of them are covered by the PAA.

5 Halderman Declaration at ¶ 3.

subsidiaries."[6] While the corporate veil may be pierced and the parent held liable for the actions of the subsidiary in certain very limited situations, such as when the corporate form is misused for wrongful purposes, none of those exceptions are present here.

3. In accordance with the foregoing, Exelon has filed a separate Motion to Dismiss simultaneously with this Response. Nonetheless, in the interest of preserving its right to argue the substantive merits of the case should the Commission decline to grant its Motion to Dismiss, Exelon is joining PECO in this Response. By joining in this Response, Exelon does not consent to the Commission's jurisdiction or waive any rights to protest jurisdiction.

4. For its part, PECO does not have an obligation to respond to the Complaint at all, given that it was filed only against Exelon, a separate entity. PECO requests that the FCC require RCN to refile the Complaint or file an Amended Complaint if it wishes to proceed with an action against PECO. PECO recognizes that if the Complaint is dismissed as to Exelon (as it should be), RCN will simply refile the Complaint against PECO. Accordingly, in the interest of administrative economy, and in the event the Commission does not require RCN to refile or file an Amended Complaint, PECO is submitting this Response.[7] Also, by filing this Response, PECO does not consent to the Commission's jurisdiction or waive any rights to protest jurisdiction.

II. BACKGROUND

A. Description Of PECO

5. PECO is a public utility company engaged in the transmission, distribution, and sale of electricity and natural gas to customers in southeastern Pennsylvania, including the

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[6] *United States v. Best Foods*, 524 U.S. 51, 61 (1998) (quoting Douglas and Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929)).

[7] Regardless of whether the Commission requires RCN to refile or file an Amended Complaint, if it grants RCN a refund of any pole attachment fees (which it should not), it should order that any refund will run only from April 16, 2001, which is theoretically the earliest day RCN would be able to refile or file an Amended Complaint. Under no circumstances should the refund run from the date the Complaint was filed against Exelon, as it is not a proper party.

Philadelphia metropolitan area. Exelon was a subsidiary of PECO prior to October 2000.[8] However, pursuant to an October 2000 merger involving PECO, Exelon, and Unicom Corporation, Exelon became the holding company parent of PECO.[9] The merger was structured such that, first, Exelon and PECO engaged in a stock swap.[10] That transaction resulted in Exelon becoming the parent of PECO.[11] Unicom Corporation then merged with Exelon, with Exelon remaining as the surviving entity.[12] Unicom's subsidiaries, including Commonwealth Edison Company, became subsidiaries of Exelon.[13] Despite the change in corporate structure effected by the transactions, Exelon and PECO retained their names and remaining ongoing concerns in those names.[14] Also, PECO retained ownership and control of its utility poles and, for purposes of this proceeding, operates in substantially the same manner as before the merger.[15]

6. Exelon also has several telecommunications interests. While only two of these companies directly or indirectly have attachments on PECO's poles, PECO Adelphia Communications (formerly PECO Hyperion Communications) and Exelon Infrastructure Services, Inc,[16] Respondents briefly discuss the others here to provide the Commission with a full picture of Exelon's interests. Exelon's telecommunications interests are primarily owned by Exelon Communications Holdings, L.L.C. ("Exelon Communications"). Exelon

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8 Exelon SEC Form 10-K at 1 (filed Apr. 2, 2001).

9 Exelon SEC Form 10-K at 1 (filed Apr. 2, 2001).

10 Exelon SEC Form 10-K at 1 (filed Apr. 2, 2001).

11 Exelon SEC Form 10-K at 1 (filed Apr. 2, 2001).

12 Exelon SEC Form 10-K at 1 (filed Apr. 2, 2001).

13 Exelon SEC Form 10-K at 1 (filed Apr. 2, 2001).

14 Halderman Declaration at ¶ 2.

15 Halderman Declaration at ¶¶ 2-3.

16 Robinson Declaration at ¶ 4; PECO Adelphia currently subleases dark fiber capacity from Exelon Communications' subsidiary Exelon Communications Company, L.L.C., on fiber that is attached to PECO's poles. PECO Adelphia is charged an attachment rate of $47.25 per pole.

Communications' principal investments are PECO Adelphia Communications[17] and AT&T Wireless PCS of Philadelphia, LLC.[18]

7. Exelon Capital Partners, Inc. ("Exelon Capital") was created to facilitate capital investments in the areas of unregulated energy sales, energy services, utility infrastructure services, e-commerce and communications.[19] Exelon Capital recently purchased a 14.83% interest in Everest Broadband ("Everest") for $14,999,998. Everest is a broadband service provider catering to small to mid-sized business tenants in multi-tenant buildings and hotel properties focusing on the business traveler.[20] Everest also recently acquired Metrocomm International, Inc. ("Metrocomm"), a provider of in-building wiring for telecommunications that operates in the New York region. Neither Metrocomm nor Everest currently operates in the Philadelphia area.[21]

8. Exelon Infrastructure Services, Inc. ("EIS") provides infrastructure services including construction and maintenance services for fiber networks. EIS is building a national network of contractors to serve the needs of electric, gas, telecommunications, cable, and water utilities throughout the United States.[22] EIS has attachments on a small number of PECO's poles

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17 PECO Adelphia Communications is a CLEC, providing local and long distance, point-to-point voice and data communications, Internet access and enhanced data services for businesses and institutions in eastern Pennsylvania. PECO Adelphia is a 50% owned joint venture with Adelphia Business Solutions. *See* PECO Energy Co. SEC Form 10-K at 18 (filed April 2, 2001).

18 Formed in 1996, AT&T Wireless PCS of Philadelphia, LLC is a joint venture to provide wireless telecommunications in the Philadelphia metropolitan area. It commercially launched its service in October 1997. Exelon Communications holds a 49% equity interest in the venture. *See* PECO Energy Co. SEC Form 10-K at 18 (filed April 2, 2001).

19 PECO Energy Co. SEC Form 10-K at 18 (filed April 2, 2001).

20 Press Release of Everest Broadband dated Jan. 3, 2001, available at http://www.everestbroadband.com/news/010301.htm.

21 Press Release of Everest Broadband dated Aug. 14, 2000, available at http://www.everestbroadband.com/news/081400.htm.

22 *See,* http://www/exeloninfrastructure.com/affil.htm.

to provide a closed circuit fiber network for school systems located in Delaware County and Bucks County. EIS pays the same rate pole attachment rate of $47.25 and is subject to same general terms and conditions as RCN.[23]

B. Description of RCN's Regulatory Status[24]

9. Respondents assert the following on information and belief. RCN was certified by the FCC to provide service over an OVS on June 15, 1998.[25] Their original certification encompassed 109 communities in the counties of Bucks, Chester, Delaware, and Montgomery.[26] On October 2, 1998, RCN filed a Notice of Intent to Establish an Open Video System in the Philadelphia area with the FCC.[27] Approximately a year later, RCN requested modification of its OVS authority, withdrawing several communities in the Philadelphia area and indicating to the Commission that they held cable franchises in those locations.[28] RCN subsequently filed a modification to reflect a name change which occurred as a result of a corporate restructuring.[29]

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23 Robinson Declaration at ¶ 4.

24 Respondents have sought to identify RCN's status and activities utilizing all publicly available information. However, due to unavoidable uncertainties regarding the status of mergers, acquisitions, or other transactions in which RCN may be involved, some of the information in this section may not be completely current.

25 In the Matter of RCN Telecom Services of Philadelphia, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd. 1200 (1998).

26 *Id.* These include, among others, in relevant part: In Bucks County: Bristol Borough, Bristol Township, Langhorne, Newton Borough, Newton Township, Pendel, Upper Southampton, Warminster; in Delaware County: Aldan, Collingdale, East Lansdowne, Eddystone, Folcroft, Glenolden, Haverford, Lansdowne, Millbourne, Morton, Nether Providence, Norwood, Prospect Park, Ridley, Ridley Park, Sharon Hill, Springfield, Tinicum, Trainer, Upper Darby, Yeadon; and in Montgomery County: Abington, Ambler, Lower Providence, Plymouth, and Springfield.

27 RCN Telecom Services of Philadelphia, Inc. Files a Notice of Intent to Establish an Open Video System, *Public Notice*, 13 FCC Rcd. 20109 (1998).

28 *See* RCN Telecom Services of Philadelphia, Inc. Files a Modification to the Service Area of its Open Video System, *Public Notice*, 14 FCC Rcd. 17860 (1999) (requesting withdrawal of Bristol Borough, Colwyn, Eddystone, Folcroft, Morton, Newton Borough, Newton Township, Ridley, Rutledge, and Sharon Hill.)

29 *See* RCN Amends Open Video System Certifications to Update Statements of Ownership, *Memorandum Opinion and Order*, DA No. 99-2437 (Oct. 29, 1999). It is

10. RCN appears to hold non-exclusive franchises to operate cable television systems in several communities.[30] To the extent, however, that RCN both holds cable franchises and continues to be certified to provide service by OVS, its OVS status remains intact for regulatory purposes and RCN should continue to be categorized as such.[31] On information and belief, the communities in which RCN possesses both OVS certification and a cable franchise may include Collingdale, Folcroft, Glenolden, Norwood, Prospect Park, Ridley, Ridley Park, and Upper Darby.[32] Of the 109 communities in which RCN was originally certified to provide OVS, RCN has only modified its grant to withdraw 10 communities, leaving 99 communities still covered under its OVS grant.[33]

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unclear from the publicly available documents precisely the current status of RCN's regulatory authority. RCN's own counsel indicates that "RCN," identified in the complaint as referring to "RCN Telecom Services of Philadelphia" as the holder of FCC OVS authority. RCN, however, is undergoing an internal corporate reorganization, whereby RCN Telecom Services of Philadelphia, Inc. will be merged into its RCN Telecom Services of Pennsylvania, and thereafter renamed RCN Telecom Services, Inc. *See*, Application of jurisdictional utilities RCN Telecom Services of Pennsylvania, Inc. d/b/a RCN of Pennsylvania (RCN PA), RCN Long Distance Company (RCN LD), and RCN Telecom Services of Philadelphia, Inc. d/b/a RCN of Philadelphia (RCN of Philadelphia) for approval of the mergers of RCN of Philadelphia and RCN LD into RCN PA, Docket No. 310555F0004 (Penn. PUC Feb. 1, 2000). PECO has no information on the current status of RCN's reorganization or the consummation thereof.

30 *See, e.g.*, Cable Franchise Agreement, Borough of Collingdale (Dec. 13, 1999); Ordinance No. 609, Borough of Morton (June 9, 1999); Franchise Agreement, Borough of Norwood (Nov. 22, 1999); Cable Franchise Agreement, Township of Ridley (Dec. 23, 1998); Ordinance 2896, Township of Upper Darby (Feb. 16, 2000). These are provided for illustration; PECO does not know the full extent of RCN's franchise authority and in what localities it may be held.

31 *See generally, City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999) (determining local franchising authority may require OVS operator to obtain a franchise to operate in given locality).

