

anticompetitive weapons remains very real. Therefore, the historic legislative concern with anticompetitive tactics by utilities remains relevant and should continue to inform this Commission's pole attachment policies.

IV. The Section 224(d) "Cable" Rate Is A Fully Compensatory Just And Reasonable Pole Attachment Rate.

The Cable Rate that was adopted by the Commission three decades ago fully compensates utility pole owners for use of the pole, and actually provides a benefit that is greater than originally intended by Congress in enacting the Pole Attachment Act in 1978. Given that this formula adequately compensates pole owners for their fully allocated costs of providing attachments – no matter what service is provided over the attached wires – the Commission should simply extend the Cable Rate formula to cover pole attachments made by both cable operators and telecommunications carriers to provide commingled communications services, including broadband Internet access services.

A. *The Cable Rate Is Set At The Upper End Of The Range Contemplated By The Statute And Allows Utilities To Recover The Fully-Allocated Costs Of Pole Attachments By Cable Systems.*

The Commission's tentative conclusion that the Cable Rate is an inadequate vehicle to compensate pole owners for attachments used to provide broadband Internet access service appears to be rooted in the premise that the Cable Rate formula "results in a subsidized rate" ^{35/} because it allegedly "does not include an allocation of the cost of unusable space." ^{36/} This premise – that a subsidy for cable operators is somehow embedded in the Cable Rate formula based on a misallocation of costs – is mistaken.

^{35/} NPRM, ¶19.

^{36/} NPRM, ¶22; *see also id.* at ¶19 (noting that "the current cable rate formula[']s . . . space factor does not include unusable space").

In Section 224 of the Communications Act, Congress required the Commission to establish a pole attachment rate for attachments used by cable operators that is “just and reasonable” – *i.e.*, a rate that “assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole.” 47 U.S.C. § 224(d)(1). This statutory command thus permitted the Commission to set a pole attachment rate somewhere “between the *incremental costs* of the utility and the cable operator’s share of the utility’s *fully allocated costs*” of the entire pole. ^{37/}

There is a significant difference between a pole attachment rate based on “incremental” or “additional” costs, on the one hand, and a formula based on “fully allocated costs,” on the other. ^{38/} “Incremental” or “additional” costs only “consist of those costs which would not be incurred by the utility[] ‘but for’ the presence of cable attachments”^{39/} – that is, the costs “aris[ing] solely by virtue of the [cable system’s] occupation of space within the communications space on the pole.” ^{40/} Such costs would include items like “preconstruction survey costs and

^{37/} 1987 Report & Order, 2 F.C.C.R. at 4388, ¶4 (emphasis added); *see also id.* at 4397, ¶71 (“A review of the Senate Report reveals that the standard permits the contracting parties, or the Commission, to determine a CATV pole attachment rate somewhere between avoidable costs and fully allocated costs.”); *see also* S. Rep. No. 95-580, at 19 (noting that Section 224’s rate-setting formula “describes a range of permissible rates between ‘additional costs’ and a proportionate share of the ‘operating expenses and actual capital costs’ of the utility pole.”).

^{38/} *See, e.g.*, S. Rep. No. 95-580, at 19.

^{39/} 1987 Report & Order, 2 F.C.C.R. at 4388, ¶4.; *see also* S. Rep. No. 95-580, at 19 (explaining that “[t]he term ‘additional costs’ means those costs which would not be incurred by the pole owner or controller ‘but for’ the CATV attachment.”).

^{40/} S. Rep. No. 95-580, at 19.

engineering, make-ready, and change-out costs incurred in preparing the utility pole for the [cable system] attachment.” 41/

Congress authorized the Commission to adopt a formula based on incremental costs owing to the fact that “[c]able television attachments cause *no capital costs* to the utilities.” 42/ That utilities do not incur any capital costs in order to provide attachments for cable operators remains true today and is a fundamental fact that the Commission fails to recognize in its *NPRM*. Unlike their core utility services where the utility undertakes a requirement to provide capacity sufficient to serve, utility pole owners do not construct pole lines with regard to the needs of cable operators or other licensees. Poles typically come in five-foot increments, 43/ and because of that many poles installed by utilities have some “excess” or “surplus” space that may be used for others to attach. But standard utility pole attachment license agreements uniformly make clear that utilities do not construct capacity for use by licensees. And these standard agreements – with the understanding of Congress and the Commission 44/ – provide that (i) licensees must pay to create space if the pole does not contain enough surplus space at the time of attachment to accommodate the licensee; (ii) the pole owner may decline to allow the licensee to attach for reasons of “capacity, safety, reliability, and [generally applicable] engineering standards,” 47 C.F.R. § 1.1403(b), or if the utility has a “bona fide development plan” that calls for future use of

41/ *Id.*; see also *1987 Report & Order*, 2 F.C.C.R. at 4388, ¶4.

42/ 123 Cong. Rec. at 16,695.

43/ See *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C.2d 59, ¶¶21-22 (1979) (recognizing that 35, 40, and 45 foot poles are most common).

44/ See 123 Cong. Rec. at 16,695 (Statement of House Communications Subcomm.); see also *Amendment of Commission’s Rules & Policies Governing Pole Attachments*, 16 F.C.C.R. at 12,119, ¶24 (“[I]f a utility is required to replace a pole in order to provide space for an attacher, the attacher pays the full cost of the replacement pole.”).

the space; 45/ and (iii) licensees are responsible for a portion of any cost of increasing space on the pole after attachment if they choose to make use of it, 47 U.S.C. § 224(h). 46/ Thus, even where they pay to create space through the cost of installing a new and larger pole, licensees do not own the pole, and they are required to pay annual “rent” for the space on the pole that they have paid to purchase and install. 47/

In the 1996 amendments to the Communications Act, Congress gave cable and telecommunications pole licensees a right to attach in surplus space and the right to remain in the space, even if the utility later needs it. 47 U.S.C. § 224(f) & (i). But, as noted above, the pole owner is not required to allow attachment where it has a “bona fide development plan” to use the available space or for reasons of safety, reliability or engineering standards. And the licensee cannot force the pole owner to install a taller pole, even at the cable operator’s expense. *See Southern Co.*, 293 F.3d at 1347 (when “capacity is insufficient, there is no obligation to provide third parties with access to that particular ‘pole, duct, conduit, or right-of-way.’”) (quoting 47 U.S.C. § 224(f)(2)). The “right of access” added to the Act in 1996 thus is strictly limited and

45/ *Implementation of Local Competition Provisions in Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, 16,078, ¶1169 (1996) (“We will permit an electric utility to reserve space if such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service.”); *see also Southern Co.*, 293 F.3d at 1348 (holding “[t]he FCC guideline require[ing] a ‘bona fide development plan’ as a prerequisite to a utility’s reservation of space for its future needs is a reasonable exercise of agency discretion.”).

46/ *See, e.g., Hearings on S. 1547 Before the Subcomm. on Communications of the S. Comm. on Commerce, Science and Transp.*, 95th Cong. 1st Sess., at 38 (1977); *Hearings before the Subcomm. on Communications of the H. Comm. on Interstate & Foreign Commerce*, at 899.

47/ *See, e.g., Hearings on S. 1547 Before the Subcomm. on Communications of the S. Comm. on Commerce, Science and Transp.*, 95th Cong. 1st Sess., at 29 (1977). Even the Senior Vice President and General Counsel of American Electric Service Corp., testifying on behalf of the Edison Electric Institute on the Pole Attachment Act, conceded that this practice “would sound inequitable to me.” *Id.* at 184-185.

does not affect the obligation of the licensee to pay to create space in any case where it is deemed not to be available or “surplus.” The access rights do little to change the relations of the parties and plainly do not require the pole owner to create capacity for the licensee.

