

**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; ) FCC 07-187  
Amendment of the Commission's Rules and )  
Policies Governing Pole Attachments ) RM-11293, RM-11303

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION  
INITIAL COMMENTS**

The National Telecommunications Cooperative Association (NTCA)<sup>1</sup> files these initial comments in response to the Federal Communications Commission's (Commission's or FCC's) November 20, 2007, Notice of Proposed Rulemaking (NPRM) seeking comment on changes to its implementation of Section 224 of the Act which establishes the rights of pole attachments at just and reasonable rates, terms and conditions.<sup>2</sup>

NTCA commends the Commission for opening this rulemaking proceeding on rates, terms, and conditions for pole attachments. Since 2005, NTCA has contended that the pole attachment rules do not fully implement the Communications Act of 1934, as amended (Act), and unreasonably discriminate against incumbent local exchange carriers (ILECs), particularly small, rural ILECs. The NPRM presents an opportunity for the Commission to eliminate this discrimination. NTCA urges the Commission to recognize through the NPRM the difficulties small rural ILECS face in negotiating pole attachment agreements with utilities. Furthermore,

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<sup>1</sup> NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents over 580 rural rate-of-return regulated incumbent local exchange carriers (ILECs). All of its members are full service local exchange carriers, and many members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

<sup>2</sup> *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, FCC 07-187, Notice of Proposed Rulemaking (NPRM) (rel. Nov. 20, 2007).

the Commission should create a dispute resolution mechanism that would allow ILECs to process and resolve complaints against utilities.

## **I. Background.**

Section 224(b)(1) of the Act states that the Commission “shall regulate the rates, terms and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions.” “Pole attachment” is defined in Section 224(a)(4) as “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.” The Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public.” ILECs offer telecommunications for a fee directly to the public and are thus “providers of telecommunications service” for whom the protections of 224(b) were intended.

Congress enacted the Pole Attachment Act of 1978 to allow the FCC to regulate the rates, terms and conditions for pole attachments, when attachments are not regulated by a state. To date, eighteen states and the District of Columbia have certified to the Commission that they have regulations in place to determine the rates, terms, and conditions for pole attachments.<sup>3</sup> The Commission has noted that such certification preempts the Commission from accepting pole attachment complaints.<sup>4</sup> The 1978 Act specifically exempted electric cooperatives and did not require utilities to offer access to their poles.<sup>5</sup> If electric cooperatives did provide access to their

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<sup>3</sup> “New Hampshire Joins States That Have Certified That They Regulate Pole Attachments,” Public Notice, WC Docket No. 07-245, DA 08-450 (rel. Feb. 22, 2008) (New Hampshire Pole Attachment Certification). The eighteen states joining the District of Columbia are Alaska, California, Connecticut, Delaware, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Oregon, Utah, Vermont, and Washington.

<sup>4</sup> 47 U.S.C. § 224(c); 47 C.F.R. §§ 1.1401-1.1418; New Hampshire Pole Attachment Certification, p. 1.

<sup>5</sup> 47 U.S.C. § 224(b)(1); § 224(a)(1).

poles, the Commission is required to ensure the rates are just and reasonable. The FCC has established rules and a formula for setting pole attachment rates.

The Telecommunications Act of 1996 expanded pole attachment regulation to apply to telecommunications service providers. The 1996 Act requires utilities to provide cable systems and telecommunications providers access to their poles, ducts, and conduits in a non-discriminatory manner. As a result, the FCC established a formula to govern charges for pole attachments used to provide telecommunications services.

In the NPRM, the Commission seeks to promote pro-competitive and deregulatory goals of the Act while reducing the need of parties to complain about Section 224 violations.<sup>6</sup> The Commission asks broadly:

- Are existing pole attachment rates appropriate?
- Does Section 224 give the FCC the authority to regulate rates ILECs pay for pole attachments?
- Should the Commission adopt rules regarding non-price terms and conditions regarding Section 224 access rights?<sup>7</sup>

The Commission also seeks comment on its tentative conclusion that all broadband Internet access service attachments should be subject to a single rate that is higher than the current cable rate but less than or equal to the telecommunications rate, regardless of the platform over which the services are provided.<sup>8</sup>

The NPRM responds to two 2005 petitions the Commission received by Fibertech (to open rulemakings regarding standard practices for pole and conduit access) and by USTelecom (to decide whether the FCC could regulate pole attachment rates paid by ILECs).<sup>9</sup> Time Warner asked that the Commission adopt the same pole attachment rate for both cable television systems

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<sup>6</sup> NPRM, ¶ 2.

