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

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

REPLY COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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April 22, 2008

SUMMARY

The fundamental issue raised in this proceeding is whether the Commission will be able to establish a regulatory regime for pole attachments that: (1) promotes the deployment and adoption of broadband; (2) establishes regulatory parity among providers offering similar services; and (3) preserves the safety and reliability of utility networks. As we explain in these reply comments, the record in this proceeding provides a path for the Commission to follow that will achieve all of these goals. The three main components of this approach are as follows:

1. Broadband Incentives. The Commission should reduce attachment rates for telecommunications providers, rather than raising attachment rates for cable operators. By reducing attachment rates, the Commission will encourage new broadband investment and affordable prices for broadband services. Conversely, raising attachment rates for cable operators would discourage broadband deployment and adoption, particularly in rural areas, as described in the attached declaration of Billy Jack Gregg, a former member of the Federal-State Joint Board on Universal Service.

2. Regulatory Parity. Using its forbearance authority, the Commission should apply the just and reasonable cable rate formula to broadband attachments of non-ILEC telecommunications providers. It also should establish a procedure under which any attaching party – including ILECs – can "opt in" to a license agreement that a pole owner makes available to any other attaching party. With these changes, all broadband providers will be able to attach their facilities at the same rates, terms, and conditions that pole owners make available to cable operators today. Alternatively, the Commission can adopt recommendations made by AT&T and Time Warner Telecom regarding modifications to the telecommunications rate formula.

3. Safety and Reliability. The Commission generally should defer to state and local processes on operational issues, including concerns regarding unsafe and unauthorized

attachments. While the Commission should continue to be available to address complaints as it is today, responsibility for day-to-day operational issues is better handled by state agencies.

The key to these proposals is that they offer all broadband providers the opportunity to attach under the same rates, terms, and conditions that pole owners currently make available to cable operators. The cable attachment regime reflects a policy that has been in place for three decades and, in the face of repeated challenges by the electric industry, it has stood the test of time.

This proceeding provides the Commission with a unique opportunity to achieve a number of important goals. In particular, it can advance its broadband agenda in a significant and tangible way, particularly in rural areas, by reducing the cost of building broadband networks and providing broadband service. The record in this proceeding reveals a path by which these goals can be achieved and we urge the Commission to move in this direction expeditiously.

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The National Cable & Telecommunications Association ("NCTA") hereby submits its reply comments in the above-captioned proceeding.[1] NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest broadband provider of high-speed Internet access after investing over $100 billion since 1996 to build a two-way interactive network with fiber optic technology. Cable companies also provide voice service to millions of American homes and are rapidly making these services available nationwide. But the cable industry's continued deployment of broadband and voice services, particularly in rural areas, depends on access to poles at reasonable rates.

INTRODUCTION

In this proceeding the Commission has a stark choice. It can establish a pole attachment system that expands the availability of affordable broadband access. Or it can build a new barrier to broadband that effectively overwhelms the Commission's and Congress' broadband

[1] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Notice of Proposed Rulemaking, FCC 07-187 (rel. Nov. 20, 2007) (*Notice*).

incentive tools. The Commission's regulation of cable pole attachments has enabled cable operators to invest billions of dollars in broadband networks and to introduce exciting video, voice, and data services to virtually every American. After three decades of regulatory policy in which the Commission both recognized the connection between regulated pole attachment rates and investment by cable operators and vigorously protected the right to attach at reasonable rates, the *Notice* in this proceeding took an unfortunate turn. In particular, in an effort to promote purported regulatory "parity" among broadband providers, the Commission tentatively concluded that the rates paid by cable operators should be increased (and possibly doubled or tripled) when they provide broadband services.

NCTA's opening comments explained that the *Notice* mischaracterized the current regime under which cable operators and others attach their facilities to poles and that the tentative conclusion to raise rates for broadband attachments was fundamentally inconsistent with the Commission's broadband policy goals. NCTA also explained that, while regulatory parity is a worthwhile goal, any changes the Commission adopts must acknowledge and account for the fact that *incumbent LECs are not similarly situated* to cable operators and competitive LECs.

In these reply comments, NCTA responds to electric company proposals to raise attachment rates for all parties, and particularly for cable operators. Simply put, such proposals would completely undermine the Commission's broadband policies, without providing any benefit to electric company ratepayers. Rural areas would be particularly harmed, as explained in the attached declaration of Billy Jack Gregg. The better approach, as we set forth below, is for the Commission to allow other broadband providers to attach under the same rates, terms, and conditions as cable operators. The cable attachment regime works well for pole owners and

cable operators and the Commission should use its broad authority under Section 224, as well its forbearance authority under Section 10, to extend that regime to all broadband providers. By doing so, the Commission can achieve its goal of regulatory parity without undermining its broadband policy goals.

I. THE COMMISSION CAN ADVANCE ITS BROADBAND GOALS BY REDUCING THE RATE FOR BROADBAND ATTACHMENTS BY TELECOMMUNICATIONS PROVIDERS

A. There is Strong Bipartisan Support for Improving Broadband Investment Incentives

In its recent report to Congress pursuant to Section 706 of the 1996 Act, the Commission concluded that broadband service is being deployed to all Americans on a reasonable and timely basis.[2] Notwithstanding the success of the marketplace in expanding the availability of broadband services, each FCC Commissioner has recognized that providing the proper incentives for new investments in broadband facilities is absolutely critical to the economic future of the United States:

> Continued broadband deployment and **infrastructure investment is vital to this country's economic growth.**

Statement of Chairman Kevin J. Martin, Section 706 Report (emphasis added)

> A national broadband strategy should include government and the private sector working together as it has always done to meet the great infrastructure challenges of the day. . . . It means **incentives to build infrastructure**, something we always managed to do in our nation's past but where we seem strangely reluctant to act when it comes to this perhaps most awesome-ever technology.

Statement of Commissioner Michael J. Copps, Dissenting, Section 706 Report (emphasis added)

[2] *See* News Release, *FCC Expands, Improves Broadband Data Collection* (Mar. 19, 2008) ("Separately, the FCC today adopted a report showing that broadband services are currently being deployed to all Americans in a reasonable and timely fashion. The Fifth Report to Congress on broadband deployment under Section 706 of the Telecommunications Act of 1996 finds that there have been considerable changes and advances in the delivery of broadband-based services and applications since the Fourth Report.").

> Since our 2004 report, it has become increasingly apparent that one of America's central challenges is promoting the **widespread deployment of higher-bandwidth broadband facilities** to carry the vast array of innovative services that are transforming virtually every aspect of the way we communicate, and to make sure that these facilities are affordable for consumers.

Statement of Commissioner Jonathan S. Adelstein, Dissenting, Section 706 Report (emphasis added)

> I believe that the continued and complete deployment of broadband across this nation should be our number one focus, indeed Congress requires this: to provide **incentives for investment in broadband facilities** and encourage broadband deployment.

Statement of Commissioner Deborah Taylor Tate, Section 706 Report (emphasis added)

> Accordingly, it is absolutely essential that broadband network and service providers have the **proper incentives to deploy new technologies**. In order to entice network operators, or potential builders of new networks, to raise the capital necessary to build better networks, they must be able to pay back their investors. That's the only way new networks will get built.

Opening Statement of Commission Robert McDowell, En Banc Hearing on Broadband Network Management Practices (Feb. 25, 2008) (emphasis added).

The Commission's policies with respect to pole attachments may well have a larger impact on whether the Commission helps or hinders the shared goal of widespread broadband deployment and adoption than any other broadband incentive program – including the broadband fund recently proposed by the Federal-State Board on Universal Service.[3] As a number of electric companies explain, they currently are not competing in the broadband market and have no immediate plans to do so.[4] Consequently, if the Commission wants to encourage broadband

[3] The Commission is seeking comment on a recommendation by the Federal-State Joint Board for Universal Service to create a $300 million Broadband Fund to support broadband investments in areas where terrestrial broadband service is not available. *Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, FCC 08-22 (rel. Jan. 29, 2008). In comparison, NCTA's expert, Dr. Michael Pelcovits, concluded that requiring cable operators to pay pole attachment rates calculated under the telecommunications rate formula could raise the annual cost of providing service by more than $600 million. NCTA Comments, Appendix B, Declaration of Dr. Michael Pelcovits at 11 (Pelcovits Declaration).

[4] Edison Electric Institute (EEI) Comments at 12.

deployment and adoption, it must do what it can to provide even stronger incentives for companies that attach facilities to poles, like cable operators, to make such investments.

B. Expanding the Cable Attachment Regime to Other Broadband Providers Will Promote Broadband Investment and Adoption

As NCTA and numerous other parties explained in their comments, the regime established by the Commission for pole attachments by cable operators has been extremely effective in balancing the needs of attaching parties and pole owners.[5] On the one hand, the combination of make-ready payments and annual rental fees assures pole owners that allowing attachments will make them better off financially than they would be if there were no attaching parties.[6] On the other hand, by setting a ceiling on rental fees, guarding against double recovery of costs, and establishing a strong complaint process, the Commission's rules generally enable cable operators to attach their facilities on a timely basis and at reasonable rates.[7] Thirty years of precedent from the Commission, state commissions, and the courts confirms that the cable attachment regime rests on sound constitutional, legal, and economic footing.[8]

Allowing telecommunications providers to attach under the same rates, terms, and conditions as cable operators clearly promotes broadband deployment and adoption. The comments filed by parties that attach their facilities to utility poles demonstrate conclusively that

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[5] NCTA Comments at 12; CenturyTel at 14 ("Thus, pole owners are assured that they are guaranteed a methodology that can produce a compensatory rate, and thus their constitutional due process rights are preserved through the use of the cable TV formula for all providers of telecommunications."); Time Warner Telecom Comments at 10 ("state commissions have generally mandated that pole owners follow the cable rate formula, because it most appropriately allocates the costs between pole owners and attachers.")).

[6] *See, e.g.*, *2007 ALJ Decision*, 22 FCC Rcd at 2004, ¶ 21 n.10 ("The Commission has already concluded that Cable Formula rates plus payment of make-ready expenses provides compensation that *exceeds* just compensation.") (emphasis added); *Alabama Power*, 311 F.3d at 1369 ("The legal principle is that in takings law, just compensation is determined by the loss to the person whose property is taken.").

[7] NCTA Comments at 1 ("The Commission's regulation of pole attachments has been a major success story for three decades, facilitating billions of dollars in investment by cable operators in broadband networks and the introduction of exciting video, voice, and data services to virtually every American home.")

[8] NCTA Comments, Appendix A.

lower attachment rates would promote investment. As AT&T explains, "establishment of a uniform pole attachment rate that would apply to all attachments used by a cable television system or provider of telecommunications service for broadband Internet access . . . would remove disincentives to invest in and deploy broadband infrastructure by eliminating the use of pole attachment as a revenue stream that artificially inflates the cost of broadband service."[9]

Reducing the price of a key input also helps broadband providers keep rates affordable and therefore promotes adoption of broadband services by consumers. As the Independent Telephone & Telecommunications Alliance explains, "reasonable pole attachment rates, terms and conditions are another crucial element in the drive to deploy advanced services further, particularly where price inelasticity would drive take-rates downward should unreasonable pole attachment rates force carriers to flow high costs back to consumers."[10] In short, where the Commission has the legal authority to reduce attachment rates (which we address in Section II below), there are numerous benefits that would result from doing so.

