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

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

REPLY COMMENTS OF EMBARQ

Embarq Local Operating Companies
By its Attorneys:

David C. Bartlett
John E. Benedict
Jeffrey S. Lanning
701 Pennsylvania Ave., NW
Suite 820
Washington, DC 20004
202-393-1516

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REPLY COMMENTS OF EMBARQ

I. INTRODUCTION AND SUMMARY

The comments received in response to the Commission's Notice of Proposed Rulemaking[1] confirm that the Commission needs to act on pole attachments[2] to level the playing field for all providers of broadband Internet access service.

The Embarq Local Operating Companies ("Embarq") share industry frustrations with the gross and unjustified disparities in pole attachment rates among different categories of broadband competitors. Embarq owns poles and conduit in many places, and it relies on attachments to other party's poles in other places -- mainly those of electric utilities. Embarq understands these issues, and it and its customers suffer from the distortions created by the current pole attachment rate regime.

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[1] *Implementation of Section 224 of the Act: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-2455, RM-11293, RM-11303, Notice of Proposed Rulemaking, FCC 07-187 (rel. Nov. 20, 2007), 73 Fed. Reg. 6788 (Feb. 6, 2008) ("NPRM"). Comments were filed on March 7, 2008.

[2] In these comments, Embarq uses the terms "poles" or "pole attachments" to include all manner of use of poles, conduit, or rights of way owned or controlled by a utility.

The Commission needs to act to ensure that all providers of broadband Internet access service qualify for the same pole attachment rate cap for all attachments used for broadband Internet access service. Commenters mostly agreed that the Commission has authority under section 224 of the Communications Act[3] to regulate pole attachment rates for all providers of telecommunications services, including incumbent local exchange carriers ("ILECs").

Some parties, however, called for a wide range of detailed new rules to govern the terms and conditions of access to poles and conduit, unrelated to any rate applicable for broadband attachments. Those rules are largely unnecessary and would do little to improve conditions of pole attachments. Embarq believes the Commission should decline to adopt additional rules on these issues, but should allow them to be addressed through negotiation and, where necessary, through the Commission's complaint process for pole attachments.

II. THE COMMISSION NEEDS TO PROVIDE A UNIFORM POLE ATTACHMENT RATE FOR ALL BROADBAND ATTACHMENTS.

A. Comments confirm the pressing need to level the unfair playing field created by the current pole attachment regime.

The current pole attachment regime generates unreasonable and discriminatory rates. Parties largely agreed that it is unfair and unreasonable to have different rates for broadband attachments for different classes of competitors. Electric utilities agreed with ILECs that the commission needs to provide a level playing field for all cable systems

[3] 47 U.S.C. § 224.

and telecommunications carriers.[4] The wireless industry agreed all attachments used to offer broadband "should be subject to a single broadband rate."[5] Even the cable industry acknowledged that the rate for telecommunications attachments should be substantially reduced.[6]

ILEC and association comments recounted how ILECs are charged pole attachment rates 500 percent higher than that paid by cable in the same area, and 300 percent higher than the competitive local exchange carrier ("CLEC") rate.[7] USTelecom identified instances where ILECs pay more than 1400% more for attachments than cable competitors, and up to 900% more than CLEC competitors.[8] Windstream reported that its own CLEC and ILEC pole attachment rates are 607% and 824% higher, respectively, than what it is allowed to charge cable companies for similar attachments.[9] CenturyTel and Frontier also showed how ILECs are repeatedly "unable to obtain reasonable rates through negotiations."[10]

Embarq's experience is no better. Like Windstream, Embarq is both an owner of poles and an attacher on poles owned by electric utilities. Embarq's service territories

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[4] Edison Electric Institute and the Utilities Telecom Council at 8-9.

[5] CITA at 14. To promote broadband deployment, CTIA advocated setting the broadband rate as low as possible, perhaps at the current cable television rate.

[6] NCTA at 21-22.

[7] *See* ITTA at 5 & n.14.

[8] USTelecom at 7-9. USTelecom provided data from thirteen states, showing the gross disparity in average rates among cable, CLEC, and ILEC attachments.

