

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

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

**COMMENTS OF  
THE UNITED STATES TELECOM ASSOCIATION**

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## SUMMARY

The Federal Communications Commission's existing pole attachment regulations place incumbent local exchange carriers (ILECs) at a significant competitive disadvantage compared to cable and competitive local exchange carriers (CLEC) providers of identical services. USTelecom demonstrated in a survey previously submitted in this docket that on average, ILECs pay eight times what cable companies pay to attach to poles owned by electric utility companies in the states subject to Commission regulations.

As the NBP recognized, pole attachment rates are today dependent upon an "arcane" structure "based solely on the regulatory classification of the attaching provider..." Certainly, the market-distorting impact of such a "silo" approach were much less significant when the Commission last engaged in a substantial review of its pole attachment regulations a dozen years ago. However, given the fundamental changes in the communications marketplace since that time – evident in the industry's shift to broadband networks for voice, video and Internet services – changes to the Commission's current approach to pole attachment regulation is long overdue. The Commission has broad authority under the pole attachment statute to ensure just and reasonable rates for pole attachments – a view supported by U.S. Supreme Court precedent.

As demonstrated in the extensive record in this proceeding, the disparity in pole attachment rates paid by ILECs, CLECs and cable providers "var[ies] widely." USTelecom has identified instances where ILECs pay more than 1,400% more for pole attachments than their cable counterparts. As USTelecom noted in its previous comments in this proceeding, these rate disparities are "significant, consistent and widespread."

This disparity in rates is particularly acute in rural areas, where, as the Commission has recognized, there are fewer homes per mile of plant. More poles – and, consequently, more attachments – are required to bring broadband to each subscriber's home. Excessive rates have a disproportionately negative impact on the subscribers in rural areas, and can significantly increase the cost of broadband deployment in small markets and rural areas – areas served to a large degree by ILECs, including many of USTelecom's member companies. This is an issue identified in the NBP and acknowledged by other stakeholders addressing broadband deployment issues. Moreover, while issues relating to the pole attachment rates of cooperatives and municipalities are subject to separate pole attachment regulation, the fact of the matter is that investor-owned utilities serve considerable portions of the country.

The Commission has ample authority under Section 224(b) of the Act to ensure just and reasonable rates for pole attachments by all providers of telecommunications services. Section 224(b)(1) gives the Commission broad, general authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." In fact, nothing in section 224 requires the Commission to *exclude* ILECs from a uniform rate pricing approach. The absence of any provider-based distinction in section 224(b)(1), means the Commission should find that it has the responsibility to establish pole attachment rates for all provider types, including ILECs.

USTelecom is generally supportive of reasonable rules for timely access to poles so long as they are practical, narrowly tailored and allow sufficient flexibility to address unique circumstances. However, USTelecom objects to rules that would impose more burdensome obligations on ILECs than on other pole owners, particularly in the absence of any evidence that ILECs have unreasonably denied access to subvert competition.

USTelecom generally supports the Commission's proposal regarding access timelines, although adjustments to the proposed timeline may be warranted. In addition, any timelines should contain reasonable mechanisms, including the presence of an executed agreement between the parties, appropriate adjustments to the timeline due to extenuating circumstances and mutual obligations on requesting attachers.

The Commission's arbitrary distinction between the use of outside contractors for utility and ILEC pole owners is unwarranted. The same set of safety concerns that the Commission cites as a basis for applying rules to electric utility pole owners are equally relevant with respect to ILEC pole owners. These substantial safety issues should inform any Commission action in this area and should be equally applied all pole owners, regardless of their industry distinction. Finally, USTelecom notes that any Commission provisions regarding the use of outside contractors may conflict with existing labor obligations between ILECs and unionized labor.

The Commission proposes to implement measures permitting attaching entities to pay for make-ready work in stages. Rather than requiring staggered make ready payments, the Commission should encourage those pole owners that do not already do so to allow staggered make ready payments. The Commission, however, should steer clear of its proposal to adopt a common schedule for make-ready charges. Make-ready work is extremely variable – even on a pole-by-pole basis, and it would be infeasible to ask the pole owner to institute a standard schedule for individual make-ready elements.

Finally, USTelecom opposes Commission proposals that would require any standard and periodic reporting of pole information to the Commission or any other third-party entities. The Commission's proposal to collect information regarding the location and availability of poles constitutes a monumental undertaking without any apparent benefit, and would be particularly problematic for smaller, more rural ILECs.

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**COMMENTS OF  
THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTelecom) is pleased to submit its comments to the Federal Communications Commission (Commission or FCC) in its rulemaking proceeding addressing pole attachment regulations (Notice).<sup>1</sup> USTelecom supports the Commission’s goal reflected in the Notice of facilitating access to infrastructure essential for the deployment of affordable broadband networks. In particular, USTelecom supports the tentative conclusion in the Notice that pole attachment rates should be “as low and close to uniform as possible, consistent with Section 224 of the Communications Act of 1934, to promote broadband deployment.” If, however, the Commission were to merely maintain the *status quo* by maintaining the protections of these rates only for cable and competitive telephone companies, it will have missed its most significant opportunity in this proceeding to address the serious impediments to broadband deployment identified in the National Broadband Plan (NBP). Indeed, it is the incumbent local telephone companies that are currently both (i) paying substantially higher pole attachment rates than their competitors in areas served by multiple

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<sup>1</sup> These comments are submitted in response to Order and Further Notice of Proposed Rulemaking, *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51 (May 20, 2010) (*Notice*).

broadband providers, and (ii) most likely to be offering broadband service in low-density rural areas where pole attachment rates can have the most significant impact on deployment costs and decisions. Accordingly, USTelecom strongly urges the Commission to exercise its clear statutory authority to include incumbent local exchange companies (ILECs) within whatever rate mechanism it ultimately sets in order to carry out its statutory mandate to provide that “the rates, terms, and conditions for pole attachments...are just and reasonable...”<sup>2</sup>

## **I. INTRODUCTION**

In its previous comments filed in this docket more than two years ago, USTelecom provided extensive survey data demonstrating that the Commission’s existing pole attachment regulations place its member companies at a significant competitive disadvantage compared to cable providers and competitive local exchange carriers (CLECs) offering identical services. Specifically, the USTelecom survey demonstrated that on average, incumbent telephone companies pay eight times what cable companies pay to attach to poles owned by electric utility companies in the states subject to Commission regulations. In some cases, the difference was as much as 14 times the rate paid by the competing cable companies. Even taking into consideration possible differences in space usage among different service providers, there was universal acknowledgement in the record from the previous notice that ILECs paid significantly more for pole attachments.

