

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

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

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I. INTRODUCTION AND SUMMARY

The current pole attachment regime is in dire need of reform, and the Commission's *Pole Attachment NPRM* is a critical step in that process.¹ Under today's system, maximum pole attachment rates for cable operators and non-incumbent providers of telecommunications services are set under two different formulas, while incumbent local exchange carriers ("ILECs") are subject to unjustified and excessive pole attachment rates without any means of redress. By treating competitors providing the same or similar services differently, the current pole attachment regime distorts competition and undermines the broader goals of the Communications Act ("Act"), including promoting the deployment of broadband services.

AT&T, Inc. ("AT&T") applauds the Commission's efforts to bring rationality to the pole attachment regime and supports many of the tentative conclusions in the *Pole Attachment NPRM*. AT&T is uniquely positioned to address these issues, given its status as a pole owner and a pole attacher in its capacity as an ILEC within its service territory, a competing local exchange carrier ("CLEC"), and the nation's largest wireless carrier. Although AT&T firmly

¹ *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 (2007) ("*Pole Attachment NPRM*").

believes that market forces and arms'-length negotiations are generally preferable to Commission intervention in ensuring just and reasonable rates, terms, and conditions for services and access to facilities, the current market is not operating effectively with respect to pole attachments. This market failure is evidenced by the sky-rocketing pole attachment rates that AT&T pays under its existing joint use agreements with electric companies ("ELCOs"). Because ILECs historically have been unable to avail themselves of the protections of just and reasonable rates, terms, and conditions for pole attachments under 47 U.S.C. § 224(b)(1), ILECs have little recourse when ELCOs demand exorbitant rates for ILEC pole attachments.

To remedy this situation and to achieve the Commission's objectives of promoting broadband deployment and ensuring competitive neutrality, the Commission should adopt its tentative conclusion that all pole attachments used by a cable television system or telecommunications service provider for broadband Internet access service should be subject to a uniform rate, regardless of the platform over which such service is provided. However, *all* pole attachments of such providers should be subject to a uniform rate without regard to the nature of the services being provided. The same facilities that are used for broadband also are used to provide other services, and, as a practical matter, the two types of services are inseparable for any given attachment. Accordingly, to achieve its overarching regulatory objectives, the Commission should: (i) adopt a rebuttable presumption that all attachments of a cable operator or provider of telecommunications service are used for broadband Internet access service, and (ii) direct that the uniform rate apply to any pole attachment of a cable operator or provider of telecommunications service, regardless whether the attachment is being used for broadband Internet access service as well as to provide other services.

Because of the unique nature of utility poles as structural assets that are impracticable to duplicate, the Commission should adopt a uniform broadband pole attachment rate, limited to reasonable cost recovery. In doing so, the Commission should ensure that only pole-related costs of standard 40-foot Class 5 wood poles and only annual expenses directly associated with a shared pole should be included in calculating a uniform broadband pole attachment rate. Furthermore, the Commission should require that the owner's direct pole-related costs associated with a shared pole be allocated among all users in direct proportion to their allocated share of the pole's total usable space.

The Commission has the authority to adopt a uniform broadband pole attachment rate under 47 U.S.C. § 224. As the Supreme Court has confirmed, the Commission has the responsibility to ensure that the rates, terms, and conditions for pole attachments are “just and reasonable” and has expansive authority to prescribe pole attachment rates in order to promote broadband deployment.²

The Commission also should take this opportunity to correct a fundamental inequity of the current pole attachment regime by extending to ILECs the protections in section 224(b)(1) of “just and reasonable” pole attachment rates, terms, and conditions. As a “provider of telecommunications,” ILECs are entitled to such protections under the plain language of section 224 and consistent with Congressional intent.

II. FACTUAL BACKGROUND

The use of utility poles has evolved considerably from the 1920s when ILECs and ELCOs were the only parties on a pole, and the rates, terms, and conditions for pole attachments were established under so-called “joint use” agreements. Over the years, ELCOs have required

² *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (hereinafter referred to as “NCTA”).

considerably more space on utility poles, while ILECs have required less space, and ELCOs' relative ownership of utility poles has increased dramatically, while the number of poles owned by ILECs has declined. In addition, the number of attaching parties on utility poles has grown as have the types of services pole attachments are being used to provide. As a result of these changes, the use of joint use agreements to establish pole attachment rates is no longer sustainable.

“Joint use” agreements refer to shared use by ILECs and ELCOs in their common operating areas for placement of their respective aerial facilities and related equipment. The objective was to minimize costs and maximize savings by using one pole jointly instead of two separate poles for the placement of the two companies' facilities. Joint use allowed both the ILEC and ELCO to avoid unnecessary investment that could otherwise result in higher rates to their customers and had the added aesthetic and safety benefits of minimizing the proliferation of utility poles across the country.³

The principle underlying joint pole use was straightforward: fair and reasonable allocation of the costs and benefits associated with shared use among users of a “standard” utility pole, typically identified in early joint use agreements as a 35-foot Class 5 pole made of wood. The respective allocation of space and cost responsibility between the ILEC and ELCO in early joint use agreements typically ranged between 40 percent/60 percent to 50 percent/50 percent. Of course, at the time many joint use agreements were entered into by ILECs and ELCOs, each of those entities owned or expected to own a proportion of utility poles that was roughly comparable to the ratio of the rates in their joint use agreements. Increasingly, however, there

³ See Declaration of Veronica Mahanger MacPhee ¶¶ 5-6 (hereinafter “Mahanger Declaration”).

have been fundamental changes in pole usage, which call into serious question the assumptions underlying pole attachment rates in existing joint usage agreements.⁴

First, there have been fundamental changes in the space requirements on poles by the electric and telephone industries. In the 1920s and 1930s when joint use agreements were first introduced, the space requirements of the ILECs and ELCOs were the same or nearly the same for the open (un-insulated) copper wire they both then used. In a typical early joint usage agreement, ILEC and ELCO pole space allocations for the placement of their respective cable facilities either nearly equal at 3 feet and 4 feet respectively, or equal at 3 feet to each party on a 35-foot two-party pole. The 40 percent/60 percent to 50 percent/50 percent rental rates were in line with the two parties' relative pole usage.⁵

Today, by contrast, in order to accommodate the equipment necessary to provide the increasingly higher voltages required to serve their customers, the effective space utilization of poles by ELCOs has increased from 4 feet in the 1970s, to anywhere from 8 feet to 12 feet today. At the same time, as ILECs went from open copper wire to insulated fiber optic cable with infinitely greater pair capacity for serving their customers, their space usage contracted and is continuing to do so. Today, for example, ILECs such as AT&T often need only one to two feet of space on utility poles for their wireline facilities.⁶

Second, there have been fundamental changes in the number of parties occupying joint use poles. While historically only the ILEC and the ELCO occupied a utility pole, the space on utility poles traditionally reserved for the ILEC today also is occupied by cable operators,

⁴ *Id.* ¶¶ 7-10.