Recognizing the limited rights held by pole licensees and the fact that pole owners never pay to create capacity for the licensees, Congress understood that a rate at or approaching the utility’s “additional costs” in making surplus pole space available would be appropriate. 48/ “The level of pole attachment fees is intimately connected with the terms and conditions of pole space leasing agreements.” 49/ Congress believed that a pole attachment fee designed to recover the licensee’s appropriate share of the utility’s fully allocated costs “might justify giving cable operators all of the rights with respect to poles as other utility users,” while “a fee designed to recover only the utility’s avoidable costs . . . would justify treating cable as a clearly secondary use subordinate in every respect to the provision of electric and telephone service.” 50/

Congress envisioned that recovery of the utility’s additional costs would establish a rate “floor,” which would allow utilities to fully recover any administrative costs resulting from pole attachments in order to ensure that rates are not set which result in the utilities subsidizing cable companies – *i.e.*, that “a utility will not lose money by having . . . cable [attachments] on its poles.” 51/ Both Congress and the Commission have recognized that a pole attachment rate based on “additional” or “incremental” costs would indeed be “minimal” because “most”

48/ S. Rep. No. 95-580, at 19.

49/ *Id.*

50/ *Id.*

51/ 123 Cong. Rec. 11,465 11,466 (daily ed. Oct. 25, 1977); *see id.*

incremental costs “would have been fully recovered in the make-ready charges already paid by the cable company.” ^{52/}

At the other end of the statutory zone of reasonableness Congress set the fully allocated cost methodology. In contrast to “incremental” or “additional” costs, fully allocated costs cover the “operating expenses and capital costs incurred by the utility in owning and maintaining the poles *regardless of the presence of cable.*” ^{53/} These costs include “interest on debt, return on equity (profit), depreciation, taxes, administrative and maintenance expenses.” ^{54/} As Congress explained, “the upper end of th[e] range” established in the statute – *i.e.*, a fully allocated cost methodology – “is expressed in terms of the charge to the [cable system] pole user which reflects its proportionate share of the *total cost of the pole*, such total costs being the recurring operating expenses and capital costs attributable to the utility pole.” ^{55/} In other words, the fully allocated cost approach looks to the annual costs of owning and maintaining the pole, regardless of the presence of any licensee attachment and allocates a portion of that cost to the licensee. The

^{52/} 1987 Report & Order, 2 F.C.C.R. at 4388, ¶4; S. Rep. No. 95-580, at 19 (explaining that “a fee designed to recover only the utility’s avoidable costs . . . could be expected to be minimal since most of those costs are the outlays that should be fully recovered in the made-ready charges”).

^{53/} 1987 Report & Order, 2 F.C.C.R. at 4388, ¶5 (emphasis added); S. Rep. No. 95-580, at 19-20 (explaining that “[t]he term ‘operating expenses and actual capital costs of the utility . . . refers to the costs of the utility[y], irrespective of the CATV attachment, of owning and maintaining poles.’”) (emphasis added.)

^{54/} S. Rep. No. 95-580, at 20; accord 1987 Report & Order, 2 F.C.C.R. at 4388, ¶5.

^{55/} S. Rep. No. 95-580, at 27 (emphasis added); see also 123 Cong. Rec. at 16,695 (“Higher rates are also permitted in a formula which allows the utilities to recover a *proportion of all their costs* based on the amount of usable space occupied by the television cable.”) (emphasis added).

Commission has relied on the upper end of this zone of reasonableness for the past 30 years, and the courts have continually approved. 56/

Congress decided in 1978 that in determining the fully allocated cost, it was reasonable to assign to the pole licensee that portion of the annual cost of the entire pole represented by the proportion of the “usable” space on the pole used by the licensee. 57/ The Commission’s suggestion in the *NPRM* that the Cable Rate formula may produce a subsidized rate because it “does not include an allocation of the cost of the unusable space” is simply wrong. The cost of the entire pole, including the unusable space, is allocated in this fashion. As recognized in the legislative history of the 1978 Act, the allocation methodology may be analogized to a fair method of determining the rental rates in an apartment building. 58/ The method outlined by Congress would set the rent for each of 10 equivalent apartments at an amount sufficient to cover one-tenth of the costs of owning and maintaining the entire apartment building, including common spaces such as the lobby, elevators and parking garage. 59/ “The renter of one of the

56/ See 1987 Report & Order, 2 F.C.C.R. 4387; *Texas Cablevision v. Southwestern Elec. Power Co.*, Mimeo No. 2747 (Feb. 26, 1985); *Group W Cable, Inc. v. Interstate Power Co.*, Mimeo No. 3118 (Mar. 27, 1984); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 3 (1978); see also *Florida Power*, 480 U.S. 245.

57/ Under the Commission’s rules, “usable space” means “the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility.” 47 C.F.R. § 1.1402(c). By contrast, “unusable space” is “the space on a utility pole below the usable space, including the amount required to set the depth of the pole.” *Id.* § 1.1402(l).

58/ 123 Cong. Rec. at 16,695; see *Hearings Before the Subcomm. on Communications of the S. Comm. on Commerce, Science & Transp., To Amend the Communications Act of 1934, as Amended with Respect to Penalties & Forfeitures & to Authorize the Federal Communications Commission to Regulate Pole Attachments & for Other Purposes*, 95th Cong., 1st Sess., 95-36, at 35 (June 24, 1977).

59/ The formula awards a return on investment equivalent to the return the pole owner receives in its core utility rates. See 47 C.F.R. § 1.1404(g)(X); see *Amendment of Rules &*

ten units pays the cost of that unit plus one-tenth of the cost of all common areas. He does not pay one-half of the cost of the common areas just because only one other person occupies the other nine units, but rather he pays his one-tenth share of all costs attributable to the building.” 60/

B. The Cable Rate Reasonably Compensates Utilities For Their Costs Of Providing Attachments, Especially Given The Limited Pole Rights Cable Operators Receive From Utilities.

Because the utility does not make any investment to create capacity for the licensee to use, the utility has no legitimate complaint against a Commission pole attachment rate that is based on incremental costs. The Commission’s fully allocated Cable Rate formula provides utilities with reasonable compensation for making available to communications attachers a small part of an otherwise unproductive asset. In fact, the fully allocated rate is a form of subsidy to the utilities’ ratepayers – or shareholders – because it provides income that was never contemplated in the installation of the pole. 61/ An article in the Bell Journal of Economics,

Policies Governing Pole Attachments, 12 F.C.C.R. 7449, 7466, ¶37 (1997) (“[O]ur pole attachment formula allows utilities to include a return on pole-related investment in pole attachment rates charged to telecommunications carriers. To simplify pole attachment rate proceedings, we currently use the rate of return authorized for the utilities’ intrastate services.”).

60/ 123 Cong. Rec. at 16,695.

61/ As the Congress recognized long ago, cable television “offers an income-producing use for an otherwise unproductive and often surplus portion of plant.” S. Rep. No. 95-580, at 16; see also *Hearings Before the Subcomm. on Communications of the S. Comm. on Commerce, Science & Transp., To Amend the Communications Act of 1934, as Amended with Respect to Penalties & Forfeitures & to Authorize the FCC to Regulate Pole Attachments & for Other Purposes*, 95th Cong., 1st Sess., 95-36, at 35 (June 24, 1977) (“It is pure happenstance that space does exist which is unneeded for the provision of either electric or telephone service and were it not for the possible use of that space by cable television, it would remain what it is today, an unproductive and unneeded unit of utility plant whose total costs must be borne by the consumers of utility services.”). One agency to consider the relationship of pole attachment fees to utility investment in poles solely for their own purposes colorfully described pole attachment fees as akin to “money from the wife’s folks.” *Regulation of Rates, Terms & Conditions for the*

quoted in the legislative history of the Pole Attachment Act, noted that, so long as there remains unused capacity on poles, the uses by cable operators “do not represent true economic costs” and that pole owners “are receiving profits which are actually generated by cable television” 62/

Given that cable operators are treated as “clearly secondary” pole users, the pole owners are clearly not entitled to any more than their fully allocated costs – based on the amount of usable space used by the licensee – of providing pole attachments.

