Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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
THE UNITED STATES TELECOM ASSOCIATION

Its Attorneys:

Jonathan Banks
Glenn Reynolds
Kevin Rupy
607 14th Street, NW
Suite 400
Washington, D.C. 20005
(202) 326-7300

TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY OF ARGUMENT.....1

II. COMPELLING PUBLIC POLICY REASONS EXIST FOR THE COMMISSION TO ADOPT A UNIFORM FORMULA CAPPING RATES FOR BROADBAND POLE ATTACHMENTS. 4

A. Outdated Silo-Based Pole Attachment Regulations are Inadequate for Addressing the Realities of Today's Converged Marketplace.....4

B. The Commission's Current 'Silo' Approach to Pole Attachment Regulations Has a Significant and Detrimental Impact in Today's Converged Broadband Marketplace.....6

C. Artificial Regulatory Differences Applied to Similar Services Discourages Competition in Price and Quality, to the Ultimate Detriment of Consumers.....9

III. SECTION 224 AUTHORIZES THE COMMISSION TO ESTABLISH A PARITY POLE ATTACHMENT RATE FORMULA CAPPING ALL BROADBAND ATTACHMENT RATES, INCLUDING THOSE OF ILECS 11

A. Section 224(b) Broadly Defines the Commission's Authority to Regulate Rates.....12

B. Section 224 Requires the Commission to Ensure Just and Reasonable Attachment Rates for all Broadband Attachments.. 16

IV. CONCLUSION 17

* * *

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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
THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTelecom) is pleased to submit its comments to the important issues raised by the Federal Communications Commission (Commission) in its rulemaking proceeding addressing pole attachment regulations (Notice).[1] USTelecom[2] supports the Commission's tentative conclusions contained in the Notice and urges the Commission to move quickly to update its pole attachment rules to reflect today's competitive environment.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Section 224 of the Communications Act directs the Commission to ensure that the pole attachment rates paid by *all* providers of cable television or telecommunications services are just and reasonable. With the exception of cable systems providing solely cable television services (a category that is now virtually non-existent), the statute provides broad discretion to the Commission to determine what constitutes "just and reasonable." Indeed, the Supreme Court in

[1] These comments are submitted in response to Notice of Proposed Rulemaking, *Implementation of Section 224 of the Act;Amendment of the Commission's Rules and Policies Governing Pole Attachments s*, WC Docket No. 07-245 (November 20, 2007) (*Notice*). *See also*, United States Telecom Association Petition for Rulemaking, RM-11293 (filed Oct. 11, 2005).

[2] USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks.

its *Gulf Power*[3] decision affirmed this broad discretion when it found that the Commission had the authority under the default "just and reasonable" standard of Section 224(b)(1) to continue applying the "cable formula" to mixed-use cable facilities.

When the Commission last examined pole attachment issues in 1998, cable and telephone companies were in the early stages of broadband deployment, very few cable companies were offering voice service and even fewer telecom providers were offering video service. Today, things could not be more different.

Virtually all cable lines now are capable of delivering broadband and voice services. And while telephone companies are still investing heavily to compete in the provision of video services, they are aggressively marketing bundles of voice, broadband and video to their customers. Perhaps the most salient fact demonstrating the new telecommunications marketplace is Comcast Corporation's (Comcast) recent announcement trumpeting the news that it is now the fourth (and perhaps soon to be third) largest provider of residential *voice* services in the country.[4] The convergence of services across diverse platforms is especially apparent in the intense – and growing – competition among broadband providers.

Yet under certain interpretations of the Commission's existing rules implementing Section 224, incumbent telephone companies typically are asked to pay on average more than 8 times the pole attachment rate paid by cable companies for attachments used to deliver competing broadband services. From a consumer policy perspective, this is indefensible as it denies consumers the benefits of a level competitive playing field.