Although changing the rates, terms, and conditions under which some broadband providers attach might affect electric company revenues, it should have no material effect on electric company ratepayers. As NCTA and other parties explained, most state commissions with jurisdiction over pole attachment rates have elected to allow parties to attach at the cable rate, or something close to it.[11] Unlike the FCC, these state commissions actually have responsibility for protecting the interests of electric company ratepayers. That they have chosen

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[9] AT&T Comments at 13.

[10] Independent Telephone & Telecommunications Alliance (ITTA) Comments at 8.

[11] NCTA Comments at 20-21; *see also* Time Warner Telecom Comments at 10 ("The states have also concluded that a single rate *based on the cable formula* appropriately allocates the benefit of attachments provided to telecommunications carriers and cable systems.") (emphasis in original).

the cable rate formula for cable operators and competitive providers of all services, rather than some higher rate, speaks volumes.

A series of decisions by the Massachusetts Department of Telecommunications and Energy (DTE) illustrates the negligible impact of pole attachment rates on electric ratepayers. In a case involving Boston Edison, it was demonstrated that "pole revenues equate to *no more than one cent of a monthly electric bill*...."[12] The DTE reduced pole rental fees and held that this rate reduction would have "minimal" impact (.009%) on electric ratepayers "and not require an adjustment of other [utility] rates."[13] The DTE reached the same conclusion in a case involving Massachusetts Electric (MECo), where the utility proposed to increase pole attachment rates from $9.40 to nearly $16.00. The DTE rejected the proposed increase and instead followed the cable rate formula. It found that the cable rate formula adequately considers the interests of electric and cable customers and "is reasonable and will not impose a financial disruption on the subscribers of CATV services or MECo ratepayers."[14] Similarly, as explained in the attached declaration of Billy Jack Gregg, experience with electric companies in West Virginia also demonstrates that pole attachment revenues represent a miniscule portion of electric company revenues, and reductions in such revenues would have a negligible effect on the rates charged to electric customers.[15]

Moreover, a reduction in the pole attachment revenues received by electric companies should be of no concern to the Commission because the record shows that electric companies are

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[12] *Cablevision of Boston v. Boston Edison Co*., Mass. Docket No. D.T.E. 97-82 at 12 (Apr 15, 1998) (*Boston Edison*), citing Transcript 1 at 205 (emphasis added).

[13] *Boston Edison* at 45, 46.

[14] *A/R Cable Servs. v. Massachusetts Elec. Co*., Mass. Docket No. D.T.E. 98-52 at 30 (Nov 6, 1998) (*MECO*). To the same effect is the DTE's earlier decision in *Greater Media Cable, Inc*., D.P.U. 91-218 (Apr 17, 1992), *affirmed*, 415 Mass. 409 (1993), finding that conduit rent reductions pursuant to what is now the FCC's standard formula would have trivial impact on the revenues of electric utilities.

[15] Declaration of Billy Jack Gregg at 14-15 (attached as Exhibit A) (Gregg Declaration).

being overcompensated by the current rules. AT&T makes the point that not only are electric companies using more space on poles than in the past, but they also are recovering a greater percentage of pole costs from attaching parties.[16] AT&T offers an example where the electric company effectively pays only 20 percent of the cost of the pole, even though it uses more space on the pole than any other party.[17] Under these circumstances, the purported harm to electric companies from a reduction in pole attachment rates is really just an offset to benefits those companies received from excessive pole attachment rates in the past.

C. There Is No Basis Whatsoever For Raising Pole Attachment Rates

As they have for thirty years, electric companies once again complain about the injustice of the rates they are permitted to charge under the current attachment regime and they propose a variety of alternatives to address these concerns, ranging from "tweaking" the current telecommunications rate formula[18] to adopting entirely new formulas that would, at a minimum, double the telecommunications attachment rate.[19] As it has done countless times in the past, the Commission should reject these arguments and confirm yet again the validity of the cable attachment regime.

1. Raising Pole Attachment Rates Cannot Be Justified On Legal or Economic Grounds

A consistent theme in the comments of the electric companies is that the Commission should remove the purported "subsidies" inherent in the existing cable and telecommunications rate formulas. These arguments are utterly lacking in merit and should be rejected.

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[16] AT&T Comments, Declaration of Veronica MacPhee at 8-9 (MacPhee Declaration).

[17] *Id*. We note, however, that AT&T's analysis focuses only on the annual rental fee and does not consider the greater attachment rights that an ILEC typically is granted under a joint use agreement.

[18] Florida Power Comments at 11-17; *see also* EEI Comments at 92-109; Utilities Telecom Council (UTC) Comments at 20-28.

[19] *See* Coalition of Concerned Utilities (CCU) Comments at 6-36.

As demonstrated in NCTA's opening comments, questions about the legal validity of the cable rate formula consistently and repeatedly have been resolved in the Commission's favor.[20] The Supreme Court confirmed the legality of the cable rate formula over 20 years ago in the *Florida Power* case,[21] and that conclusion has been reaffirmed by the FCC and the courts repeatedly since then,[22] both with respect to cable services and broadband services.[23] Nothing in any of the comments filed by the electric companies provides the Commission with any reason to revisit these long-settled legal issues.[24]

The electric companies fare no better with respect to economics. The cable rate formula is based on a fully allocated cost methodology that allows pole owners to recover a portion of all the costs of the pole. As the Supreme Court found, there can be no serious argument that such an approach is not compensatory to the pole owner.[25] In combination with make-ready payments that cover all incremental costs of attachment, the annual rents established under the cable rate formula undoubtedly place electric companies in a better position financially than if there were

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[20] NCTA Comments, Appendix A.

[21] *FCC v. Florida Power Corp*., 480 U.S. 245 (1987).

[22] *See, e.g*., *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002); *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103 (2001) (*Consolidated Reconsideration Order*); *Florida Cable Tele. Assoc. v. Gulf Power*, 22 FCC Rcd 1997 (ALJ 2007).

[23] *National Cable & Telecommunications Assoc. v. Gulf Power*, 534 U.S. 327 (2002); *Texas Utilities Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

[24] Some utility companies repeat the erroneous statement, contained in the NPRM, that the cable rate formula does not include the cost of unusable space. *See, e.g.*, UTC Comments at 20. As NCTA explained, and the Commission previously found, the cable rate formula does include a portion of the cost of unusable space, and any suggestion to the contrary is a "complete mischaracterization" of the Commission's rules. *Alabama Cable Tele. Assoc. v. Alabama Power*, 16 FCC Rcd 12209, 12236, ¶ 60 (2001).

[25] *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. Appellees 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.").

no attachments on their poles. As explained by former FCC Commissioner Harold Furchtgott-Roth:

> The current cable pole rate is much higher than the marginal cost of adding a cable attachment to a pole: it covers marginal costs through make-ready, and then pays much more than marginal costs through a rental calculated as a share of average cost of the full pole – including both costs of usable and unusable space.[26]

Moreover, notwithstanding the overheated rhetoric about subsidized rates, the actions of electric companies belie the argument that they are not being adequately compensated for allowing attachments on their poles. If it really were the case that allowing attachments on their poles was a money-losing proposition, we would expect to see electric companies owning fewer poles. As Furchtgott-Roth explains, if pole attachment rates were subsidies, "[o]ne possible market reaction would be underinvestment in pole networks."[27] Alternatively, utilities might "sell pole network assets to unregulated third parties."[28]

But the record reveals nothing of the kind. As explained by AT&T, the share of poles that are owned by the electric companies relative to ILECs has been increasing over time, and electric companies generally are reluctant to sell poles to ILECs to restore the balance that previously existed.[29] Similarly, as Furchtgott-Roth explains, "there is no evidence of underinvestment by utilities in pole networks" and "[u]tilities, rather than third parties, continue to own pole distribution networks."[30] These facts certainly suggest that, rather than subsidizing attaching parties, the current pole attachment regime is a dependable source of profits for electric companies.

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[26] Comcast Comments, Exhibit 2, Declaration of Harold Furchtgott-Roth Declaration at 12 (Furchtgott-Roth Declaration).

[27] Furchtgott-Roth Declaration at 15.

[28] *Id.*

[29] MacPhee Declaration at 10-12.

[30] Furchtgott-Roth Declaration at 15.

Utilities also argue that it is time to reassess the cable attachment regime because cable no longer is a nascent industry providing a single service, but is rather a well-established industry providing multiple services over the same wire.[31] There is no merit to that argument. Regardless of how well-established cable operators or other attaching parties have become, the record demonstrates the electric companies have a monopoly over access to utility poles that is undiminished by developments in the retail marketplace.[32] Under these circumstances, the relevant legal test is based on the cost of providing space on the pole, not the value of that space to the attaching party. As the court explained in *Alabama Power*: "The legal principle is that in takings law, just compensation is determined by the loss to the person whose property is taken."[33]

The legal principle that rates should be based on the costs to the pole owner and not the value of the attachment to the attaching party is fully consistent with economic principles. As explained by Patricia Kravtin, a cost-based approach to setting prices is wholly appropriate when there is no working market for the good or service that is being valued, as is the case here.[34] The size of the attaching company or the revenue it is able to derive from the attachment should be no more relevant to the price charged for a pole attachment than it is in setting the price an electric company charges for electric service. The amount that an attaching party saves by not having to build its own pole network is equally irrelevant given that building a duplicate network is not even a remotely realistic alternative.[35]

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[31] CCU Comments at 18-22.

[32] AT&T Comments at 9; CenturyTel Comments at 2-3; Time Warner Telecom Comments at 5.

[33] *Alabama Power*, 311 F.3d at 1369.

[34] Comcast Comments, Exhibit 1, Report of Patricia Kravtin at 19-20 (Kravtin Report).

[35] *Id*. at 18-23.

Finally, despite suggestions to the contrary by some of the electric companies, there is no consumer benefit associated with raising pole attachment rates. As noted above, even when pole revenues are considered in the ratemaking process, there is a *de minimis* impact on consumer electric rates.[36] Moreover, while most of the utilities participating in this docket have requested significant pole rate increases, not a single one has committed to reduce retail rates to consumers in response to the financial windfall they would receive as a result of such increases. While some companies make vague assertions that consumers would benefit in future electric rate proceedings, at least one party acknowledges that states rarely conduct such rate cases anymore.[37]

2. The Electric Companies' Proposed "Fixes" to the Commission's Rate Formulas Should Be Rejected

A few utilities argue that a handful of state and local decisions that depart from the cable attachment regime support their argument that a new approach to pole attachment rates is needed. Coalition for Concerned Utilities, for example, argues that decisions made by the Delaware PSC, the Maine PUC, the Indiana URC, and the City of Seattle, as well as proposal in a U.S. House bill from 1996, all represent superior alternatives to the existing rate formulas.[38] Although the specifics differ, all of these formulas share a common element in that they depart from apportioning costs based on usage, as occurs under the cable rate formula, and move toward an equal allocation of pole costs among parties without regard to usage.

