

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

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| In the Matter of |) | |
| |) | WC Docket No. 07-245 |
| Implementation of Section 224 of the Act; |) | |
| Amendment of the Commission's Rules and |) | GN Docket No. 09-51 |
| Policies Governing Pole Attachments |) | |

**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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August 16, 2010

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EXECUTIVE SUMMARY

The Commission’s proposed pole attachment rate structure is critical to achieving the National Broadband Plan’s objective to provide every American with “access to broadband capability.” By establishing rates at levels that are as low and close to uniform as possible, the Commission will eliminate known disincentives to investment and promote timely and robust deployment of broadband facilities. At the same time, the proposed overall structure is fully consistent with the language of section 224 and produces rates that are just, reasonable and fully compensatory. The proposed modifications to the lower bound formula correctly recognize that capital costs associated with attaching entities are already accounted for in make-ready payments. And, in setting the floor for broadband rates at the existing cable rate – a rate that has been upheld by the Supreme Court as fair and more than compensatory for broadband attachments – the Commission ensures that pole owners are more than compensated for the cost of accommodating third party attachments.

In these comments, 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 within which the Commission could faithfully implement the Act. Specifically, NCTA proposes modifications to the lower bound of that range based on a “marginal cost proxy,” which accounts not only for overpayments for certain capital costs recognized by the Commission, but also for overpayments for certain operating expenses being made under the existing formula. NCTA also applies a “fresh look” to the upper bound of that range that updates certain capital cost inputs and operating expenses to more accurately measure the actual carrying charges attributable to pole attachments while adhering to a fully allocated approach. Both approaches

adhere to the existing space allocation methods of the statute. The end result is an upper and lower bound to the possible range that remove existing overpayments for costs and expense elements that have nothing to do with pole attachments.

This study confirms that the Commission's approach is correct and is consistent with the Commission's pro-competitive broadband policies, which have triggered billions of dollars in broadband investment. It builds on decades of regulatory policy in which the Commission both recognized the connection between regulated pole attachment rates and investment by attachers and vigorously protected the right to attach at reasonable rates. It also adheres to the cost causation principles promoted by the *FNPRM* approach and confirms it with even more refined measures of the true cost of attachments.

While NCTA supports the Commission's proposed revisions to the rate formula, it cautions the Commission against modifying other long standing rules and policies addressed in the *FNPRM*. For example, utilities have offered no evidence to support changes to Commission rules permitting an attacher to sign an agreement and subsequently petition the Commission for relief from terms unfairly forced upon it during "negotiations." Indeed, the *FNPRM* recognizes that utilities continue to have monopoly control of poles and that the same "coercive pressure in pole attachment agreement negotiations" that utilities held at the time the sign and sue rule was adopted continue to exist today. Without retaining the authority to review the terms and conditions in executed agreements, the Commission will not have the ability to enforce its responsibility to ensure that terms and conditions are just and reasonable. Moreover, requiring an attacher, at the time of execution, to memorialize every potentially problematic term in complex, often lengthy agreements will necessarily delay the attachment process in direct contravention of the Commission's goal to expedite broadband deployment.

Similarly the Commission should not depart from long-standing precedent governing unpermitted attachments to give utilities unfettered discretion to impose even greater penalties. Utility claims alleging the existence of vast numbers of unauthorized attachments are both grossly overstated and contradicted by the utilities' own submissions made to state regulatory bodies in safety compliance dockets. To the extent there are discrepancies in the number of billed versus actual attachments, most are caused by utility billing and record keeping processes, not by attachers seeking to avoid the permitting process. Indeed, attachers have an equally strong interest in ensuring that billing records are accurate and that attachments are vetted through the permitting process. Moreover, the Oregon experience, rather than providing a model for emulation, provides a clear example of why additional penalties should not be allowed.

Finally, the Commission should amend its rules to create enforcement mechanisms that incent compliance by utilities and encourage prompt, pre-complaint resolution of disputes. The Commission's proposals to expressly provide for compensatory damages and to extend the date for refunds to state statutory limits will send a strong signal to utilities that game playing will not be tolerated. Additionally, adopting timetables and best practices for prompt dispute resolution and eliminating the requirement that access complaints be filed within 30 days of a denial will help to avoid complaints being filed unnecessarily.

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**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (NCTA) hereby submits its comments in response to the *FNPRM* released in the above-captioned proceeding.¹ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest broadband provider of high-speed Internet access after investing over \$160 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide voice service to millions of American homes and are rapidly making these services available nationwide.

The *FNPRM* gives thoughtful consideration to numerous aspects of the Commission's regulations governing pole attachments, and how they can be amended to improve access to poles and expedite the deployment of affordable broadband services. Following the directives of the National Broadband Plan,² the *FNPRM* proposes to establish pole rental rates that are lower and more uniform than the current structure, to expedite the build- out of affordable broadband

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

² *Connecting America: The National Broadband Plan*, GN Docket No. 09-51, at 109-118, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf (Omnibus Broadband Initiative, Mar. 16, 2010) (National Broadband Plan).

infrastructure, and to reform the course of action for resolving pole attachment disputes. Specifically, the Commission proposes to revise its approach to the telecommunications formula to better align with principles of cost causation and the policies of the National Broadband Plan.³ As the Commission explains, there is the zone of reasonableness within which the Commission may establish “just and reasonable” pole rents for telecommunications providers, ranging from a lower bound closer to recovery of actual incremental costs to an upper bound based on fully distributed operating and capital costs.⁴ The approach initially taken by the Commission, while “not inherently unreasonable” at the time, has resulted in rate disparities and disputes which undermine the purposes of the Pole Act and goals of the National Broadband Plan.⁵ Thus, the Commission proposes to adopt a new approach, setting the “just and reasonable” rate for purposes of section 224(e) at the higher of the lower bound rate or the rate derived using the existing formula for cable operator attachments.⁶

The Commission’s proposal to lower the telecommunications pole formula to yield an attachment rate as close to the cable rate as possible pursues exactly the right policy. The Commission’s regulation of cable pole attachments has been a major success, facilitating billions of dollars in investment and consumer benefits. Bringing the telecom rate formula more into line with the cable rate formula will match that formula to accepted principles of compensation and remove barriers to broadband deployment.

³ *Id.* at ¶ 129.

⁴ *Id.*

⁵ *Id.* at ¶ 130.

⁶ *Id.* at ¶ 141.

I. THE COMMISSION'S PROPOSED POLE ATTACHMENT RATE STRUCTURE WILL MEET NATIONAL POLICY PRIORITIES

The Commission's regulation of pole attachments has been a major success story for three decades, facilitating billions of dollars in investment by cable operators in broadband networks and the introduction of exciting video, voice, and data services to virtually every American home. Without any government funding, cable operators have been able to offer high capacity broadband Internet access to over 92 percent of the country. In many areas, cable operators also have introduced Voice over Internet Protocol (VoIP) services that offer consumers the first widespread facilities-based telephone service alternative to incumbent local exchange carriers (LECs). The competition cable operators have brought to the voice market has produced over \$35 billion in consumer savings, with more than \$100 billion expected in the next five years.⁷ More broadband investment promises even greater consumer benefit and thousands of additional jobs.⁸

The ability to attach cable facilities to utility poles at regulated rates has been a cornerstone of the cable industry's successful roll-out of advanced video, voice, and data services over the last three decades. The availability of reasonably priced access to poles pursuant to the cable rate formula contained in section 224(d) of the Communications Act of 1934, as amended (the Act), along with the Commission's other pro-competitive policies, has

⁷ Cable's provision of advanced digital video, voice and data services alone has yielded an estimated increased consumer benefit of over \$25 billion. Michael D. Pelcovits and Abigail B. Ferguson, *Benefits to Consumers from the Transformation of the Cable Industry*, Microeconomic Consulting & Research Associates, at 36 (July 29, 2009) (available at Cable's Digital Transformation Providing Consumers with Advanced Technology, Lower Prices and Enhanced Competition, NCTA Press Release, <http://www.ncta.com/ReleaseType/MediaRelease/Cables-Digital-Transformation-Providing-Consumers-with-Advanced-Technology-Lower-Prices-and-Enhanced.aspx>, (July 29, 2009)). Total consumer benefits of cable's provision of Triple Play services, however, provides about \$35 billion in annual consumer benefits, including the added benefit to all consumers as a result of the competitive response of incumbent telephone companies. *Id.*

⁸ Robert W. Crandall and Hal J. Singer, *The Economic Impact of Broadband Investment*, Broadband for America, <http://www.ncta.com/PublicationType/ExpertStudy/The-Economic-Impact-of-Broadband-Investment.aspx>, (Feb. 23, 2010).

enabled cable operators to expand and upgrade the capacity of their networks in a manner that advances the congressional mandate to promote competition and encourage network investment. With these advanced networks, cable operators have been able to offer high-capacity broadband Internet access to over 92 percent of the country.

Utility poles are an important component of the networks that utilities use to provide service to their customers. Whether built by incumbent LECs or electric companies, pole systems always have been treated as regulated assets, with costs recovered from captive subscribers and, in some cases, subsidized by the federal government, e.g., through Rural Utilities Service loans or universal service fund payments. Thus, as with other regulated utility assets, it is “settled beyond dispute that regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible.”⁹

In any given geographic area, there generally is only one set of poles, and it is almost always owned by the electric company, the incumbent LEC, or a combination of the two. Consequently, a cable operator building a network in an area where an electric company or an incumbent LEC has built poles will have little choice but to place its facilities on those poles. As a general matter, allowing other parties to attach is beneficial for the pole owner any time the compensation it receives from the attaching party exceeds the additional costs, if any, that result from allowing the attachment.¹⁰ Given the lack of alternatives available to the attaching party, however, an unregulated pole owner will be able to charge attachment rates that far exceed the costs imposed by the attachment. The Supreme Court accurately summarized the situation as

⁹ *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987) (*Florida Power*), citing *Munn v. Illinois*, 94 U.S. 113, 133-34 (1877); *Permian Basin Area Rate Cases*, 390 U.S. 747, 768-69 (1968).

¹⁰ Rent from additional attachers was viewed from the outset as found money for pole owners. “It has been made clear ... that access to utility poles does not in itself constitute a problem, among other reasons because CATV offers an income-producing use of an otherwise unproductive and often surplus portion of plant.” Communications Act Amendments of 1978, Sen. Rep. 95-580, P.L. 95-234, 92 Stat. 33, 97th Cong., 2d Sess., as reprinted in 1997 U.S.C.A.A.N. 109, 124 (Communications Act Amendments of 1978).

follows: “Since the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They 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.”¹¹

Long ago it became apparent to Congress and the Commission that this situation was not conducive to the deployment of facilities by cable operators. Congress first addressed this issue in 1978. Recognizing that utilities possessed the incentive and the ability to impose unreasonably high attachment rates on cable operators, Congress directed the Commission to establish limits to the rates utilities could charge.¹² The Commission’s approach to limiting unreasonable pole rents was challenged by the utilities but affirmed by the Supreme Court in 1987.¹³ The Commission subsequently recognized that there were strong policy reasons for allowing cable operators to provide non-video services over facilities attached to utility poles pursuant to regulated attachment rates, and that applying the cable rate formula “will encourage greater competition in the provision of Internet service and greater benefits to consumers.”¹⁴ Despite repeated appeals by utilities, the Commission’s approach and application of the cable

¹¹ *National Cable & Telecommunications Ass’n v. Gulf Power*, 534 U.S. 327, 330 (2002) (*Gulf Power*); see also *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1362 (11th Cir. 2002), *cert. denied*, 540 U.S. 937 (2003) (*Alabama Power*) (“In the view of Congress, the costs of erecting an entirely new set of poles would have created an insurmountable burden on cable companies. As the owner of these ‘essential’ facilities, the power companies had superior bargaining power, which spurred Congress to intervene in 1978.”).

¹² 47 U.S.C. § 224; S. Rep. No. 95-580, *reprinted in* 1978 U.S.C.C.A.N. 109 (Congress sought to “establish a mechanism whereby unfair pole attachment practices may come under review and sanction and to minimize the effect of unjust and unreasonable pole attachment practices on the wider development of cable television service to the public.”).

¹³ *Florida Power*, 480 U.S. 245.

¹⁴ *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, CS Docket No. 97-51, Report and Order, 13 FCC Rcd 6777, 6795-96, ¶ 32 (1998) (footnote omitted) (*1998 Pole Attachment Order*).

rate formula was repeatedly upheld.¹⁵ In the three decades since Congress started regulating pole attachment rates, there is not a single agency or court decision finding that the cable rate formula produces a rate that is confiscatory. Indeed, utility claims that the cable rate is a “subsidy” have been repeatedly refuted and rejected by the Commission, the courts, public service commissions, and consumer advocates.¹⁶ As the National Association of State Utility Consumer Advocates (NASUCA) explained in endorsing the cable rate as the unified pole rate, “[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

¹⁵ *Heritage Cablevision Associates of Dallas v. Texas Utilities Elec. Co.*, File No. PA-89-002, Memorandum Opinion and Order, 6 FCC Rcd 7099, 7103, ¶ 18 (1991). *Texas Utilities Elec. Co. v. FCC*, 997 F.2d 925, 933 (D.C. Cir. 1993) (“[T]he Commission held that a utility may only charge a cable television system operator a single, regulated rate regardless of the fact that part of the cable may transmit nonvideo communications. We have no trouble finding this interpretation reasonable . . .”). *Gulf Power*, 534 U.S. at 339 (Raising pole rents for Internet services would subject innovative cable operators to “monopoly pricing . . . [and] defeat Congress’ general instruction to the FCC to ‘encourage the deployment’ of broadband Internet capability and, if necessary, ‘to accelerate deployment of such capability by removing barriers to infrastructure investment.’”).

¹⁶ *See, e.g., 1998 Pole Attachment Order*, 13 FCC Rcd at 6795-96, ¶ 32 (“We conclude, pursuant to Section 224 (b)(1), that the just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate.”), *aff’d in relevant part, NCTA v. Gulf Power*, 534 U.S. 327 (2002); *Alabama Cable Telecomm’s Ass’n v. Alabama Power Co.*, File No. PA 00-003, Order, 16 FCC Rcd 12209, 12236, ¶ 60 (2001) (*ACTA Order*) (“Respondent’s repeated claims that cable attachers do not pay for any costs of unusable space is a complete mischaracterization of the Pole Attachment Act and the Commission’s rules. Cable attachers pay all of the costs associated with the pole attachment, which are allocated based on the portion of usable space occupied by the attachment. The costs associated with the entire pole are included in that calculation.”); *Gulf Power Co. v. United States*, 998 F. Supp. 1386 (N.D. Fla. 1998), *aff’d*, 187 F.3d 1324 (11th Cir. 1999); *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); *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); *Consideration of Rules Governing Joint Use of Utility Facilities & Amending Joint-Use Regulations Adopted Under 3 AAC 52.900 – 3 AAC 52.940*, Order Adopting Regulations, 2002 Alas. PUC LEXIS 489 (Oct. 2, 2002); *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 & Internet Access*, Docket No. 05-06-01, Decision, 2005 Conn. PUC LEXIS 295, at *11-12 (Dec. 14, 2005); *Rulemaking to Amend & Adopt Rules in OAR 860, Divisions 024 and 028, regarding Pole Attachment Use & Safety (AR 506) & Rulemaking to Amend Rules in OAR 860, Division 028 Relating to Sanctions for Attachments to Utility Poles & Facilities (AR 510)*, Order No. 07-137, 2007 Ore. PUC LEXIS 115, at *24 (Apr. 10, 2007); *Cablevision of Boston v. Boston Edison Co.*, Mass. Docket No. D.T.E. 97-82 at 12, 45, 46 (Apr. 15, 1998) (reducing pole rental fees and holding that cable rate will “not require an adjustment of other [utility] rates.”); Reply Comments of NCTA, WC Docket No. 07-245 at App. A, 14-15 (Decl. of Billy Jack Gregg) (Apr. 22, 2008) (NCTA Reply Comments); Reply Comments of NASUCA, WC Docket No. 07-245 at 4-5 (Apr. 22, 2008) (NASUCA Reply Comments). A full listing of court and agency decisions affirming and applying the cable rate formula is attached as Attachment B.

identity of the attacher.... Equally importantly, the Commission must not increase the rate paid by broadband service providers because this would be contrary to ‘the nation’s commitment to achieving universal broadband deployment and adoption.’”¹⁷

The National Broadband Plan and this *FNPRM* rightly take the next and necessary step of removing remaining barriers to broadband deployment. To spur broadband deployment, the National Broadband Plan recommends that the Commission establish rates for all pole attachments by broadband service providers that are as low and as uniform as possible under section 224, and facilitate the timely and efficient access to poles, conduits and rights-of-way by such providers. The National Broadband Plan acknowledges that the amount of pole attachment rent plays a significant role in broadband deployment decisions and that broadband deployment can be encouraged by directly cutting such costs. In addition, the National Broadband Plan notes that, with the convergence of video, voice and data services over shared networks, charging different rates for similar pole attachments based on regulatory classifications (i.e., cable vs. telecommunications), is outdated and has led to significant litigation and uncertainty, which can deter broadband deployment and investment. Consequently, the National Broadband Plan recommends that the Commission establish pole attachment rates as low and as close to uniform as possible, in light of statutory limitations. The National Broadband Plan notes that the cable formula “has been in place for 31 years and is ‘just and reasonable’ and fully compensatory to utilities.”¹⁸ The National Broadband Plan urges the Commission to modify its rules to lower the telecommunications pole formula to yield an attachment rate as close to the cable rate as possible.

¹⁷ NASUCA Reply Comments 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.

¹⁸ National Broadband Plan at 108.

This is exactly the right approach. As NCTA demonstrated in earlier comments, high pole attachment rates for any broadband provider run counter to the Commission's goal of increasing broadband deployment and adoption. NCTA submitted a report by economist Michael Pelcovits demonstrating that imposing the telecom rate formula as currently implemented on cable attachments would impose between \$200 and \$600 million in new costs on cable operators and their customers annually, even though there is no additional burden on pole owners.¹⁹ We also submitted a report prepared by Billy Jack Gregg, former consumer advocate for the West Virginia Public Service Commission and former member of the Federal-State Joint Board on Universal Service, demonstrating that the impact of increased pole attachment fees would be particularly onerous in rural areas, where there are more poles and fewer customers.²⁰ Comparable impact analysis confirmed these conclusions,²¹ and USTA agreed: "In rural areas with many miles of lines per customer the impact of such fees are particularly acute, and can result in [preventing] unserved or underserved rural areas from obtaining the benefits of increased broadband deployment."²² As also noted in the *Rural Broadband Report*, "[t]imely and reasonably priced access to poles and rights of way is critical

¹⁹ NCTA Reply Comments at App. B, 11 (Decl. of Michael Pelcovits).

²⁰ NCTA Reply Comments at App. A, 11-12 (Decl. of Billy Jack Gregg).

²¹ See Comments of Charter Communications, WC Docket No. 07-245 (Mar. 7, 2008) (Charter Comments); Reply Comments of Charter Communications, WC Docket No. 09-154, GN Docket No. 09-51 (Oct. 9, 2009); Letter from Jill M. Valenstein, Counsel for the Arkansas Cable Telecommunications Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-245, at 1-2 (July 11, 2008) (ACTA *Ex Parte* Letter). Moreover, in some cases, such increases may even jeopardize an operator's ability to continue providing video service. ACTA *Ex Parte* Letter at 2-3 (quoting testimony from Dennis R. Krumbly, Vice President of Engineering for Buford Media Group, LLC: "I'm faced not only with the prospect of probably not being able to deliver broadband in that system, but with 48 per cent of my revenue going just to pole rental alone, I will probably be faced in this system and other systems as those rates increase and just turning those systems off all together.").

²² Comments of United States Telecom Association, WC Docket 09-154 at 5 (Sept. 24, 2009).

to the buildout of broadband infrastructure in rural areas.”²³ Making the fully compensatory cable rate available not only to cable broadband providers but also to all other broadband providers, as NCTA has proposed in prior comments,²⁴ would facilitate greater investment in broadband networks by lowering costs, especially in rural areas, where there are more poles per customer.²⁵ As the Commission has recognized, any strategy to promote increased deployment and adoption of broadband must take steps to improve the business case for investing in broadband facilities, particularly in rural areas. Ensuring pole rates that are fair for all broadband providers and as close to uniform as possible will create the regulatory certainty that drives broadband investment.

II. THE COMMISSION’S PROPOSED POLE ATTACHMENT RATE STRUCTURE, WITH CERTAIN ADJUSTMENTS, WILL INCENT BROADBAND INVESTMENT AND ESTABLISH REGULATORY PARITY AMONG PROVIDERS, CONSISTENT WITH THE NATIONAL BROADBAND PLAN

The Commission proposes to establish a single annual rental rate for all entities providing telecommunications services, including cable operators. The proposal sets the attachment rate at the higher of a rate produced using a revised “lower bound” telecom rate formula, which excludes certain capital and related operating costs,²⁶ or the existing attachment rate for cable

²³ *Bringing Broadband to Rural America: Report On A Rural Broadband Strategy*, Acting Chairman Michael J. Copps, Federal Communications Commission, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291012A1.pdf, at ¶ 157 (May 22, 2009) (“Timely and reasonably priced access to poles and rights of way is critical to the buildout of broadband infrastructure in rural areas.”).

²⁴ NCTA Reply Comments at 18-23 (proposing, with respect to competitive LECs, that the Commission forbear from the statutory telecommunications rate formula contained in section 224(e) and apply the cable rate formula instead, and that incumbent LECs be brought under the cable attachment regime by permitting them to “opt in” to existing agreements between cable operators and electric companies).

²⁵ *See id.* at App. A, 13 (Decl. of Billy Jack Gregg) (“The new higher pole attachment rates for cable providers in West Virginia will substantially increase the annual cost of doing business for these providers and will increase the costs of extending service to rural and high-cost areas that currently do not have broadband service.”).

²⁶ The revised telecom rate formula would exclude capital and related operating costs – the utility’s pole plant depreciation, rate of return on pole plant investment, and taxes – from the annual pole carrying charges, bringing the rate closer to recovery of actual incremental costs. *See FNPRM* at ¶ 133.

operator attachments.²⁷ The Commission’s proposed pole attachment rate structure correctly recognizes that the current telecom rate formula, which departs significantly from principles of cost causation and cost allocation and produces rates significantly higher than the fully compensatory cable rate, is not consistent with the goals of increased broadband deployment and competition in the communications market set forth in the National Broadband Plan. The Commission also rightly concludes that the capital and operating cost categories specified in section 224(d) for the upper bound cable rate formula do not dictate or constrain the cost categories the Commission must include in a telecommunications rate formula under section 224(e). The Commission’s recognition that cable operators pay their share of capital costs in the form of make-ready payments and its decision to remove capital costs from the lower bound rate formula is entirely consistent with the statutory requirements. Moreover, setting the telecom rate at the higher of the cable rate or the rate produced using the lower bound formula ensures that rates are close to uniform regardless of technology and that utilities receive adequate compensation.

NCTA fully supports the Commission’s movement toward a pole attachment rate structure that incorporates more appropriate costing principles and produces rates that are lower and closer to uniform, and therefore more economically efficient and fair. The Commission’s approach is confirmed by a refined economic analysis of the range of possible rate approaches that would most align with cost causation and cost allocation principles. The result confirms that the Commission’s approach produces “just, reasonable and non-discriminatory” rates that are near the top end of the range within which the Commission could faithfully implement the Act. Specifically, NCTA offers a formula for the lower bound rate based on a “marginal cost proxy,”

²⁷ *Id.* at ¶ 141.

which refines the *FNPRM* approach to account for overpayments for operating expenses, in addition to capital costs. NCTA also presents a fresh look at the current telecom rate formula that updates certain capital cost inputs, more accurately measures carrying charges attributable to pole attachments, and demonstrates that the Commission’s approach is reasonable.

A. The Commission Is Correct That The Current Telecommunications Rate Formula Is Not Measuring Appropriate Costs

As repeatedly demonstrated by attaching entities in Commission filings and recognized by the Commission and the courts, cable operators not only pay utilities annual per pole attachment rental fees, they also reimburse utilities directly for the costs incurred in making the space on a pole available for attachments, i.e., “make-ready” work.²⁸ Any time a wire is moved or a pole is replaced to accommodate an attachment, the cost-causing attaching entity pays. As stated by the Commission in the *FNPRM*, “a pole owner recovers the entire capital cost of a new pole through make-ready charges from the new attacher when a new pole is needed to enable the attachment.”²⁹ In addition to paying for the actual make-ready work, attaching entities typically pay directly for costs the utility incurs in processing pole attachment applications, including the cost of any pre-construction engineering surveys and post-construction inspections. They may also pay utilities directly for their share of billing audits and inspections of their facilities. And, when governmental requirements necessitate pole transfers, attaching entities make these transfers themselves, at their own cost. Finally, attaching entities are responsible for the cost of removing their attachments if a pole is retired or they stop providing service.

²⁸ *Alabama Power*, 311 F.3d at 1368-69 (“The known fact is that the Cable Rate requires the attaching cable company to pay for any ‘make-ready’ costs and all other marginal costs (such as maintenance costs and the opportunity cost of capital devoted to make-ready and maintenance costs), in addition to some portion of the fully embedded cost.”); *see also ACTA Order*, 16 FCC Rcd 12240, ¶ 69 n.154.

²⁹ *FNPRM* at ¶ 134.

Competitive LECs and incumbent LECs filing comments in earlier rounds of this proceeding described these direct charges as a profit center for pole-owning utilities. AT&T, a pole owner with decades of joint ownership and joint use experience reported that “electric utilities view pole attachments as a line of business to generate revenue rather than a cost recovery mechanism.”³⁰ Competitive LEC comments described utilities’ excessive charges as including counting audits, exorbitant safety inspection charges, unnecessary pole replacements, excessive make-ready charges including for correcting pre-existing utility violations, and excessive and unexplained material and labor charges.³¹

The Commission therefore correctly recognized that attachers pay the entire amount of the capital costs attributable to their attachments in the form of make-ready payments and that no more than a *de minimis* portion of additional capital costs related to poles are “caused” by the attaching entity.³² Thus, the Commission rightly concluded that the current telecom rate formula

³⁰ Comments of AT&T, Inc., WC Docket No. 07-245, at 5 (Mar. 7, 2008) (AT&T Comments).

