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 OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The record in this proceeding overwhelmingly demonstrates that the Commission should quickly grant the petition for reconsideration filed by National Cable & Telecommunications Association (NCTA), COMPTEL, and twtelecom in 2011.[1] Notwithstanding the Commission's clear warnings in the *Open Internet Order*,[2] it appears that certain electric utilities are taking advantage of the reclassification of broadband as an excuse to significantly raise pole attachment rates for cable operators and telecommunications carriers. Granting the NCTA/COMPTEL Petition is necessary to prevent this result, which is why the petition is supported by a wide range of broadband providers, including cable operators, telecommunications carriers and wireless providers. The opposing arguments advanced by electric utilities fail to withstand scrutiny and should be rejected.

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[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] *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*).

INTRODUCTION AND SUMMARY

After a lengthy rulemaking proceeding, the Commission modified its pole attachment rules in 2011 to better promote competition and broadband deployment.[3] In particular, the Commission found that its broadband and competition policies would be advanced by modifying the telecommunications rate formula so that it produces rates that are substantially equivalent to the rates produced by the cable rate formula.[4] The new rules were challenged by electric utilities, but affirmed on appeal by the U.S. Court of Appeals for the District of Columbia Circuit.[5]

NCTA supported the Commission's change to the telecommunications rate formula, but in the NCTA/COMPTEL Petition we explained that minor changes to the new rule were needed to ensure that there were no loopholes by which pole owners could undermine the Commission's clear policy choices. In particular, the petition proposed rule changes that would ensure that the rates produced by the telecommunications formula would be comparable to rates produced by the cable formula even in cases where the number of attaching parties differs from the presumptions established by the Commission.[6]

Based on concerns that the reclassification of broadband services pursuant to the *Open Internet Order* might lead to unwarranted increases in pole attachment rates,[7] the Commission

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[3] *Implementation of Section 224 of the Act*, WC Docket No. 07-245, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5298-99, ¶ 136 (2011) (*2011 Pole Attachment Order*), *affirmed American Electric Power v. FCC*, 708 F.3d 183 (D.C. Cir. 2013).

[4] *Id*. at 5305, ¶ 151.

[5] *American Electric Power v. FCC*, 708 F.3d at 190.

[6] NCTA/COMPTEL Petition at 6-7, App. B.

[7] *Open Internet Order* at ¶¶ 482-84.

issued a notice asking parties to refresh the record on the NCTA/COMPTEL Petition.[8] In response, a wide range of broadband providers demonstrated that the risk of increased rates is significant and imminent and expressed support for granting the NCTA/COMPTEL Petition to avoid this result. Two parties representing electric utilities – the Utilities Telecom Council and a coalition of investor-owned utilities (IOUs) – submitted comments urging the Commission not to grant the petition.[9] For the reasons explained below, the Commission should reject the arguments advanced by the utilities and grant the petition expeditiously.

I. GRANTING THE PETITION ADVANCES THE COMMISSION'S BROADBAND AGENDA

The record demonstrates that granting the petition and thereby ensuring the availability of uniform, low (but still compensatory) pole attachment rates in all circumstances will advance the Commission's broadband agenda. A wide range of parties, including cable operators,[10] telecommunications carriers,[11] and wireless providers[12] all express support for the rule changes proposed in the NCTA/COMPTEL Petition. Regardless of technology, these parties demonstrate that pole attachment costs are an important consideration in broadband deployment decisions,[13] particularly in rural areas.[14]

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

[9] *See* Comments of the Utilities Telecom Council at 5; Comments of Ameren Corp. et al (IOUs) at iii.

[10] *See* Comments of the American Cable Association (ACA) at 2; Comments of Comcast Corporation at 3.

[11] *See* Comments of COMPTEL and Level 3 Communications at 3; Comments of the ITTA – The Voice of Mid-Size Communications Companies at 5.