32 PECO does not have complete information on where RCN may hold local cable franchises.

33 RCN Telecom Services of Philadelphia, Inc. Files a Modification to the Service Area of its Open Video System, *Public Notice*, 14 FCC Rcd. 17860 (1999).

11. RCN also holds Certificates of Public Convenience and Necessity from the Pennsylvania Public Utility Commission ("PUC") to provide CLEC, CAP and Long Distance services including resale of such services in the Commonwealth of Pennsylvania.[34] RCN's CLEC certification is limited to resold services in the Bell Atlantic-Pennsylvania and GTE service areas (now Verizon).[35] RCN has a number of affiliates certificated to offer and render utility service within Pennsylvania.[36]

12. Although it has sought such information from RCN,[37] PECO does not have any information on precisely what combination of services RCN is providing in the communities in which it is attached to PECO's poles.

C. The PECO/RCN Pole Attachment Agreement

13. PECO first met with RCN to discuss a pole attachment agreement ("Agreement") on June 18, 1999.[38] As shown by the following chronology, it took a little under two months to go from this first meeting to the signing of an Agreement. While that span provided each party with enough time to fully analyze its position each step of the way and make appropriate judgments, it also allowed RCN to begin to attach to PECO's poles very quickly. That speed to market worked to RCN's advantage, as it was able to implement its pole attachments and provide service to customers that much faster.

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34 *See* Pennsylvania PUC, Applications of RCN in Docket Nos. A-310554 (CLEC, RCN Telecom Services of Pennsylvania, Inc.), A-310555, A-310555 (CLEC and CAP, RCN Telecom Services of Philadelphia, Inc.) (April 5, 1999), and A-310509 (Long Distance, RCN Long Distance) (April 7, 1997). *See also*, Application for merger approval, RCN Telecom Services of Pennsylvania, Inc., RCN Telecom Services of Philadelphia, Inc., and RCN Long Distance (Feb. 1, 2000) (same Docket Nos.).

35 Docket Nos. A-310555F002, A-310555F003 at 2 (April 5, 1999).

36 *Id.* at 3. These include C-TEC Corp., RCN Telecom Services of Pennsylvania, Inc., Commonwealth Long Distance Co., Commonwealth Communications, Inc., and Commonwealth Telephone Co.

37 Robinson Declaration at ¶ 5.

38 Furey Declaration at ¶ 3.

14. At the June 18 meeting, RCN had PECO's standard contract to review, which had already been executed by a number of similarly situated attachers.[39] RCN claims it was given the contract on a "take-it-or-leave-it" basis.[40] To the contrary, the use of a standard contract assures to the greatest degree possible non-discrimination among attachers with regard to rates, terms, and conditions, regardless of their financial clout or aggressiveness.[41] RCN, to be sure, had financial clout and was aggressive. At the time of its negotiations with PECO, it had built-out networks in several cities, had revenues of approximately $245 million per year, and had approximately $2.3 billion in readily available cash.[42]

15. RCN presented proposed changes to PECO's standard attachment agreement during the June 18 meeting, and requested a decision on the changes that very day.[43] The changes were substantial, involving items such as the proposed rate, terms for relocating attachments for safety or reliability reasons, liability for damage to attachments, and indemnification provisions.[44] While PECO was interested in moving the process along, it took RCN's proposals under careful consideration for two reasons.[45] First, in order to avoid a claim of discrimination, PECO did not want to give RCN different terms than it had given other attachers.[46] Second, some of the changes sought by RCN, particularly those regarding liability and indemnification provisions, posed an unacceptable risk to PECO's core utility business.[47]

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39 Furey Declaration at ¶ 3.

40 Pole Attachment Complaint at 2.

41 47 U.S.C. § 224(f) (Supp. IV 1998).

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

43 Furey Declaration at ¶ 3.

44 Furey Declaration at ¶ 3.

45 Furey Declaration at ¶¶ 3-4.

46 Furey Declaration at ¶ 3.

47 Furey Declaration at ¶ 4.

When PECO later informed RCN that it was not accepting its changes, RCN asked that PECO initiate a further level of consideration of the proposed changes by an attorney.[48] PECO agreed to do so, and one of its attorneys reviewed the proposals on July 19, 1999.[49] His second level of review confirmed that the changes posed an unacceptable risk.[50] RCN was informed of that decision and sent the proposed Agreement on July 22, 1999.[51] RCN signed the Agreement, although it did so with reservations. PECO subsequently signed it as well.[52]

16. After the Agreement had been executed, RCN began to submit applications for attachments.[53] The applications were promptly processed by PECO.[54] Make-ready work and other matters were handled in a timely manner, setting the stage for RCN to attach its cables quickly and provide service to its customers, which to PECO's knowledge RCN has done.[55] For example, PECO allowed RCN to use RCN's own survey firm to do initial survey work because, due to scheduling matters, that firm was able to start work more quickly than PECO's engineers.[56] Exelon Infrastructure Services, PECO's contractor, has increased its work force and meets with RCN every Monday to determine which poles RCN wishes to give priority.[57] Additionally, PECO attempts to limit make-ready costs by jointly reviewing with RCN those poles that are likely to involve high make-ready costs, with the goal of determining whether a less expensive method is feasible.[58]

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48 Furey Declaration at ¶ 4.

49 Furey Declaration at ¶ 5.

50 Furey Declaration at ¶ 5.

51 Furey Declaration at ¶ 5.

52 Furey Declaration at ¶ 6.

53 Robinson Declaration at ¶ 3.

54 Robinson Declaration at ¶ 3.

55 Robinson Declaration at ¶ 3.

56 Robinson Declaration at ¶ 3.

57 Robinson Declaration at ¶ 3.

58 Robinson Declaration at ¶ 3.

17. Nearly a year after it began its build-out on PECO's poles, RCN sent PECO a letter asserting its belief that the rate of $47.25 was too high.[59] That letter led to a series of telephone conversations between the parties, during which PECO informed RCN that the parties had a valid contract in place.[60] RCN demanded that PECO put its position in writing, so on November 8, 2000, PECO sent RCN a letter explaining that RCN was not entitled to a regulated rate for its attachments and that the rate it was paying was the same rate paid by all similarly situated entities.[61] RCN continued to press for a lower rate in a letter to PECO dated January 23, 2001, in which RCN requested a meeting with PECO and asked that PECO provide it with pole attachment cost data.[62] PECO quickly responded in a letter dated February 2, 2001, in which it suggested setting up a meeting at RCN's earliest convenience to discuss RCN's concerns.[63] Meetings between PECO and RCN representatives were held on March 7 and April 5, 2001 (PECO agreed to meet even after RCN filed this Complaint).[64] Unfortunately, the parties were unable to reach a consensus regarding PECO's rates.[65]

18. Separately, in January 2001, PECO sent a survey to all the attachers on its poles to ensure that its records were up to date as to the services offered by each attacher.[66] The survey asked attachers to list the services they provide over their attachments.[67] RCN was sent such a letter on January 5, 2001, but failed to reply.[68] Accordingly, PECO sent a follow-up letter on

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59 Furey Declaration at ¶ 7.

60 Furey Declaration at ¶ 7.

61 Furey Declaration at ¶ 7.

62 Furey Declaration at ¶ 8.

63 Furey Declaration at ¶ 8.

64 Furey Declaration at ¶ 9.

65 Furey Declaration at ¶ 9.

66 Robinson Declaration at ¶ 5.

67 Robinson Declaration at ¶ 5.

68 Robinson Declaration at ¶ 5.

March 26, 2001.[69] That letter specifies that RCN has until April 16, 2001 to respond.[70] As of this date, it still has not done so.[71]

19. At no time has PECO denied RCN access to its poles, delayed processing of RCN's applications or performance of make-ready work, or failed to abide by the terms of the Agreement.

III. RESPONSE TO FACTUAL ALLEGATIONS

20. In this section of the Response, Respondents address the individual factual allegations in RCN's Complaint.[72] *Respondents hereby submit a general denial (i.e., blanket denial) regarding any allegations as to actions or omissions of Exelon.* At the beginning of RCN's Complaint, it states that it will use "PECO" as the short form reference for "Exelon Corp., f/k/a PECO Energy Company" throughout the body of the Complaint, but does not consistently do so.[73] This is unduly confusing and, in any event, Respondents object to this combination because Exelon and PECO are separate companies and cannot be said to have undertaken the same alleged actions and omissions. Exelon does not own any of the poles at issue in this case and was not otherwise involved with the issues in this case.[74] Accordingly, in the interest of clarity, Respondents address the factual allegations of RCN's Complaint as if "PECO" as used therein refers only to PECO Energy Company, and have attempted, where appropriate, to clarify the reference based on the context of the allegation.

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69 Robinson Declaration at ¶ 5.

70 Robinson Declaration at ¶ 5.

71 Robinson Declaration at ¶ 5.

72 Because RCN failed to number its paragraphs, as is customary in pole complaints, Respondents have labeled each based on the section in which it appears and the order it appears in that section. For example, the first paragraph of Section I of the Complaint (Summary and Introduction) is labeled "Section I, 1st Paragraph."[72] Footnotes are deemed included in the main text sentence to which they pertain, and are thus addressed in the discussion of that sentence.

73 Pole Attachment Complaint at 1 n.3.

74 Halderman Declaration at ¶ 3.

21. **Section I, 1st Paragraph.** Respondents neither admit nor deny the first sentence. Respondents deny the second sentence of this paragraph on information and belief. The third sentence is admitted. The fourth sentence is denied, except to the extent that it alleges that the pole attachment agreement requires RCN to pay $9.21 annually for cable only services and $47.25 annually for all other services. The fifth sentence is admitted only to the extent that it alleges that PECO has been charging RCN $47.25 for all its pole attachments; notably, PECO denies that the sections of PECO's standard pole agreement cited by RCN in footnote 5 are inappropriate. These provisions, not at issue here, reflect PECO's need to protect its ratepayers and shareholders from liability created by the presence of multiple attachers on its infrastructure. The sixth sentence is denied as follows: PECO's records indicate that RCN has applied for permits for approximately 14,802 poles. The seventh sentence is admitted. The eighth sentence is denied as follows: based on applications for 14,802 poles and current attachment to 9,446 poles, RCN's pending attachment applications total approximately 5,356 poles. However, the number of poles for which attachments are requested often may not mirror the number of attachments reflected in a permit due to the attachers' choice to utilize alternate routes to take advantage of favorable locations or to avoid make ready costs; numbers are finalized after the engineering surveys are completed.

22. **Section I, 2nd Paragraph.** Respondents deny the first sentence of this paragraph. The second sentence is denied, except to the extent that RCN has sought to meet with PECO. The third sentence is denied, except that a meeting in early March did occur. The fourth sentence is admitted only to the extent it alleges that PECO's poles carry wiring of non-PECO entities. The fifth sentence is admitted. The sixth sentence is denied, except to the limited extent that some PECO poles may carry PECO wiring for internal PECO communications, and some may carry wiring for affiliates.

