

October 15, 2015

**VIA ECFS**

***EX PARTE NOTICE***

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

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

Dear Ms. Dortch,

Nick Alexander of Level 3 and the undersigned from COMPTTEL met separately with Travis Litman of Commissioner Rosenworcel's office and Nick Degani of Commissioners Pai's office on October 13, 2015, and Amy Bender of Commission O'Rielly's office on October 15, 2015, with regard to the above-referenced proceedings. During the meetings we urged the Commission to resolve the remaining disparities between the pole attachment rates applicable to cable and telecommunications providers by granting the still-pending petition for reconsideration of the Commission's *2011 Pole Attachment Order*.<sup>1</sup> Granting the petition will effectuate the underlying purpose of the *2011 Pole Attachment Order* and is a critical step in promoting broadband deployment.<sup>2</sup>

It is rare that the Commission experiences consensus from all sectors, and all sizes, of broadband providers for the need to take a particular action to promote broadband deployment. Yet, in this proceeding, cable providers, incumbent LECs, competitive LECs, wireless carriers, and rural providers have urged the Commission to grant this petition. This fact further confirms, in addition to what is in the record, that pole attachment rates have a significant effect on broadband deployment and immediate action is needed.

Pole attachment costs are a significant portion of broadband deployment costs.<sup>3</sup> While it was not the intent of the Commission in the *2011 Pole Attachment Order*, under existing rules,

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<sup>1</sup> Petition for Reconsideration or Clarification of the National Cable & Telecommunications Association, COMPTTEL and tw telecom, inc, WC Docket No. 07-245 (filed June 8, 2011) ("NCTA/COMPTTEL Petition"). Level 3 Communications, LLC's indirect parent Level 3 Communications, Inc. acquired tw telecom in 2014.

<sup>2</sup> *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, FCC 11-50 (rel. Apr. 7, 2011) (*2011 Pole Attachment Order*).

<sup>3</sup> See CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 109 ("The cost of deploying a broadband network depends significantly on the costs that service providers incur to

when a pole owner calculates a rate for telecommunications providers using fewer attaching parties than the Commission's presumptions, a telecommunications carrier can be charged upwards of 70% more than a cable operator to attach to the same pole.<sup>4</sup> The cable rate has been found to provide the pole owners fair compensation<sup>5</sup> and is consistent with practices of many states that have exercised jurisdiction over pole attachments.<sup>6</sup> Preventing broadband providers from being subject to excessive rates enables them to invest in broadband infrastructure and technology. Bringing the telecom rate to parity with the cable rate also reduces the cost and delays that result from disputes as to the number of attachers and legal classification of services and, instead, provides regulatory certainty (with regard to pole attachment fees) for broadband providers that seek to extend their networks.

Reducing the telecom rate to the cable rate is not only sound public policy, it is consistent with the Commission's authority under Section 224. As the D.C. Circuit explained in *American Electric Power*, the Commission is actually less restrained by Section 224(e) with regard to constructing the telecommunications rate formula than it is under Section 224(d) with regard to the cable rate formula.<sup>7</sup> Because the Court found the cost allocation provision in Section 224(e) to be ambiguous,<sup>8</sup> the Commission has ample room to interpret that provision in a way that better comports with good public policy by removing the disparity between the cable and telecommunications rates. Indeed, the court upheld the telecom rate revision in *2011 Pole Attachment Order* which the Court understood to be based on expressed policy objective of "eliminating the differences between the cable and the telecom rates."<sup>9</sup>

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access conduits, ducts, poles and rights-of-way on public and private lands. Collectively, the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20% of the cost of fiber optic deployment.").

<sup>4</sup> NCTA/COMPTEL Petition at 4-6 and att. A.

<sup>5</sup> *2011 Pole Attachment Order* at ¶ 129 ("In 1987, the U.S. Supreme Court found that the cable rate formula adopted by the Commission provides pole owners with adequate compensation, and thus did not result in an unconstitutional 'taking.'") Additionally, pole rents could have been set at a lower bound rate that is even less than the rate produced by the cable formula. The Commission explained that utilities should recover at least the "cost of providing space" in all areas, but that such costs should no longer include certain capital costs for the pole. *2011 Pole Attachment Order* at ¶ 144. But the Commission opted to minimize any potential undue burden on utility ratepayers that the exclusion of capital costs might entail. *Id.* at ¶ 149.

<sup>6</sup> *Id.* at ¶ 177 ("[M]any [states that exercise jurisdiction over pole attachments] apply a uniform rate for all attachments used to provide cable and telecommunications services, and have done so by establishing a rate identical or similar to the Commission's cable rate formula."); See also *id.* at ¶ 147 ("NASUCA recommends that the cable rate 'should be used for all pole attachments.'").

<sup>7</sup> *American Electric Power Service Corp. v. FCC*, 708 F.3d 183, 188-89 (D.C. Cir. 2013).

<sup>8</sup> *Id.* at 189-90.

<sup>9</sup> *Id.* at 189-91.

Please do not hesitate to contact me if you have any questions about this submission.

Respectfully submitted,

*/s/ Karen Reidy*

cc: Travis Litman  
Nick Degani  
Amy Bender