

**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

REPLY COMMENTS OF COMCAST CORPORATION

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I. INTRODUCTION AND SUMMARY

In its Comments, Comcast Corporation (“Comcast”) demonstrated that the Petition for Declaratory Ruling¹ seeks the imposition of a massive new pole “tax” on virtually all cable broadband attachments. In a rare showing of unanimity cutting across a broad spectrum of industry groups, cable, CLEC and ILEC commenters urge that the Petition be rejected. The commenters establish that (consistent with the *Broadband Pole Proceeding*² record): (i) higher pole rents deter broadband investment and voice competition; (ii) the existing cable rate formula overcompensates utilities and is not a subsidy; and (iii) should the Commission desire to

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) (hereinafter “Petition”).

² *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*”).

establish a uniform broadband pole attachment rate for cable and competitive local exchange carriers (“CLECs”), it should do so at the cable rate.

The power companies provide no support for their bizarre position that *raising* pole rents for cable VoIP attachments (in essence, for all cable broadband attachments) would somehow help promote broadband deployment and competition. However, numerous commenters point out the obvious – raising pole rents would have the opposite effect. As Verizon stated:

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.³

Commenters reaffirm that *lower* pole rates are the catalyst that will promote the Commission’s broadband deployment and competition policies.

The power companies also fail to provide any substantive support for their contention that the cable pole attachment rate formula produces a subsidy rate. Contrary to the Petitioners’ assertions, the fact that the telecommunications rate is higher than the cable rate does not “logically” make the cable rate a subsidy. Expert economic testimony, Commission decisions, court decisions, State PSC decisions, and comments filed by consumer groups representing utility consumer interests have overwhelmingly demonstrated that the cable rate is not a subsidy, but instead overcompensates pole owners.

³ Comments of Verizon at 1-2 (hereinafter “Verizon Comments”).

Finally, the comments demonstrate that the Commission has several legal options to establish a uniform pole attachment rate for CLEC broadband attachments at the cable formula rate.

II. APPLYING THE TELECOM POLE RATE TO VOIP WILL FRUSTRATE THE COMMISSION'S BROADBAND DEPLOYMENT POLICY

The power companies argue that the establishment of a uniform attachment rate at the telecom rate (or higher)⁴ will promote broadband deployment and competition by “ensuring ‘regulatory parity among providers of similar services [and] will minimize marketplace distortions arising from regulatory advantage.’”⁵ However, as concisely noted by Verizon, “[t]hat approach does not make sense.”⁶ The United States Telecom Association explains that “the obvious policy implication of this analysis leads to precisely the opposite end-result urged by Petitioners. Rather than increase the impact of pole attachments on the costs of deploying broadband, the Commission should be concerned with ensuring that such costs do not unnecessarily deter the extension of broadband networks and the adoption by end users.”⁷ Even

⁴ See Comments of the Coalition of Concerned Utilities at 15 (hereinafter “Coalition Comments”) (“[T]here is nothing in the Commission’s or Court’s analysis that prevents the Commission from approving a higher rate than the Telecom rate when such an entity provides broadband service in addition to telecommunications service. When more than telecom services are provided, more than the Telecom rate should be charged.”). The Coalition goes on to explain that “[a] rate for commingled telecommunications and broadband service that is higher than the rate for telecommunications services alone makes sense as a ‘surcharge’ on the basic rate paid by a telecommunications carrier providing telecommunications service.” *Id.* at 16 n.47. Similarly, the Petitioners reserve their right to later argue that the telecommunications rate is also a subsidy. Petitioners’ Comments at 33 n.91.

⁵ Petitioners’ Comments at 30.

⁶ Verizon Comments at 1-2.

⁷ Comments of United States Telecom Association at 3-4 (hereinafter “USTA Comments”). See also Comments of Time Warner Cable at 10 (hereinafter “Time Warner Cable Comments”) (granting the Petition will not promote broadband deployment but “would accomplish just the opposite”).

though AT&T's pole rate position appears to have changed over the past year,⁸ it previously stated in the *Broadband Pole Proceeding*:

While the Commission should unify rates for pole attachments used to provide broadband Internet access service, the Commission would hardly promote broadband deployment by implementing the unwarranted pole attachment rate increases sought by the ELCOs.⁹

These comments simply confirm prior Commission findings regarding the harmful impact of higher pole rents on broadband deployment.

