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October 9, 2009

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Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: ***Comments of Time Warner Cable in Opposition to the Petition of American Electric Power Service Corporation, Duke Energy Corporation, SouthernCompany, and Excel Energy Services, Inc. for a Declaratory Ruling*, GN Docket No. 09-51, WC Docket Nos. 07-245 and 04-36**

Dear Ms. Dortch:

On behalf of Time Warner Cable (Time Warner), I am submitting the attached comments timely filed in WC Docket No. 09-154 on September 24, 2009 to be added to the dockets captioned above.

Should you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

Daniel L. Brenner

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Petition for Declaratory Ruling that the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over Internet Protocol Service	)))	WC Docket No. 09-154

COMMENTS OF TIME WARNER CABLE In OPPOSITION TO THE PETITION OF AMERICAN ELECTRIC POWER SERVICE CORPORATION, DUKE ENERGY CORPORATION, SOUTHERNCOMPANY, AND XCEL ENERGY SERVICES INC. FOR A DECLARATORY RULING

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EXECUTIVE SUMMARY

Though its inquiry into a National Broadband Plan for Our Future, the Commission has embarked on a wide-ranging effort to promote build-out and utilization of the nation's high-speed broadband infrastructure. Time Warner Cable, along with other cable operators, have been in the forefront of investing in that infrastructure. Pole attachment fees are an integral part of the cost structure of cable's infrastructure deployment.

Large electric companies have filed a Petition for Declaratory Ruling in WC Docket No. 90-154 to upend the current pole attachment cost structure and require cable attachers who provide broadband to pay the higher Telecommunications Services rate. It should be rejected. The Commission has an ongoing rulemaking into the pole attachment rate structure, in which the Petitioners, as well as the electric utility industry generally, have actively participated. Procedurally, there is no reason to short-circuit that comprehensive effort, which involves numerous interrelated policy questions. Moreover, the record there establishes that the cable rate is fully compensatory, and there is no reason to raise the rate when cable offers VoIP or consumers access third-party providers' VoIP over cables' broadband services.

Granting this petition would increase the cost of providing broadband services, thereby undermining the Commission's goal in its National Broadband Plan Inquiry to facilitate greater deployment and adoption. Finally, there is no legal or factual basis to grant Petitioners' request.

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Before the
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Petition for Declaratory Ruling that the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over Internet Protocol Service	)))	WC Docket No. 09-154

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Time Warner Cable ("TWC") respectfully submits its comments in opposition to the Petition for Declaratory Ruling ("Petition") filed by American Electric Power Service Corp., Duke Energy Corp., Southern Co., and XCEL Energy Services Inc. ("Petitioners") on August 17, 2009, and noticed for comment on August 25, 2009[1]. For the reasons set forth below, Petitioners' requested relief is unwarranted in light of ongoing, comprehensive proceedings addressing the very issues they raise, and in any event it directly contravenes broadband policy and lacks any legal or factual foundation.

INTRODUCTION AND SUMMARY

Petitioners seek a declaratory ruling that the telecommunications rate, defined in Section 224(e)(1) of the Communications Act ("Telecom Rate"), applies to cable system pole attachments used to provide or access interconnected voice over Internet protocol (VoIP)

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

services.[2] Section 224(e)(i) assigns this rate to "charges for pole attachments used by *telecommunications carriers* to provide *telecommunications services*."[3] Petitioners do not dispute that the FCC has neither determined that VoIP service is a "telecommunications service" nor determined that any interconnected VoIP service provider, including a cable VoIP provider or an over-the-top VoIP provider,[4] is a "telecommunications carrier."

TWC is the nation's second-largest cable operator, serving approximately 14.7 million customers in 28 different states over its technologically advanced broadband networks passing nearly 27 million homes. In addition to offering basic and digital cable services, TWC is a leading provider of broadband Internet access and facilities-based VoIP services to customers across its footprint. TWC has long been an innovator in the broadband arena, establishing a remarkably successful track record in the provision of broadband-based services to residential and enterprise customers for over a decade.[5] TWC has invested hundreds of millions of dollars in facilities, including through pole attachments, to offer broadband services, including interconnected VoIP services.[6]

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[2] 47 U.S.C. § 224(e)(1).

