

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

<b>In the Matter of:</b>	)	
	)	
<b>Petition for Declaratory Ruling that</b>	)	
<b>the Telecommunications Rate Applies</b>	)	<b>WC Docket No. 09-154</b>
<b>to Cable System Pole Attachments Used</b>	)	
<b>to Provide Interconnected Voice Over</b>	)	
<b>Internet Protocol Service</b>	)	

**REPLY COMMENTS OF CENTURYLINK**

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**I. INTRODUCTION AND SUMMARY**

In their Petition, a group of electric utilities<sup>1</sup> ask the Commission to ensure cable television companies pay the same rate as competitive local exchange carriers for attachments used to provide voice over Internet protocol (“VoIP”) services.<sup>2</sup> Just two comments supported the Petition.<sup>3</sup> Both were filed by electric utilities or their associations. All other commenters -- including cable telephony providers, competitive local exchange carriers (“CLECs”), incumbent local exchange carriers (“ILEC”), and their associations -- opposed the Petition.

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<sup>1</sup> The petitioners included American Electric Power Service Corp., Duke Energy Corp., Southern Co., and Xcel Energy Services, Inc.

<sup>2</sup> *Petition for Declaratory Ruling that the Telecom Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice Over Internet Protocol Service*, filed Aug. 17, 2009 (“Petition”); Public Notice, DA 09-1879 (rel. Aug. 25, 2009). Comments were filed on September 24, 2009.

<sup>3</sup> The petitioners (AEP, *et al.*) also filed separate comments supporting their own Petition.

Overall, the comments received confirm that the Commission needs to act on pole attachments<sup>4</sup> to level the playing field for all providers of broadband Internet access service. CenturyLink shares the industry's frustrations with the gross and unjustified disparities in pole attachment rates among different categories of broadband competitors. CenturyLink owns poles and conduit in many places, and it relies on attachments to other party's poles in others. It relies heavily on attachments from electric utilities. CenturyLink understands these issues, and it and its customers suffer from the distortions created by the current pole attachment rate regime.

As most commenters agreed, however, that the Petition would do nothing to improve the unfairness and irrationality of the existing pole attachment regulatory regime. The Commission should deny the Petition and instead act to provide a uniform pole attachment rate for all attachments used for broadband.

A low, reasonable unified rate would bring about much needed regulatory parity, would promote competition, and would promote broadband investment, deployment, and adoption. The Commission already has a proceeding open to address a unified rate for broadband attachments, and is reviewing pole attachment rates and policies as part of the National Broadband Plan. The Commission has ample statutory authority under sections 224 and 706 to adopt a uniform rate formula for attachments for all providers of broadband services.<sup>5</sup>

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<sup>4</sup> In these comments, Embarq uses the terms "poles" or "pole attachments" to include all manner of use of poles, conduit, or rights of way owned or controlled by a utility.

<sup>5</sup> 47 U.S.C. § 224; 47 U.S.C. § 157 nt.

CenturyLink agrees that the Commission should act promptly to reduce pole attachment disputes. Adopting a uniform rate for *all* broadband attachments -- as proposed in the *Pole Attachments NPRM*<sup>6</sup> -- will effectively end the disputes cited in the Petition and promote competition and broadband availability. At the same time, however, CenturyLink sees no need for new rules setting arbitrary deadlines for processing applications, sought by Sunesys. Instead, the Commission should clarify that all telecommunications service providers, including ILECs, can use existing FCC complaint procedures to challenge unreasonable attachment rates, terms, or conditions -- including unreasonable delays in processing applications. If rules need to be changed, then the Commission should amend its complaint procedures to ensure all providers of telecommunications services to file complaints pursuant to the FCC's pole attachment complaint procedures.