³¹ See, e.g., Comments of Knology, WC Docket No. 07-0245, at 15 n.27 (Mar. 8, 2008) (Knology Comments) (“One utility charges an exorbitant sum of \$3.58 *per attachment* for a pole inventory.”); Comments of Sunesys, WC Docket No. 07-024, at 8-10 (Mar. 8, 2008) (“Utilities often seek to charge attachers for work that is either (i) unnecessary or (ii) should be paid by the utility,” “Sunesys has ceased attempts to enter the Delaware market as a result of Connectiv’s high costs and lengthy delays for make-ready,” “Sunesys has abandoned efforts to provide wide area network services to an interested school district in Maryland because the excessive make-ready charges demanded by BG&E rendered the project economically infeasible”); Comments of TWT, WC Docket No. 07-0245, at 15 (Mar. 8, 2008) (“pole owners needlessly replace poles and pass on the substantial replacement cost to attachers instead of simply rearranging the attachments to create additional space on existing poles at a much lower cost; ... pole owners incorrectly bill attachers for make-ready costs incurred by previous attachers; and ... pole owners often bill an attacher for the entire cost of correcting a safety violation which may have been caused by a prior attacher”); Comments of Fibertech Networks, LLC and Kentucky Data Link, Inc., WC Docket No. 07-0245 at 7 (Mar. 8, 2008) (“make-ready estimates typically require unnecessary and time-consuming work, improperly impose the entire cost of the work on the license applicant even when the owners use some or most of the newly created space, and are based on frequently unexplained and very high labor or material rates”).

³² *FNPRM* at ¶ 135.

inappropriately requires telecommunications attachers to pay for certain capital costs that are wholly unrelated to their attachments.³³

In fact, the existing telecom rate formula departs from accepted principles of cost causation and cost allocation for other reasons as well. The cost allocation requirement in section 224(e) apportions the cost of the pole not solely on the basis of occupancy (i.e., one that adheres to principles of cost causation) but rather on a per-capita basis. As a result, the allocator apportions a much higher percentage of costs to the attacher than a space allocator unless there are a very large number of attaching entities, a condition that was expected but did not emerge at the time the Telecom Act was enacted. In addition, as recognized by the Commission years ago, the pole investment account already includes numerous costs that are not attributable to pole attachments. “Even with the 15% reduction for non-pole appurtenances such as crossarms, this is still a very generous account [for utilities], including the cost of towers, transformer racks and platforms.”³⁴ Indeed, this concept was expanded upon by AT&T in earlier rounds where it showed excessive cost recovery by electric utilities arising from the inclusion of both tower costs and the costs of wooden poles beyond the 40 foot, Class 5 poles found in FERC account 364.³⁵

The Commission’s exclusion of capital costs from the telecom rate formula is a critical step in the right direction.³⁶ The Commission’s “no capital cost” approach, which is designed to limit what attachers pay to the costs they actually cause, is precisely the type of adjustment

³³ See Attachment A at ¶15 (Kravtin Report) (“The present carrying charge factor overstates the true economic carrying costs associated with pole attachment, by including many types of expenses that are widely acknowledged as being non-pole related or that pertain entirely to the conduct of the electric enterprise business and are not impacted by the presence of third-party attachments.”)

³⁴ *Amendment of Commission’s Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket Nos. 97-98, 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12161, ¶ 121 (2001) (*Consolidated Reconsideration Order*).

³⁵ AT&T Comments at Att. (Decl. of Veronica MaHanger MacPhee).

³⁶ *FNPRM* at ¶¶ 135-136 (discussing 47 U.S.C. § 224(e)).

needed to establish appropriate economic signals and incent broadband deployment consistent with the objectives of the National Broadband Plan. As set forth in the attached Kravtin Report at Attachment A, additional refinements to this approach would ensure that the lower bound rate more closely tracks the costs caused by attaching entities, and produces economically efficient and fair rates.

B. Costs In Section 224(e) Are Not Constrained By Costs In Section 224(d)

The Commission rightly concludes that it has discretion to reinterpret the term “cost” as it is used in section 224(e) for purposes of setting the lower bound attachment rate for broadband services.³⁷ The costs in section 224(e) are not constrained by the capital and operating costs enumerated in section 224(d), instructing the Commission how to calculate the *upper bound* of the rate for *cable* television operators. It is well established that the meaning given a particular term in one section of a statute does not necessarily dictate the meaning attributed to the same term used in the same statute.³⁸ It is also well established, as recognized by the Commission, that “words like ‘cost’ give rate setting commissions broad methodological leeway” in determining a particular rate.³⁹

³⁷ See FNPRM at ¶ 131.

³⁸ *Verizon Cal. v. FCC*, 555 F.3d 270, 276 (D.C. Cir. 2009) (“Because . . . different contexts dictat[e] different interpretations[,] courts addressing the meaning of a term in one context commonly refrain from any declaration as to its meaning elsewhere in the same statute.”); see also *Atlantic Cleaners & Dyers, Inc. v. U.S.*, 286 U.S. 427, 433 (1933) (identical words may have different meanings where among other things the conditions are different); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 342-43 (1997) (term “employees” means current employees only in some sections of Title VII of Civil Rights Act, but in other sections includes former employees); *U.S. v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001) (different statutory contexts of worker eligibility for Social Security benefits and “administrability” of tax rules justify different interpretations); *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 594-595 (2004) (word “age” means “old age” when included in the term “age discrimination” in the Age Discrimination in Employment Act even though it is used in its primary sense elsewhere in that act).

³⁹ FNPRM at ¶ 131 and nn. 352 and 352 (citing *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 500-01 (2002)).

While the Commission’s initial implementation of section 224(e), which interpreted costs there to include the same cost categories used in the cable rate formula, was reasonable, it was not required.⁴⁰ Indeed, the Commission has broad authority under section 224(e)(1) to set a rate that is “just, reasonable and non-discriminatory.”⁴¹ As recognized by the Commission, in similar regulatory contexts, a rate is considered reasonable if it falls within a “zone of reasonableness.”⁴² To fall within this zone, a rate must balance the interests of the rate payer “in being charged non-exploitative rates” and the “financial integrity” of the entity being compensated.⁴³

The *FNPRM*’s proposal is consistent with the overall way in which section 224 is to be read. Indeed, it produces a result even *more* accurate than the current administration of section 224(e). Both sections 224(d) and (e) are governed by the overarching requirement in section 224(b) that rates, terms and conditions must be just and reasonable.⁴⁴ As the Supreme Court explained in *Gulf Power*, the rate formulas articulated in subsections (d) and (e) are “subsets of – but not limitations upon” the requirement of “just and reasonable” for all pole attachments mandated by subsections (a) and (b).⁴⁵ Thus, to the extent that the language in section (d) informs section (e), it is to help demonstrate that a rate that falls within the range of incremental costs and fully allocated costs likely falls “within the zone of reasonableness.”

⁴⁰ *FNPRM* at ¶ 130.

⁴¹ 47 U.S.C. § 224(e)(1).

⁴² *FNPRM* at ¶ 129.

⁴³ *Id.* (citing *Long Term Number Portability Tariff Filings*, CC Docket No. 99-35, Memorandum Opinion and Order, 14 FCC Rcd 11983, 12026-27, ¶98 (1999)).

⁴⁴ 47 U.S.C. §224 (b).

⁴⁵ *Gulf Power*, 534 U.S. at 336. Section 224(b) provides that all pole attachment rates must be “just and reasonable.” Section 224(e)(1) also mandates that telecom service rates must be “just, reasonable, and nondiscriminatory.” As the 1978 legislative history explains, section 224(d)’s rate setting formula was adopted, in part, “to provide the Commission with a sense of congressional intent as to the meaning of the term ‘just and reasonable’”. *Communications Act Amendments of 1978, reprinted in 1997 U.S.C.A.A.N.* 109, 129.

C. Economically Appropriate Costs Are Costs Caused By Attaching Entities

As more fully set forth in the Kravtin Report, the Commission’s decision to remove capital cost elements from the carrying charge component of the rent is based on sound economic policy.⁴⁶ “The closer the rate for pole attachment is to marginal cost, the more efficient the allocation of resources (which in turn maximizes the overall societal value that can be generated from use of those resources) and the more likely the emergence of conditions that stimulate competition in the relevant communication markets and produce the desired competitive market performance attributes such as lower prices, greater choices among new and innovative broadband services, enhanced productivity and economic development opportunities for the national and local economies.”⁴⁷ Moreover, there is no risk of economic harm to the utility or its ratepayers from a pole rental rate set using marginal costs “where there is space available on the pole.”⁴⁸ Utilities historically have failed to show a lack of existing capacity or lost opportunity costs associated with pole attachments.⁴⁹ Accordingly, a marginal cost approach is entirely supported by economic principles.

The specific modifications made by the Commission to the Carrying Charge Factor of the lower bound formula, i.e., elimination of the capital costs pertaining to depreciation, taxes and return on investment, are economically sound and fully consistent with cost causation principles. As correctly stated by the *FNPRM*, those costs are fully and appropriately covered through direct charges for make-ready and other activities related to pole attachments.⁵⁰

⁴⁶ Attachment A, Kravtin Report at ¶ 64.

⁴⁷ *Id.* at ¶ 51.

⁴⁸ *FNPRM* at ¶ 135.

⁴⁹ *Gulf Power*, 534 U.S. 327.

⁵⁰ Attachment A, Kravtin Report at ¶¶ 64-69.

The economic and policy justification for a low, unified broadband pole attachment rate is even more compelling given the increased national priority on broadband deployment. The National Broadband Plan urges development of a regulatory framework that will spur continued growth and new investment in the nation’s broadband infrastructure.⁵¹ A key component of the National Broadband Plan is its call for governmental action to “ensure efficient allocation and management of assets [that] government controls or influences, such as spectrum, poles, and rights-of-way, to encourage network upgrades and competitive entry.”⁵² The National Broadband Plan specifically recommends a reduction in costs and improvement of existing infrastructure, concluding the “FCC should establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 of the Communications Act of 1934, as amended, to promote broadband deployment.”⁵³ Recognizing that the Commission’s cable rate formula “has been in place for 31 years and is ‘just and reasonable and fully compensatory for utilities,’” the National Broadband Plan recommends that the Commission “revisit its application of the telecommunications carrier rate formula to yield rates as close as possible to the cable rate in a way that is consistent with the Act.”⁵⁴

As found by the National Broadband Plan’s creators, “[t]he cost of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands.”⁵⁵ Accordingly, the National Broadband Plan recommended that the Commission establish pole attachment rental

⁵¹ Congress directed the Commission to develop a National Broadband Plan that ensures that “all people of the United States have access to broadband capability.” American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(D), 123 Stat. 115, 516 (2009).

⁵² National Broadband Plan at xi.

⁵³ *Id.* at 109.

⁵⁴ *Id.* at 110.

⁵⁵ *Id.* at 109.

rates “that are as low and close to uniform as possible,” recognizing that such a step would greatly reduce the complexity and risk for those deploying broadband.⁵⁶ “[U]ncertainty may be deterring broadband providers that pay lower pole rates from extending their networks or adding capabilities (such as high-capacity links to wireless towers).”⁵⁷ “If the lower rates were applied, and if the cost differential ... were passed on to consumers, the typical monthly price of broadband for some rural consumers could fall materially.”⁵⁸

An approach that more accurately reflects the marginal costs of attachments also is consistent with cost causation principles employed by the Commission in its Part 64 rules, which provide a methodology to allocate costs between regulated and non-regulated activities designed to prevent the cross subsidization of the latter. Part 64 instructs carriers to allocate indirect costs (including common costs that cannot be directly assigned to either regulated or non-regulated activities) “based upon an indirect, cost-causative linkage to another cost category ... for which a direct assignment or allocation is available.”⁵⁹

D. A Marginal Cost Proxy For The Lower Bound Rate Accurately Accounts For The True Costs Imposed By Attachments

In addition to removing capital costs from the carrying charge component of the formula (as the Commission has proposed in its “no capital cost” approach), the Commission could also make adjustments to certain operating cost elements so as to more accurately capture the true proportion of aggregated costs attributable to poles. Currently, both the Maintenance and Administrative charge components overstate the amount of expenses that are attributable to poles. The overstatement stems from the fact that the FERC Form 1 accounts used to track

⁵⁶ *Id.* at 109-111.

⁵⁷ *Id.* at 110.

⁵⁸ *Id.*

⁵⁹ 47 C.F.R. § 64, Subpart I (allocation of costs); 47 C.F.R. § 64.901(3)(i) (“Whenever possible, common cost categories are to be allocated based upon direct analysis of the origin of the cost themselves.”).

expenses operate at a higher level of aggregation than pole plant. The current formulas attempt to adjust for this fact with ratios intended to attribute the costs appropriately between poles and other classes of plant. However, the current formula used to derive these amounts incorrectly assumes that expenses should be allocated in equal proportions to bare poles as to electric distribution plant. In fact, administrative and maintenance expenses related to bare poles is significantly less. The costs properly attributed to attaching entities are more accurately reflected in Ms. Kravtin's "marginal cost proxy."

The proposed "marginal cost proxy" offers an improved formula for calculating the lower bound attachment rate because it applies the Commission's cost causation principles consistently across all elements of the lower bound formula. The proxy captures the true costs caused by pole attachments (that are not captured by make-ready or other direct reimbursements to the utility) and measures and allocates these costs in a simple and expeditious manner, while respecting the space cost allocators set forth in section 224(e).

1) The Maintenance Charge Carrying Factor Should Be Adjusted To More Accurately Reflect The Expenses Attributable To Maintaining Pole Plant

The Maintenance FERC account 593 includes significant expenses associated with maintenance costs of a sophisticated electric grid that are not related to the maintenance of a bare pole. The way the maintenance charge component currently is derived presumes that a utility's maintenance costs for bare poles are the same proportionately as the maintenance costs of the overhead distribution lines and the electric service drops extending between the lines and the home. Today, account 593 expenses are divided proportionately among accounts 364 (poles), 365 (lines) and 369 (drops) based on relative net asset value. However, as set forth in the Kravtin Report and Appendix B thereto, a comparison of the maintenance expense ratios of

geographically paired pole-owning utilities and incumbent LECs demonstrates a systematic overstatement of pole-related maintenance expenses for utilities vis-à-vis their counterpart incumbent LECs, as measured by relative percentages of FERC account 593 (maintenance expense for overhead lines) to account 364 (gross pole plant) to pole specific maintenance expense tracked under ARMIS account 6411 and the incumbent LEC's Gross Investment in Pole Plant.

Specifically, the analysis shows, on average, that the maintenance costs applicable to poles in account 593 are not spread equally across dollars of net investment in plant accounts 364, 365 and 369, but rather constitute 45 percent of that amount. Accordingly, an adjustment is required. The specific adjustment recommended by Ms. Kravtin is to reduce maintenance expense to 45 percent of the amount produced using the current formula. This adjustment is necessary to ensure that the line maintenance expenses from account 593 are appropriately reduced. Without this adjustment, attachers would continue to pay more than their fair share of the plant maintenance expense.

2) The Administrative Charge Carrying Factor Should Be Adjusted To Reflect The Work Force Assigned To Pole Attachments

Similarly, in both FERC and ARMIS accounting systems, costs pertaining to the administrative and general expenses are maintained at a higher level of aggregation than poles. Specifically, administrative charges are kept at the total plant level. The Commission has tried to account for this by comparing the aggregated administrative expenses with total investment in plant, and making the assumption that the indirect costs of administration for poles is proportional to the net asset value of poles compared to net asset value for total electric plant. However, as explained in the Kravtin Report, this presumption is “at odds with basic principles

of cost allocation.”⁶⁰ A better approach would be to reduce Administrative expenses based upon a direct calculation of labor resources employed by the pole owner in connection with third party pole attachments. This approach is consistent with the principles of cost allocation as applied by the Commission’s Part 64 rules, in which costs that cannot be directly assigned are to be allocated “based upon a direct, cost-causative linkage to another cost category ... for which a direct assignment or allocation is available.”⁶¹ Consistent with cost-causation principles, administrative costs should be attributed to poles using a direct calculation for the actual labor resources employed by the pole owner in connection with third party pole attachments, an amount properly determined in Ms. Kravtin’s “marginal cost proxy.”

3) Other Cost Inputs Should Be Updated

As set forth below in NCTA’s discussion of the upper range, additional cost inputs should be updated to more accurately capture the costs allocated to attaching entities. Specifically, the pole height should be adjusted to reflect the fact that pole inventory today is taller than it was 40 years ago when presumptions were first adopted, and the number of presumed attaching entities should be adjusted to reflect today’s marketplace realities.

E. A Fresh Look Also Reveals Necessary Adjustments To The Costs Utilized In The Current Telecom Rate Formula

While the Commission’s presumption is that rates will be set at the higher of the marginal cost proxy and the cable rate, the reasonableness of this approach is confirmed by a refined and updated economic analysis of the upper end of the range of possible rate approaches that would align with cost causation and cost allocation principles.

⁶⁰ Attachment A, Kravtin Report at ¶ 35.

⁶¹ See 47 C.F.R. § 64.901.

The departure of the existing telecom rate formula from accepted principles of cost causation and cost allocation has resulted in unreasonably high attachment rates for telecom attachments. The section 224(e) space allocation methodology builds in a significant (and unwarranted) cushion of cost over-recovery by the pole owner. The relatively low number of facility-based competitive LECs that have succeeded since the 1996 Act also has adversely affected the results producing outsized rents that defeat national goals for broadband deployment. The Commission has recognized that the costs in section 224(d) do not constrain its interpretation of the costs in section 224(e). It would therefore be free to reevaluate the costs included in the current telecom rate formula to ensure that they more closely track principles of cost causation and thus more accurately reflect the true “fully allocated” costs associated with pole attachments.⁶²

The Commission could adjust the Maintenance carrying charge to account for the fact that a significantly larger proportion of plant maintenance is expended on the electric grid than on the bare pole. The Commission could also adjust the Administrative charge to make it proportionate to the operations expense rather than total plant investment, as this narrower cost category more closely aligns with pole costs, but does so consistent with the principles of fully allocated costs. In addition, as with the lower bound formula, certain cost inputs require adjustment in the current telecommunications formula to ensure that the most current and accurate information is reflected. Specifically, the average pole height presumption should be adjusted to reflect the fact that poles today are taller than they were 20 years ago when the pole

⁶² For example, when the Commission reinterpreted section 224(e) to include pole owners as “attaching entities” under section 224(e), the D.C. Circuit Court of Appeals sustained that reinterpretation as permissible because the broader definition of attaching 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.” *Southern Co. Serv., Inc. v. FCC*, 313 F. 3d 574, 581 (D.C. Cir. 2002) (*Southern Company*).

height presumptions were adopted. In addition, the number of attaching entities could be adjusted to 4 for the reasons set forth below.

This analysis of the upper bound retains the capital cost related carrying charge components of depreciation, return and taxes. While this is reasonable for a fully allocated upper bound analysis, other adjustments are necessary to ensure that the upper bound reflects certain fundamental principles of cost causation and also is updated to include more current and accurate data inputs.

1) The Maintenance Charge Carrying Factor Should Be Adjusted To More Accurately Reflect The Expenses Attributable To Maintaining Pole Plant

The Maintenance carrying charge component of the upper bound formula should be adjusted in the same manner as described above for the lower bound formula. Essentially, an adjustment (presumptively 45 percent of the amount produced using the current estimates) is necessary to reflect the fact that the maintenance expenses for utility poles and overhead lines are not directly proportional.⁶³

2) The Administrative Charge Carrying Factor Should Be Adjusted To Reflect Only Those Expenses Relating To Poles

As stated above, Administrative costs are maintained at a higher level of aggregation than poles. The Commission currently accounts for this by comparing the aggregated Administrative expense with the total investment in plant. A more refined approach would be to allocate the Administrative overhead expense in proportion to the direct operations and maintenance expenses associated with poles, as in Ms. Kravtin's approach.⁶⁴

⁶³ Attachment A, Kravtin Report at ¶¶ 32-34.

⁶⁴ *Id.* at ¶¶ 35-37.

3) The Tax Carrying Charge Should Be Adjusted To Reduce The Portion Of Income Taxes Assignable To Pole Attachers

The current formula apportions income-related taxes on the basis of net plant investment.⁶⁵ While property taxes are appropriately measured in this way, since they are a function of property value, income taxes – which are a function of income not property value – are not. From a cost causation perspective, taxes related to income are more accurately accounted for by grossing up the return to ensure the utility earns its allowed return on a tax-adjusted (i.e., after-tax) basis. Accordingly, under the methodology described in the Kravtin Report, the tax component of the carrying charge would be disaggregated into income tax and other tax components, with each calculated in a distinct manner more reflective of cost causative linkages to pole plant.⁶⁶ Income-related taxes would be recovered through a gross-up factor applied directly to the rate of return component of the carrying charge, using the average embedded tax rate for the utility as recorded in the FERC and ARMIS accounts, to better reflect the actual tax burden created by pole rental payments. Taxes other than income-related, which relate more directly to pole plant investment, would continue to be captured in the tax carrying charge, in the same manner as in the existing methodology.

4) The Utility Rate Of Return Should Be Based Upon The IRS Refund Rate, Which Is Updated Quarterly And Reflects Current Conditions In Relevant Capital Markets

The Commission allows utilities to recover an appropriate return on investment. However, as state regulatory bodies began moving away from rate of return regulation, the last

⁶⁵ As recognized by the Commission, under normal operating conditions, there should not be any direct cost causative linkages between third party pole attachment rentals and the pole owner's aggregate tax liability. *See FNPRM* at ¶ 137.

⁶⁶ Attachment A, Kravtin Report at ¶¶ 38-40.

authorized state returns have grown quite stale and no longer reflect current market conditions.⁶⁷ The Commission's default rate of return of 11.25%, set decades ago when the return on capital was significantly higher than it is today, has grown equally out of date. The Commission borrowed the 11.25% rate from regulations setting the authorized rate of return for interstate access services, assuming it would be "modified from time to time" to mimic true market conditions.⁶⁸ In fact, the rate was not modified.

In contrast, the interest rate set by the Internal Revenue Service (IRS) for individual underpayments to section 6621 of the Internal Revenue Code is updated quarterly based on current capital market conditions, publicly reported, and based on a consistent and objective methodology tied to (and well above) the federal short-term interest rate. The Commission has relied upon the IRS interest charge in a number of other applications, including refunds issued pursuant to pole attachment regulations.⁶⁹ As reported by Ms. Kravtin, the IRS interest charge is "a more efficient and accurate measure of the true opportunity costs of capital facing the pole-owning utility."⁷⁰ To ensure that the rate of return accurately represents the true cost of capital, the Commission could adopt the IRS interest charge as the permissible rate of return for poles.

5) Other Cost Allocation Data Inputs Should Be Updated

Adjustments must be made to certain data inputs used in the calculation of the space allocation factor to bring an upper bound analysis more in line with current market conditions. Specifically, the presumptive pole height and number of attaching entities should be adjusted to

⁶⁷ *Id.* at ¶¶ 41-43.

⁶⁸ *Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Report and Order, 15 FCC Rcd 6453, 6490-91, ¶¶ 75-76 (2000) (citing *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, CC Docket No. 89-624, Order, 5 FCC Rcd 7507 (1990)).

⁶⁹ *Mile Hi Cable Partners, LP. v. Public Service Co.*, File No. PA 98-003, Order, 15 FCC Rcd 11450, 11458 ¶ 14 (Cable Serv. Bur. 2000) (*Mile Hi Cable Partners I*).

⁷⁰ Attachment A, Kravtin Report at ¶ 43.

ensure that the rate reflects current and accurate cost data. When the Commission first adopted the cable rate formula over 30 years ago, the average utility poles were 35 and 40 feet in height.⁷¹ The Commission set the presumptive usable space at 13.5 (presuming a pole height of 37.5 and subtracting out 18 feet for ground clearance) but allowed the complainant and the utility to rebut the figure using actual measurements.⁷² However, today, as reflected in the Kravtin Report, the average pole height typically is 40 feet or taller.⁷³ Indeed, in rulemaking proceedings following the 1996 Act, utilities filed a white paper asserting that “over time, and with increased demand, the average pole height has increased to 40 feet.”⁷⁴ Other studies demonstrate that pole heights have increased.⁷⁵ And certified states that have addressed the issue more recently have adopted a 40 foot pole height presumption (or a usable space presumption of 16 feet).⁷⁶

According to the Kravtin Report, the use of the lower presumptive pole height has contributed to the existing telecom rate formula’s over-recovery of the costs of pole attachments.⁷⁷ Adjusting the pole height increases the usable space on the pole from 13.5 to 16 feet and the space allocator factor used to apportion total costs of the pole to attachers is adjusted

⁷¹ See *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, FCC Docket No. 78-144, Memorandum Opinion and Second Report and Order, 72 FCC 2d 59, 68, ¶ 21 (1979).

⁷² See 47 C.F.R. §1.1418.

⁷³ See, e.g., *Armstrong Utilities, Inc. v. The United States Telephone Co. of Pennsylvania d/b/a Embarq Pennsylvania*, File No. EB-08-MD-009, Order of Dismissal, 23 FCC Rcd 16539 (Enf. Bur. 2008) (order granting joint order to dismiss formal complaint with prejudice where Embarq sought to deny attachment to certain class poles typically 25 to 30 feet tall).

⁷⁴ *1998 Pole Attachment Order*, 13 FCC Rcd at 6791, ¶23 (while utilities submitted this data to support assertions that 30 foot poles should be removed from inventory, the data actually shows that the overall inventory of poles is changing).

⁷⁵ AT&T Comments at Att. (Decl. of Veronica MaHanger MacPhee), ¶13 (“pole heights have risen from 35 feet to 40 feet or 45 feet to provide ELCOs with additional space to accommodate their facilities”); CTAM Response to Petition, EB-02-MD-031, Exhibit 4, Attachment PG-6, (including a statistically reliable study of BGE’s jointly and solely owned poles with cable attachments to rebut the 13.5-foot presumption).

⁷⁶ Vermont Board Policy Paper and Comment Summary on PSB Rule 3.700, at 10-11 (2001) (“[m]ore and more 40 foot poles are being installed” in part to accommodate higher voltage utility grids); Oregon Admin. Rule 860-028-0020 (22) (“there is a rebuttable presumption that the average bare pole is 40 feet”).

⁷⁷ Attachment A, Kravtin Report at ¶ 45.

commensurately.⁷⁸ The resulting rate captures more accurately the total pole cost amount that should be attributed to each foot of space occupied by an attacher.

In addition to updating the average pole height, the Commission could revisit the number of attaching entities that are presumed to be attached to the pole. The existing telecom rate formula has two presumptions for the number of attaching entities: 5 for urban areas and 3 for rural areas, where a utility service area is deemed to be urban if any part of its service area is classified as urban, *i.e.*, as having populations of 50,000 or more. The Commission adopted these rebuttable presumptive averages to “expedite the process and allow utilities to avert the expense of developing location specific averages.”⁷⁹ It concluded, based on record evidence submitted in that proceeding, that in all geographically defined areas, even less populated rural areas, the poles to which third party attachers are attached have at a minimum, three attaching entities: the utility, the incumbent LEC and the cable operator.⁸⁰ In urban areas, in addition to these entities, the presumption, based upon evidence in the record, was that a competitive LEC and a governmental entity would also be attached.⁸¹ In setting the urban presumption at 5 attachers, the Commission relied on evidence that the number of competitive services were increasing.⁸² It also concluded that “[i]f any part of a specific service area ...is urbanized, then all that service area would be considered urbanized for pole attachment purposes.”⁸³

⁷⁸ See *id.* at Table 4.