[9] Windstream at 4.

[10] CenturyTel at 2; Frontier at 2; Verizon at 4.

cover portions of 18 states -- from Florida to Washington, from New Jersey to Nevada, and from Texas to Minnesota. Embarq's experience is fairly representative of ILECs nationwide. Across Embarq's states, the median attachment rate it pays for attachments on utility-owned poles is $25.48, although too often Embarq pays as much as twice that amount.

In contrast, the median rate that Embarq receives from CLECs for their attachments on Embarq-owned poles is $15.74. The median attachment rate that Embarq receives from cable companies for attachments on Embarq-owned poles is just $4.85. Thus, Embarq pays, on average, a per-attachment rate that is more than *five times* as high as what its cable competitors pay for the same attachments, and often is even higher. Rural carriers like Embarq, moreover, necessarily have proportionately many more attachments per customer, which makes this rate disparity even more troubling.[11]

Because there is no default formula for ILEC attachment rates, there is no cap on what utilities may charge ILECs. As Verizon explained, these higher rates mean utilities can end up recovering from attachers (and mainly from the ILEC) more than 100 percent of the costs they incur to own and carry their jointly-occupied poles.[12] In fact, ILECs often pay a higher share of the electric company's costs than the utility itself does, even though electric utilities ordinarily require three or even four times as much pole space as an ILEC needs. CLECs pay a much lower rate for similar attachment space on the same poles. At the same time, cable television companies pay only a small *fraction* of the

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[11] CenturyTel at 3; Windstream at 2.

[12] Verizon at 5.

ILEC rate. They enjoy artificially cheap access to the same poles and are receiving a forced subsidy from utilities or ILECs for the attachments they use to provide their competing, cable-based broadband services.

This "broken system"[13] puts ILECs at a real disadvantage in competing against CLECs and cable television systems to provide similar services. Artificially high pole attachment rates for ILECs mean they are forced to incur higher costs to provide all of their services to customers when competing against CLEC and especially against cable-based providers. By having such disparate rates for broadband attachments, AT&T showed, the current regime is plainly harmful to competition, discourages investment, and undermines the interests of consumers.[14]

Embarq joins the majority of commenting parties that endorse the Commission's tentative conclusion that "due to the importance of promoting broadband deployment and the importance of technological neutrality, ... all categories of providers should pay the same pole attachment rate for all attachments used for broadband Internet access services."[15] Embarq also agrees with the majority of parties that endorsed the NPRM's tentative conclusion that the uniform rate for broadband attachments "should be higher than the current cable rate, yet no greater than the telecommunications rate."[16]

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[13] *Id.*

[14] USTelecom at 9; AT&T at 13.

[15] NPRM at ¶ 36.

[16] *Id.*

B. A unified rate cap for pole attachment rates will promote broadband investment, especially in rural areas.

Windstream emphasized that Congress directed the Commission to take all appropriate steps to promote the rapid deployment of broadband services in all parts of the country.[17] Section 706 provides that

> The Commission ... shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing, in a manner consistent with the public interest, convenience, and necessity, ... measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[18]

The Commission itself "has consistently recognized the critical importance of broadband services to the nation's present and future prosperity and is committed to adopting policies to promote the development of broadband services, including broadband Internet access services."[19]

Every ILEC commenter rightly complained that the current pole attachment regime has been interpreted to allow utilities to charge ILECs profoundly discriminatory rates for pole attachments. NCTA agreed that the telecom rate for broadband

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[17] Windstream at 3-4.

[18] Pub. L. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 157 nt.

[19] *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to all Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice Over Internet Protocol Subscribership*, Notice of Proposed Rulemaking, WC Docket No. 07-38, FCC 07-17 at ¶ 17 (2007).

attachments is unreasonable.[20] Indeed, electric utilities believe the current regime actually *compels* utilities to charge ILECs unfair broadband attachment rates, because in their view the rate for cable attachers is artificially and unrealistically low. As a result, ILECs universally are forced to pay far more for pole attachments than their direct competitors. Not only does that place ILECs at an artificial competitive disadvantage -- purely because of their regulatory classification -- but it also artificially inflates their costs in providing telecom and broadband services.

