

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

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

Reply Comments

Of The

United States Telecom Association

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REPLY COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTelecom)¹ is pleased to submit these reply comments in the above referenced Notice of Proposed Rulemaking.² The initial comments in this docket clearly demonstrate widespread enthusiasm and support among diverse groups for a uniform, reasonable rate formula for broadband attachments. Representatives from incumbent local exchange carriers (ILECs), cable providers, wireless providers, competitive local exchange carriers (CLECs) and utilities expressed their support for such an approach.

Commenters recognized the inherent consumer and public policy benefits that such a uniform standard formula for broadband pole attachments would have in today's converged, voice, video and broadband marketplace. Consumers will benefit through enhanced competition and superior voice, video and broadband services, while at the same time a level playing field is created for providers of essentially identical services, making fundamentally similar attachments.

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks.

² Notice of Proposed Rulemaking, *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245 (November 20, 2007) (*Notice*). See also, United States Telecom Association Petition for Rulemaking, RM-11293 (filed Oct. 11, 2005).

As USTelecom and other parties have demonstrated in this proceeding, the Federal Communications Commission (Commission) has ample legal authority, including Supreme Court precedent, to prescribe rules under Section 224 of the Communications Act to establish a uniform, reasonable rate formula for broadband attachments. Not only does the Commission have the authority, it has the *obligation*, to establish a uniform rate formula for broadband attachments by all providers, including ILECs. Given the important Federal interest in broadband deployment that is at stake, it is imperative that the Commission move quickly to establish such a rate formula.

Finally, USTelecom agrees with many of the commenters, including those from the utility industry, about other mechanics that any Commission action should address. In particular, any uniform rate formula for broadband attachments should address legitimate safety issues, be compensatory to pole owners and – in the interest of regulatory parity – contain a complaint mechanism for all parties, including ILECs.

I. WIDESPREAD SUPPORT EXISTS AMONG DIVERSE GROUPS FOR A UNIFORM, REASONABLE RATE FORMULA FOR BROADBAND ATTACHMENTS

The initial comments in this proceeding demonstrate consistent, enthusiastic and strong support for the Commission's proposed uniform formula for broadband attachments. Support was expressed from broad sectors of the industry, ranging from pole attachers (including ILECs, CLECs, cable and wireless providers) and pole owners, particularly electric utility interests. Even state government agencies that regulate pole attachments expressed their support for a uniform rate.³

³ See e.g., Public Utility Commission of Oregon Comments (OPUC Comments), p. 3 (reporting that all attachers in Oregon, including broadband Internet access service providers, are subject to the same pole attachment

Despite the disparate views of these parties on other pole attachment related issues, all acknowledged the inherent public policy benefits inherent in establishing such a uniform rate.⁴

The elimination of the current regulatory discrimination will provide a balanced competitive landscape to the benefit of broadband consumers and enhance further broadband competition.

The only matter in dispute was where such a rate should be set and the scope of its application.⁵

The electric utility industry, which owns the vast majority of poles in the United States,⁶ consistently voiced support for a uniform rate. The Edison Electric Institute (EEI) and the Utilities Telecom Council (UTC), call for the adoption of a single rate for attaching entities under a revised version of the telecom formula.⁷ The Coalition of Concerned Utilities (Coalition) also supports a unified rate for all attachers, concluding that “[f]airness requires no less.”⁸

From those in the attaching community, there is widespread support from diverse interests for uniform regulatory treatment of pole attachment rates. Wireless providers such as

rate formula.); Utah Public Service Commissioners Comments (Utah PSC Comments), p. 1 (reporting that Utah has adopted uniform technology neutral rental rates that apply to all attaching entities.).

⁴ See e.g. Edison Electric Institute and Utilities Telecom Council Comments (EEI/UTC Comments), p. 100 (noting that a uniform rate would be justified since “the distinction between cable systems and telecommunications service providers is no longer clear.”); Ameren Services Company and Dominion Electric and Power Company (Ameren Dominion Comments), p. 23 (stating that “[r]egulatory parity and common sense require a rental formula for attachments that are used to offer broadband Internet access service); National Cable & Telecommunications Association Comments (NCTA Comments), p. 14 (stating that “[a]ll else being equal, companies that provide similar service should be subject to the same regulatory regime.”).

