Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	WC Docket No. 07-245
Implementation of Section 224 of the Act;	)	
Amendment of the Commission's Rules and	)	RM-11303
Policies Governing Pole Attachments	)	
	)	RM-11293

COMMENTS OF THE

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Daniel L. Brenner
Neal M. Goldberg
Steven F. Morris
National Cable &
Telecommunications Association
25 Massachusetts Avenue, N.W.
Suite 100
Washington, D.C. 20001-1431

March 7, 2008

SUMMARY

The ability to attach cable facilities to utility poles at regulated rates has been a cornerstone of the cable industry's success over the last three decades. The availability of reasonably priced access to poles, along with the Commission's other pro-competitive policies, has enabled cable operators to expand and upgrade the capacity of their networks in a manner entirely consistent with the congressional mandate to promote competition and encourage network investment. With these advanced networks, cable operators have been able to offer high-capacity broadband Internet access to over 92 percent of the country. In many areas, cable operators also have introduced Voice over Internet Protocol (VoIP) services that offer consumers the first widespread facilities-based alternative to incumbent local exchange carriers' telephone service. This competition has produced an estimated $23 billion in consumer savings over the last four years, with more than $100 billion in additional savings expected over the next five years.

After decades of regulatory policy in which the Commission both recognized the connection between regulated pole attachment rates and investment by cable operators and vigorously protected the right to attach at reasonable rates, the *Notice* proposes a stunning change in direction. Notwithstanding the billions of dollars in investment triggered by the Commission's pro-competitive cable broadband policies and a Supreme Court decision affirming its treatment of pole attachments used for cable broadband service, the Commission inexplicably reaches a tentative conclusion that, in order to promote regulatory parity, the rates paid by cable operators should be increased (and possibly doubled or tripled) when they provide broadband services.

The Commission should not try to achieve regulatory parity by requiring cable operators to pay a higher rate for broadband attachments, as the *Notice* proposes. That approach is tantamount to a new tax on customers of cable broadband services. It would overcompensate pole owners, penalize companies (particularly rural companies) that already have invested in broadband, and discourage critical new investment by companies trying to bring broadband to unserved areas. As explained in the Declaration of Dr. Michael Pelcovits, attached as Appendix B, raising attachment rates for cable operators would raise the annual cost of providing broadband service by $208 million to $672 million, or from $10.46 to $33.75 per cable broadband subscriber annually. In essence, the *Notice* proposes a huge windfall for shareholders of electric utilities and incumbent local exchange carriers (ILECs) at the expense of broadband customers, the exact opposite of what the Commission should be doing to advance federal policies aimed at encouraging ubiquitous broadband availability at reasonable prices.

To promote broadband investment and facilities-based competition, as well as regulatory parity, the Commission should move the rate for telecommunications attachments closer to the rate produced by the cable formula. The cable rate formula adopted by the Commission under Section 224(d) successfully balances the need to compensate pole owners with the desire to promote investment by attaching parties. Indeed, as demonstrated in Appendix A, there is ample Commission and judicial precedent affirming the constitutionality and lawfulness of the cable rate formula, precedent the *Notice* chose to downplay or even ignore completely.

A primary reason that courts and the Commission have found that an annual rental fee calculated pursuant to the cable rate formula provides just compensation is that cable operators also pay for all the incremental expenses of attaching their facilities, *i.e.*, "make-ready" expenses, including the cost of rearranging facilities on a pole or installing a new pole if necessary. The

Notice, however, makes no mention of these make-ready payments. To the extent the Commission is trying to achieve regulatory parity, it must strive for parity of all pole-related compensation mechanisms, not just the annual rental fee as suggested in the *Notice*. In particular, any adjustments to the formulas for calculating annual rental fees should reflect the fact that some companies (*i.e.*, incumbent LECs) have more favorable make-ready arrangements with pole owners than other companies (*i.e.*, cable operators and competitive LECs).

TABLE OF CONTENTS

SUMMARY i

I. POLE ATTACHMENTS REMAIN A SIGNIFICANT BOTTLENECK AND STRINGENT REGULATION CONTINUES TO BE NEEDED 2

A. Utility Poles Are Essential Facilities 2

B. For Three Decades, Congress and the Commission Have Understood That Pole Attachments Must Be Regulated. 4

C. Nothing Has Changed Since the Commission's Last Pole Attachment Rulemaking to Warrant Less Scrutiny of Pole Owners 6

II. THE CABLE FORMULA FULLY COMPENSATES POLE OWNERS FOR THE COSTS OF ALLOWING ATTACHMENTS 8

A. The Combination Of Rental Fees And Make-Ready Payments Fully Compensates Pole Owners For Attachments By Cable Operators 8

B. There Is No Subsidy At The Expense Of Electric Ratepayers 12

III. THE COMMISSION SHOULD BE REDUCING BROADBAND ATTACHMENT RATES, NOT RAISING THEM 13

A. The Commission Should Promote Regulatory Parity, But Not At The Expense of Broadband Investment and Facilities-Based Competition 13

B. Taxing Cable Broadband Services By Raising The Rate For Attachments By Cable Operators Would Undermine The Commission's Policies Promoting Deployment and Adoption of Broadband Services 17

C. The Commission Should Reduce the Rate Paid By Telecommunications Carriers. 21

IV. THE COMMISSION SHOULD RETAIN THE "SIGN AND SUE" RULE 22

CONCLUSION 24

APPENDIX A: EXAMPLES OF FCC, STATE AND COURT DECISIONS ADDRESSING REASONABLENESS OF CABLE POLE ATTACHMENT RATES

APPENDIX B: DECLARATION OF DR. MICHAEL D. PELCOVITS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	WC Docket No. 07-245
Implementation of Section 224 of the Act;	)	
Amendment of the Commission's Rules and	)	RM-11303
Policies Governing Pole Attachments	)	
	)	RM-11293

COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA") hereby submits its comments in the above-captioned proceeding.[1] NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest broadband provider of high-speed Internet access after investing $110 billion since 1996 to build a two-way interactive network with fiber optic technology. Cable companies also provide voice service to millions of American homes and are rapidly making these services available nationwide.

The Commission's regulation of cable pole attachments has been a major success story for three decades, facilitating billions of dollars in investment by cable operators in broadband networks and the introduction of exciting video, voice, and data services to virtually every American home. Without any government funding, cable operators have been able to offer high-capacity broadband Internet access to over 92 percent of the country. In many areas, cable

[1] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Notice of Proposed Rulemaking, FCC 07-187, 22 FCC Rcd 20195 (2007) (*Notice*).

operators also have introduced Voice over Internet Protocol (VoIP) services that offer consumers the first widespread facilities-based telephone service alternative to incumbent local exchange carriers (ILECs). The competition cable operators have brought to the voice market has produced an estimated $23 billion in consumer savings over the last four years, with more than $100 billion in additional savings expected over the next five years.[2]

The *Notice*, unfortunately, ignores the success of the past and potentially sabotages cable's future as a vibrant competitor to incumbent local exchange carriers. The Commission's tentative conclusion to adopt a uniform broadband attachment rate that is *higher* than the current rate for cable attachments amounts to a broadband tax on cable customers, particularly rural customers, and discourages any future investment by operators that hope to bring broadband to unserved areas. If the Commission is at all serious about promoting broadband investment and facilities-based competition, it should not raise rates for broadband attachments by cable operators. Rather, the Commission should continue its pro-competitive broadband policies by moving the rate for telecommunications attachments closer to the rate produced by the cable formula under Section 224(d), which successfully balances the need to compensate pole owners with the desire to promote investment by attaching parties.

I. POLE ATTACHMENTS REMAIN A SIGNIFICANT BOTTLENECK AND STRINGENT REGULATION CONTINUES TO BE NEEDED

A. Utility Poles Are Essential Facilities

Utility poles are an important component of the networks that utilities use to provide service to their customers. Whether built by ILECs or electric companies, pole systems always have been treated as regulated assets, with costs recovered from captive subscribers and, in some

[2] *See* Michael Pelcovits and Daniel Haar, *Consumer Benefits of Cable-Telco Competition*, at 11, available at http://www.micradc.com/news/publications/pdfs/Updated_MiCRA_Report_FINAL.pdf.

cases, subsidized by the federal government, *e.g.*, through Rural Utilities Service loans or Universal Service Fund payments. Thus, as with other regulated utility assets, it is "settled beyond dispute that regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible."[3]

In any given geographic area, there generally is only one set of poles, and it is almost always owned by the electric company, the ILEC, or a combination of the two. Consequently, a cable operator building a network in an area where an electric company or ILEC has built poles will have little choice but to place its facilities on those poles. As a general matter, allowing other parties to attach is beneficial for the pole owner any time the compensation it receives from the attaching party exceeds the additional costs, if any, that result from allowing the attachment. Given the lack of alternatives available to the attaching party, however, an unregulated pole owner will be able to charge attachment rates that far exceed the costs imposed by the attachment. The Supreme Court accurately summarized the situation as follows: "Since the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents."[4]

---

[3] *FCC v. Florida Power Corp*., 480 U.S. 245, 253 (1987), *citing Munn v. Illinois*, 94 U.S. 113, 133-34 (1877); *Permian Basin Area Rate Cases*, 390 U.S. 747, 768-69 (1968).

[4] *National Cable & Telecommunications Ass'n v. Gulf Power*, 534 U.S. 327, 330 (2002) (*Gulf Power*); *see also Alabama Power Co. v. FCC*, 311 F.3d 1357, 1362 (11th Cir. 2002) (*Alabama Power*) ("In the view of Congress, the costs of erecting an entirely new set of poles would have created an insurmountable burden on cable companies. As the owner of these 'essential' facilities, the power companies had superior bargaining power, which spurred Congress to intervene in 1978.").

B. For Three Decades, Congress and the Commission Have Understood That Pole Attachments Must Be Regulated.

Long ago it became apparent to Congress and the Commission that this situation was not conducive to the deployment of facilities by cable operators. Congress first addressed this issue in 1978. Recognizing that utilities possessed the incentive and the ability to impose unreasonably high attachment rates on cable operators, Congress directed the Commission to establish parameters for the rates utilities could charge, although it did not require them to provide access to their poles.[5] The Commission's rules implementing the statute established a formula for calculating the maximum permissible rate.[6] An order imposing rates established under this formula was challenged by the utilities but ultimately affirmed by the Supreme Court in 1987 in the *Florida Power* case.[7]

The Commission subsequently recognized that there were strong policy reasons for allowing cable operators to provide non-video services over facilities attached to utility poles pursuant to regulated attachment rates. As it stated in a 1991 decision, "Congress was aware that cable might not evolve beyond its traditional video offerings if utilities were able to employ overly restrictive pole attachment agreements."[8] This decision also was challenged by the utilities and again the Commission was affirmed by the courts.[9]

---

[5] 47 U.S.C. § 224; S. Rep. No. 95-580, reprinted in 1978 U.S.C.C.A.N. 109 (Congress sought to "establish a mechanism whereby unfair pole attachment practices may come under review and sanction and to minimize the effect of unjust and unreasonable pole attachment practices on the wider development of cable television service to the public.").

[6] *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, First Report and Order, 68 FCC 2d 1585 (1978); Second Report and Order, 72 FCC 2d 59 (1979).

[7] *FCC v. Florida Power Corp*., 480 U.S. 245 (1987).

[8] *Heritage Cablevision Associates of Dallas v. Texas Utilities Elec. Co.*, File No. PA-89-002, Memorandum Opinion and Order, 6 FCC Rcd 7099, 7103, ¶ 18 (1991).

[9] *Texas Utilities Elec. Co. v. FCC*, 997 F.2d 925, 933 (D.C. Cir. 1993) ("[T]he Commission held that a utility may only charge a cable television system operator a single, regulated rate regardless of the fact that part of the cable may transmit nonvideo communications. We have no trouble finding this interpretation reasonable . . . .").

In 1996, Congress expanded its regulation of pole attachments, generally granting cable operators and telecommunications carriers (other than ILECs) mandatory access to poles at regulated rates.[10] These changes, which were part of an effort by Congress to break open the local exchange monopoly in this country, recognized that cable operators and competitive local exchange carriers (CLECs) would need more protection than ILECs, who typically owned many of their own poles and already had long-standing joint-use arrangements with electric utilities. Following Congress' 1996 changes to Section 224, the Commission issued a series of orders implementing the new access requirements of Section 224(f), continuing the existing formula used in calculating the "cable rate" under Section 224(d), and establishing a modified formula used in calculating the "telecom rate" under Section 224(e).[11] These rules were challenged by the utilities and again the courts ruled in favor of the Commission.[12]

In implementing the 1996 amendments, the Commission again addressed the treatment of commingled video and data services, this time in the context of broadband Internet access services. The Commission decided to keep in place its policy of allowing cable operators to pay the cable rate for non-video attachments.[13] Indeed, the Commission concluded that raising the broadband pole attachment rate was not in the public interest.