⁵ *Id.* ¶ 11.

⁶ *Id.* ¶¶ 12-14.

wireless carriers, and CLECs. . In addition, utility poles also are used by local municipalities for the placement of streetlights, and sometimes by non-telecommunications carriers to carry privately owned facilities.⁷

In renegotiating their joint use agreements, ELCOs insist on preserving the myth that there are only two parties on a pole and that their usage and pole ownership are relatively similar. That scenario bears no resemblance to the reality of today. The addition of other attachments on a joint use pole owned by an ELCO results in the ELCO receiving additional compensation for “renting” the same space on the pole while, at the same time, the ILEC receives no corresponding benefit or reduction in the amount it has to pay despite CATV and CLEC attachments in the ILEC’s space, and even though the additional CATV and CLEC attachments reduce the ILEC’s proportional usage of that pole. Thus, while a traditional joint use agreement may have provided that the ILEC and the ELCO were each responsible for 50 percent of the annual pole costs of a pole owned by the ELCO, revenue for additional attachments significantly reduces the ELCO’s own effective contribution of its annual carrying costs. By contrast, the ILEC is left to defray 40 to 50 percent of the pole’s annual costs, even though it is now using approximately the same amount of space as its competitors.

In addition, it is no longer possible to accommodate the growing number of pole users on the 35-foot standard pole of early two-party joint use. Consequently, ILECs are being asked to help pay for both the initial construction and the recurring annual carrying costs of stronger and taller poles that become necessary in order to accommodate additional attachers, from which ILECs derive no benefit.⁸

⁷ *Id.* ¶¶ 15-16.

⁸ *Id.* ¶¶ 17-20.

Third, the relative ownership of joint use poles has shifted dramatically. Whereas ILECs formerly owned a significant portion of joint use poles, that is no longer the case. The relative pole ownership distribution across the country is now approximately 25 to 30 percent ILEC ownership as compared with 70 to 75 percent ELCO ownership.⁹ In the Midwest, Southwest, and Southeast regions of AT&T's service territory (the areas served by legacy Ameritech, SBC, and BellSouth, respectively), for example, AT&T owns less than 24 percent of the more than 12 million joint use poles in place, with electric utilities owning the remaining 76 percent.¹⁰

The current imbalance in ownership of joint use poles is due to the differing nature of the telecommunications and electric industries. For example, when a new subdivision is under construction, the developer usually contacts the electric company early in the process (and typically before contacting the telephone company) in order to ensure the delivery of electric service. As a result, electric companies are often first to make preparations to serve a new development, which entails the installation of electric company-owned poles at the site. This same phenomenon occurs when a utility pole is damaged and needs to be replaced – because of the real or perceived primacy of electric service, the ELCO typically is the first utility on the scene, giving the electric company the first opportunity to install its own poles. In addition, following natural disasters involving significant number of poles that require replacement, ELCOs are the first to clear an area to ensure the safety of citizens and utility workers, and, as a result, install their own poles in place of any poles owned by ILECs. The imbalance in pole ownership in favor of the ELCOs also has been exacerbated by: (1) overbuilding, which is a

⁹ *Id.* ¶ 21.

¹⁰ Declaration of Phillip Gauntt ¶ 5 (hereinafter “Gauntt Declaration”).

practice by ELCOs to set taller poles beside existing ILEC poles, which results in the ILEC's having to transfer its facilities to the new ELOC poles and thereby lose ownership of its own poles; (2) the desire on the part of ELCOs to maintain control and ownership of joint use poles in order to minimize their potential exposure to liability due to their highly energized facilities; and (3) the ELCOs' expanded need for pole space to accommodate their facilities, which has resulted in ELCOs conducting expensive pole change outs in order to get space on taller poles.¹¹

These trends – the change in the space requirements of the electric and telephone industries, the increase in the number of attaching parties on utility poles, and the dramatic increase in ELCO-owned joint use poles – make the traditional allocation to the ILEC of 40 percent to 50 percent of the cost of a pole under most joint use agreements unwarranted and unsupportable. Yet, when called upon to renegotiate pole rental rates under joint use agreements, ELCOs have little incentive to do so. ELCOs typically refuse to discuss, let alone to update, the obsolete space and cost allocation percentages to reflect more accurately actual pole usage. ELCOs also typically decline to discuss, much less to incorporate, any offset in their pole costs generated by the income they receive from the proliferating number of users seeking to attach to utility poles today. Instead, ELCOs simply continue to demand that ILECs continue to defray 40 percent to 50 percent of their annual pole carrying cost, based on the demonstrably outdated premise that joint use poles still carry attachments of only two parties occupying 3 to 4 feet of space each.¹²

That the current market is not operating effectively is evidenced by the sky-rocketing pole attachment rates that AT&T pays under its existing joint use agreements. For example, in

¹¹ *Id.* ¶¶ 22-26.

¹² *Id.* ¶¶ 28-30.

2007, the pole attachment rates paid by AT&T to two electric companies in the Southwest region increased by 700 percent and 120 percent, respectively. While these rate increases were substantial, they paled in comparison to the demands by these two electric companies, which were seeking increases in attachment rates of more than 2000 percent and 300 percent, respectively. These examples are not unique. In each of AT&T's regions, AT&T has experienced pole attachment rate increases by certain electric companies ranging from approximately 60 percent to more than 200 percent.¹³

ILECs have relatively little bargaining power in re-negotiating pole attachment rates downward under existing joint use agreements. Because ILECs own relatively few joint use poles and have limited options to relocate their facilities from ELCO poles, ILECs often find themselves at the mercy of ELCOs during any renegotiation process. This disparate bargaining power is exacerbated by the historic interpretation excluding ILECs from the protection of “just and reasonable” pole attachment rates under 47 U.S.C. § 224(b)(1), which is an issue the Commission is examining in this proceeding.¹⁴

¹³ Gauntt Declaration ¶¶ 6-9.

¹⁴ Mahanger Declaration ¶ 30; Gauntt Declaration ¶ 7; *see also Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12112, ¶ 13 (2001) (“*Reconsideration Order*”) (rejecting arguments by the electric industry that “the market for pole attachments is fully competitive or that the utilities now lack any disincentive to discriminate against attaching entities”); *Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 6777, 6784, ¶ 11 (1998) (“*Implementation Order*”) (noting that “parties in a pole attachment negotiation do not have equal bargaining positions”).

