Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

CTIA – THE WIRELESS ASSOCIATION®
1400 16th Street, NW Suite 600
Washington, D.C. 20036
(202) 785-0081

Marlo A. Go
Staff Counsel

Michael F. Altschul
Senior Vice President & General Counsel

Christopher Guttman-McCabe
Vice President, Regulatory Affairs

Brian M. Josef
Director, Regulatory Affairs

Its Attorneys

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REPLY COMMENTS OF CTIA - THE WIRELESS ASSOCIATION®

CTIA – The Wireless Association® ("CTIA")[1] respectfully submits these Reply Comments in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("NPRM") seeking comment on the rules and policies governing pole attachments and whether changes to the implementation of Section 224 of the Communications Act of 1934, as amended, may be warranted.[2] CTIA urges the Commission to clarify and reaffirm its existing rules to protect and ensure wireless carriers' rights of just and nondiscriminatory pole access at reasonable rates. Specifically, the Commission should explicitly affirm that wireless providers are telecommunications carriers subject to the Telecommunications Rate Formula, establish a

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, and AWS, as well as providers and manufacturers of wireless data services and products.

[2] *In re Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Polices Governing Pole Attachments*, Notice of Proposed Rulemaking, WC Docket No. 07-245, RM-11293, RM-11303 (Nov. 20, 2007) ("*Pole Attachments NPRM*"); *In re Pole Attachments NRPM*, Order, WC Docket No. 07-245 (Mar. 14, 2008)(granting Motions for Extension of Time).

presumption for space used by wireless attachments, and specify that "usable space" includes the pole top, among others. In the event the Commission adopts a unified broadband rate, the Commission should set the rate at the cable rate for all attachments used to provide broadband Internet access service.

I. INTRODUCTION AND SUMMARY

While wireless carriers have relatively few pole attachments at this time, wireless carriers foresee increased placement of wireless communications equipment on existing electric utility poles in the years to come. The numerous benefits of wireless attachments on utility poles include expanded wireless coverage, greater capacity, increased signal strength, and improved quality of service. Notably, these factors are the necessary building blocks for wireless providers to deliver new, ubiquitous and affordable broadband services to more Americans. Through FCC action affirming that wireless attachments are protected under 47 U.S.C. § 224, the wireless industry hopes to set a path for deployment by working cooperatively with the electric utilities to foster greater understanding of wireless pole attachments

Network reliability and reach remain critical as wireless carriers continue to deploy the next generations of spectrum (*e.g.*, 700 MHz and Advanced Wireless Service ("AWS")) and mobile data and broadband technologies (*e.g.*, Long Term Evolution ("LTE") and WiMAX). Today, consumers can choose from a number of broadband access providers including wireless as well as cable, traditional telephone, Broadband over Power Line ("BPL") and other providers. Significantly, mobile wireless broadband

Internet access remains the fastest growing segment of the U.S. broadband market.[3] Through wireless attachments on electric utility poles, wireless providers are able to emhance reliable "last mile" coverage to meet consumer demand for next generation broadband services.

The electric utilities' contention that the Commission should take a "hands off" approach to wireless attachments because wireless carriers have other options for deployment is no justification to deny wireless providers of their attachment rights under Section 224.[4] Pole attachments and other such alternative siting options are increasingly essential in the face of regulatory, technical, and environmental obstacles that impede wireless providers' traditional tower siting efforts. CTIA is optimistic that the FCC's protection afforded under this proceeding coupled with an improved working relationship with the electric utilities will promote Congress's and the Commission's pro-competitive goal of facilitating the deployment of broadband services to every American, while reducing the need for parties to resort to the Section 224 complaint process.

II. WIRELESS CARRIERS ROUTINELY ATTACH TO EXISTING ELECTRIC UTILITY POLES WITHOUT JEOPARDIZING THE POLES AND WITHOUT INCIDENT

Wireless carriers' pole attachments are now treated as routine by many electric utilities, but other utility companies have expressed concerns regarding wireless pole

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[3] *See In re* Implementation of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Comments of CTIA-The Wireless Association, WC Docket No. 08-27, at 7-8 (Mar. 26, 2008) ("*CTIA Competition Report Comments*").