**II. THERE IS A WIDELY RECOGNIZED NEED FOR REGULATORY PARITY IN BROADBAND ATTACHMENTS.**

**A. Parties all acknowledge the importance of regulatory parity between competitors.**

Commenters widely opposed the Petition. Yet virtually all commenters agree on the importance of "regulatory parity" for mixed-use pole attachments between cable VoIP providers and their competitors. Cable companies vigorously opposed the Petition.

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<sup>6</sup> *Implementation of Section 224 of the Act: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-2455, RM-11293, RM-11303, Notice of Proposed Rulemaking, FCC 07-187 (rel. Nov. 20, 2007), 73 Fed. Reg. 6788 (Feb. 6, 2008) ("NPRM" or "Pole Attachment NPRM").

Comcast and NCTA argued that the Commission should deny the Petition but create “parity” by extending the cable TV attachment rate to CLEC attachers.<sup>7</sup> CLECs and ILECs also opposed the Petition. tw Telecom called on the Commission to “focus its efforts on adopting a single pole attachment formula” for attachments of all types.<sup>8</sup> USTelecom, ITTA, Qwest, Verizon, and AT&T agreed that the Commission should deny the Petition, and complete reform of all attachments used to provide broadband and associated services.

Even the petitioners and their electric utility supporters acknowledge the need for regulatory parity, although they focus only on cable and CLEC attachments. They point out that cable companies enjoy an “unfair competitive advantage over other telephone service providers,” and note that “[g]reater regulatory parity in voice telephony markets” would eliminate disputes and “facilitate broadband penetration.” After all, they explain, “VoIP is a substitute for traditional telephone service” and “increasingly a replacement for analog voice service,” fully “comparable to voice telecommunications services offered by competitors.”<sup>9</sup>

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<sup>7</sup> Comcast (at 26) and NCTA (at 17) suggest using forbearance, if necessary, to bring CLEC attachments down to the cable rate.

<sup>8</sup> tw Telecom at 1.

<sup>9</sup> AEP, *et al.* at 6, 9, 15, 18.

**B. The Petition fails to provide regulatory parity.**

The Petition plainly fails to provide real regulatory parity. With few exceptions, cable telephony is provided using broadband capable plant.<sup>10</sup> The petitioners and the electric utility commenters, however, ignore the far greater regulatory disparity between attachment rates paid by ILECs and their cable TV and CLEC competitors. As USTelecom explained, the electric utilities say “‘parity’ is good, so long as it only increases attachment rates and doesn’t apply to the majority of attachments (i.e., those of ILECs) who they charge even more.”<sup>11</sup>

The Commission cannot rationally limit its focus to one group of attachers. CenturyLink agrees with USTelecom that “the current regulatory scheme is broken and needs reform for all broadband attachers, regardless of platform.”<sup>12</sup> CenturyLink joins Qwest in “reiterat[ing] its support for the FCC’s tentative conclusion in the pole attachment NPRM that all categories of providers should qualify for the same attachment rate for all attachments” for broadband and mixed services.<sup>13</sup>

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<sup>10</sup> The Commission has already found that Section 706 does not require it somehow “to separate out those pole attachments that are used to offer broadband Internet access service from those used for other services” when fashioning a unified broadband pole attachment rate.” NPRM at ¶ 36.

<sup>11</sup> USTelecom at 3.

<sup>12</sup> *Id.*

<sup>13</sup> Qwest at 1.

**III. THE COMMISSION SHOULD DENY THE PETITION, AND INSTEAD COMPLETE COMPREHENSIVE ATTACHMENT REFORM.**

**A. The Commission should adopt comprehensive broadband attachment rate reform, with the resulting rate at or near the cable rate.**

**1. Imposing the CLEC rate for attachments would raise costs for consumers and frustrate broadband deployment.**

Cable TV commenters pointed out that the Petition would “raise costs to consumers” and “impede broadband deployment.”<sup>14</sup> Charter estimated granting the Petition “would increase costs by \$2.47 to \$4.33 per subscriber per month,” and even higher in rural areas.<sup>15</sup> The petitioners belittle Charter’s estimates, claiming they are “inflated.”<sup>16</sup> It is undeniable, however, that excessive pole attachment rates impact consumers, both directly and indirectly. They “increase the cost of providing broadband services,” have a “chilling effect on deployment decisions,” and undermine deployment and adoption.<sup>17</sup> That inevitably affects what consumers must be called on to pay for service, and it necessarily deters “deployment of new and competitive services.”<sup>18</sup>