III. DISCUSSION

A. The Commission Should Establish A Uniform Rate For Pole Attachments Used for Broadband Internet Access Service.

1. Establishment of a uniform broadband pole attachment rate would facilitate the goals of the Act.

In the *Pole Attachment NPRM* the Commission “tentatively conclude[d] that all categories of providers should pay the same pole attachment rate for all attachments used for broadband Internet access service”¹⁵ AT&T supports this tentative conclusion and agrees with the Commission that a uniform broadband pole attachment rate would “promot[e] broadband deployment” and ensure “technological neutrality.”¹⁶

Under the current regime, competing broadband providers pay different pole attachment rates based solely upon their status – an arrangement that “is not in the public interest as it creates distortions in the marketplace that may harm consumers.”¹⁷ A cable operator offering cable modem service pays a maximum rate for pole attachments based on one formula, while a competing local exchange carrier (“CLEC”) offering digital subscriber line service pays a higher maximum pole attachment rate calculated under a different formula. By contrast, an ILEC

¹⁵ *Pole Attachment NPRM* at 20209, ¶ 36.

¹⁶ *Id.*

¹⁷ *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended*, Memorandum Opinion and Order, 22 FCC Rcd 16304, 16360, ¶ 129 (2007); see also *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4696, ¶ 21 (2005) (noting that “in a market where carriers are offering the same services and competing for the same customers, disparate treatment of different types of carriers or types of traffic has significant competitive implications” and could give one carrier “a competitive advantage over another type of carrier”); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5920, ¶ 53 (2007) (noting that the “disparate treatment” of competitors “would introduce competitive distortions into the marketplace”).

offering a competing broadband service does not pay pole attachment rates under either formula but rather must pay whatever rate it can “negotiate” with a pole owner.

In section 706 of the Act, Congress directed the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” by, among other means, “remov[ing] barriers to infrastructure investment.”¹⁸ The Commission has recognized previously that consistent regulatory treatment of competing platforms “best facilitates the goals of the Act, including promoting the ubiquitous availability of broadband Internet access services to all Americans.”¹⁹ This recognition prompted the Commission in 2005 to classify wireline broadband Internet access service as an information service – consistent with the regulatory classification of cable modem service – which, according to the Commission, would “enable consumers to reap the benefits of advanced wireline broadband Internet access services that incorporate the latest technologically advanced integrated equipment, on a more widely available and more timely basis”²⁰

This same reasoning compels the establishment of a uniform broadband pole attachment rate. In today’s broadband market, cable operators and providers of telecommunications services offer the same or similar broadband services and compete for the same customers. Under these circumstances, they should pay the same rate for pole attachments used for broadband Internet

¹⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, tit. 7, § 706(a), 110 Stat. 56, 153 (1996); 47 U.S.C. § 157 note.

¹⁹ See, e.g., *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14865, ¶17 (2005), *aff’d Time Warner Telecom v. FCC*, 507 F.3d 205 (3d Cir. 2007) (“*Wireline Broadband Internet Access Order*”).

²⁰ *Wireline Broadband Internet Access Order* at 14878, ¶ 80.

access service, and this consistent regulatory treatment of maximum pole attachment rates across platforms would promote broadband deployment and consumer choice.

Furthermore, as the Commission found in the *Wireline Broadband Internet Access Order*, regulation that constrains incentives to invest in and deploy the infrastructure needed to deliver broadband services is not in the public interest.²¹ Such is the case today when ILECs such as AT&T are subject to ever increasing pole attachment rates, which artificially inflate the cost of all services, including broadband service. For example, in AT&T's Midwest region, one electric company increased AT&T's pole attachment rates by approximately 58 percent between 2001 and 2007, while another electric company increased rates by 25 percent in one year alone (2007). Between 2000 and 2007, the pole attachment rates that AT&T paid to an electric company in AT&T's West region increased by more than 200 percent between 2000 and 2007. During this same time period, two electric companies in AT&T's Southeast region increased AT&T's pole attachment rates by approximately 60 percent and approximately 113 percent, respectively. ELCOs' use of ILEC pole attachment rates as a line of business to generate revenues rather than as a cost recovery mechanism is a deterrent to ILEC infrastructure investment that the Commission should remedy.²²

²¹ *Id.* at 14896, ¶ 45.

²² Gauntt Declaration ¶¶ 8-9 & 11. In certain instances, AT&T has refused to agree to electric company demands that AT&T pay excessive pole attachment rates. For example, an electric company in AT&T's Southwest region terminated its joint use agreement with AT&T and demanded increased pole attachment rates that were 400 percent to 500 percent higher than the pre-termination rate. After several unsuccessful attempts to reach an agreement, AT&T elected to utilize alternative arrangements to place its facilities going forward, including placing its telecommunications facilities underground. Gauntt Declaration ¶ 10.

The establishment of a uniform pole attachment rate that would apply to all attachments used by a cable television system or provider of telecommunications service for broadband Internet access service would alleviate these problems. It would remove distortions in the broadband market by ensuring consistent regulatory treatment of competing broadband platforms. It also would remove disincentives to invest in and deploy broadband infrastructure by eliminating the use of pole attachment as a revenue stream that artificially inflates the cost of broadband service. Thus, by establishing a uniform broadband pole attachment rate, the Commission would promote Congress's express goals of "secur[ing] lower prices and higher quality services for American telecommunications consumers and encourag[ing] the rapid deployment of new telecommunications technologies [*i.e.*, broadband]."²³

2. The pole attachment rate for broadband Internet access service should apply when the attachment also is used to provide other services.

As reflected in the *Pole Attachment NPRM*, the Commission's tentative conclusion to establish a uniform broadband pole attachment rate is premised upon the concept that "*all* categories of providers should pay the same pole attachment rate for *all* attachments used for broadband Internet access service"²⁴ This concept of uniformity – that all pole attachments used to provide broadband Internet access service should be subject to the same rate – is

²³ Pub. L. No. 104-104, § 706, 110 Stat at 153; *see* 47 U.S.C. § 157 note (a) (defining "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology"). Although AT&T endorses the establishment of a uniform pole attachment rate for broadband Internet access service, this endorsement and discussion are limited to applying such rate to a "pole attachment" as that term is defined in 47 U.S.C. § 224(a)(4).

