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

Petition For Declaratory Ruling Regarding The Rate For Cable System Pole Attachments Used To Provide VoIP Service	))))	WC Docket No. 09-154
A National Broadband Plan For Our Future	)))	GN Docket No. 09-51
Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments	))))	WC Docket No. 07-245
IP-Enabled Services	)	WC Docket No. 04-36

COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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EXECUTIVE SUMMARY

As the Commission has recognized, any strategy to promote increased deployment and adoption of broadband must take steps to improve the business case for investing in broadband facilities, particularly in rural areas. Pole attachment fees are a significant cost associated with deploying and operating broadband networks, and therefore ensuring that those rates are fair for all broadband providers should be a key element of the Commission's National Broadband Plan.

The Petition for Declaratory Ruling filed by four large electric companies in WC Docket No. 09-154 is completely out of touch with the national emphasis on broadband. The Petition would double or triple the rate applicable to the vast majority of cable operator pole attachments. Such an approach would increase the cost of deploying and operating broadband networks by hundreds of millions of dollars annually, in direct contravention of the Commission's policy goals.

If the Commission is to achieve the congressional goal of universal access to broadband capability, it must pursue a different course than the one proposed by the electric companies. As NCTA explains in these comments, the best means of achieving the Commission's goal of promoting broadband would be to enable all broadband providers to pay rates established under the existing cable rate formula. Making this fully compensatory rate available not only to cable broadband providers but also to all other broadband providers, as NCTA has proposed in the *Broadband Pole Attachment* proceeding, would facilitate greater investment in broadband networks by lowering costs, especially in rural areas, where there are more poles per customer.

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The National Cable & Telecommunications Association ("NCTA") hereby submits its comments in response to the Commission's Notice in WC Docket No. 09-154.[1] The Commission should reject the Petition filed by American Electric Power, Duke Energy, Southern Company, and Xcel Energy in that docket.[2] The Petition proposes a massive increase in pole attachment rates paid by cable operators. As NCTA has demonstrated in the Commission's pending *Broadband Pole Attachment* rulemaking,[3] there is no legal, economic or policy basis for such an increase because the existing cable pole attachment regime is fully compensatory to pole owners. Indeed, increasing attachment rates would likely depress broadband deployment and

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[1] Public Notice, *Pleading Cycle Established for Comments on Petition for Declaratory Ruling of American Electric Power Service Corporation, et al. Regarding the Rate for Cable System Pole Attachments Used to Provide Voice Over Internet Protocol Service*, WC Docket No. 09-154, DA 09-1879 (rel. Aug. 25, 2009).

[2] Petition of American Electric Power Service Corp. *et al* For a Declaratory Ruling, WC Docket No. 09-154 (filed Aug. 17, 2009) (Petition).

[3] Comments of the National Cable & Telecommunications Association, WC Docket No. 07-245 (filed Mar. 7, 2008) (NCTA Comments); Reply Comments of the National Cable & Telecommunications Association, WC Docket No. 07-245 (filed Apr. 22, 2008) (NCTA Reply Comments).

adoption. Rather, the Commission should promote broadband deployment and adoption by preserving the cable attachment regime and extending it to telecommunications carriers.

INTRODUCTION

NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of high-speed Internet service after investing over $145 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to over 20 million customers.

The ability to attach cable facilities to utility poles at regulated rates has been a cornerstone of the cable industry's successful roll-out of advanced video, voice, and data services over the last three decades. The availability of reasonably priced access to poles pursuant to the rate formula contained in Section 224(d) of the Communications Act (the "Cable Rate Formula"), along with the Commission's other pro-competitive policies, has enabled cable operators to expand and upgrade the capacity of their networks in a manner that advances the congressional mandate to promote competition and encourage network investment. With these advanced networks, cable operators have been able to offer high-capacity broadband Internet access to over 92 percent of the country. In many areas, cable operators also have introduced Voice over Internet Protocol (VoIP) services that offer consumers the first widespread facilities-based alternative to incumbent local exchange carriers. Consumers have been extremely satisfied with these offerings, as evidenced by the fact that cable operators consistently have placed at the top of J.D. Power's annual survey of residential telephone services.[4] A 2007 report

[4] Press Release, *J.D. Power and Associates Reports: Overall Consumer Satisfaction with Residential Telephone Services Increases Considerably* (Sept. 16, 2009) ("The 2009 study marks the third consecutive year that

estimated that this competition had produced $23 billion in consumer savings over the prior four years, with more than $100 billion in additional savings expected over the next five years.[5]

In 2007, the Commission initiated a rulemaking to consider adopting a uniform rate formula that would apply to all parties that use attachments in providing broadband services. In the *Broadband Pole Attachment NPRM*, the Commission recognized that a sound pole attachment policy could be a significant element of the Commission's broadband policy.[6] The Commission made similar findings in the *Rural Broadband Report* and *Broadband Plan NOI* issued earlier this year.[7]

In the Petition, a group of electric utilities are seeking a declaratory ruling that attachments by cable operators are subject to the rate formula for telecommunications carriers pursuant to Section 224(e) (the "Telecom Rate Formula") when their attachments are used to provide service. The Telecom Rate Formula produces rates that generally are 2-3 times higher than the rates produced by the Cable Rate Formula. Because cable operators now offer VoIP service over their broadband networks to the vast majority of American households, granting the Petition would increase the pole attachment costs of cable operators by hundreds of millions of dollars annually.

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traditional cable television providers have achieved the highest rankings in all regions included in the study."), available at http://www.jdpower.com/corporate/news/releases/pressrelease.aspx?ID=2009199.

[5] Michael Pelcovits and Daniel Haar, *Consumer Benefits from Cable-Telco Competition* (updated Nov. 2007), available at http://www.micradc.com/news/publications/pdfs/Updated_MiCRA_Report_FINAL.pdf.

[6] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 (2007) (*Broadband Pole Attachment NPRM*).

[7] *Bringing Broadband to Rural America: Report On A Rural Broadband Strategy*, Acting Chairman Michael J. Copps, Federal Communications Commission, at ¶ 157 (May 22, 2009) (*Rural Broadband Report*) ("Timely and reasonably priced access to poles and rights of way is critical to the buildout of broadband infrastructure in rural areas."); *A National Broadband Plan For Our Future*, GN Docket No. 09-51, Notice of Inquiry, FCC 09-31 at ¶ 50 (rel. Apr. 8, 2009) (*Broadband Plan NOI*) ("More generally, to what extent do tower siting, pole attachments, backhaul costs, cable franchising and rights of way issues, as well as others, stand as impediments to further broadband deployments where such deployments would be made by market participants in the absence of any government-funded programs?").

The Petition is the latest chapter in the electric industry's 30-year battle to overturn the Commission's pole attachment regime. With regrettable consistency, the electric utilities have sought to hinder deployment and extract excessive pole rents from fiber optics,[8] then from hybrid fiber-coax cable systems,[9] then from the Internet and wireless,[10] and now from VoIP and broadband providers.[11] With every encore engagement, the Commission has had to rein in the utilities, and has been sustained in court. As we demonstrate in these comments, there is no legal, economic, or policy basis for the Commission to grant the Petition.

From a policy perspective, as NCTA demonstrated in the *Broadband Pole Attachment* rulemaking, raising pole attachment rates for any broadband provider runs counter to the Commission's goal of increasing broadband deployment and adoption. NCTA submitted a report by economist Michael Pelcovits demonstrating that imposing the Telecom Rate Formula on cable attachments would impose between $200 and $600 million in new costs on cable operators and their customers annually, even though there is no additional burden on pole owners.[12] We also submitted a report prepared by Billy Jack Gregg, former consumer advocate for the West Virginia Public Service Commission and former member of the Federal-State Joint

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[8] *Heritage* Cablevision *Assocs. of Dallas, L.P. et al. v. Texas Util. Elec. Co.*, 6 FCC Rcd 7099, 7101 ¶ 12 (1991), *recon. dismissed*, 7 FCC Rcd 4192 (1992*), aff'd, Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

[9] *Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12141 ¶ 75 (2001), *aff'd, Southern Company v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002); *Cable Television Ass'n of Ga v. Georgia Power Co*., 18 FCC Rcd. 16333, 16340-41 (Enforcement Bureau 2003).

[10] *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, 6795-96 ¶ 32 (1998), *petition for review granted*, 208 F.3d 1263 (11th Cir. 2000), *rev'd, NCTA v. Gulf Power*, 534 U.S. 327, 339-341 (2002) (reinstating FCC decision).

[11] The Petition seeks to impose a rent increase not only on interconnected VoIP provided by cable operators themselves, but also on any cable systems that can pass through "over the top" voice services by providers such as Vonage and Skype. Petition at 1-2 n. 4. Consequently, while the Petition is nominally focused on VoIP, it has implications for all cable operators that provide high-speed Internet access over broadband networks.

[12] NCTA Comments, Appendix B, Declaration of Michael Pelcovits (Pelcovits Declaration) at 11. A copy of the Pelcovits Declaration is attached as Appendix B.

Board on Universal Service, demonstrating that the impact of increased pole attachment fees would be particularly onerous in rural areas, where there are more poles and fewer customers.[13] Rather than raising the rate paid by cable operators, NCTA proposed that the Commission apply the Cable Rate Formula to telecommunications providers, an idea that has drawn strong support from many parties, including consumer advocates like the National Association of State Utility Consumer Advocates (NASUCA), who are responsible to both utility and cable customers.[14]

As a legal matter, the validity of the Cable Rate Formula has consistently and repeatedly been upheld as appropriate and fully compensatory. The Supreme Court confirmed the legality of the cable rate formula over 20 years ago in the *Florida Power* case,[15] and that conclusion has been reaffirmed by the FCC and the courts repeatedly since then,[16] both with respect to cable services and broadband services.[17] Nothing in the Petition provides the Commission with any reason to revisit these long-settled legal issues.

The Petition fares no better with respect to economics. The Cable Rate Formula is based on an established cost methodology that allows pole owners to recover the fully-allocated costs of the pole associated with the attaching facility. As the Supreme Court found, there can be no

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[13] NCTA Reply Comments, Declaration of Billy Jack Gregg (Gregg Declaration) at 11-12. A copy of the Gregg Declaration is attached as Appendix C.

[14] Reply Comments of the National Association of State Utility Consumer Advocates, WC Docket No. 07-245 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.").

[15] *FCC v. Florida Power Corp*., 480 U.S. 245 (1987).

[16] *See, e.g*., *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002); *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103 (2001) (*Consolidated Reconsideration Order*); *Florida Cable Tele. Assoc. v. Gulf Power*, 22 FCC Rcd 1997 (ALJ 2007). A full listing of court and agency decisions affirming and applying the Cable Rate formula was included in NCTA's comments in the *Broadband Pole Attachment* proceeding. *See* NCTA Comments, Appendix A. A copy of that list is attached as Appendix A.

[17] *National Cable & Telecommunications Assoc. v. Gulf Power*, 534 U.S. 327 (2002); *Texas Utilities Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

serious argument that such an approach is not compensatory to the pole owner.[18] In combination with make-ready payments that *by themselves* cover all incremental costs of attachment, the annual rents established under the Cable Rate Formula undoubtedly place electric companies in a better position financially than if there were no attachments on their poles.[19]

Finally, the Petition misses the mark in arguing that the similarities between VoIP and traditional telecommunications services compel the Commission to apply the Telecom Rate Formula. The classification of VoIP is an issue that is pending in the *IP-Enabled Services* rulemaking.[20] And questions regarding the appropriate rate for broadband attachments, whether used for VoIP or not, are before the Commission in the *Broadband Pole Attachment* rulemaking.[21] The Commission should address any issues regarding pole attachments for VoIP in the context of those two rulemakings, not by granting this Petition.

I. THE CABLE FORMULA FULLY COMPENSATES POLE OWNERS FOR THE COSTS OF ALLOWING ATTACHMENTS

The basic theory underlying the Petition is that requiring electric companies to allow cable operators to attach pursuant to the Cable Rate Formula constitutes a "subsidy" from electric companies to cable operators and that eliminating this subsidy somehow serves the public interest.[22] As demonstrated below, the Cable Rate Formula does not produce a subsidized

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[18] *Florida Power*, 480 U.S. at 254 ("The rate imposed by the Commission in this case was calculated according to the statutory formula for the determination of fully allocated cost. Appellees have not contended, nor could it seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory.").

[19] When Congress enacted the 1978 Pole Attachment Act, it explained that "CATV offers an income-producing use of an otherwise unproductive and often surplus portion of the plant." *See* S. REP. NO. 95-580 at 16, reprinted in 1978 U.S.C.C.A.N. at 124.

[20] *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004).

[21] *Broadband Pole Attachment NPRM*, 22 FCC Rcd at 20206-09.

[22] *See, e.g.*, Petition at 5, 12, 23.

rate. As the FCC and the courts consistently have found, it fully compensates pole owners and complies with all legal and constitutional requirements.

A. The Combination of Rental Fees And Make-Ready Payments Fully Compensates Pole Owners For Attachments By Cable Operators

Section 224(d)(1) establishes cost-based minimum and maximum rates that may be charged to a cable operator for pole attachments. The minimum rate is based on "the additional costs of providing pole attachments," while the maximum rate is "the percentage of the total usable space" used by the attachment multiplied by "the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit or right-of-way."[23] The Commission's rules implementing this section allow utilities to charge for make-ready costs covering "the additional costs of providing pole attachments," *plus* recurring rent at the maximum statutory rate, which fully allocates the operating expenses and capital costs for the entire pole based on the percentage of usable space occupied by an attachment.[24]

The Petition asserts that the Cable Rate Formula produces a subsidized rate because it does not allocate the cost of unusable pole space equally.[25] There is no basis for this argument. The Commission's rules implementing Section 224(d)(1) establish an allocator or "space factor" based on the percent of usable space occupied by a cable operator's attachment (generally 1 foot of the 13.5 feet of usable space or 7.4 percent), but that allocator is applied to the costs of the entire pole.[26] The suggestion that allocating the cost of unusable space proportionally is

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[23] 47 U.S.C. § 224(d)(1).

[24] *Consolidated Reconsideration Order*, 16 FCC Rcd at 12174, Appendix D-2.

[25] Petition at 23 ("The Cable Rate is inherently a subsidy rate formula because it does not divide the cost of the common (*i.e.*, so-called 'unusable') space on the pole equally among all attachers. As a result, electric utility customers are compelled to pay more than their fair share of the costs of the pole infrastructure.").

[26] 47 U.S.C. § 224(d)(1). Specifically, a utility's total pole investment is divided by the number of poles to determine the average cost of a pole. *Consolidated Reconsideration Order*, 16 FCC Rcd at 12174, Appendix D-2. The telecom rate considers all the same costs as the cable rate, but it allocates a larger portion of the cost of unusable space to an attaching party. 47 C.F.R. § 1.1409(e); *Consolidated Reconsideration Order*, 16 FCC Rcd

somehow unfair to electric companies ignores the fact that electric facilities use the most space on the pole and technical and safety standards for providing electric service and handling electric facilities dictate the size and placement of pole systems. Conversely, parties attaching to a pole pursuant to a license agreement use relatively little space on the pole and have no ownership or control of the pole. Assigning costs "equally" to an electric utility that uses 8-12 feet of space and a cable attachment that uses less than 1 foot of space has been rejected time and again by the Commission and by state public service commissions.[27] As AT&T's expert in the *Broadband Pole Attachment* proceeding observed, an equal allocation of pole costs "has a singular purpose – to increase each pole user's share of the pole's space, and correspondingly, increase the rate each user pays."[28]

In addition to mischaracterizing the Cable Rate Formula, the Petition also ignores another key component of the compensation regime. Cable operators not only pay an annual rental fee, they also reimburse utilities for the costs incurred in making space on a pole available for attachments, *i.e.*, "make-ready" work. For some utilities, make-ready generates millions of dollars in payments annually.[29] Because cable operators pay for make-ready, utilities are fully compensated for any incremental costs associated with the attachment of particular facilities. As the court recognized in *Alabama Power*, it is a "known fact that the Cable Rate requires the attaching cable company to pay for any 'make-ready' costs and all other marginal costs (such as maintenance costs and the opportunity cost of capital devoted to make-ready and maintenance

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at 12176, Appendix E-2. As a result, the telecom rate is typically 2-3 times higher than the cable rate. *See* TWTC Presentation Regarding Pole Attachment NPRM, attached to Letter from Thomas Jones, Counsel to Time Warner Telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, RM-11303, 11293 (filed Oct. 23, 2007) (comparing cable rates between $4.57 and $7.10 with telecom rates between $10.41 and $18.21) (TWTC Presentation).

[27] NCTA Reply Comments at 13-14.

[28] Reply Comments of AT&T, WC Docket No. 07-245, Reply Declaration of Veronica MacPhee at ¶ 29.

[29] *See, e.g.*, *Alabama Power*, 311 F.3d at 1369 n.21.

costs), in addition to some portion of fully embedded cost."[30] And as the Commission's prior orders have recognized, "Congress expected pole attachment rates based on incremental costs to be low because utilities generally recover make-ready or change-out charges directly from cable systems."[31]

The Petition also argues that it is time to reassess the cable attachment regime because cable no longer is a nascent industry providing a single service, but is rather a well-established industry providing multiple services over the same wire.[32] There is no merit to that argument. In implementing the 1996 Act, the Commission found that utilities continued to have monopoly control of poles and that the Commission still had to "prevent utilities from charging monopoly rents to attach to their bottleneck facilities."[33] Again in 2001, the Commission found that "[n]othing in the record demonstrates that the utilities' monopoly over poles has since changed."[34] The record in the *Broadband Pole Attachment* proceeding demonstrates that electric companies' monopoly over access to utility poles is undiminished.[35] Under these circumstances, the relevant legal test is based on the cost of providing space on the pole, not the value of that space to the attaching party. As the court explained in *Alabama Power*: "The legal principle is

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[30] *Alabama Power*, 311 F.3d at 1368.

