

**BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.**

In the Matter of)	
)	
Implementation of Section 224 of the Act)	WC Docket No. 07-245
)	
)	
A National Broadband Plan For Our Future)	GN Docket No. 09-51

COMMENTS OF COMCAST CORPORATION

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ATTACHMENT 1: Declaration of Timothy S. Pecaro

EXECUTIVE SUMMARY

Comcast supports the Commission's proposal to establish a pole attachment rental rate for telecommunications services that is as close as possible to the cable attachment rate. Since passage of the 1996 Telecommunications Act ("1996 Act"), a primary objective of both Congress and the Commission has been to promote broadband deployment and competition, and pole attachment rent policies have played a significant role in pursuing this objective. The Commission's 1998 decision to encourage cable systems to deploy broadband and other advanced communications services by applying the cable television attachment rate to cable system broadband attachments ignited investments exceeding \$160 billion. These investments have enabled delivery of ever increasing broadband speeds and the introduction of voice over Internet protocol service ("VoIP"), the first successful facilities-based competition for residential voice service. Consumers have saved billions of dollars from this competition.

The continued deployment of broadband facilities and services faces utility company demands for telecommunications pole attachment rates that are dramatically higher than the cable attachment rate. When Congress adopted the telecommunications pole formula in 1996, competing facilities-based telecommunications carriers were expected to proliferate as the pro-competitive policies of the Act took effect over the ten year phase-in for the new rate. However, the large number of competing telecommunications lines did not develop – both because of fierce ILEC opposition and because of the unanticipated development of a more efficient technology (cable VoIP) which did not require the attachment of additional lines to poles. The result has been higher than expected telecommunications pole attachment rents as the "pole costs" were shared among fewer attachers than anticipated by Congress and the Commission. The unintended consequence of this result is that the FCC's current telecommunications formula

is undermining key Congressional and Commission objectives by imposing excessive costs on telecommunications providers who are deploying broadband facilities. The American Recovery and Reinvestment Act of 2009 (“2009 Reinvestment Act”) recognized that the deployment of broadband now needs additional impetus in order “to ensure that every American has access to broadband capability,” and the Commission’s National Broadband Plan (“NBP”) recommends lowering and unifying telecommunications pole rates to achieve this objective.

Consistent with the objectives of the 1996 Act, the 2009 Reinvestment Act, and NBP recommendations, the Commission has proposed a reevaluation of its telecommunications pole attachment formula to reduce unnecessary deployment costs imposed on telecommunications carriers. The telecommunications pole rate methodology set forth in Section 224(e) of the Communications Act provides the Commission with ample latitude to revise the telecommunications formula – in a manner that is consistent with all applicable law.

The Commission’s proposal to establish a lower bound telecommunications pole attachment rate by eliminating the capital components of the carrying charge (*i.e.*, depreciation, rate of return and taxes) is supported by sound economic theory as well as by the language and intent of Section 224(e). As economic valuation expert Timothy Pecaro explains, Section 224(e)’s directive for the Commission to assign the “cost of providing pole space” need not include any capital component, but instead requires only inclusion of a share of maintenance and administrative costs arising from the provision of pole space to attachers. This is consistent with fundamental cost causation principles and Congress’ recognition that pole attachments generally cause no capital costs to utilities that are not already recovered in make-ready.

A fundamental principle of statutory construction also supports the Commission's revision of the telecommunications pole rate formula. Although Congress specifically included "actual capital costs" in the carrying charges for the cable pole rate formula in Section 224(d), it chose to limit the telecommunications formula in Section 224(e) to the "cost of providing space." The courts have advised that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." The Commission has, therefore, clear authority to establish the appropriate Section 224(e) cost components consistent with the intent of Section 224.

While the Commission's proposal to lower telecommunications pole rents will promote broadband deployment and competition, other elements of the Commission's proposed rules will have the opposite effect. Most critically, the Commission should not modify the current "sign and sue" policy. The FNPRM proposes to require that an attacher notify a utility in writing regarding *every contract provision that the attacher believes is unlawful before signing* a pole attachment agreement – at the risk of forfeiting the right to challenge such unlawful provisions at the FCC. There exists no practical problem or policy reason necessitating any such change in the current policy. To the extent a utility claims that an otherwise unreasonable rate, term or condition in a pole agreement is the result of a bargained for exchange of consideration, Commission policy already permits it to consider such *quid pro quo* in assessing the lawfulness of the agreement. The proposed rule will trigger greater conflict between utilities and attachers and generate a lengthy new preliminary round of disputes. Parties will engage in letter writing exchanges in order to get the "last word" on each disputed provision in an effort to ensure that all

rights and positions are fully preserved at the Commission. This will produce significant delay in the pole permitting process and in broadband deployment. In contrast, under the current policy there have been no issues involving sign and sue for many years. Utilities routinely include a significant number of unlawful provisions in contracts, but then typically do not enforce them so that the unlawful provisions rarely produce a dispute or Commission complaint.

Comcast agrees that the enforcement process needs to be improved. However, the solution is not changing the current complaint process (which has worked well for decades), but instead timely resolution of filed complaints. Although parties may wish to pursue mediation voluntarily, the Commission should not mandate a pre-complaint Commission mediation process. In many instances, this will simply be another point of significant delay in obtaining Commission resolution of a dispute. If the Commission were to ensure prompt resolution of pole attachment complaints (*e.g.*, by adopting a deadline for acting on complaints), attachers and utilities alike would have useful precedent to facilitate the negotiation of pole agreements, and unlawful utility behavior would be deterred.

Finally, the Commission should maintain its current policy regarding the treatment of unauthorized attachments. Comcast is not aware of any cable company that purposefully engages in unauthorized attachments to utility poles, a practice that would violate not only the pole agreement itself but also local franchise agreements. With millions of pole attachments nationwide, these “unauthorized” attachment issues most often are a product of faulty recordkeeping by utilities, unilateral changes in what the utility considers to be an “attachment,” or other ambiguities in the field. For over thirty years, attachers and utilities have successfully handled the vast majority of such issues informally in the field in the ordinary course of business.

As described by numerous commenters in the initial broadband pole proceeding, many electric utilities now view their poles as profit centers and are engaged in numerous strategies to generate unjustified revenues from those monopoly assets. By placing a bounty on purportedly unauthorized attachments, the Commission will only encourage utility efforts (and bounty hunter contractors) to improperly profit from purportedly unauthorized attachments.

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COMMENTS OF COMCAST CORPORATION

I. INTRODUCTION

Comcast Corporation (“Comcast”) hereby submits its comments in the above-captioned Further Notice of Proposed Rulemaking¹ (“FNPRM”) regarding the rates, terms and conditions for pole attachments under Section 224 of the Communications Act (“Act”). The FNPRM proposes to create uniform rates among all attachers (cable and wired telecommunications providers) by establishing a telecommunications pole rate that is as close as possible to the cable pole rate. In addition, the FNPRM proposes, *inter alia*, to modify the Commission’s approved “sign and sue” policy, to consider whether to impose a new regime of sanctions for unauthorized attachments and to revise the Commission’s pole attachment enforcement process.

¹*In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, WC Docket No. 07-245; GN Docket No. 09-51, FCC 10-84 (rel. May 20, 2010).

Comcast fully supports the Commission’s proposal to unify pole attachment rates by lowering the telecommunications pole rate as close as possible to the cable rate. The proposal represents an important step in promoting Congress’ broadband deployment objectives as set forth in the 1996 Telecommunications Act² (“1996 Act”), the American Recovery and Reinvestment Act of 2009³ (“Reinvestment Act”), and the Commission’s National Broadband Plan⁴ (“NBP”). As demonstrated below, the Commission has both statutory authority and a sound economic basis for the proposed revision to the telecommunications pole formula.

However, the Commission’s proposal to modify its time-tested and judicially approved “sign and sue” policy will serve only to delay potential attachers’ access to poles and should be rejected. The Commission has explained, and the courts have agreed, that limiting challenges to pole agreements would undermine effective pole attachment regulation, increase litigation and delay access.

The Commission can greatly reduce utility pole abuses (and thereby encourage pole access and broadband deployment) by acting promptly on attacher complaints. Timely Commission action on complaints will remedy specific utility abuses and provide valuable precedent that will deter more widespread utility misconduct.

Finally, the Commission should refrain from imposing a sanctions program for unauthorized attachments. Such sanctions will only further encourage utilities to adopt practices

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

³ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

⁴ Federal Communications Commission, Connecting America: The National Broadband Plan (2010).

that mischaracterize attachments as “unauthorized” -- already a problem under the current regime where many utility unauthorized attachment findings are reversed when challenged by attachers. Further, it will provide utilities with an additional means to exploit their monopoly control over poles, undermining broadband deployment in the process. For over thirty years, parties have worked through these issues in the field and the Commission should not disrupt this largely successful process.⁵

II. THE PROPOSED TELECOMMUNICATIONS POLE RATE FORMULA LAWFULLY PROMOTES NATIONAL BROADBAND OBJECTIVES

A. Background

Congress, the Commission and the courts have long recognized the vital role that reasonable pole attachment rates play in the deployment of advanced communications services. The legislative history of the 1978 Pole Attachment Act recognized that “the introduction of broadband cable service may pose a competitive threat” to utilities and that pole attachment practices of utilities “could if unchecked, present realistic dangers of competitive restraint in the future.”⁶ The 1996 Act explicitly directed the Commission to encourage the deployment of broadband capabilities to all Americans by removing barriers to infrastructure investment.⁷

⁵ Although not addressed in detail herein, the FNPRM also proposes a number of sound measures to speed pole access and reduce unnecessary costs through a new application/make-ready timeline, expanded use of outside contractors, more transparent make-ready charges, and improved administration of jointly owned poles. *See* FNPRM ¶¶ 25-51, 54-74. However, the Commission’s proposal to provide utilities the right “to make the final determinations ... that relate to insufficient capacity ... of infrastructure” conflicts with existing law and Commission objectives and should be rejected. *See id.* ¶ 67 and proposed rule 1.1422(b)(2).

⁶ S. Rep. No. 580, at 13 and n.27 (1977) (hereinafter “1977 Senate Report”), *reprinted in* 1978 U.S.C.C.A.N. 109, 121. In 1991, the Commission rejected an electric utility’s effort to impose a huge pole rent surcharge on a cable operator’s non-video attachments to protect the emergence of new, competitive cable broadband services. *See, e.g., Heritage Cablevision Assocs. of Dallas v. Texas Utils. Elec. Co.*, Memorandum Opinion and Order, 6 FCC Rcd. 7099 ¶¶ 9, 18, 29 (1991), *aff’d*, *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 932-935 (D.C. Cir. 1993) (court upholds FCC’s rejection of \$90 surcharge on top of \$5 pole rent for “non-video” attachments). *See also* Common

Consistent with this directive, the Commission took important steps to promote cable broadband deployment and competition following the 1996 Act. In 1998, the Commission applied the cable television pole rate formula to commingled cable/broadband attachments:

In specifying this rate, we intend to encourage cable operators to make Internet services available to their customers. We believe that specifying a higher rate might deter an operator from providing non-traditional services... Rather we believe that specifying the Section 224(d)(3) rate will encourage greater competition in the provision of Internet service and greater benefits to consumers.⁸

The Supreme Court upheld the Commission ruling that utility efforts to impose higher unregulated pole rents on commingled cable attachments “would defeat Congress’ general instruction to the FCC to ‘encourage the deployment’ of broadband Internet capability and... ‘to accelerate deployment of such capability by removing barriers to infrastructure investment.’”⁹

The Commission’s policy of applying the cable television pole rent formula to commingled cable/broadband service attachments has proven highly successful. Since 1996, the

Carrier Bureau Cautions Owners of Utility Poles, Public Notice, DA 95-35 (Jan. 11, 1995), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Public_Notices/1995/pncc5001.txt (caution regarding anti-competitive overlash policies); *Marcus Cable Assocs., L.P. v. Texas Utils. Elec. Co.*, 12 FCC Rcd. 10362 (1997) (rejecting utility pole agreement provision requiring cable operator to disclose non-video service offerings).

⁷ Section 706(a) of the 1996 Act, reproduced in notes under 47 U.S.C. § 157 (“The Commission...shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans...by utilizing... methods that remove barriers to infrastructure investment.”). Congress defined “advanced telecommunications capability” as high-speed, switched, broadband telecommunications capability...using any technology.” *Id.* § 706(c)(1).

⁸ *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd. 6777 ¶ 32 (1998) (hereinafter “1998 Pole Order”), *rev’d*, *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *rev’d*, *NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002), and *petition for review denied*, *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002).

⁹ *NCTA v. Gulf Power Co.*, 534 U.S. 327, 339 (2002). The Court also observed that cable companies have “found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents.” *Id.* at 330.

cable television industry has invested over \$160 billion to extend broadband services to virtually all homes passed by cable television companies nationally.¹⁰ This investment has enabled innovation in new technologies like DOCSIS 3.0, which will permit cable companies like Comcast to offer broadband speeds up to 100 Mbps or more. Comcast deployed DOCSIS 3.0 to 80% of its footprint by the end of 2009 (over 40 million households), and continues to extend the service within its footprint.¹¹ The cable industry's aggressive broadband deployment also has enabled cable's VoIP service to be the first facilities-based competition for residential voice service. Cables' VoIP service is projected to have directly and indirectly benefited consumers and small businesses by over \$100 billion between 2007 and 2011.¹²

To promote infrastructure investment and competition, the 1996 Act also amended Section 224 of the Act to provide telecommunications carriers the right of pole access. However, Congress established a different rate formula for telecommunications attachers than for cable operators. The cable rate formula, as implemented by the Commission, fully allocates the cost of the entire pole (including usable and unusable space) based upon the percentage of the pole's usable space occupied by the attachment.¹³ The statute specifies that these fully allocated

¹⁰ NCTA Industry Data, Investments in Infrastructure, *available at* <http://www.ncta.com/StatsGroup?Investments.aspx>. As of March 2009, the five largest cable MSOs offered broadband service to virtually all of the 96 million households they passed. Robert C. Atkinson and Ivy E. Schultz, Columbia Institute for Tele-Information, *Broadband in America: Where It Is and Where It Is Going*, at 20 (2009), *available at* http://www.broadband.gov/docs/Broadband_In_America.pdf.