²⁴ *Pole Attachment NPRM* at 20209, ¶ 36 (emphasis added).

sensible. It also is a reasonable means by which to achieve the Commission’s objective of creating “even-handed treatment and incentives for broadband deployment”²⁵

Equal treatment of pole attachments used to provide broadband Internet access services requires that any uniform rate applicable to broadband pole attachments apply even when such attachments are used to provide other services. Cable operators and providers of telecommunications frequently offer broadband services over the same aerial facilities used to provide video or telecommunications services. This is a cost-effective serving arrangement that promotes efficiencies in offering broadband.²⁶ Consequently, as long as a pole attachment is used to provide broadband Internet access service, it should be eligible for the broadband pole attachment rate, regardless of what other services the attachment may be used to provide.²⁷

Section 706 does not compel the Commission “to *separate out* those pole attachments that are used to offer broadband Internet access service from those used for other services” in establishing a broadband pole attachment rate.²⁸ Section 706 directs the Commission to promote broadband deployment by “remov[ing] barriers to infrastructure investment.”²⁹ Any rule by

²⁵ *Id.*

²⁶ *See, e.g., Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, Fourth Report to Congress, 19 FCC Rcd 20540, 20555 (2004) (noting that “DSL is a copper-based service that allows the telephone carrier to add certain electronics to the telephone line to enhance the copper loop that provides the customer voice service so that it serves as a conduit for both voice and high-speed data traffic”).

²⁷ As discussed below, the Supreme Court has held that pole attachments carrying commingled services are subject to Commission regulation under section 224(b)(1) and that Congress left “unmodified the FCC’s customary discretion in calculating a ‘just and reasonable’ rate for commingled services.” *NCTA*, 534 U.S. at 339.

²⁸ *Pole Attachment NPRM*, at 20209, ¶ 36 (emphasis added).

²⁹ Pub. L. No. 104-104, § 706(a), 110 Stat. at 53; 47 U.S.C. § 157 note.

which a broadband pole attachment rate would apply only to attachments used to provide broadband Internet access service “separate” from other services would be inconsistent with this directive. Such a rule effectively would require a provider unnecessarily to add duplicate attachments to separate out facilities used to provide broadband Internet access services from other services in order to take advantage of the broadband pole attachment rate. The result would be the addition of significant, unnecessary expense in deploying broadband services that would erect, rather than remove, barriers to infrastructure investment.

Furthermore, any rule by which a broadband pole attachment rate would apply only to attachments used for broadband Internet access service “separate” from other services would be inconsistent with the plain language of section 224. Section 224(b)(1) requires the Commission to “regulate the rates, terms, and conditions for pole attachments,” which are defined in section 224(a)(4) to mean “any attachment by a cable television system or provider of telecommunications service” If the Commission exercises its authority under section 224(b)(1) to establish a rate for pole attachments used for broadband Internet access service (as AT&T believes it should), that rate necessarily should apply to “*any attachment*” used by a cable television system or provider of telecommunications service to offer broadband Internet access service – whether separate from or commingled with other services.³⁰

Accordingly, the Commission should make clear that the uniform broadband pole attachment rate applies to all pole attachments used by a cable television system or provider of

³⁰ See, e.g., *NCTA*, 534 U.S. at 333 (noting that a cable used to provide high-speed Internet access in addition to cable service “does not cease . . . to be an attachment ‘by a cable television system’” because “[t]he addition of a service does not change the character of the attaching entity”).

telecommunications service for broadband Internet access service, even when such attachments are used to provide other services.

3. The Commission should adopt a rebuttable presumption that all pole attachments are eligible for the broadband pole attachment rate, absent a showing otherwise.

The Commission should be mindful that establishment of a uniform rate to be paid for all attachments used for broadband Internet access service is only the first step. Establishing a broadband pole attachment rate without adopting a mechanism by which broadband providers can readily avail themselves of that rate would be a hollow act. Depending upon the rate selected, a uniform broadband pole attachment rate could mean less revenue for pole owners, and, as a result, they may have little incentive to actually charge that rate to attaching entities. Thus, in order to achieve its goals of promoting broadband deployment and ensuring technological neutrality, the Commission should take steps to ensure that any uniform broadband pole attachment rate is implemented in a timely and cost effective manner.

In order to do so, AT&T proposes that the Commission adopt a rebuttable presumption by which all attachments of a cable television system or provider of telecommunications service would be entitled to any uniform pole broadband attachment rate, absent a showing by either the attaching party or the pole owner that the attachment is not used to provide broadband Internet access service. Creating such a presumption is appropriate for at least two reasons.

First, cable operators and ILECs already offer broadband service to the vast majority of customers served by their networks, and thus most, and in some areas all, pole attachments are currently being used to provide broadband Internet access service. For example, Comcast offers

broadband service to 48 million homes, which represents 99% of its cable footprint.³¹ Similarly, both Time Warner Cable and Cox Communications make broadband available to 99% of the homes passed by their networks.³² Charter offers broadband service to 11 million out of 11.8 million homes passed or approximately 94% of homes passed.³³ Most ILECs, including AT&T, make available broadband service to more than 80% of the customers served by their networks.³⁴ Under the circumstances, it is reasonable to presume that the attachments of cable television systems and providers of telecommunications services are being used for broadband Internet access services and thus are eligible for the uniform broadband pole attachment rate. In those areas where broadband is not available, adoption of uniform broadband pole attachment rate is likely to facilitate further broadband deployment.

Second, absent such a presumption, it would fall either to the pole owner to determine or the pole attacher to establish entitlement to any uniform broadband pole attachment rate. This would be a costly, time consuming, and administratively difficult exercise. From the pole

³¹ See Press Release, "Comcast Reports 2007 Results and Provides Outlook for 2008," at Table 6 (Feb. 14, 2008) (available at <http://www.cmsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=1108172&highlight=>).

³² See "Time Warner Cable Reports 2007 Full-Year and Fourth Quarter-Results," at Table 4 (Feb 6, 2008) (available at <http://www.timewarnercable.com/InvestorRelations/PressReleases/TWCPressReleaseDetail.aspx?PRID=2111&MarketID=0>); see About Cox: SEC Filings, 10-K, at 6 (Mar. 29, 2006) (available at <http://phx.corporate-ir.net/phoenix.zhtml?c=76341&p=irol-SECText&TEXT=aHR0cDovL2NjYm4uMTBrd2l6YXJkLmNvbS94bWwvZmlsaW5nLnhtbD9yZXBvPXRlbmsmaXBhZ2U9NDA1Nzk2MyZkb2M9MSZudW09Ng%3d%3d>).