[12] *See* Comments of PCIA – The Wireless Infrastructure Association at 2-3; Comments of Verizon at 2.

[13] *See* COMPTEL/Level 3 Comments at 3; Comments of Crown Castle at 6.

[14] *See* ACA Comments at 6; ITTA Comments at 2-3.

The utilities argue that these comments are erroneous and even go so far as to suggest that allowing pole attachment rates to rise would promote broadband deployment.[15] As explained below, these comments demonstrate that the utilities fundamentally misunderstand the factors driving broadband deployment in the U.S. and the relationship between pole attachment fees and deployment.

First, the IOUs suggest that reducing the telecommunications attachment rate is bad policy because "broadband deployment is best facilitated through a cooperative approach between pole owners and broadband providers."[16] Given the decades-long challenges parties have faced in negotiating reasonable attachment rates and practices with electric utilities, this statement is not credible. Congress, the Commission, and the courts all have recognized that pole owners possess a monopoly and that regulation is necessary to ensure that pole owners do not abuse that monopoly.[17] Moreover, it has been almost two decades since the Commission recognized that applying the cable rate formula for attachments that also are used for broadband "will encourage greater competition in the provision of Internet service and greater benefits to consumers."[18] Nothing has changed to support the utilities' contention that regulation no longer is needed and that the Commission can rely solely on cooperation between utilities and broadband providers.

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[15] *See* IOU Comments at 8; UTC Comments at 3.

[16] IOU Comments at 8.

[17] *See National Cable & Telecommunications Ass'n v. Gulf Power*, 534 U.S. 327, 330 (2002) ("Since the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents."); *see also Alabama Power Co. v. FCC*, 311 F.3d 1357, 1362 (11th Cir. 2002) ("In the view of Congress, the costs of erecting an entirely new set of poles would have created an insurmountable burden on cable companies. As the owner of these 'essential' facilities, the power companies had superior bargaining power, which spurred Congress to intervene in 1978.").

[18] *See Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, 6795-96, ¶ 32 (1998).

Second, the IOUs argue that "basic economic principles" suggest that prices should rise as demand for pole space increases.[19] The reference to "basic economic principles" seems to be another attempt to gloss over the fact that utilities offer access to poles as regulated monopolists. Under the Commission's pole attachment rules, attaching parties already bear responsibility for paying the up-front make-ready costs on existing poles, or the cost of installing new, taller poles, to the extent necessary to accommodate their attachments. In this context, "basic economic principles" should mean that recurring pole costs can be spread across more parties and prices should go down, not up. Indeed, by allowing utilities to collect the cable rate from all parties, on top of any make-ready or pole replacement costs, the utilities are afforded even *more* revenue than economic principles would suggest.

Third, the IOU's argument that pole attachment costs represent such a small portion of deployment costs that increases would be irrelevant misses the point.[20] It is true that there are dozens of factors that determine whether any particular network investment goes forward and that some of these factors are more significant than pole attachment costs. But it does not follow that the Commission should be unconcerned about the level or direction of those costs. To the contrary, the Commission should address any and all factors within its jurisdiction in a manner that will make the business case for private investment in broadband Internet access more attractive. The more that the Commission can take steps to reduce the costs of deploying and operating broadband networks in rural areas, the less it will need to rely on subsidies from the federal universal service program.[21] Likewise, the more that the Commission can prevent utilities from overcharging existing broadband providers with unreasonable pole rents on

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[19] IOU Comments at 8-9.

[20] *See* IOU Comments at 5-6

[21] CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN at 145 ("Connect America Fund support levels should be based on what is necessary to induce a private firm to serve an area.").

millions of existing pole attachments, the more it frees resources for existing broadband providers to extend service to unserved homes or neighborhoods that are within or adjacent to their existing service areas.

