

**BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.**

Petition for Declaratory Ruling of)	WC Docket No. 09-154
American Electric Power Service Corporation et al.)	
Regarding the Rate for Cable System Pole)	
Attachments Used to Provide Voice Over Internet)	
Protocol Service)	
)	
In the Matter of)	
A National Broadband Plan For Our Future)	GN Docket No. 09-51

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September 24, 2009

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EXECUTIVE SUMMARY

The Commission should reject this latest effort by the electric utility pole owners to impose a massive broadband pole tax on cable pole attachments. The power companies inexplicably claim that applying the telecommunications pole rent surcharge to pole attachments used to transmit voice over Internet protocol (“VoIP”) service (including over the top VoIP, i.e., Vonage) will somehow “promote broadband deployment and competition.” In reality, the power companies’ proposal would increase cable pole attachment rent costs by up to \$672 million *annually* – thereby undermining current Commission efforts to implement an effective national broadband deployment plan and derailing competitive facilities-based voice competition. For three decades, the Congress, the Commission, the courts and the States have repeatedly found that the cable television pole attachment formula is just, reasonable and *more than fully compensatory to pole owners*. Moreover, the Commission has long recognized that reasonable pole rents set at the cable rate encourage the deployment of broadband infrastructure and the introduction of new communications services – a view that was endorsed by the Supreme Court in 2002. At the very time the Commission has identified the delivery of broadband to all Americans as its top priority, the power companies’ request to impose a massive new annual surcharge on VoIP/broadband attachments will erect a substantial economic barrier to achieving that goal.

The Commission’s 1998 decision to apply the cable rate formula to cable operators that offer commingled video and broadband Internet services helped trigger over \$120 billion in cable broadband infrastructure investment. The upgrade of the nation’s cable networks to deliver broadband services also made it possible for the cable industry to deploy VoIP – the first ever successful facilities-based residential voice competition to the ILEC monopoly. This

competition saved consumers over \$23 billion between 2003 and 2007, and is expected to save another \$100 billion by 2011. It is estimated that the total consumer benefits associated with the cable industry's post-1996 infrastructure investment, including the deployment of broadband and competitive voice services, approaches \$35 billion annually. Maintaining lower pole attachment rates for commingled cable attachments contributed substantially to this phenomenal success – just as the Commission intended.

States that regulate pole attachments have also recognized that higher pole attachment rents discourage the deployment of broadband and new communications services. California, New York, Connecticut, Oregon, Utah, and Massachusetts, among others, specifically considered and rejected imposing higher pole rates when new services were being offered over the provider's network. The vast majority of States regulating attachments, apply the cable based rate to *all attachments*, regardless of the services offered. These States, and the Commission, have recognized that the provision of new services over a cable line does not impose additional costs on pole owners or burdens to the poles that would justify any increase in pole rent.

Just last year the Commission assembled a comprehensive record in its *Broadband Pole Proceeding* refuting the pole owners' contention that the cable rate "subsidizes" cable operators and their customers at the expense of utility customers. The comments in that proceeding include reports by prominent economists, and filings from certified States and public interest groups – each explaining that the cable rate is not a subsidy and in fact overcompensates pole owners. Precisely because the cable rate provides full and fair compensation to pole owners, the National Association of State Utility Consumer Advocates, whose members are legally obligated

to protect the interests of both cable and utility consumers, specifically urged the Commission to apply the cable rate to all commingled services to promote broadband deployment and adoption.

The power companies are also wrong in asserting that the 1996 Act intended for the telecommunications surcharge to be imposed on cable VoIP. Their reliance on Commission decisions that extend specific social policy and public safety requirements (e.g., E911, Discontinuance Notices, CPNI, and CALEA) to VoIP providers is clearly misplaced. The Commission recognized that the extension of these social policies to VoIP also encouraged greater broadband deployment and investment consistent with Congress' goals. Increasing cable VoIP/broadband attachment rates would serve none of the social policies identified by the Commission in those decisions and would undermine the Commission's broadband deployment and adoption objectives.

Instead, the Commission should extend the cable rate to CLECs that offer commingled VoIP/broadband services, a proven Commission strategy for encouraging infrastructure investment and broadband deployment. The Commission can extend the cable rate to CLECs by forbearing from applying the telecommunications rate to CLECs. Section 706 of the Communications Act authorizes the Commission to use regulatory forbearance to promote competition, encourage the rapid deployment of new telecommunications technologies, and remove barriers to infrastructure investment. Section 10 of the Act provides the legal conditions for the Commission to exercise its forbearance authority. Each of the statutory conditions for applying forbearance exist and support its application with regard to the telecommunications pole rate formula. In addition, the Commission can exercise its authority under *Gulf Power* to apply the cable rate to commingled VoIP/broadband services offered by CLECs. Alternatively, the Commission can reform the telecommunications formula by removing the recovery of

numerous cost elements from the pole formula that improperly and unnecessarily increase attachers' pole rent costs.

The Petition should be rejected because the current cable attachment rate more than fully compensates pole owners while advancing the Commission's primary goals of broadband deployment and facilities-based competition. Further, the Commission should apply the cable rate as the uniform attachment rate applicable to cable and CLEC providers of broadband services.

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COMMENTS OF COMCAST CORPORATION

Comcast Corporation (“Comcast”) hereby responds to the above-captioned Petition for Declaratory Ruling (“Petition”) filed jointly by American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services Inc. (“Power Companies”).¹ The Petition requests a Commission ruling that the telecommunications pole attachment rate formula applies to cable television pole attachments used to provide interconnected voice over Internet protocol service (“VoIP”), including VoIP provided “by any third party using the attached cable wire (e.g., Vonage Digital Voice).”²

¹ *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 Services*, Public Notice, WC Docket No. 09-154, DA 09-1879 (rel. Aug. 25, 2009).

² Petition at 2 n.4.

As demonstrated below, the Petition should be rejected. The requested ruling would impose a massive new pole “tax” on virtually all cable broadband attachments – effectively reversing the Commission’s *Gulf Power* decision, jeopardizing broadband deployment, stunting facilities-based voice competition and frustrating Congress’ broadband stimulus efforts by siphoning off private broadband deployment capital and turning it into utility pole rental profits. The Power Companies’ request to increase already excessive monopoly pole rents is fundamentally inconsistent with the Commission’s national broadband deployment policy.

I. INTRODUCTION

While the Commission is diligently creating a national plan to expand deployment and access to broadband services, the Power Companies continue their relentless efforts to impose an unwarranted pole surcharge on broadband and VoIP services that would undermine the Commission’s efforts. As observed by Commissioner McDowell in the *Broadband NOI Proceeding*, “[a]lthough more can, and should, be done to improve on our broadband competitiveness, let’s be sure to recognize what has gone right at least as much as we analyze any shortcomings.”³ A key policy that has “gone right” is the Commission’s 1998 decision to apply the cable rate to all commingled cable / broadband attachments.⁴ This decision,

³ *In the Matter of a National Broadband Plan for Our Future*, GN Docket No. 09-51, Notice of Inquiry, FCC 09-31 (rel. Apr. 8, 2009) (hereinafter “*Broadband NOI Proceeding*”) (statement of Comm’r Robert M. McDowell).

⁴ *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd. 6777 ¶¶ 31-32 (1998) (hereinafter “*1998 Pole Order*”), *rev’d*, *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1278 (11th Cir. 2000), *rev’d*, *National Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 338-39 (2002).

subsequently approved by the Supreme Court in 2002,⁵ ignited over \$120 billion in cable broadband investment that has transformed the nation's communications infrastructure and enabled the first ever successful facilities-based voice competition to the ILEC monopoly – cable VoIP. Consumers saved over \$23 billion from 2003 to 2007 from this new competition and will save over \$100 billion more by 2011⁶ – as long as VoIP deployment is not derailed and its cost efficiencies are not eroded by the imposition of massive and unjustified new pole fees.

Not surprisingly, the Power Companies' Petition fails to mention that *just last year* the Commission amassed a comprehensive and detailed record in its pending broadband pole attachment proceeding – a record that refutes the very same assertions and premises relied upon by the Power Companies in their current Petition.⁷ Comments in the *Broadband Pole Proceeding*, including testimony from prominent economists, State public service commissions and public interest groups representing the interests of residential electric consumers, demonstrate that increases in pole rents for broadband would derail both broadband deployment and emerging facilities-based voice competition. Moreover, the *Broadband Pole Proceeding* record clearly confirms that the cable rate is not a “subsidy” rate but instead substantially

⁵ *NCTA v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (hereinafter “*Gulf Power*”) (noting Congress' general instruction to the FCC to “accelerate deployment of [broadband] capability by removing barriers to infrastructure investment”).