[31] *Consolidated Reconsideration Order*, 16 FCC Rcd at 12109, ¶ 8 n.37.

[32] Petition at 11 ("It is abundantly clear today that the cable industry is no longer an infant industry, and its spectacularly successful VoIP services have no need of further regulatory 'incubation' in the form of a competition-distorting pole attachment rate advantage.").

[33] *See, e.g., Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103, ¶13 (2001) ("Contrary to UTC/EEI's argument, the record as a whole does not demonstrate that the market for pole attachments is fully competitive or that the utilities now lack any incentive to discriminate against attaching entities. As stated in Gulf Power II . . . the original purpose of the Pole Attachment Act, to prevent utilities from charging monopoly rents to attach to their bottleneck facilities, did not change with the 1996 Act.").

[34] *Amendment of the Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, FCC 01-170, 16 FCC Rcd 12103, 12112-13 ¶ 13 (2001) ("*2001 Reconsideration Order*").

[35] Comments of AT&T, WC Docket No. 07-245 (AT&T Comments), at 9; Comments of CenturyTel, WC Docket No. 07-245, at 2-3; Comments of Time Warner Telecom, WC Docket No. 07-245 at 5.

that in takings law, just compensation is determined by the loss to the person whose property is taken."[36]

The legal principle that rates should be based on the costs to the pole owner and not the value of the attachment to the attaching party is fully consistent with economic principles. As explained by economist Patricia Kravtin, Comcast's expert in the *Broadband Pole Attachment* proceeding, a cost-based approach to setting prices is wholly appropriate when there is no working market for the good or service that is being valued, as is the case here.[37] The size of the attaching company or the revenue it is able to derive from the attachment should be no more relevant to the price charged for a pole attachment than it is in setting the price an electric company charges for electric service. The amount that an attaching party saves by not having to build its own pole network is equally irrelevant given that building a duplicate network is not even a remotely realistic alternative.[38]

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.[39] To provide electric service, "electric utilities need poles that are taller, stronger and more closely spaced" than either telephone companies or cable operators would need if they were to build stand-alone pole systems.[40] As a result, the obligation to provide access to attaching parties

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[36] *Alabama Power*, 311 F.3d at 1369.

[37] Comments of Comcast, WC Docket No. 07-245, Exhibit 1, Report of Patricia Kravtin at 19-20 (Kravtin Report).

[38] *Id*. at 18-23.

[39] *See, e.g., 2007 ALJ Decision*, 22 FCC Rcd at 2004, ¶ 21 n.10 ("The Commission has already concluded that Cable Formula rates plus payment of make-ready expenses provides compensation that *exceeds* just compensation.") (emphasis added); *Alabama Power*, 311 F.3d at 1369 ("The legal principle is that in takings law, just compensation is determined by the loss to the person whose property is taken.").

[40] *See* Letter from Jack Richards, Keller & Heckman, LLP, to Kevin J. Martin, Chairman, Federal Communications Commission, RM-11293, 11303, at 3 (filed June 1, 2007).

generally does not increase the investment the utility must make in constructing its pole system. Any contribution that attaching parties make to the recovery of that investment through payment of the annual rental fee is a net positive for the utility, which otherwise would bear 100 percent of these costs.[41]

In situations where a utility does incur costs beyond those it would incur on its own, *e.g.*, if it must rearrange or change out a pole to accommodate a new attachment, those costs are reimbursed by the cable operator (or other third-party attacher) through make-ready payments.[42] Far from being confiscatory, the ability of the pole owner to impose two distinct sets of charges – rental fees and make-ready charges – creates a significant risk of double recovery of costs by the pole owner. As a result, the Commission has been diligent in making sure that any make-ready fees recover costs that are not already recovered through the annual pole rental fee.[43]

B. There Is No Subsidy At The Expense Of Electric Ratepayers

In the ratemaking context, the Commission considers a rate to be "subsidized" when it does not recover the cost of providing the service. For example, it has been the Commission's policy to subsidize basic local phone service so that it can be provided at affordable rates in all parts of the country. Some of these subsidies are explicit, such as when a carrier receives payments from the federal Universal Service Fund, and some are implicit, such as when a carrier is permitted to impose above-cost access charges for the termination of calls with the expectation

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[41] *Alabama Power*, 311 F.3d at 1370-71 (Absent evidence that a pole is full and another buyer is "waiting in the wings . . . any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation.").

[42] *Consolidated Reconsideration Order*, 16 FCC Rcd at 12119, ¶ 24 n.120. As the record in the *Broadband Pole Attachment* proceeding makes clear, make-ready obligations are different under joint use agreements between electric companies and ILECs. *See, e.g.*, Kravtin Report at 61-69.

[43] *See, e.g.*, *Fee Order*, 15 FCC Rcd at 6459, ¶ 7; *Texas Cable Television Assoc. v. GTE Southwest*, 14 FCC Rcd 2975, 2984-85, ¶¶ 32-33 (CSB 1999).

that the excess revenue will offset below-cost rates for local service.[44] When rates are based on costs, however, the Commission has unequivocally recognized that there is no subsidy.[45]

In the three decades since Congress started regulating pole attachment rates, there is not a single agency or court decision finding that the Cable Rate Formula produces a rate that is confiscatory for purposes of the Takings Clause of the Fifth Amendment. To the contrary, as the Supreme Court explained in the *Florida Power* case, "[t]he rate imposed by the Commission in this case was calculated according to the statutory formula for the determination of fully allocated cost. Appellees have not contended, nor could it seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory."[46]

As summarized in Appendix A, a string of decisions from the Commission and the courts have found the Cable Rate Formula to be fully compensatory. In the face of this consistent precedent finding that the Cable Rate Formula is compensatory, there simply is no basis whatsoever for the suggestion in the Petition that the cable rate subsidizes cable operators at the expense of electric company ratepayers.

The consistent conclusion that there is no subsidy when the Cable Rate Formula is applied to cable operators should give the Commission comfort that there would be no harm to electric company ratepayers if the Cable Rate Formula were extended to other attaching parties as NCTA has proposed in the *Broadband Pole Attachment* rulemaking. A series of decisions by the Massachusetts Department of Telecommunications and Energy (DTE) illustrates the

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[44] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4689, ¶ 8, n.20 (2005).

[45] *Request to Update Default Compensation for Dial-Around Calls from Payphones*, WC Docket No. 03-225, Report and Order, 19 FCC Rcd 15636, 15646, ¶ 29 ("If the rate is cost-based, it cannot be a 'subsidy.'").

[46] *FCC v. Florida Power Corp*., 480 U.S. 245, 254 (1987). Numerous state commissions also have concluded that the cable rate formula is fully compensatory. *See* Appendix A at 3-5.

negligible impact of pole attachment rates on electric ratepayers. In a case involving Boston Edison, it was demonstrated that "pole revenues equate to *no more than one cent of a monthly electric bill*...."[47] The DTE reduced pole rental fees and held that this rate reduction would have "minimal" impact (.009%) on electric ratepayers "and not require an adjustment of other [utility] rates."[48] The DTE reached the same conclusion in a case involving Massachusetts Electric (MECo), where the utility proposed to increase pole attachment rates from $9.40 to nearly $16.00. The DTE rejected the proposed increase and instead followed the Cable Rate Formula. It found that the Cable Rate Formula adequately considers the interests of electric and cable customers and "is reasonable and will not impose a financial disruption on the subscribers of CATV services or MECo ratepayers."[49] Similarly, as explained in the attached declaration of Billy Jack Gregg, experience with electric companies in West Virginia also demonstrates that pole attachment revenues represent a miniscule portion of electric company revenues, and reductions in such revenues would have a negligible effect on the rates charged to electric customers.[50]

Moreover, the Commission need not be concerned even if there were a reduction in the pole attachment revenues received by electric companies because, as the record in the *Broadband Pole Attachment* proceeding shows, electric companies are being overcompensated by the current rules. In this regard, AT&T made the point that not only are electric companies using more space on poles than in the past, but they also are recovering a greater percentage of

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[47] *Cablevision of Boston v. Boston Edison Co*., Mass. Docket No. D.T.E. 97-82 at 12 (Apr 15, 1998) (*Boston Edison*), citing Transcript 1 at 205 (emphasis added).

[48] *Boston Edison* at 45, 46.

[49] *A/R Cable Servs. v. Massachusetts Elec. Co*., Mass. Docket No. D.T.E. 98-52 at 30 (Nov 6, 1998) (*MECO*). To the same effect is the DTE's earlier decision in *Greater Media Cable, Inc*., D.P.U. 91-218 (Apr 17, 1992), *affirmed*, 415 Mass. 409 (1993), finding that conduit rent reductions pursuant to what is now the FCC's standard formula would have trivial impact on the revenues of electric utilities.

[50] Gregg Declaration at 14-15.

pole costs from attaching parties.[51] AT&T offers an example where the electric company effectively pays only 20 percent of the cost of the pole, even though it uses more space on the pole than any other party.[52] Under these circumstances, there is no basis for increasing the rents that the utilities may extract from the use of their poles.

II. TO PROMOTE BROADBAND, THE COMMISSION SHOULD CONTINUE TO APPLY THE CABLE RATE FORMULA TO CABLE OPERATORS AND SHOULD EXTEND IT TO TELECOMMUNICATIONS CARRIERS

A. Pole Attachment Policy Is a Critical Element Of Broadband Policy

As the Commission has recognized, any strategy to promote increased deployment and adoption of broadband must take steps to improve the business case for investing in broadband facilities, particularly in rural areas. As explained by Blair Levin, Executive Director of the Commission's Omnibus Broadband Initiative, "part of our job, in thinking about a national broadband plan, is to explore whether [] policies should be adjusted to increase the revenues and decrease the costs of inputs associated with broadband."[53]

Pole attachment fees are a significant cost associated with deploying broadband, and ensuring that those rates are fair for all broadband providers would create the regulatory certainty that drives broadband investment and provides customers more meaningful choices among providers. As noted in the *Rural Broadband Report*, "[t]imely and reasonably priced access to poles and rights of way is critical to the buildout of broadband infrastructure in rural areas."[54]

The Commission can promote broadband deployment by taking steps to ensure that pole attachment rates are no higher than needed to cover the costs incurred by the pole owner. As we

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[51] AT&T Comments, Declaration of Veronica MacPhee at 8-9 (MacPhee Declaration).

[52] *Id.*

[53] Blair Levin, *It Takes A Worried Man . . . Sharing His Worries*, available at http://blog.broadband.gov/?p=212

[54] *Rural Broadband Report* at ¶ 157.

explain below, the best means of achieving the Commission's goals of promoting broadband would be to set a formula that enables all broadband providers to pay rates established under the existing Cable Rate Formula. Making this fully compensatory rate available not only to cable broadband providers but also to all other broadband providers, as NCTA has proposed in the *Broadband Pole Attachment* proceeding,[55] would facilitate greater investment in broadband networks by lowering costs, especially in rural areas, where there are more poles per customer.[56] In contrast, the higher pole attachment rates proposed in the Petition would increase the costs of broadband service and so would reduce demand for broadband, undermining the federal goals of increasing sustainable broadband adoption.

B. Raising Pole Attachment Rates For Cable Operators Will Undermine Broadband Investment and Adoption

The record in the *Broadband Pole Attachment* proceeding confirms the obvious point that raising the price of a key input to broadband service will discourage needed investment by providers and discourage adoption of broadband services by consumers.[57] As NCTA's expert Dr. Michael Pelcovits explained:

> There will be significant damage to the economy and to consumer welfare from the proposed increase in pole attachment rates. The harm will come from three different sources: (1) higher prices to consumers from direct pass through of higher pole attachment rates; (2) reduced availability of broadband services to

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[55] *See* NCTA Reply Comments at 18-23 (proposing, with respect to CLECs, that the Commission forbear from the statutory telecommunications rate formula contained in Section 224(e) and apply the cable rate formula instead, and that ILECs be brought under the cable attachment regime by permitting them to "opt in" to existing agreements between cable operators and electric companies).

[56] *See* Gregg Declaration at 13 ("The new higher pole attachment rates for cable providers in West Virginia will substantially increase the annual cost of doing business for these providers and will increase the costs of extending service to rural and high-cost areas that currently do not have broadband service.").

[57] *See, e.g.*, ITTA Comments at 8 ("reasonable pole attachment rates, terms and conditions are another crucial element in the drive to deploy advanced services further, particularly where price inelasticity would drive take-rates downward should unreasonable pole attachment rates force carriers to flow high costs back to consumers.").

> consumers, particularly in rural areas; and (3) reduced investment by cable companies in new plant and technology.[58]

Rural areas would be particularly hard hit by increases in pole attachment rates, as demonstrated in the attached Declaration of Billy Jack Gregg. Gregg served for 26 years as the Director of the Consumer Advocate Division of the West Virginia Public Service Commission. Among his many activities in that role, Gregg served as a member of the Federal-State Joint Board on Universal Service and he chaired the West Virginia Advanced Services Task Force. He is an acknowledged expert on the issues related to broadband deployment in rural America.

In his declaration, Gregg describes the unique challenges that broadband providers face in trying to extend broadband service to rural portions of West Virginia, including difficult terrain and sparse population. Both of these factors mean that "more poles are required to pick up each potential customer in unserved rural areas."[59] Gregg explains that requiring cable operators to pay the telecommunications attachment rate could raise the cost of providing broadband service in the state of West Virginia by over $4 million per year.[60] Given the already challenging environment for broadband investment in West Virginia, he concludes that such a dramatic increase in the cost of providing services undoubtedly would lead to less investment in the state and higher prices for retail services, both of which are fundamentally inconsistent with the goals the state and federal government have been pursuing in West Virginia and other rural states.[61]

Some utilities have argued that pole attachment fees represent a relatively minor cost of deploying broadband as compared to the fixed cost of adding new equipment to the network and

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[58] Pelcovits Declaration at 12.

[59] Gregg Declaration at 6.

[60] *Id*. at 11.

[61] *Id*. at 12.

therefore increases in those fees will not be the deciding factor in whether a provider deploys broadband. This is simply incorrect. As the Arkansas Cable Telecommunications Association explained in the *Broadband Pole Attachment* proceeding, while both sets of costs are highly relevant, the recurring nature of pole attachment fees means that significant increases in those fees definitely can jeopardize future investment in broadband.[62] The fact that pole attachment costs are just one of many challenges facing rural operators in deploying broadband obviously provides no basis for rate increases that would make it even more difficult to justify future investment in, or continued operation of, broadband facilities.

C. The Commission Should Forbear From Applying the Telecommunications Rate Formula to CLEC Broadband Attachments And Apply the Cable Rate Formula Instead

As demonstrated in Section I above, the cable attachment regime is fully compensatory to pole owners. That fact raises an obvious and important question for policymakers – *if the Cable Rate Formula is compensatory, is there any reason that any attaching party should be required to pay a higher rate when it provides broadband services?*

The Petition essentially ignores this question, going so far as to suggest that it is "wholly irrelevant" that three decades of court and agency decisions have upheld the compensatory nature of the Cable Rate Formula.[63] According to the utilities, all these cases simply deferred to the Commission's discretion to use the Cable Rate Formula, just as they have deferred to the Commission's interpretation of the Telecom Rate Formula. In other words, because the courts

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[62] *See* Letter from Jill M. Valenstein, Counsel for the Arkansas Cable Telecommunications Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-245 (filed July 11, 2008) at 1-2. Moreover, in some cases, such increases may even jeopardize an operator's ability to continue providing video service. *Id.* at 2-3 ("I'm faced not only with the prospect of probably not being able to deliver broadband in that system, but with 48 per cent of my revenue going just to pole rental alone, I will probably be faced in this system and other systems as those rates increase and just turning those systems off all together.").

[63] Petition at 22.

have already have approved imposing high rates on telecommunications carriers, there is no harm in making cable operators pay those rates as well.

The utilities' line of thinking is completely out of step with national priorities. If the Cable Rate Formula is compensatory, which it is, and the Commission has discretion to apply that formula more broadly, which it does, requiring any attaching party to pay a higher rate unnecessarily raises the cost of building and operating broadband networks. For that reason, in the *Broadband Pole Attachment* proceeding, NCTA encouraged the Commission to allow telecommunications providers to attach under the same rates, terms, and conditions as cable operators. The comments filed by parties that attach their facilities to utility poles demonstrate conclusively that lower attachment rates would promote investment. As AT&T explained, "establishment of a uniform pole attachment rate that would apply to all attachments used by a cable television system or provider of telecommunications service for broadband Internet access . . . would remove disincentives to invest in and deploy broadband infrastructure by eliminating the use of pole attachments as a revenue stream that artificially inflates the cost of broadband service."[64]

Reducing the price of a key input also helps broadband providers keep rates affordable and therefore promotes adoption of broadband services by consumers. As the Independent Telephone & Telecommunications Alliance explained, "reasonable pole attachment rates, terms and conditions are another crucial element in the drive to deploy advanced services further, particularly where price inelasticity would drive take-rates downward should unreasonable pole attachment rates force carriers to flow high costs back to consumers."[65] In short, where the

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[64] AT&T Comments at 13.

