

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
)

**REPLY 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 reply to those comments filed in response to the May 6, 2015, Public Notice in the above captioned-proceedings.¹ In its initial comments, ACA explained that the Commission and the courts have found that the cable pole attachment rate established by the Commission in implementing Section 224 of the Communications Act, as amended, 47 U.S.C. §224, is just, reasonable, and fully compensatory.²

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 Comments of ACA, WC Docket No. 07-245 and GN Docket No. 09-51, at 4 n. 14 (filed June 4, 2015); *citing 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) and *FCC v. Florida Power Corp.*, 480 U.S. 245, 253–54 (1987); *see also* Comments of the National Cable and Telecommunications Association, WC Docket No. 07-245 and GN Docket No. 09-51, at 7 n. 22 (filed June 4, 2015), *citing 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, ¶183 (2011) (“2011 Pole Attachment Order”) *aff’d sub nom., Am. Elec. Power Serv. Corp. v. FCC*,

Telecommunications carrier attachments have been (and are) physically identical to cable attachments in terms of space occupied on the poles, yet telecommunications carriers have paid higher rates, which by definition are more than necessary compensation for their attachments. The Commission recognized this fact and in the *2011 Pole Attachment Order* sought to rectify the situation to remove disincentives to and reduce the costs of broadband deployment. Specifically, in that *Order*, the Commission implemented changes to the telecommunications carrier pole attachment rate formula intended to effectively bring into parity the cable rate and the telecommunications rate.³ In reviewing the *2011 Pole Attachment Order*, the court in *Am. Elec. Power Serv. Corp.* found the term “cost” utilized in Section 224(e) of the Act to be ambiguous and deferred to the Commission’s resulting authority to interpret the term, that is, to revise the telecommunications attachment formula in such a way as to achieve the Commission’s objective of eliminating the disparity between the cable and telecommunications rates.⁴

The petition for reconsideration or clarification filed by the National Cable and Telecommunications Association (“NCTA”), COMPTTEL, and tw telecom inc. (collectively, the “Petitioners”)⁵ asks the Commission to utilize that same interpretive authority to address open issues left by the *2011 Pole Attachment Order* and ensure parity even where a pole owner chooses to not use the Commission’s presumptive average numbers of attachers when calculating

708 F.3d 183 (D.C. Cir. 2013) (“American Electric Power”) *pet’n for cert. denied* 134 S. Ct. 118 (Oct. 7, 2013).

³ *2011 Pole Attachment Order, supra*, ¶¶ 149-153.

⁴ *Am. Elec. Power Serv. Corp. v. FCC, supra*, 708 F.3d at 188.

⁵ 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”).

its telecommunications attachment rate. While it was important to address the NCTA Petition when it was filed, it has become even more urgent in light of the reclassification of broadband Internet access service as a Title II telecommunications service,⁶ potentially exposing cable operators for the first time to the still often much higher telecommunications rate. The initial comments filed in response to the Public Notice made clear that potentiality had given way to reality, despite the Commission’s cautions in its *Open Internet Order*, and pole owners are seeking to impose significant increased attachment rates on cable operators.⁷ Notably, the Utilities Telecom Council (“UTC”) announced in its comments that “virtually all non-ILEC pole attachments are now subject to the telecom rate” as a result of the *Open Internet Order*.⁸ Not surprisingly, as a result, most parties filing in response to the Public Notice, like ACA, urge the Commission to expeditiously grant the *NCTA Petition*.

UTC and a coalition of electric utilities⁹ not only oppose the petition but seek to turn back the clock. In essence, they seek to overturn the *2011 Pole Attachment Order* altogether by

⁶ *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).

⁷ *See, e.g.*, Comments of Comcast Corporation, WC Docket No. 07-245 and GN Docket No. 09-51, at 5-6 (filed June 4, 2015) (American Electric Power notified Comcast of a new and higher telecom pole rate on May 1, 2015, 72 percent higher than the cable rate); Comments of NCTA, *supra*, at 6 (“Vyve Broadband . . . 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”); *see also* Comments of ACA, *supra*, at 5 (describing notices of increases of 55 to 80 percent).

⁸ Comments of UTC, WC Docket No. 07-245 and GN Docket No. 09-51, at iii (filed June 4, 2015).

⁹ *See* Comments of Ameren Corp. *et al.* WC Docket No. 07-245 and GN Docket No. 09-51 (filed June 4, 2015).

having the Commission revoke the amendments made to the pole attachment formula, a decision which the U.S. Court of Appeals for the D.C. Circuit upheld. UTC and the coalition claim the telecommunications rate formula adopted in the *2011 Pole Attachment Order* produces a rate below cost and thereby acts as a subsidy for attachers. However, as discussed at the outset, the even lower cable rate is fully compensatory and does not represent a subsidy for the deployment of communications networks borne by the pole owners. The utility commenters completely ignore this critical finding of the courts and the FCC. Further, they fail to recognize that the Commission has discretion to interpret the pole attachment formula and the definition of “cost” in particular to promote national broadband policies and objectives.

The Commission should not be distracted by these utility commenters from furthering its goal of achieving greater parity in pole attachment rates. Grant of the *NCTA Petition* is necessary, not only to ensure the Commission’s objectives inspiring the *2011 Pole Attachment Order* are achieved, but also to prevent cable operators from becoming unintended victims of the *Open Internet Order* and the Commission’s decision to not forbear from Section 224. The recent actions by some utilities to notify cable operators that they will be applying the telecommunications rate to them going forward in light of the *Open Internet Order* underscores the need for the Commission to “take prompt action . . . 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.”¹⁰ The Commission should grant the clarification or reconsideration requested by the Petitioners.

¹⁰ *Id.*, ¶484.

Respectfully submitted,



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