[4] *See* Comments of the Coalition of Concerned Utilities, WC Docket No. 07-245, RM-11293, RM-11303, at 44-45 (Mar. 7, 2008); Initial Comments of Florida Power & Light and Tampa Electric Regarding ILECs and Pole Attachment Rates, WC Docket No. 07-245, RM-11293, RM-11303, at 17 (Mar. 7, 2008).

attachments and seek to limit or block wireless providers' deployment on their utility poles. Like other pole attachments, wireless attachments have become conventional and their deployment standardized.[5] Some electric utilities openly welcome wireless attachments and use their websites to facilitate the attachment process.[6] Through sharing of information, education and a cooperative working environment, CTIA is confident that wireless carriers can help reluctant electric utilities and their engineers overcome any concerns.

Contrary to electric utilities' claims, wireless attachments are eminently workable and do not threaten the electrical distribution system. Wireless carriers share the electric utilities concerns for the safety and reliability of electric utility systems as wireless carriers have every incentive to ensure their own networks remain intact. As an example of an exceptional safety record of wireless attachments, the Long Island Power Authority in New York has allowed wireless pole top access for several years and has not reported any safety related issues.[7] Other electric utilities that permit wireless pole top attachments include Dominion Virginia Power, Progress Energy Florida and PacifiCorp.[8]

Wireless carriers hold safety issues in the highest regard. Wireless attachers strictly adhere to the extensive regulations of the FCC, National Electrical Safety Code

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[5] *See* Comments of T-Mobile USA, Inc., WC Docket No. 07-245, RM-11293, RM-11303, at 3 (Mar. 7, 2008) ("*T-Mobile Comments*").

[6] *See* Dominion Power website, "Wireless Antennas on Electric Distribution Poles," *available at* http://www.dom.com/about/collocation/dp_antennas/index.jsp (provides an online form for wireless providers to make a joint use attachment request).

[7] *See* State of New York Public Service Commission, Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles, Joint Comments of T-Mobile, Sprint Nextel and AT&T Mobility, Case 07-M-0741, at 22 (Sept. 10, 2007).

[8] *See id.* at 42-43.

("NESC"), Occupational Safety and Health Administration ("OSHA"), Environmental Protection Agency ("EPA") and state building code standards, among others. Under these comprehensive regulations, electric utilities' apprehensions about safety and RF emissions are adequately addressed. Electric utilities must recognize wireless attachment rights and permit attachment where feasible. The Commission should affirm that electric utilities may not invoke blanket prohibitions on wireless attachments without identifying with specificity how the attachments may harm the electrical network. This action is consistent with the FCC's previous rejection of the electric utilities' contention that they may exercise unfettered discretion to reject pole attachments.[9]

III. FCC ACTION IS NECESSARY TO PROTECT AND ENSURE WIRELESS CARRIERS' RIGHTS OF JUST, REASONABLE AND NONDISCRIMINATORY POLE ACCESS

Around the country, telecommunications providers, particularly wireless carriers, experience problems negotiating and obtaining fair pole attachment agreements for access both for mid-pole and pole-top wireless attachments. Carriers' requests have been met with unreasonable delays, discriminatory treatment and exorbitant fees.[10] Hopeful wireless attachers must then resort to the Commission's lengthy Section 224 complaint

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[9] *See In re* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *et al.*, First Report and Order, 11 FCC Rcd 15499, at ¶ 1158 (1996) ("we reject the contention of some utilities that they are the primary arbiters of [capacity, safety, reliability, or engineering] concerns, or that their determinations should be resumed reasonable"); *on reconsideration*, 14 FCC Rcd 18049 (1999). *See also* Kansas City Cable Partners v. Kansas City Power & Light Co., Order, 14 FCC Rcd 11599, 11604 ¶ 11 (1999) ("utility may rely on the NESC to provide standards for safety, reliability, and generally applicable engineering standards, but the utility is not the final arbiter of such issues and its conclusions are not presumed reasonable"(emphasis added)).

