Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest") submits these comments with respect to the Federal Communications Commission's ("Commission") *Notice of Proposed Rulemaking* in the above-captioned proceeding.[1] Qwest interprets that the Commission has authority under Section 224 of the Communications Act[2] to regulate pole attachment rates for all providers of telecommunications services, including incumbent local exchange carriers ("ILECs"). And, Qwest supports the tentative conclusion of the Commission that all categories of providers should qualify for the same pole attachment rate for all attachments used for broadband Internet access service. With respect to other issues regarding terms and conditions of access, Qwest views that the Commission need not impose additional rules on these issues, but continue to permit these issues to be addressed through negotiation and, if necessary, through the Commission's complaint process for pole attachments.

---

[1] *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, Notice of Proposed Rulemaking, FCC 07-187, rel. Nov. 20, 2007 ("*NPRM*"); 73 Fed. Reg. 6788 (Feb. 6, 2008).

[2] 47 U.S.C. § 224.

I. THE COMMISSION HAS AUTHORITY UNDER SECTION 224 TO REGULATE REASONABLE RATES, TERMS AND CONDITIONS FOR ILEC ATTACHMENTS TO POLES.

Qwest agrees with the position of the United States Telecom Association ("USTelecom") that the Commission has authority under Section 224 to regulate reasonable rates, terms and conditions for ILEC attachments to utility poles.[3] Section 224(f)(1) of the Act guarantees a cable telecommunications system or "any telecommunications carrier" nondiscriminatory access to a utility's poles, ducts, conduit, or rights-of-way ("poles"). But, Section 224(a)(5) specifically excludes ILECs from the definition of "telecommunications carrier." Based on these statutory provisions, the Commission's pole attachment rules (47 C.F.R. §§ 1.1401-1.1418) currently do not address pole attachments sought or obtained by ILECs. ILECs as attachers must negotiate their attachments' rates, terms and conditions with the owners of the poles to which they wish to attach, without recourse to the Commission if they view that the rates, terms, and conditions pole owners seek for attachments are excessive or unfair.

But, Qwest agrees with USTelecom that Sections 224(b)(1) and 224(a)(4) provide an independent right to reasonable rates, terms, and conditions for any pole attachment by a "provider of telecommunications service," and that the statute applies the "just and reasonable" standard to pole attachments for all such providers, including ILECs. Thus, the Commission can and should adopt rules to regulate the reasonable rates, terms, and conditions of ILEC pole attachments.

At the core of this statutory authority issue is whether the statutory terms "telecommunications carrier" and "provider of telecommunications service" in Section 224 have the same or different meanings for purposes of applying the provisions of the statute. Qwest

---

[3] United States Telecom Association Petition for Rulemaking, RM-11293, filed Oct. 11, 2005. *See NPRM* ¶¶ 23-24 (discussing USTelecom's position).

agrees with USTelecom that the terms are specifically used and intended to have different meanings. The statute defines "pole attachment" to mean "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."[4] Immediately following this definition the statute defines "telecommunications carrier" for purposes of Section 224, to exclude ILECs.[5] Because the definition of "pole attachment" refers to a "provider of telecommunications service" and not "telecommunications carrier," "pole attachment" as used in the statute encompasses ILEC attachments. Most critically, Section 224(b) requires the Commission to regulate rates, terms and conditions of all "pole attachments," including ILEC pole attachments.[6]

Qwest agrees with USTelecom that had Congress intended to exclude ILEC attachments from any regulation by the Commission, it easily could have limited the term "pole attachments" to attachments by a cable television system or a "telecommunications carrier." The fact that Congress did not use this specific terminology -- especially with the definition of "telecommunications carrier" immediately following the definition of "pole attachment" -- seems intentional.

Further, U.S. Supreme Court holdings support the argument that the Commission has general authority under Section 224(b) to regulate the rates, terms, and conditions of ILEC pole attachments. In *NCTA v. Gulf Power*, 534 U.S. 327 (2002), the U.S. Supreme Court upheld the Commission's decisions to (1) adopt a rate for pole attachments by cable providers offering both

---

[4] 47 U.S.C. § 224(a)(4).

[5] 47 U.S.C. § 224(a)(5).

[6] Specifically that Section states that unless a state has satisfied the criteria of subsection (c) to regulate pole attachments, 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." 47 U.S.C. § 224(b)(1).

cable television and internet services and (2) include attachments by wireless carriers within the scope of Section 224. On the first issue, the Supreme Court rejected the Eleventh Circuit's conclusion that Section 224 does not permit the Commission to set any rates for pole attachments beyond those expressly set out in the statute. The Court found that "this conclusion has no foundation in the plain language of §§ 224(a) and (b)." Though Congress prescribed specific formulas for 'just and reasonable' rates for certain attachments by cable TV providers and telecommunications carriers, "nothing about the text of §§ 224(d) and (e), and nothing about the structure of the Act, suggest that these are the exclusive rates allowed."[7]

On the second issue, the Court found that a wireless provider is a "provider of telecommunications service," such that its attachments were "pole attachments" for Section 224 purposes. Similarly, an ILEC is a "provider of telecommunications service," such that its attachments are "pole attachments" for Section 224 purposes.

