

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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

COMMENTS OF TIME WARNER CABLE INC.

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EXECUTIVE SUMMARY

The stated purpose of this omnibus rulemaking is to ensure that the Commission's pole attachment regulations continue to reflect the Communications Act's overriding policy of promoting the deployment and adoption of advanced communications services. But the proposals the Commission puts forward in its *Notice of Proposed Rulemaking* ("NPRM") here run contrary to that goal. The proposals indeed disregard prior Commission policies that have worked to speed the deployment of advanced communications services.

This is most evident in the Commission's tentative conclusion to significantly increase the pole attachment fees that some communications attachers must pay when they use their networks built on utility poles to deliver broadband Internet access services. Raising some broadband providers' infrastructure costs simply cannot be squared with the nation's commitment to achieving universal broadband deployment and adoption so that all Americans can enjoy the benefits of advanced communications services, or the Commission's many specific efforts to achieve that aim. The Commission's efforts have specifically included ensuring that utilities do not impose unjustifiable surcharges on pole attachments that cable operators use to provide Internet service. The Commission's proposal of a rate hike marks an unexplained – and unwarranted – about-face from that sound approach.

Time Warner Cable Inc. ("TWC") agrees that the Commission's regulations should not tilt the competitive playing field – that is, providers of like communications services in similar circumstances should be treated alike. However, as the Commission considers applying a uniform pole attachment rate to all broadband Internet access providers, it must bear in mind that not all providers of broadband Internet access service have similar pole attachment rights. Pole owning incumbent local exchange carriers and electric utilities operating under historic joint use

or joint ownership agreements enjoy far greater rights than cable operators and competitive local exchange carriers who, as mere pole licensees, have very limited attachment rights. Most importantly, pole owners – who create capacity under joint ownership and joint use agreements for utility joint owners and joint users – do not create capacity for cable operators and competitive LECs. In enacting the Pole Attachment Act, Congress appreciated that the amount of pole attachment fees paid by communications attachers should reflect the extent of the rights those attachers receive in exchange.

The Commission must also remember – as Congress, the courts, and even past FCC commissioners have all long recognized – that pole attachments are an essential service for cable operators. Just as they have historically, cable operators today lack any practical, economical alternative to constructing their communications networks in reliance on poles owned by electric utilities and incumbent local exchange carriers. Separate, duplicative pole runs often remain unlawful, and underground construction often remains cost-prohibitive. And for cable operators and competitive LECs that have already built their networks in reliance on reasonable pole attachment rates under FCC regulations, rebuilding these networks so as not to rely on existing utility poles is clearly not an option.

Instead of adopting a higher rate for pole attachments used by cable operators to provide broadband Internet access service, the Commission should reaffirm that the Cable Rate remains the correct rate for attachments used by cable operators to provide commingled communications services that include Internet access service. The Cable Rate allows utilities to recover their fully allocated costs of providing pole attachments, and thus in no way contains any subsidy for cable operators – as the Commission and the courts have long understood. Indeed, in view of the limited rights that cable operator attachers receive in exchange for payment of pole attachment

fees, the Cable Rate compensates pole owners to a level greater than originally intended by Congress.

Many states that regulate pole attachments have reached the same conclusion. The large majority of states that regulate pole attachments use formulas based on the Cable Rate. Several of these states have affirmatively concluded that a single pole attachment rate based on the Cable Rate is appropriately applied to attachments used to provide different types of communications services because a pole attachment rate cannot logically depend upon the nature of the communications services traveling over the wire affixed to the pole. That conclusion is one that this Commission, too, has recognized: Its past pole attachment policy has long been guided by the understanding that utilities incur no additional costs when pole attachments are used to provide more than one communications service – such as commingled cable and Internet service.

In such circumstances, the Commission's tentative conclusion in its *NPRM* that the Telecom Rate may be the appropriate rate for pole attachments used by cable operators to provide broadband Internet access service is seriously mistaken. Applying that formula to cable operator attachments used for broadband Internet access service would clearly be excessive because it would require cable operators to pay far more than their fair share of annual pole costs.

Rather than *raising* the pole attachment costs of cable operators, the Commission should stay its course of promoting broadband deployment and adoption by *lowering* the pole attachment costs that competitive LECs must pay when they provide commingled communications services involving broadband Internet access service. Such an approach is fully consistent with this Commission's past interpretation of the Pole Attachment Act as providing the Commission leeway to adopt the Cable Rate for attachments used by cable operators to deliver commingled services – an interpretation approved by the United States Supreme Court.

The Commission cannot, however, extend the Pole Attachment Act's rate or access provisions to incumbent LECs. The text of the statute, its legislative history, and even the Commission's precedents make clear that incumbent LECs are utilities on which Section 224 imposes obligations; they are not covered by its protections. But the failure of the statutory protections to extend to incumbent LECs does not give rise to any grave concerns about discriminatory treatment. Under historic joint use and joint ownership arrangements, incumbent LECs receive far greater rights than cable and competitive LEC attachers, who, unlike pole-owning incumbent LECs, are mere licensees. It is thus entirely appropriate that incumbent LECs pay more for those far greater rights.

Lastly, the Commission should reject the utilities' trumped-up charges that cable operators and other communications attachers recklessly create unsafe pole conditions and attach to their poles unlawfully. The utilities' contentions are unfounded and, if accepted, would needlessly impose additional costs – both in terms of time and money – on communications attachers. While cable operators may occasionally create safety violations in their construction, in TWC's experience utilities are frequently responsible for creating wholesale safety violations on their own poles. While all safety violations should be cured when identified, it is not true that cable operators are responsible for creating more than their share of safety issues on utility poles. Likewise, in TWC's experience, utility claims of "unlawful" and "unauthorized" attachments are largely a byproduct of poor utility record keeping or utilities' sudden reversal of accepted attachment practices. These issues, however, are fact-sensitive and are more appropriately addressed in individual adjudications, rather than this rulemaking proceeding.

The Commission must resist in particular Verizon's request that the Commission depart from its past precedent and require cable operators to obtain individual permits in advance before

attaching to drop poles. The industry-wide practice of allowing cable operators to attach to drop poles prior to obtaining a specific permit for the attachment has been accepted by almost all utilities. Reversal of Commission precedents approving of this practice here would cause severe anticompetitive harms. The Commission should therefore reaffirm that drop poles need not be permitted prior to attachment.

