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EX PARTE

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC, 20554

RE: *Implementation of Section 224 of the Act; Amendment of the Commission's Rules Governing Pole Attachments, WC Docket No. 07-245; RM-11303; RM-11293*

Dear Ms. Dortch:

The National Cable & Telecommunications Association (NCTA) submits this letter in response to statements by the United States Telecom Association (USTelecom) alleging that the current pole attachment regime is unfair because its members pay substantially more than cable operators for equivalent pole attachment rights.¹ Not only does USTelecom's analysis fail to acknowledge significant differences in the attachment rights and obligations of incumbent local exchange carriers (ILECs) and cable operators, but its figures comparing the pole attachment fees paid by ILECs and cable operators are substantially inaccurate.

The inaccuracies in USTelecom's filing are a symptom of a larger infirmity – namely its myopic argument that the annual rental fees paid for attachments should be equivalent, regardless of the significant differences that exist between cable operators and ILECs. Where parties are similarly situated, NCTA agrees that, as a policy matter, equivalent regulatory treatment is appropriate. Unfortunately, USTelecom's arguments consistently ignore the very real differences between ILECs (which typically use 2-3 feet of pole space, pay no make-ready fees, and have comprehensive rights as joint owners) and cable operators (which typically use one foot of pole space, pay substantial make-ready fees, and have limited rights as licensees).

¹ See Comments of USTelecom at 3 (filed Mar. 7, 2008) (USTelecom Comments); Reply Comments of USTelecom at 14 (filed Apr. 22, 2008); Letter from Glenn Reynolds, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245 (filed Sept. 12, 2008); Letter from Glenn Reynolds, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-245 (filed July 24, 2008).

Notwithstanding the ILECs' willful blindness to these differences, NCTA has proposed a solution that not only maintains the clear benefits of the cable rate formula, but also fully addresses USTelecom's concern that like parties be treated similarly. This point bears emphasis. NCTA has explained at length why the existing cable attachment regime is the best approach for setting attachment rates for all providers.² To promote genuine competitive parity, as well as broadband deployment and adoption, NCTA has proposed that ILECs be brought under the cable attachment regime by permitting them to "opt in" to existing agreements between cable operators and electric companies.³ Such an approach would give ILECs the option to attach to poles on exactly the same rates, terms, and conditions that are available to cable operators. NCTA's proposal is a complete solution to the concerns identified by USTelecom, and neither USTelecom nor any of its members have offered any evidence suggesting otherwise. Accordingly, the Commission should adopt NCTA's proposal.

Turning to USTelecom's filings, its July 24 *ex parte* letter asserts that ILECs use from 6-13% of usable space on a typical 40 foot pole, but pay 26% of pole costs, while cable operators use 6% of usable space and pay 6% of the costs.⁴ As a preliminary matter, while USTelecom has made unverified assertions about the rates that ILECs pay, it has provided no actual data to support those assertions. Neither USTelecom, nor any of its ILEC members, including AT&T and Verizon, have disclosed the details of their existing contracts with electric companies in this docket. The Commission therefore has been deprived of any way to determine the true extent of any differences between ILEC payments and the payments made by cable operators and CLECs. The Commission cannot simply take it on faith that USTelecom's summary figures are accurate.

In addition to the complete lack of supporting data, there appear to be at least three fatal flaws in USTelecom's analysis. First, it appears that USTelecom grossly overstates the amount paid by ILECs. The USTelecom *ex parte* asserts that ILECs pay an average of 26% of the cost of a pole. No support is provided for that figure, nor is there any explanation of how it relates to the assertion in USTelecom's earlier comments that ILECs pay an average of \$26.00 in pole rents to power companies.⁵ That \$26.00 figure appears to be totally unreliable because USTelecom has commingled rates charged for telephone companies putting *multiple* attachments

² Comments of the National Cable & Telecommunications Association at 8-22 (filed March 7, 2008) (NCTA Comments); Reply Comments of the National Cable & Telecommunications Association at 8-17 (filed Apr. 22, 2008) (NCTA Reply Comments). That approach has been endorsed by numerous parties in this proceeding, including consumer advocates. *See* NASUCA Reply Comments at 5 (The cable rate formula "should be used for all pole attachments, regardless of the exact service provided over the attachment, and regardless of the identity of the attacher."); *id.* ("Equally important, the Commission must not increase the rate paid by broadband service providers because this would be contrary to the nation's commitment to achieving universal broadband deployment and adoption."). Moreover, as NCTA has explained, this approach already has been accepted by almost every state that has considered the issue. *See* NCTA Comments, Appendix A.

³ NCTA Reply Comments at 21-23. NCTA also proposed that the Commission forbear from applying the telecommunications rate formula to CLECs and apply the cable rate formula instead. *Id.* at 18-20.

⁴ *See* Letter from Glenn Reynolds, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-245 (filed July 24, 2008).

⁵ USTelecom Comments at 7-8.

into 2-3 feet of space with rates charged by the foot.⁶ Put differently, USTelecom has failed to make any adjustment reflecting the fact that ILECs typically use 2-3 feet of space on a pole while cable operators and CLECs use only 1 foot of space for *one* attachment. A comparison of payments made by different industry segments that fails to reflect that difference in usage is essentially worthless.

Similarly, it appears that USTelecom has not made any adjustment to reflect the fact that ILECs generally do not pay to attach to every electric company pole.⁷ Instead, under many joint use and joint ownership agreements, the ILEC only pays for poles that are “out of balance” under the terms of the agreement. It should be obvious that considering only the poles on which the ILEC pays and ignoring the ones to which it attaches for free will produce meaningless results. But that appears to be exactly what USTelecom has submitted to the Commission.