[3] *Id.* (emphasis supplied).

[4] Vonage is an example of an "over-the-top" VoIP provider specifically mentioned by Petitioners, Petition at n.4, as a "third-party using the attached cable wire" for purposes of bringing such cable wire -- the same "cable wire" over which the cable provider's broadband Internet access service is provided -- within the scope of the Petitioners' request.

[5] TWC has described its broadband accomplishments in greater detail in its comments in the national broadband plan proceeding. *See* Comments of Time Warner Cable Inc., GN Docket No. 09-51, at 3-4 (filed June 8, 2009) ("TWC Broadband Plan Comments"); Reply Comments of Time Warner Cable Inc., GN Docket No. 09-51 (filed July 27, 2009) ("TWC Broadband Plan Reply Comments").

[6] Pursuant to Section 224(d) of the Act and Commission implementing rules and policies, TWC's commingled cable and broadband pole attachments are subject to the cable pole attachment rate (Cable Rate). In 1998, the FCC first determined that the Cable Rate should apply to attachments that provide both cable and broadband services; the Supreme Court later upheld that determination in the *Gulf Power* case. *See* Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commissions' Rules and Policies Governing Pole Attachments, 13 FCC Rcd 6777 (1998), *aff'd sub nom NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002).

Through this instant Petition, Petitioners seek to have the Commission raise the cost of a critical input to broadband deployment -- pole attachments -- at the very time the Commission, indeed the Nation, is fervently working to determine how best to pave the way for additional broadband deployment and to reduce costs and barriers that may frustrate that objective.[7] Petitioners request a Commission declaration that cable broadband attachments that are used to provide or to access interconnected VoIP services[8] should now be raised from the current Cable Rate to the higher telecommunications services rate (Telecom Rate).[9] They base their claim on the premise that interconnected VoIP services are "increasingly used to replace analog voice services,"[10] and therefore should be classified as "telecommunications services" under the Act in order to implicate the Telecom Rate.

As a threshold matter, unlike declaratory ruling petitions that seek to clarify or interpret existing rules to address unforeseen or unanticipated changes in circumstances, this Petition attempts to short-circuit key issues that the Commission is already expressly considering in comprehensive ongoing rulemakings. There is simply no compelling or exigent need to examine

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

[8] Because "over-the-top" interconnected VoIP services can be accessed via any cable broadband Internet access service -- a service that has been subject to the Cable Rate since 1998 -- granting Petitioners' request would substitute the Telecom Rate for the Cable Rate for *all* commingled cable and broadband attachments, effectively reversing a long-standing Commission finding.

[9] *See* 47 U.S.C. §§ 224(d) (Cable Rate); 224(e) (Telecom Rate).

[10] *See* Petition at 1-2.

such issues outside of the context of those proceedings.[11] Moreover, while Petitioners allege they seek only a "clarification," a more circumspect review reflects they, in fact, are seeking a reversal of the current commingled cable and broadband attachment rate.[12] The Petition is therefore procedurally improper.

In any event, the requested relief would undercut critical Commission policy objectives and lacks any legal foundation. In particular, granting the Petition would undermine the Commission's wide-ranging efforts to develop policies and rules to facilitate broadband deployment and adoption. [13] The Commission has acknowledged on numerous occasions that VoIP services drive demand for broadband connections, and consequently encourage more broadband investment and deployment.[14] Furthermore, the claim for relief is based on a faulty factual and legal analysis of the Commission's Section 224 rules and cable pole attachment rates, the validity of both having been consistently and repeatedly upheld.[15]

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[11] *Implementation of Section 224 of the Act: Amendment of the Communications Rules and Policies Governing Pole Attachments,* WC Docket No. 07-245, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 (2007) (*Broadband Pole Attachment NPRM);. IP-Enabled Services,* WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) (*IP-Enabled Services NPRM).*

[12] *See supra* note 8 and Petition at n. 4.

[13] *See supra* note 7.