In rural America, ILECs are consumers' only realistic option for broadband services. Cable systems focus on towns, CLECs limit service to the larger towns, wireless broadband is not available in deeply rural areas, and satellite services remain out of reach for many consumers because of their higher cost. For ILECs, it is already difficult to justify investment in broadband infrastructure in high-cost, low-density service areas. But as many parties explained, artificially high costs for pole attachments actively discourage broadband deployment in areas that otherwise could be economically served, by adding significantly to the costs of deployment and the provision of service.[21] By definition, rural areas incur proportionately far higher attachment costs per customer served.

To promote investment in broadband infrastructure in rural areas, the Commission must use every opportunity -- as Congress directed -- to reduce regulatory costs and burdens. A unified rate would "significantly reduce the costs [of] ILECs," and possibly

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[20] NCTA at 14.

[21] CenturyTel at 4; Windstream at 3; NTCA at 5; ITTA at 7.

others, "therefore freeing up funds that could be used to further invest in advanced communications networks,"[22] especially in rural areas. The Commission should adopt a "uniform rate for all pole attachments used for broadband Internet access services ... and the rate should be ... no greater than the telecommunications rate."[23] As they are currently interpreted, the Commission's existing rules serve only to discourage broadband investment by the service providers otherwise most likely to invest in rural America -- the ILECs that currently serve those areas.

C. The Commission should ensure the unified broadband attachment rate applies whether or not the attachment is also used for other services.

Embarq agrees with many other parties that the broadband rate should apply regardless of whether the attachment is also used for other, "mixed services."[24] As AT&T explained, "the concept of uniformity -- that all pole attachments used to provide broadband Internet access service should be subject to the same rate -- is sensible."[25] It also is unquestionably the only reasonable way to meet the Commission's stated goal of providing "even-handed treatment and incentives for broadband deployment."[26]

Equal treatment of attachments used to offer broadband Internet access service means the attachment rate must apply even if attachments are also used to offer other services.

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[22] Verizon at 6.

[23] NPRM at ¶ 36.

[24] Century Tel at 12-15.

[25] AT&T at 13-14.

[26] NPRM at ¶ 36.

Section 706 does not require the Commission somehow "to separate out those pole attachments that are used to offer broadband Internet access service from those used for other services" when fashioning a unified broadband pole attachment rate.[27] On the contrary, section 706 instructs the Commission to promote broadband deployment by "removing barriers to infrastructure investment" wherever they are found, including in the Commission's own regulations and policies.[28] Any approach other than a unified rate for all attachments used to offer broadband Internet access service would require separating facilities and duplicating attachments. As many ILECs explained,[29] that would serve only to increase costs, discourage investment, and frustrate the goals of Congress and the Commission to promote further expansion of broadband networks, especially in rural America.

D. The Commission's new rate cap should include a rebuttable presumption that all attachments are eligible for the broadband rate.

Embarq agrees with other carriers that the Commission should adopt a "rebuttable presumption" that attachments are subject to the broadband rate.[30] A unified broadband pole attachment rate will often yield lower revenue for electric utilities, so they will have no incentive to apply that rate, particularly when they are uncertain about the services supported by any particular attachment. At the same time, cable companies currently

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[27] NPRM at ¶ 36.

[28] 47 U.S.C. § 157 nt.

[29] *E.g.*, ITTA at 7; USTelecom at 3; AT&T at 12-13.

[30] AT&T at 16; CenturyTel at 12.

enjoying improperly low attachment rates for attachments used for broadband services would have no incentive to identify where they should be subject to the higher rate.

If the Commission is to promote its goals of encouraging broadband deployment and ensuring technological neutrality,[31] the Commission needs to ensure that the uniform rate is actually applied, and in a timely and cost-effective way. Realistically the best way to do that is to provide that all attachments of a cable television system or a provider of telecommunications service shall be entitled to the uniform broadband attachment rate, absent a showing by either the attaching party or the pole owner that the attachment is *not* used to offer broadband Internet access service.

