October 27, 2008

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

Re: In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Practices
Governing Pole Attachments, WC Dkt. No. 07-245.

Dear Ms. Dortch:

USTelecom is pleased to place in the record a proposal to fix the current pole attachment regime, which skews competition by permitting different providers of broadband services to pay different pole attachment rates.

As recognized in the Commission's Notice of Proposed Rulemaking,[1] the current scheme is a remnant of the days when cable companies sold cable service, and telephone companies sold telephone service—and competition between the two was non-existent. In that environment, it was perhaps not so important to consumer welfare that the different companies paid vastly different rates for use of third-party owned poles. In today's marketplace, however, telephone companies, cable companies and wireless companies are engaged in customer-by-customer competition to provide broadband-based packages of voice, video and Internet access services. As a result, it is imperative that the Commission move forward with this proceeding in order to level the regulatory playing field for the rates paid by broadband competitors to attach their facilities to third-party owned poles. In doing so, however, the Commission must also remain mindful of the disproportionate impact that pole attachment costs have on rural rates and the deployment of broadband to rural, high-cost areas of the country. Because longer loops are necessary to reach rural customers, there are typically more pole attachments per end-user. Additionally, these poles often have fewer attachers. The Commission must be acutely aware that any proposal or formula that results in higher attachment rates in less densely populated areas will have the effect of suppressing broadband deployment to rural consumers.

[1] Notice of Proposed Rulemaking, *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 22 FCC Rcd 20195 (2008) (*Pole Attachment NPRM*).

USTelecom Parity Rate Approach

The premise underlying the Commission's *Pole Attachment NPRM* is indisputable—rate parity for pole attachments among competing providers of broadband services is essential to ensuring that consumers receive all the benefits of competition in this critical sector of the economy. Indeed, this Commission assertion mostly has gone unchallenged by commenters. Accordingly, USTelecom's proposal ensures that: (i) competing providers of broadband services—which may include cable, competitive local exchange carriers (CLECs), incumbent local exchange carriers (ILECs), Electric Utility or wireless—pay the same rate for attaching their facilities to a particular pole; and (ii) pole attachments rates for facilities used to provide broadband services do not vary based on the nature of the attacher or some other historic anomaly.[2]

This proposal is also consistent with the tentative conclusion in the *Pole Attachment NPRM* that the broadband pole attachment rate should fall somewhere between the existing cable and telecom rates.[3] While the Commission, state commissions and appellate courts repeatedly have upheld the cable rate as being legally compensatory to pole owners, the Commission's tentative conclusion recognized that universally applying that rate would likely reduce overall attachment revenues for pole owners, particularly electric utilities. As owners of poles themselves, USTelecom's member companies fully support the Commission's critical goal of ensuring regulatory parity for competing providers of broadband services, while maintaining fair overall attachment revenues and investment incentives for pole owners.

A. USTelecom Proposal to Establish Rate Parity For Broadband Attachment

USTelecom offers an approach that seeks to balance rate parity for broadband pole attachments and fairness to pole owners, while also trying to achieve administrative simplicity to the extent reasonably possible. While USTelecom recognizes that there are many combinations of pole size and attachment usage in the field, the record in this proceeding demonstrates a fairly narrow spectrum of inputs and, most importantly, outcomes, that should guide the establishment of parity rates for broadband attachers. With that in mind, USTelecom believes that the Commission can establish a broadband pole attachment rate based on an appropriate percentage of pole costs—rather than requiring pole-by-pole studies by both pole owners and attachers. While this approach may result in pole owners recovering a higher percentage of their costs from attachers on certain poles, both the per-pole attacher rate and total compensation amounts for all poles would be assured to fall within legally permitted levels.[4]

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[2] USTelecom notes that two of its member companies, AT&T and Verizon, recently filed their own proposal to address the disparities in pole attachment rates.

[3] *Pole Attachment NPRM*, ¶3.

[4] The Commission could also establish a process to address the very rare case (if any) where an attacher consistently requests an amount of space outside normal parameters in order to ensure adequate compensation to pole owners consistent with cost causation principles.

Although there is variation in pole sizes across the country, the record indicates that the average pole height is 37.5 feet.[5] This is the average of 35 foot and 40 foot poles, which the Commission has recognized are common pole heights for the purposes at issue here.[6] The record also demonstrates that Electric Utilities typically use an average of 10½ feet of pole space on such poles—6 to 8 feet for attachments and 40 inches for safety space.[7] This equals approximately 78% of the 13.5feet of usable space on a 37.5 foot pole. Thus, for purposes of establishing an appropriate parity rate for broadband attachers, our approach looks to recover the remaining 22% of pole costs, on average, from broadband attachers.