In its prior advocacy, USTelecom further demonstrated that these differences in regulatory treatment were far from academic. As we noted in our previous filings in this record, the Commission has consistently recognized that the lack of regulatory parity among competing

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<sup>2</sup> 47 U.S.C. §224(b).

providers of similar services can create artificial disincentives to invest in broadband infrastructure.<sup>3</sup> And in an ex parte filing in this docket, USTelecom emphasized that:

rural service providers are working to deploy broadband in areas where the costs of such deployment already make it difficult to offer service economically. Pole attachment rates can disproportionately affect the cost of delivering broadband in such areas because the typically longer loops in rural areas often require more pole attachments per end user.<sup>4</sup>

The recently released NBP expressed fundamental agreement with USTelecom's prior advocacy. First, the NBP finds that applying different attachment rates based solely upon the historical fact of whether a company is a "cable" or "telecommunications" company "distorts attachers' deployment decisions. This is especially true with regard to integrated, voice, video and data networks."<sup>5</sup> Second, the NBP finds that the cost of deploying a broadband network "depends significantly" on the costs attachers incur in order to access the poles and rights-of-way, which "can amount to 20% of the cost of fiber optic deployment."<sup>6</sup> Finally, the NBP recognizes that "the impact of [pole attachment] rates can be particularly acute in rural areas, where there often are more poles per mile than households."<sup>7</sup> To address this barrier to broadband deployment, the NBP recommends that the Commission "establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 of

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<sup>3</sup> See USTelecom Comments, WC Docket 07-245 (submitted March 7, 2008) at p. 9-11 (*USTelecom Comments*).

<sup>4</sup> See, Ex parte letter from Jonathan Banks, Glenn T. Reynolds, USTelecom to Marlene Dortch, Federal Communications Commission, WC Docket 07-245, at p. 6 (October 27, 2008).

<sup>5</sup> See, Federal Communications Commission, *Connecting America: The National Broadband Plan*, p. 110 (released March 16, 2010) (*National Broadband Plan*).

<sup>6</sup> *National Broadband Plan*, p. 109.

<sup>7</sup> *Id.*

the Communications Act of 1934, to promote broadband deployment.”<sup>8</sup> In the Notice, the Commission affirmed this recommendation as a tentative conclusion.

## **II. A BRIEF HISTORY OF THE COMMISSION’S POLE ATTACHMENT REGULATIONS.**

As the NBP recognizes, pole attachment rates today are dependent upon an “arcane” structure “based solely on the regulatory classification of the attaching provider...”<sup>9</sup> Certainly, the market-distorting impact of such a “silo” approach was much less significant when the Commission last engaged in a substantial review of its pole attachment regulations a dozen years ago. However, given the fundamental changes in the communications marketplace since that time – evident in the industry’s shift to broadband networks for voice, video and Internet services – change to the Commission’s current approach to pole attachment regulation is long overdue.

Congress first addressed the issue of pole attachments when it enacted the Pole Attachment Act in 1978 to address obstacles that cable operators encountered as they sought to expand their respective cable television networks.<sup>10</sup> With ILECs and investor-owned utilities owning the means of access to critical infrastructure for the emerging cable industry, that statute focused on eliminating unfair pole attachment practices and established a mandate for the Commission to ensure that attachment rates and conditions imposed upon cable operators were “just and reasonable.”<sup>11</sup> Congress believed that the legislation would “serve two specific,

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<sup>8</sup> *National Broadband Plan*, at 110.

<sup>9</sup> *Id.*

<sup>10</sup> *See Amendment of Commission’s Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103, 12112, ¶ 13 (2001).

<sup>11</sup> *See Implementation of Section 703 of the Telecommunications Act of 1996; Amendments and Additions to the Commission’s Rules Governing Pole Attachments*, 11 FCC Rcd 9541, 9542, ¶ 3 (1996).

interrelated purposes: [t]o establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public.”<sup>12</sup>

The Telecommunications Act of 1996 (1996 Act)<sup>13</sup> extensively expanded the protections of Section 224. In particular, amended Section 224(b) requires the Commission to provide for “just and reasonable” rates, terms and conditions for pole attachments by any “cable television system *or provider of telecommunications service*.”<sup>14</sup> While the statute provides for separate rate formulas applicable to: (i) telecommunications carriers other than ILECs; and (ii) cable television systems *solely providing cable service*, each of these fall under the broader mandate of Section 224(b) to ensure “just and reasonable” rates – a provision that expressly applies to *all* providers of telecommunications service, without limitation.

In contrast, the *access* rights in Section 224(f) are extended to “telecommunications carriers,” a term which is defined for this purpose to exclude ILECs. Nor can Congress’s use of the two distinct terms be ignored as they have separate and defined meanings in the statute. Moreover, there is no indication in the statute or legislative history of Congressional intent to limit the right to “just and reasonable” pole attachment rates, terms and conditions under Section 224(b) in the manner expressly set forth for the access rights of Section 223(f).

In its *1998 Implementation Order*, the Commission adopted rules in response to the 1996 Act’s amendments to Section 224, including the new pole attachment rate formula for

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<sup>12</sup> Communications Act Amendments of 1978, S. Rep. No. 95-580, at 122 (1978).