---

[3] *Nat'l Cable & Telecommunications Ass'n v. Gulf Power*, 434 U.S. 327 (2002).
[4] Comcast Press Release, Move Over Bells: Comcast Corporation Becomes The Fourth-Largest Phone Service Provider In The U.S., January 8, 2008 (available at: http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=721) (visited March 6, 2008).

As noted above, and explained in more detail below, the default just and reasonable provision of Section 224(b)(1) applies to attachments of facilities carrying broadband based services. And while that standard allows the Commission significant discretion to define "just and reasonable," it can hardly be challenged that "just and reasonable rates" should mean the same thing for providers of fundamentally identical services making fundamentally similar attachments. As the Commission has emphasized repeatedly in recent proceedings, similar services should be regulated similarly.

Such parity regulation is the best way to ensure that the providers of these services compete on an even playing field, all to the ultimate benefit of consumers. For these reasons, USTelecom supports the Commission's tentative conclusions contained in the Notice and urges the Commission to move quickly to update its pole attachment rules to reflect today's competitive environment.

The disparity in pole attachment rates paid by incumbent local exchange carriers (ILECs), competitive local exchange carriers (CLECs) and cable providers is significant, consistent and widespread. Parity in the rates for broadband pole attachments as proposed by the Commission will eliminate the artificial – and significant – pricing inequity in pole attachment rates paid by different classes of providers, despite their deployment of identical services. The elimination of these regulatory handicaps provides a balanced competitive landscape to the benefit of broadband consumers and helps enable further deployment of broadband services.

II. COMPELLING PUBLIC POLICY REASONS EXIST FOR THE COMMISSION TO ADOPT A UNIFORM FORMULA CAPPING RATES FOR BROADBAND POLE ATTACHMENTS.

In today's converged marketplace of voice, video and broadband services, the Commission's existing rules for establishing pole attachment rates are inconsistent with the purposes of Section 224 as well as with the Commission's broader obligations to encourage a competitive broadband marketplace. These rules are based on the premise that companies are either 'cable providers' or 'voice providers.'

But today, virtually all these companies are "broadband providers" offering a bundle of services over the same facilities. Cable companies, ILECs and CLECs are all aggressively competing in today's marketplace to offer bundled broadband services to consumers. But the Commission's current silo approach to pole attachment pricing regimes, which have created significant and widespread disparity in pole attachment rates between classes of providers, is having real-world consequences for consumers in today's converged marketplace. As the Commission has concluded in numerous, recent proceedings, such artificial regulatory disparities to similar services discourages competition in price and quality that would benefit consumers.

*A. **Outdated Silo-Based Pole Attachment Regulations are Inadequate for Addressing the Realities of Today's Converged Marketplace.***

In the ten years since the Commission implemented section 224 of the Act, the competitive landscape in the market for bundled services has changed dramatically. In light of this change, the traditional regulatory distinctions between cable, ILECs and CLECs have been rendered increasingly irrelevant, as each class of provider has aggressively deployed bundled voice, broadband, and video services over their respective platforms. This technological

convergence means that companies that once existed in separate silos in the Act, now compete vigorously with one another to provide broadband services.

Ten years ago, the market for voice, video and broadband services was markedly different from today's vibrant marketplace. Broadband deployment was in its infancy, with less than one third of ZIP codes in the United States reporting availability of two or more competing broadband providers.[5] In the video market, cable was essentially unchallenged by competing wireline providers of video services.[6] During the same timeframe, the Commission discussed its expectation that ILECs would begin to compete in video delivery markets, and cable operators would begin to provide local telephone exchange service. But on both counts, it concluded that "the expected technological convergence that would permit use of telephone facilities for video service has not yet occurred," and "only a limited number of cable operators have begun to offer telephone service."[7]

Flash forward to today and broadband has made the story markedly different. Ninety seven percent of ZIP codes in the United States report availability of broadband services from two or more providers, with twenty-two percent of ZIP codes reporting ten or more providers.[8] On the video front, in direct and aggressive competition to cable incumbents, telephone companies continue to invest heavily in the deployment and provision of video services to