⁶ Dr. Michael D. Pelcovits and Daniel E. Haar, Microeconomic Consulting & Research Associates, Inc., “Consumer Benefits from Cable-Telco Competition,” November 2007, at 19, available at http://www.micradc.com/news/publications/pdfs/Updated_MiCRA_Report_FINAL.pdf (last visited Sept. 23, 2009) (hereinafter “2007 Pelcovits Report”).

⁷ See *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 22 FCC Rcd. 20195 (2007) (hereinafter “*Broadband Pole Proceeding*”).

overcompensates pole owners for attachments.⁸ The Petition, however, makes no reference to this extensive *Broadband Pole Proceeding* record.

The Petition also disregards entirely the record in the ongoing *Broadband NOI Proceeding*, which seeks to establish a plan to enable “the build-out and utilization of high-speed broadband infrastructure.”⁹ In that proceeding, the Commission recognized that reasonably priced access to poles is critical to the buildout of broadband infrastructure.¹⁰ Numerous commenters in the *Broadband NOI Proceeding* urged the Commission to avoid excessive and harmful pole rents by applying the cable rate formula to all broadband providers.¹¹

The Power Companies are simply wrong in asserting that cable VoIP attachments must be assessed at the telecommunications rate to eliminate the pole rate difference between cable VoIP and CLEC telecommunications services. If the Commission determines that the different pole rate treatment requires resolution through a uniform rate, the Commission can and should

⁸ See, e.g. *Broadband Pole Proceeding*, Comments of Comcast Corporation (hereinafter “Comcast Comments”) at 12-19; Reply Comments of Comcast Corporation (hereinafter “Comcast Reply Comments”) at 3-8; Comments of Time Warner Cable Inc. at 25-35; Reply Comments of the National Association of Utility Consumer Advocates at 3-5; Comments of the National Cable & Telecommunications Association at 8-12. In fact, as pointed out by another *pole owner* (AT&T), pole attachments have become an important profit center for electric utilities. Comments of AT&T, Inc. (hereinafter “AT&T Comments”) at 8; *id.* Declaration of Philip Jack Gauntt ¶ 11 (hereinafter “Gauntt Decl.”); *id.* Declaration of Veronica Mahanger MacPhee ¶¶ 17, 19 (hereinafter “MacPhee Decl.”).

⁹ *Broadband NOI Proceeding* ¶ 1.

¹⁰ *Id.* ¶ 50; See also *Bringing Broadband to Rural America: Report On A Rural Broadband Strategy*, Acting Chairman Michael J. Copps, FCC, ¶ 157 (May 22, 2009) (“Timely and reasonably priced access to poles and rights of ways is critical to the buildout of broadband infrastructure in rural areas.”), at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291012A1.pdf (last visited Sept. 23, 2009).

¹¹ See, e.g., *Broadband NOI Proceeding*, Comments of CTIA-The Wireless Association at 22; Comments of Cbeyond, Inc., Integra Telecom, Inc., One Communications Corp., and tw telecom inc. at 21; Comments of Level 3 Communications LLC at 18.

apply the *cable* pole rate formula to all VoIP/broadband attachments maintained by cable operators and competitive local exchange carriers.¹² *The cable rate has been found on every occasion by the Commission and the courts to be more than fully compensatory to pole owners.* Applying the cable rate to CLECs that provide VoIP/broadband service would resolve the disparity in pole rents between competing cable operators and CLECs, thereby eliminating any concerns of discrimination, while also stimulating broadband deployment and voice competition consistent with *Gulf Power* and current national broadband objectives. There is ample legal authority for the Commission to establish such parity at the cable rate.

The Commission should reject this latest utility effort to obscure well-settled pole attachment facts, law and policy. Decades of debating these questions time and again demonstrate that the cable rate pole formula is more than fully compensatory to utilities and that such rate has played a key role in broadband deployment and the emergence of voice competition since 1996 – saving billions of dollars for consumers. There is no justification for levying a massive new pole surcharge on cable VoIP/broadband attachments.

II. INCREASING POLE RENTS FOR VOIP/BROADBAND SERVICES WILL UNDERMINE BROADBAND DEPLOYMENT AND VOICE COMPETITION

A. Increasing the Pole Rent on VoIP Amounts to a Massive Tax on Broadband.

Since 1996, the cable television industry has invested more than \$140 billion to construct broadband networks that provide high speed internet, VoIP and other advanced services to

¹² As explained recently by several CLECs in response to a Commission broadband workshop, “[t]his means that the FCC should eliminate the differential between the existing telecommunications carrier attachment rate and the cable attachment rate by setting a uniform pole attachment rate at a level equal to the current cable rate.” Broadband Workshop Response of tw telecom inc., One Communications Corp., Cbeyond, Inc. and Integra Telecom, Inc. at 15 (filed Sept. 15, 2009).

consumers.¹³ The deployment of this broadband network has created enormous consumer benefits in the provision of new advanced services, including the first successful facilities-based residential voice competitor to the ILEC telephone monopoly. It is estimated that the total benefit to all U.S. consumers flowing from the cable industry's broadband deployment and introduction of VoIP and other broadband services to be \$34.9 billion annually.¹⁴ The Power Companies' proposal to levy a massive pole tax on interconnected VoIP (estimated at up to \$672 million *annually*)¹⁵ must be recognized for what it is – yet another misguided effort by electric utilities to impose excessive charges on broadband communications networks.

There should be no mistaking what the Power Companies are requesting – their proposed rate increase for VoIP pole rent is tantamount to imposing a pole rent surcharge on all cable broadband. As specified in footnote 4 of the Petition:

This petition addresses all attachments by cable companies that are used to provide VoIP services, including VoIP provided by the cable company itself (e.g., Comcast Digital Voice), by a cable affiliate, or by any third party using the attached wire (e.g., Vonage Digital Voice).¹⁶

¹³ See <http://www.ncta.com/StatsGroup/Investments.aspx> (last visited Sept. 23, 2009).

¹⁴ Dr. Michael D. Pelcovits and Dr. Abigail B. Ferguson, Microeconomic Consulting & Research Associates, Inc., “Benefits to Consumers from the Transformation of the Cable Industry,” July 29, 2009, at 36 (“Most of the benefit, \$25.2 billion, can be ascribed to the cable companies’ customers. Benefits to the ILECs’ customers, however, should be included in the overall total and are conservatively estimated at another \$9.7 billion. The total annual benefits therefore are \$34.9 billion.”), available at <http://www.ncta.com/ReleaseType/MediaRelease/Cables-Digital-Transformation-Providing-Consumers-with-Advanced-Technology-Lower-Prices-and-Enhanced.aspx> (last visited Sept 23, 2009).

¹⁵ In the *Broadband Pole Proceeding*, NCTA estimated that increasing pole rents for broadband attachments as proposed by the electric industry would result in increased cable industry pole costs of up to \$672 million each year. NCTA Comments at 18-19; *id.*, Appendix B, Declaration of Dr. Michael D. Pelcovits ¶ 22 (hereinafter “Pelcovits Report”).

¹⁶ Petition at 1-2 n.4.

VoIP service is accessed via broadband connections and the Power Companies' inclusion of over-the-top providers (like Vonage) along with cable VoIP would extend the pole surcharge to virtually all cable broadband connections.

The Commission has recognized the “nexus” between VoIP services and accomplishing the goals of section 706 through increased broadband adoption:

Subscribership to broadband services will increase in the future as new applications that require broadband access, *such as VoIP*, are introduced into the marketplace, and consumers become more aware of such applications.¹⁷

Application of the telecommunications pole rate to cable and third party VoIP services will stunt the growth of such services and slow the consumer broadband adoption anticipated by the Commission.

The impact of these new pole costs on consumers of broadband and VoIP services would be substantial and damaging. NCTA's economic expert estimates that if this increase in pole costs were allocated across all cable broadband customers, the annual cost of broadband service could increase up to \$33.75 per customer. If the increase were allocated on a VoIP customer basis, the annual increase per customer could be up to \$89.18.¹⁸ As confirmed by a second economic expert, the impact of these increased consumer costs will impede VoIP and broadband deployment and adoption rates in conflict with national policies:

¹⁷ See, e.g., *Vonage Holdings Corporation Petition for Declaratory Ruling*, FCC 04-267, 19 FCC Rcd. 22404 ¶ 36 n.128 (2004) (emphasis added by FCC) (*quoting Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, FCC 04-208, at 38 (2004)).

