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January 22, 2015

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**Re: Open Internet, GN Docket No. 14-28  
Pole Attachments, WC Docket No. 07-245**

Dear Ms. Dortch:

On January 20, 2015, Steve Morris of the National Cable & Telecommunications Association and Paul Glist of Davis Wright Tremaine met with Matt DelNero, Claude Aiken and Marcus Maher to discuss the pole attachment implications of classifying broadband Internet access services as Title II telecommunications services.

Consistent with NCTA's January 9, 2015, *ex parte* letter, we explained that it was critically important that any Commission order in the *Open Internet* proceeding preserve the existing pole attachment rights of cable operators and telecommunications carriers pursuant to Section 224 of the Act.<sup>1</sup> To the extent the Commission forbears from that statutory provision, it must be clear that it is forbearing with respect to new obligations that otherwise might be imposed on broadband providers. It should not forbear from existing obligations on electric utilities and local exchange carriers to provide access to poles at regulated rates pursuant to Section 224.<sup>2</sup>

We further explained that the Commission long ago established a policy, affirmed by the Supreme Court, that cable operators are entitled to pole attachments pursuant to the cable rate formula in Section 224(d) when they offer broadband services, rather than the telecommunications rate formula in Section 224(e), which typically results in higher rates.<sup>3</sup> The Commission found that the cable rate was fully compensatory to pole owners and that there was

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<sup>1</sup> See Letter from Matthew A. Brill, Counsel to NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28 (filed Jan. 9. 2015).

<sup>2</sup> *Id.* at 1-2.

<sup>3</sup> *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (1998) (*1998 Pole Attachment Order*), reversed *Gulf Power v. FCC*, 208 F.3d 1263 (11<sup>th</sup> Cir. 2000), reversed *NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002) (*Gulf Power*).

no policy reason to penalize cable operators with higher pole attachments rates when they entered the market for broadband services.<sup>4</sup>

NCTA expressed concern that classification of broadband Internet access as a telecommunications service in the *Open Internet* proceeding could lead to significant increases in the pole attachment rates paid by cable operators because it would enable pole owners to charge cable operators the telecommunications rate, rather than the cable rate. Such a decision would reverse the policy established by the Commission in the *1998 Pole Attachment Order* and affirmed by the Supreme Court in *Gulf Power* and penalize companies for expanding broadband networks as intended by the Commission.

We further explained that while the Commission's *2011 Pole Attachment Order* reduced the disparity between the cable rate and the telecommunications rate,<sup>5</sup> it did not eliminate the gap between the two rates in all circumstances. To address this concern and ensure that the two rates were equivalent in all circumstances, NCTA joined with COMPTTEL and twtelecom in filing a petition asking the Commission to clarify or reconsider the rules.<sup>6</sup> As explained in that petition, the rules adopted in the *2011 Pole Attachment Order* specify cost allocators to be used in calculating the telecommunications rate, but the allocators yield approximately the cable rate only when the pole owner uses the presumptions in the Commission's rules regarding the number of attaching parties.<sup>7</sup> The cable rate and the telecommunications rate will diverge, however, in when the pole owner calculates a rate using fewer attaching parties than the Commission's presumptions.<sup>8</sup> The NCTA/COMPTTEL Petition demonstrated that the telecommunications rate could be as much as 70% higher than the cable rate in cases where the presumptions are challenged.<sup>9</sup> We estimated that classification of broadband Internet access as a telecommunications service could result in pole rent increases of \$150-\$200 million annually.

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<sup>4</sup> *1998 Pole Attachment Order*, 13 FCC Rcd at 6794, ¶ 32 (1998) (“We conclude, pursuant to Section 224 (b)(1), that the just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate. In specifying this rate, we intend to encourage cable operators to make Internet services available to their customers. We believe that specifying a higher rate might deter an operator from providing non-traditional services. Such a result would not serve the public interest. Rather, we believe that specifying the Section 224(d)(3) rate will encourage greater competition in the provision of Internet service and greater benefits to consumers.”).

<sup>5</sup> *Implementation of Section 224 of the Act*, WC Docket No. 07-245, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (*2011 Pole Attachment Order*), *affirmed American Electric Power v. FCC*, 708 F.3d 183 (D.C. Cir. 2013).

<sup>6</sup> *See* Petition for Reconsideration or Clarification of the National Cable & Telecommunications Association, COMPTTEL and twtelecom, Inc., WC Docket No. 07-245 (filed June 8, 2011) (NCTA/COMPTTEL Petition).

<sup>7</sup> *See* 47 C.F.R. § 1.1409.

<sup>8</sup> NCTA/COMPTTEL Petition at 4-6.

<sup>9</sup> *Id.*, Att. A.

The NCTA/COMPTEL Petition requested that the Commission specify the cost allocator to be used in all cases, whether or not the presumptions are used.<sup>10</sup> As an alternative, the NCTA/COMPTEL Petition suggested the Commission could simply establish the maximum just and reasonable telecommunications rate as the higher of the rate yielded by the cable formula or the rate yielded by the telecommunications formula if capital costs were excluded.<sup>11</sup>

The decision of the D.C. Circuit in *American Electric Power* affirming the *2011 Pole Attachment Order* fully supports both options identified in the NCTA/COMPTEL Petition. As the court explained, Section 224(e) is “less specific” than Section 224(d) in prescribing how the statutory rate formula should be implemented.<sup>12</sup> In particular, the court found that the term “cost” as used in Section 224(e) is ambiguous and that the Commission had ample authority to interpret that term in a manner designed to achieve its policy objective of eliminating the disparity between the cable rate and the telecommunications rate.<sup>13</sup> The Commission’s authority under Section 224(e), as described by the court in *American Electric Power*, is more than sufficient to support adoption of either option proposed in the NCTA/COMPTEL Petition.

The NCTA/COMPTEL Petition has been pending for well over three years and is ripe for resolution, either in the context of a decision in the *Open Internet* proceeding or in a separate order. While NCTA strongly opposes reclassification of broadband as a telecommunications service, if the Commission proceeds down that path, it should grant the NCTA/COMPTEL Petition as part of that decision. Grant of the petition not only would eliminate the potential for pole owners to increase the pole attachment rates paid by cable operators, but it also could reduce the rates paid by existing telecommunications carriers, as well as broadband providers that would be newly classified as telecommunications carriers. Conversely, a failure by the Commission to grant the petition or otherwise preclude pole owners from raising attachment rates will impose massive new costs on the cable industry and dampen any incentive to expand broadband networks, particularly in rural areas where more plant, and therefore more poles, are required to support each customer.<sup>14</sup> Such a result directly and significantly undermines the “virtuous circle” the Commission states that is trying to promote through adoption of *Open Internet* rules.

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<sup>10</sup> *Id.* at 6-7, Att. B.

<sup>11</sup> *Id.* at 7

<sup>12</sup> *American Electric Power*, 708 F.3d at 188.

<sup>13</sup> *Id.* at 189-90.

<sup>14</sup> See Letter from Thomas Cohen, Counsel for the American Cable Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28 (filed Jan. 20, 2015) at 3 (“If the attachment rates of cable operators that also provide broadband Internet access service increase as a result of a reclassification decision, that decision would create disincentives for broadband deployment and investment by affected cable operators, especially for those operating in less dense areas where access to more poles is generally required and where there are fewer subscribers over which to spread costs. It would also would create pressure to increase retail rates for broadband Internet access service, harming subscribers and dampening adoption of the service by those not yet connected.”).

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Respectfully submitted,

**/s/ Steven F. Morris**

Steven F. Morris

cc: M. DelNero  
C. Aiken  
M. Maher