---

[5] Industry Analysis Division, Common Carrier Bureau Report, *High-Speed Services for Internet Access: Subscribership as of June 30, 2000*, October 2000, Table 6 (citing broadband deployment data as of December 1999).
[6] Sixth Annual Report, *Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 14 FCC Rcd 9617, ¶5 (rel. Jan. 14, 2000) (concluding that cable television remained the "dominant technology" for delivery of video programming to consumers in the video marketplace).
[7] Sixth Report, ¶10.
[8] Industry Analysis and Technology Division, Wireline Competition Bureau Report, *High-Speed Services for Internet Access: Subscribership as of December 31, 2006*, October 2007, Table 15 (citing broadband deployment data as of December 2006) (*2006 Broadband Report*).

consumers over broadband facilities. The Commission recently concluded that video providers of "all stripes are offering nonvideo services in tandem with their traditional video services."[9]

Deployment of such bundled services is particularly apparent in the intense – and growing – competition between broadband platforms. As competing cable and ILEC providers seek to differentiate their video and/or voice services, each is increasingly emphasizing their respective broadband services. According to the Commission's most recent statistics, 82.5 million total high-speed lines were reported as of December 2006, with 38.9% from cable modem, 32% from asymmetric and symmetric DSL, and 1.2% from fiber to the end user.[10]

In this converged marketplace, where cable has become a significant provider of voice services, ILECs have increasingly penetrated the video market, and both are increasingly competing for broadband customers, the Commission's outdated regulatory treatment of pole attachment is simply indefensible. The practical effect of the currently regulatory framework is that one provider of broadband services benefits from a very substantial regulatory advantage over its competitors.

B. The Commission's Current 'Silo' Approach to Pole Attachment Regulations Has a Significant and Detrimental Impact in Today's Converged Broadband Marketplace.

The disparity in pole attachment rates paid by ILECs, CLECs and cable providers is significant, consistent and widespread. There is no sound policy basis for maintaining such an inequitable pricing mechanism that is hindering competition in the broadband market through unbalanced regulatory treatment of certain classes of broadband providers over others.

---

[9] Twelfth Annual Report, Assessment of the Status of Competition in Markets for the Delivery of Video Programming, 21 FCC Rcd 2503, ¶5 (rel. Mar. 3, 2006).
[10] *2006 Broadband Report*, p. 2.

USTelecom recently completed a broad survey of its members regarding rates paid to investor-owned utilities for pole attachments, and rates received from cable providers and CLECs attaching to ILEC-owned poles.[11] The results of this survey collected to date confirmed the existence of a broad disparity in pole attachment rates.

Based upon this internal survey, USTelecom identified instances where ILECs pay more than 1,400% more for pole attachments than their cable counterparts. The disparity between ILEC and CLEC rates while not as high as cable, are significant -- in some instances near 900%.[12] Such glaring disparity in pole attachment rates between competitive broadband providers lacks any sound public policy basis. These rate disparity findings are similar to those of both investor-owned utilities and CLEC studies.[13]

In general, the survey revealed that pole attachment rates paid by ILECs are often significantly higher than the regulated rates paid by their cable and CLEC competitive counterparts. In a sampling of thirteen states where the FCC has jurisdiction over pole attachment regulation, USTelecom identified broad disparity in pole attachment rates. On average, ILECs surveyed pay more than 8 times what cable providers pay per attachment, and almost 6 times the rate paid by CLECs.[14] In dollar terms, these ILECs on average pay over