<sup>7</sup> *Id.*, ¶ 3.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Id.*, ¶ 12.

and telecommunications systems to avoid regulatory disparity.<sup>10</sup> USTelecom asserted that the percentage of poles owned by electric utilities has increased significantly since 1996, and that electric utilities leverage the growing imbalance in pole ownership to engage in unjust and unreasonable practices.<sup>11</sup> NTCA, in comments supporting USTelecom's petition, contended that small and rural ILECs are particularly disadvantaged by pole attachment rules.<sup>12</sup>

## **II. The Commission Should Recognize The Disadvantages Small and Rural ILECs Face Regarding Pole Attachment Issues.**

In the NPRM, the Commission sought further clarification on relative bargaining power and NTCA's claim that small and rural carriers are disproportionately harmed by pole attachment issues.<sup>13</sup> This assertion remains an accurate portrayal of difficulties that NTCA's members face in negotiating and, in some cases, litigating contractual terms for pole attachments. Of specific concern to NTCA's small companies are the high rates charged by utilities who fail to provide just and reasonable cost-based rates.

Small rural ILECs such as NTCA's members do not have the leverage necessary to procure fair terms and find they cannot afford protracted litigation over pole attachment rates in state or federal court or before the state public service commission. Even large telecommunications companies have experienced negotiation difficulties with utilities and some have resorted to federal litigation. For example, in a 2007 federal appellate court case, Time Warner failed to convince the bench that a North Carolina electric cooperative's pole attachment rate of \$20 per pole was excessive and discriminatory under state statutes and state common

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<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> NPRM, ¶ 16.

<sup>13</sup> NPRM, ¶¶ 15, 16 n. 50.

law.<sup>14</sup> NTCA members report that this 2007 decision has encouraged utilities to use a free hand in setting pole attachment rates that do not reflect a cost basis.

Unreasonable and unjust rates for pole attachments are not only expensive to small rural companies, but they are also burdensome to the rural consumers the companies serve. Some NTCA members offer local exchange service to as few as 44 lines and nearly half of NTCA members serve between 1,000 and 5,000 lines.<sup>15</sup> The population density in most NTCA member service areas is in the 1 to 5 customers per square mile range.<sup>16</sup> Excessive pole attachment charges to small rural companies cannot be spread among large customer base, as can mid-sized and large carriers. Rural customers of small telcos, consequently, feel a disproportionate impact from unreasonably high pole attachment rates when compared to their urban counterparts.

Small rural telcos often are disadvantaged in their negotiating leverage when dealing with utilities who own the poles essentially as a monopoly. One Kentucky NTCA member reports that, although his state public service commission exerts jurisdiction over pole attachments, that jurisdiction does not extend to electric cooperatives. The electric cooperatives whose poles the NTCA member uses are regulated by the Tennessee Valley Authority (TVA), not the state public service commission. The TVA electric cooperatives' rates are much higher than the rates charged by non-TVA electric cooperatives. Yet, the Kentucky NTCA member has no recourse or remedy for unjust or unreasonable rates through the state commission.

This same NTCA member has been battling a TVA electric cooperative over what constitutes a "ground wire attachment" for several years. The NTCA member does not have

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<sup>14</sup> *Time Warner Entertainment – Advance/Newhouse Partnership, v. Carteret-Craven Electric Membership Corporation*, U.S.C.A. 4<sup>th</sup> Cir. 2007, Case No. 06-1974. A copy is available at: <http://pacer.ca4.uscourts.gov/opinion.pdf/061974.P.pdf>.

<sup>15</sup> NTCA 2007 Broadband/Internet Availability Survey, p. 5, available at [http://www.ntca.org/content\\_documents/2007NTCABroadbandSurveyReport.pdf](http://www.ntca.org/content_documents/2007NTCABroadbandSurveyReport.pdf).

<sup>16</sup> *Ibid.*

much aerial plant because they have buried everything possible. The NTCA member located pedestals near the power poles so they could run a ground wire from their cable sheath to the power company's ground at the bottom of the pole in order to meet the National Electric Safety Code (NESC). The electric cooperative, however, has been charging these "ground wire attachments" the same as any other pole attachment even though they take up virtually no usable space on the pole. The NTCA member company has asserted that this type of attachment should not be billed as a pole attachment at all and has protested the bill; yet again, this NTCA member has no remedy before the state public service commission.