In rural areas, such as those CenturyLink serves, “these detrimental impacts are disproportionately higher.”<sup>19</sup> Broadband deployment is most difficult in rural areas,

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<sup>14</sup> American Cable Ass’n at 3. Comcast (at 5) described the Petition as proposing a “massive tax on broadband.”

<sup>15</sup> Charter at 10-12.

<sup>16</sup> AEP, *et al.* at 36.

<sup>17</sup> Charter at 13.

<sup>18</sup> State Associations at 10.

<sup>19</sup> USTelecom at 4.

where costs of providing service already are highest, and where providers need many more attachments per end user. The Coalition of Concerned Utilities argues there is “no reason” to think lower pole attachment rates would “stimulate provision of VOIP or other broadband services to rural America.” That thinking assumes much of rural America must be written off as uneconomic because of pole attachment costs, absent “targeted subsidies to cover up front capital costs.”<sup>20</sup> Cable companies and CLECs have shown little interest in residents of the most rural areas, instead focusing on rural towns where customers are concentrated. ILECs like CenturyLink, however, have been investing in rural America, and are eager to upgrade network to expand availability of broadband to rural consumers. Excessive and discriminatory pole attachment rates, terms, and conditions, however, make low density areas less economic for investment.

**2. A unified rate for pole attachments will promote competition.**

All of the parties acknowledged that regulatory parity in pole attachments will promote competition, even if the Petition tries to limit focus just to cable attachments. The magnitude of the discrimination in pole attachment rates is set out in the *Pole Attachment NPRM* proceeding. A survey by USTelecom showed that ILECs are charged pole attachment rates 500 percent higher than that paid by cable in the same area, and 300 percent higher than the CLEC rate. USTelecom identified instances where ILECs pay

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<sup>20</sup> Coalition at 10.

more than 1400% more for attachments than cable competitors, and up to 900% more than CLEC competitors.<sup>21</sup>

For its part, CenturyLink is both an owner of poles and an attacher on poles owned by electric utilities. Its service territories cover portions of 33 states, in virtually every region of the U.S. Like other ILECs, however, it is unable to obtain reasonable rates through negotiations. CenturyLink is often forced to pay far more than its competitors for the same attachments. For example, CenturyLink has been forced to pay electric utilities, on average, a rate that is *five times* as high as the average rate that cable competitors pay CenturyLink for comparable use of its poles. As a rural carrier needing many more poles to serve each customer, this rate disparity is even more serious.

As USTelecom emphasized, this “broken” system<sup>22</sup> puts every ILEC at a disadvantage competing against CLECs and cable television systems to provide similar services. Artificially high pole attachment rates for ILECs force them to incur higher costs to provide all of their services to customers when competing against CLEC and especially against cable-based providers. The Petition does nothing to address the most important regulatory disparity of all.

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<sup>21</sup> See Comments of USTelecom, WC Docket No. 07-245 (filed Mar. 7, 2008), at 7-9. USTelecom provided data from thirteen states, showing the gross disparity in average rates among cable, CLEC, and ILEC attachments.

<sup>22</sup> USTelecom at 3.

