

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Petition for Declaratory Ruling that the Telecommunications Rate Applies to System Pole Attachments Used to Provide Interconnected Voice of Internet Protocol Service))))))	WC Docket No. 09-154
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**REPLY COMMENTS OF THE EDISON ELECTRIC INSTITUTE AND
UTILITIES TELECOM COUNCIL
IN SUPPORT OF PETITION FOR DECLARATORY RULING**

The Edison Electric Institute (“EEI”), on behalf of its member companies, and the Utilities Telecom Council (“UTC”) hereby submit these Reply Comments in support of the Petition for Declaratory Ruling (“Petition”) filed by American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services Inc. (collectively “Petitioners”) requesting that the Federal Communications Commission (“FCC” or “Commission”) issue a declaratory ruling¹ to clarify that pursuant to the existing section 224(e) of the Pole Attachment Act, existing Commission regulations, and existing Federal court precedents support applying the statutory telecommunications rate (“Telecom Rate”) to cable television (“CATV”) system pole attachments used to provide interconnected voice protocol (“VoIP”).

EEI and UTC reiterate that issuing the declaratory ruling requested in the Petition is appropriate and necessary to address ongoing widespread and growing disputes over the applicable rate for CATV VoIP pole attachments. The Petition raises a current controversy

¹ See 47 C.F.R. § 1.2 (The Commission may “issue a declaratory ruling terminating a controversy or removing uncertainty.”).

under the existing statute and the Commission's regulations with respect to whether the CATV industry must pay the Telecom Rate for their CATV VoIP attachments, consistent with the express provisions of Sections 224(d) and (e) of the Communications Act, as amended.² As such, the Petition raises an issue that as a matter of administrative efficiency can and should be addressed through a declaratory ruling.

The Commission should reject comments on the record that seek to distract the Commission from the legal issues raised in the Petition. Contrary to those comments, application of the Telecom Rate will promote broadband deployment by providing a non-discriminatory rate that will provide better cost recovery from CATV operators, who currently refuse to pay the Telecom Rate for attachments that they use to provide telecommunications services. This is consistent with the public interest, because it will resolve disputes and eliminate subsidies that distort competition between telecommunications providers and that systematically shortchange critical infrastructure.

INTRODUCTION

The Edison Electric Institute is the association of the United States investor-owned electric utilities and industry associates worldwide. Its U.S. members serve almost 95 percent of all customers served by the shareholder-owned segment of the U.S. industry, and about 70 percent of all electricity customers, and they generate about 70 percent of the electricity delivered in the U.S. EEI frequently represents its U.S. members before Federal agencies, courts, and Congress in matters of common concern, and has filed comments before the

² Petitioners have attached a letter from the Cable Television Association of Georgia to Georgia Power Company, which documents the CATV industry position that "VoIP is Not Telecommunications." See Petition, Attachment II, Letter from John Seiver and Christopher A. Fideli, counsel on behalf of the Cable Television Association of Georgia to Joseph Lawhorn, counsel on behalf of Georgia Power Company, at 3-6 (December 12, 2008). Petitioners also describe disputes over this issue with other CATV operators, as well as telecommunications carriers.

Commission in various proceedings affecting the pole attachment interests of its members, who are subject to FCC and state pole attachment jurisdiction.

UTC is an international trade association for the telecommunications and information technology interests of electric, gas and water utilities and other critical infrastructure industries, including pipeline companies. Its members include investor-owned, municipal and cooperatively organized utilities. These utilities can range in size from large combination electric, gas and water utilities that serve millions of customers in a region to small distribution companies that serve a few thousand customers in isolated communities or rural areas. Despite their differences, they all have two things in common: 1) they own, manage or operate communications systems that support the safe, reliable and efficient delivery of essential services to the public at large; and 2) they own or control poles, ducts and conduit that must meet strict engineering and safety standards for construction and maintenance. Thus, UTC advocates for public policies that promote critical infrastructure communications systems and protect the underlying poles, ducts and conduit that utilities use to deliver essential services to the public at large.

REPLY COMMENTS

EEI and UTC strongly believe that the Commission should proceed to address this issue by declaratory ruling as the Petition requests. This is a straightforward matter which can and should be addressed in the context of a declaratory ruling. This is not a policy issue, and the Commission should not be misled by comments that claim otherwise. The fact is that CATV operators simply refuse to pay the Telecom rate for pole attachments that are being used to provide telecommunications services. The Commission should simply enforce the provisions of the statute and declare that for the rate purposes of the Pole Attachment Act that VoIP is a telecommunications service that is subject to the Telecom Rate under subsection (e) of the Act.