A North Carolina NTCA member describes the challenges they have faced in dealing with the increasing trend toward "hidden" charges. In addition to the rental rates, this member reports that the trend is for utilities to include additional charges for application fees, make-ready costs, security costs, inspection costs, insurance costs, etc. While the Commission has said a reasonable application fee might be appropriate, this NTCA member has contended that those additional costs should generally be included in the rental rate. Since North Carolina has not certified its readiness to assume pole attachment jurisdiction, this NTCA member is struggling for a remedy.

These are just a few examples of the disproportionate harm that small rural ILECS experience in attempting to negotiate pole attachment rates with utilities. Small rural ILECs may not have the financial or personnel resources to detect, negotiate, and challenge successfully the excessively high pole attachment rates and onerous terms and conditions. The Commission should recognize that small rural ILECs and their rural customers are more economically sensitive to unjust and unreasonable high pole attachment rates.

### **III. ILECs Deserve An Express Procedural Remedy For Unjust, Unreasonable Pole Attachment Rates, Terms, and Conditions.**

The NPRM asks whether the Commission should “require the parties to engage in mediated negotiation or arbitration subject to Commission review.”<sup>17</sup> NTCA renews its contention that ILECs deserve some remedy mechanism by which ILECs can present claims of unjust, unreasonable pole attachment rates, terms and conditions imposed by utilities.

Some utility companies appear to ignore their obligation to provide essential public services through fair pole attachment agreements. The right to place those poles was generally acquired through encroachment agreements from the state or through the right or threat of eminent domain. Those poles should be viewed as essential facilities and, as a monopoly providers, the utility companies should, to the extent space is available, provide space to other providers of public services on reasonable terms. This is an issue of great importance to our member companies who rely on pole attachments to provide voice, video and data services to their rural customers. Small rural ILECs need a procedural mechanism to address these complaints, and the Commission’s suggestion for mediation or arbitration is appropriate.

The Commission’s current rules are inconsistent with the Congressional mandate on pole attachments. ILECs lack an express procedural remedy for unjust and unreasonable pole attachment rates, terms, and conditions. The current rules are generally viewed as denying ILECs a remedy against unreasonable pole attachment provisions. Without a remedy or complaint procedure, ILECs are without protection and are forced to pay whatever rates the pole owner requests. Given the current reading of the Commission’s rules, utilities may charge ILECs significantly more than their competitors for the same amount of space on a pole. ILECs may be subject to unreasonably high rates which bear no relation to cost or space.

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<sup>17</sup> NPRM, ¶ 33.

The Commission's current pole attachment rules effectively deny rural ILECs a remedy against unreasonable pole attachment provisions which have a significant economic impact on a substantial number of small rural ILECs. The Regulatory Flexibility Act (5 U.S.C. §601) requires the FCC to consider alternative rules that will reduce the economic impact on small entities. NTCA's proposed changes to the pole attachment rules would reduce the economic impact on small rural communications providers. The proposed rule changes will also promote the public interest, convenience, and necessity through increased competition and diversity in the communications market.

NTCA renews its request that the Commission amends its rules to clarify that: (1) an incumbent local exchange carrier, is a "provider of telecommunications service" under 47 U.S.C. § 224(a)(4), and is entitled to "just and reasonable" pole attachment rates, terms, and conditions when attaching to poles of other utilities; and (2) under Section 1.1404 of the Commission's rules, an ILEC may bring a complaint against a utility company for unjust or unreasonable pole attachment rates, terms, and conditions. Supervised mediation or arbitration would certainly help level the bargaining positions between small rural ILECs and utilities.

### **III. Conclusion.**

For these reasons, the Commission should recognize through the NPRM the difficulties small rural ILECS face in negotiating pole attachment agreements with utilities and should create a dispute resolution mechanism that would allow ILECs to process complaints against utilities to remedy unreasonable pole attachment provisions which have a significant economic impact on a substantial number of small rural ILECs.

Respectfully submitted,

**NATIONAL TELECOMMUNICATIONS  
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March 7, 2008

## CERTIFICATE OF SERVICE

I, Adrienne L. Rolls, certify that a copy of the foregoing Initial Comments of the National Telecommunications Cooperative Association in WC 07-245, FCC 07-187, was served on this 7th day of March 2008 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

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