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

REPLY COMMENTS IN OPPOSITION TO PETITION FOR RECONSIDERATION

CenterPoint Energy Houston Electric, LLC, Dominion Virginia Power, Florida Power & Light Company, and UGI Utilities – Electric Division (the "Electric Utilities") submit these reply comments in response to the *Notice*,[1] and in opposition to the Petition for Reconsideration of NCTA, COMPTEL, and tw telecom, Inc. in the above-captioned proceedings,[2] and related comment filings supporting further reductions to pole attachment rates under Section 224(e) of the Communications Act. The Commission must not ignore the unambiguous express language of Section 224 and the straightforward interplay of Sections 224(d) and 224(e) at the demand of telecommunication service providers seeking to reduce their own operating costs without any resulting benefit to consumers. Even four (4) years following the rate reductions of the *2011 Pole Attachment Order*,[3] the record before the Commission is devoid of any evidence that lower pole attachment rates spur growth, competition, or benefits to consumers in the market for

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1 Parties Asked to Refresh Record Regarding Petition to Reconsider Cost Allocators Used to Calculate the Telecom Rate for Pole Attachments, Public Notice, WC Docket No. 07-245 and GN Docket 09-51, DA-15-542 (rel. May 6, 2015) (Notice).

2 Petition for Reconsideration or Clarification of the National Cable and Telecommunications Association (NCTA), COMPTEL, and tw telecom Inc., WC Docket No. 07-245 and GN Docket No. 09-51 (Jun. 8, 2011) (*Petition*).

3 *In the Matter of Implementation of Section 224 of the Act* (WC Docket No. 07-245); *A National Broadband Plan for Our Future* (GN No. 09-51), Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011), *aff'd, American Elec. Power Serv. Co. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013) (*2011 Pole Attachment Order*).

broadband services, and in fact, electric utilities have demonstrated that the opposite is true.[4] Moreover, it is too soon to evaluate if reclassification of broadband Internet access service under Title II of the Communications Act will affect pole attachment rates at all, let alone impose substantial new costs that ultimately will be to the detriment of broadband consumers.[5] The mere potential for such an adverse result does not support establishing a rate framework that flatly contradicts cost allocation principles mandated under the express language of Section 224(e). The Electric Utilities therefore submit that any grant of the relief demanded in the *Petition* would be contrary to law, and arbitrary and capricious.[6]

I. THE STATUTE REQUIRES EQUAL APPORTIONMENT OF THE COST OF PROVIDING UNUSABLE SPACE AMONG ALL ATTACHING ENTITIES.

As explained in the prior comment filings of Edison Electric Institute and Utilities Telecom Council,[7] the *Petition* offers nothing more than an algebraic sleight of hand.[8] Through adoption of new cost allocators found nowhere in the statute, the *Petition* proposes a pole attachment rate calculation that would produce the same mathematical result under Section 224(e) ("Telecom Rate"), as under Section 224(d) ("Cable Rate"), notwithstanding the average number of attaching entities sharing in pole costs. This result is precluded under the plain

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4 *See* Comments in Opposition to Petition to Reconsider the Cost Allocators Used to Calculate the Telecom Rate for Pole Attachments, Ameren Corp., American Electric Power Service Corp., Duke Energy Corp., Oncor Electric Delivery Company LLC, Southern Company, Tampa Electric Company; WC Docket No. 07-245 and GN Docket No. 09-51 (June 4, 2015); Comments of the Utilities Telecom Council; WC Docket No. 07-245 and GN Docket No. 09-51 (June 2, 2015).

5 *In the Matter of Protecting and Preserving the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order (rel. Mar. 12, 2015) (*Open Internet Order*) at ¶¶ 483-84.

6 *See Petition, supra* note 2.

7 *Opposition of the Edison Electric Institute and Utilities Telecom Council*, WC Docket No. 07-245 and GN Docket No. 09-51 (Aug. 10, 2011) at 5 – 9 and 10.

8 *See Comments of Verizon In Response to the Commission's Request to Refresh the Record*, WC Docket No. 07-245 and GN Docket No. 09-51 (Jun. 4, 2015) (*Verizon Comments*) at 2 for a concise demonstration of the math proposed ("Petitioners propose the following cost allocators: 66 percent when the average is five; 56 percent when the average is four; 44 percent when the average is three; 31 percent when the average is two;..."). In contrast, the statute directs that 66 percent (2/3) of the cost of non-usable space is to be equally divided by the number of attaching entities; i.e. 66 percent should always be the cost allocator whether the average is five or two.