> We conclude, pursuant to Section 224 (b)(1), that the just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate. In specifying this rate, we intend to encourage cable operators to make Internet services available to their customers. We believe that specifying a higher rate might deter an operator from providing non-traditional services. Such a result would not

---

[10] 47 U.S.C. § 224(f). Some pole owners, such as electric co-ops, are not subject to these requirements. *Id.*, § 224(a)(1).

[11] *See Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777 (1998) (*Telecom Order*); Report and Order, 15 FCC Rcd 6453 (2000) (*Fee Order*); Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103 (2001) (*Consolidated Reconsideration Order*).

[12] *See, e.g., Southern Co. Services v. FCC*, 313 F.3d 574 (D.C. Cir. 2002).

[13] *Telecom Order*, 13 FCC Rcd at 6795-96.

> serve the public interest. Rather, we believe that specifying the Section 224(d)(3) rate will encourage greater competition in the provision of Internet service and greater benefits to consumers.[14]

Once again the utilities challenged the Commission's decision and once again the Commission was upheld, this time by the Supreme Court in the *Gulf Power* case.[15]

C. Nothing Has Changed Since the Commission's Last Pole Attachment Rulemaking to Warrant Less Scrutiny of Pole Owners

As the preceding discussion illustrates, for thirty years cable operators have been trying to attach to poles at reasonable rates, and for thirty years utilities have resisted these efforts at every turn. Unfortunately, that basic dynamic continues to this day, as illustrated by the long-running dispute between cable operators in Florida and Gulf Power. The dispute started in 2000, when "Gulf Power unilaterally decided that an attachment rate based on the Cable Formula does not provide just compensation, and that an alternative methodology should be employed to arrive at an appropriate albeit much high[er] rate."[16] Specifically, Gulf Power was attempting to charge "an annual per pole rate of $38.06, an amount exceeding the Cable Formula rate by over 500%."[17] The Enforcement Bureau granted the cable operators' complaint in 2003, finding Gulf Power's proposed rate to be unjust and unreasonable.[18]

---

[14] 13 FCC Rcd 6777, 6795-96, ¶ 32 (footnote omitted).

[15] *Gulf Power*, 534 U.S. at 339 (Raising pole rents for Internet services would subject innovative cable operators to "monopoly pricing … [and] defeat Congress' general instruction to the FCC to 'encourage the deployment' of broadband Internet capability and, if necessary, 'to accelerate deployment of such capability by removing barriers to infrastructure investment.").

[16] *Florida Cable Telecommunications Ass'n. v. Gulf Power Co*., EB Docket No. 04-381, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, 22 FCC Rcd 1997, 1998, ¶ 2 (*2007 ALJ Decision*).

[17] *Id*. at 1999, ¶ 4.

[18] *FCTA v. Gulf Power Co*., EB Docket No. 04-381, Memorandum Opinion and Order,18 FCC Rcd 9599 (EB 2003) (granting complaint).

The Bureau subsequently gave Gulf Power an additional opportunity to present evidence that compensation in excess of marginal costs was warranted.[19] After reviewing this additional evidence, the Commission's chief administrative law judge completely rejected Gulf Power's arguments for imposing any rate in excess of the cable rate.[20] The utility is now seeking review from the full Commission. Thus, after seven years of litigation, Gulf Power is continuing its effort to impose unreasonable attachment rates on cable operators.

The last time the Commission considered its pole attachment regime in a rulemaking proceeding, in 2001, it concluded that "the record as a whole does not demonstrate that the market for pole attachments is fully competitive or that utilities now lack any incentive to discriminate against attaching entities."[21] While much has changed in the retail marketplace since then, the Florida dispute described above demonstrates that there has been no change whatsoever in the incentive or ability of utilities to impose excessive rates for pole attachments.[22] In particular, it is still the case that cable operators have no realistic alternative to placing their facilities on utility poles. Building a second set of poles is, obviously, wasteful and inefficient.[23] Placing facilities underground is a theoretical option, but in most cases it is much more expensive for the cable operator and much more disruptive to residents in the community. As a

---

[19] *FCTA v. Gulf Power Co.*, EB Docket No. 04-381, Hearing Designation Order, 19 FCC Rcd 18718 (EB 2004) (granting request for additional evidentiary hearings before ALJ).

[20] *2007 ALJ Order* at 2006, ¶¶ 25-28.

[21] *Consolidated Reconsideration Order*, 16 FCC Rcd at 12112, ¶ 13; *see also 2007 ALJ Order* at ¶ 21 ("Gulf Power finally argues that its poles are not essential because there are other options, including underground construction . . . . This argument amounts to a long-discredited attack on the basis for the Pole Attachment Act which the Commission is not at liberty to ignore.").

[22] If anything, as electric companies increasingly provide broadband service and ILECs provide video service, the incentive for pole owners to discriminate against cable operators is increasing.

[23] *See Alabama Power*, 311 F.3d at 1362 ("In the view of Congress, the costs of erecting an entirely new set of poles would have created an insurmountable burden on cable companies.")

result, local officials typically require the use of existing utility poles when that option is available, thereby placing cable operators at the mercy of utilities.[24]

As documented in Appendix A, the Commission and the courts repeatedly have affirmed the validity of the current pole attachment compensation regime and consistently applied those rules to prevent the utilities from avoiding their obligations under that regime. Faced with a situation where market forces plainly do not exist, it is imperative that the Commission continue protecting the rights of attaching parties in the face of certain resistance from the utilities.

II. THE CABLE FORMULA FULLY COMPENSATES POLE OWNERS FOR THE COSTS OF ALLOWING ATTACHMENTS

The *Notice* asks whether the cable rate "results in a subsidized rate, and if so, whether cable operators should continue to receive such subsidized pole attachment rate at the expense of electric customers."[25] This question demonstrates a complete lack of understanding of the history and purpose of Section 224 of the Act and the Commission's rules implementing that section. As we explain below, the *Notice* mischaracterizes the cable rate formula and ignores other payments that cable operators make to utilities when they attach to poles. A more complete consideration of the existing compensation regime, including ample precedent not highlighted in the *Notice*, demonstrates unequivocally that the cable rate is not a subsidized rate and that it is fully compensatory as a legal matter, as a policy matter, and as an economic matter.

A. The Combination Of Rental Fees And Make-Ready Payments Fully Compensates Pole Owners For Attachments By Cable Operators

Section 224(d)(1) establishes cost-based minimum and maximum rates that may be charged to a cable operator for pole attachments. The minimum rate is based on "the additional costs of providing pole attachments," while the maximum rate is "the percentage of the total

[24] *Consolidated Reconsideration Order*, 16 FCC Rcd at 12118, ¶ 24.

[25] *Notice* at ¶ 22.

usable space" used by the attachment multiplied by "the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit or right-of-way."[26] The Commission's rules implementing this section, which allow utilities to charge the statutory maximum rate, identify the specific costs to be considered in developing operating expenses and capital costs and the assumptions to be used in calculating the percentage of usable space occupied by an attachment.[27]

The *Notice* suggests that the cable formula produces a subsidized rate because it "does not include an allocation of the cost of unusable space."[28] This statement is incorrect. The Commission has long recognized that the cable rate is "identified as a percentage of fully allocated costs."[29] The Commission's rules implementing Section 224(d)(1) establish an allocator or "space factor" based on the percent of usable space occupied by a cable operator's attachment, but that allocator is applied to the costs of the *entire* pole.[30] As the Supreme Court explained in the *Florida Power* case, "[t]he rate imposed by the Commission in this case was calculated according to the statutory formula for the determination of fully allocated cost. Appellees have not contended, nor could it seriously be argued, that a rate providing for the

---

[26] 47 U.S.C. § 224(d)(1).

[27] *Consolidated Reconsideration Order*, 16 FCC Rcd at 12174, Appendix D-2.

[28] *Notice* at ¶ 22.

[29] *Consolidated Reconsideration Order*, 16 FCC Rcd at 12109, ¶ 8.

[30] 47 U.S.C. § 224(d)(1). Specifically, a utility's total pole investment is divided by the number of poles to determine the average cost of a pole. *Consolidated Reconsideration Order*, 16 FCC Rcd at 12174, Appendix D-2. The telecom rate considers all the same costs as the cable rate, but it allocates a larger portion of the cost of unusable space to an attaching party. 47 C.F.R. § 1.1409(e); *Consolidated Reconsideration Order*, 16 FCC Rcd at 12176, Appendix E-2. As a result, the telecom rate is typically 2-3 times higher than the cable rate. *See* TWTC Presentation Regarding Pole Attachment NPRM, attached to Letter from Thomas Jones, Counsel to Time Warner Telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, RM-11303, 11293 (filed Oct. 23, 2007) (comparing cable rates between $4.57 and $7.10 with telecom rates between $10.41 and $18.21) (TWTC Presentation).

recovery of fully allocated cost, including the actual cost of capital, is confiscatory."[31] Numerous state commissions also have concluded that the cable rate formula is fully compensatory.[32]

In addition to mischaracterizing the cable formula, the *Notice* also neglects to even mention another key component of the compensation regime. Cable operators not only pay an annual rental fee, they also reimburse utilities for the costs incurred in making space on a pole available for attachments, *i.e.*, "make-ready" work. For some utilities, make-ready generates millions of dollars in payments annually.[33] Because cable operators pay for make-ready, utilities are fully compensated for any incremental costs associated with the attachment of particular facilities. As the court recognized in *Alabama Power*, it is a "known fact that the Cable Rate requires the attaching cable company to pay for any 'make-ready' costs and all other marginal costs (such as maintenance costs and the opportunity cost of capital devoted to make-ready and maintenance costs), in addition to some portion of fully embedded cost."[34] And as the Commission's prior orders have recognized, "Congress expected pole attachment rates based on incremental costs to be low because utilities generally recover make-ready or change-out charges directly from cable systems."[35]

The key point for constitutional purposes is that the compensation regime the Commission has established under Section 224(d) puts a pole owner in a financial position that is

---

[31] *FCC v. Florida Power Corp*., 480 U.S. 245, 254 (1987).

[32] *See* Appendix A at 3-5.

[33] *See, e.g.*, *Alabama Power*, 311 F.3d at 1369 n.21.

[34] *Alabama Power*, 311 F.3d at 1368.

[35] *Consolidated Reconsideration Order*, 16 FCC Rcd at 12109, ¶ 8 n.37. Moreover, through the make-ready process, cable operators frequently discover, and pay for, fixing or replacing poles that are in violation of safety standards. Although the Commission does raise the issue of unsafe poles, *Notice* at ¶ 38, it erroneously assumes that this is a problem created solely by attaching parties and to be solved by regulating attaching parties. If the Commission decides to address technical issues related to pole attachments, it must not place utilities in the position of being the sole arbiters of safety issues.

at least as good as it would be if there were no other parties attaching facilities to its poles.[36] To provide electric service, "electric utilities need poles that are taller, stronger and more closely spaced" than either telephone companies or cable operators would need if they were to build stand-alone pole systems.[37] As a result, the obligation to provide access to attaching parties generally does not increase the investment the utility must make in constructing its pole system. Any contribution that attaching parties make to the recovery of that investment through payment of the annual rental fee is a net positive for the utility, which otherwise would bear 100 percent of these costs.[38]

In situations where a utility does incur costs beyond those it would incur on its own, *e.g.*, if it must rearrange or change out a pole to accommodate a new attachment, those costs are reimbursed by the cable operator (or other third-party attacher) through make-ready payments.[39] Far from being confiscatory, the ability of the pole owner to impose two distinct sets of charges – rental fees and make-ready charges – creates a significant risk of double recovery of costs by the pole owner. As a result, the Commission has been diligent in making sure that any make-ready fees recover costs that are not already recovered through the annual pole rental fee.[40]

---

[36] *See, e.g.*, *2007 ALJ Decision*, 22 FCC Rcd at 2004, ¶ 21 n.10 ("The Commission has already concluded that Cable Formula rates plus payment of make-ready expenses provides compensation that *exceeds* just compensation.") (emphasis added); *Alabama Power*, 311 F.3d at 1369 ("The legal principle is that in takings law, just compensation is determined by the loss to the person whose property is taken.").

[37] *See* Letter from Jack Richards, Keller & Heckman, LLP, to Kevin J. Martin, Chairman, Federal Communications Commission, RM-11293, 11303, at 3 (filed June 1, 2007).

[38] *Alabama Power*, 311 F.3d at 1370-71 (Absent evidence that a pole is full and another buyer is "waiting in the wings . . . any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation.").

[39] *Consolidated Reconsideration Order*, 16 FCC Rcd at 12119, ¶ 24 n.120. As discussed below, make-ready obligations are different under joint use agreements between electric companies and ILECs.

[40] *See, e.g.*, *Fee Order*, 15 FCC Rcd at 6459, ¶ 7; *Texas Cable Television Ass'n v. GTE Southwest*, 14 FCC Rcd 2975, 2984-85, ¶¶ 32-33 (CSB 1999).