[11] The data reflected in USTelecom's comments does not include rates paid for pole attachments to municipally owned electric plant and electric cooperative plant.
[12] With respect to the rates paid by CLEC and cable attachers, USTelcom's data is based on amounts paid to ILECs by each of these providers. Although there may be some variation in the costs of poles owned by utilities and those owned by ILECs, rates charged by ILECs and electric utilities to cable and CLEC providers are governed by the same Commission pole attachment regulations. Thus, they should provide a reasonable approximation of the rates paid by cable providers and CLECs to electric utilities.
[13] *See e.g.*, Edison Electric Institute (EEI) Presentation, *Pole Attachments 101*, p. 15 (available at EEI website: http://www.eei.org/industry_issues/energy_infrastructure/distribution/Pole_Attachments_101.ppt) (visited March 6, 2008) (*EEI Presentation*); *see also*, Letter from Thomas Jones, Counsel for Time Warner Telecom Inc., to Marlene H. Dortch, Secretary, FCC, RM-11293, RM-11303, Attach. at 11-12 (filed Jan. 16, 2007) (*TWTC White Paper*).
[14] The *EEI Presentation* and *TWTC White Paper* also show that ILECs are paying roughly 7 to 8 times the cable rate. *See EEI Presentation*, p. 15; *TWTC White Paper*, p. 10.

$26.00 compared to cable and CLEC providers on ILEC poles, which pay $3.26 and $4.45, respectively.

Analyzed at a more granular state level, USTelecom's survey revealed alarmingly disproportionate gaps in rates paid for pole attachments. The following chart represents a sampling of states in which survey results were obtained from two or more USTelecom members.

	Average Rate Charged[15]			**Percentage Difference in Rates**	
State[16]	**ILEC Rate**	**Cable Rate**	**CLEC Rate**	**ILEC vs. Cable**	**ILEC vs. CLEC**
State 1	$51.76	$3.43	$5.20	1409%	895%
State 2	$43.71	$3.61	$5.43	1111%	705%
State 3	$34.08	$3.27	$14.30	942%	138%
State 4	$34.95	$3.60	$3.44	871%	916%
State 5	$37.55	$4.62	$9.85	713%	281%
State 6	$34.53	$4.28	$6.30	707%	448%
State 7	$29.12	$3.99	$6.01	630%	385%
State 8	$26.17	$3.79	$6.90	591%	279%
State 9	$20.00	$3.17	$3.57	531%	460%
State 10	$19.30	$3.24	$5.07	496%	281%
State 11	$22.13	$5.12	$19.52	332%	13%
State 12	$13.34	$2.90	$3.08	360%	333%
State 13	$7.99	$2.43	$3.02	229%	165%

[15] Average rates paid by ILECs reflect pole weighted average amounts paid to investor owned utilities. These weighted averages include rates paid on a per pole basis, per attachment basis and a combination of each. Average rates for cable and CLEC are also weighted by number of poles and were derived from rates charged by ILECs for attachment to their respective poles.

[16] Each of the states identified in the matrix are states where the Commission has exclusive jurisdiction over pole attachment rates. Due to the competitively sensitive nature of this information, the chart does not identify by name the states in which these rates were determined.

This substantial disparity in rates demonstrates that surveyed USTelecom members pay millions of dollars more in pole attachment fees each year than broadband competitors in the same markets. This disparity in pole attachment rates, verified by the Edison Electric Institute[17] and Time Warner Telecom, Inc.,[18] demonstrates that the deployment of broadband facilities by some providers, particularly cable, benefit from a substantial regulatory advantage while other providers offering identical broadband services are unfairly disadvantaged. In essence, the disparity in cable pole attachment rate equates to a broadband regulatory tax borne by all non-cable broadband subscribers.

C. Artificial Regulatory Differences Applied to Similar Services Discourages Competition in Price and Quality, to the Ultimate Detriment of Consumers.

