

FEDERAL COMMUNICATIONS COMMISSION
WIRELINE COMPETITION BUREAU

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Parties Asked to Refresh the Record)
Regarding Petition to Reconsider Cost) **WC Docket No. 07-245**
Allocators Used to Calculate the Telecom) **GN Docket No. 09-51**
Rate for Pole Attachments)
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**REPLY 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

June 15, 2015

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Ameren Corp., American Electric Power Service Corp., Duke Energy Corp., Oncor Electric Delivery Company LLC, Southern Company, and Tampa Electric Company (the “Electric Utilities”) respectfully submit the following reply comments to address limited points raised by certain commenters in the above-captioned proceeding.

DISCUSSION

I. THE COMMENTERS FAILED TO PROFFER ANY EVIDENCE THAT REDUCTION OF THE TELECOM RATE HAS RESULTED IN BROADBAND DEPLOYMENT OR THAT FURTHER REDUCTIONS WILL HAVE ANY IMPACT ON BROADBAND DEPLOYMENT.

Though commenters repeated generalities regarding how the previous reduction of the telecom rate has promoted broadband, and how a further reduction of the rate would encourage even further deployment, none of the commenters submitted any actual evidence to support those generalities. For example, the American Cable Association (“ACA”) states in its comments that “As long as the [Open Internet Order] decision stands and the 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 operators.” ACA comments, 5-6. The ACA, though, provides no data regarding how the telecom rate affects broadband deployment. *See generally* ACA comments. Similarly, Comcast Corporation (“Comcast”) states that “the benefits of the revised telecom formula have been substantial,” citing to USTelecom’s website for the proposition that “USTelecom estimates that annual capital investment for broadband has increased from \$68 to \$75 billion—over 10 percent—between 2010 and 2013.” Comcast comments, n.13. However, Comcast fails to provide any data linking that increased capital investment to any decreased operating expense for telecom carriers yielded by the Commission’s 2011 reduction of the telecom rate. In fact, for all we know, the vast majority of the increase could have occurred *prior* to July 2011 (when the 2011 telecom rate reduction took effect).

The point being that broadband providers—cable companies in particular—continue to repeat the message that lower pole attachment rates mean greater broadband deployment. But there is no evidence to support this message. Continuously repeating it does not make it true. The limited evidence on the nexus between pole attachment rentals and broadband deployment actually shows (a) that pole attachment rentals are an insignificant portion of operating expenses and (b) that the capital expense of broadband deployment far outweighs the operational expense of pole attachment rentals. *See* Electric Utilities initial comments, 5-8. Moreover, it does not make sense for the cable companies to complain about the impact of pole attachment rates on broadband deployment decisions. Their broadband networks already are deployed. For them, it is about preserving dirt cheap operating costs at the expense of pole owners’ ratepayers.

Further, many of the commenters who purport to proffer “evidence” on this issue rely solely upon the National Broadband Plan. *See, e.g.*, Comcast comments, n.12; COMPTEL and Level 3 Communications, LLC comments, n.10; Crown Castle International Corp. comments, n.4-5; ITTA comments, 2-3, n.9; National Cable & Telecommunications Association (“NCTA”) comments, 4, n.17; Verizon comments, 5, n.18. This reliance is misplaced for two reasons. First, the data in the National Broadband Plan is now more than five years old. Second, as discussed in the Electric Utilities’ initial comments, the data underlying the portion of the National Broadband Plan relied upon by commenters either (a) references *only* capital expenditures, or (b) if it references pole attachment rentals at all, does so in a way that indicates that such rentals represent no more than 2% of broadband providers’ deployment costs. Electric Utilities’ initial comments, 7-8. The Commission should not adopt changes to its rules that will effectively moot existing regulations and deprive the pole owners’ ratepayers of network cost recovery based on a record that is devoid of evidentiary support for its central premise.

II. REBUTTAL OF THE PRESUMPTIVE AVERAGE NUMBER OF ATTACHING ENTITIES IS NOT EXPLOITATION OF A “LOOPHOLE” BY POLE OWNERS.

Several commenters contend that the Commission’s rebuttable presumptions regarding the number of attaching entities were intended to be non-rebuttable, and that pole owners are exploiting (or will exploit) some sort of “loophole” in the Commission’s rules by rebutting those presumptions with actual data. For example, Verizon alleges that:

The Commission intended that—when paired with the rebuttable presumption that the average number of attaching entities is five in urban areas and three in non-urban areas—the cost allocators would produce a new telecom rate that approximates the cable rate But, as some parties predicted, power companies have instead deployed the cost allocators to *create* artificial rate disparities that undermine the Commission’s broadband deployment goals. For example, applying the 66-percent urban cost allocator together with 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.

