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October 9, 2015

Via ECFS

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Letter of the American Cable Association Regarding Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Docket No. 07-245

Dear Ms. Dortch:

The Commission is considering an order on circulation in the above-referenced docket in response to the Petition for Reconsideration or Clarification filed by the National Cable and Telecommunications Association, Comptel, and tw telecom, inc.[1] The petitioners request that the Commission address open issues from the *2011 Pole Attachment Order*[2] and ensure parity in attachment rates even where a pole owner chooses not to use the Commission's presumptive average numbers of attachers when calculating its telecommunications attachment rate. The

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1 Petition for Reconsideration or Clarification of the National Cable and Telecommunications Association, COMPTEL, and tw telecom inc., WC Docket No. 07-245, GN Docket No. 09-51 (filed June 8, 2011) ("NCTA Petition").

2 *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*, 708 F.3d 183 (D.C. Cir. 2013) ("American Electric Power") *pet'n for cert. denied* 134 S. Ct. 118 (Oct. 7, 2013).

American Cable Association ("ACA") submitted comments and reply comments in support of the petition.[3] 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, is just, reasonable, and fully compensatory.[4]

- Telecommunications carrier pole attachments are physicially identical to cable attachments in terms of space occupied and burdens placed on the poles, yet telecommunications carriers have paid higher rates, which by definition provide utilities with higher than reasonable compensation for their attachments.

- The Commission has sought to rectify this situation and effectively bring the telecommunications rate into parity with the cable rate.[5]

- The *NCTA Petition* addresses a potential substantial problem that could thwart the Commission's objective to obtain parity in the cable and telecommunications rates and should be granted for that reason alone.

- The Commission also should act expeditiously to grant the *NCTA Petition* because the the Commission's decision in the *Open Internet Order* to reclassify broadband Internet access service as a telecommunications service and not to forbear from Section 224[6]

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3 *See* Comments of ACA, WC Docket No. 07-245 and GN Docket No. 09-51 (filed June 4, 2015) ("ACA Comments"); Reply Comments of ACA, WC Docket No. 07-245 and GN Docket No. 09-51 (filed June 15, 2015).

4 *See* ACA Comments at 4.

5 *2011 Pole Attachment Order, supra*, ¶¶ 149-153. 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. *Am. Elec. Power Serv. Corp. v. FCC, supra*, 708 F.3d at 188.

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).

> creates a real and significant risk that cable operators will face the higher telecommunications rate for attachments; indeed, electric utilities have already indicated they will seek to have cable operators pay the higher rate.[7]

For these reasons, ACA is heartened that the Commission is considering granting the *NCTA Petition* and urges it to do so.

ACA notes that a group of electric utilities met recently with Commission staff in opposition to the petition.[8] They claim that the Commission has already reduced the "telecom rate by more than 1/3 in every instance" and "that the current telecom rate formula is not discouraging broadband deployment in any way" because cable companies have already deployed their networks. They further argue that the "petition, if granted, would render the statutory cost allocators in section 224(e) meaningless" and "the petition's proposed manner of defining 'cost' for purposes of section 224(e)...is a clearly erroneous proposition." These claims and arguments are specious.

First, the Commission's objective in the *2011 Pole Attachment Order* was to bring the much higher telecommunications attachment rates into parity with the fully compensatory cable attachment rates; it was not simply to reduce the telecommunications rate. Unfortunately, despite the Commission's efforts, there are still circumstances where the telecommunications rate is not at parity with the cable rate. As ACA has explained, the Commission and courts have found the lower cable rate is just, reasonable, and fully compensatory, and there is no difference between cable and telecommunications attachments. Accordingly, the rates should be in parity – at the cable rate – and the Commission would be justified in taking further measures to ensure this resuult.

Second, cable operators continue to deploy new transmission lines, particularly as they expand into areas where they do not offer service and install fiber to meet exploding broadband demand. Further, increases in attachment rates to supra-compensatory rates would decrease free cash flow needed to upgrade broadband electronics.

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7 *See e.g.* Comments of UTC, WC Docket No. 07-245 and GN Docket No. 09-51, at iii (filed June 4, 2015) ("virtually all non-ILEC pole attachments are now subject to the telecom rate" as a result of the *Open Internet Order*).

8 *See e.g.* Letter from Eric B. Langley, Balch & Bingham LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-245 *et al.* (Oct. 6, 2015).

Third, the Commission has discretion to interpret section 224(e) to ensure that the statute furthers the public interest, particularly those aspects which are, as the courts have confirmed, ambiguous. Far from rendering the statutory cost allocators "meaningless" or defining cost errorneously, the Commission has used and should continue to use its authority to interpret the statute in a manner that encourages more rapid deployment of broadband infrastructure.

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's rules.

Sincerely,

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