

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

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

**REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.**

In its Comments, Charter submitted an analysis of the impact of a proposed pole rent increase on broadband deployment and adoption. The utility Petitioners who proposed that increase—American Electric Power, Duke Energy, Southern Company, and Xcel Energy—have leveled an array of attacks on Charter’s analysis, and proposed that a purely “legal question” of raising rents should be disconnected from the impact of such increases. As Charter will demonstrate, the utilities’ challenges are unfounded and without support in the record.

**I. CHARTER’S ANALYSIS CORRECTLY DEMONSTRATES THE ADVERSE IMPACT OF POLE RENT INCREASES ON BROADBAND DEPLOYMENT**

Charter’s study has been on record and uncontroverted by any party (including these Petitioners) since it was submitted in March, 2008. Now, the Petitioners claim to have spotted a series of “red flags” in the study: they question (1) the data sources; (2) why rent increases bear

any relationship to broadband or VOIP customers; and (3) why Charter would separately report on the impact of pole rent increases in rural areas.

First, the utilities question why the study would use assumptions of 35 poles per mile, \$7.50 in current pole rent, and data on Connecticut residents, when empirics can vary in specific locales and the Connecticut DPUC regulates pole rents.<sup>1</sup> Of course specific utility span lengths can vary by history, lot size, type of circuit, and terrain; but 35 poles per mile is a standard design principle used in utility cost engineering.<sup>2</sup> Likewise, specific pole rents vary by utility; the Charter study used the “average current rate of \$7.50” for power companies reported by an expert economist in the NCTA study of record.<sup>3</sup> Charter used Connecticut data on housing density because the Connecticut DPUC posts raw data on plant mileage, homes passed, and subscribers by territory, so that impacts can be measured against public information. Connecticut is also a jurisdiction that regulates pole rents, but it recently rejected an identical utility petition for the telcom penalty in favor of the cable rate based on allocated usable space.<sup>4</sup> Contrary to the utilities’ unsupported assertions to the contrary, Charter’s study does not rely on “skewed

---

<sup>1</sup> Comments of American Electric Power, Duke Energy, Southern Company, and Xcel Energy, WC Docket No. 09-154, at 37-38 (Sept. 24, 2009) (hereinafter “Utility Petitioners Comments”).

<sup>2</sup> One recent example is the Florida pole hardening docket, 06-0172-EU and 06-0173-EU. *See, e.g.*, Tampa Electric Company revised cost submission of May 26, 2006, posted at <http://www.floridapsc.com/library/filings/06/04608-06/04608-06.pdf>.

<sup>3</sup> *See* Comments of the National Cable & Telecommunications Association, WC Dkt. No 07-245, Appendix B, Declaration of Dr. Michael D. Pelcovits ¶ 18 (hereinafter “Pelcovits Report”) (Mar. 7, 2008).

<sup>4</sup> *Petition of the United Illuminating Company For A Declaratory Ruling Regarding Availability Of Cable Tariff Rate For Pole Attachments By Cable Systems Providing Telecommunications Services & Internet Access, Docket No. 05-06-01*, Decision, 2005 Conn. PUC LEXIS 295, at \*11-12 (Dec. 14, 2005). The Utility Petitioners also challenge Connecticut as a high income, high cost state. Utility Petitioners Comments at 37. Income is not a factor in the cost analysis. Utility Petitioners also question why impacts are reported in ranges. Data ranges were used because the telecom penalty proposed by the Utility Petitioners varies by number of entities on the pole. As clearly shown in the Charter analysis, the resulting rate varies depending on whether there are two or three entities on the pole (the usual range used by Utility Petitioners).

assumptions” nor does it involve “statistical wizardry,” as the utilities put it.<sup>5</sup> It identifies a reasonable, fact-supported method of measuring the impacts of real rents on real subscribers—something the utilities have failed to refute in *any* of their submissions.

Second, the utilities question why one would measure impacts on broadband and VOIP by assigning pole rent increases to those services.<sup>6</sup> The economist Michael Pelcovits answered that question in his detailed study of record in Docket 07-245: increases in pole rents for those services directly affects the willingness of firms to deploy or offer them. “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.”<sup>7</sup> To measure that impact, one has to account for the actual penetration level likely to be achieved by the service that triggers the pole rent increase.<sup>8</sup> The economic relevance of pole rent increases to broadband deployment

---

<sup>5</sup> Utility Petitioners Comments at 36, 40.

<sup>6</sup> Utility Petitioners Comments at 38-39.