³³ See Press Release "Charter Reports Third Quarter Financial and Operating Results" (Nov. 8, 2007) (available at <http://phx.corporate-ir.net/phoenix.zhtml?c=112298&p=irol-newsArticle&ID=1074737&highlight=>).

³⁴ AT&T 2006 Annual Report: IP and Broadband , available at gen/investor-relations?Pid=9186; Windstream Communications, SEC Filings, 2006 Annual Report, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=198367&p=irol-reportsAnnual> (noting that by the end of 2006 Windstream had expanded its broadband network to reach 80% of its customers).

owner's standpoint, it often will not have a reasonable means of verifying the types of services being provided over particular attachments and, as discussed above, may have little motivation to do so if it means receiving reduced pole attachment rental revenues. For the pole attacher, it would be a Herculean task for it to show that each of its pole attachments is being used for broadband Internet access. This is particularly true for an ILEC such as AT&T, which has millions of pole attachments across its service territory. In addition, there likely would be numerous disputes if a pole attacher had to demonstrate entitlement to the broadband pole attachment rate on an attachment-by-attachment basis, especially with a pole owner that may have no incentive to cooperate in the process.

Creating the rebuttable presumption proposed by AT&T would streamline implementation of a uniform broadband pole attachment rate and facilitate achievement of the Commission's goals. It also would ensure that the process of implementing a uniform broadband pole attachment rate does not itself become a barrier to infrastructure investment.

4. The Commission should establish a pole attachment rate for broadband Internet Access service that equitably and fairly shares costs among all pole owners and attachers.

In the *Pole Attachment NPRM*, the Commission tentatively concluded that the uniform broadband pole attachment rate “should be higher than the current cable rate, yet no greater than the telecommunications rate.”³⁵ Whatever rate is selected, however, the Commission should take this opportunity to correct certain shortcomings in the manner by which the current formulas are applied and should require a pole owner to provide reasonable records of its costs.

³⁵ *Pole Attachment NPRM* at 20209, ¶ 36.

First, the Commission's pole attachment formulas should be consistent, which is not the case today. For example, certain components of the Commission's current rate methodology permit a pole owner to include all its poles in calculating average pole costs, no matter how tall or strong the poles might be or how much usable and non-usable space is actually available on them. By contrast, other components of the Commission's current rate methodology limit consideration to only 35- and 40-foot poles, and the space actually available on them, in calculating a pole user's space usage.³⁶

Second, the Commission should streamline its pole attachment methodology and assumptions for allocation of cost by distributing space on a 40-foot standard jointly occupied pole based on the assumption of four users on the pole. This allocation better reflects actual conditions of pole usage. In addition, assuming four users on the pole promotes efficiency and standardization by combining the Commission's two assumptions on this issue – that there are five users in urbanized settings and three users in non-urbanized settings.³⁷

Third, each pole user's space and associated cost allocation factor for both the usable space and the non-usable space should be calculated by expressing its allocated usable space as a percentage of the pole's total usable space. The amount of space required on a pole varies by attacher, and the Commission should recognize this disparity in usage on the pole by making each pole user responsible for a percentage of the cost of the entire pole that reflects its specific allocation of the usable space.³⁸

³⁶ *Id.* ¶ 37.

³⁷ *Id.* ¶ 38.

³⁸ *Id.* ¶ 39.

Fourth, the Commission's current formulas include the cost of *all* poles in calculating pole cost, even though there is no logical or reasonable basis for requiring attachers occupying one foot of space on a pole to help defray the cost of 50-, 60-, 70-foot or even higher poles, or the cost of steel or concrete poles, or the cost of Class 1 through Class 4 poles, all of which are set by electric companies to serve their own needs for excess height and strength. Accordingly, the Commission should modify its pole attachment methodology by considering only the net average cost of a standard 40-foot Class 5 wood pole in calculating pole attachment rates. In addition, each pole owner's total investment should be adjusted to reflect the true cost of standard 40-foot Class 5 wood poles, as the only appropriate pole type and height actually needed to accommodate an owner's pole attachers.³⁹

Fifth, the Commission should amend the pole cost component of its methodology to remove the true or actual cost of non-pole related fixtures or "appurtenances" from the cost of poles to arrive at bare pole cost. Although the Commission currently uses a rebuttable presumption that 15 percent of electric costs are associated with fixtures, this figure understates electric fixture costs. Accordingly, the Commission should require that the actual costs of fixtures be removed in the formula if those costs are tracked separately or, if not, that a more appropriate factor be applied to reflect the ELCOs' fixture costs.⁴⁰

Sixth, the Commission should develop a mechanism to exclude capital reimbursement from the pole owner's costs, and such contributions in aid of construction that a pole owner receives from other entities, including ILECs. If such contributions in aid of construction have been paid to the pole owner but have not been credited back to its pole line account, then "double

³⁹ *Id.* ¶¶ 40-41.

⁴⁰ *Id.*, ¶ 42.

dipping” will occur, contrary to sound cost principles. Although that has been the rule for CATVs since 1979, the Commission should adopt the same rule for all attaching parties.⁴¹

Finally, only annual expenses directly associated with a shared pole should be included in calculating a pole attachment rate. Thus, a pole owner’s costs that are exclusively related to the conduct of its own business or to maintain its own facilities on the pole are not appropriate to pass on to other pole users. For example, electric companies should not be permitted to include any costs associated with the maintenance of their overhead electric facilities in developing pole attachment rates. In addition, the pole owner’s business or industry-related expenses, right-of-way maintenance expenses, recurring expenses already reimbursed by other pole users, and other non-pole-related expenses should be excluded.⁴²

Due in part to the nature of the industry and an accident of history, ownership of pole infrastructure has become concentrated in the hands of a single industry – the electric industry. As the nation’s majority pole owners, ELCOs have an effective monopoly in this area, since providers requiring access to poles do not have the option to build new pole lines across the country. Because the poles that exist are in the nature of a public trust, the Commission should ensure that pole attachment rates are calculated based on an accurate reflection of the benefit of usage and applied consistently to all pole users.⁴³

⁴¹ *Id.* ¶ 43; see *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Second Report and Order, 72 F.C.C.2d 59, ¶ 27 (1979), *aff’d sub nom. Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981).

⁴² *Id.* ¶¶ 44-46.

⁴³ *Id.* ¶ 47.

B. The Commission Has Authority to Establish a Uniform Rate For Pole Attachments Used for Broadband Internet Access Service.