language of the statute, which sets forth different formulas in its text. Nothing in Section 224 supports that the term "cost" varies with the number of attaching entities, or as between subsections (d) and (e). Rather, these subsections make clear that Congress intended one rate for pole attachments used solely to provide cable service,[9] and another, higher rate for those used to provide telecommunications services.[10]

Under Section 224(d), pole attachment rates are permitted to range from the additional cost of adding an attachment to the pole, up to the product of the percentage of usable space occupied by an attachment and the total cost of the pole. This means that the higher end of the Cable Rate apportions the costs associated with both usable and unusable space based on a single percentage equal to the amount of usable space occupied by the attachment. In notable contrast, Section 224(e) specifies different principles for apportioning the costs of providing usable and unusable space: the cost of providing usable space must be apportioned based on the percentage of usable space occupied by an attachment; and, *in addition*, the cost of providing unusable space must be equally divided among the number of attaching entities, and then multiplied by two-thirds.[11] The Telecom Rate, therefore, incorporates two distinct cost elements for those costs associated with usable and unusable space. In directing a rate formula that requires pole owners to use separate, specified calculations for usable and unusable space, rather than applying the long-established single percentage multiplier arising under Section 224(d), Congress made clear

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9 47 U.S.C. § 224(d).

10 47 U.S.C. § 224(e).

11 The statute is clear that there is to be an equal division among all "entities," not just telecommunications service providers. This language means Congress was directing what portion of the cost can be assigned not just to the telecommunications service providers, but also the utility. Had Congress intended the Commission to be able to assign additional costs to the utility it would have said "among telecommunications carriers." *See In the Matter of Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Consolidated Partial Order on Reconsideration (rel. May 25, 2001) at ¶ 59. Further evidence that Congress intended section 224 to also limit the amount of costs that could be assigned to the utility is the fact that Congress directed that the equal allocation be adjusted by multiplying the result by 2/3, thus assigning an additional third of the overall cost to the utility. The Petition's cost allocators conflict with the plain language of the statute by assigning additional costs – beyond the equal division plus 1/3 specified by Congress – to the utility. 47 U.S.C. § 224(e).

that the Telecom Rate could not be equal to the Cable Rate. As the Telecom Rate formula modifications proposed in the *Petition* would have the effect of apportioning the cost of providing unusable space based on the usable percentage of the pole occupied by an attachment – and not equally among all attaching entities – such modifications would violate the express mandate of Section 224(e) in effecting a pole attachment rate that is equal to rate yielded under Section 224(d).[12]

II. THE COMMISSION'S JUSTIFICATION FOR REDUCING THE TELECOM RATE IS NOT APPLICABLE FOLLOWING THE *OPEN INTERNET ORDER.*

Prior to effecting further adjustments to the Telecom Rate formula, the Commission must revisit its primary justification for reducing the Telecom Rate to a level that is equal to the Cable Rate: the purported need to reduce the cost of pole attachments as a means of reducing the price of broadband Internet access service to consumers, and ensuring that broadband is deployed in a reasonable and timely fashion, as encouraged by Section 706 of the 1996 Act.[13] The Commission's errant classification of broadband Internet access service as an "information service," coupled with the Supreme Court's holding in *NCTA v. Gulf Power*,[14] effectively provided cable television system operators offering such service lower pole attachment rates, as compared to telecommunication service providers offering the same service. Therefore, the Commission justified reductions to the Telecom Rate as essential to achieving rate parity between broadband Internet access service providers using cable television systems as the basis

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[12] *Verizon Comments* at 3 ("the previous telecom formula recovered 'approximately 11.2% of the relevant 'cost' of a pole in urbanized service areas and about 16.9% in non-urban areas" while the cable formula recovered approximately 7.4%). The different percentages reflect the effect of equally dividing non-usable space costs among 5 attaching entities in urban areas and 3 attaching entities in rural areas and *adding* the percentage of usable space used times cost of usable space (the Telecom Rate at 11.2% and 16.9% of total cost, respectively) versus multiplying the cost of usable and non-usable space times the percentage of usable space used (the Cable Rate at 7.4%).

[13] 47 U.S.C. § 1302. *See In the Matter of Implementation of Section 224 of the Act*, GN Docket 09-51, Report and Order and Order on Reconsideration (rel. Apr. 7, 2011) (*2011 Pole Attachment Order*) at ¶ 43.