Fourth, the suggestion that the 2011 rule changes have been ineffective because broadband deployment has not accelerated also misses the mark.[22] Cable operators have been consistently investing in broadband for two decades. Because the *2011 Pole Attachment Order* largely protected the status quo for cable operators – attaching at rates established pursuant to the cable formula – there would have been no reason to expect any significant uptick in investment as a result of that order. That said, by not allowing increases in pole attachment rates as the utilities had been proposing, the *2011 Pole Attachment Order* enabled cable operators to continue investing in broadband networks and raising the speeds they are able to offer to consumers.[23]

Similarly, the fact that one company – Google – has been able to deploy new broadband networks does not demonstrate that high pole attachment rates are not an obstacle to deployment.[24] Google appears to have selected its initial markets based in part upon promises of ready access to infrastructure.[25] Moreover, the recommendations Google has published for prospective locations make clear that it expects municipal governments to help the company

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[22] *See* UTC Comments at 1-3.

[23] *See* NCTA website, Broadband by the Numbers, at https://www.ncta.com/broadband-by-the-numbers (demonstrating escalating broadband investment and broadband speeds).

[24] *See* IOU Comments at 6-7. As NCTA has explained previously, Google should be able to obtain access to poles pursuant to the cable rate formula because the IP video service it offers to customers meets the definition of a cable service. *See* Letter from Matthew Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28 (filed Jan. 9, 2015) at 2-3.

[25] *See, e.g.*, Ars Technica, *How Kansas City taxpayers support Google Fiber* (Sept. 7, 2012), at http://arstechnica.com/tech-policy/2012/09/how-kansas-city-taxpayers-support-google-fiber/ ("Space under a city's streets and along its utility poles is a scarce, taxpayer-owned resource. When a city offers a private company access to those resources for free, it's forgoing an opportunity to raise revenue. The implicit subsidy is even clearer when taxpayers, rather than Google, pay to hire extra city staff to supervise the project.").

obtain access to poles under terms "at least equivalent to the rights made available to traditional cable operators and telephone companies per the FCC's current rules."[26] Google's entry into the broadband marketplace in no way suggests that excessive pole attachment rates are not an obstacle to deployment.

In sum, the Commission has understood for decades that excessive pole attachment costs are harmful to the goal of expanding broadband access and it consistently has taken steps to ensure that rates are reasonable. The Commission should continue this longstanding and consistent approach by rejecting the arguments advanced by the utilities and granting the NCTA/COMPTEL Petition.

II. GRANTING THE PETITION WILL CAUSE NO HARM TO UTILITIES

A key part of the utilities' argument against further changes to the telecommunications rate formula is the fact that they already have absorbed significant revenue reductions due to the *2011 Pole Attachment Order* and granting the petition would unfairly lead to additional reductions.[27] As explained below, this argument provides no basis for the Commission not to grant the relief requested in the NCTA/COMPTEL Petition.

As an initial matter, the utilities ignore the fact that the Commission and the courts consistently have found that the cable rate formula results in rates that are "just, reasonable and fully compensatory."[28] It is simply wrong, therefore, for UTC to suggest that cable operators are

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[26] *Google Fiber City Checklist* (Feb. 2014) at 5, at https://fiber.storage.googleapis.com/legal/googlefibercitychecklist2-24-14.pdf.

[27] IOU Comments at 11-12.

[28] *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")).

benefitting from any sort of unwarranted "subsidy" and that grant of the petition would extend that subsidy to other providers.[29]

Because the cable rate formula produces rates that are compensatory, any revenue reduction utilities face from reducing the telecom rate to a level that is comparable to the cable rate or from offering regulated rates to broadband-only providers is long overdue. These companies have been over-recovering pole costs for years and the Commission has no obligation to continue that state of affairs simply because the utilities have grown accustomed to these windfall payments.

