

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of  
Implementation of Section 224 of the Act  
A National Broadband Plan for the Future

WC Docket No. 07-245

GN Docket No. 09-51

**COMMENTS OF AT&T INC.**

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## INTRODUCTION AND SUMMARY

Once again, the Commission seeks comments on pole attachment issues.<sup>1</sup> In its most recent notice, the Commission addresses pole-attachment rates, access, and enforcement. Given the importance of pole attachments for broadband deployment, the Commission can take a critical step toward meeting the dual goals of removing barriers to broadband infrastructure investment and promoting competition in the telecommunications market by ensuring its rules and policies promote fairness, equity, and reasonableness in three areas: rates, enforcement and access.

### *A. Rates*

The Commission's present proposal—to lower the pole-attachment rate for one class of attachers—does not go far enough. The Commission needs to return to its original idea of creating a low, uniform broadband pole-attachment rate that applies to all attachers, including cable providers, CLECs, wireless carriers, and ILECs. Anything short of that mark will not comply with Congress' express § 706 direction to the Commission to remove barriers to advanced telecommunications infrastructure and to promote competition in telecommunications markets. In point of fact, reducing the pole-attachment rate for one class of attacher will only cause further distortions in the telecommunications market and adversely impact infrastructure deployment decisions.

To achieve the goals set for it by Congress, the Commission has been equipped with the necessary regulatory tools. Among these tools, Congress amended § 224 in the Telecommunications Act of 1996 to give the Commission broad power to regulate the rates, terms, and conditions affecting any pole attachment, including those of ILECs. While it has been assumed that ILECs do not enjoy the rights of pole attachers, this assumption has been incorrect.

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<sup>1</sup> Throughout these comments, AT&T will refer to poles; however, these comments are equally applicable to ducts, conduits, and rights-of-way, unless expressly stated to the contrary or unless context dictates otherwise.

Under § 224(b), the Commission is authorized to regulate the rates, terms and conditions for any “pole attachment.”<sup>2</sup> Pole attachment, in turn, is defined as any attachment “by a cable television system or a provider of telecommunications service to a pole, duct, conduit or right of way owned or controlled by a utility.”<sup>3</sup> As ILECs are clearly providers of telecommunications service,<sup>4</sup> the Commission has authority to regulate the rates, terms and conditions of pole attachments by ILECs.

The fact that, for purpose of § 224(e), the term “telecommunications carrier” expressly excludes ILECs does not act as an impediment to the Commission’s authority to regulate pole attachments by ILECs. In the *NCTA* case, the Supreme Court ruled that, when it comes to the question of the Commission’s authority to regulate pole attachments, what matters is the entity doing the attaching. In the *NCTA* case, the entity was a cable television system using attached facilities to provide commingled services. The language of § 224(d)(3)—“used by a cable television system solely to provide cable service”—was not deemed to limit the power of the Commission to regulate any pole attachment conferred by § 224(b). Likewise, the language of § 224(e) cannot be deemed to limit the authority of the Commission to regulate pole attachments under § 224(b), because both § 224(d)(3) and § 224(e) are merely subsets of the authority granted the Commission under § 224(b).

Applying the statutory construction principle of disparate inclusion and exclusion, the presumption is that Congress intended to use particular language in one part of the statute—“a provider of telecommunications service” in § 224(a)(4)—and omit it in another—“telecommunications carrier” in § 224(e)(1). Here Congress intended to *include* ILECs generally within the Commission’s power to regulate pole attachments under § 224(b) (which expressly includes all “provider(s) of telecommunications service) but to *exclude* ILECs from the telecom rate formula set forth in § 224(e). Had Congress intended to exclude ILECs from the

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<sup>2</sup> 47 U.S.C. § 224(b)

<sup>3</sup> 47 U.S.C. § 224(a)(4).

<sup>4</sup> See 47 U.S.C. § 153(44), definition of telecommunications carrier.

rights of pole attachers generally, as claimed by cable providers, it could have easily done so by using the term “telecommunications carrier” in the § 224(a)(4) definition of pole attachment, in lieu of the term “a provider of a telecommunications service.”

Given the express directive of § 706 to remove barriers to infrastructure investment and to promote competition in the telecommunications market, the Commission needs to use its regulatory tools to create a low, across-the-board uniform broadband pole-attachment rate for all regulated attachers, including ILECs. This includes the Commission’s “customary discretion” in calculating just and reasonable pole-attachment rates without the necessity of having a statutorily prescribed formula. The Commission need only create a just and reasonable and fully compensatory rate that can be applied to cable providers and telecommunications carriers and then apply it to ILECs, too, pursuant to its authority under § 224(b).

Assertions that joint-use agreements bestow extraordinary rights on ILECs that should restrain the Commission from applying a uniform broadband attachment rate to ILECs are unfounded, especially in light of the fact that ILECs are paying increasingly higher pole-attachment rates, enjoying fewer benefits under joint-use agreements, and subsidizing the provisioning costs of their competitors.

#### *B. Enforcement*

As part of its efforts to fortify its pole-attachment enforcement rules, the Commission is considering specialized forums to address pole attachment disputes. AT&T counsels that the Commission would be wise to use existing commercially available arbitration/mediation services, like the American Arbitration Association, instead of creating a new process from scratch. Such services have the necessary expertise to address these issues, are familiar to the attachers covered by the Commission’s rules, and are quicker, less expensive, and more convenient than other mechanisms. The Commission should create a structure for the arbitration/mediation process, such as setting a default process, but should allow parties to agree to other terms if possible.

The Commission's proposal to award compensatory damages is unwise and, most likely, unnecessary. If the Commission achieves its aims of facilitating access to poles by the use of its proposed comprehensive timeline, specialized forums, and amendments to the "Sign and Sue" rule, there should be no need to award compensatory damages. Moreover, creating the right to such damages will more likely than not encourage litigation, and thereby undo whatever benefits the Commission intends to achieve through the changes to the rules applicable to access, as well as bog down the Commission's enforcement mechanism.

The proposal to amend the "Sign and Sue" rule to require attachers to give written notice of objections before bringing a complaint to challenge a provision as unjust and unreasonable should help resolve disputes without Commission involvement. The amendment would focus a utility's attention to the attacher's concern, help the utility assess the reasonableness of its position, and allow attachers to meet their business needs without fear of being subject to unlawful provisions in pole-attachment agreements.

AT&T opposes, however, the proposal to allow unreasonable-as-applied challenges to pole-attachment agreement provisions that are just and reasonable on their face on the grounds that they are unnecessary. Such challenges really amount to contract interpretation disputes and should be treated as such. Attachers are protected from unjust and unreasonable provisions by the Commission's general enforcement provisions and through the "Sign and Sue" rule.

### *C. Access*

The Commission should maintain flexibility in the application and enforcement of its pole-attachment rules because no one can reasonably anticipate the variety of field conditions, local laws, and limitations on performance that can arise naturally and without unlawful intent in the pole-access process. Naturally, the use of local specialized forums should go a long way toward providing such flexibility.

The Commission's proposed comprehensive timeline should allow for adjustment in cases involving an insufficient pole-attachment request, non-payment of pole-access-related monies, and for special projects of 200 or more pole attachments. To the degree possible, parties

should remain free to negotiate alternative timelines, subject to the Commission imposed arbitration/mediation process.

In light of the obligation of ILECs to provide safe work environments for their employees and given the danger that even ILEC pole attachments can pose to the public, the Commission should allow ILECs to bring to the attention of attachers safety concerns caused by as-built pole attachments and, if necessary, to bring disputes relating to those concerns to arbitration/mediation. Finally, ILECs should be indemnified and held harmless by uncooperative attachers if the Commission is going to require ILECs to move their facilities in order to meet the deadlines imposed by the comprehensive timeline.

## DISCUSSION

### **A. The Commission Should Promote Broadband Deployment and Eliminate Market Distortions by Setting a Uniform Broadband Pole-Attachment Rate**

***1. The Commission's present proposal doesn't go far enough; the Commission needs to establish a uniform broadband attachment rate for all attachers.***

In the *2007 Notice*, the Commission articulated a policy of promoting broadband deployment by squarely addressing the issues associated with broadband infrastructure. Specifically, the Commission grappled with both the access issues and the rate issues that impinge on that deployment. In the case of pole-attachment rates, the Commission concluded, rightly, that “the critical need to create even-handed treatment and incentives for broadband deployment would warrant the adoption of *a uniform rate for all pole attachments used for broadband Internet access service.*”<sup>5</sup> This is so because, even though pole attachers compete toe-to-toe in the same market (*i.e.*, broadband Internet access services), under the existing pole-attachment regime, they pay vastly different rental rates based solely on their classification as either a cable provider or a telecommunications carrier (a term which includes a wireless telecommunications provider) or an incumbent local exchange carrier (ILEC),<sup>6</sup> causing significant market distortions that can affect their business case for deploying broadband infrastructure.