[14] *NCTA v. Gulf Power*, 534 U.S. 327 (2002).

for their pole attachments, and broadband Internet access service providers who obtain pole attachments as telecommunications carriers.[15] As the Commission has reclassified broadband Internet access service as a "telecommunications service", the statute itself provides the level playing field the Congress intended in adopting the 1996 Act:[16] that is, attachments used to deliver broadband Internet access service provided over *any* network, including cable television systems, are now subject to the same Section 224(e) pole attachment rate. The Commission plainly acknowledged this in the *Open Internet Order* saying:

> We also are not persuaded that we could forbear exclusively from the telecom rate formula in section 224(e), and then adopt a lower rate—such as the cable rate—pursuant to section 224(b). In particular, applying the 'specific governs the general' canon of statutory interpretation, the Supreme Court interpreted the rate formulas in sections 224(d) and (e) as controlling, within their self-described scope, over the Commission's general authority to ensure just and reasonable rates for pole attachments under section 224(b).[17] We question whether forbearing from applying section 224(e) would actually alter the scope of our authority under section 224(b), or if instead rates for carriers' telecommunications service attachments would remain governed by the (now forborne-from) section 224(e), leaving a void as to regulation of rates for such attachments.[18]

Further, the evidence before the Commission demonstrates that reducing pole attachment rates, as was accomplished in the *2011 Pole Attachment Order*, does not further the objectives of Section 706 of the 1996 Act, or otherwise result in benefits to broadband Internet access service consumers, such as through new deployment of broadband facilities or lower priced service

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15 *2011 Pole Attachment Order* at ¶ 178 ("These arguments, however, overlook the documented reluctance of on the part of cable providers to expand their networks and provide new high-capacity services to customers... because of the risk that ... the higher telecom rate should be applied... By minimizing this disparity, the Commission will promote competition that will lead to more and better service offerings at lower prices.").

16 Congress directed that the offering of telecommunications to the public is a "telecommunications service" "regardless of the facilities used." 47 U.S.C. § 154(53). This language was clearly included to address the well-known fact that cable systems were being used to provide broadband data transmission services. *See Texas Utilities*, 997 F.2d 925 at 930-931 (discussing Commission and Congressional statements recognizing the use of cable systems for "broadband" data transmission services and the potential for competition with telephone networks).

17 *Gulf Power*, 534 U.S. at 335-36.

18 *Open Internet Order*, ¶ 481.

offerings.[19] In fact, the cost of broadband Internet access services is cited among consumers as a major reason why such service is not adopted to the extent that it is available.[20] Moreover, Congress provided the Commission explicit tools to control the cost of "telecommunications service" (including broadband Internet access service, as reclassified in the *Open Internet Order*), such that the costs of providing such service need not (and should not) be passed on to electric utilities and their ratepayers. Such tools are found in sections 201 through 204, and sections 251 and 252 of the Communications Act.

Sections 201 through 204 allow the Commission to determine "just and reasonable" rates for broadband Internet access service, and sections 251 and 252 establish the framework for non-incumbent providers to offer broadband Internet access service pursuant to regulated carrier-to-carrier resale and interconnection arrangements. While the preference is that competition – and not direct price regulation – moderate the subscription charges paid by broadband Internet access service consumers, the fact that the Commission has eschewed all permissible means Congress provided for direct price regulation or reducing prices by enhancing competition does not entitle it to now contort Section 224 under the guise of promoting widespread and affordable broadband Internet access service.

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[19] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry (rel. Feb. 4, 2015) (2105 Broadband Progress Report) at ¶¶ 4 – 7 (finding that advanced telecommunications capability is not being reasonably and timely deployed and that the price of broadband Internet access service remains a barrier to adoption.). *See also Comments in Opposition to Petition to Reconsider the Cost Allocators Used to Calculate the Telecom Rate for Pole Attachments*, WC Docket No. 07-245 and GN Docket No. 09-51, Ameren Corp. et al (Jun. 4, 2015) at 7-8 ("even at the extreme end of the Commission's own estimate ranges, pole attachment rentals account for no more than 2% [] of the total 'cost of fiber optic deployment.'").

[20] *Id.* at ¶ 7 (citing NTIA report).

III. THE EVIDENCE BEFORE THE COMMISSION DEMONSTRATES THAT THE CABLE RATE HAS NOT INCREASED BROADBAND DEPLOYMENT NOR REDUCED COSTS TO CONSUMERS.

The Commission now has before it substantial proof that lower pole attachment rates do not accelerate the growth of broadband, and do not reduce the cost of broadband Internet access service to consumers. In fact, the Petition itself is evidence that the Commission's policies have failed. As NCTA cogently observed in their comments, "[t]he cable rate and the telecommunications rate diverge, however, when the pole owner calculates a rate using *fewer* attaching parties than the Commission's presumptions."[21] Verizon also complains that applying "2.6 average attaching entities – instead of the rebuttable presumption of 5 average attaching entities for urban areas – results in a new telecom rate that is 70 percent higher than the cable rate."[22] As electric utilities must rebut the Commission's presumptions based on actual data, the fact that the average number of attaching entities used to calculate the Telecom Rate is often *lower* than presumptions set forth in the Commission's rules demonstrates that the numbers of service providers nationwide are not growing as the Commission anticipated.[23] Moreover, the Petitioners have not demonstrated, and there is no evidence otherwise before the Commission, that reduction of the Telecom Rate under the *2011 Pole Attachment Order* increased broadband deployment in the more than four (4) years since that order took effect, or reduced the price of

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21 *Comments of the National Cable & Telecommunications Association*, WC Docket No. 07-245 and GN Docket No. 09-51 (June 4, 2015) (*NCTA Comments*) at 2 (emphasis added).