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COMMENTS OF TIME WARNER CABLE INC.

Time Warner Cable Inc. ("TWC") respectfully submits these Comments in response to the Commission's November 20, 2007, *Notice of Proposed Rulemaking* ("NPRM") in WC Docket No. 07-245, published in the Federal Register on February 6, 2008. *See* 73 Fed. Reg. 6879 (Feb. 6, 2008).

DISCUSSION

I. Introduction.

The Commission describes its purpose in initiating this proceeding as an effort to "ensure that [its] regulatory framework [for pole attachments] remains current and faithful to the pro-competitive, market-opening provisions of the [Communications] Act in light of [its] experience over the last decade, advances in technology, and developments in markets for telecommunications and video services." *NPRM*, ¶1. Consistent with this stated purpose, TWC shares the view that this agency should do all that it can to encourage both broadband deployment and adoption, which is critical to this nation's economic future and the enrichment of its citizens' everyday lives. For its own part, TWC has invested hundreds of millions of dollars in its facilities and plant in order to offer two-way broadband services. That substantial

commitment to broadband deployment has allowed TWC to be in the position to offer broadband services to more than 25 million service-ready homes.

The Commission's current proposals relating to pole attachments used to provide broadband Internet access services, however, would do violence to advancing the important goal of continued growth in both deployment and adoption of broadband. In key respects, the Commission proposes to overhaul its long-standing pole attachment policies without adequate legal, policy, or economic justification. Nowhere is this more glaring than in the *NPRM's* central proposal to raise broadband Internet access providers' infrastructure costs through a surcharge on the very pole attachments that are vital to the delivery of advanced communications services. That approach is inconsistent with the Commission's venerable policy of keeping pole costs at reasonable levels to facilitate broadband deployment, is based on misapprehensions about utilities' cost recovery under the Cable Rate formula, and stands to countermand the national imperative of expeditiously achieving ubiquitous deployment of facilities necessary to deliver advanced communications services to all Americans.

The Commission should decline to pursue its suggested unwarranted departure from longstanding – and eminently sound – Commission policy and precedent. Instead, the Commission should take this opportunity to fine tune its well-established policies. The Commission should reaffirm that the Cable Rate remains a fully compensatory rate for pole attachments used to provide broadband Internet access service – irrespective of the platform over which such services are provided. The Commission also should reaffirm that it lacks jurisdiction to sweep incumbent LECs within the protections of Section 224. Finally, the Commission should block utilities from adhering to practices that increase the time or expense required for cable operators to make pole attachments.

II. The Commission's Proposal To Raise Pole Attachment Costs For Providers Of Broadband Internet Access Is Misguided.

A. Raising The Infrastructure Costs Of Broadband Internet Access Providers Cannot Be Reconciled With The National Goals Of Universal Broadband Deployment And Encouragement Of Advanced Services.

The Commission's proposal to raise a key infrastructure cost – pole attachments – for some providers of broadband Internet access service 1/ runs headlong into the nation's commitment to encouraging advanced telecommunications services and to achieving universal broadband deployment as expeditiously as practicable. These objectives have not only been inscribed into the Communications Act by Congress, they have also been a common refrain of this Commission and the Executive Branch. With the 1996 amendments to the Communications Act, Congress specifically instructed 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.’ ” 2/ Promoting the delivery of advanced communications services has also been a core priority of the Executive Branch; the President has “established a national goal of universal, affordable broadband access for all Americans by 2007.” NTIA, *Submission for OMB Review; Comment Request*, 72 Fed. Reg. 45,218, 45,219 (Aug. 13,

1/ See *NPRM*, ¶3 (“[W]ith regard to rates, we tentatively conclude that all attachments used for broadband Internet access should be subject to a single rate, regardless of the platform over which those services are provided, and that that rate . . . should be greater than the current cable rate, yet no greater than the telecommunications rate.”).

2/ *National Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (citing & quoting Pub. L. 104-104, Tit. VII, §§ 706(a), (b) & (c)(1), 110 Stat. 153, note following 47 U.S.C. § 157); see *id.* (holding that core “congressional policy” of promoting broadband deployment “underscores the reasonableness of the FCC’s interpretation [of Section 224]”); see also *NPRM*, ¶36 (“Section 706 of the 1996 Act directs us to promote the deployment of broadband infrastructure.”).

2007). ^{3/} And Chairman Martin has remarked that ensuring universal broadband deployment has been and remains the Commission's "highest priority," ^{4/} as it promotes deployment of new advanced communications services that are critical to the future of the communications industry, such as new Internet-protocol based services combining voice and data features. ^{5/}

Following Congress's and the President's directives, the Commission has adopted policies to encourage advanced services and to remove regulatory barriers and disincentives to infrastructure investment. ^{6/} In doing so, it has fully recognized the critical importance of

^{3/} See *Promoting Innovation & Competitiveness: President Bush's Technology Agenda, Promoting Innovation & Economic Security Through Broadband Technology*, at http://www.whitehouse.gov/infocus/technology/economic_policy200404/chap4.html ("This country needs a national goal for . . . the spread of broadband technology. We ought to have . . . universal, affordable access for broadband technology by the year 2007, and then we ought to make sure as soon as possible thereafter, consumers have got plenty of choices when it comes to [their] broadband carrier."); see also MSNBC, *Bush calls for universal broadband by 2007* (Mar. 26, 2004), available at <http://www.msnbc.msn.com/id/4609864/> ("President Bush urged Friday that affordable high-speed Internet access be available to all Americans by 2007.").

^{4/} *Chairman Martin's Statement Before the Senate Committee on Commerce, Science & Transp.*, at 3 (Sept. 12, 2006). Chairman Martin told Congress that the Commission has "worked hard to create a regulatory environment that promotes broadband deployment." *Id.*

^{5/} See, e.g., *Vonage Holdings Corp.*, 19 F.C.C.R. 22,404, 22,411 n.46 (2004) ("While these matters are being comprehensively addressed, however, it is essential that we take action to bring some greater measure of certainty to the industry to permit services like DigitalVoice to evolve. By ruling on the narrow jurisdictional question here, we enable this Commission and the states to focus resources in working together along with the industry to address the numerous other unresolved issues related to this and other IP-enabled and advanced communications services that are of paramount importance to the future of the communications industry."); see also *IP-Enabled Services*, 19 F.C.C.R. 4863, 4866, ¶3 (2004) ("[B]efore long, providers will be able to integrate voice and real-time video to provide new capabilities and service offerings."); Steinert, *Apple of Comcast's Eye*, *Multichannel News* at 30 (Jan. 14, 2008) ("Comcast will start delivering new communications services that will let a person check home voice mail and e-mail not on a TV, but on a PC. Anywhere, at any time.").