That recommendation is a reasonable one. First, cable companies and ILECs already offer broadband service to the great majority of customers on their networks, so most pole attachments are already being used to offer broadband Internet access service. Comcast offers broadband service to 48 million residences. Comcast, Cox, and Time Warner Cable all offer broadband Internet access service to 99% of addresses in their territories.[32] Charter likewise offers broadband service to 94% of households in its service areas.[33] Nationally, ILECs offer broadband service to the large majority of

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[31] In endorsing a uniform pole attachment rate, the American Legislative Exchange Council noted (at 1) that "[t]echnological neutrality and low, cost-recovery rates are essential to a competitive marketplace and increased deployment of broadband services." It recommended setting all broadband attachment rates at a low level, suggesting the existing cable company attachment rate should be sufficient, absent clear economic data suggesting otherwise."

[32] *See* AT&T at 17 and nn.31, 32.

[33] Press Release: *Charter Reports Third Quarter Financial and Operating Results* (Nov. 8, 2007) at 1.

people in their territories. AT&T and Windstream provide broadband to 80% of customers served by their networks.[34] Despite being chiefly rural, Embarq currently offers broadband to nearly 80% of its potential customers, and it is continuing to expand its broadband network wherever it can be economically justified. Nationally, 97% of U.S. ZIP codes have broadband services available from two or more providers.[35]

Second, without this presumption, either the pole owner or the attacher would have to determine time and time again whether the broadband rate is applicable. That process could be an expensive and needless administrative headache. Pole owners often cannot verify the types of services being provided using a particular attachment, and may not be motivated to do so. Pole attachers would face an even larger headache if they had to demonstrate eligibility on a pole-by-pole basis, especially if the pole owner is uncooperative. A rebuttable presumption would minimize disputes for both parties.

E. The Commission should clarify that ILECs can use existing complaint procedures to challenge unreasonable attachment rates, terms, and conditions.

Section 224(b)(1) requires the Commission to ensure all providers of telecommunications services have access to pole attachments on rates, terms, and conditions that are just and reasonable.[36] Verizon and other commenters explained, however, that the Commission's existing rules fail to make clear that ILECs have the

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[34] AT&T at 17 & n.17.

[35] Indus. Anal. & Technology Div., Wireline Competition Bureau, *High-Speed Services for Internet Access: Subscribership as of Dec. 31, 2006* (Oct. 2007) at Table 15.

[36] 47 U.S.C. § 224(d)(1) provides the Commission guidelines for just and reasonable pole attachment rates.

same rights as all other providers of telecommunications services to be free from unreasonably discriminatory pole attachment rates. Accordingly, the Commission should take this long-overdue opportunity to make clear that as "providers of telecommunications services,"[37] ILECs are entitled to just and reasonable pole attachment rates. By the Act's own definitions, ILECs are "'providers of telecommunications service' for whom the protections of section 224(b) were intended."[38] The use that term, distinct from "telecommunications carrier," in the 1996 Act's amendments to section 224 "is both significant and intentional, given that Congress was making the two sets of changes simultaneously and chose to use two different terms.[39]

Existing rules have been misinterpreted to limit the Commission's ability to remedy unjust and unreasonable discrimination by utility pole owners, by denying ILECs standing (wrongly, in Embarq's view) to bring a complaint. At the same time, state authorities too often have been unwilling or unable to hear these disputes. Consequently, ILECs have been left without any effective recourse when utilities unreasonably raise rates and discriminate against ILECs.[40]

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[37] 47 U.S.C. § 224(a)(4).

[38] NTCA at 2.

[39] The decision of Congress to use the different terms "telecommunications carrier" and "provider of telecommunications service" within section 224 must be followed. *See Clay v. U.S.*, 537 U.S. 522, 528-29 (2003) (noting that "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of particular language in different sections of the statute), quoting *Russello v. U.S.*, 464 U.S. 16, 23 (1983).

[40] *See*, *e.g.*, NTCA at 4-6; CenturyTel at 4-5.