¹¹ Final Transcript, Q2 2010 Comcast Corporation Earnings Conference Call, July 28, 2010, Statement of Brian Roberts, Chairman and CEO, Comcast Corporation, *available at* <http://www.streetevents.com>.

¹² Consumer Benefits from Cable-Telco Competition, *available at* http://www.micradc.com/news/publications/pdfs/Updated_MiCRA_Report_FINAL.pdf.

¹³ Section 224(d)(1) provides the Commission the discretion to set the cable pole rent as low as incremental cost or as high as fully allocated cost. The Commission's rules set cable rent at the maximum level under the statute.

costs are comprised of “the operating expenses and actual capital costs of the utility attributable to the entire pole.”¹⁴

The statute’s telecommunications rate formula diverges from the cable rate formula in two important ways. First, the telecommunications formula establishes different cost allocation approaches for *unusable* as opposed to *usable* space on the pole.¹⁵ Second, it specifies different *costs* to be allocated to telecommunications attachers than the costs specified in the cable formula. While the cable formula specifies assignment of fully allocated costs (*i.e.*, operating expenses and actual capital costs) the telecommunications formula refers to allocating only the “cost of providing space” without further explanation as to which costs are to be included.

Despite the specific differences in the statutory language regarding the costs to be allocated to attachers under each formula, the Commission implemented the telecommunications pole rate formula by including the same costs required by the cable formula (*i.e.*, the operating and capital costs attributable to the entire pole) in the calculation of the telecommunications

¹⁴ 47 U.S.C. § 224(d)(1). As recognized in the FNPRM and numerous comments in the record, in addition to paying recurring pole rent, cable and telecommunications attachers pay non-recurring “make-ready” costs up front to reimburse utilities for all capital costs incurred in the process of making a pole attachment, including change out of the pole where necessary. FNPRM ¶ 110. *See also* Comcast Comments in Docket 07-245, at 17-18, filed Mar. 7, 2008 (hereinafter “March 2008 Comcast Comments”) (“Additionally, cable operators and other attachers are required by utilities to pay all ‘make-ready costs’ associated with installing or rearranging attachments in the field, including: the cost of engineering ‘ride outs’ or field visits to examine the poles to confirm that space exists and to specify the point of attachment; ‘line shifting’ or rearrangement costs, in the event utility or third-party wires need to be relocated to accommodate the cable facilities; and all of the ‘change out’ costs of removing the old pole and installing a new, taller pole (which the utilities retain title to) if there is insufficient space on an existing pole. Therefore, the marginal costs of attachments are already collected by utilities through make-ready charges.”).

¹⁵ Under the telecommunications formula, the “cost of providing *usable* space” is allocated based on the percentage of usable space occupied by the attacher (in the same manner as cable operators). *Compare* 47 U.S.C. § 224(e)(3) *with id.* § 224(d)(1). For *unusable* space, the formula provides that telecommunications attachers (and the pole owner) are each allocated an equal share of two-thirds of the “cost of providing” unusable space as specified in the statute. *Id.* § 224(e)(2). The pole owner is also allocated the remaining third of the unusable space costs. By contrast, the cable formula assigns the fully allocated costs of unusable space in the same manner as usable space – in accordance with the percentage of usable space occupied by the attacher on the pole.

carrying charges. At the time of implementation in 1998, Congress and the Commission expected the telecommunications pole rates to decline towards the cable pole rate as the number of facilities-based telecommunications attachers increased during the ten year phase-in period.¹⁶ Consequently, the decision to simply use the same (overstated and unnecessary) cable formula cost inputs in the telecommunications formula appeared reasonable at that time. However, fierce ILEC opposition to CLEC competition, and the emergence of cable technology integrating broadband (including VoIP) into the *same lines used for cable* service resulted in far fewer new facilities-based telecommunications attachers than anticipated – leaving telecommunications pole rents artificially high. As the Commission observed in 1998, “[u]nder Section 224(e)(2), the number of attaching entities is significant because the costs of unusable space assessed to each entity decreases as the number of entities increases.”¹⁷

The difference in pole rent paid under the two formulas is significant – the Commission estimates that telecommunications carriers pay about \$3 more per pole than cable attachers.¹⁸ The record indicates that, for the cable television industry alone, application of the current

¹⁶ 47 U.S.C. § 224(e)(4). The Act established an effective date for the FCC’s telecommunications pole formula regulations 5 years after the date of enactment of the 1996 Act – with an additional 5 year phase-in after that. *See id.* (“Any increase in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in [in] equal annual increments over a period of 5 years beginning on the effective date of such regulations.”). The Commission’s regulations further provide that “[t]he five-year phase-in is to apply to rate increases only. *Rate reductions* are to be implemented immediately.” 47 C.F.R. § 1.1409(f) (emphasis added). *See also Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 12 FCC Rcd. 11725 ¶ 10 n.28 (1997) (“As the carrying charge is spread among the attaching entities, the overall rate may become lower over time.”).

¹⁷ 1998 Pole Order ¶ 45 .

¹⁸ FNPRM ¶ 116.

telecommunications pole formula rate to cable attachments would increase rent payments up to \$672 million *annually*.¹⁹

While Commission policies have helped produce substantial investment in and deployment of broadband over the years – almost two-thirds of Americans subscribe to broadband and 95% of Americans (290 million) have access to it²⁰ – the Reinvestment Act and the NBP clearly state that providing all Americans with broadband access is a top priority for the Commission.²¹ Excessive and non-uniform pole rents unnecessarily increase costs and delay broadband deployment. The NBP explains that “[c]ollectively, the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20% of the cost of fiber optic deployment.”²² The Commission’s recently released Sixth Broadband Deployment Report

¹⁹ See NCTA Comments in Docket 07-245, Pelcovits Decl. ¶ 22, filed Mar. 7, 2008; FNPRM ¶ 116 n.317.

²⁰ NBP at 20, 23. By 2013, it is expected that the cable industry will have upgraded 100% of its broadband plant (covering 80% of the nation’s homes) to DOCSIS 3.0. Collectively, cable, ILECs and other broadband providers will offer over 90% of households such service by 2013. *Id.* at 20-21.

²¹ The Reinvestment Act directed the Commission to establish a plan to “ensure that all people of the United States shall have access to broadband capability....” Reinvestment Act § 6001(k)(1). See, e.g., *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Manner*, Sixth Broadband Deployment Report, GN Docket No. 09-137, FCC 10-129, ¶ 6 (rel. July 20, 2010) (hereinafter “Sixth Broadband Deployment Report”) (“We recognize that ensuring universal broadband is the great infrastructure challenge of our time and deploying broadband nationwide – particularly in the United States – is a massive undertaking.”); *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*, Notice of Inquiry, 24 FCC Rcd. 10505 ¶ 13 n.43 (2009) (noting the “increased intensity to the national goal of ubiquitous broadband deployment” triggered by the Reinvestment Act). See also *Digital Nation, 21st Century America’s Progress Toward Universal Broadband Internet Access*, National Telecommunications and Information Administration, at 3 (February 2010) (“Universal access to and adoption of 21st Century broadband for all citizens is a top priority for the Obama Administration.”).

²² NBP at 109. The Broadband Plan recognizes that closing the broadband gap will require substantial resources from private industry (over \$350 billion) on top of the \$7.2 billion that is being provided by the federal government in broadband grants and loans under the Reinvestment Act. See Federal Communications Commission Open Meeting Presentation on the Status of the Commission’s Processes for Development of a National Broadband Plan, September 29, 2009, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf; FCC Staff Presentation, National Broadband Plan Policy Framework, at 5 (Dec. 16, 2009), available at

estimates that between 14 and 24 million Americans do not have access to broadband today²³ and notes the key role that this pole proceeding plays in fulfilling the Commission’s obligation “to accelerate deployment of such capability by removing barriers to infrastructure investment.”²⁴ The FNPRM seeks to promote broadband deployment²⁵ by implementing the NBP recommendation to reduce the unnecessarily high telecommunications pole rate to a uniform level as close as possible to the cable rate, consistent with the statutory scheme.

B. The Proposed Telecommunications Pole Formula Is Consistent With Applicable Law And Is Economically Sound.

1. The proposed formula is supported by a fundamental principle of statutory construction.

The FNPRM acknowledges that the Commission’s telecommunications pole rate formula unnecessarily increases the pole rate by allocating costs to telecommunications attachers that are not required by the statute. Instead of allocating only the “cost of providing space” among attachers as directed by Section 224(e)(2), the Commission includes “operating expenses and actual capital costs” which directly produce excessive pole rents for telecommunications attachers.

http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295259A1.pdf (“Private sector investment is essential...”). Consequently, reducing unnecessary pole rental overcharges is essential to achieving Commission objectives.

²³ Sixth Broadband Deployment Report ¶¶ 5, 28. The Commission “emphasizes” the progress that has been achieved by broadband providers “to expand broadband deployment throughout America.” *Id.* ¶¶ 6, 28 n.122.

²⁴ *Id.* ¶¶ 7 & n.26, 29.

²⁵ As the FNPRM explains, unnecessary pole rent differentials have deterred investment and led to excessive litigation regarding which pole rent is applicable. FNPRM ¶¶ 116-117. *See also* NBP at 110-111.

The courts have recognized that “[t]he Act sets forth fairly general rules regarding allocations of the cost of usable and unusable space for attachments.”²⁶ In interpreting how to allocate pole space costs under these general rules, the Commission should apply a basic rule of statutory construction – “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”²⁷ The reference to including operating and actual capital costs in Section 224(d) but not in 224(e) provides the Commission with the statutory direction that Congress did not intend to require the inclusion of all such costs in the telecommunications rent calculation. As the FNPRM explains, the Section 224(e) cost provisions are ambiguous and the Commission has discretion to develop a reasonable interpretation of those costs consistent with the language and intent of Section 224, the purposes of the Act and other applicable law.²⁸

For example, when the Commission decided to include pole owners as “attaching entities” under Section 224(e), the reviewing court noted that the broader definition of attaching

²⁶ *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002).

²⁷ *Georgia Power Co. v. Teleport Commc’ns Atlanta, Inc.*, 346 F.3d 1033, 1045 (11th Cir. 2003) (quoting *CBS, Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225-26 (11th Cir. 2001)). See, e.g., *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 496-97 (1992) (concluding that “[t]he fact that Congress chose to use different terms [in the same section of a statute] surely indicates that Congress intended the two terms to have different meanings”); *Russello v. United States*, 464 U.S. 16, 23 (1983) (“We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.”); *United States v. Maria*, 186 F.3d 65, 71 (2d Cir. 1999) (“As a general matter, the use of different words within the same statutory context strongly suggests that different meanings were intended.”); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir. 1984) (“When Congress uses explicit language in one part of a statute to cover a particular situation and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing.”); Sutherland on Statutory Construction at 249 n.8 (“The same words used twice in the same act are presumed to have the same meaning. Likewise courts do not construe different terms within a statute to embody the same meaning.”).

²⁸ FNPRM ¶ 131. It is likely that even the Commission’s newly proposed calculation significantly overstates the true impact of attachments on such ongoing operating costs. See discussion *infra* at 17.

entity “limits the financial burden on telecommunications providers and therefore encourages growth and competition in the industry” and “better served the goals of the Act.”²⁹ Similarly, the Commission’s proposed telecommunications formula is reasonable and justified because it lowers the financial burden on telecommunications providers (consistent with the goals of the Act) and will encourage broadband deployment and competition.³⁰

2. *The Commission’s proposed approach is economically sound.*

The Commission proposes a common sense solution that is legally and economically sound – establish the telecommunications pole rent from within a range of possible “just and reasonable” pole rates derived from the statutory formula.³¹ At the low end of the rate range (the

²⁹ *Southern Co. v. FCC*, 313 F.3d at 581. See, e.g., *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1044-45 (D.C. Cir. 2002) (“The Commission may, of course, change its mind, but it must explain why it is reasonable to do so. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (“An agency’s view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.”); *Telecomm. Research and Action Ctr. v. FCC*, 801 F.2d 501, 518 (D.C. Cir. 1986).”).

³⁰ For these same reasons, the Commission should reject both the USTelecom and AT&T/Verizon broadband rate proposals because they are inconsistent with the language of Section 224(e) and would undermine the goals of the Act by raising deployment costs and reducing broadband and voice competition. FNPRM ¶ 121. It is also significant that USTelecom and Verizon have each seemingly disavowed their earlier proposals in more recent submissions to the Commission. For example, in a declaratory judgment proceeding initiated by several electric companies seeking to impose the telecommunications pole rate (or higher) on VoIP providers, Verizon rejected the electric utility position to raise pole rents above the cable rate level stating “[t]hat approach does not make sense.” Verizon Comments in WC Docket No. 09-154 at 1-2 (filed Sept. 24, 2009). Similarly, in the same proceeding, USTelecom opposed the electric utility position observing “the obvious policy implication of this analysis leads to precisely the opposite end-result urged by the 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.” Comments of United States Telecom Association in WC Docket No. 09-154 at 3-4 (filed Sept. 24, 2009). In the initial broadband pole proceeding, AT&T provided expert analysis explaining that the current telecom pole rate substantially overcompensates electric utilities – a position fundamentally at odds with the AT&T/Verizon proposal to raise telecommunications pole rents. Comments of AT&T, Inc. in Docket No. 07-245, Declaration of Veronica Mahanger MacPhee (“MacPhee Decl.”) ¶¶ 37-46, filed Mar. 8, 2008.

