

**THE FCC CAN AND SHOULD ELIMINATE THE COMPETITIVE
DISTORTIONS CREATED BY CURRENT POLE ATTACHMENT RATES**
(Time Warner Telecom, Aug. 9, 2006; RMs 11303, 11293)

I. Access To Poles Is A Critical Input For Competitive Providers Of Broadband Like TWTC

- A. TWTC deploys fiber transmission facilities wherever feasible to provide broadband telecommunications services and information services to business customers
- B. Access to poles is usually the most efficient and often the only means of deploying fiber transmission facilities
- C. TWTC currently has over 235,000 pole attachment arrangements with utilities
- D. TWTC shares many of these pole attachments with Time Warner Cable (arrangements in which TWTC leases dark fiber from TWCable that traverse the TWCable pole attachments) and, absent such sharing arrangements, has established its own pole attachments
- E. As TWTC expands its network footprint (including through the acquisition of Xpedius), its reliance on poles will only increase

II. The FCC's Current Interpretation Of Section 224(e) Results In Discriminatory Pole Attachment Rates That Arbitrarily Disadvantage Providers Of Telecommunications Service

- A. Section 224 grants any "cable television system" and any "provider of telecommunications service" the right to attach facilities to utility-owned or controlled poles at regulated rates
- B. Section 224 contains three primary provisions governing pole attachment rates:
 - 1. Section 224(b) grants the FCC the authority to ensure that in areas where state commissions have not asserted jurisdiction the rates, terms and conditions for pole attachments are just and reasonable, to establish procedures to hear and resolve complaints regarding such rates, terms and conditions, and to prescribe regulations to carry out the provisions of Section 224.
 - 2. Section 224(d) sets forth requirements for rates charged for pole attachments used "by a cable television system solely to provide cable service."
 - 3. Section 224(e)(1) states that the FCC shall establish regulations governing "charges for pole attachments used by telecommunications carriers to provide telecommunications services" and that "[s]uch regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments." Section 224(e)(2) and (3) describe the manner in which

utilities shall allocate the costs of pole attachments used by providers of telecommunications services

- C. The Commission has developed two formulas for pole attachments, one under Section 224(d) and the other under Section 224(e). The formulas use the same method for allocating the **usable** portion of the pole, but they use different methods for allocating the **unused** portion of the pole.
1. The Section 224(d) formula allocates the costs attributed to the **unused** portion of the pole by multiplying all costs attributed to the unused portion of the pole by the percentage of the **usable** portion of the pole occupied by an attacher; thus, if (as is presumed by 47 C.F.R. § 1.1418) the attacher occupies 1/13.5 or 7.41 percent of the usable space, 7.4 percent of the costs attributed to the unused portion of the pole are allocated to that attacher.
 2. The Section 224(e) formula allocates the costs attributed to the **unused** portion of the pole by dividing 2/3 of the costs attributed to the unused portion of the pole by the total number of attachers; thus, (a) if there are four attachers, 1/6 or 16.7 percent of the costs attributed to the unused portion of the pole are allocated to an attacher subject to Section 224(e); and (b) if there are five attachers, 2/15 or 13.3 percent of the costs attributed to the unused portion of the pole are allocated to an attacher subject to Section 224(e).
- D. In TWTC's experience, the Section 224(e) formula yields pole attachment prices that are approximately **two-to-three and a half times higher** than the prices yielded by the Section 224(d) formula. Examples of rate differentials experienced by TWTC are as follows: This differential is **competitively significant** in the emerging market for broadband services.
1. The FCC has interpreted Section 224 to mean that the lower Section 224(d) rate applies to pole attachments used solely to provide cable service or, pursuant to Section 224(b), used to provide cable service as well as other services such as internet access or presumably private carriage (i.e., telecommunications).
 2. On the other hand, the FCC has interpreted Section 224 to mean that the higher Section 224(e) rate applies to pole attachments used to provide telecommunications services only or telecommunications services as well as any other services (e.g., internet access or telecommunications)
 3. The effect of this approach is that cable operators providing internet access services, providers of facilities based internet access leasing dark fiber from a cable operator and providers of private carriage leasing dark fiber from cable operators all pay the lower Section 224(d) rate so long as they do not provide telecommunications services **but** another entity that leases exactly the same fiber to provide the same internet access or telecommunications in competition with such companies pays the higher Section 224(e) rate if the

other entity also provides telecommunications services. **In other words, entities like TWTC are penalized with a 100-250 percent increase in pole attachment rates because they provide telecommunications services, and their non-carrier competitors in the provision of internet access and in some cases transmission services are not subject to this penalty.**

4. Moreover, this is the case even for carriers like TWTC that lease dark fiber from a cable system attacher to provide telecommunications services. **TWTC's use of the pole for this purpose results in a 100-250 percent increase in the pole attachment rate even though TWTC's use of a cable operators' dark fiber does not impose any new costs or other burdens on the utility pole owner.**
5. This differential has a significant impact on competitors' bottom line. In Houston, for example, TWTC's aggregate pole attachment charges are \$112,961 per year under the lower cable pole attachment rate and \$254,560 per year under the higher Section 224(e) rate.