B. There Is No Subsidy At The Expense Of Electric Ratepayers

In the ratemaking context, the Commission considers a rate to be "subsidized" when it does not recover the cost of providing the service. For example, it has been the Commission's policy to subsidize basic local phone service so that it can be provided at affordable rates in all parts of the country. Some of these subsidies are explicit, such as when a carrier receives payments from the federal Universal Service Fund, and some are implicit, such as when a carrier is permitted to impose above-cost access charges for the termination of calls with the expectation that the excess revenue will offset below-cost rates for local service.[41] When rates are based on costs, however, the Commission has unequivocally recognized that there is no subsidy.[42]

In the three decades since Congress started regulating pole attachment rates, there is not a single agency or court decision finding that the cable formula produces a rate that is confiscatory for purposes of the Takings Clause of the Fifth Amendment. To the contrary, as summarized in Appendix A, a string of decisions from the Commission and the courts have found the cable rate formula to be fully compensatory and consistently have resisted utility attempts to impose higher rental fees or make-ready charges that recover costs already included in the rental fee. In the face of this consistent precedent finding that the cable rate is compensatory, there simply is no basis whatsoever for the suggestion in the *Notice*, and in Chairman Martin's separate statement, that the cable rate subsidizes cable operators at the expense of electric company ratepayers.

Nor is there any basis for any implication that preserving "revenue neutrality" for utilities (*e.g.*, by increasing pole attachment rates for cable operators to offset any rate reductions for telecommunications carriers) is necessary to protect the interests of electric customers. As an

---

[41] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4689, ¶ 8, n.20 (2005).

[42] *Request to Update Default Compensation for Dial-Around Calls from Payphones*, WC Docket No. 03-225, Report and Order, 19 FCC Rcd 15636, 15646, ¶ 29 ("If the rate is cost-based, it cannot be a 'subsidy.'").

initial matter, Congress has given the Commission no role whatsoever in protecting electric ratepayers. State regulators are charged with regulating electric companies and looking after the interests of their ratepayers and they are fully capable of performing that role on their own. The Commission's job is to promote broadband investment and facilities-based competition for services within its jurisdiction and to adopt a pole attachment policy that promotes these goals in a manner consistent with constitutional principles and the parameters established under Section 224.

Even if there were a role for the Commission in safeguarding the interests of electric ratepayers, allowing utilities to increase cable attachment rates would not be warranted because it would have no demonstrable impact on utility rates. With lessened forms of utility rate regulation in connection with restructuring and deregulation, the growth of incentive or performance-based regulation plans, programs of rate stability, price ceilings, and outright rate freezes of basic regulated distribution service rates, any claim that pole rental increases would inure to the benefit of ratepayers (as opposed to strictly flowing through to utility shareholders) is highly suspect, absent valid, corroborating evidence**.** In sum, while raising pole attachment rates would prove beneficial to utility shareholders, there is no evidence that it would benefit utility ratepayers.

III. THE COMMISSION SHOULD BE REDUCING BROADBAND ATTACHMENT RATES, NOT RAISING THEM

A. The Commission Should Promote Regulatory Parity, But Not At The Expense of Broadband Investment and Facilities-Based Competition

Two of the primary goals underlying the Telecommunications Act of 1996 are increased investment in broadband facilities and increased facilities-based competition for voice and video services. In Section 706(a) of the 1996 Act, Congress directed the Commission to "promote

competition in the local telecommunications market" and "remove barriers to infrastructure investment."[43] Congress also added a mandatory access provision to Section 224 and extended the rate and access protections to telecommunications carriers, actions that were "consistent with the 1996 Act's vision of competition in all sectors of the data distribution business" and necessary to address the concern that "electricity companies would have a perverse incentive to deny potential rivals the pole attachments they need."[44]

The Commission has followed the direction of Congress in prioritizing these two important policy goals. As explained in the Commission's strategic plan, the goal with respect to broadband is to adopt policies that "promote technological neutrality, competition, investment and innovation to ensure that broadband service providers have sufficient incentive to develop and offer such products and services."[45] Similarly, the Commission's goal with respect to competition is to create a regulatory framework that "foster[s] innovation and offer[s] consumers reliable, meaningful choice in affordable services."[46]

Although the *Notice* identifies the goals of broadband investment and facilities-based competition, the focus appears to be the goal of promoting regulatory parity with respect to companies providing competing services.[47] Regulatory parity is a goal that NCTA consistently has urged the Commission to pursue.[48] All else being equal, companies that provide similar service should be subject to the same regulatory regime.

---

[43] Pub. L. No. 10-104, § 706(a).

[44] *Alabama Power*, 311 F.3d at 1363.

[45] Federal Communications Commission, Strategic Plan 2006-2011, at 5, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-261434A1.pdf.

[46] *Id*. at 8.

[47] *Notice* at ¶¶ 3, 21, 22, 26-32.

[48] *See, e.g., Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Comments of the National Cable & Telecommunications

As the Commission moves toward regulatory parity with respect to pole attachments, however, it should do so in a way that does not undermine the pro-broadband and pro-competition policies that Congress has adopted. In particular, the Commission must pursue that goal across all forms of pole-related compensation. As noted above, the *Notice* takes a far too narrow approach to compensation issues by looking only at the annual rental fee produced by the cable rate formula, without giving any consideration at all to make-ready payments, which are a critical component of the compensation regime.

Considering the entire pole attachment compensation regime, NCTA supports the concept of parity between cable operators and CLECs. Like cable operators, CLECs typically do not own their own poles and therefore have no leverage in negotiating attachment arrangements with pole owners. CLECs also are required to reimburse pole owners for all costs associated with make-ready, just like cable operators. Given these similarities, there is no policy reason that CLECs should be required to pay annual rental fees that are higher than the rate that would be produced under the cable rate formula.

Where ILECs are similarly situated (*i.e.*, where they do not own poles and are responsible for all make-ready costs associated with attaching to electric company poles), there also is no policy reason for them to be required to pay rates in excess of the rate that would be produced under the cable rate formula. Where ILECs are not similarly situated, however, the issue of regulatory parity is more complex. If an ILEC owns poles in its service area, it typically is party to a joint-use agreement with the electric utility serving that area. Under a joint-use agreement,

---

Association at 8-11 (filed July 2, 2007). The Commission, however, frequently has rejected such requests for regulatory parity. *See, e.g., Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order, FCC 07-189, ¶¶ 1-2 (rel. Nov. 13, 2007) (applying MDU access restrictions to cable operators and common carriers, but not DBS providers and private cable operators).

both parties provide access for attachments on their poles in exchange for the right to attach to poles owned by the other party.

Although specific terms and conditions vary, in general these joint-use agreements provide ILECs with far more favorable treatment than cable operators or CLECs receive from electric companies. For example, when an existing pole has insufficient attachment space, ILECs usually have the right under such agreements to demand that the utility build a "normal" pole with 2-3 feet of attachment space. In contrast, pursuant to typical make-ready requirements, a cable operator must pay the electric company or ILEC for the entire cost of new poles, as well as any additional costs incurred by the utility and other existing attachers for moving their facilities to the new poles. The utility then takes ownership and control of the new poles paid for by the cable operator, uses the poles for free, and continues to charge the cable operator rent and other fees for the cable operator's use of the poles for which it paid.

The Commission long ago recognized that different rates might be warranted where companies have different make-ready obligations.[49] Given these significant differences between ILECs and other attaching entities, there are serious questions that must be resolved as part of the Commission's quest for regulatory parity. Beyond the obvious statutory questions identified in the *Notice*,[50] the Commission must scrutinize thoroughly ILEC claims that these joint-use agreements are no longer prevalent and that ILECs have lost whatever leverage they once had in

---

[49] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CC Docket No. 86-212, Report and Order, 2 FCC Rcd 4387, 4397, ¶ 76 (1984) ("For example, assuming all other factors are equal, the rate should not be the same for a cable company which is required to pay the entire cost of change-outs, even when not caused by the cable's presence, as for a cable company which only pays for the change-outs it causes.").

[50] *Notice* at ¶ 23. Specifically, for purposes of Section 224, ILECs are not defined as telecommunications carriers. 47 U.S.C. § 224(a)(5). Consequently, the Commission previously has found that an ILEC "has no rights under Section 224 with respect to the poles of other utilities." *Telecom Order*, 13 FCC Rcd at 6781, ¶ 5.

negotiating with electric companies.[51] The Commission should not make major policy changes based on a handful of anecdotes from large ILECs. Rather, it must conduct a much more thorough inquiry before it concludes that ILECs no longer enjoy the advantages they did in 1996 when Congress chose to exclude them from the protections afforded cable operators and CLECs.

B. Taxing Cable Broadband Services By Raising The Rate For Attachments By Cable Operators Would Undermine The Commission's Policies Promoting Deployment and Adoption of Broadband Services

In the *Notice*, the Commission solicits comment on its tentative conclusion that all companies should pay a uniform rate for attachments used in providing broadband service. The Commission tentatively concludes that this uniform broadband rate "should be higher than the current cable rate, yet no greater than the telecommunications rate."[52] For the reasons explained below, the Commission should not adopt this aspect of its tentative conclusion.

It is difficult to conceive of any substantive basis for the Commission's assertion that a uniform broadband attachment rate should be higher than the cable rate. Certainly this is not required as a constitutional matter, because the courts already have found that the cable rate is compensatory,[53] and that the Commission's decision to apply that rate when a cable operator provides broadband Internet access service is reasonable.[54] While the Commission suggests that the allocation of the cost of unusable space under the cable rate formula is a concern, we explain above that this concern is based on a misunderstanding of what the rules and the cable rate formula actually require and the absence of any impact on the pole owning utilities of existing

---

[51] *Id*. at ¶ 15.

[52] *Id*. at ¶ 36.

[53] *See Alabama Power*, 311 F.3d at 1370-71 (Absent proof that a pole is full and there is another buyer waiting in the wings, "any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation.").

[54] *Gulf Power*, 534 U.S. at 333.

attachments being used to provide new services. As the Commission and the courts have always found in the past, the cable rate fully compensates utilities for the cost of allowing attachments on their poles and the introduction of new retail services by the cable operator does not warrant a different conclusion.[55]

In the *Notice*, the Commission acknowledges the strong connection between its pole attachment policies and its broadband and competition policies,[56] but it fails to adequately consider the real world implications that the proposals in the *Notice* would have on these policies. As explained in the Declaration of Dr. Michael Pelcovits, attached as Appendix B, the cost of pole attachments is a fixed but recurring cost associated with the construction and operation of networks.[57] As with any other fixed but non-sunk cost, increases are likely to lead to diminished investment incentives and/or retail price increases, while cost decreases are likely to lead to increased investment incentives and/or retail price decreases.[58]

Raising the attachment rates for cable operators when they provide broadband service would have an exceedingly detrimental effect on deployment and adoption of broadband services. Because most cable operators already offer broadband service, such a rule essentially would result in across-the-board rate increases on almost all poles. As explained in the Pelcovits Declaration, doubling or tripling the cost of attaching to millions of poles (which would be the

---

[55] *Id.* ("The addition of a service does not change the character of the attaching entity . . . [a]nd this is what matters under the statute.").

[56] *Notice* at ¶¶ 26-27; *see also* Statement of Chairman Kevin J. Martin ("Pole attachments provide an important means for the deployment of broadband and other services to Americans."); Separate Statement of Commission Michael J. Copps (Pole attachment policy "is essential to ensuring that we have a competitive broadband market."); Separate Statement of Commissioner Jonathan S. Adelstein ("timely access to poles, ducts and conduits is critical for facilities-based providers of broadband service,").

[57] Declaration of Dr. Michael D. Pelcovits, attached as Appendix B, at ¶¶ 24-26 ("Pelcovits Declaration").

[58] *Id.* at ¶¶ 27-30.

result if the Commission applies the telecom attachment rate) would raise the industry's cost of providing service by $208 million to as much as $672 million annually.[59]

These cost increases are tantamount to a new tax on cable broadband customers. If cable operators were required to pay such increases, undoubtedly they would consider scaling back new investment (*e.g.*, investment in increasing speed or performance or expanding to areas with low population density), raising retail prices, or both. As explained in the Pelcovits Declaration, recovering the proposed cost increases from cable broadband subscribers would add an average of $10.46 to $33.75 annually to the cost of providing the retail service.[60] Rural customers would be particularly hard hit by such increases because systems in rural areas typically have more poles per subscriber than urban systems, fewer subscribers overall, and fewer attaching parties on the poles. Accordingly, cable systems will need to use significantly more poles to pass each rural customer and the pole rental rates will be higher. Pole attachment payments will thus have a proportionally greater cost impact in rural and less dense communities. Such results are completely antithetical to the goal of universal, affordable broadband service that Congress has established for the Commission.

For those cable operators not yet providing broadband services, the new rule would be even more devastating. It would penalize them for extending broadband to new areas, particularly in rural areas where there are more poles and fewer customers to absorb the cost increases. As Congress and the Commission struggle to find ways to promote investment in rural broadband facilities (*e.g.*, through the Universal Service Fund or Rural Utilities Service loans), it is impossible to understand why the Commission would even consider a policy that raises the costs of providing broadband service to areas where it is not available today.

