

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)	
)	
Implementation of Section 224 of the Act;)	WC Docket No. 07-245
Amendment of the Commission's Rules and)	
Policies Governing Pole Attachments)	
)	
National Broadband Plan for Our Future)	GN Docket No. 09-51
)	

**COMMENTS OF THE AMERICAN CABLE ASSOCIATION
IN RESPONSE TO PUBLIC NOTICE ASKING PARTIES TO REFRESH RECORD
REGARDING PETITION TO RECONSIDER COST ALLOCATORS USED TO
CALCULATE THE TELECOM RATE FOR POLE ATTACHMENTS**

The American Cable Association (“ACA”) hereby submits its comments in response to the May 6, 2015, Public Notice the above captioned-proceeding.¹ In the Public Notice, the Wireline Competition Bureau (“Bureau”) seeks comment to refresh the record concerning the petition for reconsideration or clarification filed by the National Cable and Telecommunications Association (“NCTA”), COMPTTEL, and tw telecom inc. (collectively, the “Petitioners”)² of the Commission’s 2011 Report and Order³ in the above-referenced proceedings. As explained

¹ Public Notice, WC Docket No. 07-245 and GN Docket No. 09-51, DA 15-542 (WCB released May 6, 2015) (“Public Notice”).

² Petition for Reconsideration or Clarification of the National Cable and Telecommunications Association, COMPTTEL, and tw telecom inc., WC Docket No. 07-245, GN Docket No. 09-51 (filed June 8, 2011) (“NCTA Petition”).

³ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (“2011 Pole Attachment Order”) *aff’d sub*

herein, ACA urges the Commission to grant expeditiously the relief sought by the Petitioners. Action on the *NCTA Petition* has become more urgent in the wake of the Commission's recent decision in the *Open Internet Order* to reclassify broadband Internet access service ("BIAS") as a Title II telecommunications service,⁴ subjecting cable operator providers of such service to treatment as telecommunications carriers and higher rates under Section 224 of the Communications Act, as amended.⁵

Under the Commission's rules and Section 224, there is a bifurcated system for pole attachers that are cable operators and those that are telecommunications carriers.⁶ For almost 40 years, cable operators have paid for their provision of cable service a reasonable "cable attachment rate," which provided them with appropriate incentives to deploy facilities while being fully compensatory for the pole owner. These operators also paid this rate when they provided BIAS over their cable systems, since BIAS was, until adoption of the *Open Internet Order*, classified as an information service. In contrast, telecommunications carriers under this system paid attachment rates, which were derived from a different statutory formula and which, under the Commission's interpretations, produced materially higher rates.⁷

nom. Am. Elec. Power Serv. Corp. v. FCC, 708 F.3d 183 (D.C. Cir. 2013) ("American Electric Power") *pet'n for cert. denied* 134 S. Ct. 118 (Oct. 7, 2013).

⁴ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, (released Mar. 12, 2015) ("Open Internet Order"), *appeal pending sub nom. United States Telecom Association, et al. v. Federal Communications Commission, and United States of America*, No. 15-1063 (D.C. Cir. 2011)(and consolidated cases).

⁵ See 47 U.S.C. § 224(e).

⁶ See 47 C.F.R. § 1.1409.

⁷ See *2011 Pole Attachment Order* ¶ 12; *American Electric Power* 708 F.3d at 185.

In an attempt to reduce distortions in “service providers’ decisions regarding deployment and offering of advanced services,”⁸ the Commission, in the *2011 Pole Attachment Order*, took steps to lower the rates paid by telecommunications carriers in an effort to eliminate the disparities between the rates paid by cable operators and telecommunications carriers. The basic thrust of the Commission’s amendment was to change the cost allocators used in the “telecommunications attachment rate” formulas in its rules, which when based on a presumptive number of attachers, would make the telecommunications rate identical to the cable rate.⁹ However, while the Commission’s amendment may work when pole owners choose to rely on the Commission’s presumptions, it does not in reality because pole owners generally will not utilize the presumptions if using the actual average number of attachers enables them to charge a higher telecommunications carrier rate. Indeed, the telecommunication attacher rate will be significantly higher than the cable rate – in practice as much as 70 percent or more – when a pole owner uses the actual average number of attachers on its poles rather than the presumptions.

The *NCTA Petition* sought to remedy this residual disparity. The Petitioners requested that the rules specify that “the cost allocator to be applied [in the telecommunications rate formula will be] based on the [actual] number of attaching entities . . .”¹⁰ The *NCTA Petition* requested that the Commission “provide the corresponding cost adjustments scaled to other

⁸ See *2011 Pole Attachment Order*, ¶ 3.

⁹ See *id.*, ¶ 149 (adjusting the cost basis to 66 percent in urban service areas and to 44 percent in rural service areas). Where the presumptions are used, the cable operator and telecommunications carrier formulas yield identical rates equal to the rate that was provided through the cable rate prior to the *2011 Pole Attachment Order*.