Virtually all commenters have reaffirmed that raising pole rents will hurt the nation's broadband deployment efforts, while lowering broadband pole rents will promote that critical national objective.¹⁰ This is the lesson learned from the Commission's consistent rejection of

⁸ In the *Broadband Pole Proceeding*, AT&T recognized that the cable rate is the most equitable method of allocating usable and unusable pole space costs. Reply Comments of AT&T Inc. in WC Docket No. 07-245 at 31 (hereinafter "AT&T Reply Comments"); see also AT&T Reply Comments in WC Docket No. 07-245, Reply Declaration of Veronica Mahanger MacPhee ¶¶ 32-33 (hereinafter "MacPhee Reply Declaration") (allocating the "total cost of a joint pole's non-usable space in any manner other than in direct proportion to the users' respective allocations on the pole's useful space is unfair and unreasonable"); Comments of AT&T Inc. in WC Docket 07-245 at 3, 19. However, after filing dozens of pages of comments establishing this economically sound position, including the submission of expert testimony supporting these views, AT&T has abruptly (and without any explanation) changed course and is advocating a joint proposal submitted in October 2008 with Verizon that would increase broadband pole rents for all attachers *above* the telecommunications rate sought by the Petitioners. In addition to AT&T's own internally conflicting positions, Verizon has now rejected the joint 2008 proposal, as evidenced by its comments on Petitioners' proposal to impose the telecom rate on all cable VoIP attachments: "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." Verizon Comments at 1-2.

⁹ AT&T Reply Comments in WC Docket No. 07-245 at 2.

¹⁰ See, e.g., Verizon Comments at 1-2; Comments of Qwest Communications International Inc. at 5 (the Commission need *not* "require cable companies to move to the Telco rate as the Electric Companies suggest"); USTA Comments at 3-4; Comments of tw telecom at 2 (hereinafter "TWTC Comments") (establishing uniform rates at the telecom rate "is self-serving and would result in bad policy ... [and] in an arbitrary and entirely unnecessary wealth transfer from telecommunications carriers and cable companies to pole owners"); Comments of Sunesys, LLC at 7 (hereinafter "Sunesys Comments") (raising cable VoIP rent to telecom rate "will lead to less broadband deployment - not more"); Comcast Comments at 5-9; Comments of the National Cable & Telecommunications Association at 14-17 (hereinafter "NCTA Comments"); Opposition of American Cable Association at 3-4 (hereinafter "ACA Comments"); Comments of Charter Communications, Inc. at 3-4, 9-14

numerous prior electric industry efforts to impose pole rate surcharges and other obstacles on the deployment of fiber and advanced services by the cable industry.¹¹ Without the Commission's foresight in reining in excess power company pole profits, consumers would not be reaping the benefits of widely deployed broadband services, the evolution of facilities-based voice competition, or the billions of dollars of savings made possible on a national basis.¹² The task of providing these benefits to all Americans is not yet complete, but the record shows that setting CLEC broadband pole rents at the cable formula rate will advance this critical national goal, while raising broadband/VoIP attachment rates will frustrate that same goal.¹³

The Petitioners next argue that the cable companies' refusal to pay the telecommunications rate for VoIP pole attachments causes disputes that divert resources that could be better used to fund broadband deployment efforts.¹⁴ However, Petitioners concede that

(hereinafter "Charter Comments"); Comments of the Alabama Cable Telecommunications Association, the Broadband Cable Association of Pennsylvania, the Cable Television Association of Georgia, the Florida Cable Telecommunications Association, the New England Cable and Telecommunications Association, Inc., and MediaCom Communications Corporation at 10-13 (hereinafter "Cable Association Comments"); Time Warner Cable Comments at 9-12.

¹¹ As explained in the comments, for decades, the Commission has been required to hold the line repeatedly on these electric utility efforts to abuse their monopoly control of poles. Comcast Comments at 10 n.27 (identifying numerous Commission decisions restraining electric utility efforts to slow fiber deployment and impose unreasonable surcharges on new services). This utility industry instinct to impose unreasonable costs and other obstacles on new communications services requiring pole attachments continues to this day. *See, e.g.*, NCTA Comments at 4; Charter Comments at 5-6 ("With each wave of innovation, the utilities ask to increase their profits on poles, and with each wave, the Commission is called upon to reject their misleading rhetoric and arrest their monopoly demands."); Sunesys Comments at 4-7 (describing utility deployment delay tactics); TWTC Comments at 4.

¹² *See* Comcast Comments at 5-9; NCTA Comments at 2-3.