[10] *See T-Mobile Comments* at 4-5; Initial Comments of NextG Networks, Inc., WC Docket No. 07-245, RM-11293, RM-11303, at 5-9 (Mar. 7, 2008)("*NextG Comments*"); Comments of the DAS Forum, WC Docket No. 07-245, RM-11293, RM-11303, at 8-11 (Mar. 7, 2008)("*DAS Forum Comments*").

process with the expectation that the dispute may take well over a year to obtain a resolution.[11] As the Commission has recognized, prolonged negotiations that prevent timely access to utility poles can impede competition by forcing telecommunications carriers to "choose between unfavorable and inefficient terms on the one hand or delayed entry, and thus, a weaker position in the market on the other."[12] Commission action is vitally important to facilitate wireless providers' access to utility poles. CTIA urges the Commission to protect and ensure wireless carriers' rights of just, reasonable and nondiscriminatory pole access.

A. The Commission Should Clarify and Reaffirm Its Rules Regarding Non-Discriminatory and Reasonable Rates For Wireless Pole Access

Although the Commission and the courts have affirmed wireless carriers' rights of just, reasonable and nondiscriminatory pole access,[13] a number of electric utilities continue to mistakenly argue that the FCC lacks jurisdiction over wireless attachments

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[11] *See T-Mobile Comments* at 8, n. 24, indicating that in 2006 and 2007, the average time from filing of a pole attachment complaint to resolution was between 14.5 months and 16.5 months.

[12] Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, Report and Order, CS Docket No. 97-151, FCC 98-20, 13 FCC Rcd 6777, 6787-88 (1998).

[13] Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, Report and Order, CS Docket No. 97-151, FCC 98-20, 13 FCC Rcd 6777 (1998), *National Cable & Telecommunications Assoc. v. Gulf Power Co.*, 534 U.S. 327, 151 L.Ed.2d 794, 122 S.Ct. 782 (2002); *See also* Southern Company Services, Inc. v. Federal Communications Commission, 313 F.3d. 574 (D.C. Cir. 2002).; Omnipoint Corp. v. PECO Energy Co., Memorandum Opinion & Order, PA 97-002, DA 03-857 at ¶ 7 (2003); *Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers with Access to Utilty Poles at Reasonable Rates*, Public Notice, DA 04-4046, 19 FCC Rcd 24930 (2004) ("*Wireless Attachments Notice*").

and that the telecommunications rate does not apply.[14] There should be no debate regarding wireless providers' rights, yet many electric utilities blatantly ignore Federal statutes, rules and policies that expressly provide wireless attachments with the same protections as wireline attachments.[15]

In contravention to the current regulatory regime, some electric utilities treat wireless providers differently than wired telecommunications providers by imposing unlawful restrictions and excessive, unnecessary, make-ready delays and costs, which effectively block wireless attachments or prohibit pole-top attachments.[16] Electric utility pole owners' unlawful tactics should not be permitted to impede competitive entry by wireless carriers or capture monopoly rental rates on the misguided belief that wireless service providers are not telecommunications carriers under Section 224 of the Communications Act and Section 1.1402(h) of the FCC's rules. CTIA urges the Commission to affirm beyond any doubt that wireless providers are telecommunications carriers for purposes of access rights and application of the Telecommunications Rate formula.

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[14] *See* Comments of Idaho Power Company, WC Docket No. 07-245, RM-11293, RM-11303, at 5 (Mar. 7 2008); Comments of the Edison Electric Institute and the Utilities Telecom Council, WC Docket No. 07-245, RM-11293, RM-11303, at 100-102 (Mar. 7, 2008).

[15] *See NextG Comments* at 8-9.

[16] *See* Comments of the Coalition of Concerned Utilities, WC Docket No. 07-245, RM-11293, RM-11303, at 45-48 (Mar. 7, 2008). *See also NextG Comments* at 5-9; *DAS Forum Comments* at 7-9.