More recently, in the *National Broadband Plan (NBP)*, the Commission reiterated of its concern that applying different pole-attachment rates based on the regulatory classification of the attacher “distorts attachers’ deployment decisions.”<sup>7</sup> The Commission noted that pole rental

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<sup>5</sup> *Implementation of Section 224 of the Act; Amendment of the Commission Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking*, 22 FCC Rcd 20195, 20209 para. 36 (2007) (*2007 Notice*).

<sup>6</sup> Section 224 defines “telecommunications carrier” as “not include[ing] any incumbent local exchange carrier as defined in section 251(h) [47 USCS § 251(h).” 47 U.S.C. § 224(a)(5). Throughout these comments, AT&T will refer to “telecommunications carriers” with the understanding that the term does not include ILECs. On occasion, however, when appropriate AT&T may use the term “CLEC” to refer to competitive local exchange carriers, which are a subclass of telecommunications carriers.

<sup>7</sup> FEDERAL COMMUNICATIONS COMMISSION, NATIONAL BROADBAND PLAN: CONNECTING AMERICA, Recommendation 6.1 at 110 (rel. Mar. 16, 2010) (*NBP*).

rates “vary widely” with cable operators paying “approximately \$7 per foot per year” and competitive telecommunications companies paying approximately “\$10 per foot per year,”<sup>8</sup> while ILECs pay “more than \$20 per foot per year.”<sup>9</sup> It doesn’t take a degree in economics to see that rental-rate disparity of this magnitude most likely has a real and detrimental impact on the infrastructure deployment decisions of competing entities.<sup>10</sup>

In the present Notice (*2010 Notice*), the Commission again recognizes that small differences in pole-attachment rates have big consequences in the marketplace. The Commission observed that the difference between the cable rate and the telecom rate, which is only approximately \$3, translates into roughly a \$90 million to \$120 million per annum difference in infrastructure costs between the cable providers and telecommunications carriers.<sup>11</sup> This means that ILECs are paying approximately \$273 million to \$364 million per annum more in infrastructure costs than cable providers—or about **3 times** the difference paid by telecommunications carriers.<sup>12</sup>

Notwithstanding the market distorting effects of this huge disparity, in the *2010 Notice*, the Commission reversed itself and now “decline[s] to pursue the approach proposed in the [2007] Pole Attachment Notice”—*i.e.*, to create a uniform broadband attachment rate *higher than the cable rate* and no greater than the telecom rate—because the Commission reasons that it would inexorably lead to “increased broadband prices and reduced incentives for deployment.”<sup>13</sup>

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<sup>8</sup> The Commission was obviously referring to telecommunications carriers as defined in § 224(a)(5).

<sup>9</sup> *NBP* at p. 110.

<sup>10</sup> Increased competition leads to lower prices for consumers, which in turn reduces the margins competitors earn on the sale of their goods and services. If one competitor, or group of competitors, can reduce its costs of deploying facilities to provide a service, it would have a competitive edge. If that competitive edge is created by regulations that keep other competitors from reducing their costs, then there is a market distortion that favors one competitor over another to the disadvantage of consumers. Consumers will be disadvantaged because these market distortions will lead to reduced choices in the broadband Internet access service market.

<sup>11</sup> *Implementation of Section 224 of the Act*, WC Docket No. 07-245, et al., Order and Further Notice of Proposed Rulemaking, FCC 10-84, at para. 116 (rel. May 20, 2010) (*2010 Notice*). This calculation is based on an estimated 30-40 million poles subject to Commission-regulated rates.

<sup>12</sup> This calculation is based on the estimate that ILECs own only about 25% of the utility poles, thus: (\$20 per pole ILEC rate less \$7 cable rate = \$13 difference per pole) times (30 million poles-30%) to (40 million poles-30%). See Comments of AT&T Inc., Declaration of Veronica Mahanger MacPhee para. 21, pp. 9-10 (Mar. 5, 2008)(“... the relative pole ownership distribution is now 25 to 30 percent ILEC ownership as compared to 70 to 75 percent [electric company] ownership.”) (*MacPhee Decl.*).

<sup>13</sup> *2010 Notice*, at para. 118.

In short, the Commission apparently fears that raising the pole rental rate for cable providers by approximately \$3 per foot per annum would reduce their incentives to deploy broadband facilities.

In spite of this, the Commission ignores the impact that the existing \$13-difference in the pole-attachment rental rate has on the investment incentives of ILECs. Worse yet, the Commission proposes to unilaterally lower the broadband pole-attachment rate paid by telecommunications carriers. Yet, the obvious result of creating a significantly lower broadband pole-attachment rate for telecommunications carriers *only*, and not an across-the-board uniform broadband rate, is to inject even more distortion into the market. Hence to remedy this problem the Commission should adopt “*a uniform rate for all pole attachments used for broadband Internet access service.*”

***2. The Commission already has the statutory authority to set a uniform pole-attachment rate for all broadband facilities.***

In the *2010 Notice*, the Commission proposes to lower the broadband pole-attachment rate for telecommunications carriers. The chief problem with the Commission’s proposal is that, by lowering through regulatory fiat only one class’ cost of providing broadband service, it exacerbates market distortions created by the disparity in pole-attachment rates and thus perpetuates disincentives for broadband deployment by ILECs. This proposal is not dictated by § 224 and it makes no sense from a policy perspective and, as discussed below, actually flies in the face of Congress’ express direction to the Commission to lower the barriers to infrastructure investment and to promote competition. As AT&T and others have explained in prior filings in this docket, the Commission has broad authority to set just and reasonable pole attachment rates for, but not limited to, ILEC broadband facilities.<sup>14</sup>

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<sup>14</sup> See AT&T Comments at pp. 25-33; Comments of Qwest Communications International, Inc., Docket WC 07-245, pp. 2-4 (Mar. 7, 2008); Comments of the United States Telecom Association (USTelecom Comments), Docket WC 07-245 pp. 12-13 (Mar. 7, 2008); Comments of Verizon in Responses to Notice of Proposed Rulemaking (Verizon Comments), Docket WC 07-245 pp. 6-7 (Mar. 7, 2008).

***(a) The Commission’s § 224 authority applies to any pole attachment by a cable television system or by a provider of telecommunications services.***

In the 2010 Notice, the Commission again seeks comment on the question, previously raised in the 2007 Notice, whether the Commission has authority to regulate the rates, terms, and conditions of pole attachments by ILECs. As explained in our 2008 comments, the Commission plainly has such authority, and should not hesitate to exercise that authority, especially over pole attachments by ILECs for the deployment of broadband facilities.

As originally drafted in 1978, § 224 was intended by Congress to “constrain the ability of utilities to extract monopoly profits from cable television system operators in need of pole, duct, conduit or right-of-way space for pole attachments.”<sup>15</sup> When Congress amended § 224 in the Telecommunications Act of 1996,<sup>16</sup> it conferred broad authority on the Commission to regulate the rates, terms, and conditions for *any pole attachment*—as that term is defined in § 224(a)(4). While it is true that Congress intended to preserve the pole-attachment rate scheme for “cable television system[s used] solely to provide cable service”<sup>17</sup> and to facilitate the deployment of “pole attachments used by telecommunications carriers to provide telecommunications services,”<sup>18</sup> it is also true that Congress intended to expand the Commission’s authority over pole attachments generally and grant it sufficient regulatory flexibility to address the future pole-attachment needs of all cable-TV systems and providers of telecommunications service.

The Supreme Court confirmed as much in *Nat’l Cable & Tele. Ass’n v. Gulf Power Co.* (NCTA).<sup>19</sup> In that case, the Court rejected a challenge to the Commission’s authority under § 224(b) to regulate pole attachments by cable providers that were used to provide commingled

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<sup>15</sup> *Amendment of Commission’s Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996, Consolidated Partial Order on Reconsideration*, 16 FCC Rcd 12103, 12109 para. 7 (2001) (*Reconsideration Order*).

<sup>16</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.) (*Act*)

<sup>17</sup> 47 U.S.C. § 224(d)(3).

<sup>18</sup> 47 U.S.C. § 224(e)(1).