C. *The Commission Has Rejected Repeatedly The Notion That The Cable Rate Provides A Subsidy To Cable System Attachers – A Conclusion That Remains Entirely Correct.*

In view of the foregoing, it should be clear that cable operators are not subsidized by a pole attachment rate that requires them to pay their proportionate share of the fully allocated costs that utilities incur in owning and maintaining their poles – especially when the cable operators receive so few rights in return for that payment. *See supra* at 12-18. But the Commission’s suggestion that there is a subsidy for cable operators embedded in the Cable Rate 63/ has already been considered – and rejected – by the Commission. 64/

Provision of Pole Attachment Space to Cable Television Sys. by Telephone Cos. & Elec. Utils., Order, at 8 (Ky. P.S.C. 1981).

62/ *See Hearings Before the Subcomm. on Communications of the S. Comm. on Commerce, Science & Transp. On S. 1547 to Amend the Communications Act of 1934, as Amended with Respect to Penalties & Forfeitures & to Authorize the FCC to Regulate Pole Attachments & for Other Purposes, 94th Cong., 1st Sess, at 30 (June 23-24, 1977) (quotation marks omitted).*

63/ *See NPRM, ¶19.*

64/ The Supreme Court has similarly concluded that the Cable Rate effects no taking of utilities’ pole assets. *See Florida Power*, 480 U.S. at 254 (“The rate imposed by the Commission in this case was calculated according to the statutory formula for the determination of fully allocated cost . . . [and the utilities] have not contended, nor could it seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory.”).

As early as 1978, the Commission confronted an allegation by utilities that its pole attachment regulations operated to compel “electric utilities to subsidize the customers of a cable company.” 65/ The Commission rejected this idea out of hand: It explained that its pole attachment regulations are designed to “equitably distribute the contribution of the parties to the expenses attendant to pole attachments.” 66/ The Commission further observed that “our rules . . . go far to assure that the customers of CATV systems are not subsidized by electric or telephone companies.” 67/

Through the following decades, the Commission has consistently recognized that the Cable Rate provides utilities with more than adequate compensation for providing pole attachments. In 2001, for example, the Commission reaffirmed that the Cable Rate fairly compensates utilities. 68/ The Commission explained that “[w]e have been presented with no persuasive evidence that utility owners do not recover a just and reasonable compensation for pole attachments from the use of the *Cable Formula*.” 69/ To the contrary, the Commission held that “[t]he application of the well-established Cable Formula . . . is consistent with establishing a just, reasonable, and nondiscriminatory *maximum* pole attachment rate as envisioned by

65/ *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 1585, ¶15 (1978).

66/ *Id.*

67/ *Id.*

68/ *Amendment of Commission’s Rules & Policies Governing Pole Attachments*, 16 F.C.C.R. at 12,115, ¶17.

69/ *Id.*

Congress . . . to compensate the pole owner for *its actual costs associated with the amount of space used by an attacher.*” ^{70/}

There is nothing to the utilities’ oft-repeated – and equally oft-rejected – refrain that the Cable Rate requires them to subsidize cable operators. To be clear: A rate formula that provides utilities with an appropriate share of *the fully allocated costs* of pole attachments by definition cannot contain a subsidy.

D. The States That Regulate Pole Attachments Rely Upon The Cable Rate As A Reasonable Means Of Ensuring That Utilities Recover The Costs Of Providing Pole Attachments To Cable Systems Irrespective Of The Services Provided Over The Attachments.

Not only is the Commission’s Cable Rate time-tested and Supreme-Court approved, but states that regulate pole attachments pursuant to Section 224’s reverse preemption clause have come to rely on that Commission formula as providing an appropriate vehicle for utilities to recover the costs of providing pole attachments to communications companies such as cable operators. As the Commission noted in its *NPRM*, “[e]ighteen states and the District of Columbia have certified that they regulate pole attachments, and thus the Commission does not regulate pole attachments in those states.” *See NPRM*, ¶4 & n.6; *see also States That Have Certified That They Regulate Pole Attachments*, 7 F.C.C.R. 1498 (1992) (listing certified

^{70/} *Id.* (emphasis added).

states). 71/ Nearly all of these certified States have adopted pole-attachment rate formulas closely based on the Commission's Cable Rate. 72/

Indeed, a number of these certified states deploy a uniform pole attachment rate based on the Cable Rate for attachments used to provide broadband Internet access and telephony services in addition to traditional multi-channel video service. 73/ In concluding that it is appropriate to

71/ Since issuance of the *NPRM*, New Hampshire has certified that it regulates pole attachments. See *New Hampshire Joins States That Have Certified That They Regulate Pole Attachments*, Public Notice, DA 08-450, WC Docket No. 07-245 (rel. Feb. 22, 2008) at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-450A1.doc.

72/ In fact, sixteen (now including New Hampshire) of the nineteen states that regulate pole attachments base their formulas largely on the Commission's Cable Rate. Those states are: Alaska, see Alaska Adm. Code, tit. 3, § 52.900, *et. seq.*; California, Cal. Pub. Util. Code § 767.5; Connecticut, see *Application of Southern New England Tel. Co. to Amend its Rates & Rate Structure*, 1993 WL 378949 (Conn. D.P.U.C. Jul. 7, 1993); Illinois, see Ill. Adm. Code, tit. 83, §§ 315.10-315.70; Kentucky, see 807 Ky. Adm. Regs. § 5:006; Louisiana, see *Agreements for Joint Utilization of Poles & Facilities by Two or More Entities*, Order No. U-143245-A (La. P.S.C. Jan. 9, 1981), available at <https://p8.lpsc.org/workspace/search.jsp>; *Agreements for Joint Utilization of Poles & Facilities by Two or More Entities*, Order No. U-143245 (La. P.S.C. Oct. 31, 1980), available at <https://p8.lpsc.org/workspace/search.jsp>; Massachusetts, see Mass. Regs. Code, tit. 220, § 45.00-11; Michigan, see *Consumers Power Co.*, 1997 WL 107296 (Mich. P.S.C. Feb. 11, 1997); New Jersey, see N.J. Adm. Code 14:18-2.9; New York, see *In re Certain Pole Attachment Issues Which Arose in Case 94-C-0095*, 1997 N.Y. PUC LEXIS 364 (rel. June 17, 1997); Ohio, see *Columbus & Southern Ohio Elec. Co.*, 50 P.U.R. 4th 37 (Oh. P.U.C. Nov. 5, 1982); Oregon, see Or. Adm. R. § 860-028-0110 (2007); Utah, see Utah Adm. Code R. 746-345; and Vermont, see Vt. Pub. Serv. Bd. Rules §§ 3.700-711; See also N.H. Rev. Stat. § 374:34-a (2008) (establishing New Hampshire Public Utilities Commission jurisdiction over the regulation of pole attachments, and requiring Commission to establish a rulemaking proceeding regarding the regulation of pole attachments); *PUC 1300, Pole Attachments - Regular Rules*, Rulemaking, N. H. Pub. Util. Comm'n, Docket No. DRM 08-0004 (rel. Jan. 22, 2008), available at <http://www.puc.state.nh.us/Regulatory/e-docketfiling.htm> (establishing interim regulations governing pole attachment disputes.); see also Comments of Oregon PUC, WC Docket No. 07-245, at 1 (Mar. 4, 2008).

