BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Investigation into the Creation of a Shared Database or Statewide Census of Utility Poles and Conduit in California

And Related Matters

Investigation 17-06-027
Rulemaking 17-06-028
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REPLY COMMENTS OF THE CALIFORNIA CABLE AND TELECOMMUNICATIONS ASSOCIATION IN RESPONSE TO OIR SECTION 3 QUESTIONS

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REPLY COMMENTS OF THE CALIFORNIA CABLE AND TELECOMMUNICATIONS ASSOCIATION REGARDING OIR SECTION 3 QUESTIONS

In conformance with the E-Mail Ruling of Administrative Law Judge Robert M. Mason III dated December 10, 2018, Revising the Schedule in the Assigned Commissioner’s Scoping Memo and Ruling Dated August 8, 2018 (“ACR”), to Require Reply Comments, the California Cable and Telecommunications Association (“CCTA”) hereby submits these reply comments in response to comments regarding the OIR questions set forth in Section 3 of the ACR.2

INTRODUCTION

CCTA appreciates the opportunity to reply to comments, but also observes that the Commission has yet to rule on the outstanding motion of the California Association of Competitive Telecommunications Companies (“CALTEL”) requesting that technical workshops be scheduled to discuss these OIR issues.3 The CPUC’s ROW access rules, at their core, are intended to guide the joint-use relationship between pole owners and third

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1 CCTA is a trade association consisting of California’s incumbent Cable Television (“CATV”) providers that have collectively invested more than $40 billion in California’s broadband infrastructure since 1996 and whose systems pass approximately 96% of California’s homes.

2 See ACR at pp. 7-10.

3 See Motion of the California Association of Competitive Telecommunications Companies Requesting Reply Comments and Technical Workshops in Phase 2 of the OIR dated October 12, 2018.
party pole tenants, and to ensure safe, timely, and nondiscriminatory access, consistent with state law and policy. Workshops on these critical issues are essential to ensure that this OIR benefits from stakeholder iterative, in-depth discussions. Indeed, the Commission held two days of workshops prior to establishing its current ROW rules, which helped the Commission in that effort. Holding workshops to revise the same rules in today’s rapidly changing environment would provide a similar benefit. The Commission therefore should grant CALTEL’s motion seeking workshops in order to ensure the Commission’s ROW rules are optimized to meet the Commission’s safety, broadband deployment and competitive objectives.

Following is CCTA’s reply to Comments submitted in response to the OIR Phase II questions as set forth in Section 3 of the ACR.

3.1. Possible Right of Way (ROW) Rule Amendments

1. Should the Commission revisit the timelines set out in D.98-10-058, Rules III and IV?

CCTA Reply:

The Public Advocates Office (“PAO”) and all communications providers agree that the timelines established in Decision (D.) 98-10-058 (“the ROW Decision”) should be extended to investor-owned utilities (“IOUs”). CCTA agrees that IOUs should have deadlines for application processing and completing make-ready so that CCTA members can make Cable broadband services available to Californians in a timely manner, consistent with the objectives of the ROW Decision and California policy.

AT&T and CALTEL contend that IOU timelines should be imposed on all pole owners. They assert that imposing these timelines on all pole owners will be necessary to implement “One Touch Make-Ready” (“OTMR”), a set of Federal Communications Commission (“FCC”) regulations intended to accelerate the pole attachment process for communications providers. CCTA believes the need to establish timelines for IOUs in California exists independently of the Commission’s decision to adopt some form of OTMR. There is no reason for the Commission to predicate the adoption of make-ready timeframes on the adoption of OTMR. The FCC demonstrated this is not necessary. It
adopted application processing and make-ready timelines in 2011, some seven years before it adopted OTMR rules (which have not yet been implemented).