<sup>19</sup> 534 U.S. 327 (2002).

services—*i.e.*, both cable-TV service and broadband Internet access service.<sup>20</sup> Respondent electric companies had argued that, based on the rate formula language of § 224(d), the Commission could only regulate pole attachments “used by a cable television system *solely* to provide cable service.” The Court rejected this claim, observing that the rate-formula language of § 224(d)(3) imposed no limit on either the definition of “pole attachment” in § 224(a)(4) or the general authority of the Commission to regulate rates, terms, and conditions in § 224(b). Section 224(d)(3) was deemed to be “simply [a] subset[]” of § 224(a)(4).<sup>21</sup> The Court further held that the Commission’s general authority to regulate pole attachments is only delimited by the entity doing the attaching—*i.e.*, either a cable-TV system or a provider of telecommunications service—and not the purpose for which it seeks to attach its facilities to a pole:

No one disputes that a cable attached by a cable television company, which provides only cable television service, is an attachment “by a cable television system.” If one day its cable provides high-speed Internet access, in addition to cable television service, the cable does not cease, at that instant, to be an attachment “by a cable television system.” The addition of a service does not change the character of the attaching entity — the entity the attachment is “by.” *And this is what matters under the statute.*<sup>22</sup>

As explained in our 2008 comments, an attachment by a provider of telecommunications service includes ILECs and, therefore, ILECs are among the classes of attachers that “matter[] under the statute.”<sup>23</sup>

***(b) The Commission has authority under § 224 (b) to regulate any pole attachment by an ILEC, because ILECs are providers of telecommunications service.***

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<sup>20</sup> *Id.* at 338.

<sup>21</sup> *Id.*, 534 U.S. at 336.

<sup>22</sup> *Id.*, at 534 U.S. at 333.

<sup>23</sup> *Id.*

The issue of the Commission’s authority over pole attachments by ILECs was thoroughly briefed in 2008.<sup>24</sup> As those comments are still part of the record in this docket, AT&T offers here only a summary of the points made in those comments.

Briefly stated, the term “pole attachment” in § 224(a)(4) encompasses “any attachment by a cable television system or *provider of telecommunications service* to a pole, duct, conduit, or right-of-way owned or controlled by a utility.”<sup>25</sup> Because ILECs are providers of telecommunications service,<sup>26</sup> the authority conferred by Congress on the Commission to regulate pole-attachment rates, terms, and conditions under § 224(b) was expanded to comprise pole attachments by ILECs, not just telecommunications carriers. The fact that the definition of “telecommunications carrier” in § 224(a)(5) expressly excludes “any incumbent local exchange carrier” does not alter the plain meaning of “provider of telecommunications service” in § 224(a)(4) and, therefore, does not restrict the authority of the Commission under § 224(b).

The fact that Congress excluded “any incumbent local exchange carrier” from the definition of “telecommunications carrier,” which is used in § 224(e) to create the telecom pole-attachment formula, does not mean that pole attachments by ILECs are excluded from the § 224(a)(4) definition of “pole attachment” because, under the established principles of statutory construction,

“[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”<sup>27</sup>

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<sup>24</sup> Comments of AT&T Inc., WC Docket 07-245 (Mar. 7, 2008) (*AT&T Comments*); Reply Comments of AT&T Inc., WC Docket 07-245 (April 22, 2008) (*AT&T Reply Comments*).

<sup>25</sup> 47 U.S.C. § 224(a)(4) (emphasis added).

<sup>26</sup> The term “telecommunications carrier” means “any provider of telecommunications services.” 47 U.S.C. § 3(44). By excluding ILECs from the definition of “telecommunications carrier” for purposes of § 224, Congress was in fact acknowledging that ILECs are *providers of telecommunications services* or there would be no reason to expressly exclude them. Congress used the broader term—a provider of telecommunications service—to define “any pole attachment,” and used the more limited term—telecommunications carrier—to restrict the application of § 224(e).

<sup>27</sup> *Russello v. U.S.*, 464 U.S. 16 (1983) (quoting, *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5<sup>th</sup> Cir. 1972).

Applying this principle to the text of § 224, it is clear that Congress intended to *include* ILECs among the entities over whose pole attachments the Commission is given authority to regulate under § 224(b) but *exclude* ILECs from the application of the formula under § 224(e).

Some initial confusion in this area may have resulted inadvertently by the Commission's statement in the 1998 *Implementation Order* that "[t]he 1996 Act, . . . , specifically excluded incumbent local exchange carriers ("ILECs") from the definition of telecommunications carriers *with rights as pole attachers*."<sup>28</sup> While it is true that the § 224(a)(5) definition of "telecommunications carrier" expressly excludes ILECs, any implication, however, that ILECs do not enjoy rights under the Act "as pole attachers" is clearly incorrect.<sup>29</sup> The holding *NCTA* makes this plain.

Just as the *NCTA* Court found that the cable rate-formula language of § 224(d)(3) imposed no limitation on the general authority of the Commission to regulate rates, terms, and conditions in § 224(b), likewise the exclusionary language of § 224(e) imposes no limitation on the authority of the Commission to regulate rates, terms, and conditions in § 224(b), because § 224(e) is also simply a subset of § 224(b).<sup>30</sup> Consequently, the Commission's general authority to regulate pole attachments is limited only by the definition of "pole attachment," not by the formulas set out in §§ 224(d) and (e) or the use of the more limited term "telecommunications carrier" in § 224(e). The fact that two different terms are used in the Act—one which includes more kinds of pole attachers than the other—is evidence of Congressional design, not sloppy draftsmanship.<sup>31</sup> Said another way, had Congress intended to exclude ILECs entirely from having *the rights of pole attachers* set out in § 224, it need not have done anything more than use

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<sup>28</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, 6781 para. 5 (1998) (*Implementation Order*).

<sup>29</sup> The Commission may not have necessarily intended to interpret § 224 as a whole, but rather just the definition of "telecommunications carrier."

<sup>30</sup> *NCTA*, 534 U.S. at 336.

<sup>31</sup> *Russello*, 464 U.S. at 23. ("Had Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in the immediately following subsection (a)(2). . . We refrain from concluding here that the differing language in two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.")

the term “telecommunications carrier,” as defined in § 224(a)(5), when defining “pole attachment” in § 224(a)(4) instead of using the term “provider of telecommunications service.”

The intent of Congress in amending § 224 in the Telecommunications Act of 1996 was not to “decrease the jurisdiction of the FCC” but rather to “extend” its jurisdiction within the telecommunications sphere to any pole attachment by a “cable-TV system” and a “provider of telecommunications service.”<sup>32</sup> The *NCTA* Court noted that the absence of specific formulas for other types of pole attachments—*e.g.*, a cable-TV system attachment with commingled services (cable-TV and broadband Internet services) or pole attachments by wireless carriers—didn’t mean that Congress intended to *restrict* the Commission’s “customary discretion” in calculating just and reasonable pole-attachment rates.<sup>33</sup> Rather the Court reasoned that Congress’ intent was to *expand* the Commission’s authority and that, if for example the cable rate of § 224(d) is limited to pole attachments used by “a cable television system solely to provide cable service,” then “this would simply mean that the FCC must prescribe just and reasonable rates for [pole attachments by cable-TV systems for commingled service] without necessary reliance upon a specific statutory formula devised by Congress.”<sup>34</sup> This point applies equally to regulating any pole attachment *by a provider of telecommunications service* (including ILECs); *i.e.*, the Commission has the authority to prescribe just and reasonable rates, terms, and conditions and, in the case of rates, to do so “*without necessary reliance upon a specific statutory formula devised by Congress.*”

***(c) Congress has directed and empowered the Commission to use its regulatory tools to accelerate deployment of advanced telecommunications capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.***

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<sup>32</sup> *NCTA*, 534 U.S. at 336.

<sup>33</sup> *Id.* at 534 U.S. at 339.

<sup>34</sup> *Id.* at 534 U.S. at 336.

The Commission’s authority over pole-attachment rates applicable to broadband facilities is further confirmed by § 706 of the Act.<sup>35</sup> In § 706(a), Congress directed the Commission and state commissions to encourage deployment of “advanced telecommunications capability” by

utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, *measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.*<sup>36</sup>

And in § 706(b), Congress instructed the Commission to “determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion,” and, if not” to “take immediate action” to accelerate deployment “by removing barriers to *infrastructure investment* and by *promoting competition* in the telecommunications market.”<sup>37</sup>

The emphasis in both subsections of § 706 is on *investment* and *competition*, and, through them, Congress required the Commission to use all its regulatory tools to foster deployment of advanced telecommunications for all Americans. Included among these tools is the Commission’s authority under § 224 to regulate the rates, terms, and conditions of pole attachments. That point was made clear in *NCTA* when the Court observed that the electric companies’ position—that the commingling of services over cable-TV attachments vitiate the Commission’s authority to regulate those attachments under § 224—

would 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.”<sup>38</sup>

The Commission has been quick to acknowledge its duty and authority to regulate pole attachments to promote broadband deployment in the case of telecommunications carriers, and now needs to do the same for ILECs.

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<sup>35</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, tit. 7, § 706, 110 Stat. 56, 153, (1996); 47 U.S.C. § 157 note.