**3. A rate at or near the cable rate is fully compensatory and within the range of reasonableness.**

The electric utilities say the cable TV attachment rate is not “fully compensatory,” but instead is a “subsidy by electric rate payers that unfairly favors the cable industry at the expense of CLECs.”<sup>23</sup> Obviously, the difference in rate poses competitive unfairness, though it is more at the expense of ILECs than CLECs. CenturyLink agrees with the American Cable Association, and many others, that the electric utilities’ “subsidy” argument is overblown and has been discredited in state commissions, in part because utilities ignore the additional impact of “make ready” payments.<sup>24</sup> Electric utilities too often “treat poles as a profit center.”<sup>25</sup>

Like Verizon, CenturyLink shares tw Telecom’s confidence that Commission reform would generate “a single pole attachment formula applicable to all attachments, including those used to provide VoIP,” that ultimately will “yield[] efficient prices at or near the existing cable rate.”<sup>26</sup> Already, the cable attachment rate generally “provides just compensation and a profit to the pole owning utilities.”<sup>27</sup> Certainly, Congress saw the cable TV attachment formula as not unreasonable.

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<sup>23</sup> Coalition at 4.

<sup>24</sup> *E.g.*, American Cable Ass’n at 8; Comcast at 17; NCTA at 7, 11; Time Warner Cable at 11.

<sup>25</sup> Comcast at 21-22.

<sup>26</sup> tw Telecom at 1. *See also* Verizon at 2.

<sup>27</sup> State Associations at 5.

The petitioners claim that whether the cable rate is fully compensatory is “irrelevant,” because the Commission’s focus should be on “the legal issue of discrimination under section 224 and the policy issue of the inherent competitive advantage the cable industry receives relative to its competitors.”<sup>28</sup> As a competitor to the cable industry, CenturyLink appreciates the electric utilities’ concern about discrimination. The issue, however, is the relative adequacy of the cable rate. The Commission, state regulators, and courts -- including the Supreme Court -- have concluded that the cable rate formula is fully compensatory, for both video and broadband services.<sup>29</sup> Ultimately, as Time Warner Cable explained, the record in the *Pole Attachment NPRM* rulemaking “establishes that the cable rate is fully compensatory.”<sup>30</sup> Adopting an attachment rate at or near the cable rate is within the range of reasonableness and would withstand review.

**B. The Commission has ample statutory authority to adopt a uniform rate cap formula for attachments for all providers of broadband services.**

**1. Section 224(b) provides authority and direction to ensure just and reasonable pole attachment rates for all broadband providers.**

The Coalition of Concerned Utilities claimed “[t]he FCC has no authority to reduce the telecom attachment rate for CLEC attachers or cable companies using

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<sup>28</sup> AEP, *et al.* at ii, 21, 43.

<sup>29</sup> NCTA at 5. *See NCTA v. Gulf Power*, 534 US 327 (2002); *FCC v. Florida Power Corp.*, 480 US 245 (1987).

<sup>30</sup> Time Warner Cable at 11.

telecommunications.”<sup>31</sup> On the contrary, as USTelecom explained, “[t]he plain text of Section 224(b) authorizes the FCC to ensure just and reasonable attachment rates paid by any service provider, including ILECs.”<sup>32</sup> USTelecom’s pending petition for rulemaking outlined the statutory foundation for the Commission’s authority to regulate the reasonable rates, terms and conditions for attachments for all telecommunications providers.<sup>33</sup> That includes both CLECs and ILECs.

Under section 224(f)(1), a cable telecommunications system or “any telecommunications carrier” is entitled to nondiscriminatory access to a utility’s poles, ducts, conduit, or rights of way.<sup>34</sup> Section 224(a)(5), however, expressly excludes ILECs from the definition of “telecommunications carrier.” For that reason, the Commission’s existing pole attachment rules are silent about attachments sought by ILECs.<sup>35</sup> As a practical matter, that silence has forced ILECs to negotiate the terms, conditions, and rates for their attachments with utility pole owners, without clear recourse to the Commission if the terms, conditions, or rates are unreasonable.

Sections 224(b)(1) and 224(a)(4) give any “provider of telecommunications service” an independent right to pole attachments, and that the “just and reasonable”

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<sup>31</sup> Coalition at 12.

<sup>32</sup> USTelecom at 3.