³¹ As explained in the FNPRM, Congress did not intend for the Commission to “embark upon a large-scale ratemaking proceeding in each case brought before it, or by general order.” FNPRM ¶ 135. See also *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd. 6453 ¶ 7 (2000) (“When Congress enacted Section 224 in 1978, it directed the Commission to institute an expeditious program for determining just and reasonable pole attachment rates. Legislative history indicates that Congress was concerned with regulatory

“lower bound rate”), the Commission proposes that the phrase “cost of providing space” should be interpreted to limit carrying charges to a share of administrative and maintenance operating costs. The Commission finds that it is reasonable to expect that the presence of attachments might increase such ongoing operating expenses by some amount.³² At the high end of the range of rates (the “upper bound rate”), the Commission simply proposes to apply its current telecommunications pole rent rule, which, if left unadjusted, would continue to include the excessive capital costs in the carrying charges as discussed above.³³

With regard to the lower bound cost components, attachers already pay for any necessary make-ready costs at the outset in gaining access to poles.³⁴ Thus, the vast majority (if not all) of the capital costs associated with providing pole space are accounted for without adding the unrelated and unjustified capital costs currently included in the telecommunications formula. The Commission appropriately concludes, therefore, that capital costs can be excluded from the lower bound rate, consistent with the different cost components specified in the statute for the

complexity, opting for a simple plan requiring a minimum of staff, paperwork and procedures and the avoidance of a large-scale ratemaking proceeding.”) (*citing* 1977 Senate Report at 21).

³² FNPRM ¶ 138.

³³ *Id.* ¶ 132.

³⁴ *Id.* ¶ 110. *See also* 1977 Senate Report at 19 (Make-ready costs include “those costs which would not be incurred by the pole owner or controller “but for” the CATV attachment.... Make-ready costs are those necessary to rearrange existing telephone and power lines to maintain clearances between different pole lines required by individual utility construction and safety standards and national electrical safety codes and to reinforce poles when necessary to increase load capacity. In a few limited instances it may be necessary for the utility to replace an existing pole with a larger facility in order to accommodate the CATV user.... All of these costs arise solely by virtue of the CATV occupation of space within the communications space on the pole.”). In addition to these substantial make-ready costs, cable attachers are typically subject to other significant expenses imposed by utilities for attachment audits and safety on post-construction inspections. March 2008 Comcast Comments, Exhibit 3, Attachment 3 (Declaration of John Eichhorn).

cable formula and telecommunications formula.³⁵ This approach is also consistent with Congress' understanding that pole attachments generally do not impose any capital costs on utilities that are not recovered fully in make-ready charges: “[t]hus, the only added cost to the utility resulting from the pole attachment would be administrative costs.”³⁶ As a result, the Commission properly eliminates the depreciation, rate of return and tax components of the carrying charges in establishing the lower bound rate.

This approach is also supported by sound economic theory. As Comcast explained in its initial comments in this proceeding, in a fully competitive market, the price for a resource is driven down towards marginal cost thereby creating numerous social benefits, including lower prices for consumers and more choices. The Commission's lower bound rate proposal produces a rate for telecommunications pole attachments closer to marginal cost than the current telecommunications rate (although the proposed rate is still well above marginal cost). In addition, by eliminating the unwarranted capital costs (*i.e.*, depreciation, rate of return and taxes) from the telecommunications formula, the lower bound rate approach is more consistent with cost causation principles and therefore more economically efficient than the current formula.³⁷

³⁵ Congress recognized that identifying “actual capital costs” in implementing Section 224(d) would be difficult for the Commission to accomplish and expected only that the Commission would “have to make its best estimate of some of the less readily identifiable actual capital costs.” No special accounting measures or studies were deemed necessary for the Commission to make this “best estimate.” *See* 1977 Senate Report at 20.

³⁶ 123 Cong. Rec. 5080 (1977) (statement of Rep. Wirth). *See also* 1977 Senate Report at 19 (“[A utility’s] avoidable costs...could be expected to be minimal since most of those costs are the outlays that should be fully recovered in the make-ready charges.”).

³⁷ *See* March 2008 Comcast Comments, Exhibit 1 (“Comcast Kravtin Report”) ¶ 79.

As pole rents decline towards marginal cost, the result is a better allocation of resources which improves social welfare, which in this case promotes broadband deployment and competition.³⁸

Economic valuation expert Timothy Pecaro concurs with the Commission's approach explaining that the "Lower Bound Rate is more grounded in cost causation principles than the current telecom or cable rate formulas."³⁹ Pecaro confirms that capital costs should be eliminated from the telecom rate formula carrying charges because such costs are "(i) fully paid by the attachers (make-ready); (ii) non-existent; or (iii) de minimis" and consequently "it is fair from an economic standpoint to eliminate this element of the telecom rate formula in determining the Lower Bound Rate."⁴⁰ Pecaro goes on to explain that "consistent with economic theory, by eliminating such excess costs, the Lower Bound Rate more closely approaches the true marginal cost of an attachment thereby reflecting a more economically efficient price for pole attachments."⁴¹ Since all capital costs incident to an attachment are recovered through make-ready costs, the elimination of the depreciation, rate of return and tax carrying charges from the Lower Bound Rate properly adjusts the formula to remove excessive and duplicative

³⁸ In this regard, NCTA offers an economic study of the Commission's formulas for the upper and lower bound telecom rates, presenting a refined analysis of the range of rates that would most align with cost causation and cost allocation principles. The study confirms that the Commission's approach is just and reasonable, and produces rates that are near the top end of the range that is consistent with the requirements of Section 224. *See* Comments of National Cable & Telecommunications Association, Docket No. 07-245, filed Aug. 16, 2010 (hereinafter "August 2010 NCTA Comments").

³⁹ Attachment 1 hereto, Declaration of Timothy S. Pecaro (hereinafter "Pecaro Decl.") ¶ 23.

⁴⁰ *Id.* ¶ 15.

⁴¹ *Id.* Pecaro dismisses utility arguments that they routinely build taller poles solely to accommodate attachers and therefore incur unreimbursed capital costs: "[I]nstalling a pole that is taller than necessary is strictly speculative and contrary to efficient capital management.... Therefore, it would be wholly irrational for the utility, as well as inconsistent with a utility's capital preservation obligations, to risk nonrecovery of these costs absent a direct economic benefit." *Id.* ¶ 17.

capital costs.⁴² Ultimately, Mr. Pecaro concludes, “it is my opinion that both the existing cable rate formula and the proposed Lower Bound Rate are based on sound economic principles and produce rates for utilities that are fair and more than compensatory.”⁴³

3. *Both the lower bound telecommunications rate and the cable rate are fully compensatory to utilities.*

Having framed the lower- and upper-bound range of rates, the Commission proposes that the applicable telecommunications pole rate will be either the lower bound rate or the cable rate, whichever is higher.⁴⁴ The Commission’s calculations show that the cable rate will typically be higher than the lower bound rate and as a result, in most cases, telecommunications attachers will pay the same pole rent as cable attachers on the same poles.⁴⁵ Significantly, *both* the lower bound telecommunications rate and the cable rate are fully compensatory to utilities and satisfy all constitutional compensation requirements. The Commission, however, has taken the very conservative approach of applying the cable rate whenever it exceeds the lower bound rate.

⁴² *Id.* ¶¶ 18-22. As explained in the Pecaro Declaration, each of these cost elements are incurred by utilities regardless of the presence of attachers, and the inclusion of such costs in the formula unnecessarily drives up pole costs and leads to duplicative recovery by utilities. Removing these costs brings pole rents more in line with costs and lowers the cost of rent towards (but still substantially above) marginal cost levels. *Id.* ¶ 28.

⁴³ *Id.* ¶ 36. Pecaro goes on to explain:

[I]t is my opinion that the application of either of these rates to telecommunications attachers will result in a rate that provides just, fair, and reasonable compensation and encourages the continued expansion of broadband and other advanced services. Either of these rate options will move the price of telecommunications pole attachments closer to the most economically efficient price level of marginal cost compared to the current telecom pole attachment rate formula. Therefore establishing the rate at one of these lower levels is an economically sound policy choice and comports with the requirements of Section 224(e).

Id.

⁴⁴ FNPRM ¶¶ 140-141.

⁴⁵ *Id.* and Appendix A.

It is well established that, as a constitutional matter, pole owners receive adequate compensation to the extent that they recover their marginal costs from attachers. As a result, the cable rate has been found by the courts to be fully compensatory.⁴⁶ As the Commission observes, under the statutory scheme for pole attachments, attachers are required to pay any make-ready costs necessitated by a proposed pole attachment.⁴⁷ These make-ready payments constitute virtually all marginal costs that arise from a pole attachment.⁴⁸ Over and above the make-ready payment of the utility's marginal costs, attachers also pay recurring pole rents.⁴⁹

In the case of the recurring cable rent, the attacher pays a share of the fully allocated costs of the pole based on the percentage of the usable pole space occupied by the cable attacher.⁵⁰ Virtually all of the costs incorporated into the recurring pole rent are incurred by the utility whether or not there are any attachers, thereby providing a healthy cushion over and above the

⁴⁶ See, e.g., *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002) (“[A]ny implementation of the [FCC cable pole attachment rate] (which provides for much more than marginal cost) necessarily provides just compensation.”); *FCC v. Florida Power Corp.*, 480 U.S. 245, 253-54 (1987) (finding that it could not “seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory”). See also NBP at 110 (“[The cable rate] has been in place for 31 years and is ‘just and reasonable’ and fully compensatory to utilities.”); March 2008 Comcast Comments (Furchtgott-Roth Report ¶¶ 1, 10-11; Kravtin Report ¶¶ 38-40, 67-72). Congress has also repeatedly found the cable rate to be “just and reasonable.” See Communications Amendment Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087 (1982); Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁴⁷ FNPRM ¶ 110.

⁴⁸ See note 14 *supra*.

⁴⁹ FNPRM ¶ 110.

⁵⁰ See *supra* at 6.

minimum constitutional threshold of marginal cost.⁵¹ The same is true for the proposed lower bound rate because it provides the utility with compensation above and beyond the constitutionally required marginal costs that are satisfied by make-ready payments.⁵²

This is confirmed by economic valuation expert Pecaro:

As with the cable rate, the Lower Bound Rate ensures that the utility recovers its marginal costs from attachers through the dual revenue streams of make-ready and recurring rent payments. The utility recovers all capital costs caused by the attacher in advance through make-ready payments. Therefore, the utility's marginal costs are virtually all covered, even before considering the additional recurring rent payments paid by attachers. Since the required recurring rent is set at a level that ensures that the utility recovers substantially more than the actual maintenance and administrative expenses caused by attachers, a significant cushion above the actual marginal cost of a pole attachment is worked into the Lower Bound Rate proposal. Consequently, and for the same reasons explained earlier with regard to the cable rate, the Lower Bound Rate is fair and more than fully compensatory to the utility.⁵³

Significantly, even with the cost based lower bound rate, the resulting rent still significantly overcompensates utilities. This is because the remaining maintenance and administrative carrying charges in the formula include costs that are not caused by attachers and therefore overallocate such expenses to attachers.⁵⁴ In addition, the Commission's proposal to

⁵¹ 1977 Senate Report at 19-20 (“The term ‘operating expenses and actual capital costs of the utility’... refers to the costs to the utilities, irrespective of the CATV attachment, of owning and maintaining poles. Such costs include interest on debt, return on equity (profit), depreciation, taxes, administrative and maintenance expenses.”).

⁵² As recognized in *Alabama Power*, there is one exception to the rule that marginal cost provides just compensation. A utility may seek a pole rate above marginal cost (or above the FCC regulated rate) where it can demonstrate that the pole is at “full capacity” and that the utility can receive a higher rate from another renter or higher use. *Alabama Power*, 311 F.3d at 1370-71. Such conditions rarely exist as Gulf Power's subsequent effort to demonstrate to the Commission that its poles were at full capacity was unsuccessful. See *Florida Cable Telecomms. Ass'n v. Gulf Power Co.*, Initial Decision, 22 FCC Rcd. 1997 ¶¶ 20, 22 (2007) (“*Florida Cable Association*”).

⁵³ See Pecaro Decl. ¶ 27.

⁵⁴ *Id.* ¶¶ 23-27.

set telecom pole rents at the higher of the lower bound rate or the cable rate does not take into account the inferior pole attachment rights contained in CLEC and cable pole attachment agreements.⁵⁵ As pointed out by several electric utilities:

ILECs receive a whole host of advantages that third party attachers like cable companies and CLECs do not enjoy.... [P]ermitting ILECs to receive the same rate as cable companies and CLECs would be grossly unfair to the cable companies and CLECs....⁵⁶

Pecaro finds that “pole owners occupy substantially more vertical and horizontal pole space than the attachers, that the higher positions on the pole represent greater economic value than the lower positions occupied by the attachers, and that [pole owners] have additional rights not available to attachers such as CLECs and cable companies.”⁵⁷ As a consequence, Pecaro concludes that “[t]he Lower Bound Rate also results in an overly generous rent given the inferior pole attachment rights accorded to cable and telecom attachers....”⁵⁸

C. State Public Utility Commissions And Utility Consumer Advocates Support The Cable Rate For All Attachers.

A number of State public utility commissions (“PUC” or “PSC”) have considered the appropriate pole attachment rate to apply to cable/VoIP and telecommunications attachers

⁵⁵ *Id.* ¶ 31.