^{6/} See, e.g., *Service Rules for Advanced Wireless Serv. in the 2155-2175 MHz Band*, 22 F.C.C.R. 17,035, 17,037, ¶4 (2007) ("anticipat[ing]" that rulemaking will assist the Commission in "making further progress toward providing all Americans with universal, affordable access to broadband technology."); *Amendment of Parts 1, 21, 73, 74 & 100 of the*

universal broadband deployment to our nation's future. *See, e.g., Development of Nationwide Broadband Data to Evaluate Reasonable & Timely Deployment of Advanced Servs. to All Americans, Improvement of Wireless Broadband Subscribership Data & Development of Data on Interconnected Voice Over Internet Protocol (VoIP) Subscribership*, 22 F.C.C.R. 7760, 7760, ¶1 (2007) (“The Commission has consistently recognized the critical importance of broadband services to the nation’s present and future prosperity and is committed to adopting policies to promote the development of broadband services, including broadband Internet access services.”). As the Commission has explained, “[t]he wide spread deployment of broadband will bring new services to consumers, stimulate economic activity, improve national productivity, and advance many other objectives – such as improving education, and advancing economic opportunity for more Americans.” *In re Advanced Wireless Servs. in the 1.7 GHz & 2.1 GHz Bands*, 18 F.C.C.R. at 25,164, ¶2. The Commission has observed that among the advanced services that its policies promote, and that Americans will ultimately enjoy, are a host of combined voice/data services such as video-conferencing as well as interactive television. ^{7/}

Commission’s Rules to Facilitate the Provision of Fixed & Mobile Broadband Access, 21 F.C.C.R. 5606, 5610, ¶2 (2006) (“through these actions, we make further progress towards our goal of providing all Americans with universal, affordable access to broadband technology”); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R. 14,853, ¶1 (2005) (“[T]his Order encourages the ubiquitous availability of broadband to all Americans by, among other things, removing outdated regulations.”); *In re Advanced Wireless Services in the 1.7 GHz & 2.1 GHz Bands*, 18 F.C.C.R. 25,162, 25,164, ¶2 (2003) (“Our actions today bring us closer to our goals of achieving the universal availability of broadband access and increasing competition in the provision of such broadband services both in terms of the types of services offered and in the technologies utilized to provide those services.”).

^{7/} *See, e.g., IP-Enabled Services*, 19 F.C.C.R. at 4871-4879, ¶¶10-22.

The Commission has in fact concluded that “advanced services have *already* played a vital role in the nation’s economy and the lives of its people.” 8/ Broadband services have contributed to the vitality of the economy by enabling businesses to operate more efficiently, by creating job opportunities, and by giving employees greater flexibility in the workplace. 9/ These services also continue to “have a dramatic impact on individual citizens” by, among other things, “improv[ing] the educational opportunities of children and adults everywhere.” 10/ And they have proved critical to delivering healthcare to citizens in rural areas: “Telemedicine networks made possible by advanced services save lives and improve the standard of healthcare in sparsely populated, rural areas.” 11/

8/ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 22 F.C.C.R. 7816, 7816, ¶2 (2007) (emphasis added); *accord Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable & Timely Fashion, & Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 19 F.C.C.R. 5136, 5137, ¶2 (2004) (recognizing that advanced services play an important role in our nation’s economy and the lives of its citizens).

9/ *See* 22 F.C.C.R. at 7816-17, ¶2 (“Many U.S. companies, both large and small, depend on advanced services to run various facets of their businesses, including tracking inventory, monitoring consumer relations, and forecasting product sales. Moreover, advanced services have created new jobs, while enabling skilled employees to work more effectively in their current jobs. Advanced services have also created greater flexibility and opportunity in the workplace, particularly in the increased use of telecommuting by employees who remain connected to their jobs despite distance and other factors.”).

10/ *See id.* at 7,817, ¶3. The Commission has explained that “[h]igh-speed connections to the Internet allow children in rural areas from Alaska to Florida to access the same information as schoolchildren in urban areas” and “distance learning provides more choices for children and adults to access educational materials provided by distant learning institutions.” *Id.*

11/ *Id.* at 7817, ¶4. As the Commission has observed, telemedicine networks not only “bring the skills and knowledge of specialized doctors and other medical professionals to people that would otherwise have to travel long distances to reach them” but also “permit rural healthcare providers to utilize the latest medical information, which, in turn, improves the

In the face of these realities, the Commission's proposal to raise pole attachment costs on broadband providers is at odds with the national imperatives to attain universal broadband deployment and to continue to expand both the scope and the reach of advanced services generally. A policy specifically designed to impose higher infrastructure costs on the very companies that this Commission is counting on to fulfill these national goals is inconsistent with spurring the infrastructure investment necessary to achieve those aims. The *NPRM's* proposal to raise pole attachment costs indeed cannot be reconciled with the nation's overall objectives and should be rejected.

B. The Commission's Proposal To Raise Infrastructure Costs Marks An Unwarranted Departure From The Longstanding Congressional And Commission Policy Of Ensuring That Pole Attachment Costs Do Not Dampen Broadband Deployment.

The Commission's proposal to raise some broadband Internet access service providers' pole attachment costs does not simply mark a significant departure from the Commission's efforts to increase broadband deployment. It is also fundamentally at odds with the Commission's specific, decades-old policy of ensuring low pole attachment rates for broadband services.

Congress and the Commission have long understood the vital connection between pole attachments and broadband deployment. A decade before Congress enacted the Pole Attachment Act, the Commission saw the potential on the horizon for cable operators to deliver broadband services. *See Amendment of Part 74*, 15 F.C.C.2d 417, 419-420, ¶8 (1968). Even then, the Commission envisioned that cable systems would one day provide among other broadband services:

general provision of healthcare in areas of the country that have traditionally been underserved.”
Id.