[14] *See, e.g., IP-Enabled Services*, Report and Order, 24 FCC Rcd 6039 ¶ 13 (2009) ("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.") (citing *Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd 20540, 20578 (2004) ("[S]ubscribership 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.") (emphasis added).

[15] *National Cable & Telecommunications Ass'n v. Gulf Power,* 534 U.S. 327 (2002); *FCC v. Florida Power Corp.,* 480 U.S. 245 (1987); *Alabama Power Co. v. FCC,* 311 F.3d 1357 (11th Cir. 2002); *Texas Utilities Elec. Co. v. FCC,* 997 F.2d 925 (D.C. Cir. 1993); *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103 (2001); *Florida Cable Telecommunications. Ass'n v. FCC*, 22 FCC Rcd 199) (ALJ 2007).

DISCUSSION

I. THERE IS NO REASON TO ACT OUTSIDE OF ON-GOING COMPREHENSIVE RULEMAKINGS

While characterizing their Petition as a mere "requested clarification,"[16] Petitioners instead seek to upend the Commission's orderly rulemaking processes and reverse more than a decade-old determination about the appropriate rate for commingled services offered by cable system operators.[17] While asserting a requested ruling "is urgently needed to remove uncertainty,"[18] Petitioners fail to demonstrate what exigency compels the urgent imposition of substantially increased broadband deployment costs, not to mention reaching a complex and difficult legal classification determination, each of which have important and far reaching regulatory implications. Specifically, the appropriate rates for broadband pole attachments as well as the regulatory classification of interconnected VoIP already are before the FCC in two separate comprehensive proceedings.[19] Both of these issues implicate critically important matters in other proceedings, not the least of which is the FCC's deliberation of a national broadband plan.[20]

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[16] Petition at 4.

[17] *See supra* note 8.

[18] Petition at 2.

[19] *See Broadband Pole Attachment NPRM, supra* note 11; *IP-Enabled Services NPRM, supra* note 11. The regulatory classification choices were "telecommunications service" and "information service." Over 2,100 filings have been submitted over the years in the *IP-Enabled Services* rulemaking.

[20] *See National Broadband Plan NOI, supra* note 7. The Commission has found on numerous occasions that VoIP service drives demand for broadband services. *See, e.g., 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,* GN Docket No. 07-45, Fifth Report, 23 FCC Rcd 9615, ¶¶ 9, 14, 16, 42, 73 (2008). Because these two services are inextricably linked, Commission action with respect to interconnected VoIP must carefully consider any potential impact on broadband generally.

The pending *Broadband Pole Attachment NPRM,* was initiated, in the Commission's own words, "to consider *comprehensively* the appropriate changes, if any, to our implementation of Section 224."[21] Parties responded to assist the Commission "in compiling a record that will create, to the extent possible, *a context* in which we can place the experiences of utilities, attachers, state commissions, end users, and others in the decade since the Commission began to implement the 1996 Act."[22] The Petitioners individually and collectively are active participants in this proceeding, including through their trade association.[23] To the extent they have additional information to include in the already robust record of the *Broadband Pole Attachment NPRM* -- faithful to the objectives of the Commission in commencing this proceeding at its outset -- that is the appropriate context for considering the matters raised in this Petition. Moreover, because broadband pole attachment issues have been raised in the context of the *National Broadband Plan NOI*, the Commission would be best served by deferring any action at all while it is examining this issue in the context of a National Broadband Plan.

With respect to the legal classification of VoIP services under the Act, the Commission first raised this question in its *IP-Enabled Services NPRM* proceeding in early 2004.[24] Since then, IP-enabled services, particularly VoIP, have proliferated. Different business models have developed, including interconnected "over-the-top" providers such as Vonage as well as facilities-based providers such as TWC and other cable operators. Yet the Commission has

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[21] *Broadband Pole Attachment NPRM* at ¶2 (emphasis supplied).

