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

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

COMMENTS OF CENTURYLINK

David C. Bartlett
John E. Benedict
Jeffrey S. Lanning
801 Pennsylvania Ave., NW
Suite 612
Washington, DC 20004
202-393-1516

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY **1**

I. THE COMMISSION SHOULD ADOPT A LOW, UNIFORM POLE ATTACHMENT RATE FOR ALL BROADBAND ATTACHMENTS. **3**

A. The Commission should establish pole attachment rates that are as low and close to uniform as possible. **3**

B. The high and unequal rates charged to ILEC attachments distort competition, discourage broadband investment, and undermine affordability and adoption. **6**

(1) A low, unified attachment rate will promote competition by leveling the unfair playing field created by the current pole attachment regime. **6**

(2) A low, unified rate cap for pole attachment rates will promote broadband investment, especially in rural areas. **9**

(3) A low, unified rate cap for pole attachment rates will promote affordability and adoption. **11**

C. The Commission's revised, unified telecom rate proposal is more more appropriate than the USTelecom, AT&T/Verizon, or TWTC proposals. **13**

D. Other issues affecting attachments. **15**

(1) Joint use agreements do not provide ILECs competitive "advantages" and cannot justify imposing higher attachment rates. **15**

(2) The Commission should not exempt existing attachment agreements from rate review. **16**

(3) The Commission should ensure a low, unified broadband attachment rate applies whether or not the attachment is also used for other services. **18**

(4) The Commission's new rate cap should include a rebuttable presumption that all attachments are eligible for the broadband rate. **19**

(5) Third party attachment does not create undue pressure on pole height or pole investment. 21

II. THE COMMISSION HAS AMPLE STATUTORY AUTHORITY TO ADOPT A UNIFORM RATE CAP FORMULA FOR ATTACHMENTS FOR ALL PROVIDERS OF BROADBAND SERVICES. 22

A. Section 224(b) gives the Commission broad authority to cap pole attachment rates for all broadband providers. 22

B. Section 224 directs the Commission to ensure broadband attachment rates are just and reasonable for all broadband competitors. 26

C. Section 706 further supports the Commission's authority to ensure attachment rates are just and reasonable for all broadband competitors. 27

D. Commission precedent does not preclude the Commission from adopting a low, unified rate for all broadband pole attachments. 28

III. OTHER FEDERAL RULES GOVERNING TERMS AND CONDITIONS OF ATTACHMENT ACCESS ARE PREMATURE AT BEST AND MAY BE UNWARRANTED. 29

A. The Commission's proposed provisioning timeline is unnecessary and unrealistic. 30

B. The Commission should not adopt rules requiring collection and disclosure of pole information in a national database. 33

C. The Commission should not alter the existing "sign and sue" rule. 35

D. The Commission should not adopt penalty or damages provisions. 38

E. The Commission should not adopt rules allowing contractors the right to perform make-ready work. 41

F. The Commission should not dictate that "boxing" or standoff brackets are presumed to be reasonable practices. 43

IV. THE COMMISSION SHOULD ALLOW ALL PARTIES ACCESS TO ITS COMPLAINT PROCEDURES, BUT NEED NOT ADOPT NEW RULES OR PROCEDURES. 46

A. Rather than creating specialized, new dispute resolution forums, the Commission should clarify that ILECs can use existing complaint procedures to challenge unreasonable attachment rates, terms, and conditions. 46

B. Staff-supervised informal mediation may be helpful in many disputes, but the Commission must address disputes on a case-by-case basis. 48

V. THE COMMISSION SHOULD PRESS CONGRESS TO EXTEND ITS AUTHORITY OVER ALL OWNERS OF POLES, DUCTS, CONDUITS, AND RIGHTS OF WAY. 50

CONCLUSION 52

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COMMENTS OF CENTURYLINK

INTRODUCTION AND SUMMARY

CenturyLink applauds the Commission's Order and Further Notice of Proposed Rulemaking[1] for acting on the National Broadband Plan's[2] recommendation to ensure a low, uniform rate for all attachments. The Commission needs to act on pole attachment[3] rates to level the playing field for all providers of broadband Internet access service.

CenturyLink shares industry frustrations with the gross and unjustified disparities in pole attachment rates among different categories of broadband competitors. CenturyLink owns poles and conduit in many places, and it relies on attachments to other

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[1] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51 (rel. May 20, 2010) ("FNPRM"). *See* 75 Fed. Reg. 41338 (July 15, 2010).

[2] Omnibus Broadband Initiative, Federal Communications Commission, *Connecting America: The National Broadband Plan* (2010) ("National Broadband Plan").

[3] In these comments, CenturyLink uses the terms "poles" or "pole attachments" to include all manner of use of poles, conduit, or rights of way owned or controlled by a utility.

party's poles in other places -- mainly those of electric utilities but also cooperatives, municipalities, and public utility districts. CenturyLink understands these issues. It and it and its customers suffer from the distortions created by the current pole attachment rate regime. The Commission needs to act to ensure that all providers of broadband Internet access service qualify for the same pole attachment rate cap for all attachments used for broadband Internet access service, and should adopt a rebuttable presumption presume that attachments are used for broadband qualify for that rate. The Commission has authority under section 224 of the Communications Act[4] to regulate pole attachment rates for all providers of telecommunications services, including incumbent local exchange carriers ("ILECs").