<sup>13</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151, *et seq.*

<sup>14</sup> 47 USC 224(b)(1).

telecommunications carriers.<sup>15</sup> The Commission also addressed rate disputes between electric utility pole owners and cable companies that were at that time beginning to provide internet access services over their cable plant. To avoid disincenting the deployment of broadband technology, the Commission concluded that while Section 224(d)(3) provides for the low cable attachment formula to apply only where the facilities are being used “solely to provide cable service,” it would exercise its over-arching authority over pole attachment rates pursuant to Section 224(b)(1) to allow cable providers to continue to have the benefits of this lower rate when they were providing both cable and internet access services.<sup>16</sup> This determination was challenged but ultimately upheld by the U.S. Supreme Court in its *Gulf Power* decision, which held that Section 224(b) gives the Commission broad authority to adopt measures providing for just and reasonable pole attachment rates.<sup>17</sup>

**III. ANY MEANINGFUL COMMISSION ACTION ON POLE ATTACHMENTS MUST ENSURE THAT ANY LOW RATE ESTABLISHED BY THE COMMISSION APPLIES EQUALLY TO ILEC ATTACHMENTS.**

**A. *The Existing Disparity Among Rates Paid by Attachers Offering Identical Services Distorts Competition.***

As demonstrated in the extensive record compiled in response to the previous Notice in this proceeding, the disparity in pole attachment rates paid by ILECs, CLECs and cable providers

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<sup>15</sup> *Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777 (1998) (*1998 Implementation Order*), *aff’d in part, rev’d in part*, *Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000) (*Gulf Power v. FCC*), *rev’d*, *Nat’l Cable & Telecommunications Ass’n v. Gulf Power*, 534 U.S. 327 (2002) (*Gulf Power*).

<sup>16</sup> See *1998 Implementation Order*, 13 FCC Rcd at 6796, para. 34.

<sup>17</sup> See *Gulf Power*, 534 U.S. at 336, 338-89. The Court rejected the view that “the straightforward language of [section 224’s] subsections (d) and (e) establish two specific just and reasonable rates [and] no other rates are authorized.” *Id.* at 335 (citing *Gulf Power v. FCC*, 208 F.3d at 1276 n.29).

“var[ies] widely.”<sup>18</sup> In its prior comments, USTelecom highlighted the findings from a survey of its members regarding rates paid to investor-owned utilities for pole attachments, and rates received from cable providers and CLECs attaching to ILEC-owned poles.<sup>19</sup> USTelecom identified instances where ILECs pay more than 1,400% more for pole attachments than their cable counterparts. The disparity between ILEC and CLEC rates, while not as high as cable, also is notable – in some instances near 900%.<sup>20</sup> As USTelecom noted in its previous comments in this proceeding, these rate disparities are “significant, consistent and widespread.”<sup>21</sup> And as the NBP acknowledges,<sup>22</sup> the survey results confirm the existence of a broad disparity in pole attachment rates.<sup>23</sup>

When the Commission last examined pole attachment issues in 1998, cable and telephone companies were in the early stages of broadband deployment, very few cable companies were offering voice service and even fewer telecom providers were offering video service. Today,

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<sup>18</sup> *National Broadband Plan* at 110.

<sup>19</sup> The data reflected in USTelecom’s comments do not include rates paid for pole attachments to municipally owned electric plant and electric cooperative plant.

<sup>20</sup> With respect to the rates paid by CLEC and cable attachers, USTelcom’s data are based on amounts paid to ILECs by each of these providers. Although there may be some variation in the costs of poles owned by utilities and those owned by ILECs, rates charged by ILECs and electric utilities to cable and CLEC providers are governed by the same Commission pole attachment regulations. Thus, rates paid to ILECs should provide a reasonable indication of the rates paid by cable providers and CLECs to electric utilities.

<sup>21</sup> *USTelecom Comments*, p. 3.

<sup>22</sup> *National Broadband Plan*, p. 116, n. 7.

<sup>23</sup> *USTelecom Comments*, pp. 7 - 9. The results of the USTelecom survey are consistent with findings by the Edison Electric Institute and Time Warner Telecom, Inc. *See e.g.*, Edison Electric Institute (EEI) Presentation, *Pole Attachments 101*, p. 15 (available at Internet Archive website: [http://web.archive.org/web/20080131145431/www.eei.org/industry\\_issues/energy\\_infrastructure/distribution/index.htm](http://web.archive.org/web/20080131145431/www.eei.org/industry_issues/energy_infrastructure/distribution/index.htm)) (visited August 13, 2010) (*EEI Presentation*); *see also*, Letter from Thomas Jones, Counsel for Time Warner Telecom Inc., to Marlene H. Dortch, Secretary, FCC, RM-11293, RM-11303, Attach. at 11-12 (filed Jan. 16, 2007) (*TWTC White Paper*).

things could not be more different. The traditional regulatory distinctions among cable, ILECs and CLECs have been rendered increasingly irrelevant, as each class of provider has aggressively deployed bundled voice, broadband and video services over its respective platform. This technological convergence means that companies that once existed in separate silos in the Act, now compete vigorously with one another to provide broadband services. Virtually all cable lines now are capable of delivering broadband and voice services. And while telephone companies are still investing heavily to compete in the provision of video services, they are aggressively marketing bundles of voice, broadband and video to their customers. The convergence of services across diverse platforms is especially apparent in the intense – and growing – competition among broadband providers.

The record from the previous Notice also demonstrated that there is widespread support for a uniform approach to rate regulation of all broadband pole attachments. In testimony before the Senate Committee on Commerce, Science and Transportation in 2006, the Edison Electric Institute stated that “[r]egulated pole attachment rates should be technology-neutral so that all attaching entities pay the same rate regardless of the technology involved, and also must ensure that all costs of critical wireline infrastructure are shared proportionately among users.”<sup>24</sup> Indeed, the NBP notes that the current rate structure is “so arcane that, since the 1996 amendments to Section 224, there has been near-constant litigation about the applicability of

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<sup>24</sup> Statement for the Record Submitted by Edison Electric Institute, Committee on Commerce, Science and Transportation, United States Senate, Hearing on State and Local Issues and Municipal Networks, February 14, 2006, p. 8 (available at: [http://commerce.senate.gov/public/?a=Files.Serve&File\\_id=be18cc36-84a5-451c-ab16-2cc54b43501c](http://commerce.senate.gov/public/?a=Files.Serve&File_id=be18cc36-84a5-451c-ab16-2cc54b43501c)) (visited August 13, 2010).

