

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

In the Matter of)	
)	
Implementation of Section 224 of the Act)	WC Docket No. 07-245
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51

**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (NCTA) urges the Commission to quickly grant the reconsideration petition it filed four years ago in the above-referenced proceeding.¹ Granting the petition will promote broadband deployment by ensuring that all broadband providers are eligible for the lowest possible pole attachment rates, while still fairly compensating pole owners.

INTRODUCTION

Section 224 of the Act includes two different provisions governing the calculation of pole attachment rates, which the Commission has used as the basis for two different rate formulas – the cable rate formula adopted pursuant to Section 224(d) and the telecommunications rate formula adopted pursuant to Section 224(e).² Historically “the telecommunications rate formula generally resulted in higher pole rental rates than the cable rate formula.”³ Based on the Commission’s determination that there were negative consequences for competition and broadband deployment from telecommunications carriers paying higher pole attachment rates

¹ See Petition for Reconsideration or Clarification of the National Cable & Telecommunications Association, COMPTel and twtelecom, Inc., WC Docket No. 07-245 (filed June 8, 2011) (NCTA/COMPTel Petition).

² *Implementation of Section 224 of the Act*, WC Docket No. 07-245, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5297, ¶ 131 (2011) (*2011 Pole Attachment Order*), affirmed *American Electric Power v. FCC*, 708 F.3d 183 (D.C. Cir. 2013).

³ *Id.*

than necessary to compensate pole owners, it found that the public interest would be served by modifying the telecommunications rate formula to produce rates that equal the rates produced by the cable rate formula.⁴ Accordingly, in the *2011 Pole Attachment Order*, the Commission adopted rule changes intended to substantially equalize the cable rate and the telecommunications rate.⁵

The *2011 Pole Attachment Order* did not, however, eliminate the gap between the two rates in all circumstances. Specifically, 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.⁶ The cable rate and the telecommunications rate diverge, however, when the pole owner calculates a rate using fewer attaching parties than the Commission's presumptions.⁷

To address this concern and ensure that the two rates are substantially equivalent in all circumstances as intended by the Commission,⁸ NCTA and COMPTTEL filed a petition asking the Commission to clarify or reconsider the rules.⁹ The NCTA/COMPTTEL Petition demonstrated that the telecommunications rate could be as much as 70 percent higher than the

⁴ *2011 Pole Attachment Order*, 26 FCC Rcd at 5298-99, ¶ 136 (“[W]e believe the telecom rate should be lowered to more effectively achieve Congress’ goals under the 1996 Act to promote competition and “advanced telecommunications capability” by both wired and wireless providers by “remov[ing] barriers to infrastructure investment,” and the broader pro-competitive goals and policies that Congress directed the Commission to carry out under the 1996 Act.”).

⁵ *Id.*, 26 FCC Rcd at 5304-06, ¶¶ 149-152.

⁶ *See* 47 C.F.R. § 1.1409.

⁷ *See* NCTA/COMPTTEL Petition at 5-6.

⁸ *2011 Pole Attachment Order*, 26 FCC Rcd at 5305, ¶ 151 (“We observe that these definitions of cost, when applied pursuant to the cost apportionment formula in section 224(e), generally will recover a portion of the pole costs that is equal to the portion of costs recovered in the cable rate.”).

⁹ NCTA/COMPTTEL Petition at 4-6.

cable rate in cases where the presumptions are challenged.¹⁰ To avoid such a result, 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.¹¹

The reclassification of broadband services as Title II telecommunications services pursuant to the *Open Internet Order* highlights the importance of the issues raised in the NCTA/COMPTEL Petition.¹² In the *Open Internet Order*, the Commission sought to extend the benefits of low pole attachment rates to broadband providers thereby limiting the input costs they would otherwise have to incur.¹³ At the same time, it cautioned against “any increase in the rates,” which it stated would be “unacceptable as a policy matter,”¹⁴ and expressed concern regarding “any potential undermining of the gains the Commission achieved by revising the pole attachment rates paid by telecommunications carriers.”¹⁵

While the issue addressed in the petition exists regardless of the Commission’s reclassification of broadband Internet access services, the reclassification of those services may lead to higher rates paid by cable operators and telecommunications carriers if the Commission fails to grant our petition. Specifically, because virtually all pole attachments in states subject to the Commission’s rules will now be subject to the telecommunications rate formula, there is an increased likelihood that pole owners will seek to rebut the presumptions for the number of attaching parties. If that happens, attaching parties could face increased costs associated with

¹⁰ *Id.*, Att. A.

¹¹ *Id.* at 6-7, Att. B. As an alternative, the NCTA/COMPTEL Petition suggested the Commission could instead 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. *Id.* at 7.

¹² *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (rel. Mar. 12, 2015) (*Open Internet Order*).

¹³ *Id.* at ¶ 478.

¹⁴ *Id.* at ¶ 482.

¹⁵ *Id.* at ¶ 483.

reviewing (and possibly challenging) such rate increases.¹⁶ And in cases where the pole owner could effectively rebut the presumption and demonstrate that the actual number of attaching parties was lower than the number presumed by the Commission, attaching parties could be subject to significant increases in pole attachment fees. As explained in these comments, granting the NCTA/COMPTTEL Petition is the surest way to prevent pole owners from seeking to increase pole rents.