Verizon comments, 3-4 (emphasis in original). Similarly, Comcast states that “[t]he amount of money at stake is significant, and it is only a matter of time before pole owners begin testing the Commission and the current loophole in the telecom formula to facilitate such increases.”

Comcast comments, 5.

Rebuttal of the presumptive average number of attaching entities is neither a “loophole” in the telecom rate formula, nor does it negate the 2011 reductions to the telecom formula. The Commission’s existing regulations specifically authorize pole owners to “establish [their] own presumptive average number of attaching entities.” 47 C.F.R. § 1.1417(d). The Commission has expounded upon the parameters for rebutting the presumption in both rulemaking orders and decisions in pole attachment complaint proceedings. *See, e.g., In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777, ¶¶ 73-79 (Feb. 6, 1998) (the “1998 Order”); *In the Matter of Amendment of Commission’s Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103, ¶¶ 62-72 (May 25, 2001) (the “2001 Order”);

In the Matter of Teleport Communications Atlanta, Inc. v. Georgia Power Co., 17 FCC Rcd 19859, ¶¶ 14-26 (September 27, 2002).

Rule 1.1417(d) has not been amended by the Commission. Nowhere in the 2011 Order did the Commission state that pole owners were no longer permitted to rebut the average number of attaching entities, or even that the Commission would look unfavorably upon efforts to rebut those presumptions. In fact, the Commission acknowledged in the 2011 Order that the telecom rate would be higher than the cable rate where pole owners rebutted the presumptions. *See In the Matter of Implementation of Section 224 of the Act; a National Broadband Plan for Our Future, Report and Order and Order on Reconsideration*, 26 FCC Rcd. 5240, ¶ 168 (Apr. 7, 2011) (the “2011 Order”) (“Likewise, the new telecom rate we adopt in this order could, in some circumstances, be higher than the cable rate, and in other circumstances, lower”); *see also id.* at ¶ 168, n.515 (noting that “[t]he rate could be lower if, for example, the attacher demonstrated that there were more attachers on the relevant poles than reflected by the Commission’s presumptions”).

As the FCC recognized in its original order adopting the presumptions, the presumptions were established as an administrative solution for pole owners that did not wish to expend resources to determine the actual number of attaching entities:

In order to expedite the process of developing average numbers of attaching entities, and allow utilities to avert the expense of developing location specific averages, we provide two rebuttable presumptive averages for use in our *Telecom Formula*. This gives both small and large utilities the option of not conducting a potentially costly and burdensome exercise necessary to develop averages based on their company specific records . . . Our establishment of presumptive averages will expedite the process and allow utilities to avert the expense of developing location specific averages. As with all our presumptions, either party may rebut this presumption with a statistically valid survey or actual data.

2011 Order at ¶ 72. Those pole owners who do rebut the presumptions, including some of the Electric Utilities, have spent considerable time and money capturing data that accurately reflects

system characteristics. Revising the rules in a manner that negates the value of those efforts would be wasteful.

Comcast further argues that only pole owners (and not attaching entities) have access to internal records tracking the number of attaching entities to their poles, and that the data is not subject to public disclosure in regulatory filings, FERC Form 1 annual reports or the like. *Id.* at 6. This is a specious argument for three reasons. First, as referenced above, there are rules and other Commission authority that establish the parameters for rebutting the presumptions. Second, the attachers themselves are often participants in the very audits upon which a pole owner's actual average number of attaching entities is based. Third, and perhaps most importantly, in the experience of the Electric Utilities that rebut the presumptions, this is largely non-controversial. Where a dispute does arise, the parties generally come to a negotiated agreement that is amenable to both sides. If not, both parties have recourse.

To be clear, and notwithstanding the rhetoric of other commenters, rebutting the presumptions does not negate the reduction in the telecom rate visited by the 2011 Order. Regardless of the data collected by a pole owner, the telecom rate is still 34% lower in urbanized areas and 56% lower in non-urbanized areas than it was before the 2011 reductions. The notion that pole owners are somehow evading the Commission's intent by rebutting the presumptions is not just inconsistent with the plain text of the Commission's rules; it is mathematically incorrect.