As Commission Chairman Kevin J. Martin has previously observed, the lack of regulatory parity between telecom providers and their cable counterparts in the provision of broadband services "complicates investment decisions" and has "undoubtedly" inhibited broadband deployment in the United States.[19] Commissioner Robert McDowell similarly concluded that the key ingredients for spurring accelerated broadband penetration rate in the U.S. were "[r]egulatory certainty [and] regulatory parity."[20] And in the Commission's 2005 order deregulating wireline broadband facilities, Commissioner Jonathan S. Adelstein expressed his support for the order's "technology-neutral approach to broadband regulation."[21]

---

[17] *EEI Presentation*, p. 15.
[18] *See e.g.*, *TWTC White Paper*, p. 10.
[19] Remarks by Chairman Kevin J. Martin, Federal Communications Commission, to the NARUC Summer Meeting, Austin, Texas, July 26, 2005 (available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260312A1.pdf) (visited February 19, 2008).
[20] Commissioner Robert M. McDowell, Luncheon Address, Broadband Policy Summit III, June 7, 2007, Crystal City, Virginia (available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-273742A1.pdf) (visited February 19, 2008).
[21] Concurring Statement of Commissioner Jonathan S. Adelstein, *Wireline Order* (available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260433A5.pdf) (visited March 5, 2008).

In broadband related proceedings, the Commission has focused on regulatory parity as the linchpin for deployment. For example, in the *Wireline Broadband Order*, the Commission eliminated legacy restrictions for facilities-based wireline broadband Internet access service providers. In arriving at its decision, the FCC emphasized its intent to "regulate like services in a similar manner so that all potential investors in broadband network platforms, and not just a particular group of investors, are able to make market-based, rather than regulatory-driven, investment and deployment decisions."[22] Similarly, when the Commission classified Broadband over Power Line-enabled Internet access service as an unregulated information service it acknowledged its desire to "further[] the Commission's goal of developing a consistent regulatory framework across broadband platforms."[23]

There is widespread support for a uniform approach for all broadband pole attachments. In testimony before the Senate Committee on Commerce, Science and Transportation in 2006, the Edison Electric Institute stated that "[r]egulated pole attachment rates should be technology-neutral so that all attaching entities pay the same rate regardless of the technology involved, and also must ensure that all costs of critical wireline infrastructure are shared proportionately among users."[24]

Similarly, Time Warner Telecom, Inc., in a filing with the Commission last year, urged the Commission to "take steps to eliminate the distortions caused by the discrimination in pole

---

[22] Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, ¶45 (rel. Sept. 23, 2005) (*Wireline Order*).
[23] Memorandum Opinion and Order, *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281, ¶2 (rel. Nov. 7, 2006).
[24] Statement for the Record Submitted by Edison Electric Institute, Committee on Commerce, Science and Transportation, United States Senate, Hearing on State and Local Issues and Municipal Networks, February 14, 2006, p. 8 (available at: http://www.eei.org/about_EEI/advocacy_activities/Congress/060214EeiSenateCommerceTelecommunications.pdf) (visited February 25, 2008).

attachment rates as soon as possible."[25] Time Warner Telecom, Inc. noted that the passage of each month that providers are forced to pay "inexplicably discriminatory" pole attachment rates "increases the rising toll on consumer welfare."

All providers of like services should be treated in the same manner regardless of the technology that they employ. Establishing such parity between all providers of broadband services will help ensure increased broadband competition to the ultimate benefit of consumers in the form of lower prices, increased consumer choices and availability of more advanced services.

III. SECTION 224 AUTHORIZES THE COMMISSION TO ESTABLISH A PARITY POLE ATTACHMENT RATE FORMULA CAPPING ALL BROADBAND ATTACHMENT RATES, INCLUDING THOSE OF ILECS

The Commission tentatively concluded that a parity approach to pole attachment rates is the appropriate policy – and there can be little doubt that this conclusion is correct. It is equally true that the Commission has statutory authority to accomplish that goal.