Second, while USTelecom’s *ex parte* correctly notes that cable operators pay annual fees that cover a percentage of pole costs equal to the percent of usable space that their attachments occupy,⁸ USTelecom’s earlier comments in this docket grossly understate the payments cable operators make for pole attachments. USTelecom reports that cable pays about \$3.36 in pole rents to telephone companies,⁹ then says that it need not bother checking on what cable pays to electric utilities.¹⁰ This ignores hundreds of millions of dollars in rents paid by the cable industry. In Pennsylvania, for example, cable pays \$5 in rent to telephone companies, then pays from \$5.50 to \$14.65 more rent to electric companies *for the same cable line on the same pole*. This double payment arises under joint ownership agreements that the telephone and power companies have worked out among themselves but have kept secret from the FCC. As another example, in Arkansas, Kansas, Missouri, Oklahoma, and Texas, AT&T charges pole rent of only a few dollars per year – because the cost of the poles already has been recovered to the point

⁶ “Average rates paid by ILECs reflect pole weighted average amounts paid to investor owned utilities. These weighted averages include rates paid on a per pole basis, per attachment basis and a combination of each. Average rates for cable and CLEC are also weighted by number of poles and were derived from rates charged by ILECs for attachment to their respective poles.” USTelecom Comments at 8 n. 15.

⁷ See, e.g., Letter from Eric B. Langley, Balch & Bingham, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed July 24, 2008) (“**ILECs pay NOTHING in ‘rental’ when they are in parity of ownership**”) (emphasis in original); Comcast Comments, Exhibit 1, Report of Patricia Kravtin at 65 (Kravtin Report).

⁸ In this regard, and as NCTA explained in its comments, it is unfortunate that the *Notice* in this proceeding mischaracterized the cable rate formula by asserting that it does not include an allocation of the cost of unusable space. See NCTA Comments at 9. That statement is simply not true, as the Commission previously has recognized, and the error should be corrected in any future order that the Commission adopts in this docket.

⁹ USTelecom Comments at 8.

¹⁰ “Although there may be some variation in the costs of poles owned by utilities and those owned by ILECs, rates charged by ILECs and electric utilities to cable and CLEC providers are governed by the same Commission pole attachment regulations. Thus, they should provide a reasonable approximation of the rates paid by cable providers and CLECs to electric utilities.” USTelecom Comments at 7 n. 12.

where the remaining investment is *\$250 million below zero*.¹¹ By comparison, the electric utilities in these states are charging cable operators anywhere from \$7 to \$26.77. The “studies” pointed to in USTelecom’s footnotes report rents at twice the level claimed by USTelecom¹² and extensive expert affidavits in evidence show that average rents are much higher than the amount asserted by USTelecom.¹³

Finally, USTelecom’s analysis includes only annual rental fees and makes no provision for make-ready payments. The Commission has always understood that the appropriate annual rental fee is inherently related to the make-ready obligation imposed on an attaching party.¹⁴ As the record makes abundantly clear, cable operators and CLECs make substantial make-ready payments under the license agreements they have with pole owners.¹⁵ In contrast, ILECs typically do not make such payments under the joint use and joint ownership agreements they have with electric companies.¹⁶ Given this disparity in make-ready payments, a simplistic comparison of annual rental fees is wholly inadequate to demonstrate the alleged harm to ILECs under the current regime.

The net effect of USTelecom’s failure to make these three adjustments is significant. As already documented in the record, even where the nominal rate paid by an ILEC is 10 times higher than the cable rate, the actual cost per foot paid by two companies may be almost the

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State	Gross Investment (millions)	Accumulated Depreciation (millions)	Over-Recovery (millions)
Arkansas	24.2	29.4	5.2
Kansas	18.4	29.4	11.0
Missouri	63.6	101.2	37.5
Oklahoma	31.9	63.6	31.7
Texas	267.6	436.5	168.9
Total	405.7	660.0	254.3

See FCC Report 43-01, ARMIS Annual Summary Report, TABLE III - POLE AND CONDUIT RENTAL CALCULATION INFORMATION, 2007, available at <http://fjallfoss.fcc.gov/eafs7/paper/43-01/PaperReport01.cfm>.

¹² For example, the EEI slide deck reports an average pole rent of \$6.63, twice the figure claimed by USTelecom.

¹³ See, e.g., NCTA Comments, Appendix B, Declaration of Michael Pelcovits at 9 (calculating average pole rent of \$3.68 for ILEC-owned poles and \$6.43 for electric-owned poles, with a weighted average of \$5.25 per pole).

¹⁴ *Implementation of Section 703 of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12109, ¶ 8 n.37 (2001); *Amendment of the Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CC Docket No. 86-212, Report and Order, 2 FCC Rcd 4387, 4397, ¶ 76 (1984).

¹⁵ Kravtin Report at 62-63.

¹⁶ *Id.* at 63.

same.¹⁷ The Commission is obligated to acknowledge and account for these facts, and not gloss over them, in any order revising its pole attachment rules.

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USTelecom's filings present an incomplete and ultimately misleading comparison of the differences between cable and ILEC pole attachment payments. But even taking USTelecom's assertions at face value, NCTA has proposed an approach that would completely address USTelecom's concerns by enabling ILECs and other telecommunications carriers to attach to poles on exactly the same rates, terms, and conditions as cable operators. If the Commission is serious about promoting regulatory parity and broadband deployment and adoption, it should take steps to implement NCTA's proposal.

Respectfully submitted,

/s/ Daniel L. Brenner

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¹⁷ *Id.* at 68.