The Commission should reject all of these alternatives. As an initial matter, each of these proposals would dramatically raise attachment rates for every company that attaches facilities to poles, regardless of whether they are classified as cable operators or telecommunications carriers.

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[36] Gregg Declaration at 14-15; *Boston Edison* at 45, 46; *MECO* at 30.

[37] UTC Comments, Attachment at 22.

[38] CCU Comments at 25-36.

As we explain in detail in the next section, such a result cannot be reconciled with the broadband agenda established by Congress and the Commission.

Separate from the negative effect on broadband investment and adoption, these proposals ignore the fact that the electric company almost always is the dominant occupant on a pole and therefore should bear most of the costs of the pole. Electric facilities use the most space on the pole and technical and safety standards for providing electric service and handling electric facilities dictate the size and placement of pole systems. Conversely, parties attaching to a pole pursuant to a license agreement use relatively little space on the pole and have no ownership or control of the pole. To suggest that costs be split equally among parties that are not even remotely equal in their use and control over the pole is to ignore the reality of the marketplace.

To similar ends, a number of utilities propose "fixes" to various components of the existing formulas. But these proposals all have been considered and rejected before. For example, a number of utilities argue that the Commission no longer should count the pole owner as an attaching party.[39] Such a practice obviously would be a significant departure from reality. To say that an electric company is not attached to the pole when the facilities it attaches to a pole typically take up more space than the facilities of all other attaching parties combined is simply ridiculous. As the Commission stated the last time it considered this question, "[w]e do not believe that Congress intended for a single attacher, protected by the Pole Attachment Act, that uses one foot of space on a pole, to a pay a higher (double) portion of the unusable space cost than the pole owner that controls, and uses a good portion of, the rest of the usable space."[40]

Similarly, a number of electric companies propose that the Commission treat the 40-inch worker "safety" space between cable attachments and electric attachments as unusable space,

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[39] EEI Comments at 105-07; UTC Comments at 25-27.

[40] *Consolidated Reconsideration Order*, 16 FCC Rcd at 12134, ¶ 60.

rather than assigning the cost of that space to the pole owner.[41] But, as the Commission explained when it last rejected this approach, that space is "usable and used by the electric utility."[42] The Commission has followed this same approach since 1979,[43] and the electric companies offer no compelling reason to change course now.

Electric companies also argue that the Commission should revisit its presumptions regarding the number of parties that are attached to poles, and many of them include studies that purport to demonstrate that there are fewer attaching parties in practice than is presumed under the Commission's rules.[44] Even accepting these studies at face value, it is unremarkable that real world experience differs from the presumptions established by the Commission. The Commission anticipated that such differences might exist and that is why it clearly established the right of either party to introduce evidence that something other than the presumed number of parties should be used in calculating rates.[45]

Another proposal that many utilities advance is to establish a presumption that all cable attachments are used for telecommunications service and therefore subject to the telecommunications rate.[46] There is no basis for the Commission to adopt such a presumption. As a legal matter, most cable operators that offer voice service use Voice over Internet Protocol

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[41] CCU Comments at 40; EEI Comments at 103-04; UTC Comments at 27-28; Florida Power Comments at 14-15.

[42] *Consolidated Reconsideration Order*, 16 FCC Rcd at 12130, ¶ 51.

[43] *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, FCC Docket No. 78-144, Memorandum Opinion and Second Report and Order, 72 FCC 2d 59, 70-71, ¶ 24 (1979) ("[A]ssigning any portion of the safety space to CATV would contravene the clear intent of Congress that CATV be responsible only for the space it actually occupies, i.e., one foot.")

[44] *See, e.g.*, AEP Comments at 19-23; CCU Comments at 13-18; EEI Comments at 45-47.

[45] *Consolidated Reconsideration Order*, 16 FCC Rcd at 12139, ¶ 70 ("As with all our presumptions, either party may rebut this presumption with a statistically valid survey or actual data."). If the Commission decides to revisit the presumptions underlying its rate formulas, it should not limit such a review to the presumptions regarding the number of attaching parties. There are other presumptions in these formulas that also are out of date. For example, as noted below, the assumption of an average pole height of 37.5 feet may no longer be appropriate.

[46] EEI Comments at 75.

(VoIP) technology, rather than traditional circuit-switched technology. The Commission has not determined whether VoIP services are classified as telecommunications services, and therefore the proposed presumption is premature at best.[47] In addition, even if the Commission were to find that VoIP services should be treated as telecommunications services for purposes of Section 224, as NCTA explains below, there are strong reasons to grant forbearance from the telecommunications rate formula with respect to non-ILEC companies providing broadband service.

3. Raising Pole Attachment Rates Will Undermine Broadband Investment and Adoption

Allowing utilities to raise pole attachment rates for any class of attaching parties may, in one fell swoop, do more to undermine broadband deployment than all other FCC and Congressional incentive programs do to promote it. In fact, the increased cost of pole attachments may prove a larger disincentive to broadband build out than the entire incentive that would be created by the recently proposed universal service broadband fund.[48] The record confirms the obvious point that raising the price of a key input to broadband service will discourage needed investment by providers and discourage adoption of broadband services by consumers.[49] As NCTA's expert Dr. Michael Pelcovits explained:

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[47] *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4886-90 (2004).

[48] The Commission is seeking comment on a recommendation by the Federal-State Joint Board for Universal Service to create a $300 million Broadband Fund to support broadband investments in areas where terrestrial broadband service is not available. *Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, FCC 08-22 (rel. Jan. 29, 2008). In comparison, NCTA's expert, Dr. Michael Pelcovits, concluded that requiring cable operators to pay pole attachment rates calculated under the telecommunications rate formula could raise the annual cost of providing service by more than $600 million. Pelcovits Declaration at 11.

[49] *See, e.g.*, ITTA Comments at 8 ("reasonable pole attachment rates, terms and conditions are another crucial element in the drive to deploy advanced services further, particularly where price inelasticity would drive take-rates downward should unreasonable pole attachment rates force carriers to flow high costs back to consumers.")

> There will be significant damage to the economy and to consumer welfare from the proposed increase in pole attachment rates. The harm will come from three different sources: (1) higher prices to consumers from direct pass through of higher pole attachment rates; (2) reduced availability of broadband services to consumers, particularly in rural areas; and (3) reduced investment by cable companies in new plant and technology.[50]

Rural areas would be particularly hard hit by increases in pole attachment rates, as demonstrated in the attached Declaration of Billy Jack Gregg. Gregg served for 26 years as the Director of the Consumer Advocate Division of the West Virginia Public Service Commission. Among his many activities in that role, Gregg served as a member of the Federal-State Joint Board on Universal Service and he chaired the West Virginia Advanced Services Task Force. He is an acknowledged expert on the issues related to broadband deployment in rural America.

In his declaration, Gregg describes the unique challenges that broadband providers face in trying to extend broadband service to rural portions of West Virginia, including difficult terrain and sparse population. Both of these factors mean that "more poles are required to pick up each potential customer in unserved rural areas."[51]

Gregg explains that requiring cable operators to pay the telecommunications attachment rate could raise the cost of providing broadband service in the state of West Virginia by over $4 million per year.[52] Given the already challenging environment for broadband investment in West Virginia, he concludes that such a dramatic increase in the cost of providing services undoubtedly would lead to less investment in the state and higher prices for retail services, both

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[50] Pelcovits Declaration at 12.

[51] Gregg Declaration at 6.

[52] *Id*. at 11.

of which are fundamentally inconsistent with the goals the state and federal government have been pursuing in West Virginia and other rural states.[53]

II. THE COMMISSION CAN ACHIEVE ITS GOAL OF REGULATORY PARITY BY ENABLING ALL BROADBAND PROVIDERS TO ATTACH UNDER THE SAME RATES, TERMS, AND CONDITIONS AS CABLE OPERATORS

As NCTA explained in its opening comments, all else being equal, the Commission should establish similar rights and obligations among parties that provide similar services.[54] But the record makes clear that in the pole attachment context, not all companies are similarly situated. Joint use arrangements between ILECs and electric companies are fundamentally different than the license arrangements that CLECs and cable operators have with electric companies.[55] In particular, the make-ready obligations associated with license agreements are substantially more burdensome than obligations imposed under joint use agreements.[56] The Commission must acknowledge and account for these differences, not gloss over them.[57]

There are legal differences that the Commission must consider as well. Section 224 distinguishes between telecommunications carriers and cable operators and establishes different rate formulas for the two types of entities.[58] But for purposes of these rate provisions, Congress specifically chose not to include ILECs in the definition of telecommunications carriers.[59]

Under these circumstances, the Commission would be justified in simply leaving its current pole attachment regime in place on the grounds that parity among providers was not

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[53] *Id*. at 12.

[54] NCTA Comments at 14.

[55] Kravtin Report at 61-69; MacPhee Declaration at 2-13; CCU Comments at 48-70; EEI Comments at 110-127.

[56] Kravtin Report at 62-65; CCU Comments at 53-61.

[57] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (agency decision will not be upheld if it "glosses over or swerves from prior precedent without discussion.").

[58] 47 U.S.C. §§ 224(d), (e).

[59] 47 U.S.C. § 224(a).

specifically contemplated by Congress, and would be difficult to achieve given the different arrangements under which different providers operate. While preserving the status quo might be in the short-term interest of many cable operators, it is not the Commission's only option, nor is it necessarily the best option. In this section we identify three different approaches by which the Commission can achieve regulatory parity – within the existing statutory framework and without undermining the broadband goals shared by each of the commissioners.

A. The Commission Should Forbear From Applying the Telecommunications Rate Formula to CLEC Broadband Attachments and Apply the Cable Rate Formula Instead

NCTA fully supports the comments of parties that request the Commission to forbear from applying the telecommunications rate formula to broadband attachments by non-ILEC telecommunications carriers and instead apply the cable rate formula.[60] Forbearance is "[a]n integral part of the pro-competitive, de-regulatory national policy framework established in the 1996 Act."[61] Section 10(a) of the Act *requires* the Commission to forbear from applying "any provision of this Act" if the Commission finds that enforcement of that provision is not needed to ensure the reasonableness of the rates and practices of affected telecommunications carriers or to protect consumers of such carriers, and that forbearance is otherwise in the public interest.[62] The

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[60] Time Warner Telecom White Paper at 2 ("the Commission has used every means available to it under the Communications Act [to level the competitive playing field for facilities-based providers of broadband service], including its authority under the 'at a minimum' clause in Section 251(d)(2) and its forbearance powers under Section 10"). Because ILECs are not covered by Section 224(e), forbearance from that provision would be of no benefit to them without additional actions by the Commission. NCTA proposes one possible approach to this issue in the next section.