⁵ While Comcast and other commenters in this proceeding concede their support for a uniform rate, many argue that ILECs should not be subject to such a rate. These arguments are addressed in Section II of these Reply Comments.

⁶ See OPUC Comments, p. 2 (reporting that about “75 percent of the utility poles in Oregon that support both high voltage electric and communication networks are owned by electric utilities.”); Utah PSC Comments, p. 1 (stating that “the majority of poles in Utah are owned by the one regulated monopoly electric utility.”); EEI/UTC Comments, p. 19 (stating that “in many cases, a growing majority of the poles are owned solely by the electric utility.”); AT&T Comments, p. 7 (noting that “the relative pole ownership distribution across the country is now approximately 25 to 30 percent ILEC ownership as compared with 70 to 75 percent [electric company] ownership.”).

⁷ EEI/UTC Comments, p. 9.

⁸ Coalition of Concerned Utilities Comments (Coalition Comments), p. 37.

T-Mobile echoed the sentiment of others in the attaching community, when it emphasized the “certainty and regulatory evenhandedness” that would result from a single pole attachment formula for all broadband providers.⁹ The cable industry’s lead trade association concluded that companies providing “similar service should be subject to the same regulatory regime.”¹⁰ And of course, ILECs and CLECs expressed their support for adoption of a uniform, reasonable rate formula for broadband attachments.¹¹

State governmental interests also expressed broad support for a uniform rate. The American Legislative Exchange Council (ALEC), the nation’s largest, non-partisan organization of state legislators, observed that “[t]echnological neutrality demands a uniform pole attachment rate” and that “[c]onsumer welfare is enhanced when the regulatory environment is hospitable to competing platforms, services, pricing packages.”¹² Moreover, of the 13 states that have preempted federal regulation of pole attachments, the vast majority have adopted a uniform rate.¹³

Based upon the comments in this docket thus far, there is a strong and clear mandate from diverse parties for the Commission to establish a uniform, reasonable rate formula for broadband capable pole attachments. USTelecom urges the Commission to act on this mandate, particularly in light of its clear statutory authority and obligation to do so.

⁹ T-Mobile Comments, p. 5. *See also* CTIA Comments, p. 14 (supporting the FCC’s conclusion “for a unified rate for all providers capable of providing broadband service.”).

¹⁰ NCTA Comments, p. 14.

¹¹ AT&T Comments, pp. 10-21; Verizon Comments, pp. 3-16; WindStream Comments, pp. 2-5; Time Warner Telecom Comments, pp. 5 - 14.

¹² ALEC Reply Comments, p. 3.

¹³ Time Warner Telecom Inc., One Communications Corp. and Comptel Comments (Comptel/TWTC Comments), pp. 7 - 8.

II. THE COMMISSION HAS EXPRESS STATUTORY AUTHORITY TO ADOPT A UNIFORM, REASONABLE RATE FORMULA FOR BROADBAND ATTACHMENTS BY ALL PROVIDERS

USTelecom and other commenters demonstrated in their initial comments that the Commission unquestionably has the full legal authority – and indeed, the obligation – to establish a uniform, reasonable rate formula for broadband attachments under Section 224 of the Act. Section 224(b)(1) clearly states that “[t]he Commission *shall* regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions.”¹⁴ Further, the Supreme Court in its *Gulf Power* decision¹⁵ concluded that the Commission under Section 224(b)(1) has the authority to establish a uniform broadband formula for broadband cable attachments.

A. *Plain Reading of Section 224(B) Makes Clear That ILECs – As Providers of “Telecommunications Service” – are Entitled to Just and Reasonable Rates.*

Parties seeking to limit the Commission’s authority to establish a broadband pole attachment rate under Section 224(b)(1) of the Act ignore the broad authority granted to the Commission under that Section. A plain reading of that Section makes clear that ILECs – as providers of “telecommunications service” – are entitled to avail themselves of any broadband rate established by the Commission.