23. **Section I, 3rd Paragraph.** Respondents deny the first sentence of this paragraph, except that RCN sent a letter dated January 23, 2001 to PECO regarding its pole attachment rates. The second sentence is denied, except that PECO has not provided data to RCN. The

third sentence is denied; contrary to RCN's claim that PECO simply ignored the January 23 letter, PECO sent Mr. Burnside a letter in response on February 2, 2001. PECO's letter suggested setting up a meeting at RCN's earliest convenience to discuss RCN's concerns, and asked Mr. Burnside to provide PECO with the dates he was available to meet.[75] PECO met with RCN on March 7 and April 5, 2001. The fourth and fifth sentences are admitted. The sixth sentence is denied. The seventh sentence is admitted. The eighth sentence is prospective and not capable of admittance or denial.

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

25. **Section II, 1st Paragraph.** Respondents admit on information and belief the first sentence, only to the extent that RCN's principal place of business is in Princeton, New Jersey, it is a wholly owned subsidiary of RCN Corporation, Inc. and it holds certification in several states to provide services as a CLEC. The second and third sentences are admitted on information and belief. The fourth sentence is admitted to the extent that a description of RCN Corp. appears in the Comments referred to by RCN. PECO neither admits nor denies the fifth sentence, as PECO is without information regarding the exact services being provided by RCN, although PECO is aware that RCN holds OVS certificates, some cable franchises and a CLEC certificate in Pennsylvania. The sixth sentence is admitted on information and belief.

26. **Section II, 2nd Paragraph.** Respondents deny the first sentence of this paragraph except to the extent it alleges that RCN offers some combination of telecommunications, video, and Internet service. The remaining sentences of this paragraph are neither admitted nor denied, as PECO has no information available on which to form a belief.

27. **Section II, 3rd Paragraph.** Respondents admit the first sentence of this paragraph to the extent that RCN holds a certificate from the Pennsylvania PUC to provide CLEC services, but neither admits not denies RCN's allegations regarding its subscribers as PECO has no information on the subject. Respondents admit the second sentence to the extent

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[75] Furey Declaration at ¶ 8.

that it refers to RCN's original OVS certification issued by the FCC for the Philadelphia area. Respondents admit the third sentence based on information and belief only to the extent that RCN terminated its negotiations with the City of Philadelphia. The fourth, fifth, and sixth sentences are neither admitted nor denied as Respondents have no information upon which to form a belief.

28. **Section II, 4th Paragraph.** The first sentence of this paragraph is admitted to the extent that it refers to PECO Energy Company, but denies the allegation with respect to Exelon. The second sentence is denied except to the extent that PECO owns more utility poles than any other utility in the greater Philadelphia area. The third sentence is denied, as Respondents have no information upon which to base a belief. With regard to the fourth sentence, Respondents admit only that PECO is engaged principally in the purchase, transmission, distribution and sale of electricity and the distribution and sale of natural gas to residential, commercial, industrial, and wholesale customers. The fifth sentence is admitted. The sixth sentence is admitted except with respect to the statement that PECO merged with Unicom Corporation; that portion of the sentence is denied as stated and Respondents reference Section II, A above of this Response. The seventh sentence is admitted to the extent that it refers to PECO Energy Co. The eighth sentence is denied and clarified as follows: PECO currently has approximately 2700 employees, expected revenue for the year 2001 of $4 billion, and expected total assets at December 31, 2001 of $12.6 billion. The ninth and tenth sentences are admitted to the extent that it refers to PECO Energy Company.

29. **Section II, 5th Paragraph.** Respondents deny the first sentence except to the extent described in Section II, A above of this Response. The second sentence is admitted.[76] Respondents admit the third sentence, except that, to the extent that the partnership provides CLEC service, it is only to commercial entities. The fourth sentence is admitted to the extent

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[76] For clarification, PECO Hyperion Communications is now known as PECO Adelphia Communications. *See* http://www.adelphia-abs.com/html/corp/genpr01192000.htm.

that some of PECO's poles have fiber optic cable attachments for the partnership. Respondents deny the fifth sentence, except to the extent described in Section II, A above.

30. **Section II, 6th Paragraph.** Respondents deny the first sentence, except that Exelon Communications provides customized telecommunications packages, design and management of distributed networks, and Exelon Infrastructure Services manages, maintains and constructs fiber networks. Respondents admit the second sentence. Respondents deny the third and fourth sentences to the extent that they refer to PECO Energy Company, and admit to the extent described in Section II, A above. Respondents admit the seventh sentence.

31. **Section II, 7th Paragraph.** Respondents deny the first and second sentences except to the extent described in Section II, A above. Respondents do not admit or deny the third sentence, as they have no information on which to base a belief. The fourth sentence is admitted. As to the fifth sentence, Respondents have no information upon which to form a belief and therefore neither admit nor deny it, except that Everest does not currently operate in the Philadelphia area.

32. **Section III, 1st Paragraph.** The first sentence of this paragraph is denied. The second and third sentences are admitted. The fourth sentence is denied as stated; Respondents admit only that neither PECO Energy nor its parent Exelon Corp. are owned by any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any state government.

33. **Section III, 2nd Paragraph.** Respondents admit the sentence set forth in this paragraph.

34. **Section III, 3rd Paragraph.** Respondents deny the first and second sentence of this paragraph. Respondents admit the third and fourth sentences. The fifth sentence is in the nature of legal argument and not capable of admittance or denial. The sixth sentence is denied, except to the extent that PECO indicated to RCN its belief that RCN's attachments are not covered by the PAA. The seventh and eighth sentences are in the nature of legal argument and not capable of admittance or denial. The ninth sentence is denied.

35. **Section III, 4th Paragraph.** Respondents admit the first sentence of this paragraph; Respondents deny the second sentence, except to the extent that PECO's rates are based on its position that RCN's attachments are not covered by the PAA. The third and fourth sentences are in the nature of legal argument and not capable of admittance or denial; however, PECO contends that at no time has it taken a position adverse to the PAA or the Commission's implementing rules and policies.

36. **Sections IV and V.** Sections IV and V are the "Argument" and "Conclusion" sections of RCN's Complaint and hence not amenable to addressing in an admit/deny manner. However, to the extent those sections contain factual allegations, Respondents hereby issue a general denial regarding them unless otherwise specifically stated in this Response.

IV. ARGUMENT

A. The Complaint Should Be Dismissed For Lack of Jurisdiction

37. Pursuant to the PAA, the Commission's jurisdiction extends to pole attachments used by a cable television system to provide cable service and by a telecommunications carrier to provide telecommunications services.[77] Those are the *only* situations over which the Commission has jurisdiction. The PAA must be interpreted narrowly, and, thus, the Commission has no jurisdiction over services or combinations of services not specifically set forth therein.[78]

1. Upon information and belief, RCN does not provide pure cable or pure telecommunications services over attachments to PECO's poles.

38. In the Complaint, RCN describes itself as a company that "offers bundled services to the public including local exchange and long distance telephone service, high speed Internet

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77 *See generally* 47 U.S.C. § 224 (d)(3) and (e)(1) (Supp. IV 1998).

78 The only commingled use the PAA even arguably addresses is the provision of a telecommunications service by a cable system. In those instances, Section 224(d)(3) could be read in conjunction with Section 224(e) to mean that after February 2001, once a cable system provides both cable television and telecommunications service the 224(e) rate should be applied.

access service, and broadband cable service."[79] That description, however, lends itself to a number of combinations with regard to which services are actually provided via attachments to PECO's poles. For example, RCN is an OVS operator in PECO's area and provides video programming pursuant to a certificate granted by the FCC.[80] However, it also apparently offers some services via local cable franchises.[81] And while it holds a CLEC certificate, in some areas it provides telecommunications over its own network and in others it resells the services of other carriers.[82] To some extent, RCN also utilizes wireless systems.[83]

39. In accordance with the foregoing, RCN could potentially be providing a number of services and combinations of services via its attachments to PECO's poles. Specifically, it could be providing (1) OVS; (2) commingled OVS and Internet access; (3) commingled cable television and Internet access; (4) commingled Internet access and telecommunications; (5) commingled cable television, Internet access, and telecommunications; and (6) commingled OVS, Internet access, and telecommunications. Respondents address those potential combinations in separate subsections below and explain why none of them are covered by the PAA.[84]

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79 Pole Attachment Complaint at 2-3.

80 13 FCC RCD. 12000 (1998).

81 *See, e.g.*, Cable Franchise Agreement, Borough of Collingdale (Dec. 13, 1999); Ordinance No. 609, Borough of Morton (June 9, 1999); Franchise Agreement, Borough of Norwood (Nov. 22, 1999); Cable Franchise Agreement, Township of Ridley (Dec. 23, 1998); Ordinance 2896, Township of Upper Darby (Feb. 16, 2000). These are provided for illustration; PECO does not know the full extent of RCN's franchise authority and in what localities they may be held.

82 *See* RCN's SEC Form 10-K at 4-5 (filed Mar. 30, 2000) (Section entitled "RCN Services").

83 *Id.*

84 Respondents have no information on precisely which services RCN provides via its attachments on PECO's poles. As noted above, PECO has repeatedly requested this information over the past several months but RCN has not provided it. However, based on the Complaint and publicly available information, Respondents do not believe RCN provides either pure cable or pure telecommunications service.

2. The PAA must be interpreted narrowly.

40. The Commission cannot interpret the PAA to provide jurisdiction over services and combinations of services that the PAA does not expressly cover. The fact that a narrow interpretation is required is first indicated by the PAA's legislative history. In enacting the PAA, Congress made it clear that it was making only a limited jurisdictional grant to the FCC. Both the Administration and Congress were concerned about the propriety of giving the *communications* agency jurisdiction to regulate electric power companies, which were already subject to comprehensive regulation by the Federal Power Commission (now the Federal Energy Regulatory Commission) and state public utility commissions.[85] Congress responded forcefully to these concerns, explaining in the Senate Report accompanying the legislation that it would give only a very narrow grant of additional jurisdiction to the Commission.[86] The FCC's new jurisdiction would be "strictly circumscribed" and limited to "arrangements affecting the provision of utility pole communications space to CATV systems."[87]

41. A second reason the PAA must be interpreted narrowly derives from the fact that it effects a taking of utility property.[88] Where, as here, an administrative interpretation of a statute creates an "identifiable class of cases in which application of a statute will necessarily constitute a taking[,]" such interpretation is to be avoided.[89]

42. In light of the foregoing, it is beyond doubt that the PAA must be construed narrowly. Taking a narrow construction, the plain language of the statute indicates that the FCC's jurisdiction is limited to the types of pole attachments expressly referenced therein. If Congress had wanted to confer jurisdiction over other types of attachments, it would have done

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85 *See* H.R. Rep. No. 94-1630, at 34 (1976 (T. J. Houser Letter); H.R. Rep. No. 95-721, pt. 2, at 12 (1977 (W. J. Thaler Letter); 124 Cong. Rec. at 14974 (May 17, 1977.

86 S. Rep. No. 95-580, at 14-16, reprinted in 1978 U.S.C.C.A.N. at 122-24.

87 *Id.*

88 *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328-31 (11th Cir. 1999), cert. granted, in part, 121 S. Ct. 879 (Jan. 22, 2001)..

