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VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: **Implementation of Section 224 of the Act, WC Docket No. 07-245, A National Broad-band Plan for Our Future, GN Docket No. 09-51**

Dear Ms. Dortch:

Pursuant to 47 C.F.R. § 1.1206(b)(1), the undersigned submits this written *ex parte* presentation, on behalf of LTS Holdings, through its operating subsidiaries Lighttower Fiber Networks I, LLC, and Lighttower Fiber Networks II, LLC (collectively “Lighttower”), to urge the Commission to grant the Petition for Reconsideration filed in the above-referenced dockets by the National Cable & Telecommunications Association (“NCTA”), COMPTTEL and twtelecom, inc. to clarify or amend the Commission’s implementation of the telecom rate for pole attachments by modifying the cost allocators adopted in the *2011 Pole Attachment Order* based on the number of attaching entities on the pole.¹

Lighttower is a leading, all-fiber provider of custom, high-capacity network services that ensure optimal application and business performance. Serving enterprise, government, carrier and data center customers, Lighttower’s comprehensive suite of fiber-based solutions is delivered across a robust, dense and highly-reliable network. The company offers over 20,000 route miles of network, which provides access to over 8,500 service locations throughout the Northeast, Mid-Atlantic and Chicago Metro areas with connectivity to critical international landing sites.

¹ See Petition for Reconsideration or Clarification of the National Cable & Telecommunications Association, COMPTTEL and twtelecom, inc., (filed June 8, 2011) (“Petition”).

Lightower relies on reasonable and timely pole access in order to deploy its high capacity fiber network.

In its *2011 Pole Attachment Order*,² the Commission recognized that its formula for the telecom rate for pole attachments “generally resulted in higher pole rental rates than the cable rate formula”³ and that this rate differential distorted competition and the deployment of broadband.⁴ As a result, the *2011 Pole Attachment Order* revised the telecom rate formula in an attempt to produce equivalent rates under both the cable and telecom rate formula.⁵

Unfortunately, the Commission’s revised telecom rate formula did not completely eliminate the disparity between rates under the two formulas. The *2011 Pole Attachment Order* adjusted the telecom rate formula in part by adopting a cost allocator that will allow the utility to recover “a portion of the pole costs that is equal to the portion of costs recovered in the cable rate.”⁶ The cost allocator differed depending on whether the poles were located in urban or non-urban areas, based on the Commission’s presumptions regarding the number of attachers in urban and non-urban areas.⁷ When a utility uses those presumptions in the telecom rate formula, the result is a rate equivalent to the cable rate. If, however, the utility calculates the rate for a pole by developing its own lower number of attachers, it results in a telecom rate that is significantly higher than the cable formula.⁸ According to the Petition, the rate differential can be as high as 70 percent.⁹

Such disparities in pole attachment rates are not sustainable where telecommunications carriers and cable operators both compete to deliver broadband to American businesses and consumers. Under the current telecom rate formula, when the cost allocator is used with a number of attachers lower than the Commission’s presumptions,¹⁰ the spread between the telecom and cable rates

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

³ *Id.* at 5297 ¶ 131.

⁴ *Id.* at 5298-99, ¶ 136.

⁵ *Id.* at 5304-06, ¶¶ 149-152.

⁶ *Id.* at 5305, ¶ 151.

⁷ *Id.* at 5304-05 ¶ 149-50.

⁸ Petition at 4-6.

⁹ *Id.* at 6.