[61] *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c)*, 22 FCC Rcd 19478, 19487 (2007) (quoting Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996)) (internal quotation omitted). *See also Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c)*, 22 FCC Rcd 18705, 18714-15 (2007) (same); *Petitions of the Verizon Tel. Cos. for Forbearance Pursuant to 47 U.S.C. § 160(c)*, 22 FCC Rcd 21293, 21303 (2007) (footnotes omitted) (emphasis added); *AT&T Inc. v. FCC*, 452 F.3d 830, 833 (D.C. Cir. 2006) (same);

[62] 47 U.S.C. § 160(a).

public interest analysis must consider whether forbearance would promote competition among telecommunications carriers.[63]

Using its forbearance authority is an entirely rational and legal way for the Commission to move toward regulatory parity in the context of pole attachments. In particular, forbearing from applying the Section 224(e) telecommunications rate formula furthers the precise objective underlying Section 10 of the Act insofar as "forbearance seeks elimination of regulatory uncertainty [that] even the Commission recognizes … may discourage investment and innovation regarding the very technologies Congress intended the Act to promote,"[64]

Forbearance from the telecommunications rate formula, and application of the cable rate formula instead, easily satisfies the statutory criteria. First, applying the telecom rate formula is not necessary to ensure the reasonableness of rates those carriers charge, nor is it necessary to protect consumers. Indeed, applying the telecommunications rate formula *harms* consumers by raising the cost of providing broadband and telecommunications services.

Second, application of Section 224(e) is not necessary for the protection of consumers. Forbearance will keep pole attachment rates from rising above just and reasonable compensation and is appropriate to "help ensure that customers … have competitive choices,"[65] and remove barriers to a fully competitive market.[66] Finally, forbearance would promote competition in the marketplace by allowing all broadband providers covered by Section 224 to attach under the

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[63] 47 U.S.C. § 160(b).

[64] *AT&T v. FCC*, 452 F.3d at 836.

[65] *Petition of ACS of Anchorage, Inc.*, 21 FCC Rcd 13655, 13688 (2007).

[66] *See* Charter Comments at 5 (demonstrating with respect to prospect of raising pole costs above cable-only rates when additional services like Internet and VoIP are added to system, the "impact on a new entrant who must charge incrementally more to recoup its new plant investment within a reasonable amount of time … is utterly forbidding"). *See also Embarq*, 22 FCC Rcd at 19482 (discussing in grant of forbearance the propriety of "easing the regulatory requirements for broadband facilities and service").

same regime that is now used by cable operators, [67] rather than penalizing providers that choose to offer voice applications that help fulfill the 1996 Act goals of "promoting competition in every sector of the communications industry."[68] The Commission has itself cited the "competitive benefit of … continued investment in fiber-based broadband facilities,"[69] and has held that "regulation that constrains incentives to invest in and deploy the infrastructure needed to deliver broadband services is not in the public interest." [70] As explained by numerous parties, including a number of electric companies, greater uniformity in the rates, terms, and conditions under which similarly situated parties attach facilities would promote competition.[71] Under these circumstances, forbearance clearly serves the public interest and is required here in this rulemaking proceeding pursuant to Section 10(a).[72]

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[67] *See* Alabama Cable Association *et al*. Comments at 22 ("we do not oppose CLECs that face the same attachment terms as cable operators paying the same cable rate for their attachments because there is no legitimate reason to increase *any* broadband pole attachment rates") (emphasis in original).

[68] *Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment to the Commission's Rules and Policies Governing Pole Attachments,* Report and Order, 13 FCC Rcd 6777, ¶ 31 (1998). *See also* Charter Comments at 10 ("Increasing pole rents on the Internet would inexplicably reverse Congressional intent to promote [ ] broadband deployment and local voice competition.").

[69] *BOC Forbearance Petitions*, 19 FCC Rcd at 21508.

[70] *Embarq*, 22 FCC Rcd at 19503; *AT&T*, 22 FCC Rcd at 18732.

[71] EEI Comments at 92; CenturyTel Comments at 15; CTIA Comments at 14; DAS Forum at 14; Ameren Comments, Liebel Declaration at ¶ 10; Alabama Power Comments at 17-18; CCU Comments at 37; MetroPCS Comments at 3-6; T-Mobile Comments at 6.

[72] The Commission may properly consider forbearance in this rulemaking proceeding without a separate petition pursuant to Section 10(c). The provision for forbearance petitions in Section 10(c) is stated in the permissive, *i.e.*, that parties "may" file them, while Section 10(a), the substantive statutory provision, states the FCC "shall" forbear where the relevant requirements are met. *Compare* 47 U.S.C. § 160(a)-(b) *with id*. § 160(b). Examples of FCC forbearance under Section 10 not preceded by a separate petition include *Implementation of the Call Home Act of 2006*, 22 FCC Rcd 1030 (2007); *Regulation of Prepaid Calling Card Services*, 21 FCC Rcd 7290, 7299 (2006); *Federal-State Board on Universal Service*, 20 FCC Rcd 16883, 16893-94 (2005). *But see Petition of Mid-Rivers Tel. Coop., Inc.*, 21 FCC Rcd 11506, 11517 & n.71 (2006) (refusing to grant forbearance requested only in comments, reply, and *ex parte* letter) (citing 47 C.F.R. § 1.53).

B. The Commission Should Allow Broadband Providers to "Opt In" to Existing License Agreements Between Pole Owners And Other Attaching Parties

As the Supreme Court found in the *Gulf Power* case, the Commission's authority over pole attachments is not limited to the two categories of attachments identified in the rate provisions of Sections 224(d) and 224(e).[73] Rather, the Court found that the Commission has authority under Section 224(b) to regulate types of pole attachments, including the rates for such attachments, that are not specifically identified in either of the two rate provisions.[74]

Given this broad authority over pole attachments generally, one option available to the Commission would be to allow all attaching parties to "opt in" to existing pole agreements. The opt in procedure proposed below is premised on a presumption that pole owners will not be harmed by allowing third parties to attach to their poles at rates, terms, and conditions that the pole owner already has made available to at least one other attaching party in its service area. Given the decades of precedent confirming that the cable attachment regime more than compensates pole owners, there is a strong basis for this presumption.

Under this proposal, each pole owner would be required to make publicly available each pole attachment, joint ownership, or joint use agreement pursuant to which it allows parties to attach facilities. Any attaching party, including ILECs, would be permitted to opt in to any of these agreements, with the applicable state specific rate. Pole owners would be required to make available within 30 days of a request all information reasonably necessary for an attaching party to make an informed decision as to whether it would want to opt in to a particular agreement (*e.g.*, cost information).

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[73] *Gulf Power*, 534 U.S. at 335-36 ("[N]othing about the text of §§ 224(d) and (e), and nothing about the structure of the Act, suggest that these are the exclusive rates allowed.").

[74] *Id*. at 336 ("The sum of the transactions addressed by the rate formulas is less than the theoretical coverage of the Act as a whole."); *id*. at 337 ("[W]e hold that §§ 224(d) and (e) work no limitation on §§ 224(a) and (b).").

Companies that choose to opt in to a particular agreement would be required to accept all the terms and conditions in the agreement (i.e., this is an "all-or-nothing" regime, not a "pick-and-choose" regime), with one exception. As the Commission found in the context of interconnection agreements, allowing companies to opt in to an entire agreement is superior to allowing companies to "pick and choose" contract terms.[75] The one exception to the all-or-nothing requirement is that contracts should be adjusted as necessary to reflect differences in space used. For example, if an electric company charges a cable operator $8.00 a year for attaching facilities in one foot of pole space, it should be permitted to charge an incumbent LEC $16.00 a year for attachments that use two feet of pole space. Disputes over opt-in, rates, terms, conditions, and practices, as well as over nondiscriminatory enforcement of contractual provisions, would be resolved by the Commission.

As a practical matter, it is not clear how many ILECs actually would choose to opt in to existing license agreements between cable operators and electric companies. As the record makes clear, existing joint use agreements between electric companies and ILECs generally include terms that are more favorable than those contained in license agreements.[76] Notwithstanding their complaints about the annual rental fees they pay for some subset of poles under some agreements, many ILECs may be reluctant to give up the favorable attachment rights that they typically possess under most joint use agreements. But in extreme situations, an existing joint use agreement (or a proposal made in the context of renegotiating such an agreement) may be so lopsided in favor of the electric company that the option of attaching as a licensee may be more attractive to an ILEC. Under those circumstances, there are strong policy

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[75] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order, 19 FCC Rcd 13494, 13501-02 ¶ 12 (2004), *affirmed New Edge Network, Inc. v. FCC*, 461 F.3d 1105 (9th Cir. 2006).

[76] Kravtin Report at 61-69.

reasons to allow the ILEC to transition to a different, but still entirely compensatory, set of rates, terms, and conditions.

C. Alternatively, the Commission Can Modify the Telecommunications Rate Formula to Reduce the Rate For Broadband Attachments By Telecommunications Carriers

An alternative approach to establishing a uniform broadband attachment formula would be to modify the existing telecommunications formula, and thereby reduce the attachment rates paid by telecommunications carriers to a level that is much closer to the rates paid by cable operators. Specifically, as recommended by Time Warner Telecom and AT&T, the Commission could retain the existing space factor calculation, but switch from a fully allocated costing methodology to an approach that is closer to an incremental costing methodology.[77]

Changing the costing methodology underlying the telecommunications rate formula is fully consistent with the statute and entirely justified by the record. As a statutory matter, Section 224(e) is less specific than Section 224(d) regarding the costs to be considered in calculating pole attachment rates. While Section 224(d) specifically requires the Commission to consider "operating expenses and actual capital costs" in setting the maximum rate for attachments by a cable operator, Section 224(e) simply uses the term "cost."[78] It is well-established that the term "cost" is a "chameleon" that gives agencies "broad methodological leeway" in determining a particular rate.[79]

As a factual matter, the record makes clear that pole owners currently are including in their calculations costs that are completely unrelated to the cost of allowing attachments on the

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[77] AT&T Comments at 18-21; Time Warner Telecom White Paper at 17-20.

[78] 47 U.S.C. §§ 224(d), (e); *see also* Time Warner Telecom White Paper at 18-20.

[79] *Verizon Communications v. FCC*, 535 U.S. 467, 500-01 (2002), *quoting Strickland v. Commissioner, Maine Dep't of Human Services*, 96 F.3d 542, 546 (1st Cir. 1996) and *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 423 (1999) (Breyer, concurring in part and dissenting in part).

pole. For example, AT&T demonstrates that the "maintenance" costs that electric companies include in their rate calculations are two to three times the cost of pole maintenance because they also include costs attributable to maintenance of their power lines (rather than poles).[80] Similarly, AT&T demonstrates that electric companies are including in their rate calculations costs that they also recover through separate fees to attaching entities.[81] This sort of "double dipping" has long been prohibited with respect to fees paid by cable operators,[82] and NCTA agrees with AT&T that costs recovered through fees imposed on other attaching entities should be excluded from the calculation of annual pole rents.[83] Attaching parties also are being forced to pay more than they should for other components of the rate calculation, such as taxes, return on investment, and costs associated with costlier poles engineered for the expanding demands of power companies.[84]

In addition, if the Commission decides that it should revisit either of its rate formulas, it also should adopt AT&T's proposal to presume a 40-foot pole, rather than a 37.5-foot pole, for purposes of calculating rates for attaching to electric company poles.[85] This change would result in a presumption that there are 16 feet of usable space, rather than the current presumption of 13.5 feet.

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[80] MacPhee Declaration at 22-23.

[81] *Id*. at 20-21.