¹³ *See, e.g.*, Comcast Comments at 8 (imposing up to a \$672 million annual broadband tax on broadband will undercut "the Commission's 'top priority' of broadband deployment and the success of competitive VoIP services"); Sunesys Comments at 7; TWTC Comments at 2; Verizon Comments at 1-2; USTA Comments at 3-4.

¹⁴ Petitioners' Comments at 18-19 (arguing that establishing the cable VoIP attachment rate at the telecommunications rate will "reduce the opportunity for cable companies to instigate and perpetuate disputes by ensuring that pole attachment rates for similar services are the same").

VoIP service has never been classified by the Commission as a telecommunications service,¹⁵ which is a precondition to any application of the telecommunications formula. As explained by TWTC:

The utilities blame the victim and argue that the cable companies' unreasonable failure to pay the telecommunications rate for VoIP attachments resulted in "billing disputes".... But it is the utilities themselves that are acting unreasonably by forcing attachers to defend themselves against utility claims that have no basis in law.¹⁶

The only outcome that will resolve the rate disparity issue consistent with the Commission's broadband deployment and competition objectives – and as advocated by nearly all of the commenters – is to establish a uniform attachment rate set at the cable rate for cable and CLEC broadband attachments.¹⁷

¹⁵ Petitioners' Comments at 7-8.

¹⁶ TWTC Comments at 7-8. *See also* Charter Comments at 16 ("What the utilities are really saying is that if cable operators would simply pay the higher rate, then the utilities would stop demanding it."). Even this would not be enough as the power companies believe that the telecommunications rate is also a "subsidy" and that an additional "surcharge" on broadband services should be added above the telecommunications rate. *See* discussion at note 4 *supra*. Thus, the prospect for future rate disputes has already been announced by the power companies even if the Commission were to grant the Petition's request. Moreover, as explained in the *Broadband Pole Proceeding*, applying a higher broadband pole attachment rate would not minimize pole attachment rate disputes – the opposite should be expected. *See* Comcast Comments in WC Docket 07-245, Exhibit 2, Declaration of Harold W. Furchtgott-Roth at 20-21.

¹⁷ The Coalition argues that applying the cable rate to cable broadband attachments in urban and suburban areas will do nothing to encourage the expansion of broadband in rural areas. Coalition Comments at 10-12. Moreover, it argues that high head-end capital costs and upgrade costs deter the expansion of cable broadband deployment in rural areas and that pole rents are not a relevant factor. *Id.* at 8-10. The Coalition is wrong on both counts. The record in this and the *Broadband Pole Proceeding* is replete with expert economic and other evidence addressing the detrimental impact that higher pole rents have on broadband deployment and adoption rates – in rural, suburban and urban areas. *See, e.g.,* Comcast Comments at 7-8; Charter Comments at 9-14; ACA Comments at 3-4; NCTA Comments at 15-17. Unnecessarily raising pole attachment costs in urban and suburban areas places the same upward cost pressures on broadband and VoIP services in those areas with obvious detrimental consequences to increasing broadband adoption rates and maintaining the natural cost efficiencies of emerging VoIP competition.

III. THE POWER COMPANIES AGAIN FAIL TO PROVIDE ANY EVIDENCE THAT THE CABLE RATE IS A SUBSIDY

The power companies' comments do not contain a shred of evidence (nor could they) that the cable rate constitutes a subsidy. In the *Broadband Pole Proceeding*, Comcast and others noted that the power company commenters had failed to put forward any authoritative support for their subsidy claim, whether in the form of expert economic testimony or other precedent.¹⁸ The power companies' strategy seems to rest on the hope that sheer repetition of their subsidy claim will eventually overcome the mountain of substantive evidence to the contrary.

As set forth in numerous comments (here and in the *Broadband Pole Proceeding*), the Commission, courts, State PSCs, consumer advocates, as well as prominent economists, all agree that the cable rate *more than fully compensates utilities*.¹⁹ After reimbursing pole owners for all marginal costs (*i.e.*, make-ready), cable operators then pay an additional annual pole rent under the cable formula. As a matter of economics, there is no subsidy as long as the utility recovers its marginal costs, which the utilities do through the imposition of pole "make-ready" expenses on cable operators.²⁰ Contrary to the power companies' assertions, AT&T and others have

¹⁸ See, e.g., Comcast Reply Comments in WC Docket 07-245 at 8 ("[D]espite repeated utility assertions that the cable rate is a 'subsidized' rate, utilities provide no substantive economic analysis to support their claim, nor could they in light of well-established principles of economics."); *id.* Exhibit 2, Reply Report of Patricia D. Kravtin ¶ 10 (hereinafter "Kravtin Reply Report").