Embarq agrees with many parties[41] that the Commission should clarify that ILECs can use existing complaint processes and procedures to challenge unreasonable pole attachment rates, terms, and conditions. Alternatively, the Commission could adopt ITTA's recommendation and amend rule 1.1404 to state expressly that ILECs may bring complaints of unjust or unreasonable pole attachments.[42] A rule change, frankly, may be unnecessary if the Commission adequately clarifies that the existing complaint rules and procedures also apply to ILEC attachments to utility-owned poles.

III. THE COMMISSION HAS AMPLE STATUTORY AUTHORITY TO ADOPT A UNIFORM RATE CAP FORMULA FOR ATTACHMENTS FOR ALL PROVIDERS OF BROADBAND SERVICES.

A. Section 224(b) gives the Commission broad authority to cap pole attachment rates for all broadband providers.

The United States Telecom Association's petition for rulemaking outlined the statutory foundation for the Commission's authority to regulate the reasonable rates, terms and conditions for ILEC attachments to utility poles.[43] Under section 224(f)(1), a cable telecommunications system or "any telecommunications carrier" is entitled to nondiscriminatory access to a utility's poles, ducts, conduit, or rights of way. Section 224(a)(5), however, expressly excludes ILECs from the definition of "telecommunications carrier." For that reason, the Commission's existing pole

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[41] CenturyTel at 15; Verizon at 10; NTCA at 8.

[42] ITTA at 6-7. *See* 47 C.F.R. §§ 1.1402, 1.1404, and 1.1410 (outlining complaint and remedy processes) and § 1.1409 (setting default rate formula).

[43] NPRM at ¶¶ 23-24; *United States Telecom Association Petition for Rulemaking*, RM-11293 (filed Oct. 11, 2005).

attachment rules are silent about attachments sought by ILECs.[44] As a practical matter, that silence has forced ILECs to negotiate the terms, conditions, and rates for their attachments with utility pole owners, without clear recourse to the Commission if the terms, conditions, or rates are unreasonable.

Utilities and some cable and CLEC competitors tried to argue that "ILECs have no attachment rights" or that Commission regulation of ILEC attachments is "prohibited" by section 224(f)(1).[45] ILECs explained, however, that sections 224(b)(1) and 224(a)(4) give any "provider of telecommunications service" an independent right to pole attachments, and that the "just and reasonable" standard for attachments applies to all telecommunications providers, ILECs among them.[46] The Commission accordingly has ample statutory authority to adopt rules to regulate the reasonable rates, terms, and conditions of pole attachments by ILECs.

The central statutory issue is whether section 224's use of "telecommunications carrier" and "provider of telecommunications service" have different meanings. The statute defines "pole attachment" to include "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned

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[44] *See* 47 C.F.R. §§ 1.1401-1.1418.

[45] American Electric Power, et al. at 3; Alpheus, et al. at 4. *See also* Comcast at 48; Time Warner Cable at 47.

[46] USTelecom at 16. *See also* Qwest at 2-3; AT&T at 27-28; Verizon at 10; CenturyTel at 10-11; ITTA at 3.

or controlled by a utility."[47] The next definition defines "telecommunications carrier" to exclude ILECs.[48]

Had Congress intended to exclude ILEC attachments from any Commission oversight, it would have limited the term "pole attachments" to those made by a cable television system or a "telecommunications carrier." Instead, Congress chose not to use those terms, but used the broader term, "provider of telecommunications service," which includes ILECs. Although section 224(a)(5) may exclude ILECs from the definition of "telecommunications carriers," ILECs unquestionably remain "provider[s] of telecommunications services." Section 224(f)(1) requires the "utility [to] provide a cable television system or *any telecommunications carrier* with nondiscriminatory access to any pole duct, conduit, or right-of-way owned or controlled by it."[49] The statute thus distinguishes between the right to *access* utility-owned poles and the right to just and reasonable rates, terms, and conditions. Whether or not section 224(a)(5) may be understood "to exclude ILECs from rights to *access* poles," once given access, they -- like all "providers of telecommunications service" -- are entitled to "rates, terms, and conditions for that attachment [that are] just and reasonable."[50] If Congress had meant to limit those rights just to "telecommunications carriers" within section 224(a)(5)'s

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[47] 47 U.S.C. § 224(a)(4) (emphasis added).