<sup>36</sup> *Id.* § 706(a) (emphasis added).

<sup>37</sup> *Id.* § 706(b) (emphasis added).

<sup>38</sup> *NCTA*, 534 U.S. at 339.

**3. *The Commission should exercise its authority to create an across-the-board, uniform broadband pole-attachment rate***

By proposing to lower the pole-attachment rates for telecommunications carriers without establishing a uniform broadband pole-attachment rate that can be applied across-the-board to all attachers, the Commission is abdicating its responsibility under § 706 to remove barriers to infrastructure investment and to promote competition in the telecommunications market. And, just as a matter of policy, the Commission's proposal to favor one group of competitors over another makes no sense.

***(a) The best plan is for the Commission to create a broadband pole-attachment rate for cable providers and telecommunications carriers and make it equally applicable to broadband pole attachments by ILECs.***

The path to a uniform broadband pole-attachment rate is not as complicated as the Commission seems to believe. The Commission already acknowledges that it has the authority to regulate the rates, terms, and conditions of any pole attachment by a cable television system and by telecommunications carriers. The *first step* toward setting a uniform broadband pole-attachment rate is for the Commission to also acknowledge that it has the authority to regulate the rates, terms, and conditions of *any pole attachment by ILECs*, as providers of telecommunications service, including, but not limited to, pole attachments for use in providing broadband Internet access services.

The *second step* is for the Commission to create a uniform broadband pole-attachment rate that is applicable to cable providers and telecommunications carriers, consistent with any limitations imposed on the Commission's discretion imposed by § 224(e). As the Commission realizes, § 224(d) provides a cable rate formula that is applicable to pole attachments "used by a cable television system *solely to provide cable service*," whereas the § 224(e) telecom rate formula is not limited in a similar manner.<sup>39</sup> Section 224(e) provides for "charges for pole attachments used by telecommunications carriers to provide telecommunications services,"

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<sup>39</sup> 47 U.S.C. §§ 224(d) and (e) (emphasis added).

which presumably can be and are offered simultaneously with broadband Internet access services. This being the case, the Commission has asked interested parties whether there is a reasonable alternative interpretation of § 224 that would allow the Commission to set a broadband telecom rate that is different from the rate derived from the formula set out in the § 224(e) in spite of the fact that those carriers can and do offer telecommunications service “in combination with other services.”<sup>40</sup>

Addressing this conundrum will either *require* the Commission to use the present § 224(e) telecom rate formula or *allow* the Commission to use a different formula for pole-attachment facilities by telecommunications carriers used for commingled services.<sup>41</sup> Nevertheless, assuming that the Commission can develop a broadband telecom rate using a formula consistent with whatever limitations are imposed by the language of § 224(e), AT&T could support a broadband telecom rate (1) that is consistent with the Commission’s prior decisions setting compensatory rates and authority to set those rates; (2) that is just, reasonable, and fully compensatory; and (3) that is part of a simultaneous plan to impose an across-the-board, uniform broadband pole-attachment rate—*i.e.*, the new rate must be applied to *all* competitors in the telecommunications market *at the same time*.

The *third step* is simply to apply the same new broadband pole-attachment rate—*i.e.*, the one applicable to cable providers and telecommunications carriers—to the broadband attachments of ILECs. Under *first step* above, the Commission will have already acknowledged the authority it so obviously has under § 224(b) to regulate the rates, terms, and conditions of any pole attachment by ILECs. Whatever the case may be for telecommunications carriers, any pole-attachment rate applicable to ILECs is not constrained by an existing statutory formula. Thus, as established in the *NCTA* case, the Commission is free to use its “customary discretion” in

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<sup>40</sup> *2010 Notice*, at para. 120.

<sup>41</sup> To the extent that the Commission deems it necessary and the case can be made, the Commission could use its authority under § 10 of the Telecommunications Act of 1996, 47 U.S.C. § 160, to forbear from the application of the presumably higher telecom rate for attachments used for comingled services. Naturally, unless the new uniform pole-attachment rate were applied across-the-board to all, including ILECs, it would not be in the public interest.

calculating just and reasonable pole-attachment rates “without necessary reliance upon a specific statutory formula devised by Congress.”<sup>42</sup> As in the case of all such rates, it merely has to be just and reasonable and fully compensatory. Any broadband pole-attachment rate that meets those criteria for cable providers and telecommunications carriers will do so equally for ILECs.

***(b) The Commission should not be dissuaded from setting an across-the-board uniform broadband pole-attachment rate because of the perceived advantages of joint-use agreements.***

The Commission has asked that parties “reconcile” the perceived benefits ILECs receive from joint-use agreements with electric companies when compared with the terms and conditions that are provided to other attachers under license agreements. The Commission specifically references Comcast’s Comments from 2008 in which Comcast lists its perspective on differences between the “rights” of joint-use ILECs and those of license agreement cable providers.<sup>43</sup> The benefits ILECs enjoy under joint-use agreements are exaggerated and, over the past 30 years, have been decreasing steadily—*i.e.*, ILEC pole-related costs have been increasing, ILEC pole-related benefits have been decreasing.

The Comcast list is a series of perceived benefits enjoyed by ILECs—“ILEC RIGHTS”—paired with the corresponding cable-provider situation—“CABLE RIGHTS.” For purposes of this discussion, AT&T will discuss them together.

• **ILEC: Guaranteed 2 to 3 feet of space; Cable: Requests 1 foot of space—**

In the 2008 comments, Comcast contended that one of the benefits ILECs enjoy under joint-use agreements is that ILECs are guaranteed 2’ to 3’ of space on the electric company pole.<sup>44</sup> Even though the communications space on the pole is three feet, AT&T has found that its actual average pole use to be approximately one to one-and-a-half feet (1’ to 1.5’) per pole.<sup>45</sup> Regardless, ever since Congress mandated non-discriminatory access to poles for cable

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<sup>42</sup> NCTA, at 534 U.S. at 339.

<sup>43</sup> Comments of Comcast Corp., Docket 07-245, p. 6, pp. 24-28 (Mar. 7, 2008) (*Comcast Comments*).

<sup>44</sup> Report of Patricia D. Kravtin, para. 99, p. 63 (Mar. 6, 2008) (emphasis added) (Kravtin Report).

<sup>45</sup> Reply Declaration of Veronica Mahanger MacPhee, WC Docket 07-245, p. 18 n.32 (April 18, 2008) (MacPhee Decl.)

providers, however, ILECs have not enjoyed consistent or unlimited access to space on electric company poles or, indeed, on their own poles. From 1978, ILECs have had to share the communications space with cable providers, and, since the enactment of the Telecommunications Act of 1996, ILECs have had to share that space with both cable providers and CLECs. The two feet of reserved space on utility poles allocated to cable providers and telecommunications carriers cannot be deemed a benefit to ILECs.<sup>46</sup> In addition to losing a portion of the space originally set aside for them, ILECs now have decreased flexibility to meet their own needs. If the ILEC needs an additional foot of space from this so-called “reserved” area, it frequently will need to request a pole change-out and bear the capital costs of doing so.<sup>47</sup>

What’s more, after the institution of mandatory non-discriminatory cable and CLEC attachment and under the joint-use arrangement, the electric company enjoys additional compensation on its poles for the same communications space—for which the ILEC is paying now—and yet the ILEC receives no corresponding benefit (*e.g.*, subtenant rent) or reduction in the amount of the attachment rate it has to pay the electric company. This odd arrangement is as if the ILEC was paying a landlord for renting a small three-bedroom house and, one day, had to accept two strangers who didn’t pay the ILEC anything for the two bedrooms they use—they paid rent directly to the landlord—and the landlord wasn’t obligated to reduce the ILEC’s rent. In fact, that rent has been increasing over the years, while the two boarders’ rent has not. As disturbing as this analogy is, it fails to capture the truly anticompetitive nature of this arrangement, which is to have the ILEC subsidize the operations of its competitors.

- **ILEC: Multiple attachment + FiOS lines; Cable: 1 attachment—**

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<sup>46</sup> See, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order*, 11 FCC Rcd 15499, 16079 (1998) (“Allowing the pole or conduit owner to favor itself or its affiliate with respect to the provision of telecommunications or video services would nullify, to a great extent, the nondiscrimination that Congress required. Permitting an incumbent LEC, for example, to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.”)

<sup>47</sup> MacPhee Reply Decl. para. 9.

In its comments, Comcast refers to the ability of ILECs to attach multiple lines, with no real explanation, except to refer to Verizon’s FiOS service.<sup>48</sup> AT&T’s U-verse services are similar to Verizon’s FiOS services, but AT&T provisions its U-verse services differently than Verizon provisions FiOS. Verizon has chosen to run fiber to the home. Under the AT&T architecture, AT&T runs fiber to a Video Ready Access Device (V-RAD) in the neighborhood. From there, the services are provisioned over existing copper facilities without adding fiber. Further, most of the fiber to the V-RAD that AT&T uses in provisioning U-verse services is underground, and not aerial.