[F]acsimile reproduction of newspapers, magazines, documents, etc.; electronic mail delivery; merchandising; business concern links to branch offices, primary customers or suppliers; access to computers; e.g., man to computer communications in the nature of inquiry and response (credit checks, airline reservations, branch banking, etc.), information retrieval (library and other reference material, etc.), and computer to computer communications.

15 F.C.C.2d at 419-420, ¶8; *accord Amendment of Part 74*, 36 F.C.C.2d 143, 144, ¶1 & n.10 (1972) (same); *see also* FCC, *Internet Over Cable: Defining the Future In Terms of the Past*, OPP Working Paper No. 30 (Aug. 1998), *available at* 1998 WL 567433, at *52-*53. And in later vesting the Commission with authority to regulate utility pole attachment practices hampering the expansion of cable systems, Congress seized on the link between pole attachments and advanced services deployment by cable operators. The Senate Report accompanying the Act explained that “the introduction of broadband cable services may pose a competitive threat to telephone companies, and that the pole attachment practices of telephone companies could, if unchecked, present realistic dangers of competitive restraint in the future.” ^{12/} S. Rep. No. 95-580, 95th Cong., 1st Sess., 13, *reprinted in* 1978 U.S.C.C.A.N. 109, 121. The House Report for the Cable Act, meanwhile, noted that the Cable Act’s definition of “cable system” “is not limited to a facility that provides only cable service which includes video programming. Quite the contrary, many cable systems provide a wide variety of cable services and other communications services as well. A facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service.” H. Rep. No. 98-934, 98th Cong. 2d Sess. 44, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4681.

^{12/} The Commission recognized that “[t]he same anticompetitive concerns which the Senate report referenced with respect to telephone companies are applicable with equal force to electric utilities, which may seek to provide broadband communications services in competition with cable operators and other providers of such services.” *Heritage*, 6 F.C.C.R. at n.27.

The Commission has consistently exercised the authority Congress gave it in Section 224 to advance a policy reflecting the fundamental premise that pole attachment costs must remain at reasonable levels because of the impact those costs have on decisions to invest in broadband infrastructure. In *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, the Commission found a utility’s attempt to impose a separate, and higher, charge “for so-called non-cable television pole attachments” – *i.e.*, attachments used to provide broadband data service – to be unjust and unreasonable under Section 224. 6 F.C.C.R. 7099 (1991). The Commission recognized that “Congress was aware that cable might not evolve beyond its traditional video offerings if utilities were able to employ overly restrictive pole attachment agreements to frustrate these potential competitors in the provision of nonvideo services.” *Id.* at 7103, ¶18. And it explained that “Section 224 makes no provision for disparate rates based on the type of service provided over the equipment attached to a utility’s poles”; rather, “Section 224 permits a single, regulated, just and reasonable rate for pole attachments.” *Id.* at 7105, ¶31. Accordingly, the Commission held that the utility could only charge “a single, regulated rate for pole attachments . . . and that this rate must fall within the parameters established by Section 224(d)(1).” *Id.* at 7106, ¶32. The Commission’s judgment was affirmed on appeal. *See Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 935 (D.C. Cir. 1993).

Following the 1996 amendments to the Communications Act, the Commission reaffirmed *Heritage’s* holding on the appropriate rate applicable to attachments made by cable operators to provide Internet service. *See Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules & Policies Governing Pole Attachments*, Report & Order, 13 F.C.C.R. 6777, 6792-6796 (1998) [*1998 Pole Attachment Report & Order*]. In explaining its conclusion that “the just and reasonable rate for commingled cable and Internet

service is the Section 224(d)(3) rate” – the rate applicable to cable attachments – the Commission recognized that where Congress intended a higher rate it expressly “provided for one.” *Id.* at 6796, ¶¶32, 34. But it mandated no higher rate for cable system attachments used for Internet service. The Commission further offered that by extending the Cable Rate to include commingled attachments used for Internet service, it “intend[ed] to encourage cable operators to make Internet services available to their customers.” *Id.* at 6794, ¶32. The Commission did so because it feared that “specifying a higher rate *might deter an operator from providing non-traditional services*” and because “[s]uch a result would not serve the public interest.” *Id.* (emphasis added). The Supreme Court affirmed this conclusion. *See National Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327 (2002).

The Commission’s 1998 finding that raising the costs of pole attachments made by cable operators to provide broadband service would create a disincentive for broadband deployment remains fundamentally correct a decade later in 2008. *See infra* at 18-25, 41, 45. Raising pole attachment rates in disregard of the core rationale expressed in *Heritage* and the *1998 Pole Attachment Report & Order* would be an unwarranted departure from longstanding policy with no countervailing justification. ^{13/} Indeed, in its *NPRM* the Commission never questions the continuing validity of its 1998 findings, and nothing since that time has changed to warrant a contrary finding today. It remains the case that raising the costs of providing broadband services will create a disincentive for broadband deployment. Accordingly, the Commission should refrain from adopting a new rule that is contrary to its own longstanding pole attachment policies

^{13/} *See Northpoint Technology, Ltd. v. FCC*, 412 F.3d 145, 156 (D.C. Cir. 2005) (reversing Commission “statutory interpretation . . . that result[ed] from an unexplained departure from prior Commission policy” as “not a reasonable” interpretation); *Telephone & Data Systems, Inc. v. FCC*, 19 F.3d 42, 50 (D.C. Cir. 1994) (reversing Commission “order [that] effected an unexplained departure from Commission precedent”).

and should instead reaffirm that cable operators continue to qualify for the cable rate where they offer multiple services – including broadband services – over the same attachment. *See NPRM*, ¶19. There is simply no reason to change tack now, and plenty of sound reasons not to.

C. In Its Zeal To Eliminate Discriminatory Treatment, The Commission Should Not Ignore The Unequal Positions Of Some Pole Users.

In its *NPRM*, the Commission tentatively concludes that “the critical need to create even-handed treatment and incentives for broadband deployment would warrant the adoption of a uniform rate for all pole attachments used for broadband Internet access service.” *NPRM*, ¶36. TWC supports a uniform rate applicable to pole attachments used by providers of broadband Internet access who have similar attachment rights. TWC also agrees with the Commission that providers of like services should be treated alike and that this Commission should – as it has before ^{14/} – act swiftly to remove regulatory obstacles that artificially distort competition in markets for communications services. However, in attempting to eliminate potentially discriminatory treatment, the Commission must acknowledge the unequal positions of the various parties involved in pole attachment arrangements.