[48] 47 U.S.C. § 224(a)(5).

[49] 47 U.S.C. § 224(f)(1).

[50] ITTA at 3.

definition, it would not have used a different, broader term -- "provider of telecommunications service" -- in section 224(a)(4).

Many commenters noted that the Supreme Court's *Gulf Power* ruling shows that the Commission has authority under 224(b) to regulate rates, terms, and conditions of pole attachments for ILECs.[51] In that case, the Commission had adopted a rate for pole attachments by cable providers offering both cable television and Internet services, and it had added wireless carriers' attachments to section 224. The Court rejected the 11th Circuit's conclusion that section 224 denies the Commission authority to set any rates for pole attachments beyond those expressly set out in the statute. The Court found that "this conclusion has no foundation in the plain language of 224(a) and (b)."[52]

Though Congress prescribed specific formulas for "just and reasonable" rates for certain attachments by cable television providers and telecommunications carriers, "nothing about the text of [sections] 224(d) and (e), and nothing about the structure of the Act, suggest that these are the exclusive rates allowed."[53] Once any "provider of telecommunications services" -- including an ILEC -- receives access to a pole, then the rates, terms, and conditions must be just and reasonable. The Commission has authority, and the duty, to regulate those rates, terms, and conditions to ensure a level competitive playing field.

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[51] *National Cable & Telecom. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002),.

[52] 534 U.S. *at* 335, *rev'g Gulf Power Co. v. FCC*, 208. F. 3d 1263, 1276, n. 29 (11th Cir. 2000).

[53] 534 U.S. at 335 (citation omitted).

Comcast and Time Warner Cable acknowledged there should be a unified rate for attachments used to offer broadband Internet access, but argued that the Commission's authority to regulate pole attachments excludes those sought by ILECs.[54] Section 224(b)'s prohibition of unreasonable rates, terms, and conditions, however, plainly is broader than the more specific provisions in section 224(d), (e), and (f).[55] In light of *Gulf Power*, the Commission's regulatory authority is not limited to the statutory rates for attachments used for cable television services or CLEC services, but extend to any rates, terms, and conditions that the Commission believes "appropriate to promote other services," including particularly the provision of broadband services.[56] As the Supreme Court explained, sections 224(e) and (f) "work no limitation on" Commission authority under section 224(b) to adopt a unified rate for all attachers, ILECs included.[57] The 1996 amendments to section 224 did not decrease the Commission's jurisdiction. "To the contrary, the amendments' new provisions extend the Act to cover telecommunications."[58]

Some utility commenters wrongly assume that ILECs have no rights to Commission oversight of rates for attachments used to offer broadband Internet Access. The Coalition of Concerned Utilities, for example, argued that ILECs cannot have rights

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[54] *E.g.*, Time Warner Cable at 47

[55] CenturyTel at 10.

[56] AT&T at 22.

[57] 534 U.S. at 337.

[58] 534 U.S. at 336.

to regulated rates if Congress failed to specify the rate formula that the Commission must apply.[59] Congress, however, provided the Commission very broad authority under section 224(b)(1), and broadened the definition of pole attachment precisely to ensure the Commission could prevent unfairness in pole attachment charges.

B. Section 224 directs the Commission to ensure broadband attachment rates are just and reasonable for all broadband competitors.

Many parties also recognized that section 224 gives the Commission authority, and a mandate, to regulate a unified rate for attachments used for broadband Internet access services.[60] *Gulf Power* confirms the Commission has authority to set a distinct rate for pole attachments that support broadband services. Section 224, the Court noted, has formulas for determining "just and reasonable" rates for particular attachments by cable television providers and telecommunications carriers, and therefore the statute signaled that these were not "the exclusive rates allowed."[61]

Beyond section 224, section 706 gives the Commission additional authority "to apply pole attachment rates for use by ILECs in order to promote competition for broadband,"[62] and to encourage additional investment in broadband facilities. The

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[59] Coalition of Concerned Utilities at 63. *See also* Edison Electric Institute at 119.