<sup>33</sup> NPRM at ¶¶ 23-24; *United States Telecom Association Petition for Rulemaking*, RM-11293 (filed Oct. 11, 2005).

<sup>34</sup> 47 U.S.C. § 224(f)(1).

<sup>35</sup> *See* 47 C.F.R. §§ 1.1401-1.1418.

standard for attachments applies to all telecommunications providers, ILECs among them.<sup>36</sup> The statute defines “pole attachment” to include “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.”<sup>37</sup> The next definition defines “telecommunications carrier” to exclude ILECs.<sup>38</sup> Had Congress intended to exclude ILEC attachments from any Commission oversight, it would have limited the term “pole attachments” to those made by a cable television system or a “telecommunications carrier.” Instead, Congress chose not to use those terms, but used the broader term, “provider of telecommunications service,” which includes ILECs. Although section 224(a)(5) may exclude ILECs from the definition of “telecommunications carriers,” ILECs unquestionably remain “provider[s] of telecommunications services.” Section 224(f)(1) requires the “utility [to] provide a cable television system or *any telecommunications carrier* with nondiscriminatory access to any pole duct, conduit, or right-of-way owned or controlled by it.”

The Supreme Court’s *NCTA* ruling confirms that the Commission has authority under 224(b) to regulate rates, terms, and conditions of pole attachments for ILECs.<sup>39</sup> The Commission had adopted a rate for pole attachments by cable providers offering both cable television and Internet services, and it had added wireless carriers’ attachments to

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<sup>36</sup> 47 U.S.C. §§ 224(a)(4), 224(b)(1).

<sup>37</sup> 47 U.S.C. § 224(a)(4).

<sup>38</sup> 47 U.S.C. § 224(a)(5).

<sup>39</sup> *NTCA*, 534 U.S. 327.

section 224. The Court rejected the 11th Circuit’s conclusion that section 224 denies the Commission authority to set any rates for pole attachments beyond those expressly set out in the statute.<sup>40</sup> Although Congress prescribed specific formulas for “just and reasonable” rates for certain attachments by cable television providers and telecommunications carriers, “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.”<sup>41</sup> As the Court explained, sections 224(e) and (f) “work no limitation on” Commission authority under section 224(b) to adopt a unified rate for all attachers, ILECs included.<sup>42</sup> The 1996 amendments to section 224 did not decrease the Commission’s jurisdiction. “To the contrary, the amendments’ new provisions extend the Act to cover telecommunications.”<sup>43</sup>

Section 224 gives the Commission not merely authority, but also a mandate, to regulate a unified rate for attachments used for broadband and mixed services. Section 224(b)(1) provides that “[t]he Commission *shall* regulate the rates , terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and

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<sup>40</sup> The Court found that “this conclusion has no foundation in the plain language of 224(a) and (b).” *NTCA*, 534 U.S. at 335, *rev’g Gulf Power Co. v. FCC*, 208 F.3d 1263, 1276, n. 29 (11<sup>th</sup> Cir. 2000).

<sup>41</sup> 534 U.S. at 335 (citation omitted).

<sup>42</sup> *Id.* at 337.

<sup>43</sup> *Id.* at 336.

reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions.”<sup>44</sup>

**2. Section 706 of the Act allows the Commission to apply pole attachment rates for all providers to promote broadband.**

In *NCTA*, the Supreme Court also held that section 706 “reinforces the Commission’s expansive jurisdiction to regulate pole rates.”<sup>45</sup> The Commission has acknowledged that section 706 gives the Commission additional authority to establish broadband attachment rates, terms, and conditions for all providers of telecommunications services, including ILECs.<sup>46</sup> It also instructs the Commission to promote the availability through regulatory policy.<sup>47</sup>

Cable TV providers, CLECs, and ILECs now offer a range services over broadband attachments, including interconnected VoIP services. Yet the three classes of competitors face different rates, terms, and conditions for pole attachments. Cable TV providers and CLECs enjoy pole attachment rate protection under section 224 for every pole they utilize -- and not just those used for broadband services. The absence of a

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<sup>44</sup> 47 U.S.C. § 224(b)(1) (emphasis added).