<sup>7</sup> Pelcovits Report ¶¶ 26-27 (“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 non-sunk fixed costs 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. 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.”).

has long been of record without challenge by the Petitioners. Charter has provided a specific case in point using data posted by a State PSC. The same point was illustrated with respect to West Virginia residents in a separate study.<sup>9</sup> The utilities seek to brush all that away, now saying that the cable industry should not associate a pole rent increase for broadband services with the broadband services triggering the proposed increase, but just pay the increased rent on every pole, and raise cable rates for every customer.<sup>10</sup> This does nothing helpful for consumers and nothing to change the underlying economic reality that increasing pole rents deters broadband deployment and adoption.

Third, the utilities question why Charter would separately analyze the impact on less densely populated rural areas.<sup>11</sup> USTA already answered that question succinctly: "In rural areas with many miles of lines per customer the impact of such fees are particularly acute, and can result in [preventing] unserved or underserved rural areas from obtaining the benefits of increased broadband deployment."<sup>12</sup> The utilities go on to say that even in rural areas, such pole rent increases should be immaterial.<sup>13</sup> Real operators and the Commission's own Broadband

---

<sup>8</sup> Pelcovits Report ¶¶ 28-29 ("As an example, consider an area with a population density of 15 households per mile of cable plant. 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. ... 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.").

<sup>9</sup> See Reply Comments of the National Cable & Telecommunications Association, WC Dkt. No 07-245, Appendix A, Declaration of Billy Jack Gregg (Apr. 22, 2008)

<sup>10</sup> Utility Petitioners Comments at 39.

<sup>11</sup> *Id.* at 40-41. The utilities also feign confusion over what is "rural." As clearly set forth in the Charter analysis (Exhibits A & B), impacts can be analyzed both at average density levels of 35 homes/mile (152606/4321) and 23 subs/mile and at densities half that.

<sup>12</sup> Comments of USTA at 5.

<sup>13</sup> Utility Petitioners Comments at 41.

Plan staff have documented that significant increases in pole attachment fees can jeopardize future investment in broadband.<sup>14</sup>

In summary, the challenges the utilities have made reflect only their disconnect from the record and from the real world impact of pole rent increases.

## II. THE UTILITIES' "LEGAL" ISSUE CAN BE RESOLVED BY APPLYING THE CABLE RATE TO ALL SERVICES, WHETHER CLEC OR CABLE

In the utilities' view of the world, any pole rent less than the monopoly rent they would prefer to extract would result in a "subsidy." This claim has been repeatedly refuted and rejected by the Commission, the courts, public service commissions, and consumer advocates.<sup>15</sup> The

---

<sup>14</sup> 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, at 1-2 (filed July 11, 2008). 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."). See also Presentation of the Omnibus Broadband Initiative Team, September 29, 2009, Slide 50 ("The cost of obtaining pole attachments and rights of way may have a significant impact on fiber deployment.").

<sup>15</sup> See, e.g., *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, FCC 98-20, 13 FCC Rcd 6777, 6795-96 ¶ 32 (1998) ("We conclude, pursuant to Section 224 (b)(1), that the just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate."), *aff'd*, *NCTA v. Gulf Power*, 534 U.S. 327 (2002); *Alabama Cable Telecomm's Ass'n. v. Alabama Power Co.*, FCC 01-181, 16 FCC Rcd 12209, 12236 ¶ 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. Cable attachers pay all of the costs associated with the pole attachment, which are allocated based on the portion of usable space occupied by the attachment. The costs associated with the entire pole are included in that calculation."); *Gulf Power Co. v. United States*, 998 F. Supp. 1386 (N.D. Fla. 1998), *aff'd*, 187 F.3d 1324 (11<sup>th</sup> Cir. 1999); *Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service*, R.95-04-043, I.95-04-044, Decision 98-10-058, 1998 Cal. PUC LEXIS 879 (Oct. 22, 1998); *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 Companies*, Order Directing Utilities to Cancel Tariffs, Case 01-E-0026, 2002 N.Y. PUC LEXIS 14, at \*4 (Jan. 15, 2002); *Consideration of Rules Governing Joint Use of Utility Facilities & Amending Joint-Use Regulations Adopted Under 3 AAC 52.900 – 3 AAC 52.940*, Order Adopting Regulations, 2002 Alas. PUC LEXIS 489 (Oct. 2, 2002); *Petition of the United Illuminating Company For A Declaratory Ruling Regarding Availability Of Cable Tariff Rate For Pole Attachments By Cable Systems Providing Telecommunications Services & Internet Access*, Docket No. 05-06-01, Decision, 2005 Conn. PUC LEXIS 295, at \*11-12 (Dec. 14, 2005); *Rulemaking to Amend & Adopt Rules in OAR 860, Divisions 024 and 028, regarding Pole Attachment Use & Safety (AR 506) & Rulemaking to Amend Rules in OAR 860, Division 028 Relating to Sanctions for Attachments to Utility Poles & Facilities (AR 510)*, Order No. 07-137, 2007 Ore. PUC LEXIS 115, at \*24 (Apr. 10, 2007); *Cablevision of Boston v. Boston Edison Co.*, Mass. Docket No. D.T.E. 97-82 at 12, 45, 46 (Apr 15, 1998) (reducing pole rental fees and holding that cable rate will "not require