⁵⁶ *Id.* ¶ 32. The Coalition of Concerned Utilities explains that ILECs (i) have minimal make-ready costs; (ii) need not seek approval from the electric company to make attachments as cable and CLECs do; (iii) do not pay for post-construction inspections; (iv) are guaranteed a specific number of feet on each pole while cable and CLECs must pay make-ready if pole space is limited; and (v) do not incur relocation and rearrangement costs. Moreover, electric utilities often obtain rights-of-way for ILECs while cable and CLECs must secure their own. *See* Comments of Coalition of Concerned Utilities in Docket 07-245, at 53-56, filed Mar. 8, 2008. *See also* March 2008 Comcast Comments at 24-28. Pecaro also points out that the cable rate is overstated due to certain outdated Commission presumptions that overallocate pole costs to attachers (*e.g.*, the presumed 13.5 feet of usable space should be updated to 16 feet reflecting current pole heights). Pecaro Decl. ¶ 30.

⁵⁷ *Id.* ¶ 35.

⁵⁸ *Id.* ¶ 31.

services, and have decided to adopt the cable rate formula for all attachments because it fairly compensates utilities and promotes broadband deployment and competition.⁵⁹ In 1998, the California PUC reached these conclusions in adopting a uniform pole rent based on the cable rate for all attachers and services:

Moreover, such an approach promotes the incentive for facilities-based local exchange competition through the expansion of existing cable services.... We conclude that the adoption of attachment rates based on the [cable rate] formula provides reasonable compensation to the utility owner, and there is no basis to find that the utility would be lawfully deprived of any property rights.⁶⁰

These policies have persuaded other states to apply similar uniform, cable based pole attachment rates to all attachers. For example, in rejecting adoption of higher pole rents for telecommunications and other non-cable services, the New York PSC explained that,

[t]o allow increased pole attachment rates at this time, when competition and the number of attachers has not developed as previously contemplated, is contrary to the public interest under PSL §119-a, in that it would undermine efforts to encourage facilities-based competition and to attract business in New York.⁶¹

Both the Oregon and Utah PSCs adopted pole rent formulas for all attachers and services based on the cable formula and filed comments earlier in this proceeding explaining that such pole rates fairly compensate utilities and avoid creating barriers for new and existing technologies.⁶²

⁵⁹ The FNPRM inquires about approaches used by states to set pole attachment rates. FNPRM ¶ 142.

⁶⁰ *Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service*, R.95-04-043, I.95-04-044, Decision 98-10-058, 1998 Cal. PUC LEXIS 879 (Oct. 22, 1998) (internal citations omitted).

⁶¹ *Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments and to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Companies*, Order Directing Utilities to Cancel Tariffs, Case 01-E-0026, 2002 N.Y. PUC LEXIS 14, at *4 (Jan. 15, 2002).

⁶² See Comments of Public Utility Commission of Oregon in Docket 07-245, at 1 and attached PUC Order at 9-10, filed Mar. 7, 2008; Comments of Utah Public Service Commission in Docket 07-245, at 1, filed Mar. 7, 2008.

In 2005, the Connecticut Department of Public Utility Control also rejected utility efforts to impose a pole rate surcharge for additional services.⁶³

Application by numerous states of the cable rate to all categories of attachers (CLEC and cable) regardless of the services offered by the attacher, provides important support for the Commission's conclusion that its proposal to achieve low, uniform pole rates for all attachers appropriately balances the need to reasonably compensate pole owners with national broadband and competition objectives.

Additional support comes from the National Association of State Utility Consumer Advocates ("NASUCA"), which has a legal obligation to represent the interests of both cable and electric utility consumers. NASUCA applied its "dual perspective" to endorse the cable rate in finding that,

[t]his rate was upheld against challenges that it was confiscatory. Thus this is the rate that 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

⁶³ See *Petition of the United Illuminating Company For A Declaratory Ruling Regarding Availability of Cable Tariff Rate For Pole Attachments By Cable Systems Providing Telecommunications Services and Internet Access*, Docket No. 05-06-01, Decision, 2005 Conn. PUC LEXIS 295, at *11-12 (Dec. 14, 2005). See also *Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations Adopted Under 3 AAC 52.900 – 3 AAC 52.940*, Order Adopting Regulations, 2002 Alas. PUC LEXIS 489, at *6 (Oct. 2, 2002) ("The CATV formula is reasonable and should be the default formula for calculating pole attachment rates if the pole owner and the attachers cannot negotiate their own agreement. We find that the formula provides the right balance given the significant power and control of the pole owner over its facilities."); *Cablevision of Boston Co. v. Boston Edison Co.*, Docket D.P.U./D.T.E. 97-82 (1998) (cable rate assures payment by cable operators of "the fully allocated costs for the pole space occupied by them"); *Detroit Edison Co. v. Michigan Public Serv. Comm'n*, 1998 Mich. App. LEXIS 832, at *6-7 (Nov. 24, 1998), *aff'g Consumers Power Co., Detroit Edison Co., Setting Just and Reasonable Rates for Pole Attachments to Utility Poles, Ducts and Conduits*, Case Nos. U-010741, U-010816, U-010831, Opinion and Order, 1997 Mich. PSC LEXIS 26 (Feb. 11, 1997).

broadband service providers because this would be contrary to ‘the nation’s commitment to achieving universal broadband deployment and adoption.’⁶⁴

Thus, state PSCs and utility consumer advocates endorse the uniform application of the cable pole rate formula to all attachers and provide powerful support for the Commission’s FNPRM proposal.

III. THE COMMISSION CAN USE FORBEARANCE TO UNIFY ATTACHMENT RATES

A. Background.

If the Commission decides against adopting its proposed telecommunications rate formula, it should forbear from applying Section 224(e)(2) with respect to establishing telecommunications pole rates. Congress adopted Section 10 of the 1996 Act in recognition that the Commission needed better tools to adjust regulation in response to rapidly evolving and unpredictable market conditions. Under Section 10, the Commission *is required* to forbear from applying provisions of the Act or its rules if it determines that:

(i) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(iii) forbearance from applying such provision or regulation is consistent with the public interest.⁶⁵

⁶⁴ Reply Comments of The National Association of State Utility Consumer Advocates in Docket 07-245, filed Apr. 22, 2008, at 1-2, 5. NASUCA is a national association of consumer advocates in more than 40 states and the District of Columbia who are “designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.” *Id.* at 1 n.3.

⁶⁵ 47 U.S.C. § 160(a).

In applying this test to “the supply market for broadband services,” the Commission and courts uniformly agree that the objectives of Section 706 must inform any analysis.⁶⁶

Section 706 of the 1996 Act “explicitly directs the FCC to ‘utilize’ forbearance to ‘encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.’”⁶⁷ The Act specifically provides that forbearance is among the measures that the Commission can use to “remove barriers to infrastructure investment.”⁶⁸ As explained earlier, Congress and the Commission fully expected that expanded deployment of competitive telecommunications carriers following the 1996 Act would increase the number of attaching entities on poles thereby driving telecommunications pole rents down to the cable rate (or below).⁶⁹ It was not anticipated that ILEC opposition to CLECs and the development of cable VoIP service (not requiring extra lines on poles) would significantly limit the number of attaching entities on poles – directly causing today’s excessive and non-uniform telecommunications pole rates.⁷⁰ Under these circumstances, forbearance provides the tool intended by Congress to promote the objectives of the Act.

⁶⁶ See *EarthLink Inc. v. FCC*, 462 F.3d 1, 6-7 (D.C. Cir. 2006) (“*EarthLink*”) (“[T]he FCC made clear that its forbearance analysis is ‘informed’ by section 706’s mandate to encourage deployment of broadband services.”); *Deployment of Wireline Service Offering Advanced Telecommunications Capability*, Memorandum Opinion & Order, FCC, 98-188, 13 FCC Rcd. 24011 ¶ 77 (1998).

⁶⁷ *Petition of Qwest Corp. for Forbearance (Phoenix)*, Order, WC Docket No. 09-135, FCC 10-113, ¶ 39 (rel. June 22, 2010) (citing *EarthLink*). “Advanced telecommunications capability” is defined “without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability...using any technology.” 47 U.S.C. § 157(c) note.

⁶⁸ 47 U.S.C. § 157(a) note.

⁶⁹ See discussion *supra* at 7.

⁷⁰ FNPRM ¶ 142 n.384 (“[H]ave circumstances differed from what Congress anticipated in a way that would counsel in favor of forbearance?”).

B. Forbearance From Applying Section 224(E)(2) Achieves The Objectives Of The National Broadband Plan.

As the *EarthLink* court explained, the Commission has broad authority to “adapt forbearance decisions to the circumstances” and to forbear where evidence demonstrates that a provision of the Act “would skew investment incentives in undesirable ways....”⁷¹ The NBP establishes that investment in broadband infrastructure is being skewed by the non-uniform and excessively high pole attachment rates paid by telecommunications carriers.

Under these circumstances, forbearance from applying Section 224(e)(2) to such telecommunications carriers is fully justified. As explained above, the provision of the Act driving excessive, non-uniform rates that impede broadband investment and deployment is Section 224(e)(2) – the telecommunications rate formula for the *unusable* space on the poles.⁷² By not applying that Section, the Commission would retain complete authority under Sections 224(e)(1) and 224(e)(3) to reinterpret the telecommunications rate formula consistent with the goals of this proceeding.

Under Section 224(e)(1), the Commission is directed to establish a telecommunications rate formula that ensures utilities charge “just, reasonable, and nondiscriminatory rates for pole attachments.” Section 224(e)(3) further provides that usable space costs must be apportioned among all entities according to the usable space occupied by each entity (*i.e.*, the current cable rate formula approach). Consequently, the Commission would have the authority under Section

⁷¹ *EarthLink*, 462 F.3d at 5-6, 10.

⁷² “A utility shall apportion the cost of providing space on a pole...other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.” 47 U.S.C. § 224(e)(2).

224(e)(1) to determine how costs should be allocated among telecommunications attachers for the unusable portion of a pole to ensure just, reasonable and nondiscriminatory rates. In light of the recommendations in the NBP, the Commission can decide to allocate such costs in the same manner as it does for usable space – on a proportional use basis (as in the cable rate).

C. Forbearance From Applying Section 224(E)(2) Is Consistent With The Act.

Forbearing in this manner is consistent with the requirements of Section 10. With regard to the first prong of the test, continuing to apply Section 224(e)(2) to telecommunications carriers is not required to ensure that the pole rent charged by pole owners is “just and reasonable” or to ensure such pole rents are not “unjustly or unreasonably discriminatory.” As explained previously, the cable rate has been repeatedly determined by Congress, the Commission and the courts to be a just and reasonable rate.⁷³ Moreover, applying the same rate to cable and telecommunications attachers would result in nondiscriminatory rates.

It is also readily apparent that continued use of the current excessive telecommunications rate formula is not necessary for the protection of consumers under the second prong of the forbearance test. As demonstrated earlier, and consistent with common sense, higher pole rents translate directly into higher costs to consumers of broadband services.⁷⁴ If telecommunications pole rents are reduced, an important cost input for broadband services will decline and provide an opportunity for reduced prices for customers.

⁷³ See *supra* note 46.

⁷⁴ See discussion *supra* at 8 (infrastructure and pole leasing constitute 20% of deployment costs).

Finally, as recognized by the NBP, establishing a unified rate at the cable rate would promote broadband deployment and competition by eliminating arbitrary price disparities and minimizing disputes between attachers and utilities. Such competition presumptively satisfies the public interest prong of the forbearance test.⁷⁵

If the Commission decides not to adopt its proposed telecommunications rate formula, it should forbear from applying Section 224(e)(2) to achieve the goals of the Act.⁷⁶

IV. THE COMMISSION MUST CONTINUE TO SERVE AS AN EFFECTIVE FORUM TO REMEDY POLE ABUSES

A. It Is Essential That The Commission Retain Its “Sign And Sue” Rule To Ensure Effective Regulation Of Pole Attachments And To Promote Broadband Deployment.

The NBP acknowledges that “time is critical in establishing the rate, terms and conditions for attaching” to poles.⁷⁷ The FNPRM proposes a number of measures, which Comcast supports, to ensure that timely access to poles is not frustrated by pole owners.⁷⁸ Ironically,

⁷⁵ 47 U.S.C. § 160(b).

⁷⁶ While Section 224(e)(2) imposes a restriction on the amount that utilities can charge telecommunications attachers for pole rent, the provision is also clearly a “provision of the Act” that is applied to a telecommunications carrier or telecommunications service. *See* 47 U.S.C. § 160(a). Therefore, the Commission has clear authority to forbear from applying the provision (*i.e.*, “enforcing” it) against telecommunications carriers. To the extent Congress intended to exempt particular sections of the Act from the Commission’s forbearance authority it did so in Section 160(d) (“Limitation”). *Id.* § 160(d) (“Except as provided in section 251(f), ... the Commission may not forbear from applying the requirements of section 251(c) or 271....”). *See generally Framework for Broadband Internet Services*, Notice of Inquiry, GN Docket No. 10-127, FCC 10-114, ¶ 87 (rel. June 17, 2010) (“We ask whether section 10 provides authority to forbear from provisions of the statute that do not directly impose obligations on carriers.”).

⁷⁷ NBP at 111. *See also* FNPRM ¶¶ 19-20, 26.

⁷⁸ For example, the Commission’s proposals to expedite infrastructure access include establishing specific timeframes for pole owner action at each stage of attachment, liberalization of use of third party contractors and common construction practices (*i.e.*, boxing), increased transparency regarding make-ready costs, staged progress based make-ready payments and authorizing compensatory damages and refunds through the applicable statute of

while a number of the Commission’s access proposals will improve the ease and cost of pole access once a pole agreement is negotiated, the Commission’s proposed modification to the “sign and sue” policy will nullify those improvements by creating entirely new delays and costs for those seeking to negotiate pole agreements.⁷⁹ Given the long demonstrated penchant of pole owners’ to obstruct pole access (necessitating the access improvements recommended by the NBP), the Commission should retain its current judicially approved sign and sue policy, which has proven vital in protecting attachers’ rights for decades.⁸⁰

The FNPRM acknowledges that the superior bargaining power of utilities poses a substantial continuing risk that pole owners could “nullify the statutory rights” of a cable or telecommunications attacher through “take it or leave it” pole agreements.⁸¹ In spite of this risk,

limitations as remedies. *See, e.g.*, FNPRM ¶¶ 29-44; 58-65; 66, 68-74; 85-88. These are all common sense and equitable improvements to the current pole attachment process which the Commission should adopt.