---

[59] *Id.* at ¶ 22, Table 4.

[60] *Id.*

Similar effects are likely if the Commission decides to impose higher attachment rates when a cable operator introduces VoIP service. The introduction of voice services from cable operators already has produced billions of dollars in consumer benefits and promises even more in the future.[61] But those benefits will be significantly reduced if the Commission taxes VoIP customers by raising the pole attachment rates paid by cable operators that provide those services. As shown in the Pelcovits Declaration, recovering the proposed cost increases from cable VoIP subscribers would add an average of $27.65 to $89.18 annually to the cost of providing the retail service.[62] The effect could be even more dramatic in areas, particularly rural areas, where cable operators do not yet offer VoIP services. If cable operators choose to scale back their VoIP investments in the face of higher pole attachment rates, customers in those areas may be prevented from having their first facilities-based alternative to their incumbent local exchange carrier.

A number of states already have rejected the idea of imposing higher rates when a cable operator introduces new services.[63] As the California Public Utilities Commission explained, "applying a consistent rate for use of cable attachments . . . promotes the incentive for facilities-based local exchange competition through the expansion of existing cable services."[64] Similarly, the New York Public Service Commission found that allowing "increased pole attachment rates at this time, when competition and the number of attachers has not developed as previously

---

[61] *See* Michael Pelcovits and Daniel Haar, *Consumer Benefits of Cable-Telco Competition*, at 11, available at http://www.micradc.com/news/publications/pdfs/Updated_MiCRA_Report_FINAL.pdf.

[62] Pelcovits Declaration at ¶ 22, Table 4.

[63] *See, e.g.*, *Petition of The United Illuminating Company for a Declaratory Ruling Regarding the Availability of Cable Tariff Rate for Pole Attachments by Cable Systems Providing Telecommunication Service and Internet Access*, Docket No. 05 06 01, (Conn. DPUC, Dec. 14, 2005); *In the Matter of the Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint Use Regulations Adopted Under 3 AAC 52.900 – 3 AAC 52.940*, Order Adopting Regulations at 3-5 (Alaska Reg. Comm'n, Oct. 2, 2002).

[64] *Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service*, R. 95-04-043, I. 95-04-044, Decision 98-10-058 (Cal. PUC, Oct. 22, 1998).

contemplated . . . would undermine efforts to encourage facilities-based competition and to attract business in New York."[65] The Commission would do well to follow the approach established by these states and reject any effort to raise attachment rates when cable operators add new services.

C. The Commission Should Reduce the Rate Paid By Telecommunications Carriers.

The best way for the Commission to make progress on all of its goals – broadband investment, facilities-based competition, and regulatory parity – is to reduce the rate for attachments by telecommunications carriers. Just as taxing cable broadband customers by raising the attachment rates paid by cable operators could have significant negative effects on investment and competition, reducing the rate for telecommunications attachments could have significant positive effects.

As explained in the Pelcovits Declaration, the telecommunications formula produces an annual rental fee that is 2-3 times higher than the cable rate.[66] The difference in rates results from the fact that the telecommunications rate formula allocates a greater percentage of the cost of unusable space to attaching parties. If there are three attaching parties, the telecommunications formula will produce a rate that is 2.28 times the cable formula.[67] If there are only two attaching parties, the telecommunications rate would be 3.24 times the cable rate.[68]

Where the attaching party reimburses all of the pole owner's incremental costs through make-ready payments, this difference in annual fees is not necessary to compensate utilities

---

[65] *Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments and to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Companies,* Order Directing Utilities to Cancel Tariffs, Cases 01-E-0206, *et al*. at 4 (NYPSC, January 15, 2002).

[66] *See* Pelcovits Declaration at ¶¶ 19-21 and Table 3; *see also* TWTC Presentation.

[67] Pelcovits Declaration at ¶ 20 and Table 3.

[68] *Id*.

because the much lower cable rate has been found to be fully compensatory.[69] Rather, the additional payments to pole owners only serve to increase the cost of providing telecommunications services.

Reducing pole attachment rates for telecommunications carriers in rural areas would be particularly beneficial. Reducing pole attachment rates lowers the cost of upgrading existing networks and building new networks, which likely will reduce the amount of government support (*e.g.*, Universal Service Fund (USF) payments) needed to provide voice and broadband services. At a time when there is great concern that the Universal Service Fund has become so bloated that it "is in dire jeopardy of becoming unsustainable,"[70] reducing pole attachment rates for telecommunications carriers offers a method of advancing the Commission's policy goals without the financial burden that the federal USF imposes on competitors and consumers.

IV. THE COMMISSION SHOULD RETAIN THE "SIGN AND SUE" RULE

Under the Commission's rules, an attaching party is permitted to sign an agreement with a utility and subsequently file a complaint challenging the lawfulness of provisions in that agreement.[71] In the *Notice*, the Commission seeks comment on "whether we should adopt some contours to the rule, such as time-frames for raising written concerns about a provision of a pole attachment agreement."[72] The Commission provides no discussion of why any change would be needed or why it even feels the need to ask about "contours" to the rule.

---

[69] As explained above, a higher rental fee may be warranted for telecommunications attachments if no make-ready payments are required, as may be the case with an incumbent LEC that operates under a joint use agreement with an electric utility.

[70] *High-Cost Universal Service Support*, WC Docket No. 05-337, Recommended Decision, FCC 07J-4, at ¶ 9 (Joint Board 2007)

[71] *Consolidated Reconsideration Order*, 16 FCC Rcd at 12112-13, ¶ 13.

[72] *Notice* at ¶ 37 n.110.

Putting aside the vagueness of the *Notice*, NCTA finds it perplexing that the Commission would even consider revisiting the "sign and sue" rule. This rule has been one of the great successes of the Commission's pole attachment regime. It serves important policy goals by ensuring that pole owners don't abuse their inherent bargaining power and interfere with the ability of cable operators and others to make network investments in a timely manner. If the Commission were to eliminate the rule, or even to limit the ability of attaching parties to file a complaint during the duration of a contract, attaching parties would face a Hobson's choice of agreeing to unreasonable terms proposed by a utility or delaying construction pending resolution of any negotiation and litigation to resolve disputes.[73]

The Commission recognized these points when it defended the rule in court just a few years ago, explaining that "one scenario in which 'sign and sue' is likely to arise is when the attacher acquiesces in a utility's 'take it or leave it' demand that it pay more than the statutory maximum or relinquish some other valuable right – without any *quid pro quo* other than the ability to attach its wires on unreasonable or discriminatory terms. Of course the Pole Attachments Act was designed to prevent such an exercise of monopoly power that would nullify the statutory rights of cable systems or telecommunications carriers to obtain both immediate access and timely regulatory relief to the extent access is unreasonable or discriminatory."[74]

As with every other aspect of the Commission's current pole attachment regime, the "sign and sue" rule has been upheld by the courts. The United States Court of Appeals for the Eleventh Circuit found that the rule was "a reasonable exercise of the agency's duty under the

---

[73] Contrary to the implication in the *Notice* that restricting the sign and sue rule would reduce the number of complaints filed with the Commission, the rule actually serves to limit complaints because it reduces a pole owner's incentive to enforce unreasonable provisions that may be contained in an agreement.

[74] *Southern*, 313 F.3d at 583, *quoting* FCC Brief at 42-43.

statute to guarantee fair competition in the attachment market."[75] There has been no change in circumstances that would justify reaching a different conclusion in this proceeding.

CONCLUSION

For all the reasons explained above, the Commission should proceed with caution in changing its pole attachment rules. To the extent the Commission makes changes in pursuit of uniformity across different types of providers, its efforts should be focused on reducing pole attachment rates paid by telecommunications providers, rather than taxing cable broadband customers by raising the attachment rates paid by cable operators.

Respectfully submitted,

/s/ Daniel L. Brenner

Daniel L. Brenner
Neal M. Goldberg
Steven F. Morris
National Cable &
Telecommunications Association
25 Massachusetts Avenue, N.W.
Suite 100
Washington, D.C. 20001-1431

March 7, 2008

[75] *Id.* at 583-84.

APPENDIX A

EXAMPLES OF FCC, STATE AND COURT DECISIONS ADDRESSING REASONABLENESS OF CABLE POLE ATTACHMENT RATES

APPENDIX A

EXAMPLES OF FCC, STATE AND COURT DECISIONS ADDRESSING REASONABLENESS OF CABLE POLE ATTACHMENT RATES

Supreme Court

NCTA v. Gulf Power, 534 U.S. 327 (2002) – affirming FCC decision to apply the cable rate formula to attachments used by a cable operator to provide broadband services

FCC v. Florida Power, 480 U.S. 245 (1987) – finding that FCC regulation of pole attachment rates is not an unconstitutional taking of property and that the cable rate formula is not confiscatory

Courts of Appeals

Alabama Power v. FCC, 311 F.3d 1357 (11th Cir. 2002), *cert. denied*, 124 S.Ct. 50 (2003) – affirming FCC's decision that utility's rates were unreasonable and that the cable rate formula provides just compensation and is not an unconstitutional taking of property

Southern Co. Services v. FCC, 313 F.3d 574 (D.C. Cir. 2002) – affirming FCC's implementation of changes to Section 224 that were adopted as part of the Telecommunications Act of 1996

Texas Utilities Electric Co. v. FCC, 997 F.2d 925 (D.C. Cir. 1993) – affirming FCC's decision to apply cable rate formula to non-video attachments

Monongahela Power v. FCC, 655 F.2d 1254 (D.C. Cir. 1981) – affirming FCC's original rules implementing the cable rate formula contained in Section 224(d)

Federal Communications Commission

A. Rulemakings

Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments, 16 FCC Rcd 12103 (2001) (*Consolidated Reconsideration Order*) – rejecting utilities' arguments that regulation of pole attachment agreements no longer is necessary and reaffirming the validity and importance of the FCC's rate formulas

Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments, 15 FCC Rcd 6453 (2000) (*Fee Order*) – reaffirming the use of rate formulas based on historical costs and declining to modify the usable space presumptions

Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments, 13 FCC Rcd 6777 (1998) (*Telecom Order*) –

establishing the telecom rate formula and deciding that the cable rate formula will continue to apply when a cable operator provides commingled cable and Internet services

Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 2 FCC Rcd 4387 (1987) – making minor adjustments to the cable rate formula and clarifying that make-ready fees may not recover costs already recovered in the annual pole rental fee

Petition to Adopt Rules Concerning Usable Space on Utility Poles, 56 Rad. Reg. 2d 707 (1984) – declining to reconsider assumptions underlying the cable rate formula adopted in 1978-80

B. Adjudications[1]

FCTA v. Gulf Power, 22 FCC Rcd 1997 (ALJ 2007) – rejecting utility arguments that poles were at full capacity and therefore it was appropriate to charge an unregulated attachment rate

FCTA v. Gulf Power, 18 FCC Rcd 9599 (EB 2003) – granting complaint that utility violated FCC rules by unilaterally imposing attachment rate and finding that payment of rent based on cable rate formula plus make-ready expenses exceeds just compensation

Teleport Communications Atlanta v. Georgia Power, 16 FCC Rcd 20238 (EB 2001), *affirmed* 17 FCC Rcd 19859 (2002) – granting complaint that utility violated FCC rules by using its own formula to calculate pole attachment rates rather than using cable or telecom rate formula and reaffirming that both formulas provide just compensation to pole owners

RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Co., 17 FCC Rcd 25238 (EB 2002) – rejecting utility's $47.25 pole attachment rate as unjust and unreasonable and calculating a maximum just and reasonable annual cable rate of $6.79 per pole attachment

Nevada State Cable Television Ass'n v. Nevada Bell, 17 FCC Rcd 15534 (EB 2002) – affirming a Cable Services Bureau Order that calculated a maximum per pole attachment rate of $1.26 for poles owned by Nevada Bell

Cable Television Ass'n of Georgia v. BellSouth Telecommunications, 17 FCC Rcd 13807 (EB 2002) – finding unjust and unreasonable an annual pole attachment rate of $5.03 and setting the proper rate at $4.27

ACTA v. Alabama Power, 15 FCC Rcd 17346 (EB 2000), *affirmed* 16 FCC Rcd 12209 (2001) – granting complaint that utility's proposed attachment rate was unreasonable and affirming that cable rate formula plus the payment of make-ready expenses provides the pole owner with compensation that exceeds the just compensation required under the Constitution

[1] This list only includes examples of adjudications following the Supreme Court's 1987 decision in *Florida Power*. There are literally dozens of decisions prior to *Florida Power* applying the cable rate formula and finding that rates proposed by utilities were unreasonable.