89 *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5 (1985).

so. As observed by the Supreme Court, "we assume that in drafting legislation, Congress said what it meant."[90] Also, as noted in *Sutherland Statutory Construction*, the statutory construction maxim *expressio unius est exclusio alterius* -- the inclusion of one thing means the exclusion of another -- is a relevant consideration when construing legislation to ascertain the scope of administrative powers granted to an agency.[91]

43. In this case, RCN would have the Commission assume jurisdiction over pole attachments for the provision of OVS, Internet access, and various combinations of services including OVS and/or Internet access, but none of those are expressly set forth in the PAA. As such, the PAA cannot be read to encompass them and, thus, the FCC lacks jurisdiction over them.

3. The FCC lacks jurisdiction over OVS attachments and commingled OVS/Internet access attachments.

44. Under the PAA, the Commission has jurisdiction to prescribe just and reasonable rates for pole attachments made by "a cable television system or provider of telecommunications service."[92] The Commission is authorized to prescribe a specific rate for attachments used by "a cable television system *solely* to provide cable television service,"[93] and for "telecommunications providers to provide telecommunications services."[94] Much of RCN's video service, however, is not provided through a cable television system as defined in the Act but is rather provided through RCN's OVS. An OVS is also designed to provide video service, but is regulated under a wholly distinct set of rules from that of cable television systems and entitled to benefits based on the Commission's grant of certification.[95] OVS, however, is by definition excluded from the

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90 *United States v. LaBonte*, 520 U.S. 751, 757 (1997).

91 3 Norman J. Singer, *Sutherland Statutory Construction* § 65.02 (5th ed. 1992).

92 47 U.S.C. § 224(a)(4).

93 47 U.S.C. § 224(d) (emphasis added).

94 47 U.S.C. § 224(e).

95 47 U.S.C. § 573; 47 C.F.R. §§ 47.1500 *et seq.*

term "cable television system,"[96] which is the relevant term under the PAA. As such, the Commission does not have jurisdiction to prescribe rates and cannot adjudicate disputes relating to RCN's OVS attachments.

45. The FCC certified RCN to operate an OVS in multiple communities in the state of Pennsylvania under the provisions of 47 U.S.C. § 573.[97] RCN has "elected to pursue the open video system" as its preferred method to enter the video services market, and "incumbent upon RCN's decision are the benefits and responsibilities of open video system operation as determined by Congress and the Commission."[98] OVS differs both in how it operates and in how it is regulated from traditional cable service and from common carrier service.[99] OVS operators are exempt from Title II requirements governing common carriers, and are likewise exempt from most of the Title VI obligations of traditional cable operators.[100] In fact, OVS is *definitionally excluded* from the term "cable system."[101] The statute reads in pertinent part:

> the term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term *does not include... (D) an open video system that complies with section 573 of this Title...*[102]

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96 47 U.S.C. § 522(7); 47 C.F.R. § 76.5.

97 Pole Attachment Complaint at 5; In the Matter of RCN Telecom Services of Philadelphia, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd. 1200 (1998).

98 *See* Time Warner Cable v. RCN Telecom Services of New York, Inc., *Memorandum Opinion and Order*, 14 FCC RCD. 50, 53 (1998).

99 *Cablevision of Boston, Inc. v. Public Improvement Commission of Boston*, 184 F.3d 88, 93 n.5 (1st Cir. 1999) (noting that RCN's joint venture in Boston licensed as OVS was "subject to different legal and regulatory obligations than those providing traditional Multiple Video Programming Distribution (MVPD) cable service"); *City of Dallas v. FCC*, 165 F.3d 341, 345-346 (5th Cir. 1999) (detailing differences between OVS and cable operators or common carriers).

100 47 U.S.C. § 573(c)(3) (Supp. IV 1998).

101 47 U.S.C. § 522(7) (Supp. IV 1998); 47 C.F.R. § 76.5 (2000).

102 47 U.S.C. § 522(7) (emphasis added); *see also*, 47 C.F.R. § 76.5.

As such, to the extent that RCN provides services by means of OVS, it is not a cable system. Because it is not a cable system, it falls outside Section 224 and thus the Commission's jurisdiction with respect to pole attachments.[103]

46. The Commission's jurisdiction is limited here by the clear statutory language excluding OVS from the definition of "cable systems," which are in turn entitled to the regulated cable rate under Section 224(d). All of the agency's power "springs from the statute" and although an administrative agency may have a "wide latitude within which to function" its discretion "continues only so long as it acts within its statutory scope."[104] An agency may not depart from or put aside a statutory definition. It is axiomatic that "[a]n agency may not confer power upon itself," and that "[t]o permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override congress."[105] Accordingly, any attachments used for OVS are outside the Commission's Section 224 jurisdiction.

47. Similarly, the Commission lacks jurisdiction over an OVS provider offering Internet service, as neither OVS nor Internet is covered under Section 224. As illustrated above, OVS is excluded from the definition of a cable system, and is therefore not covered under the PAA. Internet is likewise excluded under a reasonable reading of the plain meaning of the statute, and is not a service covered by the relevant language. This logic guided the 11th Circuit

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103 In a similar case, the District Court for the Western District of Texas found that an affiliate of an ILEC providing video service over the lines of the franchised ILEC was not "using" the public rights of way, and therefore fell under the private cable exemption of the definition of a "cable system" under 47 U.S.C. § 522(7)(B). As such, the local franchising authority was not entitled to a separate franchising fee because it was not a "cable system." *See also* 47 C.F.R. § 76.5.

104 *Peoples Bank v. Eccles*, 161 F.2d 636, 640 (D.C. Cir. 1947).

105 *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

in *Gulf Power Co. v. FCC ("Gulf Power II")*, when it noted that the plain meaning of the PAA excluded Internet from the definition of either a cable service or a telecommunications service.[106]

48. In this case, RCN is outside of Section 224 for two reasons. First, OVS is not a cable system, and therefore to the extent that RCN operates an OVS it cannot claim coverage under Section 224. Second, Internet, according to *Gulf Power II*, is neither a cable service nor a telecommunications service.[107] As such, it is not a service when provided alone that is entitled to coverage under Section 224 regardless of the who provides it. Where RCN is both an OVS and providing Internet, therefore, the Commission's jurisdiction under Section 224 must also fail.

4. The FCC lacks jurisdiction over commingled cable television/Internet access attachments.

49. One combination of services RCN may potentially provide is commingled cable television (pursuant to a cable franchise) and Internet access. The first reason the Commission lacks jurisdiction over this combination is that it is not expressly referenced in the PAA. As established in the foregoing argument on narrow construction, and given the need to narrowly interpret the PAA, the combination cannot be read into it. The second reason is that the Eleventh Circuit Court of Appeals indicated in *Gulf Power II* that the Commission lacks jurisdiction over pole attachments that are used to provide Internet service, regardless of whether the Internet service is provided standing alone or commingled with cable service.[108] The Eleventh Circuit's decision was based on its determination that the PAA authorizes the FCC to establish rates only for cable television systems providing solely cable service and telecommunications carriers providing telecommunications service.[109] Internet service fits into neither category, so pole attachment rates for it cannot be regulated.[110] Thus, the Commission should dismiss RCN's

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106 *Gulf Power Co. v. FCC*, 208 F. 3d 1263, 1276, 1278 (11th Cir. 2000) ("*Gulf Power II*"), *cert. granted, in part*, 121 S. Ct. 879 (Jan. 22, 2001).

107 *Gulf Power II*, 208 F.3d at 1276, 1278.

108 *Gulf Power II*, 208 F.3d at 1275-78.

109 *Gulf Power II*, 208 F.3d at 1276 n.29.

110 *Gulf Power II*, 208 F.3d at 1277.

Complaint for lack of jurisdiction with regard to attachments over which it provides bundled cable and Internet access service.

50. Respondents are mindful of the Cable Services Bureau's statement in *Alabama Cable Television Association v. Alabama Power Company* that the Eleventh Circuit has not yet issued a mandate in *Gulf Power II* and "[p]ending the issuance of a mandate . . . or a clarification of the *Gulf Power II* decision, we will continue to apply our pole attachment rules to all attachers who are either cable service or telecommunications service providers."[111] Respondents are also aware that the Supreme Court has granted certiorari to review *Gulf Power II.* Nonetheless, the Eleventh Circuit's decision is clear and correct. Also, the Eleventh Circuit's own operating rules clearly state that whether a mandate has been issued has no bearing on the precedential value of a decision.[112] Additionally, the Eleventh Circuit has clearly indicated that it is bound to follow its decisions even if Supreme Court review is pending.[113] Thus, Respondents urge the Commission to decide this matter in accordance with the holding of *Gulf Power II.*

5. The FCC lacks jurisdiction over attachments for other variations of commingled services potentially provided by RCN.

51. Other combinations of services RCN may potentially be providing via attachments to PECO's poles are: (1) commingled Internet access and telecommunications; (2) commingled cable television, Internet access, and telecommunications; and (3) commingled OVS, Internet access, and telecommunications. The Commission lacks jurisdiction over attachment rates for these combinations for several reasons. First, these combined services are not expressly referenced in the PAA, and pursuant to the need to narrowly interpret it, the

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111 Alabama Cable Telecommunications Association; Comcast Cablevision of Dothan, Inc., *et al.* v. Alabama Power Company, PA No. 00-003, *Order*, 15 FCC Rcd. 17,346, 17,348 (2000).

112 Eleventh Circuit Internal Operating Procedures, p. 107, available at http://www.ca11.uscourts.gov/opinions.htm.

113 *See, e.g., White v. Lemacks,* 183 F.3d 1253, 1255 (11th Cir. 1999).

combinations cannot be read into it. Second, appropriate statutory interpretation indicates that jurisdiction is precluded for any combination of services which do not fit the precise terms of the PAA. Third, even assuming, *arguendo*, that the Commission has jurisdiction over commingled services, it has not heretofore ruled on the combinations at issue here. At a minimum, the question presents numerous unresolved issues that can only be properly addressed through a rulemaking.

52. The first reason, regarding the need to narrowly interpret the PAA, is detailed above and Respondents incorporate that argument here.

53. The second reason the Commission lacks jurisdiction over these combinations is that a plain reading of the statute precludes jurisdiction of any combination of services not fitting the definitions found in the statute, *i.e.*, "solely" "cable service" (under Section 224(d)) or "telecommunications service" (under Section 224(e)). In *Gulf Power II* the Court observed that "we know that the statute emphasizes *the type of service* over the type of entity acquiring the attachment . . . ."[114] Following the Court's logic, attention must be paid to the particular services Congress intended to be covered by the PAA. Both "cable service" and "telecommunications service" have precise meanings under Commission rules and precedent.[115] The Commission cannot simply conclude that the combination of cable, Internet, and telecommunications service has the same meaning as "cable service" or "telecommunications service" *alone*.[116] The same would also be true of the combination of OVS, Internet access, and telecommunications. Given the Court's observation that PAA jurisdictional analysis should focus on the type of *service*, not the type of *attaching entity*, the focus is on whether a combined group of services is either cable or telecommunications service. Clearly, any combine RCN services would be neither and cannot be deemed so merely to reach a desired result as to rates.