⁷⁹ *Consolidated Reconsideration Order*, 16 FCC Rcd at 12139, ¶70.

⁸⁰ *Id.* at 12140, ¶ 72.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 12137, ¶ 66.

As explained in the Kravtin Report, the Commission could adopt a single presumption of four attaching entities per pole for both rural and urban communities.⁸⁴ While the market has failed to deliver the large number of attaching entities anticipated when the Telecom Act was adopted, the number of attachers is in fact growing. Fiber backbone providers such as Fibertech and distributed antenna service providers such as NextG, Extanet, and American Tower, are attaching to utility poles.⁸⁵ Moreover, NTIA and RUS have been given grant money to build broadband systems in unserved and underserved areas, many of which are necessarily located in rural areas. Indeed, RUS loans are only made available for projects in rural areas.⁸⁶

Applying a single presumption, would avoid the protracted fights that often arise when utilities are unwilling to accept the presumption of five attaching entities. Precious time is lost in negotiating rates and conducting appropriate studies of third party poles in relevant service areas. Often the end result is a compromise of four attaching entities. A single presumptive figure is less complex to administer and will likely lead to fewer disputes in the field.⁸⁷ In addition, a single number provides consistency and uniformity in rates, and serves to level the competitive playing field, all of which will promote broadband deployment, consistent with the National Broadband Plan's objectives.

⁸⁴ See Attachment A, Kravtin Report at ¶¶ 47-49.

⁸⁵ See *FNPRM* at Appendix C (List of Commenters).

⁸⁶ American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115 (2009), at div. A, tit. I, 123 Stat. at 118-119.

⁸⁷ Faced with the possibility of 5 attaching entities, utilities almost always opt to perform a study that starts with an inaccurately low number, based on a "survey" of the utility's entire service area, which inevitably includes portions of the utility's footprint that have poles with no third party attachments. The average number is thereby artificially low. The parties must dispute the number of attaching entities and it is not uncommon for the parties to arrive at 4 attaching entities.

F. The Commission’s Proposed Rates Fall Within The Range Of Just And Reasonable Rates Required By Section 224

Both sections 224(b) and 224(e)(1) direct the Commission to ensure that pole attachment rates for telecommunications services are just, reasonable and non-discriminatory. As recognized in the *FNPRM*, the Commission’s regulatory scheme fulfills this obligation if it produces rates that “fall within a zone of reasonableness” because they balance “investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates.”⁸⁸

The attached Kravtin Report demonstrates that the Commission’s approach is just and reasonable. It assures the utility of recovering the higher of marginal costs (most accurately represented by the “marginal cost proxy” developed by Ms. Kravtin) and the rate produced by the cable rate formula. That rate is demonstrably near the very top end (within 5 percent on average) of the range within which the Commission could faithfully implement the Act.⁸⁹

The Commission historically has recognized that pole attachment rates, to be reasonable, should fall between incremental costs and fully allocated costs.⁹⁰ The National Broadband Plan recommends that the Commission establish pole attachment rental rates “that are as low and close to uniform consistent with [s]ection 224 of the [Act], to promote broadband deployment.”⁹¹

As the Kravtin Report confirms, the Commission’s proposed approach:

- Is fully consistent with the existing statutory framework of section 224(e) of the Act;

⁸⁸ *FNPRM* at ¶ 129.

⁸⁹ See Attachment A, Kravtin Report, Table 8.

⁹⁰ *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CC Docket No. 86-212, Report and Order, 2 FCC Rcd 4387, 4397 at ¶ 74 (1987) (“we will continue to focus on the maximum rate. If, however, a cable operator can make a specific, quantifiable and supportable proposal for a rate which falls between the statutory minimum and maximum rates, we will examine the proposal.”).

⁹¹ National Broadband Plan at 107.

- Supports national broadband policy by removing artificially high pole rental rates as barriers to cable operators’ and telecommunications carriers’ deployment of broadband;
- Is fully consistent with “underlying economic or analytical theory,”⁹² i.e., the principles of cost causation and economically efficient marginal cost pricing;
- Meets the Commission’s stated concerns that section 224(e) rates designed to recover purely marginal costs may not be fully compensatory to the pole owner, by demonstrably assuring cost recovery in full accord with the cost allocations set forth in section 224(e);⁹³
- Can be applied in a simple, expeditious, and unified manner; and
- Assures that the resulting rate is more economically efficient than the existing telecom rate, is fair to pole owning utilities and their ratepayers, and would do nothing to compromise the safety or integrity of the utility’s pole network.

G. The Commission’s Approach Ensures That Utilities Receive Just Compensation

The Commission’s proposal also assures the utility of recovering just compensation, as determined by prior court cases. As recognized by the Commission in the *FNPRM*, a pole attachment rate above marginal cost can provide just compensation, and the cable rate, which reimburses utilities for both their marginal costs and a proportional share of the fully allocated cost for each entire pole, more than fully compensates utilities.⁹⁴ The Commission and the courts have repeatedly recognized that the rates produced using the cable rate formula are just, reasonable, and fully compensatory.⁹⁵ “[A]ny implementation of the Cable Rate (which provides

⁹² See *FNPRM* at ¶ 125.

⁹³ See *FNPRM* at ¶ 126 (“To the extent that TWTC is arguing for ‘costs’ to be defined as marginal or incremental costs for purposes of Section 224(e), we are skeptical of that theory. Marginal cost can be defined either as the rate of change in total cost when output changes by an infinitesimal unit or as the change in total cost when output changes by a single unit.... However, the Section 224(e) formulas allocate the relevant costs in such a way that simply defining ‘cost’ as equal to incremental cost would result in pole rental rates *below* incremental cost.”).

⁹⁴ *FNPRM* at ¶126, n. 344 (citing *Alabama Power*, 311 F.3d at 1370 (“In some cases, then, marginal cost will be sufficient to compensate the pole owner.”)).

⁹⁵ *Florida Power*, 480 U.S. at 254.

for much more than marginal cost) necessarily provides just compensation.”⁹⁶ Numerous state commissions also have concluded that the cable rate formula is fully compensatory.⁹⁷ For example, the Massachusetts DTE concluded that its pole attachment rate formula, which follows the Commission’s cable rate formula, assures that utilities are provided adequate compensation.⁹⁸

The Commission also has ensured that the proposed rate formula is compensatory and otherwise lawful by creating a rebuttable presumption which the utility may challenge with actual evidence that the rate is not compensatory. As stated by the Court in *Alabama Power*, “before a power company can seek compensation above marginal cost, it must show with regard to each pole that (1) the pole is at full capacity; and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher valued use with its own operations.”⁹⁹ Otherwise, any implementation of a rate that provides for more than marginal cost necessarily provides just compensation. Despite repeated utility assertions that the cable rate and make-ready do not make them whole, utilities have never provided substantive economic analysis to support their claim, nor could they in light of well established principles of economics.¹⁰⁰

The Kravtin Report demonstrates that within the range of rates that would most align with cost causation and cost allocation principles—between a “marginal cost proxy” and a refined approach to today’s telecommunications rate formula—the Commission’s approach is

⁹⁶ *Alabama Power*, 311 F.3d. at 1370-1371.

⁹⁷ See Comments of NCTA, WC Docket No. 07-245, App. A at 3 (Mar. 7, 2008) (NCTA Comments) (providing list of state public utility Commission decisions addressing reasonableness of cable pole attachment rates).

⁹⁸ *Order Establishing Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-Of-Way and to Enhance Consumer Access to Telecommunications Services*, D.T.E. 98-36-A, at 11 (Mass DTE 1999).

⁹⁹ *Alabama Power*, 311 F.3d at 1370-71.

¹⁰⁰ Attachment A, Kravtin Report at ¶¶ 14, 77.

just and reasonable, and produces rates that are near the top end of the range within which the Commission could faithfully implement the Act.

H. The Commission May Use Forbearance To Prevent Unreasonable Pole Rents

In addition to the Commission’s broad discretion under section 224 of the Act, it also possesses broad authority under section 10 of the Act to forbear from applying “to a telecommunications carrier or telecommunications service” statutory provisions or rules that no longer serve the public interest. Forbearance is “[a]n integral part of the pro-competitive, de-regulatory national policy framework established in the 1996 Act.”¹⁰¹ Section 10(a) of the Act requires the Commission to forbear from applying “any provision of this Act” if the Commission finds that enforcement of that provision is not needed to ensure the reasonableness of the rates and practices of affected telecommunications carriers or to protect consumers of such carriers, and that forbearance is otherwise in the public interest.¹⁰² Section 706(a) of the 1996 Act, as amended, specifically identifies forbearance as one of the tools available to the Commission to “remove barriers to infrastructure investment.”¹⁰³

In the event the Commission does not adopt a revised rate approach based on cost causation principles, the Commission can and should implement the National Broadband Plan’s recommendation to reduce the attachment rates for broadband providers by adopting the additional measure of forbearing from applying the current telecom rate formula to broadband

¹⁰¹ *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19487, ¶15 (2007) (*Embarq Forbearance Order*) (quoting Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996)) (internal quotation omitted); *see also* *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705, 18714-15, ¶16 (2007) (same); *Petitions of the Verizon Tel. Cos. for Forbearance Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd 21293, 21303, ¶19 (2007) (footnotes omitted) ; *AT&T Inc. v. FCC*, 452 F.3d 830, 833 (D.C. Cir. 2006).

¹⁰² 47 U.S.C. § 160(a).

¹⁰³ 47 U.S.C. § 1302(a).

attachments by telecommunications carriers and applying the cable rate formula instead, as proposed by NCTA in its 2008 reply comments in the broadband pole attachment proceeding.¹⁰⁴ Using its forbearance authority in the context of pole attachments is an entirely rational and legal way for the Commission to promote its broadband goals. In particular, forbearing from applying section 224(e)(2) of the telecom rate formula furthers the precise objective underlying section 10 of the Act insofar as “forbearance seeks elimination of regulatory uncertainty [that] even the Commission recognizes ... may discourage investment and innovation regarding the very technologies Congress intended the Act to promote.”¹⁰⁵

Forbearance from disproportionate allocations under the telecom rate formula, and application of the cable rate formula instead, easily satisfies the statutory criteria. First, under section 10(a)(1), applying disproportionate allocations under the telecom rate formula is not necessary to ensure the reasonableness of rates those carriers charge. Indeed, it harms consumers by raising the cost of providing broadband and telecommunications services.

Second, section 10(a)(2) is satisfied because application of section 224(e)(2) is not necessary for the protection of consumers. Forbearance will keep pole attachment rates from rising above just and reasonable compensation and is appropriate to “help ensure that customers

¹⁰⁴ See NCTA Reply Comments at 18-20; see also Letter from Thomas Jones, Counsel for Time Warner Telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, RM-11293, RM-11303, Attach. (White Paper on Pole Attachment Rates Applicable to Competitive Providers of Broadband Telecommunications Services at 2) (filed Jan. 16, 2007) (“the Commission has used every means available to it under the Communications Act [to level the competitive playing field for facilities-based providers of broadband service], including its authority under the ‘at a minimum’ clause in Section 251(d)(2) and its forbearance powers under Section 10”). Because incumbent LECs are not currently covered by the Commission’s rules implementing section 224(e), forbearance from that provision would be of no benefit to them without additional actions by the Commission. See Petition of the United States Telecom Association for Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures, RM-11293 (filed Oct. 11, 2005). NCTA has proposed alternative solutions to provide incumbent LECs with parity to other attachers. See NCTA Reply Comments at 21-22.

¹⁰⁵ 47 U.S.C. § 1302(a).

... have competitive choices,”¹⁰⁶ and remove barriers to a fully competitive market.¹⁰⁷ Although utilities have alleged that reducing pole attachment rates could have a harmful effect on electric ratepayers, NCTA demonstrated in its pleadings that the effect on electric ratepayers is *de minimis*.¹⁰⁸ The fact that NASUCA, which represents the interests of electric ratepayers, supports the use of the cable rate formula demonstrates the fallacy of the utilities’ argument.

Finally, under sections 10(a)(3) and 10(b), forbearance is in the public interest because it would promote competition in the marketplace by allowing all broadband providers covered by section 224 to attach under the same regime that is now used by cable operators,¹⁰⁹ rather than penalizing providers that choose to offer telecommunications services or other services that help fulfill the 1996 Act goals of “promoting competition in every sector of the communications industry.”¹¹⁰

Utilities have raised a number of arguments against the proposal to forbear, but none withstand scrutiny. For example, it has been suggested that the Commission cannot forbear from the rate provisions of section 224(e) because Congress clearly wanted two separate rate formulas

¹⁰⁶ *Petition of ACS of Anchorage, Inc.*, 21 FCC Rcd 13655, 13688 (2007).

¹⁰⁷ See Charter Comments (demonstrating that, with respect to the prospect of raising pole costs above cable-only rates when additional services like Internet and VoIP are added to system, the “impact on a new entrant who must charge incrementally more to recoup its new plant investment within a reasonable amount of time ... is utterly forbidding”); see also *Embarq Forbearance Order*, 22 FCC Rcd at 19482 (discussing in grant of forbearance the propriety of “easing the regulatory requirements for broadband facilities and service”).

¹⁰⁸ NCTA Reply Comments at 7. For example, the Massachusetts DTE has found that reducing pole rental fees to the level set by the cable rate formula would have “minimal” impact (.009%) on electric ratepayers “and not require an adjustment of other [utility] rates.” *Cablevision of Boston Co.*, D.P.U./D.T.E. 97-82, p. 12 (Apr. 15, 1998). The DTE reached the same conclusion in a case involving Massachusetts Electric. *A-R Cable Services, Inc.*, D.P.U./D.T.E. 98-52 (Nov. 16, 1998) (“The Department’s pole attachment formula reasonably balances the interests of subscribers of CATV services as well as the interests of consumers of utility services...”).

¹⁰⁹ See Comments of State Cable Associations, WC Docket No. 07-245, at 22 (Mar. 8, 2008) (“we do not oppose CLECs that face the same attachment terms as cable operators paying the same cable rate for their attachments because there is no legitimate reason to increase *any* broadband pole attachment rates”) (emphasis in original).

¹¹⁰ *1998 Pole Attachment Order*, 13 FCC Rcd at 6794, ¶ 31; see also Charter Comments at 10 (“Increasing pole rents on the Internet would inexplicably reverse Congressional intent to promote new broadband deployment and local voice competition.”).

and therefore forbearance would be inconsistent with congressional intent. In fact, Congress adopted the forbearance provision because it recognized that circumstances change over time and the agency needs the ability to make changes that Congress might not have anticipated in 1996. That is precisely the situation here. The expectation in 1996 was that bringing down barriers to entry and promoting competition would result in the emergence of multiple, competing facilities-based networks. Competitive providers were expected to use their new rights of access to deploy their lines on utility poles,¹¹¹ and with more lines on the poles, there would be more entities to share pole costs under the telecommunications pole formula.

Had competition developed as anticipated, with multiple providers all placing new facilities on poles, the newly added telecom rate formula would have produced results comparable to the existing cable rate formula.¹¹² But for a variety of reasons, competition developed differently, with fewer competitive LECs, fewer companies attaching new facilities to poles, and technology migrating from separate lines switching circuits to IP packets integrated into lines already attached to poles for other services. As a result, applying the telecom rate formula to today's technology and market produces pole rents that are far higher than the cable rate formula, far higher than necessary to fairly compensate pole owners, and far higher than Congress anticipated. Forbearance here is necessary to adjust to these changed circumstances.

Utilities also argue that forbearance is permitted only with respect to provisions that impose obligations on telecommunications carriers and cannot be used for section 224, which

¹¹¹ Section 251(b)(4), for example, imposed upon each LEC the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with Section 224."

¹¹² Under Congress's concept, each new attaching entity would decrease the amounts that each entity would pay. But Congress also knew that from a standing start in 1996, it would take 10 years to achieve reasonable penetration, assuming all went well. Therefore, it prohibited any change in rent for the first 5 years, and required a phase in of any changes over the next five years. That decade, it was assumed, would give CAPs and other facility-based providers the chance to establish substantial market presence without being hit by massive pole penalties from the outset.

imposes obligations on utilities.¹¹³ That theory is inconsistent with the text of the statute. It is the telecommunications service providers that are obligated to pay costs apportioned in (e)(2), not the utility. While the wording of subpart (e)(2) may direct the utility to apportion costs in particular manner, these subparts are encompassed in the broader instruction to the Commission “to prescribe regulations ... to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services.” If the statutory criteria are satisfied, the Commission is required to forbear from “any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets.”¹¹⁴ Section 224 is “a provision of this Act” that applies “to telecommunications carriers” and therefore it is a permissible subject of forbearance. Section 10(d) includes the only statutory limitation on the provisions that may be the subject of forbearance. In that provision, Congress stated that the Commission cannot forbear from sections 251(c) and 271 until it determines those sections have been “fully implemented.”¹¹⁵ The fact that Congress did not include section 224 as one of the provisions identified in section 10(d) provides further support for the notion that the Commission must forbear if the statutory criteria are satisfied.

Moreover, forbearance alone would produce the intended result because the Commission would retain the authority under sections 224(e)(1) and (e)(3) to assure just, reasonable, and nondiscriminatory rates consistent with the Act and with the recommendations of the National

¹¹³ In the *Third Way NOI*, the Commission asks, “Does section 10 provide the Commission authority to forbear from Section 224 insofar as it imposes rate-related obligations on the Commission and utilities that own poles, rather than on telecommunications carriers or telecommunications services?” *Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, FCC 10-114 (rel. June 17, 2010) (*Third Way NOI*).

¹¹⁴ 47 U.S.C. § 160(a).

¹¹⁵ 47 U.S.C. § 160(d).

Broadband Plan. The Commission’s 2007 decision in response to a petition filed by Core Communications is thus distinguishable.¹¹⁶ In that case, the Commission denied the request to forbear from access charge provisions on the ground that further Commission action, in a separate proceeding, would be needed to fill the void created by forbearance. NCTA’s request for forbearance from section 224(e)(2) is distinguishable because it arises in the context of a rulemaking proceeding, not a section 10(c) petition, and therefore the Commission has the ability to forbear from the old rule while adopting a new rule in a single proceeding.¹¹⁷

III. RETAINING SIGN AND SUE IN ITS PRESENT FORM IS CRITICAL TO EFFECTIVE BROADBAND DEPLOYMENT

The Commission must retain its “sign and sue” rule in its current form to appropriately fulfill its statutory duty to ensure that rates, terms and conditions of pole attachments are just, reasonable and non-discriminatory, and to incent broadband deployment. Utilities are sophisticated companies with years of experience in negotiating pole attachment agreements and navigating the Commission’s pole attachment rules and policies. They are not, and will not be, “blind sided” by challenges to terms that are facially unreasonable. Nor is there any evidence in the record that attachers are abusing the sign and sue rule. Moreover, requiring attachers to list each and every term that is potentially illegal will needlessly extend an already lengthy negotiation process. It is entirely inconsistent with the objectives of the National Broadband Plan to accelerate “the duration of the entire process for obtaining access to poles, duct, conduit and rights-of-way.”¹¹⁸

¹¹⁶ *Petition of Core Communications, Inc.*, Memorandum Opinion and Order, WC Docket No. 06-100, 22 FCC Rcd 14118 (2007).

¹¹⁷ As NCTA explained in its reply comments, the Commission has granted forbearance in the context of a rulemaking on numerous occasions. See NCTA Reply Comments at 20, n. 72, citing *Implementation of the Call Home Act of 2006*, 22 FCC Rcd 1030 (2007); *Regulation of Prepaid Calling Card Services*, 21 FCC Rcd 7290, 7299 (2006); *Federal-State Board on Universal Service*, 20 FCC Rcd 16883, 16893-94 (2005).

¹¹⁸ National Broadband Plan at 111.

A. The Proposed Requirement To Memorialize Illegal Terms Will Undermine Commission Authority To Regulate Rates, Terms And Conditions

In adopting the sign and sue requirement over 30 years ago, the Commission 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.”¹¹⁹ The U.S. Court of Appeals for the D.C. Circuit affirmed the Commission, concluding that if attachers could not sign a contract and sue later, the Commission would be incapable of addressing the “numerous abuses of [the utilities’] monopoly power” identified by Congress in the Pole Attachment Act.¹²⁰ The court reached the same conclusion twenty years later, endorsing the Commission’s explanation that “[i]f 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.”¹²¹

Throughout the *FNPRM* the Commission acknowledges that the fundamental premise on which this rule was adopted, has not changed: utilities retain monopoly control over poles and the Commission’s regulatory oversight remains essential to ensuring just and reasonable terms and conditions of attachments. Recognizing “a real possibility that utilities may abuse their monopoly power during the negotiating process,” the Commission rejected several other utility suggestions to limit sign and sue, including utility requests to: limit Commission review of

¹¹⁹ *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, 68 FCC 2d 1585, 1590 ¶16 (1978).

¹²⁰ *Monongahela Power Co. et al. v. FCC*, 655 F.2d 1254, 1256 (D.C. Cir. 1981) (citing 123 Cong. Rec. 35,006 (1977) (remarks of Rep. Wirth)).

¹²¹ 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.” *Southern Company*, 313 F.3d at 583-84.

agreements to state law considerations of unconscionability,¹²² adopt a presumption that executed pole attachment agreements are just and reasonable,¹²³ require attaching entities to submit extrinsic evidence of coercion or undue influence, and limit challenges to pole attachment complaints to state court.¹²⁴ The Commission concluded that the “record does not demonstrate that the potential for utilities to exert such coercive pressure in pole attachment agreement negotiations is less significant today than when the Commission first adopted the sign and sue rule.”¹²⁵

Notwithstanding its clear understanding of the need for sign and sue, the Commission proposes to require attachers to provide a utility with written notice of objections to provisions in a pole attachment agreement that are, on their face, unjust or unreasonable, as a prerequisite to later bringing a complaint challenging such provisions. Not only is there no basis in the record or real world negotiations to support such a requirement, limiting review to items memorialized at the time of negotiation would limit the Commission’s ability to fulfill its regulatory duty to ensure that rates, terms and conditions of attachment are just and reasonable. Even if it is applied only to contracts entered into at the next renewal, as would be standard for Commission rule changes,¹²⁶ it is still unworkable. The Commission must be empowered to review a patently

¹²² *FNPRM* at ¶ 105.

¹²³ *Id.* at ¶ 104.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *See, e.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996; Review of the Commission's Cable Attribution Rules, Report and Order*, 14 FCC Rcd 19014, ¶ 138 (1999) (rules setting limits on ownership - the horizontal ownership rule, the cable/SMATV cross-ownership prohibition rule, the cable-telco buyout prohibition, and the effective competition test -- made effective only to interests acquired after date of NPRM); 47 C.F.R. § 76.1002(e) (exempting from prohibition exclusive satellite programming agreements entered into prior to 1990).

unreasonable term or condition of attachment even if such term is not memorialized by the attacher.¹²⁷

B. The Proposed Modification To Sign And Sue Would Delay Access To Poles And Broadband Deployment

The Commission’s proposal would necessarily delay the already lengthy pole attachment process and is thus entirely inconsistent with the Commission’s efforts to “expedite the build-out of affordable broadband services.”¹²⁸ Indeed, increasing the speed of all aspects of the pole attachment process is a primary recommendation of the National Broadband Plan.¹²⁹ But just like the application and make-ready process, the process of negotiating an agreement can be painfully slow. Typically, a utility provides the attaching entity with a lengthy one-sided template that contains numerous provisions which stray from established Commission principles governing just and reasonable attachments. The exchange of drafts and debate over terms typically lasts several months. The *FNPRM* provides no guidance concerning what is and is not a facially invalid contract term, or what kinds of contract terms are only unlawful “as applied.”

¹²⁷ See *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 16 FCC Rcd at 12112-13, ¶ 13 (2001) (“[T]he record as a whole does not demonstrate that the market for pole attachments is fully competitive or that the utilities now lack any incentive to discriminate against attaching entities. As the Court stated in *Gulf Power II*... the original purpose of the Pole Attachment Act, to prevent utilities from charging monopoly rents to attach to their bottleneck facilities, did not change with the 1996 Act. Nothing in the record demonstrates that the utilities’ monopoly over poles has since changed.”); *Southern Company*, 313 F.3d at 583-584 (The court found the sign and sue rule is “a reasonable exercise of the agency’s duty under the statute to guarantee fair competition in the attachment market.”).

¹²⁸ See *FNPRM* at ¶¶ 31-45, 52-53, 55-67, 70-77. We support the Commission’s proposals to expedite infrastructure access by establishing specific timeframes for pole owner action at each stage of attachment, facilitating the use of third party contractors and common construction practices (i.e. boxing), increasing transparency of make-ready changes, staged progress-based make-ready payments, and authorizing remedies to include compensatory damages and refunds through the applicable statute of limitations period. Each of these improvements could be nullified if the Commission were to abrogate the sign and sue rule. We believe, however, that the Commission should not delegate to pole owning utilities the unilateral right to determine when capacity is sufficient. *FNPRM* at ¶ 67 and proposed rule 1.1422(b)(2) (referring to pole owners “final determinations” relating insufficient capacity). The Eleventh Circuit rejected this notion when it held that such a delegation “is clearly not what Congress intended when it passed the Act.” *Southern Company*, 293 F.3d at 1347-48 (rejecting “argu[ment] that the language [in § 224(f)(2)] permitting utilities to deny access on the basis of ‘insufficient capacity’ specifically entrusts [] utilities with the power to determine when capacity is insufficient”).

¹²⁹ National Broadband Plan, Chapter 2, Goal 1, p. 9 (“securing rights to this infrastructure is often a difficult and time-consuming process that discourages private investment”).

The proposed rule will require attaching entities to err on the side of including all potentially problematic terms in a written letter to the utility prior to signing an agreement. Creating such a list of objectionable terms will be a time consuming, expensive and potentially unnecessary exercise. If the Commission were to impose this requirement, negotiations will necessarily extend well beyond what already is an unacceptable timeframe and broadband facilities deployment will be delayed.

C. Utilities Are Not In Jeopardy Of Losing Bargained For Exchanges

Utilities' assertions that the sign and sue rule allows attachers to "cherry pick" favorable terms and conditions in pole attachment agreements and that utilities are somehow "blindsided" when attachers file complaints with the Commission are wholly unsupported and inaccurate. As an initial matter, utilities, which still "have monopoly power over pole access,"¹³⁰ have no market-based incentive to make concessions that are not required by law. Accordingly, operators are not able to obtain favorable terms and conditions beyond what is legally required. Moreover, if, as utilities suggest, attachers simply are signing "virtually any pole attachment agreement" and filing complaints later, significantly more complaints would have been filed to date. There is no evidence in the record that attaching entities are abusing the complaint process and filing complaints about bargained-for terms that they "would like to disavow." Indeed, utilities are sophisticated companies with a history of challenging the Commission's pole attachment rules and policies. Rather than placing the burden on attachers, the Commission should recognize that the initial template provided to attachers should be free of facially illegal terms.