TCTA v. GTE Southwest, 14 FCC Rcd 2975 (CSB 1999) – reaffirming that a utility cannot recover in make-ready charges any costs that it recovers through the annual pole fee

Time Warner Entertainment v. Florida Power & Light Co., 14 FCC Rcd 9149 (CSB 1999) – rejecting a pole attachment rate of $6.00 as unjust and unreasonable and calculating the maximum just and reasonable rate at $5.79 per pole

Texas Cable & Telecommunications Association, et al. v. Entergy Services Inc., et al., 14 FCC Rcd 9138 (CSB 1999) – ordering Entergy to reimburse cable company complainants the difference between the parties prior negotiated rate of $3.50 and a non-negotiated rate of $4.34 per pole charged by Entergy

Heritage Cablevision v. Texas Utilities Electric Co., 6 FCC Rcd 7099 (1991) – finding that it is unreasonable for a pole owner to charge a cable operator higher pole attachment rates for attachments that carry commingled cable and data services; *see also Selkirk Communications v. Florida Power & Light*, 8 FCC Rcd 387 (CCB 1993); *WB Cable Assoc. v. Florida Power & Light*, 8 FCC Rcd 383 (CCB 1993)

State Public Utility Commissions

Alaska

In the Matter of the Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations Adopted Under 3 AAC 52.900 – 3 AAC 52.940, Order Adopting Regulations, 2002 Alas. PUC LEXIS 489 (Alas. PUC Oct. 2, 2002) – finding that the cable rate formula "provides the right balance given the significant power and control of the pole owner over its facilities" and that "changing the formula to increase the revenues to the pole owner may inadvertently increase overall costs to consumers . . . ."

California

Order Instituting Rulemaking on the Commission's Own Motion Into Competition of Local Exchange Service, R.95-04-043, I.95-04-044, Decision 98-10-058, 1998 Cal. PUC LEXIS 879, pp. 53-56, 82 CPUC 2d 510 (Oct. 22, 1998) (internal citations omitted) – finding "that the adoption of attachment rates based on the [cable rate] formula provides reasonable compensation to the utility owner, and there is no basis to find that the utility would be lawfully deprived of any property rights."

Connecticut

Petition of the United Illuminating Company for a Declaratory Ruling Regarding Availability of Cable Tariff Rate for Pole Attachments by Cable Systems Providing Telecommunications Service and Internet Access, Docket No. 05-06-01, pp. 5-6, 2005 Conn. PUC Lexis 295 (Dep't of Pub. Util. Control 2005) – upholding cost-based attachment rate and finding that the provision of additional services by a cable operators does not impose costs on the pole owner.

District of Columbia
*Formal Case No. 815, In the Matter of Investigation Into The Conditions For Cable Television Use of Utility Poles In The District of Columbi*a, Order No. 12796 (2003) – finding that FCC regulations should be followed in determining reasonable rates

Massachusetts
A Complaint and Request for Hearing of Cablevision of Boston Co., D.P.U./D.T.E. 97-82 at 18-19 (Apr. 15, 1998) – finding that FCC formula "meets Massachusetts statutory standards as it adequately assures that [the utility] recovers any additional costs caused by the attachment of [] cables . . . while assuring that the [attachers] are required to pay no more than the fully allocated costs for the pole space occupied by them."

Michigan
In the Matter of the Application of Consumer Power Company, Case Nos. U-10741, U-10816, U-10831 at 27, 1997 Mich. PSC Lexis 26 (1997), *reh'g denied*, 1997 Mich. PSC LEXIS 119 (April 24, 1997), *aff'd Detroit Edison Co. v. Mich. Pub. Serv. Comm'n*, No. 203421 (Mich. Court of Appeals, Nov. 24, 1998); *aff'd Consumers Energy Co. v. Mich. Pub. Serv. Comm'n*, No. 113689 (Mich. Sup. Ct. Aug. 31, 1999) – adopting FCC standard and finding that the FCC cable rate formula aligns pole rates in Michigan "more closely with other states that already adhere to this standard."

New Jersey
Regulations of Cable Television Readoption with Amendments: N.J.A.C. 14:18, Docket No. CX02040265 (2003) – affirming use of a cost-based attachment rate and adopting the FCC formula

New York
In the Matter of Certain Pole Attachment Issues Which Arose in Case No. 94-C-0095, 997 N.Y. PUC Lexis 364 (1997) – adopting FCC approach to pole attachments

Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments and to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Carriers, Case 01-E-0026 (2001) – rejecting a higher telecom rate formula based on concerns that competition would suffer

Ohio
Re: Columbus and Southern Electric Company, 50 PUR 4th 37 (1982) – adopting the FCC cable formula for attachments by cable operators

Oregon
Oregon Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, regarding Pole Attachment Use and Safety, AR 506; 510 at p. 10 (2007) – adopting FCC cable rate formula and finding that "the cable formula has been found to fairly compensate pole owners for use of space on the pole."

Utah

In the Matter of an Investigation into Pole Attachments, 2006 Utah PUC Lexis 213 (2006) – adopting the FCC cable rate formula following a comprehensive pole attachment rulemaking, later codified at UTAH ADMIN. CODE R746-345-5(A) Pole Attachments (2006).

Vermont

Vermont Policy Paper and Comment Summary on PSB Rule 3.700 (2001) at 6 – finding that a reduction in pole attachment costs to cable companies will lead to increased deployment of advanced services and "lead to cable services becoming available in some additional low-density rural areas. . . . [Thus creating] even more value for Vermonters as cable TV companies are increasingly offering high-speed Internet service to new customers."

APPENDIX B

DECLARATION OF DR. MICHAEL D. PELCOVITS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	WC Docket No. 07-245
Amendment of the Commission's Rules and	)	
Policies Governing Pole Attachments	)	RM-11293
	)	
	)	
	)	RM-11303

DECLARATION OF DR. MICHAEL D. PELCOVITS

TABLE OF CONTENTS

I. INTRODUCTION ..... - 1 -

II. AN INCREASE IN POLE ATTACHMENT RATES PAID BY CABLE COMPANIES WOULD HARM ECONOMIC EFFICIENCY ..... - 3 -

III. IMPACT ON THE INDUSTRY AND CONSUMERS OF AN INCREASE IN POLE ATTACHMENT RATES..... - 5 -

A. Study Methodology..... - 6 -

B. Impact of an increase in pole attachment rates ..... - 10 -

C. Effect of a rate increase on the industry and consumers..... - 12 -

IV. "LEVEL PLAYING FIELD" CONSIDERATIONS DO NOT DICTATE AN INCREASE IN THE RATES PAID BY CABLE COMPANIES ..... - 15 -

A. Competitive Neutrality Defined..... - 17 -

B. Comparison of the cost of pole usage for cable companies and ILECs ..... - 17 -

V. CONCLUSION..... - 21 -

I. INTRODUCTION

1. My name is Michael Pelcovits. I am a principal in the consulting firm MiCRA, Inc. My business address is 1155 Connecticut Avenue, Washington, D.C. 20036. I joined MiCRA in October 2002. Since joining MiCRA, I have filed several declarations before the Federal Communications Commission on a wide range of common carrier, wireless, and international telecommunications policy issues. Prior to my employment at MiCRA, I was Vice President and Chief Economist at WorldCom. In this position, and in a similar position at MCI prior to its merger with WorldCom, I was responsible for directing economic analysis of regulatory and antitrust matters, before federal, state, foreign, and international government agencies, legislative bodies, and courts. Prior to my employment at MCI, I was a founding principal of the consulting firm, Cornell, Pelcovits & Brenner. From 1979 to 1981, I was Senior Staff Economist in the Office of Plans and Policy, Federal Communications Commission. I have testified or appeared before the Federal Communications Commission, many state regulatory commissions, the Office of Telecommunications (Oftel) of the UK government, the European Commission, the Ministry of Telecommunications of Japan, and the Civil Aeronautics Board. I have lectured widely at universities and published several articles on telecommunications regulation and international economics. I hold a B.A. from the University of Rochester (*summa cum laude)* and a Ph.D. in Economics from the Massachusetts Institute of Technology, where I was a

National Science Foundation fellow. My curriculum vita is provided as Attachment I of this declaration.

2. I have been asked by the National Cable & Telecommunications Association ("NCTA") to provide an economic analysis of the Commission's recent proposal to adopt a uniform rate – set above the current cable rate -- for pole attachments used for broadband Internet access.[1] This proposal raises a number of normative and positive economic issues, which I address in the following three sections of my declaration. In addition, I present the results of a recent study performed by my firm that estimates the likely impact on the industry and consumers that would result from an increase in the pole attachment rates.

3. The first and most fundamental economic issue concerning a proposal to change regulated rates is whether this change will improve economic efficiency. Economic efficiency is achieved when the goods and services that people value the most are produced in the least costly manner. Generally speaking, economic efficiency is achieved when prices are set at long run marginal cost. In this proceeding, where the Commission is proposing to increase current rates that are already far above marginal or incremental cost,[2] it is vital to measure the potential loss and evaluate whether the loss in economic efficiency can be justified by some

[1] Notice Of Proposed Rulemaking, *Implementation of Section 224 of the Act; Amendments of the Commission's Rules and Policies Governing Pole Attachments*, 22 FCC Rcd. 20195, WC Docket No. 07-245 (Nov. 20, 2007), (hereafter "Notice").

[2] Marginal cost and incremental cost are often used synonymously. Strictly speaking, marginal cost refers to the additional cost of supplying an infinitesimally small additional unit of output. Incremental cost refers to the additional cost of supplying a finite and potentially large change in production or sales. See, Alfred E. Kahn, *The Economics of Regulation, Principles and Institutions*, The MIT Press, 1988, Volume I, at 66. I will use the term marginal cost when referring to general propositions about economic efficiency and the term incremental cost when referring to a large change in production.

other public policy goal. I conclude that an increase in pole attachment rates paid by cable companies would be most likely to induce a less efficient market outcome and reduce social welfare.

4. In the following section, I report on my firm's estimate of the likely economic impact of an increase in pole attachment rates. My intention is to show the potential size of the distortion created by a movement away from efficient pricing. Based on this analysis, I project that an increase in pole attachment rates in the range contemplated by the Commission would be very damaging to the industry and to the users of broadband service.

5. The third issue I address is whether concerns over competitive neutrality should dictate an increase in pole attachment rates for broadband access service providers. My conclusion is that increasing the rates paid by cable companies would be likely to create a distortion in the competitive positions of the different service providers in the industry, rather than leveling the proverbial playing field.

II. AN INCREASE IN POLE ATTACHMENT RATES PAID BY CABLE COMPANIES WOULD HARM ECONOMIC EFFICIENCY

6. The starting point for my analysis of the Commission's proposal to increase the pole attachment rates paid by cable companies that offer broadband Internet service is to compare current rates to long run marginal cost. The reason is that prices in excess of marginal cost will be inefficient. Therefore, if current rates are already in excess of marginal cost, as is set forth below, any increase in rates will cause an even greater deviation from economic efficiency and harm the public.

7. The long run marginal cost of a pole attachment will depend on whether space is available. If space is available, and there are no competing uses for the space, marginal cost is zero. When space can be made available through rearrangement or expansion of a pole's height, the marginal cost is the cost of these measures taken to make the space available.

8. Current practice is to require the attacher to bear the entire cost of any rearrangements or replacement of poles where required to make space available. The utility is compensated directly by the attacher "for the cost of any modifications to utility poles necessitated by the attachments, including pole rearrangements, inspections, pole replacements, and other direct incremental costs of making space available to the cable operation."[3] Payments made by the attacher are referred to as "make-ready" and "change out" charges. I will use the term "make-ready" to refer generically to all of these charges.

9. The make-ready charges are equal to the capital cost of improving a pole to accommodate additional attachments. If the attacher continues to use the pole over its entire life, it will have covered the "lifetime" marginal costs in its payment of the make-ready charges. However, if the attacher later removes its attachment, and the pole owner is able to rent the space to another party without incurring additional cost and without sharing any of the revenue with the original attacher, it will turn out *ex post* that the make-ready charges were in excess of the marginal cost imposed by the attacher.

[3] *In the Matter of Alabama Cable Telecommunications Association v. Alabama Power Company,* 16 FCC Rcd. 12,209 (2001) at ¶48

10. The recurring pole attachment rental rates paid by cable companies are above and beyond the make-ready charges and cover a portion of the joint and common costs of the entire pole based on the space occupied by the attacher. Since none of these joint and common costs are marginal to the pole attachment, these recurring rates are entirely in excess of marginal cost. Under these circumstances, payment of these recurring rates make the pole owner better off than before, because prior to the licensee attaching to the pole, the pole owner had to recover the entire costs of the pole from its own retail customers.

11. Although current cable rental rates are thus in excess of make-ready charges (or marginal cost), they do not appear to have deterred entry into the market or reduced the level of competition in multichannel video distribution markets. However, increasing the rates paid by cable companies even more above marginal cost and linking these higher rates to their delivery of broadband Internet access or voice service will create a new marketplace distortion and cause significant harm to consumers. I will expand on this point in the next section of this declaration.

III. IMPACT ON THE INDUSTRY AND CONSUMERS OF AN INCREASE IN POLE ATTACHMENT RATES

12. An increase in the pole attachment rates paid by the cable companies would have a substantial and harmful effect on the industry and consumers. In order to gauge the potential size of these effects, I have analyzed industry data on the current pole attachment rates paid by cable companies and estimated the dollar impact of

a rate increase under a number of different scenarios. Below, I describe the approach taken by the study, summarize the results, and explain the policy implications. Attached to the declaration as Attachment 2 is a description of the source material and detail on the methodology used.