- **ILEC: Can displace Cable; Cable: Can be displaced by telco, power—**

It isn’t clear what Comcast means when it claims that it can be “displaced by telco, power.” Presumably, Comcast is referring to rearranging its facilities at its own expense as part of make-ready to accommodate another attacher—be it on a pole owned by an ILEC or an electric company. Regardless, the threat of being “displaced” appears to be largely illusory because as Comcast’s own expert, Patricia D. Kravtin noted:

After performing what is routine work on the pole (for which it is fully compensated by the incremental attacher through make-ready charges), *the utility does not have to displace any existing attachment, or turn away a new attachment.* In fact, the power company is typically able to accommodate even more attachments after the routine make-ready work has been performed than it was before.<sup>49</sup>

In view of Comcast’s own expert’s testimony, it is hard to see how whatever Comcast is trying to say about displacement works as an advantage to ILECs.

- **ILEC: Individual lines are heavier and multiple lines attached equates to more pole load; Cable: Lightest attachment—**

Comcast asserted that ILECs “place more physical stress on poles, by use of banjo tight fiber, heavier copper and more lines—which increases the amount of stress on and costs of the

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<sup>48</sup> Comcast Reply Comments, p. 17.

<sup>49</sup> Report of Patricia D. Kravtin, para. 90, p. 58 (Mar. 6, 2008) (emphasis added).

pole.”<sup>50</sup> This is a red herring. First, the amount attachers pay in pole rental is based in part on space used.<sup>51</sup> The weight of the facilities is not a factor in determining the attachment rate. Second, there is no evidence to suggest, let alone prove, that ILEC pole attachments cause or are a significant cause of pole overloading. Pole owners routinely design their poles to handle the load of all attachments—cable, power, wireline/wireless telecommunications, and municipal (*e.g.*, streetlights).

- **ILEC: Pays no make-ready for normal space; Cable: Pays millions of dollars of make-ready annually, including purchasing new poles (on which cable subsequently pays rent)—**

*First*, AT&T cannot attest to the amount paid by cable providers in make-ready work annually. Regardless, no one pays for make-ready work unless there’s no space on the pole. And, if there is no space on the pole, whoever is seeking to attach a new facility—cable provider, telecommunications carrier, or ILEC—will be responsible for paying the make-ready costs to create that space. Again, in AT&T’s experience, there is normally space for all attachers, in large measure because the height of poles has increased over the years. It has increased *not to serve the needs of ILECs* but to address the increasing space used by electric companies, as well as to create space for other attachers, including attachers like Comcast, that compete directly with the ILECs.<sup>52</sup> As pointed out in the MacPhee Reply Declaration, while pole height has increased, ILEC space has decreased and “the obsolete rate[] arrangements in those joint use agreements still require ILECs to defray some 40-50 percent of the cost of [electric company]-owned joint use poles in the form of annual rental rates.”<sup>53</sup> The ILECs’ “ongoing expense of

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<sup>50</sup> Comcast Reply Comments, p. 26.

<sup>51</sup> And as noted numerous times in these comments, the classification of the attacher plays a significant part in how much is paid in pole rental fees.

<sup>52</sup> MacPhee Decl. para. 20.

<sup>53</sup> MacPhee Reply Decl. para. 16.

subsidizing their competitors like Comcast” is a far greater burden than Comcast’s “intermittent, episodic costs.”<sup>54</sup>

*Second*, it must be remembered that cable providers pay these costs to avoid the costs of installing and maintaining their own poles. Presumably, the costs of attachments for cable providers, including intermittent make-ready costs, do not approach or exceed the costs incurred by pole owners to install and maintain poles, otherwise cable providers would be installing poles.

- **ILEC: Build plant at will; Cable: Seeks permission pole-by-pole and waits for approval thereby slowing deployment—**

Comcast complains that “ILECs can deploy their distribution plant when and where they wish without enduring the delays or attempts at leverage sought by utilities through the permitting process.”<sup>55</sup> Attachers, like Comcast, seek pole-by-pole permission to allow pole owners to make appropriate determinations regarding capacity, safety, reliability, and generally applicable engineering standards. Nevertheless, the Commission’s proposed new access rules should address the speed with which cable providers can attach their facilities. Whether electric companies “leverage” the permitting process, AT&T cannot say. But, more and more, ILECs are not free to deploy plant “when and where they wish” and have to give notice of attachment or apply for all attachments to electric company poles, with exception of the service drop line.

- **ILEC: Receives billions of dollars of annual USF subsidies based in part on pole expenses; Cable: Receives minimal USF subsidies—**

*First*, the Universal Service Fund (USF) has nothing to do with joint-use agreements. Whatever amount an ILEC is entitled to under the USF is not calculated in any reference to the existence or non-existence of those agreements.

*Second*, unlike ILECs, most cable operators, like Comcast, have elected not to become “eligible telecommunications carriers,” pursuant to § 214(e) of the Act.<sup>56</sup> This designation

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<sup>54</sup> *Id.*

<sup>55</sup> Comcast Reply Comments, p. 26.

<sup>56</sup> 47 U.S.C. § 214(e).

enables a telecommunications carrier to be eligible to receive high-cost universal service support to the extent that it is providing voice telecommunications service in high-cost areas.<sup>57</sup> Most cable providers have declined to seek this status due to the regulatory obligations that accompany it (e.g., a federal carrier of last resort-like requirement to provide the supported services throughout the designated area, including in high-cost areas). In exchange for forgoing high-cost universal service dollars, cable providers have been able to avoid building out facilities in the highest-cost areas of the country—even if those areas are within their franchise areas.

Comcast states that “telephone companies” received nearly \$4.5 billion in high-cost support in 2007.<sup>58</sup> According to the Commission, in 2007, the universal service fund provided approximately \$4.3 billion in high-cost support, of which almost \$1.2 billion was distributed to competitive eligible telecommunications carriers, not ILECs.<sup>59</sup> Of course, these figures provide an incomplete view of the Commission’s broken high-cost mechanisms. For example, over 30 percent of the nation’s rural households are located in AT&T’s ILEC service areas, yet AT&T’s ILECs receive high-cost model universal service support in just three of its 22 ILEC states, which amounts to about six percent of the high-cost support disbursed to ILECs.

Comcast’s assertion that ILECs “qualify” for high-cost funding based in part on their pole expenses, which they use to “pay their rents for pole attachments,”<sup>60</sup> thus misses the mark for AT&T’s ILECs. In any event, that some ILECs receive high-cost support for providing services to the most rural, high-cost areas of the country, in furtherance of the universal service principles contained in the Telecommunications Act of 1996,<sup>61</sup> certainly is no justification for perpetuating higher pole-attachment rates for ILECs.

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<sup>57</sup> 47 C.F.R. §54.101(a) (describing the services supported by the high-cost universal service support mechanisms).

<sup>58</sup> Comcast Reply Comments at 27.

<sup>59</sup> See, e.g., *High-Cost Universal Service Support*, WC Docket No. 05-337; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 23 FCC Rcd 8834, ¶ 6 (2008), *aff’d sub nom. Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1102-03 (D.C. Cir. 2009).

<sup>60</sup> Comcast Reply Comments at 27.

<sup>61</sup> 47 U.S.C. § 254(b).

- **ILEC: Pays an adjustment rate based only on a small percentage of joint use poles that are out of balance with the utility; Cable: Pays rent for all poles used—**

This claim appears to be based on the belief that the rate-payment provisions in joint-use agreements are based on 50/50 parity. That isn't so. There are three approaches to joint-use agreement payments: (1) rental; (2) reciprocal; and (3) parity.

Under the rental method, the ILEC pays a per-pole rate—ILEC pays rate X, electric company pays Y. This is similar to the license agreement arrangement for cable providers and telecommunications carriers.