In the Notice, the Commission asks whether it has the authority to regulate pole attachment rates for all service providers, including ILECs.[26] The Commission previously declined to regulate the rates paid by ILECs based on a clearly erroneous and conclusory interpretation of section 224 of the Act. In the *Local Competition Order*, the Commission concluded that, "[b]ecause, for purposes of Section 224, an ILEC is a utility but is not a

[25] *TWTC White Paper*, p. 3.
[26] *Notice* at ¶ 20.

telecommunications carrier…the ILEC has no rights under Section 224 with respect to the poles of other utilities."[27]

This interpretation of Section 224 was flawed, however, because it focused solely on section 224(a)(5)'s exclusion of ILECs from the definition of "telecommunications carrier" and ignored Section 224(b)'s general mandate applicable to "pole attachments" which includes an attachment by any "cable television system or *provider of telecommunications service*." There can be little doubt that Congress' express decision to use the term "provider of telecommunications service" in the definition provision of Section 224(a)(4), as opposed to the term "telecommunications carrier" subject to the restrictions of 224(a)(5), was intended to give broader applications to the just and reasonable standard of Section 224(b)(1). Accordingly, it is clear that Section 224(b) authorizes the Commission to regulate pole attachment rates for all providers, including ILECs.[28]

A. Section 224(b) Broadly Defines the Commission's Authority to Regulate Rates.

Section 224(b) is entitled "*Authority of* Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations."[29] Regarding any question of the

[27] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 15499, 16103-04 (1996); *Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, 6781 (1998) (*Local Competition Order*).

[28] *See McCarthy v. Bronson*, 500 U.S. 136, 139 (1992) (holding that a statute should be interpreted by looking at not only the particular statutory language, but to the design of the statute as a whole and to its object and policy) (cited in *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Second Report and Order, 19 FCC Rcd 13494 (2004)). The Commission has applied this "whole act rule" in previous decisions. *See, e.g.*, *Applications of Ameritech Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14939-14940 (1999) ("Because neither the statute nor the legislative history sheds light on how this apparent conflict might be resolved, we must resolve the conflict in a way that makes sense of the statute as a whole.") (citation omitted).

[29] 47 U.S.C. § 224(b) (emphasis added).

FCC's authority, the section entitled "authority" should control.[30] In this case, section 224(b)(1) gives the Commission broad, general authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable."[31] Nothing in Section 224(b) limits the Commission's authority to a type of provider or type of service provided. Thus, the plain text of Section 224(b) authorizes the Commission to ensure just and reasonable pole attachment rates paid by any service provider, including ILECs.

Nothing in the more specific directives in sections 224(d) or (e) alters Congress's general grant of authority in Section 224(b). As noted above, section 224(b)(1) generally defines the FCC's authority to regulate pole attachment rates, terms and conditions. Section 224(b)(2) then directs the Commission to adopt regulations to carry out the general provisions of section 224(b)(1).[32] After setting forth this general directive, Congress stated that the Commission was to adopt a certain subset of rate regulations, some within a specified time frame, as specified in sections 224(d) for a "cable television system" and (e) for "telecommunications carriers."[33] However, the fact that Congress described specific rate regulations in sections 224(d) and (e) for specific cases does not mean that those rate regulations are the only regulations that the FCC is authorized to adopt. If that were the case, then Section 224(b)'s general directive regarding authority and rates would be meaningless. This cannot be the correct interpretation, because an

[30] Courts consistently have considered section or sub-section titles or headings in interpreting statutes when ambiguity is present. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (noting that heading of a section is a tool for resolving doubt about the meaning of a statute) (citations omitted); *Hardin v. City Title & Escrow*, 797 F.2d 1037, 1039 (D.C. Cir. 1986).

[31] 47 U.S.C. § 224(b)(1).

[32] 47 U.S.C. § 224(b)(2) ("The Commission shall prescribe by rule regulations to carry out the provisions of this section.").