[82] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CC Docket No. 86-212, Report and Order, 2 FCC Rcd 4387, 4393, ¶ 44 (1987)

[83] 47 C.F.R. § 1.1404(g)(1)(xiii).

[84] Time Warner Telecom White Paper at 19-20

[85] The Commission should not change the pole height presumption for telephone poles. As AT&T concedes, ILECs "average poles typically are shorter than 40 feet." MacPhee Declaration at 19.

III. THE COMMISSION CAN ACHIEVE ITS SAFETY AND RELIABILITY GOALS BY DEFERRING TO STATE AND LOCAL PROCESSES ON MOST OPERATIONAL ISSUES

Safety and reliability obviously are of paramount concern to every party involved in this proceeding.[86] As a general matter, the best way for the Commission to ensure that pole attachments do not compromise safety or reliability is to defer to experts within the industry and at state commissions. As Comcast explained, "[t]he vast majority of outside plant issues have been handled cooperatively between utilities and attachers in the ordinary course of business. There is no compelling reason for the Commission to intervene in this area which works in most cases and where individual solutions turn on countless unique facts in the field."[87]

In this section, we address three specific issues raised in the record – unauthorized attachments, attachments to drop poles, and safety code violations – and explain why these issues are best resolved by the parties and state commissions, rather than the FCC.

Unauthorized Attachments. A number of electric companies raise concerns regarding the significant number of "unauthorized attachments" that are placed by cable operators and telecommunications providers.[88] They argue that pole owners should have the ability to impose onerous penalties so that these unauthorized attachments do not jeopardize the safety and reliability of the electric network.[89]

As an initial matter, the figures cited by the utilities must be viewed with a healthy dose of skepticism. As Time Warner Cable explains, these counts of "unauthorized" attachments

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[86] *See, e.g.*, Comcast Comments, Exhibit 3 at 1 (noting "common interest" of all parties "in maintaining safe and reliable plant."); Time Warner Cable Comments at 54 ("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.").

[87] Comcast Comments at 26, n.86.

[88] CCU Comments at 73-74; EEI Comments at 32-36; UTC Comments at 34.

[89] CCU Comments at 75-76, 77-78; EEI Comments at 76-80; UTC Comments at 34-36.

often include attachments authorized by a prior owner of the pole, attachments where no authorized was required at the time of attachment, and attachments where the cable operator has been paying rent for years but the owner has no record of a permit.[90] The practice of overstating counts of unauthorized attachments was among the issues that was addressed by the former Cable Services Bureau in its *Mile Hi Cable* decision.[91]

There is no need for the Commission to adopt new rules regarding unauthorized attachments. It is well-established that the way to handle unauthorized attachments is through a mix of regular inspections and audits by the pole owner and reasonable fines on attaching parties when violations are discovered. As the Commission explained in its decision affirming the Bureau in *Mile Hi Cable*, "we must balance the need to provide an effective remedy with the need to encourage utilities not to delay audits of unauthorized attachments."[92] Nothing in the record provides a reason for the Commission to revisit this basic approach. As it found in the *Mile Hi Cable* case, egregious situations may require more stringent penalties, but such penalties should not be standard practice.[93]

Attachment to Drop Poles. Some utilities argue that attaching parties should be required to obtain prior approval for the attachment of facilities to "drop" poles.[94] Drop poles are the poles between a utility's distribution network and a subscriber location. Drop poles typically are smaller than regular distribution poles and electric and telecommunications providers typically

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[90] Time Warner Cable Comments at 55.

[91] *Mile Hi Cable Partners v. Public Service Co*., File No. PA 98-003, Order, 15 FCC Rcd 11450, 11459-60, ¶ 16 (CSB 2000) (*Mile Hi Cable Bureau Decision*).

[92] *Mile Hi Cable Partners v. Public Service Co*., File No. PA 98-003, Order, 17 FCC Rcd 6268, 6272, ¶ 9 (2002) (*Mile Hi Cable*), *affirmed Public Service Co. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

[93] *Mile Hi Cable*, 17 FCC Rcd at 6273, ¶ 10 n. 24 ("Our conclusion does not preclude a finding, under other circumstances, that action by an attacher might support a penalty reflecting exemplary or punitive damages.")

[94] CCU Comments at 89-90. As explained by Time Warner Cable, Verizon has pursued a similar practice. Time Warner Cable Comments at 56-57.

place lighter attachments on these poles. It is standard practice by most utilities to allow cable operators to install facilities on drop poles without prior approval and apply for a permit after the installation.[95] This approach strikes the proper balance between allowing attaching parties to connect new customers to the their networks, while ensuring that pole owners know what facilities are attached to their poles.[96]

The proposal to require prior approval of attachments to drop poles would completely skew the competitive marketplace in favor of pole owners because they would be able to dictate how quickly, or slowly, a cable operator or CLEC could install service to a customer. Given approval procedures that routinely take weeks to complete, such a requirement would be devastating to competitors. There is no safety rationale that would justify such an anticompetitive result. Because drop poles carry much lighter attachments than standard distribution poles, "[m]eeting NESC requirements is simpler and less of an issue than attachments to distribution poles. As the entire utility industry – except Verizon – clearly recognizes, there are no compelling reasons to require pole licensees to obtain a pole attachment permit before attaching to a drop pole."[97] The Commission should reject this proposal.

Safety Code Violations. Utilities also complain about the number of attachments that do not comply with the National Electric Safety Code (NESC) or other applicable safety requirements.[98] But the record confirms that reality is more complicated than these

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[95] *See, e.g.*, Time Warner Cable Comments at 56-57.

[96] *Mile Hi Cable Bureau Decision*, 15 FCC Rcd at 11460-61, ¶ 19 ("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."); *see also* Oregon PUC Comments at 5 ("Consequently, the OPUC has rules allowing an attacher to install a service drop on a pole without prior owner permission as long as the attacher complies with the pole owner's contract and the NESC, and the attacher applies to the owner for a permit within 7 days of the service drop installation.").

[97] Time Warner Cable Comments at 58.

[98] CCU Comments at 72; EEI Comments at 37-38.

oversimplified allegations suggest. When cable operators and CLECs attach facilities, they generally must obtain prior approval and the pole owner typically has a right to do a post-attachment inspection. Pole owners and parties to joint use arrangements, however, generally are not subject to the same obligations when they add facilities to a pole. As demonstrated by Comcast, the result is often that an ILEC or an electric company will perform work on the pole that causes a situation that does not comply with the NESC or other applicable requirements.[99]

Given the fact-specific, and highly technical, nature of these disputes, it generally does not make sense for the FCC to establish specific rules to address these issues. Industry engineers, experts, and state commissions have proven that they have the necessary expertise to handle these issues in the vast majority of circumstances. Most utilities and attachers are able to resolve most issues cooperatively in the ordinary course of business. A number of states have attempted to address recurring disputes through collaborative efforts that are designed to accommodate the needs of all interested parties.[100]

While industry experts and state commissions should remain on the front line in dealing with the operational issues surrounding pole attachments, NCTA is not advocating that the Commission defer completely to state and local processes.[101] The record confirms that some significant issues may not be susceptible to local resolution and can require Commission intervention. There continues to be a strong need for the Commission to play a role in resolving disputes over the terms and conditions of pole attachment agreements and the enforcement of such agreements by pole owners.

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[99] Comcast Comments, Exhibit 3.

[100] *See, e.g., Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment Use and Safety*, AR506/AR510, Order No. 07-137 (rel. Apr. 10, 2007).

[101] In particular, the Commission should make clear that it does not agree with those utilities that assert a unilateral right to determine what constitutes a safe practice and what does not. *See, e.g.*, EEI Comments at 70

CONCLUSION

This proceeding provides the Commission with an opportunity to advance some its most important goals, including broadband deployment and adoption, facilities-based voice competition, and regulatory parity. To accomplish all these objectives, the Commission should take steps to reduce pole attachment rates paid by telecommunications providers, rather than taxing cable broadband customers by raising the attachment rates paid by cable operators.

Respectfully submitted,

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April 22, 2008

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

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

DECLARATION OF BILLY JACK GREGG

DECLARATION OF BILLY JACK GREGG

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I. INTRODUCTION

1. My name is Billy Jack Gregg. I am an independent consultant and the principal in the consulting firm Billy Jack Gregg Universal Consulting. The firm specializes in issues involving universal service, intercarrier compensation and broadband deployment. My business address is P.O. Box 107, Hurricane, West Virginia 25526. I began Billy Jack Gregg Universal Consulting following my retirement as Director of the Consumer Advocate Division of the Public Service Commission of West Virginia ("WVCAD") in October 2007. I served as Director of the WVCAD for 26 years. In that position I was actively involved in local and national telecommunications issues. Nationally, I served as a member of the Rural Task Force, the Federal-State Joint Board on Universal Service, NARUC's Intercarrier Compensation Task Force, the Board of Directors of the Universal Service Administrative Company ("USAC"), and the Board of Directors of the National Regulatory Research Institute ("NRRI"). Locally, I served as Chair of the West Virginia Advanced Services Task Force, Chair of the West Virginia Payphone Task Force, and Chair of the West Virginia 271 Workshop Process. I have testified or appeared before the Federal Communications Commission; regulatory bodies in the states of West Virginia, Georgia, and Alaska; legislative committees in the states of West Virginia, Virginia, Pennsylvania and Tennessee; and committees of both houses of Congress. I hold a B.A. from Austin College in Sherman, Texas, and J.D. from the University of Texas School of Law. My resume is appended to this declaration as Attachment A.

2. I have been asked by the National Cable & Telecommunications Association ("NCTA") to investigate the impact of new pole attachment rates on the provision of broadband in rural and high cost areas of West Virginia by cable providers. These new

pole attachment rates were proposed in an NPRM released by the FCC on November 20, 2007, in Wireline Competition Bureau Docket No. 07-245.[1] ("FCC NPRM"). Based upon that investigation I conclude that the new higher pole attachment rates proposed for cable providers in West Virginia will substantially increase the annual cost of doing business for those providers and will increase the costs of extending service to rural and high-cost areas that currently do not have broadband service. This will make it less likely that these unserved areas will obtain broadband service in the normal course of business. If the FCC desires to implement uniform pole attachment rates for broadband providers, the uniform rates should be based on the existing costing methodology for cable providers. This approach would be consistent with actions taken by several states that have already adopted uniform pole attachment rates. The bases for my conclusions are set forth below.

II. BACKGROUND ON BROADBAND DEPLOYMENT IN WEST VIRGINIA

3. As previously stated, from 2000 until my retirement in 2007 I served as the Chair of the West Virginia Public Service Commission's Advanced Services Task Force ("WVASTF"). The purpose of the WVASTF was to monitor the deployment and use of broadband within West Virginia and to make recommendations to the Public Service Commission on policies to encourage deployment and use of broadband. The WVASTF issued its first report and recommendations in February 2003. Pursuant to an invitation from the Public Service Commission to periodically update the report, the WVASTF

[1] *Implementation of Section 224 of the Act: Amendments of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 22 FCC Rcd. 20195, WC Docket No. 07-245 (Nov. 20, 2007).

issued annual updates beginning in 2004.[2] These updates tracked the changes in deployment and subscription to broadband throughout West Virginia over time. The reports of the WVASTF relied on FCC data, as well as West Virginia-specific data gathered in annual surveys of cable and telephone broadband providers. The annual updates included maps which showed availability of broadband in West Virginia by type of provider. As a result of my participation in the preparation of these reports, I became intimately familiar with the types of broadband available, and with the broadband providers in West Virginia.