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114 *Gulf Power II*, 208 F.3d at 1277 n.32 (emphasis added).

115 See discussion at Paragraph 45, *supra*, and 47 U.S.C. § 153 (46).

116 Arguably only one combination of services, i.e., cable and telecommunications, is contemplated under statute. *See* footnote 78, *supra*.

54. Third, even assuming, *arguendo*, that the PAA permits jurisdiction over commingled attachments, the attachments for commingled services would be most appropriately dealt with in an agency rulemaking rather than on an *ad hoc* adjudicatory basis. Three arguments support this conclusion. First, to rule on this issue in the context of this Complaint deprives the Commission of a full record on the issue including comments from the relevant industry groups and the public, and would effectively constitute a rulemaking in a vacuum having effects reaching far beyond the present dispute. As the Supreme Court has noted, since "the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct" within the framework of the relevant Act.[117] The agency's function of "filling in the interstices" of the Act should be "performed, as much as possible, though this quasi-legislative promulgation of rules to be applied in the future."[118]

55. Second, the practical difficulties of applying a rate to commingled services also weigh in favor of rulemaking rather than adjudication. In an industry increasingly marked by convergence in technology and decreased barriers to market entry, firms are frequently offering bundled services in an attempt to win the customer who prefers "one stop shopping." This issue is not unique to the parties to the current dispute. Determining how to count the poles carrying commingled services, and how to allocate the cost and the basis for allocation, whether by traffic, customers, or revenues (among others) are complex decisions that would benefit from the more complete factual record that could be developed under a full rulemaking rather than solely on the facts specific to this case.

56. Third, although as noted above, the Commission may act either through adjudication or rulemaking, "in determining the impact of statutory limitations upon agency action, substance is more important than form."[119] If the Commission chooses to rule on the

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

118 *Id.*

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

highly complex issues of this case solely on the facts here, the effect of its decision would be prospective and reach far beyond the parties to this dispute, effectively functioning as an industry wide rule. As the Supreme Court has noted with respect to agency adjudication, "a rule of law with exclusively prospective effect, could not be accepted as binding (without new analysis) in subsequent adjudications, since it would constitute rulemaking and as such could only be achieved following prescribed rulemaking procedures."[120] It is the province of the Commission in a rulemaking to set forth rules "of general application or particular applicability *and future effect*."[121] It is the distinction in the timing of the effect of agency action that is the heart of the Administrative Procedure Act ("APA"). Adjudicative orders pronounce the Commission's position on the past and the present.[122] It is the Commission's unique prerogative in its quasi-legislative capacity to prescribe future rules through rulemaking.[123] Therefore, assuming, *arguendo*, that the Commission finds that it has jurisdiction with respect to the commingled services herein described, the Commission should still forebear from applying a commission imposed rate upon the RCN/PECO pole attachment agreement unless and until it deals with the issues in a full notice and comment proceeding under the APA.

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

121 5 U.S.C. § 551(4) (1994) (emphasis added).

122 *See Bowen,* 488 U.S. at 219, *citing* Attorney General's Manual on the Administrative Procedure Act at 13-14 (1947) ("[T]he entire Act is based upon a dichotomy between rule making and adjudication...Rule making is agency action which regulates the future conduct of either groups of persons of a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations...Conversely, adjudication is concerned with the determination of past and present rights and liabilities.")

123 *See Bowen,* 488 U.S. at 476 (Scalia, J., concurring).

B. In The Alternative, If The Commission Does Not Dismiss The Complaint For Lack Of Jurisdiction, RCN's Request For A Lower Pole Attachment Rate Should Be Denied Because The Parties Reached The Present Rate Through Good Faith Negotiations

57. The Complaint should be dismissed for lack of jurisdiction in accordance with the foregoing arguments. However, if the Commission declines to dismiss the Complaint on that basis, it should be denied because the rate at issue is contained in a voluntarily negotiated pole attachment agreement, and such agreements should be binding on the parties. The Commission has no statutory authority to facilitate breaches of existing contracts. In fact, Section 224(e)(1) expressly states that the so-called regulated rate shall apply only when parties cannot agree on a rate. Toward that end, the FCC has recognized the importance of good faith negotiations with regard to setting pole attachment rates. In implementing the changes to the PAA promulgated by the Telecommunications Act of 1996, the FCC expressly stated that "[t]he [PAA], legislative policy, administrative authority, and current industry practices all make private negotiation the preferred means by which pole attachment arrangements are agreed upon between a utility pole owner and an attaching entity."[124] The FCC also explained that "it is implicit in our current rule that all parties must negotiate in good faith for non-discriminatory access at just and reasonable pole attachment rates."[125]

58. Honoring the results of good faith negotiations would be especially appropriate in this case, where both parties were large corporations with a multitude of resources. Certainly, RCN was not the small cable operator the PAA was originally intended to protect. It boasts in the Complaint of having raised "billions of dollars" and having "one of the most modern fiber optic and coaxial networks being built by any telecommunications or cable entity."[126] At the

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124 In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd. 6777, 6783-84 (1998).

125 *Id.* at 6789-90.

126 Pole Attachment Complaint at 5.

time of negotiations with RCN it had approximately $2.3 billion in readily available cash.[127] Moreover, it was clearly experienced with pole attachment agreements, having negotiated them with utilities in numerous major metropolitan areas.[128]

59. Allowing attachers to simply turn to the FCC to get the rates and terms they deem most favorable leads to a "sign-and-sue" mentality. So long as an attaching entity understands that it can turn to the FCC to secure a rate that is below what it negotiated, the attaching entity has no real incentive to use its best effort to determine whether the use of pole attachments are truly in its best economic interest. Because poles have finite capacity, making such a determination would enable those who value pole attachments the most to utilize them. In other words, a limited resource would be properly allocated. With heavy-handed rate regulation, however, the attaching entity is encouraged to merely go through the motions to enter an agreement without really having any intention of honoring its terms and conditions, *i.e.*, to sign-and-sue.

60. In the instant case, RCN has taken the sign-and-sue approach. PECO first met with RCN to discuss a pole attachment agreement on June 18, 1999.[129] RCN presented proposed changes to PECO's standard attachment agreement and requested that PECO make a decision on the changes that very day.[130] The changes were substantial, involving items such as the proposed rate, terms for relocating attachments for safety or reliability reasons, liability for damage to attachments, and indemnification provisions.[131] PECO refused to rush the negotiation, instead taking RCN's proposals under careful consideration.[132] When PECO later informed RCN that it

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127 RCN Press Release dated July 30, 1999, available at http://www.rcn.com/investor/press/07-99/07-30-99/07-30-99.html.

128 Pole Attachment Complaint at 13.

129 Furey Declaration at ¶ 3.

130 Furey Declaration at ¶ 3.

131 Furey Declaration at ¶ 3.

132 Furey Declaration at ¶ 3.

was not accepting its changes because they would create an unacceptable risk to PECO's core utility business, RCN asked that PECO initiate a further level of consideration of the proposed changes, namely by an attorney.[133] PECO agreed to do so, and one of its attorneys reviewed the proposals on July 19, 1999.[134] His second level of review also determined that the changes posed an unacceptable risk.[135] RCN was informed of that decision and sent executable copies of the agreement on July 22, 1999.[136] It signed the agreement and PECO received it back on August 13, 1999.[137]

61. The foregoing chronology of events clearly demonstrates that PECO and RCN engaged in good faith negotiations over the pole attachment agreement at issue in this case. Additionally, RCN clearly knew what it was doing and, in fact, largely guided the course of negotiations. The fact that it had equal bargaining power in the negotiations is indicated by its billions of dollars in financing and readily available cash. The FCC should not countenance a sign-and-sue strategy in this case nor encourage its use in the future. Rather, it should recognize the validity of good faith negotiations and, thus, deny the Complaint.

C. In The Alternative, If The Commission Does Not Dismiss The Complaint For Lack Of Jurisdiction, RCN's Allegations of Discrimination Should Be Denied

62. In the beginning of RCN's Complaint and at several points thereafter, it repeatedly accuses PECO of charging discriminatory pole attachment rates.[138] However, RCN acknowledges later in the Complaint that it is not really sure whether the rates are discriminatory. Rather, it just thinks the Commission should look into it and "compel PECO to avoid

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133 Furey Declaration at ¶ 4.

134 Furey Declaration at ¶ 5.

135 Furey Declaration at ¶ 5.

136 Furey Declaration at ¶ 5.

137 Furey Declaration at ¶ 6.

138 Pole Attachment Complaint at 1, 3-4, 11.

discrimination in setting its pole license rates."[139] RCN attempts to turn its own lack of evidence into a black eye for PECO by claiming that it asked for underlying information on the rate PECO was charging its affiliates but that PECO declined to provide it.[140] However, PECO has no obligation to provide a party with information on the rates it charges its affiliates or other parties. Additionally, it is well aware of its obligations with regard to non-discrimination and has acted in a manner consistent with this obligation. What RCN is really complaining about is PECO's refusal to give it "favored" treatment.

63. RCN's discrimination concerns come down to two items. First, it claims that PECO *may* be engaging in discrimination if it is charging RCN a higher pole attachment rate than it is charging similarly situated affiliates and other attachers.[141] Second, it alleges that PECO *may* be engaging in discrimination by charging Verizon and RCN the same rate but allowing Verizon more pole space.[142] FCC Rule section 1.1409 provides that pole attachment complainants must establish a prima facie case.[143] However, RCN fails to provide any relevant evidence in support of its discrimination allegations.[144] Indeed, the Complaint indicates that RCN is uncertain as to whether problems exist at all in these areas. Because the PAA does not provide a forum for fishing expeditions, RCN's discrimination allegations should be rejected.

64. In any event, the facts and law bear out that PECO has not discriminated against any attachers to its poles. As discussed above, RCN's pole attachments are not covered by the PAA, so the discrimination provisions contained therein do not apply to them. Even so, however, the attached declaration of Simona Robinson establishes that PECO's own affiliates

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139 Pole Attachment Complaint at 4, 15-17.

140 Pole Attachment Complaint at 15.

141 Pole Attachment Complaint at 15-16.

142 Pole Attachment Complaint at 16-17.

143 47 C.F.R. § 1.1409 (2000).

144 RCN provides only the Statement of Marvin Glidewell, who testifies that AT&T appears to be allocated more pole space than RCN. As explained below, however, this observation could not establish discrimination under any circumstances.

and other attachers similarly situated to RCN are all charged the same rate.[145] RCN makes a desperate bid to keep this particular allegation alive no matter what by claiming that *even if* PECO charges affiliates the same rate it charges RCN, there would still be an issue of discrimination because the rate could "be partially or wholly recovered through ownership or by other collateral means."[146] Such a claim is entirely unsupported, extraordinarily speculative, and completely without merit.[147] Endorsement of such a concept by the Commission would lead to the untenable conclusion that every provision of pole space to a utility's affiliate would be automatically suspect until proven otherwise.