In contrast to the communications facility providers, the IOUs urge the Commission to reject application processing and make-ready timelines for IOUs. They argue that the “dramatic increase in [pole attachment] applications” occurring over the past few years should somehow exempt them from such timelines. SDG&E relies on the increase in applications to argue that the Commission should include a pole application cap or limit into its decision. In support of this self-serving exemption, SDG&E alludes to Conclusion of Law 38 of the ROW Decision, in which the Commission concludes that “[i]n the event that an initial inquiry to an ILEC involves more than 500 poles or 5 miles of conduit, the response time shall be subject to the negotiations of the parties involved.” The Commission should decline SDG&E’s request to read a pole application cap or limit into its decision. The ROW Decision places no time, distance, or pole number restriction concerning the number of allowable pole applications. Rather, the decision states only that for an initial inquiry involving more than 500 poles or 5 miles of conduit, response time will be subject to negotiations. Placing an annual cap on pole attachments would throttle broadband deployment, undermining the pro-broadband deployment policies of the ROW Decision and California. Similarly, interjecting a limit of 5 miles into the ROW Decision would similarly serve as an unwarranted and arbitrary cap on communications facility deployment.

Regarding SDG&E’s suggestion that it is important to preserve its right to negotiate mutual agreeable timelines with the attaching parties, nothing would prevent the parties from doing so. But without mandated timelines, the pole owner has no incentive to timely process applications. Indeed, IOUs have used the absence of mandated timelines to delay and deny cable operators access facilities to which they are entitled under state law.

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4 See FCC 2011 Report and Order on Consideration, GN Docket No. 09-51 at paras. 21-62.
5 Comments of San Diego Gas & Electric Company (“SDG&E”) On Order Instituting Rulemaking Questions Set Forth in Section 3 of Assigned Commissioner’s Scoping Memo and Ruling at 4. See also Pacific Gas & Electric Company (“PG&E”) Comments at 3; and Southern California Edison Company (“SCE”) Comments at 3.
6 ROW Decision at COL 38.
7 SDG&E Comments at 5.
In addition to mandated timelines for all pole owners, the Commission should adopt an objective access standard, similar to the FCC’s (and most certified states) that states:

A utility shall provide an attacher with nondiscriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it. Notwithstanding this obligation, a utility may deny access on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability or generally applicable engineering standards that cannot be addressed through make-ready.⁸

The Commission’s ROW rules should be updated and modernized to include timelines for all pole owners and to ensure that access occurs on a nondiscriminatory and objective basis, rather than based on any unreasonable requirement that a particular pole owner may impose.

Finally, PG&E recommends that attachers use 3D software to expedite the process. CCTA and its members appreciate PG&E’s recommendation and are currently working with PG&E, other pole owners, attachers and interested parties in Phase I (the pole database portion) of this proceeding⁹ to explore whether those type of solutions can expedite the pole application process in a mutually beneficial manner. CCTA anticipates that the parties should be able to address this issue cooperatively and thereby obviate the need for the Commission to adopt rules in this regard.

2. Should the Commission revisit the requirement in ROW Rule III.B that the pole-owning utility “provide access to maps, and currently available records such as drawings, plans and any other information,” in light of the current state of digital technology and the possibility of shared digital data?

CCTA Reply:

Regarding maps and materials, SCE contends that all such information is not available in digital format and that the matter is best addressed by pole owners.¹⁰ While mindful of SCE’s caution, CCTA agrees with parties that make clear steps should be taken to move away from paper and towards digital records.¹¹ Regardless of the format,

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⁹ See I.17-06-027.
¹⁰ SCE Comments at 4.
¹¹ See, e.g., CALTEL Comments at 12 (stating that there are opportunities to mechanize many aspects of the attachment and maintenance processes).
however, it is essential that maps and materials be made available in a timely manner. Some progress is being made in that regard. For example, CCTA members have found that PG&E’s digital access through its Joint Utilities Map Program (“JUMP”) is a promising tool for allowing users to access PG&E records significantly faster. However, not all pole owners are taking such proactive measures.

3. **Should the Commission revisit and amend the Third Party Contractor Rules in ROW Rule IV.C (numbered as IV.D in most recent version), to allow for one-touch make-ready (OTMR) and/or right-touch make ready (RTMR)?**

**CCTA Reply:**

Some communications providers argue in favor of OTMR rules similar to those promulgated by the FCC. In contrast, the IOUs explain that OTMR raises safety and reliability concerns. PG&E describes the OTMR rules as contrary to the goals of public safety and electric transmission reliability, and SDG&E states that the OTMR rules would compromise safety and reliability for the sake of speed and quick access. Similarly, SCE asserts that, “to the extent OTMR involves contractors relocating SCE facilities, this is unacceptable.” Like the IOUs, CCTA’s members also are concerned that OTMR rules would undermine their ability to ensure the safety and reliability of their systems.