[33] 47 U.S.C. § 224(d); 47 U.S.C. § 224(e). Specifically, in section 224(e), Congress stated that "no later than two years after" enactment of the provision, the Commission was to "prescribe regulations…to govern charges for pole attachments used by telecommunications carriers." Additionally, Congress directed the Commission to regulate "just and reasonable" rates for cable television systems consistent with section 224(d).

agency cannot interpret one part of a statute in a manner that renders another part meaningless.[34] Instead, the correct interpretation is that Congress's directives in sections 224(d) and (e) regarding charges for pole attachments dictated only what the Commission initially *must* regulate and not what it ultimately *may* regulate. Thus, if the Commission now acknowledges that the competitive landscape demands regulatory parity in pole attachment rates, nothing in the "bare minimum" sections of 224(d) or (e) precludes the Commission from adopting a uniform rate applicable to all types of providers, including ILECs.[35] Indeed, the statutory construction arguably *requires* the Commission to ensure just and reasonable rates for all providers.

The U.S. Supreme Court endorsed this holistic, plain text reading of Section 224 in *National Cable & Telecommunications Ass'n v. Gulf Power*, when it upheld the FCC's authority under Section 224 to regulate rates charged for pole attachments used to provide wireless or "commingled" services.[36] In doing so, the Court expressly rejected the Court of Appeals' conclusion "that subsections (d) and (e) narrow (b)(1)'s general mandate to set just and reasonable rates."[37] Instead, the Court found that section 224(b)'s general mandate gave the

---

[34] In statutory construction terms, this principle is known as the rule against interpreting a provision to negate another, a corollary of the whole act rule. *See, e.g. Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002) (rejecting interpretation that would render one section of statute superfluous because it would violate the precept against interpreting one provision of a statute to negate another) (citing *Sorenson v. Secretary of the Treasury*, 475 U.S. 851 (1986) (applying the "whole act rule" to the Omnibus Budget Reconciliation Act of 1981)). The Commission recently applied this principle when interpreting Section 309(j) of the Act. *See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz; Petition for Rule Making of The American Mobile Telecommunications Association*, Report and Order and Further Notice of Proposed Rule Making, 15 FCC Rcd 22709 (2000) ("To interpret the exemption for public safety radio services in Section 309(j)(2)(A) in a manner that effectively negates the changes to Section 309(j)(l) would not be reasonable.").

[35] The fact that multiple types of providers all offer broadband services presents further justification for the Commission to adopt a uniform rate pursuant to its authority under section 706 of the 1996 Act. *See* 47 U.S.C. § 157 nt (indicating that the Commission should encourage the deployment of advanced telecommunications capability).

[36] *Nat'l Cable & Telecommunications Ass'n v. Gulf Power*, 434 U.S. 327 (2002).

[37] *Gulf Power v. FCC*, 208. F. 3d 1263, 1276, n. 29 (11th Cir. 2000).

FCC broad authority to regulate pole attachment rates, regardless of the more specific directives in sections 224 (d) and (e). Specifically, the Supreme Court reasoned as follows:

> Congress did indeed prescribe two formulas for 'just and reasonable' rates in two specific categories; but nothing about the text of §§ 224(d) and (e), and nothing about the structure of the Act, suggest that these are the exclusive rates allowed. It is true that specific statutory language should control more general language when there is a conflict between the two. Here, however, there is no conflict. The specific controls but only within its self-described scope.[38]

In sum, because the Court has held that sections 224(d) and (e) "work no limitation on" section 224(b), the Commission is authorized to adopt a uniform pole attachment rate applicable to all types of providers, including ILECs.[39]

Prior Commission decisions also support this interpretation of the Commission's authority under section 224 and its subsections. In 1998, the Commission relied upon its broad, general authority under section 224(b)(1) to conclude that it could regulate rates for commingled services (*e.g.*, when a single provider offers traditional cable service and Internet service) as well as wireless services. In reaching this conclusion, the Commission reasoned as follows: "Even if the provision of Internet service over a cable television system is deemed to be neither 'cable service' nor 'telecommunications service' under the existing definitions, the Commission is still obligated under Section 224(b)(1) to ensure that the 'rates, terms and conditions [for pole attachments] are just and reasonable….'"[40] Ultimately, the Commission found that section 224(b)(1) generally authorized it to regulate rates for services not specifically addressed in later

[38] *Gulf Power*, 434 U.S. at 335-36.