III. THE COMMISSION SHOULD NOT CHANGE ITS RULES SIMPLY BECAUSE THE CABLE COMPANIES CAN NO LONGER DODGE THEM.

Several commenters predict that electric utilities not currently rebutting the Commission's average number of attaching entities presumptions will do so given that the reclassification of broadband internet access service "will subject virtually all cable television attachments to the telecom formula." *See* Comcast comments, 3; *see also id.* at 4 ("Given these

circumstances, pole owners have both the incentive and the ability to understate their average number of attaching entities The reclassification of BIAS as a telecommunications service has provided pole owners with a compelling incentive to rebut the FCC’s attaching entity presumption in order to impose a higher telecommunications pole rate on Comcast and other cable operators”); NCTA comments, 3 (“Specifically, because virtually all pole attachments in states subject to the Commission’s rules 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”). Of course, many pole owners, including some of the Electric Utilities, *already* rebut the presumptions and did so even before the 2011 revisions to the telecom rate formula.

None of the commenters cite to any instance in which a pole owner has raised its telecom rate in response to the Open Internet Order. Comcast alleges that it recently received notice from Wheeling Power Company, one of AEP’s operating companies, of its annual adjustment to the telecom rate (which is based on Wheeling Power’s actual number of attaching entities), and Comcast implies that the rate increase was catalyzed by the Open Internet Order. Comcast Comments, 5-6. Not so. This was Wheeling Power’s standard (and Commission-required) 60-day rate notice, dated May 1, 2015, for rates to take effect July 1, 2015. *See* 47 C.F.R. § 1.1403(c)(2) (“A utility shall provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to . . . [a]ny increase in pole attachment rates”). The letter accurately sets forth both the cable rate and the telecom rate. Wheeling Power has been rebutting the presumption regarding the average number of attaching entities since 2011. Perhaps most importantly, Comcast has not challenged the calculation or accuracy of either the rates set forth in the letter or the number of attaching entities upon which Wheeling Power’s

telecom rate is based. What exactly is Comcast's complaint? And whatever it is, why is Wheeling Power hearing about it for the first time in comments filed in this proceeding rather than through the ordinary course of business?

In addition to inaccurately portraying Wheeling Power's telecom rate increase as somehow connected to the Open Internet Order, Comcast also inaccurately attributes a statement by an unidentified "cable attorney" in a trade press article to "attorneys representing the utility pole owners." (Comcast comments, 5). The misattributed quote from the unidentified "cable attorney" states:

Neither the Commission's "intent" that rates not go up nor its "caution" to utilities not to raise them have any binding effect on pole owners. Once the reclassification takes effect, the Commission's rules permit rate increases notwithstanding the language in the order and there is every reason to think those companies will take advantage of those rules.

Net Neutrality Order Leads to Uncertainty Over Cable Pole Attachment Rates, Communications Daily, Apr. 17, 2015, 6-9. Despite Comcast's inaccurate attribution, the Electric Utilities agree with the unidentified "cable attorney" that the Commission's rules allow—and have always allowed—for the application of the telecom rate to cable provider attachments used to provide telecommunications services. Comcast apparently agrees. *See* Comcast comments, 3 (stating that the reclassification of broadband internet access service "will subject virtually all cable television attachments to the telecom formula").

The Electric Utilities understand that the telecom rate is anathema to cable companies. Cable companies have been dodging their obligation to pay the telecom rate for many years, and routinely ignoring the Commission rules requiring them to "notify pole owners upon offering telecommunications services." 47 C.F.R. § 1.1403(e) (a rule that, but for the applicability of a different rate, would not exist). In the experience of the Electric Utilities, cable companies seldom, if ever, voluntarily provide this required notice, despite clear law requiring them to do

so. *See id.*; *see also In the Matter of Implementation of Section 224 of the Act*, 22 FCC Rcd 20195, ¶ 6 (Oct. 31, 2007) (stating that the telecom rate “applies also to cable television systems that offer telecommunications services”); *NCTA v. Gulf Power Co.*, 534 U.S. 327, 357, n.7 (2002) (Thomas, J., concurring in part) (“Rates for attachments used to provide telecommunications service are covered by § 224(e)’s rate methodology regardless of whether these attachments are also used to provide cable service and/or other types of service as well.”).

Now, at least, cable companies need not worry about their decades-long evasion of the Commission’s rules because “virtually all cable television attachments” are subject to the telecom rate. Comcast comments, 3. In short, many cable companies should have been paying the telecom rate for at least some of their attachments for many years. The fact that cable companies can no longer dodge the rules does not mean the rules should be rewritten in the cable companies’ favor.