⁷⁹ The Commission also proposes to reverse current law by providing pole owners (except ILECs) with the ability to make the “final determination” in deciding whether there is “insufficient capacity” on a pole. *Id.* ¶ 67; Appendix B Proposed Rules § 1.1422(b)(2). This proposal would also give utilities the ability to unilaterally “nullify” pole attachment rights contrary to the Pole Act as interpreted by the Eleventh Circuit. A finding of insufficient capacity allows a utility to deny access to a pole, which is not a decision that can be left to utilities alone to decide given their undisguised motives to frustrate attacher rights. *See Southern Co.*, 293 F.3d at 1347-48 (“[Utilities’] construction of the Act, which claims that the utilities enjoy the unfettered discretion to determine when capacity is insufficient, is not supported by the Act’s text...”). Instead, the Court found that, “[w]hen *it is agreed* that capacity is insufficient, there is no obligation to provide third parties with access to that particular ‘pole, duct, conduit, or right-of-way.’” *Id.* (emphasis added). Consequently, the Commission should modify its proposed rule to reflect the requirement that attachers and utilities agree with regard to determinations of insufficient capacity. *See also Florida Cable Association*, 22 FCC Rcd. 1997 ¶ 24 (“In any event, since there was never an agreement between Complainants and Gulf Power regarding pole capacity, the Southern Co. decision is not relevant to any HDO issue, and has no decisional application in this case.”).

⁸⁰ In the Commission’s initial order adopting pole attachment regulations over 30 years ago it was recognized that “without authority to alter unreasonable or unjust contractual rates, terms or conditions, the Commission would be powerless to act in accordance with its mandate.” *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, FCC 78-594, 68 F.C.C.2d 1585 ¶ 16 (1978), *aff’d*, *Monongahela Power Co. v. FCC*, 655 F.2d 1254, 1256 (D.C. Cir. 1981) (sign and sue essential to address “numerous abuses of [utilities’] monopoly power...”).

⁸¹ FNPRM ¶ 104. *See also Selkirk Commc’ns, Inc. v. Florida Power & Light*, 8 FCC Rcd. 387 ¶ 17 (1993) (“[Florida Power & Light] relies on the pole lease agreement which allows a higher charge and that such an

the Commission proposes to modify the sign and sue policy to require attachers to notify the utility in writing during contract negotiations of any unreasonable/unlawful provisions or be estopped from later challenging the provisions.⁸²

The proposed modification will delay access and increase costs by putting in motion a never ending exchange of correspondence between the attacher and the utility as each attempts to get the “last word” on record to characterize the unlawful provisions in the agreement. It can be expected that the pole agreement negotiation process will grind to a halt while the utility reviews and responds to the potential attacher’s notice of unreasonable/unlawful terms. And it can be expected that the utility response letter will attempt to detail why each and every identified term is not unreasonable/unlawful in the context of the specific negotiated agreement. The potential attacher, in turn, will not want the negotiation record to reflect that the utility’s arguments went unanswered. And on it will go – with significant delays and a further polarization of the negotiating parties. Ultimately, the Commission will be asked to unravel the record to determine whether the attacher has in fact waived its statutorily protected rights.

The proposal will only serve to unnecessarily and prematurely ignite a host of theoretical disputes that would likely never arise during the normal course of the contract term. While utilities routinely salt their pole agreements with boilerplate terms that violate numerous

agreement was negotiated through arms length bargaining. FPL’s reliance on this argument is misplaced. Due to the inherently superior bargaining position of the utility over the cable operator in negotiating the rates, terms and conditions for pole attachments, pole attachment rates cannot be held reasonable simply because they have been agreed to by a cable company.”).

⁸² FNPRM ¶ 107. The Commission proposes an exception allowing a contract provision to be challenged without prior written notice where “the attacher could not reasonably have anticipated that the utility would apply the challenged rate, term or condition in such an unjust and unreasonable manner.” *Id.* ¶ 108.

provisions of pole attachment law and policy, many of these provisions are never implemented or enforced by the utility, in part because the provisions are known to be unenforceable.⁸³

Complaints by utilities that sign and sue leaves them exposed to an “illusory commitment to a bargain” are utterly unpersuasive.⁸⁴ Utilities are the pole monopolists that provide the voluminous pole agreement templates containing unlawful terms in the first place. The lack of any litigation on this point at the Commission for many years also belies utility concerns. However, to the extent the Commission remains concerned that pole owners, with decades of experience negotiating pole agreements with attachers, are being hoodwinked by unfair attacher “cherry picking,” the Commission’s current policies already protect the utilities. As both the courts and the FNPRM recognize, “in some circumstances, a utility ‘may give a valuable concession in exchange for the provision the attacher subsequently challenges as unreasonable.’”⁸⁵ The D.C. Circuit acknowledged the Commission’s policy that “[w]here such a *quid pro quo* is established, the Commission will not disturb the bargained-for package of provisions.”⁸⁶

The Commission’s proposal will provide utilities with a powerful mechanism to circumvent the pole attachment law by setting up new waiver arguments, which will serve only

⁸³ See, e.g., Comments of Knology, Inc. in Docket No. 07-245, at 11, filed Mar. 7, 2008 (hereinafter “March 2008 Knology Comments”) (“Attachers do not know, in advance, whether unreasonable provisions will be enforced.... [E]ven though an unreasonable term remains unenforced an attacher would be forced” to engage in “hypothetical disputes” wasting resources of attachers, utilities and the Commission.); Reply Comments of Time Warner in Docket No. 07-245, at 60, filed Apr. 22, 2008 (hereinafter “April 2008 Time Warner Reply Comments”).

⁸⁴ FNPRM ¶ 102 n.276.

⁸⁵ *Id.* ¶ 106.

⁸⁶ *Southern Co.*, 313 F.3d at 583 (citing Commission brief); FNPRM ¶ 106 & n.289.

to delay access and increase the costs of pole negotiations contrary to the Commission's objectives in this proceeding. New competitors needing prompt pole access and those entities lacking the resources to engage in this extensive review and notice process will find their attachment rights compromised as utilities take advantage of these new tools.⁸⁷ The reality is that the existence of the current sign and sue policy provides utilities with the necessary "impetus" to negotiate in good faith over provisions that will be negated by the Commission if enforced by the utility (absent a demonstrable *quid pro quo* already recognized under current policies).⁸⁸

The Commission recently and successfully defended each of the utility objections to the sign and sue policy in court.⁸⁹ As the Commission explained in its brief and as the court agreed:

The utilities do not describe or explain under what circumstances the Commission's condoning of "sign and sue" undermines reliance on private negotiation or when exactly it is unfair to the utilities, but we observe that "sign and sue" is likely to arise only in a situation in which the attacher has agreed, for one reason or another, to pay a rate above the statutory maximum or otherwise relinquish a valuable right to which it is entitled under the Pole Attachments [sic] Act and the Commission's rules. If the rates and conditions to which the attacher later objects are within the statutory framework, then the utility has nothing to fear from the attacher's complaint. The attacher would not be entitled to relief.⁹⁰

⁸⁷ As the Commission recognized in 1998, "[p]rolonged negotiations can deter competition because they can force a new entrant to choose between unfavorable and inefficient terms on the one hand or delayed entry and, thus, a weaker position in the market on the other." 1998 Pole Order ¶ 17.

⁸⁸ *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd. 4387 ¶ 77 (1987).

⁸⁹ *See Southern Co.*, 313 F.3d at 583-84 (upholding rule as "a reasonable exercise of the agency's duty under the statute to guarantee fair competition in the attachment market").

⁹⁰ *Id.* at 583-84.

The court concluded that the sign and sue rule was a “reasonable exercise” of the Commission’s authority and “does not interfere with any of the rights afforded [the utilities] under the Act.”⁹¹ Rather than retreat from the success of the current sign and sue policy, the Commission should reaffirm its importance in promoting broadband deployment policies.

B. The Commission’s Rules Should Promote Prompt Resolution Of Pole Attachment Complaints And Eliminate Incentives For Utility Delay

1. *The Commission must resolve complaints on a timely basis.*

The most effective way that the Commission can improve the enforcement process is to take prompt action on pole attachment complaints. Commission decisions provide attachers and utilities alike with useful precedents that facilitate the negotiation of pole agreements and deter behavior that a utility knows will be swiftly rejected by the Commission.⁹² The current Commission policy of strongly encouraging mediation as a prerequisite to filing a complaint often ends up delaying resolution because there are no established timeframes for completing such mediation and utilities have little incentive to do more than participate in the process. The fact that Commission remedies typically limit utility refund liability to the period after the date a complaint is filed, or to prospective relief from other unjust and unreasonable practices, underscores utility incentives to delay.

⁹¹ *Id.*

⁹² The number of pole attachment complaints filed with the Commission has diminished significantly over time as precedents helped to guide attaching parties and pole owners in their negotiations and in their resolution of disputes. 1998 Pole Order ¶ 10 n.37. The order explains that from 1979 to 1991 about 246 complaints were filed, while from 1991 to 1996 only about 44 complaints were filed. At the time of the 1998 Order, only seven pole complaints were pending.

Several important, concrete steps can be taken to realign incentives and reestablish the timely issuance of critical precedents. The Commission should establish a specific timeframe for issuance of pole attachment complaint decisions. A number of states have adopted new video franchising laws in recent years to facilitate deployment of broadband and enhance competition. These states typically provide for expedited access to public rights-of-ways within 17 to 45 days after submission of a franchise application.⁹³ Prompt issuance of pole decisions by the Commission – within 90 to 120 days after submission – would harmonize Commission policies with these important state efforts consistent with national broadband policies.⁹⁴ Any Commission sponsored mediation can take place during this time period, and – with the clock running – utility compliance with Commission rules and policies would take on an added sense of urgency.⁹⁵

The Commission inquires whether it would improve the dispute resolution process if it, *inter alia*, (1) required parties to seek mediation or arbitration before filing a complaint or (2) established specialized forums to handle pole disputes. Comcast opposes either requiring

⁹³ See, e.g., Cal. Pub. Util. Code § 5840(h)(4) (44 days); 610.104(5) Fla. Stat. (30 days); Ga. Code § 36-76-4(d) (45 days); 220 Illinois Comp. Stat. 5/21-401(d)(2) (30 days); Ohio Rev. Code § 1332.25(D) (45 days); Tex. Utils. Code § 66.003(b) (17 business days).

⁹⁴ In related contexts requiring prompt action, the Commission has established 90 to 120 day timeframes for action. See, e.g., 47 C.F.R. § 76.41(d) (requiring local franchise authority action on franchise application within 90 days for party with existing facilities in ROW – “[w]e therefore seek to establish a time limit that balances the reasonable needs of the LFA with the needs of the public for greater video service competition and broadband deployment.” *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended*, Report and Order, FCC 06-180, 22 FCC Rcd. 5101 ¶¶ 69 (2007)); 47 C.F.R. § 76.502 (Commission provides local franchise authorities up to 120 days to act on a cable television company application to sell a cable system, which involves review of the legal, technical and financial qualifications of the purchaser); Order on Reconsideration, WT Docket No. 08-165, FCC 10-144, ¶¶ 1, 5-6 (rel. Aug. 4, 2010) (reaffirming rule requiring local action on wireless siting applications within 90 to 150 day timeframe “to promote the timely deployment of innovative broadband”).

⁹⁵ Of course, the parties would continue to have the right to work together informally before and after a complaint is filed to resolve their differences.

mandatory dispute resolution procedures or the use of specialized forums. Such requirements would simply add another layer of review (and associated delays and expense) before an attacher can obtain relief from the Commission.⁹⁶ In addition, as the Commission acknowledges, private settlements of disputes do not establish precedent that other attachers can rely upon to protect their rights.⁹⁷

2. Attachers should be compensated for damages caused by utility delays.

The Commission's proposal to provide compensatory damages to remedy unlawful denial or delay of access, and where a rate, term or condition has been found unjust or unreasonable, will create a long-needed incentive for utilities to timely comply with their legal obligations.⁹⁸ As the Commission explains, the current policy that typically limits attacher relief to a refund for unlawful payments made *after* a complaint is filed or limits relief to prospective orders requiring access does nothing to encourage timely attacher access or to deter utility noncompliance with their obligations. By providing compensatory relief, the Commission will create a direct and powerful incentive for utilities to promptly comply with their pole attachment obligations.

⁹⁶ The FNPRM inquires whether specialized forums, if adopted, should issue decisions and whether such decisions should be appealable to the Commission. To the extent that the Commission adopts this approach, the decisions should be appealable *de novo* to the Commission. A common problem associated with arbitration and other informal dispute resolution processes is that the preferred solution for the mediators is for the parties to compromise their differences. If applied to the pole attachment area without *de novo* Commission review, these informal mechanisms will lead to the rapid erosion of statutory attachment rights as utilities seek to undo the pole attachment act. *De novo* Commission review of any such decisions is also required by Section 224(b)(1) of the Act. FNPRM ¶¶ 78-80.

⁹⁷ NBP at 112.

⁹⁸ FNPRM ¶¶ 86-88.

The Commission proposes to delete rule 1.1404(m), which requires that a complaint be filed with the Commission within 30 days after access to a pole, duct or conduit is denied.⁹⁹ As the Commission notes, this provision provides an unrealistically short timeframe for resolving an access dispute informally with a utility. Moreover, it is not always precisely clear when an actual denial of access has occurred. Where it is unclear, parties are forced to file a complaint within 30 days of a possible denial to avoid losing rights at the Commission. While some circumstances may necessitate filing a complaint within 30 days, and attachers should retain the right to do so, no sound policy is achieved by compelling such a filing within 30 days. Eliminating the 30 day filing rule, together with providing compensatory damages through the applicable statute of limitations period, gives attachers the flexibility to attempt to resolve access disputes informally, without sacrificing their right to later seek Commission relief if necessary.