¹⁸ Pelcovits Report ¶ 23.

Increasing pole attachment rates for cable operators raises the cost of an important and necessary input of production. These increases will ultimately result in higher prices to consumers, reduced build-out of plant, especially in low density areas, and/or the slower roll-out of new advanced products and services including Voice Over Internet Protocol (VoIP), all of which work to the ultimate detriment of a broad base of consumers and to the achievement of the Commission's goal to promote broadband and new service deployment.¹⁹

Granting the Power Companies' Petition at this time would be particularly inopportune when Congress has only recently "underscored the importance of broadband to the nation and *its position as the top priority at the Commission.*"²⁰ The *Recovery Act* sets aside \$7.2 billion to advance broadband deployment, which the Commission recognizes is not sufficient to achieve nationwide broadband deployment without the "wholehearted effort of both the private and the public sector."²¹ Yet the VoIP/broadband tax proposed by the Power Companies would divert up to \$672 million of private broadband deployment capital *every year* into excess pole profits – directly undercutting the Commission's "top priority" of broadband deployment and the success of competitive VoIP services.

This Petition is only the most recent effort of pole owners to use their monopoly control over poles to generate excess pole profits. As described below, only through the Commission's

¹⁹ *Broadband Pole Proceeding*, Comments of Comcast Corporation, Attachment 1, Declaration of Patricia D. Kravtin, ¶ 36 (hereinafter "Kravtin Report").

²⁰ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry GN Docket Nos. 09-137 and 09-51, FCC 09-65, ¶ 2 (rel. Aug. 7, 2009) (emphasis added) (noting the "increased intensity to the national goal of ubiquitous broadband deployment" triggered by the American Recovery and Reinvestment Act of 2009 (hereinafter "Recovery Act")); *see also id.* ¶ 13 n.43.

²¹ *Broadband NOI Proceeding* ¶ 7.

diligent oversight have new pole-dependent communications technologies (like cable VoIP) been permitted to flourish.

B. Pole Owners Continue to Abuse Their Monopoly Control Over Poles to Frustrate the Deployment of New Services.

Poles have long been regarded as “essential facilities” and thus, “bottlenecks” to facilities-based competition.²² Cable operators and CLECs need access to poles at reasonable rates, terms and conditions to deploy their facilities and to offer competitive services at a reasonable rate.

Initially, telephone utilities threatened by potential competition from cable responded with a variety of anti-competitive tactics tied to their monopoly control over poles, including installation delays, unreasonable charges and excessive rents. These anticompetitive actions continued in the 1990s when electric utilities began to recognize the potential for delivering communications services over their fiber networks used for internal communications purposes. In 1991, the Commission rejected an electric utility’s effort to impose a huge surcharge on cable attachments used for potentially competitive fiber data services.²³

²² See, e.g., S. Rep. No. 95-580 (1977), reprinted in 1978 U.S.C.C.A.N. 109 (hereinafter “1977 Senate Report”) (“Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles.”); *Gulf Power*, 534 U.S. at 330 (finding that cable companies have “found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents.”); Comcast Comments at 8-12.

²³ See *Heritage Cablevision Assocs. of Dallas v. Texas Utilities Elec. Co.*, Memorandum Opinion and Order, FCC 91-379, 6 FCC Rcd. 7099 ¶ 9 (1991) (“*Heritage*”), *aff’d*, *Texas Utilities Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

The 1996 Telecommunications Act further opened the way for the electric utility industry to enter other communications businesses, and intensified the anticompetitive behavior of utilities against pole attachers nationwide.²⁴ As explained by the Eleventh Circuit:

By 1996, the economic landscape surrounding pole attachments had undergone a fundamental change. Electric utilities saw the telecommunications arena as a logical and potentially lucrative choice for the diversification of their businesses. Cable companies were fearful that the [electric] utilities' prospective entry into the telecommunications market would endanger their pole attachments, as utilities would be unwilling to rent space on their poles to competing entities.²⁵

Following passage of the 1996 Act, electric companies again attempted to impose higher pole rents on cable operators that offered cable modem services – a tactic which if successful would have derailed cable's investment in broadband and the deployment of facilities-based voice competition.²⁶ Repeated electric utility efforts to slow fiber deployment by imposing unreasonable conditions on overlashing fiber to existing cable plant have also been rejected by the Commission.²⁷

²⁴ See *Implementation of Section 34(a)(1) of the Public Utility Holding Company Act of 1935, as added by Section 103 of the Telecommunications Act of 1996*, Report and Order, FCC 96-376, 11 FCC Rcd. 11377 ¶ 1 (1996) (allowing electric utilities to enter the telecommunications industry).

²⁵ *Southern Co. v. FCC*, 293 F.3d 1338, 1341-42 (11th Cir. 2002).

²⁶ See *supra* pp. 2-3.

²⁷ See, e.g., *Common Carrier Bureau Cautions Owners of Utility Poles*, Public Notice, DA 95-35 (Jan. 11, 1995) available at http://www.fcc.gov/Bureaus/Common_Carrier/Public_Notices/1995/pncc5001.txt (caution regarding anti-competitive overlash policies); *Implementation of Section 703(e) of the Telecommunications Act of 1996; 1998 Pole Order*, 13 FCC Rcd. 6777 ¶¶ 60-64 (FCC rejects utility efforts to impose additional rent for overlashing); *Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103 ¶ 75 (2001) (hereinafter "2001 Reconsideration Order") ("We affirm our policy that neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment."), *aff'd*, *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002); *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utilities Electric Co.*, 8 FCC Rcd. 373 (1993) (ruling that the utility failed to make "key . . . showing of increased costs to prepare or maintain poles to which piggy-backed [i.e., overlashed] cables are attached"); *Marcus Cable Assocs., L.P. v. Texas Utilities Elec. Co.*, 12 FCC Rcd. 10362 (1997) (rejecting utility pole agreement provision requiring cable operator to disclose nonvideo service offerings).

Electric utility hostility toward competitive broadband technology extends beyond traditional wired services. They have also proven to be persistent obstacles to the deployment of wireless infrastructure on poles despite rulings from the FCC and courts recognizing the attachment rights of those broadband providers.²⁸ As CTIA-The Wireless Association noted in the *Broadband Pole Proceeding*:

However, notwithstanding these regulatory assurances, in practice, wireless providers continue to endure significant challenges in acquiring reasonable rates, terms and conditions for access to electric utility poles.²⁹

In the pending *Broadband Pole Proceeding*, electric companies again advocated for huge increases in pole rents for cable broadband attachments – even though cable’s provision of such broadband services over its wires places no additional burdens on the utility poles. In the current *Broadband NOI Proceeding*, electric utilities proclaim that their practices are not an impediment to broadband deployment,³⁰ yet concurrently advocate higher pole rents and the perpetuation of access practices that wireless and wireline attachers have long documented as being unreasonable obstacles to broadband deployment.³¹

²⁸ See, e.g., *Wireless Telecommunications Bureau Reminds Utility Pole Owners of their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates*, Public Notice, DA 04-4046, 19 FCC Rcd. 24930 (2004); *Omnipoint Corp. v. PECO Energy Co.*, Memorandum Opinion & Order, DA 03-857, 18 FCC Rcd. 5484 ¶ 7 (2003); *Gulf Power*, 534 U.S. at 342 (the U.S. Supreme Court held that “attachments at issue in this suit – ones which provide . . . wireless telecommunications – fall within the heartland of the [Pole Attachments] Act”); *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002).

²⁹ See *Broadband NOI Proceeding*, Comments of CTIA-The Wireless Association at 9; see also Comments of Sunesys, LLC and Comments of FiberTower; Ex Parte Submission of FiberNet Inc. (filed Sept. 16, 2009).

³⁰ See, e.g., *Broadband NOI Proceeding*, Reply Comments of Utilities Telecom Council and Edison Electric Institute at 5-6 (hereinafter “UTC/EEI Reply Comments”); Comments of UTC/EEI at 14-15 (hereinafter “UTC/EEI Comments”); Comments of Ameren Services Company and Virginia Electric and Power Company at 12-13.