¹³⁰ *FNPRM* at ¶ 104; *see also Gulf Power*, 534 U.S. 327 (2002).

The Commission's existing rules provide sufficient protections for utilities in the event they make concessions. First, the Commission's existing rules require cable operators to work with pole owners informally to try to resolve disputes concerning pole attachment terms and conditions before filing a complaint, unless that effort would be futile. The operators must then summarize all steps taken to resolve problems prior to filing a complaint.¹³¹ Accordingly, utilities will not be "blind sided" by attacher complaints that certain terms are unreasonable. In reality, the "sign and sue" rule is virtually the only leverage attachers have when negotiating contracts and is the primary reason pole owners negotiate in good faith. Second, as recognized by the Commission in the *FNPRM*, "[e]vidence of such a quid pro quo could come from several sources, including communications between the parties during contract negotiations."¹³² Therefore, if a pole owner wishes to demonstrate that an attacher bargained away the precise term or condition that it subsequently challenges in a complaint, it can do so under the existing regulatory regime. It is not necessary to burden attaching entities with a requirement to list all of the unjust terms that the utility has refused to change or remove.

IV. UTILITY REQUESTS FOR UNFETTERED DISCRETION TO IMPOSE ADDITIONAL PENALTIES FOR UNAUTHORIZED ATTACHMENTS MUST BE REJECTED

No additional penalties are needed to incent attaching entities to comply with existing permitting requirements. Instead, the status quo should be maintained. Cable attachers already are motivated to ensure that their attachments to poles are properly permitted, safe, and that improper pole engineering will not lead to service interruptions or to the sizeable penalties that already exist under current law. As repeatedly demonstrated by attaching entities, utility assertions that attachers routinely fail to permit attachments and thereby cause pole safety issues

¹³¹ 47 C.F.R. § 1.1404(h).

¹³² *FNPRM* at ¶ 105 n. 89.

are unsupported, inaccurate and misleading. The numbers of attaching entities reported by various utilities in this proceeding do not withstand scrutiny. There is no evidence to support claims that third parties are failing to get permits or that attachments are unsafe. The true cause of any discrepancies that exist between the number of billed and actual attachments, always has been, and continues to be, one of record keeping, changing pole ownership, and morphing definitions of what constitutes a “billable attachment.”

Contrary to the image painted by utilities for this Commission, an image that contrasts sharply with that drawn for state regulatory bodies investigating service outages, attachers, as a rule, comply with the permitting process. Attachers have strong and obvious incentives in maintaining the structural integrity of the poles to which their facilities are attached, to ensure that billing records are accurate (often they are billed for attachments they no longer own or that have been removed), and to avoid existing penalties, which typically assess multiple years of back rent. Attachment audits performed by utilities are often seriously flawed and thus grossly overstate the number of unauthorized attachments. This is precisely why the Commission historically has declined to adopt a “hard and fast” penalty scheme. Its proposal to do so now is without justification. Indeed, the Oregon experience provides precautionary instruction for maintaining the status quo.

A. Utility Claims Concerning Unauthorized Attachments And Safety Problems Caused By Third Party Attachments Are Unsupported And Misleading

Cable attachers have a strong interest in ensuring that their attachments to poles are properly permitted and that all their facilities are compliant with applicable safety codes and will not be disrupted due to improper pole engineering practices. They care about the safety of their employees and community residents, and they are subject to legal requirements that demand

careful attention to safety compliance, proper permitting and maintenance of reliable plant. They also have incentives to ensure that billing records are accurate. After considerable litigation, the Commission adopted a balanced order that has become today's *de facto* benchmark—that unauthorized attachments could be subject to up to five years of back rent.¹³³ For example, if pole rents are \$8, then a pole agreement could provide penalties of \$40 per pole if attachments are unauthorized. This creates strong additional incentives for procedural regularity in attachment practices, while preventing utilities from converting occasional liquidated damage provisions into large and unregulated cash cows.

Some utilities would have the Commission believe that cable attachers routinely make attachments without following the required permitting process resulting in large numbers of alleged “unauthorized” attachments, and corresponding safety issues. However, the number of unauthorized attachments reported in this proceeding not only vary dramatically among pole owners, as recognized by the Commission,¹³⁴ they are contradicted by evidence submitted by other commenters at earlier stages of this proceeding as well as by statements made by these same utilities to state regulators in other contexts.

In reply comments filed previously in this proceeding, Comcast submitted evidence that the allegations of Oncor that third party attachments were to blame for violations of applicable safety codes were unfounded. “With Oncor and USS representatives present, a sample of poles that Oncor had demanded be replaced because of alleged cable operator safety violations was

¹³³ *Mile Hi Cable Partners v. Public Service Co.*, 17 FCC Rcd 6268, 6273, ¶ 13 (2002), *aff'd Public Service Co. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003) (hereinafter “Mile Hi Cable Partners II”).

¹³⁴ See *FNPRM* at ¶ 91 (“Based on the current record, we are unable to gauge with certainty the extent of the problem of unauthorized attachments.”).

reviewed. At the conclusion of this joint review, it was found that *Oncor had in fact caused all of the violations that necessitated the pole replacements* for the sample of poles reviewed.”¹³⁵

Similarly, the Florida Cable Television Association (FCTA) submitted data in reply comments filed in earlier rounds of this proceeding that demonstrate that utilities are painting a much different picture for the Commission than they are for state regulatory bodies examining service outages related to pole failures. In Reliability Reports submitted in Florida’s Storm Preparedness proceedings, the Florida utilities touted the overall safe condition of their poles as well as the compliance of third party attachments.¹³⁶ For example, FP&L reported, “In 2006, audit results [of 20% of its plant inspected] indicate that unauthorized attachments (47) ... were almost nonexistent.”¹³⁷ FP&L also reported that its “2007 audit results continue to show that FPL’s joint use processes and procedures, along with cooperation from joint pole owners and 3rd party attachers, indicate that joint use facilities are being properly maintained.”¹³⁸ These reports contrast sharply with the 33,350 unauthorized attachments reported by FP&L in this proceeding for year 2006, the same year where FP&L reported 47 unauthorized attachments to the Florida Public Service Commission.¹³⁹

¹³⁵ Reply Comments of Comcast Corporation WC Docket No. 07-245, at 25-26 (Apr.22, 2008)(Comcast Reply Comments) (citing Declaration of Michael Harrelson) (emphasis added).

¹³⁶ For example, Progress Energy reported that it found “no apparent NESC violations involving third party attachments.” *PEF Reliability Report* dated March 1, 2007 (Joint Use Attachment-Distribution Poles chart).(<http://www.psc.state.fl.us/library/filings/07/02092-07/02092-07.pdf> at page 1210 of 3458.).

¹³⁷ *FP&L Status Report and Update of its Storm Preparedness Initiatives*, filed in FPSC Docket 060198-EI at 4, (<http://www.psc.state.fl.us/library/filings/07/01933-07/01933-07.pdf>).

¹³⁸ FPL’s status report and update of its Storm Preparedness Initiatives, which was filed in Docket No. 0601 98-EI on June 1, 2006, (<http://www.psc.state.fl.us/library/filings/08/01619-08/01619-08.pdf> at 2 and at page 377 of 445 (reporting significantly less than 1% of attachments to be “unauthorized”).).

¹³⁹ Similarly, Gulf Power stated that of the thousands of third party attachments on its poles, approximately *two percent* were unauthorized. *Gulf Power Company's Annual Distribution Service Reliability Report* as required by Rule 25-6.0455, filed February 27, 2007in FPSC Docket 060198-EI at 32 (<http://www.psc.state.fl.us/library/filings/07/01922-07/01922-07.pdf>).

Indeed, the comments submitted to date in this docket demonstrate that the inflated number of unauthorized attachments, such as those reported by EEI, UTC and AEP,¹⁴⁰ are the result of: “the utility’s retroactive enforcement of a change in its attachments policies;”¹⁴¹ “the unavailability of pole licensing records;”¹⁴² changes in pole ownership;¹⁴³ and financial incentives offered by utilities to their contractors to find unauthorized attachments.¹⁴⁴

The Commission has acknowledged these issues in its rejection of utility efforts to retroactively count attachments as “unauthorized” that were not previously subject to “permitting” (i.e., billing) requirements.¹⁴⁵ The Commission has also had to remind utilities that attachments made outside of the usable space are not to be counted as billable attachments.¹⁴⁶ No doubt there are some situations where billings do not capture all existing attachments, as well as others where attachers are billed for attachments incorrectly. But, as recognized by Verizon, also a pole owner, these are largely due to “utilities changing out poles or adding attachments without notifying attachers and from inaccurate pole records.”¹⁴⁷ The Commission should not

¹⁴⁰ *FNPRM* at ¶ 89.

¹⁴¹ Knology Comments at 18.

¹⁴² Time Warner Cable Reply Comments, WC Docket No. 07-245 at 49 (Apr. 22, 2008) (Time Warner Cable Reply Comments).

¹⁴³ Comcast Reply Comments at 30.

¹⁴⁴ *Id.*; see also Knology Comments at 15; Time Warner Cable Reply Comments at 49.

¹⁴⁵ *Mile Hi Cable Partners II*, 17 FCC Rcd at 6273 ¶ 13 (“The evidence introduced by the parties, and cited by the Bureau, supported the finding that it was the specific practice of Respondent not to require that Complainant gain advance authorization for drop poles (or, therefore, to pay fees for them) until 1998. ... We agree that it would be unjust and unreasonable to allow Respondent to collect unauthorized attachment fees for drop poles when Respondent has provided no evidence to contradict Complainant’s evidence that prior to 1998, Complainant was not required to apply for, or pay for, attachments to drop poles.”).

¹⁴⁶ *Texas Cablevision Company, et al. v. Southwestern Electric Power Company*, Memorandum Opinion and Order, PA-84-007, 1985 FCC Lexis 3818, ¶ 6 (rel. Feb. 26, 1985). Guy wires that attach to a pole outside of the presumptive one foot of space occupied by an attachment are to be excluded from any calculation of occupied space. *Id.*

¹⁴⁷ *FNPRM* at n. 248.

adopt an entirely new penalty scheme for attachers when utilities have failed to prove the existence of a problem caused by attaching entities.

B. No Additional Incentives Are Necessary To Ensure That Permits Are Obtained For Attachments

Cable attachers, as explained above, have a strong and obvious interest in ensuring that their attachments to poles are properly permitted and already operate under strong financial incentives to ensure for procedural regularity in attachment practices.

The *FNPRM* asks “whether the system of penalties instituted by the Oregon Commission has been effective in reducing the incidence of unauthorized attachments.”¹⁴⁸ As a preliminary matter, it is important to clarify that the penalties in Oregon that pertain to unauthorized (i.e., unpermitted) attachments as that term has been routinely used by the Commission are the penalties set forth in ORS 860-028-0140 (Sanctions for Having No Permit). Pursuant to this provision, sanctions for unpermitted attachments may not exceed five times the current annual rental fee (if the violation is reported by the attacher or discovered through joint inspection), and the attacher is given time to obtain a permit before additional sanctions may be levied.¹⁴⁹ Oregon also imposes sanctions for attaching without an agreement¹⁵⁰ and for violations of other duties related to compliance with standards governing the installation and maintenance of attachments.¹⁵¹ Sanctions related to compliance issues are part of Oregon’s much larger pole

¹⁴⁸ *FNPRM* at ¶ 96.

¹⁴⁹ An attacher that refuses to participate in an inspection is subject to an additional sanction of \$100 per pole. Or. Admin. Rule § 860-028-0140.

¹⁵⁰ See Or. Admin. Rule § 860-028-0130.

¹⁵¹ See Or. Admin. Rule § 860-028-0150. Subsequent to its initial adoption, the Oregon PUC severely limited a pole owner’s ability to apply the \$500 sanction for failing to have an agreement. Under the new rule, “the last contract between the parties . . . continue[s] in effect until a new contract between the parties goes into effect.” Or. Admin. Rule § 860-028-0060(4). Accordingly, the \$500 penalty is rarely needed.

safety compliance inspection program which encompasses the entire pole infrastructure and all entities attached thereto.¹⁵²

While the *FNPRM* references these other sanctions imposed by Oregon under its entire safety compliance program,¹⁵³ the Commission is not proposing wholesale revisions to its practices that adoption of a safety compliance program like Oregon's would entail. The Oregon Joint Use Association (OJUA)¹⁵⁴ and the Oregon Public Utility Commission actively monitor the pole inspection process by all state pole owners and attachers and devote significant state resources to the program's oversight and to resolving the many disputes that arise among the parties under this regime. The Commission does not have the authority or manpower to institute a similarly broad inspection program in all 30 non-certified states.

Moreover, the Oregon experience demonstrates why an abrupt departure from the status quo is not a good idea. Oregon originally adopted a rule in 2001 that allowed pole owners to impose an unauthorized attachment penalty of \$250 per pole or 30 times back rent – whichever was higher.¹⁵⁵ Pole attachment counting quickly became a profit center and led to massive costly disputes among attachers and pole owners. After years of discord, in 2007, Oregon reduced its penalties substantially to more reasonable levels and instituted a 60 day grace period for attachers to correct problems.¹⁵⁶ In revising the rules, the Oregon Public Utility observed that “pole occupants have asserted that sanctions rules have been abused as sources of revenue by

¹⁵² See Or. Admin. Rule, Division 24, Safety Standards, § 860-024-011; (http://www.sos.state.or.us/archives/rules/OARS_800/OAR_860/860_024.html).

¹⁵³ *FNPRM* at ¶ 95.

¹⁵⁴ The Oregon Joint Use Association is a uniquely structured organization created by the Oregon state legislature. See OR. Rev. Stat. §757.290(1).

¹⁵⁵ See *Adoption of Rules to Implement House Bill 2271, Sanctions and Rental Reduction Provisions Related to Utility Pole Attachments*, AR-386, Order No 00-467, Public Utility Commission of Oregon, Appendix A (Aug. 23, 2000).

¹⁵⁶ See Or. Admin. Rule § 860-028-0140.

pole owners,” and stated that it was adopting the changed unauthorized attachment penalty structure to “allow[] sanctions to provide an incentive for compliance *without allowing for possible abuses.*”¹⁵⁷ The Oregon experience shows that a draconian approach of high penalties is not workable.

For years this Commission has rightly concluded that the appropriate remedy for “unauthorized attachments” is compensatory damages. Payment of back rent plus “just and reasonable costs associated with safety compliance issues” is “consistent with general contract principles that prohibit the enforcement of unreasonable penalties for breach of contract.”¹⁵⁸ While the Commission has allowed utilities to impose a penalty of five years back rent or back to the date of the last audit, where attachers cannot produce records, it has always allowed attachers to provide evidence to rebut utility allegations concerning unauthorized attachments. In fact, the Commission specifically declined to adopt a “hard-and-fast rule requiring back rent to the date of the last inspection” recognizing this “could grossly overcompensate [the pole owner] if an unauthorized attachment were installed long after the last inspection.”¹⁵⁹

In the *FNPRM*, the Commission also suggests that unauthorized attachment penalties may be necessary to counteract possible incentives for attachers to bring services to market quickly.¹⁶⁰ However, to the extent such incentives ever existed, they are largely addressed by the Commission’s proposed mandatory application and make-ready timeframes¹⁶¹ as well as its

¹⁵⁷ *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, p. 26 (Apr. 10, 2007) (emphasis added).

¹⁵⁸ *Mile Hi Cable Partners II*, 17 FCC Rcd at 6273-74.

¹⁵⁹ *Cable Television Ass’n of Georgia v. Georgia Power*, 18 FCC Rcd 16333, ¶18 (2003)

¹⁶⁰ *FNPRM* at ¶ 94.

¹⁶¹ *See FNPRM* at ¶¶ 31-44.

requirement that utilities employ time-saving construction techniques where practical and consistent with pole owners' use of those techniques.¹⁶²

V. THE COMMISSION SHOULD ADOPT REMEDIES TO INCENT UTILITIES TO COMPLY WITH THE RULES IN ADVANCE OF A COMMISSION ORDER AND TO ENCOURAGE PRE-COMPLAINT RESOLUTION

Changes in the Commission's enforcement processes are necessary to ensure that the Commission's rules are respected and followed by pole owners. In addition, the Commission's proposals to amend its rules pertaining to refunds and complaints alleging denials of access will go a long way toward encouraging pre-complaint resolution of disputes.

A. The Commission Should Amend Its Rules To Incent Prompt Compliance By Pole Owners

Under the current regime, utilities have little incentive to comply with regulations until a complaint is filed. Even then, the process for resolving disputed matters can extend well beyond the time when prospective resolution will make the attacher whole. Potential customers will have sought out alternative solutions or work forces will have been deployed to other projects. As recognized in the *FNPRM*, attachers should be made whole. Where prospective relief is the primary remedy, the longer the utilities wait, the longer they can impose unreasonable terms and conditions. The possibility of compensatory damages will provide incentives to rectify illegal behavior more promptly.

Currently, pole attaching entities are strongly encouraged to participate in the Commission's mediation process prior to filing complaints. However, there is no apparent structure governing the mediation process and no limits on the amount of time a dispute remains in mediation. As a result, the longer pole owners give the appearance of cooperation the more time that passes before a complaint is filed, and ultimately, before a dispute is resolved. The

¹⁶² *FNPRM* at ¶16.

Commission proposes to make the informal dispute resolution process more efficient and asks whether it should develop a set of best practices to govern the process.¹⁶³

NCTA supports an approach that borrows from the best practices of other successful regimes. One of the key difficulties in current procedures is the absence of any time limit within which pole disputes must be resolved. As a practical matter, encouragement of unbounded pre-complaint mediation, with no fixed time for resolving the underlying dispute either through mediation or through complaint, has created delays that are antithetical to prompt deployment and to the prompt resolution of rate issues that can have profound impact on deployment decisions. In prior pole attachment enforcement regimes, the Commission had greater success by inviting parties to mediation while complaint processes were running or immediately after the pleading cycle closed. Pole attachment dispute resolution has historically benefited greatly by the promise of expeditious resolution and a body of promptly issued precedential decisions, both of which spur parties to resolve the vast majority of their differences outside of the Commission process.¹⁶⁴ But these advantages are lost if dispute resolution is delayed or channeled primarily into mediation forums with built-in incentives to “split the baby” rather than to meet national law and priorities. In other enforcement regimes, the Commission has recognized the salutary value of having defined “shot clocks” which spur either informal or formal resolution.

We therefore suggest that the Commission should adopt the goal of resolving pole attachment complaints within 90 days from submission of the complaint to the Commission, without requiring pre-complaint mediation. Any Commission mediation can occur during the cycle of pleadings. Under current pole attachment pleading cycles, the record is closed within 50

¹⁶³ *FNPRM* at ¶ 81.

¹⁶⁴ By making such rapid resolution available, and by adopting the *FNPRM* proposal to remove a 30 day complaint deadline for access complaints, the Commission would provide even better opportunity for access disputes to be resolved privately, even in advance of filing.

days, leaving 40 days for resolution. Ninety days is the reasonable time frame established by the Commission for other governmental bodies to resolve franchise negotiations for those authorized to occupy the public rights-of-way¹⁶⁵ and to resolve zoning and other concerns over the use of existing towers by co-located facilities.¹⁶⁶ Pole attachments are by definition co-located facilities of providers with authority to occupy the public rights-of-way. Extensions would be permitted in complex cases, or by agreement of the parties (such as when parties extend times for responsive pleadings if mediated results seem imminent); but the extension should be limited to an additional 30 days, for a total of 120 days of process. That time period—120 days—has been considered ample for resolving complex cases such as must carry and market modification before the Commission,¹⁶⁷ and cable franchise modification before state and local governments.¹⁶⁸ This approach would satisfy the Congressional instruction that pole attachment procedures be kept “simple and expeditious.”¹⁶⁹

Timetables like this would provide the certainty and structural incentives for parties to resolve their differences or obtain prompt agency determinations, both of which are essential to the prompt deployment of broadband.

¹⁶⁵ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act*, FCC 06-180, 22 FCC Rcd 5101 ¶68 (2007) (“We are concerned that without a defined time limit, the extended delays will continue, depriving consumers of cable competition and applicants of franchises.”).

¹⁶⁶ *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, WT Docket No. 08-165, FCC 09-99, 24 FCC Rcd 13994 at ¶35 (2009) (“Delays in the processing of personal wireless service facility siting applications are particularly problematic as consumers await the deployment of advanced wireless communications services, including broadband services, in all geographic areas in a timely fashion.”).

¹⁶⁷ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965 (1993).

¹⁶⁸ 47 U.S.C. § 545(a)(2).

¹⁶⁹ *Communications Act Amendments of 1978*, S. Rep. No. 95-580 at 129 (“The committee desires that the commission institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paper-work and procedures consistent with fair and efficient regulation.”).

B. Access Disputes And Refunds Should Not Be Contingent Upon The Date A Complaint Is Filed

The Commission should eliminate the requirement that a complaint for denial of access be filed within 30 days.¹⁷⁰ Denials often take the form of unacceptable delays or continuous enforcement of unreasonable terms and conditions. In such cases it is difficult to identify a specific date on which the denial takes place. And, as recognized by the Commission, forcing attaching entities to file within 30 days of a denial significantly reduces the opportunity for informal resolution.¹⁷¹

The Commission should also amend its rules to allow attachers to obtain refunds of overpayments dating back to the earlier of the date such overpayments began or to the date permitted by the state statute of limitations. Pole owners are not required to adjust rates annually or to notify attaching entities if maximum permitted rates decrease. Attachers must police rents and typically are reimbursed only to the date on which an error is discovered and reported to the utility (or, if a complaint is filed, to the date of the complaint). The adoption of rules to ensure prompt resolution of disputes and to require pole owners to compensate attachers from the date of wrongful conduct would go a long way to creating an environment where pole owners are encouraged to comply with the Commission's rules. Section 1.1410(c) permits a monetary award in the form of refunds plus interest measured from the date a complaint is filed. However, attachers should be permitted to reach back to before the time it discovers an unjust rate or files a complaint. If utilities knowingly charge a rate that exceeds permitted maximum, they should not be rewarded simply because they get away with it until the overcharge is discovered.

¹⁷⁰ 47 C.F.R. 1.1404(m).

¹⁷¹ *FNPRM* at ¶ 82.

CONCLUSION

The Commission's proposed rate structure produces just, reasonable and nondiscriminatory pole attachment rates that assure just compensation and promote robust broadband deployment. Utility claims that the rates will not allow them to recover their costs are unsupported and refuted by numerous agency and court decisions finding the cable rate to be more than compensatory. Utility assertions of widespread unauthorized attachments are similarly lacking, and the Commission should reject utility requests for hard and fast rules imposing heavy sanctions for what is generally caused by flaws in utility billing and record keeping processes. As reflected by the record, pole owners still retain control over an essential asset and thus an unfair advantage in the negotiation process. Accordingly, the Commission should retain the sign and sue provision in its current form to ensure that it retains the ability to exercise its authority to regulate rates, terms and conditions, and should also amend its enforcement provisions to create incentives for utility compliance and to assure prompt dispute resolution.

Respectfully submitted,

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August 16, 2010

ATTACHMENT A

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

In the Matter of

Implementation of Section 224 of the Act;
A National Broadband Plan for Our Future

WC Docket No. 07-245

GN Docket 09-51

REPORT OF

PATRICIA D. KRAVTIN

August 16, 2010

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INTRODUCTION

Qualifications

1. My name is Patricia D. Kravtin. My business address is 57 Phillips Avenue, Swampscott, Massachusetts. I am an economist in private practice specializing in the analysis of telecommunications regulation and markets.

2. I have testified or served as an expert on telecommunications matters in proceedings before over thirty state regulatory commissions. I have also provided expert testimony and reports in proceedings before this Commission, the FCC's Chief Administrative Law Judge, and before international agencies including the Canadian Radio-television and Telecommunications Commission, the Ontario Energy Board, and the Guam Public Utilities Commission. In addition, I have testified as an expert witness in antitrust and other litigation in federal and state district court, and also before a number of state legislative committees. A detailed resume summarizing my educational background and previous experience is provided in Appendix A to this Report.

3. Over the past decade and a half, I have been actively involved in proceedings, both at the state and federal level, concerning implementation issues in connection with the passage of the Telecommunications Act of 1996 (the Act). One component, essential for the provision of competitive communications services, with which I am very familiar, and have testified extensively on, is access to poles, ducts, conduits, and rights-of-way.

4. In March 2008, I submitted a report on matters pertaining to pole attachment rates and regulation in response to the Commission's earlier Notice of Proposed Rulemaking in this docket, *In the Matter of Implementation of Section 224 of the Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, dated November 20, 2007 ("Kravtin March 2008 Report"). In 2006, I submitted testimony and was subject to live cross-examination before the Commission's Chief Administrative Law Judge, on issues pertaining to utility compensation for pole attachments *In the Matter of Florida Cable Telecommunications Association, Inc., et al. v. Gulf Power Company*, EB Docket No. 04-381, FCC 07D-01 (Initial Decision, rel. January 31, 2007). Previously, I submitted declarations on pole attachment, conduit and rights-of-way issues before the Commission in a pole attachment rulemaking proceeding, CS Docket No. 97-98, on behalf of the National Cable Television Association, et al., and in a pole attachment complaint proceeding *Cavalier Telephone v. Dominion Virginia Power* (Case No. EB-02-MD-005).

5. I have served as an expert or advisor on pole attachment matters in proceedings involving incumbent local exchange carriers, investor-owned utilities, non-profit consumer-owned utilities, and municipally-owned utilities, and before the following state regulatory commissions: the Arkansas Public Service Commission, the Kentucky Public Service Commission, the Public Utilities Commission of Ohio, the Public Utilities Commission of Texas, the Georgia Public Service Commission, the South Carolina Public Service Commission, the Public Service Commission of the District of Columbia, the New Jersey Board of Public Utilities, and the New York Public Service Commission.

6. I have also been actively involved in key related issues pertaining to broadband deployment. I have authored a number of reports dealing with this subject and participated as a grant reviewer for the Broadband Technology Opportunities Program (“BTOP”) administered by National Telecommunications and Information Administration (“NTIA”).