73/ See, e.g., Utah Adm. Code R. § 746-345 (2007); *Petition of the United Illuminating Co. for a Declaratory Ruling Regarding Availability of Cable Tariff Rate for Pole Attachments by Cable Sys. Providing Telecomm. Servs. & Internet Access*, Docket No. 05-06-01 (Conn. D.P.U.C., rel. Dec. 14, 2005); *Consideration of Rules Governing Joint Use of Utility Facilities & Amending Joint-Use Regulations Adopted under 3 AAC 52.900 – 3*, 2002 WL 32830485 (Alaska R.C., Oct. 2, 2002); *Proceeding on Motion of the Commission as to New York*

apply a single rate based on the Cable Rate to attachments used to provide multiple communications services, these states have recognized that a rate based on the Cable Rate formula is appropriate given that utilities control essential facilities ^{74/} and a different, higher, pole attachment rate would undermine efforts to enhance facilities-based competition in the broadband services market. ^{75/} These states have also recognized that there is simply no basis for adopting a different rate for pole attachments used to provide more than one communications service because utilities do not incur any additional, incremental costs when a pole attachment is used by a communications attacher to provide more than one communications service. *See, e.g., Petition of the United Illuminating Company for a Declaratory Ruling Regarding Availability of Cable Tariff Rate for Pole Attachments by Cable Sys. Providing Telecomm. Servs. & Internet Access*, Docket No. 05-06-01, at 5-6 (Conn. D.P.U.C., rel. Dec. 14, 2005) (“[T]he Department is not persuaded that there are incremental real costs to [the pole owner] from a pure cable

State Electric & Gas Corporation's Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments & to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Cos., 2002 N.Y. PUC LEXIS 14, (rel. January 15, 2002); *Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Serv.*, D. 98-10-058, 1998 WL 1109255 (Cal. PUC rel. Oct. 22, 1998); *see also* Oregon PUC Comments at 3 (“All attachers in Oregon, including broadband Internet access providers, are subject to the same pole attachment rate formula” based on the Cable Rate).

^{74/} *See e.g., Consideration of the Rules Governing Joint Use of Utility Facilities & Amending Joint-Use Regulations*, 2002 WL 32830485 (Alaska R.C., Oct. 2, 2002) (“We find that the [cable] formula provides the right balance given the significant power and control of the pole owner over its facilities. We are also concerned that changing the formula to increase the revenues to the pole owner may inadvertently increase overall costs to consumers . . .”).

^{75/} *See e.g., Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments & to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Cos.*, 2002 N.Y. PUC LEXIS 14, at *4-*5 (rel. Jan. 15, 2002) (“To allow increased pole attachment rates at this time, when competition and the number of attachers has not developed as previously contemplated, is contrary to the public interest. . . in that it would undermine efforts to encourage facilities-based competition and to attract business in New York.”).

company wire that provides only cable services and a cable company wire that also provides internet and telecommunication services. Therefore, there do not appear to be any real cost impacts to [the utility] as a result of this ruling.”). ^{76/}

For example, when the California Public Utilities Commission (“CPUC”) addressed “whether the statutory formula for pole attachment rates . . . for cable television corporations applies to all services for which the pole attachment is used,” it found “no convincing rationale justifying the adoption of different pole attachment rates” based on the number or kind of services a pole attachment is used to provide to consumers. *See Competition for Local Exchange Serv.*, Decision 98-10-058, 82 C.P.U.C.2d 510, *available at* 1998 WL 1109255 (Cal. P.U.C. Oct. 26, 1998). To the contrary, the CPUC determined that sound policy considerations counseled in favor of extending its current pole attachment methodology applicable to attachments used to provide cable services to apply to attachments used for other communications services as well. *See id.*

The CPUC recognized that extending the reach of its current pole attachment formula would serve the important objective of “promot[ing] the incentive for facilities-based . . . competition through the expansion of existing cable services.” *Id.* By the same token, the CPUC also appreciated that compromising this objective by adopting a different methodology for pole attachments used for more than one communications service would make little sense given that “[t]here is generally no difference in the physical connection to the poles or conduits attributable to the particular service involved.” *Id.*

^{76/} *See also Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Serv.*, 1998 Cal. PUC LEXIS 879, at *2 (rel. Oct. 22, 1998) (“[O]ur rules shall apply uniformly, without the need to distinguish whether a given attachment is used to provide cable television, as opposed to telecommunications services.”).

These same considerations should now counsel this Commission against adopting a rate formula for attachments used to provide broadband Internet access service that effectively penalizes cable systems for deploying advanced services – services that are provided over the very same wires used to provide traditional cable service.

E. Utilities Incur No Additional Costs When Pole Attachments Are Used For Broadband Internet Access In Addition To Cable Television Service.

While the Commission proposes to adopt a rate higher than the Cable Rate for pole attachments used by cable operators to provide broadband Internet access service in addition to traditional cable television service, the *NPRM* does not articulate any justification for doing so, let alone one that purports to be based on actual utility costs. *See NPRM*, ¶36 (tentatively concluding, without explanation, that “the rate should be higher than the current cable rate, yet no greater than the telecommunications rate.”). There is no justification: Utilities do not incur additional costs justifying any additional level of recovery above the fully allocated Cable Rate when a cable operator (or other attacher) uses pole attachments to provide more than one communications service, including broadband Internet access service.

The Commission has consistently recognized this reality in the past, and its current proposal to impose a rate surcharge for attachments used for Internet access service does not fit with it. In *Heritage*, the Commission held that a utility was not entitled to impose a separate and steep charge for pole attachments used by a cable operator for data service because it “fail[ed] to provide any . . . justification” for doing so. 6 F.C.C.R. at 7105, ¶29. As the Commission recognized, the utility was unable even to “suggest that it incurs any additional costs in preparing or maintaining its poles as a result of [the cable operator’s] installation of fiber optic cables or . . . data transmission activities.” *Id.* Nor did the utility in *Heritage* “even dispute . . . that the

physical attachment of fiber to the poles is identical to that of coaxial cable.” *Id.* Utilities will be unable to make any greater showing in this rulemaking proceeding.

The Court of Appeals for the District of Columbia Circuit affirmed the Commission’s *Heritage* order on appeal, again recognizing that the utility “offer[ed] no basis for its disparate treatment of the two types of cable” – *i.e.*, coaxial and fiber optic. *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 935 (D.C. Cir. 1993). The court actually doubted that a distinction “between video and nonvideo cable attachments can withstand current technological innovations” that allow “a single fiber strand to carry both video and data communications.” *Id.* This view was informed by the Commission’s “undisputed” position before the court that “ ‘the over-lashing of a fiber optic cable onto the aerial support strand alongside the coaxial cable still requires only a single attachment to the pole with no additional guying or anchoring,’ ” and that the rate accordingly should “ ‘remain the same irrespective of the presence of the additional wire.’ ” *Id.* (citing & quoting FCC Brief at 25).

When the Commission again considered the appropriate rate for pole attachments used by cable operators to provide both cable television service and Internet access service following Congress’s 1996 amendments to the Communications Act, it reaffirmed the central rate holding of *Heritage*. See *1998 Pole Attachment Report & Order*, 13 F.C.C.R. at 6792-6796. Building on the foundation it had in put in place in *Heritage*, in its *1998 Pole Attachment Report & Order* the Commission again explained that the nature of a pole attachment “does not turn on what type of service the attachment is used to provide.” *Id.* at 6793, ¶30. Accordingly, the Commission reiterated “that the just and reasonable rate for commingled cable and Internet service is the”

Cable Rate. *Id.* at 6794, ¶32. ^{77/} This conclusion, too, met with judicial approval. The Supreme Court ultimately affirmed the Commission’s approach. *See Gulf Power*, 534 U.S. 327.