³¹ See UTC/EEI Reply Comments at 10-13 (UTC/EEI opposes mandatory deadlines for make ready, presumptions regarding access to pole tops and occupied space for wireless attachments and presumption for compliance with NESC); UTC/EEI Comments at 15-20. Electric utilities are also opposing the extension of pole attachment rights to

The motivation of pole owners to disrupt or delay the deployment of broadband services remains strong today. As electric utilities continue to develop their competitive technology offerings, it is no coincidence that those making the most progress are also the most aggressive in using poles to handicap cable and telecommunications competitors.³²

C. The Commission Has Already Decided the Cable Pole Rate is Appropriate to Promote Cable Broadband Deployment.

As discussed earlier, the Power Companies' proposal to apply a rent surcharge to cable VoIP is tantamount to applying the surcharge to all broadband services. However, the Commission has already rejected application of the telecommunications pole rate to cable broadband services. In *Gulf Power*, the Commission ruled that charging higher pole rents for commingled cable/Internet services would conflict with Congressional objectives to promote the deployment of broadband and new advanced services:

In specifying this rate, we intend to encourage cable operators to make Internet services available to their customers. We believe that specifying a higher rate might deter an operator from providing non-traditional services. Such a result would not serve the public interest. Rather, we believe that specifying the [cable rate] will

innovative providers of broadband and wireless services. *See id. at 13; see also* Comments of Clearwire Corporation at 9-10; Comments of Wireless Internet Service Providers Association at 21; Comments of Wireless Communications Association International at 25-27.

³² For example, one of the Petitioners, Duke Energy, has applied to the Department of Energy for over \$214 million to deploy a smart grid technology that is Internet protocol based "to accommodate new and emerging communications technology." Press Release, Duke Energy, Duke Energy Seeks \$214 Million in Federal Funds to Accelerate Electric 'Smart Grid' in Five States (Aug. 6, 2009), *available at* <http://www.duke-energy.com/news/releases/2009080601.asp> (last visited Sept. 23, 2009). Oncor Electric Delivery Company has acquired the SmartGrid system deployed by Current Communications over Oncor's Dallas, Texas electric system. The acquired SmartGrid system includes broadband over power line (BPL) equipment and technology as well as fiber optics. *See* Press Release, Oncor, Oncor to Purchase Current's Smart Grid Network (May 1, 2008), *available at* <http://www.oncor.com/news/newsrel/detail.aspx?prid=1130> (last visited Sept. 23, 2009). CenterPoint Energy is deploying a wireless advanced metering system covering 2.4 million customers around Houston in five years. *See* Press Release, CenterPoint, CenterPoint Energy Teams with GE on Advanced Metering system (Mar. 30, 2009) *available at* <http://www.reuters.com/article/pressRelease/idUS157138+30-Mar-2009+BW20090330> (last visited Sept. 23, 2009).

encourage greater competition in the provision of Internet service and greater benefits to consumers.³³

The Supreme Court agreed that the imposition of higher pole attachment rates for cable broadband would “defeat” Congress’ objectives under the 1996 Act to promote broadband deployment by imposing a barrier to infrastructure investment.³⁴

The Commission’s assessment has proven accurate. In the wake of the Commission’s 1998 decision to apply the cable rate to commingled cable/broadband services, the cable industry invested over \$120 billion to construct broadband networks consistent with the goals of Section 706 – thereby ushering in the first successful facilities-based alternative to the local ILEC voice monopoly. While cable VoIP technology results in no added burdens on poles to justify higher pole rents, the savings generated by VoIP for consumers and small businesses – estimated to be more than \$100 billion between 2007 and 2011 – are profound.³⁵

D. The States Have Rejected Higher Pole Rates For VoIP/Broadband Services.

A number of State public utility commissions (“PUC” or “PSC”) have considered whether to apply a higher pole attachment rate for cable provided broadband/VoIP services, and each decided to adopt the cable rate formula for all attachments because it fairly compensates utilities and promotes broadband deployment and competition. In 1998, the California PUC reached these conclusions in adopting a single pole rent based on the cable rate for all attachers and services:

³³ 1998 Pole Order, 13 FCC Rcd. 6777 ¶ 32.

³⁴ *Gulf Power*, 534 U.S. at 339.

³⁵ 2007 Pelcovits Report, *supra* note 6.

Moreover, such an approach promotes the incentive for facilities-based local exchange competition through the expansion of existing cable services. . . . We conclude 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.³⁶

Other states have followed suit. For example, in rejecting adoption of higher pole rents for telecommunications and other non-cable services, the New York PSC explained that,

[t]o allow increased pole attachment rates at this time, when competition and the number of attachers has not developed as previously contemplated, is contrary to the public interest under PSL §119-a, in that it would undermine efforts to encourage facilities-based competition and to attract business in New York.³⁷

Both the Oregon and Utah PSCs recently adopted pole rent formulas for all attachers and services based on the cable formula and filed comments in the *Broadband Pole Proceeding* explaining that such pole rates fairly compensate utilities and do not create barriers for new and existing technologies.³⁸ In 2005, the Connecticut Department of Public Utility Control also rejected utility efforts to impose a pole rate surcharge for additional services.³⁹

State application of the cable rate to all categories of attachers (CLEC and cable) regardless of the services offered by the attacher, reaffirms that the cable rate appropriately

³⁶ *California Competition Decision*, 1998 Cal. PUC LEXIS 879 (internal citations omitted).

³⁷ *N.Y. Pole Attachment Order*, 2002 N.Y. PUC LEXIS 14, at *4.

³⁸ See *Broadband Pole Proceeding*, Comments of Public Utility Commission of Oregon (hereinafter “Oregon PUC Comments”) at 1 and attached PUC Order at 9-10; Comments of Utah Public Service Commission (hereinafter “Utah PSC Comments”) at 1.

³⁹ See *Connecticut Rate Order*, 2005 Conn. PUC LEXIS 295, at *11-12; see also *Alaska Joint Use Order*, 2002 AK PUC LEXIS 489, at *6 (“The CATV formula is reasonable and should be the default formula for calculating pole attachment rates if the pole owner and the attachers cannot negotiate their own agreement. We find that the formula provides the right balance given the significant power and control of the pole owner over its facilities.”); *Cablevision of Boston Co. v. Boston Edison Co.*, Docket D.P.U./D.T.E. 97-82 (1998) (cable rate assures payment by cable operators of “the fully allocated costs for the pole space occupied by them.”); *Detroit Edison Co.*, 1998 Mich. App. LEXIS 832, at *6-7.

balances the need to reasonably compensate pole owners with national broadband and competition objectives.

E. Broadband and VoIP Services Do Not Increase the Burden on Poles.

The Commission, courts, states and the electric companies themselves confirm that the provision of new services over a cable line does not impose any additional costs on the utility or burdens on the pole that would justify the imposition of any increased rate or surcharge.

In its 1991 *Heritage* decision, the Commission applied the cable rate formula to commingled video and data service, and observed that,

[t]he utility offers no cost justification for the disputed surcharge, nor does TU Electric suggest that it incurs any additional costs in preparing or maintaining its poles as a result of TCI's installation of fiber optic cables or TCI's data transmission activities. TU Electric does not even dispute TCI's statement that the physical attachment of fiber to the poles is identical to that of coaxial cable.⁴⁰

In 1998, the California PUC reached the same conclusion in adopting a single pole rent based on the cable rate for all attachers and services:

There is generally no difference in the physical connection to the poles or conduits attributable to the particular service involved. In many cases, a cable operator may not be able to delineate exactly what particular services are being provided to a customer at a given time because the customer can use the connection for various services, depending on the equipment attached to the connection at the customer's premises. . . .⁴¹

In 2005, the Connecticut DPUC declined to increase the approved cable formula based pole rent for cable operators providing telecommunications and Internet services, explaining “the

⁴⁰ *Heritage*, 6 FCC Rcd. 7099 ¶ 29, *aff'd*, *Texas Utilities*, 997 F.2d at 935-36.

⁴¹ *California Competition Decision*, 1998 Cal. PUC LEXIS 879, at *84-85 (internal citations omitted).

Department is not persuaded that there are any incremental real costs to [electric utility United Illuminating] from a pure cable company wire that provides only cable services and a cable company wire that also provides internet and telecommunication services. Therefore, there do not appear to be any real cost impacts to UI as a result of this ruling.”⁴² In the Connecticut proceeding, the electric utility’s expert witness admitted under oath that cable lines create no additional burden when they carry data or voice.⁴³

III. THE CABLE RATE IS NOT A SUBSIDY

For over 30 years, pole owners have inaccurately claimed that the cable pole attachment rate is a subsidy. The Power Companies’ Petition raises this thoroughly discredited claim once again, despite the fact that it has been found to be false in every conceivable forum—Congress, the courts, the Commission and State public service commissions.⁴⁴

⁴² *Connecticut Rate Order*, 2005 Conn. PUC LEXIS 295, at *11-12.