As described in CCTA’s comments, CCTA members with first-hand experience with OTMR in other jurisdictions have found that OTMR undercuts their ability to ensure the safety and reliability of their systems. As shown in CCTA’s comments, OTMR programs have resulted in safety violations caused by new attachers, damage to existing networks resulting in service outages, routine misclassification of complex work as “routine,” and no notice to existing attachers.

While CCTA is not suggesting that cable operators be excluded from any OTMR obligations if ultimately adopted, CCTA urges the Commission to wait and see if the

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12 PG&E Comments at 5.
13 SDG&E Comments at 6.
14 SCE Comments at 5.
15 CCTA Comments at 5.
16 See CCTA Comments at Attachments A and B, containing comments submitted in the FCC’s Wireline Deployment NPRM describing CCTA members’ experiences with OTMR.
rules recently adopted by the FCC can be successfully implemented in FCC-regulated states before adopting similar rules in California. CALTEL notes that OTMR will soon apply in the 30 states in which the FCC retains jurisdiction over pole attachments; thus, there will be numerous “laboratories” from which the Commission can draw information. That information will be useful should the Commission pursue TURN’s recommendation to review the FCC’s OTMR requirements and to further consider how to possibly incorporate such rules into California’s “complicated pole attachment process.” The Commission also should explore alternatives to OTMR, including the cable industry’s Accelerated and Safe Access to Poles (“ASAP”) proposal. As noted in CCTA’s comments, ASAP promotes the twin Commission goals of efficient access and safety.

4. Should attachers with agreements whose rates adjust annually based upon changes to the annual cost of ownership be notified of the new rate on a date certain? How far in advance of the effective date of the new rate should such notice be provided? In addition, should attachers seeking to negotiate new attachment agreements and those with agreements whose rates change on an annual basis be provided with the supporting documents underlying the default rate calculation upon request?

**CCTA Reply:**

Question 4 asks, in part, whether attachers seeking to negotiate new agreements should be provided with supporting documents underlying the default rate calculation, upon request. As explained below, and supported by comments of other parties, access to supporting non-public documents underlying a pole rate calculation is essential for a variety of reasons, including:

1. To determine whether the utility’s pole attachment rate is “just and reasonable” as required by the Public Utilities Code and Commission precedent.

2. To ensure that California’s goals to promote broadband deployment and close the Digital Divide are not undermined by dramatically escalating pole attachment rates that impermissibly include pole owner costs not allowed under Pub. Util. Code § 767.5.

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17 CALTEL Comments at 5.
18 TURN Comments at 4.
19 The particulars of ASAP are described in The Internet & Cable Television Association’s (“NCTA”) FCC ex parte dated March 5, 2018, attached to CCTA’s Comments as Attachment C.
20 CCTA Comments at 5.
(3) To prevent pole owners from recovering the same costs both in a pole attachment rate and in a General Rate Case, especially at a time when pole replacement is a key element of electric utility infrastructure hardening, as well as to prevent double recovery of make-ready fees and other non-recurring fees paid by cable and telecommunications providers.

Public Util. Code § 767.5 states the Legislature’s finding that it is in the public interest to provide cable providers access to utility poles, and the Commission’s implementing regulations and decisions establish a pole attachment rate formula to ensure just and reasonable compensation for the utility. The Commission’s attachment rate formula is based on a utility’s “annual cost of ownership” of a pole with inputs including pole related actual capital and operating costs and pole inventory. Public Utilities Code Section 767.5 specifically prohibits including “costs for any property not necessary for a pole attachment.”21 As CCTA stated in its opening comments, a utility should be required to provide its rate calculation and the underlying cost and pole inventory data that are inputs to the formula.22 Without this information, neither the Commission nor attachers are able to verify if a rate paid by an attacher is just and reasonable and therefore lawful under § 767.5.23

Communications pole owners agree. AT&T, for example, explains, “supporting work papers for the rate changes should be provided with a proper [nondisclosure agreement].”24 Verizon, which is also a pole owner in other states, also recognizes the need for supporting documentation.”25