Purpose and Summary of Report

7. The purpose of this Report is to respond to matters raised in the Commission’s Order and Further Notice of Proposed Rulemaking (FNPRM), adopted and released May 20, 2010, pertaining to revisions to the Commission’s pole attachment rules “to lower the costs of telecommunications, cable, and broadband deployment and to promote competition, as recommended in the National Broadband Plan.”¹ The Commission proposes to revise its approach to the telecommunications formula to better align that formula with principles of cost causation and the policies of the National Broadband Plan (NBP). As the Commission explains, there is the zone of reasonableness within which the Commission may establish “just and reasonable” pole rents for telecommunications providers, ranging from a lower bound closer to recovery of actual incremental costs to an upper bound based on fully distributed operating and capital costs. As recognized in the FNPRM, the approach initially taken by the Commission has resulted in rate disparities and disputes which undermine the purposes of the Pole Act and goals of the NBP. Thus, the Commission proposes to adopt a new approach, setting the “just and reasonable” rate for purposes of section 224(e) at the higher of the lower bound rate or

¹*Further Notice of Proposed Rulemaking*, WC Docket No. 07-245, GN Docket No. 09-51, adopted May 20, 2010, and released May 20, 2010 (“FNPRM”), at para. 1.

the rate derived using the existing formula for cable operator attachments. This report responds in particular to the Commission’s request for comments “on ways to reinterpret the section 224(e) telecom rate formula so as to yield pole rental rates that reduce disputes and investment disincentives which can arise from the disparate rates yielded by the Commission’s current rules” yet are “within the existing statutory framework.”²

8. The uniformity of pole attachment rates across the spectrum of broadband providers is a desirable goal, as recognized in the NBP.³ However, the Commission appropriately recognizes in the FNPRM that achievement of the overarching goals set forth in the NBP for increased broadband deployment and competition in communications markets should be the ultimate driver of changes in the Commission’s pole rate policies. For the reasons set forth in the FNPRM, the mandate to promote our national broadband policy dictates the Commission *lower* the existing telecom rate to more economically appropriate levels, i.e., to levels at or below the existing cable rate:

We believe that pursuing uniformity by increasing cable operators’ pole rental rates—potentially up to the level yielded by the current telecom formula—would come at the cost of increased broadband prices and reduced incentives for deployment. Instead, by seeking to limit the distortions present in the current pole rental rates by reinterpreting the telecom rate to a lower level consistent with the Act, we expect to increase the

²See FNPRM at para. 122. (“Rather than deviating from the statutory telecom rate formula, we seek comment on ways to reinterpret the section 224(e) telecom rate formula so as to yield pole rental rates that reduce disputes and investment disincentives which can arise from the disparate rates yielded by the Commission’s current rules. As the National Broadband Plan recognizes, this disparity largely results from the existing statutory framework, as implemented by the Commission. Although the National Broadband Plan recommended that Congress “consider amending [s]ection 224 of the Act to establish a harmonized access policy for all poles, ducts, conduits and rights-of-way,” it also recommended that the Commission take what actions it can to address these rate disparities within the existing statutory framework.”)

³ See NBP at 110.

availability of, and competition for, advanced services to anchor institutions and as middle-mile inputs to wireless services and other broadband services.⁴

9. As articulated in the Commission’s NBP, a fresh approach to the existing telecom formula can “yield rates as close as possible to the cable rate in a way that is consistent with the Act” in order to best promote widespread broadband deployment across this country.⁵ With this in mind, this report presents a framework for analyzing the Commission’s proposed approach of capping pole rents at the higher of the cable rate and a methodology oriented towards marginal costs. This report demonstrates that the Commission’s approach produces more economically efficient rates that are near the top end of the range within which the Commission could faithfully implement the Act in ways that most align with cost causation and cost allocation principles.

10. Specifically, this report frames the “zone of reasonableness” with two modified telecom rate formulas that establish a lower bound and upper bound to the “just, reasonable, and non-discriminatory” rates that the Commission could apply in setting pole attachment rates under section 224(e). These analytical bounds follow the same basic approach proposed by the Commission, but incorporate a number of important refinements to the Commission’s lower bound formula and to calculations under the existing telecom formula which would serve as an upper bound in the analysis.

11. The analysis confirms the reasonableness of the Commission’s approach, in that this approach:

⁴ FNPRM at 118.

- Produces rates that are fully consistent with the existing statutory framework of section 224(e) of the Act;
- Supports national broadband policy by removing artificially high pole rental rates as barriers to cable operators' and telecommunications carriers' deployment of broadband;
- Is fully consistent with "the underlying economic or analytical theory,"⁶ i.e., the principles of cost causation and economically efficient marginal cost pricing;
- Meets the Commission's stated concerns that section 224(e) rates designed to recover purely marginal costs may not be fully compensatory to the pole owner,⁷ by demonstrably assuring cost recovery in full accord with the cost allocation methodology set forth in Section 224(e);
- Can be applied in a simple, expeditious, and unified manner; and
- Assures that the resulting rate is more economically efficient than the existing telecom rate, is fair to pole owning utilities and their ratepayers, and would do nothing to compromise the safety or integrity of the utility's pole network.

12. The lower bound telecom rate analysis presented in this report is based on a direct proxy for the economically efficient marginal cost of pole attachment – the cost standard most conducive to achieving the goals set forth in the NBP. The marginal cost proxy

⁵ See NBP, Chapter 6, 109-110

⁶ See FNPRM at para. 125.

⁷ See *id.* at para. 126 ("To the extent that TWTC is arguing for "costs" to be defined as marginal or incremental costs for purposes of section 224(e), we are skeptical of that theory. Marginal cost can be defined either as the rate of change in total cost when output changes by an infinitesimal unit or as the change in total cost when output changes by a single unit.... However, the section 224(e) formulas allocate

presented here is a refinement of the Commission's "no capital cost" telecom formula. This marginal cost proxy applies the underlying economic or analytical theory consistently to all components and inputs of the rate formula, whereas the Commission's proposed formula limits revisions to the capital cost components of the carrying charge factor.

13. The upper bound telecom rate analysis presented in this report is based on a fully allocated cost approach, similar to the Commission's existing cable and telecom rate methodologies. This analysis refines the existing telecom formula methodology to achieve a more direct linkage of the individual components of and inputs to the formula (for both capital and operating costs) to the fundamental economic principle of cost causation.

14. The Commission states its intention is to "select a particular rate from within that range" [i.e., "the current application of the telecom rate formula at the higher end.... to an alternative application of the telecom rate formula based on cost causation principles at the lower end"] as the appropriate telecom rate.⁸ This Report confirms that the existing cable rate falls between these upper and lower bounds and is "just, reasonable, and fully compensatory."⁹ As detailed in my March 2008 report, the existing cable rate formula (which allocates costs exclusively in proportion to relative use) offers many advantages from an economics and public policy perspective vis-a-vis the existing telecom rate

the relevant costs in such a way that simply defining "cost" as equal to incremental cost would result in pole rental rates *below* incremental cost.")

⁸ See *id.* at para. 128.

formula (which allocates costs using a hybrid proportional and per-capita approach), and would be the best overall choice for a unified rate for broadband providers.¹⁰

15. The Commission has focused its attention on cost causation principles on the lower end of the range of permissible rates.¹¹ The analysis presented in this report demonstrates that the rate produced by the existing cable rate formula is demonstrably near the *upper* bound (within 5% on average for electric utilities) of the range within which the Commission could implement the Act.

16. Table 1 below presents an illustrative comparison of the existing cable rate, the rates produced under the Commission’s proposal (i.e., existing telecom rate for the upper bound, no capital cost telecom rate for the lower bound), and the rates produced using the two modified upper and lower bound telecom methodologies analyzed in this report (i.e., cost-causative fully allocated cost for the upper bound, and marginal cost proxy for the lower bound). Rates are provided for a representative utility and ILEC taken from the sample of pole owners for which rate calculations are provided in the FNPRM.

⁹ See *id.* at paras. 140-141.

¹⁰ See Kravtin March 2008 Report at 38-48.

¹¹ See *id.* at para. 128, emphasis added (“We propose an alternative approach which would recognize that the Commission has substantial—but not unlimited—discretion under the statutory framework to interpret the term “cost” for purposes of section 224(e). This proposal would view the range of possible interpretations of “cost” under section 224(e) as yielding a range of permissible rates, from the current application of the telecom rate formula at the higher end of the range, to an alternative application of the telecom rate formula *based on cost causation principles at the lower end.*”)

Table 1

| Illustrative Comparison of Existing and Possible Alternative Pole Attachment Rates (\$ per attachment per year)* | | |
|---|--------------------|-------------------|
| All Costs | AT&T FL | Gulf Power |
| Existing Cable Rate | 4.92 | 6.31 |
| | | |
| Telecom Rate (4 attachers) | | |
| Per formulas proposed in FNPRM: | | |
| High End: Existing Telecom | 8.86 | 11.35 |
| Low End: No Capital Costs | 2.42 | 3.39 |
| | | |
| As analyzed in this Report: | | |
| High End: Cost-Causative Fully Allocated Cost | 5.83 | 7.13 |
| Low End: Marginal Cost Proxy | 1.18 | 0.95 |
| *Based on Year End 2007 ARMIS and FERC data. | | |

ANALYTICAL FRAMEWORK FOR A BROADBAND POLE RATE

17. Section 224(d) upon which the cable rate formula is based establishes a range of reasonableness that has marginal costs as a lower bound, and fully allocated cost as an upper bound.¹² The Commission’s cable rate formula is designed to allow recovery of a portion (relating to the attacher’s actual occupancy of a pole) of the utilities’ booked operating expenses and actual capital costs attributable to the entire pole, plus a return on those costs. In doing so, the cable formula adheres to the *greater* fully allocated cost standard described in Section 224(d), which by definition, allows the utility to recover

¹² Section 224(d) “assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space...which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole.”

through the rental rate ongoing costs *in excess* of marginal costs.¹³ As well established in the economic literature, marginal cost is the most economically efficient pricing standard, and most closely mimics the outcome of a competitive market with its resultant benefits to both consumers (lower prices and a greater array of service offerings) and to service providers (lower input costs that promote infrastructure investment).¹⁴

18. While the cable formula adheres to the greater fully allocated cost standard specified in Section 224(d) in determining the *total cost of the pole to be allocated* to attachers (which by definition, is in excess of the economically efficient marginal costs), it uses an economically efficient *allocation method* (i.e., one that adheres to principles of cost-causation) to *apportion* that cost. Specifically, the cable formula apportions the costs of the pole using a space allocation factor based on the attacher's relative use or occupancy on the pole.

19. By contrast, as described in the FNPRM, pursuant to Section 224(e), the telecom formula apportions the cost of the pole using a hybrid approach in which usable space is allocated on the basis of occupancy, but unusable space is allocated on a per-capita basis. Unless there are a very large number of attaching entities (a condition that has not emerged, despite expectations at the time of the Telecom Act's passage), the allocator

¹³ This is especially the case when make-ready charges which apply over and above the annual rental rate are taken into account. See *Alabama Power*, 311 F.3d at 1369, 1370; also *Florida Cable Telecommunications Association v. Gulf Power Company*, EB Docket No. 04-381, FCC 07D-01 (rel. Jan. 31, 2007) ("*FCTA*") at 21, n.10.

¹⁴See Kravtin March 2008 Report at 21.

employed in the telecom formula results in a much higher proportion of costs assigned to the attacher vis-a-vis the cable formula, or than is economically efficient.

20. The problem that arises in connection with the telecom formula's use of an allocator that is at odds with established cost causation principles (and that produces rates well in excess of economically efficient marginal costs) is compounded by the fact that the underlying costs of the pole that are currently being allocated under the telecom formula are fully allocated costs (the same as under the cable formula). Indeed, for a number of expense categories, the direct cost linkage to pole attachments is weak to non-existent. While applying the same fully allocated cost approach to the telecom formula as had been historically applied to cable was convenient, there is no language in section 224(e) that mandates the Commission to do so. The Commission did so, however, at a time when many more facilities-based providers were expected to be on the pole. As noted above, under those circumstances, the impact of the telecom formula's inefficient cost allocator would have been much less pronounced, and the two formulas would have produced rates much more closely in sync.

21. The significant disparity that has emerged between the pole rates yielded by the existing cable and telecom formulas is thus attributable to two main factors: the departure of the telecom formula from accepted principles of cost causation and cost allocation, exasperated by the failure of the telecommunications market and telecommunications technologies to develop as expected at the time of the 1996 Act (circumstances beyond the Commission's control). As the NBP makes clear, the resulting outsized rents produced by the telecom formula - as evidenced by the widening disparity between the

cable and telecom rates - is at direct odds with the national goals of promoting broadband deployment and competition in communications markets.

22. The approach taken in this analysis is to modify the telecom formula to yield rates more closely aligned with an economically appropriate attribution of cost, by adjusting *the total costs of the pole being allocated* to the broadband provider under the telecom rate formula so that they are closer to (but still in excess of) the lower bound of the range of reasonableness, i.e., the marginal costs of attachment. This approach is fully consistent with the economic principles of cost causation that serve as the foundation of Section 224 and the effective regulation of poles, while accepting as a given, the statutory requirement that the telecom formula use a per capita approach to allocating unusable space on the pole as prescribed in Section 224(e).

23. In adjusting the total costs of the pole being allocated under the modified telecom formulas to more economically efficient levels – in both the lower bound marginal cost-proxy analysis and the upper bound rate fully allocated cost-based analysis – the proposed framework relies on principles of cost causation and cost allocation well established in the economics and regulatory literature and consistent with the Commission’s Part 64 rules. Part 64 of the Commission’s rules provides a methodology dealing with the allocation of costs between regulated and non-regulated activities specifically designed to prevent the cross-subsidization of the latter. Under Part 64, carriers are instructed to allocate costs on a direct basis whenever possible, and to allocate indirect costs (such as common costs defined as costs that cannot be directly assigned to either regulated or non-regulated activities) “based upon an indirect, cost-

causative linkage to another cost category...for which a direct assignment or allocation is available.”¹⁵

24. For example, under the existing telecom rate formula, administrative and total company general (A&G) expenses are assigned to poles through a carrying charge factor based on the ratio of investment in pole plant to investment in total company plant. This approach does not accurately reflect the actual or even relative amount of administrative activities associated with pole plant compared to total company operations. By contrast, both the upper and lower bound telecom rate methodologies presented in this report determine an amount of those indirect administrative expenses properly attributable to poles based on *direct* cost linkages to poles. As detailed in the following two sections of this report, the modified upper and lower bound telecom rate methodologies differ in the manner or precision with which direct pole expenses are estimated: the former does so using an indirect fully allocated methodology based on the ratio of estimated direct pole expenses to total company direct expenses, while the latter does so using a calculation of direct labor resources employed by the pole owner in connection with the administration of third-party pole attachments (that “but for” the attachment would not be expended).

25. In addition to the methodological changes outlined above, the analysis presented in this report also includes revisions to a number of data inputs to the existing telecom formula. As described below, these revisions are economically justified and reflect more current and accurate information regarding the costs of pole attachment.

¹⁵ See 47 C.F.R.. Ch. 1, §64.901.

UPPER BOUND TELECOM RATE ANALYSIS

26. The modifications proposed to the existing telecom formula for purposes of calculating a more cost-causative fully allocated (upper bound) just and reasonable rate include a number of adjustments to the carrying charge factor methodology and inputs, as well as to inputs used in the derivation of the space allocation factor. As noted above, no changes are made to the section 224(e) space allocation methodology itself, which at the presumptive levels of attaching entities, builds in a significant (and unwarranted) cushion of cost over-recovery for the pole owner. These two components, along with the net bare cost of a pole (also unchanged under the presented methodologies), comprise the major components of the existing telecom rate formula. The modifications used in the analysis, along with their respective economic rationale, are as follows:

Modifications to the Carrying Charge Factor

27. As in the current telecom formula, annual pole carrying costs are the product of net bare pole investment (expressed on a per unit basis) multiplied by a carrying charge factor (CCF), consisting of the following five elements: maintenance, depreciation, administrative and general expenses, taxes, and rate of return. The present carrying charge factor overstates the true economic carrying costs associated with pole attachment, by including many types of expenses that are widely acknowledged as being non-pole related or that pertain entirely to the conduct of the electric enterprise business and are not impacted by the presence of third-party attachments. The proposed modifications, detailed below, are generous from the utility pole owner's perspective in that the resulting

carrying costs are still well in excess of levels associated with the true additional or marginal costs of pole attachment.

Adjustment to the maintenance expense component of the carrying charge factor for utilities to reflect only those expenses relating to the maintenance of the poles, exclusive of expenses pertaining to maintenance of the utility's overhead lines and service drops.

28. The Commission has been able to better isolate pole expense input data used in the pole rate formulas for ILECs, because the Commission set the ARMIS accounts used to track ILEC expenses. For example, when ARMIS was changed, and the rents that ILECs paid to utilities got commingled into pole maintenance, the Commission required those accounts to be unbundled so that the actual costs of pole maintenance could be separately identified.¹⁶

29. In the case of electric utilities, however, the FERC Form 1 accounts used to track expenses operate at a higher level of aggregation. Specifically, maintenance expense for poles, as recorded in FERC account 593, is commingled with maintenance expense associated with electric overhead distribution lines and with the service drops between the pole and the home. The Commission has attempted to adjust for this limitation in the utility's accounting records by comparing the aggregated maintenance account (593) with the investment in poles, lines, and services (i.e., calculating the maintenance element of the carrying charge factor by dividing account 593 expenses by a denominator consisting of the three respective plant accounts, 364, 365, and 369). The Commission's methodology implicitly assumes that maintenance costs for wood poles are

¹⁶ See ARMIS Annual Summary, FCC Report 43-01, Row 501.1, and 501.2, which provides a breakdown of Account 6411 "Pole Expense" (ARMIS 43-03) as between pole maintenance and pole rental expense.

proportionately the same as maintenance costs for a sophisticated electrical grid. That that underlying assumption is incorrect can be evidenced empirically.

30. The empirical analysis performed in this report compares ILEC pole maintenance expenses booked to the relevant subaccount of Account 6411 (related solely to poles under the Commission's reporting rules) with utility Account 593 maintenance expenses (which include both pole and line-related expenses under FERC Form 1 accounting), for a representative sampling of pairs of utilities and ILECs operating in similar geographic service areas. This analysis is presented in Appendix B to this Report.

31. All else being equal, given the generic nature of pole plant, the maintenance expense ratios of the geographically-paired pole-owning utilities and pole-owning ILECs would be expected to roughly track. This is because the greater dollars of booked maintenance expenses in account 593 associated with the utility's more aggregated tracking expense account in the numerator of the ratio should be largely offset by the correspondingly aggregated amount of plant investment dollars (i.e., dollars of net investment in accounts 364, 365, and 369) in the denominator of the ratio. Instead, the empirical analysis presented in Appendix B demonstrates a systematic overstatement of the pole-related maintenance expenses for utilities vis-à-vis their counterpart ILECs, as measured by relative percentages of account 593 expenses to account 364 gross pole plant for the utility, and pole-specific maintenance expenses tracked under Account 6411 to gross pole plant for the ILEC.

32. Specifically, the analysis shows, on average, that the maintenance costs applicable to poles for utilities is not accurately derived by taking account 593 expenses and spreading those expenses equally across dollars of net investment in plant accounts 364, 365, and 369 (the amount derived under the current formula), but only between 40% to 45% of that amount. The remaining amounts constitute maintenance costs for electric lines which have been commingled in account 593.

33. In order to remove line maintenance expenses from account 593, the existing formula ($593/364+365+369$) would need to be reduced—either to 45% of account 593, if compared to net investment in plant accounts 364, 365, and 369, or to 15% of account 593, if compared solely to net investment in pole plant account 364. The two potential adjustment factors identified in the benchmark analysis (i.e. 15% of account 593 if calculated on the basis of account 364 only, or 45% of account 593 if calculated on the basis of the combined accounts $364+365+369$), on average, produce an approximately equivalent carrying charge factor and impact on the pole rate. This analysis prefers the former (i.e., adjustment factor stated on the basis of account 364 alone) as it better expresses a more direct cost-causative linkage to poles.

34. Accordingly, to correct for the demonstrated overstatement of utility pole maintenance expenses relative to cost-causative levels, the analysis applies an adjustment factor of 15% derived from the empirical analysis described above to utility maintenance expenses booked to account 593. Corresponding to that adjustment factor, the carrying charge factor is then computed as the ratio of account 593 expense to account 364 net investment. The identified adjustment effectively normalizes the maintenance expenses

for utilities to exclude non-pole-related expenses, on the basis of appropriate pole benchmarking data from the ILECs. (As with the existing adjustment for appurtenances, the identified adjustment factor for maintenance could be rebutted by utility-specific accounting data that tracks pole maintenance expenses at the detailed sub-account level.)

Adjustment to the administration and general (A&G) expense component of the carrying charge factor to reflect only those expenses relating to A&G functions applicable to poles, rather than to core utility services.

35. In both the FERC and ARMIS accounting systems, costs pertaining to administrative and general expenses (i.e., common or overhead costs) are likewise maintained at a higher level of aggregation than poles. The Commission has attempted to account for this by comparing the aggregated administrative expenses with total investment in plant. The Commission's methodology assumes that the indirect costs of administration for poles are proportional to the net asset value of poles relative to the net asset value for total plant. However, that assumption is at odds with basic principles of cost allocation as applied by the Commission in its Part 64 rules.

36. As described above, under the Commission's Part 64 rules, costs are to be directly assigned wherever possible, and in those cases where costs cannot be directly assigned, they are to be allocated "based upon an indirect, cost-causative linkage to another cost category...for which a direct assignment or allocation is available." Consistent with the Part 64 methodology, it is far more appropriate from a cost allocation/cost causation perspective to allocate administrative and general (i.e. overhead) expenses in proportion to direct operations expense. Such an approach better reflects the cost

causation principle, because of its direct linkage to costs that “but for” pole attachments the utility or ILEC would otherwise not incur.

37. To better conform to accepted principles of cost causation and cost allocation, the analysis for the upper bound fully allocated methodology develops an adjustment factor based on the ratio of direct pole expenses (recorded in account 593 “Maintenance Overhead Lines”) to total company direct expenses (the sum of utility operations and maintenance accounts 581-598, 901-916).¹⁷ For ILECs, the adjustment factor is based on equivalent accounts as reported in ARMIS.¹⁸ This adjustment factor is then applied to aggregate A&G expense to develop an A&G expense applicable to poles, which in turn is divided by net pole plant recorded in account 364 for utilities (ARMIS 43-01 for ILECs) to derive a more cost-causative A&G carrying charge factor.

Adjustment to the tax component of the carrying charge factor to distinguish between taxes related to income taxes and taxes other than income-related.

38. The Commission’s existing approach for the tax component of the CCF combines property taxes and income taxes, and apportions both according to property cost (i.e., on the basis of total net plant investment). While property taxes are appropriately measured

¹⁷ For the reasons explained in the previous section of this report, because of the aggregated nature of account 593 as described in the previous discussion of the maintenance element of the carrying charge factor, an adjustment factor to apportion A&G expenses to poles based on the ratio of total Account 593 expenses to Account 364 pole plant is generous to the utility.

¹⁸ For a telephone utility, pole maintenance expense is that portion of ARMIS Account 6411 excluding pole rental expense (Report 43-01 Table III, Row 501.2), and total direct expenses for the utility is calculated as the sum of all plant expenses (ARMIS 6100 – 6500 accounts, excluding 6560 depreciation accounts).

in this way, since they are a function of property value, income taxes - which are a function of income not property value – are not. From a cost causation perspective, taxes related to income are more accurately accounted for by grossing up the return to ensure the utility earns its allowed return on a tax-adjusted (i.e., after-tax) basis. Separating the treatment in this way also allows a more convenient handling of capital and operating costs, as highlighted in the discussion of the marginal cost proxy (i.e., lower-bound) methodology.

39. Accordingly, in the analysis for the upper bound fully allocated methodology, the tax component of the carrying charge factor is disaggregated into income tax and non-income related tax components, with each handled in a distinct manner more reflective of the type of potential cost-causative linkages to pole plant. Specifically, income-related taxes are recovered through a gross-up factor applied directly to the rate of return component of the carrying charge, using the average embedded tax rate for the utility as recorded in the FERC accounts (ARMIS in the case of telephone utilities), to better reflect the actual tax burden engendered by the pole rental payments.¹⁹ Taxes other than income-related and that relate more directly to plant investment than revenues, would continue to be captured in the tax carrying charge, in the same manner as the existing methodology, i.e., according to the ratio of the sum of designated tax expenses to total net plant in service.

¹⁹Because the modified formula uses an average embedded tax factor in the calculation of an appropriate gross up factor (to more accurately reflect the actual tax burden attributable to pole attachment rental revenue), and to be generous to the pole owner, the calculation of the gross up factor does not take into account the tax deductibility of interest that is associated with the debt component of the rate of return, as is commonly done.

40. As discussed further in the context of the marginal cost proxy formula, under normal operating conditions, one would not expect there to be any direct cost-causative linkages between third party pole attachments rentals and the aggregate tax liability recorded on the books of the pole owners. However, for the purposes of an upper bound fully allocated methodology, it is not unreasonable to attribute a portion of tax related costs to pole attachments, provided those costs are attributed in a manner that has a defensible cost-causative linkage.

Replacement of the Commission's default rate of return input with the applicable, published interest rate determined (and updated regularly) by the Internal Revenue Service for underpayments and overpayments.

41. Existing Commission formula rules dictate the use of a rate of return authorized by a state regulatory commission, or in the absence of one, the Commission's default rate return. Because the rules do not set any requirement for "currency" of the authorized rate of return, the rules permit the use of stale rate of returns that no longer accurately reflect current conditions in the relevant capital markets or the true opportunity cost of capital facing the pole owner.

42. Similarly, the Commission's default rate of return (as determined) in the Commission's last rate of return prescription proceeding in 1990), has remained unchanged at 11.25% for the past two decades, notwithstanding dramatic variations in the capital markets over this period that have produced dramatically lower costs of capital for much of the period. The use of stale and generally overstated rates of return is a significant contributor to the existing telecom's formula's over-recovery of the costs of

pole attachments relative to true economic or cost-causative costs. A comparison of the IRS published interest charges and the Commission’s default rate of return presented in Table 2 on the following page, demonstrates this point.

43. The IRS interest charge is currently used by the Commission in a number of other applications, including refunds pursuant to pole rate and cable rate regulation.²⁰ The IRS rate is updated quarterly based on current capital market conditions, publicly reported, based on a consistent and objective methodology tied to (and well above) the federal short-term interest rate,²¹ and applicable across varying sectors of the economy.

Accordingly, it is a more efficient and accurate measure of the true opportunity costs of capital facing the pole-owning utility, and hence a convenient and logical choice for the rate of return input in a cost-causative telecom methodology.

²⁰ See relating to cable rate regulation: 47 C.F.R. § 76.961(d) (“Refunds shall include interest computed at applicable rates published by the Internal Revenue Service for tax refunds and additional tax payments. Interest shall accrue from the date a valid complaint is filed until the refund issues.”) and 47 C.F.R. § 76.942 (e) (“Refunds shall include interest computed at applicable rates published by the Internal Revenue Service for tax refunds and additional tax payments.”); see relating to pole rate regulation: *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 15 FCC Rcd 9563, ¶ 42 (2000) (“The Commission has determined previously that the current interest rate for Federal tax refunds and additional tax payments is the appropriate rate of interest for overcharges.”), also *Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Company of West Virginia*, 79 FCC 2d 232, ¶¶ 25-25 (1980) (“This brings us to the single remaining question, namely the appropriate rate of interest. As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for Federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and it is revised on a regular basis.”).

²¹ The federal short-term rate is determined from a one-month average of the market yields from marketable obligations of the United States with maturities of 3 years or less. The IRS rate for under- and overpayments is generally set at the federal short term rate plus 3%.