⁴³ *Id.* at *11 n.4.

⁴⁴ Congress has confirmed that the FCC formula is “just and reasonable” in 1982, 1984, 1992, and 1996. *See* Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087 (1982); Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). So too have the FCC, courts, and state PSCs. *See, e.g.*, 2001 Reconsideration Order, 16 FCC Rcd 12103 ¶¶ 15-25 (2001); *Alabama Cable Telecomms. Ass’n v. Alabama Power Co.*, 16 FCC Rcd 12209 ¶ 60 (2001) (“Respondent’s repeated claims that cable attachers do not pay for any costs of unusable space is a complete mischaracterization of the Pole Attachment Act and the Commission’s rules.”) (hereinafter “*ACTA v. APCo*”); *Florida Power*, 480 U.S. at 253-54 (finding that it could not “seriously be argued, that a rate providing for the recovery of fully allocated cost, including the cost of capital, is confiscatory”); *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002); *California Competition Decision*, 1998 Cal. PUC LEXIS 879, at *88-89 (“The formula does not result in a subsidy since the formula is based upon the costs of the utility. A subsidy would require that the rate be set below cost.”).

A. *Broadband Pole Proceeding* Record Discredits Subsidy Claim.

Most recently, the record in the *Broadband Pole Proceeding* demonstrates conclusively (once again) that there is no basis in law or economics for the position that the cable rate is a subsidy. And, once again, the utilities provided no evidence to support their subsidy claim.

As a matter of economics, there is no valid claim of subsidy where attachers pay at least the marginal (i.e., incremental) cost of attaching to a pole.⁴⁵ Cable attachers pay not only all incremental costs incurred by the utility as a result of an attachment – amounting to millions of dollars in “make-ready” annually – but also pay a pole rent on top of all such incremental costs. As explained by the Eleventh Circuit,

[t]he known fact is 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 costs), in addition to some portion of the fully embedded cost.⁴⁶

Economists agreed with this analysis in the *Broadband Pole Proceeding*:

While economists may disagree on many things, there is perhaps one central tenet upon which there is solid agreement, and that is the notion that rates that recover the marginal costs of production are economically efficient and subsidy-free. For a subsidy to occur, the utility must have unrecovered costs that *but for* the attacher would otherwise not exist.⁴⁷

⁴⁵ See, e.g., *supra* text accompanying note 8; Comcast Comments at 12-15; Furchtgott-Roth Report at 11-12; Comcast Reply Comments, Exhibit 2, Reply Report of Patricia D. Kravtin ¶¶ 10-13 (“[I]t is a widely acknowledged tenet of economics that a rate is not a subsidized rate if it covers the provider’s marginal costs.... Marginal costs . . . are those costs that . . . would not exist ‘but for’ the presence of the attacher.”) (hereinafter “Kravtin Reply Report”).

⁴⁶ *Alabama Power*, 311 F.2d at 1368-69 (citing *ACTA v. APCo*, 16 FCC Rcd. 12209 ¶ 69 n.154).

⁴⁷ Kravtin Report ¶ 67 (emphasis in original). See also Furchtgott-Roth Report at 10 (“Although pole rental rates have been regulated under Section 224, the cable rate is not a ‘subsidized rate . . . at the expense of electric consumers’ as suggested in the NPRM.”); Reply Comments of Time Warner, Exhibit 1, Declaration of Coleman Bazelon at 23 (“[T]o the extent that the usable space on poles is largely now used, it appears that the FCC Cable Rate may overstate the appropriate attachment rate.”) (hereinafter “Bazelon Report”).

Because the cable pole rate more than compensates utilities for their marginal costs resulting from adding cable attachments, there is no subsidy. Moreover, courts recognize that a pole owner receives “just compensation” to the extent that it recovers the incremental costs associated with a pole attachment.⁴⁸

Once all incremental costs have been paid by the cable operator for an attachment, an additional annual rent is also paid for each attachment. As explained in the Kravtin Report,

[t]aken together, the *combination* of rental rates - which cover a proportionate share of the operating costs (administration, maintenance, inspections, etc) and the capital costs (depreciation, taxes, and a return on investment) based on the costs of the entire pole - and make-ready charges (which cover any non-recurring costs incurred by the utility) ensures the utility recovery of much more than the marginal cost of attachment.⁴⁹

The Eleventh Circuit acknowledged this in finding that the cable rate “provides for *much more* than marginal cost.”⁵⁰

Since make-ready expenses fully compensate utilities for all incremental costs of an attachment, the annual pole rent paid by attachers represents “found money” and helps to fund

⁴⁸ See *Alabama Power*, 311 F.3d at 1370-71 (“[A]ny implementation of the [FCC cable pole attachment rate] (which provides for much more than marginal cost) necessarily provides just compensation.”); *Florida Power*, 480 U.S. at 253-54 (finding that it could not “seriously be argued, that a rate providing for the recovery of fully allocated cost, including the cost of capital, is confiscatory”).

⁴⁹ Kravtin Report ¶ 71. It is important to recognize that the cable rate formula’s allocation of costs to cable attachers is significantly overinclusive and results in excessive charges being assigned to cable through the cable rate formula. In the *Broadband Pole Proceeding*, AT&T provided numerous examples of cost accounts that are included in the cable formula that are unrelated to Section 224 attachments resulting in overcompensatory pole rents. See MacPhee Decl. ¶¶ 37-46; Kravtin Reply Report ¶¶ 37-38. Comcast’s Comments contain a detailed discussion of how the cable formula is used to calculate pole rent. See Comcast Comments at 17-18, n.62; Kravtin Report ¶¶ 39-41.

⁵⁰ *Alabama Power*, 311 F.2d at 1369 (emphasis added).

fixed pole operating expenses that exist whether or not there are any attachers.⁵¹ Moreover, the utility benefits because improvements to poles become the property of the utility. The utility obtains a newer, stronger pole for its own operations at the cable company's expense, and can realize savings (or deferred capital expenditures) to its own build-out program.⁵²

B. State Public Service Commissions Confirm that the Cable Pole Rate Formula Is Not a Subsidy.

Certified states that regulate pole attachment rates have a legal duty to “consider the interests of the subscribers of cable television services as well as the interests of consumers of the utility services” in setting those rates.⁵³ In establishing such pole rates, State PSCs have found that the cable rate formula is not a subsidy.⁵⁴ For example, in adopting the cable rate formula for all pole attachments in California, the PUC found that:

⁵¹ As explained in the Kravtin Report, the provision of space on poles is not a “zero sum” game where the attacher gains at the expense of the utility or its rate payers. To the contrary, the utility and its rate payers would simply bear the same costs as without the attacher but without any contribution towards those costs. Kravtin Report ¶¶ 12-14, 69-74, 82, 94. This fact was recognized by Congress when it enacted the 1978 Pole Attachment Act. *See 1977 Senate Report* at 16, 1978 U.S.C.C.A.N. at 124 (“CATV offers an income-producing use of an otherwise unproductive and often surplus portion of the plant.”); *see also* Bazelon Report at 12 (“[T]he pole owner is actually better off as a result of third-party attachment.”).

⁵² *See* Comcast Comments at 19; *see also* *ACTA v. ACPo*, 16 FCC Rcd. 12209 ¶ 58 (“In instances where attachers pay the costs of a replacement pole, the attacher actually increases the utility’s asset value and defers some of the costs of the physical plant the utility would otherwise be required to construct as part of its core service.”).

⁵³ 47 C.F.R. § 1.1414(a)(2). Under the Commission’s rules, a state can certify that it will regulate pole attachments thus preempting Commission jurisdiction over attachments in such state. *Id.* § 1.1414(a)-(e).