‘cable’ or ‘telecommunications’ rates to broadband, voice over Internet protocol and wireless services.”<sup>25</sup>

In addition, Time Warner Telecom, Inc. urged the Commission to “take steps to eliminate the distortions caused by the discrimination in pole attachment rates as soon as possible.”<sup>26</sup> Time Warner Telecom, Inc. noted that the passage of each month that providers are forced to pay “inexplicably discriminatory” pole attachment rates “increases the rising toll on consumer welfare.” The NBP acknowledges this reality when it concludes that regulatory uncertainty surrounding pole attachment rates “may be deterring broadband providers that pay lower pole rates from extending their networks or adding capabilities.”<sup>27</sup>

In this converged marketplace – where cable has become a significant provider of voice services, ILECs have increasingly penetrated the video market, and both are increasingly competing for broadband customers – the Commission’s outdated regulatory treatment of pole attachment is simply indefensible. The practical effect of the currently regulatory framework is that one provider of broadband services benefits from a very substantial regulatory advantage over its competitors. The Commission should address this artificial regulatory disparity and adopt pole attachment rates that are low and close to uniform as possible.

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<sup>25</sup> *National Broadband Plan* at p. 110.

<sup>26</sup> *TWTC White Paper*, p. 3.

<sup>27</sup> *National Broadband Plan* at p. 110.

***B. Lower ILEC Attachment Rates Are Particularly Critical to Broadband Deployment in Rural Underserved and Unserved Areas.***

This disparity in pole attachment rates is particularly acute in rural areas, where, as the Commission has recognized, there are fewer homes per mile of plant.<sup>28</sup> More poles – and, consequently, more attachments – are required to bring broadband to each subscriber’s home. Excessive rates have a disproportionately negative impact on the subscribers in rural areas, and can significantly increase the cost of broadband deployment in small markets and rural areas – areas served to a large degree primarily by ILECs, including many of USTelecom’s member companies.

High pole attachment rates impede the delivery of broadband in sparsely populated rural areas. As the Commission noted in its 2000 Pole Attachment Order, “small systems serve areas that are far less densely populated areas than the areas served by large operators. A small rural operator might serve half of the homes along a road with only 20 homes per mile, but might need 30 poles to reach those 10 subscribers.”<sup>29</sup> Moreover, these challenges are particularly acute for ILECs, since they are *both* paying the highest pole attachment rates, and are also the mostly likely to deploy broadband in rural areas of the country.

A recent study from the U.S. Department of Agriculture (USDA) examined broadband deployment issues in Metro and Non-Metro areas. According to the USDA report, Metro ZIP

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<sup>28</sup> See, e.g., *In the Matter of Amendment of Rules and Policies Governing Pole Attachments, Report and Order*, 15 FCC Rcd. 6453, ¶ 118 (2000) (“The Commission has recognized that small systems serve areas that are far less densely populated areas than the areas served by large operators. A small rural operator might serve half of the homes along a road with only 20 homes per mile, but might need 30 poles to reach those 10 subscribers.”); *In the Matter of Caribbean Communications Corp., Petition for Special Relief, Memorandum Opinion and Order*, 17 FCC Rcd. 7092, ¶ 14 (2002) (noting that systems with more than 15,000 subscribers average 68.7 subscribers per mile, while small systems service on average only 35.3 subscribers per mile).

<sup>29</sup> *Amendment of the Commission’s Rules and Policies Governing Pole Attachments, WC Docket No. 07-245, Report and Order*, 15 FCC Rcd 6453, 6507–08, para. 118 (2000)

Code areas average a population density of 190 individuals per square mile, while Non-Metro ZIP Code areas average a population density of 23 individuals per square mile. As a result of this stark contrast, the USDA concludes that “population diversity drives geographic variation in the cost of broadband provision.”<sup>30</sup> USDA adds that “as broadband access has expanded to encompass a large majority of Americans, the remaining areas of limited coverage increasingly reflect the higher costs associated with providing service to smaller populations.”<sup>31</sup>

These findings are consistent with those of the NBP which find that “[i]n a rural area with 15 households per linear mile, data suggest that the cost of pole attachments to serve a broadband customer can range from \$4.54 per month per household passed (if cable rates are used) to \$12.96 (if ILEC rates are used).”<sup>32</sup> The NBP finds that if the lower cable rates were applied to attachers, and the resulting cost differential in excess of \$8 per month were passed on to consumers, the typical monthly price of broadband for some rural consumers “could fall materially.”<sup>33</sup> This finding led the NBP to conclude that the adoption of a lower attachment rate for all providers could have the added affect of “generating an increase—possibly a significant increase—in rural broadband adoption.”<sup>34</sup>

While issues relating to the pole attachment rates of cooperatives and municipalities are subject to separate pole attachment regulation, investor-owned utilities serve considerable

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<sup>30</sup> United States Department of Agriculture Report, *Broadband Internet’s Value for Rural America*, p. 14 (August 2009) (available at: <http://www.ers.usda.gov/publications/err78/>) (visited August 13, 2010) (*USDA Broadband Report*).

<sup>31</sup> *USDA Broadband Report*, p. 14.

<sup>32</sup> *National Broadband Plan* at p. 110.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

portions of the country.<sup>35</sup> As such, any Commission action establishing rate parity for pole attachments will have a substantial and immediate impact on the provision of broadband to rural areas.