V. THE COMMISSION'S CURRENT UNAUTHORIZED ATTACHMENT POLICY PROPERLY BALANCES THE INTERESTS OF ATTACHERS AND POLE OWNERS

A. Utilities Significantly Exaggerate Unauthorized Attachment Claims.

Contrary to utility allegations, Comcast and other attachers are vitally interested in maintaining properly authorized facilities that are in compliance with applicable safety codes.¹⁰⁰ In addition to the obvious interest in maintaining safe plant that will not harm employees on the poles or the public at large, Comcast and most other attachers are legally obligated by franchise agreements, and state and local laws (as well as pole agreements) to maintain compliant

⁹⁹ *Id.* ¶ 82.

¹⁰⁰ See Reply Comments of Comcast Corporation in Docket 07-245, at 23 and Exhibit 3 (Declaration of Michael T. Harrelson) ¶ 4, filed Apr. 23, 2008 (“Comcast is vitally interested in safe and reliable pole infrastructure throughout the country as well as the safety of its employees, contractors, others who work on the poles, and the public.”) (hereinafter “April 2008 Comcast Reply Comments”).

facilities.¹⁰¹ Well maintained and compliant facilities provide for better, more reliable delivery of quality communications services, which in today's competitive environment is essential to survival.

Of course, with tens of millions of pole attachments nationally, the process of administering and surveying poles periodically for unauthorized attachments as well as for safety issues is a monumental task. Even under the best of circumstances, there will inevitably be many ambiguous situations and mistakes made regarding the status of attachments. However, the situation is significantly aggravated by systemic errors in utility recordkeeping and other utility practices that dramatically skew the number of unauthorized attachments reported in their “studies.”¹⁰²

The Commission reports that it cannot “gauge with certainty the extent of the problem of unauthorized attachments.”¹⁰³ However, the attacher comments in this proceeding, including comments by pole-owning ILECs, provide a strong basis for viewing the utilities' unauthorized attachment claims with overwhelming skepticism.¹⁰⁴ The record establishes that the following

¹⁰¹ See *Mile Hi Cable Partners, LP*, Order, 17 FCC Rcd. 6268 ¶ 10 n.26 (2002) (“*Mile Hi*”) (“Complainant not only has a contractual obligation to comply with the application process, but also has a separate obligation to comply with state and local government safety codes. Complainant must follow the agreed to application process to ensure that the location of its attachments in relation to Respondent's attachments is in compliance with these safety codes.”), *aff'd*, *Public Serv. Co. of Colorado v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

¹⁰² The Commission references a number of unverified utility “studies” that report unauthorized attachment incidence between 2% to 30% of attachments. FNPRM ¶ 89.

¹⁰³ FNPRM ¶ 91.

¹⁰⁴ See, e.g., April 2008 Comcast Reply Comments at 28-30; April 2008 Reply Comments of Time Warner at 47-49; March 2008 Knology Comments at 18; AT&T Reply Comments in Docket No. 07-045, at 32-35, filed Apr. 22, 2008; Reply Comments of Verizon in Docket No. 07-045, at 17-19, filed Apr. 22, 2008.

recurring problems exist across utility service territories which lead to exaggerated utility assessments of unauthorized attachments:

- Poor utility recordkeeping, including –
 - Changes in pole ownership that result in authorized poles being recharacterized as unauthorized by the new pole owner;
 - Computerization of pole records leading to loss of permit data;
 - Assessing penalties for attachments not owned by the attacher (often not even for poles in the attacher’s service territory);
 - Assessing penalties for attachments on poles not owned by the utility;
 - Renumbering poles without updating databases to correlate new pole numbers with preexisting permits associated with old pole numbers;
 - Failure to enter permitted attachments in records; and
 - Failure to delete permitted attachments that are no longer in place (thus charging for non-existent attachments).
- Unilateral reclassification by utilities of non-current carrying service and driveway poles as requiring a permit (historically no permits were required by many utilities for these poles);
- Use of independent contractors compensated in a manner that rewards discovery of “unauthorized” attachments (*i.e.*, bounty or contingency arrangements that pay contractors a percentage of back rents and penalties collected); and
- Electric utilities’ increasing treatment of poles as a profit center¹⁰⁵ thereby incentivizing utilities to “discover” unauthorized attachments, relying on attachers to not have the time or records to disprove the utility charges.

As a result of these errors and inappropriate profit incentives, substantial sums are paid annually to utilities in unjustified back rents and penalties for lawfully permitted, but

¹⁰⁵ See, e.g., April 2008 Comcast Reply Comments at 3-5; March 2008 AT&T Comments at 8; MacPhee Decl. ¶¶ 17, 19; March 2008 Knology Comments at 12.

misclassified, attachments.¹⁰⁶ When attachers are able to research reported unauthorized attachments, a large percentage of the utility claims are reversed.¹⁰⁷

B. The Current Five-Year Back Rent Remedy Is Appropriate And Prevents Utilities From Abusing Their Monopoly Control Of Poles.

Despite the complex circumstances described above, for decades attachers and utilities have managed to resolve issues among themselves without the need to resort to engaging regulatory bodies for relief. In this context, the Commission's five-year back rent formula for unauthorized attachments has worked reasonably well to place some limits on utilities whose superior bargaining power and monopoly control of poles continue to give them a unique ability to exploit attachers and to impose excessive charges and penalties.

Significantly, the Commission's five-year back rent penalty was established as a carefully balanced response to efforts by a utility to exploit its monopoly pole power by imposing over \$6 million dollars in penalties on an attacher. In that case, the utility claimed the attacher had over 25,000 unauthorized attachments, however, on review, both the Commission and the appellate court found that the attachments were not unauthorized at all.¹⁰⁸ In this proceeding, a number of

¹⁰⁶ In fact, utilities have no downside in asserting frivolous and intentionally inflated claims regarding the number of unauthorized attachments. If the attacher fails to research the utility claims and pays the associated back rent, then the utility profits handsomely for each wrongfully asserted unauthorized attachment claim. If the attacher can prove the utility wrong, the utility can just delete the wrongful charge without any liability for the substantial costs imposed on the attacher to disprove the allegation.

¹⁰⁷ See, e.g., April 2008 Comcast Reply Comments, Exhibit 5 (Declaration of John Detweiler) ¶ 3 ("It is not unusual for Comcast to reverse a large percentage of the initial unauthorized classifications once the situation is reviewed and to receive sizable refunds of the penalties assessed by PPL...."); March 2008 Time Warner Comments at 55-56; April 2008 Time Warner Reply Comments at 47-49.

¹⁰⁸ In rejecting the utility's \$6 million claim, the Commission noted that the payment of up to five years back rent "is consistent with general contract principles that prohibit the enforcement of unreasonable penalties for breach of contract." *Mile Hi* ¶ 10.

attachers, including pole owning ILECs, recognize that electric utilities now treat their pole plant as a profit center and that any increase in unauthorized attachment penalties will be aggressively used to generate additional profits.¹⁰⁹

The Commission should retain its current policy on unauthorized attachment penalties. Utilities have not provided any reliable evidence of a problem and the lack of disputes at the Commission over this issue since the policy was adopted almost a decade ago provides solid evidence that attachers and pole owners are able to work these issues out themselves. Moreover, to the extent that utilities are concerned that some new attachers will be motivated to shortcut the application process to get on poles more quickly to compete, the Commission's proposals to speed pole access should ameliorate that concern.

C. The Commission Should Not Adopt Oregon's Unauthorized Attachment Procedures/Penalties.

The Commission should not adopt the pole attachment penalty regime implemented by the Oregon Public Utilities Commission. Initially, it should be noted that the Oregon PUC's unauthorized attachment rules are only one piece of a broader pole attachment regulatory regime whereby the PUC involves itself in a vast array of field issues and policies that extend far beyond the Commission's experience, resources and likely (on some matters) jurisdiction. For example, the PUC rules impose specific procedures regarding the timing of system wide utility pole inspections,¹¹⁰ identification and correction of safety violations on poles,¹¹¹ establishment of

¹⁰⁹ See *supra* note 105.

¹¹⁰ See OAR 860-024-0011 (1)-(2). These provisions, *inter alia*, require pole owners to comply with the PUC Safety Rules (*i.e.*, the NESR), conduct regular "detailed" annual plant inspections over a 10 year revolving cycle, provide regular progress reports to the PUC; maintain written inspection "policies, plans and schedules" and make them available to the PUC.

duties on pole owners,¹¹² and establishment of penalties for unauthorized attachments and safety violations under certain conditions.¹¹³ While the Commission suggests that the process in Oregon reflects a proper balance among attachers and pole owners,¹¹⁴ the reality is that the penalty system has resulted in substantial controversy and its success is far from assured. Ironically, after much litigation, the PUC's unauthorized attachment sanction (while initially set in 2000 at 30 times back rent for each unauthorized attachment) was reformed in 2007 as a result of utility abuse to now mimic the Commission's five-year back rent policy.¹¹⁵

Many other issues remain unresolved under the PUC's rules. For example, an attacher is entitled to notice regarding alleged safety violations and an opportunity to submit a "plan of correction."¹¹⁶ However, utilities routinely reject the adequacy of the attacher's plan without

¹¹¹ See OAR 860-028-0115 (4) (providing for reimbursement of attachers by pole owners under specified circumstances); *id.* 860-028-0120 (5), (6) (providing timeframes and correction procedures).

¹¹² See OAR 860-028-0115 (1)-(7). For example, the rules require that a pole owner "install, maintain, and operate its facilities in compliance with Commission Safety Rules." In addition, "an owner must ensure the accuracy of inspection data prior to transmitting information to the pole occupant." Where an attacher makes a safety correction to a pole that was not caused by the attacher "a pole owner must reimburse the pole occupant for the actual cost of corrections."

¹¹³ See OAR 860-028-0140 (sanctions for no permit); OAR 860-028-0150 (sanctions for violation of other duties (*i.e.*, safety violations, etc.).

¹¹⁴ See FNPRM ¶ 95 ("The Oregon penalties have been tested and refined with assistance from the Oregon Joint Use Association.").

¹¹⁵ In restoring the five-year back rent approach for unauthorized attachments, the PUC sought a more balanced sanctions approach "to provide an incentive for compliance without allowing for possible [utility] abuses." *Rulemaking to Amend and Adopt Rules in OAR 860, Division 028 Relating to Sanctions for Attachments to Utility Poles and Facilities, AR-510*, Order No. 07-137, Public Utility Commission of Oregon, at 26 (Apr. 10, 2007). Although the PUC rules provide for \$100 plus five years back rent in cases where an attacher declines to participate in a utility pole inspection, utilities rarely provide any notice of inspections that any attacher has the ability to decline. OAR 860-028-0140(2)(b). Therefore, as a practical matter, attachers are essentially subject to a five-year back rent penalty.

¹¹⁶ The FNPRM suggests initially that it is seeking a solution for unauthorized attachments; however, the FNPRM also suggests a more sweeping involvement in the processes and penalties arising from all pole safety violations. For example, the Commission inquires whether a sanctions policy should make exceptions for *violations* caused or

providing an adequate explanation or alternative plan thereby triggering disputes and throwing the sanctions process into disarray.¹¹⁷ It is also questionable whether the Commission has the jurisdiction to impose and enforce the kinds of obligations on utilities that are key to Oregon's far reaching regime. For example, it is not apparent that the Commission can dictate specific utility pole inspection schedules and practices in all Commission regulated states or that the Commission can (or would) establish specific pole safety rules and require both attachers *and pole owners* to comply. Indeed, it would be near impossible for the Commission to monitor and enforce all of the additional requirements governing the 30 million poles in the 30 states subject to FCC jurisdiction.

While Oregon represents an interesting experiment in pole attachment regulation – involving a relatively small number of poles – it is not yet clear what answers can be fruitfully applied by the Commission. As noted, on the issue of unauthorized attachments, once the PUC established the level of sanction sought by the utilities (30 times past rent) the policy was immediately abused by utilities seeking to profit from their monopoly control of the poles. As a

contributed to by the pole owner or third parties. FNPRM ¶ 96. Normally, such exceptions would not be relevant to situations involving unauthorized attachments but only to properly permitted attachments (*i.e.*, where the attacher has applied and paid for the utility for make-ready to install a compliant attachment). The Commission should not adopt Oregon's processes and sanctions relating to safety issues. This is an area that is fact intensive and particularly unsuited to Commission expertise and resources. As Comcast demonstrated in its comments, utility claims that attachers routinely violate safety rules are highly exaggerated. March 2008 Comcast Comments at 25 n. 86 (*citing Florida Cable Telecomms. Ass'n v. Gulf Power Co.*, Initial Decision, 22 FCC Rcd. 1997, 2002 ¶ 17 (2007), Bowen Cross, Apr. 25, 2006, Tr., at 1066-76 (Gulf Power witness admits under cross-examination that NESC violations alleged to have been caused by communications attachers may have been caused by Gulf Power); April 2008 Comcast Reply Comments at 23-28, and Exhibit 3 ¶ 16 (Declaration of Michael T. Harrelson) (engineering analysis of utility safety claims against cable operator found that the utility itself had caused the vast majority of the violations), and Exhibit 4 (Appendix of Commission Authority Rejecting Utility Safety Arguments). Creating a penalty regime for safety issues will only incent utilities to further exploit their monopoly power over poles to profit unfairly from attachers and undermine broadband deployment efforts.

¹¹⁷ See OAR 860-028-0170(3).

result, the PUC reverted to a policy in line with the Commission's. Despite exaggerated utility claims regarding unauthorized attachments, the fact is that there are far fewer than suggested. Attachers and utilities can continue to successfully manage the inspection and verification process far more effectively among themselves in the field, as they have done for decades. For these reasons, Comcast urges the Commission to maintain its current policy on unauthorized attachments.