This can be done without the need for a rulemaking, just as the Commission has done in other contexts. Moreover, it would be appropriate for the Commission to do so because it would provide immediate relief on an issue that needs to be urgently addressed. In addition, such a declaratory ruling would not prejudice matters pending in other proceedings, because it is narrowly tailored. Instead, it would be appropriate as a matter of administrative efficiency to address this issue in the context of a declaratory ruling, because it would settle an issue affecting similarly-situated parties.

Specifically, a declaratory ruling will remove the ongoing uncertainty surrounding the applicability of the Telecom Rate to CATV attachments used to provide VoIP. This clarification will bring a measure of regulatory stability to the marketplace for pole attachments and therefore remove barriers to investment and deployment of the underlying pole infrastructure upon which both the electric industry and the communications industry derive benefits. Eliminating rate uncertainty under the existing statute and regulations will also help to ensure that poles and pole attachments continue to serve as a reliable and convenient platform for broadband deployment. In addressing the legal issue raised by the Petition, the Commission should not be distracted by irrelevant non-legal arguments, false predicates, and an assorted of ginned-up boogiemen.

I. The Petition properly raises a legal issue that the Commission should determine by issuing a declaratory ruling.

The Petition properly raises an existing legal dispute that is directly related to the Pole Attachment Act and the Commission's existing regulations related thereto. The Petition does not ask for the Commission to change or create new rules such that would be appropriately addressed by administrative rulemaking. To the contrary, the Petition argues that the statute requires that the FCC apply the Telecom Rate to CATV VoIP attachments, because they are used

to provide telecommunications services. This is consistent with Congressional intent, which is manifested in the 1996 amendments to the Pole Attachment Act. First, Congress amended section 224(d) to limit the cable television rate to those pole attachments that are used *solely* to provide cable television services. Second, it added section 224(e) to provide a just and reasonable rate for attachments used to provide telecommunications services. Together these provisions show that Congress intended for CATV operators to pay the Telecom Rate to the extent that they offered telecommunications service over their pole attachments. The Commission interpreted the statute accordingly and implemented the 1996 amendments to the pole attachment act to require CATV operators to pay the Telecom Rate for their pole attachments that are used to provide telecommunications services. None of the comments dispute this.

The Commission need not address broad policy issues to grant this declaratory ruling. It need not decide the regulatory classification of VoIP, nor does granting the application necessarily have implications for the rate that should apply to broadband attachments. Instead, the Commission may simply decide to apply the Telecom Rate to VoIP for purposes of the Pole Attachment Act. It may do this under one of two theories: 1) to provide a non-discriminatory rate under section 224(e)(1), or 2) to provide a just and reasonable rate under section 224(b). Hence, the Commission can either determine that CATV VoIP attachments constitute “telecommunications services” for purposes of section 224, or it can simply decide that the Cable Rate should not apply to commingled cable and VoIP services and that instead, the just and reasonable rate for such attachments under section 224(b) is the Telecom Rate.

Proceeding on the first theory, the Commission can determine that CATV VoIP constitutes “telecommunications service” under section 224(e). The Commission has treated

interconnected VoIP as a telecommunications service in the context of other provisions of the Act. It concluded that interconnected VoIP is a telecommunications service for purposes of universal service contributions. There, it found “interconnected VoIP providers to be ‘providing’ telecommunications regardless of whether they own or operate their own transmission facilities or they obtain transmission from third parties.”³ It also found that it was in the public interest to require interconnected VoIP providers to contribute to USF in order to share in the costs of the PSTN from which their customers benefit.⁴ Moreover, it found that its principle of “competitive neutrality” should require interconnected VoIP providers to contribute their fair share of the costs of the PSTN.⁵ The same rationale applies in the context of pole attachments: interconnected VoIP providers provide telecommunications services and it is in the public interest that they contribute to the costs of the underlying poles, ducts, conduit and rights-of-way from which their customers benefit. Moreover, it is consistent with the principle of “competitive neutrality” and the non-discrimination requirement of Section 224 to require interconnected VoIP to pay the same pole attachment rate as other telecommunications service providers.

Alternatively, the Commission may simply decide under section 224(b) that the Telecom Rate is the “just and reasonable” rate that should apply to CATV VoIP attachments. There is precedent for this approach. When the Commission applied the cable rate as provided in the statute (the “Cable Rate”) to pole attachments used to provide commingled Internet and cable services, it used its general authority under section 224(b). Not only does this provide a separate

³ *Universal Service Contribution Methodology Federal-State Joint Board on Universal Service 1998 Biennial Regulatory Review*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 F.C.C.R. 7518 at ¶40-41 (2006) (adding that “[i]n contrast to services that merely use the PSTN to supply a finished product to end users, interconnected VoIP supplies PSTN transmission *itself* to end users.”)

