

**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 COMPTTEL AND LEVEL 3 COMMUNICATIONS, LLC

COMPTTEL and Level 3 Communications, LLC urge the Commission to resolve the remaining disparities between their pole attachment rates applicable to cable and telecommunications providers by granting the still-pending petition for reconsideration of the Commission’s *2011 Pole Attachment Order*.¹ Granting the petition will effectuate the underlying purpose of the *2011 Pole Attachment Order*, promote broadband deployment, and protect against competitive distortions that these disparate rates can cause.

Section 224 provides the Commission with authority to regulate the rates charged by utilities for the use of utility poles by cable and telecommunications providers. Historically, the Commission has implemented the cable and telecommunications rate provisions in Section 224 of the Communications Act by using two different rate formulas²—with “the telecommunications rate formula generally result[ing] in higher pole rental rates than the cable rate formula.”³ In the *2011 Pole Attachment Order*, the Commission recognized that this

¹ Petition for Reconsideration or Clarification of the National Cable & Telecommunications Association, COMPTTEL and tw telecom, inc., WC Docket No. 07-245 (filed June 8, 2011) (“NCTA/COMPTTEL Petition”). Level 3 Communications, LLC’s indirect parent Level 3 Communications, Inc. acquired tw telecom in 2014.

² Implementation of Section 224 of the Act, *Report and Order and Order on Reconsideration*, 26 FCC Rcd. 5240, 5297 ¶ 131 (2011) (“*2011 Pole Attachment Order*”), *aff’d by American Electric Power Service Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013).

³ *Id.*

disparity had significant, negative implications for competition and broadband deployment,⁴ and thus modified the telecommunications rate formula in an effort to create parity between the rates derived from the two formulas.⁵

Unfortunately, the *2011 Pole Attachment Order* did not fully resolve the disparity. Unlike its cable counterpart, the new telecommunications formula includes a rebuttable presumption regarding the number of attaching parties.⁶ So, when a pole owner calculates a rate for telecommunications providers using fewer attaching parties than the Commission's presumptions, a telecommunications carrier can be charged upwards of 70% more than a cable operator to attach to the same pole.⁷

Shortly after the Commission released the *2011 Pole Attachment Order*, COMPTEL, tw telecom, and NCTA filed a petition asking the Commission to clarify or reconsider the rules to address this disparity and ensure that the rates charged to cable and telecommunications providers are substantially equivalent in all circumstances as intended by the Commission.⁸ Specifically, the Petition requested that the Commission specify how costs were to be allocated

⁴ *See id.* 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.* at 5304-06 ¶¶ 149-152.

⁶ *See* 47 C.F.R. § 1.1409.

⁷ NCTA/COMPTEL Petition at 4-6 and att. A.

⁸ *Id.* at 1; *see also 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.”).

in all cases, notwithstanding the presumptions the formula used regarding the number of attaching parties.⁹

An expeditious grant of that Petition would serve the public interest. Pole attachment rates have a significant and well-documented effect on broadband deployment. Pole attachment costs are a significant portion of broadband deployment costs.¹⁰ As such, any decrease in those rates necessarily improves a telecommunications provider's business case for deploying broadband—including for Broadband Internet Access Service providers that prior to the *Open Internet Order* were not eligible to take advantage of either the telecommunications rate or cable rate. By the same token, any difference between the rate charged to cable operators and telecommunications providers to attach to the same poles also distorts competition between the two.¹¹ The *2011 Pole Attachment Order* recognized the importance of ensuring that all competitors had access to poles as the same, low cable rate¹²—a point that the recent *Open*

⁹ NCTA/COMPTTEL Petition at 6-7, att. B. Alternatively, 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. *Id.* at 7.

¹⁰ See CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 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.”).

¹¹ While several ISPs and their trade associations have argued that the *Open Internet Order* could result in cable operators being charged the telecommunications rate, this result appears to be unlikely. It is not clear that an electric utility has the legal right to impose the telecommunications rate on any other cable operator, and the Commission has warned utilities against attempting to do so. In any event, even if utilities had the right to apply the telecommunications rate to cable providers, cable providers would presumably already be subject to that rate to the extent that they provide facilities-based VoIP service.

¹² See *2011 Pole Attachment Order*, 26 FCC Rcd. at 5303 ¶ 147 (“We thus conclude that lowering the telecom rates 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.”).

Internet Order reiterated.¹³ Granting the Petition would simply fulfill this policy goal by finally completing the important work the Commission began four years ago.

Grant of the Petition also is fully consistent with the Commission's authority under Section 224. As the D.C. Circuit explained in *American Electric Power*, the Commission is actually less restrained by Section 224(e) with regard to constructing the telecommunications rate formula than it is under Section 224(d) with regard to the cable rate formula.¹⁴ Because the Court found the cost allocation provision in Section 224(e) to be ambiguous,¹⁵ the Commission has ample room to interpret that provision in a way that better comports with good public policy by removing the disparity between the cable and telecommunications rates.

For the reasons stated above, COMPTTEL and Level 3 request that the Commission expeditiously adopt the changes and clarifications requested in their Petition for Reconsideration.

Respectfully submitted,

/s/
Karen Reidy
COMPTTEL
900 17th Street NW, Suite 400
Washington, DC 20006

Joseph C. Cavender
Level 3 Communications, LLC
1220 L Street NW, Suite 660
Washington, DC 20005

¹³ See Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, GN Docket No. 14-28, FCC 15-24, ¶ 478 (rel. Mar 12, 2015) (“*Open Internet Order*”) (“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.”).

¹⁴ *American Electric Power Service Corp. v. FCC*, 708 F.3d 183, 188-89 (D.C. Cir. 2013).

¹⁵ *Id.* at 189-90.