As noted by several commenters in this proceeding, the Commission’s authority under Section 224(b)(1) is expansive.¹⁶ AT&T notes that the Commission’s authority extends not only

¹⁴ 47 U.S.C. 224(b)(1) (emphasis added).

¹⁵ *National Cable & Telecommunications Assn., Inc. v. Gulf Power Co.*, 534 U. S. 327 (2002).

¹⁶ AT&T Comments, p. 22. *See also* Verizon Comments, p. 15 (stating that the Commission “unquestionably” has authority to adopt a common rate formula.); Comptel/TWTC Comments, p. 2 (noting that Congress has granted the Commission “powerful regulatory tools in Section 224 of the Communications Act.”); CenturyTel Comments, p. 5 (stating that the Act grants the Commission “broad authority” to regulate rates for pole attachments.).

to the statutory rates for cable operators and CLECs, but also to “whatever rates the Commission deems appropriate to promote deployment of other services such as broadband Internet access.”¹⁷

While opponents of such an interpretation fixate on the exclusionary language contained in Section 224(a)(5),¹⁸ CenturyTel correctly notes that the general prohibition in Section 224(b) on unreasonable rates and conditions is “broader than the specific references contained elsewhere in Section 224, such as the rate and access provisions found in subsections (d) through (f).”¹⁹

Numerous commenters in this proceeding appropriately emphasize the Supreme Court’s conclusion in its *National Cable & Telecommunications Ass’n v. Gulf Power* decision. There, the Court endorsed the “unambiguous”²⁰ reading of Section 224 regarding the Commission’s authority to regulate rates charged for pole attachments used to provide wireless or “commingled” services.²¹ The arguments of various parties in this proceeding are clearly at odds with the Court’s rejection of the view that Sections 224 (d) and (e) somehow narrow (b)(1)’s broad mandate to set just and reasonable rates.²² Instead, the Court found that section 224(b)’s general mandate gave the FCC broad authority to regulate pole attachment rates, regardless of the more specific directives in sections 224(d) and (e). Specifically, the Supreme Court reasoned as follows:

Congress did indeed prescribe two formulas for ‘just and reasonable’ rates in two specific categories; but nothing about the text of §§ 224(d) and (e), and nothing about the structure of the Act, suggest that these are the exclusive rates allowed. It

¹⁷ AT&T Comments, p. 22.

¹⁸ In general Section 224(a)(5) excludes “any incumbent local exchange carrier” from its definition of “telecommunications carrier.”

¹⁹ CenturyTel Comments, p. 10.

²⁰ *Gulf Power*, 434 U.S. at 333.

²¹ *Nat’l Cable & Telecommunications Ass’n v. Gulf Power*, 434 U.S. 327 (2002).

²² See e.g., EEI/UTC Comments, p. 118 (stating that “there are limits to how broadly the language of Section 224 can be interpreted.”); Coalition Comments, pp. 63-64 (arguing that “Section 224 provides the rates for cable-only attachments and for attachments by “telecommunications carriers,” but not attachments by ILECs or “providers of telecommunications services.”). See also *Gulf Power v. FCC*, 208 F. 3d 1263, 1276, n. 29 (11th Cir. 2000).

is true that specific statutory language should control more general language when there is a conflict between the two. Here, however, there is no conflict. The specific controls but only within its self-described scope.²³

Contrary to the views of the cable and electric industry, Sections 224(d) and (e) “work no limitation on” Section 224(b)’s grant of broad authority to the Commission to adopt a uniform, reasonable pole attachment rate applicable to all types of providers, including ILECs.²⁴ USTelecom urges the Commission to act on this authority, and establish an appropriate, reasonable and compensatory formula for broadband capable pole attachments.