[65] Comments of Independent Telephone & Telecommunications Alliance, WC Docket No. 07-245 at 8.

Commission has the legal authority to reduce attachment rates, there are numerous benefits that would result from doing so.

One approach to achieving this result is for the Commission to forbear from applying the Telecommunications Rate Formula to broadband attachments by non-ILEC telecommunications carriers and instead apply the cable rate formula.[66] Forbearance is "[a]n integral part of the pro-competitive, de-regulatory national policy framework established in the 1996 Act."[67] Section 10(a) of the Act *requires* the Commission to forbear from applying "any provision of this Act" if the Commission finds that enforcement of that provision is not needed to ensure the reasonableness of the rates and practices of affected telecommunications carriers or to protect consumers of such carriers, and that forbearance is otherwise in the public interest.[68] The public interest analysis must consider whether forbearance would promote competition among telecommunications carriers.[69]

Using its forbearance authority in the context of pole attachments is an entirely rational and legal way for the Commission to promote its broadband goals. In particular, forbearing from applying the Section 224(e) Telecommunications Rate Formula furthers the precise objective underlying Section 10 of the Act insofar as "forbearance seeks elimination of regulatory

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[66] Time Warner Telecom White Paper at 2 ("the Commission has used every means available to it under the Communications Act [to level the competitive playing field for facilities-based providers of broadband service], including its authority under the 'at a minimum' clause in Section 251(d)(2) and its forbearance powers under Section 10"). Because ILECs are not currently covered by the Commission's rules implementing Section 224(e), forbearance from that provision would be of no benefit to them without additional actions by the Commission. NCTA proposes one possible approach to this issue in the next section.

[67] *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c)*, 22 FCC Rcd. 19478, 19487 (2007) (quoting Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996)) (internal quotation omitted). *See also Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c)*, 22 FCC Rcd. 18705, 18714-15 (2007) (same); *Petitions of the Verizon Tel. Cos. for Forbearance Pursuant to 47 U.S.C. § 160(c)*, 22 FCC Rcd. 21293, 21303 (2007) (footnotes omitted) (emphasis added); *AT&T Inc. v. FCC*, 452 F.3d 830, 833 (D.C. Cir. 2006) (same).

[68] 47 U.S.C. § 160(a).

[69] 47 U.S.C. § 160(b).

uncertainty [that] even the Commission recognizes … may discourage investment and innovation regarding the very technologies Congress intended the Act to promote,"[70]

Forbearance from the Telecommunications Rate Formula, and application of the Cable Rate Formula instead, easily satisfies the statutory criteria. First, applying the Telecom Rate Formula is not necessary to ensure the reasonableness of rates those carriers charge, nor is it necessary to protect consumers. Indeed, applying the Telecommunications Rate Formula *harms* consumers by raising the cost of providing broadband and telecommunications services.

Second, application of Section 224(e) is not necessary for the protection of consumers. Forbearance will keep pole attachment rates from rising above just and reasonable compensation and is appropriate to "help ensure that customers … have competitive choices,"[71] and remove barriers to a fully competitive market.[72] Finally, forbearance would promote competition in the marketplace by allowing all broadband providers covered by Section 224 to attach under the same regime that is now used by cable operators,[73] rather than penalizing providers that choose to offer voice applications that help fulfill the 1996 Act goals of "promoting competition in every sector of the communications industry."[74] The Commission has itself cited the "competitive

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[70] *AT&T v. FCC*, 452 F.3d at 836.

[71] *Petition of ACS of Anchorage, Inc.*, 21 FCC Rcd. 13655, 13688 (2007).

[72] *See* Comments of Charter Communications, WC Docket No. 07-245 at 5 (demonstrating with respect to prospect of raising pole costs above cable-only rates when additional services like Internet and VoIP are added to system, the "impact on a new entrant who must charge incrementally more to recoup its new plant investment within a reasonable amount of time … is utterly forbidding"). *See also Embarq*, 22 FCC Rcd. at 19482 (discussing in grant of forbearance the propriety of "easing the regulatory requirements for broadband facilities and service").

[73] *See* Comments of State Cable Associations, WC Docket No. 07-245 at 22 ("we do not oppose CLECs that face the same attachment terms as cable operators paying the same cable rate for their attachments because there is no legitimate reason to increase *any* broadband pole attachment rates") (emphasis in original).

[74] *Telecom Order*, ¶ 31. *See also* Comments of Charter Communications, WC Docket No. 07-245 at 10 ("Increasing pole rents on the Internet would inexplicably reverse Congressional intent to promote new broadband deployment and local voice competition.").

benefit of … continued investment in fiber-based broadband facilities,"[75] and has held that "regulation that constrains incentives to invest in and deploy the infrastructure needed to deliver broadband services is not in the public interest." [76] And as the Petition acknowledges, greater uniformity in the rates, terms, and conditions under which similarly situated parties attach facilities would promote competition.[77] Under these circumstances, forbearance clearly serves the public interest and can and should be applied in the *Broadband Pole Attachment* rulemaking proceeding pursuant to Section 10(a).[78]

D. The Commission Should Allow Broadband Providers to "Opt In" to Existing License Agreements Between Pole Owners And Other Attaching Parties

As the Supreme Court found in the *Gulf Power* case, the Commission's authority over pole attachments is not limited to the two categories of attachments identified in the rate provisions of Sections 224(d) and 224(e).[79] Rather, the Court found that the Commission has authority under Section 224(b) to regulate types of pole attachments, including the rates for such attachments, that are not specifically identified in either of the two rate provisions.[80]

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[75] *BOC Forbearance Petitions*, 19 FCC Rcd at 21508.

[76] *Embarq*, 22 FCC Rcd. at 19503; *AT&T*, 22 FCC Rcd. at 18732.

[77] Petition at 14.

[78] The Commission may properly consider forbearance in a rulemaking proceeding without a separate petition pursuant to Section 10(c). The provision for forbearance petitions in Section 10(c) is stated in the permissive, *i.e.*, that parties "may" file them, while Section 10(a), the substantive statutory provision, states the FCC "shall" forbear where the relevant requirements are met. *Compare* 47 U.S.C. § 160(a)-(b) *with id*. § 160(b). Examples of FCC forbearance under Section 10 not preceded by a separate petition include *Implementation of the Call Home Act of 2006*, 22 FCC Rcd. 1030 (2007); *Regulation of Prepaid Calling Card Services*, 21 FCC Rcd. 7290, 7299 (2006); *Federal-State Board on Universal Service*, 20 FCC Rcd. 16883, 16893-94 (2005). *But see Petition of Mid-Rivers Tel. Coop., Inc.*, 21 FCC Rcd. 11506, 11517 & n.71 (2006) (refusing to grant forbearance requested only in comments, reply, and *ex parte* letter) (citing 47 C.F.R. § 1.53).

[79] *Gulf Power*, 534 U.S. at 335-36 ("[N]othing about the text of §§ 224(d) and (e), and nothing about the structure of the Act, suggest that these are the exclusive rates allowed.").

[80] *Id*. at 336 ("The sum of the transactions addressed by the rate formulas is less than the theoretical coverage of the Act as a whole."); *id*. at 337 ("[W]e hold that §§ 224(d) and (e) work no limitation on §§ 224(a) and (b).").

Given this broad authority over pole attachments generally, NCTA explained that one option available to the Commission would be to allow all attaching parties to "opt in" to existing pole agreements.[81] The opt in procedure proposed below is premised on the reasonable presumption that pole owners will not be harmed by allowing third parties to attach to their poles at rates, terms, and conditions that the pole owner already has made available to at least one other attaching party in its service area. Given the decades of precedent confirming that the cable attachment regime more than compensates pole owners, there is a strong basis for this presumption.

Under this proposal, each pole owner would be required to make publicly available each pole attachment, joint ownership, or joint use agreement pursuant to which it allows parties to attach facilities. Any attaching party, including ILECs, would be permitted to opt in to any of these agreements, with the applicable state specific rate. Pole owners would be required to make available within 30 days of a request all information reasonably necessary for an attaching party to make an informed decision as to whether it would want to opt in to a particular agreement (*e.g.*, cost information).

Companies that choose to opt in to a particular agreement would be required to accept all the terms and conditions in the agreement (*i.e.*, this is an "all-or-nothing" regime, not a "pick-and-choose" regime), with one exception. As the Commission found in the context of interconnection agreements, allowing companies to opt in to an entire agreement is superior to allowing companies to "pick and choose" contract terms.[82] The one exception to the all-or-nothing requirement is that contracts should be adjusted as necessary to reflect differences in

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[81] NCTA Reply Comments at 21-22.

[82] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order, 19 FCC Rcd 13494, 13501-02 ¶ 12 (2004), *affirmed New Edge Network, Inc. v. FCC*, 461 F.3d 1105 (9th Cir. 2006).

space used. For example, if an electric company charges a cable operator $8.00 a year for attaching facilities in one foot of pole space, it should be permitted to charge an incumbent LEC $16.00 a year for attachments that use two feet of pole space. Disputes over opt-in, rates, terms, conditions, and practices, as well as over nondiscriminatory enforcement of contractual provisions, would be resolved by the Commission.

III. THE COMMISSION IS NOT REQUIRED TO IMPOSE THE TELECOM RATE ON CABLE OPERATORS THAT PROVIDE VOIP SERVICES

Rather than acknowledging the important role that pole attachments play in the development of an effective broadband strategy, the Petition attempts to focus on the narrow issues raised by the introduction of VoIP services by cable operators. But even looking solely at this narrow set of issues, the Petition misses the mark.

The Petition makes much of the fact that VoIP services have become a substitute for traditional telecommunications services. In particular, it cites a string of Commission decisions extending various obligations to VoIP providers. According to the utilities, the Commission should take the same approach with pole attachments and issue a declaratory ruling that the Telecom Rate Formula rather than the Cable Rate Formula applies when cable operators provide VoIP service.

As an initial matter, the Commission should not proceed by declaratory ruling as the Petition requests. Rather, related issues have been fully briefed in the *Broadband Pole Attachment* rulemaking and that is the appropriate proceeding in which to address the treatment of poles used for the provision of both broadband and VoIP services.[83] In so doing, we would urge the Commission to adopt our proposal as described in these comments.

[83] In every other situation where the Commission has made a determination that VoIP providers should be subject to the same obligation as telecommunications carriers, it has acted in the context of a rulemaking proceeding and changed its rules to incorporate the new obligation, rather than issuing a declaratory ruling. Based on this

Beyond this procedural concern, the Petition's substantive arguments are wrong as well. The fact that VoIP services may be similar to traditional telecommunications services from a consumer perspective is not dispositive of the treatment of those services under the pole attachment rules. The history of Section 224 does not "show that Congress intended" for the telecommunications rate to apply to VoIP, as the utilities contend. VoIP did not even exist in 1996. When Congress created a "telecommunications service" rate in 1996, it did so expecting that many new facilities-based providers would enter the local exchange market by placing new facilities on poles. Instead, cable operators have introduced competitive voice offerings that did not require the use of additional lines or place more burden on poles.

In addition, as the Petition concedes, the Commission has avoided making a blanket finding that all VoIP services are subject to all Title II obligations.[84] Instead, it has opted for a much more deliberate approach that carefully considers the consequences of applying a particular requirement to a particular set of services. In every one of these cases, the Commission carefully assessed whether assigning some non-economic regulatory obligations to IP-enabled services would promote key social policies such as consumer protection, public safety, encouragement of the development of new technologies, and Section 706 deployment.[85] In this case, economic rent increases on IP-enabled services would defeat the Nation's most important broadband policies and should be rejected.

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history, if the Commission were to decide that VoIP providers should be treated the same as telecommunications carriers for pole attachment purposes, that decision should be made in the context of the existing rulemaking proceeding.

[84] Petition at 3 ("In its *IP-Enabled Services* proceeding, the Commission continues to consider whether VoIP is a 'telecommunications service,' an 'information service,' or neither.").

[85] *See, e.g.*, *IP-Enabled Services; Telecommunications Rely Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, WC Docket Nos. 04-36, 03-123, Report and Order, 22 FCC Rcd 11275 (2007); *Universal Service Contribution Methodology*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006) ; *IP-Enabled Services; E-911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005).

The Petition argues that applying the Telecom Rate Formula to cable VoIP providers would promote regulatory parity, a factor the Commission has considered in decisions applying other obligations, such as USF contributions, on VoIP providers.[86] The cable industry has often encouraged the Commission to take steps that promote regulatory parity and, as described above, we have taken that same approach in the *Broadband Pole Attachment* proceeding. But for all the reasons explained in these comments, the best way for the Commission to promote regulatory parity is to apply the Cable Rate Formula, not the Telecom Rate Formula, to all broadband attachments.

Finally, the Petition argues that the Cable Rate Formula should not be considered the default rate for cable VoIP services pending a determination of the whether VoIP is a telecommunications service. Rather, the Petition proposes that the Commission use its discretion to establish the Telecom Rate Formula as the default pending a decision regarding the status of cable VoIP services.[87] This approach ignores the fact that the provision of VoIP by a cable operator places absolutely no additional burden on an electric company and it invites an implementation of the statute which would discourage and undermine the introduction of innovative services. In the absence of any legal obligation to impose the Telecom Rate Formula or any cost burden on the pole owner associated with the provision of VoIP services, there is no reason to require a cable operator to pay more than it was paying before it introduced VoIP services.

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[86] Petition at 14-15.

[87] *Id*. at 20-21.

CONCLUSION

The Petition should be rejected. It lacks any meaningful legal or economic analysis and ignores the broadband policy issues that are so important to Congress and the Commission. The Commission's cable attachment regime has been a major success for decades and preservation of that regime should be a cornerstone of the Commission's efforts to promote broadband deployment and adoption. Not only should the Commission continue to apply that regime to cable operators, but it also should adopt NCTA's proposal to expand that regime to telecommunications carriers.

Respectfully submitted,

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APPENDIX A

APPENDIX A

EXAMPLES OF FCC, STATE AND COURT DECISIONS ADDRESSING REASONABLENESS OF CABLE POLE ATTACHMENT RATES

Supreme Court

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

Courts of Appeals

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)

Federal Communications Commission

A. Rulemakings

Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments, 16 FCC Rcd 12103 (2001) (*Consolidated Reconsideration Order*) – rejecting utilities' arguments that regulation of pole attachment agreements no longer is necessary and reaffirming the validity and importance of the FCC's rate formulas

Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments, 15 FCC Rcd 6453 (2000) (*Fee Order*) – reaffirming the use of rate formulas based on historical costs and declining to modify the usable space presumptions

Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments, 13 FCC Rcd 6777 (1998) (*Telecom Order*) –

establishing the telecom rate formula and deciding that the cable rate formula will continue to apply when a cable operator provides commingled cable and Internet services

Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 2 FCC Rcd 4387 (1987) – making minor adjustments to the cable rate formula and clarifying that make-ready fees may not recover costs already recovered in the annual pole rental fee

Petition to Adopt Rules Concerning Usable Space on Utility Poles, 56 Rad. Reg. 2d 707 (1984) – declining to reconsider assumptions underlying the cable rate formula adopted in 1978-80

B. Adjudications[1]

FCTA v. Gulf Power, 22 FCC Rcd 1997 (ALJ 2007) – rejecting utility arguments that poles were at full capacity and therefore it was appropriate to charge an unregulated attachment rate

FCTA v. Gulf Power, 18 FCC Rcd 9599 (EB 2003) – granting complaint that utility violated FCC rules by unilaterally imposing attachment rate and finding that payment of rent based on cable rate formula plus make-ready expenses exceeds just compensation

Teleport Communications Atlanta v. Georgia Power, 16 FCC Rcd 20238 (EB 2001), *affirmed* 17 FCC Rcd 19859 (2002) – granting complaint that utility violated FCC rules by using its own formula to calculate pole attachment rates rather than using cable or telecom rate formula and reaffirming that both formulas provide just compensation to pole owners

RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Co., 17 FCC Rcd 25238 (EB 2002) – rejecting utility's $47.25 pole attachment rate as unjust and unreasonable and calculating a maximum just and reasonable annual cable rate of $6.79 per pole attachment

Nevada State Cable Television Ass'n v. Nevada Bell, 17 FCC Rcd 15534 (EB 2002) – affirming a Cable Services Bureau Order that calculated a maximum per pole attachment rate of $1.26 for poles owned by Nevada Bell

Cable Television Ass'n of Georgia v. BellSouth Telecommunications, 17 FCC Rcd 13807 (EB 2002) – finding unjust and unreasonable an annual pole attachment rate of $5.03 and setting the proper rate at $4.27

ACTA v. Alabama Power, 15 FCC Rcd 17346 (EB 2000), *affirmed* 16 FCC Rcd 12209 (2001) – granting complaint that utility's proposed attachment rate was unreasonable and affirming that cable rate formula plus the payment of make-ready expenses provides the pole owner with compensation that exceeds the just compensation required under the Constitution

[1] This list only includes examples of adjudications following the Supreme Court's 1987 decision in *Florida Power*. There are literally dozens of decisions prior to *Florida Power* applying the cable rate formula and finding that rates proposed by utilities were unreasonable.