PG&E states that, upon request, it can provide “the factors used to calculate the new rate, including the net cost per pole, depreciation expenses, administrative expenses, operation and maintenance costs, and normalized taxes.”26 Similarly, SCE indicates that,

21 Pub. Util. Code §767.5(b) and (c).  See also ROW Decision at 55.
22 CCTA Comments at 6-7.
23 Requiring a utility to provide the cost information necessary to determine whether its annual pole attachment rate is lawful reduces the need for Commission intervention. Attachers have no choice but to file time-consuming and resource intensive pole attachment complaints when such information is withheld.
24 AT&T Comments at 6.
25 Verizon Comments at 12.
26 PG&E Comments at 6.  But, please be advised that all that information is already available in PG&E’s FERC filing.  Attachers need access to information that is not always available in a FERC Form 1 report.
upon request, it would provide supporting documentation underlying the calculation that
“would provide the details of SCE’s calculation and identify the location in SCE’s
Federal Energy Regulatory Commission (“FERC”) Form 1 of the data SCE used in the
calculation.”

Of course, that information is not complete and is already publicly
available on the FERC website. CCTA stresses that a pole owner must provide
information that may not be publicly available, but underlies the utility’s calculations,
such as continuing property records (“CPR”) and other cost data that is not set forth on a
FERC Form 1 report, such as a pole count. This information is essential to ensure that a
utility’s rates are lawful under § 767.5.

SDG&E’s argues that documents provided for purposes of establishing a cost-
base rate “should be limited to inputs based on costs established in other proceedings and
available in public documents to which the attaching parties already have access.”

SDG&E’s argument is misplaced. Attachers should have access to information that is
essential for performing an independent rate calculation in order to determine the
lawfulness of the pole rental fee. By limiting cost inquiries only to publicly available
information, as SDG&E argues, attachers would be precluded from any meaningful
inquiry into the accuracy of their reported costs or the identification of “costs not
necessary for a pole attachment.”

Cable operators and other third party attachers must
have a mechanism that allows them to analyze the cost information and rate calculation
performed by the IOUs. Otherwise, the IOUs will have virtually no accountability for
their pole rental fees and attachers can only accept the offered rates with no recourse,
except a complaint filed with the Commission. Moreover, SDG&E’s proposed limitation
is contrary to the definition of “annual cost of ownership” in Pub. Util. Code §
767.5(a)(9), as well as Commission precedents, and would result in skyrocketing pole
attachment rates, which CCTA members are currently experiencing.

27 SCE Comments at 6.
28 SDG&E Comments at 7 (emphasis added).
31 In 2017, SDG&E proposed to increase the rate it charges cable companies to rent space on its
poles from $16.35 to $30.58- a one year increase of 87%. Other IOUs have proposed similarly
dramatic rate increases.
A fundamental shortcoming of SDG&E’s proposal is that some of the key information used in the pole attachment formula is not publicly available. For example, the number of poles owned, used, or controlled by the IOU, and the IOU’s pole depreciation records. Attachers therefore require internal IOU information confirming the IOU’s pole inventory. That information is generally found in the IOU’s CPR, and should include all poles by age, height, type, and class (regardless of whether the poles are used for the attachment of third party communications attachments), the related investment, and the FERC account to which those costs are recorded (generally Account 364). This information would necessarily include, for example, brace poles, stub poles, dead-end poles, SCADA poles, joint-use poles, and mixed-use poles.32 (i.e., poles that have attachments of both electric transmission and distribution plant)

Another fundamental concern with SDG&E’s proposal is that many of the costs reported in FERC Account 364 (the distribution pole account) include, in addition to the costs of installed poles, the costs for assets “not necessary for a pole attachment,” commonly referred to as “appurtenances”33 which must be removed from the “annual cost of ownership” pursuant to Code § 767.5(a)(9). Attachers must have information to confirm and segregate the costs of the poles included in Account 364 from the costs of “appurtenances” that also are included in Account 364. This generally is accomplished by using a rebuttable presumption that 15% of the total costs in FERC Account 364 are attributable to appurtenances (known as the “appurtenance factor”). Due to a variety of causes, however, including the “hardening” costs, the actual appurtenance factor in modern systems is more likely in the 25%-30% range. Attachers, therefore, must have access to IOU records regarding the costs of the specific items included in Account 364 to confirm whether the rebuttable presumption is accurate or must be increased to reflect the actual costs of “appurtenances.” This information is readily available in the IOU’s accounting database.34