Section 224 of the Act is intended “to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use to reach customers.”⁴⁴ Although originally enacted to ensure that utilities’ control over poles and rights-of-way did not create a bottleneck that would stifle the growth of cable television, Congress subsequently amended section 224 as part of the Telecommunications Act of 1996 (“1996 Act”) in order “to accelerate rapidly private sector deployment of advanced telecommunication and information technologies and services.”⁴⁵

The Commission has expansive authority under section 224(b)(1) to “regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable” This authority extends not only to the statutorily established rate formulas applicable to the pole attachments of cable operators, 47 U.S.C. § 224(d)(3), and non-incumbent telecommunications carriers, 47 U.S.C. § 224(e)(1), but also to whatever rates the Commission deems appropriate to promote deployment of other services such as broadband Internet access.⁴⁶ Because pole attachments by cable operators and providers of telecommunications services used to offer broadband services fall squarely within the regulatory

⁴⁴ *Implementation Order* at 6780, ¶ 2 (citing S. Rep. 95-580, at 20 (1977)).

⁴⁵ *Reconsideration Order* at 12110, ¶ 9 (2001) (quoting H.R. Rep. No. 104-458 (1996) (Conf Rep.) to 1996 Act).

⁴⁶ *See NCTA*, 534 U.S. at 336-37.

ambit of section 224(b)(1), the Commission “must prescribe just and reasonable rates for them without necessary reliance upon a specific statutory formula devised by Congress.”⁴⁷

In *NCTA*, the Supreme Court affirmed the Commission’s flexibility to establish pole attachment rates for communications services not explicitly included in section 224. In articulating the contours of the Commission’s authority under section 224, the Court resolved two distinct issues, neither of which was expressly addressed within the text of the Act. The Court first addressed whether commingled traditional cable and broadband Internet access service was covered under section 224. Second, the Court addressed whether attachments by wireless carriers were entitled to just and reasonable rates under section 224(b)(1). On both accounts, the Court held that Congress’s failure to provide specific regulatory guidance concerning either the type of service (commingled broadband Internet access service) or the type of telecommunications service provider (wireless carriers) did not preclude the Commission from implementing Congress’s policy aims through adoption of appropriate pole attachment rules.⁴⁸

Through section 224(a)(4), which defines the term “pole attachment,” and section 224(b)(1), Congress vested the Commission with a general regulatory mandate to set just and reasonable pole attachment rates. Those sections, however, “leave unmodified the FCC’s customary discretion” to establish rates that promote communications services even if unforeseen by Congress.⁴⁹ Reversing the contrary interpretation of the Eleventh Circuit, the Supreme Court explained that the rate formulae for cable operators and non-incumbent

⁴⁷ *Id.* at 336.

⁴⁸ *Id.* at 338, 341.

⁴⁹ *Id.* at 339.

telecommunications carriers provided in sections 224(d)(3) and (e)(1), respectively, “are simply subsets of but not limitations upon” the Commission’s regulatory authority under section 224(a)(4). According to the Court, those congressionally prescribed rates do not constrain Commission jurisdiction to promulgate additional pole attachment rates designed to promote access to communications services because “nothing about the structure of the Act suggest[s] that [sections 224(d)(3) and (e)(1)] are the exclusive rates allowed.”⁵⁰

NCTA foreclosed any question that the Commission has comprehensive statutory authority to prescribe just and reasonable pole attachment rates under section 224(b)(1). That provision confers upon the Commission the power to regulate pole attachments for communications services that might “evolve in directions Congress knew it could not anticipate,” particularly with services such as broadband that are “technical, complex, and dynamic,” for which agencies generally “have authority to fill gaps where the statutes are silent.”⁵¹ Furthermore, the Supreme Court confirmed the Commission’s authority to establish pole attachment rates for broadband services, consistent with “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.’”⁵²

The Commission’s establishment of a uniform rate for pole attachments used for broadband Internet access service would be a fully warranted exercise of the Commission’s expansive regulatory authority under section 224 as endorsed by the Supreme Court in *NCTA*.

⁵⁰ *Id.* at 335-36.

⁵¹ *Id.* at 339 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

⁵² *Id.* (quoting Pub. L. 104-104, §§ 706(a), (b), and (c)(1), 110 Stat. 153, note following 47 U.S.C. § 157).

Indeed, the Commission has already properly interpreted *NCTA* as authorizing the Commission to regulate rates for pole attachments used to provide broadband Internet access service, irrespective of whether the service is provided on a stand-alone or commingled basis, and it should adhere to that interpretation in this rulemaking.⁵³

C The Commission Must Ensure That ILECs, As “Providers of Telecommunications Service,” Are Entitled To Just and Reasonable Pole Attachment Rates, Terms, And Conditions Under Section 224.

ILECs, like all other providers of telecommunications services, enjoy a statutory right to just and reasonable pole attachment rates, including any uniform rate the Commission may decide to adopt for pole attachments used for broadband Internet access services. Commission authority to prescribe just and reasonable rates for ILEC pole attachments is confirmed by the text of section 224, the structure of section 224, and the legislative intent of the amendments to section 224 that were adopted as part of the 1996 Act.

First, the plain language of section 224 demonstrates that ILECs are “providers of telecommunications service” within the meaning of section 224(a)(4) and are thus entitled to just and reasonable rates, terms, and conditions for pole attachments under section 224(b)(1). A “pole attachment” under section 224(a)(4) is defined as “any attachment by a cable television system or provider of telecommunications service” “Telecommunications service,” in turn, is defined as “the offering of telecommunications for a fee directly to the public.” 47 U.S.C. § 153(46). Because ILECs offer telecommunications for a fee directly to the public, they are, by

⁵³ See, e.g., *Florida Cable Telecommunications Ass’n, Inc.*, 18 FCC Rcd 9599, 9603-04, ¶ 6 (2003); see also *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 932 (D.C. Cir. 1993) (upholding as reasonable Commission regulation of pole attachments used to transmit nonvideo broadband communications services, noting that “while Congress did not specifically discuss how to deal with cable carrying video and nonvideo communications, it meant for the agency to regulate pole attachments that are part of a cable company’s cable television system, regardless of whether other types of service are being transmitted over that system as well”).

definition, providers of telecommunications service under section 224(a)(4). As such, ILECs are entitled to the protections of section 224(b)(1) with regard to just and reasonable pole attachment rates, terms, and conditions.⁵⁴

The nomenclature Congress used to describe attaching entities underscores the classification of ILECs as “providers of telecommunications service” under the Act. ILECs are explicitly excluded from the definition of “telecommunications carrier” under section 224(a)(5).⁵⁵ However, no such exclusion applies to the term “provider of telecommunications service” under the immediately preceding section 224(a)(4). It is thus readily apparent that had Congress intended to exclude ILECs from the class of attaching entities defined as “providers” under the Act, it readily could have done so. As a matter of basic statutory construction, Congress’s use of two distinct terms in adjacent statutory provisions gives rise to the presumption that it intended to include ILECs within the class of “provider[s] of telecommunications service” under section 224(a)(4).⁵⁶

The Supreme Court considered an analogous question of statutory interpretation in *Barnhart v. Sigmon Coal, Co.*, 534 U.S. 438 (2002), which involved the permissible scope of

⁵⁴ The only statutory restriction on the Commission’s jurisdiction to regulate pole attachment rates of providers of telecommunications service is triggered when a State certifies that it has undertaken regulation of pole attachments itself – a situation that is not relevant to the instant rulemaking. *See* 47 U.S.C. § 224(c).