Under their pole attachment agreements, for instance, cable operators are “licensees” ^{15/} that enjoy far fewer rights than the pole owners or third-party “joint users” or “joint owners” – in

^{14/} *See, e.g., Telephone Number Requirements for IP-Enabled Servs. Providers*, 22 F.C.C.R. 19,531, 19,532, ¶1 (2007) (“We believe that these steps we take to ensure regulatory parity among providers of similar services will minimize marketplace distortions arising from regulatory advantage.”); *Interconnection & Resale Obligations Pertaining to Commercial Mobile Radio Serv.*, 11 F.C.C.R. 9462, 9471, ¶13 (1996) (“We are applying the manual roaming rule to these categories of CMRS licensees in order to ensure regulatory parity and to promote competition in the wireless market by enhancing all such carriers’ abilities to compete.”).

^{15/} *See also Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report & Order, 2 F.C.C.R. 4387, 4394, ¶55 (1987) [hereinafter *1987 Report & Order*] (acknowledging that “under the typical pole attachment agreement, the cable operator is given a ‘mere revocable license.’ ”).

other words, the worst of both worlds the Congress envisioned and addressed in the 1978 Pole Attachment Act. As the owners of the particular poles to which cable operators attach, of course, both the electric companies and the incumbent LECs have much greater rights than cable operator licensees to the use of those poles. *See infra* at 12-18 & 53. But the electric companies and the incumbent LECs are also typically “joint owners” or “joint users” of the other’s poles, and these entities are in a fundamentally different position vis-à-vis the pole owners than are cable operators and competitive LECs, both of whom are merely licensees.

Incumbent LECs, as recognized by Congress in both 1978 and 1996, own poles throughout the country. Various commenting parties before the Commission in response to the Petition for Rulemaking filed by United States Telephone Association (“USTA”) noted that incumbent LECs have failed to keep up the ownership percentage of jointly used poles originally anticipated in the historic joint use agreements under which the electric companies and these incumbent LECs continue to operate. *See* Opposition of FirstEnergy Corp., RM-11293, at 3 (Dec. 2, 2005); Reply Comments of AT&T Inc., RM-11293, at 6 (Dec. 19, 2005). Still, incumbent LECs continue to own huge numbers of poles to which cable operators and competitive LECs require access at reasonable rates. For example, although FirstEnergy bemoans the fact that its incumbent LEC partners’ proportion of joint pole ownership has slipped to 35 percent, incumbent LECs remain owners of approximately 564,000 poles to which FirstEnergy is also attached. *See* FirstEnergy Opposition at 3. AT&T admits to owning 37 percent of joint poles. AT&T Reply Comments at 6.

Under the typical arrangements of “joint use” between incumbent LECs and the electric companies, moreover, incumbent LECs enjoy greater rights and use more space than do cable operator and competitive LEC licensees. Most importantly, under joint use and joint ownership

agreements which have dictated for generations the conditions under which incumbent LECs have built their plant, the electric companies have built pole capacity for incumbent LECs. See *Agreement for the Joint Use of Poles, Consumers Power Co. & Michigan Bell Tel. Co.*, Ex. 1, at 2 (“The owner of a jointly used pole shall be responsible for providing a pole suitable for the requirements of both parties.”); see also *Agreement Between Columbus & Southern Ohio Elec. Co. & Ohio Bell Tel. Co. Covering the Joint Use of Poles*, Ex. 2, at 4-6 (providing for exclusive use of space designated for each utility on standard joint use poles). ^{16/} Under these joint use agreements, incumbent LECs are typically afforded the right to use 2-4 feet of usable space, and the electric company is afforded the right to use 6-8 feet of usable space. See *Agreement Between Columbus & Southern Ohio Elec. Co. & Ohio Bell Tel. Co. Covering the Joint Use of Poles*, Ex. 2, at 4; AT&T Reply Comments at 4 (under a typical joint use agreement, 3-4 feet of space is allocated to the incumbent LEC and as much as 8 feet is allocated to the electric utility, plus the 40 inches of “neutral space” which the electric company may also use). Additionally, the poles installed by each company are sized to provide this capacity.

Under a typical “joint use” agreement, therefore, the parties are required to construct standard 40-foot poles so that the electric company is assured use of 6-8 feet of usable space (plus the 40 inches of so-called “safety” or “neutral” space) and the incumbent LEC is assured 2-4 feet of usable space. See *Agreement Between Columbus & Southern Ohio Elec. Co. & Ohio Bell Tel. Co. Covering the Joint Use of Poles*, Ex. 2, at 4. So long as one party does not seek to

^{16/} The two joint use agreements that TWC attaches as exhibits were previously submitted to the Commission in *Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Util. Poles*, CC Docket No. 86-212 as exhibits to the Comments of Continental Cablevision, Inc.; Harron Corporation; Ohio Cable Television Association; Prime Cable Corporation; and Storere Communications, Inc., filed September 11, 1986. Whether or not these particular agreements remain in effect, they are typical of the joint use agreements that both electric utilities and incumbent LECs admit continue to control the relationships among these parties. See AT&T Reply Comments at 2-4; FirstEnergy Opposition at 4-6.

exceed its designated space on a given pole, the joint users agree not to charge each other makeready costs incurred as a result of attachments. ^{17/} The joint users are essentially guaranteed that a pole will be able to accommodate their attachments because the pole owner is required to construct a pole of a certain height with space designated for the other joint user. ^{18/} As a result, for many decades joint users have not been obligated to incur makeready expenses in order to make attachments to poles; instead, the pole owners have made their capital investment with the joint users already in mind. ^{19/} Indeed, where the pole owner's existing facilities on a pole have been required to be rearranged to accommodate a joint user, absent some need to exceed its designated space, the makeready expenses have been paid for by the pole owner – not the joint user. ^{20/}

The utility joint users, in fact, make productive use of the space allocated to them in the joint use agreements. Even though AT&T argues that it no longer requires all of the space that it is allocated under its joint use agreements, it concedes to using “on average, approximately 1.75 feet of space on each pole to which it is attached.” AT&T Reply Comments at 4. Even without delving into the methodology used by AT&T to measure the space used (cable attachments, for example actually “use” only a few inches, yet are allocated 1 foot under the Commission's pole

^{17/} See, e.g., *Agreement Between Columbus & Southern Ohio Elec. Co. & Ohio Bell Tel. Co. Covering the Joint Use of Poles*, Ex. 2, at 11 (“Each party shall, at its own expense, place its own attachments on the new joint use poles”); see also *id.* at 14 (“Whenever either party requests space for its attachments on an existing joint use pole in space not allocated to it and such space can be made available by rearrangement of the attachments of the other party, such other party shall make such arrangements to minimize the premature replacement of poles.”).