⁴ *Id.* at ¶43.

⁵ *Id.* at ¶44.

source of authority within section 224 to apply the Telecom Rate to CATV VoIP attachments, but it would also allow the Commission to do so without treating VoIP as a “telecommunications service” for purposes of section 224. It could simply find that the Telecom Rate serves as a “just and reasonable” rate for CATV VoIP attachments under section 224(b).

The Commission may apply the Telecom Rate to CATV VoIP attachments, and it does not need to decide the regulatory classification of VoIP. Instead, the Commission may use its ancillary jurisdiction to extend Title II common carrier regulations to VoIP for the limited purpose of carrying out its general authority under section 224. Again, the Commission has done this in other contexts regarding VoIP. For example, the Commission applied its ancillary jurisdiction to extend local number portability (“LNP”) requirements to VoIP providers. The Commission found that it was “reasonably ancillary” to do so because if customers could not transfer their NANP telephone numbers between service providers, it would undermine the purpose of section 251.⁶ Similarly here, the Commission should use its ancillary jurisdiction to extend section 224(e) to apply to CATV VoIP attachments in order to carry out section 224’s fundamental purpose of providing “just, reasonable and *non-discriminatory rates.*”⁷ The Commission can do this without deciding the regulatory classification of VoIP for other purposes of the Act.

The Commission can also apply the Telecom Rate to CATV VoIP attachments without implicating the rate that should apply to pole attachments used to provide broadband Internet

⁶ *Telephone Number Requirements for IP-Enabled Services Providers Local Number Portability Porting Interval and Validation*, WC Docket No. 07-243 , Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd. 19531 at ¶26 (2007) .

⁷ 47 U.S.C. §224(e)(1).

services, which is a matter currently pending in the FCC’s pole attachment reform proceeding.⁸

The Commission has separated the issues of VoIP and broadband Internet services in other contexts. For example, the Commission decided that:

Our conclusion that mobile wireless broadband Internet access service is not an “interconnected service” for purposes of section 332 does not decide whether other services or applications may be “interconnected service” under section 332 and its implementing regulations. For instance, we do not here address the question whether “interconnected VoIP” service is an “interconnected service” under section 332. Such “interconnected VoIP” services have been recognized as services separate from broadband Internet access service, and the Commission has imposed certain obligations on interconnected VoIP, such as Enhanced 911 (E911) obligations, that it has not imposed on broadband Internet access service.⁹

Similarly here, the Commission may apply the Telecom Rate for VoIP without implicating the rate that should apply to attachments used to provide broadband Internet access services.

The Commission must recognize that applying the Telecom Rate to CATV VoIP attachments would be consistent with Congressional intent. As the Petition explains, Congress did not intend for a mature CATV industry that has vastly expanded its service offerings to avail itself to the Cable Rate irrespective of the service supported by its pole attachments. The Petition not only provides textual support for this conclusion from the statute’s text, but the Petition correctly points out that Congress anticipated that the array of services that a mature industry such as the Cable industry would expand, thereby eliminating the justification or

⁸ See *Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Notice of Proposed Rule Making, 22 FCC Rcd 20195, 20200 at ¶13 (2007)(“NPRM”).

⁹ *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 at ¶46 (2007), citing *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Docket No. 04-295, *First Report and Order and Further Notice of Proposed Rulemaking*, 20 FCC Rcd 14989, 15008, ¶39 (2005) (*CALEA Order*), *aff’d American Council on Education v. FCC & USA*, 451 F.3d 226 (D.C. Cir. 2006) (*American Council on Education v. FCC & USA*); *In the Matter of E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, *First Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 10245, 10257-58, ¶24 (2005).

necessity of this subsidy rate by providing that generally that pole attachments for telecommunications services must be at the Telecom Rate. The Petition argues that to ensure non-discrimination pursuant to section 224(e), the Commission must apply the Telecom Rate to pole attachments by cable operators that are used for VoIP, which is the same service to the end-user. Addressing this legal question will remove uncertainty and facilitate resolution of ongoing disputes that hinder the deployment of broadband.

II. The Commission should reject comments calling for the Commission to avoid determining the legal issue raised by the Petition.