CONCLUSION

The Commission should adopt its proposed telecommunications pole rate formula, which will advance key national broadband objectives by lowering and unifying pole attachment rates consistent with recommendations in the National Broadband Plan. As demonstrated in these comments, the proposal is consistent with statutory requirements, is economically sound, and is more than fully compensatory to utilities. The Commission's proposals to ease and speed pole access will also significantly improve the broadband deployment process. That progress, however, will be derailed by the Commission's proposed modification of the "sign and sue" rule. The proposed modification of that rule will inject significant new delays and costs into the process of negotiating pole agreements and gaining pole access, and should, therefore, be rejected. Further, the Commission can effectively deter utility misconduct by promptly ruling on pole attachment complaints and providing compensatory damages for unlawful conduct. Finally, the Commission should not establish new penalties relating to unauthorized attachments or safety issues. The record demonstrates that utilities routinely exaggerate these concerns, which have been successfully resolved by the parties for decades.

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August 16, 2010

ATTACHMENT 1

DECLARATION OF TIMOTHY S. PECARO

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

In the Matter of)	
)	
Implementation of Section 224 of the Act;)	WC Docket No. 07-245
)	
A National Broadband Plan for Our Future)	GN Docket 09-51

DECLARATION OF TIMOTHY S. PECARO

August 16, 2010

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
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Implementation of Section 224 of the Act;)	WC Docket No. 07-245
)	
A National Broadband Plan for Our Future)	GN Docket 09-51

DECLARATION OF TIMOTHY S. PECARO

I, Timothy S. Pecaro, do hereby declare as follows:

I. Introduction

1. I am a Principal of Bond & Pecaro, Inc., a financial consulting firm based in Washington, D.C., specializing in the valuation and analysis of media and telecommunications properties. I founded the firm in 1986 and have been involved in the valuation and appraisal of media and telecommunications businesses and their assets since 1980. Prior to that time I was employed at the NBC television and radio stations in Chicago. I am on the Board of Directors and Strategic Planning Committee of the Media Financial Management Association (MFM) and past Vice-Chairman of the Association. I have been co-chair of its annual conference on two occasions. I have also served as co-chairman of the Association's Cable Television Committee. I am also a member of the Broadband Tax Institute (BTI). I am an expert in the valuation and appraisal of cable television

systems and their assets and have testified as an expert witness and prepared sponsored exhibits in connection with numerous media and telecommunications valuation matters before Federal, state, and local courts. I have been retained to appraise, for a fee, over 3,000 cable television, broadcast, common carrier, telecom, media, satellite, Internet, and technology properties.

2. I have been retained by Comcast Corporation to comment on issues raised by the Federal Communications Commission's ("FCC" or "Commission") Order and Further Notice of Proposed Rulemaking ("FNPRM"), released May 20, 2010, and published in the Federal Register on July 15, 2010, which seeks comment on "ways to minimize distortionary effects arising from the differences in current pole rental rates, consistent with the objectives of the National Broadband Plan and the existing statutory framework."¹ The FCC has proposed amendments to the rules that govern pole attachments of telecommunications carriers in order to further the goals of the National Broadband Plan. The goal of the FCC is to provide telecommunications carriers and cable television services with pole rate formulas that reflect just and reasonable rates, terms, and conditions. I have been asked to analyze the proposed rulemaking to determine whether the proposed revisions to the telecommunications rate formula are economically sound and consistent with applicable cost and rate principles of Section 224.

¹ FNPRM at para. 110, p. 46.

II. FCC Regulation of Pole Attachment Rates

A. Background.

3. The electric utility is the primary provider of poles in the public utility corridors, rights-of-way, and easements attached to by cable television systems and telecommunications service providers. The electric utility together with the telephone utility (which controls a significant but declining share of poles) have a monopoly on pole attachments in their service areas and any rents they negotiate -- if unprotected by FCC rate regulation -- would reflect a monopoly or “hold-up” value. To provide protection to the various attachers to utility poles, the FCC has held the responsibility of setting pole attachment rates based upon specific formulas that can be readily applied.
4. In most instances, where cable and telecommunications providers occupy space on utility poles, they have no practical or cost-effective alternative to the use of these poles. Zoning, environmental, municipal, and financial constraints make it impractical for any third party to construct new pole systems.² In any specific area, there is only one provider of pole space and there is virtually always surplus space on those poles.

B. The Cable Pole Rate Formula is Just and Reasonable, Fully Compensatory and Economically Sound.

5. Where utilities accommodate cable attachers pursuant to Section 224, the current cable rate formula is more than compensatory. Because there is

virtually always surplus space on the poles used for attachment, there is no opportunity cost for the utility to provide such space to attachers. The utilities nonetheless receive two streams of revenue flowing from pole attachments. First, the cable attacher is required to pay all “make-ready,” which includes the pole rearrangements, inspections, pole replacements, and other direct incremental costs of making space available to the cable operator. When poles are replaced by the attacher, ultimate ownership of those assets conveys to the utility. These expenses are paid to the utility at current cost and cover virtually all marginal costs associated with an attacher’s use of a pole. Second, in addition to covering a utility’s marginal costs through make-ready payments, the cable attacher is required to pay a recurring fee that assures the utility a rate of return plus a recovery of the capital costs of depreciating the pole and the expenses of maintaining, administering, and paying taxes on the pole in proportion to the space used by the cable attachment. To the extent that the cable rate provides utilities with more than their marginal costs associated with an attachment, the attacher is actually defraying costs that utilities and their customers would otherwise bear themselves.

6. This payment of marginal costs through make-ready and a recurring fee (reflecting the attacher’s proportional share of fully allocated costs) allows utilities a recovery that is far in excess of the just compensation appropriate

² The rates, terms and conditions of pole attachments generally are regulated because of the bottleneck monopoly status of poles. They are essential facilities that historically have been used for anti-competitive purposes by pole owners.

for these economic arrangements.³ Several courts have found that this arrangement is more than compensatory to the utilities, is just and reasonable, and satisfies just compensation requirements.⁴

7. Pole rent set at marginal cost under such circumstances is also economically sound because it represents the most economically efficient pricing mechanism which produces many associated benefits to society. In a fully competitive market, prices are driven towards marginal cost, which ultimately represents the most economically efficient price for a good or service. Marginal cost pricing lowers the cost of inputs and ultimately the prices consumers pay. Fully competitive markets also stimulate more consumer choice and variety to the benefit of all.
8. In testimony provided before the FCC, I have previously explained that the nature of cable television pole attachment rights and interests, and the monopoly inherent in the poles owned by utilities, practically mandate the

³ The FCC's cable pole attachment rate methodology, which uses publicly reported, actual underlying costs, provides more than just compensation and fair value to the utilities. A properly crafted and computed actual cost methodology is so straightforward that it can be updated annually without agency intervention, thus allowing each year's costs to be substituted for those in place during the prior year. The FCC formula may be applied by recourse to publicly available information contained in existing annual reports, thus precluding the need for an extended rate case. When an embedded cost-based methodology is established in a self-adjusting formula in this manner, new rates, based on the latest year-end actual publicly reported costs, are brought current automatically, with a minimum of private, ministerial effort, and no regulatory involvement.

⁴ *FCC v. Florida Power Corp.*, 480 U.S. 245, 253-54 (1987)(finding that it could not “seriously be argued, that a rate providing for the recovery of fully allocated cost, including the cost of capital, is confiscatory.”); *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (“Alabama Power”)(“any implementation of the [FCC cable pole attachment rate] (which provides for much more than marginal cost) necessarily provides just compensation”); *Metropolitan Transportation Authority v. ICC*, 792 F. 2d 287, 297 (2d Cir. 1986) (“[C]ompensation is adequate since [the facility owner], in obtaining avoidable costs, will receive what it would have had but for the taking. In other words the owner [of the facilities]...will be put into the same position monetarily as it would have occupied if the property had not been taken, and this is precisely the guiding principle of what is just compensation....If the Fifth Amendment required sharing [of overhead costs of ownership then the owner] would be put in a better position...”).

use of the historical cost approach in the valuation of such interests.⁵ Using historic costs not only meets the appropriate appraisal standards for these economic arrangements; it also satisfies regulatory policy.⁶ These conditions also apply to attachments by telecommunications providers.

C. The Current Telecom Rate Formula Overcompensates Utilities.

9. In the Telecommunications Act of 1996, the FCC expanded Section 224 to include two separate pole attachment formulas; one for those used for cable service (i.e. the cable rate formula), and another for telecommunications services, known as the telecom rate formula. Over time, it has become apparent that these two formulas yield substantially different pole attachment rates despite almost indistinguishable equipment attached to the pole. In almost all cases the telecom rate formula yields a higher rate. In fact, according to the National Broadband Plan, the telecom rate formula yields an average annual difference that is approximately \$3 higher than the rate calculated under the cable formula.⁷ Based on a National Cable & Telecommunications Association (“NCTA”) study, the difference between

⁵ Reply of Alabama Cable Telecommunications Association in P.A. No. 00-003, Exhibit 1 (Declaration of Timothy S. Pecaro) ¶ 55 (filed August 29, 2000).

⁶ The Commission, its bureaus and administrative law judges, and reviewing courts have all rejected replacement costs and other non-historical, cost-based approaches finding the FCC formula more than fair, just and reasonable. *Alabama Cable Telecomms. Ass’n v. Alabama Power Co.*, Application for Review, FCC 01-181, 16 FCC Rcd 12209, 12235 ¶¶ 45-58 (2001) *aff’d*, *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1369 (11th Cir. 2002) (“Because of the unusual nature of pole attachments, and the nature of the property interest conveyed, the three standard appraisal techniques for determining market value, comparable sales, income capitalization, and replacement costs less depreciation, are particularly unsuited for valuing pole attachments.”); *In the Matter of Commission’s Rules and Policies Governing Pole Attachments, Partial Order on Reconsideration*, 16 FCC Red. 12, 103 at Paras. 15, 17 (2001) (rejected pole attachment rates based on replacement cost), affirming *Fee Order*, 15 FCC Rcd, 6453, at Para. 10 (2000) (replacement cost methodology rejected). *See also Florida Cable Telecomms. Ass’n v. Gulf Power Co.*, Initial Decision, FCC 07D-01, 22 FCC Rcd 1997, 2004 n.10 (“replacement cost methodology would not be used”).

the two rates is even greater and leads to a total rate impact of as much as \$672 million *annually*.⁸

10. The FNPRM explains that this rate differential is obstructing national broadband deployment objectives and that the proposed revision of the telecom rate formula redresses this concern by unifying and lowering pole rates for telecom providers.⁹ Moreover, the FNPRM recognizes that the telecom rate formula is unnecessarily high because it allocates a significant share of pole costs to telecom attachers that are neither supported by cost causation principles nor required by Section 224(e).
11. Accordingly, the FNPRM proposes an alternative computation of the telecom rate formula based upon cost causation principles and application of either the cost based telecom rate or the cable rate, whichever is higher. The Commission has chosen to leave the cable rate formula as it is in the present FNPRM and to focus on adjustments to the telecom rate formula in order to remove the unwarranted rate differential and to bring telecom pole rates as close as possible to cable pole rates.

III. The Lower Bound Rate More Accurately Reflects the Limited Incremental Costs to a Pole Owner of an Additional Attacher

12. The FCC's proposed Lower Bound Rate under section 224(e) is intended to provide a rate that "covers the pole owners' incremental cost associated with attachment."¹⁰ However, the FCC concludes that the costs utilized in the

⁷ FNPRM at para. 116, p. 49.

⁸ Ibid.

⁹ FNPRM at para. 118, p.50.

¹⁰ FNPRM at para. 133, p. 56.

Lower Bound formula need to be “somewhat above incremental cost”¹¹ because of the effects of the allocation methods in the 224(e) formula (i.e. only 2/3 of “costs” of unusable space assigned to attaching entities). However, if the “costs” are sufficiently above incremental cost, the Commission concludes that the “resulting pole rental rate [under the 224(e) formula] would allow the utility to recover the incremental cost associated with the attachment.”¹² As discussed earlier, cost causation principles, as well as the law of just compensation, indicate that an additional attacher to a pole should pay the marginal costs associated with its presence on the pole.

13. If there were no additional service providers on the pole, the utility would bear all of the capital and operating costs associated with the pole. When an additional attachment is made to the pole, the utility must be compensated for any additional capital and operating costs that are directly attributable to that additional attachment. As discussed, the capital costs associated with a pole attachment are recovered through the make-ready charges applied to the additional attacher.

A. Removing Capital Costs from the Lower Bound Rate is Economically Justified

14. In order to calculate the Lower Bound Rate for telecom services, the FCC has developed a telecom pole attachment rate formula based on cost causation principles. This formula removes certain capital costs that the Commission has determined are unsupported by cost causation principles or

¹¹ Ibid.

¹² Ibid.

are *de minimis*. The resulting rate approximates (although it is still comfortably above) the marginal cost of a pole attachment taking into account the telecom rate formula's cost allocation methodology for unusable space. The specific adjustments are described in the following paragraphs.