22 *Verizon Comments* at 4. The fact that the resulting rate goes up when there are fewer attaching entities is an inescapable result of the Congressional command that there be an "equal apportionment" of the cost of non-usable space among all attaching entities. Any other result would be contrary to the plain language of the statute.

23 *See NCTA Comments* at 3 – 4 ("Specifically, because virtually all pole attachments ... 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 ... and demonstrate that the actual number of parties was lower than the number presumed by the Commission...") *See also 2015 Broadband Progress Report* at ¶ 83 ("The data suggest that only 12 percent of households have 3 more options for 25 Mbps/3Mbps broadband service, 27 percent of households have two provider options for this service, and 45 percent of households have only a single provider option for these services. Approximately 16% of households without a single provider...").

broadband Internet access services for consumers during that time. To the contrary, as the Commission's own inquiries and other electric utilities have demonstrated, the only evidence on record indicates that broadband deployment has been tepid and slowing,[24] and that rates for cable service have increased at twice the rate of the consumer price index.[25] In addition, State officials reviewing pole attachment disputes have concluded that pole attachment rates have little impact on broadband deployment.[26]

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[24] *See 2015 Broadband Progress Report* at ¶ 84. *See also Verizon nears "the end" of FiOS builds*, arstechnica, Jan. 23, 2015 (available at http://arstechnica.com/business/2015/01/verizon-nears-the-end-of-fios-builds/)(viewed Jun. 10, 2015 and *Comments in Opposition to Petition to Reconsider the Cost Allocators Used to Calculate the Telecom Rate for Pole Attachments*, WC Docket No. 07-245 and GN Docket No. 09-51, Ameren Corp. *et al* (Jun. 4, 2015) at 7-8 ("even at the extreme end of the Commission's own estimate ranges, pole attachment rentals account for no more than 2% [] of the total 'cost of fiber optic deployment.'... the insignificant operating expense of pole attachment rentals does not drive broadband deployment; capital expenditures drive deployment.")(footnote omitted).

[25] The Commission's most recent report to Congress on cable pricing found that "[t]he price of expanded basic service has increased at a compound average annual growth rate of 6.1 percent during the period 1995 – 2012. The CPI increased at a compound average annual rate of 2.4 percent over the same period." *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-266, Report on Cable Industry Prices (rel. Jun. 7, 2013) at ¶ 2. Clearly cable television service subscribers are not seeing a lower rate, even though cable television system operators are receiving additional revenue from broadband Internet access services to pay for the same attachment. *See also Comments of the Utilities Telecom Council*, WC Docket No. 07-45 and GN Docket No. 09-51 (Jun. 4, 2015) at 1 – 2 and footnote 4.

[26] *See, e.g.*, Report to the House Commerce and Labor Committee and the Senate Commerce and Labor Committee of the Virginia General Assembly, Commonwealth of Virginia State Corporation Commission, Report on Electric Cooperative Pole Attachment Issues (Nov. 1, 2011) at iv ("No persuasive evidence was submitted in this proceeding that proved lower pole attachment rates would directly result in additional broadband deployment.") and Application of Northern Virginia Electric Cooperative for Approval of Pole Attachment Rates, Report of Howard P. Anderson, Jr., Hearing Examiner (Jun. 12, 2014), Commonwealth of Virginia State Corporation Commission, Case No. PUE-2013-00055 at 43 ("I find that the record in this proceeding indicates that reasonable pole attachment rates have little impact on broadband expansion ... if pole attachment rates were a major factor, one would expect broadband to be readily available in rural areas served by IOUs, whose FCC-regulated attachment rates are similar to the rates advocated by Comcast... [yet] broadband is not readily available in rural IOU service areas despite FCC-regulated pole attachment rates that are significantly lower than most electric cooperative rates.").

For all of the reasons set forth herein, the Petition for Reconsideration of NCTA, COMPTEL, and tw telecom, Inc. should be denied, and Commission should adopt no additional allocators for the purpose of calculation the Section 224(e) pole attachment rate.

Respectfully submitted,

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