The Electric Utilities believe, as proposed in their initial comments, that adoption of a “broadband rate” consistent with the Commission’s proposal in the 2007 NPRM would strike the proper balance between the interests of pole owners, their rate payers and communication firms. Electric Utilities initial comments, 17-18. That their pole attachment rates might increase slightly as a result of their regulatory classification should come as no surprise to cable operators. It has been an inevitability since the 1996 Telecom Act. The surprise is that it has taken nearly twenty years to get there.

Of course, this may all be much ado about nothing if the cable operators challenging the Open Internet Order (some of which are also commenters in this proceeding) are successful on appeal. *See American Cable Assoc. v. FCC*, Case No. 15-1095 (D.C. Cir. April 14, 2015); *National Cable & Telecomm. Assoc. v. FCC*, Case No. 15-1090 (D.C. Cir. April 14, 2015).

Perhaps the cable companies' position in this proceeding has less to do with the potential impact of the Open Internet Order than with protecting the attachments those cable companies already use to provide telecommunications services (but which they routinely fail to disclose to pole owners).

IV. THE 2011 ORDER LEFT OPEN-ENDED THE MANNER IN WHICH THE TELECOM RATE FORMULA APPLIES TO WIRELESS POLE TOP ANTENNA ATTACHMENTS.

Crown Castle does not appear to have any input on the issues in the Petition (*see generally* Crown Castle's comments) but nonetheless urges the Commission to take this opportunity to "reinforce the application of telecom rates to pole top attachments." Crown Castle comments, 5. This request is based on what Crown Castle characterizes as "significant opposition" to a "directive of the Commission [that] could not have been stated more clearly." *Id.* at 3-4. This clearly-stated directive, according to Crown Castle, was the following passage from the 2011 Order:

We also reaffirm that wireless carriers are entitled to the benefits and protection of section 224, including the right to the telecom rate under section 224(e). We do so in response to reports by the wireless industry of cases where wireless providers were not afforded the regulated rate. ... Accordingly, wireless attachments are entitled to the telecom rate formula, and where parties are unable to reach agreement through good faith negotiations, they may bring a complaint before the Commission.

Crown Castle comments, 3, quoting 2011 Order at ¶ 77 (ellipses in Crown Castle's comments). Though it may be clear that the telecom rate formula applies to wireless attachments, including pole top antenna attachments, Crown Castle's recitation of the Commission's "clear directive" ellipsed-out the Commission's long-standing recognition of "potential difficulties in applying the Commission's rules to wireless pole attachments." 2011 Order at ¶ 153, quoting 1998 Order at ¶ 41.

Among those “potential difficulties” is a difficulty that Crown Castle glosses over in its comments: the potential disagreement on the amount of space occupied by the wireless antenna attachment. Though this is more easily quantified in the context of wireless antenna attachments in the communications space, it is not so easily quantified in the context of all pole top antenna attachments. The Electric Utilities appreciate Crown Castle’s recognition that the clearance required for pole top attachments is appropriately attributed to the pole top attacher, but not all wireless carriers agree. Crown Castle comments, 4. Some wireless carriers have taken the extreme position that, because their antenna bracket physically covers only a foot of pole space, that their rate should be identical to the one-foot wireline telecom rate.

The “potential difficulties” do not end there. Even when the clearance space is attributed to a pole top attachment, depending on the height of the antenna, the telecom formula can still lead to a lower rate than it would yield in the communications space (if the antenna height is equal to or greater than the required clearance space).¹ This is an unacceptable result for a number of reasons, not the least of which is that a pole top is scarce; unlike communications space, more pole tops on the same pole cannot be created through make-ready.

Another “potential difficulty” is a practical one—and one that may shed light on Crown Castle’s supposed examples of “significant opposition” to the Commission’s “clear directive.” Crown Castle comments, 3-4. Wireless carriers often want to know “the rate” at the time they first request an agreement, but this request oversimplifies a complex issue. The “rate” almost always depends on the physical features of the equipment, and each wireless provider’s

¹ For example, if a one-foot bracket and five-foot antenna are attached at the pole top with five feet of clearance above electric conductors, but only the bracket and clearance space are attributed to the attachment, this would mean six feet are attributed to the attachment. If the same facility was installed in the communications space, the bracket (one-foot) along with the antennae (five feet) and at least another one foot of clearance would be attributed to the attachment, for a total of seven feet. This would result in the same attachment being attributed less space when attached at the pole top as compared to the communications space.

equipment is different. Wireless antenna equipment is not composed of standard through-bolts with messenger strand attached in the communications space. Thus, without an understanding of the physical attributes of what any given wireless carrier proposes to attach, it is difficult for a pole owner to quote a “rate.”