B. Congressional Intent is Clear in the Application of Section 224(b) to Providers of “Telecommunications Service.”

Congress’s intent to grant the Commission broad authority to set reasonable pole attachment rates is clear from not only the plain language of the statute, but also from the legislative history of the Act. Congress amended Section 224 in 1996 in several important respects. First, it expanded the protections of Section 224 beyond cable operators to include telecommunications carriers as well. Second, it gave cable operators and telecommunications carriers a mandatory right of access to utility poles, and established specific rate formulas governing their attachments. Finally, Congress broadly expanded the definition of “pole attachment” to include any attachments by a “provider of telecommunications service.” Congress clearly voiced its intention to broaden the scope of Section 224, contrary to the assertions of the utility industry who claim that “no such explanation exists.”²⁵

A Conference Report accompanying the 1996 amendments to Section 224 discusses Congress’s rationale for expanding “the definition of ‘pole attachment’ to include attachments by

²³ *Gulf Power*, 434 U.S. at 335-36.

²⁴ *Id.* at 337.

²⁵ Coalition Comments, p. 63.

all providers of telecommunications service.”²⁶ The Conference Report explains that the broader definition was added to “remedy the inequit[ies] of charges for pole attachments among providers of telecommunications services.”²⁷

As CenturyTel notes in its comments, “if Congress only intended to protect ‘telecommunications carriers’ defined in subsection (a)(5) it would have used that phrase in Section 224(a)(4)’s definition of ‘pole attachment.’ It did not do so.”²⁸ Indeed, the Supreme Court reached this exact conclusion in its *Gulf Power* decision when it concluded that “nothing about the 1996 amendments suggests an intent to decrease the jurisdiction of the FCC. *To the contrary*, the amendments’ new provisions *extend the Act to cover telecommunications*.”²⁹

The utility interests largely ignore – or misstate – Congress’ clear intent to grant the Commission its broad authority in establishing a uniform, reasonable formula for broadband capable attachments. For example, the Coalition of Concerned Utilities (Coalition) states that “it makes little sense that Congress granted ILECs rights to regulate pole attachment rates but failed to ‘drop the other shoe’ by specifying an applicable rate.”³⁰

The Coalition’s analysis, however, ignores the broad authority granted to the Commission under Section 224(b)(1). Indeed, it makes perfect sense the Congress would refrain from establishing formulas for each and every type of attachment from all manner of providers, and would opt instead to grant the Commission the broad authority to establish relevant formulas as appropriate. Such a desire is clear from the Conference Report that broadened the definition

²⁶ S. Rep. No. 104-230, at 206 (1996); H.R. Rep. No. 104-458, at 206.

²⁷ H.R. Rep. No. 104-458, at 206.

²⁸ CenturyTel Comments, p. 9.

²⁹ *Gulf Power*, at 336 (emphasis added).

³⁰ Coalition Comments, p. 63.

of pole attachment to enable the Commission to “remedy” the inequities of charges for pole attachments among “providers of telecommunications services.”³¹

For its part, EEI points to a Senate report on the 1996 legislation which states that the bill “includes revisions to section 224 of the 1934 Act to allow *competitors to the telephone companies* to obtain access to poles owned by utilities and telephone companies at rates that give the owners of poles a fair return on their investment.”³² Based upon this single sentence in the report, EEI then concludes that the 1996 amendment “clearly did not contemplate allowing ILECs themselves to obtain any pole attachment rights.”

But the Senate report language referenced by EEI speaks only to one section of the Act – Section 224(e) – which established pole attachments rates for CLECs. Viewed in that context, the Senate report language is correct: Section 224(e) was indeed created to allow “competitors to the telephone companies” (*i.e.* CLECs) to obtain access to poles at just and reasonable rates. But the fact that the same sentence makes no reference to the broader language added by Congress under Section 224(a)(4), hardly supports EEI’s claim that that Congress did not contemplate allowing ILECs – or any other provider of “telecommunications services” – from obtaining just and reasonable rates.

In a similar vein, EEI contends that it would be “nearly impossible” for the Commission to “depart from its long-standing precedent” and apply a broadband pole attachment formula to ILECs without such a holding being deemed arbitrary and capricious.³³ EEI ignores the fact that only when an agency *reverses* prior policy can the arbitrary-and-capricious standard be applied.³⁴

³¹ H.R. Rep. No. 104-458, at 206.