Table 2

| Comparison of FCC Default Rate of Return and Applicable IRS Interest Rates | | | | | | |
|--|------------|------------|--|-------------|------------|------------|
| Year | FCC | IRS | | Year | FCC | IRS |
| 1991 | 11.25 | 10.25 | | 2001 | 11.25 | 7.75 |
| 1992 | 11.25 | 8.0 | | 2002 | 11.25 | 6.00 |
| 1993 | 11.25 | 7.0 | | 2003 | 11.25 | 4.75 |
| 1994 | 11.25 | 7.75 | | 2004 | 11.25 | 4.50 |
| 1995 | 11.25 | 9.25 | | 2005 | 11.25 | 6.00 |
| 1996 | 11.25 | 8.75 | | 2006 | 11.25 | 7.50 |
| 1997 | 11.25 | 9.0 | | 2007 | 11.25 | 8.00 |
| 1998 | 11.25 | 8.25 | | 2008 | 11.25 | 6.00 |
| 1999 | 11.25 | 7.75 | | 2009 | 11.25 | 4.25 |
| 2000 | 11.25 | 8.75 | | 2010: 2 | 11.25 | 4.00 |
| Sources: http://www.irs.gov/pub/irs-drop/rr-09-07.pdf , 1990 FCC Represcription Order, eff. 1-1-91. | | | | | | |

Modifications to the Space Allocation Factor

44. The analysis for the upper bound fully allocated methodology also includes adjustments to several presumptive values used as data inputs in the calculation of the space allocation factor component of the telecom formula. The revised values better reflect the current “production function” or underlying cost structure associated with poles, and hence produce rate results more aligned with cost causation principles. As detailed below, the inputs proposed for revision include: pole height, usable space on the pole, and the number of attaching entities.

Adjustment to the pole height and usable space presumptive values to conform them to the current standard 40 foot joint use pole.

45. The existing telecom formula is based on the presumptions of a 37.5' foot pole, with 13.5 feet of usable space and 14 feet of unusable space (reflecting 6 feet below-grade support and 8 feet above -ground clearance). The 37.5' pole is a blend of 35 and 40 foot poles. It is widely acknowledged that 35' poles are no longer the relevant standard for joint use poles, and that 40' poles are the new minimum standard.²² The continued use of a stale, and artificially lower pole height input (similar to the use of a stale, overstated rate of return input described above) has contributed to the existing telecom's formula's over-recovery of the costs of pole attachments relative to true economic or cost-causative costs (i.e. costs with a direct cost linkage to pole attachments).

46. To correct for this source of over-recovery, the analysis for the upper bound fully allocated methodology relies on updated presumptive values for pole height, along with the related inputs for usable and unusable space. Under the modified methodology, the presumptive value for pole height increases to 40 feet, and there is a corresponding increase in the presumptive value for usable space from 13.5 feet to 16 feet. In keeping with standard industry guidelines for pole setting depth and minimum clearances, the presumptive value for unusable space stays unchanged at 14 feet. As show in Table 3 on the following page for varying number of attaching entities, with these updated values,

²² See Vermont Board Policy Paper and Comment Summary on PSB Rule 3.700 (2001) at 10-11 (“[m]ore and more 40 foot poles are being installed” in part to accommodate higher voltage utility grids); Oregon Admin. Rule 860-028-0020 (22) (“there is a rebuttable presumption that the average bare pole is 40 feet”).

the space allocator factor used in the telecom formula to apportion the total costs of the pole to attachers is reduced commensurately to more cost causative levels - although levels well in excess of the space allocation factor employed in the cable formula.

Table 3

| Comparison of Telecom Formula Space Allocation Factors Under Existing and Possible Alternative Pole Height and Usable Space Presumptions | | |
|---|--------------------|-----------------|
| | 37.5 ' Pole | 40' Pole |
| Cable Formula | 7.41% | 6.25% |
| | | |
| Telecom Formula | | |
| 3 Att. Entities | 16.89% | 15.83% |
| 4 Att. Entities | 13.33% | 12.50% |
| 5 Att. Entities | 11.20% | 10.50% |

Adjustment to the presumptive number of attaching entities used in the calculation of the unusable space component of the space allocation factor to a uniform figure of 4.0.

47. The existing telecom formula has two different presumptions for attaching entities: 3 for a rural area, and 5 for an urbanized area, where urbanized areas are defined as those having populations of 50,000 or more, but where the urbanized presumption applies to the utility's entire service area if any part of that area is classified as urbanized. The proposed number of 4.0 represents an average of the two presumptive figures reflected in the current rules. A single presumptive figure offers many advantages. In addition to being less complex to administer, it provides more consistency and uniformity among

rates, as well as serves to level the competitive playing field – all of which will promote the Commission’s goals of encouraging broadband deployment and competitive entry. Moreover, the distinction between rural and urbanized areas is becoming increasingly blurred, and population alone is not necessarily well correlated with the true underlying determinants affecting the number of attaching entities, i.e., density or concentrations of population, commerce, educational, and/or governmental activity.

48. In summary, as described above, the analysis of the upper bound fully allocated methodology presented in this report incorporates adjustments to the maintenance, administrative and general, tax, and rate of return elements of the carrying charge factor, and to the presumptive values for pole height, usable space, and number of attaching entities used in the calculation of the space allocation factor component of the formula. With the various inputs to the formula refined in the manner described above, the calculation of the pole attachment rate under the Commission’s formula approach is a straightforward multiplication of three major components: net bare pole cost times carrying charge factor times space allocation factor.

49. Table 4 on the following page provides an illustrative comparison of the three major components of the modified telecom upper bound with the existing telecom and cable formulas. A more detailed side-by-side comparison of the proposed upper bound methodology vis-à-vis the existing FCC telecom methodology, including the calculation of all five elements of the carrying charge factor, is provided in Appendix C to this Report for a representative utility, and Appendix D for a representative ILECs (applicable

in circumstances where the ILEC is a sole or part owner of poles with third parties paying the telecom rate).

Table 4

| Illustrative Comparison of Upper Bound Rate Methodology and Existing Telecom and Cable Rate Formulas | | | |
|---|---------------------|---|-------------------|
| ILEC/Utility (4 entities) | Existing Telecom | High End Cost Causative Fully Allocated Cost | Existing Cable |
| AT&T Florida | | | |
| Net. Inv. Per Bare Pole | \$85.19 | \$85.19 | \$85.19 |
| x Carrying Charge Factor | 77.96% | 54.70% | 77.96% |
| x Space Allocation Factor | 13.33% | 12.50% | 7.41% |
| = Maximum Rate | \$8.86 | \$5.83 | \$4.92 |
| | | | |
| Gulf Power | | | |
| Net. Inv. Per Bare Pole | \$185.71 | \$185.71 | \$185.71 |
| x Carrying Charge Factor | 45.86% | 30.70% | 45.86% |
| x Space Allocation Factor | 13.33% | 12.50% | 7.41% |
| = Maximum Rate | \$11.35 | \$7.13 | \$6.31 |

LOWER BOUND TELECOM RATE ANALYSIS

50. “In identifying the lower bound of reasonable rates under section 224(e), [the Commission] proposes that a rate that covers the pole owners’ incremental cost associated with attachment would, in principle, provide a reasonable lower limit,” citing legal precedent.²³ As discussed earlier, given the increased national priority of promoting broadband deployment, there is compelling economic and public policy justification for a unified broadband pole attachment rate set as close as possible a true marginal or incremental cost of pole attachment. As the FNPRM points out, this is all that is required by the language in Section 224 of the Act for a rate to be deemed “just and reasonable.”²⁴

51. The economic theory is clear: as discussed in my March 2008 Report, the closer the rate for pole attachment is to marginal cost, the more efficient the allocation of resources.²⁵ This in turn maximizes the overall societal value that can be generated from use of those resources. Perhaps most importantly from the perspective of the NBP, it better fosters the emergence of conditions that stimulate competition in the relevant communication markets and produce the desired competitive market performance attributes including lower prices, greater choices among new and innovative broadband services, enhanced productivity and economic development opportunities for the national and local economies.

²³ FNPRM at para. 133.

²⁴ See Section 224(d)(1) (“For purposes of subsection (b) of this section, a rate is just and reasonable if it assures the utility the recovery of not less than the additional costs of providing pole attachments”); see also FNPRM at para. 126, citing *Alabama Power Co. v. FCC*, 311 F.3d at 1370-71, and Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions*, Vol. 1, 65-122 (1970); Charles F. Phillips, Jr., *The Regulation of Public Utilities*, 443-49 (1993).

52. Moreover, there is no risk of economic harm to the utility or to its ratepayers from a pole rental rate set at marginal cost. Utilities frequently cite to the theoretical incompatibility of marginal cost pricing and the full recovery of costs under conditions of natural monopoly (i.e., the presence of large fixed assets with declining per unit costs) that characterize utility distribution plant. However, such counter arguments ignore the practical reality of the two-part pricing structure that exists under the Commission's rules for pole attachments.

53. This two-part pricing structure consists of a recurring pole rental rate set pursuant to the Commission's pole rate formula methodology, and non-recurring charges (set unilaterally by the utility) to recover the costs of any make-ready work performed in connection with the accommodation of a third party attachment. Make-ready refers to the normal and customary process, including rearrangements and pole change-outs, by which the utility is able to readily harness pole capacity to accommodate an additional attachment on the pole. The make-ready process allows the pole owner a mechanism to recover all non-recurring, out-of-pocket capital costs incurred in connection with the accommodation of a third-party attacher. It is worth emphasizing that make-ready charges apply *in addition to* the recurring pole rental rate. Moreover, many utilities continue to assess similar charges after construction, in the form of application, inspection, or audit fees.

²⁵ See Kravtin March Report at 52-53.

54. From an economic standpoint, a two-part pricing structure that recovers capital costs from those users who are causally responsible for those costs, in combination with a recurring rate which recovers ongoing operating costs is a much more efficient pricing mechanism than a single rate set at an inflated fully allocated cost that diverges from cost-causative principles. This is true in terms of enhancing resource allocation, maximizing societal value, and promoting the goals of the NBP, provided both recurring and non-recurring rates are set at an economically appropriate marginal cost.

55. That there are little to no opportunity costs associated with third-party occupancy on utility poles is well documented in a 2005 case before the Commission involving Gulf Power.²⁶ This condition exists because there is either excess capacity on the poles, or because additional capacity can be readily harnessed through a routine make-ready process for which the utility is compensated by the attacher (again, in a charge set by the utility and that applies in addition to the annual pole rental rate). Because the true opportunity costs of third-party attachment is so small, the two tier pricing system applicable under the Commission's rules – *even with recurring rental rates set at the lower bound* - produce a result that is not only more economically efficient than the existing telecom rate, but one that is fair to pole owning utilities and their ratepayers. The proposed lower bound telecom methodology produces rates that still make contribution over and above true economically efficient marginal costs, and accordingly would do nothing to compromise the safety or integrity of the utility's pole network.

²⁶See *Florida Cable Telecommunications Association v. Gulf Power Company*, EB Docket No. 04-381, FCC 07D-01 (rel. Jan. 31, 2007) (“*FCTA*”), at 10.

56. The FNPRM expresses concerns that the particular construction of the 224(e) rate precludes a rate designed to recover *no more than* marginal cost. This reasoning would appear to be the basis for the Commission's proposal to make no other modification to the existing telecom formula other than to remove capital costs, leaving unchanged operating cost elements and other inputs to the formula (i.e., maintenance, and administrative and general elements, rate of return input). As shown in the preceding section, however, the existing formula's operating cost elements recover costs in excess of those causally linked to pole attachments. The expressed concerns are unfounded, given the hybrid cost allocation methodology incorporated in the telecom formula.

57. Under the hybrid cost methodology prescribed in Section 224(e), usable costs are allocated in a cost-causative proportion based on relative occupancy on the pole, but unusable costs are allocated based on the number of attaching entities. This hybrid approach gives much more in excess cost recovery to the pole owner (*vis-à-vis* economically appropriate marginal costs) than is taken away by the application of the statutory two-thirds adjustment factor. As demonstrated in Table 5 below, the marginal cost proxy formula proposed here as the basis of the lower bound telecom rate similarly relies on the inefficient hybrid allocation method prescribed in section 224(e) (versus the more efficient 224(d) allocation method). Accordingly, this marginal cost proxy produces a rate that is still well in excess of the true marginal or incremental of pole attachment.

58. As described at length in my March 2008 Report, the true marginal or incremental cost of pole attachment is most accurately estimated using the relative-use allocation methodology embodied in the section 224(d) cable rate, which more closely tracks the

causation of costs by third party attachments (i.e., costs “but for” the attachers, would not otherwise exist). The way the cable rate formula allocates pole costs on the basis of relative use (i.e., direct occupancy of the pole) is consistent with the Commission’s Part 64 rules, whereas the telecom formula, which allocates a portion of costs on a per capita basis, is not.

59. Table 5 below compares the proposed marginal cost proxy rates, calculated using the same methodology for calculating the total costs of the pole to be allocated, but using differing allocation methodologies associated with 224(d) and (e), for cable and telecom respectively. Specifically, under the 224(d) allocation methodology, 6.25% of the total costs of the pole are allocated to third-party attachers, as compared with the 224(e) allocation methodology, which allocates 12.50% of the total costs in the case of four attaching entities. Given these cost allocators, as demonstrated in Table 5, the marginal cost proxy rate calculated using the section 224(e) telecom allocation methodology exceeds the marginal cost proxy calculated using the section 224(d) cable allocation methodology (a much truer proxy of marginal costs) by approximately a factor of two.²⁷

²⁷ For three attaching entities, 224(e) formula would allocate 15.83% of total costs compared to the 224(d) allocation of 6.25% - over 2.5 times the allocation; for five attaching entities, the 224(e) formula would allocate 10.50%, approximately 1.7 times the allocation.

Table 5

**Comparison of Marginal Cost Proxy Rates
Under 224(e) and (d) Cost Allocators
(\$ per attachment per year)***

| ILECs - 4 entities* | VZ NY | VZ PA | AT&T CA | AT&T FL | AT&T IL | AT&T TX | Qwest CO | Qwest WA |
|---|-------------------|----------------------|----------------------|-----------------------|-----------------------|---------------------|----------------------|-----------------|
| Marginal Cost Proxy - 224(e) Allocator | 0.50 | 0.57 | 0.73 | 1.18 | 0.27 | 0.25 | 0.87 | 0.94 |
| Marginal Cost Proxy - 224(d) Allocator | 0.25 | 0.28 | 0.36 | 0.59 | 0.14 | 0.12 | 0.43 | 0.47 |
| Utilities -4 entities* | Gulf Power | Alabama Power | Georgia Power | Tampa Electric | Jersey Central | Metro Edison | Penn Electric | NSTAR |
| Marginal Cost Proxy - 224(e) Allocator | 0.95 | 1.28 | 0.96 | 1.35 | 1.33 | 1.27 | 0.78 | 1.02 |
| Marginal Cost Proxy - 224(d) Allocator | 0.48 | 0.64 | 0.48 | 0.67 | 0.66 | 0.63 | 0.39 | 0.51 |
| *Based on ARMIS and FERC Data (Year End 2007) | | | | | | | | |

60. This analysis effectively resolves concerns expressed in the FNRPM that the manner in which the section 224(e) formula allocates the relevant costs of a pole (i.e., the application of the prescribed 2/3 adjustment factor in the calculation of the unusable space percentage) means that “simply defining ‘cost’ as equal to incremental cost would result in pole rental rates *below* incremental cost.”²⁸ While such concerns might be valid if the telecom formula employed an economically efficient allocation factor such as employed by the cable formula, this is decidedly not the case given the telecom’s formula hybrid allocation methodology.

²⁸ See FNPRM at para.126.

61. As shown in Table 5 above, the effect of that methodology, within the presumptive range of attaching entities, is to build into the rate a magnitude of *over-recovery* of costs that more than offsets the effect of the 2/3 adjustment factor. Moreover, in the case of utilities, this demonstrated over-recovery due to the telecom formula's use of the hybrid space allocator is *in addition to* the over-recovery built into both the cable and telecom formulas in connection with their use of account 364 pole plant. As recognized by the Commission, "[E]ven with the 15% reduction for non-pole appurtenances such as crossarms, this is still a very generous account, including the cost of towers, transformer racks and platforms."²⁹

62. The Commission's proposed lower bound telecom formula, by stripping out capital costs, produces a pole rate that is much closer to marginal cost than the existing telecom formula, and even closer than the existing cable rate. As discussed further below, the Commission's reasoning to strip out the capital cost components from a marginal cost formula is sound. However, by failing to apply economic cost causation principles consistently across *all* elements of the formula, the Commission's lower bound formula produces a rate that is well in excess of the marginal cost standard statutorily permitted

²⁹ See Recon. Order at para. 121 ("For electric utility poles, we use Account 364 (poles, towers and fixtures). Account 364 includes the cost of installed poles, towers, and appurtenant fixtures used for supporting overhead distribution conductors and service wires. Specific items include: 1. Anchors, head arm, and other guys, including guy guards, guy clamps, strain insulators, pole plates, etc.; Brackets; Crossarms and braces; Excavation and backfill, including disposal of excess excavated material; Extension arms; Foundations; Guards; Insulator pins and suspension bolts; Paving; Permits for construction; Pole steps and ladders; Poles, wood, steel, concrete, or other material; Racks complete with insulators; Railings; Reinforcing and stubbing; Settings; Shaving, painting, gaining, roofing, stenciling, and tagging; Towers; Transformer racks and platforms. Even with the 15% reduction for non-pole appurtenances such as crossarms, this is still a very generous account, including the cost of towers, transformer racks and platforms.")

for the lower bound of a just and reasonable rate and that would best promote attainment of the goals of the National Broadband Plan.

63. The lower bound rate analysis presented in this report builds on the Commission's approach, but refines it by applying cost-causation principles consistently across all elements of the formula, in order to produce a truer estimate of the marginal cost of pole attachment. The modifications to the existing telecom formula embodied in the proposed marginal cost proxy analysis are discussed in turn below:

Modifications to the Carrying Charge Factor

Adjustment to Remove Capital Cost Elements Consistent with Cost-Causation Principles and to Achieve a More Economically Efficient Marginal Cost Proxy Rate.

64. Consistent with the Commission's proposed lower bound formula, the marginal cost proxy methodology presented in this report does not provide for capital cost recovery.

As the FNPRM correctly recognizes, those costs are fully and appropriately covered on an incremental basis through the make-ready charges utilities charge third-party attachers in situations where rearrangements and replacements of existing pole capacity would not otherwise be required "but for" the presence of the third-party attacher.³⁰ The rationale supporting the elimination of the various capital cost elements of the formula is economically sound and fully consistent with cost causation principles.

65. Depreciation – Depreciation is a non-cash expense item reflecting the utility's "consumption" of the pole asset over time, as measured by the reduction in the asset's value by virtue of wear and tear and/or obsolescence. As a non-cash expense,

depreciation lowers a company's reported earnings (and tax liability) and provides a source of free cash from which the company can fund capital purchases including replacement of plant past its useful life. From a cost-causation perspective, there is no net impact on the utility's depreciation accrual due to pole attachments. Both the original purchase of the pole asset, its consumption over time, and its replacement are driven by the utility's provision of core electric (or telephone) services.

66. To the extent there are any capital costs that would not have occurred "but for" the presence of third-party attachers, as mentioned above, those costs are recovered through make-ready charges. Moreover, because the utility gets the benefit of plant additions or replacements funded through make-ready payments from attachers in terms of reductions or delays to its capital expenditures for poles (caused or driven by its core utility service requirements), allocation of depreciation charges through the recurring rate formula in effect results in a double recovery of capital costs from attachers.

67. Taxes – From a strict cost-causation perspective, there is similarly no net revenue impact on the utility associated with either income or property-related taxes. First, with respect to income or revenue-related taxes, as long as pole attachment revenues are accounted for "above-the-line," as the utilities claim them to be, pole rate increases are ultimately offset by decreases in other utility rates dollar-for-dollar. Thus, theoretically, pole rates should be revenue neutral to the utility in terms of income tax liability. This also holds true for property-related taxes, and for the same reason as for depreciation –

³⁰ See FNRPM at paras. 134-135.

namely the imposition of make-ready charges in those cases where the utility is required to make a capital outlay that “but for” the third-party attacher would not have occurred. As long as pole-related capital improvements funded through make-ready charges are properly accounted for, i.e., applied as an offset to the utility’s rate base to avoid double recovery, there is no net revenue impact on the utility associated with property-taxes either.

68. Return - Similarly, from a cost-causation perspective, there is no economic justification why a marginal cost proxy would mark-up the recurring pole rental rate so as to earn an additional return or “profit” *over and above* the normal cost recovery reflected in the rental rate. First, under the theory of marginal cost pricing, prices that recover a producer’s cost provide a “normal” return on investment. Rates set in excess of costs will be bid down to more efficient levels in response to actual competition or to deter potential competition. Second, make-ready charges already provide the utility the opportunity to earn additional return (over and above the normal level built into the recurring cost recovery provided in the rental rate) in those instances where capital costs are actually caused by a third-party attachment, as such charges commonly build in contribution over costs.

69. In addition, as mentioned above, by virtue of the fact that utilities benefit from plant additions or replacements funded through make-ready payments in terms of reductions or delays to its capital expenditures for poles, make-ready payments in effect provide utilities with an interest-free source of capital. Allowing utilities to reap a return on

capital in the recurring rental rate over and above that reflected in make ready payments directly or through the capital savings that make-ready work provides is excessive.

Adjustments to Operating Cost Elements

70. Maintenance – The lower bound marginal cost proxy analysis applies the same adjustment to utility maintenance expenses as applied in the upper bound fully allocated cost analysis. Specifically, the methodology used in this analysis applies an adjustment factor of 15% to correct for the demonstrated overstatement of utility pole maintenance expense relative to cost-causative levels (due to the aggregated nature of FERC account 593). The carrying charge element is then computed by dividing the adjusted maintenance expense figure to net investment in account 364 for poles. As described above, this adjustment factor is derived from an empirical analysis comparing ILEC and utility booked maintenance expenses, where the former is based on strictly pole-related expenses.

71. Administrative and General – Like the upper bound fully allocated cost methodology, the lower bound marginal cost proxy analysis corrects for the inherently non-cost-causative manner in which A&G costs are allocated to poles. However, where the former does so using an indirect fully allocated methodology based on the ratio of estimated direct pole expenses to total company direct expenses, the latter does so, using a direct approach, more consistent with cost-causation principles and the Commission’s own cost allocation rules. Specifically, A&G costs are attributed to poles using a direct calculation

of the actual labor resources employed by the pole owner in connection with third party pole attachments that “but for” the attacher would not be expended.

72. The direct calculation of A&G costs attributable to poles is based on information provided in a recent utility rate case, which identifies the number of full-time equivalent (FTE) employees assigned to administer and manage the third-party attachment process.³¹ The available benchmark data identifies five FTEs, including one program administrator and four engineers, all at base salaries equivalent to line workers.³² Using data on utility line workers’ base salaries available from the Bureau of Labor Statistics,³³ adjusted upward to restate those salaries on a fully loaded basis, the lower bound methodology calculates an estimate of dedicated A&G labor costs directly attributable to poles. This direct cost estimate is divided by net pole plant recorded in account 364 for utilities (ARMIS 43-01 for ILECs) to produce an economically appropriate A&G carrying charge element. (As with the maintenance adjustment, properly supported and verifiable utility-specific data could be used in lieu of the benchmark data, and/or a set of presumptive values applicable to different size ranges of utilities could be established, to the extent additional benchmarking data is available and demonstrates clear scalar relationships.³⁴)

³¹ See Connecticut Light & Power, Docket No. 09-12-05, Data Request DPUC-05, Q EL-255, dated 2/8/10.

³² Id.

³³ See <http://www.bls.gov:80/oco/ocos195.htm>

³⁴ CP&L, the source of the benchmark data used in this analysis, has approximately 700,000 poles.

Modifications to the Space Allocation Factor

73. The proposed lower bound marginal cost proxy analysis incorporates the same economically appropriate adjustments to presumptive values used as data inputs in the calculation of the space allocation factor as included in the upper bound analysis. As previously described, the inputs proposed for revision include: an increase in pole height to 40 feet, a corresponding increase in usable space to 16 feet, and the use of a uniform number of attaching entities of 4.

74. In summary, the lower bound methodology presented in this report excludes all three capital cost elements of the carrying charge factor (i.e. depreciation, taxes, and return), adjusts the maintenance and A&G elements of the carrying charge factor, and revises the presumptive values for pole height, usable space, and number of attaching entities used in the calculation of the space allocation factor component of the formula.

75. With the various inputs to the formula refined in the manner described above, the calculation of the pole attachment rate under the Commission's formula approach is a straightforward multiplication of three major components: net bare pole cost times carrying charge factor times space allocation factor. Table 6 below provides an illustrative comparison of the three major components of the modified telecom lower bound methodology with the no capital costs telecom formula proposed in the FNRPM for the lower bound rate, as well as the existing cable formula. A more detailed side-by-side comparison of the proposed lower bound methodology vis-à-vis the existing FCC telecom formula methodology, including the calculation of all five elements of the

carrying charge factor, is provided in Appendix C to this Report for a representative utility, and Appendix D for a representative ILEC.

Table 6

| Illustrative Comparison of Lower Bound Methodology, FNPRM No Capital Cost Telecom Formula, and Existing Cable Formula | | | |
|--|------------------------------------|--|---------------------------|
| ILEC/Utility (4 entities) | No Capital Cost Telecom | Low End Marginal Cost Proxy | Existing Cable |
| AT&T Florida | | | |
| Net. Inv. Per Bare Pole | \$85.19 | \$85.19 | \$85.19 |
| x Carrying Charge Factor | 21.27% | 11.10% | 77.96% |
| x Space Allocation Factor | 13.33% | 12.50% | 7.41% |
| = Maximum Rate | \$2.42 | \$1.18 | \$4.92 |
| Gulf Power | | | |
| Net. Inv. Per Bare Pole | \$185.71 | \$185.71 | \$185.71 |
| x Carrying Charge Factor | 13.68% | 4.09% | 45.86% |
| x Space Allocation Factor | 13.33% | 12.50% | 7.41% |
| = Maximum Rate | \$3.39 | \$0.95 | \$6.31 |

**COMPARATIVE POLE ATTACHMENT RATES AND RECOMMENDATIONS
FOR A BROADBAND POLE RATE**

76. Tables 7 and 8 on the following pages present calculations of pole attachment rates based on (1) the existing cable rate formula; (2) the Commission’s proposal as set forth in the FNPRM (i.e., existing telecom rate for the upper bound and the no capital cost

telecom rate for the lower bound); and (3) the upper and lower bound methodology presented in this report (i.e., cost-causative fully allocated for the upper bound, and marginal cost proxy for the lower bound). Rates are presented for the same sample of utility and ILEC pole owners for which rate calculations are provided in Appendix A of the FNPRM.