^{18/} See Ex. 2, at 4; see *infra* at 53.

^{19/} See Ex. 2, at 4; see *infra* at 53.

^{20/} See Ex. 2, at 11 & 14; see *infra* at 53.

attachment rate methodology), the incumbent LECs not only have space created for them, but they use more space than do cable operators and competitive LECs.

Joint use agreements often provide that the electric companies and incumbent LECs will each own a set percentage of the poles. ^{21/} Because the electric company is expected to use more space on the pole, the prevalent arrangement provides that the electric company will own a greater number of poles – often in the range of 60 percent. In some other cases, that different usage of the parties is recognized in lower rates for the incumbent LEC joint user. In either case, if the parties hold to their agreed-on ownership percentage, the rate payments will essentially be a wash. *See* FirstEnergy Opposition at 6 n.5 (“the annual rental that each party must pay to the other [under a joint use agreement] recognizes the disparity in the gross amount of usable space allocated to each party . . .”); Joint Opposition of American Electric Power, RM-11293, at 18 (Dec. 2, 2005) (under most joint use agreements, balanced ownership of poles prevents the need for money to change hands); AT&T Reply Comments at 3 (same). ^{22/} It will not matter whether the rates are high or low; so long as the set ownership percentages of the parties are observed, no payments will have to be made. In fact, these rates have typically – though not always – been quite low. *See, e.g.,* American Electric Power Opposition at 18 (rates for incumbent LECs have

^{21/} *See, e.g., Agreement Between Columbus & Southern Ohio Elec. Co. & Ohio Bell Tel. Co. Covering the Joint Use of Poles*, Ex. 2, at 3 (“[I]t is the intent of this Agreement that both companies will set and own joint use poles.”); *Agreement for the Joint Use of Poles, Consumers Power Co. & Michigan Bell Tel. Co.*, Ex. 1, at 5.

^{22/} *See, e.g., Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 3, 10 ¶19 (1978) (“Under these agreements, both the electric utilities and telephone companies erect and maintain pole line plant, but avoid erecting duplicative plant. A portion of each pole is reserved for communications services. The telephone companies which are parties to the joint use agreements usually control this space.”); *Better T.V., Inc. v. New York Tel. Co.*, 31 F.C.C.2d 984, 1039 ¶156 (1970) (“[T]he joint occupants of poles had a mutual ownership in the poles. That permitted joint use was based upon reciprocal agreements.”); *see also* Ex. 1, at 5; Ex. 2 at 25-30.

recently been \$2 and \$3 a pole). Only because the incumbent LECs no longer own the percentage of poles contemplated in the joint use agreements has the question of the appropriate rates between these parties arisen.

The pole attachment license agreements imposed by incumbent LECs and electric companies on cable operators and competitive LECs, however, are far different from “joint use” agreements. Most importantly, no capacity is created for the licensees. When there is no room on a pole for the cable operator to attach, it must create space for itself by paying to rearrange the existing facilities on the pole or by paying for the installation of a new, larger pole. 23/ This represents a critical difference from the rights that joint pole users or owners have historically received.

Furthermore, when the cable operator is required to pay for the installation of a new pole in order to create space for its facilities, the utility – not the cable operator – owns the pole. 24/ Even though the cable operator has thus paid for the entire new and larger pole, it is still required to pay “rent” annually to attach to it. By the same token, cable operators are also required to pay for pole owner inspections of their facilities, whereas joint users are obligated only to conduct their own plant inspections. 25/ The inspections for which cable operators are charged include (i) preconstruction inspections, (ii) post construction inspections, and (iii) periodic safety inspections – none of which are charged by pole owners under typical joint use agreements. And cable operators must also broadly indemnify the pole owner – including often from its own

23/ See *infra* at 53.

24/ See *infra* at 53.

25/ See Exs. 1-2 (not providing for inspection of joint user attachments).

negligence – while parties to joint use agreements share the risk of damage and injury equally. 26/

As a result, the costs that cable operators bear related to these lesser rights can be enormous, in both dollars and time-to-market for cable operator services. The costs of “makeready” are heavy for cable operators’ new construction. Utility pole owners often charge as much as \$3,000 - \$5,000 to install a new pole, remove the old pole and transfer all wires, and in some areas makeready bills can be extremely high because a number of the utility poles are virtually fully occupied. Utilities often require cable operators to pay \$100 a pole (or more) for the utility’s hiring of contractors to conduct pre-attachment inspections. Post-construction inspections are also expensive, as are periodic safety inspections conducted by the utilities of the cable operator’s attachments. Although the Commission has been helpful in dealing with cable operator complaints about inspections that the utilities use to better their own plant, facts about how data collected in inspections are used and whether costs are inflated are often beyond the knowledge of the cable operators. Before they even can begin construction, therefore, cable operators are often required to absorb significant costs that the pole “joint-users” are generally able to avoid. Even when performing “overlapping,” cable operators are sometimes required to pay for inspections by the pole owners, despite the Commission’s declarations that overlapping does not require permitting – again incurring expenses not borne by joint users.

Additionally, all of these expensive procedures that are charged to cable operators take time, time that limits cable operators’ ability to extend service or upgrade plant to enable new services to be provided broadly. Pole permitting, especially where makeready is involved, can

26/ *Agreement for the Joint Use of Poles, Consumers Power Co. & Michigan Bell Tel. Co., Ex. 1, Art. X, at 9-10 (providing that each party is liable for its sole negligence, for injuries to its own employees or property where concurrent negligence, and for one-half of damages or injuries to third parties where concurrent negligence); see infra at 53.*

take many months. Even where TWC is upgrading its plant by overlashing fiber on existing attachments, some utilities are attempting to require TWC to halt construction when encountering minor National Electrical Safety Code (“NESC”) violations on the pole. Even where the violation was created by the pole owner or a joint user, and has remained uncured for many years, the cable operator may be required to wait until the utility gets around to fixing the violation before it is allowed to overlash. These practices can cumulatively halt new projects for months, thus causing delays in providing new or competitive services, delays that are not experienced by the pole owners or their joint users.