The physical nature of cable operators’ use of pole attachments today has not changed since the Commission decided *Heritage* or adopted its *1998 Report & Order*. Just as they did in the 1990s, cable operators continue to make only one attachment per utility pole to provide multiple communications services, including broadband Internet access service, to their subscribers over fiber optic and coaxial cable lines. ^{78/} The factual and logical underpinnings of *Heritage* and the *1998 Report & Order* remain fundamentally correct: Utilities incur no additional costs as a result of cable operators providing Internet access service over the same physical facilities used to provide cable television service. The Commission in this proceeding should reaffirm that the Cable Rate affords utilities a just and reasonable rate for attachments used by cable operators to provide their subscribers commingled communications services, including broadband Internet access service.

F. The Commission’s “Telecom Rate” For Attachments Would Charge Cable Operators Too High A Proportion Of Pole Expenses.

The Commission tentatively concludes in the *NPRM* that any rate for broadband Internet access should be no higher than the “telecommunications attachment rate” the Commission employs under Section 224(e) for attachments by telecommunications carriers used to provide telecommunications services. But this rate would be excessive for pole licensees providing broadband Internet access services. The “Telecom Rate” is typically between two to three times

^{77/} In discussing overlashing, the Commission reiterated that “[t]here is a general consensus . . . that the leasing and use of dark fiber by third parties places no additional spatial or physical requirements on the utility pole.” *Id.* at 6811, ¶73.

^{78/} *See, e.g., TWTC White Paper*, RM-11293, at 11 (explaining that “use of the poles to provide telecommunications service [in addition to services provided by cable operator] imposes no additional costs or burdens on the pole owner”).

the “Cable Rate” because the Telecom Rate allocates to the licensee a much higher percentage of the annual costs of the pole than does the Cable Rate. Returning to the apartment house example from the legislative history of the 1978 Act (as discussed *supra* at 31-32), whereas the economic theory underlying the Cable Rate would allocate to a family renting one of 10 equivalent apartments one-tenth of the costs of the entire building, the economic theory underlying the Telecom Rate would allocate to the family the cost of its particular apartment, but would divide the costs of the common space of the building – such as the elevators, the lobby, and the parking garage – according to the number of families that rent apartments. So, even though one family might rent only one apartment, while another family might take 6 apartments and yet another family might take 2 apartments, each of the three families would essentially share the costs of the lobby, the elevators and the parking garage equally. The Telecom Rate does reduce the portion of the costs of the overall common space that is allocated to the licensee by one-third – presumably in some recognition that the licensee has far fewer rights than does the owner or joint user ^{79/} – but the Telecom Rate still allocates to licensees what amounts to a high percentage of the overall pole costs in view of the limited amount of the usable space on the pole (only one foot) that the licensees’ attachments occupy.

The pole owners argue that each of the users of the usable space gets equal use of the pole’s common “usable” space, but that clearly is not true. That is like saying the family renting one apartment out of 10 in an apartment building gets the same use out of the lobby and the parking garage as do the two other families, one of whom rents six apartments and the other of whom rents two apartments. Surely, each may need access to the lobby, the elevators and the parking garage, but it is not true that they each use those facilities equally. In fact, the family

^{79/} 47 U.S.C. § 224(e).

using the single apartment could get along with a smaller lobby, fewer elevators and a smaller garage. It would certainly not be equitable – or supportable as a matter of economic theory – to charge that family an equal share of all the common costs.

When Congress outlined the allocation formula for the Telecom Rate in the 1996 amendments to the Communications Act, there was an expectation that the increased competition in telecommunications services the Act promised would generate numerous additional attaching parties. ^{80/} In such an anticipated environment, it may have been economically justifiable to allocate pole costs by sharing two-thirds of the costs of the unusable space on the pole evenly among attaching entities. *See* 47 U.S.C. § 224(e). Indeed, with 7 attaching parties, the Telecom Rate is lower than the Cable Rate. But with only three to five (or sometimes fewer) attaching parties, ^{81/} the Telecom Rate imposes on the licensees costs for the common space that are not reflective of the benefits the licensees receive from it. Especially where the attachments are used for commingled services, the Commission is not bound to follow the Telecom Rate. *See infra* at 44-47.

^{80/} *See* Pub. L. No. 104-104, 110 Stat. 56, 56 (1996) (stating that the Act is intended “to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies”); *see also Destek Group, Inc. v. State of New Hampshire Pub. Utils. Comm’n*, 318 F.3d 32, 37 (1st Cir. 2003) (“A principal purpose of the Telecommunications Act is to increase competition in the market for local telephone services.”); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1236 (10th Cir. 1999) (explaining “the broad purpose of the Telecommunications Act of 1996 is to foster increased competition in the telecommunications industry”).

^{81/} The Commission presumes three to five attaching parties, but utilities may make a showing that the number of attaching parties in the circumstances is less than three. *See Amendment of Rules & Policies Governing Pole Attachments*, 16 F.C.C.R. 12,103, 12,139-40, ¶¶71-72 (2001).

G. *The Commission Should Extend Application Of The Cable Rate Formula To Attachments Used By Telecommunications Carriers To Provide Commingled Services In Order To Adequately Compensate The Pole Owner And Encourage Broadband Deployment.*

While Section 224 specifies the rate methodologies that are applicable to pole attachments “used by a cable television system *solely to provide cable service*” ^{82/} and “pole attachments used by telecommunications carriers *to provide telecommunications services,*” ^{83/} as the Commission recognized in the *1998 Report & Order*, the statute does not clearly delineate the rate methodology applicable to attachments used to provide broadband Internet service – whether that service is provided by a cable television system or telecommunications carrier. Indeed, the Supreme Court has held that Section 224(a)(4) sweeps broader than the rate methodologies specified in subsections (d)(3) and (e). As the Court explained, the rates in Sections 224(d)(3) and (e)(1) are merely “subsets of . . . , not limitations upon,” the broader categories established in Section 224(a)(4), which “reaches ‘any attachment by a cable television system or provider of telecommunications service.’ ” *Gulf Power*, 534 U.S. at 336 (quoting & citing 47 U.S.C. § 224(a)(4)); *see also id.* at 337 (“[W]e hold that §§ 224(d) and (e) work *no* limitation on §§ 224(a)(4) and (b).”) (emphasis added). As a result, Congress has manifestly entrusted the agency to resolve the obvious gap between these interrelated statutory provisions through a reasonable interpretation based on its technical expertise and its understanding of the public interest. ^{84/}

^{82/} 47 U.S.C. § 224(d)(3) (emphasis added).

^{83/} *Id.* § 224(e)(1) (emphasis added).

^{84/} Under the two-step methodology articulated by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984), courts must “defer to the Commission’s interpretation of the Communications Act so long as the Congress has not unambiguously forbidden it and the interpretation is otherwise permissible.” *Northpoint*

The Commission need not break any new interpretative ground to adopt a rate for the commingled services at issue here. The interpretation the Commission adopted in *Heritage* and the *1998 Report & Order* – and that the Supreme Court blessed in *Gulf Power* – points the way to resolving the present ambiguity over the proper rate methodology applicable to attachments used by telecommunications carriers to provide commingled communications services, including broadband Internet access service. Recognizing that Section 224 did not specify a rate for cable system attachments used to provide Internet service, in its *1998 Report & Order* the Commission applied the Cable Rate because “where Congress affirmatively wanted a higher rate for a particular service . . . it provided for one,” and because a “higher or unregulated” rate would deter the core “pro-competitive” purpose of the 1996 amendments to the Communications Act to “encourage expanded services.” 85/

In deference to the Commission’s broad authority to gloss ambiguous provisions contained in the statute that it administers, the Supreme Court expressly approved this interpretation. The Court concluded that “the result obtained by [the Commission’s] interpretation of §§ 224(a)(4) and (b) is sensible.” 86/ As it recognized, “Congress may well have chosen to define a ‘just and reasonable’ rate for pure cable television service, yet declined to produce a prospective formula for commingled cable service.” 87/ The Court understood that the category of commingled services “might be expected to evolve in directions Congress knew it could not anticipate It might have been thought prudent to provide set formulas for

Technology, Ltd. v. FCC, 412 F.3d 145, 151 (D.C. Cir. 2005); see also *Barnhart v. Walton*, 535 U.S. 212, 218 (2002).