¹⁰ *See* 47 C.F.R. § 1.1417(c).

can be as high as six dollars.¹¹ In the *2011 Pole Attachment Order*, the Commission determined that “a \$3 difference between the cable rate and the present telecom rate could amount to approximately \$90 million to \$120 million per year, which could ultimately affect subscribers and future infrastructure investment, including broadband deployment.”¹²

One of the Commission’s principal objectives under the Communications Act is to “encourage the deployment ... of advanced telecommunications capability to all Americans ... by utilizing in a manner consistent with the public interest, convenience, and necessity, ... measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”¹³ “[A]dvanced telecommunications capability” as defined in the Act “includes broadband Internet access.”¹⁴ Under Section 706(a), the Commission has the authority to address conditions “that have the potential to stifle overall investment in Internet infrastructure and limit competition in telecommunications markets”¹⁵

The discrepancy between the cable rate and the telecom rate is plainly such a condition that warrants Commission action. The discrepancy is antithetical to the Commission’s statutory goal of promoting deployment of and competition for broadband services. In the *2011 Pole Attachment Order*, the Commission determined that “lowering the telecommunications 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.”¹⁶

The Commission therefore should promptly modify the telecom rate formula to eliminate the discrepancy between the cable and telecom rates. Failure to remedy the discrepancy jeopardizes the gains the Commission achieved by lowering the telecom rate in the *2011 Pole Attachment Order*, distorts competition and could retard broadband deployment.

The utilities raise numerous objections, many that simply repeat arguments the DC Circuit rejected in their challenge to the *2011 Pole Attachment Order* or otherwise lack merit. For instance, the utilities assert that the record does not show a connection between pole attachment

¹¹ Comments of Verizon at 4 (filed June 4, 2015).

¹² *Id.*, citing *2011 Pole Attachment Order*, 26 FCC Rcd at 5318 ¶ 175.

¹³ 47 U.S.C. § 1302(a) (Section 706(a) of the Telecommunications Act of 1996).

¹⁴ *Preserving the Open Internet, Report and Order*, 25 FCC Rcd 17905, 17968 ¶ 117. (2010).

¹⁵ *Id.* at 17970 ¶ 120.

¹⁶ *2011 Pole Attachment Order*, 26 FCC Rcd at 5303, ¶ 147.

rates and broadband deployment. They say instead that data, at best, shows that pole attachment rates comprise only one percent of broadband network provider costs. Even where pole rental rates comprise one percent of a network provider's costs, however, "a disparity in rates produces an arbitrary competitive disadvantage for one class of providers and the consumers they seek to serve."¹⁷ And such a disparity could have an impact of competitive decision-making. There is no policy justification for one set of broadband providers to have competitively advantaged pole rental rates when other providers are competing to provide the same services to the same customers. Nor is it necessary for the Commission to demonstrate a precise causal linkage between pole attachment rates and broadband deployment; the FCC's "predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review, as long as they are reasonable,"¹⁸ ... and need not rest on 'pure factual determinations.'¹⁹

Nor is there any validity to the utilities' grumbling about further decreases in the telecom rate. The Supreme Court has already determined that the cable formula results in reasonable rates that are "fully compensatory."²⁰ And the utilities do not contend that the proposed revisions to the telecom rate formula result in rates that are confiscatory or otherwise fall outside the "zone of reasonableness" that is the touchstone for evaluating whether the Commission's rates are consistent with the statute.²¹

Instead they reply on arguments that are precluded by the rejection of their challenge to the *2011 Pole Attachment Order*. The utilities, for example, argue that reducing the telecom rate to the equivalent of the cable rate would render the telecom rate section of the Act superfluous, claiming that Congress intended a higher rate for telecom service pole attachments as opposed to cable

¹⁷ Reply Comments of the NTCA-The Rural Broadband Association at 4 (filed June 15, 2015).

¹⁸ *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006) citing *In re Core Commc'ns, Inc.*, 455 F.3d 267 (D.C. Cir. 2006) (internal quotation marks and citation omitted).

¹⁹ *Id.*, citing *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594, (1981).

²⁰ See Comments of The National Cable & Telecommunications Association at 7 (filed June 4, 2015), citing *2011 Pole Attachment Order*, 26 FCC Rcd at 5321 ¶ 183, citing *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002) and *FCC v. Florida Power Corp.*, 480 US 245, 253-54 (1987).