**IV. THE COMMISSION HAS AMPLE STATUTORY AUTHORITY UNDER SECTION 224 TO REGULATE POLE ATTACHMENT RATES FOR ALL SERVICE PROVIDERS.**

The Commission tentatively concludes that a parity approach to pole attachment rates is the appropriate policy – and there can be little doubt that this conclusion is correct.<sup>36</sup> It is equally true that the Commission has statutory authority to accomplish that goal.

In the *Notice*, the Commission asks whether it has the authority to regulate pole attachment rates for all service providers, including ILECs.<sup>37</sup> The Commission previously declined to regulate the rates paid by ILECs based on a clearly erroneous and conclusory interpretation of Section 224 of the Act. In the *Local Competition Order*, the Commission found that, “[b]ecause, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier...the ILEC has no rights under Section 224 with respect to the poles of other utilities.”<sup>38</sup>

This interpretation of Section 224 is flawed, because it focuses solely on Section 224(a)(5)’s exclusion of ILECs from the definition of “telecommunications carrier” and ignores

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<sup>35</sup> See, Edison Electric Institute, U.S. Member Company Service Territories Map, February 2010 (available at: <http://www.eei.org/howeare/ourmembers/USElectricCompanies/Documents/EEIMemCoTerrMap.pdf>) (visited August 6, 2010).

<sup>36</sup> *Notice*, ¶¶ 128 - 139.

<sup>37</sup> *Id.*, ¶¶ 143 - 148.

<sup>38</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 15499, 16103-04 (1996); *Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, 6781 (1998) (*Local Competition Order*).

Section 224(b)'s general mandate applicable to "pole attachments," which includes an attachment by any "cable television system or *provider of telecommunications service*." There can be little doubt that Congress's express decision to use the term "provider of telecommunications service" in the definition provision of Section 224(a)(4), as opposed to the term "telecommunications carrier" subject to the restrictions of Section 224(a)(5), was intended to give broader application to the just and reasonable standard of Section 224(b)(1).

Accordingly, it is clear that Section 224(b) authorizes the Commission to regulate pole attachment rates for all providers, including ILECs.<sup>39</sup>

***A. Section 224(b) Broadly Defines the Commission's Authority to Regulate Rates.***

Section 224(b) is entitled "*Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations.*"<sup>40</sup> Regarding any question of the FCC's authority, the section entitled "authority" should control.<sup>41</sup> In this case, Section 224(b)(1) gives the Commission broad, general authority to "regulate the rates, terms, and conditions for

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<sup>39</sup> See *McCarthy v. Bronson*, 500 U.S. 136, 139 (1992) (holding that a statute should be interpreted by looking at not only the particular statutory language, but to the design of the statute as a whole and to its object and policy) (cited in *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Second Report and Order, 19 FCC Rcd 13494 (2004)). The Commission has applied this "whole act rule" in previous decisions. See, e.g., *Applications of Ameritech Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14939-14940 (1999) ("Because neither the statute nor the legislative history sheds light on how this apparent conflict might be resolved, we must resolve the conflict in a way that makes sense of the statute as a whole.") (citation omitted).

<sup>40</sup> 47 U.S.C. § 224(b) (emphasis added).

<sup>41</sup> Courts consistently have considered section or sub-section titles or headings in interpreting statutes when ambiguity is present. See *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (noting that heading of a section is a tool for resolving doubt about the meaning of a statute) (citations omitted); *Hardin v. City Title & Escrow*, 797 F.2d 1037, 1039 (D.C. Cir. 1986).

pole attachments to provide that such rates, terms, and conditions are just and reasonable.”<sup>42</sup>

Nothing in Section 224(b) limits the Commission’s authority to a type of provider or type of service provided. Thus, the plain text of Section 224(b) authorizes the Commission to ensure just and reasonable pole attachment rates paid by any service provider, including ILECs.

Nothing in the more specific directives in Sections 224(d) or (e) alters Congress’s general grant of authority in Section 224(b). As noted above, Section 224(b)(1) generally defines the FCC’s authority to regulate pole attachment rates, terms and conditions. Section 224(b)(2) then directs the Commission to adopt regulations to carry out the general provisions of Section 224(b)(1).<sup>43</sup> After setting forth this general directive, Congress states that the Commission is to adopt a certain subset of rate regulations, some within a specified time frame, as specified in Sections 224(d) for a “cable television system” and (e) for “telecommunications carriers.”<sup>44</sup> However, the fact that Congress describes specific rate regulations in Sections 224(d) and (e) for specific cases does not mean that those rate regulations are the only regulations that the FCC is authorized to adopt. If that were the case, then Section 224(b)’s general directive regarding authority and rates would be meaningless. This cannot be the correct interpretation, because an agency cannot interpret one part of a statute in a manner that renders another part meaningless.<sup>45</sup>

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<sup>42</sup> 47 U.S.C. § 224(b)(1).

<sup>43</sup> 47 U.S.C. § 224(b)(2) (“The Commission shall prescribe by rule regulations to carry out the provisions of this section.”).

<sup>44</sup> 47 U.S.C. § 224(d); 47 U.S.C. § 224(e). Specifically, in Section 224(e), Congress states that “no later than two years after” enactment of the provision, the Commission is to “prescribe regulations...to govern charges for pole attachments used by telecommunications carriers.” Additionally, Congress directs the Commission to ensure “just and reasonable” rates for cable television systems consistent with Section 224(d).