The record further demonstrates that, on average, there are somewhere between two and four third-party (that is, non-pole owner) attachers on poles.[8] Telecommunications and cable

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[5] *See Florida Power and Light Reply Comments, Second Declaration of Thomas J. Kennedy, P.E.*,¶8 (stating that a normal joint use pole "is either 35 or 40 feet tall."); *NCTA Comments, Declaration of Dr. Michael D. Pelcovits*, ¶20 (referring to a presumed 37.5' pole height); *Comcast Comments*, ¶49 (referencing the 37.5' pole presumed by the Commission.); *AT&T Comments, Declaration of Veronica Mahanger Macphee*, p. 19 (stating that ILEC poles are "typically shorter than 40 feet.") (*Macphee Declaration*); *Verizon Reply Comments*, p. 9 (stating that in "Verizon's experience, the average height of incumbent-LEC-owned poles is only 35 feet tall, shorter than the current presumed height of 37.5 feet." *See also*, Analysis of Pole Attachment Rate Issues in Tennessee, Tennessee Advisory Commission on Intergovernmental Relations, p. 48 (referencing the comments of the Tennessee Municipal Electric Power Association which reference a "hypothetical 37.5 foot pole.") (available at: http://www.tennessee.gov/tacir/PDF_FILES/Other_Issues/pole%20attachment%20rate%20issues.pdf) (visited August 28, 2008) (*Tennessee Report*); Utah Admin. Code R746-345-5(A) (identifying a rebuttable presumption of 37.5' for average utility pole height).

[6] While electric utilities have built poles larger than 40 feet, these larger poles are rarely if ever needed to accommodate telco or cable attachers—and particularly not broadband attachments which tend to need less space than traditional attachments. Accordingly, the costs assigned to these attachers should be limited to those needed to construct and maintain a 40 foot pole. *See e.g.* Order, *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments, Implementation of Section 703(e) of the Telecommunications Act of 1996*, 16 FCC Rcd 12103, ¶48 (2001) (concluding that there was no "persuasive evidence or arguments" presented that challenged the Commission's long-standing presumptions regarding a 37.5 foot pole height). *See also*, AT&T Comments, p. 20.

[7] *See e.g., Reply Comments of Alabama Power, Georgia Power, Gulf Power and Mississippi Power*, p. 9 (stating that the standard space allocation for Alabama Power on a 40 foot pole is 8 feet); *Comments of Ameren Services Company and Virginia Electric and Power Company*, p. 25 (identifying a range of approximately 4.5 feet to 8 feet for electric utility attachments); Comments of Coalition of Concerned Utilities, p. 50 (identifying an allocation of up to 8 feet for electric utility attachments); *AT&T Comments, Declaration of Veronica Mahanger Macphee*, ¶13 (stating that the electric utility pole space utilization "has increased from 4 feet in the 1970s, to anywhere from 8 to 12 feet."); *Tennessee Report*, p. 49 identifying 7.18 feet of space used by the electric utility (not including safety space); *Reply Comments of the Alabama Cable Telecommunications Association, et. al*, p. 8 (stating that "the power company fully occupies the top 7 feet (or much more) of pole space."). As the Commission has found in previous proceedings, the safety space is appropriately assigned to the Electric Utility. *See e.g.*, Order on Reconsideration, *In the Matter of Implementation of Section 703(E) of the Telecommunications Act of 1996*, 16 FCC Rcd. 12103, ¶51 (2001); Memorandum Opinion and Second Report and Order, *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C. 2d (May 23, 1979).

[8] For purposes of this letter, we use the term third-party attacher to mean any attacher other than the pole owner.

interests suggest the average is three or four attachers[9]; while Electric Utilities assert the average is closer to two.[10] Electric Utilities also contend that there are an additional 30% or more of attachments are unauthorized, and for which they are not currently being paid. [11]

Under the current pole attachment formula applied to CLECs, four third-party attachers are presumed in urban areas, while two third-party attachers are presumed in rural areas. To avoid the line drawing exercise of distinguishing "urban" areas from "rural" areas and to establish an administratively workable approach, USTelecom recommends that the Commission divide the remaining 22% of pole costs based upon a fixed, non-rebuttable average of two attachers[12]. This average is conservative, fully supported by the record, and is more favorable to pole owners, as compared to the current assumptions of four third-party attachers in urban areas and two in rural areas under the current CLEC pole attachment formula.