utilities have sought to assess monopoly rents for decades. In this proceeding, they again seek a pole rent increase—retroactively, in the form of a declaratory ruling—mischaracterized as being a “legal” necessity to resolve discrimination. As Verizon has said of the utility proposal: “That approach does not make sense. In fact, to encourage broadband deployment and investment, if the choice is between the two existing rates as the electric companies propose, the Commission should adopt the lower cable rate as the uniform rate for all broadband attachments.”<sup>16</sup> Qwest, CLECs, and USTA also reject the utility proposal.<sup>17</sup> USTA has succinctly called the utilities approach “disingenuous.”<sup>18</sup> The utilities did not initiate this proceeding with the selfless goal of assuring parity between cable and CLECs, but rather with the simple goal of extracting more rent.

If there is a legal issue, it is very straightforward: why should the Commission increase pole rents when current rents provide more than just compensation? Charter does not seek pole rent regulation for competitive advantage—it seeks to limit utilities to just compensation. Just as State Commissions have done, Charter invites the Commission to provide parity to CLECs at the cable rate. The legal paths to do so have been clearly detailed in other Comments.<sup>19</sup> With each wave of technological innovation, the utilities have sought to increase pole rents, and each time,

---

an adjustment of other [utility] rates.”); Reply Comments of the National Cable & Telecommunications Association, WC Dkt. No 07-245, Appendix A, Declaration of Billy Jack Gregg at 14-15 (Apr. 22, 2008); Reply Comments of NASUCA, WC Docket No. 07-245 (April 22, 2008) at 4 -5.

<sup>16</sup> Comments of Verizon at 1-2.

<sup>17</sup> Comments of Qwest Communications International Inc. at 5-6; Comments of USTA at 5; Comments of tw telecom inc. at 1-3, 8; Comments of Sunesys at 6-7.

<sup>18</sup> Comments of USTA at 3.

<sup>19</sup> See Comments of tw telecom at 3-4; Comments of NCTA at 19-21, Comments of Comcast at 26-33.

the Commission has had to rein them in.<sup>20</sup> Raising rents is not the appropriate means of achieving rate parity and is not necessary to cover any alleged cost burden associated with the subject pole attachments. Raising rents would frustrate broadband deployment. It is time for the Commission to once again say no to pole rent increases.

Respectfully Submitted,

/s/ **Paul Glist**

Hunt Brown  
Vice President, Senior Counsel  
**Charter Communications, Inc.**  
12405 Powerscourt Drive  
Saint Louis, Missouri 63131

---

Paul Glist  
**Davis Wright Tremaine LLP**  
1919 Pennsylvania Avenue, N.W.  
Suite 200  
Washington, D.C. 20006-3402  
Phone: (202) 973-4200

Megan M. Delany  
Vice President, Senior Counsel  
**Charter Communications, Inc.**  
1919 Pennsylvania Ave. NW, Suite 200  
Washington, DC 20006

*Attorneys for Charter Communications, Inc.*

October 9, 2009

---

<sup>20</sup> See *Heritage Cablevision Assocs. of Dallas, L.P. et al. v. Texas Util. Elec. Co.*, FCC 91-379, 6 FCC Rcd 7099, 7101 ¶ 12 (1991), *recon. dismissed*, FCC 92-266, 7 FCC Rcd 4192 (1992), *aff'd*, *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993) (surcharge for fiber). See also *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, 8 FCC Rcd. 373 (1993) (surcharge for fiber); *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](http://www.fcc.gov/Bureaus/Common_Carrier/Public_Notices/1995/pncc5001.txt) (anti-competitive overlap policies); *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, FCC 98-20, 13 FCC Rcd 6777, 6795-96 ¶ 32 (1998) (Internet), *petition for review granted*, 208 F.3d 1263 (11th Cir. 2000), *rev'd*, *NCTA v. Gulf Power*, 534 U.S. 327 (2002) (Internet); *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd. 6777 ¶¶ 60-64 (1998) (surcharge for fiber); *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 Co. Servs., Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002) (overlapping fiber to existing cable plant); *Cable Television Ass'n of Ga. v. Georgia Power Co.*, 18 FCC Rcd. 16333, 16340-41 (Enforcement Bureau 2003) (overlapping); *Marcus Cable Assocs., L.P. v. Texas Utils. Elec. Co.*, 12 FCC Rcd. 10362 (1997) (utility requiring cable operator to disclose nonvideo service offerings); *NCTA v. Gulf Power*, 534 U.S. at 339-341 (wireless).