[22] *Id.* at ¶ 3 (emphasis supplied). An ECFS system search lists 250 submissions in this docket as of Sept. 16, 2009, including those submitted by TWC, *see* Comments of Time Warner Cable Inc. (filed Mar. 7, 2008); Reply Comments of Time Warner Cable Inc. (filed Apr. 22, 2008); *see also* http://fjallfoss.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch_v2.hts for a complete list of filings.

[23] We note *16* filings in the *Broadband Pole Attachment NPRM* from Petitioners' trade association, Edison Electric Institute alone, including *ex parte* submissions by the counsel of record for the Petitioner in this proceeding.

[24] *See IP-Enabled Services NPRM, supra* note 11.

repeatedly declined to reach the classification determination. This regulatory approach has promoted the rapid growth of facilities-based VoIP, the first significant facilities-based mass market wireline competition to traditional local telephone service, by means of an innovative broadband technology that was contemplated neither by the 1996 Act, generally, nor its pole attachment amendments.

Contrary to Petitioners' suggestion, the Commission's regulation of interconnected VoIP services undercuts its request to classify such offerings as "telecommunications services" as a means of increasing pole attachment rates for cable operators' broadband connections. The Commission has rightly recognized that the ultimate statutory classification of interconnected VoIP services will have far-reaching consequences, and it has accordingly refused to resolve that issue in the narrow context of proceedings addressing discrete regulatory obligations. While the Commission has not hesitated to adopt certain requirements for VoIP providers when deemed necessary to protect consumer interests[25] or public safety,[26] or to advance important societal imperatives such as Universal Service[27] or disability access,[28] it has done so pursuant to its ancillary authority, while repeatedly and expressly *declining* to decide the complex statutory classification of interconnected VoIP services. Despite Petitioners' attempt to use them as a

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[25] *See, e.g., Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services,* 22 FCC Rcd 6927 (2007), *aff'd sub nom. National Cable & Telecommunications. Ass'n v. FCC,* 555 F.3d 996 (D.C. Cir. 2009).

[26] *See, e.g., IP-Enabled Services: E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245 (2005), *aff'd sub nom Nuvio Corp. v. FCC,* 473 F.3d 302 (D.C. Cir. 2006).

[27] *Universal Service Contribution Methodology*, 21 FCC Rcd 7518 (2006), *aff'd in part, vacated in part sub nom Vonage Holdings Corp. v. FCC,* 489 F.3d 1232 (D.C. Cir. 2007).

[28] *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities*, 22 FCC Rcd 11275 (2007).

springboard to extract higher, above-cost pole attachment rates, none of these public interest objectives are present in the instant Petition.

Finally, to further support its call for imposing the more expensive Telecom Rate on cable broadband attachments, Petitioners suggest that cable companies hold themselves out as telecommunications providers at state public service commissions while at the same time hold themselves out as VoIP providers to consumers and the FCC.[29] Petitioner simply misunderstands the business model under which facilities-based VoIP providers, such as TWC, purchase wholesale telecommunications services from telecommunications carriers that are certificated by state commissions. Those certificated carriers, which may or may not be affiliated with the retail provider of interconnected VoIP services, provide regulated telecommunications services to interconnected VoIP providers, but do not themselves provide interconnected VoIP services. The Commission is not only familiar with this business model, but has recognized and affirmed the validity and legality of its use.[30]

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[29] "[C]able companies are eager to hold themselves out as competitive telecommunications carriers when there is a regulatory advantage to be gained – such as interconnection." Petition at 10.

[30] *See E911 Requirements for VoIP*, 20 FCC Rcd at 10274 at ¶ 52 (noting that interconnected VoIP providers "often enlist a competitive LEC partner in order to obtain interconnection to the Wireline E911 Network; *see also Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket 06-55,Memorandum Opinion and Order, 22 FCC Rcd 3513 (WCB 2007) (affirming the ability of a CLEC to obtain interconnection to provide wholesale telecommunications service to VoIP providers). Subsequently, the Commission's Sec. 706 Report in 2008 expanded on this point in describing the Bureau's TWC decision stating: "That order helped ensure that new entrants have the ability to interconnect with incumbent LECs, consistent with the text of the Communications Act and Commission precedent. WCB concluded that a contrary decision also would impede the important development of wholesale telecommunications competition, facilities-based VoIP competition, and broadband deployment policies that the Commission had developed and implemented over the last decade by limiting the ability of wholesale carriers to offer service." 23 FCC Rcd9615 at ¶ 43. *See also Consolidated Communications of Fort Bend Co. v. PUC of Tex.*, 497 F. Supp. 2d 836 (W.D. Tex. 2007) (involving TWC and Sprint); *Sprint Communications Co. L.P. v. Neb. PSC*, 2007 WL 2682181 at *23 (D. Neb. 2007) (same); *Berkshire Tel. Corp. v. Sprint*, 2006 WL 3095665 (W.D.N.Y. 2006).