TCTA v. GTE Southwest, 14 FCC Rcd 2975 (CSB 1999) – reaffirming that a utility cannot recover in make-ready charges any costs that it recovers through the annual pole fee

Time Warner Entertainment v. Florida Power & Light Co., 14 FCC Rcd 9149 (CSB 1999) – rejecting a pole attachment rate of $6.00 as unjust and unreasonable and calculating the maximum just and reasonable rate at $5.79 per pole

Texas Cable & Telecommunications Association, et al. v. Entergy Services Inc., et al., 14 FCC Rcd 9138 (CSB 1999) – ordering Entergy to reimburse cable company complainants the difference between the parties prior negotiated rate of $3.50 and a non-negotiated rate of $4.34 per pole charged by Entergy

Heritage Cablevision v. Texas Utilities Electric Co., 6 FCC Rcd 7099 (1991) – finding that it is unreasonable for a pole owner to charge a cable operator higher pole attachment rates for attachments that carry commingled cable and data services; *see also Selkirk Communications v. Florida Power & Light*, 8 FCC Rcd 387 (CCB 1993); *WB Cable Assoc. v. Florida Power & Light*, 8 FCC Rcd 383 (CCB 1993)

State Public Utility Commissions

Alaska

In the Matter of the Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations Adopted Under 3 AAC 52.900 – 3 AAC 52.940, Order Adopting Regulations, 2002 Alas. PUC LEXIS 489 (Alas. PUC Oct. 2, 2002) – finding that the cable rate formula "provides the right balance given the significant power and control of the pole owner over its facilities" and that "changing the formula to increase the revenues to the pole owner may inadvertently increase overall costs to consumers . . . ."

California

Order Instituting Rulemaking on the Commission's Own Motion Into Competition of Local Exchange Service, R.95-04-043, I.95-04-044, Decision 98-10-058, 1998 Cal. PUC LEXIS 879, pp. 53-56, 82 CPUC 2d 510 (Oct. 22, 1998) (internal citations omitted) – finding "that the adoption of attachment rates based on the [cable rate] formula provides reasonable compensation to the utility owner, and there is no basis to find that the utility would be lawfully deprived of any property rights."

Connecticut

Petition of the United Illuminating Company for a Declaratory Ruling Regarding Availability of Cable Tariff Rate for Pole Attachments by Cable Systems Providing Telecommunications Service and Internet Access, Docket No. 05-06-01, pp. 5-6, 2005 Conn. PUC Lexis 295 (Dep't of Pub. Util. Control 2005) – upholding cost-based attachment rate and finding that the provision of additional services by a cable operators does not impose costs on the pole owner.

District of Columbia
*Formal Case No. 815, In the Matter of Investigation Into The Conditions For Cable Television Use of Utility Poles In The District of Columbi*a, Order No. 12796 (2003) – finding that FCC regulations should be followed in determining reasonable rates

Massachusetts
A Complaint and Request for Hearing of Cablevision of Boston Co., D.P.U./D.T.E. 97-82 at 18-19 (Apr. 15, 1998) – finding that FCC formula "meets Massachusetts statutory standards as it adequately assures that [the utility] recovers any additional costs caused by the attachment of [] cables . . . while assuring that the [attachers] are required to pay no more than the fully allocated costs for the pole space occupied by them."

Michigan
In the Matter of the Application of Consumer Power Company, Case Nos. U-10741, U-10816, U-10831 at 27, 1997 Mich. PSC Lexis 26 (1997), *reh'g denied*, 1997 Mich. PSC LEXIS 119 (April 24, 1997), *aff'd Detroit Edison Co. v. Mich. Pub. Serv. Comm'n*, No. 203421 (Mich. Court of Appeals, Nov. 24, 1998); *aff'd Consumers Energy Co. v. Mich. Pub. Serv. Comm'n*, No. 113689 (Mich. Sup. Ct. Aug. 31, 1999) – adopting FCC standard and finding that the FCC cable rate formula aligns pole rates in Michigan "more closely with other states that already adhere to this standard."

New Jersey
Regulations of Cable Television Readoption with Amendments: N.J.A.C. 14:18, Docket No. CX02040265 (2003) – affirming use of a cost-based attachment rate and adopting the FCC formula

New York
In the Matter of Certain Pole Attachment Issues Which Arose in Case No. 94-C-0095, 997 N.Y. PUC Lexis 364 (1997) – adopting FCC approach to pole attachments

Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments and to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Carriers, Case 01-E-0026 (2001) – rejecting a higher telecom rate formula based on concerns that competition would suffer

Ohio
Re: Columbus and Southern Electric Company, 50 PUR 4th 37 (1982) – adopting the FCC cable formula for attachments by cable operators

Oregon
Oregon Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, regarding Pole Attachment Use and Safety, AR 506; 510 at p. 10 (2007) – adopting FCC cable rate formula and finding that "the cable formula has been found to fairly compensate pole owners for use of space on the pole."

Utah

In the Matter of an Investigation into Pole Attachments, 2006 Utah PUC Lexis 213 (2006) – adopting the FCC cable rate formula following a comprehensive pole attachment rulemaking, later codified at UTAH ADMIN. CODE R746-345-5(A) Pole Attachments (2006).

Vermont

Vermont Policy Paper and Comment Summary on PSB Rule 3.700 (2001) at 6 – finding that a reduction in pole attachment costs to cable companies will lead to increased deployment of advanced services and "lead to cable services becoming available in some additional low-density rural areas. . . . [Thus creating] even more value for Vermonters as cable TV companies are increasingly offering high-speed Internet service to new customers."

APPENDIX B

Before the
Federal Communications Commission
Washington, D.C. 20554

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

DECLARATION OF DR. MICHAEL D. PELCOVITS

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I. INTRODUCTION

1. My name is Michael Pelcovits. I am a principal in the consulting firm MiCRA, Inc. My business address is 1155 Connecticut Avenue, Washington, D.C. 20036. I joined MiCRA in October 2002. Since joining MiCRA, I have filed several declarations before the Federal Communications Commission on a wide range of common carrier, wireless, and international telecommunications policy issues. Prior to my employment at MiCRA, I was Vice President and Chief Economist at WorldCom. In this position, and in a similar position at MCI prior to its merger with WorldCom, I was responsible for directing economic analysis of regulatory and antitrust matters, before federal, state, foreign, and international government agencies, legislative bodies, and courts. Prior to my employment at MCI, I was a founding principal of the consulting firm, Cornell, Pelcovits & Brenner. From 1979 to 1981, I was Senior Staff Economist in the Office of Plans and Policy, Federal Communications Commission. I have testified or appeared before the Federal Communications Commission, many state regulatory commissions, the Office of Telecommunications (Oftel) of the UK government, the European Commission, the Ministry of Telecommunications of Japan, and the Civil Aeronautics Board. I have lectured widely at universities and published several articles on telecommunications regulation and international economics. I hold a B.A. from the University of Rochester (*summa cum laude)* and a Ph.D. in Economics from the Massachusetts Institute of Technology, where I was a

National Science Foundation fellow. My curriculum vita is provided as Attachment I of this declaration.

2. I have been asked by the National Cable & Telecommunications Association ("NCTA") to provide an economic analysis of the Commission's recent proposal to adopt a uniform rate – set above the current cable rate -- for pole attachments used for broadband Internet access.[1] This proposal raises a number of normative and positive economic issues, which I address in the following three sections of my declaration. In addition, I present the results of a recent study performed by my firm that estimates the likely impact on the industry and consumers that would result from an increase in the pole attachment rates.

3. The first and most fundamental economic issue concerning a proposal to change regulated rates is whether this change will improve economic efficiency. Economic efficiency is achieved when the goods and services that people value the most are produced in the least costly manner. Generally speaking, economic efficiency is achieved when prices are set at long run marginal cost. In this proceeding, where the Commission is proposing to increase current rates that are already far above marginal or incremental cost,[2] it is vital to measure the potential loss and evaluate whether the loss in economic efficiency can be justified by some

[1] Notice Of Proposed Rulemaking, *Implementation of Section 224 of the Act; Amendments of the Commission's Rules and Policies Governing Pole Attachments*, 22 FCC Rcd. 20195, WC Docket No. 07-245 (Nov. 20, 2007), (hereafter "Notice").

[2] Marginal cost and incremental cost are often used synonymously. Strictly speaking, marginal cost refers to the additional cost of supplying an infinitesimally small additional unit of output. Incremental cost refers to the additional cost of supplying a finite and potentially large change in production or sales. See, Alfred E. Kahn, *The Economics of Regulation, Principles and Institutions*, The MIT Press, 1988, Volume I, at 66. I will use the term marginal cost when referring to general propositions about economic efficiency and the term incremental cost when referring to a large change in production.

other public policy goal. I conclude that an increase in pole attachment rates paid by cable companies would be most likely to induce a less efficient market outcome and reduce social welfare.

4. In the following section, I report on my firm's estimate of the likely economic impact of an increase in pole attachment rates. My intention is to show the potential size of the distortion created by a movement away from efficient pricing. Based on this analysis, I project that an increase in pole attachment rates in the range contemplated by the Commission would be very damaging to the industry and to the users of broadband service.

5. The third issue I address is whether concerns over competitive neutrality should dictate an increase in pole attachment rates for broadband access service providers. My conclusion is that increasing the rates paid by cable companies would be likely to create a distortion in the competitive positions of the different service providers in the industry, rather than leveling the proverbial playing field.

II. AN INCREASE IN POLE ATTACHMENT RATES PAID BY CABLE COMPANIES WOULD HARM ECONOMIC EFFICIENCY

6. The starting point for my analysis of the Commission's proposal to increase the pole attachment rates paid by cable companies that offer broadband Internet service is to compare current rates to long run marginal cost. The reason is that prices in excess of marginal cost will be inefficient. Therefore, if current rates are already in excess of marginal cost, as is set forth below, any increase in rates will cause an even greater deviation from economic efficiency and harm the public.

7. The long run marginal cost of a pole attachment will depend on whether space is available. If space is available, and there are no competing uses for the space, marginal cost is zero. When space can be made available through rearrangement or expansion of a pole's height, the marginal cost is the cost of these measures taken to make the space available.

8. Current practice is to require the attacher to bear the entire cost of any rearrangements or replacement of poles where required to make space available. The utility is compensated directly by the attacher "for the cost of any modifications to utility poles necessitated by the attachments, including pole rearrangements, inspections, pole replacements, and other direct incremental costs of making space available to the cable operation."[3] Payments made by the attacher are referred to as "make-ready" and "change out" charges. I will use the term "make-ready" to refer generically to all of these charges.

9. The make-ready charges are equal to the capital cost of improving a pole to accommodate additional attachments. If the attacher continues to use the pole over its entire life, it will have covered the "lifetime" marginal costs in its payment of the make-ready charges. However, if the attacher later removes its attachment, and the pole owner is able to rent the space to another party without incurring additional cost and without sharing any of the revenue with the original attacher, it will turn out *ex post* that the make-ready charges were in excess of the marginal cost imposed by the attacher.

[3] *In the Matter of Alabama Cable Telecommunications Association v. Alabama Power Company,* 16 FCC Rcd. 12,209 (2001) at ¶48

10. The recurring pole attachment rental rates paid by cable companies are above and beyond the make-ready charges and cover a portion of the joint and common costs of the entire pole based on the space occupied by the attacher. Since none of these joint and common costs are marginal to the pole attachment, these recurring rates are entirely in excess of marginal cost. Under these circumstances, payment of these recurring rates make the pole owner better off than before, because prior to the licensee attaching to the pole, the pole owner had to recover the entire costs of the pole from its own retail customers.

11. Although current cable rental rates are thus in excess of make-ready charges (or marginal cost), they do not appear to have deterred entry into the market or reduced the level of competition in multichannel video distribution markets. However, increasing the rates paid by cable companies even more above marginal cost and linking these higher rates to their delivery of broadband Internet access or voice service will create a new marketplace distortion and cause significant harm to consumers. I will expand on this point in the next section of this declaration.

III. IMPACT ON THE INDUSTRY AND CONSUMERS OF AN INCREASE IN POLE ATTACHMENT RATES

12. An increase in the pole attachment rates paid by the cable companies would have a substantial and harmful effect on the industry and consumers. In order to gauge the potential size of these effects, I have analyzed industry data on the current pole attachment rates paid by cable companies and estimated the dollar impact of

a rate increase under a number of different scenarios. Below, I describe the approach taken by the study, summarize the results, and explain the policy implications. Attached to the declaration as Attachment 2 is a description of the source material and detail on the methodology used.

A. Study Methodology

13. The first step is to estimate the number of poles with cable attachments subject to FCC regulation. To do this, I start with an estimate of the total number of poles nationwide and then reduce the number to account for: states not subject to FCC jurisdiction; the percentage of poles to which cable companies do not attach; cable systems not used to provide broadband service; and poles owned by rural electric companies that are not subject to FCC jurisdiction. This final adjustment allows for the possibility that not all of the poles owned by rural electric companies should be eliminated, because the FCC's decision is likely to have a spillover effect on these rates set outside its jurisdiction. Making all of these adjustments and allowing for a range of spillover effects, I estimate that between 31 million and 40 million poles will be affected by the FCC's decision on pole attachment rates.

14. I gathered information on pole attachment rates subject to FCC jurisdiction now being paid by cable companies from a number of sources, including a survey of cable pole attachment rates published by the National Association of Regulatory Utility Commissions in early 2001;[4] rates recently identified in a Time Warner

[4] Mann, John, CPA, "Pole Attachments," (presented at 2001 NARUC Winter Meetings), February 2001, pp. 6-7.

Telecom White Paper;[5] and a review conducted of recent FCC decisions on pole attachments.

15. The NARUC paper provides the most comprehensive data on pole attachment rates charged by telephone companies and electric utilities on a state-by-state basis. There is no other comparable source available on which to base an analysis of the impact of a change in the rates or rate methodology. I have adjusted the electric utility rate from the NARUC paper based on several more recent FCC decisions on pole attachment rates. The rates allowed in three of the four largest FCC-regulated states – Florida, Pennsylvania, and Georgia – were on average 25% higher than those reported in the NARUC paper as of 1999. Therefore, I base my estimate of the cable attachment rates for the electric utility poles on 125% of the 1999 average. The underlying data and calculations are shown in Table 1 below.

[5] Time Warner Telecom, Inc., "White Paper on Pole Attachment Rates Applicable to Competitive Providers of Broadband Telecommunications Services," (filed to the FCC regarding RM-11293 and RM-11303), January 16, 007, pp. 9-10.

TABLE 1
Ratio of Recent to 1999 Rates
for Investor-Owned Utilities

	NARUC Survey 1999 Rates	*Recent FCC Order* Rate	Pole Owner
Florida	$5.36	$7.47	Gulf Power
Georgia	$5.79	$8.24	Georgia Power Co.
Pennsylvania	$6.80	$6.79	PECO Energy Co.
Average	$5.98	$7.50	
Ratio of Rates	***1.25***		

Sources:
FCTA v. Gulf Power , 22 F.C.C.R. 1997, EB 04-381, para. 4, 10, & fn 4, FCC 07D-01 (rel. Jan. 31, 2007)

Teleport Communications Atlanta, Inc. v . Georgia Power Co., 17 F.C.C.R. 19859 October 08, 2002, File No. PA 00-005, FCC 02-270

RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Co., 17 F.C.C.R. 25238, December 18, 2002, File No. PA 01-003, DA 02-3485, para. 9

16. I have not discovered any evidence of a similar trend in pole attachment rates for ILEC-owned poles. Therefore, I base my estimate of cable attachment rates for ILEC-owned poles on the 1999 average.

17. The average current pole attachment rates paid by cable companies will depend on ownership shares of the poles used by the cable companies. Table 2 below shows that the average pole attachment rental rate would be $5.25 if the cable companies' pole utilization is the same as the publically available estimate of nationwide pole ownership. I understand that the actual utilization of investor-owned utility poles may be greater than indicated by the nationwide average, but

absent any reliable estimate of actual proportions, I rely on the nationwide shares shown below.

TABLE 2
Weighted Average Cable Rate

	Number of Poles	*Weight*	*Rate*
Investor Owned Utilities	28,050,000	57.3%	$6.43
Telcos	20,900,000	42.7%	$3.68
	48,950,000		
Weighted Average Cable Rate			**$5.25**

18. Based on my discussions with cable industry representatives, I understand that the level of pole attachment rates currently being paid is much higher than the estimate I derived from publically available sources. Therefore, for purposes of considering the possible range of outcomes resulting from the FCC's actions, I ran the model using an alternative average current rate of $7.50.

19. In order to estimate the potential level of a rate increase, I compare the ratio of the rate using the "telecommunications" formula to the rate using the "cable" formula of the Telecommunications Act. This ratio will vary depending upon the amount of space used by the attaching entity, the height of the poles, the amount of usable space, and the total number of attaching entities. I have explored the impact of these variables, but report here on only two of the model runs.

B. Impact of an increase in pole attachment rates

20. In this discussion, I will describe two baseline analyses, which are based on the following common inputs: Total pole length – 37.5 feet; Usable space – 13.5 feet; space used by licensee – 1 foot. For one of the model runs I used three attaching entities; for another model run I used two attaching entities. These two baseline cases yield a ratio of 2.28-to-1 for three entities and 3.24-to-1 for two entities for the level of pole attachment rates using the telecommunications formula compared to the rate level using the cable formula.

21. Using these inputs for current pole rates and the number of attaching entities, I estimate that the new pole attachment rates will range from $11.97 to $24.30. The rate for each combination of inputs is shown in Table 3 below.