For similar reasons, the utilities' attempt to revive the Commission's 2007 proposal to establish a uniform rate at a level higher than the cable rate is unwarranted and counterproductive.[30] NCTA demonstrated at the time that the Commission's original proposal in this proceeding would have harmful consequences for cable operators and telecommunications carriers.[31] The Commission itself ultimately concluded that the better approach was to adjust the telecom rate formula to produce rates comparable to the cable rate formula[32] – a decision upheld by the D.C. Circuit in *American Electric Power* – and the utilities provide no reason for the Commission to depart from that conclusion now.

Finally, while the IOUs provide information on the losses they supposedly would suffer if the petition is granted, they provide no information regarding the windfall they would receive if

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[29] UTC Comments at 3.

[30] IOU Comments at 17-18.

[31] Comments of the National Cable & Telecommunications Association, WC Docket No. 07-245 (filed Mar. 7, 2008) at ii ("The Commission should not try to achieve regulatory parity by requiring cable operators to pay a higher rate for broadband attachments, as the Notice proposes. That approach is tantamount to a new tax on customers of cable broadband services. It would overcompensate pole owners, penalize companies (particularly rural companies) that already have invested in broadband, and discourage critical new investment by companies trying to bring broadband to unserved areas.").

[32] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5298-99, ¶ 136.

the Commission does not grant the NCTA/COMPTEL Petition. Because cable operators are responsible for a substantial majority of pole attachments,[33] IOUs potentially could seek rate increases on the vast majority of their poles in states where pole attachments are subject to the Commission's rules as a result of the reclassification of broadband. The Commission already has determined that such a result would undermine its broadband policies and should not be allowed to occur.[34] Now is the time for the Commission to take the steps necessary to ensure that result by granting the NCTA/COMPTEL Petition.

III. GRANTING THE PETITION IS FULLY CONSISTENT WITH THE STATUTE AND THE CASE LAW

As they did when the NCTA/COMPTEL Petition was filed in 2011,[35] the utilities argue that the Commission does not have legal authority to grant the petition. These arguments are no more compelling than they were the first time they were raised. The primary argument advanced by the utilities is that the rule change proposed in the NCTA/COMPTEL Petition would improperly define the term "cost" in Section 224(e). In particular, they argue that the requested rule change is unlawful because it would render the cost apportionment language in Section 224(e)(2) "inoperative and superfluous."[36]

As we explained previously, the proposed rule change does not make any change to the statutory cost allocator in Section 224(e).[37] Rather, as with the 2011 rule change, the rule proposed in the petition would modify the costs that are subject to the allocator, not the allocator

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[33] *Id.* at ¶ 151.

[34] *Open Internet Order* at ¶ 482.

[35] *See* Opposition of the Edison Electric Institute and Utilities Telecom Council, WC Docket No. 07-245 (filed Aug. 10, 2011). As NCTA demonstrated at the time, "none of these arguments has any merit." Reply to Opposition of NCTA, COMPTEL and twtelecom , WC Docket No. 07-245 (filed Aug. 22, 2011) (2011 Reply to Opposition) at 3.

[36] IOU Comments at 15.

[37] 2011 Reply to Opposition at 3-4.

itself. While the utilities argue that there is "no basis to suggest that the cost of space on a pole and the number of attachers on a pole are in any way related," defining the "cost of providing space" in this manner is a reasonable approach for achieving the policy objectives identified by the Commission. As the court in *American Electric Power* made clear, the term "cost" as used in Section 224(e) is ambiguous and the Commission has 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.[38] The argument advanced by the utilities would lead to the nonsensical result that the term "cost" is sufficiently flexible to justify the rules changes adopted in 2011, as the court found in *American Electric Power*, but somehow not flexible enough to support the minor change necessary for those rules to work as the Commission intended, which is all that is proposed in the NCTA/COMPTEL Petition.[39]

In addition to their substantive legal arguments, the utilities also suggest that the Administrative Procedure Act somehow requires the Commission to commence a new rulemaking proceeding before granting the relief requested in the NCTA/COMPTEL Petition.[40] The utilities' procedural concerns are hard to take seriously. The Commission conducted a rulemaking proceeding that lasted from 2007 through 2011. At the conclusion of that proceeding, it issued an order modifying the telecommunications rate formula to achieve particular policy results. The NCTA/COMPTEL Petition requested reconsideration to fine tune the rule to better achieve those policy results. The utilities commented on that petition at the

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[38] *American Electric Power*, 708 F.3d at 189-90.