<sup>45</sup> In statutory construction terms, this principle is known as the rule against interpreting a provision to negate another, a corollary of the whole act rule. *See, e.g. Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9<sup>th</sup> Cir. 2002) (rejecting an interpretation that would render one

Indeed, recognition of the need to render meaning in each part of the a statute guides the Commission’s previous determination that it had the authority to regulate rates paid by cable companies providing both cable and internet access services despite the express limitation of Section 224(f) that the cable rate provided therein apply only to attachments used “solely to provide cable service.” To be clear, the Commission’s rules today provide cable companies offering broadband services the competitive advantage of rates based on the cable formula of Section 224(f)(1); *but in doing so, the Commission did not rely on Section 224(f), but rather on its general authority under Section 224(b)(1)*. In reaching this conclusion, the Commission reasoned as follows: “Even if the provision of Internet service over a cable television system is deemed to be neither ‘cable service’ nor ‘telecommunications service’ under the existing definitions, the Commission is still obligated under Section 224(b)(1) to ensure that the ‘rates, terms and conditions [for pole attachments] are just and reasonable....”<sup>46</sup>

The U.S. Supreme Court endorsed this holistic, plain text reading of Section 224 in *National Cable & Telecommunications Ass’n v. Gulf Power*, when it upheld the FCC’s authority

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section of statute superfluous because it would violate the precept against interpreting one provision of a statute to negate another) (citing *Sorenson v. Secretary of the Treasury*, 475 U.S. 851 (1986) (applying the “whole act rule” to the Omnibus Budget Reconciliation Act of 1981)). The Commission recently applied this principle when interpreting Section 309(j) of the Act. *See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz; Petition for Rule Making of The American Mobile Telecommunications Association*, Report and Order and Further Notice of Proposed Rule Making, 15 FCC Rcd 22709 (2000) (“To interpret the exemption for public safety radio services in Section 309(j)(2)(A) in a manner that effectively negates the changes to Section 309(j)(1) would not be reasonable.”).

<sup>46</sup> *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, 6795-96 (1998). This decision was upheld by the Supreme Court in *Gulf Power*, as discussed above.

under Section 224(b) to regulate rates charged for pole attachments used to provide wireless or “commingled” services.<sup>47</sup> In doing so, the U.S. Supreme Court expressly rejected the Court of Appeals’ conclusion “that subsections (d) and (e) narrow (b)(1)’s general mandate to set just and reasonable rates.”<sup>48</sup> Instead, the U.S. Supreme Court found that Section 224(b)’s general mandate gave the FCC broad authority to regulate pole attachment rates, regardless of the more specific directives in Sections 224 (d) and (e). Specifically, the U.S. Supreme Court reasoned as follows:

Congress did indeed prescribe two formulas for ‘just and reasonable’ rates in two specific categories; but nothing about the text of §§ 224(d) and (e), and nothing about the structure of the Act, suggest that these are the exclusive rates allowed. It is true that specific statutory language should control more general language when there is a conflict between the two. Here, however, there is no conflict. The specific controls but only within its self-described scope.<sup>49</sup>

In sum, because the plain language of Section 224(b) applies to “pole attachments” broadband and the U.S. Supreme Court has held that Sections 224(d) and (e) “work no limitation on” Section 224(b), the Commission is authorized to adopt a uniform pole attachment rate applicable to all types of providers, including ILECs.<sup>50</sup>

***B. Section 224 Requires the Commission to Ensure Just and Reasonable Rates for All Broadband Attachments.***

As noted above, Section 224(b)(1) provides the FCC with broad, general authority to adopt a uniform regulate pole attachment rates for all providers. Additionally, nothing in Section 224 requires the Commission to exclude ILECs from a uniform rate pricing approach. Section

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<sup>47</sup> *Nat’l Cable & Telecommunications Ass’n v. Gulf Power*, 434 U.S. 327 (2002).

<sup>48</sup> *Gulf Power v. FCC*, 208 F. 3d 1263, 1276, n. 29 (11<sup>th</sup> Cir. 2000).

<sup>49</sup> *Gulf Power*, 434 U.S. at 335-36.

<sup>50</sup> *Gulf Power*, 434 U.S. at 337.

224(b)(1) does not limit the FCC's authority to regulate rates paid by a particular type of provider, such as a "telecommunications carrier." Thus, Section 224(a)(5)'s purported exclusion of ILECs from the definition of "telecommunications carrier" is irrelevant in determining the FCC's authority in this area. Absent any provider-based distinction in Section 224(b)(1), there is no reason for the FCC to limit its authority based on provider type. Accordingly, the Commission *must* find that it ensure just and reasonable pole attachment rates for all provider types, including ILECs.

Congress's decision to not use the term "telecommunications carriers" when describing the FCC's general authority under Section 224(b)(1) demonstrates that the FCC's authority encompasses rates paid by ILECs. In Section 224(b)(1), Congress gave the FCC broad authority over pole attachment rates, terms and conditions, as follows: "*Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable....*"<sup>51</sup> "Pole Attachments" are defined in Section 224(a)(4) to include any attachment made by a provider of telecommunications service, not merely those attachments made by a "telecommunications carrier." ILECs are providers of telecommunications services, and nothing in Section 224 explicitly or implicitly suggests otherwise.

Congress's decision to exclude ILECs from the specific rates, terms and conditions applicable in Section 224(e)(1) *only* applies to its express direction for how the Commission should engage in narrow regulation of pole attachment rates used by telecommunications carriers providing telecommunications services. It does not mean that Congress does, or intends to, limit

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<sup>51</sup> 47 U.S.C. 224(b)(1) (emphasis added).

the Commission's broader authority under Section 224(b) to regulate pole attachments that expressly include those of all "providers of telecommunications services."

**V. ANY CHANGES TO THE COMMISSION'S ACCESS REGULATIONS SHOULD BE PRACTICAL AND FLEXIBLE, AND SHOULD ONLY BE ADOPTED AFTER CAREFULLY BALANCING THE NEEDS OF THE ATTACHER WITH EXISTING OBLIGATIONS OF THE POLE OWNER.**

As the Commission acknowledges in its *Notice*, timely action by all the relevant participants in the pole attachment process is important to ensure just and reasonable access to poles. The NBP recommends a series of steps that the Commission could take to streamline the existing pole attachment process.

USTelecom is generally supportive of reasonable rules for timely access to poles so long as they are practical, narrowly tailored and allow sufficient flexibility to address unique circumstances. However, USTelecom objects to rules that would impose more burdensome obligations on ILECs than on other pole owners, particularly in the absence of any evidence that ILECs have unreasonably denied access to subvert competition.