4. Based on the last update report of the WVASTF and the FCC's most recent report on high-speed lines, broadband is available to approximately 77% of households in West Virginia.[3] However, only 37.1% of West Virginia households actually subscribe to some sort of broadband service.[4] This level of subscribership is among the lowest in the United States, substantially below the national subscribership level of 56.8%.[5] West Virginia's low level of subscribership is due to several factors: high median age, low average education level, low average income level, low level of home computer ownership, and lack of availability of broadband service in rural areas.[6]

5. Cable modem service has been and remains the predominant form of broadband service in West Virginia. The WVASTF's first report in 2003 reviewed data

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[2] All of the reports of the WVASTF are available on the West Virginia Consumer Advocate Division's website at http://www.cad.state.wv.us/AdvSvcPage.htm.

[3] *High Speed Services for Internet Access: Status as of June 30, 2007*, FCC IATD (March 2008), Table 14 ("*June 30, 2007 FCC Report*"); *WVASTF 2007 Update*, p. 3.

[4] *June 30, 2007 FCC Report*, Table 13. As of June 30, 2007, 275,845 residential customers subscribed to broadband services, 37.1% of the 743,064 total households in West Virginia. U. S. Census Bureau, *2006 American Community Survey: Selected Social Characteristics, West Virginia* (Sept. 2007).

[5] *Id.*; As of June 30, 2007, 65,904,499 residential customers nationwide subscribed to broadband services, 56.8% of the 116.01 million households in the United States. U. S. Census Bureau, *Current Population Survey, 2007 Annual Social and Economic Supplement* (Aug. 2007), Table HINC-06.

[6] *WVASTF 2007 Update*, pp. 6-7.

available for 2002. At that time only 7.7% of West Virginia households actually subscribed to broadband. Cable modem service provided 48,858 high speed lines in 2002, or 83% of the total broadband lines in West Virginia.[7] According to the FCC's most recent report on high-speed services, cable modem service is still the leading technology for broadband access in West Virginia. Cable modem service now accounts for 155,867 lines, or 50.9% of the total high-speed lines in West Virginia.[8] This compares to 34% of total high-speed lines provided by cable modem providers nationwide.[9] Even though the share of total broadband lines in West Virginia provided by cable modem service has fallen since 2002, the number of high-speed lines provided by cable companies in West Virginia has grown by 219%.

6. Approximately ten cable companies provide broadband in West Virginia by means of cable modem service. Although cable companies provide cable modem service throughout the urban and suburban areas of West Virginia, they also serve a tremendous number of very small, rural communities. These communities are detailed in an attachment to the most recent WVASTF update, which is also attached to this declaration as Attachment B. For example, Suddenlink, the largest cable provider in the state, serves large cities like Charleston, but also serves tiny communities such as Amigo, Ethel, Lyburn and Uneeda in remote areas of southern West Virginia. Many of these communities consist of only a few dozen homes. This service footprint is common to almost all cable companies in West Virginia.

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[7] *WVASTF 2003 Report*, p. 5.
[8] *June 30, 2007 FCC Report*, Table 9.
[9] *Id.* Part of the reason for the difference between the percentage of high speed lines provided by cable modem service nationally and within West Virginia is the fact that there is less availability of mobile wireless broadband service in West Virginia. Table 9 of the June 30, 2007 FCC Report shows that nationwide mobile wireless service provides the greatest number of high speed lines of any technology. As previously noted, cable modem service has been and remains the predominant broadband service within West Virginia.

7. Cable companies make cable modem service available to 96% of the homes in areas of West Virginia where they provide cable television service. This percentage is the same as the national average.[10] However, even though cable providers offer nearly ubiquitous broadband in areas they serve, there are still large areas of West Virginia that do not have broadband service available. As I mentioned earlier, only 77% of West Virginia households have access to broadband. This means that 170,000 West Virginia households do not yet have access to broadband services from any type of land-based provider.[11] Expanding broadband service into these unserved areas has been a primary concern of state government in West Virginia. For example, on April 15, 2008, Connect West Virginia, in conjunction with West Virginia state government, published an interactive map on the web showing areas in West Virginia that had broadband service, and those that did not.[12] This information is presented at a very granular level and will be used to direct future efforts to bring broadband to unserved areas.

8. All types of land-based broadband providers face unique challenges in expanding broadband service into unserved areas of West Virginia. First and foremost, the topography of West Virginia is very difficult. West Virginia is almost entirely covered by hills, mountains and forests. The terrain is very irregular. Most population centers are located in the small amounts of flat land available in river and stream valleys. Even though fixed and mobile wireless broadband solutions are effective in these urbanized areas of West Virginia, the irregular terrain and heavy vegetation renders mobile and

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[10] *June 30, 2007, FCC Report*, Table 14.

[11] I use the term "land-based" to refer to all means of providing broadband besides satellite broadband service. Satellite broadband service is theoretically available to all persons with a clear view of the southern sky. Satellite broadband service is typically higher in cost and slower in speed than land-based broadband service.

[12] The map is available at http://www.connectwestvirginia.org/mapping_and_research/interactive_map.php

fixed wireless broadband impractical in most rural areas.[13] This means that broadband service in rural areas is almost always provided by means of wire and cable facilities of cable or telecommunications companies. Because of limitations imposed by the topography, extending cable to an area only a mile away by air may take seven cable route miles. All of this cable will typically be installed as aerial plant. These topographical factors increase the costs of providing broadband service in rural areas of West Virginia. Second, the population density in the unserved areas is generally very low. As previously mentioned, most of the population centers in West Virginia tend to be found in river and stream valleys. This is true for large cities as well as tiny communities. Once outside these river valleys, the population density drops dramatically. It is the areas outside of the river valleys that constitute most of the unserved portions of West Virginia. These population factors tend to reduce the potential revenue that can be recovered to offset the cost of providing broadband service to unserved areas. Third, the same factors limiting broadband subscribership in already served areas of West Virginia - age, education and income – are also present in unserved areas. In terms of pole attachments, all of these factors mean that more poles are required to pick up each potential customer in unserved rural areas.

9. A primary factor for cable companies in deciding whether to expand into an adjacent area and provide cable and broadband service is the "pay back period" for the investment required. In other words, how many years will it be before net revenue generated by providing the service recoups the investment required to provide the service. Each cable company will use their own "rule of thumb" pay back period in

[13] In fact, because of the narrow valleys and steep hillsides in many rural parts of West Virginia, the availability of satellite broadband service is also limited.

evaluating possible expansion projects. In other words, if the expansion will return the investment within the pay back period, the decision to expand is considered economic. If the expansion will not return the investment within the pay back period, it is harder to justify. The major impediment to expansion of cable and cable modem service into unserved areas of West Virginia is that the costs of providing the service are already high and the potential revenues are low.

III. METHODS OF INVESTIGATION

10. The purpose of my investigation in this case was to determine the likely impact of new pole attachment rates on cable providers in determining whether to expand into areas of West Virginia that do not currently have access to any land-based broadband service. In order to conduct this investigation I reviewed data from several publicly available sources, such as FCC and West Virginia Public Service Commission reports. I also reviewed data on current pole counts and pole attachment rates contained in a survey conducted by NCTA of West Virginia cable companies in March 2008. Finally, I interviewed a number of West Virginia cable operators concerning pole attachment issues, and conducted on-site visits to rural areas being considered for expansion of cable service.

IV. IMPACT OF HIGHER POLE ATTACHMENT RATES ON THE ABILITY OF CABLE PROVIDERS TO EXPAND BROADBAND SERVICE INTO RURAL AREAS

11. In order to determine the current pole attachment rates paid by cable providers in West Virginia, NCTA conducted a survey of West Virginia cable companies in March 2008. Responses were received from the four largest cable providers in West Virginia, which together serve over 88% of all cable customers in the state. The results of the

NCTA pole attachment survey of West Virginia cable companies are shown in Table 1 below.[14] The pole attachment rates currently paid by each cable company to different incumbent utilities are shown under the column labeled "Current Rate." The likely rates for each company that would result from adoption of the costing methodology in the FCC NPRM are shown in the columns labeled "Proposed Rate (Hi)," "Proposed Rate (Low)," and "Proposed Rate (Av)."

[14] In order to protect the confidentiality of the responses to the NCTA survey, the responding cable companies are identified as Cable Company A, B, C or D. The pole-owning utilities shown in Table 1 are designated as follows: ELC for electric companies, and TEL for telephone companies.

Table 1

DERIVATION OF NEW POLE ATTACHMENT RATES FOR CABLE MODEM PROVIDERS IN WEST VIRGINIA

Cable Company	Pole Owner	Current Rate	Proposed Rate (Hi)	Proposed Rate (Low)	Proposed Rate (Av)
Cable Company A	ELC1	$6.65	$21.54	$15.16	$18.35
Cable Company A	ELC2	$9.79	$31.71	$22.31	$27.01
Cable Company A	TEL1	$4.04	$13.09	$9.21	$11.15
Cable Company A	TEL2	$4.18	$13.54	$9.53	$11.53
Cable Company A	TEL3	$13.75	$44.53	$31.34	$37.94
Cable Company B	ELC1	$8.48	$27.47	$19.33	$23.40
Cable Company B	ELC2	$7.24	$23.45	$16.50	$19.98
Cable Company B	TEL4	$5.00	$16.19	$11.40	$13.80
Cable Company B	ELC3	$7.50	$24.29	$17.10	$20.69
Cable Company B	TEL1	$6.30	$20.40	$14.36	$17.38
Cable Company B	TEL2	$2.22	$7.19	$5.06	$6.13
Cable Company C	ELC2	$6.66	$21.57	$15.18	$18.38
Cable Company C	ELC1	$5.79	$18.75	$13.20	$15.98
Cable Company C	TEL5	$2.52	$8.16	$5.74	$6.95
Cable Company C	TEL6	$8.02	$25.98	$18.28	$22.13
Cable Company C	ELC4	$4.01	$12.99	$9.14	$11.06
Cable Company C	ELC5	$6.00	$19.43	$13.68	$16.55
Cable Company C	ELC6	$20.00	$64.78	$45.59	$55.18
Cable Company C	TEL7	$4.79	$15.51	$10.92	$13.22
Cable Company C	TEL1	$4.94	$16.00	$11.26	$13.63
Cable Company C	TEL8	$3.00	$9.72	$6.84	$8.28
Cable Company C	ELC7	$9.50	$30.77	$21.65	$26.21
Cable Company C	ELC8	$23.23	$75.24	$52.95	$64.09
Cable Company C	ELC9	$8.00	$25.91	$18.23	$22.07
Cable Company C	TEL9	$12.14	$39.32	$27.67	$33.50
Cable Company C	TEL2	$4.08	$13.21	$9.30	$11.26
Cable Company C	ELC10	$7.75	$25.10	$17.66	$21.38
Cable Company D	ELC2	$6.35	$20.57	$14.47	$17.52
Cable Company D	TEL2	$2.22	$7.19	$5.06	$6.13
TOTAL		**$6.03**	**$19.53**	**$13.74**	**$16.63**

12. Current pole attachment rates in West Virginia range from $2.22 to $23.23 per pole per year depending on the company providing the pole and the number of entities attaching to the pole. The average for all reporting companies is $6.03 per pole per year. In order to determine the financial impact on individual cable providers resulting from

the new costing methodology proposed in the FCC NPRM, I used the data presented in Table 3 of Dr. Michael Pelcovits' declaration which was attached to NCTA's initial comments in this proceeding. Based on a comparison of pole attachment rates under the telecommunications formula and the cable formula, Dr. Pelcovits' studies showed that new pole attachment rates resulting from the NPRM could be higher than current cable attachment rates by ratios ranging from 2.28 to 1 for three attaching entities to 3.24 to 1 for two attaching entities.[15] Based on these ratios I have developed proposed rates for each company that are high, low and average. The "Proposed Rates (Hi)" shown in Table 1 are based on the 3.24 to 1 ratio to current rates, while the "Proposed Rate (Low)" are based on the 2.28 to 1 ratio. The "Proposed Rates (Av)" is the average of the high and low proposed rates. While the actual rates for each company resulting from the proposal in the FCC NPRM may vary from the rates shown in Table 1, I believe the rates presented are a fair range of possible outcomes. As can be easily seen in Table 1, pole attachment rates for cable providers will be substantially higher under the methodology proposed in the NPRM.