A. Study Methodology

13. The first step is to estimate the number of poles with cable attachments subject to FCC regulation. To do this, I start with an estimate of the total number of poles nationwide and then reduce the number to account for: states not subject to FCC jurisdiction; the percentage of poles to which cable companies do not attach; cable systems not used to provide broadband service; and poles owned by rural electric companies that are not subject to FCC jurisdiction. This final adjustment allows for the possibility that not all of the poles owned by rural electric companies should be eliminated, because the FCC's decision is likely to have a spillover effect on these rates set outside its jurisdiction. Making all of these adjustments and allowing for a range of spillover effects, I estimate that between 31 million and 40 million poles will be affected by the FCC's decision on pole attachment rates.

14. I gathered information on pole attachment rates subject to FCC jurisdiction now being paid by cable companies from a number of sources, including a survey of cable pole attachment rates published by the National Association of Regulatory Utility Commissions in early 2001;[4] rates recently identified in a Time Warner

[4] Mann, John, CPA, "Pole Attachments," (presented at 2001 NARUC Winter Meetings), February 2001, pp. 6-7.

Telecom White Paper;[5] and a review conducted of recent FCC decisions on pole attachments.

15. The NARUC paper provides the most comprehensive data on pole attachment rates charged by telephone companies and electric utilities on a state-by-state basis. There is no other comparable source available on which to base an analysis of the impact of a change in the rates or rate methodology. I have adjusted the electric utility rate from the NARUC paper based on several more recent FCC decisions on pole attachment rates. The rates allowed in three of the four largest FCC-regulated states – Florida, Pennsylvania, and Georgia – were on average 25% higher than those reported in the NARUC paper as of 1999. Therefore, I base my estimate of the cable attachment rates for the electric utility poles on 125% of the 1999 average. The underlying data and calculations are shown in Table 1 below.

[5] Time Warner Telecom, Inc., "White Paper on Pole Attachment Rates Applicable to Competitive Providers of Broadband Telecommunications Services," (filed to the FCC regarding RM-11293 and RM-11303), January 16, 007, pp. 9-10.

TABLE 1
Ratio of Recent to 1999 Rates
for Investor-Owned Utilities

	NARUC Survey 1999 Rates	*Recent FCC Order* Rate	Pole Owner
Florida	$5.36	$7.47	Gulf Power
Georgia	$5.79	$8.24	Georgia Power Co.
Pennsylvania	$6.80	$6.79	PECO Energy Co.
Average	$5.98	$7.50	
Ratio of Rates	***1.25***		

Sources:
FCTA v. Gulf Power , 22 F.C.C.R. 1997, EB 04-381, para. 4, 10, & fn 4, FCC 07D-01 (rel. Jan. 31, 2007)

Teleport Communications Atlanta, Inc. v . Georgia Power Co., 17 F.C.C.R. 19859 October 08, 2002, File No. PA 00-005, FCC 02-270

RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Co., 17 F.C.C.R. 25238, December 18, 2002, File No. PA 01-003, DA 02-3485, para. 9

16. I have not discovered any evidence of a similar trend in pole attachment rates for ILEC-owned poles. Therefore, I base my estimate of cable attachment rates for ILEC-owned poles on the 1999 average.

17. The average current pole attachment rates paid by cable companies will depend on ownership shares of the poles used by the cable companies. Table 2 below shows that the average pole attachment rental rate would be $5.25 if the cable companies' pole utilization is the same as the publically available estimate of nationwide pole ownership. I understand that the actual utilization of investor-owned utility poles may be greater than indicated by the nationwide average, but

absent any reliable estimate of actual proportions, I rely on the nationwide shares shown below.

TABLE 2
Weighted Average Cable Rate

	Number of Poles	*Weight*	*Rate*
Investor Owned Utilities	28,050,000	57.3%	$6.43
Telcos	20,900,000	42.7%	$3.68
	48,950,000		
Weighted Average Cable Rate			**$5.25**

18. Based on my discussions with cable industry representatives, I understand that the level of pole attachment rates currently being paid is much higher than the estimate I derived from publically available sources. Therefore, for purposes of considering the possible range of outcomes resulting from the FCC's actions, I ran the model using an alternative average current rate of $7.50.

19. In order to estimate the potential level of a rate increase, I compare the ratio of the rate using the "telecommunications" formula to the rate using the "cable" formula of the Telecommunications Act. This ratio will vary depending upon the amount of space used by the attaching entity, the height of the poles, the amount of usable space, and the total number of attaching entities. I have explored the impact of these variables, but report here on only two of the model runs.

B. Impact of an increase in pole attachment rates

20. In this discussion, I will describe two baseline analyses, which are based on the following common inputs: Total pole length – 37.5 feet; Usable space – 13.5 feet; space used by licensee – 1 foot. For one of the model runs I used three attaching entities; for another model run I used two attaching entities. These two baseline cases yield a ratio of 2.28-to-1 for three entities and 3.24-to-1 for two entities for the level of pole attachment rates using the telecommunications formula compared to the rate level using the cable formula.

21. Using these inputs for current pole rates and the number of attaching entities, I estimate that the new pole attachment rates will range from $11.97 to $24.30. The rate for each combination of inputs is shown in Table 3 below.

TABLE 3
New Pole Attachment Rates

	Current Rate	
	$5.25	*$7.50*
3 Attaching Entities	**$11.97**	**$17.10**
2 Attaching Entities	**$17.01**	**$24.30**

22. The annual impact of the increase in pole attachment rates across the entire cable industry will depend on the number of poles affected. In Table 4 below, I report a range of estimates based on the top and bottom of my estimated range of the number of poles affected, and using the four different estimates of the new pole attachment rates. The total annual dollar impact for this range of inputs is estimated to be between $208 million to $672 million.

TABLE 4
Range of Annual Impact

Number of Attachers	*3*	*3*	*2*	*2*
Poles Subject to Rate Increase (in Millions)	*31.00*	*40.00*	*31.00*	*40.00*
	Current Rate:		***$5.25***	
Annual Impact of Rate Increase (Millions)	**$208.32**	**$268.80**	**$364.56**	**$470.40**
Basic Cable Subscribers in 32 States (in Millions)	*35.81*	*35.81*	*35.81*	*35.81*
Annual Impact of Rate Increase Per Basic Subscriber	**$5.82**	**$7.51**	**$10.18**	**$13.14**
Broadband Subscribers in 32 States (in Millions)	*19.91*	*19.91*	*19.91*	*19.91*
Annual Impact of Rate Increase Per Broadband Subscriber	**$10.46**	**$13.50**	**$18.31**	**$23.63**
Telephone Subscribers in 32 States (in Millions)	*7.54*	*7.54*	*7.54*	*7.54*
Annual Impact of Rate Increase Per Telephone Subscriber	**$27.65**	**$35.67**	**$48.38**	**$62.43**
	Current Rate:		***$7.50***	
Annual Impact of Rate Increase (Millions)	**$297.60**	**$384.00**	**$520.80**	**$672.00**
Basic Cable Subscribers in 32 States (in Millions)	*35.81*	*35.81*	*35.81*	*35.81*
Annual Impact of Rate Increase Per Basic Subscriber	**$8.31**	**$10.72**	**$14.55**	**$18.77**
Broadband Subscribers in 32 States (in Millions)	*19.91*	*19.91*	*19.91*	*19.91*
Annual Impact of Rate Increase Per Broadband Subscriber	**$14.95**	**$19.29**	**$26.16**	**$33.75**
Telephone Subscribers in 32 States (in Millions)	*7.54*	*7.54*	*7.54*	*7.54*
Annual Impact of Rate Increase Per Telephone Subscriber	**$39.50**	**$50.96**	**$69.12**	**$89.18**

23. If the increase in pole rent were allocated to each basic cable customer, the annual cost increase will range from $5.82 to $18.77 per cable customer. If the increase were allocated to the customers of the broadband service that caused the rent increase, the cost increase ranges from $10.46 to $33.75 on a per broadband Internet customer basis. If the increase were allocated to customers with voice service the increase cost ranges from $27.65 to $89.18 on a per voice customer basis. (This latter scenario is not one proposed by the NPRM, nor is it suggested by NCTA. Rather, it is intended to show the range of possible outcomes,

including where the higher pole attachment rate is linked to the provision of voice service.)

C. Effect of a rate increase on the industry and consumers

24. There will be significant damage to the economy and to consumer welfare from the proposed increase in pole attachment rates. The harm will come from three different sources: (1) higher prices to consumers from direct pass through of higher pole attachment rates; (2) reduced availability of broadband services to consumers, particularly in rural areas: (3) reduced investment by cable companies in new plant and technology.

25. The extent of any direct pass through of cost increases will depend on a number of factors, such as the method by which the charge is assessed and the state of competition in the markets affected by the rate increase. For example, if the FCC follows a "contamination" theory of pole attachment rates, the marginal cost per subscriber may not be impacted by the rate increase. But this does not mean that market prices would not increase substantially as a result of the increase in the costs incurred by the cable companies to offer broadband Internet service.

26. It is a common misconception in economics to claim that a change in fixed costs will not affect prices. Sunk costs do not affect prices, but <u>non-sunk fixed costs</u> can do so by changing the investment plans or operational plans of the firm. Prior to incurring a fixed cost, a firm will consider whether the cost can be recovered from the increased marginal profit earned as a result of the activity supported by that fixed cost expenditure. If the margin earned is insufficient, the firm will not

expend the fixed cost, but will exit or cut-back its activities in the line of business that relies on the fixed cost item. As a result of the firm's decision to cut-back its activities, there will be less output and less competition in the market. And this will affect prices and consumers in many important and complex ways.

27. The effect of an increase in non-marginal pole attachment rates will depend on whether the cable company can be more profitable by withdrawing from the part of the market (i.e. broadband access or voice service) that causes the increase in rates. It is difficult to assess the likelihood of this happening, but I would expect that if higher pole attachment rate are imposed as a result of a cable company entering a line of business, cable companies will withdraw from offering broadband service in some markets. This will be more likely to happen in geographic areas where pole attachment costs are high relative to the size of the customer base, such as in rural areas. The reason is that the cable company will have less upside potential to recover the fixed pole attachment costs from this smaller customer base. The conditions that would contribute to the likelihood of market exit are: low population density and a greater proportion of electric utility-owned poles.

28. As an example, consider an area with a population density of 15 households per mile of cable plant.[6] The potential cost increase per broadband customer (or voice customer) will depend on the percentage of customers that subscribe the service, i.e. the take rate. Based on the range of potential pole attachment rate increases

[6] As an example, Kentucky Power Company, an investor owned utility, provides service to 145,000 residential customers over 9,777 miles of distribution plant, for an average 14.8 customers per distribution mile.

and a reasonable range of take rates, I estimate the annual impact on a per broadband customer basis to be in a range of $52.27 to $392.00. The results are shown in Table 5 below.

TABLE 5
Increase in Cost Per Subscriber

		Take Rate		
		10%	*20%*	*30%*
Rate Increase:	*$6.72*	**$156.80**	**$78.40**	**$52.27**
Rate Increase:	*$16.80*	**$392.00**	**$196.00**	**$130.67**

Assuming 15 households per plant mile, and 35 poles per mile.

29. The key point of this exercise is to show how much retail rates for cable broadband access service would have to increase in order to justify continuing to offer the service. A cable company operating in rural area of this density and facing an increase in pole attachment rates of this magnitude would have to increase retail rates by the amount indicated on the services that cause this cost increase – not on its basic cable subscribers. If the cable company could not pass through these higher retail rates – along with all of its other costs – without driving its take rates below a break even level, it would not offer broadband services to these customers.

30. Consumers would bear very large costs in any market where higher pole attachment rates drive the cable companies out of the broadband access line of business. The loss to consumers in these markets would be much larger than

indicated by the per-customer cost increases shown in the tables above. Since in many markets the cable company is one of only two broadband providers, its exit from the market would leave the ILEC monopoly free to raise prices and degrade service. There should be no doubt that restoration of a monopoly would create losses many times greater than the size of the "tax" that is being proposed for the cable industry.

31. Increases in pole attachment rates can also be expected to reduce the cable industry's ability to invest in future plant and new technology. As stated earlier, the potential for earning profits in rural areas will be especially hard hit by increased pole rates. More broadly, to the extent that cable companies are not able to pass through cost increases, or reduce costs by scaling back operations, their financial position will weaken, which can be expected to affect the companies' investment plans and ability to engage in developing new technologies and services.

IV. "LEVEL PLAYING FIELD" CONSIDERATIONS DO NOT DICTATE AN INCREASE IN THE RATES PAID BY CABLE COMPANIES

32. The Commission requests comment on whether "having different rates for different classes of providers providing the same services distort[s] investment decisions or tilt[s] the competitive playing field."[7] The Commission's tentative conclusion to adopt "a uniform rate for all pole attachments used for broadband

[7] Notice, ¶26.