Were the pole attachment rental fees higher for joint users and joint owners than for cable operators, therefore (and in most cases, to the best of TWC’s knowledge, they are not), such higher attachment fees would not necessarily be discriminatory. As noted above, the pole owners are required under their joint use agreements to create capacity for joint users, and the joint users are able to avoid many other costs – as well as lengthy delays – that cable operators have been required to bear under their pole licensee agreements.

III. Pole Attachments Remain An Essential Service For Cable Operators That Utilities Can Exploit For Anti-Competitive Ends.

1. Congress, the courts, and this Commission have all long recognized that access to utility poles is essential for cable operators to deliver communications services to their subscribers. Since the 1970s, Congress has recognized that, owing to environmental, zoning and rights-of-way restrictions, as well as the costs of erecting a duplicative set of utility poles or placing cable facilities underground, cable operators lack a practical, economical alternative to attaching their communications cables to existing poles erected and owned by telephone and electric power utilities. *See, e.g.*, S. Rep. No. 95-580, at 13 (“Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or

entrenching cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles.”). 27/ The legislative history of the Pole Attachment Act confirms that it was this practical reality – and the anti-competitive opportunities that it affords to utilities owning the poles – that prompted Congress to vest the Commission with authority to regulate the pole attachment rates charged by utilities in the first place.

The reason for this legislation is simple – cable television operators are generally prohibited by local governments from constructing their own poles to bring cable service to consumers. This means that they must rely on the excess space on poles owned by the power and telephone utilities. These utilities, however, have responded in traditional monopolistic fashion, offering cable operators “take it or leave it” terms.

123 Cong. Rec. 16,694 (daily ed. May 25, 1977). Recognition of the importance to cable operators of access to utility poles at reasonable prices, furthermore, is found far beyond the pages of the Congressional Record.

Just as Congress, in enacting the Pole Attachment Act, appreciated the importance of access to pole space to cable operators at reasonable rates, courts around the country have found that cable operators have little alternative to the use of existing pole facilities to construct their communications networks. 28/ Among other difficulties, these courts have explained that it

27/ See, e.g., S. Rep. No. 94-1630, 2d Sess., at 5 (1976) (“In many communities, because of the lack of available rights-of-way, environmental restrictions, or zoning laws, the CATV operator is unable to construct his own pole plant for the attachment of his coaxial cable. A CATV operator who is unable to use his own pole plant must seek to use existing utility company poles.”); H. Rep. No. 95-721, at 2 (1977) (“Use is made of existing poles rather than newly placed poles due to the reluctance of most communities, based on environmental considerations, to allow an additional, duplicate set of poles to be placed.”).

28/ See, e.g., *Southern Co. v. FCC*, 293 F.3d 1338, 1341 (11th Cir. 2002) (“As a practical matter, cable companies have had little choice but to” attach “their distribution cable to utility poles owned and maintained by power and telephone companies.”); *Georgia Power Co. v. Teleport Commc’ns Atlanta, Inc.*, 346 F.3d 1033, 1036 (11th Cir. 2003) (noting “lack of alternatives to these existing poles”); *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 927 (D.C. Cir.

would be prohibitively expensive for cable operators to undertake to build an entirely new and independent set of utility poles simply to provide their communications services. *See, e.g., Southern Co.*, 293 F.3d at 1341 (“The start up costs of constructing an entirely new set of poles and other distribution facilities for cable television cables are prohibitive, and when coupled with the difficulties of obtaining regulatory approval for a distinct set of utility poles, the barriers to such construction are insurmountable.”); *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 576-577 (D.C. Cir. 2002) (“Since building new poles was prohibitively expensive, cable operators instead leased existing space from utilities”). Courts have come to describe pole-owning utilities as “the owner[s] of . . . ‘essential’ facilities” for cable operators. *See, e.g., Alabama Power Co. v. FCC*, 311 F.3d 1357, 1362 (11th Cir. 2002).

The United States Supreme Court has acknowledged cable operators’ dependence on utility poles. In *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), for example, the Court explained:

Cable Television operators, in order to deliver television signals to their subscribers, must have a physical carrier for the cable; in most instances underground installation of the necessary cables is impossible or impracticable. *Utility company poles provide, under such circumstances, virtually the only practical medium for the installation of television cables.*

Id. at 247 (emphasis added). The Court made this same point again more than a decade later in *Gulf Power*. There, the Court explained that cable companies have found it “essential to lease space for their cables on telephone and electric utility poles” and utilities “have found it convenient to charge monopoly rents.” 534 U.S. at 331.

1993) (explaining that “the nascent cable television industry turned to the poles owned by telephone and electric utilities as the only feasible method for building a network to access customers.”).

This Commission, too, has consistently recognized that “as a practical matter the use of existing poles is necessary” for cable operators. *Petition By Telecable Corp., To Stay Construction or Operation of A CATV System In Bloomington & Normal, Ill., by G.T. & E. Communications, Inc.*, 19 F.C.C.2d 574, ¶12 (1969). The Commission has consistently described pole access as “essentially a monopoly service” ^{29/} and pole attachments themselves as “essential” and “bottleneck” facilities for cable operators. ^{30/} As recently as last year, the Commission dismissed the counter-argument that utility poles are not essential facilities for cable operators as little more than “a long-discredited attack on the basis for the Pole Attachment Act.” *Florida Cable Telecomms. Ass’n v. Gulf Power Co.*, 22 F.C.C.R. 1997, 2004, ¶21 (2007) (Sippel, J.). Indeed it is.

2. Access to space on utility poles at reasonable rates is no less vital today than it was when Congress first enacted the Pole Attachment Act in 1978. ^{31/} Cable operators still do not have a viable alternative to pole attachments for building their communications networks and

^{29/} *Applications of Tel. Cos. for Section 214 Certificates for Channel Facilities Furnished to Affiliated CATV Sys.*, 21 F.C.C.2d 307, ¶46 (1970) (recognizing pole access as “essentially a monopoly service”).