B. The Commission Should Adopt an Explicit Rebuttable Presumption That Wireless Providers' Access to Poles Includes the Pole Top

Some electric utility pole owners demand total control over pole top access and seek permission to outright reject all wireless pole top attachments.[17] CTIA urges the Commission to block electric utilities' efforts to establish a blanket presumption against wireless attachments at the pole tops, and to bar utilities from charging premium rates for such access.[18] Electric utilities do not have unfettered discretion to deny pole top access and must substantiate claims of insufficient capacity and reasons of safety, reliability and engineering purposes.[19] Electric utilities' assertions that the party being denied access must seek relief from the Commission unfairly places wireless attachers at a disadvantage because only the electric utilities possess the necessary information (*i.e.*, pole schematics and electric distribution grid) to rebut a blanket presumption.[20] CTIA urges the FCC to amend its rules to specify that a telecommunications carrier's access to poles includes access to the pole tops and that the standard Telecommunications Rate Formula applies.[21]

Further, the Commission should look to Utah for its method of determining actual space occupied by a wireless attachment and its definition of "usable space." Under the

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[17] *See* Comments of Ameren Services Company and Virginia Electric and Power Company, WC Docket No. 07-245, RM-11293, RM-11303, at 38 (Mar. 7, 2008)("*Ameren and Dominion Virginia Power Comments*").

[18] *See DAS Forum Comments* at 11-13; Comments of Crown Castle Solutions Corp., WC Docket No. 07-245, RM-11293, RM-11303, at 5 (Mar. 07, 2008)("*Crown Castle Comment*s").

[19] *See supra* note 9; 47 U.S.C. Section 224(f).

[20] *See* Initial Comments of Florida Power & Light, Tampa Electric and Progress Energy Florida Regarding Safety and Reliability, WC Docket No. 07-245, RM-11293, RM-11303, at 18 (Mar. 7, 2008). In a case involving denial of access, the utility shall have the burden proving the denial was lawful, 47 CFR Section 1.1409

[21] *See DAS Forum Comments* at ii, 13. *See also, Crown Castle Comments* at 9-11.

Utah code, space on a utility pole above the minimum grade level to the top of the pole that can be "used for the attachment of wireless, cable and associated equipment," including the space occupied by the pole owner, qualifies as "usable space."[22] CTIA and T-Mobile also agree with Utah that space used by a wireless provider should not include the length of vertically placed cable, wire, etc., or any other facility that does not prevent another attaching entity from placing equipment in usable space.[23]

The wireless industry strives for nationwide nondiscriminatory access and rates that are the same as any other telecommunications service providers in regions within the Commission's jurisdiction and in states that have certified regulation of pole attachments.[24] Attachers of wireless facilities enjoy nondiscriminatory access and rates under state pole attachment laws in California, Louisiana, Maine, Massachusetts, New York, Oregon and Vermont. New York recently decided that wireless carriers need not obtain certification as a telecommunications service provider in order to obtain pole attachment rights.[25] New York's decision ensures that the growth and deployment of new and advanced capabilities will proceed in a much more rapid fashion than if wireless providers in the state are declined these opportunities. CTIA urges the Commission to

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[22] Utah Admin Code, Pole Attachments, R746-345-5 ("Utah Code").

[23] *See T-Mobile Comments* at 5; Utah Admin. Code, Rule R746-345-5(A)(3)(e)(i).

[24] *See T-Mobile Comments* at 10-11.

[25] *See* CASE 06-E-0082 - Tariff filing by Niagara Mohawk Power Corporation d/b/a National Grid to make revisions to Rule 35 – Cable Television Pole Attachment Rate and Electric Distribution Pole Wireless Attachment Rate, Order, at 5 (N.Y. Dept. of Pub. Serv. June 23, 2006), *available at* http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/0BBB008971D47DF185257188006666A0/$File/06e0082_ord_06_23_06.pdf?OpenElement.

promote the nationwide protection of wireless carriers' rights of just, reasonable and nondiscriminatory pole access.