⁵⁵ *Implementation Order* at 6801, ¶ 48 (noting that “the definition of telecommunications carrier under Section 224 excludes ILECs”).

⁵⁶ *See Clay v. United States*, 537 U.S. 522, 528 (2003) (“[D]isparate inclusion[s] or exclusion[s]” in the same statute are presumed intentional); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452-53 (2002) (“[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.”) (citation and internal quotation marks omitted).

assigning successor liability under the Coal Act. Sections 9706(b)(2) and 9711 of the Coal Act, 26 U.S.C. § 9701 *et seq.*, specifically reference the possibility of imposing liability on the successors-in-interest of assigned operators. Those subsections, however, stand in direct contrast to sections 9701(c)(1), (2), and (4), which define various operator entities but fail to mention the imposition of liability on a signatory operator’s successors-in-interest. Reading the provisions together, the Court concluded that in light of the specific reference made to the possibility of successor liability elsewhere in the Coal Act, the definitions contained in section 9701(c)(1), (2), and (4) must be understood to exclude successor liability.⁵⁷

Consistent with the Supreme Court’s reasoning in *Barnhart*, the Commission must presume that Congress did not intend to exclude ILECs from the class of “provider[s] of telecommunications services” under section 224. In section 224(a)(5), Congress specifically defined the term “carrier” to exclude ILECs, but made no mention of ILECs in the immediately preceding discussion of pole attachments made by “providers” under subsection (a)(4). Like the statutory interpretation issue in *Barnhart*, in section 224 Congress demonstrated through its qualification of the term “carrier” that it was capable of excluding ILECs from certain classes of attaching entities when it so chose. But Congress used the term “provider of telecommunications service” throughout section 224 without providing any analogous limiting definition. The rule of statutory construction articulated by the *Barnhart* Court requires the Commission to heed this distinction and not read into the statute limiting constructions that Congress did not include.

Second, as a structural matter, Congress assigned distinct statutory protections to attaching entities classified as “telecommunications carrier[s]” and “provider[s] of telecommunications service” under section 224. “Carriers,” in contrast to “providers,” enjoy

⁵⁷ *Id.* at 453-54.

nondiscriminatory access to poles owned by utilities.⁵⁸ According to the Commission, the exclusion of ILECs from the right to nondiscriminatory pole access arose out of Congress's belief that ILECs generally had access to utility poles through joint-use agreements with electric utilities or due to preexisting ILEC pole ownership and accordingly did not require the protection afforded by 224(f).⁵⁹

That ILECs may lack a federal statutory right to nondiscriminatory access to pole attachments enjoyed by "carriers" says nothing about the rights of ILECs as "provider[s] of telecommunications service" under other provisions of section 224. In other words, the exclusion of ILECs from the definition of "telecommunications carrier" in section 224(a)(5) is relevant only to the statutory protections that apply to "carriers." In contrast to the section 224(f)(1) right to nondiscriminatory access, the right to just and reasonable rates contained in section 224(b)(1) applies to "pole attachments" by "providers," not "carriers."⁶⁰

The Commission previously has recognized the distinction between a "telecommunications carrier" and "a provider of telecommunications service" in the structure of section 224. For example, in the *Implementation Order*, the Commission rejected the argument

⁵⁸ 47 U.S.C. § 224(f). Although less central to the analysis provided here, the term "telecommunications carrier" also is used in section 224(e)(1), which provides that "carriers" were entitled to regulated pole attachment rates "no later than 2 years after February 8, 1996." Congress did not grant "providers" an analogous right.

⁵⁹ See, e.g., *Implementation Order* at 6801-02, ¶ 49 (citing § 224(f)(1)); see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16104, ¶ 1231 (1996) (noting that section 224 does not authorize an ILEC to "seek access to the facilities or rights-of-way of a LEC or any utility...") (subsequent history omitted).

⁶⁰ 47 U.S.C. § 224(a)(4) (emphasis added). "Providers" also enjoy the right to avail themselves of the procedures adopted by the Commission "to hear and resolve complaints" concerning pole attachment rates, terms, and conditions. 47 U.S.C. § 224(b)(1).

by the electric industry that an ILEC's attachments should not be counted as an attaching entity for the purposes of allocating the costs of unusable space under section 224(e) because the definition of a telecommunications carrier excludes ILECs. In so doing, the Commission noted that the exclusion of ILECs in section 224(a)(5) was in the context of providing access to poles. By contrast, section 224(e), "which delineates a new means to allocate costs, does not refer to 'telecommunications carriers,' but to "attaching entities,"" and, according to the Commission, Congress defined the term pole attachment "in terms of attachments by a 'provider of telecommunications service' not as an attachment by a 'telecommunications carrier.'"⁶¹ Thus, the structure of section 224 confirms that ILECs are properly considered part of the class of "providers" entitled to rights different from those possessed by the narrower class of "carriers."

Third, examination of the legislative impetus behind the amendments to section 224 adopted as part of the 1996 Act further underscores that Congress intended to extend the right to just and reasonable attachment rates to all attaching entities that offer telecommunications services, including ILECs. Prior to the 1996 Act, section 224(a)(4) narrowly defined a pole attachment as "any attachment by a cable system." Following the 1996 Act, however, the term was expanded to cover "any attachment by a cable television system *or provider of telecommunications service.*"⁶² (emphasis added) The legislative history clearly manifests Congress's desire that section 224(a)(4) provide comprehensive coverage for all attaching entities so as "to remedy the inequity of charges for pole attachments among providers of

⁶¹ *Implementation Order* at 6801-02, ¶ 49.