TABLE 3
New Pole Attachment Rates

	Current Rate	
	$5.25	*$7.50*
3 Attaching Entities	**$11.97**	**$17.10**
2 Attaching Entities	**$17.01**	**$24.30**

22. The annual impact of the increase in pole attachment rates across the entire cable industry will depend on the number of poles affected. In Table 4 below, I report a range of estimates based on the top and bottom of my estimated range of the number of poles affected, and using the four different estimates of the new pole attachment rates. The total annual dollar impact for this range of inputs is estimated to be between $208 million to $672 million.

TABLE 4
Range of Annual Impact

Number of Attachers	*3*	*3*	*2*	*2*
Poles Subject to Rate Increase (in Millions)	*31.00*	*40.00*	*31.00*	*40.00*
	Current Rate:		***$5.25***	
Annual Impact of Rate Increase (Millions)	**$208.32**	**$268.80**	**$364.56**	**$470.40**
Basic Cable Subscribers in 32 States (in Millions)	*35.81*	*35.81*	*35.81*	*35.81*
Annual Impact of Rate Increase Per Basic Subscriber	**$5.82**	**$7.51**	**$10.18**	**$13.14**
Broadband Subscribers in 32 States (in Millions)	*19.91*	*19.91*	*19.91*	*19.91*
Annual Impact of Rate Increase Per Broadband Subscriber	**$10.46**	**$13.50**	**$18.31**	**$23.63**
Telephone Subscribers in 32 States (in Millions)	*7.54*	*7.54*	*7.54*	*7.54*
Annual Impact of Rate Increase Per Telephone Subscriber	**$27.65**	**$35.67**	**$48.38**	**$62.43**
	Current Rate:		***$7.50***	
Annual Impact of Rate Increase (Millions)	**$297.60**	**$384.00**	**$520.80**	**$672.00**
Basic Cable Subscribers in 32 States (in Millions)	*35.81*	*35.81*	*35.81*	*35.81*
Annual Impact of Rate Increase Per Basic Subscriber	**$8.31**	**$10.72**	**$14.55**	**$18.77**
Broadband Subscribers in 32 States (in Millions)	*19.91*	*19.91*	*19.91*	*19.91*
Annual Impact of Rate Increase Per Broadband Subscriber	**$14.95**	**$19.29**	**$26.16**	**$33.75**
Telephone Subscribers in 32 States (in Millions)	*7.54*	*7.54*	*7.54*	*7.54*
Annual Impact of Rate Increase Per Telephone Subscriber	**$39.50**	**$50.96**	**$69.12**	**$89.18**

23. If the increase in pole rent were allocated to each basic cable customer, the annual cost increase will range from $5.82 to $18.77 per cable customer. If the increase were allocated to the customers of the broadband service that caused the rent increase, the cost increase ranges from $10.46 to $33.75 on a per broadband Internet customer basis. If the increase were allocated to customers with voice service the increase cost ranges from $27.65 to $89.18 on a per voice customer basis. (This latter scenario is not one proposed by the NPRM, nor is it suggested by NCTA. Rather, it is intended to show the range of possible outcomes,

including where the higher pole attachment rate is linked to the provision of voice service.)

C. Effect of a rate increase on the industry and consumers

24. There will be significant damage to the economy and to consumer welfare from the proposed increase in pole attachment rates. The harm will come from three different sources: (1) higher prices to consumers from direct pass through of higher pole attachment rates; (2) reduced availability of broadband services to consumers, particularly in rural areas: (3) reduced investment by cable companies in new plant and technology.

25. The extent of any direct pass through of cost increases will depend on a number of factors, such as the method by which the charge is assessed and the state of competition in the markets affected by the rate increase. For example, if the FCC follows a "contamination" theory of pole attachment rates, the marginal cost per subscriber may not be impacted by the rate increase. But this does not mean that market prices would not increase substantially as a result of the increase in the costs incurred by the cable companies to offer broadband Internet service.

26. It is a common misconception in economics to claim that a change in fixed costs will not affect prices. Sunk costs do not affect prices, but <u>non-sunk fixed costs</u> can do so by changing the investment plans or operational plans of the firm. Prior to incurring a fixed cost, a firm will consider whether the cost can be recovered from the increased marginal profit earned as a result of the activity supported by that fixed cost expenditure. If the margin earned is insufficient, the firm will not

expend the fixed cost, but will exit or cut-back its activities in the line of business that relies on the fixed cost item. As a result of the firm's decision to cut-back its activities, there will be less output and less competition in the market. And this will affect prices and consumers in many important and complex ways.

27. The effect of an increase in non-marginal pole attachment rates will depend on whether the cable company can be more profitable by withdrawing from the part of the market (i.e. broadband access or voice service) that causes the increase in rates. It is difficult to assess the likelihood of this happening, but I would expect that if higher pole attachment rate are imposed as a result of a cable company entering a line of business, cable companies will withdraw from offering broadband service in some markets. This will be more likely to happen in geographic areas where pole attachment costs are high relative to the size of the customer base, such as in rural areas. The reason is that the cable company will have less upside potential to recover the fixed pole attachment costs from this smaller customer base. The conditions that would contribute to the likelihood of market exit are: low population density and a greater proportion of electric utility-owned poles.

28. As an example, consider an area with a population density of 15 households per mile of cable plant.[6] The potential cost increase per broadband customer (or voice customer) will depend on the percentage of customers that subscribe the service, i.e. the take rate. Based on the range of potential pole attachment rate increases

[6] As an example, Kentucky Power Company, an investor owned utility, provides service to 145,000 residential customers over 9,777 miles of distribution plant, for an average 14.8 customers per distribution mile.

and a reasonable range of take rates, I estimate the annual impact on a per broadband customer basis to be in a range of $52.27 to $392.00. The results are shown in Table 5 below.

TABLE 5
Increase in Cost Per Subscriber

		Take Rate		
		10%	*20%*	*30%*
Rate Increase:	*$6.72*	**$156.80**	**$78.40**	**$52.27**
Rate Increase:	*$16.80*	**$392.00**	**$196.00**	**$130.67**

Assuming 15 households per plant mile, and 35 poles per mile.

29. The key point of this exercise is to show how much retail rates for cable broadband access service would have to increase in order to justify continuing to offer the service. A cable company operating in rural area of this density and facing an increase in pole attachment rates of this magnitude would have to increase retail rates by the amount indicated on the services that cause this cost increase – not on its basic cable subscribers. If the cable company could not pass through these higher retail rates – along with all of its other costs – without driving its take rates below a break even level, it would not offer broadband services to these customers.

30. Consumers would bear very large costs in any market where higher pole attachment rates drive the cable companies out of the broadband access line of business. The loss to consumers in these markets would be much larger than

indicated by the per-customer cost increases shown in the tables above. Since in many markets the cable company is one of only two broadband providers, its exit from the market would leave the ILEC monopoly free to raise prices and degrade service. There should be no doubt that restoration of a monopoly would create losses many times greater than the size of the "tax" that is being proposed for the cable industry.

31. Increases in pole attachment rates can also be expected to reduce the cable industry's ability to invest in future plant and new technology. As stated earlier, the potential for earning profits in rural areas will be especially hard hit by increased pole rates. More broadly, to the extent that cable companies are not able to pass through cost increases, or reduce costs by scaling back operations, their financial position will weaken, which can be expected to affect the companies' investment plans and ability to engage in developing new technologies and services.

IV. "LEVEL PLAYING FIELD" CONSIDERATIONS DO NOT DICTATE AN INCREASE IN THE RATES PAID BY CABLE COMPANIES

32. The Commission requests comment on whether "having different rates for different classes of providers providing the same services distort[s] investment decisions or tilt[s] the competitive playing field."[7] The Commission's tentative conclusion to adopt "a uniform rate for all pole attachments used for broadband

[7] Notice, ¶26.

Internet service" is based at least in part on its understanding that a uniform rate would promote broadband deployment and help create competitive neutrality.[8]

33. I agree with the Commission's goal to achieve competitive neutrality, but do not share in its tentative conclusion that setting a so called uniform rate for pole attachments used for broadband Internet access service will achieve that goal. In a world where all service providers pay a third party for use of poles, it would be a relatively simple matter to achieve competitive neutrality by setting a uniform rate. However, the different categories of service providers (e.g. ILECs, cable companies, wireless providers, BPL providers) do not pay pole attachment rates or incur pole usage costs in a parallel manner. Therefore, it is not possible to create uniformity or competitive neutrality simply by declaring that a uniform rate will apply to pole attachments for broadband Internet access.

34. Considering the limited information available on the costs incurred by the ILECs for use of their own poles and the poles owned by the electric utilities and potential limitations on the Commission's jurisdiction, it is probably not possible to discover or mandate a completely neutral "playing field." However, it is possible and important to investigate whether the change from the status quo proposed by the Commission will move things in the right direction. My analysis of this issue leads me to believe that cable companies are not now receiving an unfair advantage over their primary competitors in video, data, and voice residential markets. Therefore, the Commission's proposal to impose higher pole

[8] Notice, ¶36.

attachment fees will fall disproportionately on the cable companies could skew the market toward a less neutral outcome.

35. To facilitate discussion of this issue, I will proceed by first explaining the meaning of competitive neutrality. Then, I will compare the costs of pole usage for ILECs and cable companies.

A. Competitive Neutrality Defined

36. I believe that the best test of whether a policy change is competitively neutral is to analyze whether it will cause or contribute to a market outcome in which services are supplied by more efficient firms. This can be judged primarily by how it alters the marginal or incremental cost of the participants. For example, if a policy imposes a "tax" on one group of firms by setting the price of an input it uses above marginal cost, but allows other firms to use this input without paying the "tax," it will be giving the second set of firms an artificial advantage, which may lead the market to substitute higher-cost output for lower-cost output. In order to perform a test of "competitive neutrality," therefore, it is necessary to analyze the effects of a policy change on the marginal and incremental cost of differently-situated firms.

B. Comparison of the cost of pole usage for cable companies and ILECs

37. A provider of broadband Internet access incurs marginal or incremental cost in two different ways. First, the provider incurs the incremental cost of remaining in the broadband access business. This category of incremental cost includes any ongoing (non-sunk) fixed cost of the business itself, including any increment in

the pole attachment rates or costs that are imposed as a consequence of offering broadband service to any customers.

38. The second category of marginal cost is the more "traditional" change in cost with respect to an increase in the number of customers taking service from that broadband Internet access provider. This category of marginal cost includes any change in pole attachment rates linked to the number of customers served. For a pole owner, this category of marginal cost would include any additional costs associated with adding more subscribers to the system.

39. An increase in pole attachment rates charged to a cable company that provides broadband Internet access service will impose a higher marginal or incremental cost on the company of continuing to offer broadband service. The incremental cost effect will result from a pole attachment rate increase tied to the decisions whether to offer the service at all. In contrast, the "per customer" marginal cost effect will result from a pole attachment rate increase that is prorated based on the number of customers subscribing to the cable company's broadband access service.

40. By comparison, the ILEC's marginal cost of pole attachments or pole usage will be different depending on pole ownership. There are three general categories: (1) poles owned by the ILEC; (2) poles owned by electric utilities but shared under joint use agreements; (3) poles not owned by an ILEC or covered by a joint use agreement with an electric utility.

41. On poles that it owns outright, an ILEC will incur zero marginal cost with respect to adding a new service (e.g. broadband or video) or with respect to adding subscribers to any service offering. Therefore, an increase in "uniform" pole attachment rates charged to cable companies for broadband service will give the ILECs an artificial incremental cost advantage, and shift the market towards ILEC delivery of these services. This will happen with respect to any market or markets where the ILECs and cable companies go head-to-head. For example, in the rapidly developing market for the bundle of voice, data, and video service, the imposition of a higher pole attachment rate on the cable companies will provide an artificial benefit to the ILECs – at least with respect to the poles that it owns.

42. When an ILEC's use of another party's poles is governed by a joint use agreement, the marginal cost of a service or an additional subscriber will be entirely dependent on the nature of the joint use agreement. If an ILEC's responsibility for building or maintaining poles is unaffected by what services it offers or the number of subscribers to those services, then any change in the regulated pole attachment rates will have no effect on the ILEC's marginal cost. Under the terms of the joint ownership agreements that I have reviewed, neither party incurs additional cost or obligations as a result of a change in the number or type of services offered or the number customers being served. Also in these joint ownership agreements either party may use unallocated space without additional charge.

43. I understand that some ILECs and utilities have argued that the "adjustment rates" contained in some joint use agreements are evidence of pole "rental" at rates well

in excess of the cable pole attachment rate. (These adjustment rates are applied if a joint owner's ownership of poles is out of balance with the ownership share required by the agreement.) I disagree with the argument that these adjustment rates are a proper benchmark for pole attachment rates to be paid by cable companies or others attachers.

44. The adjustment rates are designed to encourage an equitable ownership share of the jointly used poles. The adjustment rates are not a marginal rate for pole usage, but for the right to remain a party to a joint use agreement, which is a complex multifaceted agreement with many benefits and costs. The parties to the joint use agreement need to create incentives to prevent one of the parties from avoiding new pole placement or replacement of poles, especially in higher cost locations. One would expect the adjustment rates to be higher than a compensatory rental rate in order to give a more powerful incentive for the joint owner to maintain their shares and not avoid sole responsibility for the "marginal" – and therefore most expensive – pole.

45. In cases when an ILEC's pole attachment arrangement is entirely as a "renter" of space, with no involvement in a joint ownership agreement with the utility, its marginal cost and total cost will depend entirely on the pole attachment rates that it pays. I am not aware of any systematic information on the frequency of these agreements or the amounts paid by ILECs to cooperatively or investor-owned pole owners. As a policy matter, if it were established that there was a pure pole rental relationship between an ILEC and a utility, it would be reasonable for ILECs and cable companies to pay the same absolute and marginal rates with

respect to their offerings of broadband Internet service. This could be accomplished by imposing a single rate regardless of services offered, set near marginal costs in order to maximize economic efficiency. On the other hand, evidence on the existing levels of these rental rates should not serve as a benchmark for setting rates across-the-board on all poles leased by cable companies or other attachers.

46. In conclusion, I believe that if the Commission were to set a higher rate for use of poles for broadband service access, the burden would fall disproportionately on the cable companies.

V. CONCLUSION

47. The Commission's proposal to adopt a uniform rate for broadband Internet access service at a level above the cable rate would not improve on economic efficiency or help create competitive neutrality.

48. The Commission's proposal to raise the rates paid by cable companies above current levels could cost the industry and the public between $208 million and $672 million annually. Allocated across all broadband subscribers in the states affected by the FCC, this would translate to a cost increase ranging between $10.46 and $33.75 annually per broadband subscriber.

49. The proposed increase in pole attachment rates is likely to make it unprofitable for cable companies to enter new markets or continue to offer broadband service in some rural areas. This will impose very large costs on rural customers, who

will be left without broadband service, or at best have no alternative to DSL service.

50. After reviewing the information and data filed by the ILECs and utilities in the comment round of this proceeding, I propose to elaborate and expand my analysis of the economic issues raised by the Notice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: March 7, 2008

Michael D. Pelcovits

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CURRICULUM VITÆ

(January 2008)

EDUCATION

Massachusetts Institute of Technology, Ph.D. (Economics), 1976
University of Rochester, B.A. (Economics), *summa cum laude*, 1972

EMPLOYMENT

MiCRA
Principal: October 2002 – Present

MCI Communications (WorldCom, subsequent to its acquisition of MCI)
Vice President and Chief Economist: 1998 - 2002
Executive Director: 1996 – 1998
Director: 1992 – 1996
Senior Policy Adviser: 1988 – 1992

Cornell, Pelcovits & Brenner Economists Inc
Vice President and Treasurer: 1982 – 1988

Owen, Cornell, Greenhalgh & Myslinski Economists Inc.
Senior Economist: 1981 – 1982

Federal Communications Commission, Office of Plans and Policy
Senior Economist: 1979 – 1981

Civil Aeronautics Board, Bureau of International Aviation
Industry Economist: 1978 – 1979

University of Maryland, College Park, Department of Economics
Assistant Professor: 1976 – 1978

ACADEMIC AWARDS

National Science Foundation Graduate Fellowship, 1972 – 1975
Phi Beta Kappa, 1972
Isaac Sherman Graduate Fellowship, 1972 (University of Rochester)
John Dows Mairs Prize in Economics, 1971 (University of Rochester)

PUBLICATIONS

"Long Distance Telecommunications" in Diana L. Moss, editor, Network Access, Regulation and Antitrust, (Routledge), 2005.

"The WorldCom-Sprint Merger" in John Kwoka, Jr. and Lawrence J. White, editors, The Antitrust Revolution, The Role of Economics, 4th Edition (Oxford University Press), 2003.

"Economics of the Internet," (with Vinton Cerf), in Gary Madden and Scott Savage, editors, The International Handbook On Emerging Telecommunications Networks (Edward Elgar), 2003.

"Application of Real Options Theory to TELRIC Models: Real Trouble or Red Herring" in James Alleman and Eli Noam, editors, The New Investment Theory of Real Options and its Implications for Telecommunications Economics, (The Netherlands, Kluwer Academic Publishers, 1999).

"The Promise of Internet Access over Cable TV: Should the government force open access requirements?" (with Richard Whitt), CCH Power and Telecom Law, Vol. 2, No. 7, November/December 1999.