The Commission should not entertain suggestions that essentially ask the Commission to avoid addressing current controversies over a discrete legal issue, namely, whether applying the Telecom Rate to CATV pole attachments used to provide VoIP services is required by the statute and by the Commission's precedents interpreting the statute.¹⁰ The Petition raises a question of legal interpretation of the Pole Attachment Act and the Commission's existing regulations, not for the Commission to develop new regulations or policies supported by new reasoning, which seems most appropriately handled in rulemakings to promulgate prospective rules. Indeed, that NCTA and other parties disagree with the Petition and with respect to the nature of the statute and its legislative history simply proves that a declaratory ruling on this issue is necessary to enforce the provisions of the statute and the FCC's regulations that require CATV operators to pay the Telecom Rate for their pole attachments that are used to provide telecommunications service.

¹⁰ See e.g., NCTA Comments at 6 and at 23.

The Commission should not address the legal issue raised by the Petition in the *IP-Enabled Services*¹¹ rulemaking or the *Broadband Pole Attachment* rulemaking,¹² as suggested by NCTA.¹³ To the contrary, the Commission can and should address the requested clarification prior to consideration of broader issues raised in these proceedings. The Petition makes clear that regardless of how the Commission proceeds with respect to how VoIP is classified for other regulatory purposes, the Commission cannot avoid its statutory mandate under section 224(e) to ensure “nondiscrimination.” Furthermore, in neither of these rulemakings is the Commission asked to address what is squarely a matter of statutory clarification.

III. The Commission should reject comments irrelevant to the scope of the issues raised in the Petition.

The Commission should reject comments raising the specter of a threat to the deployment of broadband, and other utterly unprincipled arguments that only serve to underline the need for the Commission to issue a declaratory ruling that will resolve this issue.

The Commission should reject Comcast’s erroneous assertion that electric utilities are competitors. For example, Comcast is incorrect to characterize electric utilities having a motivation to disrupt or delay the deployment of broadband services and to assert that electric utilities “continue to develop their competitive technology offering.”¹⁴ It is simply absurd and incredulous to argue that utility Smart Grid deployments, including the underlying communications infrastructure, are “competitive.” To the extent that electric utilities have used broadband networks for Smart Grid, their use of broadband is for the purpose of enhancing the

¹¹ See *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004).

¹² See *Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 (2007).

¹³ See NCTA Comments at 6.

¹⁴ See Comments of Comcast at 12.

performance of electric utilities' operations. Electric utilities are simply not generally engaged in offering broadband or other communications technologies. The fact is that EEI member companies are primarily focused on their core service as electric utilities and the electric industry is not in competition in the broadband markets, to the contrary electric utilities are generally end-users. In general, electric utilities lack the expertise and administrative support needed to engage in the business of providing broadband services on a large-scale commercial basis. In sum, the Commission should not be fooled by these absurd accusations.

The Commission should also reject erroneous assertions that utilities treat regulated pole attachments as a profit center.¹⁵ If not simply showing an utter disregard for utility rate making, then Comcast appears to believe that if they repeat the same falsehood over and over again it can become true. EEI and UTC reiterate that pole attachment revenues are simply offsets for rates paid by consumers.¹⁶ Furthermore, the suggestion that if pole attachment rates were in fact subsidies, then electric utilities would be expected to sell pole network assets to an unregulated third party totally overlooks that electric utilities operate under state and federal reliability requirements. Furthermore, this type of assertion entirely overlooks why electric companies have been forced to bear a disproportionate and growing share of the responsibilities of pole ownership.

The Commission should reject NCTA's economic analysis in this proceeding. This analysis only serves to distract from the legal issue associated with a complex subject, and for the most part rehashes old non-legal arguments intended to maintain subsidy rates for communications attachers as low as possible. For example, this declaration, argues that pole

¹⁵ See Comments of Comcast at 21-23.

¹⁶ See EEI and UTC Reply Comments in WC Docket No. 07-245 at 34.

attachment rates should be charged at long-run marginal cost, because prices in excess of that would be economically inefficient. However, EEI and UTC have already pointed out to the Commission in the *Broadband Pole Attachment* proceeding that when a utility's marginal cost of service falls under its average cost of service (as it generally does), it would be unable to remain in business if regulators compelled it to set rates and charges for services at marginal cost. Hence, the average cost principle is generally used to determine the appropriate rate for all services offered by utilities.¹⁷ In response to the implication that the utility has already been compensated for the cost of the pole in its own rates, and that therefore any new entity that connects to the pole should be charged marginal rather than average cost, EEI and UTC have made clear that the fact that these are 'new customers' using existing assets does not change the argument – if all “new” customers were put on a marginal cost rate, then a utility would not be recovering its average cost of service as new assets are eventually added to supplement or replace the existing ones. The Commission should find further reason to reject this declaration in the context of a declaratory ruling proceeding since in identifying three sources of harm to consumer welfare from increased pole attachment rates: higher prices to broadband consumers, reduced availability of broadband, and reduced investment by cable companies in new plant and technology, the declaration completely ignores the fact that in the long-run, these increases in pole attachment rates, dollar-for-dollar, translate to reductions in electricity rates for consumers (and vice versa), because they are an offset to the utility's revenue requirement. It is problematic whether it is ultimately better for consumer welfare to raise electricity rates so that broadband rates can be kept low. In sum, this analysis does nothing to inform the Commission on how to determine the legal question raised by the Petition.