[39] *Gulf Power*, 434 U.S. at 337.

[40] *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, 6795-96 (1998). This decision was upheld by the Supreme Court in *Gulf Power*, as discussed above.

sections, such as sections 224(d) and (e).[41] The Commission should make a similar finding in this proceeding so that its goals of regulatory parity and improved services to the public may be realized.[42]

B. Section 224 Requires the Commission to Ensure Just and Reasonable Attachment Rates for all Broadband Attachments..

As noted above, section 224(b)(1) provides the FCC with broad, general authority to adopt a uniform regulate pole attachment rates for all providers. Additionally, nothing in section 224 requires the Commission to exclude ILECs from a uniform rate pricing approach. Section 224(b)(1) does not limit the FCC's authority to regulate rates paid by a particular type of provider, such as a "telecommunications carrier." Thus, section 224(a)(5)'s purported exclusion of ILECs from the definition of "telecommunications carrier" is irrelevant in determining the FCC's authority in this area. Absent any provider-based distinction in section 224(b)(1), there is no reason for the FCC to limit its authority based on provider type. Accordingly, the Commission should find that it has the responsibility to establish pole attachment rates for all provider types, including ILECs.

Congress's decision to not to use the term "telecommunications carriers" when describing the FCC's general authority under section 224(b)(1) irrefutably demonstrates that the

---

[41] *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd at 6795-96; *see also Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Elec. Co.* 6 FCC Rcd 7099 (1991), *recon. dismissed*, 7 FCC Rcd 4192 (1992), *aff'd sub nom. Texas Utilities Electric Co. v. FCC*, 977 F.2d 925 (D.C. Cir. 1993).

[42] Such a finding also would be consistent with the Commission's method of statutory interpretation in other contexts. Specifically, the relationship between section 224(b) and sections 224(d) and (e) is similar to the relationship between section 628(b) and section 628(c) of the Act regarding cable operators, as recently interpreted by the Commission. With respect to the latter two statutory sections, the Commission has concluded that a prohibition on certain *specific* conduct by cable operators in section 628(c) does not negate the Commission's authority to restrict other conduct under the *general* prohibition on unfair practices by cable operators in section 628(b). *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20255-20256 (2007).

FCC's authority encompasses rates paid by ILECs. In section 224(b)(1), Congress gave the FCC broad authority over pole attachment rates, terms and conditions, as follows: *"Subject to the provisions of subsection (c) of this section*, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable…."[43] "Pole Attachments" are defined in Section 224(a)(4) to include any attachment made by a provider of telecommunications service. ILECs are providers of telecommunications services, and nothing in Section 224 explicitly or implicitly suggests otherwise.

Congress's decision to exclude ILECs from the specific rates, terms and conditions applicable in Section 224(e)(1) *only* applies to the Commission's narrow regulation of pole attachment rates used by telecommunications carriers providing telecommunications services. It does not mean that Congress did, or intended to, limit the Commission's broader authority over pole attachment rates under Section 224(b), which expressly applies to all "providers of telecommunications services."

Congress broadly defined the Commission's authority to regulate pole attachment rates in Section 224(b). Nothing in Sections 224(d), 224(e) or any other subsection limits this broad authority. Accordingly, Section 224 authorizes the Commission to adopt a single pole attachment rate calculation that applies to all service providers, including ILECs.

IV. CONCLUSION

USTelecom applauds the Commission's examination of this critical issue which is directly – and adversely – affecting the viability of delivering broadband services to American consumers. The establishment of a parity cap for broadband pole attachments between all

[43] 47 U.S.C. 224(b)(1) (emphasis added).

classes of providers will ensure a technology neutral and level playing field where broadband deployment will flourish, and consumers will benefit.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By: _____
Jonathan Banks
Glenn Reynolds
Kevin Rupy

Its Attorneys

607 14th Street, NW, Suite 400
Washington, DC 20005
(202) 326-7300

March 7, 2008