77. For the reasons set forth in this report and in my March 2008 report, a pole attachment rate for broadband providers based on marginal cost is the most efficient and economically justified, and best serves the overarching national broadband goals. That said, there are other considerations to be taken into account in setting a unified broadband pole attachment rate, including the constraints of section 224(e) and the desirability of assuring just compensation to the pole owner through a proxy that the courts have already held to be well above just compensation.

78. Such considerations advocate for setting a unified rate based on the existing cable rate or any rate in between the marginal cost proxy rate and the cable rate, the latter found to be well in excess of just compensation.³⁵ It would be reasonable for the Commission to set a unified pole attachment rate at the higher of the marginal cost proxy rate or the existing cable rate. As shown in this report, the cable rate is demonstrably near the upper bound (within 5% on average for electric utilities) of the range within which the Commission could implement the Act. (Supporting calculations are provided in Appendix E to this report).

³⁵See e.g., *Alabama Power*, 311 F.3d at 1369, 1370.

Table 7
Comparative ILEC Pole Attachment Rates
(\$ per attachment per year)*

| All Costs | VZ NY | VZ PA | AT&T CA | AT&T FL | AT&T IL | AT&T TX | Qwest CO | Qwest WA |
|-------------------------------------|-------|-------|---------|---------|---------|---------|----------|----------|
| Existing Cable Rate | 4.58 | 2.16 | 5.43 | 4.92 | 1.80 | 2.16 | 1.58 | 2.48 |
| Telecom Rate: 4 attachers | | | | | | | | |
| Existing Telecom | 8.24 | 3.88 | 9.78 | 8.86 | 3.24 | 3.88 | 2.84 | 4.46 |
| No Capital Costs | 2.04 | 0.58 | 2.94 | 2.42 | 0.61 | 1.11 | 0.98 | 0.78 |
| Cost-Causative Fully Allocated Cost | 6.97 | 3.74 | 5.89 | 5.83 | 2.20 | 3.16 | 2.00 | 3.80 |
| Marginal Cost Proxy | 0.50 | 0.57 | 0.73 | 1.18 | 0.27 | 0.25 | 0.87 | 0.94 |
| *Based on ARMIS Data (YE 2007) | | | | | | | | |

Table 8
Comparative Utility Pole Attachment Rates
(\$ per attachment per year)*

| All Costs | Gulf Power | Alabama Power | Georgia Power | Tampa Electric | Jersey Central | Metro Edison | Penn Electric | NSTAR |
|--|------------|---------------|---------------|----------------|----------------|--------------|---------------|-------|
| Existing Cable Rate | 6.31 | 8.00 | 5.77 | 8.24 | 8.21 | 8.69 | 8.01 | 6.90 |
| Telecom Rate :4 attachers | | | | | | | | |
| Existing Telecom | 11.35 | 14.39 | 10.38 | 14.83 | 14.77 | 15.64 | 14.41 | 12.42 |
| No Capital Costs | 3.39 | 5.14 | 3.19 | 3.84 | 3.92 | 4.34 | 2.26 | 3.45 |
| Cost- Causative Fully allocated Cost | 7.13 | 8.36 | 6.10 | 9.58 | 7.54 | 8.73 | 8.61 | 6.97 |
| Marginal Cost Proxy | 0.95 | 1.28 | 0.96 | 1.35 | 1.33 | 1.27 | 0.78 | 1.02 |
| *Based on FERC Form 1 Data (Year End 2007) | | | | | | | | |

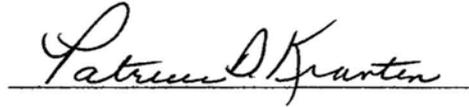
CONCLUSION

79. This report presents a refined economic analysis of the range of possible rate approaches to telecommunications pole attachment rates that would most align with cost causation and cost allocation principles. The results of this analysis confirm that the Commission's approach produces "just, reasonable and non-discriminatory" rates that are near the top end of the range within which the Commission could faithfully implement the Act. The methodologies applied are fully consistent with economic principles of cost causation and effective pole regulation.

80. Even with the modifications to the Commission's existing telecom formula described above, both the upper and lower bound telecom rates presented in this report and the rates calculated using the existing cable rate formula exceed by multiples the marginal cost of pole attachment. By well-established economic, regulatory, and legal just-compensation principles, marginal costs provide the appropriate standard for a non-subsidized, economically efficient, competition-promoting broadband or telecom rate. The more the pole attachment rate diverges from this standard, the more at odds that rate will be with the pressing national goals of stimulating broadband deployment and competitive entry so clearly articulately in the Commission's National Broadband Plan.

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

Executed on: August 11, 2010

A handwritten signature in cursive script, reading "Patricia D. Kravtin", is written over a horizontal line.

Patricia D. Kravtin

Appendix A

Patricia D. Kravtin

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Summary

Consulting economist with specialization in telecommunications, cable, and energy markets. Extensive knowledge of complex economic, policy and technical issues facing incumbents, new entrants, regulators, investors, and consumers in rapidly changing telecommunications, cable, and energy markets.

Experience

CONSULTING ECONOMIST

2000–Present Independent Consulting Swampscott, MA

- Providing expert witness services and full range of economic, policy, and technical advisory services in the telecommunications, cable, and energy fields.

SENIOR VICE PRESIDENT/SENIOR ECONOMIST

1982–2000 Economics and Technology, Inc. Boston, MA

- Active participant in regulatory proceedings in over thirty state jurisdictions, before the Federal Communications Commission, Federal Energy Regulatory Commission, and other international regulatory authorities on telecommunications, cable, and energy matters.
- Provided expert witness and technical advisory services in connection with litigation and arbitration proceedings before state and federal regulatory agencies, and before U.S. district court, on behalf of diverse set of public and private sector clients (see Record of Prior Testimony).
- Extensive cable television regulation expertise in connection with implementation of the Cable Act of 1992 and the Telecommunications Act of 1996 by the Federal Communications Commission and local franchising authorities.
- Led analysis of wide range of issues related to: rates and rate policies; cost methodologies and allocations; productivity; cost benchmarking; business case studies for entry into cable, telephony, and broadband markets; development of competition; electric industry restructuring; incentive or performance based regulation; universal service; access charges; deployment of advanced services and broadband technologies; and access to pole attachments and other rights-of-way.

- Served as advisor to state regulatory agencies, assisting in negotiations with utilities, non-partial review of record evidence, deliberations and drafting of final decisions.
- Author of industry reports and papers on topics including market structure and competition, alternative forms of regulation, patterns of investment, telecommunications modernization, and broadband deployment.
- Invited speaker before various national organizations, state legislative committees and participant in industry symposiums.
- Grant Reviewer for Broadband Technology Opportunities Program (BTOP) administered by National Telecommunications and Information Administration (NTIA), Fall 2009.

RESEARCH/POLICY ANALYST

1978–1980 Various Federal Agencies Washington, DC

- Prepared economic impact analyses related to allocation of frequency spectrum (Federal Communications Commission).
- Performed financial and statistical analysis of the effect of securities regulations on the acquisition of high-technology firms (Securities and Exchange Commission).
- Prepared analyses and recommendations on national economic policy issues including capital recovery. (U.S. Dept. of Commerce).

Education

1980–1982 Massachusetts Institute of Technology Boston, MA

- Graduate Study in the Ph.D. program in Economics (Abd). General Examinations passed in fields of Government Regulation of Industry, Industrial Organization, and Urban and Regional Economics.
- National Science Foundation Fellow.

1976–1980 George Washington University Washington, DC

- B.A. with Distinction in Economics.
- Phi Beta Kappa, Omicron Delta Epsilon in recognition of high scholastic achievement in field of Economics. Recipient of four-year honor scholarship.

Prof. Affiliation

American Economic Association

Reports and Studies (authored and co-authored)

Report on the Financial Viability of the Proposed Greenfield Overbuild in the City of Lincoln, California, prepared for Starstream Communications, August 12, 2003.

“Assessing SBC/Pacific’s Progress in Eliminating Barriers to Entry, The Local Market in California is Not Yet ‘Fully and Irreversibly Open,” prepared for the California Association of Competitive Telecommunications Companies (CALTEL), August 2000.

“Final Report on the Qualifications of Wide Open West-Texas, LLC for a Cable Television Franchise in the City of Dallas,” prepared for the City of Dallas, July 31, 2000.

“Final Report on the Qualifications of Western Integrated Networks of Texas Operating L.P. For a Cable Television Franchise in the City of Dallas,” prepared for the City of Dallas, July 31, 2000.

“Price Cap Plan for USWC: Establishing Appropriate Price and Service Quality Incentives in Utah” prepared for The Division of Public Utilities, March, 2000.

“Building a Broadband America: The Competitive Keys to the Future of the Internet,” prepared for The Competitive Broadband Coalition, May 1999.

“Broken Promises: A Review of Bell Atlantic-Pennsylvania's Performance under Chapter 30,” prepared for AT&T and MCI Telecommunications, June 1998.

“Analysis of Opportunities for Cross Subsidies between GTA and GTA Cellular,” prepared for Guam Cellular and Paging, submitted to the Guam Public Utilities Commission, July 11, 1997.

“Reply to Incumbent LEC Claims to Special Revenue Recovery Mechanisms,” submitted in the Matter of Access Charge Reform in CC Docket 96-262, February 14, 1997.

“Assessing Incumbent LEC Claims to Special Revenue Recovery Mechanisms: Revenue opportunities, market assessments, and further empirical analysis of the ‘Gap’ between embedded and forward-looking costs,” FCC CC Docket 96-262, January 29, 1997.

“Analysis of Incumbent LEC Embedded Investment: An Empirical Perspective on the ‘Gap’ between Historical Costs and Forward-looking TSLRIC,” Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC CC 96-98, May 30, 1996.

“Reply to X-Factor Proposals for the FCC Long-Term LEC Price Cap Plan,” prepared for the Ad Hoc Telecommunications User Committee, submitted in FCC CC Docket 94-1, March 1, 1996.

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“The Economic Viability of Stentor's ‘Beacon Initiative,’ exploring the extent of its financial dependency upon revenues from services in the Utility Segment,” prepared for Unitel, evidence before the Canadian Radio-television and Telecommunications Commission, March 1995.

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2003

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2003

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1999

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1993

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1992

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1990

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1989

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Inc., GA Association of Telemessaging Services, Prodigy Services, Company, Telnet Communications, Corp., filed November 28, 1989.

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1988

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1987

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1986-1982

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Analysis of Utility and ILEC Maintenance Carrying Charge Factors

I. Utility/ILEC Comparison Based on Ratio of Account 593 / Accounts 364+365+369

| | | Column (1) | Column (2) | Column (2) / (1) | |
|------------------------------------|---------------|-------------------------|--------------------------|------------------------|---------------------|
| Geographical Pairing | | Gross Investment | Expense booked to | Maintenance | Ratio CCF |
| Utility/ILEC | Year | FERC 364+365+369 | FERC 593 or | Carrying Charge | ILEC/Utility |
| | | or ARMIS 101 | ARMIS 43-01,501.1 | Factor (CCF) | |
| Alabama | | | | | |
| Alabama Power (Southern Co.) | 2004 | \$1,759,229,144 | \$77,346,166 | 4.40% | 0.25 |
| AT&T Alabama | 2004 | \$162,233,000 | \$1,760,000 | <u>1.08%</u> | |
| Georgia | | | | | |
| Georgia Power (Southern Co.) | 2006 | \$2,378,992,924 | \$78,370,976 | 3.29% | 0.28 |
| AT&T Georgia | 2006 | \$163,915,000 | \$1,509,000 | <u>0.92%</u> | |
| Mississippi | | | | | |
| Mississippi Power (Southern Co.) | 2006 | \$239,534,760 | \$7,746,713 | 3.23% | 0.83 |
| AT&T Mississippi | 2006 | \$102,071,000 | \$2,738,000 | <u>2.68%</u> | |
| Florida - Gulf Power | | | | | |
| Gulf Power (Southern Co.) | 2006 | \$297,327,723 | \$8,125,897 | 2.73% | 0.69 |
| AT&T Florida (**see box below) | Avg 2005/2007 | \$182,779,000 | \$3,422,500 | <u>1.87%</u> | |
| Florida - Gulf Power | | | | | |
| Gulf Power (Southern Co.) | 2006 | \$297,327,723 | \$8,125,897 | 2.73% | 0.69 |
| GTE Florida | 2006 | \$31,504,000 | \$593,000 | <u>1.88%</u> | |
| Florida - FP&L | | | | | |
| Florida Power & Light | 2006 | \$2,550,085,103 | \$104,137,776 | 4.08% | 0.46 |
| AT&T Florida (**see box below) | Avg 2005/2007 | \$182,779,000 | \$3,422,500 | <u>1.87%</u> | |
| Massachusetts | | | | | |
| NSTAR (Boston Edison) | 2006 | \$528,426,350 | \$15,745,383 | 2.98% | 0.20 |
| Verizon Massachusetts | 2006 | \$393,102,000 | \$2,386,000 | <u>0.61%</u> | |
| New York | | | | | |
| Central Hudson Gas & Electric | 2006 | \$281,626,440 | \$12,823,304 | 4.55% | 0.13 |
| Verizon - New York | 2006 | \$654,542,000 | \$3,874,000 | <u>0.59%</u> | |
| Virginia | | | | | |
| Dominion Virginia Power | 2006 | \$2,316,851,825 | \$64,959,421 | 2.80% | 0.31 |
| Verizon Virginia | 2006 | \$93,287,000 | \$805,000 | <u>0.86%</u> | |
| Average Ratio ILEC/ Utility | | | | | 0.43 |

II. Utility/ILEC Comparison Based on Ratio of Account 593/ Account 364

| | | Column (1) | Column (2) | Column (2) / (1) | |
|------------------------------------|---------------|-------------------------|--------------------------|------------------------|---------------------|
| Geographical Pairing | | Gross Investment | Expense booked to | Maintenance | |
| Utility/ILEC | Year | FERC 364 | FERC 593 or | Carrying Charge | Ratio CCF |
| | | or ARMIS 101 | ARMIS 43-01,501.1 | Factor (CCF) | ILEC/Utility |
| Alabama | | | | | |
| Alabama Power (Southern Co.) | 2004 | \$782,999,486 | \$77,346,166 | 9.88% | 0.11 |
| AT&T Alabama | 2004 | \$162,233,000 | \$1,760,000 | <u>1.08%</u> | |
| Georgia | | | | | |
| Georgia Power (Southern Co.) | 2006 | \$772,038,482 | \$78,370,976 | 10.15% | 0.09 |
| AT&T Georgia | 2006 | \$163,915,000 | \$1,509,000 | <u>0.92%</u> | |
| Mississippi | | | | | |
| Mississippi Power (Southern Co.) | 2006 | \$94,818,137 | \$7,746,713 | 8.17% | 0.33 |
| AT&T Mississippi | 2006 | \$102,071,000 | \$2,738,000 | <u>2.68%</u> | |
| Florida - Gulf Power | | | | | |
| Gulf Power (Southern Co.) | 2006 | \$102,262,675 | \$8,125,897 | 7.95% | 0.24 |
| AT&T Florida (**see box below) | Avg 2005/2007 | 182,779,000 | \$3,422,500 | <u>1.87%</u> | |
| Florida - Gulf Power | | | | | |
| Gulf Power (Southern Co.) | 2006 | \$102,262,675 | \$8,125,897 | 7.95% | 0.24 |
| GTE Florida | 2006 | \$31,504,000 | \$593,000 | <u>1.88%</u> | |
| Florida - FP&L | | | | | |
| Florida Power & Light | 2006 | \$791,839,370 | \$104,137,776 | 13.15% | 0.14 |
| AT&T Florida (**see box below) | Avg 2005/2007 | 182,779,000 | \$3,422,500 | <u>1.87%</u> | |
| Massachusetts | | | | | |
| NSTAR (Boston Edison) | 2006 | \$94,775,228 | \$15,745,383 | 16.61% | 0.04 |
| Verizon Massachusetts | 2006 | \$393,102,000 | \$2,386,000 | <u>0.61%</u> | |
| New York | | | | | |
| Central Hudson Gas & Electric | 2006 | \$119,158,663 | \$12,823,304 | 10.76% | 0.05 |
| Verizon - New York | 2006 | \$654,542,000 | \$3,874,000 | <u>0.59%</u> | |
| Virginia | | | | | |
| Dominion Virginia Power | 2006 | \$567,361,486 | \$64,959,421 | 11.45% | 0.08 |
| Verizon Virginia | 2006 | \$93,287,000 | \$805,000 | <u>0.86%</u> | |
| Average Ratio ILEC/ Utility | | | | | 0.15 |

| Calculation of AT&T Florida Average To Correct for Anomaly in 2006 Data | | | |
|--|-------------|---------------------------------------|--|
| | Year | Gross Investment ARMIS 101 | Expense booked to ARMIS 43-01,501.1 |
| AT&T Florida | 2005 | \$194,162,000 | \$3,971,000 |
| AT&T Florida | 2007 | \$171,396,000 | \$2,874,000 |
| Average 2005/2007 | | \$182,779,000 | \$3,422,500 |

| | Col. (1) Existing FCC Cable and Telecom Rates | Col. (2) FNPRM No Capital Cost Telecom Rate | Col.(3) High End Cost-Causative Fully Allocated Telecom Rate | Col.(4) Low End Marginal Cost Proxy Telecom Rate |
|--|--|--|---|---|
| POLE ATT. RATE CALCULATION: GULF POWER, Year End 2007 FERC/4 Attachrs | | | | |
| Net Investment Per Bare Pole: | | | | |
| Gross Investment in Pole Plant | \$110,201,017.00 | \$110,201,017.00 | \$110,201,017.00 | \$110,201,017.00 |
| -Depreciation Reserve for Poles | \$45,563,061.24 | \$45,563,061.24 | \$45,563,061.24 | \$45,563,061.24 |
| -Accumulated Deferred Taxes | \$10,795,869.72 | \$10,795,869.72 | \$10,795,869.72 | \$10,795,869.72 |
| =Net Investment in Pole Plant | \$53,842,086.04 | \$53,842,086.04 | \$53,842,086.04 | \$53,842,086.04 |
| Adjustment for Appurtenances | 15% | 15% | 15% | 15% |
| -Net Investment in Appurtenances | \$8,076,312.91 | \$8,076,312.91 | \$8,076,312.91 | \$8,076,312.91 |
| =Net Investment in Bare Pole Plant | \$45,765,773.14 | \$45,765,773.14 | \$45,765,773.14 | \$45,765,773.14 |
| /Number of Poles--Equivalent | 246,434 | 246,434 | 246,434 | 246,434 |
| =Net Investment per Bare Pole | \$185.71 | \$185.71 | \$185.71 | \$185.71 |
| Carrying Charges | | | | |
| Maintenance | | | | |
| Maintenance Expenses | \$10,440,357 | \$10,440,357 | \$10,440,357 | \$10,440,357 |
| x Adjustment for Non-Pole Related Expenses | | | 15% (a) | 15% |
| =Maintenance Attributable to Pole | | | \$1,566,054 | \$1,566,054 |
| /Net Inv. 364,365+369 (or Net Inv. 364 in Cols. 3 & 4) | \$152,281,822 | \$152,281,822 | \$53,842,086 (a) | \$53,842,086 (b) |
| =Maintenance Carrying Charge | 6.9% | 6.9% | 2.91% | 2.91% |
| Depreciation | | | | |
| Annual Depreciation Rate for Poles | 5.40% | | 5.40% | |
| Gross Investment in Pole Plant | \$110,201,017 | | \$110,201,017 | |
| /Net Investment in Pole Plant | \$53,842,086 | | \$53,842,086 | |
| =Gross/Net Adjustment | 2.05 | | 2.05 | |
| Deprec Rate Applicable to Net Pole Plant | 11.05% | x | 11.05% | x |
| Administrative | | | | |
| Total A&G Expenses (or Dedicated FTE in Col. 4) | \$89,128,761 | \$89,128,761 | \$89,128,761 | \$638,765 (c) |
| x Ratio Direct Pole Exp. to Total Utility Direct Exp. | | | 1.26% (d) | |
| =A&G Attributable to Pole | | | \$1,126,174 (d) | |
| Total Plant - Electric | \$2,672,226,878 | \$2,672,226,878 | | |
| -Depreciation Reserve | \$1,104,843,133 | \$1,104,843,133 | | |
| -Accumulated Deferred Taxes | 261,785,363 | 261,785,363 | | |
| =Total Net Plant in Service (or Net Inv. 364 in Cols. 3 & 4) | \$1,305,598,382 | \$1,305,598,382 | \$53,842,086 (d) | \$53,842,086 (c) |
| Administrative Carrying Charge | 6.83% | 6.83% | 2.09% | 1.19% |
| Taxes | | | | |
| Tax Expense (or Taxes Other than Income in Col. 3) | \$128,886,795.00 | | \$82,991,780.00 (e) | |
| Total Plant | \$2,672,226,878 | | \$2,672,226,878 | |
| -Depreciation Reserve | \$1,104,843,133 | | \$1,104,843,133 | |
| -Accumulated Deferred Taxes | 261,785,363 | | 261,785,363 | |
| =Total Net Plant in Service | \$1,305,598,382 | | \$1,305,598,382 | |
| Tax Carrying Charge | 9.87% | x | 6.36% | x |
| Return | | | | |
| FCC Default Return (or IRS Payment Rate in Col. 3) | 11.25% | x | 8.00% (f) | x |
| Avg Embedded Tax Factor | | | 3.52% (e) | |
| Gross up Rate | | | 1.0364 (e) | |
| Return Grossed Up for Income Taxes | | | 8.29% | |
| Total Carrying Charges | 45.86% | 13.68% | 30.70% | 4.09% |

| | Col. (1) Existing FCC Cable and Telecom Rates | Col. (2) FNPRM No Capital Cost Telecom Rate | Col.(3) High End Cost-Causative Fully Allocated Telecom Rate | Col.(4) Low End Marginal Cost Proxy Telecom Rate | |
|---|--|--|---|---|----------------------------------|
| Allocation of Annual Carrying Costs | | | | | |
| Space Occupied by Cable | 1 | 1 | 1 | 1 | |
| /Total Useable Space 37.5' pole (or 40' pole in Cols. 3 & . | 13.5 | 13.5 | 16 (g) | 16 (h) | |
| =Space Allocation Factor - Cable | 7.41% | 7.41% | 6.25% | 6.25% | |
| Statutory Factor | 0.667 | 0.667 | 0.667 | 0.667 | |
| x Unusable Space | 24.00 | 24.00 | 24.00 | 24.00 | |
| / No attaching entities | 4.00 | 4.00 | 4.00 (i) | 4.00 (h) | |
| =Unusable Space Allocated to Telecom | 4.00 | 4.00 | 4.00 | 4.00 | |
| + Usable Space Occupied by Telecom | 1.00 | 1.00 | 1.00 | 1.00 | |
| =Total Space Allocated to Telecom | 5.00 | 5.00 | 5.00 | 5.00 | |
| /Height of Pole | 37.50 | 37.50 | 40.00 (g) | 40.00 (h) | |
| =Space Allocation Factor - Telecom | 13.33% | 13.33% | 12.50% | 12.50% | |
| Maximum Cable Rate | | | | | |
| Net Investment Per Bare Pole | \$185.71 | | | | |
| *Carrying Charges | 45.86% | | | | |
| *Space Allocation Factor | 7.41% | | | | |
| =MAXIMUM RATE | \$6.31 | | | | |
| Maximum Telecom Rate | | | | | |
| Net Investment Per Bare Pole | \$185.71 | \$185.71 | \$185.71 | \$185.71 | |
| *Carrying Charges | 45.86% | 13.68% | 30.70% | 4.09% | |
| *Space Allocation Factor | 13.33% | 13.33% | 12.50% | 12.50% | |
| =MAXIMUM RATE | \$11.35 | \$3.39 | \$7.13 | \$0.95 | |
| DATA ENTRY AND SOURCE | | | | | |
| Accumulated Deferred Taxes 190 (Plant) | (59,785,640) | (59,785,640) | (59,785,640) | (59,785,640) | FERC OR OTHER: Pg. 234, c 18. |
| Accumulated Deferred Taxes 281 (Plant) | 2,274,551 | 2,274,551 | 2,274,551 | 2,274,551 | Pg. 273, k 17. |
| Accumulated Deferred Taxes 282 (Plant) | 255,029,916 | 255,029,916 | 255,029,916 | 255,029,916 | Pg. 275, k 9. |
| Accumulated Deferred Taxes 283 (Plant) | 64,266,536 | 64,266,536 | 64,266,536 | 64,266,536 | Pg. 277, k 19. |
| Accumulated Deferred Taxes-Total (Plant) | \$261,785,363 | \$261,785,363 | \$261,785,363 | \$261,785,363 | |
| Taxes 408.1 | \$82,991,780 | \$82,991,780 | \$82,991,780 | \$82,991,780 | Pg. 114, c 14. |
| Taxes 409.1 Federal | \$50,132,023 | \$50,132,023 | \$50,132,023 | \$50,132,023 | Pg. 114, c 15. |
| Taxes 409.1 Other | \$8,308,524 | \$8,308,524 | \$8,308,524 | \$8,308,524 | Pg. 114, c 16. |
| Taxes 410.1 | \$45,300,659 | \$45,300,659 | \$45,300,659 | \$45,300,659 | Pg. 114, c 17. |
| Taxes 411.1 Cr. | (56,112,567) | (56,112,567) | (56,112,567) | (56,112,567) | Pg. 114, c 18. |
| Taxes 411.4 | -\$1,733,624 | -\$1,733,624 | -\$1,733,624 | -\$1,733,624 | Pg. 114, c 19. |
| Taxes - Income Related | \$45,895,015 | \$45,895,015 | \$45,895,015 | \$45,895,015 | Sum |
| Gross Investment in Total Plant | \$2,672,226,878 | \$2,672,226,878 | \$2,672,226,878 | \$2,672,226,878 | Pg. 200, b 8. |
| Gross Investment in Total Plant--Electric | \$2,672,226,878 | \$2,672,226,878 | \$2,672,226,878 | \$2,672,226,878 | Pg. 200, c 8. |
| Accumulated Prov for Deprec.--Total | \$1,104,843,133 | \$1,104,843,133 | \$1,104,843,133 | \$1,104,843,133 | Pg. 200, b 22. |
| Accumulated Prov for Deprec.--Electric | \$1,104,843,133 | \$1,104,843,133 | \$1,104,843,133 | \$1,104,843,133 | Pg. 200, c 22. |