¹⁰ *NCTA Petition* at 1, Attach. B. (proposing revision of 47 C.F.R. § 1.1409).

entity counts” when pole owners utilized the actual number of attachers in lieu of the permitted presumptions.¹¹

ACA has supported and supports a grant of the *NCTA Petition*.¹² The cost burden imposed on pole owners by telecommunications carriers attaching to their poles is no different than the burden placed by cable operator attachers. The federal appellate courts have made clear that the cable rate, which reflects fully allocated costs, is justly compensatory for pole owner’s costs.¹³

The urgency to provide the clarification or expansion of the telecommunications rate formula sought by Petitioners has been made plain by actions taken by at least certain pole owners since the release of the *Open Internet Order* and the reclassification of BIAS as a telecommunications service. ACA has been informed by numerous members that they have received notice recently from pole owners about application of the higher telecommunications rate if they are providing BIAS. Thus, the consequence of the reclassification decision is that cable operators, including ACA members, that have not provided and do not otherwise provide a telecommunications service, potentially face much higher pole attachment rates if a pole owner

¹¹ *Id.* at 6. In the alternative, Petitioners requested that “the Commission . . . establish the maximum just and reasonable rate as the higher of the cable rate . . . or the ‘lower bound’ telecom rate obtained by excluding capital costs from the definition of ‘cost of providing space’ in the existing telecom rate formula.” *Id.* at 7.

¹² *See e.g.*, Letter from Thomas Cohen and Edward A. Yorkgitis, Jr., Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 2-3 (filed Jan. 20, 2015).

¹³ *See e.g.*, *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370–71 (11th Cir. 2002), *cert. denied*, *Alabama Power Co. v. FCC*, 540 U.S. 937 (2003) (“[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”).

chooses to use the Commission's *Open Internet Order* as a pretext to commence charging the telecommunications rate.

Mindful of this possibility, the Commission in the *Open Internet Order* underscored that “[t]o the extent that there is a potential for an increase in pole attachment rates for cable operators that also provide broadband Internet access service, we are highly concerned about its effect on the positive investment incentives that arise from new providers’ access to pole infrastructure.”¹⁴ Expressing concern over “any potential undermining of the gains the Commission achieved by revising the pole attachment rates paid by telecommunications carriers,” the Commission stated it would “monitor[] marketplace developments”¹⁵ and “take prompt action if necessary to address the application of the Commission’s pole rental rate formulas in a way that removes any doubt concerning the advancement of the goals intended by our 2011 reforms.”¹⁶ Unfortunately, since the release of the *Open Internet Order*, as noted above, at least some pole owners have ignored the Commission’s admonition and begun to issue notices to ACA members informing them that as of July 1, 2015, providers of BIAS will be charged the telecommunications attachment rate, representing increases of as much as 55 and 80 percent over the cable rate.

ACA opposes the Commission decision to reclassify broadband Internet access service as a telecommunications service subject to Title II for smaller Internet Service Providers (“ISPs”) and believes that action was not supported by the record and otherwise was arbitrary and capricious. It has sought an appeal of the decision. As long as the decision stands and the

¹⁴ *Open Internet Order*, ¶ 484.

¹⁵ *Id.*, ¶ 483.

¹⁶ *Id.*, ¶ 484.

Commission fails to take the action sought by the *NCTA Petition*, pole owners can levy higher attachment rates, deterring investment and broadband deployment by affected cable operators.¹⁷ The disincentives for deployment created by the *Open Internet Order* will especially harm smaller operators operating in less dense areas where access to more poles is generally required and where it is already harder to justify a network build enabling higher performance BIAS. Further, the Commission should expect that cable operators providing BIAS will need to pass along some, if not all, of the increase in attachment rates by raising retail rates, harming subscribers and dampening adoption of the service by those not yet connected. In sum, by permitting pole owners to assess higher, supercompensatory pole attachment rates on ACA members, the Commission would threaten the very broadband deployment it sought to facilitate in the *2011 Pole Attachment Order* in furtherance of the *National Broadband Plan's* objectives.

Consequently, the Commission should take immediate action to reduce substantially further, if not outright eliminate, any remaining disparities between the cable and telecommunications rates by granting the *NCTA Petition*. As the Wireline Competition Bureau, quoting the *2011 Pole Attachment Order*, has noted, “reducing the telecom rate to be lower and closer to uniform with the cable rate ‘will better enable providers to compete on a level playing field, will eliminate distortions in end-user choices between technologies, and lead to provider behavior being driven more by underlying economic costs than arbitrary price differentials.’”¹⁸

The Commission should finish what it started in the *2011 Pole Attachment Order* and

¹⁷ This will occur even where pole owners have not yet sought higher rates, since BIAS providers will need to account for these potentially higher rates in determining whether to undertake new network builds.

¹⁸ *Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order, DA 11-980, ¶ 12 (WCB rel. June 1, 2011) (quoting *2011 Pole Attachment Order*, ¶¶ 134).

significantly reduce the remaining potential disparity between the cable rate and the telecommunications carrier rate and better achieve the foregoing stated purposes of the *2011 Pole Attachment Order*.¹⁹ In light of the actions of pole owners to raise cable provider's attachment rates in the wake of the *Open Internet Order*, the Commission should act immediately.

Respectfully submitted,



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¹⁹ See *NCTA Petition* at 4-7.