65. With regard to RCN's allegation that PECO may be engaging in discrimination by charging Verizon and RCN the same rate but giving Verizon more pole space, PECO does, in fact, charge Verizon the same rate it charges RCN.[148] In some cases, Verizon may occupy more vertical inches of space on PECO's poles than RCN.[149] This does not, however, constitute discrimination because Verizon, as an ILEC, is not covered by the PAA as an attacher. The PAA covers "cable television systems" and "telecommunications carriers," but ILECs are expressly excluded from the definition of telecommunications carriers (and Verizon does not meet the criteria for a cable television system).[150] The FCC has indicated that the PAA's non-discrimination requirements mandate that rates, terms, and conditions must be "uniformly applied" to all cable television systems and telecommunications carriers.[151] Accordingly, the

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145 Robinson Declaration at ¶ 2.

146 Pole Attachment Complaint at 15 n.37.

147 As an initial matter, PECO is a regulated electric utility subject to numerous Pennsylvania Public Utility Commission rules that govern its transactions with affiliates to prevent cross-subsidization.

148 Robinson Declaration at ¶ 6.

149 Robinson Declaration at ¶ 6.

150 47 U.S.C. § 224(a)(5) (Supp. IV 1998).

151 In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd. 15499, 16073 (1996).

universe of similarly situated attachers from which rates, terms, and conditions may be drawn for discrimination comparisons is limited to cable television systems and telecommunications carriers. Because Verizon is neither, criteria regarding it are not valid comparisons for discrimination claims.

D. In The Alternative, If The Commission Does Not Dismiss The Complaint Or Otherwise Deny Its Allegations, The Commission Should Apply The Telecommunications Rate To Any Attachments It Deems Encompassed By The PAA

66. The Commission should dismiss or deny the Complaint in accordance with the foregoing arguments. However, should the Commission decline to do so, Respondents maintain that since RCN cannot claim cable-only status, the only possible remaining statutory rate is the telecommunications rate set forth in Section 224(e)(1) of the PAA. This rate should be applied to all of RCN's attachments it deems encompassed by the PAA beginning from the date of the filing of the Complaint.[152]

67. The *Post-2001 Rate Making Report and Order* ("*Post-2001 Order*"), set out a detailed rate formula prescribing the calculation to be applied to attachments used for the provision of telecommunications services after February 8, 2001.[153] The Commission adopted a new methodology to allocate the costs of both the usable and unusable space on the pole among the attaching entities.[154] This Order was based on the language of Section 224(e)(2), which sets forth the rate that a telecommunications carrier must pay for pole attachments:

> A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated

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152 As pointed out above, any possible recalculations of the rate should be done only as of April 16, 2001 at the earliest (earliest date Complaint could theoretically be refiled or amended).

153 In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd. 6777 (1998) ("*Post-2001 Order*").

154 *Id.*

to such entity under an equal apportionment of such costs among all attaching entities.

68. This language in essence provides that two-thirds of "unusable" space on the pole be apportioned among all attaching entities. In order to calculate the unusable space factor, the number of attaching entities must be assessed. As part of the *Post-2001 Order*, the Commission allows pole owners to calculate a presumptive number of attaching entities based on the location of its poles, *i.e.* urban, rural, urbanized.[155] For the purpose of the rate applicable to RCN's telecommunications attachments the appropriate number of presumptive attaching entities is three. By its own admission, the vast majority of RCN's current and proposed attachments to PECO infrastructure are located in urbanized areas wherein PECO has calculated that its presumptive number of attaching entities is three.[156]

69. Additionally, the Commission adopts a new methodology to apportion the costs associated with the usable space. In the *Post-2001 Order* the Commission indicated that the maximum rate for telecommunications service attachments would be the sum of the unusable and usable space factors.[157] For purposes of this Response PECO has utilized the maximum rate formula set forth in the Commission's *Post-2001 Order* and has calculated a rate of $58.35, as set forth in Attachment A.[158] The maximum rate, however will not be effective until February 8, 2006, as the Act required that the rate increase between the pre-2001 cable rate and the post-2001 telecommunications rate be phased in over a five year period.[159] The incremental increase represents 20% of the difference between the pre-2001 cable rate and the maximum rate for telecommunications attachments.

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155 *Post-2001 Order* at 6813.

156 Pole Attachment Complaint at 6.

157 *Post-2001 Order* at 6823.

158 PECO based this calculation on its 1999 FERC Form 1. It reserves the right to update the calculation based on new data that becomes available.

159 47 U.S.C. § 224 (e)(4) (Supp. IV 1998).

70. Therefore, assuming the Commission does not dismiss this Complaint based on the jurisdictional arguments set out in this Response, PECO asserts that the telecommunications rate should be applied to all of RCN's attachments to PECO's facilities from the date of a properly-filed Complaint forward.

E. RCN's Request For A Refund From The Date Of The Alleged Violation Should Be Denied

71. RCN's request for a refund of fees paid prior to the date of Complaint should be denied. The Commission's rules in this context are clear, providing that the FCC may require a refund, "if appropriate...from the date that the complaint, as acceptable, was filed, plus interest."[160] RCN places great stock in the modifier "normally" that accompanies this provision, and claims that the circumstances surrounding the current dispute stray from that which is "normally" covered under the Commission's rules. Therefore, claims RCN, it is entitled to receive a refund of fees paid from the time of the alleged violation rather than from the time the Complaint was filed. RCN, however, has not identified any facts that would warrant this extraordinary relief or distinguish the current situation from a normal pole attachment dispute. In fact, it is inappropriate to even require a refund in this case given the complexity of the issues presented and the need, as illustrated above, to proceed in a rulemaking context. Should the Commission choose to issue a ruling on this Complaint, it should only give prospective effect to any newly announced rate for commingled services which have previously gone unaddressed by the Commission.

72. First, RCN's reliance on *Cable Texas, Inc. v. Entergy Services*[161] is misplaced. As RCN itself identifies, *Cable Texas* involved the assessment of non-recurring pole inspection fees that were paid under protest due to the fact that Entergy refused to process any further pole

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160 47 C.F.R. § 1.1410 (2000).

161 In the Matter of Cable Texas, Inc. v. Entergy Services, PA No. 97-006, *Order*, 14 FCC Rcd. 6647 (2000).

attachment applications until payment was made.[162] This is not the situation in the current dispute. The fees here are standard pole attachment fees, rather than non-recurring inspection fees imposed without prior notice of the amount due. Further, PECO has not made approval of any additional pole attachment applications by RCN contingent on RCN's payment. The current Complaint represents precisely the situation that the Commission's rules were designed to address: a disagreement as to the compensation due to a utility for attachments made to its poles. The rules were just so applied in the recent cases of *Alabama Cable Telecommunications Association v. Alabama Power Co.*[163] and in *Texas Cable Telecommunications Association v. GTE*,[164] both of which awarded refunds only to the date of the complaint.

73. Second, RCN's reference to the programming access rules under 47 U.S.C § 628 is inapposite. The rule in the programming access context to allow refunds back to the date of violation was adopted in a full notice and comment proceeding and tailored to the specific goals of enforcing the programming access provisions.[165] This is not the standard for pole attachments. The rule allowing refunds back to the date of the complaint in the pole attachment context was adopted after a full notice and comment proceeding which considered and discarded the suggestion that the date the first payment which was alleged to be impermissible under the PAA be used as the demarcation point for refunds.[166] In the pole context, this standard was

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162 *Id.* at 6653-54.

163 In the Matter of Alabama Cable Telecommunications Association v. Alabama Power Co., PA No. 00-003, *Order*, 15 FCC Rcd. 17346 (2000) ("*ACTA*") (awarding refund to date of complaint in case filed after *Gulf Power II*).

164 In the Matter of Texas Cable Telecommunications Association v. GTE, PA No. 96-006, *Order*, 14 FCC Rcd. 2975 (1999) ("*TCTA*") (denying complainant's request for refund from date of imposition of disputed rate).

165 In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Docket No. 97-248, *Report and Order*, 13 FCC Rcd. 15822, 15839 (1998).

166 In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC Docket No. 78-144, *First Report and Order*, 68 F.C.C.2d 1585, 1600 (1978).

adopted specifically to "avoid abuse and encourage early filing when rates are considered objectionable by the CATV operator."[167] The rationale suggested by RCN should not be imported into the pole attachment regime absent a full notice and comment rulemaking.

74. As the Commission has previously identified in the context of pole attachment complaints, 47 C.F.R. § 1.1410 prescribes that any refund "must be calculated from the date the complaint was filed."[168] The Commission has consistently utilized the date of the complaint as the date from which to measure a complainant's entitlement to a refund.[169] To do otherwise would undermine the Commission's "repeatedly expressed"[170] and "consistently promoted"[171] preference for negotiation to resolve pole attachment disputes and deviation is not warranted under these circumstances.

75. A refund, however, is only warranted "if appropriate."[172] Even if, *arguendo*, the Commission moves forward, the balance of considerations in this case do not justify a refund based on a Commission imposed rate for commingled services that would supercede the negotiated rate between PECO and RCN for their attachments carrying commingled traffic. PECO negotiated its current pole attachment agreement with RCN in good faith, and due to the highly complex issues associated with commingled services and their regulatory status, could not reasonably anticipate what the Commission may decide on the matter. To retroactively apply a newly announced commingled rate to the contract rate negotiated in good faith between these

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167 *Id.*

168 *TCTA* at ¶ 34.

169 *See, e.g.,* In the Matter of Cavalier Telephone v. Virginia Elec. & Power Co., PA No. 99-005, *Order*, 15 FCC Rcd. 17962, 17963-64 (2000); *ACTA* at 17351; *TCTA* at 2985.

170 *TCTA* at 2978.

171 In the Matter of Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co., PA No. 99-001, *Consolidated Order*, 14 FCC Rcd. 11599, 11667 (1999).

172 47 C.F.R. § 1.1410 (2000).

parties would produce a result contrary to the law as it currently stands, and would serve to impermissibly penalize PECO in this instance. Therefore, should the Commission choose to take up the issue of commingled services here, it should only apply any rate adjustments on a prospective basis.

F. RCN's Request For A Waiver Of FCC Rule Section 1.1410 Should Be Denied

76. The applicant requesting a rule waiver faces a "high hurdle even at the starting gate."[173] The requesting party must plead with particularity the facts and circumstances which warrant such action.[174] The use of a waiver is intended as a "safety valve" only when special circumstances warrant.[175] Even further, that safety valve is "limited" at best.[176] The availability of a waiver for special circumstances and the "obligation to give meaning full consideration" to such an application "emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers."[177]

77. The Commission need not grant a waiver of its Rules unless an application "sets forth adequate reasons why the Rules should be waived."[178] RCN has not identified what special circumstances are present in this case to warrant the waiver of a rule that has been consistently and successfully applied by the Commission.

78. The Commission's rules set forth clear procedural requirements for pole complaints and a clear standard for the calculation of a refund in appropriate cases back to the date that the complaint is filed. There is nothing unusual about this dispute that would warrant a waiver of the Commission's rule. PECO negotiated the current agreement with RCN in good

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173 *Wait Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

174 *Id.*

175 *Id.*

176 *Id.* at 1159.