15. We agree with the Commission that capital costs should be excluded from the Lower Bound Rate calculation because these costs are either attributable to make-ready expenses which are already fully paid by the attacher or because the attacher is not the "cost causer" and should not be charged for the existing pole. The Commission concluded that "most, if not all, of the past investment in the pole would have been incurred regardless of the demand for attachments other than the (pole) owner's attachments."¹³ Because the capital cost of an attachment is (i) fully paid by the attacher (make-ready); (ii) non-existent; or (iii) *de minimis*, it is fair from an economic standpoint to eliminate this element of the telecom rate formula in determining the Lower Bound Rate. Moreover, consistent with economic theory, by eliminating such excess costs, the Lower Bound Rate more closely approaches the true marginal cost of an attachment thereby reflecting a more economically efficient price for pole attachments.
16. Utility pole owners contend that there are considerable extra capital costs expended in providing taller utility poles that can accommodate additional attachers. The utility, however, provides poles that are of a height that are suitable and necessary solely for the utility's needs. There are several

¹³ FNPRM at para. 135, p.57.

reasons that utilities might “over-invest” in poles – because they meet their own specific needs in the subject environment; because it contributes to the utility’s rate base by establishing higher capital costs for utility ratemaking proceedings; or because they are able to profit from the addition of other service providers on that pole. It is this last point that is most relevant here. The only rational impetus for the utility to incur these additional costs would be the expectation that they will subsequently be able to profit from installing these taller poles. If the pole is found to be of inadequate height for additional attachers, it is part of the make-ready process to replace the pole *at the expense of the additional attacher*. Since it is the additional attacher that bears the cost of any necessary pole replacement, it *cannot* be the case that the utility is required to invest its own capital in taller poles. In most cases, the poles needed for the utility’s own purposes can accommodate the typical additional attachers.

17. We therefore agree with the Commission’s analysis in Footnote 365 of the FNPRM. A company must make decisions regarding the allocation of its limited capital resources to provide the best possible returns to shareholders. In making its capital allocation decision, a utility must act prudently in order to maximize the use of its capital. The utility is under no obligation to construct a pole taller than what is required solely for its own needs, and installing a pole that is taller than necessary is strictly speculative and contrary to efficient capital management. Indeed, if the pole could not accommodate an attacher, the burden falls on the attacher to pay the

necessary costs to ensure that it receives the required amount of space on the pole. If the pole never attracts an attacher, the utility's excessive investment in the taller pole would be wasted capital. Therefore, it would be wholly irrational for the utility, as well as inconsistent with a utility's capital preservation obligations, to risk nonrecovery of these costs absent a direct economic benefit.

18. Depreciation – Excluding a factor for depreciation in the Lower Bound Rate is appropriate and prevents attachers from being “double-charged.” As described previously, the utility incurs no incremental capital costs for the pole as a result of additional attachers that are not reimbursed by the attacher. Depreciation is a non-cash expense that relates to the amortization of the underlying capital assets over a period of years. It is used for tax and accounting purposes to adjust the original value of an asset to its net book or net tax value over time. It is not an operating expense of the utilities and should not be included in the carrying charge formula. In fact, depreciation is actually a benefit to the utility by providing a non-cash expense that reduces taxable income. Excluding depreciation from the Lower Bound Rate is consistent with the principle of cost causation, since the utility would generate the same level of depreciation expense from its pole assets regardless of the presence of any attacher on the poles.
19. Rate of Return – The Commission is correct to exclude any rate of return from the Lower Bound Rate calculation because it has no relevance when measuring the marginal cost of an attachment. In fact, the inclusion of a rate

of return in the telecom pole attachment rate formula represents double compensation to the pole owner and is not supported by cost causation principles. The regulated utilities have already been provided with a rate of return on the pole network investment as part of the Public Utility Commission (“PUC”) and Public Service Commission (“PSC”) ratemaking in the various states in which they operate. Providing the pole owner with additional compensation for a rate of return in the carrying charge formula results in overcompensation. This overcompensation is magnified to the extent that the Commission’s outdated and artificially high 11.25% default rate of return is applied in setting rates.

20. Exacerbating the problem, the pole owner is compensated by the PUCs and PSCs in their rate of return calculations for the make-ready expenditures made by the telecom and cable attachers. Currently, the utilities are then compensated a second time by the attachers through the rate of return input contained in the carrying charge formula. This is clearly inappropriate and unsupported by cost causation principles. The rate of return input should be excluded from the Lower Bound pole attachment rate formula because it provides double compensation for the same capital assets, many of which were already fully paid for by the attachers.
21. Taxes -- The Commission has also properly excluded income taxes as capital costs from the calculation of the Lower Bound Rate based upon cost causation principles. This has been done “because they apply to the return

equity holders receive for providing funds used to pay for the pole.”¹⁴ Taxes based on the utility’s profitability should not be included because they would be incurred regardless of the presence of the attacher. By excluding such taxes, the Commission is moving the price of pole attachments down towards the more economically efficient marginal cost price point.

22. Cost causation principles also dictate that property taxes and other taxes such as possessory interest taxes should not be included in the Lower Bound Rate calculation. The attachers are already responsible for their own tax obligations, including income, property, and possessory interest taxes. It is inconceivable that the attachers should be asked to pay similar taxes on behalf of the utilities simply because of occupying a small portion of the space on the pole owned by the utility. Certainly the presence of an attacher does not contribute to the tax obligations of the utility and therefore should not be included under marginal cost principles.

B. Retaining Maintenance and Administrative Carrying Charges is Consistent with Economic Theory, but Still Overallocates Costs to Attachers, and Overcompensates Utilities

23. The resulting Lower Bound Rate is more grounded in cost causation principles than the current telecom or cable rate formulas. The revised formula consists of substantially reduced carrying charge factors utilizing only maintenance and administrative expenses, and the existing telecom unusable and usable space allocation factors. Application of this formula by the Commission staff in the FNPRM yields telecom attachment rates that are

¹⁴ FNPRM, Footnote 372, p. 59.

below the cable rate formula and well below the currently prevailing telecom Upper Bound pole attachment rate formula.

24. Maintenance and Administrative Charges -- Routine maintenance on a pole is relatively limited and, in any case, is unrelated to the number of attachments on the pole. Nevertheless the Commission includes these items in the Lower Bound Rate reasoning that “it is likely that an attacher is causally responsible for some of the ongoing maintenance and administrative expenses relating to use of the pole.”¹⁵ Rather than “embark upon a large-scale ratemaking proceeding” to identify the precise level of such costs caused by attachers, the Commission conservatively decides to simply include the fully allocated share of such costs in the carrying charges.
25. The main concern with regard to pole maintenance is deterioration of the pole caused by insects, fungi, plants, and woodpeckers. In most cases, decay of treated poles occurs just below the groundline where conditions of moisture, temperature and air are most favorable for growth of fungi. All of the primary aspects of pole inspection associated with pole maintenance – visual, sounding, invasive core sampling, and excavation – are designed to detect general decay of the pole. None of these factors are associated in any material way with the introduction of additional attachers to the pole.
26. Administrative costs, which would include primarily such costs as billing functions, also would not vary materially depending on the presence of attachers or the type of transmissions taking place through the cable. In

¹⁵ FNPRM at para. 138, p. 59.

addition, many utilities already impose additional charges on attachers to recover pole permit application processing charges and “loaders” covering administrative and other cost overhead relating to make-ready activities conducted by the utility.

C. The Lower Bound Rate is Fair and More Than Fully Compensatory to Utilities.

27. As with the cable rate, the Lower Bound Rate ensures that the utility recovers more than its marginal costs from attachers through the dual revenue streams of make-ready and recurring rent payments. The utility recovers all capital costs caused by the attacher in advance through make-ready payments. Therefore, the utility’s marginal costs are virtually all covered, even before considering the additional recurring rent payments paid by attachers. Since the required recurring rent is set at a level that ensures that the utility recovers substantially more than the actual maintenance and administrative expenses caused by attachers, a significant cushion above the actual marginal cost of a pole attachment is contained in the Lower Bound Rate proposal. Consequently, and for the same reasons explained earlier with regard to the cable rate, the Lower Bound Rate is fair and more than fully compensatory to the utility.

D. The Lower Bound Rate Overstates Allocations to Attachers and is Too Generous to Utilities Since Cable and Telecommunications Providers Have Inferior Attachment Rights

28. While the Commission’s proposed Lower Bound Rate is economically supportable and closer to more economically sound pricing for pole

attachments (i.e. marginal cost), the proposed formula still overallocates expenses to such attachers.

29. The use of a pole by a cable system or telecom company neither impedes nor limits the development of the property for other purposes. The loss to a pole owner is non-existent. No loss to a pole owner has ever been demonstrated, and any costs that are incurred to accommodate an attacher are exceeded by the combination of make-ready payments and the proposed Lower Bound Rate. In fact, because of pole make-ready charges, the cable television and telecom systems actually pay to improve the utilities' pole structure without any corresponding reduction in rents. Additionally, the presence of attachers on poles actually helps utilities defray some of the costs of the physical plant it is otherwise required to construct as part of its public service obligation. In many cases the attacher provides an additional five feet of rentable space to the utility through its make-ready improvements. As discussed above, where recurring rent payments exceed the actual costs imposed on the utility by the attacher, the presence of attachers actually contributes towards paying costs that would otherwise be borne by the utility and its customers.
30. Overallocation of pole costs to attachers is also caused by the Commission's continued use of outdated presumptions regarding pole heights and the amount of usable space on today's poles. The Lower Bound Rate assumes a pole height of 37.5 feet, even though the standard for poles is currently 40 feet or more. The allocation formula assumes that there is generally 13.5 feet of usable space, while in actual practice there is 16 feet of usable space.

The impact of this difference is that telecom attachers are paying for 7.41% of the pole's usable space even though they occupy only 6.25%, resulting in telecom attachers having an over-allocation of more than 18%.

31. The Lower Bound Rate also results in an overly generous rent given the inferior pole attachment rights accorded to cable and telecom attachers, particularly given the minimal burden their lines place on poles. The legislative history notes the relationship between rights accorded to an attacher and the corresponding level of rent, i.e., attachers with fewer rights should pay lower rental rates.¹⁶ The Lower Bound Rate formula does not account for this important aspect of establishing a rental rate which, in light of the minimal rights accorded telecommunications attachers, would justify a pole rent close to marginal cost.
32. The record in this proceeding provides ample evidence regarding the inferior pole attachment rights accorded to telecommunications and cable attachers by pole owners. The Coalition of Concerned Utilities points out that “ILECs receive a whole host of advantages that third party attachers like cable companies and CLECs do not enjoy. . . . [P]ermitting ILECs to receive the same rate as cable companies and CLECs would be grossly unfair to the cable companies and CLECs. . . .”¹⁷ Examples of the superior ILEC rights

¹⁶ “The level of pole attachment fees is intimately connected with the terms and conditions of the pole space leasing agreements...[A] fee designed to recover only the utilities avoidable costs, which could be expected to be minimal since most of those costs are the outlays that should be fully recovered in the make-ready charges, would justify treating [the attacher] as a clearly secondary use subordinate in every respect to the provision of electric and telephone service.” 1977 Senate Report 95-580 at 19.

¹⁷ Comments of Coalition of Concerned Utilities in Docket 07-245, at 53-56, filed March 8, 2008.

compared to CLEC and cable attachers under their respective pole agreements include:

- ILECs have minimal make-ready costs;
- ILECs need not seek approval from the electric company to make attachments as cable and CLECs do;
- ILECs do not pay for post-construction inspections;
- Electric utilities often obtain rights-of-way for ILECs while cable and CLECs must secure their own;
- ILECs are guaranteed a specific number of feet on each pole while cable and CLECs must pay make-ready if pole space is limited; and
- ILECs do not incur relocation and rearrangement costs.

33. Unusable Space Allocation Factor - Although required by the statute, the unusable space allocation factor included in the telecom rate formula does not accurately reflect the burden placed on the pole by the electrical and telephone utilities and other attachers. The telecom unusable space allocation factor is based upon the total number of attaching entities and not on the burden each places on the pole. For example, the electrical utility occupies the top position on the pole, installs a cross-arm, typically installs 3 to 6 independent electrical lines, and requires a significant clearance between itself and other pole attachers due to the danger of electrocution. By contrast, a telecom or cable attacher requires a much smaller amount of space at a lower position on the pole, has a single line and no cross-arm, and does not present a public safety hazard. Clearly, a space allocation factor based upon only the number of occupying entities does not account for the burden on the pole or reflect the intensity of use of the electrical utility versus the telecom and cable attachers.

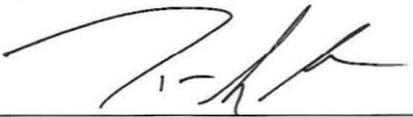
34. An optimal rate formula should properly consider the number of lines utilized by each attacher, the height and width of the space utilized by each attacher, the position on the pole (with the highest attachment position having the greatest value), and the rights and protections afforded to each attacher compared to those of the utilities. The current telecom pole attachment rate formula does not consider any of these relevant factors with regard to unusable space costs and, as a result, overallocates the capital costs and operating expenses to the telecom and cable attachers. The electric utility places the greatest burden on the pole and deserves the greatest allocation of any capital costs and expenses.
35. The current space allocation factor is unfair to the attachers since it overcompensates the pole owners who place a greater burden on the pole and occupy premium positions on the pole. Telecom and cable companies place the least burden on the pole and their pole spaces are preemptible based upon the needs of the utilities. Consequently, the Commission should also recognize in establishing a just and reasonable pole attachment telecom rate under Section 224(e) that the pole owners occupy substantially more vertical and horizontal pole space than the attachers, that the higher positions on the pole represent greater economic value than the lower positions occupied by the attachers, and that they have additional rights not available to attachers such as CLECs and cable companies.

IV. Conclusion

36. Based upon the foregoing, it is my opinion that both the existing cable rate formula and the proposed Lower Bound Rate are based on sound economic principles and produce rates for utilities that are fair and more than compensatory. Further, it is my opinion that the application of either of these rates to telecommunications attachers will result in a rate that provides just, fair, and reasonable compensation and encourages the continued expansion of broadband and other advanced services. Either of these rate options will move the price of telecommunications pole attachments closer to the most economically efficient price level of marginal cost compared to the current telecom pole attachment rate formula. Therefore, establishing the rate at one of these lower levels is an economically sound policy choice and comports with the requirements of Section 224(e).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: August 16, 2010



Timothy S. Pecaro