[60] Section 224(b)(1) provides 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." 47 U.S.C. § 224(b)(1) (emphasis added). *See* Verizon at 6; CenturyTel at 13; USTelecom at 11-16.

[61] 534 U.S. at 336 (citation omitted).

[62] CenturyTel at 11-12.

Supreme Court also held in *Gulf Power* that section 706 "reinforces the Commission's expansive jurisdiction to regulate pole rates."[63]

The Commission should act on its authority to regulate the rates, terms, and conditions of ILEC pole attachments, and it should set a single rate cap for all pole attachments for broadband Internet access services, including ILEC attachments on utility-owned poles. Virtually all commenters recognized that the existing regulatory system creates serious competitive distortions. It is unreasonable that different classes of competitors pay vastly different rates when using attachments for the same purpose, and it is manifestly unfair that ILECs pay a vastly higher rate than other attachers. Qwest also explained, "different rates for separate categories of providers makes increasingly less sense as cable providers and telecommunications service providers are increasingly using their attachments to provide similarly functioning service bundles."[64]

No commenter could dispute that these disparities in rate grossly distort the competitive marketplace.[65] The fairest, simplest, and most reasonable way to address these rate disparities is to apply a unified rate for all pole attachments used to offer broadband Internet access services, whether the attacher is a cable television system, a CLEC, or an ILEC. The wireless industry shared this view. T-Mobile, for example, cited the need for the "certainty and even-handedness" of a unified rate for all broadband

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[63] 534 U.S. at 339.

[64] Qwest at 5.

[65] Although some cable commenters claimed that joint use agreements give ILEC attachers greater rights that cable companies, they could not deny, much less justify, the drastic difference in rate faced by ILEC attachers. *E.g.,* Comcast at 24; NTCA at iii; Time Warner Cable at 47.

attachments.[66] The Coalition of Concerned Utilities agreed that "fairness requires no less" than a unified rate.

The Edison Electric Institute and other utilities agreed that broadband providers should pay the same rate for attachments, but nevertheless argued that the Commission cannot apply a unified rate to ILEC attachments on utility-owned poles without violating "long-standing [Commission] precedent" and "Commission practice." [67] In effect, they argued, because the Commission has not acted until now to address the unfairness in the rates charged ILECs for broadband attachments, it can never do so. In fact, the Commission has previously acknowledged its authority and its obligation under section 224(b) and 224(a)(4) to ensure that pole attachment rates are just and reasonable for cable companies providing Internet service and for wireless carriers providing telecommunications service. Again, *Gulf Power* confirmed the Commission's broad authority under section 224. Certainly, the Commission has never previously found that it *lacks* authority to regulate rates, terms, and conditions for ILEC broadband attachments on utility-owned poles for ILECs. There is no precedent to preclude the Commission from including ILECs within a unified broadband attachment formula applicable to all "providers of telecommunications services," and statutory and Commission policy both dictate that it should do so.

Some commenters suggested that the Commission should adopt a standardized rate based on the amount of space occupied on a pole. That approach, however, appears

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[66] T-Mobile at 6.

[67] Edison Electric Institute at 9, 121; American Electric Power, et al. at 3.

inconsistent with the existing statutory rate regime under section 224, and it would be very impractical for administrative reasons. Moving to a standardized rate for attachments used to offer broadband service, including attachments by ILECs, would remain consistent with the existing framework, and would be consistent with the Commission's existing statutory authority. In today's converging market, it would ensure a more competitively neutral playing field for all providers of broadband services, and it would promote broadband investment in rural areas, where ILECs face artificially high attachment rates.

IV. OTHER FEDERAL RULES GOVERNING TERMS AND CONDITIONS OF ATTACHMENT ACCESS ARE UNWARRANTED.

Most parties opposed Fibertech's calls for new rules and regulations governing the conditions of access to poles.[68] Some CLECs supported an array of such new "national rules."[69] In the past, however, the Commission has rejected the same type of more detailed rules that Fibertech and others have proposed, finding that existing Commission guidelines are sufficient to ensure attaching parties timely and non-discriminatory access to poles.[70] The Commission realized that "there are simply too

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[68] *Petition for Rulemaking of Fibertech Networks*, Docket No. RM-11303 (filed Dec. 7, 2005).