85/ *1998 Pole Attachment Report & Order*, 13 F.C.C.R. at 6796, ¶34.

86/ *Gulf Power*, 534 U.S. at 338.

87/ *Id.* at 338-339.

telecommunications service and ‘solely cable service,’ and to leave unmodified the FCC’s customary discretion in calculating a ‘just and reasonable’ rate for *commingled services*.” 88/

The Commission’s and the Court’s recognition that Section 224 does not prescribe a rate for commingled communications services gives this Commission latitude to supply a just and reasonable rate under subsection (b). The Commission has already located a just and reasonable rate for commingled services involving broadband Internet service in the Cable Rate. The same reasons that motivated the Commission to adopt that rate for commingled communications services provided by cable systems warrant application of that rate to commingled communications services provided by telecommunications carriers that have the same limited rights as licensees that cable operators do. Just like cable system attachments used to provide commingled services, the attachments used by telecommunications carriers for broadband Internet access service do not fit within one of the two pole attachment rate methodologies that Congress specified in the statute. 89/ So, too, Congress could have mandated that the higher, telecommunications rate applied to such attachments, but remained silent instead. 90/ And once again, as the Commission has previously recognized, applying the higher telecommunications rate to such attachments would undermine the core purpose of the 1996 amendments to the Communications act to “encourage expanded services.” 91/ All of the same considerations that informed the Commission’s interpretation of Section 224 in the *1998 Report & Order* and the Court’s approval of that interpretation in *Gulf Power* again counsel that the Commission,

88/ *Id.* at 339.

89/ *1998 Pole Attachment Report & Order*, 13 F.C.C.R. at 6796, ¶34.

90/ *Id.*

91/ *Id.*

invoking its authority under Section 224(b), should apply the Cable Rate – rather than the Telecom Rate – to telecommunications carrier licensee attachments used to provide commingled communications services that include broadband Internet access service. *See* 47 U.S.C. § 224(e).

V. The Commission Lacks Authority To Extend Section 224’s Protections To Incumbent LECs, Who Receive Significant Rights (Unavailable to Mere Licensees) Under Joint Use Arrangements.

In its *NPRM*, the Commission seeks “comment on the extent of [its] authority to regulate pole attachment rates for incumbent LECs,” particularly the concept that incumbent LECs may be “providers of telecommunications service” under Section 224(a)(4) entitled to rate protection by virtue of Section 224(b)(1). *NPRM*, ¶23. TWC does not object in principle to incumbent LECs receiving the protections afforded to non-pole-owner attachers under Section 224 to the extent that incumbent LECs and cable operators are using pole attachments in the same way and enjoy the same rights (or lack of rights). But the structure and plain language of that statute, the legislative history of the Communications Act, and the Commission’s own precedent confirm that the Commission lacks any statutory authority to regulate the pole attachment rates imposed on incumbent LEC pole owners. In any case, the Commission’s concern about disparate or discriminatory treatment of incumbent LECs is considerably overblown. Incumbent LECs typically receive far greater rights from other pole owners under joint use and joint ownership arrangements than do cable operators and competitive LEC pole licensees.

1. The relevant statutory text, the legislative history of the Communications Act, and this Commission’s precedent uniformly indicate that the Commission is without authority to accord incumbent LECs any of Section 224’s rate and access protections. *First*, the plain and unambiguous language and structure of Section 224 make clear that incumbent LECs are not covered by the statute’s rate protections. The statute contains only two rate mechanisms, one

applicable to “cable television system[s]” and another applicable to “telecommunications carriers.” See 47 U.S.C. § 224(d)(3) & (e)(1). In these circumstances, incumbent LECs fit into neither category. Incumbent LECs are expressly excluded from the definition of “telecommunications carrier” in Section 224: “For purposes of this section, the term ‘telecommunications carrier’ (as defined in section 3 of this Act) does not include *any incumbent local exchange carrier* as defined in section 251(h) of this title.” *Id.* § 224(a)(5) (emphasis added). As the Commission appears to recognize, this explicit binary statutory rate structure – applicable only to cable systems and “telecommunications carriers” (as defined in Section 224(a)(5) to exclude incumbent LECs) evinces Congress’s clear intent to excise incumbent LECs from Section 224’s protections. Any atextual extension of either of these rate mechanisms by the Commission to encompass incumbent LECs would clearly upset that carefully delineated scheme.

But the statute’s binary rate structure is not the only textual clue that incumbent LECs do not fit within its pole attachment rate protections. ^{92/} For the statute’s plain language further demonstrates that, far from being entitled to statutory rate protections, Section 224 instead imposes *obligations* on incumbent LECs. This is clear from the definition of “utility,” which includes “any person who is *a local exchange carrier* or an electric, gas, water, steam or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.” *Id.* § 224(a)(1) (emphasis added). Incumbent LECs thus receive pride of place on the list of utilities enjoined from imposing unreasonable and discriminatory pole attachment rates, terms and conditions.

^{92/} That the statute is designed only to apply to two types of entities – cable systems and telecommunications carriers – is further reinforced by the statute’s access provisions. Thus, the statute obligates a utility to “provide a *cable television system* or any *telecommunications carrier* with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.” 47 U.S.C. § 224(f) (emphasis added). There is again no mention of the undefined third broad class of “providers of telecommunications service” here.

That incumbent LECs are utilities subject to Section 224's rate and access obligations is further confirmed by the definition of "pole attachment." The term is defined as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit or right-of-way owned or controlled by a utility." *Id.* § 224(a)(4) (emphasis added). Pole attachments thus include attachments to utility structures by "cable television system[s]" and "provider[s] of telecommunications service." *See id.* They do not include, however, attachments made by a *utility* to another utility's poles. *See id.*

In the face of this plain statutory language and structure, the suggestion that, while incumbent LECs are statutorily-defined utilities excluded from the definition of "telecommunications carrier," they may nevertheless come within the meaning of the term "provider of telecommunications service" used in Section 224(a)(4) and therefore receive rate protection under Section 224(b)(1), makes no sense. *See NPRM*, ¶23. Including incumbent LECs within the definition of "pole attachment" or "provider of telecommunications service," *see* 47 U.S.C. § 224(a)(4), would have the impact of applying to attachments to poles in which the incumbent LECs hold a joint ownership interest. That is absurd. The absence of a statutory rate protection for incumbent LECs and the oddity of requiring that incumbent LECs be charged a set rate for poles in which they hold an actual ownership interest strongly counsel against a statutory construction that would invent an entirely new protected class of attachers – especially a class composed entirely of statutorily-defined *utilities*.

The very notion that there is a meaningful statutory difference between "telecommunications carrier[s]," on the one hand, and "provider[s] of telecommunications service," on the other, is gainsaid by the Communications Act's definition of "telecommunications carrier." That definition makes clear that telecommunications carriers and

providers of telecommunications service are one and the same: “The term ‘telecommunications carrier’ means *any provider of telecommunications services.*” 47 U.S.C. § 153(44). The Commission thus need look no further than the structure and language of the statute to conclude that incumbent LECs fall outside Section 224’s rate protections. In matters of statutory construction, “job one is to read the statute, read the statute, read the statute.” *Goldring v. District of Columbia*, 416 F.3d 70, 77 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 2985 (2006); *see also* Henry J. Friendly, *Benchmarks* 202 (1967) (“(1) Read the statute; (2) read the statute; (3) read the statute!” (quoting Justice Frankfurter’s “threefold imperative to law students”))). Other relevant indicia point to that very conclusion.