32 A higher pole count results in a lower attachment rate.
33 Appurtenances are property primarily used for the IOU’s core electric service such as cross-arms, insulators, and transformer racks.
34 A higher appurtenance factor results in a lower attachment fee.
SDG&E’s proposal not only denies an attacher the opportunity to test the validity and lawfulness of the attachment rates it must pay, but the proposal also opens the door for unjust double recovery by an IOU, because SDG&E’s formula leaves no means to reconcile whether costs recovered from pole attachers are also recovered from ratepayers. Access to certain non-public information and records, such as the data inputs to FERC accounts noted above, is the only mechanism available to a cable company to ensure it does not pay for the same thing twice – and that the IOU is not paid twice for the same asset.

Accordingly, CCTA urges the Commission to reject SDG&E’s proposal to confine cost information to publicly reported data and instead to reiterate that, at a minimum: (1) IOUs must provide their CPR or other pole-related records to attachers upon request (subject to a non-disclosure agreement (“NDA”)) that will confirm all the pole inventory and related data (pole sizes, span lengths, etc.) used in the IOU’s electric distribution system, including relevant cost data; and (2) IOUs must provide relevant portions of their accounting records to confirm the costs included in Account 364 that relate to “any property not necessary for a pole attachment,” as required § 767.5. Both

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35 Note that one such “ratepayer” would be the cable company – that in addition to paying pole attachment rates, also pays the IOU as an electric supply customer – potentially paying hardening costs once through electricity rates, and again as a third party tenant. Similarly, non-recurring capital costs recovered by the utility via make-ready fees must be eliminated from relevant FERC Accounts used to calculate attachment rates to avoid double recovery by the utility. See generally, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Report and Order, Declaratory Ruling and Further Notice of Proposed Rulemaking, WC Docket No. 17-84, FCC 17-154 at 4, para. 7 (2017) (FCC adoption of regulation specifically requiring utility “to exclude capital expenses already recovered [from cable operators and telecommunications carriers] via non-recurring make-ready fees from recurring pole attachment rates.”). “[S]uch costs must be subtracted from the utility’s corresponding pole line capital account to insure that . . . operators are not charged twice for the same costs.” Id. See also 47 C.F.R. Section 1.1409(c).

36 See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Report and Order, Declaratory Ruling and Further Notice of Proposed Rulemaking, WC Docket No. 17-84, FCC 17-154 at 4, para. 7 (2017) (FCC adoption of regulation specifically requiring utility “to exclude capital expenses already recovered [from cable operators and telecommunications carriers] via non-recurring make-ready fees from recurring pole attachment rates.”). “[S]uch costs must be subtracted from the utility’s corresponding pole line capital account to ensure that . . . operators are not charged twice for the same costs.” Id. See also 47 C.F.R. Section 1.1409(c).
items are in the exclusive custody and control of the IOUs, are readily available, and not burdensome to provide, especially intensive pole attachment complaints when such information is already included in a utility’s electronic database. Escalating pole attachment rates, rate disputes and complaints filed at the Commission are likely to occur if utilities are permitted to withhold such information and records.

5. **ROW Rule VI.C requires the utilities to file all pole and conduit agreements with the Commission …** If the core objective of the ROW decision and ROW rules is to promote nondiscriminatory access to utility support structures, please explain how this can be achieved if negotiated agreements are not made public in their entirety.

*CCTA Reply:*

*See Reply Comments to Question 6, below.*

6. **Should dark fiber leases be made publicly available so that the rates, terms, and conditions of these agreements can be extended to similarly situated providers?**

*CCTA Reply:*

Responses to this question vary widely, from CALTEL’s recommendation that all IOU- and ILEC-negotiated pole and/or conduit agreements be made public in their entirety,37 to Verizon’s claim that there is no evidence that dark fiber providers discriminate against companies that construct their own fiber facilities, indicating that the Commission should rely on this market-based competition, and that requiring dark fiber leases to be public raises serious legal and policy concerns.38 Those responses highlight CCTA’s observation that (i) all attachers are not similarly situated, and (ii) the proposed filing requirement does not necessarily promote nondiscriminatory access to utility support structures. More important is that attachers have access to necessary cost data to ensure that the negotiation of pole attachment rate agreements are consistent with California law. If an attacher is denied that critical information and the resulting pole attachment agreement is then used by the pole owner as a template for other agreements,

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37 CALTEL Comments at 31.
38 Verizon Comments at 12, citing response to question 6.
then all attachers subject to those agreements would be denied their legal right to have a cost-based agreement consistent with Pub. Util. Code § 767.5.