Accordingly, under our proposal, each broadband attacher would pay 11% of the costs of the pole to the pole owner, regardless of the actual number of attachers on a particular pole or the actual amount of space each attacher uses on that pole. This result achieves rate parity for broadband providers, results in a reasonably compensable broadband attachment rate for pole

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[9] *AT&T Comments*, p. 19 (stating that an assumption of four attachers "better reflects actual conditions of pole usage."); *Verizon Comments*, p. 9 (identifying four attachers per pole as the most acceptable and supportable presumption); *see also*, *Ameren Comments*, p. 25 (stating that its "most common circumstance is that the pole is occupied by the electric utility, an ILEC joint user, and two linear attaching entities, usually a cable company and a CLEC.").

[10] *See Comments of Edison Electric Institute* (*EEI Comments*), p. 46 (reporting "an average of fewer than three attaching entities per pole in both rural and urban areas."); *Comments of Coalition of Concerned Utilities*, p. 15 (identifying companies with two or more attachers per pole. The Coalition of Concerned Utilities inexplicably includes poles with zero attachers in its calculations for attaching entities per pole. When their data is corrected to include only those poles with third-party attachers, it demonstrates that almost 75% of their poles have two or more additional attachers, and an overall average of 1.87 third-party (*i.e.*, non-utility) attachers per pole.); *Comments of American Electric Power Service Corporation*, *et. al* (*AEP Comments*), pp. 21 – 22 (identifying an average of 2.37 through 2.98 attachers per pole (including the utility)); *But see Ameren Comments*, p. 25 (stating that its "most common circumstance is that the pole is occupied by the electric utility, an ILEC joint user, and two linear attaching entities, usually a cable company and a CLEC.").

[11] *See e.g.*, *Comments of Coalition of Concerned Utilities*, p. 74 (citing audits by one investor owned utility that identified unauthorized attachments rates of 29% for telephone attachments and 33% for cable attachments); *EEI Comments*, p. 34 (citing a utility's audit that concluded 34% of cable attachments were unauthorized; *AEP Comments*, et. al, pp. 10 - 18 (referencing unauthorized attachment rates for several investor owned utilities. Duke Energy reported unauthorized attachment rates up to 31% (*AEP Comments*, p. 13), and PPL Electric Utilities reported unauthorized attachment rates as high as high as 49.6% (*AEP Comments*, p. 15). PPL Electric Utilities, in particular, found that 57.1% of all cable attachments, and 30% of all CLEC attachments made during the period 2002-2006 were unauthorized (*AEP Comments*, p. 14)). As discussed below, we encourage the Commission to strengthen its enforcement mechanisms to reduce the number of unauthorized attachers. This will have the effect of increasing the average number of attachers per pole, as well as further ensure parity among competing providers of broadband services.

[12] To be clear, we are not proposing that Electric Utilities necessarily pay a fixed percentage of pole costs when they attach non-broadband facilities to ILEC-owned poles, but rather that this percentage be used only in determining how much of Electric Utility-owned pole costs should be fairly recovered from third-party attachers.

owners, and avoids many of the administrative problems inherent under the current pole attachment system.

As with most efforts to achieve rate parity in an administratively workable manner, there is some trade-off in precision—that is, not every pole owner will receive precisely the same level of compensation as would be the case if it conducted an exhaustive survey of the space and attachment characteristics of every pole attachment on every utility pole. However, charging a broadband pole attachment rate that is equal to 11% of the costs of the pole reflects a reasonable compromise between the advocacy positions of some pole owners and attachers, and will ensure, on average, that pole owners are adequately compensated for the use of their facilities. Importantly, this 11% rate is higher than the rate set by many state commissions that regulate pole attachment rates,[13] as well as the current cable rate which has been consistently upheld by courts as being legally compensatory.[14] Indeed, it is at the high end of the Commission's tentative conclusion that the parity rate for broadband attachments should be somewhere between the existing cable and telecom rates.