¹⁹ See, e.g., Comcast Comments at 17-23; NCTA Comments at 10-14, Appendix A; Time Warner Cable Comments at 10-11; State Association Comments at 5-10; Charter Comments at 6-9. See also AT&T Reply Comments in WC Docket No. 07-245, MacPhee Reply Declaration ¶ 39 ("This [subsidy] assertion is impossible to reconcile with the fact that ELCOs usually recover in advance their costs in the form of 'make ready' work to accommodate a new attacher. This total up-front reimbursement of any cost, capital or expense, incurred by the owner to accommodate the new pole user makes a pole owner absolutely whole at the very beginning of the new attacher's occupancy.").

²⁰ Comcast Comments at 17 n.47.

recognized that poles have become profit centers for electric utilities²¹ – and that cable operators and other attachers provide “an income-producing use of an otherwise unproductive and often surplus portion of the plant.”²²

The power companies argue that the cable rate is (i) “inherently a subsidy formula” because it does not assign the cost of unusable space equally among all attaching parties, and (ii) “logically” a subsidy because it is lower than the telecom rate.²³ They are wrong on both counts.

The cable formula allocates the costs of the entire pole (usable and unusable space) based upon the percentage of usable space that is occupied by the cable attacher. As the legislative history of the 1978 Pole Act explained, this cost allocation approach is analogous to other well accepted, familiar contexts such as an apartment house:

The renter of one of the ten units pays the cost of that unit plus one-tenth of the cost of all common areas. He does not pay one-half the cost of the common areas just because only

²¹ Comcast Comments at 21-22 & n.61; AT&T Comments in WC Docket 07-245, Declaration of Philip Jack Gauntt ¶ 11; *id.* Declaration of Veronica Mahanger MacPhee ¶¶ 17, 19.

²² Comcast Comments at 18-19 n.51. Since there is no “subsidy,” there is no harm to electric rate payers. This is also the conclusion of numerous State PSCs that regulate pole rates under a legal duty to ensure that the interests of both cable and utility customers are protected. The vast majority of these State PSCs have adopted the FCC’s cable rate or a formula that is close to it thereby confirming that there is no subsidy and no harm to electric customers. *See* Comcast Comments at 19-21; *see also* AT&T Reply Comments in WC Docket 07-245, MacPhee Reply Declaration ¶¶ 41-42 (“What all of this means is that any contribution at all to the annual carrying charges by pole attachers is in fact a financial boon for the utility pole owner.”); Reply Comments of Time Warner Cable in WC Docket 07-245, Declaration of Coleman Bazelon at 12 (“In fact, to the extent that an attacher pays anything more than its incremental costs, it is making a contribution to the fixed, common costs of the pole, and the pole owner is actually better off as a result of the third-party attachment.”).

²³ Petitioners’ Comments at 33-34.

one other person occupies the other nine units, but rather he pays his one-tenth share of all the costs attributable to the building.²⁴

In the *Broadband Pole Proceeding*, AT&T's expert explained the reasonableness of this approach by using a shared office building analogy:

If there were 14 floors to the building, and one tenant alone occupied 11 of them, with two other tenants occupying 1 and 2 floors respectively, it would be inconceivable for the three tenants of the building to share its common costs - e.g., parking facilities, janitorial services, electricity, heat, etc. - equally. These common costs would be most fairly and reasonably allocated in direct proportion to the number of floors each tenant occupied, since this would be a fair and reasonable reflection of the relative benefit each tenant obtains from the building's shared or common support services. No less is true of a shared joint use pole, and the equal allocation of its common space that is consistently recommended by the ELCOs is unreasonable and insupportable.²⁵

Obviously, if common (*i.e.*, unusable) space were shared equally as advocated by the power companies (who use eight to ten feet of pole space compared to cable's one foot of space) cable and other lesser attachers would be the ones subsidizing the power companies. The cable rate apportionments costs of the entire pole in an equitable manner that does not result in any subsidies from the power companies or their customers.²⁶

²⁴ 123 Cong. Rec. 5080 (1977) (statement of Rep. Wirth); *see also* Comcast Comments in WC Docket 07-245, Exhibit 1, Report of Patricia D. Kravtin ¶¶ 56-66 (hereinafter "Kravtin Report"); S. Rep. No. 95-580 at 20 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 128 ("This allocation formula reflects the concept of relative use of the entire facility. To the extent that a pole is used for a particular service in greater proportion than it is used for another service, the relative costs of that pole are reflected proportionately in the costs of furnishing the service which has the greater amount of use.").