Internet service" is based at least in part on its understanding that a uniform rate would promote broadband deployment and help create competitive neutrality.[8]

33. I agree with the Commission's goal to achieve competitive neutrality, but do not share in its tentative conclusion that setting a so called uniform rate for pole attachments used for broadband Internet access service will achieve that goal. In a world where all service providers pay a third party for use of poles, it would be a relatively simple matter to achieve competitive neutrality by setting a uniform rate. However, the different categories of service providers (e.g. ILECs, cable companies, wireless providers, BPL providers) do not pay pole attachment rates or incur pole usage costs in a parallel manner. Therefore, it is not possible to create uniformity or competitive neutrality simply by declaring that a uniform rate will apply to pole attachments for broadband Internet access.

34. Considering the limited information available on the costs incurred by the ILECs for use of their own poles and the poles owned by the electric utilities and potential limitations on the Commission's jurisdiction, it is probably not possible to discover or mandate a completely neutral "playing field." However, it is possible and important to investigate whether the change from the status quo proposed by the Commission will move things in the right direction. My analysis of this issue leads me to believe that cable companies are not now receiving an unfair advantage over their primary competitors in video, data, and voice residential markets. Therefore, the Commission's proposal to impose higher pole

[8] Notice, ¶36.

attachment fees will fall disproportionately on the cable companies could skew the market toward a less neutral outcome.

35. To facilitate discussion of this issue, I will proceed by first explaining the meaning of competitive neutrality. Then, I will compare the costs of pole usage for ILECs and cable companies.

A. Competitive Neutrality Defined

36. I believe that the best test of whether a policy change is competitively neutral is to analyze whether it will cause or contribute to a market outcome in which services are supplied by more efficient firms. This can be judged primarily by how it alters the marginal or incremental cost of the participants. For example, if a policy imposes a "tax" on one group of firms by setting the price of an input it uses above marginal cost, but allows other firms to use this input without paying the "tax," it will be giving the second set of firms an artificial advantage, which may lead the market to substitute higher-cost output for lower-cost output. In order to perform a test of "competitive neutrality," therefore, it is necessary to analyze the effects of a policy change on the marginal and incremental cost of differently-situated firms.

B. Comparison of the cost of pole usage for cable companies and ILECs

37. A provider of broadband Internet access incurs marginal or incremental cost in two different ways. First, the provider incurs the incremental cost of remaining in the broadband access business. This category of incremental cost includes any ongoing (non-sunk) fixed cost of the business itself, including any increment in

the pole attachment rates or costs that are imposed as a consequence of offering broadband service to any customers.

38. The second category of marginal cost is the more "traditional" change in cost with respect to an increase in the number of customers taking service from that broadband Internet access provider. This category of marginal cost includes any change in pole attachment rates linked to the number of customers served. For a pole owner, this category of marginal cost would include any additional costs associated with adding more subscribers to the system.

39. An increase in pole attachment rates charged to a cable company that provides broadband Internet access service will impose a higher marginal or incremental cost on the company of continuing to offer broadband service. The incremental cost effect will result from a pole attachment rate increase tied to the decisions whether to offer the service at all. In contrast, the "per customer" marginal cost effect will result from a pole attachment rate increase that is prorated based on the number of customers subscribing to the cable company's broadband access service.

40. By comparison, the ILEC's marginal cost of pole attachments or pole usage will be different depending on pole ownership. There are three general categories: (1) poles owned by the ILEC; (2) poles owned by electric utilities but shared under joint use agreements; (3) poles not owned by an ILEC or covered by a joint use agreement with an electric utility.

41. On poles that it owns outright, an ILEC will incur zero marginal cost with respect to adding a new service (e.g. broadband or video) or with respect to adding subscribers to any service offering. Therefore, an increase in "uniform" pole attachment rates charged to cable companies for broadband service will give the ILECs an artificial incremental cost advantage, and shift the market towards ILEC delivery of these services. This will happen with respect to any market or markets where the ILECs and cable companies go head-to-head. For example, in the rapidly developing market for the bundle of voice, data, and video service, the imposition of a higher pole attachment rate on the cable companies will provide an artificial benefit to the ILECs – at least with respect to the poles that it owns.

42. When an ILEC's use of another party's poles is governed by a joint use agreement, the marginal cost of a service or an additional subscriber will be entirely dependent on the nature of the joint use agreement. If an ILEC's responsibility for building or maintaining poles is unaffected by what services it offers or the number of subscribers to those services, then any change in the regulated pole attachment rates will have no effect on the ILEC's marginal cost. Under the terms of the joint ownership agreements that I have reviewed, neither party incurs additional cost or obligations as a result of a change in the number or type of services offered or the number customers being served. Also in these joint ownership agreements either party may use unallocated space without additional charge.

43. I understand that some ILECs and utilities have argued that the "adjustment rates" contained in some joint use agreements are evidence of pole "rental" at rates well

in excess of the cable pole attachment rate. (These adjustment rates are applied if a joint owner's ownership of poles is out of balance with the ownership share required by the agreement.) I disagree with the argument that these adjustment rates are a proper benchmark for pole attachment rates to be paid by cable companies or others attachers.

44. The adjustment rates are designed to encourage an equitable ownership share of the jointly used poles. The adjustment rates are not a marginal rate for pole usage, but for the right to remain a party to a joint use agreement, which is a complex multifaceted agreement with many benefits and costs. The parties to the joint use agreement need to create incentives to prevent one of the parties from avoiding new pole placement or replacement of poles, especially in higher cost locations. One would expect the adjustment rates to be higher than a compensatory rental rate in order to give a more powerful incentive for the joint owner to maintain their shares and not avoid sole responsibility for the "marginal" – and therefore most expensive – pole.

45. In cases when an ILEC's pole attachment arrangement is entirely as a "renter" of space, with no involvement in a joint ownership agreement with the utility, its marginal cost and total cost will depend entirely on the pole attachment rates that it pays. I am not aware of any systematic information on the frequency of these agreements or the amounts paid by ILECs to cooperatively or investor-owned pole owners. As a policy matter, if it were established that there was a pure pole rental relationship between an ILEC and a utility, it would be reasonable for ILECs and cable companies to pay the same absolute and marginal rates with

respect to their offerings of broadband Internet service. This could be accomplished by imposing a single rate regardless of services offered, set near marginal costs in order to maximize economic efficiency. On the other hand, evidence on the existing levels of these rental rates should not serve as a benchmark for setting rates across-the-board on all poles leased by cable companies or other attachers.

46. In conclusion, I believe that if the Commission were to set a higher rate for use of poles for broadband service access, the burden would fall disproportionately on the cable companies.

V. CONCLUSION

47. The Commission's proposal to adopt a uniform rate for broadband Internet access service at a level above the cable rate would not improve on economic efficiency or help create competitive neutrality.

48. The Commission's proposal to raise the rates paid by cable companies above current levels could cost the industry and the public between $208 million and $672 million annually. Allocated across all broadband subscribers in the states affected by the FCC, this would translate to a cost increase ranging between $10.46 and $33.75 annually per broadband subscriber.

49. The proposed increase in pole attachment rates is likely to make it unprofitable for cable companies to enter new markets or continue to offer broadband service in some rural areas. This will impose very large costs on rural customers, who

will be left without broadband service, or at best have no alternative to DSL service.

50. After reviewing the information and data filed by the ILECs and utilities in the comment round of this proceeding, I propose to elaborate and expand my analysis of the economic issues raised by the Notice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: March 7, 2008

Michael D. Pelcovits

Michael D. Pelcovits

MiCRA *Microeconomic Consulting & Research Associates, Inc.*

MICHAEL D. PELCOVITS

PRINCIPAL
Microeconomic Consulting & Research Associates, Inc. (MiCRA)
1155 Connecticut Avenue, N.W., Suite 900
Washington, D.C. 20036

Phone: (202) 467-2513 mp@micradc.com Fax: (202) 296-5694

CURRICULUM VITÆ

(January 2008)

EDUCATION

Massachusetts Institute of Technology, Ph.D. (Economics), 1976
University of Rochester, B.A. (Economics), *summa cum laude*, 1972

EMPLOYMENT

MiCRA
Principal: October 2002 – Present

MCI Communications (WorldCom, subsequent to its acquisition of MCI)
Vice President and Chief Economist: 1998 - 2002
Executive Director: 1996 – 1998
Director: 1992 – 1996
Senior Policy Adviser: 1988 – 1992

Cornell, Pelcovits & Brenner Economists Inc
Vice President and Treasurer: 1982 – 1988

Owen, Cornell, Greenhalgh & Myslinski Economists Inc.
Senior Economist: 1981 – 1982

Federal Communications Commission, Office of Plans and Policy
Senior Economist: 1979 – 1981

Civil Aeronautics Board, Bureau of International Aviation
Industry Economist: 1978 – 1979

University of Maryland, College Park, Department of Economics
Assistant Professor: 1976 – 1978

ACADEMIC AWARDS

National Science Foundation Graduate Fellowship, 1972 – 1975
Phi Beta Kappa, 1972
Isaac Sherman Graduate Fellowship, 1972 (University of Rochester)
John Dows Mairs Prize in Economics, 1971 (University of Rochester)

PUBLICATIONS

"Long Distance Telecommunications" in Diana L. Moss, editor, Network Access, Regulation and Antitrust, (Routledge), 2005.

"The WorldCom-Sprint Merger" in John Kwoka, Jr. and Lawrence J. White, editors, The Antitrust Revolution, The Role of Economics, 4th Edition (Oxford University Press), 2003.

"Economics of the Internet," (with Vinton Cerf), in Gary Madden and Scott Savage, editors, The International Handbook On Emerging Telecommunications Networks (Edward Elgar), 2003.

"Application of Real Options Theory to TELRIC Models: Real Trouble or Red Herring" in James Alleman and Eli Noam, editors, The New Investment Theory of Real Options and its Implications for Telecommunications Economics, (The Netherlands, Kluwer Academic Publishers, 1999).

"The Promise of Internet Access over Cable TV: Should the government force open access requirements?" (with Richard Whitt), CCH Power and Telecom Law, Vol. 2, No. 7, November/December 1999.

"Toward Competition in Phone Service: A Legacy of Regulatory Failure," (with Nina W. Cornell and Steven R. Brenner), Regulation, July/August 1983.

"Access Charges, Costs, and Subsidies: The Effect of Long Distance Competition on Local Rates," (with Nina W. Cornell), in Eli Noam, editor, Telecommunications Regulation Today and Tomorrow, (New York: Harcourt Brace Jovanovich, 1983).

"The Equivalence of Quotas and Buffer Stocks as Alternative Stabilization Policies," Journal of International Economics, May 1979.

"Revised Estimates U.S. Tax Revenue (with Jagdish Bhagwati), in Bhagwati and Partington editors, Taxing the Brain Drain, (North Holland, 1976).

"Quotas Versus Tariffs," Journal of International Economics, November, 1976.

OTHER PROFESSIONAL ACTIVITIES

Speaker and Panelist (selected examples):

Advanced Workshop in Regulation and Competition, Center for Research in Regulated Industries, Rutgers Business School, "Open Access Policies, Net Neutrality and Incentives for Innovation in the Telecommunications," June 29, 2006

National Association of State Utility Consumer Advocates, "Telco Structural Separations, Costs & Benefits," June 19, 2001

LeBoeuf, Lamb, Greene & MacRae, "Telecom Restructuring: The Road to Profitability -- Is there a Map?" June 11, 2001

Columbia University, Graduate School of Business, Institute for Tele-Information, "European Lessons in Liberalization: The German Experience in Telecommunications & Internet Applications," February 16, 1999

Massachusetts Institute of Technology, "Economics of the Internet: Lessons from Regulation of Telephony," April 30, 1998

National Association of State Utility Consumer Advocates, "The Telecommunications Act Two Years Later," February 10, 1998

Columbia University, Graduate School of Business, Institute for Tele-Information, "From the Blueprint to Reality: A Look Into the Second Year of the Telecommunications Act of 1996," April 10, 1997

Federal Communications Commission, Federal State Joint Board on Separations, February 26, 1997

Alliance for Public Technology, "Technologies of Freedom: Linking the Home to the Highway," February 21, 1997

Federal Communications Commission, Federal-State Joint Board on Universal Service, June 5, 1996

Columbia University, Graduate School of Business, Institute for Tele-Information, "Telecommunications Act of 1996: The Morning After," February 6, 1996

New York Law School, Communications Media Center, "Universal Service in Context: A Multidisciplinary Perspective," December 6, 1995

Kansas University, "Stakeholders Symposium on Telecommunications," November 2, 1995

Guest lecturer in graduate and undergraduate courses at:

Columbia University, Graduate School of Business
New York University, Stern School of Business
Georgetown University, McDonnough School of Business
George Washington University
Johns Hopkins University
University of Maryland
American University
Northeastern University

RECENT TESTIMONIES (2003 to present)

U.S. DISTRICT COURT

In The United States District Court for The District of Colorado, Civil Action No. 03-F-2084 (CBS), QWEST CORPORATION, Plaintiff, v. AT&T CORP, Defendant. (Deposition taken; case settled)

LONDON COURT OF INTERNATIONAL ARBITRATION

In the Matter of an Arbitration Between: France Mobile Telecom Mobile Satellite SA, Stratos Wireless Inc, Telenor Satellite Services AS Claimants - and – Inmarsat Global Limited Respondents, LCIA Arbitrations No. 6767, 6768, and 6769.