177 *Id.*

178 *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968).

faith, and gave RCN rapid access to its poles for the roll out of RCN's service. RCN has not alleged, nor has there been, any delay in the grant of permit applications on the part of PECO, nor has PECO hindered RCN's ability to attach its wires once a permit was obtained. The Complaint at issue represents a "plain vanilla" contract dispute. The Commission should not countenance RCN's overly aggressive tactics of seeking forfeitures and waivers in a situation where they are clearly inappropriate.

79. Although the agency may be required to give a "hard look" to a waiver request, it is "not necessarily required to have an existing waiver policy for all of its rules."[179] Adherence to a general rule may be justified when "the gain of certainty and administrative ease" is accomplished.[180]

G. RCN's Request For Imposition Of A Forfeiture Should Be Denied

80. RCN's request that forfeiture be assessed against PECO should be denied. PECO has not discovered any case in which the Commission has found it necessary to require forfeiture in the context of a pole attachment complaint. Further, PECO has charged RCN a rate that it believes is reasonable under the law and in light of the recent decision in *Gulf Power II*. As demonstrated above, PECO has a legitimate legal basis for the rates negotiated with RCN on a good faith basis. There is no evidence whatsoever that PECO has discriminated against RCN. RCN was given access to PECO's poles in a timely manner. The suggestion on RCN's part that forfeiture would be appropriate in this context is totally without merit. This Complaint merely represents RCN's attempt to renegotiate its contract with PECO.

81. Furthermore, even if, *arguendo*, the FCC finds it has jurisdiction over the rates for RCN's attachments, in the context of cable rates, the Commission has found it inappropriate to utilize forfeiture as a tool for enforcement "simply because a rate... is found to be

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179 *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1225 (D.C. Cir. 1999).

180 *Id.*

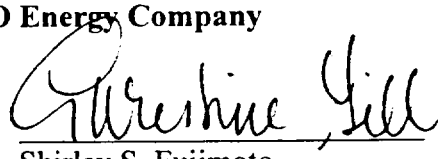
unreasonable."[181] In the same context, Congress has stated that a finding "that rates are unreasonable is not deemed a violation of law subject to the penalties and forfeitures of the Communications Act."[182] The circumstances here in any event do not warrant a forfeiture being imposed on PECO.

V. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, Respondents respectfully request that the Commission dismiss the Complaint for lack of jurisdiction. In the alternative, Respondents request that the allegations of the Complaint be denied based on the non-jurisdictional arguments set forth above. If the Commission does not dismiss or deny the Complaint, it should apply the telecommunications rate as calculated by Respondents to any of RCN's pole attachments the Commission deems encompassed by the PAA.

Respectfully submitted,

Exelon Corporation and
PECO Energy Company

By: 

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181 In the Matter of the Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd. 5631, 5869 (1993) (determining forfeiture was inappropriate to impose upon cable operator simply because cable programming service rate found to be unreasonable).

182 *Id. citing* H.R. Rep. No. 102-628 at 88, 2d Sess. (1992).

INDEX TO ATTACHMENTS

A

Attachment A

PECO'S TELECOMMUNICATIONS POLE RATE CALCULATION PURSUANT TO THE FEDERAL COMMUNICATIONS COMMISSION'S RATE FORMULA[1]

I. FCC's Rate Formula for Telecommunications Attachments

Maximum Pole Rate =
Usable Space Factor + Unusable Space Factor

Allocation of *Usable* Space

$$\text{Pole } \textit{Usable} \text{ Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \frac{\text{Total Unusable Space}}{\text{Pole Height}} \times \text{Net Cost of Bare Pole} \times \text{Carrying Charge Rate}$$

Allocation of *Unusable* Space

$$\text{Pole } \textit{Unusable} \text{ Space Factor} = \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{Pole height}} \times \frac{\text{Net Cost of Bare Pole}}{\text{Number of Attachers}} \times \text{Carrying Charge Rate}$$

II. PECO's Application of the FCC's Telecommunications Rate Formula

ITEM		SOURCE[2]
Net Cost of Bare Pole		
Gross Investment in Pole Plant	$311,042,370	FERC Form 1, pg. 207, ln. 59 col. g. (Acc. 364)
-Depreciation Reserve for Poles	$93,182,370	Gross Plant minus Net Plant for Acc. 364 FERC Form 1, p. 107, ln. 59, col. g. minus FERC Form 1, p. 337, line 27, col. b.[3]
-Accumulated Deferred Taxes	$47,592,560	Company Records
= Net Investment in Pole Plant	$170,267,440	
-Net Investment in Appurtenances (15%)	$25,540,116	
= Net Investment in Bare Pole Plant	$144,727,324	
/ Number of Poles	405,570	Company Records
= Net Investment per Bare Pole	$356.85	
Carrying Charge Rate		
Maintenance		
Maintenance Expense	$71,410,003	FERC Form 1, pg. 322, ln. 119, col. b (Acc. 593)
/ Net Investment in 364,365, 369	$586,984,471	Company Records.
= Maintenance Carrying Charge	12.17%	

1 In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151, (1998); 47 C.F.R.§ 1.1409(c)(2) (2000).

2 All FERC Form 1 data taken from PECO's 1999 FERC Form 1.

3 $311,042,370 - $217,860,000

ITEM		SOURCE[2]
Depreciation		
Annual Depreciation Rate for Poles	2.25%	FERC Form 1, pg. 337, ln. 27, col. e (Acc. 325)
Gross Investment in Pole Plant	$311,042,370	FERC Form 1, pg. 207, ln. 59, col. g (Acc. 364)
/ Net Investment in Pole Plant	$170,267, 440	from above
= Gross/Net Adjustment	182.68%	
Depreciation Rate Applied to Net Pole Plant	4.11%	
Administrative		
Administrative Expenses	$332,918,874	FERC Form 1, pg. 323, ln. 168, col. b
Electric Plant in Service	$14,626,785,648	FERC Form 1, pg. 200, ln. 8 col. c
-Depreciation Reserve for Electric	$11,472,498,140	FERC Form 1, pg. 200, ln. 22, col. c
-Accumulated Deferred Taxes-Electric	$2,238,042,911	See Footnote 1.[4]
= Net Plant in Service	$916,244,597	
Administrative Carrying Charge	36.34%	
Taxes		
Normalized Tax Expense	$617,737,288	FERC Form 1, pg. 114 ln. 13 col. c (Acc. 408.1) + ln. 14, col. c (Acc. 409.1-fed) + ln. 15, col. c (Acc. 409.1-other) + ln. 16, col. c (Acc. 410.1) + ln. 17. col. c (Acc. 411.1) + ln. 18, col. c (Acc. 411.4)
Total Plant In Service	$16,262,102,070	FERC Form 1, pg. 200, ln. 8, col. b
-Depreciation Reserve for TPIS	$11,986,776,038	FERC Form 1, pg. 200, ln. 22, col. b
-Accumulated Deferred Taxes- Total	$2,400,545,719	FERC Form 1, pg. 234, ln. 18 col. c (Acc. 190) + pg. 275, ln. 9, col. k (Acc. 282) + pg. 277, ln. 19, col. k (Acc. 283)
= Net Plant in Service	$1,874,780,313	
Tax Carrying Charge	32.95%	
Return		
Return Authorized by State	11.23%	
Total Carrying Charge Rate	96.79%	
Allocation of Pole Space		
Space Occupied by Cable	1.0	FCC Formula
/ Total Usable Space	13.50	FCC Formula
Charge Factor	7.41%	
Maximum § 224 (d) Rate		
Net Cost of Bare Pole	$356.85	See Attachment A, page 1
* Carrying Charge Rate	96.79%	See Attachment A, page 1
* Charge Factor	7.41%	See Attachment A, page 1
= MAXIMUM § 224 (d) RATE	$25.58	

[4]

A/C Def Taxes(Electric)	$ (356,087,833	FERC Form 1, page 234, line 8, col. c
A/C Def Taxes(Electric)	$ 2,549,735,158	FERC Form 1, page 275, line 2, col. k
A/C Def Taxes(Electric)	$ 44,395,586	FERC Form 1, page 277, line 9, col. k
	$2,238,042,911	

ITEM		SOURCE[2]
Allocation of Space		
Total Pole Height	37.5 feet	FCC Presumption
Total Unusable Space	24 feet	FCC Presumption
Number of Attaching Entities	3	
Pole Unusable Space Factor		
Statutory Apportionment Factor (2/3)	0.67	FCC Presumption
* [Total Unusable Space/ Pole Height]	.64	[24 feet divided by 37.5 feet]
* [Net Cost of Bare Pole/ Number of Attachers]	$118.95	[$356.85 divided by 3]
* Carrying Charges	96.79%	see page 1
= Unusable Space Factor	$49.15	
Pole Usable Space Factor		
[Space Occupied by Attachment/ Total Usable Space]	.074	(1/13.5) 13.5 is FCC's presumptive usable space #
* [Usable Space/ Pole Height]	.36	[13.5 divided by 37.5]
* Net Cost of Bare Pole	$356.85	see page 1
* Carrying Charge Rate	96.79%	see page 1
= Usable Space Factor	$9.20	
MAXIMUM RATE	$49.15	
Unusable Space Factor		
+ Usable Space Factor	$9.20	
= Maximum Rate (Full Implementation)	**$58.35**	
Annual Incremental Increases		
Fully Implemented Rate	$58.35	
- § 224(d) Rate	$25.58	
= Total Increase	$32.77	
/5 Years (Implementation Period)	5	
= Annual Incremental Increase	$6.55	
Phase-In Rate		
Year 1	$32.13	
Year 2	$38.68	
Year 3	$45.23	
Year 4	$51.78	
Year 5	$58.35	

B

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

In the Matter of	)	
	)	
RCN TELECOM SERVICES	)	**PA No. 01-003**
OF PHILADELPHIA, INC.	)	
	)	
v.	)	
	)	
EXELON CORP. f/k/a/	)	
PECO ENERGY COMPANY	)	

DECLARATION OF JOHN C. HALDERMAN

I, John C. Halderman, pursuant to FCC Rule Sections 1.16 and 1.1407, hereby declare as follows:

1. I am an individual over the age of 18 and serve as Assistant General Counsel for Exelon Business Services Group. In that capacity, I am familiar with Exelon Corporation ("Exelon"). I am also familiar with the facts of this case and have actual knowledge of the facts discussed in this declaration.

2. Exelon was incorporated in February 1999 as a subsidiary of PECO Energy Company ("PECO"). However, through a merger involving Exelon, PECO, and Unicom Corporation in October 2000, Exelon became the holding company parent of PECO. The merger first involved a stock swap between Exelon and PECO Energy Company. Through that transaction, Exelon became the parent of PECO. Unicom Corporation then merged into Exelon, with Exelon as the surviving entity (Exelon became the parent of Unicom's subsidiaries, including Commonwealth Edison Company). Despite the merger

transactions, Exelon and PECO both retained their names and remained ongoing concerns under those names. Exelon has never been known as PECO Energy Company.