***A. Any Timeline Adopted By the Commission Should Be Flexible and Subject to Reasonable Exceptions.***

In the *Notice*, the Commission proposes a comprehensive timeline that it says will "provide predictability and regularity for the deployment of broadband, telecommunications, and cable infrastructure."<sup>52</sup> Specifically, it proposes to adopt a timeline consisting of the following five stages: 1) survey (45 days); 2) estimate (14 days); 3) attacher acceptance (14 days); 4) performance (45 days); and, if needed; 5) multiparty coordination (30 days). As indicated in the

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<sup>52</sup> *Notice*, ¶ 29.

*Notice*, these timeframes would not apply where pole replacement is required.<sup>53</sup> Excluding applications requiring pole replacement from the proposed timeframes is appropriate given the additional steps and variables that pole replacements introduce into the make ready process. USTelecom generally supports the Notice's recommendation for additional regulatory guidance, such as timeframes, governing the timing of providing access to poles and conduit.

First, USTelecom supports the Commission's proposal to *retain* the existing forty-five day deadline for responding to pole and conduit access applications. This is likely a reasonable timeframe that pole owners can generally meet.

Second, USTelecom supports the Commission's tentative conclusion that any applicant should have 14 days to accept the tendered estimate.<sup>54</sup> The Commission is correct that it would be unreasonable to require a utility to commit indefinitely to its make-ready proposal and estimate of charges, and adoption of this time limit will provide additional certainty to all parties.<sup>55</sup> Any timeframe the Commission adopts for the acceptance of make ready estimates should make clear that any timeline associated with obligations on the pole owner should not commence until the contracting parties have a fully executed agreement. It is reasonable for a pole owner to seek assurance that an entity requesting attachment is willing to accept the terms and conditions of attaching before the owner performs make-ready work. If the attacher is ultimately not willing to accept these terms and conditions, the pole owner's make-ready work will be for naught.

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<sup>53</sup> *Id.* at ¶ 32.

<sup>54</sup> *Id.* at ¶ 39.

<sup>55</sup> *Id.*.

Third, USTelecom supports additional regulatory guidance concerning the time for completing make-ready work. However, the proposed forty-five day timeframe for completing make ready work would not provide pole owners or attachers with sufficient time for completing non-pole replacement make ready work. Instead, sixty days is much closer to the time it typically takes for attachers and pole owners to complete non-pole replacement make ready work. The Commission can easily allow sixty-days for completing non-pole replacement make ready work without materially increasing its overall timeline by consolidating the survey and estimate into a single step that is subject to the existing forty-five day deadline for responding to pole applications. Many telephone companies already provide a make ready estimate along with their response to pole and conduit applications. Consolidating the survey and estimate stages would free up an additional fourteen days that could be added to the proposed forty-five day timeframe, along with an additional day to reach sixty days.

The Commission is correct to acknowledge the possible need for “any necessary adjustments or exclusions from its proposed timeline.”<sup>56</sup> USTelecom supports mechanisms that acknowledge the reality that there are instances where adjustments to the timeline – particularly those associated with pole owner performance obligations – may be necessary due to extenuating circumstances. These often include such factors as the number of pole attachments requested, the complexity of the proposed attachment request, material changes to an application midstream and the need for multiparty coordination. Moreover, any Commission rules should likewise acknowledge the possibility of external and/or unforeseen factors that could impact the timeline, such as weather-related delays, delays attributable to the actions of the other pole owner or attacher, permits or property permissions, or work stoppages resulting from labor contract

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<sup>56</sup> *Notice*, ¶ 46.

disputes. Using guidelines with proposed timeframes for completing the various stages of the process, rather than firm deadlines, is one way of providing the flexibility needed to account for these factors.

Finally, while the Commission addresses the obligation of both pole owners and current attachers to comply with make-ready requests, USTelecom supports parallel consideration of a similar obligation on requesting attachers. While the Commission notes that delays can result “from existing attachers’ action (or inaction),”<sup>57</sup> similar delays can and do result from the failure of attaching parties to meet critical timelines. This is particularly the case in instances where multi-party coordination must be arranged. To the extent it considers imposing a timeline on pole owners, the Commission should therefore consider imposing similar compliance obligations on the requesting attacher.

***B. The Use of Outside Contractors Raises Substantial Safety Concerns and May Be Subject to Existing Labor Obligations.***

With respect to the use of outside contractors by attaching parties, the Commission proposes one set of rules for electric utility pole owners, and another set of more onerous rules for ILEC pole owners. The Commission’s arbitrary distinction between the use of outside contractors for utility and ILEC pole owners is unwarranted. Moreover, the same set of safety concerns that the Commission cites as a basis for applying rules to electric utility pole owners are equally relevant with respect to ILEC pole owners. These substantial safety issues should inform any Commission action in this area and should be equally applied to all pole owners, regardless of their industry distinction. The Commission also should recognize that provisions regarding

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<sup>57</sup> *Id.* at ¶ 41.

the use of outside contractors may conflict with existing labor obligations between ILECs and unionized labor.

In its *Notice*, the Commission distinguishes between two different types of work: a) surveys and make-ready; and b) post-make-ready attachment of lines.<sup>58</sup> With respect to the former, the Commission proposes to allow attachers to use contractors pre-approved by a utility if it has failed to perform its obligations within the timeline.<sup>59</sup> Regarding the latter, the Commission proposes retaining its current rules, which deny utilities the right to pre-designate or co-direct an attacher's chosen contractor.<sup>60</sup> USTelecom does not oppose the existing provision.

The Commission, however, proposes to “take a different approach with respect to [ILECs], whereby attachers could use any outside contractor for surveys and make-ready-work so long as the contractor “has the ‘same qualifications, in terms of training, as the utilities own workers.’”<sup>61</sup> Citing only to a vague and unsupported “heightened” risk of anti-competitive conduct, the Commission ignores the same safety concerns present for electric utilities in applying a more restrictive – and dangerous – approach for ILECs.