E. The dramatic and unjustified differential in pole attachment rates imposed on telecommunications carriers versus their non-carrier competitors is contrary to sound policy and the Commission's own pronouncements regarding the purpose of Section 224 and cannot have been intended by Congress. We believe that Section 224 does not compel this result.

1. "[W]here access [to poles] is mandated, the rates, terms, and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access." *Local Competition Order* ¶ 1156
2. The duty to provide pole attachment rates on a "just, reasonable, and nondiscriminatory" basis means, "at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the [utility] provisions such elements to itself." *Id.* ¶ 315.
3. "Interpreting these terms in light of the 1996 Act's goal of promoting local exchange competition, and the benefits inherent in such competition, . . . these terms require [the utility] to provide [attachments] under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete." *Id.* "Such terms and conditions should serve to promote fair and efficient competition." *Id.* "We reach this conclusion because providing new entrants, including small entities, with a meaningful opportunity to compete is a necessary precondition to obtaining the benefits that the opening of local exchange markets is designed to achieve." *Id.*
4. Pole attachment requirements must "promote fair and efficient competition." *Id.*

5. Congress enacted the original Pole Attachment Act in response to "pole attachment practices" that, if unchecked, could "present realistic dangers of competitive restraint in the future." S. Rep. No. 95-580, 1978 U.S.C.C.A.N. 109, 121 (1978)

III. The FCC Has The Authority To Interpret Section 224 In A Manner That Eliminates Harmful Discrimination Against Providers of Telecommunications Services

- A. The Commission could rely on the requirement in Section 224(e)(1) that utilities charge "nondiscriminatory" rates for pole attachments used by telecommunications carriers to provide telecommunications services. Nondiscrimination here should be interpreted to mean that telecommunications service providers must pay the same rates as its competitors in the provision of internet access and transmission services. The cost-apportionment guidelines set forth in Section 224(e)(2)-(3) do not require a different result because those guidelines address only "costs," not "rates." Any "rates" established under Section 224(e) must be nondiscriminatory. That means that attachers subject to Section 224(e) must pay the same rates as their competitors in the provision of internet access and transmission services.
- B. The Commission could interpret Section 224 to mean that only the services provided by the attaching entity itself determine the relevant pole attachment rate, and that the services provided by a third party using dark fiber leased from the attacher are irrelevant to the analysis. For example, where TWCable uses its pole attachment to provide cable services and cable modem services but not telecommunications services, the Section 224(d)/(b) rate applies under the FCC's rules and *Gulf Power*. Nothing in Section 224 or *Gulf Power* requires that the Section 224(e) rate apply when TWCable sells dark fiber to TWTC for the provision of a telecommunications service by TWTC. In fact, focusing solely on the services offered by the attacher itself (rather than third parties leasing fiber from the attacher) simplifies pole attachment administration because it obviates the need to examine the types of services offered by all third parties.
- C. The Commission could rely on the language of Section 224(e), which applies by its terms to attachments used by telecommunications carriers to provide telecommunications services to conclude this otherwise redundant formulation must mean that Section 224(e) applies only to attachments used solely to provide telecommunications services.
- D. The Commission could rely on its forbearance authority under Section 10 to relieve telecommunications carriers of their obligation to pay the higher Section 224(e) rate and instead mandate that telecommunications carriers pay the rate applicable to other attachers.
- E. At the very least, the Commission should reassess its interpretation of the cost allocation rules in Sections 224(e)(2) and (3) to diminish the differential between Section 224(e) rates and rates paid by other attachers. Section 224(e) rates should

recover only the actual cost that pole owners incur to provide pole attachments to telecommunications carriers. Such an approach would require that the Commission reassess, among other things,

1. The definition of “cost” for purposes of Section 224(e); the Commission currently determines “cost” for purposes of Section 224(e) based on the sum of operating expenses and actual capital costs, but Section 224(e) does not mention operating expenses or actual capital costs; and
2. Its current consideration of a host of factors in calculating costs under Section 224(e) that find no basis in the terms of Section 224(e), including (a) “rate of return” set at a default rate of 11.25 percent, and (b) a “carrying charge rate” (defined as costs incurred by a pole owner regardless of the presence of pole attachments).