3. Exelon does not own, administer, or control the utility poles at issue in this case. It has never owned, administered, or controlled the utility poles at issue in this case. Rather, the poles are owned and controlled by PECO. Also, Exelon was not involved in negotiating the pole attachment agreement between PECO and RCN Telecom Services of Philadelphia ("RCN") dated August 13, 1999 ("the Agreement"). Nor is Exelon currently involved with administering the Agreement or in any continuing dialogue between PECO and RCN over the pole attachment rate being charged to RCN. Those matters are purely within the purview of PECO.

4. I have reviewed the Response to Complaint and Motion to Dismiss of Exelon, and to the best of my knowledge and belief, all the facts stated in those pleadings with regard to Exelon are true and correct.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 12, 2001 at Philadelphia, Pennsylvania.

John C. Halderman, Declarant

c

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

In the Matter of	)	
	)	
RCN TELECOM SERVICES OF PHILADELPHIA, INC.	)	**PA No. 01-003**
	)	
v.	)	
	)	
EXELON CORP. f/k/a/ PECO ENERGY COMPANY	)	

DECLARATION OF MARIE P. FUREY

I, Marie P. Furey, pursuant to FCC Rule Sections 1.16 and 1.1407, hereby declare as follows:

1. I am an individual over the age of 18 and am employed by PECO Energy Company ("PECO"). My job title is Manager-Facilities Leasing, my responsibilities involve oversight of leasing activities on various infrastructure assets owned by PECO including its distribution poles which are the subject of this dispute. I have actual knowledge of the facts and exhibits discussed in this declaration.

2. I am familiar with the facts of this case, including the pole attachment agreement between PECO and RCN Telecom Services of Philadelphia ("RCN") dated August 13, 1999 ("Agreement"). I was closely involved in the negotiations leading up to the Agreement, and have been involved in the administration of the Agreement since that time.

3. The first meeting between PECO and RCN to discuss a pole attachment agreement took place on June 18, 1999. At that meeting, Wayne Waldron of RCN presented me with requested changes to PECO's standard pole attachment agreement and requested that PECO make a decision on the changes that same day. The changes RCN requested were significant, involving items such as the proposed rate, terms for relocating attachments for safety or reliability reasons, liability for damage to attachments, and indemnification provisions. I reviewed the requested changes and indicated that these changes would not be consistent with our agreements with other similar situated attachers. I told Mr. Waldron that PECO could not make a decision that day, but would take RCN's requests under consideration.

4. After giving careful consideration to RCN's requests for changes, PECO decided not to accept them because they would shift unacceptable liability risks related to RCN's presence on PECO's poles to PECO's ratepayers and shareholders. I communicated this to Mr. Waldron in a telephone conversation. At that point, Mr. Waldron asked that PECO have an attorney review the changes. I asked Mr. Waldron to first provide me with RCN's proposed changes in a "black line" format on PECO's standard pole attachment agreement, and he provided this on June 29, 1999. I then spoke with Mr. Waldron shortly thereafter by telephone and reemphasized PECO's concerns that RCN's changes could increase risks to PECO's utility business. However, I agreed to review the changes with an attorney.

5. I reviewed the changes with John Halderman, then Assistant General Counsel at PECO, on July 19, 1999. Mr. Halderman agreed that the requested changes posed increased risks to PECO's utility business that could not be accepted. When I called Mr. Waldron and notified him of that determination, he asked that the reasons for it be put in writing. I informed him that it was not PECO's practice to do so because, given the large number of pole attachment requests it must deal with, putting all responses in writing

would be too great an administrative burden. I then had executable originals of the Agreement sent to Mr. Waldron on July 22, 1999.

6. I received back the originals of the Agreement, signed by RCN with reservations, on August 13, 1999. They were then signed on behalf of PECO, and one original was sent to RCN and the other original retained by PECO.

7. After the Agreement was entered on August 13, 1999, PECO did not receive any letters from RCN complaining about attachment rates until July 27, 2000. On that date, Terry Roberts, Director of Access and Rights of Way at RCN Corporation, wrote to M.A. Williams, Manager of Real Estate and Facilities at PECO, expressing RCN's belief that the attachment rate PECO was charging was too high (attached as Exhibit A). Mr. Williams subsequently discussed the matter with Mr. Roberts, informing him that PECO believed RCN was bound to abide by the rates and terms of the Agreement, which it had already entered into with PECO. At Mr. Robert's request, Craig Adams, Vice President of Contractor and Supply Management at PECO, followed-up that conversation with a letter to Mr. Roberts dated November 8, 2000, in which Mr. Adams stated that the rate being paid by RCN was an unregulated market rate, and that application of it to RCN was appropriate due to the fact that RCN provides Internet access (attached as Exhibit B). Mr. Adams also emphasized that all companies similar to RCN were charged the same rate RCN was being charged.

8. The next correspondence RCN sent PECO regarding pole attachment rates was a letter dated January 23, 2001 from Scott Burnside, Senior Vice President of Regulation and Government Affairs at RCN, to Mr. Halderman (attached as Exhibit C). The letter set forth RCN's belief that the rates were "unreasonable and unlawful" and asked that PECO provide it with "company data" on rates and schedule a meeting. Mr. Halderman responded to the letter on February 2, 2001, informing Mr. Burnside that he

had discussed that letter with Mr. Williams of PECO and would like to set up a meeting with Mr. Burnside at Mr. Burnside's earliest convenience (attached as Exhibit D). Mr. Halderman provided Mr. Burnside with his secretary's name and telephone number and asked that he contact her with dates he was available.

9. Subsequently on March 7 and April 5, 2001, I and other PECO representatives met with RCN representatives to discuss the rate issue and other issues related to make-ready for RCN's attachments. While the parties made progress regarding make-ready issues, the disagreement between PECO and RCN regarding rates was not resolved at these meetings.

I declare under penalty of perjury that the foregoing is true and correct. I also hereby verify that the exhibits attached to this declaration are true and correct. Executed on April 12, 2001 at Philadelphia, Pennsylvania.

Marie P. Furey, Declarant

D

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

In the Matter of	)	
	)	
RCN TELECOM SERVICES	)	**PA No. 01-003**
OF PHILADELPHIA, INC.	)	
	)	
v.	)	
	)	
EXELON CORP. f/k/a/	)	
PECO ENERGY COMPANY	)	

DECLARATION OF
SIMONA S. ROBINSON

I, Simona S. Robinson, pursuant to FCC Rule Section s1.16 and 1.1407, hereby declare as follows:

1. I am an individual over the age of 18 and am employed by PECO Energy Company ("PECO"). My job title is Joint Use Administrator, and my position entails managing the day-to-day process of reviewing and approving applications for attachments to PECO's poles. In addition, I oversee the make-ready work and attachment process. I have actual knowledge of the facts and exhibits discussed in this declaration.

2. I am familiar with the facts of this case, including the pole attachment agreement between PECO and RCN Telecom Services of Philadelphia ("RCN") dated August 13, 1999, and the pole attachment agreements between PECO and other entities. I am also familiar with federal law regarding discrimination in the context of pole

attachments. I can state with certainty that PECO is not discriminating against RCN. All companies that PECO's records indicate are similarly situated to RCN, including PECO's affiliates, are charged the same rate as RCN ($47.25 per pole) and are subject to the same general terms and conditions as RCN.

3. PECO quickly processed RCN's applications for attachments and took other steps to makes sure that the attachments could be completed in time to meet RCN's build-out schedule. For example:

a. PECO allowed RCN to use RCN's own surveying firm to do initial survey work because, due to PECO's engineers' heavy schedules, that firm was able to complete the work more quickly than PECO's engineers.

b. To ensure that RCN's build-out schedule is being met, EIS has increased its work force and meets with RCN every Monday to determine which poles RCN wants to give priority.

c. For poles where make-ready work may involve unusually high costs, often due to the number of attachers that must be relocated, PECO and RCN undertake joint walk-outs to the poles to determine if a less expensive method is feasible.

4. In its Complaint, RCN lists several telecommunications companies with which it asserts PECO is affiliated or otherwise related. RCN lists PECO Hyperion Telecommunications (now PECO Adelphia Communications), Exelon Communications, Exelon Infrastructure Services, AT&T Wireless PCS of Philadelphia, Everest Broadband

Networks, and Metrocomm International Inc. Of those companies, only PECO Adelphia Communications and Exelon Infrastructure Services directly or indirectly have attachments to PECO's poles. PECO Adelphia does so through a sublease of dark fiber capacity from Exelon Communications on fiber that is already attached to PECO's poles. Both PECO Adelphia Communications and Exelon Infrastructure Services are charged the $47.25 per pole attachment rate and adhere to the same general terms and conditions as RCN. In other words, PECO does not discriminate in favor of them.

5. To ensure that PECO's records are up to date as to the services offered by each attacher, and that it is thus charging each attacher the appropriate rate, PECO issued a survey to each attacher in January 2001. The survey asked attachers to list the services they provides over their attachments. A copy of the survey letter sent to RCN, on January 5, 2001, is attached as Exhibit A. RCN did not respond to that letter, so PECO sent a follow-up letter on March 26, 2001. A copy of that letter is also attached, as Exhibit B. That letter specifies that RCN has until April 16, 2001 to respond. As of this date, PECO has not received a response.

6. Verizon is charged a pole attachment rate of $47.25. Under long-standing joint use arrangements between PECO and Verizon, it is generally allocated 12 inches of space on PECO's poles. It is PECO's understanding that Verizon as an incumbent local exchange carrier is not considered an attaching entity covered by the Pole Attachment Act

and, accordingly, PECO's pole attachment agreement with it is not relevant for non-discrimination purposes.

I declare under penalty of perjury that the foregoing is true and correct. I also hereby verify that the exhibits attached to this declaration are true and correct. Executed on April 12, 2001 at Philadelphia, Pennsylvania.

Simona S. Robinson

Simona S. Robinson, Declarant

E

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

In the Matter of	)	
	)	
RCN TELECOM SERVICES OF PHILADELPHIA, INC.	)	**PA No. 01-003**
	)	
	)	
v.	)	
	)	
EXELON CORP. f/k/a/ PECO ENERGY COMPANY	)	

VERIFICATION

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

1. I am an individual over the age of 18 and am employed by PECO Energy Company ("PECO"). My job title is Director, Real Estate and Facilities, PECO Energy Company. I have reviewed the Response to Complaint, and to the best of my knowledge and belief, all the facts stated therein with regard to PECO are true and correct.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 12 2001 at Philadelphia, Pennsylvania.

Michael A. Williams, Declarant

CERTIFICATE OF SERVICE

I, Jane Aguilard, hereby certify that on this 16th day of April, 2001, a single copy of the foregoing "Response to Complaint" was served on the following as indicated:

By Messenger

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

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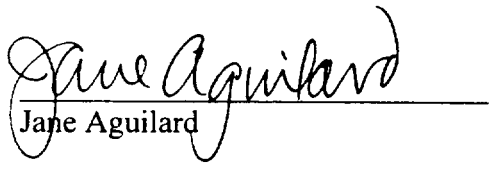

Jane Aguilard