³² EEI/UTC Comments, p. 119 (emphasis in original).

³³ *Id.*, at p. 121.

³⁴ See *Motor Vehicles Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-42 (1983) (applying the arbitrary-and-capricious standard only in cases involving reversals in agency policy).

In fact, it would be entirely *consistent* for the Commission to establish and apply a just and reasonable rate for pole attachments to all manner of broadband providers – including ILECs – in light of its previous interpretations of Section 224(b) and 224(a)(4). Indeed, to act in an arbitrary and capricious manner would be to continue to deny one type of competitor – ILECs – the right to reasonable pole attachment rates.

Specifically, a mere two years after passage of the 1996 amendments, the Commission exercised its broad authority under Section 224(b) and the amended Section 224(a)(4) to carry out its “duty” to ensure “just and reasonable” pole attachment rate formulas for cable providers of broadband Internet service and wireless providers of telecommunications services. In applying Sections 224(b)(1) and 224(a)(4) to cable providers, the Commission concluded that its decision did not turn on “what type of service the attachment is used to provide” but rather on the nature of the attaching entity.³⁵ For wireless providers, the Commission again relied on the language of Section 224(a)(4) which stipulates that a pole attachment is an attachment by “any” provider of telecommunications services.

On both points, the Supreme Court in its *Gulf Power* decision agreed with the Commission’s analysis. The Court concluded that the language contained in Sections 224(a)(4) and 224(b)(1) “resolve[d] the question” of whether the Commission had sufficient authority to establish pole attachment rates for cable and wireless providers.³⁶ The Court further concluded that the nature of the service is irrelevant under the statute, and the question of who the attachment is “by” is “what matters under the statute.”³⁷

³⁵ 13 FCC Rcd. 6777, 6793, 1998 Order, ¶30. Section 224(a)(4) originally only addressed attachments by a “cable television system,” but was amended in 1996 to include any attachments by “providers of telecommunications services.”

³⁶ *Gulf Power*, at 333.

³⁷ *Id.*

In this regard, the question of whether ILECs are entitled to just and reasonable pole attachment rates under Sections 224(a)(4) and 224(b) is only now being addressed by the Commission in its Notice. Thus, EEI's claim that the Commission would have to "depart from its long-standing precedent" is simply without merit. Indeed, it would be entirely consistent for the Commission to conclude that ILECs would be subject to a just and reasonable broadband formula based upon their status as "providers of telecommunications services."

III. ANY COMMISSION ACTION ON POLE ATTACHMENTS SHOULD AVOID UNNECESSARY SAFETY OVERSIGHT, ENSURE ADEQUATE COMPENSATION FOR POLE OWNERS AND ESTABLISH COMPLAINT PROCEDURES FOR ILECS.

A uniform, reasonable broadband formula for pole attachments should address three issues of particular importance. First and foremost, USTelecom shares the view of the utility industry and others that while safety is an issue of paramount importance, the Commission should avoid imposing new and unnecessary obligations on pole owners. Second, fairness demands that any such formula established by the Commission include ILECs and be compensatory to pole owners. Finally, the Commission should ensure that adequate complaint procedures for all parties, including ILECs, are incorporated into any such formula. Each of these issues is discussed in greater detail below.

A. Existing Safety Oversight of Pole Attachments at the Federal, State and Local Levels are Sufficient, and the Commission Should Avoid Imposing Unnecessary Safety Obligations on Pole Owners.

USTelecom shares the view of numerous commenters in this proceeding that safety is an issue of paramount importance. In the context of pole attachments, safety is a matter of significant importance to electric utility employees, communications workers, and the public, and can ultimately impact the reliability of the electric grid.