[39] The utilities advance a secondary argument that "even if the *letter* of the statute would permit such a result . . ., it cannot be credibly argued that the *spirit* of the statute permits such a result." IOU Comments at 15 (emphasis in original). NCTA is confident that a rule that limits pole owners to a compensatory rate and also advances the Commission's broadband and competition policies is well within the spirit of what Congress intended in Section 224.

[40] *See* IOU Comments at 17.

time it was filed,[41] they had four years to raise additional concerns, and they now have been given one more opportunity to comment. Any suggestion that the Commission has not provided them with ample notice of the petition or a sufficient opportunity to raise concerns is patently ridiculous.

IV. THE COMMISSION SHOULD GRANT THE PETITION EXPEDITIOUSLY

Not only is it clear that granting the NCTA/COMPTEL Petition is the right choice to advance the Commission's broadband and competition policies, but the record also demonstrates that there is a compelling need for the Commission to act quickly. While the *Open Internet Order* made clear that the Commission did not want utilities to use the reclassification of broadband as an excuse for raising pole attachment rates,[42] a number of parties filed comments demonstrating that certain utilities did not get the message. For example, Comcast explained that it had received a notice from AEP (losing petitioner in the appeal of the *2011 Pole Attachment Order* and part of the coalition of IOUs filing comments now) proposing a new telecommunications rate that is 72 percent higher than the cable rate.[43] Similarly, ACA explained that many of its members "have received notice recently from pole owners about application of the higher telecommunications rate if they are providing [broadband]."[44]

Moreover, NCTA has learned of additional rate increase proposals since the initial comments were filed last week. For example, a number of cable operators in Pennsylvania have

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[41] *See* Opposition of the Edison Electric Institute and Utilities Telecom Council, WC Docket No. 07-245 (filed Aug. 10, 2011).

[42] *Open Internet Order* at ¶ 482 ("To be clear, it is not the Commission's intent to see any increase in the rates for pole attachments paid by cable operators that also provide broadband Internet access service, and we caution utilities against relying on this decision to that end. This Order does not itself require any party to increase the pole attachment rates it charges attachers providing broadband Internet access service, and we would consider such outcomes unacceptable as a policy matter.").

[43] Comcast Comments at 5-6.

[44] ACA Comments at 4.

received notice from one utility that is proposing a telecommunications rate that is more than double the cable rate. The higher rate would apply to thousands of poles, including many in rural portions of the state.

There is every reason to believe that the notices received so far are merely the tip of the iceberg in terms of rate increases. The Commission could not have been clearer about its intent in the *Open Internet Order*, but it appears that warning was insufficient. If the Commission does not grant the NCTA/COMPTEL Petition quickly, every utility that provides access to poles pursuant to the Commission's rate regulations will have an incentive to rebut the attaching party presumptions in the telecommunications rate formula and seek increases in the telecommunications rate.

CONCLUSION

The Commission correctly decided in 2011 that establishing a policy favoring uniform pole attachment rates at the level produced by the cable rate formula was the best way to achieve the Commission's broadband and competitive objectives. While the utilities continue to advocate proposals that would raise the cost of attaching broadband facilities to poles, the record in this proceeding both confirms the wisdom of the Commission's prior policy choices and demonstrates that quickly granting the NCTA/COMPTEL Petition is necessary to protect against utility rate increases that would undermine those policies. Accordingly, for all the reasons explained in these reply comments, the Commission should grant the petition expeditiously.

Respectfully submitted,

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