13. In order to determine the total annual impact from these higher pole attachment rates, I have used the total number of poles reported by each company in response to the NCTA survey. I multiplied the number of poles rented from each utility by current rates to derive the total annual pole attachment expenses for each cable provider. I then multiplied the same number of poles by the average proposed rate for each cable company shown in Table 1. The results are shown in Table 2 below.

[15] Declaration of Dr. Michael D. Pelcovits, pp. 8-11. I believe that use of the telecommunications formula is reasonable for analytical purposes since it is at the high end of the range of possible outcomes resulting from the FCC NPRM. I should note that most electric companies are advocating rates that are much higher than those produced under the current telecommunications formula.

Table 2

IMPACT OF NEW POLE ATTACHMENT RATES ON CABLE MODEM PROVIDERS IN WEST VIRGINIA

Cable Company	Pole Owner	Number of Poles	Current Rate	Annual Expense	Proposed Rate (Av)	Annual Expense	Difference
Cable Company A	ELC1	6,271	$6.65	$41,702	$18.35	$115,061	$73,359
Cable Company A	ELC2	40,558	$9.79	$397,063	$27.01	$1,095,540	$698,477
Cable Company A	TEL1	4,344	$4.04	$17,550	$11.15	$48,422	$30,872
Cable Company A	TEL2	22,336	$4.18	$93,364	$11.53	$257,603	$164,238
Cable Company A	TEL3	985	$13.75	$13,544	$37.94	$37,369	$23,825
Cable Company B	ELC1	8,659	$8.48	$73,428	$23.40	$202,597	$129,168
Cable Company B	ELC2	198	$7.24	$1,434	$19.98	$3,955	$2,522
Cable Company B	TEL4	1,357	$5.00	$6,785	$13.80	$18,721	$11,936
Cable Company B	ELC3	279	$7.50	$2,093	$20.69	$5,773	$3,681
Cable Company B	TEL1	6,151	$6.30	$38,751	$17.38	$106,919	$68,168
Cable Company B	TEL2	5,100	$2.22	$11,322	$6.13	$31,239	$19,917
Cable Company C	ELC2	106,113	$6.66	$706,713	$18.38	$1,949,897	$1,243,185
Cable Company C	ELC1	105,102	$5.79	$608,541	$15.98	$1,679,030	$1,070,489
Cable Company C	TEL5	3,028	$2.52	$7,631	$6.95	$21,054	$13,423
Cable Company C	TEL6	3,141	$8.02	$25,191	$22.13	$69,504	$44,313
Cable Company C	ELC4	3,509	$4.01	$14,071	$11.06	$38,824	$24,753
Cable Company C	ELC5	798	$6.00	$4,788	$16.55	$13,211	$8,423
Cable Company C	ELC6	789	$20.00	$15,780	$55.18	$43,539	$27,759
Cable Company C	TEL7	2,671	$4.79	$12,794	$13.22	$35,300	$22,506
Cable Company C	TEL1	3,848	$4.94	$19,009	$13.63	$52,448	$33,439
Cable Company C	TEL8	399	$3.00	$1,197	$8.28	$3,303	$2,106
Cable Company C	ELC7	484	$9.50	$4,598	$26.21	$12,686	$8,088
Cable Company C	ELC8	45	$23.23	$1,045	$64.09	$2,884	$1,839
Cable Company C	ELC9	42	$8.00	$336	$22.07	$927	$591
Cable Company C	TEL9	563	$12.14	$6,835	$33.50	$18,858	$12,023
Cable Company C	TEL2	52,118	$4.08	$212,641	$11.26	$586,701	$374,060
Cable Company C	ELC10	810	$7.75	$6,278	$21.38	$17,320	$11,043
Cable Company D	ELC2	2,983	$6.35	$18,942	$17.52	$52,263	$33,321
Cable Company D	TEL2	14,791	$2.22	$32,836	$6.13	$90,598	$57,762
TOTAL		**397,472**	**$6.03**	**$2,396,261**	**$16.63**	**$6,611,545**	**$4,215,284**

14. As shown on Table 2, the total annual pole attachment expense for the reporting companies would rise from $2.4 million under current rates to $6.6 million under average proposed rates, an almost threefold increase. Obviously, increases of this magnitude will be substantial and material.

15. The significantly higher pole attachment rates resulting from the methodology proposed in the FCC NPRM will impact the ability of cable providers to extend broadband into unserved areas in a number of ways. First, the increased expense resulting from higher pole attachment rates will not produce any additional revenue. As a result, there will be less internal cash generated by the cable company, and there will be less cash available to invest in expansions into unserved areas. Second, if the cable company is forced to raise rates to recover the increased pole attachment expense, then cable and broadband service offered by the cable company will become less attractive to and less affordable for new customers. The four cable companies included in Tables 1 and 2 serve a total of 309,977 customers using the poles listed in the tables.[16] This means that the average annual pole expense per customer under current rates is $7.73. Under the proposed rates shown in Tables 1 and 2, this annual expense would rise to $21.33 per customer. Third, when the cable company considers the economics of expanding into a new area on a "stand alone" basis, the increased pole attachment expense piled on top of already marginal economics will make it even less likely that these rural areas will receive service.

V. OTHER POLE ATTACHMENT RELATED ISSUES

16. In discussions with cable company officials in West Virginia several other issues related to pole attachments were raised. Pole-owning utility companies have begun imposing new pre-engineering study requirements on every entity that proposes to attach to their poles. This requirement obtains even if a pre-engineering study was recently completed on the same set of poles. The cost of these pre-engineering studies can

[16] The four companies responding to the survey actually serve a total of 370,924 customers in West Virginia. However, pole attachment data was not included for the former Adelphia properties which were recently acquired by two of the reporting companies.

sometimes equal or exceed current pole attachment expenses. In addition, other pole "make ready" requirements and delays can add to the overall cost of attaching to the existing poles of other utilities with available space. All of these added costs hinder the ability of cable companies to expand into unserved areas.

VI. RECOMMENDATIONS

17. Based on my investigation I recommend that the FCC maintain the current cable rate methodology for pole attachments and reject the use of a higher rate as proposed in the November 20, 2007, NPRM. The new higher pole attachment rates proposed for cable providers in West Virginia will substantially increase the annual cost of doing business for those providers and will increase the costs of extending service to rural and high-cost areas that currently do not have broadband service. This will make it less likely that unserved areas in West Virginia will obtain broadband service from cable providers in the normal course of business. As a result, these areas will have to await the provision of an explicit subsidy in order to obtain broadband service. These subsidies would likely come from the state or federal governments.

18. If the FCC desires to implement uniform pole attachment rates for broadband providers, these uniform rates should be based on the existing costing methodology for cable providers. Adoption of this approach would lower the rate paid by telecommunications providers to the rate paid by cable companies, and would be consistent with actions taken by several states that have already adopted uniform pole attachment rates. These state decisions were outlined in Appendix A to the NCTA's initial comments to this proceeding. Lowering the rate for telecommunications carrier

pole attachments to the cable rate should encourage broadband deployment in unserved areas by these carriers.

19. Lowering the existing pole attachment rate for telecommunications carriers would marginally reduce pole rental revenues received by electric utilities.[17] However, these revenue reductions would have a *de minimis* impact on electric rates. For example, in a recent rate proceeding for Allegheny Power in West Virginia,[18] pole rental revenues were included in "Other Operating Revenues" under FERC Account 454. In answer to Consumer Advocate Division Data Request J-16, Allegheny Power listed $5,693,271 in pole rental revenue for 2005. This compared to Allegheny's total operating revenues for 2005 of $961,434,841.[19] In other words, total pole rental revenues constituted only 0.6% of the total revenues of Allegheny Power. Allegheny Power's West Virginia sales in 2005 amounted to 13.7 billion kilowatt-hours of electricity. As a result, total pole attachment revenues amount to only $0.000415 per kilowatt-hour. Reduction in pole attachment rates for telecommunications carriers to the current cable rate would not eliminate all pole rental revenues for the electric companies, but would result in only a small reduction in total pole rental revenues, which are already a small portion of overall electric company revenues.

20. In West Virginia and many other jurisdictions, pole rental revenue is included in the regulated cost of service for electric utilities.[20] Any revenue reduction would not be incorporated into electric rates until the electric company's next rate case, and could

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[17] If pole attachment rates for broadband providers were equalized at the cable attachment rate, there would obviously not be any change in the level of revenues from cable providers.

[18] *Monongahela Power Company and The Potomac Edison Company, both dba Allegheny Power*, 06-0960-E-42T, Company Exhibit 1, Statement A, Schedule 1.

[19] *Id.*

[20] Since electric poles are installed to serve electric customers, these customers are responsible for the full cost of these facilities. Any pole rental revenues that are received by the electric company go to offset this cost.

possibly be offset by changes in other revenue items. However, even if looked at in isolation, the reduction in the pole attachment rate for telecommunications carriers would amount to only pennies for the average electric customer. In comparison, adoption of the costing methodology proposed in the FCC NPRM would impose substantial increases in the rates paid by cable and cable modem customers,[21] and would make it less likely that broadband can be extended into unserved areas without explicit governmental subsidies.

21. In this regard it should be pointed out that telecommunications companies in West Virginia already receive $63.3 million per year in explicit federal High-Cost Support in order to subsidize telephone service in rural and high-cost areas of the state.[22] Cable providers receive no such explicit subsidies from either the state or federal government. If pole attachment rates are raised for cable broadband providers, funds available for expansion of broadband networks by cable operators will be reduced, rather than increased. Once again, this will make it less likely that cable providers will be able to expand broadband service into rural and unserved areas of West Virginia.