In the absence of any statutory requirement to apply the Telecom Rate to the as-yet unclassified interconnected VoIP service, neither policy arguments nor economic theories justify that outcome. The statute permits the Commission to determine the appropriate rate for services that do not fall into the "cable service" or "telecommunications service" categories; and it has wisely and properly applied the Cable Rate to commingled cable services attachments to date.

II. GRANTING THIS PETITION WOULD UNDERMINE THE COMMISSION'S EFFORTS TO ADVANCE THE GOAL OF UNIVERSAL BROADBAND DEPLOYMENT

Apart from these procedural infirmities, in the midst of this agency's expansive and around-the-clock efforts to meet Congress's expectation for a National Broadband Plan ("NBBP"), it is remarkable that the Petitioners propose to increase the cost of a key input of broadband deployment. This is particularly so in light of the focus on unserved areas where the costs to deploy may already be prohibitive.[31] As the FCC recognized in its *National Broadband Plan NOI*, pole attachment rates directly impact the cost of providing broadband services.[32] Similarly, the *Rural Broadband Report*, now a part of the record in the NBBP proceeding, found that "reasonably priced access to poles and rights of way is critical to the buildout of broadband infrastructure in rural areas."[33] A logical regulatory response to these observations in considering

[31] It is equally remarkable given the focus on the relation between broadband and smart grid technology, a technology that promises energy independence and efficiency. *See Comment Sought On The Implementation Of Smart Grid Technology, NBP Public Notice #2*, DA-09-2017 (rel. Sept. 4, 2009) ("Smart Grid technology has been identified as a promising way to use broadband and other advanced communications to promote energy efficiency, reduce greenhouse gas emissions, and encourage energy independence."); *National Broadband Plan NOI, supra* note 7, at ¶¶ 86-87.

[32] *National Broadband Plan NOI, supra* note 7, at ¶ 50.

[33] *Rural Broadband Report, supra note 7* at ¶ 157.

ways to encourage broadband deployment would suggest reducing, or at a minimum, maintaining, the current rate for broadband pole attachments.[34]

Granting Petitioner's request, however, would accomplish just the opposite. It would raise a key cost input – the rate to attach fiber or coaxial cable to electric utilities' poles when a cable broadband provider offers a commingled cable and broadband service – with no countervailing or competing policy interest or benefit that would serve to enhance the objective of increased broadband deployment. Petitioner's request also runs counter to Section 706 of the Act, wherein Congress directed the Commission to find ways to *remove* regulatory impediments to broadband deployment.[35] A declaratory ruling that unnecessarily raises the cost of cable pole attachments for providing broadband services is antithetical to the objectives of Section 706. To suggest, as Petitioner does,[36] that higher broadband pole attachment rates are *consistent* with that provision, is simply not credible.

Perhaps seeking to deflect attention from this conflict with core broadband policies, Petitioners assert that raising pole attachment rates is necessary to avoid improper subsidies. Specifically, Petitioners claim that when cable companies pay only the Cable Rate for pole attachments for broadband services that provide "functionally equivalent telephone services" a

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[34] *See* Blair Levin, FCC, Executive Director, Omnibus Broadband Initiative, *"A Framework for Universal Broadband", Sept. 2, 2009, available at* http://blog.broadband.gov/?page_id=185: "To start accelerating that process of capturing those externalities and building that foundation, we want more deployment and adoption. To do that we either have to increase the revenues associated with the ecosystem or we have to decrease the cost of the inputs required to produce more activity in the ecosystem."