[69] Time Warner Telecom, et al. at 14. *See also* Cavalier at 2; Alpheus at 2.

[70] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and order, 11 FCC Rcd 15499 at ¶ 1143 (1996) (subsequent history omitted).

many variables to permit any other approach with respect to access to the millions of utility poles and untold miles of conduit in the nation."[71]

Pole owners necessarily must evaluate the circumstances affecting any particular attachment request, including existing regulations, standards, and safety requirements. Embarq agrees with ILECs and utilities that the Commission should deny Fibertech's requests for specific rules. Given safety concerns, it would be unreasonable to categorically prohibit pole owners from requiring attachers to submit applications before installing drops, from allowing pole owners to inspect attachers' work, and from insisting that attachers be licensed. For safety and engineering reasons, it would be unreasonable to require pole owners to always permit extension arms or to force ILECs to share building entry conduit if there is no ability to separate the facilities. It would be unreasonable to require pole owners always to allow third party contractors to conduct make-ready work. It would be unreasonable to shorten the existing application processing timeframe from 45 to 30 days. The Commission's existing rules and guidelines reflect an appropriate balancing of interests in timely access and in safe and reliable installations. Embarq agrees with Qwest and other parties that " promulgating additional rules on the specific, detailed issues raised by Fibertech is unnecessary and runs counter to the Commission's existing policy that these issues are best addressed on a case-by-case basis through negotiation between pole or conduit owner and attacher."[72]

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[71] *Id.* at ¶ 1124.

[72] Qwest at 6-7.

Embarq acknowledges the safety issues raised by some electric utilities. As a pole owner itself, Embarq shares these concerns. Nevertheless, like Florida Power & Light and the Edison Electric Institute,[73] Embarq does not believe the Commission should adopt new safety rules for attachments. There is no shortage of safety guidelines or requirements governing pole attachments. These include policies and rules issued by pole owners themselves, by state and local authorities, by the Occupational Safety Health Administration, and by the Federal Energy Regulatory Commission, among others. Pole attachments and use of conduit are also governed by quite specific industry codes and standards, notably the National Electric Safety Code.

The problem all pole owners face is not a lack of safety rules or standards, but the occasional failure by some attaching parties to comply with those standards. The examples provided by the utilities all present violations of existing rules, particularly NESC standards. Adopting new Commission rules will do little to change such noncompliance. Embarq understands their frustration, but all pole owners must monitor their poles and conduit and address substandard or unauthorized attachments or installations on a case-by-case basis. Adding a further layer of Commission regulations would do little to promote safety or to improve compliance with existing standards.

V. CONCLUSION

Embarq applauds the NPRM's tentative conclusion that there should be a unified rate for pole attachments used to offer broadband services. The Commission needs to act

[73] Florida Power & Light, Tampa Electric, and Progress Energy Florida at 2; Edison Electric Institute and United Telecom Council at 7-8.

to ensure all providers of broadband Internet access service qualify for the same pole attachment rate cap for attachments used for broadband Internet access service. The Commission has existing statutory authority to regulate pole attachments for all providers of telecommunications services, including ILECs. It should exercise that authority to benefit competition and to promote ILEC broadband investment in rural America, where infrastructure investment is otherwise difficult to justify.

The Commission does not need to issue other detailed rules governing other terms and conditions of pole attachments. The Commission has found such specific rules are unnecessary, and new rules would do little to improve conditions of pole attachments. Inevitably, such details must be addressed through negotiation and, where necessary, through the Commission's complaint process for pole attachments.

Respectfully submitted,

EMBARQ CORPORATION

By:_____

David C. Bartlett
Jeffrey S. Lanning
John E. Benedict
701 Pennsylvania Ave., NW, Suite 820
Washington, DC 20004
(202) 393-1516

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