In addition to providing parity among each of the broadband competitors attaching to the pole, this approach creates a "carrot" for pole owners to identify those attachers that are trying to skirt the rules by allowing them to keep all of the revenue from each additional attacher. As noted above, the electric utilities have complained about large numbers of unauthorized attachments. This is an important parity concern because broadband providers that are not paying for their use of a utility pole are enjoying an unfair competitive advantage over those competitors that are paying. Under other approaches, there is little incentive for pole owners to identify these additional attachers because all or part of the attachment revenue they would receive would be offset by lower payments by existing "authorized" attachers.

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[13] *See e.g.*, Public Utilities Commission State of California, Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service, Decision 98-10-058, p. 55 (1998) (stating that a 7.4% cost allocation for cable or telecommunications attachers "results in a fair cost apportionment in deriving attachment rates, for either cable or telecommunications services."); State of New York Public Service Commission, *Order Directing Utilities To Cancel Tariffs*, Case 01-E-0026, et al., p. 5 (January 15, 2002) (concluding that New York State's continued use of the cable rate – which allocates approximately 7.4% of the costs -- was "just and reasonable."); Ill. Admin. Code Title 83, §315-31.520 (2002) (establishing a cost allocation for cable and telecommunications providers of approximately 7%); Michigan Public Service Commission, Opinion and Order, *In the Matter of the Application of Consumers Power Company for Authority to Modify Tariffs Governing Attachments to Poles*, Case No. U-10741,p . 27 (concluding that a cost allocation factor of 6.49% for attaching entities was reasonable.).

[14] *NCTA v. Gulf Power*, 534 U.S. 327 (2002) (affirming FCC decision to apply the cable rate formula to attachments used by a cable operator to provide broadband services); *FCC v. Florida Power*, 480 U.S. 245 (1987) (finding that FCC regulation of pole attachment rates is not an unconstitutional taking of property and that the cable rate formula is not confiscatory); *Alabama Power v. FCC*, 311 F.3d 1357 (11th Cir. 2002), cert. denied, 124 S.Ct. 50 (2003) (affirming FCC's decision that utility's rates were unreasonable and that the cable rate formula provides just compensation and is not an unconstitutional taking of property); *Southern Co. Services v. FCC*, 313 F.3d 574 (D.C. Cir. 2002) (affirming FCC's implementation of changes to Section 224 that were adopted as part of the Telecommunications Act of 1996); *Texas Utilities Electric Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993) (affirming FCC's decision to apply cable rate formula to non-video attachments); *Monongahela Power v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981) (affirming FCC's original rules implementing the cable rate formula contained in Section 224(d)).

Indeed, as a number of commenters in this proceeding have pointed out, the current formulas provide little or no incentive for pole owners to facilitate new attachments since additional attachments will not lead to a net increase in pole attachment revenue.[15] USTelecom's proposed approach has the additional benefit of creating an incentive for timely responsiveness by pole owners to requests for new attachments—namely, additional revenue.

At the same time, this proposal insures that pole attachment rates will not deter broadband deployment in those unserved or underserved areas of the country. Under any approach that seeks to divide costs evenly among broadband attachers, undue hardship will be imposed in areas where there is only a single broadband attacher on the pole. As the Commission is acutely aware, rural service providers are working to deploy broadband in areas where the costs of such deployment already make it difficult to offer service economically. Pole attacher rates can disproportionately affect the cost of delivering broadband in such areas because the typically longer loops in rural areas often require more pole attachments per end user. Accordingly, it is critical that the Commission not adopt rules in this proceeding that might actually significantly *increase* the pole attachment costs in unserved or underserved areas, especially where wireline broadband competition is still developing. This is the identical situation about which the Commission was concerned in its last review of pole attachment policies when it determined that cable broadband providers should continue to pay under the "cable formula" pursuant to the just and reasonable provisions of Section 224(b)(1).[16]

In short, while USTelecom recognizes that there is variation in pole heights, space usage, and number of attachers, those variations tend to move in the same direction such that the resulting percentages fall within a reasonably discreet range.[17] Accordingly, we believe that the administrative simplicity for all parties involved of having the Commission establish a fixed percentage of costs to be paid by each broadband pole attacher far outweighs the burden of establishing the precise elements for each pole or groups of poles. It is particularly true for third-party attachers, as they are typically not in possession of any of this information, absent undertaking expensive pole by pole surveys.[18]

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[15] *See, e.g.*, Ex parte letter from Sunesys, LLC (July 8, 2008) ("utilities have no incentive to act promptly on pole attachment requests.").

[16] Report and Order, *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777 (1998). *Nat'l Cable & Telecommunications Ass'n v. Gulf Power*, 434 U.S. 327 (2002).