"Toward Competition in Phone Service: A Legacy of Regulatory Failure," (with Nina W. Cornell and Steven R. Brenner), Regulation, July/August 1983.

"Access Charges, Costs, and Subsidies: The Effect of Long Distance Competition on Local Rates," (with Nina W. Cornell), in Eli Noam, editor, Telecommunications Regulation Today and Tomorrow, (New York: Harcourt Brace Jovanovich, 1983).

"The Equivalence of Quotas and Buffer Stocks as Alternative Stabilization Policies," Journal of International Economics, May 1979.

"Revised Estimates U.S. Tax Revenue (with Jagdish Bhagwati), in Bhagwati and Partington editors, Taxing the Brain Drain, (North Holland, 1976).

"Quotas Versus Tariffs," Journal of International Economics, November, 1976.

OTHER PROFESSIONAL ACTIVITIES

Speaker and Panelist (selected examples):

Advanced Workshop in Regulation and Competition, Center for Research in Regulated Industries, Rutgers Business School, "Open Access Policies, Net Neutrality and Incentives for Innovation in the Telecommunications," June 29, 2006

National Association of State Utility Consumer Advocates, "Telco Structural Separations, Costs & Benefits," June 19, 2001

LeBoeuf, Lamb, Greene & MacRae, "Telecom Restructuring: The Road to Profitability -- Is there a Map?" June 11, 2001

Columbia University, Graduate School of Business, Institute for Tele-Information, "European Lessons in Liberalization: The German Experience in Telecommunications & Internet Applications," February 16, 1999

Massachusetts Institute of Technology, "Economics of the Internet: Lessons from Regulation of Telephony," April 30, 1998

National Association of State Utility Consumer Advocates, "The Telecommunications Act Two Years Later," February 10, 1998

Columbia University, Graduate School of Business, Institute for Tele-Information, "From the Blueprint to Reality: A Look Into the Second Year of the Telecommunications Act of 1996," April 10, 1997

Federal Communications Commission, Federal State Joint Board on Separations, February 26, 1997

Alliance for Public Technology, "Technologies of Freedom: Linking the Home to the Highway," February 21, 1997

Federal Communications Commission, Federal-State Joint Board on Universal Service, June 5, 1996

Columbia University, Graduate School of Business, Institute for Tele-Information, "Telecommunications Act of 1996: The Morning After," February 6, 1996

New York Law School, Communications Media Center, "Universal Service in Context: A Multidisciplinary Perspective," December 6, 1995

Kansas University, "Stakeholders Symposium on Telecommunications," November 2, 1995

Guest lecturer in graduate and undergraduate courses at:

Columbia University, Graduate School of Business
New York University, Stern School of Business
Georgetown University, McDonnough School of Business
George Washington University
Johns Hopkins University
University of Maryland
American University
Northeastern University

RECENT TESTIMONIES (2003 to present)

U.S. DISTRICT COURT

In The United States District Court for The District of Colorado, Civil Action No. 03-F-2084 (CBS), QWEST CORPORATION, Plaintiff, v. AT&T CORP, Defendant. (Deposition taken; case settled)

LONDON COURT OF INTERNATIONAL ARBITRATION

In the Matter of an Arbitration Between: France Mobile Telecom Mobile Satellite SA, Stratos Wireless Inc, Telenor Satellite Services AS Claimants - and – Inmarsat Global Limited Respondents, LCIA Arbitrations No. 6767, 6768, and 6769.

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In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Records, Docket No. 2005-1 CRB DTRA

In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings for a New Subscription Service, Docket No. 2005-5 CRB DTNSRA

In the Matter of Adjustment of Rates and Terms for Preexisting Subscription Service and Satellite Digital Audio Radio Services, Docket No. 2006-1 CRB DSTRA

STATE UTILITY COMMISSIONS

State of New Hampshire, Public Utility Commission, Joint Petition of Verizon New England Inc., and FairPoint Communications, Inc. Transfer of New Hampshire Assts of Verizon New England, Inc. et. al., Docket No. DT 07-011

State of Vermont, Public Service Board, Joint Petition of Verizon New England, Inc., d/b/a Verizon Vermont, Certain Affiliates Thereof and FairPoint Communications, Inc. for approval of asset transfer, acquisition of control by merger and associated transactions, Docket No. 7270

State of Connecticut, Department of Public Utility Control, DPUC Investigation of Intrastate Access Charges, Docket No. 02-05-17.

State of Connecticut, Department of Public Utility Control, Application of Southern New England Telephone Company for Approval to Reclassify Certain Private Line Services from Noncompetitive to Competitive Category, Docket No. 03-02-17.

Pennsylvania Public Utility Commission, AT&T Communications of Pennsylvania, Inc. v. Verizon North, Inc. Docket Number C-20027195.

Pennsylvania Public Utility Commission, Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements, Docket No. I-00030099.

Pennsylvania Public Utility Commission, Generic Investigation in re: Impact On Local Carrier Compensation if A Competitive Local Exchange Carrier Defines Local Calling Areas Differently Than the Incumbent Local Exchange Carrier's Local Calling Areas but Consistent With Established Commission Precedent, Docket No. I - 00030096.

Pennsylvania Public Utility Commission v. Verizon Pennsylvania Inc. Tariff No. 216 Revisions Regarding Four Line Carve Out, Docket No. R – 00049524; Pennsylvania Public Utility Commission v. Verizon Pennsylvania Tariff No. 216 Revisions Regarding Switching, Transport and Platform for High Capacity Loop, Docket No. R – 00049525.

FCC DECLARATIONS

In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket No. 03-123

In the Matter of Amendments of Parts 1, 21, 73, and 101 of The Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66

In the Matter of Tyco Telecommunications, VSNL Telecommunications, et al, Application for Transfer of Control of Cable Landing Licenses, Petition to Deny of Crest Communications Corporation

In the Matter of Review of the Commission's Rule Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers

In the Matter of AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services

In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities

Center for Communications Management Information, Econobill Corporation, and On Line Marketing, Inc., Complainants, v. AT&T Corporation, Defendant

RECENT CONSULTING ASSIGNMENTS

Telecommunications Industry

Prepared FCC declaration for Sorenson Communications concerning the rate methodology for reimbursing Video Relay Service providers

Prepared FCC declaration for the Wireless Communications Association International analyzing the impact of limits on spectrum leases in the Educational Broadcasting Service bands on investment in wireless infrastructure

Prepared expert reports for the Infocomm Development Authority of Singapore on access to submarine cable landing stations and regulation of local leased line circuits

Prepared and presented an analysis of the market for termination of calling on mobile phones to Ofcom, the independent regulator and competition authority for the UK communications industries

Hired to provide expert analysis of liability and damage issues in Civil Action No. 5:03-CV-229: *Z-Tel Communications Inc.* v. *SBC Communications Inc. et al;* In the United States District Court for the Eastern District of Texas, Texarkana Division (case settled)

Other Industries

Analyzed the market for satellite radio services (XM and Sirius) and recommended rates for the compulsory license fee for digital audio transmission of sound recordings

Analyzed the market for Internet music services and recommended rates for the compulsory license fee for digital audio transmission of sound recordings.

Hired by a rural electric power company to develop a damage model for a case involving the failure of a lessee to properly maintain and utilize a coal-powered electric power plant (case settled)

Analysis of economic benefits and tax revenues from the construction and operations of a hotel and villa complex in the British Virgin Islands

ATTACHMENT 2

Methodology and Sources

Estimation of the total number of poles directly and indirectly affected by the FCC decision

The precise number of poles currently in use for each of four groups, Investor-Owned Utilities ("Private Utilities"), ILECs, Rural Electrics and Railroads, is not readily available. However, the American Wood Protection Agency (AWPA) has published estimates for each of these four ownership groups, which are supported by estimates of the total number of poles obtained from other sources. As shown in **TABLE A-1** below, AWPA's combined estimate for the four ownership groups is 134 million poles.[1] Other sources have identified that there are "approximately 135 million chemically treated wood utility poles in the U.S.,"[2] and that "150 million poles in use."[3] A January 2008 interview with a wood preservation expert refers to 160 million poles, or "one [pole] for every other person."[4] Also, AWPA's estimate for Private Utilities is 9 million lower than the 60 million estimated by the Electric Power Research Institute (EPRI).[5]

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[1] AWPA, "Frequently Asked Questions," http://www.awpa.com/references/faq accessed on February 20, 2008.

[2] http://www.beyondpesticides.org, accessed on February 20, 2008

[3] North Pacific

[4] NPR Transcript, "What's Up with Those Utility Poles," January 6, 2007 (interview with Professor Jeff Morrell and Bryan Hayes).

[5] The Electric Power Research Institute (EPRI), "Treated Wood Poles: In Use and In the Environment, Questions and Answers About Utility Poles."

TABLE A-1
Poles by Ownership

	Number of Poles	*Percent of Total*
Private Utilities	51,000,000	38.1%
ILECs	38,000,000	28.4%
Subtotal of Private Utilities & ILECs	89,000,000	66.4%
Rural Electrics	37,000,000	27.6%
Railroads	8,000,000	6.0%
Subtotal of Rural Electrics & Railroads	45,000,000	33.6%
Total	134,000,000	

State population data is used as a proxy for the portion of the nation's poles that are located in the 32 states subject to FCC-regulated pole attachment rates. Since 55% of the U.S. population lives in the FCC-regulated states,[1] as shown in **TABLE A2** below, we estimate that 73.7 million poles would be located in those states (*i.e.*, 134.0 million times 55%).

TABLE A-2
2007 Population

	Population	*Percent of Total*
FCC-Regulated States	165.8 Million	55.0%
Self-Regulated States	135.9 Million	45.0%
Total	301.6 Million	

As shown in **TABLE A-1** above, 33.6% of the nation's poles are owned by Rural Electrics and Railroads, entities whose poles attachment rates are not subject to FCC-regulation. For our

[1] U.S. Census, July 2007 (http://www.census.gov/Press-Release/www/releases/archives/population/011108.html).

analysis, we have assumed that 33.6 % of the 73.7 million poles in the FCC-regulated states are also owned by Rural Electrics and Railroads. Therefore, we estimate that 49.0 million poles would be subject to FCC-regulated rates (*i.e.*, 73.7 million times 66.43%).

The estimate of 49 million poles includes all poles subject to FCC-regulated rates, regardless of whether a cable company is now attaching to the pole. It is necessary to adjust for this factor. We understand based on discussions with industry sources that cable companies attach to approximately two-thirds of all poles. Using this factor, we estimate that the cable industry attaches to 32.7 million poles (*i.e.*, 49.0 million times 66.7%) in jurisdictions affected directly by the FCC ruling.

The next adjustment is to account for pole attachments in areas where the cable company does not offer broadband service. According to NCTA statistics, 123,400,000 homes are passed by cable, and of these 117,700,000 are passed by high-speed data service. Therefore, on a nationwide basis, 95.4 per cent of homes passed by cable are broadband capable and would be subject to a higher pole attachment rate. Applying this percentage to the 32.7 million poles derived earlier yields an estimate of 31.2 million poles directly affected by the FCC ruling. This estimate (rounded down to 31 million) serves as the lower bound for affected poles used in this study.

In addition, the rate set by the FCC would be likely to lead to an increase in pole attachment rates set by rural electrics. As detailed in the prior paragraph, 31 million (or 35%) of the 89 million poles owned by ILECs and IOUs are directly affected by the FCC ruling. If 35% of all poles owned by rural electrics were also subject to a similar rate increase, then an additional 13 million poles (*i.e.*, 35% times 37 million) would be indirectly affected by the

FCC's decision. Hence, the 31 million poles subject to the FCC jurisdiction would increase to 44 million poles, directly and indirectly affected by the FCC's decision.

However, an adjustment should be applied to reflect the lower percentage of the poles attached by cable companies to rural electrics and the uncertain affect of the FCC decision on pole attachment rates charged by the rural electrics. We believe a reasonable upper-bound for the indirect effect of the FCC's decision should be based on an assumption that two-thirds of the 13 million poles owned by rural electrics, or 9 million poles, would be subjected to the higher rates. When combined with the 31 million poles discussed above, 40 million poles would be directly or indirectly affected by the FCC's action. This serves as the upper bound for calculating the impact of the higher pole attachment rates.

NARUC data on pole attachment rates in 1999

As explained in the text, the rates reported in the NARUC paper were averaged separately for ILEC owned poles and electric utility owned poles. Table A3 provides the rates in each state for each ownership category as well as the average rate of each on both an unweighted and weighted basis. The study uses an unweighted average, since we were unable to take account of the method used in the NARUC paper for averaging across individual observations in each state.

TABLE A-3
Average 1999 Pole Attachment Rates
for FCC-Regulated States

	Poles Owned by ILECs	Poles Owned by Private Electrics	*Population Factor*
Alabama	$5.17	$7.02	*2.79%*
Arizona	$3.35	$4.61	*3.82%*
Arkansas	$1.99	$4.00	*1.71%*
Colorado	$4.00	$1.72	*2.93%*
Florida	$3.99	$5.36	*11.01%*
Georgia	$4.56	$5.79	*5.76%*
Hawaii	$8.50	$8.50	*0.77%*
Indiana	$3.75	$5.57	*3.83%*
Iowa	$2.75	$3.50	*1.80%*
Kansas	$3.21	$4.00	*1.67%*
Maryland	$2.21	$6.40	*3.39%*
Minnessota	$3.13	$3.48	*3.14%*
Mississippi	$4.71	$5.77	*1.76%*
Missouri	$3.39	$4.72	*3.55%*
Montana	$2.50	$3.55	*0.58%*
Nebraska	$4.50	$6.12	*1.07%*
Nevada	$4.38	$5.22	*1.55%*
New Hampshire	$7.26	$7.61	*0.79%*
New Mexico	$1.07	$1.00	*1.19%*
North Carolina	$4.45	$6.22	*5.47%*
North Dakota	$2.75	$3.50	*0.39%*
Oklahoma	$2.14	$4.24	*2.18%*
Pennsylvania	$4.60	$6.80	*7.50%*
Rhode Island	$4.98	$6.71	*0.64%*
South Carolina	$4.41	$7.23	*2.66%*
South Dakota	$2.75	$3.50	*0.48%*
Tennessee	$6.18	$7.30	*3.71%*
Texas	$2.58	$4.06	*14.42%*
Virginia	$2.40	$4.39	*4.65%*
West Virginia	$3.73	$5.84	*1.09%*
Wisconsin	$2.90	$3.98	*3.38%*
Wyoming	$2.00	$4.21	*0.32%*
Simple Average	***$3.76***	***$5.06***	
Weighted Average	***$3.68***	***$5.14***	

Note: The population factors reflect a state's population relative to the 32-state total population, and are used to compute the Weighted Average Rates.

Other evidence on recent pole attachment rates

Additional information on recent pole attachment rates is included in the Time Warner Telecom White Paper on Pole Attachments. This evidence supports an even larger estimate for the increase in pole rates since 1999. In Table A4 below, we compare the Time Warner Telecom (TWT) reported rates to the NARUC reported rates for the four states that were not included in our survey. TWT does not report whether these pole attachment rates were for ILECs or electric utilities. In either case, however, the ratio of the rates would be higher than the 1.25 ratio used in the paper to inflate the rates for electric utilities.

TABLE A-4
Ratio of TWT to NARUC Attachment Rates
Based on Rates Reported by Time Warner Telecom (TWT)

			NARUC 1999	
State	Population	TWT	ILECs	Private Electrics
Indiana	6,345,289	$4.90	$3.75	$5.57
North Carolina	9,061,032	$6.26	$4.45	$6.22
Wisconsin	5,601,640	$4.57	$2.90	$3.98
Texas	23,904,380	$7.10	$2.58	$4.06
Weighted Average		$6.30	$3.16	$4.70
Ratio of TWT to NARUC			***1.99***	***1.34***

APPENDIX C

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

DECLARATION OF BILLY JACK GREGG

DECLARATION OF BILLY JACK GREGG

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I. INTRODUCTION

1. My name is Billy Jack Gregg. I am an independent consultant and the principal in the consulting firm Billy Jack Gregg Universal Consulting. The firm specializes in issues involving universal service, intercarrier compensation and broadband deployment. My business address is P.O. Box 107, Hurricane, West Virginia 25526. I began Billy Jack Gregg Universal Consulting following my retirement as Director of the Consumer Advocate Division of the Public Service Commission of West Virginia ("WVCAD") in October 2007. I served as Director of the WVCAD for 26 years. In that position I was actively involved in local and national telecommunications issues. Nationally, I served as a member of the Rural Task Force, the Federal-State Joint Board on Universal Service, NARUC's Intercarrier Compensation Task Force, the Board of Directors of the Universal Service Administrative Company ("USAC"), and the Board of Directors of the National Regulatory Research Institute ("NRRI"). Locally, I served as Chair of the West Virginia Advanced Services Task Force, Chair of the West Virginia Payphone Task Force, and Chair of the West Virginia 271 Workshop Process. I have testified or appeared before the Federal Communications Commission; regulatory bodies in the states of West Virginia, Georgia, and Alaska; legislative committees in the states of West Virginia, Virginia, Pennsylvania and Tennessee; and committees of both houses of Congress. I hold a B.A. from Austin College in Sherman, Texas, and J.D. from the University of Texas School of Law. My resume is appended to this declaration as Attachment A.