Under the reciprocal method, each owner pays the same rate per pole. But typically the electric company uses anywhere from eight to 12 feet of the pole compared to the ILEC's use of around two feet.<sup>62</sup>

The "parity method" is not 50/50, but rather an agreed-to ratio defined in the contract (e.g., 48/52%). The ILEC pays for all the poles "out of parity" at a prescribed rate. Both the rate and the parity imbalance have been increasing. Instead of being 50/50 or close to it, the ownership of poles is roughly 25-30% ILEC, 75-70% electric company.<sup>63</sup>

While ILECs may not be paying on a small percentage of electric company poles, ILECs are paying electric companies in the neighborhood of from 40 to 50 percent of the costs of a joint use pole:

. . . ILECs pay 40 percent to 50 percent of the [electric companies'] poles. These payments are supposed to reflect the reservation of some 3 feet of pole space for ILEC use. However, the [electric companies] continue to collect these percentages of their costs from ILECs, while also receiving payment of 7.4 percent of their costs from [cable providers] under the FCC cable formula, 11.2 percent (on urbanized five-user poles) to 16.9 percent (on non-urbanized three-user poles) from telecom companies under the FCC telecom formula, and unknown amounts from miscellaneous other pole users—for the use of some two-thirds of the very same space the ILEC is paying 40 percent to 50 percent for under the joint use agreements.<sup>64</sup>

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<sup>62</sup> MacPhee Decl., para. 13-14, pp. 5-6. And as noted above the actual used space is from 1' to 1.5'.

<sup>63</sup> MacPhee Decl. para 21 pp. 9-10.

<sup>64</sup> MacPhee Reply Decl., para. 4, p. 3.

It is hard to see how this payment arrangement benefits ILECs or represents the compelling advantage Comcast would have the Commission believe it is. AT&T seriously doubts that the cable providers, including Comcast, would exchange their pole rental rates and periodic make-ready costs for the luxury of subsidizing their competition and paying 40 to 50 percent of the costs of poles on which they use merely 1' to 1.5' of space.

The legacy of the joint-use arrangement is a mixed bag. Before mandating non-discriminatory access by third parties and before the ownership of poles was knocked out of kilter wildly in favor of the electric companies, the arrangement may have provided real benefits to ILECs and their customers. Today, however, ILECs are paying increasingly higher rates for fewer and fewer benefits and all the while subsidizing the provisioning costs of its competitors.

**B. The Commission Should Retain Present Pole-Attachment Enforcement Rules and Encourage Utilities and Attachers to Resolve Disputes Through Existing Dispute Resolution Forums**

*1. The Commission doesn't need to amplify its existing pole-attachment enforcement procedures because there is no evidence that they are inadequate to the task.*

In the last round of comments in 2008, AT&T pointed out that most of the allegations of problems with access to poles amounted to conclusory statements without underlying facts.<sup>65</sup> Attachers may have legitimate grievances with isolated utilities or may have experienced unreasonable delays in getting access to poles in some areas of the country but, on the whole, the comments in this proceeding in 2008 failed to substantiate them and, by failing to do so, demonstrated that they were not pandemic. There is in short a considerable lack of probative evidence to show that there are systemic problems with access to poles or the enforcement process that require a wholesale revamping of the Commission's pole-attachment enforcement rules.

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<sup>65</sup> Reply Comments of AT&T Inc., WC Docket 07-245, pp. 37-38 (April 22, 2008).

There is, however, merit to the proposal that the Commission should encourage utilities and attachers to resolve disputes arising during negotiation and implementation of pole-attachment agreements more quickly, locally, and less expensively through existing dispute-resolution organizations with specialized expertise. This can be done by Commission rules that guide the dispute-resolution process without the need for active, direct involvement by the Commission.

***2. The Commission should rely on existing commercially available arbitration/mediation organizations to resolve pole-attachment disputes—similar to the way ICA disputes are resolved today.***

The Commission should encourage resolution of disputes arising both out of negotiations for pole-attachment agreements and for implementation of those agreements. A model for doing so already exists in the creation and implementation of interconnection agreements (ICAs) between ILECs and CLECs. For CLECs, access to ILEC poles is provided under §§ 251(b)(4) and 224. Congress intended that ILECs and CLECs enter into negotiated arrangements, *i.e.*, ICAs, to address the rights and obligations set out in § 251(b) and (c), including access to ILEC poles. Typically ICAs include a dispute resolution provision and process. Before reaching a deal, parties to an ICA have access to a mediation process that resolves disputes that arise during the negotiation process. For roughly 14 years, these ICAs have successfully facilitated telecommunications carriers' access to ILEC poles. The record in this proceeding lacks any evidence to suggest that telecommunications carriers are having significant issues gaining access to ILEC poles. Indeed, some of the recommendations made to improve the access process for other attachers are already provided by AT&T in their ICAs with telecommunications carriers.<sup>66</sup> These ICAs also demonstrate that other commercially negotiated agreements between utilities and attachers can provide a process for quick, inexpensive, and local dispute resolution.

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<sup>66</sup> *E.g.*, allowing CLEC personnel to conduct record searches to determine availability of conduit space and permitting CLECs to make use of ILEC-approved contractors to work in manholes and on poles.

In the *2010 Notice*, the Commission contemplates the establishment of “specialized forums to handle pole attachment disputes,” and refers to the Transition Administrator procedures created in the *800 MHz Report and Order* as a possible model.<sup>67</sup> From AT&T’s experience, the Transition Administrator does not provide a good model because it has been cumbersome and expensive for some parties. The Commission’s focus should be on producing timely results with low costs by knowledgeable decision makers. After all, the idea is to get attachers on the pole as efficiently and safely as possible, where appropriate. To do this, the Commission doesn’t need to reinvent the wheel when existing commercial arbitration-mediation organizations are available to fill the bill.

The Commission should keep in mind that, apart from rate disputes, disputes surrounding the access to poles are largely about engineering and logistics—*e.g.*, what is really required for make-ready work, what load-bearing issues do facilities pose for an existing pole, is a contractor sufficiently qualified to perform the work, *etc.* Expertise in these areas would go a long way to facilitate resolution. The Commission itself lacks the expertise or the staffing to handle disputes of this nature. Hence, the concept of “specialized forums” is fundamentally sound but the Commission’s proposal to create them out of whole cloth is unnecessary, time consuming, and ill-advised. As these forums already exist, the Commission should encourage utilities and attachers to use them.

The Commission has ample authority under § 224(b) to create a process that facilitates the quick, local, inexpensive, and appropriate resolution of access disputes for non-ICA commercially negotiated pole-attachment agreements: “Subject to the provisions of subsection (c) of this section, the Commission . . . shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions.”<sup>68</sup> That section does not require that the Commission actually handle each and every dispute or that the Commission has to be the entity that conducts each and every hearing in the first instance. There is no legal

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<sup>67</sup> *2010 Notice*, para. 80.

<sup>68</sup> 47 U.S.C. § 224 (b).

barrier to the Commission's adopting procedures akin to those used for mediation in the § 252 ICA process for issues arising from negotiating and implementing pole-attachment agreements. Instead of using state commissions, however, the Commission can require utilities and attachers to submit disputes to an existing commercial arbitration-mediation organization, such as the American Arbitration Association (AAA).<sup>69</sup>

*First*, an entity, like the AAA, has at the ready a host of mediation and arbitration judges with expertise in the various issues that arise in negotiating pole-attachment agreements—*e.g.*, financial, engineering, and management experts. The issues presented in negotiating pole-attachment agreements are not so esoteric as to be beyond the ken of these experts. *Second*, the commercial world, which includes the businesses that make up utilities and pole attachers, are both familiar and comfortable with the commercial arbitration/mediation process. It is common in commercially negotiated agreements to have dispute resolution agreements that rely on the AAA or other similar organizations. *Third*, the AAA exists today and can be available to resolve disputes as soon as the Commission's directive becomes enforceable. And *fourth*, the AAA is typically available locally, or arbitrators/mediators can be flown in, to handle disputes where they arise, allowing quicker, less expensive, and more convenient dispute resolution.<sup>70</sup>

Naturally, the Commission will have to set out a basic default format in its rules to address some up-front procedural issues. These might include:

- The number of arbitrators/mediators;
- The process for choosing arbitrators/mediators;
- Whether the decision will be binding or non-binding and how the Commission would review any decision rendered;

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<sup>69</sup> The Commission has encouraged parties to use the services of the American Arbitration Association (AAA) in resolving disputes in the broadcasting field. *See for example Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.; Emergency Retransmission Consent Complaint and Complaint for Enforcement for Failure to Negotiate Retransmission Consent Rights in Good Faith, Memorandum Opinion and Order*, 22 FCC Red 35, 45 (2007).

<sup>70</sup> It is significantly more convenient and inexpensive to fly one to three arbitrators/mediators to a dispute than it is to fly two teams of lawyers, corporate representatives, and witnesses to Washington, DC. And scheduling should be easier too. See the AAA web site and the list of AAA locations: <http://www.adr.org/>

- Payment of arbitrator/mediator fees, which party pays (*e.g.*, each party pays equally, the losing party pays), and recovery of attorneys' fees and costs<sup>71</sup>;
- Whether the Commission wants to impose limits on the types of disputes submitted to the AAA (*e.g.*, engineering disputes, time-line disputes, rate disputes, *etc.*).