⁵⁴ *See, e.g.*, Alaska, Alaska Admin. Code tit. 3, § 52.900, et seq.; California, *see* Cal. Pub. Util. Code § 767.5; Connecticut, *see Application of Southern New England Tel. Co. to Amend its Rates & Rate Structure*, 1993 WL 378949 (Conn. D.P.U.C. July 7, 1993); Illinois, *see* Ill. Admin. Code tit. 83, §§ 315.10-315.70; Kentucky, *see* 807 Ky. Admin. Regs. § 5:006; Massachusetts, *see* Mass. Code Regs. tit. 220, § 45.00-11; Michigan, *see Consumers Power Co.*, 1997 WL 107296 (Mich. P.S.C. Feb. 11, 1997); New Hampshire, *see* N.H. Rev. Stat. § 374:34-a (200); *PUC 1300, Pole Attachments – Regular Rules*, Rulemaking, N.H. Pub. Util. Comm’n, Docket No. DRM 08-0004 (rel. Jan. 22, 2008), available at <http://www.puc.state.nh.us/Regulatory/e-docketfiling.htm>; New Jersey, *see* N.J. Admin. Code § 14:18-2.9; New York, *see In re Certain Pole Attachment Issues Which Arose in Case 94-C-0095*, 1997 N.Y. PUC Lexis 364 (rel. June 17, 1997); Ohio, *see Columbus & Southern Ohio Elec. Co.*, 50 P.U.R. 4th 37

[t]he formula does not result in a subsidy since the formula is based upon the costs of the utility. A subsidy would require that the rate be set below cost. The fact that the rate is below the maximum amount that the utility could extract for its pole attachment through market power absent Commission intervention does not constitute a subsidy.⁵⁵

Similarly, the Michigan PSC's pole rate – based on the Commission's cable rate formula – was upheld when the reviewing court rejected the subsidy rate claim.⁵⁶ The Massachusetts DTE held that the cable rate assures payment by cable operators of “the fully allocated costs for the pole space occupied by them.”⁵⁷

The Oregon PSC explained in the *Broadband Pole Proceeding* that its pole formula, which results in rates just slightly higher than the Commission's cable rate, “fairly compensate pole owners for use of space on the pole.”⁵⁸ The Utah PSC's comments in the *Broadband Pole Proceeding* supported its 2007 adoption of the cable rate formula because it advanced many key policy objectives with rates that “do not place barriers for deployment of new and existing

(Ohio P.U.C. Nov. 5, 1982); Oregon, *see* Or. Admin. R. § 860-028-0110 (2007); Utah, *see* Utah Admin. Code R. 746-345; and Vermont, *see* Vt. Pub. Serv. Bd. Rules §§ 3.700-711.

⁵⁵ *California Competition Decision*, 1998 Cal. PUC LEXIS 879, at *88-89.

⁵⁶ *See Detroit Edison Co.*, 1998 Mich. App. LEXIS 832, at *6-7 (“Edison . . . asserts, in a conclusory fashion, that the rate adopted by the PSC is unjust and unreasonable because it would require Edison's customers to subsidize the activities of the attaching parties. However, instead of explaining why the PSCs embedded costs method fails to provide adequate compensation, Edison merely states, as if it were a matter of fact . . . that the embedded costs method results in an unfair subsidy. . . . In any event, our review of the record reveals that there was competent, material, and substantial evidence to support the PSC's conclusion that a rate based on the embedded costs method would enable utilities to recover their historical investment.”).

⁵⁷ *Cablevision of Boston Co. v. Boston Edison Co.*, Docket D.P.U./D.T.E. 97-82 (1998).

⁵⁸ Oregon PUC Comments at 1 and attached PUC Order at 9-10.

technologies, [and provide] fair compensation to pole owners, uniform definitions and rate formulas to reduce the likelihood of disputes....”⁵⁹

Significantly, the National Association of State Utility Consumer Advocates (“NASUCA”), which has a legal obligation to represent both cable and electric utility consumers’ interests, applied its “dual perspective” to endorse the cable rate in finding that,

[t]his rate was upheld against challenges that it was confiscatory. Thus this is the rate that should be used for all pole attachments, regardless of the exact service provided over the attachment, and regardless of the identity of the attacher.... Equally importantly, the Commission must not increase the rate paid by broadband service providers because this would be contrary to ‘the nation’s commitment to achieving universal broadband deployment and adoption.’⁶⁰

Thus, State PSCs and utility consumer advocates, both with a legal obligation to ensure that electric customers are not subsidizing cable customers, endorse the cable pole rate formula.

C. Electric Utilities Treat Pole Attachments as a Profit Center.

Far from subsidizing attachers, the *Broadband Pole Proceeding* record establishes that electric utilities have come to treat pole attachments as a profit center. This was confirmed by AT&T, which owns millions of poles and has decades of experience with electric companies in joint use arrangements:

Electric companies view pole attachments as a line of business to generate revenue rather than a cost recovery mechanism.⁶¹

⁵⁹ *Broadband Pole Proceeding*, Comments of Utah Public Service Commission (“Utah PSC Comments”) at 1.

⁶⁰ *Broadband Pole Proceeding*, Reply Comments of The National Association of State Utility Consumer Advocates at 1-2, 5. NASUCA is a national association of consumer advocates in more than 40 states and the District of Columbia who are “designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.” *Id.* at 1 n.3.

⁶¹ Gauntt Decl. ¶ 11. *See also* AT&T Comments at 8, MacPhee Decl. ¶¶ 17, 19.

AT&T explained that in some cases electric utilities are now recovering over 129% of the cost of poles due to the cumulative effect of rents collected from multiple attachers.⁶² Additional sources of improper recovery arise from including assets in the rate base for which attachers receive no benefit.⁶³

Comcast and AT&T each identified numerous costs that are improperly included in the annual carrying charges because they are not associated with annual costs of shared poles. For example, maintenance carrying charges are overstated because FERC Account 593 “includes a multitude of non-pole related expenses that appear to constitute the greater proportion of this account, and that are inappropriate to pass on to a pole user.”⁶⁴

Other attachers agree that “utilities are increasingly using pole attachment inventories... as uncontrolled revenue-generating operations.”⁶⁵ Economist Furchtgott-Roth observed that if

⁶² MacPhee Decl. ¶ 19.

⁶³ Examples include: (i) The inclusion in the formula of poles taller than 40 feet, as well as towers, from which attachers receive no benefit. *See* MacPhee Decl. ¶ 40 (The inclusion of 50, 60 and 70 foot poles “is neither fair nor reasonable. Since this is usable and unusable space that is dedicated to the Pole Owner's exclusive use, and from which renters derive no benefit, they should not be required to subsidize its cost.”); and (ii) artificially low 15 percent appurtenance presumption. *id.* ¶ 42 (“In my experience, where actual data exists, the electric percentage with respect to fixtures is typically far higher than 15 percent.”).

⁶⁴ *Id.* ¶ 46. *See also* Comcast Reply Comments at 6-7, Kravtin Reply Report ¶¶ 36-49.

⁶⁵ *See, e.g., Broadband Pole Proceeding*, Comments of Knology, Inc. at 15 n.27 (“One utility charges an exorbitant sum of \$3.58 *per attachment* for a pole inventory.”) (emphasis in original); Comments of Sunesys, LLC at 8 (“Utilities often seek to charge attachers for work that is either (i) unnecessary or (ii) should be paid by the utility.”), at 9 (“Sunesys has ceased attempts to enter the market in Delaware as a result of Connectiv's high costs and lengthy delays for make-ready”) and at 10 (“Sunesys has abandoned efforts to provide wide area network services to an interested school district in Maryland because the excessive make-ready charges demanded by BG&E rendered the project economically infeasible”); Comments of Time Warner Telecom, Inc. at 15 (“[P]ole owners needlessly replace poles and pass on the substantial replacement cost to attachers instead of simply rearranging the attachments to create additional space on existing poles at a much lower cost; ... pole owners incorrectly bill attachers for make ready costs incurred by previous attachers; and ... pole owners often bill an attacher for the entire cost of correcting a safety violation which may have been caused by a prior attacher”); and Comments of Fibertech Networks, LLC and

pole attachment rates were in fact subsidies, then electric utilities would be expected to “sell pole network assets to unregulated third parties.”⁶⁶ This is not the case as electric companies have consistently been accumulating pole assets from ILECs over the last several decades.⁶⁷

IV. IF VOIP/BROADBAND POLE RATES ARE UNIFIED, IT SHOULD BE AT THE CABLE RATE

A. The Telecommunications Rate Was Designed for a Technology and Market that Did Not Develop.

The Power Companies assert that the 1996 Act and its legislative history support application of the telecommunications rate formula to interconnected VoIP. However, VoIP did not even exist in 1996 and it has not been subsequently classified as a telecommunications service by the Commission. When Congress adopted the telecommunications pole formula in 1996, it expected the formula to apply to a very different market.

Competing facilities-based telecommunications carriers were expected to proliferate after 1996 as the pro-competitive policies of the Act took effect over the ten year phase-in for the new rate. At that time, the technology for competing telecommunications services required a separate line to be attached to the pole. While the telecommunications formula starts higher than the cable rate formula, it declines toward the cable rate as the number of attachers

Kentucky Data Link, Inc. at 7 (“[M]ake-ready estimates typically require unnecessary and time-consuming work, improperly impose the entire cost of the work on the license applicant even when the owners use some or most of the newly created space, and are based on frequently unexplained and very high labor or material rates”).