2. I have been asked by the National Cable & Telecommunications Association ("NCTA") to investigate the impact of new pole attachment rates on the provision of broadband in rural and high cost areas of West Virginia by cable providers. These new

pole attachment rates were proposed in an NPRM released by the FCC on November 20, 2007, in Wireline Competition Bureau Docket No. 07-245.[1] ("FCC NPRM"). Based upon that investigation I conclude that the new higher pole attachment rates proposed for cable providers in West Virginia will substantially increase the annual cost of doing business for those providers and will increase the costs of extending service to rural and high-cost areas that currently do not have broadband service. This will make it less likely that these unserved areas will obtain broadband service in the normal course of business. If the FCC desires to implement uniform pole attachment rates for broadband providers, the uniform rates should be based on the existing costing methodology for cable providers. This approach would be consistent with actions taken by several states that have already adopted uniform pole attachment rates. The bases for my conclusions are set forth below.

II. BACKGROUND ON BROADBAND DEPLOYMENT IN WEST VIRGINIA

3. As previously stated, from 2000 until my retirement in 2007 I served as the Chair of the West Virginia Public Service Commission's Advanced Services Task Force ("WVASTF"). The purpose of the WVASTF was to monitor the deployment and use of broadband within West Virginia and to make recommendations to the Public Service Commission on policies to encourage deployment and use of broadband. The WVASTF issued its first report and recommendations in February 2003. Pursuant to an invitation from the Public Service Commission to periodically update the report, the WVASTF

[1] *Implementation of Section 224 of the Act: Amendments of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 22 FCC Rcd. 20195, WC Docket No. 07-245 (Nov. 20, 2007).

issued annual updates beginning in 2004.[2] These updates tracked the changes in deployment and subscription to broadband throughout West Virginia over time. The reports of the WVASTF relied on FCC data, as well as West Virginia-specific data gathered in annual surveys of cable and telephone broadband providers. The annual updates included maps which showed availability of broadband in West Virginia by type of provider. As a result of my participation in the preparation of these reports, I became intimately familiar with the types of broadband available, and with the broadband providers in West Virginia.

4. Based on the last update report of the WVASTF and the FCC's most recent report on high-speed lines, broadband is available to approximately 77% of households in West Virginia.[3] However, only 37.1% of West Virginia households actually subscribe to some sort of broadband service.[4] This level of subscribership is among the lowest in the United States, substantially below the national subscribership level of 56.8%.[5] West Virginia's low level of subscribership is due to several factors: high median age, low average education level, low average income level, low level of home computer ownership, and lack of availability of broadband service in rural areas.[6]

5. Cable modem service has been and remains the predominant form of broadband service in West Virginia. The WVASTF's first report in 2003 reviewed data

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[2] All of the reports of the WVASTF are available on the West Virginia Consumer Advocate Division's website at http://www.cad.state.wv.us/AdvSvcPage.htm.

[3] *High Speed Services for Internet Access: Status as of June 30, 2007*, FCC IATD (March 2008), Table 14 ("*June 30, 2007 FCC Report*"); *WVASTF 2007 Update*, p. 3.

[4] *June 30, 2007 FCC Report*, Table 13. As of June 30, 2007, 275,845 residential customers subscribed to broadband services, 37.1% of the 743,064 total households in West Virginia. U. S. Census Bureau, *2006 American Community Survey: Selected Social Characteristics, West Virginia* (Sept. 2007).

[5] *Id.*; As of June 30, 2007, 65,904,499 residential customers nationwide subscribed to broadband services, 56.8% of the 116.01 million households in the United States. U. S. Census Bureau, *Current Population Survey, 2007 Annual Social and Economic Supplement* (Aug. 2007), Table HINC-06.

[6] *WVASTF 2007 Update*, pp. 6-7.

available for 2002. At that time only 7.7% of West Virginia households actually subscribed to broadband. Cable modem service provided 48,858 high speed lines in 2002, or 83% of the total broadband lines in West Virginia.[7] According to the FCC's most recent report on high-speed services, cable modem service is still the leading technology for broadband access in West Virginia. Cable modem service now accounts for 155,867 lines, or 50.9% of the total high-speed lines in West Virginia.[8] This compares to 34% of total high-speed lines provided by cable modem providers nationwide.[9] Even though the share of total broadband lines in West Virginia provided by cable modem service has fallen since 2002, the number of high-speed lines provided by cable companies in West Virginia has grown by 219%.

6. Approximately ten cable companies provide broadband in West Virginia by means of cable modem service. Although cable companies provide cable modem service throughout the urban and suburban areas of West Virginia, they also serve a tremendous number of very small, rural communities. These communities are detailed in an attachment to the most recent WVASTF update, which is also attached to this declaration as Attachment B. For example, Suddenlink, the largest cable provider in the state, serves large cities like Charleston, but also serves tiny communities such as Amigo, Ethel, Lyburn and Uneeda in remote areas of southern West Virginia. Many of these communities consist of only a few dozen homes. This service footprint is common to almost all cable companies in West Virginia.

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[7] *WVASTF 2003 Report*, p. 5.
[8] *June 30, 2007 FCC Report*, Table 9.
[9] *Id.* Part of the reason for the difference between the percentage of high speed lines provided by cable modem service nationally and within West Virginia is the fact that there is less availability of mobile wireless broadband service in West Virginia. Table 9 of the June 30, 2007 FCC Report shows that nationwide mobile wireless service provides the greatest number of high speed lines of any technology. As previously noted, cable modem service has been and remains the predominant broadband service within West Virginia.

7. Cable companies make cable modem service available to 96% of the homes in areas of West Virginia where they provide cable television service. This percentage is the same as the national average.[10] However, even though cable providers offer nearly ubiquitous broadband in areas they serve, there are still large areas of West Virginia that do not have broadband service available. As I mentioned earlier, only 77% of West Virginia households have access to broadband. This means that 170,000 West Virginia households do not yet have access to broadband services from any type of land-based provider.[11] Expanding broadband service into these unserved areas has been a primary concern of state government in West Virginia. For example, on April 15, 2008, Connect West Virginia, in conjunction with West Virginia state government, published an interactive map on the web showing areas in West Virginia that had broadband service, and those that did not.[12] This information is presented at a very granular level and will be used to direct future efforts to bring broadband to unserved areas.

8. All types of land-based broadband providers face unique challenges in expanding broadband service into unserved areas of West Virginia. First and foremost, the topography of West Virginia is very difficult. West Virginia is almost entirely covered by hills, mountains and forests. The terrain is very irregular. Most population centers are located in the small amounts of flat land available in river and stream valleys. Even though fixed and mobile wireless broadband solutions are effective in these urbanized areas of West Virginia, the irregular terrain and heavy vegetation renders mobile and

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[10] *June 30, 2007, FCC Report*, Table 14.

[11] I use the term "land-based" to refer to all means of providing broadband besides satellite broadband service. Satellite broadband service is theoretically available to all persons with a clear view of the southern sky. Satellite broadband service is typically higher in cost and slower in speed than land-based broadband service.

[12] The map is available at http://www.connectwestvirginia.org/mapping_and_research/interactive_map.php

fixed wireless broadband impractical in most rural areas.[13] This means that broadband service in rural areas is almost always provided by means of wire and cable facilities of cable or telecommunications companies. Because of limitations imposed by the topography, extending cable to an area only a mile away by air may take seven cable route miles. All of this cable will typically be installed as aerial plant. These topographical factors increase the costs of providing broadband service in rural areas of West Virginia. Second, the population density in the unserved areas is generally very low. As previously mentioned, most of the population centers in West Virginia tend to be found in river and stream valleys. This is true for large cities as well as tiny communities. Once outside these river valleys, the population density drops dramatically. It is the areas outside of the river valleys that constitute most of the unserved portions of West Virginia. These population factors tend to reduce the potential revenue that can be recovered to offset the cost of providing broadband service to unserved areas. Third, the same factors limiting broadband subscribership in already served areas of West Virginia - age, education and income – are also present in unserved areas. In terms of pole attachments, all of these factors mean that more poles are required to pick up each potential customer in unserved rural areas.

9. A primary factor for cable companies in deciding whether to expand into an adjacent area and provide cable and broadband service is the "pay back period" for the investment required. In other words, how many years will it be before net revenue generated by providing the service recoups the investment required to provide the service. Each cable company will use their own "rule of thumb" pay back period in

[13] In fact, because of the narrow valleys and steep hillsides in many rural parts of West Virginia, the availability of satellite broadband service is also limited.

evaluating possible expansion projects. In other words, if the expansion will return the investment within the pay back period, the decision to expand is considered economic. If the expansion will not return the investment within the pay back period, it is harder to justify. The major impediment to expansion of cable and cable modem service into unserved areas of West Virginia is that the costs of providing the service are already high and the potential revenues are low.

III. METHODS OF INVESTIGATION

10. The purpose of my investigation in this case was to determine the likely impact of new pole attachment rates on cable providers in determining whether to expand into areas of West Virginia that do not currently have access to any land-based broadband service. In order to conduct this investigation I reviewed data from several publicly available sources, such as FCC and West Virginia Public Service Commission reports. I also reviewed data on current pole counts and pole attachment rates contained in a survey conducted by NCTA of West Virginia cable companies in March 2008. Finally, I interviewed a number of West Virginia cable operators concerning pole attachment issues, and conducted on-site visits to rural areas being considered for expansion of cable service.

IV. IMPACT OF HIGHER POLE ATTACHMENT RATES ON THE ABILITY OF CABLE PROVIDERS TO EXPAND BROADBAND SERVICE INTO RURAL AREAS

11. In order to determine the current pole attachment rates paid by cable providers in West Virginia, NCTA conducted a survey of West Virginia cable companies in March 2008. Responses were received from the four largest cable providers in West Virginia, which together serve over 88% of all cable customers in the state. The results of the

NCTA pole attachment survey of West Virginia cable companies are shown in Table 1 below.[14] The pole attachment rates currently paid by each cable company to different incumbent utilities are shown under the column labeled "Current Rate." The likely rates for each company that would result from adoption of the costing methodology in the FCC NPRM are shown in the columns labeled "Proposed Rate (Hi)," "Proposed Rate (Low)," and "Proposed Rate (Av)."

[14] In order to protect the confidentiality of the responses to the NCTA survey, the responding cable companies are identified as Cable Company A, B, C or D. The pole-owning utilities shown in Table 1 are designated as follows: ELC for electric companies, and TEL for telephone companies.

Table 1

DERIVATION OF NEW POLE ATTACHMENT RATES FOR CABLE MODEM PROVIDERS IN WEST VIRGINIA

Cable Company	Pole Owner	Current Rate	Proposed Rate (Hi)	Proposed Rate (Low)	Proposed Rate (Av)
Cable Company A	ELC1	$6.65	$21.54	$15.16	$18.35
Cable Company A	ELC2	$9.79	$31.71	$22.31	$27.01
Cable Company A	TEL1	$4.04	$13.09	$9.21	$11.15
Cable Company A	TEL2	$4.18	$13.54	$9.53	$11.53
Cable Company A	TEL3	$13.75	$44.53	$31.34	$37.94
Cable Company B	ELC1	$8.48	$27.47	$19.33	$23.40
Cable Company B	ELC2	$7.24	$23.45	$16.50	$19.98
Cable Company B	TEL4	$5.00	$16.19	$11.40	$13.80
Cable Company B	ELC3	$7.50	$24.29	$17.10	$20.69
Cable Company B	TEL1	$6.30	$20.40	$14.36	$17.38
Cable Company B	TEL2	$2.22	$7.19	$5.06	$6.13
Cable Company C	ELC2	$6.66	$21.57	$15.18	$18.38
Cable Company C	ELC1	$5.79	$18.75	$13.20	$15.98
Cable Company C	TEL5	$2.52	$8.16	$5.74	$6.95
Cable Company C	TEL6	$8.02	$25.98	$18.28	$22.13
Cable Company C	ELC4	$4.01	$12.99	$9.14	$11.06
Cable Company C	ELC5	$6.00	$19.43	$13.68	$16.55
Cable Company C	ELC6	$20.00	$64.78	$45.59	$55.18
Cable Company C	TEL7	$4.79	$15.51	$10.92	$13.22
Cable Company C	TEL1	$4.94	$16.00	$11.26	$13.63
Cable Company C	TEL8	$3.00	$9.72	$6.84	$8.28
Cable Company C	ELC7	$9.50	$30.77	$21.65	$26.21
Cable Company C	ELC8	$23.23	$75.24	$52.95	$64.09
Cable Company C	ELC9	$8.00	$25.91	$18.23	$22.07
Cable Company C	TEL9	$12.14	$39.32	$27.67	$33.50
Cable Company C	TEL2	$4.08	$13.21	$9.30	$11.26
Cable Company C	ELC10	$7.75	$25.10	$17.66	$21.38
Cable Company D	ELC2	$6.35	$20.57	$14.47	$17.52
Cable Company D	TEL2	$2.22	$7.19	$5.06	$6.13
TOTAL		**$6.03**	**$19.53**	**$13.74**	**$16.63**

12. Current pole attachment rates in West Virginia range from $2.22 to $23.23 per pole per year depending on the company providing the pole and the number of entities attaching to the pole. The average for all reporting companies is $6.03 per pole per year. In order to determine the financial impact on individual cable providers resulting from

the new costing methodology proposed in the FCC NPRM, I used the data presented in Table 3 of Dr. Michael Pelcovits' declaration which was attached to NCTA's initial comments in this proceeding. Based on a comparison of pole attachment rates under the telecommunications formula and the cable formula, Dr. Pelcovits' studies showed that new pole attachment rates resulting from the NPRM could be higher than current cable attachment rates by ratios ranging from 2.28 to 1 for three attaching entities to 3.24 to 1 for two attaching entities.[15] Based on these ratios I have developed proposed rates for each company that are high, low and average. The "Proposed Rates (Hi)" shown in Table 1 are based on the 3.24 to 1 ratio to current rates, while the "Proposed Rate (Low)" are based on the 2.28 to 1 ratio. The "Proposed Rates (Av)" is the average of the high and low proposed rates. While the actual rates for each company resulting from the proposal in the FCC NPRM may vary from the rates shown in Table 1, I believe the rates presented are a fair range of possible outcomes. As can be easily seen in Table 1, pole attachment rates for cable providers will be substantially higher under the methodology proposed in the NPRM.

13. In order to determine the total annual impact from these higher pole attachment rates, I have used the total number of poles reported by each company in response to the NCTA survey. I multiplied the number of poles rented from each utility by current rates to derive the total annual pole attachment expenses for each cable provider. I then multiplied the same number of poles by the average proposed rate for each cable company shown in Table 1. The results are shown in Table 2 below.

[15] Declaration of Dr. Michael D. Pelcovits, pp. 8-11. I believe that use of the telecommunications formula is reasonable for analytical purposes since it is at the high end of the range of possible outcomes resulting from the FCC NPRM. I should note that most electric companies are advocating rates that are much higher than those produced under the current telecommunications formula.

Table 2

IMPACT OF NEW POLE ATTACHMENT RATES ON CABLE MODEM PROVIDERS IN WEST VIRGINIA

Cable Company	Pole Owner	Number of Poles	Current Rate	Annual Expense	Proposed Rate (Av)	Annual Expense	Difference
Cable Company A	ELC1	6,271	$6.65	$41,702	$18.35	$115,061	$73,359
Cable Company A	ELC2	40,558	$9.79	$397,063	$27.01	$1,095,540	$698,477
Cable Company A	TEL1	4,344	$4.04	$17,550	$11.15	$48,422	$30,872
Cable Company A	TEL2	22,336	$4.18	$93,364	$11.53	$257,603	$164,238
Cable Company A	TEL3	985	$13.75	$13,544	$37.94	$37,369	$23,825
Cable Company B	ELC1	8,659	$8.48	$73,428	$23.40	$202,597	$129,168
Cable Company B	ELC2	198	$7.24	$1,434	$19.98	$3,955	$2,522
Cable Company B	TEL4	1,357	$5.00	$6,785	$13.80	$18,721	$11,936
Cable Company B	ELC3	279	$7.50	$2,093	$20.69	$5,773	$3,681
Cable Company B	TEL1	6,151	$6.30	$38,751	$17.38	$106,919	$68,168
Cable Company B	TEL2	5,100	$2.22	$11,322	$6.13	$31,239	$19,917
Cable Company C	ELC2	106,113	$6.66	$706,713	$18.38	$1,949,897	$1,243,185
Cable Company C	ELC1	105,102	$5.79	$608,541	$15.98	$1,679,030	$1,070,489
Cable Company C	TEL5	3,028	$2.52	$7,631	$6.95	$21,054	$13,423
Cable Company C	TEL6	3,141	$8.02	$25,191	$22.13	$69,504	$44,313
Cable Company C	ELC4	3,509	$4.01	$14,071	$11.06	$38,824	$24,753
Cable Company C	ELC5	798	$6.00	$4,788	$16.55	$13,211	$8,423
Cable Company C	ELC6	789	$20.00	$15,780	$55.18	$43,539	$27,759
Cable Company C	TEL7	2,671	$4.79	$12,794	$13.22	$35,300	$22,506
Cable Company C	TEL1	3,848	$4.94	$19,009	$13.63	$52,448	$33,439
Cable Company C	TEL8	399	$3.00	$1,197	$8.28	$3,303	$2,106
Cable Company C	ELC7	484	$9.50	$4,598	$26.21	$12,686	$8,088
Cable Company C	ELC8	45	$23.23	$1,045	$64.09	$2,884	$1,839
Cable Company C	ELC9	42	$8.00	$336	$22.07	$927	$591
Cable Company C	TEL9	563	$12.14	$6,835	$33.50	$18,858	$12,023
Cable Company C	TEL2	52,118	$4.08	$212,641	$11.26	$586,701	$374,060
Cable Company C	ELC10	810	$7.75	$6,278	$21.38	$17,320	$11,043
Cable Company D	ELC2	2,983	$6.35	$18,942	$17.52	$52,263	$33,321
Cable Company D	TEL2	14,791	$2.22	$32,836	$6.13	$90,598	$57,762
TOTAL		**397,472**	**$6.03**	**$2,396,261**	**$16.63**	**$6,611,545**	**$4,215,284**

14. As shown on Table 2, the total annual pole attachment expense for the reporting companies would rise from $2.4 million under current rates to $6.6 million under average proposed rates, an almost threefold increase. Obviously, increases of this magnitude will be substantial and material.