[17] For example, if you applied this formula to the 35 and 40 foot poles separately, you would end up in the same ballpark. On a 35 foot pole, if you assume the ELCO uses the minimum 6 feet plus safety space, you end up with 9.5 feet out of 11.5 feet of usable space, or approximately 83% of pole costs allocated to the pole owner. On a 40 foot pole, if you assume the Electric Utility uses the maximum 8 feet plus safety space, pole costs allocated to the ELCO pole owner would equal 11.5 feet out of 16 feet of usable space, or approximately 72% of pole costs. Moreover, a 40 foot pole has usable space for more third-party broadband attachers.

[18] We note that the other basic input to this process is pole costs, which likewise are recorded by the pole owners.

B. Better Enforcement for Unauthorized Attachments

As noted above, one of the priorities of the Electric Utility industry in this proceeding has been to urge the Commission to adopt stronger measures to address and discourage unauthorized attachments. Some Electric Utility commenters in this proceeding have indicated that samplings of their poles have shown that 30% or more attachments are unauthorized.[19] As the electric utilities correctly point out, unauthorized attachments can create safety concerns for pole workers. Additionally, unauthorized attachments are a competitive issue because unauthorized attachers are not paying their fair share of pole costs, giving them a competitive advantage over those attachers that are paying. More aggressive enforcement of the rules in this area would therefore improve safety and reinforce the Commission's commitment to parity among broadband competitors, while simultaneously ensuring that pole owners are appropriately compensated for the use of their poles.

For these reasons, we support the concept of stronger enforcement that has been a cornerstone of the Electric Utilities' advocacy in this proceeding. At the same time, however, it is essential that such enforcement measures not be subject to abuse by the pole owner. In particular, harshly punitive penalties that can be assessed by the pole owner without an appropriate adjudication process would be inappropriate. The Commission must make sure that any such deterrence tools are not subject to abuse by the pole owner.

Where agreements exist between the pole owner and the attacher spelling out procedures required before establishing new pole attachments, the terms of such agreements can establish any penalties for failure to follow those procedures. To the extent that Electric Utilities believe that Commission precedent prohibits any such penalties beyond back-payment, the Commission should allow them to be included in contracts so long as they are reasonably proportionate to the violation. In cases where contracts exist between the parties, unauthorized attachments are much more likely to be inadvertent, and any penalties should reflect that fact.

The more egregious and safety-impacting cases are those where attachments are made to poles in the absence of any agreement between the parties. The Commission should establish significant penalties in these cases where there is a showing of willful or repeated instances of unauthorized attachments by the same company. We also encourage the Commission to adopt an expedited complaint process to resolve these types of disputes over allegations of unauthorized attachments. These disputes should be relatively straightforward if, as the Electric Utilities assert, large numbers of attachments are being placed on poles without prior agreement or in violation of existing agreements. Where the Electric Utility demonstrates that this is the case, the Commission could, for example, place the burden on the attaching party to rebut that showing and to demonstrate when the attachment was placed on the pole.

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[19] *See* references at note 9, *supra*.

C. Legal Analysis

1. The Commission Has Authority to Regulate Rates for Broadband Pole Attachments by ILEC Providers of Telecommunications Services.

The Commission has ample authority to apply a uniform rate formula to all pole attachments used for broadband service by a cable television system or telecommunications service provider, including ILECs. Congress: (1) made plain that "the Commission shall regulate the rates, terms, and conditions *for pole attachments* to provide that such rates, terms, and conditions are just and reasonable"[20]; and (2) in turn expressly defined "pole attachment" as "*any* attachment *by a . . . provider of telecommunications service* to a pole, duct, conduit, or right-of-way owned or controlled by a utility."[21] There is no dispute here that ILECs are engaged in the provision of telecommunications service.[22] In fact, the Commission has previously recognized that ILECs are providers of telecommunications service.[23] Thus, Section 224 clearly empowers the Commission to regulate the rates for pole attachments used by ILECs to provide broadband services.

Contrary to the suggestion of some, the definition of the term "telecommunications carrier" in Section 224(a)(5), which excludes ILECs from its scope, does not prohibit the Commission from adopting a uniform rate for pole attachments used to provide broadband service.[24] That term "telecommunications carrier" does *not* appear in Section 224(b)(1) or Section 224(a)(4), the relevant provisions here. That term is used *only* in Section 224(f), which grants certain entities an affirmative right of access to poles. An entity can possess the right to just and reasonable pole attachment rates under Section 224(b)(1) *without* enjoying a statutory right of access under Section 224(f). Section 224(a)(5) thus does not limit the scope of the Commission's regulatory authority over rates for pole attachments in Section 224(b).