[35] Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, title VII, Sec. 706, 110 Stat. 56, 153 (1996), *as amended in relevant part,* Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (BDIA), *codified at* 47 U.S.C. § 1302(b): "If the Commission's determination [that advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion] is negative it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."

[36] Petition at 24-25.

significant cost burden ensues to electric ratepayers.[37] In the comments filed in the ongoing *Broadband Pole Attachment NPRM*, TWC and others have extensively discussed the Commission's repeated rejection that cable service pole attachment rates are a "subsidy."[38] The Supreme Court similarly long ago concluded that the cable service attachment rate constitutes no "taking" of pole assets under the Constitution and is not confiscatory.[39] Petitioners' attempt to resurrect that argument here is unavailing.[40] Put simply, there is no subsidy because pole attachment rates are fully compensatory, as the FCC, most every state commission that regulates pole attachments, and the courts all have found.[41]

Despite this body of precedent, Petitioners assert that electric rates are invariably affected by what cable attachers pay: "Every dollar that a cable company avoids paying for its use of the space on the utility's pole is one dollar more that must be rolled into the costs that make up the utility's regulated rate to consumers."[42] But this is nothing more than a truism.[43] The real question is whether cable attachers are paying a reasonable rate for attachments under Section

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[37] *Id.* at 12.

[38] *See* TWC Comments, filed Mar. 7, 2008, at 33-35.

[39] *FCC v. Florida Power Co.*, 480 U.S. 245, 253-54 (1987).

[40] Petition at 23-24.

[41] *See FCC v. Florida Power Corp.*, 480 U.S. at 254 ("Appellees have not contended, nor could it seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory."); *see also Alabama Power Co. v. FCC*, 311 F.3d at 1369; *2007; Request to Update Default Compensation for Dial-Around Calls from Payphones, WC Docket No. 03-225, 19 FCC Rcd 15636, 15646 ¶ 29 ("*If the rate is cost-based, it cannot be a 'subsidy'."); *A/R Cable Services v. Mass. Electric Co.*, Mass. Docket No. D.T.E. 98-52 at 30 (Nov. 6, 1996) (*MECO)* (cable rate formula "is reasonable").

[42] Petition at 12.

[43] *But see Broadband Pole Attachment Rulemaking, WC 07-245,* Reply Comments of National Cable & Telecommunications Ass'n at 7: "In a case involving Boston Edison, it was demonstrated that 'pole revenues equate to *no more than one cent of a monthly electric bill....*' The DTE reduced pole rental fees and held that this rate reduction would have 'minimal' impact (.009%) on electric ratepayers 'and not require an adjustment of other
Footnote Continued

224 and related policy objectives when there is no extra burden on the poles and the rate has been deemed compensatory by courts, the FCC, and state commissions time and time again. Indeed, the substantial record in the *Broadband Pole Attachment NPRM* demonstrates conclusively the absence of any subsidy with respect to the Cable Rate for any pole attachment, whether it be for cable, broadband or interconnected VoIP service. Petitioners offer no new evidence to the contrary.

[utility] rates.'" *Cablevision of Boston v. Boston Edison Co.,* Mass. Docket No. D.T.E. 97-82 at 12 (Apr. 15, 1998). *See also MECO, supra* note 41 at 30.

CONCLUSION

Petitioners have failed to demonstrate why the Commission should grant this Petition. Far from a simple "clarification", Petitioners are in fact seeking to overturn what the Commission expressly found in 1998 and the Supreme Court affirmed, namely, that commingled broadband services offered by cable operators are lawfully subject to the Cable Rate. Moreover, the Commission should reject Petitioners attempt to end run comprehensive on-going rulemakings for which these very issues are under consideration. Finally, granting this Petition could have important and far-reaching implications on broadband policy and the Commission's goals with respect thereto. In the absence of any compelling economic or legal requirement, and in view of the above, this Petition should be denied.

Respectfully submitted,

By /s/ Daniel L. Brenner

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