¹⁷ See EEI and UTC Reply Comments in WC Docket No. 07-245, at 43

The Commission should also reject NCTA's forbearance argument in this proceeding.¹⁸ The Commission's Section 10 forbearance authority is simply inapplicable to the issue in the Petition. Section 10 of the Communications Act authorizes the Commission to forbear from applying any regulation to a "telecommunications carrier or telecommunications service or class of telecommunications carriers or telecommunications services," if it finds that such regulation is 1) not necessary to "ensure that charges are just and reasonable and are not unjustly or unreasonably discriminatory;" 2) that it is not necessary to protect consumers, and that 3) forbearance is consistent with the public interest.¹⁹ Section 10 does not authorize the Commission to redline the Communications Act the way NCTA suggests. Instead, Section 10 authorizes the Commission only to deregulate (not reregulate), and the Commission must carefully analyze specific markets in determining if forbearance meets the three-part test under Section 10. As such, forbearance is inapplicable to the issue in the Petition, and the Commission should not be distracted from giving effect to section 224(e) and applying the Telecom Rate to CATV VoIP.

Contrary to comments that essentially reiterate stale non-legal claims that the sky will fall on an unsubsidized cable industry if the Commission were to follow the statute as the Petition urges, EEI and UTC believe that resolving the ambiguity and conflicts around the appropriate rate treatment for CATV pole attachments used to provide VoIP services will most certainly expedite the deployment of broadband using the pole infrastructure that is both reliable and convenient.

¹⁸ Comments of NCTA at 17-21 (urging the FCC to forbear from applying the Telecom Rate formula to CLEC broadband attachments and apply the cable rate formula instead.).

¹⁹ 47 U.S.C. §160. It is patently discriminatory to apply the cable rate to CATV VoIP attachments, because telecommunications carriers must pay the higher Telecom Rate for their VoIP attachments.

Granting the Petition will help foster infrastructure partnerships between attachers and pole owners. As UTC and EEI explained in its comments on the Petition, “[g]iven the underlying poles, ducts, conduits and rights-of-ways (*i.e.*, critical infrastructure) support the core business of electric utilities and attaching entities alike, both electric utilities and communications services providers alike have substantial interests in ensuring that such critical infrastructure is maintained through the recovery of all costs.”²⁰ Applying the Telecom Rate to CATV VoIP attachments will promote cost recovery, which will in turn promote investment in critical infrastructure, rather than extraction of value from it or diminution of its safety and reliability.

Expansion of broadband service throughout the nation will require improving partnering between broadband service providers and the owners of the supporting pole infrastructure. This means that the Commission must regulate pole attachment rates and access in a manner that fosters an understanding between attachers and pole owners that each has an interest in delivering a vital product to the public, and each has an interest in maintaining the safety, reliability, and reasonable cost of the infrastructure that supports the delivery of both products. Both broadband and electric distribution need dependable, safe, and reliable supporting infrastructure. There should be a common interest in keeping poles upright and the wires attached to them working reliably. However, attachers must accept that pole reliability has a cost. Attachers and pole owners alike reasonably and fairly share in the responsibility, benefits, burdens, and costs associated with the use and maintenance of the infrastructure.

²⁰ Comments of EEI and UTC in WC Docket No. 09-154 at 4-5, filed September 24, 2009.

By addressing the Petition's request for a declaratory ruling that the Telecom Rate, which applies to jurisdictional pole attachments used for traditional telephone service, also applies to CATV system pole attachments used to provide VoIP service, the Commission will clarify the appropriate rate treatment for these types of attachments, which will provide for a fair realization of mutual benefits. This type of regulatory clarity will enhance partnerships, and not the realization of benefits by one type of party without a benefit to another.

CONCLUSION

WHEREFORE, the foregoing reasons considered, EEI and UTC respectfully request the Commission grant the Petition for the reasons stated in these comments.

Respectfully submitted,

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