⁶² 47 U.S.C. § 224(a)(4); *see also Implementation Order* at 6798, ¶ 40 (discussing amendment of section 224(a)(4)) (emphasis added).

telecommunications services.”⁶³ The conference reports of both the House and the Senate state that amended section 224(a)(4) “expands the scope of the coverage of section 224 of the Communications Act...[by] expand[ing] the definition of ‘pole attachment’ to include attachments by *all providers of telecommunications services*.”⁶⁴ Amended section 224(a)(4) thus represents a Congressional mandate that the Commission “prescribe regulations . . . for pole attachments to all providers of telecommunications services, including such attachments used by cable television systems to provide telecommunications services.”⁶⁵ Nowhere did Congress state, let alone imply, that ILECs were to be excluded from the class of “providers” under section 224(a)(4). Nor is there any indication in the legislative history that Congress intended to apply section 224(b)(1)’s protections of just and reasonable pole attachment rates only to the narrower class of entities defined as “carriers” under section 224(a)(5).

Furthermore, the omission of an explicit reference to ILECs as members of the class of “providers” does not undermine their status as entities entitled to just and reasonable pole attachment rates under section 224(b)(1). In the *Implementation Order*, the Commission considered – and rejected – a similar argument made by the electric industry with respect to Congress’s failure to mention wireless providers in the statute.⁶⁶ The Commission observed that the statutory definitions and amendments in the 1996 Act broadened the scope of section 224(a)(4) to include all providers of telecommunications service, whether or not they are

⁶³ H.R. Rep. No. 104-458, at 206.

⁶⁴ S. Rep. No. 104-230, at 206 (1996) (emphasis added); H.R. Rep. No. 104-458, at 206.

⁶⁵ S. Rep. No. 104-230, at 206.

⁶⁶ See *Implementation Order* at 6796-99, ¶¶ 36-42.

explicitly mentioned.⁶⁷ The same interpretive principle applies here to the inclusion of ILECs within the class of “providers” under section 224(a)(4).

That the definition of a “telecommunications carrier” in section 3 of the Act incorporates the words “provider of telecommunications service” is of no legal consequence.⁶⁸ Had Congress intended to preclude application of section 224(b)(1) to ILECs, it could easily have defined “pole attachment” as “any attachment by a telecommunications carrier” – a class of attaching entities from which ILECs are excluded. It did not do so, however. Instead, Congress chose to create two severable rights under section 224 – a right to nondiscriminatory access under section 224(f) and a right to just and reasonable rates, terms, and conditions – and applied those rights to two classes of attachers defined by two distinct terms: “telecommunications carriers” and “providers of telecommunications services.” Had Congress intended the two terms to be equivalent, it would not have (a) defined them differently for purposes of sections 224(a)(4) and (a)(5); and (b) used them in different statutory provisions that confer different statutory rights.

An interpretation of sections 224(a)(4) and (a)(5) that reads “carrier” and “provider” as synonymous would improperly transform Congress's use of “provider” throughout section 224 into mere surplusage. If “provider” is simply an empty placeholder term for “carrier,” Congress had no reason to define “pole attachment” in terms of “a provider of telecommunications service” and then define “carrier” separately in a different statutory provision. The most obvious choice would have been simply to define “pole attachment” in terms of “carriers” and forego use of the redundant term “provider” altogether. Thus, the argument that the terms are equivalent

⁶⁷ *See id.* at 6798-99, ¶ 40.

⁶⁸ *Pole Attachment NPRM* at 20205, ¶ 25.

violates the rule disfavoring statutory interpretations that render statutory terms or provisions superfluous.⁶⁹

Such an interpretation also would violate the rule of statutory construction that when two distinct terms are used in neighboring subsections, a strong presumption arises that the terms are not equivalent.⁷⁰ In *Russello*, the Supreme Court confronted the scope of the term “interest” in 18 U.S.C. 1963(a)(1) of the RICO statute. The Court considered two neighboring statutory provisions that are structurally analogous to subsections 224(a)(4) and (a)(5). Section 1963(a)(1) broadly addresses “any interest ... acquired [by a defendant],” whereas the immediately following subsection (a)(2) reaches only “any interest in ... any enterprise which [the defendant] has established[,] operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.” 18 U.S.C. § 1963(a)(1) & (2)(D). The Court opined that had Congress intended to restrict the use of “interest” in section 1963(a)(1) only to an interest in an enterprise, “it presumably would have done so expressly as it did in the immediately following subsection (a)(2).” “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and

⁶⁹ See *Dodd v. United States*, 545 U.S. 353, 371 (2005) (“[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant It is a strange principle that requires strict adherence to the text of one provision while allowing another to have virtually no real world application. It would seem far wiser to give *both* sections the meaning that Congress obviously intended.”) (citations omitted); *Duncan v. Walker*, 533 U.S. 167, 167 (2001).

⁷⁰ See, e.g., *Russello v. United States*, 464 U.S. 16, 23 (1983) (“We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.”).

purposely in the disparate inclusion or exclusion,” and such deliberate distinctions between two adjacent provisions cannot be chalked up to “a simple mistake in draftsmanship.”⁷¹

Russello’s rule of statutory interpretation applies with equal force to the relationship between subsections 224(a)(4) and (a)(5). Differing language in those two provisions should not be interpreted to have the same meaning. The most natural reading of those provisions instead is that the terms “provider” and “carrier” refer to different classes of attaching entities, and that the term “carrier” – because it excludes ILECs – should be construed as a subset of the larger group of “providers,” a term that includes “*all* providers of telecommunications services.”⁷² This reading honors *Russello*’s interpretive mandate that neighboring subsections containing definitions of varying scope should not be understood to be coextensive.

IV. CONCLUSION

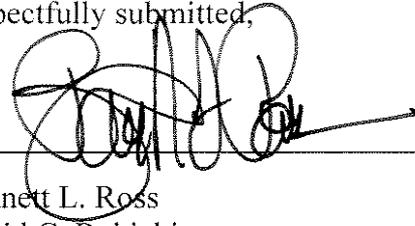
This proceeding represents an important opportunity for the Commission to advance the broader goals of the Act, including promoting the deployment of broadband services, by bringing rationality to the current pole attachment regime. The Commission can do so by establishing a uniform broadband pole attachment rate and by extending to ILECs section 224(b)(1)’s protections of “just and reasonable” rates, terms, and conditions for pole attachments.

⁷¹ *Id.*

⁷² S. Rep. No. 104-230 at 206 (emphasis added); *see also NCTA*, 534 U.S. at 335-36 (“[S]pecific statutory language should control more general language when there is a conflict between the two The specific controls but only within its self-described scope.”).

Respectfully submitted,

By:

A handwritten signature in black ink, appearing to read "B. Ross", written over a horizontal line. The signature is stylized and includes a long horizontal stroke extending to the right.

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