²¹ See e.g., *FPC v. Natural Gas Pipeline Co.*, 315 U. S. 575, 585 (1942) ("there is a zone of reasonableness within which the Commission is free to fix a rate varying in amount and higher than a confiscatory rate" and "courts are without authority ... to set aside as too low any 'reasonable rate' adopted by the Commission which is consistent with constitutional requirement").

service attachments. The D.C. Circuit squarely rejected these arguments.²² That court, while rejecting the utilities' challenges to the *2011 Pole Attachment Order*, did not rebuke the Commission's goal of lowering the telecom rate to approximate the same "7.4% of the annual pole cost" charged under the cable rate.²³

Similarly, the court's rejection of the utilities' argument that the Act forecloses the agency from adopting a telecom rate formula that produces rates equivalent to that of the cable rate²⁴ settles any question regarding the Commission's authority to adopt the proposed modification in the Petition. The formula in section 224(e) is "less specific" than the cable rate formula in 224(d).²⁵ The term "cost" in section 224(e) is ambiguous, thus affording the Commission substantial deference to construe the term in such a way to achieve its policy goal of ending the gap between the telecommunications and cable rates.²⁶ It is thus likewise permissible for the agency to now ensure, after it became clear its objective was not achieved by the 2011 revisions, that rates are equalized.

Lastly, the utilities argue that the Commission has not complied with the requirements of the Administrative Procedure Act and must institute a new rulemaking to make the requested modification to the telecom rate. This is simply wrong. The Commission issued an order on April 7, 2011, modifying the telecom rate.²⁷ After notice was published in the federal register that the new rule would take effect on June 8, 2011,²⁸ Petitioners timely filed the petition for reconsideration.²⁹ The Commission published a notice indicating the filing of petitions for reconsideration, including one on behalf of the utilities.³⁰ The utilities opposed the Petition on

²² *American Electric Power*, 708 F.3d at 189.

²³ *Id.*

²⁴ *American Electric Power v. FCC*, Final Brief of Petitioners, D.C. Cir. Case No. 11-1146, at 36-38 (April 23, 2012) ("the Act expressly anticipates that the Telecom Rate formula would yield higher rates than the Cable Rate.")

²⁵ *American Electric Power*, 708 F.3d at 188.

²⁶ *Id.* at 189-90.

²⁷ *2011 Pole Attachment Order*, 26 FCC Rcd at 5347-48 (Appx. A).

²⁸ See WC Docket No. 07-245, GN Docket No. 09-51; FCC 11-50, *A National Broadband Plan for Our Future*, 76 FR 26620-02 (May 9, 2011).

²⁹ Petition at 8.

³⁰ Petitions for Reconsideration of Action in Rulemaking Proceeding, Report No. 2931 (rel. June 20, 2011).

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August 10, 2011 and again on August 22, 2011. The Commission, having yet to act on that pending petition for reconsideration, recently issued a public notice asking for further comments to refresh the record.³¹ The result is a record that includes two rounds of comments and replies over a four-year period on the same Petition for Reconsideration. There is no justification for any additional proceedings as the utilities have received ample notice of the petition and the comment periods. The utilities' argument suggests that once the Commission adopts rules, it cannot modify them in response to a petition for reconsideration, but must instead commence an entirely new rulemaking proceeding. This flies in the face of Section 405(a) of the Act, 47 USC § 405(a), which expressly authorizes the Commission to grant reconsideration "in any proceeding" and, if it does so, to "order[] such further proceedings as may be appropriate[.]" This broad authorization has long been understood to allow the Commission to modify adopted rules as part of a reconsideration order.

For the foregoing reasons, the Commission should swiftly grant the petition for reconsideration and should adopt the changes in the telecom rate formula recommended by Petitioners.

Respectfully submitted,

/s/ Joshua M. Bobeck

Andrew D. Lipman
Joshua M. Bobeck

³¹ *Parties Asked To Refresh Record Regarding Petition To Reconsider Cost Allocators Used To Calculate The Telecom Rate For Pole Attachments*, Public Notice, DA 15-542 (rel. May 6, 2015).