Second, the clear statutory exclusion of incumbent LECs from the “protected class” of entities is buttressed by the legislative history of the Communications Act. In the beginning, the Pole Attachment Act extended protections only to cable operators vis-à-vis telephone and electric utilities; no protections were accorded any other kind of communications attacher. *See* S. Rep. No. 95-580, at 2 (explaining legislation “would empower the Commission to hear and resolve complaints regarding the arrangements between cable television systems and the owners and controllers of utility poles.”); *see also* 123 Cong. Rec. 11,446 (Oct. 25, 1977) (“H.R. 7442 will resolve a longstanding problem in the relationship of cable television companies on the one hand, and power and telephone companies on the other.”) (Rep. Wirth). Importantly, Congress did not see any need to extend protections to utilities that used each other’s poles under joint use or joint ownership arrangements. *See* S. Rep. No. 95-580, at 12 (explaining that poles “are usually owned by telephone and electric power utility companies, which often have entered into joint use or joint ownership agreements for the use of each other’s poles.”)

The Telecommunications Act of 1996, of course, extended Section 224's pole attachment protections to "telecommunications carriers." *See S. Conf. Rep. 104-230 to S. 652 & Joint Explanatory Statement of the Comm. of Conference*, 104th Cong., 2d Sess. 98-100, at 206 (1996) (explaining that amendments to Section 224 "require[] the Commission to prescribe additional regulations to establish rates for attachments by telecommunications carriers"). But in expanding Section 224's protections, Congress was careful to limit that expansion to new entrants into the telecommunications market. ^{93/} As it explained, the expansion of Section 224's protections to telecommunications carriers was designed "to allow *competitors to the telephone companies* to obtain access to poles owned by utilities and telephone companies at rates that give the owners of the poles a fair return on their investment." S. Rep. No. 103-367, at 24 (1994) (emphasis added). Congress's clear limitation on the extension of Section 224's protections was ultimately carried into the enacted version of the legislation by excluding incumbent LECs from the definition of telecommunications carriers. *See Pub. L. 104-104*, 110 Stat 149, § 703; *see also* S. Rep. No. 104-230, at 98 (1996). Nowhere is there any hint in the legislative history of the 1996 amendments that Congress intended to move incumbent LECs from the pole-owner to the attacher side of the ledger.

Third, if there were any remaining doubt about the matter – which there is not – the Commission has expressly held that incumbent LECs are entirely excluded from Section 224's suite of rate and access protections. *See, e.g., 1998 Pole Attachment Report & Order*, 13

^{93/} *1998 Pole Attachment Report & Order*, 13 F.C.C.R. at 6777, ¶5 (explaining that excluding incumbent LECs from Section 224's protections "is consistent with Congress' intent that Section 224 promote competition by ensuring the availability of access to *new telecommunications entrants*." (emphasis added)).

F.C.C.R. 6777. 94/ In implementing the 1996 amendments to the Communications Act, the Commission explained that “the 1996 Act . . . *specifically excluded* incumbent local exchange carriers (‘ILECs’) from the definition of telecommunications carriers with rights as pole attachers.” *Id.* at ¶5 (emphasis added). The Commission reasoned that, “[b]ecause, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable system operators access to its poles, *even though the ILEC has no rights under Section 224 with respect to the poles of other utilities.*” *Id.* (emphasis added). It further explained, moreover, that this exclusion makes sense in view of the statute’s overriding purpose: “The exclusion in Section 224(a)(5) of ILECs from the term telecommunications carrier is directed to the purpose of the amended Section 224, to provide an important means of access. ILECs generally possess that access and Congress apparently determined that they do not need the benefits of Section 224.” *Id.* at ¶49.

In its *NPRM*, the Commission does not offer any legitimate basis – textual or otherwise – for arriving at a statutory interpretation different from this very plain, sensible, and longstanding one. *See NPRM*, ¶23. Manifestly no such basis is to be found. What the incumbent LECs seek is a legislative amendment to Section 224. But *Chevron* does not provide the Commission “a license to rewrite the statute.” *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068, (D.C. Cir. 1998). That is a task properly undertaken by Congress.

2. Nor is there any reason for the Commission to be concerned that cable operators are somehow benefiting from more favorable treatment by electric pole owners than incumbent LECs. Congress has recognized that pole attachment pricing should reflect the relative rights

94/ *See also Amendment of the Commission’s Rules & Policies Governing Pole Attachment*, 16 F.C.C.R. at 12,105 & n.12 (explaining that 47 U.S.C. § 224(a)(5) “exempt[s] pole attachments of telecommunications carriers who are also incumbent local exchange carriers (‘ILECs’)”).

that the attaching party has. *See, e.g.*, S. Rep. No. 95-580, at 19 (“The level of pole attachment fees is intimately connected with the terms and conditions of pole space leasing agreements.”). Incumbent LECs have by far more favorable rights than cable operators and competitive LECs who, like cable operators, are mere licensees.

As noted above, under pole attachment license agreements cable operators do not receive anything approximating rights equal to those held by the pole owner and joint user. *See supra* at 12-18. Most importantly, under their joint use agreements, the electric companies construct poles with capacity for incumbent LECs’ use. Although makeready requirements for incumbent LECs may possibly be more prevalent today than in days past, 95/ at most only a tiny fraction of the poles to which incumbent LECs are attached have required makeready payments on their behalf. Cable operators, on the other hand, have been required to expend uncountable sums to buy brand new poles that they do not own *and* for which they must pay rent. Also, unlike a joint user, a cable operator must broadly indemnify the utility from potential harms – including the utility’s own negligence. *See Ex. 1, 9-10.* And unlike a joint user, a cable operator must pay for inspections conducted of its plant by the pole owner. *See Exs. 1-2.*

Accordingly, while TWC has no objection to incumbent LECs receiving rates similar to cable operators to the extent that they use poles in the same way as cable operators and have equivalent rights, the truth is that incumbent LECs have long been in a privileged position – one far more favorable than cable operators.

VI. The Commission Should Not Permit Utilities To Add To The Expense Or Time Required For Attachment.

Some utilities have attempted in comments filed in response to Fibertech’s Petition for Rulemaking to justify practices used to delay cable operators’ and competitive LECs’ attachment

95/ *See* FirstEntegy Opposition at 13.

and to add to their costs by alleging concerns about “safety” and “reliability” and alleged “unlawful” attachment practices. But the Commission should not be misled. To be sure, there is undoubtedly anecdotal evidence that cable operators and other pole licensees have failed on occasion to construct in conformity with safety codes or have attached without following permitting procedures. But the facts are that the utilities themselves are largely responsible for creating safety violations, and allegations about “unauthorized attachments” are often based on the utilities’ shoddy recordkeeping and their after-the-fact efforts to change historic pole attachment practices.