II. THE COMMISSION SHOULD REGULATE A SINGLE RATE FOR ALL BROADBAND ATTACHMENTS.

Additionally, the Commission has authority under Section 224 to regulate a single rate for all attachments used to provide broadband Internet access. The U.S. Supreme Court's holding in *Gulf Power* also provides strong support for the Commission's authority to adopt a separate rate for pole attachments used to provide broadband service. As noted above, the Court found that Congress' inclusion of prescribed formulas for 'just and reasonable' rates for certain attachments by cable TV providers and telecommunications carriers did not "suggest that these are the exclusive rates allowed."[8] Thus, if the Commission accepts its authority to regulate the

---

[7] *Gulf Power*, 534 U.S. at 335 (citation omitted).

[8] *Id.* (citation omitted).

rates, terms, and conditions of ILEC pole attachments, it can establish a single rate for all pole attachments used to provide broadband service, including ILEC attachments.

Further, moving toward a single rate for attachments, to the extent permitted by statute, will reduce the competitive inequities that the current rate scheme creates. Having different rates for separate categories of providers makes increasingly less sense as cable providers and telecommunications service providers are increasingly using their attachments to provide similarly functioning service bundles. For instance, a cable provider that uses its attachment to provide video, broadband Internet service and Voice over Internet Protocol will get the cable rate while a telecommunications service provider that uses an attachment to provide video, broadband Internet service and telephone service will get the telecom rate. Even further, if the telecommunications service provider is an ILEC, it may pay yet a third rate to acquire an attachment to provide the same services.[9] These rate disparities unfairly impact the competitive stance of these providers in the marketplace. The easiest and most straightforward way to address these rate disparities is to move to a single rate for pole attachments that is based on the amount of space occupied within the communications space on the pole. But, this seems difficult to achieve under the existing statutory rate scheme of Section 224. Thus, at least moving to a single rate for all attachments used to provide broadband access, including ILEC attachments, should lessen the competition-inhibiting effects of the current pole attachment rate disparities, while staying within the confines of the existing statutory framework.[10]

---

[9] In negotiating attachment rates with electric utilities Qwest is not privy to the rates the electric utilities charge to others. Consequently, Qwest does not know how its rates for attaching to electric utility poles compare to rates charged to other attachers offering the same types of services.

[10] Additionally, the dual-rate scheme creates an incentive for attachers eligible for the rates to acquire the lower rate whenever possible. Proper application of the telecom rate is difficult if a company does not acknowledge when it is a telecommunications service provider or is using the

With respect to wireless carriers, attachments to provide wireless service within the communication space on the pole, should be entitled to the telecommunications rate or proposed single broadband rate as appropriate. Make-ready work required to allow wireless attachments may be substantially higher compared to other telecommunications carriers, but will be at the expense of the wireless attacher. But, if a wireless provider is permitted to attach facilities to pole tops, pole owners should receive a market rate of compensation, because unlike lateral space, each pole has only one top.

III. ADDITIONAL COMMISSION RULES REGARDING TERMS AND CONDITIONS OF ACCESS ARE UNNECESSARY.

Qwest previously filed comments in response to Fibertech Networks, LLC's ("Fibertech") Petition for Rulemaking, RM-11303.[11] The Commission has incorporated those comments into this proceeding.[12] As such, Qwest will not repeat those comments in detail here, but merely reiterate that additional rules regarding pole attachments as proposed by Fibertech are not warranted. Generally, Fibertech's proposed rules do not reflect best practices in the industry and promulgating additional rules on the specific, detailed issues raised by Fibertech is unnecessary and runs counter to the Commission's existing policy that these issues are best

---

attachments to provide telecommunications service. A single rate for all communication space attachments would alleviate this problem.

[11] Comments of Qwest Communications, RM-11303, filed Jan. 30, 2006.

[12] *NPRM* at n.36.

addressed on a case-by-case basis through negotiation between the pole or conduit owner and attacher.

Respectfully submitted,

QWEST COMMUNICATIONS
INTERNATIONAL INC.

By: /s/ Tiffany West Smink
Craig J. Brown
Tiffany West Smink
Suite 950
607 14th Street, N.W.
Washington, D.C. 20005
(303) 383-6619
craig.brown@qwest.com
tiffany.smink@qwest.com

Its Attorneys

March 7, 2008

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be: 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 07-245, RM-11293 and RM-11303; 2) served via e-mail on the Competition Policy Division, Wireline Competition Bureau at cpdcopies@fcc.gov; and 3) served via e-mail on the FCC's duplicating contractor, Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/ Richard Grozier

March 7, 2008