I herby declare under penalty of perjury that the foregoing is true and correct.

Executed on: April 21, 2008

Billy Jack Gregg

[21] See, Declaration of Dr. Michael Pelcovits, p. 11, Table 4.
[22] Universal Service Administrative Company, *2007 Annual Report*, p. 43.

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RESUME

Billy Jack Gregg has over thirty years of legal and regulatory experience, with emphasis in the areas of telecommunications and energy.

EDUCATION:

J.D. **University of Texas School of Law**
Austin, Texas
May 1974

B.A. **Austin College**
Sherman, Texas
History and Government
May 1971

University of Glasgow
Glasgow, Scotland, U.K.
October 1969 – May 1970

EMPLOYMENT:

2007 - Present **Billy Jack Gregg Universal Consulting**
Hurricane, West Virginia

- Legal and consulting services in the areas of telecommunications and energy
- Specialty in topics of universal service, intercarrier compensation and broadband
- Arbitration and mediation of disputes among telecommunications carriers

1981 - 2007 **Director, Consumer Advocate Division**
Public Service Commission of West Virginia
Charleston, West Virginia

- Director of Consumer Advocate Division; responsible for all policies and personnel decisions
- Managed yearly budget of approximately $1 million

- Represented West Virginia ratepayers in hundreds of proceedings involving electric, telephone, gas and water rates
- Presented testimony in numerous rate proceedings in West Virginia; also testified in Georgia
- Testified before state legislatures of West Virginia and Tennessee
- Testified before committees of both houses of Congress
- Argued appeals before West Virginia Supreme Court
- Argued appeals before Federal 4th Circuit and D.C. Circuit Court of Appeals

1978 - 1981

Senior Staff Attorney, Field Solicitors Office
U.S. Department of Interior
Charleston, West Virginia

- Enforced Surface Mining Control and Reclamation Act of 1977 (SMCRA) in states of Virginia, West Virginia, Maryland and Pennsylvania
- Testified on surface mining issues before legislative committees in Virginia and Pennsylvania
- Lead attorney in Federal District Court hearing on constitutionality of SMCRA
- Lead attorney on first consideration of a petition to designate lands unsuitable for mining under Section 522 of SMCRA
- Participated in drafting initial rules to implement SMCRA

1977 - 1978

Billy Jack Gregg
Attorney at Law
Hurricane, West Virginia

- General practice of law
- Tried case before West Virginia Public Service Commission involving certification of high-voltage power line; established national precedents for conditions on such lines

1974 – 1977

Assistant Attorney General
Attorney General of West Virginia
Charleston, West Virginia

- Assigned as attorney for the West Virginia Human Rights Commission
- Handled numerous cases involving allegations of discrimination in employment, housing and public accommodations
- Argued numerous appeals to Circuit Courts and West Virginia Supreme Court

1974 **Reed & Gregg**
Attorneys at Law
Hurricane, West Virginia

- General practice of law
- Argued appeal in West Virginia Supreme Court one week after being admitted to practice

BOARDS

2002 - 2007 **Federal-State Joint Board on Universal Service**
Washington, DC

- Recommended policies to the Federal Communications Commission concerning the $7 billion Federal Universal Service Fund
- Participated in numerous recommended decisions to expand support to low-income customers and rationalize support in high-cost areas

2004 - 2006 **Intercarrier Compensation Task Force**
National Association of Regulatory Utility Commissioners
Washington, D.C.

- Served on national task force investigating reform of intercarrier compensation among telecommunications carriers
- Became familiar with intercarrier compensation on an interstate and intrastate level throughout the United States

2002 **Board of Directors**
Universal Service Administrative Company
Washington, D. C.

- Served on national board representing all sectors of the telecommunications industry
- USAC responsible for collection, distribution and administration of $7 billion annual fund aimed keeping rates for telecommunications affordable throughout the United States

2000 - Present **Board of Directors**
National Regulatory Research Institute
Columbus, Ohio

- Served on national board with other state utility commissioners and subject matter experts to recommend policies for research institute
- Appointed as Board member with responsibility over fiscal matters

- Appointed as Treasurer of new Board effective January 1, 2008

1998 - 2000 **Rural Task Force**
Federal-State Joint Board on Universal Service
Washington, D.C.

- Served on national task force which recommended policies concerning rural carriers to Joint Board
- Became familiar with conditions facing rural carries throughout the United States
- Principal editor of final recommended decision of Task Force

1990 - 1997 **Executive Committee**
National Association of State Utility Consumer Advocates
Washington, D.C.

- Served on Board which established policy for national organization representing utility consumers
- Served as Treasurer from 1992 - 1996

PUBLICATIONS:

- B. J. Gregg, A Survey of Unbundled Network Element Prices in the United States, National Regulatory Research Institute (2000-2006)
- B. J. Gregg, The Use of Per Line Support Benchmarks to Guide State Public Interest Determinations, WV CAD (2005)
- B. J. Gregg & S. Gregg, The Telecommunications Act of 1996: A Guide for Educators, AEL, Inc. (1996)

AWARDS:

- Robert F. Manifold Lifetime Service Award, National Association of State Utility Consumer Advocates (2007)

Declaration of Billy Jack Gregg
Attachment B

COMMUNITIES IN WEST VIRGINIA WITH CABLE MODEM SERVICE 2007

ARMSTRONG

Branchland	Hamlin	Pleasantview	West Hamlin

ATLANTIC BROADBAND

Albright	Ft. Ashby	Morgantown	Romney
Arthurdale	Independence	Newburg	Terra Alta
Bretz	Keyser	Reedsville	Wiley Ford
Carpendale	Kingwood	Ridgeley	

BRADLEY'S, INC.

Union

SUDDENLINK

Accoville	Deep Water	Lavalette	Proctor
Adrian	Delbarton	Lenore	Prosperity
Alderson	Dixie	Lerona	Pt. Pleasant
Alkol	Dorothy	Leslie	Quinwood
Allen Junction	Dry Branch	Lester	Racine
Alloy	Dunbar	Letart	Rainelle
Alum Creek	East Bank	Lewisburg	Raleigh
Ameagle	East Lynn	Lindside	Ravenswood
Amherstdale	Eccles	Lizemores	Rawl
Amigo	Elizabeth	Lochgelly	Reedy
Artie	Elk Garden	Logan	Rhodell
Ashford	Elkins	London	Ridgeview
Athens	Elkins	Lorado	Ripley
Bancroft	Elkview	Lorentz	Robson
Barboursville	Eskdale	Lost Creek	Rock
Bayard	Ethel	Lumberport	Rock Cave
Beaver	Fairdale	Lyburn	Ronceverte
Beckley	Fairlea	Mabscott	Rupert
Belle	Falling Rock	Macarthur	Salem
Belmont	Farmington	Madison	Scott Depot
Belva	Fayetteville	Malden	Seth
Ben's Run	Flat Top	Mallory	Shady Spring
Bentree	Flemington	Mammoth	Sharon
Beverly	Foster	Man	Sharples
Bickmore	French Creek	Marmet	Shenandoah Junction
Blair	Frenchton	Mason	Shinnston
Bloomingrose	Ft. Gay	Matoaka	Sissonville

Blount
Blue Creek
Blue Jay
Bolt

Boomer
Borderland
Bradley
Buckhannon
Buckhannon
Cabin Creek
Caldwell
Camp Creek
Cannelton
Cedar Grove
Chapmanville
Charleston
Charlton Heights
Charmco
Chattaroy
Chelyan
Chesapeake
Clear Creek
Clendenin
Clothier
Coal City
Colcord
Comfort
Cool Ridge
Cora
Corinne
Costa
Crab Orchard
Crawley
Crichton
Cross Lanes
Crum
Culloden
Cyclone
Daniels
Danville
Davin
Davisville
Dawes

Gallagher
Gallipolis Ferry
Gauley Bridge
Genoa

Ghent
Glasgow
Glen Daniel
Glen Ferris
Glen Morgan
Glen White
Handley
Hansford
Harper
Hartford
Helen
Henderson
Henlawson
Hernshaw
Hines
Hinkleville
Hinton
Hodgesville
Holden
Hugheston
Hurricane
Huttonsville
Idamay
Indore
Institute
Jodie
Jonben
Josephine
Julian
Jumping Branch
Kanawha Falls
Kegley
Kermit
Kilsyth
Kimberly
Kistler
Lanark
Lanham
Lashmeet

Maxwellton
Miami
Midway
Mill Creek

Milton
Minden
Mineral Wells
Minitz
Monaville
Montgomery
Montrose
Mount Alto
Mount Carbon
Mount Gay
Mount Hope
Naugatuck
Nellis
New Haven
New Martinsville
Nitro
Nolan
Oak Hill
Odd
Ohley
Omar
Ona
Orgas
Ottawa
Paden City
Parkersburg
Pax
Peach Creek
Pecks Mill
Peterstown
Peytona
Pinch
Piney View
Pipestem
Powellton
Pratt
Prince Wick
Princeton

Sistersville
Skelton
Smithers
Sophia

South Charleston
Spanishburg
Spencer
Sprague
Spring Hill
Spurlockville
St. Albans
St. Marys
Stanaford
Stephenson
Stollings
Summerlee
Surveyor
Swiss
Switzer
Sylvester
Tad
Tennerton
Uneeda
Verdunville
Vienna
Walker
Washington
Waverly
Wayne
West Columbia
West Milford
White Oak
White Sulphur Springs
Whitesville
Whitman
Wilkinson
Williamson
Williamstown
Winifrede
Woodville
Wyco
Yolyn

COLANE CABLE

Barnabus
Browning Fork
Cow Creek

Hampden
Hatfield Bottom
Maysburg

Pine Creek
Omar
Ragland

Sarah Ann
Stirrat
Superior

Chauncey	Micco	Sandy Bottom	Varney
Delbarton			

COMCAST

Bancroft	Fairmont	Monongah	Star City
Barboursville	Follansbee	Morgantown	Triadelphia
Benwood	Glen Dale	Moundsville	Valley Grove
Bethany	Grafton	New Manchester	Warwood
Bethlehem	Granville	Newell	Weirton
Bluefield	Harpers Ferry	Piedmont	Wellsburg
Bramwell	Hedgesville	Poca	West Liberty
Buffalo	Huntington	Ranson	Westover
Charles Town	Keyser	Red House	Wheeling
Chester	Lawrenceville	Rivesville	White Hall
Clearview	Martinsburg	Rowlesburg	Winfield
Eleanor	McMechen	Salem	Worthington

COMMUNITY ANTENNA SERVICE

Belleville	Millwood	Parkersburg	Vienna
Cottageville	Mineral Wells	Ravenswood	Walker
Davisville	Mount Alto	Ripley	Washington
Evans			

PHILIPPI CABLE

Philippi

RAPID CABLE COMPANY

Franklin	Pennsboro	Peterburg	Weston

TIME WARNER

Anmoore	Clarksburg	Mt. Clare	Reynoldsville
Barrackville	Decota	Nutter Fort	Stonewood
Bellview	Fairmont	Pine Grove	Wilsonburg
Bel-Meadows	Maple Lake	Pleasant Valley	Wolfe Summit
Bridgeport		Quiet Dell	