The Commission is also free to choose any rules already developed by the AAA to settle these issues. Just as importantly, however, AT&T recommends that, in spite of any default structure the Commission adopts, the parties to any dispute should be allowed to agree to different rules if they can.<sup>72</sup> Naturally, to the extent ICAs already have a dispute resolution process, these rules wouldn't apply to them either before or after execution.

As part of this arbitration/mediation process, the Commission should modify, but not delete, Commission Rule 1.1404 (m), which requires cable television system operators and telecommunications carriers to file denial-of-access complaints within 30 days of denial. The Commission seeks comment on a proposal to eliminate this rule because of complaints that the rule discourages mediation by mandating that access-denial complaints be filed within 30 days of the utility's denial of access.<sup>73</sup> AT&T recommends that, as part of the Commission's rules encouraging arbitration/mediation, the complaining party be required to notify the Commission that the party is invoking the Commission's arbitration/mediation rule and that the Commission give parties to that process reasonable time after any decision is rendered in which to file pleadings, including complaints, as part of any post-decision process the Commission might allow, such the Commission's review of an arbitration panel decision. This should eliminate any impediment to mediation caused by the present rule.

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<sup>71</sup> The Commission can deter frivolous assertions by utilities of process complications (*e.g.*, need to amend timeline, insufficient pole request) by imposing a loser-pays-costs rule. If the utility knows that it will have to pay the costs of any unsuccessful dispute-resolution process, it will not raise unsubstantiated complications as a way of derailing the timeline process.

<sup>72</sup> Naturally, if either party feels that negotiating different rules would be futile or just not in its best interests, it should be able to compel the use of the Commission's default structure.

<sup>73</sup> See the Commission's discussion and proposal regarding Commission Rule 1.1404 (m) at *2010 Notice*, para. 82.

**3. *The Commission should not award compensatory damages in the case of pole-attachment access disputes or claims of unjust and unreasonable rates, terms, and conditions.***

The proposal to award compensatory damages for either “unlawful denial or delay of access” to poles or for “unjust or unreasonable” rates, terms, and conditions in pole-attachment agreements is unwise and, likely, unnecessary.<sup>74</sup>

In the *2010 Notice*, the Commission proposes to create a timeline for pole attachments,<sup>75</sup> to utilize specialized forums for dispute resolution,<sup>76</sup> and to amend the “Sign-and-Sue” rule<sup>77</sup>—*see* discussion below—in order to eliminate barriers to pole access and to accelerate the pole-attachment process. If these procedural changes prove effective, which is likely, then awarding compensatory damages will be unnecessary. The proposed comprehensive timeline should get the vast majority of attachers onto poles in a much shorter time frame than is the case in some areas and with some utilities. When disputes arise—as they are likely to, given the variety of field conditions, local laws, and limitations on performance that can arise naturally and without unlawful intent—both use of arbitration/mediation services and sign-and-sue rights can resolve them or render them inconsequential.<sup>78</sup> Either way, attachers will have access to poles without missing business opportunities and without putting funds at risk.

But worse, providing for the award of compensatory damages would be unwise because it would encourage parties to file frivolous claims in hopes of obtaining damages, and thus clog the Commission’s enforcement apparatus. In particular, it might encourage disgruntled attachers to transform small delays and legitimate disputes with utilities into money-making ventures. And utilities, who stand to lose revenues from pole attachments as a result of the Commission’s

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<sup>74</sup> *2010 Notice*, para. 86.

<sup>75</sup> *Id.*, para. 25

<sup>76</sup> *Id.*, para. 78.

<sup>77</sup> *Id.*, para. 99.

<sup>78</sup> The right to “sign and sue” allows attachers to contest rates, terms, and conditions without these matters becoming actual barriers to pole access. Attachers can be made whole without compensatory damages by a post-decision true-up, allowing reimbursement of amounts paid in excess of a just and reasonable rates, plus interest. Using this right will allow attachers to have access to poles without losing business opportunities they might otherwise have lost if access had been denied outright.

proposal to adopt a broadband attachment rate “as low and close to uniform as possible,” risk further losses if they seek to exercise their legitimate rights in the pole-attachment process.

At best, the proposal to award compensatory damages is premature because the Commission’s new rules creating a comprehensive timeline for pole access, alternative dispute resolution mechanisms, and a right to “sign and sue” when entering into pole-attachment agreements should render them unnecessary. At worst, awarding compensatory damages will create a cottage industry for claimants seeking to make money off unavoidable delays or legitimate disputes, sapping the Commission’s resources and clogging the Commission’s enforcement capabilities.

***4. The Commission should modify the sign-and-sue rule to require attachers to notify utilities of terms the attacher considers unreasonable or discriminatory but should not modify it for unreasonable-as-applied claims.***

AT&T conditionally supports the Commission’s proposal to modify the sign-and-sue rule of Commission Rule 1.1410, which allows attachers to enter into pole-attachment agreements and, at the same time, to sue utilities asserting that the rates, terms, and/or conditions in those agreements are unjust and/or unreasonable. The proposed modification would require an attacher “to . . . provide a utility with written notice of objections to a provision in a proposed pole attachment agreement, during contract negotiations, as a prerequisite for later bringing a complaint challenging that provision.”<sup>79</sup> AT&T conditionally supports this proposed modification to the sign-and-sue rule because, apart from general allegations of “superior bargaining power,” attachers might feel economic pressure to accept a less than satisfactory agreement in order to get into business or to serve a specific customer by a certain time frame. Nevertheless, the attacher should not be allowed to “hide behind a log” and to spring a challenge on a utility after the ink has dried, *unless* the attacher notifies the utility in writing before concluding negotiations of any provisions it contends are unjust and/or unreasonable and about

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<sup>79</sup> 2010 Notice, para. 107.

which it will seek review. This should allow the parties to seriously re-examine their positions and to either stand pat or offer an alternative provision or offer an inducement to compensate for the acceptance of a provision that may not be otherwise entirely acceptable, thereby reducing, if not eliminating, post-execution litigation of pole-attachment agreements.

Along this line, however, AT&T opposes the Commission's proposal to allow unreasonable-as-applied challenges to pole-attachment agreements.<sup>80</sup> Under this proposal, the Commission would allow attachers to demonstrate that a provision that *on its face* was not unjust or unreasonable at the time the agreement was executed to later bring a claim that the provision as *applied* by the utility is unjust or unreasonable. In support of this proposal, the Commission refers to "Time Warner Reply Comments at 60," which in turn refers to Comcast's Comments at page 44-45.<sup>81</sup> Neither of these parties offers any evidence or other basis for adopting the unreasonable-as-applied rule they propose.

In any event, the notion that a provision in an agreement that, on its face, is just and reasonable could be unjust and unreasonable as applied makes no sense. If a provision of a pole-attachment agreement is just and reasonable *on its face*, then the only question to be resolved when a utility and an attacher disagree over the application of that provision is "What does the contract say?" The touchstone of all contract interpretation disputes is the intent of the parties, which is determined by reference to the four-corners of the written agreement. If there is any question about the parties' intent, then the Commission or court should apply the rules of contract interpretation. If, after the application of the rules of contract interpretation, the meaning of the provision is still unclear, then the Commission or the court can deem the provision in question to be ambiguous, allowing parole evidence as to the intent of the parties and giving the Commission the opportunity to clarify the meaning of the contract as written.

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<sup>80</sup> 2010 Notice, para. 108.

<sup>81</sup> *Id.*, para. 108 n.292; Reply Comments of Time Warner Cable Inc., Docket No. 07-245, p. 60 (April 22, 2008); Comments of Comcast Corp., Docket No. 07-245, pp. 44-45 (March 7, 2008).

In addition, permitting a party to challenge a provision of a contract “as applied” could deny the other party the benefit of the bargain. That is because that party may have traded off some other right in order to obtain the challenged provision and make a deal; thus, each party may have accepted a provision they didn’t want for something they did.<sup>82</sup> If parties are allowed to challenge provisions in the manner proposed by the Commission, what would otherwise have been a perfectly legitimate and commercially acceptable transaction is challenged at a time when the negotiators may be unavailable or memories have faded and documents lost. In such a case, the basis for the trade may be lost as well, giving one party a benefit to which it is not entitled.

The only rational approach is to require a sign-and-sue challenge at or near the time of the execution of the agreement, otherwise it is barred. So-called “unreasonable-as-applied” challenges should be treated like any other contract interpretation dispute—*i.e.*, subject to the dispute resolution provisions of the agreement and without special standing in the Commission’s rules.