7. The 1998 ROW rules fail to designate which utility is responsible for processing attachment requests when poles are jointly owned by these entities. Should the Commission clarify the respective administrative responsibilities of joint pole owners?

_CCTA Reply:_

As CALTEL’s correctly observes, the processes adopted by pole owners differ significantly and it is not clear where the responsibilities are documented.³⁹ For example, PG&E’s contends that the telecommunications pole owner should be responsible for applications,⁴⁰ while Verizon’s recommends that the Commission designate only one utility as responsible for processing attachment requests.⁴¹ From CCTA’s perspective, a simple clarification is necessary: the Commission should make clear that both IOU and ILEC pole owners (including jointly-owned poles) have the obligation to provide timely and nondiscriminatory access to poles. Attachers should be able to approach either pole owner, and that the pole owner should be required to follow the application process, notify the other pole owner and issue a permit, which would then be shared with the other pole owner. Once the permit is issued, each pole owner can bill for its appropriate fraction of ownership.

8. ROW Rule VII concerns reservation of capacity by existing utilities. Rule VII.A prohibits ILECs and electric utilities from adopting policies that result in holding back useable space on or in utility support structures except as set forth in Rule VII.C. Have would-be attachers had difficulty resulting from pole and/or conduit owners’ reservation of space? If so please provide concrete examples of such difficulty or dispute, even if the difficulty or dispute was eventually resolved.

_CCTA Reply:_

This question concerns a utility’s ability to reserve capacity. As CCTA explained in comments, under the Commission’s ROW Decision, ILECs may not reserve space on poles in the same way as electric utilities since ILECs can reserve space for up to 9

³⁹ CALTEL Comments at 25.
⁴⁰ PG&E Comments at 9.
⁴¹ Verizon Comments at 19.
months for their own future needs but IOUs may prioritize the needs of their electric customers over third party attachment requests for projects for the provision of core electric utility service within one year. It is important for the Commission to continue its oversight and vigilance given the potential for IOUs to become telecommunications competitors. Should IOUs become competitors, the Commission should re-assess the ability of IOUs to reserve pole space for their own use, as Verizon recommends.

9. **Should the Commission revisit the dispute resolution procedures set out in D.98-10-058?**

*CCTA Reply:*

The Commission received contrasting comments regarding revisiting the dispute resolution procedures set out in the ROW Decision. CALTEL contends that expedited dispute resolution (“EDR”) in the ROW rules should be eliminated, as the EDR is primarily used as a delaying tactic by pole owners. In contrast, AT&T views EDR as a “valuable venue for carriers to resolve disputes in a timely manner,” noting that EDR should be expanded to include disputes involving not just initial access to utility support infrastructures, and to disputes involving extension of existing rights, as well as renewal of existing agreements. While CCTA’s comments observed that the vast majority of pole attachment related disputes are resolved without Commission intervention, we see value in retaining EDR as an option to resolve disputes. One significant advantage of EDR is that quicker and it is considerably less expensive than its alternatives, such as a formal Commission complaint proceeding. Regarding AT&T’s proposed expansion of EDR, CCTA does not object to expanding the EDR process to include terms and conditions as long as that EDR process is optional for pole tenants.

10. **Are there other specific changes to the ROW Rules which are consistent with GO 95 and GO 128 that would increase safe and non-discriminatory access to poles, conduit, or rights-of-way, including with regard to jointly owned poles?**

*CCTA Reply:*

Please see CCTA’s Reply to Question 15.

**Question 11**

42 CCTA Comments at 9.
43 See AT&T Comments at 14.
CCTA offers no reply comment to Question 11.

12. What is the impact of a first-come, first-serve system, where the last attacher to an overloaded pole is required to erect a new pole?