⁶⁶ Furchtgott-Roth Report at 15.

⁶⁷ See UTC/EEI Comments at 4-5 (ILEC share of poles has declined from 47% to 30% since 1979); AT&T Comments at 7 (AT&T share of poles has declined to 25% to 30%).

increases.⁶⁸ Consequently, the 1996 Act provided for a ten year phase-in period before full implementation of the new telecommunications formula to allow for the expected CLEC competition to develop, which would in turn drive pole rents down towards the cable formula level.⁶⁹ But the anticipated CLEC competition and corresponding CLEC attachments did not emerge as expected during the ten year phase-in period.⁷⁰ The cable technology that actually did succeed integrates VoIP into the *same lines used for cable* – with no added burden to poles that might justify higher rents.

B. The Commission Has Not Categorized VoIP As A Telecommunications Service

The Commission should also reject the Power Companies’ contention that the Commission’s application of several non-economic Title II requirements to cable VoIP dictates the application of the telecommunications pole rate on VoIP/broadband attachments.⁷¹ These

⁶⁸ See Kravtin Report ¶¶ 50-52, Figure 4 and Attachment 2. In general, the telecommunications attachment rate declines eventually to the cable rate once there are 9 attaching entities.

⁶⁹ Section 224(e)(4) provides that the FCC’s telecommunications formula will not apply at all until 5 years after the effective date of the Act (2001) and thereafter “any increase in the rates for pole attachments that result from the adoption of the new regulations shall be phased in equal increments over a period of 5 years.”

⁷⁰ The NY PSC acknowledged this failure of expected competition to develop in declining to impose the telecommunications rate on attachers in New York. See *supra* text accompanying note 37.

⁷¹ Petition at 6-7. In each case cited, the Commission explained that its decision was based on key non-economic social policies that in most cases actually would promote the deployment of VoIP and broadband. The Commission specifically refused to classify VoIP with respect to any other purposes. See, e.g., *IP-Enabled Services*, Report and Order, FCC 09-40 ¶ 8 n.21 (May 13, 2009) (“The Commission to date has not classified interconnected VoIP service as a telecommunications service or information service as those terms are defined in the Act, and we do not make that determination today.”) (hereinafter “*Discontinuance Notice Order*”); *E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, FCC 05-116, 20 FCC Rcd. 10245 ¶ 26 (2005) (“This Order, however, in no way prejudices how the Commission might ultimately classify these services.”) (hereinafter “*E911 Order*”); *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, FCC 05-153, 20 FCC Rcd. 14989 ¶ 45 (2005) (“Indeed, the Commission has yet to determine the statutory classification of providers of interconnected VoIP for purposes of the Communications Act.”) (hereinafter “*CALEA Order*”);

decisions were made to promote key consumer protection or other social policy interests that would result in driving consumer adoption of broadband services, consistent with Congress' goals. For example, in imposing 911 emergency calling capability requirements on interconnected VoIP providers, the Commission stressed "the critical role that 911/E911 services play in achieving the Act's goal of promoting safety of life and property" and that:

Internet-based services such as interconnected VoIP are commonly accessed via broadband facilities (*i.e.*, advanced telecommunications under the Act). The uniform availability of E911 services may spur consumer demand for interconnected VoIP services, in turn driving demand for broadband connections, and consequently encouraging more broadband investment and deployment consistent with the goals of Section 706.... [T]he Commission...recognizes the nexus between VoIP services and accomplishing the goals of section 706.⁷²

Telecommunications Carrier' Use of Customer Proprietary Network Information and Other Customer Information, FCC 09-22, 22 FCC Rcd. 6927 ¶ 54 (2007), *aff'd*, *NCTA v. FCC*, 555 F.3d 996 (D.C. Cir. 2009) ("Since we have not decided whether interconnected VoIP services are telecommunications services or information services as those terms are defined in the Act, nor do we do so today, we analyze the issues addressed in this Order under our Title I ancillary jurisdiction to encompass both types of service.") (hereinafter "*CPNI Order*"); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, FCC 07-170, 22 FCC Rcd. 11275 n.50 (2007) ("The actions we take today do not prejudice the Commission's ultimate classification of interconnected VoIP service as a "telecommunications service" or as an "information service" under the statutory definitions of those terms."); *Telephone Number Requirements for IP-Enabled Services Providers*, Report and Order, Declaratory Ruling, and NPRM, FCC 07-188, 22 FCC Rcd. 19531 n.50 (2007) ("We continue to consider whether interconnected VoIP services are telecommunications services or information services as those terms are defined in the Act, and we do not make that determination today."), *pet. for review pending sub nom.*, *National Telecomm. Cooperative Ass'n v. FCC*, No. 08-1071 (D.C. Cir.); *Universal Service Contribution Methodology*, FCC 06-94, 21 FCC Rcd. 7518 ¶ 35 (2006) ("The Commission has not yet classified interconnected VoIP.... Again, here, we do not classify these services."), *aff'd in part, vacated in part sub nom.*, *Vonage Holdings Corp. v. FCC*, 489 F.2d 1232 (D.C. Cir. 2007).

⁷² *E911 Order*, 20 FCC Rcd. 10245 ¶ 31. This theme generally runs through Commission decisions applying specific telecommunications obligations to VoIP. *See, e.g., Discontinuance Notice Order*, FCC 09-40, ¶¶ 3, 13 ("The assurance that providers of interconnected VoIP services are subject to service-discontinuance procedures comparable to those that apply to non-dominant carriers may spur consumer demand for those services, in turn driving demand for broadband connections, and consequently encouraging more broadband investment and deployment consistent with the goals of section 706."); *CPNI Order*, 22 FCC Rcd. 6927 ¶ 59 ("The protection of CPNI may spur consumer demand for interconnected VoIP services . . . [and drive demand for] . . . broadband investment and deployment consistent with the goals of section 706. "); *CALEA Order*, 20 FCC Rcd. 14989 ¶ 43 (applying "three prong" public interest test – "promotion of competition, encouragement of the development of new technologies and the protection of public safety and national security").

Applying the telecommunications pole formula to cable VoIP does not advance any comparable consumer protection or public safety interests and would affirmatively undermine broadband deployment and competition.

C. Parity With CLEC Attachers.

The record in the *Broadband Pole Proceeding* demonstrates that where the rights and obligations of cable and CLEC attachers under their pole attachment agreements are the same, adopting a uniform broadband pole attachment formula for such attachers at the cable rate would not be unreasonable.⁷³ There is ample legal authority for the Commission to establish such a uniform rate.⁷⁴

1. The Commission Can Forbear From Applying Section 224(e) to CLECs.

In order to accomplish the purposes of the 1996 Act to promote competition, encourage the rapid deployment of new telecommunications technologies, and remove barriers to

⁷³ There is nothing that compels the Commission under Section 224 to establish uniform rates for cable VoIP and CLEC pole attachments. As noted earlier, in *Gulf Power*, the Commission and the Supreme Court already approved of different pole rate treatment under Section 224 between functionally indistinguishable broadband services offered by cable operators and CLECs in order to promote broadband deployment and competition. *See supra* p. 12-13. The same policy interests are at stake here and require continued application of the cable rate for cable VoIP notwithstanding the non-discrimination language in Section 224(e). Furchtgott-Roth points out that, “[i]n regulated industries, the Commission often prescribes non-uniform rates for the same service with the same physical cost structure.” Furchtgott-Roth Report at 18.

⁷⁴ In this regard, the comments in the *Broadband Pole Proceeding* show that incumbent telephone companies (“ILECs”) enjoy substantially superior pole attachment rights under their joint use agreements with electric companies than cable operators and CLECs do, which justifies any higher pole rent charges that ILECs may pay. Comcast Comments at 21-24. *See also* Comments of Coalition of Concerned Utilities at 53 (“ILECs receive a whole host of advantages that third party attachers like cable companies and CLECs do not enjoy.... [P]ermitting ILECs to receive the same rate as cable companies and CLECs would be grossly unfair to the cable companies and CLECs....”); UTC/EEI Comments at 53-55. The comments also established that the ILECs are not covered by Section 224 and therefore not entitled under the Pole Attachment Act to regulated rates. Comcast Comments at 48-52.

infrastructure investment, Congress gave the Commission authority to forbear from applying provisions of the Communications Act.⁷⁵ Critical to its strategy, Congress adopted Section 10 allowing the Commission to forbear from enforcing the Communications Act and regulations where no longer “current and necessary in light of changes in the industry.”⁷⁶

Under Section 10, the Commission is required to forbear from applying provisions of the Act or its rules if it determines that:

- (i) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (ii) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (iii) forbearance from applying such provision or regulation is consistent with the public interest.⁷⁷

In making the public interest determination, if the Commission decides that such forbearance will “promote competition among providers of telecommunications services, that determination

⁷⁵“The Commission...shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans...by utilizing, in a manner consistent with the public interest, convenience and necessity...regulatory forbearance...measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), reproduced in notes under 47 U.S.C. § 157. Section 157 provides that “[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public.” 47 U.S.C. § 157(a).