But the “potential difficulties” do not end with an understanding of the physical dimensions of the proposed attachment or even an agreement on the amount of space the attachment is deemed to occupy. For example, the discussion of financial consideration necessarily involves an understanding of the other costs associated with any particular attachment. Though these can (and often are) recovered as incremental make-ready costs, in the experience of some of the Electric Utilities, certain wireless carriers are interested in “turnkey” solutions in which the carrier pays a fixed annual fee for a defined term (with both the incremental and recurring costs built into the annual fee). The specific needs and preferences of wireless carriers are as varied as the number of such carriers.

Yet another “potential difficulty” relates to the specific type of assets capable of hosting pole top antenna attachments. Pole top attachments almost always require the replacement of the existing pole. The replacement pole is necessarily newer, taller, stronger, and more expensive than the “average” pole which serves as the cost basis for wireline attachment rates. Stated otherwise, the number of poles to which wireless antennas are attached is a small—and significantly more expensive—subset of the entire distribution pole population. The fact that wireless carriers typically pay the incremental make-ready costs associated with the pole replacement is of no consequence to a discussion of the going-forward application of the telecom rate formula because the telecom rate formula is based on the annual (i.e. recurring) ownership cost of poles. *See, e.g. In the Matter of Omnipoint Corp. v. PECO Energy Co.*, 18 FCC Rcd

5484, ¶ 7 (March 25, 2003) (“To the extent that Omnipoint continues to seek access to PECO’s facilities, once Omnipoint identifies to PECO the sites it wishes to use and the type of equipment to be installed and requests access, PECO shall provide Omnipoint with *historical cost data related to the specific facilities to which Omnipoint seeks attachment*, in accordance with section 1.1404 of the Commission’s rules. The parties shall then renegotiate a just and reasonable attachment rate based upon the cost data supplied by PECO.”) (emphasis added).

Given these and other “potential difficulties,” it not only is understandable but also appropriate that the Commission encouraged wireless carriers and pole owners to “reach agreement through good faith negotiations” on pole top attachment rates and to “bring a complaint before the Commission” in the event those negotiations are unsuccessful. 2011 Order at ¶ 77. And this was despite requests from wireless carriers for the Commission to specify precisely the manner in which the telecom rate formula applied to pole top antenna attachments. *See, e.g.*, Further Notice of Proposed Rule Making Comments of NextG Networks, Inc., WC Docket No. 07-245, ¶¶ 24-26 (Aug. 16, 2010); Comments of CTIA-The Wireless Association, in response to FNPRM, Docket No. 07-245, ¶ 17 (Aug. 16, 2010); Initial Comments of NextG Networks, Inc. in response to Notice of Proposed Rulemaking, Docket No. 07-245, ¶¶ 12-13 (March 7, 2008).

Thus, Crown Castle’s grievances regarding an unidentified “Midwestern IOU serving 2.4 million customers across two states” (which is actually Ameren Corp.) are both premature and misleading. For starters, there have been no rate “negotiations” in the unidentified “FCC state” (Missouri) as Crown Castle implies. Crown Castle asked Ameren for its template; Ameren sent the template; Crown Castle simply struck-through the rate in the template agreement and said it “would like to discuss” the rates. Though Ameren’s statement that “wireless pole-top rates are

not FCC regulated” may have been inartful, this statement was in the broader context of Crown Castle having struck completely the pole top antenna attachment fee and instead inserted Ameren’s wireline telecom rate. The point of Ameren’s response was that the wireline telecom rate (what some might call the “tariffed rate” or the “FCC regulated rate”) did not apply. But perhaps more importantly, Ameren and Crown Castle should not be having these discussions in comments filed in connection with a request to refresh the record on a petition for reconsideration—especially one in which wireless pole top rates are not even at issue. The discussions should be conducted, as the Commission suggested in its 2011 Order addressing this very subject, “through good faith negotiations.” 2011 Order at ¶ 153.

Moreover, Crown Castle’s generic grievance that pole top attachment rates somehow slow the roll-out of wireless antennae is without basis. *See* Crown Castle comments, 6. In the experience of the Electric Utilities, any delay in the roll-out of wireless antennae is a result of technical or engineering issues, not rate-related issues. Crown Castle’s efforts to link rates to deployment, like those of cable companies and other broadband commenters, are baseless.

CONCLUSION

For all of those reasons set forth in their initial comments and in these reply comments, the Electric Utilities respectfully request that the Commission deny the Petition, or in the alternative, adopt a new telecom rate formula in keeping with the Commission’s original broadband rate proposal in 2007.

Respectfully submitted this 15th day of June, 2015.

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