But USTelecom agrees with the comments of EEI, when it states that “the solution to this problem is not for the Commission to establish its own safety requirements or to assume jurisdiction for enforcement.”³⁸ In this regard, USTelecom opposes the comments of various parties in this proceeding who recommend that the Commission adopt a ‘one-size-fits all’ best practices approach.³⁹ USTelecom agrees with EEI, UTC, Verizon and others that such an approach would “inappropriately favor expedient access at the expense of safety, reliability, and engineering soundness.”⁴⁰

In general, the Commission previously rejected similar proposals when it last considered this issue in 1996. During that proceeding, the Commission acknowledged the reality that “there are simply too many variables” at play.⁴¹ The imposition of generic safety rules that do not adequately take into account the numerous variables for pole owners – including engineering, capacity, safety and reliability concerns – would lead to a *decrease* in the safety, reliability and security of critical electric infrastructure.

As various commenters in this proceeding note, there are already numerous entities and agencies addressing matters of safety as they relate to pole attachments.⁴² The Federal Energy Regulatory Commission, the Occupational Safety Health Administration, various states and municipalities, as well as widely accepted industry standards, such as the National Electric Safety Code, already outline specific safety guidelines and impose adequate requirements for

³⁸ EEI/UTC Comments, p. 37.

³⁹ See e.g., TWTC/Comptel Comments, pp. 14-29; Cavalier Telephone, LLC, pp. 2-4; WOW! Internet Cable and Phone Comments, citing Sigecom, LLC Comments, pp. 2-5.

⁴⁰ EEI/UTC Comments, p. 8.

⁴¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, CC Docket No. 96-98, 11 FCC Rcd. 15499, 16067-16068 (1996).

⁴² EEI/UTC Comments, pp. 61-70; Coalition Comments, pp. 80-81; Ameren Dominion Comments, pp. 12-13; Verizon Comments, p. 18.

pole owners and attachers, alike. There is simply no justifiable reason for the Commission to insert another layer of safety regulation, where sufficient oversight already exists.

USTelecom agrees with Verizon and others that the Commission should reject Fibertech's various proposals, such as requiring pole owners to permit so-called "boxing," permitting the use of extension arms and shortening the existing timeframes for surveys and responding to licensing applications.⁴³ These and other of the Fibertech proposals either are already addressed in the Commission's rules or ignore widely accepted industry standards and practices.

B. Any Uniform, Reasonable Broadband Rate Formula Established by the Commission Should Include ILECs and be Compensatory for Pole Owners.

Any uniform, reasonable broadband rate formula established by the Commission should be fully compensatory for pole owners. USTelecom's members, who are both attachers, and to a far lesser degree, pole owners, believe that owners of critical infrastructure should be fairly compensated for use of their facilities. But while any formula established by the Commission should fairly compensate pole owners, the current status quo where non-regulated ILECs are forced to pay rates far exceeding those of their regulated competitors, can no longer be tolerated.

Of course, the question of what constitutes proper compensation lies at the heart of this proceeding. USTelecom is eager to work with all stakeholders in this proceeding to ensure that essential facility owners are fairly compensated for use of their facilities. While numerous

⁴³ Verizon Comments, pp. 18-20; Concerned Coalition Comments, pp. 80-81; Ameren Dominion Comments, pp. 11-14; Florida IOU Comments, pp. 14-22.

commenters have made attempts to outline what a compensatory formula could entail, it is clear from the record that significant disagreement exists on this issue.⁴⁴

But there is one issue beyond dispute in this proceeding: ILECs pay a significantly disproportionate share of costs for pole attachments. As numerous commenters have made clear, and USTelecom's own survey on pole attachment rates has demonstrated, ILECs on average pay over \$26.00 per attachment compared to cable and CLEC rates of \$3.26 and \$4.45, respectively. The underlying cause of this rate disparity is simple.

Because cable and CLEC attachers can only be charged regulated rates, electric utility pole owners are increasingly exercising their monopoly power to charge exorbitant rates to non-regulated ILECs. On a proportionate basis, ILECs are paying close to 40% of the pole costs, despite utilizing – at most – only 15% of the usable space. This absence of rate parity is made even more egregious when one considers that electric utilities often use more than four times the space than ILECs for their own attachments.