GRANT OF THE PETITION WOULD PROMOTE BROADBAND DEPLOYMENT

The relationship between pole attachment rates and broadband deployment incentives are well documented. As recognized in the National Broadband Plan, pole attachment costs comprise a significant percentage of broadband deployment costs.¹⁷ If pole attachment costs are higher than necessary, the business case for deploying broadband is harder to justify. Conversely, to the extent pole attachment costs can be reduced (while still providing sufficient compensation to the pole owner), the business case for deploying broadband is enhanced. The *2011 Pole Attachment Order* recognized the importance of enabling all parties to attach at rates comparable to those produced by the cable rate formula. “[T]he new formula will minimize the difference in rental rates paid for attachments that are used to provide voice, data, and video services, and thus will help remove market distortions that affect attachers’ deployment decisions. ... Increasing competitive neutrality also improves the ability of different providers to

¹⁶ For example, attaching parties would need to review any surveys that form the basis for the “actual” number of attaching parties asserted by a pole owner.

¹⁷ CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN at 109 (“The cost of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands. Collectively, the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20% of the cost of fiber optic deployment.”).

compete with each other on equal footing, better enabling efficient competition.”¹⁸ The *Open Internet Order* reiterated the importance of that result.¹⁹

Given the positive investment incentives created by uniform low pole rents, it is clear that granting the NCTA/COMPTTEL petition would serve to advance the Commission’s broadband policies, while failing to grant the petition would have the opposite effect. Grant of the petition not only would eliminate the potential for pole owners to increase the pole attachment rates paid by cable operators, it would have the added benefit of lowering the rates paid by existing telecommunications carriers, including broadband providers that would be newly classified as telecommunications carriers. Specifically, granting the petition would eliminate any incentive for pole owners to rebut the attaching entity presumptions in the telecommunications rate formula, thereby ensuring that all attaching parties pay rates that approximate the rates produced by the cable rate formula.

Conversely, a failure by the Commission to grant the petition or otherwise preclude pole owners from raising attachment rates will have significant negative consequences for the broadband industry. By providing pole owners a greater incentive to rebut the presumptions in the telecommunications rate formula and ultimately to increase attachment fees, the Commission risks triggering the imposition of massive new costs on cable operators for exactly the same pole attachments they use today. Such a result would dampen any incentive to expand broadband

¹⁸ *2011 Pole Attachment Order*, 26 FCC Rcd at 5295, ¶ 126.

¹⁹ *Open Internet Order* at ¶ 478 (“The Commission has recognized repeatedly the importance of pole attachments to the deployment of communications networks, and we thus conclude that applying these provisions will help ensure just and reasonable rates for broadband Internet access service by continuing pole access and thereby limiting the input costs that broadband providers otherwise would need to incur.”).

networks, particularly in rural areas where more plant, and therefore more poles, are required to support each customer.²⁰

Recent experience demonstrates that prompt action by the Commission is critical. For example, Vyve Broadband, a small cable operator that serves predominantly rural areas, recently received notice from one electric utility that its telecommunications attachment rate was increasing to a level that is 81 percent higher than its cable attachment rate. The increase would cover over 27,000 poles, in an area where it takes more than three poles to reach each subscriber. Requiring a rural cable operator to pay this additional amount significantly increases the cost of operating its existing network and reduces its ability to expand the reach of that network to new customers.

Moreover, the harm associated with increased rates would not be limited to cable operators. By increasing the likelihood that a pole owner will take the time and effort to challenge the presumptions regarding the number of attaching parties, failure to grant the petition could lead to increases in the rates paid by telecommunications carriers in situations where those rates currently are comparable to the cable rate. Moreover, to the extent one of the Commission's goals in the *Open Internet Order* was to promote broadband adoption by expanding the range of providers eligible for regulated rates under Section 224,²¹ allowing pole owners to assess unreasonably high attachment rates undermines that policy and the

²⁰ 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.”).

²¹ *Open Internet Order* at ¶ 478 (“Leveling the pole attachment playing field for new entrants that offer solely broadband services also removes barriers to deployment and fosters additional broadband competition.”).

corresponding deployment incentives. Granting the petition is necessary to achieve the Commission's stated objective of equalizing rates at the cable rate, which the Commission and the courts recognize "as just, reasonable, and fully compensatory."²²

Grant of the NCTA/COMPTEL Petition not only promotes the Commission's broadband policies, but it also is fully consistent with the Commission's legal authority under Section 224. 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.²³ 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.²⁴ 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.

²² *2011 Pole Attachment Order*, 26 FCC Rcd at 5321, ¶183 (citing, e.g., *Alabama Power Co. v. FCC*, 311 F.3d at 1370–71 ("[A]ny implementation of the [Commission's cable pole attachment rate] (which provides for much more than marginal cost) necessarily provides just compensation."); *FCC v. Florida Power Corp.*, 480 U.S. 245, 253–54 (1987) (finding that it could not "seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory").

²³ *American Electric Power*, 708 F.3d at 188.

²⁴ *Id.* at 189-90.

CONCLUSION

For the reasons stated above, NCTA requests that the Commission expeditiously adopt the changes and clarifications requested in its Petition for Reconsideration.

Respectfully submitted,

/s/ Steven F. Morris

Steven F. Morris
Jennifer K. McKee
National Cable & Telecommunications
Association
25 Massachusetts Avenue, NW – Suite 100
Washington, DC 20001-1431

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