CCTA Reply:

PG&E contends that first-come, first-served is not a barrier to entry and the responsibility of replacing an overloaded pole is simply a cost of doing business,\(^44\) and that the prospective attacher bears the responsibility of providing its services in a safe, compliant manner and should rightfully bear the associated costs.\(^45\) CCTA agrees that a cost causer should pay for pole replacement, and, if an attacher’s proposed facilities would overload the pole, it should bear the associated costs of ensuring the proposed attachment is safe. However, if the pole is already overloaded or space-limited (i.e., out of compliance with G.O. 95), then the pole owner should bear the responsibility of providing a pole (and services) in a safe, compliant manner and should rightfully bear the associated costs of bringing that pole into compliance. As summarized in CCTA’s previous comments,\(^46\) the Commission should follow the FCC rule, which requires that the cost-causer pays, but that a new attacher must be provided with a compliant pole.\(^47\)

13. Should ROW Rule XI.B, regarding safety, be amended to reapportion responsibility, among incumbent pole owners and pole attachers, for non-compliant or unsafe pole conditions?

See CCTA Reply to Question 12 above.

Question 14

CCTA offers no reply comment to Question 14.

15. CCTA has stated, “Pole owners can enforce the substantial penalties imposed by pole attachment agreements for attaching without authorization.” Please list every such penalty above $10,000 known by the responding party to have been

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\(^{44}\) PG&E Comments at 13.
\(^{45}\) Id. at 14.
\(^{46}\) CCTA Comments at 13.
\(^{47}\) The FCC clarified this rule in its recent Order: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Third Report and Order and Declaratory Ruling at ¶¶ 121 and 452 (FCC rel. Aug. 3, 2018).
imposed and collected, identifying which pole owner imposed, which attacher paid, and of what the unauthorized attachment consisted.

**CCTA Reply to Questions 10 and 15:**

In response to Question 10 regarding recommended changes to the ROW rules, SCE, PG&E, and SDG&E suggest that the penalty for unauthorized attachments should be increased from the current $500 to $25,000 per unauthorized attachment, consistent with the penalties set forth in Pub. Util. Code § 2107.

The 50-fold increase in penalties proposed by the IOUs is grossly excessive and entirely unwarranted. CCTA reminds the Commission just how far even the current penalty of $500 imposed by the ROW Decision exceeds the national norm. The FCC, for example, imposes a penalty of no more than 5 times annual rent – or typically about than $50 per pole. The IOUs now attempt to tie their extreme proposal to Pub. Util. Code § 2107, which empowers the Commission to impose a fine ranging from $500 to $50,000 on a public utility that fails to comply with a statute or Commission order. The IOUs obviously are not the Commission, which has the statutory authority to impose fines, and cable companies are not public utilities. Moreover, while the Commission must provide due process before it assess any fine, the IOUs have no such limits and, because the IOUs impose penalties without verification that a permit ever existed, or on attachments that did not require a permit when attached (e.g., service drop attachments), the IOU is in the position of unilaterally determining compliance, assessing penalties, and pocketing those penalties. As a practical matter, the IOUs act as judge, jury and executioner in unauthorized attachment disputes.

Any increase in the penalty level is also unwarranted. First, CCTA respectfully disagrees with SCE’s assertion that the penalties it collects for unauthorized attachments aren’t merely the result of missing paperwork. As the IOUs point out, cable companies do pay penalties, but that does not mean the “unauthorized attachment” was not a paperwork issue. (The pole tenant often agrees to pay the penalty in order to attach and

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48 See FCC 2011 Report and Order on Consideration GN Docket No. 09-51 at para 115. A $50 penalty would apply when the annual attachment fee is $10.
deploy services in a timely manner rather than delay service to customers while disputing penalties.) While acknowledging that there may be rare occasions in which facilities are inadvertently built without permits, attachers much more frequently experience the following circumstances:

- The attacher built with an approved permit, but the pole was changed out and the pole number changed without records being properly updated by the pole owner.

- The attacher built with an approved permit from one pole owner, but its facilities were rearranged by the other pole owner without the attacher or the first pole owner being notified, or updating records.

- A pole owner issued permits for a run of poles, but inadvertently missed a pole in the middle of the run, such that the attacher would have permits for most, but not all of the poles requested in an application. If the pole owner did not complete a post construction inspection, this condition would eventually show as an “unauthorized” attachment (even though the permits were issued for all the surrounding poles).