| | Col. (1) Existing FCC Cable and Telecom Rates | Col. (2) FNPRM No Capital Cost Telecom Rate | Col.(3) High End Cost-Causative Fully Allocated Telecom Rate | Col.(4) Low End Marginal Cost Proxy Telecom Rate | |
|---|--|--|---|---|------------------|
| Gross Investment in 364 | \$110,201,017 | \$110,201,017 | \$110,201,017 | \$110,201,017 | Pg. 207, g 64. |
| Gross Investment in 365 | \$114,370,807 | \$114,370,807 | \$114,370,807 | \$114,370,807 | Pg. 207, g 65. |
| Gross Investment in 369 | \$87,110,224 | \$87,110,224 | \$87,110,224 | \$87,110,224 | Pg. 207, g 69. |
| Sum | \$311,682,048.00 | \$311,682,048.00 | \$311,682,048.00 | \$311,682,048.00 | |
| Pole Maintenance Expense 593 | \$10,440,357 | \$10,440,357 | \$10,440,357 | \$10,440,357 | Pg. 322, b 149. |
| Total Elec Op and Maint Expenses | x | x | \$915,409,686 | x | Pg. 323, b. 198. |
| Total A&G Expenses | x | x | \$89,128,761 | x | Pg. 323, b. 197. |
| Total Operation & Maint (Net of A&G) | x | x | \$826,280,925 (d) | x | Calculation |
| Ratio Pole Maint. to Total O&M (Net of A&G) | | | 0.0126 (d) | | Calculation |
| Admin & General Salaries 920 | x | x | x | \$13,142,445 | Pg. 323, b. 181. |
| Office Supplies & Expenses 921 | x | x | x | x | |
| (Less) Admin Expenses Transfrd Credit 922 | x | x | x | x | |
| Outside Services Employed 923 | x | x | x | x | |
| Property Insurance 924 | x | x | x | x | |
| Injuries & Damages 925 | x | x | x | x | |
| Employee Pensions & Benefits 926 | x | x | x | \$15,543,491 | Pg. 323, b. 187. |
| Franchise Requirements 927 | x | x | x | x | |
| Regulatory Commission Expenses 928 | x | x | x | x | |
| (Less) Duplicate Charges 929 | x | x | x | x | |
| General Advertising Expenses 930.1 | x | x | x | x | |
| Miscellaneous General Expenses 930.2 | x | x | x | x | |
| Rents 931 | x | x | x | x | |
| Subtotal Administrative - Operations | | | | | |
| Administrative Expense 935 - Maint. | | | | | |
| Total Administrative Expenses | \$89,128,761 | \$89,128,761 | \$89,128,761 | \$89,128,761 | Pg. 323, b. 197. |
| Depreciation Rate for Poles | 5.40% | x | 5.40% | x | Pg. 337.1, e 26. |
| Accumulated Deferred Taxes (Prorated to 364) | \$10,795,870 | \$10,795,870 | \$10,795,870 | \$10,795,870 | Calculation |
| Accumulated Deferred Taxes (Prorated to 365) | \$11,204,364 | \$11,204,364 | \$11,204,364 | \$11,204,364 | Calculation |
| Accumulated Deferred Taxes (Prorated to 369) | \$8,533,775 | \$8,533,775 | \$8,533,775 | \$8,533,775 | Calculation |
| Total Accumulated Deferred Taxes (prorated) | \$30,534,008 | \$30,534,008 | \$30,534,008 | \$30,534,008 | Sum |
| Depreciation Reserve for 364 (prorated) | \$45,563,061 | \$45,563,061 | \$45,563,061 | \$45,563,061 | Calculation |
| Depreciation Reserve for 365 (prorated) | \$47,287,078 | \$47,287,078 | \$47,287,078 | \$47,287,078 | Calculation |
| Depreciation Reserve for 369 (prorated) | \$36,016,078 | \$36,016,078 | \$36,016,078 | \$36,016,078 | Calculation |
| Total Depreciation Reserve | \$128,866,218 | \$128,866,218 | \$128,866,218 | \$128,866,218 | Sum |
| FCC Default Rate of Return (IRS Payment Rate in Col. 3) | 11.25% | x | 8.00% (f) | x | FCC; IRS |
| Embedded Tax Factor | x | x | 3.52% (e) | x | Calculation |
| Gross - Up Rate - Embedded | x | x | 1.0364 (e) | x | Calculation |
| Number of Poles | 246,434 | 246,434 | 246,434 | 246,434 | Utility |
| Number attaching entities | 4 | 4 | 4 (i) | 4 (h) | Presumption |
| Usable Space Factor | 13.5 | 13.5 | 16 (g) | 16 (h) | Presumption |
| Pole Height | 37.5 | 37.5 | 40 (g) | 40 (h) | Presumption |

| | Col. (1) Existing FCC Cable and Telecom Rates | Col. (2) FNPRM No Capital Cost Telecom Rate | Col.(3) High End Cost-Causative Fully Allocated Telecom Rate | Col.(4) Low End Marginal Cost Proxy Telecom Rate | |
|--|--|--|---|---|---------------------------------|
| Direct Admin Expenses Attributable to Poles: | x | x | x | | |
| No. of Directly assigned FTE employees (Poles >650K) | x | x | x | 5 (c) | CT Light & Power, Dkt 09-12-05. |
| Avg. Line Worker Salary | x | x | x | \$58,530 (c) | Bureau Labor Statistics |
| Load Factor | x | x | x | 2.18 (c) | Calculation |
| Loaded Salaries and Benefits | x | x | x | \$638,765.40 | Calculation |

Notes:

- (a) See Report at para. 34.
- (b) See Report at para. 70.
- (c) See Report at para. 72.
- (d) See Report at para. 37.
- (e) See Report at para. 39.
- (f) See Report at para. 43.
- (g) See Report at para. 46.
- (h) See Report at para. 73.
- (i) See Report at para. 47.

| | Col. (1) Existing FCC Cable and Telecom Rates | Col. (2) FNPRM No Capital Cost Telecom Rate | Col.(3) High End Cost-Causative Fully Allocated Telecom Rate | Col.(4) Low End Marginal Cost Proxy Telecom Rate |
|--|--|--|---|---|
| POLE ATT. RATE CALCULATION: AT&T FL Year End 2007 ARMIS/4 Attachers | | | | |
| Net Investment Per Bare Pole: | | | | |
| Gross Investment in Pole Plant | 194,162,000.00 | 194,162,000.00 | 194,162,000.00 | 194,162,000.00 |
| -Depreciation Reserve for Poles | 154,459,000.00 | 154,459,000.00 | 154,459,000.00 | 154,459,000.00 |
| -Accumulated Deferred Taxes | -1,012,000.00 | -1,012,000.00 | -1,012,000.00 | -1,012,000.00 |
| =Net Investment in Pole Plant | 40,715,000.00 | 40,715,000.00 | 40,715,000.00 | 40,715,000.00 |
| -Net Investment in Appurtenances (5%) | 2,035,750.00 | 2,035,750.00 | 2,035,750.00 | 2,035,750.00 |
| =Net Investment in Bare Pole Plant | 38,679,250.00 | 38,679,250.00 | 38,679,250.00 | 38,679,250.00 |
| /Number of Poles | 454,029.00 | 454,029.00 | 454,029.00 | 454,029.00 |
| =Net Investment per Bare Pole | \$85.19 | \$85.19 | \$85.19 | \$85.19 |
| Carrying Charges: | | | | |
| Maintenance | | | | |
| Chargeable Maintenance Expenses | \$3,971,000 | \$3,971,000 | \$3,971,000 | \$3,971,000 |
| /Net Investment in Pole Plant | \$40,715,000 | \$40,715,000 | \$40,715,000 | \$40,715,000 |
| =Maintenance Carrying Charge | 9.75% | 9.75% | 9.75% | 9.75% |
| Depreciation | | | | |
| Annual Depreciation Rate for Poles | 6.50% | | 6.50% | |
| Gross Investment in Pole Plant | \$194,162,000 | | \$194,162,000 | |
| /Net Investment in Pole Plant | \$40,715,000 | | \$40,715,000 | |
| =Gross/Net Adjustment | 4.77 | | 4.77 | |
| Deprec Rate Applied to Net Pole Plant | 31.00% | x | 31.00% | x |
| Administrative | | | | |
| Total A&G Expenses (or Dedicated FTE in Col. 4)) | \$379,578,000 | \$379,578,000 | \$379,578,000 | \$548,600 (a) |
| Ratio Direct Pole Exp. to Total Utility Direct Exp. | | | 0.261% (b) | |
| A&G Attributable to Pole | | | \$991,138.91 (b) | |
| Total Plant In Service | \$15,799,395,000 | \$15,799,395,000 | | |
| -Depreciation Reserve for TPIS | \$12,071,220,000 | \$12,071,220,000 | | |
| -Accumulated Deferred Taxes | \$432,677,000 | \$432,677,000 | | |
| =Total Net Plant in Service (or Net Pole Plant in Cols. 3 & 4) | \$3,295,498,000 | \$3,295,498,000 | \$40,715,000 (b) | \$40,715,000 (a) |
| Administrative Carrying Charge | 11.52% | 11.52% | 2.434% | 1.35% |
| Taxes | | | | |
| Tax Expense (or Taxes Other than Income in Col. 3) | \$476,040,000 | | \$79,954,000 (c) | |
| Total Plant In Service | \$15,799,395,000 | | \$15,799,395,000 | |
| -Depreciation Reserve for TPIS | \$12,071,220,000 | | \$12,071,220,000 | |
| -Accumulated Deferred Taxes | \$432,677,000 | | \$432,677,000 | |
| =Net Plant in Service | \$3,295,498,000 | | \$3,295,498,000 | |
| Tax Carrying Charge | 14.45% | x | 2.43% | x |
| Return | | | | |
| FCC Default Rate (or IRS Payment Rate in Col. 3) | 11.25% | x | 8.0% (d) | x |
| Avg Embedded Tax Factor | | | 12.02% (c) | |
| Gross up Rate | | | 1.137 (c) | |
| Return Grossed Up for Income Taxes | | | 9.09% | |
| TOTAL CARRYING CHARGES | 77.96% | 21.27% | 54.70% | 11.10% |

| | Col. (1) Existing FCC Cable and Telecom Rates | Col. (2) FNPRM No Capital Cost Telecom Rate | Col.(3) High End Cost-Causative Fully Allocated Telecom Rate | Col.(4) Low End Marginal Cost Proxy Telecom Rate | |
|--|--|--|---|---|--|
| ALLOCATION OF ANNUAL CARRYING COSTS | | | | | |
| Space Occupied by Cable | 1 | 1 | 1 | 1 | |
| /Total Useable Space 37.5' pole (or 40' pole in Cols. 3 & 4) | 13.5 | 13.5 | 16 (e) | 16 (f) | |
| =Space Allocation Factor - Cable | 7.41% | 7.41% | 6.25% | 6.25% | |
| Statutory Factor | 0.667 | 0.667 | 0.667 | 0.667 | |
| x Unusable Space | 24.00 | 24.00 | 24.00 | 24.00 | |
| / No attaching entities | 4.00 | 4.00 | 4.00 (g) | 4.00 (f) | |
| =Unusable Space Allocated to Telecom | 4.00 | 4.00 | 4.00 | 4.00 | |
| + Usable Space Occupied by Telecom | 1.00 | 1.00 | 1.00 | 1.00 | |
| =Total Space Allocated to Telecom | 5.00 | 5.00 | 5.00 | 5.00 | |
| /Height of Pole | 37.50 | 37.50 | 40.00 (e) | 40.00 (f) | |
| =Space Allocation Factor - Telecom | 13.33% | 13.33% | 12.50% | 12.50% | |
| Maximum Cable Rate | | | | | |
| Net Investment Per Bare Pole | \$85.19 | | | | |
| *Carrying Charges | 77.96% | | | | |
| *Charge Factor | 7.41% | | | | |
| =MAXIMUM RATE | \$4.92 | | | | |
| Maximum Telecom Rate | | | | | |
| Net Investment Per Bare Pole | \$85.19 | \$85.19 | \$85.19 | \$85.19 | |
| *Carrying Charges | 77.96% | 21.27% | 54.70% | 11.10% | |
| *Charge Factor | 13.33% | 13.33% | 12.50% | 12.50% | |
| =MAXIMUM RATE | \$8.86 | \$2.42 | \$5.83 | \$1.18 | |
| DATA ENTRY AND SOURCE | | | | | ARMIS OR OTHER: |
| Gross Investment in Total Plant | 15,799,395,000 | 15,799,395,000 | 15,799,395,000 | 15,799,395,000 | 43-01: Table III, Row 101(b) |
| Depreciation Reserve for TPIS | 12,071,220,000 | 12,071,220,000 | 12,071,220,000 | 12,071,220,000 | 43-01: Table III, Row 100(b) |
| Gross Investment in Pole Plant | 194,162,000 | 194,162,000 | 194,162,000 | 194,162,000 | 43-01: Table III, Row 201(b) |
| Depreciation Reserve for Pole Plant | 154,459,000 | 154,459,000 | 154,459,000 | 154,459,000 | 43-01: Table III, Row 200(b) |
| Chargeable Pole Maintenance | 3,971,000 | 3,971,000 | 3,971,000 | 3,971,000 | 43-01: Table III, Row 501.1(b) |
| Total Operations & Maintenance | x | x | 1,520,780,000 | x | 43-03: Table I, Rows 6100-6620, excl. 6560 |
| Ratio Pole Maint. to Total O&M | x | x | 0.261% (b) | x | Calculation |
| Depreciation Rate for Poles | 6.50% | x | 6.50% | x | 43-01: Table III, Row 301(b) |
| Total General and Administrative | 379,578,000 | 379,578,000 | 379,578,000 | x | 43-01: Table III, Row 503(b) |
| Taxes | 476,040,000 | x | x | x | 43-01: Table III, Row 504(b) |
| Non-Income Related Taxes | x | x | 79,954,000 | x | 43-03: Table I, Row 7240 |
| Income Related Taxes | x | x | \$396,086,000 | x | Calculation |

| | Col. (1) Existing FCC Cable and Telecom Rates | Col. (2) FNPRM No Capital Cost Telecom Rate | Col.(3) High End Cost-Causative Fully Allocated Telecom Rate | Col.(4) Low End Marginal Cost Proxy Telecom Rate | ARMIS: |
|--|--|--|---|---|---------------------------------|
| Current Accumulated Deferred Taxes | -1,882,000 | -1,882,000 | -1,882,000 | -1,882,000 | 43-01: Table III, Row 403(b) |
| Noncurrent Accumulated Deferred Taxes | 434,559,000 | 434,559,000 | 434,559,000 | 434,559,000 | 43-01: Table III, Row 406(b) |
| Total Accumulated Deferred Taxes | \$432,677,000 | \$432,677,000 | \$432,677,000 | \$432,677,000 | Sum |
| Current Accumulated Deferred Taxes (Poles) | 5000 | 5000 | 5000 | 5000 | 43-01: Table III, Row 401(b) |
| Noncurrent Accumulated Deferred Taxes (Poles) | -1,017,000 | -1,017,000 | -1,017,000 | -1,017,000 | 43-01: Table III, Row 404(b) |
| Total Accumulated Deferred Taxes (Poles) | -\$1,012,000 | -\$1,012,000 | -\$1,012,000 | -\$1,012,000 | Sum |
| FCC Default Rate of Return (or IRS Payment Rate in Col. 3) | 11.25% | x | 8.00% (d) | x | FCC, IRS |
| Avg Embedded Tax Factor | x | x | 12.02% (c) | x | Calculation |
| Gross - Up Rate - Embedded | x | x | 1.1366 (c) | x | Calculation |
| Number of Poles | 454,029 | 454,029 | 454,029 | 454,029 | 43-01: Table III, Row 601(b) |
| Number attaching entities | 4 | 4 | 4 (g) | 4 (f) | Presumption |
| Usable Space Factor | 13.5 | 13.5 | 16 (e) | 16 (f) | Presumption |
| Pole Height | 37.5 | 37.5 | 40 (e) | 40 (f) | Presumption |
| Direct Admin Expenses Attributable to Poles: | x | x | x | | |
| Number directly assigned FTE employees | x | x | x | 5 (a) | CT Light & Power, Dkt 09-12-05. |
| Avg. Line Worker Salary per BLS | x | x | x | \$54,860 (a) | Bureau Labor Statistics |
| Load Factor | x | x | x | 2.00 (a) | Calculation |
| Loaded Salaries and Benefits | x | x | x | \$548,600.00 | Calculation |

Notes:

- (a) See Report at para. 72.
- (b) See Report at para. 37.
- (c) See Report at para. 39.
- (d) See Report at para. 43.
- (e) See Report at para. 46.
- (f) See Report at para. 73.
- (g) See Report at para. 47.

**Comparison of Existing Cable Formula and Upper and Lower Bound Telecom Rate Methodology
For FNPRM Sample of Electric Utilities**

| All Costs | Gulf Power | Alabama Power | Georgia Power | Tampa Electric | Jersey Central | Metro Edison | Penn Electric | NSTAR | AVG | % of High End |
|--|-------------------|----------------------|----------------------|-----------------------|-----------------------|---------------------|----------------------|--------------|------------|----------------------|
| High End: Cost Causative Fully Allocated Cost | \$ 7.13 | \$ 8.36 | \$ 6.10 | \$ 9.58 | \$ 7.54 | \$ 8.73 | \$ 8.61 | \$ 6.97 | \$ 7.88 | 100.0% |
| Existing Cable Rate | \$ 6.31 | \$ 8.00 | \$ 5.77 | \$ 8.24 | \$ 8.21 | \$ 8.69 | \$ 8.01 | \$ 6.90 | \$ 7.52 | 95.4% |
| Low End: Marginal Cost Proxy | \$ 0.95 | \$ 1.28 | \$ 0.96 | \$ 1.35 | \$ 1.33 | \$ 1.27 | \$ 0.78 | \$ 1.02 | \$ 1.12 | 14.2% |

ATTACHMENT B

ATTACHMENT B

EXAMPLES OF FCC, STATE AND COURT DECISIONS ADDRESSING REASONABLENESS OF CABLE POLE ATTACHMENT RATES

Supreme Court

NCTA v. Gulf Power, 534 U.S. 327 (2002) – affirming FCC decision to apply the cable rate formula to attachments used by a cable operator to provide broadband services

FCC v. Florida Power, 480 U.S. 245 (1987) – finding that FCC regulation of pole attachment rates is not an unconstitutional taking of property and that the cable rate formula is not confiscatory

Courts of Appeals

Alabama Power v. FCC, 311 F.3d 1357 (11th Cir. 2002), *cert. denied*, 124 S.Ct. 50 (2003) – affirming FCC’s decision that utility’s rates were unreasonable and that the cable rate formula provides just compensation and is not an unconstitutional taking of property

Southern Co. Services v. FCC, 313 F.3d 574 (D.C. Cir. 2002) – affirming FCC’s implementation of changes to Section 224 that were adopted as part of the Telecommunications Act of 1996

Texas Utilities Electric Co. v. FCC, 997 F.2d 925 (D.C. Cir. 1993) – affirming FCC’s decision to apply cable rate formula to non-video attachments

Monongahela Power v. FCC, 655 F.2d 1254 (D.C. Cir. 1981) – affirming FCC’s original rules implementing the cable rate formula contained in Section 224(d)

Federal Communications Commission

A. Rulemakings

Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments, 16 FCC Rcd 12103 (2001) (*Consolidated Reconsideration Order*) – rejecting utilities’ arguments that regulation of pole attachment agreements no longer is necessary and reaffirming the validity and importance of the FCC’s rate formulas

Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments, 15 FCC Rcd 6453 (2000) (*Fee Order*) – reaffirming the use of rate formulas based on historical costs and declining to modify the usable space presumptions

Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments, 13 FCC Rcd 6777 (1998) (*Telecom Order*) –

establishing the telecom rate formula and deciding that the cable rate formula will continue to apply when a cable operator provides commingled cable and Internet services

Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 2 FCC Rcd 4387 (1987) – making minor adjustments to the cable rate formula and clarifying that make-ready fees may not recover costs already recovered in the annual pole rental fee

Petition to Adopt Rules Concerning Usable Space on Utility Poles, 56 Rad. Reg. 2d 707 (1984) – declining to reconsider assumptions underlying the cable rate formula adopted in 1978-80

B. Adjudications¹

FCTA v. Gulf Power, 22 FCC Rcd 1997 (ALJ 2007) – rejecting utility arguments that poles were at full capacity and therefore it was appropriate to charge an unregulated attachment rate

FCTA v. Gulf Power, 18 FCC Rcd 9599 (EB 2003) – granting complaint that utility violated FCC rules by unilaterally imposing attachment rate and finding that payment of rent based on cable rate formula plus make-ready expenses exceeds just compensation

Teleport Communications Atlanta v. Georgia Power, 16 FCC Rcd 20238 (EB 2001), *affirmed* 17 FCC Rcd 19859 (2002) – granting complaint that utility violated FCC rules by using its own formula to calculate pole attachment rates rather than using cable or telecom rate formula and reaffirming that both formulas provide just compensation to pole owners

RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Co., 17 FCC Rcd 25238 (EB 2002) – rejecting utility's \$47.25 pole attachment rate as unjust and unreasonable and calculating a maximum just and reasonable annual cable rate of \$6.79 per pole attachment

Nevada State Cable Television Ass'n v. Nevada Bell, 17 FCC Rcd 15534 (EB 2002) – affirming a Cable Services Bureau Order that calculated a maximum per pole attachment rate of \$1.26 for poles owned by Nevada Bell

Cable Television Ass'n of Georgia v. BellSouth Telecommunications, 17 FCC Rcd 13807 (EB 2002) – finding unjust and unreasonable an annual pole attachment rate of \$5.03 and setting the proper rate at \$4.27

ACTA v. Alabama Power, 15 FCC Rcd 17346 (EB 2000), *affirmed* 16 FCC Rcd 12209 (2001) – granting complaint that utility's proposed attachment rate was unreasonable and affirming that cable rate formula plus the payment of make-ready expenses provides the pole owner with compensation that exceeds the just compensation required under the Constitution

¹ This list only includes examples of adjudications following the Supreme Court's 1987 decision in *Florida Power*. There are literally dozens of decisions prior to *Florida Power* applying the cable rate formula and finding that rates proposed by utilities were unreasonable.

TCTA v. GTE Southwest, 14 FCC Rcd 2975 (CSB 1999) – reaffirming that a utility cannot recover in make-ready charges any costs that it recovers through the annual pole fee

Time Warner Entertainment v. Florida Power & Light Co., 14 FCC Rcd 9149 (CSB 1999) – rejecting a pole attachment rate of \$6.00 as unjust and unreasonable and calculating the maximum just and reasonable rate at \$5.79 per pole

Texas Cable & Telecommunications Association, et al. v. Entergy Services Inc., et al., 14 FCC Rcd 9138 (CSB 1999) – ordering Entergy to reimburse cable company complainants the difference between the parties prior negotiated rate of \$3.50 and a non-negotiated rate of \$4.34 per pole charged by Entergy

Heritage Cablevision v. Texas Utilities Electric Co., 6 FCC Rcd 7099 (1991) – finding that it is unreasonable for a pole owner to charge a cable operator higher pole attachment rates for attachments that carry commingled cable and data services; *see also Selkirk Communications v. Florida Power & Light*, 8 FCC Rcd 387 (CCB 1993); *WB Cable Assoc. v. Florida Power & Light*, 8 FCC Rcd 383 (CCB 1993)

State Public Utility Commissions

Alaska

In the Matter of the 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 (Alas. PUC Oct. 2, 2002) – finding that the cable rate formula “provides the right balance given the significant power and control of the pole owner over its facilities” and that “changing the formula to increase the revenues to the pole owner may inadvertently increase overall costs to consumers”

California

Order Instituting Rulemaking on the Commission’s Own Motion Into Competition of Local Exchange Service, R.95-04-043, I.95-04-044, Decision 98-10-058, 1998 Cal. PUC LEXIS 879, pp. 53-56, 82 CPUC 2d 510 (Oct. 22, 1998) (internal citations omitted) – finding “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.”

Connecticut

Petition of the United Illuminating Company for a Declaratory Ruling Regarding Availability of Cable Tariff Rate for Pole Attachments by Cable Systems Providing Telecommunications Service and Internet Access, Docket No. 05-06-01, pp. 5-6, 2005 Conn. PUC Lexis 295 (Dep’t of Pub. Util. Control 2005) – upholding cost-based attachment rate and finding that the provision of additional services by a cable operators does not impose costs on the pole owner.

District of Columbia

Formal Case No. 815, In the Matter of Investigation Into The Conditions For Cable Television Use of Utility Poles In The District of Columbia, Order No. 12796 (2003) – finding that FCC regulations should be followed in determining reasonable rates

Massachusetts

A Complaint and Request for Hearing of Cablevision of Boston Co., D.P.U./D.T.E. 97-82 at 18-19 (Apr. 15, 1998) – finding that FCC formula “meets Massachusetts statutory standards as it adequately assures that [the utility] recovers any additional costs caused by the attachment of [] cables . . . while assuring that the [attachers] are required to pay no more than the fully allocated costs for the pole space occupied by them.”

Michigan

In the Matter of the Application of Consumer Power Company, Case Nos. U-10741, U-10816, U-10831 at 27, 1997 Mich. PSC Lexis 26 (1997), *reh’g denied*, 1997 Mich. PSC LEXIS 119 (April 24, 1997), *aff’d Detroit Edison Co. v. Mich. Pub. Serv. Comm’n*, No. 203421 (Mich. Court of Appeals, Nov. 24, 1998); *aff’d Consumers Energy Co. v. Mich. Pub. Serv. Comm’n*, No. 113689 (Mich. Sup. Ct. Aug. 31, 1999) – adopting FCC standard and finding that the FCC cable rate formula aligns pole rates in Michigan “more closely with other states that already adhere to this standard.”

New Jersey

Regulations of Cable Television Readoption with Amendments: N.J.A.C. 14:18, Docket No. CX02040265 (2003) – affirming use of a cost-based attachment rate and adopting the FCC formula

New York

In the Matter of Certain Pole Attachment Issues Which Arose in Case No. 94-C-0095, 997 N.Y. PUC Lexis 364 (1997) – adopting FCC approach to pole attachments

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 Carriers, Case 01-E-0026 (2001) – rejecting a higher telecom rate formula based on concerns that competition would suffer

Ohio

Re: Columbus and Southern Electric Company, 50 PUR 4th 37 (1982) – adopting the FCC cable formula for attachments by cable operators

Oregon

Oregon Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, regarding Pole Attachment Use and Safety, AR 506; 510 at p. 10 (2007) – adopting FCC cable rate formula and finding that “the cable formula has been found to fairly compensate pole owners for use of space on the pole.”

Utah

In the Matter of an Investigation into Pole Attachments, 2006 Utah PUC Lexis 213 (2006) – adopting the FCC cable rate formula following a comprehensive pole attachment rulemaking, later codified at UTAH ADMIN. CODE R746-345-5(A) Pole Attachments (2006).

Vermont

Vermont Policy Paper and Comment Summary on PSB Rule 3.700 (2001) at 6 – finding that a reduction in pole attachment costs to cable companies will lead to increased deployment of advanced services and “lead to cable services becoming available in some additional low-density rural areas. . . . [Thus creating] even more value for Vermonters as cable TV companies are increasingly offering high-speed Internet service to new customers.”