***5. There is no reason to alter the rules applicable to the statute of limitations.***

Presumably, if the Commission were to allow either the recovery of compensatory damages or unreasonable-as-applied challenges to a pole-attachment agreement or both, the Commission might need to determine when the applicable statute of limitations began to run.<sup>83</sup> For reasons stated above, however, the Commission should allow neither. Therefore, there should be no reason for the Commission to consider the issue of when the applicable statute of limitations for pole-attachment-agreement challenges is tolled. Either the challenge is brought right away under the sign-and-sue right or the matter is handled like any contract interpretation case. Either way, the statute of limitations doesn’t come into play. As for the recovery of

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<sup>82</sup> If an attacher is being forced to accept an unjust or unreasonable term, the sign-and-sue provision allows the attacher to challenge it without fear that the challenge will inject further delay in the attacher’s access to the utility’s poles. If the attacher doesn’t challenge the provision, the only logical presumption is that the utility and the attacher made a deal where each one got something that they wanted but neither one was strictly entitled to under the law.

<sup>83</sup> See 2010 Notice, para. 109.

compensatory damages, that right is unnecessary as the process to be established by the Commission will allow for early resolution of disputes over rates, terms, and conditions and quicker access to poles.

**C. The Commission’s Proposal to Accelerate Access to Poles by Amending its Rules Applicable to Access is a Sensible Approach to This Issue**

- 1. While the Commission’s proposed timeline for access to poles is generally acceptable, it has to be made subject to a rule of reasonableness in light of the variety of field conditions, local laws, and limitations on performance.*

AT&T agrees with the Commission that setting a comprehensive timeline should go a long way toward facilitating the access process. And the timeline proposed by the Commission in its *2010 Notice* is acceptable to AT&T, with the proviso that the timeline has to be subject to a rule of reasonableness. There is simply no way anyone—the Commission, utilities, and potential attachers—can anticipate the variety of field conditions, local laws, and limitations on performance that can arise naturally and without unlawful intent in the pole-access process. The required flexibility to address these potential snags in the pole-access process must be built into the Commission’s application and enforcement of any comprehensive timeline. Use of a local, existing commercial arbitration-mediation organization can provide much of this needed flexibility.

- 2. Grounds for adjusting the comprehensive timeline should include an insufficient pole-attachment request, non-payment, and a request in excess of 200 poles.*

The Commission seeks comments on what circumstances might justify “stopping the clock” on the pole-access timeline or excepting the application of that timeline altogether. Among the reasons that the comprehensive pole-access timeline might need to be stopped and, possibly, restarted at a later date are submission of an insufficient or inaccurate pole-attachment request, failure to make payment of a pole-attachment-related charge, and a single request for attachment of 200 or more poles.

*(a) Request for Access*

The proposed timeline is comprised of a series of activities, most of which are conducted by the utility. These activities are set into motion and the clock is started by the submission of a request for access. Without a complete and accurate request, the utility cannot reasonably be expected to complete the timeline activities as proposed by the Commission. The Commission should clarify that the timeline will be stopped if the utility determines that the request is incomplete or inaccurate. Naturally, the utility should not be allowed to use minor errors (*e.g.*, obvious typos) in any request to derail the process, but any material omission or inaccuracy, especially one that would directly impact the utility's ability to perform any of the downstream timeline activities, should stop the clock.<sup>84</sup>

The Commission also asks whether it should adopt specific rules governing the application process, in particular rules on what constitutes a sufficient request to trigger the timeline.<sup>85</sup> If the parties to pole-attachment agreements are empowered with a dispute resolution process, AT&T believes that, consistent with favoring negotiated agreements, it is best to "leave the details of the application process," as well as disputes arising from the submission of pole-attachment requests, to the individual parties involved, without necessity of further regulations.<sup>86</sup>

*(b) Non-payment*

Stage 4 of the Commission's proposed comprehensive timeline is "performance," which is triggered by payment by the applicant of the utility's estimate of the make-ready work.<sup>87</sup> Clearly without payment at this point, the timeline should stop by itself. The Commission should make clear, however, that non-payment of any pole-access-related monies owed for any reason at any point during the timeline will be grounds for stopping the timeline. Obviously, the

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<sup>84</sup> The utility should not be able to rely on an alleged "material omission" of information that is already reasonably within the utility's possession, custody, or control, assuming that obtaining that information is not unreasonably time consuming or expensive. This should not be a license for making utilities hunt for information that attachers should reasonably be expected to have and provide.

<sup>85</sup> *2010 Notice*, at para. 37.

<sup>86</sup> *Id.*, para. 37.

<sup>87</sup> *Id.* at para. 40.

non-payment must be of amounts actually due and owing and not non-payment of any amounts that might be due in the future. Allowing this bit of self-help will reassure utilities that they will not be left holding the bag for any attacher that may have run into cash flow or liquidity problems at any point in the process.

*(c) Size of Request*

The Commission seeks comment on “whether requests for access to a particularly large number of poles should be excepted from [its] timeline, or subject to an alternative timeline.”<sup>88</sup> AT&T proposes that a request involving 200 or more poles be deemed a *special project* and that the Commission not regulate an alternative timeline but rather allow the parties to the pole-attachment agreement to agree upon an alternative timeline. Naturally, any party should be able to submit the question of the reasonableness of an alternative timeline to dispute resolution if the party believes that the other party is not acting in good faith or is simply not offering a reasonable alternative timeline. Given the variety of circumstances that may apply to special projects, AT&T believes that it is not reasonably possible for the Commission to propose a viable alternative timeline. As long as the parties have access to a quick, local, and inexpensive dispute resolution process, the parties should be able to resolve the question of alternative timelines without further Commission intervention.

***3. The right of attachers to use contractors in the pole-attachment process should be subject to review by ILECs and the dispute resolution process.***

The Commission has proposed that “attachers performing surveys and make-ready work using contractors shall invite a representative of the incumbent LEC to accompany and observe the contractor, but the incumbent LEC shall not have final decision-making power.”<sup>89</sup> AT&T proposes that ILEC pole owners and ILECs having responsibility for managing the communications space on a pole owned by an electric company subject to a joint-use agreement

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<sup>88</sup> *Id.*, para. 47.

<sup>89</sup> *Id.*, para. 68.

should have the right to challenge the suitability of attachments, including as-built attachments placed by contractors, for reasons of safety, reliability, or compliance with applicable engineering standards. ILECs, no less than electric companies, have legitimate safety, reliability, and engineering concerns. If nothing else, ILEC poles are work spaces, and ILECs have general obligations under state laws and the regulations of the Occupation Safety and Hazard Administration to make sure that the work space is safe for its employees.<sup>90</sup> Moreover, just because ILEC facilities do not carry high voltage equipment does not mean that telecommunications facilities cannot pose a hazard to both persons on or near a pole or, in the case of facilities crossing the public rights of way, the traveling public.

The Commission should clarify its rules to acknowledge the ILECs' right to bring any such concerns about safety, reliability or applicable engineering standards to the attention of the attacher for resolution and, failing to get satisfaction, the right to submit any dispute concerning such matters for decision under the dispute-resolution process of the pole-attachment agreement.

***4. ILECs should be indemnified and held harmless for any damages arising from any obligation to move the facilities of third-party attachers.***

Under the Commission's timeline proposal, if an attacher fails "to move, rearrange, or remove any facilities as needed to perform the make-ready work," "the utility or its agents, or the new attacher, using authorized contractors, may move or remove any facilities that impede performance of make-ready, . . . ."<sup>91</sup> If this proposal is adopted, the utility should be indemnified and held harmless by the uncooperative attacher in the event that the activities of the utility in moving or removing the facilities or the resulting reconfiguration cause any damages, losses, or injuries to persons or property. Because the utility would not undertake the responsibility of making these changes to the pole *but for* the refusal of the uncooperative pole attacher to act in a

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<sup>90</sup> See generally: Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 *et seq.*; and, *61 Am Jur 2d Plant and Job Safety — OSHA and State Laws*, § 1 (2010).

<sup>91</sup> *2010 Notice*, para. 40.

timely manner, the utility should not have to take the risk of incurring losses resulting from them, if for no other reason than the changes the utility is being compelled to undertake do not financially benefit the utility. This is especially true given the Commission's stated aim of lowering the rate for pole attachments. The utility should not be put at risk of bottomless liability in exchange for bargain-basement pole-attachment rates.

***5. The Commission should reiterate the obligation of utilities to allow access to poles by wireless telecommunications providers.***

AT&T respectfully requests that the Commission reiterate its directive that utilities may not presume that the space above the communications space on a pole is limited to the utility alone. Today, AT&T allows wireless telecommunications providers to attach facilities on its poles above the communications space. The Commission should emphasize that the "only recognized limits to access for antenna placement by wireless telecommunications carriers are those contained in the statute: 'where there is insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes.'"<sup>92</sup>

Respectfully submitted,

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<sup>92</sup> Public Notice, DA 04-4046 (Wireless Tel. Bur., Dec. 23, 2004), *see* 47 U.S.C. § 224(f)(2).