IV. CTIA AFFIRMS ITS SUPPORT FOR THE COMMISSION'S TENTATIVE CONCLUSION TO ADOPT A SINGLE BROADBAND RATE

CTIA agrees with the Commission's tentative conclusion that all attachments, regardless of the platform used to provide broadband Internet access service, should be subject to a unified broadband rate. In the electric utilities' initial comments, the majority also agree that there should be a single broadband rate. Ameren Services Company and Virginia Electric and Power Company even noted that as leading providers of broadband services, "wireless telecommunications carriers must also be subject to the rebuttable presumption that they are offering broadband services" and should therefore be subject to the unified broadband rate.[26] Any argument that the broadband rate should not apply to wireless attachments would run counter to Congressional and FCC intent and unfairly discriminate against the wireless carriers who currently are providing broadband coverage to roughly 250 million Americans in communities across the country.[27]

A number of electric utilities argue the broadband rate should be set no lower than the telecommunications rate. However, consistent with the Commission's policy of encouraging the expansion of advanced communications services, all providers capable of providing broadband Internet access service should be subject to the lower default Cable Rate Formula that will promote competitive parity for all broadband service

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[26] *Ameren and Dominion Virginia Power Comments* at 37.

[27] CTIA Competition Report Comments at 8.

providers.[28] As the courts and this Commission have consistently found, the cable rate provides "just compensation" that allows the electric utilities to recover pole maintenance costs.[29] Contrary to some electric utility claims, no subsidy arises from the current cable rate, which more than fully compensates electric utility pole owners.[30] Establishing a uniform broadband rate higher than the cable rate would increase the costs of wireless broadband services and result in a windfall to electric utilities. Such an unjustified cross-subsidy would discourage broadband deployment and inhibit voice competition. At the very least, the Commission should affirm that wireless providers are telecommunications carriers subject to the Telecommunications Rate Formula. In the event the Commission adopts a unified broadband rate, wireless carriers capable of providing broadband services should be subject to the lower default Cable Rate Formula.

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[28] *See* Comments of Verizon In Response to Notice of Proposed Rulemaking, WC Docket No. 07-245, RM-11293, RM-11303, at 6 (Mar. 7, 2008); *T-Mobile Comments* at 6.

[29] *See, e.g.* Alabama Cable Telecommunications Ass'n v. Alabama Power Co.,16 FCC Rcd 12209, 12223-36, ¶¶ 32-61 (2001); Alabama Power Co. v. FCC, 311 F.3d 1357, 1370-1371 (11th Cir. 2002); Florida Cable Telecommunications Association, *et. al.* v. Gulf Power Company, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, EB Docket No. 04-381(Jan. 31, 2007); Comments of Time Warner Cable Telecom Inc., One Communications Corp. and COMPTEL, WC Docket No. 07-245, RM-11293, RM-11303, at 6-14 (Mar. 7, 2008) ("[cable rate] is the appropriate rate because the FCC and the courts have deemed it to be just and reasonable. In addition, because it yields rates that are closer to pole owners' costs, the cable formula diminishes the harms caused by the absence of an imputation requirement for utilities that use their poles to provide broadband over power lines."); Comments of National Cable Television Association, WC Docket No. 07-245, RM-11293, RM-11303, at 8-13 (Mar. 7, 2008) ("The key point for constitutional purposes is that the compensation regime the Commission has established under Section 224(d) puts a pole owner in a financial position that is at least as good as it would be if there were no other parties attaching facilities to its poles.").

[30] *See* Comments of Comcast Corporation, WC Docket No. 07-245, RM-11293, RM-11303, at 12-19, Exhibits 1 and 2 (Mar. 7, 2008).

CONCLUSION

For the reasons stated herein, CTIA believes clarification and affirmation of the Commission's current regulatory framework for pole attachments, along with the adoption of rules consistent with CTIA's recommendations, will improve certainty and promote nondiscrimination and deployment of next generation wireless services as well as reduce the need for parties to resort to the Section 224 complaint process.

Respectfully submitted,

CTIA - The Wireless Association®

By: /s/ Marlo A. Go

Marlo A. Go
Staff Counsel

Michael F. Altschul
Senior Vice President, General Counsel

Christopher Guttman-McCabe
Vice President, Regulatory Affairs

Brian M. Josef
Director, Regulatory Affairs

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1400 16th Street, NW
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Washington, DC 20036
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