TWC is in full agreement that the NESC should be observed by all parties attaching to poles. And where TWC finds that its facilities have been constructed in violation of that Code, it acts promptly to make necessary corrections. TWC understands its obligation not to create violations of the NESC and to correct any such violations that it has created. The problem that is arising increasingly in the field, however, is that the utilities – and sometimes their partners in the provision of BPL services – themselves have created wholesale NESC violations that impact TWC’s attachments. For example, the NESC has requirements for separations of attachments at the pole; the 40-inch requirement of “neutral” or “safety space” required by the NESC between certain electrical conductors and communications facilities is one such requirement. ^{96/} TWC has found that some utilities have routinely added transformers and other energized facilities to the poles, encroaching on cable attachments made long before and creating violations of the NESC’s separations requirements. These same utilities have then conducted safety inspections – at TWC’s expense – and have demanded that TWC fix the violations by moving its attachments, or paying to install new poles if the existing poles cannot accommodate all attachments

^{96/} See *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C.2d 59, ¶¶22-25 (1979).

consistent with Code separation requirements. In some cases, the same utilities that are demanding that TWC fix Code violations it has not caused, are allowing their BPL partners to construct facilities in wholesale violation of the Code. Some of these utilities are also attempting to halt TWC's overlashing projects on the ground that a pole contains an existing Code violation, ignoring that the violation was actually created by the utility itself and that overlashing to the cable attachment does not create or exacerbate the existing violation. Nor does it recognize that cable operator contractors who would overlash the attachment are trained to do so. These efforts by utilities create severe operating issues for TWC, including bringing new, advanced services to market. Nevertheless, because these issues are so fact-specific and are more appropriately addressed in adjudicative proceedings, TWC does not believe that these are issues that the Commission should address in a rulemaking such as this.

Some utilities, in addition, have attempted to charge TWC with making unauthorized attachments wholly without basis. In some cases, the attachments were originally made to telephone poles, and TWC continues to pay incumbent LECs annually for the attachments, even though the electric company has become the owner of the pole. Because the electric company has no record of approving the attachment, however, it argues that the attachment is "unauthorized." In other cases, the utility's record keeping may be faulty while TWC has no records of the attachment because historic records of attachment were not preserved by the prior cable system owner. In the absence of such records, the utility claims the attachment is unauthorized, despite the fact that the cable operator may have been paying rent for the pole for many years. In still other cases, the utility may have never required in practice that attachments to drop poles be permitted, yet it now contends that the attachments made to drop poles many years ago are "unauthorized." Issues of "unauthorized attachments" are aggravated by the

common practice of utilities to conduct a “pole audit” (at TWC’s expense) and to treat any number of attachments found in excess of the number of “authorized attachments” reflected in the utility’s records as unauthorized. Such counts, of course, do not take into account the problems noted here. In one recent case, which has not yet been finally resolved, a utility claims that TWC owes 24 years of back pole rental based on such a count.

As with allegations of safety violations, the utilities’ contentions about “unauthorized attachments” do not hold up under scrutiny. Nevertheless, TWC does not believe that these situations are conducive to resolution in an omnibus rulemaking, again because they are fact-specific. Still, the Commission should not be misled by utility claims that “unauthorized attachments” by cable operators are an industry problem that the Commission needs to address.

One issue raised in the *NPRM* that deserves special treatment here is Verizon’s assertion that “drop poles” should be subject to a full permitting process before cable operators are allowed to attach any service drop. Verizon’s assertion, however, is a thinly veiled effort to halt cable operators’ business in its tracks.

When a cable operator extends its distribution plant, it engineers the extension, prepares design maps that show the distribution poles involved and submits pole attachment permit applications to the utility. It does not include in the design any “drop poles” to which it may have to attach its service drops to serve particular houses because it does not know at that time which of those houses will ultimately take its service. After the construction of its distribution system is complete, the cable operator then markets its services. When a customer calls to order service, a technician is dispatched to the home. To the extent that the home is served by a drop pole, the technician installing service will observe that fact and will attach the service drop to it. Historically, most utilities did not require that these drop poles ever be “permitted,” as

recognized by the Commission in *Mile High Cable Partners, L.P.*, 15 F.C.C.R. 11,450 (Cab. Serv. Bur. 2000). Today, however, most utilities require that cable operators apply for a permit within a month or so after the fact. Cable operators can conduct business under this arrangement because it allows them to install service for the customer on the initial installation trip. But if the cable operator were required to wait until a permit application could be filed with the utility and approved for the drop pole, it simply would not be able to sign up that customer. In today's market that customer would likely take service from a DBS provider or the incumbent LEC, neither of whom would be subject to any such before-the-fact permit requirement for its own poles or under its joint use agreements. Verizon, of course, understands this. Its effort to obtain a Commission rule that would require cable operators to obtain pre-authorization is a bold Hail Mary that, if successful, would dramatically skew the playing field in its favor. The Commission has properly held that it is unreasonable to require that drop poles be "include[d] in the regular applications process," although it is not unreasonable for utilities to apply a post-attachment permitting process. *Mile High Cable Partners*, 15 F.C.C.R. at 11,461, ¶ 19; *see also id.* ("For drop poles, therefore, notification to Respondent of Complainant's use of a drop pole is reasonable but Complainant need not wait for approval prior to attaching.").

TWC does not apply for permits from any pole owner for drop poles prior to attaching. In scores of pole attachment agreements that TWC has negotiated over the past decade, utilities, despite their unquestioned advantages in leverage in negotiating pole attachment agreements, have agreed with TWC that attachments to drop poles may be permitted after the attachment is made. Only Verizon has refused to accommodate that provision. Yet, understanding that the provision is unenforceable, TWC does not apply for permits before attaching to drop poles even of Verizon. And it could not operate its business in competition with Verizon if it did.

Not only are drop poles attached to in different circumstances than “line” distribution poles, the manner of attachment and the facilities attached are different. Electric companies reduce their distribution power through transformers before attaching a lower-power service drop to a drop pole. Even where an incumbent LEC has multiple, heavy copper wires attached to its distribution poles, the service drop to the home is a single light wire. The cable drop wire typically runs off the strand about two feet from the nearest distribution pole and is strung, with no steel messenger cable or strand to the drop pole and thence to the home. Although the NESC has separation requirements that apply to these service drop wires, drop poles not only typically have lower permissible attachment heights for the lowest lines, but they have fewer overall attachments. Meeting NESC requirements is simpler and less of an issue than attachments to distribution poles. As the entire utility industry – except for Verizon – clearly recognizes, there are no compelling reasons to require pole licensees to obtain a pole attachment permit before attaching to a drop pole. The Commission should not depart from its prior rulings on this point.

CONCLUSION

The Commission should reconsider its proposal to raise the infrastructure costs of pole attachments used by cable operators to provide broadband Internet access. That proposal is deeply inconsistent with this Commission’s past pro-competitive efforts to encourage the development of advanced services and to speed universal broadband deployment, including its longstanding policy of applying the Cable Rate to pole attachments used by cable operators to provide commingled communications services.

Pole attachments remain a critical component for cable operators to provide service to their subscribers, and the Section 224(d) Cable Rate fully compensates utility pole owners for the costs they incur as a result of cable operator attachments to their poles. That rate allows utilities

to recover their fully allocated costs of providing pole attachments, and there is no subsidy for cable operators embedded in the rate. Because the Cable Rate provides utilities a just and reasonable recovery for the attachment of communications wires to their poles – no matter what service is provided over those wires – the Commission should extend that rate formula to encompass attachments made by competitive LECs to provide commingled broadband Internet access service.

However, the Commission should – as it has before – decline to extend Section 224’s rate or access protections to incumbent LECs. The text of the statute, the legislative history of the Communications Act, and the Commission’s own precedent make clear that the Commission lacks authority to sweep incumbent LECs within Section 224’s protective veil.

Finally, the Commission should once again reject the utilities’ overblown rhetoric about “safety” and “reliability” concerns and their anticompetitive efforts to increase the time and money cable operators spend to make pole attachments. The same goes for utility assertions of “unlawful attachments.” These assertions often are the byproduct of poor utility recordkeeping, or breaches of longstanding pole attachment practice. These sorts of problems, in any case, are

fact-specific and thus more suitable for resolution in adjudications rather than this rulemaking proceeding.

Respectfully submitted,



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March 7, 2008