<sup>45</sup> 534 U.S. at 339.

<sup>46</sup> NPRM at ¶ 36.

<sup>47</sup> Section 706 directs that “[t]he Commission and each State commission ... shall encourage deployment on a reasonably and timely basis of advanced telecommunications capability to all Americans ... by utilizing ... price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”

unified rate and clear pole attachment rights for ILECs has grossly distorted competition and discourages broadband deployment, especially in rural areas.

**IV. THE COMMISSION SHOULD REDUCE ATTACHMENT DISPUTES BY CLARIFYING ITS RULES.**

**A. The Commission should decline to adopt new rules on deadlines for processing applications.**

Adopting a unified attachment rate for *all* broadband attachments will effectively eliminate the particular disputes cited in the Petition. Sunesys, however, raised a different issue. It argued that, “before it resolves any rate issues,” the Commission “should impose a deadline on issuance of attachment permits.” Electric utilities’ delays create regulatory uncertainty, delay broadband deployment, and create “unjust competitive advantages.”<sup>48</sup>

Given the record before the Commission in here and in the *Pole Attachment NPRM*, Sunesys’s concerns about permit delays surely pale in comparison to the gross unfairness and competitive distortions caused by widely different attachment rates applied to broadband competitors. It is telling that of the many commenters on the Petition, Sunesys was alone in raising this concern. In contrast, all other commenters pointed to regulatory parity as the critical issue.

The Commission need not impose a deadline on attachments, and need not amend its rules for that purpose. If Sunesys believes it is being treated unreasonably by a utility,

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<sup>48</sup> Sunesys at 4, 12.

Sunesys can pursue its rights under the Commission's existing pole attachment complaint rules.

**B. The Commission should clarify that all telecommunications service providers, including ILECs, can use existing FCC complaint procedures to challenge unreasonable attachment rates, terms, and conditions.**

Instead of adopting new piecemeal rules, as Sunesys suggests, the Commission would do better to clarify that all attachers can use existing complaint procedures to challenge unreasonable attachment rates, terms, and conditions. For too long, existing rules have been misinterpreted to limit the Commission's ability to remedy unjust and unreasonable discrimination by electric utilities, by denying ILECs standing to bring a complaint. At the same time, state authorities too often have been unwilling or unable to hear these disputes.

Section 224(b)(1) requires the Commission to ensure all "providers of telecommunications services" have access to pole attachments on rates, terms, and conditions that are just and reasonable.<sup>49</sup> Instead of continuing discrimination among broadband and mixed attachments, as the Petition expects, the Commission should clarify that ILECs can use existing complaint processes and procedures to challenge unreasonable pole attachment rates, terms, and conditions.<sup>50</sup>

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<sup>49</sup> 47 U.S.C. § 224(d)(1) provides the Commission guidelines for just and reasonable pole attachment rates.

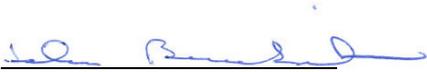
<sup>50</sup> Alternatively, if the Commission believes a rule change is necessary, it should make such a change promptly, revising section 1.1410 to state explicitly that ILECs may bring such complaints.

## V. CONCLUSION

The Commission should reject the “piecemeal approach” requested by the Petition.<sup>51</sup> It should highlight the importance of a uniform broadband attachment rates -- and reasonable rates, terms, and conditions for all types of attachments -- in the National Broadband Plan. It should complete comprehensive reform outlined in its NPRM, “obviate[ing] the need for action on the electric companies’ declaratory ruling petition.”<sup>52</sup> It should adopt a uniform rate for *all* broadband and mixed use attachments, at a level at or near the current cable rate.

Respectfully submitted,

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<sup>51</sup> AT&T at 5.

<sup>52</sup> Verizon at 2