^{30/} *Amendment of Commission’s Rules & Policies Governing Pole Attachments*, 16 F.C.C.R. 12,103, 12,112, ¶13 (describing poles as “bottleneck facilities” and acknowledging “the utilities’ monopoly over poles”) (2001); *see also id.* at 12,166 n.254 (“[U]tility poles are often regarded as essential facilities.”); *Better T.V. Inc. v. New York Tel. Co.*, 31 F.C.C.2d 939, ¶68 (1971) (“utility poles [are] . . . essential to the construction of a cable system”); *see also* FCC, *Public Notice, Common Carrier Bureau Cautions Owners of Utility Poles*, DA 95-35, at 1 (Jan. 11, 1995) (“Utility poles, ducts, and conduits are regarded as essential facilities, access to which is vital for promoting the deployment of cable television systems.”).

^{31/} *See, e.g., TWTC White Paper*, RM-11293, at 5 (Jan. 16, 2007) (“[T]hird-party access to pole attachments continues to be critically important to competition. For example, TWTC provides broadband information and telecommunications services over fiber that it deploys or leases. Access to poles is usually the most efficient and often the only means of deploying these fiber transmission facilities As TWTC expands its network footprint, . . . its reliance on poles will only increase.”).

continue to rely on utilities' pole infrastructure. It remains impractical, uneconomical and sometimes unlawful for cable operators to erect their own set of utility poles to support their wires. Indeed, it is even more difficult to contemplate constructing any sort of alternative facilities now that cable operators have already constructed their infrastructure aerially by accessing utility poles at rates kept low under Commission jurisdiction. To reconstruct their facilities underground or using their own pole lines would require rebuilding those facilities from scratch, which would be financially implausible. *See, e.g., Southern Co. Servs.*, 313 F.3d at 576-577; *see also Florida Power*, 480 U.S. at 247.

In many areas, even where aerial cable facilities do not already exist, it remains infeasible and prohibitively expensive for cable operators to entrench cable facilities underground. In rural areas, the capital cost of placing cable underground is often more than twice as expensive to construct than attaching to excess space on existing utility poles. In urban areas, underground construction can be more than 10 times the cost of aerial construction, and can even exceed \$500,000 a mile. Thus, utility poles continue to provide "virtually the only practical medium" for cable operators to provide communications services, including broadband Internet access service. *Florida Power*, 480 U.S. at 247.

3. In enacting the Pole Attachment Act, Congress was deeply concerned that utilities' control over pole assets critical for cable operators to provide their communications services put the utilities in a position to stymie, for anticompetitive ends, the development of cable systems capable of deploying broadband services. *See, e.g., Florida Power*, 480 U.S. at 247 (Congress enacted the Pole Attachment Act "as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service"). The legislative history of the

Pole Attachment Act is replete with evidence of utility abuses of cable operators, ^{32/} including instances in which utilities had attempted to take over the distribution of cable operators' communications signals and prohibited cable operators from attaching to their poles. *Communications Act Amendments of 1977: Hearings on S. 1547 Before the Subcomm. on Communications of the S. Comm. on Commerce, Science, & Transp.*, 95th Cong., 1st Sess., at 36 (1977). The Commission has consistently regulated with these concerns in mind. *See, e.g., Selkirk Communications, Inc. v. Florida Power & Light Co.*, 8 F.C.C.R. 387, 390 n.11 (CCB 1993) ("Congress, in enacting Section 224 of the Communications Act was concerned about the overreaching and anti-competitive activities of utilities and telephone companies in providing pole attachments to cable television operators."); *Heritage*, 6 F.C.C.R. at 7102, ¶14 ("Congress clearly acted to protect cable system operators from anticompetitive conduct by utilities.").

The longstanding concern over anticompetitive practices by pole-owning utilities that this Commission has consistently recognized remains relevant – indeed *more* relevant – today. At the same time that cable operators continue to depend on utilities' poles to provide communications services, *see supra* at 19-22, utilities are increasingly entering into competition with cable operators in the provision of those services – from video, to voice, to broadband Internet access service. ^{33/} As the Commission has observed, "the larger LECs have continued

^{32/} *See, e.g., S. Rep. No. 95-580*, at 13; *see also Cable Television Regulation Oversight: Hearings Before the Subcomm. on Communications of H. Comm. on Interstate & Foreign Commerce*, Part 2, 94th Cong., 2d Sess. 797 (1976); *Hearings on H.R. 15372 and H.R. 15268 Before the Subcomm. on Communications of the H. Comm. on Interstate & Foreign Commerce*, 94th Cong., 2d Sess. 59 (1976).

^{33/} *See, e.g., Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection & Competition Act of 1992*, 22 F.C.C.R. 19,633, 19,634, ¶2 (2007) ("New competitors are entering markets for the delivery of services historically offered by monopolists: traditional phone companies are entering the multichannel video market, while traditional cable companies are competing in the telephony

and accelerated their plans to roll out video services.” *Twelfth Annual Report*, 21 F.C.C.R. at 2562, ¶122. Verizon is providing multichannel video, broadband Internet access and telephony services through a fiber-to-the-home network that passes millions of homes and businesses around the country. Other incumbent LECs are undertaking similar efforts to enter into competition with cable operators in the video and broadband services markets. *See id.* at 2562-63, ¶¶123-125.

Similarly, electric utilities, who have extensive experience in the communications arena, ^{34/} are also increasingly entering the communications business. The Commission has noted that “[e]lectric . . . utilities possess certain assets that have positioned them well for entry into the [multichannel video distributor] market, including access to public rights-of-way, ownership and operation of various infrastructure amenable to the provision of network services, as well as established relationships with customers.” *Id.* at 2563, ¶126. It is therefore no surprise that in 2006 the Commission found that “616 public power entities offer some kind of broadband services, serving about 14 percent of total households in the United States.” *Id.* at 2507, ¶14. Of those utilities, “102 offered video services, 128 offered high-speed Internet access, 52 offered local telephone service and 42 offered long distance telephone service.” *Id.* at 2507-08. Some of these utilities also offered video-on-demand services. *Id.*

Needless to say, as pole-owning utilities move aggressively to compete against cable operators, the threat that the utilities may wield their control over vital pole assets as

market. Ultimately, both types of companies are projected to offer customers a ‘triple play’ of voice, high-speed Internet access, and video services over their respective networks. These entities also face competition from other new providers of bundled services, including . . . utility companies.”).

^{34/} Congress has recognized that “[e]lectric utilities in general have extensive experience in telecommunications operations. Utilities operate one of the Nation’s largest telecommunications systems – much of it using fiber optics.” S. Rep. 103-367, at 10 (1994).