⁷⁶ *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, FCC 09-56, 2009 LEXIS 3153 ¶ 5 (rel. June 29, 2009) (quoting remarks of Sen. Pressler, 141 Cong. Rec. (daily ed. June 7, 1995)) (hereinafter “*Forbearance Procedures Order*”).

⁷⁷ 47 U.S.C. § 160(a).

may be the basis for a Commission finding that forbearance is in the public interest.”⁷⁸ The Commission is authorized to forbear from applying a provision of the Act on its own motion, or in response to a petition.⁷⁹

Thirteen years after adoption of the 1996 Act, Congress and the Commission are intent on completing the unfinished task of extending broadband and voice competition to all Americans as again directed by the Recovery Act. This objective is the Commission’s top priority.⁸⁰ The Commission can take a significant and concrete step towards achieving the objectives of the 1996 Act and the Recovery Act by forbearing from applying Section 224(e) to CLECs and applying the cable rate instead.

Such a step is consistent with the requirements of Section 10. With regard to the first prong of the test, continuing to apply the telecommunications pole formula to CLECs is not required to ensure that the pole rent charged by pole owners is “just and reasonable” or to ensure such pole rents are not “unjustly or unreasonably discriminatory.” As explained previously, the cable rate has been repeatedly determined by Congress, the Commission and the courts to be a

⁷⁸ *Id.* § 160(b).

⁷⁹ *Forbearance Procedures Order*, 2009 LEXIS 3153 ¶ 5.

⁸⁰ Commissioner Baker explained the urgency: “Here we are—13 years later—and we are at such a moment again. Broadband has become critical infrastructure.... [B]roadband is our and my priority.... From an economic standpoint, broadband infrastructure is essential for restoring sustained economic growth, opportunity and prosperity; and for maintaining American competitiveness in the 21st Century.” Commissioner Meredith A. Baker, FCC, “Incentives Matter: Decision Making at the FCC,” Address to the Free State Foundation (Sept. 10, 2009), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293380A1.pdf (last visited on Sept. 23, 2009).

just and reasonable rate.⁸¹ Moreover, applying the cable rate instead of the telecommunications pole rate to CLECs would resolve the “discrimination” concern cited by the Power Companies.

It is also readily apparent that continued application of the telecommunication rate to CLECs is not necessary for the protection of consumers.⁸² As demonstrated earlier, and consistent with common sense, higher pole rents translate directly into higher costs to consumers purchasing VoIP and broadband services.⁸³ If CLEC pole rents are reduced, an important cost input for CLEC services will decline and provide an opportunity for reduced prices for CLEC customers.⁸⁴ This is consistent with the Commission’s long held policy to keep pole rents at the cable rate for commingled cable services in order not to deter the development of new services.⁸⁵ By applying the cable rate to CLECs, the Commission can similarly use this proven strategy to encourage expansion of broadband services to consumers.

Finally, establishing a unified rate at the cable rate would promote competition by providing CLECs an economic impetus to deploy broadband, which will introduce new competitive options for consumers. Moreover, establishing a unified cable rate for

⁸¹ *See supra* note 44.

⁸² As explained earlier, NASUCA, which is legally obligated to represent the interests of utility consumers, endorses the cable rate for all attachers. Thus, the interests of utility consumers would not be adversely affected. *See supra* p. 21 and note 60.

⁸³ *See supra* pp. 7-8.

⁸⁴ *See Kravtin Report supra* note 19 (“[Pole rent] increases will ultimately result in higher prices to consumers....”).

⁸⁵ *1998 Pole Order*, 13 FCC Rcd. 6777 ¶ 32 (“In specifying this rate, we intend to encourage cable operators to make Internet services available to their customers. We believe that specifying a higher rate might deter an operator from providing non-traditional services. Rather, we believe that specifying the Section 224(d)(3) rate will encourage greater competition in the provision of Internet service and greater benefits to consumers.”).

VoIP/broadband would also promote competition by lowering CLEC costs and make them more competitive with ILECs, which enjoy far more favorable terms and conditions on poles than either cable or CLECs. Accordingly, because forbearance of the telecommunications rate for CLECs will promote competition, the public interest will be served.⁸⁶

2. The Commission Has Discretion to Apply the Cable Formula to Commingled Service Attachments.

Section 224(b) of the Communications Act requires the Commission to establish a “just and reasonable” attachment rate for pole attachments. While Section 224 establishes specific rate formulas for cable service attachments and telecommunications service attachments, there is no specified statutory formula for commingled services. In the context of commingled cable/Internet services, the Commission determined in 1998 that the just and reasonable attachment rate formula under Section 224(b) was the cable rate formula.⁸⁷ The Commission noted that a higher rate would not serve the public interest and that application of the cable rate would “encourage greater competition in the provision of Internet service and greater benefits to consumers.”⁸⁸

⁸⁶ 47 U.S.C. § 10(c). See *Ad Hoc Telecommunications Users Committee, et al. v. FCC*, 2008 FCC LEXIS 8300 at *4-5 (2008).

⁸⁷ *1998 Pole Order*, 13 FCC Rcd. 6777 ¶ 32 (“We conclude . . . that the just and reasonable rate for commingled cable and Internet service is the [cable rate].”).

⁸⁸ *Id.*

The Supreme Court agreed with the Commission, observing that “nothing about the text of Sections 224(d) and (e), and nothing about the structure of the Act, suggest that these are the exclusive rates allowed.”⁸⁹ The Court explained:

It might have been thought prudent to provide set formulas for telecommunications service and “solely cable service,” and to leave unmodified the FCC’s customary discretion in calculating a “just and reasonable” rate for commingled services.⁹⁰

The Court upheld the Commission’s authority to establish the cable rate as a just and reasonable rate for such commingled services. Limiting such Commission discretion in the case of commingled services “would defeat Congress’ general instruction to the FCC to ‘encourage the deployment’ of broadband Internet capability and, if necessary, ‘to accelerate deployment of such capability by removing barriers to infrastructure investment.’”⁹¹

Congress’ mandate to assure expeditious and ubiquitous deployment of broadband and facilities-based voice competition is more urgent than ever. Commissioner McDowell’s advice in the *Broadband NOI Proceeding* that the Commission not lose sight of what has “gone right” with regard to the progress achieved in these areas highlights the Commission’s foresight in the *Gulf Power* case. The billions spent by the cable industry building broadband networks in the wake of that decision is a roadmap for what actually works. Applying the cable rate as the appropriate “just and reasonable” rate for CLEC commingled attachments is consistent with this history and creates the right incentives to accomplish the goals of Congress. The Commission is

⁸⁹ *Gulf Power*, 534 U.S. at 335.

⁹⁰ *Id.* at 339.

⁹¹ *Id.*

fully authorized to designate the cable formula rate as the appropriate rate to apply to all regulated broadband attachments including those by CLECs.

3. The Commission Can Eliminate Excessive Utility Cost Recovery in the Telecommunications Formula

If the Commission decides against applying either forbearance or its rate discretion (for commingled services) to establish uniform rates, then the Commission should modify the current telecommunications rate formula to eliminate the numerous elements that cause attachers to pay pole costs from which they do not receive any benefit. As discussed previously, the cable rate already results in substantial subsidies flowing to pole owners, and the telecommunications rate compounds these subsidies and undermines national goals to promote broadband deployment and local voice competition. A number of appropriate adjustments to the telecommunications formula were identified earlier in these comments as well as in Comcast's and AT&T's comments in the *Broadband Pole Proceeding*.⁹²

⁹² See *supra* pp. 22-23 and note 63.

CONCLUSION

The Petition should be rejected because the current cable attachment rate more than fully compensates pole owners while advancing the Commission's primary goals of broadband deployment and facilities-based voice competition. Further, the Commission should apply the cable rate as the uniform attachment rate applicable to cable and CLEC providers of broadband services.

Respectfully submitted,

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September 24, 2009