COPYRIGHT ROYALTY BOARD

In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Records, Docket No. 2005-1 CRB DTRA

In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings for a New Subscription Service, Docket No. 2005-5 CRB DTNSRA

In the Matter of Adjustment of Rates and Terms for Preexisting Subscription Service and Satellite Digital Audio Radio Services, Docket No. 2006-1 CRB DSTRA

STATE UTILITY COMMISSIONS

State of New Hampshire, Public Utility Commission, Joint Petition of Verizon New England Inc., and FairPoint Communications, Inc. Transfer of New Hampshire Assts of Verizon New England, Inc. et. al., Docket No. DT 07-011

State of Vermont, Public Service Board, Joint Petition of Verizon New England, Inc., d/b/a Verizon Vermont, Certain Affiliates Thereof and FairPoint Communications, Inc. for approval of asset transfer, acquisition of control by merger and associated transactions, Docket No. 7270

State of Connecticut, Department of Public Utility Control, DPUC Investigation of Intrastate Access Charges, Docket No. 02-05-17.

State of Connecticut, Department of Public Utility Control, Application of Southern New England Telephone Company for Approval to Reclassify Certain Private Line Services from Noncompetitive to Competitive Category, Docket No. 03-02-17.

Pennsylvania Public Utility Commission, AT&T Communications of Pennsylvania, Inc. v. Verizon North, Inc. Docket Number C-20027195.

Pennsylvania Public Utility Commission, Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements, Docket No. I-00030099.

Pennsylvania Public Utility Commission, Generic Investigation in re: Impact On Local Carrier Compensation if A Competitive Local Exchange Carrier Defines Local Calling Areas Differently Than the Incumbent Local Exchange Carrier's Local Calling Areas but Consistent With Established Commission Precedent, Docket No. I - 00030096.

Pennsylvania Public Utility Commission v. Verizon Pennsylvania Inc. Tariff No. 216 Revisions Regarding Four Line Carve Out, Docket No. R – 00049524; Pennsylvania Public Utility Commission v. Verizon Pennsylvania Tariff No. 216 Revisions Regarding Switching, Transport and Platform for High Capacity Loop, Docket No. R – 00049525.

FCC DECLARATIONS

In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket No. 03-123

In the Matter of Amendments of Parts 1, 21, 73, and 101 of The Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66

In the Matter of Tyco Telecommunications, VSNL Telecommunications, et al, Application for Transfer of Control of Cable Landing Licenses, Petition to Deny of Crest Communications Corporation

In the Matter of Review of the Commission's Rule Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers

In the Matter of AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services

In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities

Center for Communications Management Information, Econobill Corporation, and On Line Marketing, Inc., Complainants, v. AT&T Corporation, Defendant

RECENT CONSULTING ASSIGNMENTS

Telecommunications Industry

Prepared FCC declaration for Sorenson Communications concerning the rate methodology for reimbursing Video Relay Service providers

Prepared FCC declaration for the Wireless Communications Association International analyzing the impact of limits on spectrum leases in the Educational Broadcasting Service bands on investment in wireless infrastructure

Prepared expert reports for the Infocomm Development Authority of Singapore on access to submarine cable landing stations and regulation of local leased line circuits

Prepared and presented an analysis of the market for termination of calling on mobile phones to Ofcom, the independent regulator and competition authority for the UK communications industries

Hired to provide expert analysis of liability and damage issues in Civil Action No. 5:03-CV-229: *Z-Tel Communications Inc.* v. *SBC Communications Inc. et al;* In the United States District Court for the Eastern District of Texas, Texarkana Division (case settled)

Other Industries

Analyzed the market for satellite radio services (XM and Sirius) and recommended rates for the compulsory license fee for digital audio transmission of sound recordings

Analyzed the market for Internet music services and recommended rates for the compulsory license fee for digital audio transmission of sound recordings.

Hired by a rural electric power company to develop a damage model for a case involving the failure of a lessee to properly maintain and utilize a coal-powered electric power plant (case settled)

Analysis of economic benefits and tax revenues from the construction and operations of a hotel and villa complex in the British Virgin Islands

ATTACHMENT 2

Methodology and Sources

Estimation of the total number of poles directly and indirectly affected by the FCC decision

The precise number of poles currently in use for each of four groups, Investor-Owned Utilities ("Private Utilities"), ILECs, Rural Electrics and Railroads, is not readily available. However, the American Wood Protection Agency (AWPA) has published estimates for each of these four ownership groups, which are supported by estimates of the total number of poles obtained from other sources. As shown in **TABLE A-1** below, AWPA's combined estimate for the four ownership groups is 134 million poles.[1] Other sources have identified that there are "approximately 135 million chemically treated wood utility poles in the U.S.,"[2] and that "150 million poles in use."[3] A January 2008 interview with a wood preservation expert refers to 160 million poles, or "one [pole] for every other person."[4] Also, AWPA's estimate for Private Utilities is 9 million lower than the 60 million estimated by the Electric Power Research Institute (EPRI).[5]

---

[1] AWPA, "Frequently Asked Questions," http://www.awpa.com/references/faq accessed on February 20, 2008.

[2] http://www.beyondpesticides.org, accessed on February 20, 2008

[3] North Pacific

[4] NPR Transcript, "What's Up with Those Utility Poles," January 6, 2007 (interview with Professor Jeff Morrell and Bryan Hayes).

[5] The Electric Power Research Institute (EPRI), "Treated Wood Poles: In Use and In the Environment, Questions and Answers About Utility Poles."

TABLE A-1
Poles by Ownership

	Number of Poles	*Percent of Total*
Private Utilities	51,000,000	38.1%
ILECs	38,000,000	28.4%
Subtotal of Private Utilities & ILECs	89,000,000	66.4%
Rural Electrics	37,000,000	27.6%
Railroads	8,000,000	6.0%
Subtotal of Rural Electrics & Railroads	45,000,000	33.6%
Total	134,000,000	

State population data is used as a proxy for the portion of the nation's poles that are located in the 32 states subject to FCC-regulated pole attachment rates. Since 55% of the U.S. population lives in the FCC-regulated states,[1] as shown in **TABLE A2** below, we estimate that 73.7 million poles would be located in those states (*i.e.*, 134.0 million times 55%).

TABLE A-2
2007 Population

	Population	*Percent of Total*
FCC-Regulated States	165.8 Million	55.0%
Self-Regulated States	135.9 Million	45.0%
Total	301.6 Million	

As shown in **TABLE A-1** above, 33.6% of the nation's poles are owned by Rural Electrics and Railroads, entities whose poles attachment rates are not subject to FCC-regulation. For our

[1] U.S. Census, July 2007 (http://www.census.gov/Press-Release/www/releases/archives/population/011108.html).

analysis, we have assumed that 33.6 % of the 73.7 million poles in the FCC-regulated states are also owned by Rural Electrics and Railroads. Therefore, we estimate that 49.0 million poles would be subject to FCC-regulated rates (*i.e.*, 73.7 million times 66.43%).

The estimate of 49 million poles includes all poles subject to FCC-regulated rates, regardless of whether a cable company is now attaching to the pole. It is necessary to adjust for this factor. We understand based on discussions with industry sources that cable companies attach to approximately two-thirds of all poles. Using this factor, we estimate that the cable industry attaches to 32.7 million poles (*i.e.*, 49.0 million times 66.7%) in jurisdictions affected directly by the FCC ruling.

The next adjustment is to account for pole attachments in areas where the cable company does not offer broadband service. According to NCTA statistics, 123,400,000 homes are passed by cable, and of these 117,700,000 are passed by high-speed data service. Therefore, on a nationwide basis, 95.4 per cent of homes passed by cable are broadband capable and would be subject to a higher pole attachment rate. Applying this percentage to the 32.7 million poles derived earlier yields an estimate of 31.2 million poles directly affected by the FCC ruling. This estimate (rounded down to 31 million) serves as the lower bound for affected poles used in this study.

In addition, the rate set by the FCC would be likely to lead to an increase in pole attachment rates set by rural electrics. As detailed in the prior paragraph, 31 million (or 35%) of the 89 million poles owned by ILECs and IOUs are directly affected by the FCC ruling. If 35% of all poles owned by rural electrics were also subject to a similar rate increase, then an additional 13 million poles (*i.e.*, 35% times 37 million) would be indirectly affected by the

FCC's decision. Hence, the 31 million poles subject to the FCC jurisdiction would increase to 44 million poles, directly and indirectly affected by the FCC's decision.

However, an adjustment should be applied to reflect the lower percentage of the poles attached by cable companies to rural electrics and the uncertain affect of the FCC decision on pole attachment rates charged by the rural electrics. We believe a reasonable upper-bound for the indirect effect of the FCC's decision should be based on an assumption that two-thirds of the 13 million poles owned by rural electrics, or 9 million poles, would be subjected to the higher rates. When combined with the 31 million poles discussed above, 40 million poles would be directly or indirectly affected by the FCC's action. This serves as the upper bound for calculating the impact of the higher pole attachment rates.

NARUC data on pole attachment rates in 1999

As explained in the text, the rates reported in the NARUC paper were averaged separately for ILEC owned poles and electric utility owned poles. Table A3 provides the rates in each state for each ownership category as well as the average rate of each on both an unweighted and weighted basis. The study uses an unweighted average, since we were unable to take account of the method used in the NARUC paper for averaging across individual observations in each state.

TABLE A-3
Average 1999 Pole Attachment Rates
for FCC-Regulated States

	Poles Owned by ILECs	Poles Owned by Private Electrics	*Population Factor*
Alabama	$5.17	$7.02	*2.79%*
Arizona	$3.35	$4.61	*3.82%*
Arkansas	$1.99	$4.00	*1.71%*
Colorado	$4.00	$1.72	*2.93%*
Florida	$3.99	$5.36	*11.01%*
Georgia	$4.56	$5.79	*5.76%*
Hawaii	$8.50	$8.50	*0.77%*
Indiana	$3.75	$5.57	*3.83%*
Iowa	$2.75	$3.50	*1.80%*
Kansas	$3.21	$4.00	*1.67%*
Maryland	$2.21	$6.40	*3.39%*
Minnessota	$3.13	$3.48	*3.14%*
Mississippi	$4.71	$5.77	*1.76%*
Missouri	$3.39	$4.72	*3.55%*
Montana	$2.50	$3.55	*0.58%*
Nebraska	$4.50	$6.12	*1.07%*
Nevada	$4.38	$5.22	*1.55%*
New Hampshire	$7.26	$7.61	*0.79%*
New Mexico	$1.07	$1.00	*1.19%*
North Carolina	$4.45	$6.22	*5.47%*
North Dakota	$2.75	$3.50	*0.39%*
Oklahoma	$2.14	$4.24	*2.18%*
Pennsylvania	$4.60	$6.80	*7.50%*
Rhode Island	$4.98	$6.71	*0.64%*
South Carolina	$4.41	$7.23	*2.66%*
South Dakota	$2.75	$3.50	*0.48%*
Tennessee	$6.18	$7.30	*3.71%*
Texas	$2.58	$4.06	*14.42%*
Virginia	$2.40	$4.39	*4.65%*
West Virginia	$3.73	$5.84	*1.09%*
Wisconsin	$2.90	$3.98	*3.38%*
Wyoming	$2.00	$4.21	*0.32%*
Simple Average	***$3.76***	***$5.06***	
Weighted Average	***$3.68***	***$5.14***	

Note: The population factors reflect a state's population relative to the 32-state total population, and are used to compute the Weighted Average Rates.

Other evidence on recent pole attachment rates

Additional information on recent pole attachment rates is included in the Time Warner Telecom White Paper on Pole Attachments. This evidence supports an even larger estimate for the increase in pole rates since 1999. In Table A4 below, we compare the Time Warner Telecom (TWT) reported rates to the NARUC reported rates for the four states that were not included in our survey. TWT does not report whether these pole attachment rates were for ILECs or electric utilities. In either case, however, the ratio of the rates would be higher than the 1.25 ratio used in the paper to inflate the rates for electric utilities.

TABLE A-4
Ratio of TWT to NARUC Attachment Rates
Based on Rates Reported by Time Warner Telecom (TWT)

			NARUC 1999	
State	Population	TWT	ILECs	Private Electrics
Indiana	6,345,289	$4.90	$3.75	$5.57
North Carolina	9,061,032	$6.26	$4.45	$6.22
Wisconsin	5,601,640	$4.57	$2.90	$3.98
Texas	23,904,380	$7.10	$2.58	$4.06
Weighted Average		$6.30	$3.16	$4.70
Ratio of TWT to NARUC			***1.99***	***1.34***