C. The Commission Should Clarify That ILEC Attachers Can Avail Themselves of the Commission's Complaint Procedures.

As noted by at least one commenter in this proceeding, there is some ambiguity as to whether ILEC attachers can use the Commission's complaint procedures to challenge unreasonable pole attachment rates, terms and conditions. USTelecom agrees that clarifying the existence of this right for ILECs will create an "effective deterrent against the imposition of unreasonable rates, terms and conditions on ILECs by utilities" which own more poles.⁴⁵

⁴⁴ See EEI/UTC Comments, pp. 102-110; Coalition Comments, pp. 39-41; AT&T Comments, pp. 18-21; NCTA Comments, pp. 18-22.

⁴⁵ Verizon Comments, p. 16.

As the Commission has already concluded, investor-owned utilities own “the majority of poles nationwide” used to deliver bundled services of voice, video and broadband.⁴⁶ In many states, the percentage of poles owned by utilities is substantial. For example, the Oregon Public Utilities Commission reported in this proceeding that “[a]bout 75 percent of the utility poles in Oregon that support both high voltage electric and communication networks are owned by electric utilities.”⁴⁷

This significant – and growing – imbalance in pole ownership by utilities comes as no surprise to USTelecom and its members. Indeed, even EEI acknowledges that “a growing majority of the poles are owned solely by the electric utility.”⁴⁸ The cause of this increasing imbalance results from public safety emergencies – such as ice storms and hurricanes – where downed poles are common, as well as the significant growth in residential and business development over the last several years.

During public safety emergencies when utility poles are downed, it is the utility industry that is first called to the scene by public safety officials. This is the case regardless of whether the pole is jointly owned by the utility and ILEC or owned exclusively by the ILEC. In fact ILEC employees are usually prevented from entering an area where poles are down until service is restored. As a result, once a new pole is put up by the utility company, it is the utility company which has replaced the pole that obtains the exclusive ownership rights. Similarly,

⁴⁶ *In the Matter of Amendment of Commission’s Rules and Policies Governing Pole Attachments*, Consolidated Partial Order On Reconsideration, CS Docket No. 97-98, 16 FCC Rcd. 12103, 12118 (2001).

⁴⁷ OPUC Comments, p. 2.

⁴⁸ EEI/UTC Comments, p. 19 (*see also*, EEI/UTC Comments, pp. 20 – 21, stating that “[w]hen poles fall down as a result of storm damage or vehicle impacts, each attachment must be restored along with the new or repaired pole.” *See also* EEI/UTC Comments, p. 22, stating that “[t]he complexity of pole restoration is further multiplied when thousands of poles in a large utility system need to be replaced after a widespread natural disaster, such as a hurricane, ice storm, or earthquake. For example, during the 2004 hurricanes, according to a Department of Energy report, in Florida, “thousands of distribution poles and transformers had to be repaired or replaced. . .”).

when new green field construction takes place for homes and/or businesses, it is the utility company – not the ILEC – that is first in line to install its poles.

Over time, the combination of these factors has resulted in a significant imbalance of pole ownership between electric utilities and ILECs. As a result of this imbalance, investor-owned utilities have significantly greater leverage in their negotiations with ILECs regarding pole attachment rates, terms and conditions. This significant imbalance in negotiation leverage often leads to higher pole attachment rates for ILECs, in addition to more unreasonable terms and conditions; all serving to decrease the deployment of bundled services. For this reason, the Commission is urged to clarify that ILECs may avail themselves of the complaint process, thereby creating a stronger deterrent to the imposition of such onerous rates, terms and conditions.

IV. CONCLUSION

There is widespread enthusiasm and support amongst diverse interests for a uniform, reasonable rate formula for broadband attachments. In light of this broad support, the Commission is urged to exercise its ample legal authority – and indeed, its obligation – to prescribe rules under Section 224 of the Communications Act to establish a uniform, reasonable formula for broadband attachments. The establishment of a parity cap for broadband pole attachments between all classes of providers will ensure a technology neutral and level playing field, thereby benefiting consumers through enhanced broadband competition.

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