In addition, the Commission cannot and should not sweep away the legitimate safety concerns of ILECs, while at the same time acknowledging these same concerns for electric utilities. In short, there typically is little or no difference in the types of attachments on poles owned by electric utilities as compared to attachments on poles owned by telephone companies – and, as a result, the safety implications are comparable. The Commission's reasonable treatment of electric utilities with respect to safety issues cannot be squared with its separate – and more

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<sup>58</sup> *Id.* at ¶ 58.

<sup>59</sup> *Id.* at ¶ 59.

<sup>60</sup> *Notice*, ¶ 60.

<sup>61</sup> *Id.* at ¶ 65.

onerous – treatment of ILECs. Indeed, the Commission acknowledges in its Notice that “[c]rucial judgments about safety, capacity, and engineering are made during surveys and make-ready, and we find the utilities’ concerns reasonable.”<sup>62</sup> To the extent the Commission is going to implement new rules regarding the use of outside contractors, such rules should be uniformly applied to *all* pole owners, regardless of industry distinctions.

Finally, USTelecom notes that the Commission’s proposals regarding the use of outside contractors in many instances may conflict with existing labor obligations of many ILECs. As the Commission is aware, incumbent telephone companies constitute some of the largest unionized labor employers in the country, and in some cases, the type of work at issue here is covered by union contracts. Commission proposals to mandate the use of outside contractors may implicate the terms of these labor agreements, because they would likely result in shifting work from unionized workers to non-unionized contractors.

***C. Payment of Make-Ready Work in Stages May Warrant Further Consideration, But a Common Schedule for Make-Ready Charges Should Be Altogether Avoided.***

The Commission in its Notice proposes to implement measures that it says will “correctly align the incentives to perform make-ready work on schedule.”<sup>63</sup> Specifically, the Commission proposes to implement measures relating to how attaching entities pay for make-ready work. Under its proposal, applicants would trigger initiation of performance by paying one half the estimated cost for make-ready work; pay one quarter of the estimated cost midway through performance; and pay the remainder upon completion.<sup>64</sup> USTelecom notes that some members already incorporate such measures in their existing agreements. Rather than requiring staggered

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<sup>62</sup> *Id.* at ¶ 61.

<sup>63</sup> *Id.* at ¶ 70.

<sup>64</sup> *Notice*, ¶ 70.

make ready payments, the Commission should encourage those pole owners that do not already do so to allow staggered make ready payments.

In any event, the Commission should steer clear of the proposal to adopt a common schedule for make-ready charges. Make-ready work is extremely variable – even on a pole-by-pole basis. A single pole owner may employ a variety of contractors using different rate structures in different states, and if faced with a particularly large job, the pole owner may bid out the work to a contractor that establishes a package rate for the entire job. Thus, while a pole owner may endeavor to be reasonable when setting make-ready charges, it would be infeasible to ask the pole owner to institute a standard schedule for individual make-ready elements.

***D. The Commission Should Not Impose Data Collection Mandates.***

The Commission in its Notice seeks comment on ways it can improve the collection and availability of information regarding the location and availability of poles, ducts, conduits, and rights-of-way.<sup>65</sup> In this regard, it is considering such things as establishment of national database, and/or periodic reporting associated with these data. USTelecom opposes Commission proposals that would require any standard and periodic reporting of pole information to the Commission or any other third-party entities.

The Commission's proposal to collect information regarding the location and availability of poles constitutes a monumental undertaking without any apparent benefit. As noted in the NBP, there are currently 49 million utility poles located in the United States subject to the Commission's rules.<sup>66</sup> Moreover, another 85 million poles (*i.e.*, those regulated by states and/or owned by cooperatives, municipalities or non-utilities) are completely outside of the

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<sup>65</sup> *Id.* at ¶¶ 75 - 77.

<sup>66</sup> *National Broadband Plan* at p. 112.

Commission's jurisdiction which would mean that any Commission-established database would reflect only a very limited universe.<sup>67</sup>

Detailed inventories, such as the Commission proposes, would entail the collection and maintenance of substantial reams of data. Further requiring all pole owners to adopt and transition to a single standard for collecting and maintaining such data would entail substantial man hours and unprecedented costs.

These problems would be particularly acute for smaller, more rural ILECs, due to the presence of substantially more poles throughout a far more dispersed geographic area. Rather than dedicate their already limited resources towards more pressing issues, these companies would be forced to commit substantial resources towards administrative expenses associated with such an undertaking that could be better spent elsewhere.

Finally, but most importantly, there is no evidence that a problem currently exists that would be addressed by such a database. In any particular jurisdiction, there are typically no more than two pole owners – the electric company, and/or the incumbent telephone company – and the identity of those entities is readily apparent, particularly to any entity that is capable of expending significant amounts of capital for the deployment of broadband networks.

Although the NBP recommends that the Commission consider improving the collection and availability of such data, the only record information it cites in support of this proposal is inapposite. Specifically, the NBP points to an ex parte letter filed by ITTA pointing out that one of its member companies has more than 600 “rural cooperatives, municipalities, and public utility districts” with which it has to deal and that “the lack of uniform rules, standards, and oversight makes negotiating reasonable attachment terms very difficult and extremely time

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<sup>67</sup> *Id.*

consuming.”<sup>68</sup> The concerns raised by ITTA had nothing to do with a lack of information concerning poles, but rather with the exclusion of these entities from the Commission’s authority under Section 224. Indeed, the Commission would presumably have no authority to include such entities in any data gathering effort.

## VI. CONCLUSION

USTelecom applauds the Commission’s examination of this critical issue which is directly – and adversely – affecting the viability of delivering broadband services to American consumers, particularly in rural areas. The establishment of a parity rate for broadband pole attachments by all classes of providers will ensure a technology neutral and level playing field where broadband deployment will flourish, and consumers will benefit.

Respectfully submitted,

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<sup>68</sup> Letter fro Joshua Seidemann, VP, Regulatory Affairs, ITTA, to Marlene Dortch, Secretary, FCC, WC Docket 07-245 (December 22, 2009) (referenced in NBP at p. 110, n.28).