It is worth noting in this context that any effort to ensure "just and reasonable" rates, as mandated by the statute, would be compromised if the Commission were only empowered to regulate the attachment rates of some attachers but not others offering identical services. The Commission has latitude in finding a reasonable allocation of joint and common costs and any line drawing must take into account a balancing of the interests of pole owners and the interests

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[20] 47 U.S.C. § 224(b)(1) (emphasis added).

[21] *Id.* § 224(a)(4) (emphasis added).

[22] *See id.* § 153(46) ("The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.").

[23] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶¶ 992-993 (1996) (recognizing that ILECs are providers of telecommunications service) , *modified by*, 11 FCC Rcd 13,042 (1996), *aff'd in part, vacated in part by sub nom. Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997).

[24] *See* 47 U.S.C. § 224(a)(5).

of attachers.[25] But how can the Commission possibly know what a fair amount of costs it should assign to "regulated" attachers without also knowing the revenues the pole owner is receiving from the "non-regulated" attachers? For example, a recent ex parte from the Coalition of Concerned Utilities suggests that the CLECs and cable companies should each be assigned 25% of the common pole costs. But if the Electric Utility is then allowed to charge an ILEC any amount it wants over and above that, the Electric Utility is likely to end up paying for less of the common pole costs than anyone else—despite using 5 to 10 times as much space. Indeed, there is nothing to prevent the Electric Utility from recovering all of its costs or more from third-party attachers. Any such result would clearly be inconsistent with the Commission's statutory obligation of ensuring that the pole owner is not recovering more than a "just and reasonable" amount for use of its pole.

2. The Commission Has The Authority to Prescribe a Rate for Broadband Attachments Based On a Methodology Other than those Specifically Set Forth in the Statute.

As shown above, the Commission clearly possesses regulatory authority to ensure that broadband providers, including ILECs, pay only just and reasonable rates for the pole attachments they use to provide broadband service. It is equally plain that the Commission, in exercising this authority, is *not* limited to the particular rate formulas incorporating factors such as usable space set forth in Section 224(d) and (e) for pole attachments of non-incumbent telecommunications carriers and cable television systems.[26] Instead, the Commission has discretion to prescribe a uniform rate for broadband attachments based on broader policy concerns.

As the Supreme Court has explained, "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."[27] With respect to pole attachments used to provide broadband services, Section 224 is simply silent as to the means of determining a "just and reasonable" rate. And "as a general rule, agencies have authority to fill gaps where the statutes are silent."[28] The Commission thus has broad authority, within the bounds of reasonableness,[29] "to derive its own view of just and

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[25] *See, e.g, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, 14 F.C.C. Rcd. 2545 (1999) (recognizing that "[r]egulators have long recognized that there is no single correct method for allocating common costs among regulated services" and finding that fair compensation in such a case requires the Commission to "balance the interests" of payphone owners and carriers required to pay per-call compensation.) *Id.* at paras. 45, 55.

[26] *See* 47 U.S.C. §§ 224(d) (1) (cable television rate formula), (e) (telecommunications carrier rate formula); *see also* 47 C.F.R. §§ 1.1409(e)(1) (cable television rate formula), 1.1409 (e)(2) (telecommunications carrier rate formula).

[27] *NCTA v. Gulf Power Co.*, 534 U.S. 327, 335 (2002).

[28] *Id.* at 339.

[29] *See generally Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984).

reasonable rates"[30] for such attachments, regardless of conventional considerations such as usable space. Consistent with this authority, the Commission can and should fashion a uniform broadband pole attacher rate based on the long-standing policy goals of regulatory and competitive parity, as well as the promotion of broadband deployment.[31]

Conclusion

USTelecom greatly supports and appreciates the Commission's continuing efforts to establish regulatory parity among broadband competitors, and we urge the Commission to move forward in this proceeding to eliminate this obvious vestige of "silo regulation."

Sincerely,

Jonathan Banks
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Glenn T. Reynolds
Vice President, Policy

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[30] *Gulf Power*, 534 U.S. at 335.

[31] *See* 47 U.S.C. § 157 (incorporating Section 706 of the Telecommunications Act of 1996).