- Service drops from poles are often a very large part of recent designated “unauthorized” attachments, because pole owners did not previously require the permitting for such attachments. Nevertheless, they are considered “unauthorized” attachments when an audit is performed.

- Finally, pole owners have not always kept good records, which attachers should not be penalized for.

The situations described above are therefore not the result of an attempt to evade the application process or paying rent. Instead, they consist of inadvertent pole owner or attacher error, for which attachers should not be heavily penalized, particularly in the exorbitant manner proposed by the IOUs.

PG&E notes that Comcast paid it $66,500 in penalties in 2018 for 133 unauthorized attachments. Comcast acknowledges that it paid this amount as a result of an inadvertent error by a new contractor, and has since implemented measures to ensure that this one-off situation does not reoccur. However, 133 unauthorized attachments represents a miniscule fraction of the tens of thousands of fully-permitted Comcast attachments on PG&E poles. Moreover, an unauthorized attachment penalty of $25,000

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50 PG&E Comments at 15.
per attachment would have resulted in an enormous and entirely unwarranted windfall to PG&E of over $3.3 million.

CCTA does not believe any increase in the penalty level for unauthorized attachments is warranted. But should the Commission wish to explore this option, it should first ensure that IOU records are adequate to determine if an attachment is indeed unauthorized. The Commission has begun to explore options that may help. With its current investigation into a shared database, the Commission has the opportunity to create or approve database(s) that will accurately track which attachments are authorized, and which are not. Such a system is lacking today.

Questions 16 through 22

CCTA offers no reply comment to Questions 16 through 22.

3.4. Municipal and Smart Grid Issues (Reply to Q. 23 Required)

23. What impact does the investor-owned utility (IOU) placement of communications conductors in the supply space have on safety and competition?

CCTA Reply:

PAO contends that the risk of power line damage increases if communications lines are installed in the electrical supply space and, accordingly, says the Commission should not open up the electrical supply space for lit fiber communications services.\(^{51}\) CCTA agrees that equipment in proximity to electrical supply lines raises safety considerations, but takes no position regarding PAO’s recommendation; CCTA instead believes the matter of placing communications conductors in the supply space is primarily a question for IOUs. However, CCTA strongly disagrees with PAO’s unsupported justification for its position declaring, “in recent years several brush fires were caused by broken lashing wire that came off communications lines and caused electrical arcing.”\(^{52}\) PAO’s claim of fire causation is neither supported by PAO’s own citation to authority nor by any other authoritative source provided. PAO’s claim that lashing wire has caused “several brush fires” falsely suggests that lashing wire poses an extraordinary fire safety risk and that communications providers are designing plant in a

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\(^{51}\) PAO Comments at 12.

\(^{52}\) *Id.* at 11-12.
manner that heightens the risk of fires. CCTA therefore is concerned that parties may wrongly assume that PAO’s claim is factually accurate, which it unequivocally is not. For example, the Guejito Fire Report does not, as PAO suggests, conclude that the fire was caused when broken lashing wire came off communications lines and caused electrical arcing. Although Cox does not contest that its facilities and SDG&E’s power lines came in contact starting the Guejito Fire, the reason contact was made never was established. The Commission’s investigation into the cause of the Guejito Fire (Investigation 08-11-007) was settled with the Commission’s approval, before a hearing was held or a decision was issued. As a result, the Commission never reached a conclusion or made findings about the cause of the Guejito Fire. In addition, both the Commission’s investigator and the California Department of Forestry and Fire Protection investigator admitted in sworn deposition testimony that they did not know how or when the lashing wire broke, and had no evidence to support the theory of a pre-existing broken lashing wire.

Also unsubstantiated is PAO’s claim that in recent years several brush fires were caused by broken lashing wire. The Guejito Fire Report on which PAO relies, makes no such claim. Nor does PAO cite any of the numerous annual reports filed by each IOU in accordance with the Fire Incident Data Collection Plan set forth in D.14-02-015, which undoubtedly would indicate if any loose or broken lashing wire was implicated in the ignition of a fire. The Commission should not rely on such bald, unsupported – and factually erroneous – assertions.

53 Id. at 12, note 18.
54 Id.
Respectfully submitted,

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