15. The significantly higher pole attachment rates resulting from the methodology proposed in the FCC NPRM will impact the ability of cable providers to extend broadband into unserved areas in a number of ways. First, the increased expense resulting from higher pole attachment rates will not produce any additional revenue. As a result, there will be less internal cash generated by the cable company, and there will be less cash available to invest in expansions into unserved areas. Second, if the cable company is forced to raise rates to recover the increased pole attachment expense, then cable and broadband service offered by the cable company will become less attractive to and less affordable for new customers. The four cable companies included in Tables 1 and 2 serve a total of 309,977 customers using the poles listed in the tables.[16] This means that the average annual pole expense per customer under current rates is $7.73. Under the proposed rates shown in Tables 1 and 2, this annual expense would rise to $21.33 per customer. Third, when the cable company considers the economics of expanding into a new area on a "stand alone" basis, the increased pole attachment expense piled on top of already marginal economics will make it even less likely that these rural areas will receive service.

V. OTHER POLE ATTACHMENT RELATED ISSUES

16. In discussions with cable company officials in West Virginia several other issues related to pole attachments were raised. Pole-owning utility companies have begun imposing new pre-engineering study requirements on every entity that proposes to attach to their poles. This requirement obtains even if a pre-engineering study was recently completed on the same set of poles. The cost of these pre-engineering studies can

[16] The four companies responding to the survey actually serve a total of 370,924 customers in West Virginia. However, pole attachment data was not included for the former Adelphia properties which were recently acquired by two of the reporting companies.

sometimes equal or exceed current pole attachment expenses. In addition, other pole "make ready" requirements and delays can add to the overall cost of attaching to the existing poles of other utilities with available space. All of these added costs hinder the ability of cable companies to expand into unserved areas.

VI. RECOMMENDATIONS

17. Based on my investigation I recommend that the FCC maintain the current cable rate methodology for pole attachments and reject the use of a higher rate as proposed in the November 20, 2007, NPRM. The new higher pole attachment rates proposed for cable providers in West Virginia will substantially increase the annual cost of doing business for those providers and will increase the costs of extending service to rural and high-cost areas that currently do not have broadband service. This will make it less likely that unserved areas in West Virginia will obtain broadband service from cable providers in the normal course of business. As a result, these areas will have to await the provision of an explicit subsidy in order to obtain broadband service. These subsidies would likely come from the state or federal governments.

18. If the FCC desires to implement uniform pole attachment rates for broadband providers, these uniform rates should be based on the existing costing methodology for cable providers. Adoption of this approach would lower the rate paid by telecommunications providers to the rate paid by cable companies, and would be consistent with actions taken by several states that have already adopted uniform pole attachment rates. These state decisions were outlined in Appendix A to the NCTA's initial comments to this proceeding. Lowering the rate for telecommunications carrier

pole attachments to the cable rate should encourage broadband deployment in unserved areas by these carriers.

19. Lowering the existing pole attachment rate for telecommunications carriers would marginally reduce pole rental revenues received by electric utilities.[17] However, these revenue reductions would have a *de minimis* impact on electric rates. For example, in a recent rate proceeding for Allegheny Power in West Virginia,[18] pole rental revenues were included in "Other Operating Revenues" under FERC Account 454. In answer to Consumer Advocate Division Data Request J-16, Allegheny Power listed $5,693,271 in pole rental revenue for 2005. This compared to Allegheny's total operating revenues for 2005 of $961,434,841.[19] In other words, total pole rental revenues constituted only 0.6% of the total revenues of Allegheny Power. Allegheny Power's West Virginia sales in 2005 amounted to 13.7 billion kilowatt-hours of electricity. As a result, total pole attachment revenues amount to only $0.000415 per kilowatt-hour. Reduction in pole attachment rates for telecommunications carriers to the current cable rate would not eliminate all pole rental revenues for the electric companies, but would result in only a small reduction in total pole rental revenues, which are already a small portion of overall electric company revenues.

20. In West Virginia and many other jurisdictions, pole rental revenue is included in the regulated cost of service for electric utilities.[20] Any revenue reduction would not be incorporated into electric rates until the electric company's next rate case, and could

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[17] If pole attachment rates for broadband providers were equalized at the cable attachment rate, there would obviously not be any change in the level of revenues from cable providers.

[18] *Monongahela Power Company and The Potomac Edison Company, both dba Allegheny Power*, 06-0960-E-42T, Company Exhibit 1, Statement A, Schedule 1.

[19] *Id.*

[20] Since electric poles are installed to serve electric customers, these customers are responsible for the full cost of these facilities. Any pole rental revenues that are received by the electric company go to offset this cost.

possibly be offset by changes in other revenue items. However, even if looked at in isolation, the reduction in the pole attachment rate for telecommunications carriers would amount to only pennies for the average electric customer. In comparison, adoption of the costing methodology proposed in the FCC NPRM would impose substantial increases in the rates paid by cable and cable modem customers,[21] and would make it less likely that broadband can be extended into unserved areas without explicit governmental subsidies.

21. In this regard it should be pointed out that telecommunications companies in West Virginia already receive $63.3 million per year in explicit federal High-Cost Support in order to subsidize telephone service in rural and high-cost areas of the state.[22] Cable providers receive no such explicit subsidies from either the state or federal government. If pole attachment rates are raised for cable broadband providers, funds available for expansion of broadband networks by cable operators will be reduced, rather than increased. Once again, this will make it less likely that cable providers will be able to expand broadband service into rural and unserved areas of West Virginia.

I herby declare under penalty of perjury that the foregoing is true and correct.

Executed on: April 21, 2008

Billy Jack Gregg

[21] See, Declaration of Dr. Michael Pelcovits, p. 11, Table 4.
[22] Universal Service Administrative Company, *2007 Annual Report*, p. 43.

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RESUME

Billy Jack Gregg has over thirty years of legal and regulatory experience, with emphasis in the areas of telecommunications and energy.

EDUCATION:

J.D. **University of Texas School of Law**
Austin, Texas
May 1974

B.A. **Austin College**
Sherman, Texas
History and Government
May 1971

University of Glasgow
Glasgow, Scotland, U.K.
October 1969 – May 1970

EMPLOYMENT:

2007 - Present **Billy Jack Gregg Universal Consulting**
Hurricane, West Virginia

- Legal and consulting services in the areas of telecommunications and energy
- Specialty in topics of universal service, intercarrier compensation and broadband
- Arbitration and mediation of disputes among telecommunications carriers

1981 - 2007 **Director, Consumer Advocate Division**
Public Service Commission of West Virginia
Charleston, West Virginia

- Director of Consumer Advocate Division; responsible for all policies and personnel decisions
- Managed yearly budget of approximately $1 million

- Represented West Virginia ratepayers in hundreds of proceedings involving electric, telephone, gas and water rates
- Presented testimony in numerous rate proceedings in West Virginia; also testified in Georgia
- Testified before state legislatures of West Virginia and Tennessee
- Testified before committees of both houses of Congress
- Argued appeals before West Virginia Supreme Court
- Argued appeals before Federal 4th Circuit and D.C. Circuit Court of Appeals

1978 - 1981

Senior Staff Attorney, Field Solicitors Office
U.S. Department of Interior
Charleston, West Virginia

- Enforced Surface Mining Control and Reclamation Act of 1977 (SMCRA) in states of Virginia, West Virginia, Maryland and Pennsylvania
- Testified on surface mining issues before legislative committees in Virginia and Pennsylvania
- Lead attorney in Federal District Court hearing on constitutionality of SMCRA
- Lead attorney on first consideration of a petition to designate lands unsuitable for mining under Section 522 of SMCRA
- Participated in drafting initial rules to implement SMCRA

1977 - 1978

Billy Jack Gregg
Attorney at Law
Hurricane, West Virginia

- General practice of law
- Tried case before West Virginia Public Service Commission involving certification of high-voltage power line; established national precedents for conditions on such lines

1974 – 1977

Assistant Attorney General
Attorney General of West Virginia
Charleston, West Virginia

- Assigned as attorney for the West Virginia Human Rights Commission
- Handled numerous cases involving allegations of discrimination in employment, housing and public accommodations
- Argued numerous appeals to Circuit Courts and West Virginia Supreme Court

1974 **Reed & Gregg**
Attorneys at Law
Hurricane, West Virginia

- General practice of law
- Argued appeal in West Virginia Supreme Court one week after being admitted to practice

BOARDS

2002 - 2007 **Federal-State Joint Board on Universal Service**
Washington, DC

- Recommended policies to the Federal Communications Commission concerning the $7 billion Federal Universal Service Fund
- Participated in numerous recommended decisions to expand support to low-income customers and rationalize support in high-cost areas

2004 - 2006 **Intercarrier Compensation Task Force**
National Association of Regulatory Utility Commissioners
Washington, D.C.

- Served on national task force investigating reform of intercarrier compensation among telecommunications carriers
- Became familiar with intercarrier compensation on an interstate and intrastate level throughout the United States

2002 **Board of Directors**
Universal Service Administrative Company
Washington, D. C.

- Served on national board representing all sectors of the telecommunications industry
- USAC responsible for collection, distribution and administration of $7 billion annual fund aimed keeping rates for telecommunications affordable throughout the United States

2000 - Present **Board of Directors**
National Regulatory Research Institute
Columbus, Ohio

- Served on national board with other state utility commissioners and subject matter experts to recommend policies for research institute
- Appointed as Board member with responsibility over fiscal matters

- Appointed as Treasurer of new Board effective January 1, 2008

1998 - 2000 **Rural Task Force**
Federal-State Joint Board on Universal Service
Washington, D.C.

- Served on national task force which recommended policies concerning rural carriers to Joint Board
- Became familiar with conditions facing rural carries throughout the United States
- Principal editor of final recommended decision of Task Force

1990 - 1997 **Executive Committee**
National Association of State Utility Consumer Advocates
Washington, D.C.

- Served on Board which established policy for national organization representing utility consumers
- Served as Treasurer from 1992 - 1996

PUBLICATIONS:

- B. J. Gregg, A Survey of Unbundled Network Element Prices in the United States, National Regulatory Research Institute (2000-2006)
- B. J. Gregg, The Use of Per Line Support Benchmarks to Guide State Public Interest Determinations, WV CAD (2005)
- B. J. Gregg & S. Gregg, The Telecommunications Act of 1996: A Guide for Educators, AEL, Inc. (1996)

AWARDS:

- Robert F. Manifold Lifetime Service Award, National Association of State Utility Consumer Advocates (2007)

Declaration of Billy Jack Gregg
Attachment B

COMMUNITIES IN WEST VIRGINIA WITH CABLE MODEM SERVICE 2007

ARMSTRONG

Branchland	Hamlin	Pleasantview	West Hamlin

ATLANTIC BROADBAND

Albright	Ft. Ashby	Morgantown	Romney
Arthurdale	Independence	Newburg	Terra Alta
Bretz	Keyser	Reedsville	Wiley Ford
Carpendale	Kingwood	Ridgeley	

BRADLEY'S, INC.

Union

SUDDENLINK

Accoville	Deep Water	Lavalette	Proctor
Adrian	Delbarton	Lenore	Prosperity
Alderson	Dixie	Lerona	Pt. Pleasant
Alkol	Dorothy	Leslie	Quinwood
Allen Junction	Dry Branch	Lester	Racine
Alloy	Dunbar	Letart	Rainelle
Alum Creek	East Bank	Lewisburg	Raleigh
Ameagle	East Lynn	Lindside	Ravenswood
Amherstdale	Eccles	Lizemores	Rawl
Amigo	Elizabeth	Lochgelly	Reedy
Artie	Elk Garden	Logan	Rhodell
Ashford	Elkins	London	Ridgeview
Athens	Elkins	Lorado	Ripley
Bancroft	Elkview	Lorentz	Robson
Barboursville	Eskdale	Lost Creek	Rock
Bayard	Ethel	Lumberport	Rock Cave
Beaver	Fairdale	Lyburn	Ronceverte
Beckley	Fairlea	Mabscott	Rupert
Belle	Falling Rock	Macarthur	Salem
Belmont	Farmington	Madison	Scott Depot
Belva	Fayetteville	Malden	Seth
Ben's Run	Flat Top	Mallory	Shady Spring
Bentree	Flemington	Mammoth	Sharon
Beverly	Foster	Man	Sharples
Bickmore	French Creek	Marmet	Shenandoah Junction
Blair	Frenchton	Mason	Shinnston
Bloomingrose	Ft. Gay	Matoaka	Sissonville

Blount
Blue Creek
Blue Jay
Bolt

Boomer
Borderland
Bradley
Buckhannon
Buckhannon
Cabin Creek
Caldwell
Camp Creek
Cannelton
Cedar Grove
Chapmanville
Charleston
Charlton Heights
Charmco
Chattaroy
Chelyan
Chesapeake
Clear Creek
Clendenin
Clothier
Coal City
Colcord
Comfort
Cool Ridge
Cora
Corinne
Costa
Crab Orchard
Crawley
Crichton
Cross Lanes
Crum
Culloden
Cyclone
Daniels
Danville
Davin
Davisville
Dawes

Gallagher
Gallipolis Ferry
Gauley Bridge
Genoa

Ghent
Glasgow
Glen Daniel
Glen Ferris
Glen Morgan
Glen White
Handley
Hansford
Harper
Hartford
Helen
Henderson
Henlawson
Hernshaw
Hines
Hinkleville
Hinton
Hodgesville
Holden
Hugheston
Hurricane
Huttonsville
Idamay
Indore
Institute
Jodie
Jonben
Josephine
Julian
Jumping Branch
Kanawha Falls
Kegley
Kermit
Kilsyth
Kimberly
Kistler
Lanark
Lanham
Lashmeet

Maxwellton
Miami
Midway
Mill Creek

Milton
Minden
Mineral Wells
Minitz
Monaville
Montgomery
Montrose
Mount Alto
Mount Carbon
Mount Gay
Mount Hope
Naugatuck
Nellis
New Haven
New Martinsville
Nitro
Nolan
Oak Hill
Odd
Ohley
Omar
Ona
Orgas
Ottawa
Paden City
Parkersburg
Pax
Peach Creek
Pecks Mill
Peterstown
Peytona
Pinch
Piney View
Pipestem
Powellton
Pratt
Prince Wick
Princeton

Sistersville
Skelton
Smithers
Sophia

South Charleston
Spanishburg
Spencer
Sprague
Spring Hill
Spurlockville
St. Albans
St. Marys
Stanaford
Stephenson
Stollings
Summerlee
Surveyor
Swiss
Switzer
Sylvester
Tad
Tennerton
Uneeda
Verdunville
Vienna
Walker
Washington
Waverly
Wayne
West Columbia
West Milford
White Oak
White Sulphur Springs
Whitesville
Whitman
Wilkinson
Williamson
Williamstown
Winifrede
Woodville
Wyco
Yolyn

COLANE CABLE

Barnabus
Browning Fork
Cow Creek

Hampden
Hatfield Bottom
Maysburg

Pine Creek
Omar
Ragland

Sarah Ann
Stirrat
Superior

Chauncey	Micco	Sandy Bottom	Varney
Delbarton			

COMCAST

Bancroft	Fairmont	Monongah	Star City
Barboursville	Follansbee	Morgantown	Triadelphia
Benwood	Glen Dale	Moundsville	Valley Grove
Bethany	Grafton	New Manchester	Warwood
Bethlehem	Granville	Newell	Weirton
Bluefield	Harpers Ferry	Piedmont	Wellsburg
Bramwell	Hedgesville	Poca	West Liberty
Buffalo	Huntington	Ranson	Westover
Charles Town	Keyser	Red House	Wheeling
Chester	Lawrenceville	Rivesville	White Hall
Clearview	Martinsburg	Rowlesburg	Winfield
Eleanor	McMechen	Salem	Worthington

COMMUNITY ANTENNA SERVICE

Belleville	Millwood	Parkersburg	Vienna
Cottageville	Mineral Wells	Ravenswood	Walker
Davisville	Mount Alto	Ripley	Washington
Evans			

PHILIPPI CABLE

Philippi

RAPID CABLE COMPANY

Franklin	Pennsboro	Peterburg	Weston

TIME WARNER

Anmoore	Clarksburg	Mt. Clare	Reynoldsville
Barrackville	Decota	Nutter Fort	Stonewood
Bellview	Fairmont	Pine Grove	Wilsonburg
Bel-Meadows	Maple Lake	Pleasant Valley	Wolfe Summit
Bridgeport		Quiet Dell	