²⁵ AT&T Reply Comments in WC Docket No. 07-245, MacPhee Reply Declaration ¶ 33. *See also* Kravtin Report ¶¶ 58-62; Kravtin Reply Report ¶¶ 5-9.

²⁶ The National Association of State Utility Consumer Advocates, which is legally obligated to represent the interests of both cable and utility customers, confirms that the cable rate is not a subsidy. "[The cable rate] 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.'" Reply Comments of National Association of State Utility Consumer Advocates in WC Docket No. 07-245 at 5.

Petitioners are also incorrect in arguing that the cable rate is “logically” a subsidy simply because the telecommunications formula produces a higher rate.²⁷ The fact that the telecommunications pole formula (which the power companies also argue is a subsidy) overcompensates power companies to an even greater extent than the cable rate, in no way supports their subsidy theory.

IV. THE COMMISSION HAS THE AUTHORITY TO APPLY THE CABLE RATE TO CLECs

The power companies mistakenly argue that the Commission has no authority to apply an attachment rate lower than the telecommunications rate for CLECs. The Petitioners assert that “[p]ursuant to section 224(e), the Commission cannot apply any rate to CLECs other than the Telecom Rate. . . . This subsection provides no exemption for telecommunications carriers that also provide video or internet services.”²⁸ This reflects a fundamental misunderstanding of the Commission’s authority to set a “just and reasonable” rate (other than the telecommunications rate) with regard to cable and telecommunications services that are commingled with broadband or other unclassified advanced services.

In *Gulf Power*, the Supreme Court addressed the structure of section 224 and ruled that “Congress did indeed prescribe two formulas for ‘just and reasonable’ rates in two specific categories; but nothing about the text of §§ 224(d) and (e) and nothing about the structure of the Act, suggest that these are the exclusive rates allowed.”²⁹ The Court explained that the subject

²⁷ Petitioners’ Comments at 33-34.

²⁸ *Id.* at 22.

²⁹ *NCTA v. Gulf Power Co.*, 534 U.S. 327, 335 (2002) (hereinafter “*Gulf Power*”).

matter of pole attachment rate policy and communications technology is “technical, complex, and dynamic; and as a general rule, agencies have authority to fill gaps where the statutes are silent.”³⁰ In *Gulf Power*, the Court upheld the Commission’s authority to establish an appropriate just and reasonable rate for commingled services. In doing so the Court explained:

[Congress] might have . . . thought [it] 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.³¹

Under this authority, the cable pole rate is clearly both lawful and appropriate as the commingled rate for cable and VoIP services. The identical analysis applies to the situation where a CLEC is providing not just telecommunications service but is commingling that service with an unclassified service or a service other than cable. Such circumstances exist where CLECs are offering broadband as well as telecommunications services – and the Commission has the same authority to establish a just and reasonable rate for CLECs at the cable rate in order to fill the same “gap” identified in *Gulf Power*.³²

As demonstrated by Comcast and the vast majority of the other commenters in this proceeding, the Commission should exercise its discretion and apply the cable formula to all cable and CLEC attachers that offer broadband services. Alternatively, the Commission can

³⁰ *Id.* at 339.

³¹ *Id.*

³² In the *Broadband Pole Proceeding*, the Commission tentatively concluded that it had authority to set a CLEC pole rent rate lower than the telecommunications rate for attachments carrying commingled broadband services. *See Broadband Pole Proceeding*, 22 FCC Rcd. 20195 ¶ 36. The Coalition also recognizes that the telecommunications rate is not the mandatory rate for CLECs that offer services other than “circuit switched service.” In such cases, the Coalition believes the Commission is not bound by the telecom rate but can apply a higher “surcharge” rate to such attachments. As explained above, the commingled service rate for CLECs can be lower than the telecommunications rate and should be set at the cable rate.

forbear from applying the section 224(e) rate to CLECs offering broadband and apply the cable rate, or the Commission can adjust the inputs in the telecommunications rate formula to lower the rate to the cable rate.

CONCLUSION

The Commission's cable pole rate more than fully compensates pole owners while promoting the Commission's primary goals of broadband deployment and facilities-based voice competition. The Commission should reject the Petition and, instead, extend the cable pole rate to all CLEC broadband providers.

Respectfully submitted,

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