However, CenturyLink believes the Commission's proposed rules to "improve the speed of access to utility poles" -- including by a make-ready timeline, use of outside contractors, and availability of data -- are premature, if not potentially unwarranted. The FNPRM proposes a wide range of detailed new rules to govern the terms and conditions of access to poles and conduit, unrelated to any rate applicable for broadband attachments. CenturyLink believes the Commission should defer consideration of those issues until after it has implemented pole attachment rate reform, and in the meantime simply confirm that ILECs can utilize the Commission's existing complaint procedures for pole attachment rates, terms, and conditions. The Commission's May 2010 order

[4] 47 U.S.C. § 224.

adopted some measures to improve the process of access to pole attachments.[5] For the time-being, CenturyLink believes the Commission should decline to adopt additional rules on these issues, but should allow time to see how those newly adopted measures -- together with rate reform and ILEC access to complaint procedures -- improve experience in the work of pole attachments. Rate reform should commence immediately, but any new provisioning rules should wait for Congress to enable comprehensive reform.

At the same time, the Commission should not delay in asking Congress to revise Section 224 to eliminate the exemptions claimed from the Act today by cooperatives, municipalities, non-utilities, and ostensibly state-regulated pole owners. The National Broadband Plan recommended this step to Congress,[6] and the Commission should endorse and aggressively press for that policy.

I. THE COMMISSION SHOULD ADOPT A LOW, UNIFORM POLE ATTACHMENT RATE FOR ALL BROADBAND ATTACHMENTS.

A. The Commission should establish pole attachment rates that are as low and close to uniform as possible.

The National Broadband Plan concluded, "[a]pplying different rates based on whether the attacher is classified as a 'cable' or a 'telecommunications' company distorts attachers' deployment decisions."[7] It is unreasonable that different classes of competitors pay vastly different rates when using attachments for the same purpose, and it is clearly

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[5] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future,* WC Docket No. 07-245; GN 09-51, *Order and Further Notice of Proposed Rulemaking* at ¶¶ 7-18 (rel. May 20, 2010).

[6] National Broadband Plan at 110.

[7] *Id.*

unfair that ILECs pay a vastly higher rate than other attachers. It is particularly unreasonable as cable providers and telecommunications service providers are increasingly marketing their competing services as bundles.[8] The impact of the disparity between ILEC and cable attachment rates is "particularly acute in rural areas, where there often are more poles per mile than households."[9]

CenturyLink understands the impact that artificially high pole attachment rates have on broadband deployment. The average household density throughout CenturyLink's service area is only 21 per square mile. These disparities in rate grossly distort the competitive marketplace, by inflating ILECs costs and leading to higher costs for consumers. In concert with the goals of the National Broadband Plan, the fairest, simplest, and most reasonable way to address these rate disparities is to apply a unified rate for all pole attachments used to offer broadband Internet access services, whether the attacher is a cable television system, a CLEC, or an ILEC.

The National Broadband Plan rightly found that "[t]he FCC should establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 of the Communications Act of 1934, to promote broadband deployment."[10] As a carrier that owns its own poles and attaches to the poles of others, CenturyLink agrees with the Plan's conclusion that the appropriate policy to promote broadband deployment and investment is clear. The Commission should adopt the

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[8] The large majority of households in ILEC territories are also offered service by cable based competitors. That holds true for CenturyLink, as well.

[9] National Broadband Plan at 110.

[10] *Id.*

current cable rate for all broadband attachments. The National Broadband Plan recognized this.

> The rate formula for cable providers articulated in Section 224(d) has been in place for 31 years and is "just and reasonable" and fully compensatory for utilities. Through a rulemaking, the FCC should revisit its application of the telecommunications carrier rate formula to yield rates as close as possible to the cable rate in a way that is consistent with the Act.[11]

The cable rate has indeed been in place for three decades. It has withstood legal challenge taken all the way to the U.S. Supreme Court, confirming it provides pole owners with adequate compensation and does not result in an unconstitutional "taking."[12] The cable rate is reasonable for broadband attachments, and consistent with the Commission's, and Congressional, broadband policy objectives.[13]

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[11] National Broadband Plan at 110.

[12] *See FCC v. Florida Power Corp*., 480 U.S. 245 (1987). *See also Alabama Cable Telecomm. Ass'n v. Alabama Power Co.*, File No. PA 00-003, Order, 16 FCC Rcd 12209 (2001).

[13] CenturyLink likewise supports the FNPRM's tentative conclusion (at ¶ 118) that, as part of comprehensive attachment rate reform, it should decline to adopt the Commission's proposal, outlined the *Pole Attachment Notice* that "the [uniform] rate should be higher than the current cable rate, yet no greater than the telecommunications rate." *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245; RM-11293; RM-11303, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 at ¶ 36 (2007) ("*Pole Attachment Notice*").

B. The high and unequal rates charged to ILEC attachments distort competition, discourage broadband investment, and undermine affordability and adoption.

(1) A low, unified attachment rate will promote competition by leveling the unfair playing field created by the current pole attachment regime.

The National Broadband Plan and the FNPRM rightly recognize current pole attachment regime generates unreasonable and discriminatory rates.[14] It is unfair and unreasonable to have different rates for broadband attachments for different classes of competitors, and it frustrates broadband deployment, discourages broadband investment, and retards broadband adoption.[15]

The National Broadband Plan concluded that "the rental rates paid by communications companies to attach to a utility pole vary widely -- from approximately $7 per foot per year for cable operators to $10 per foot per year for competitive telecommunications companies to more than $20 per foot per year for some incumbent local exchange carriers."[16] It also found that the impact is "particularly acute in rural areas." In rural America, the cost of pole attachments "may range from $4.54 per month per household passed (if cable rates are used) to $12.96 (if ILEC rates are used).[17]

In reality, the problem is even worse than the National Broadband Plan acknowledges. Two years ago, the Commission received comments showing ILECs are

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[14] FNPRM at ¶¶ 112-113.

[15] National Broadband Plan at 110-112; FNPRM at ¶ 115.

[16] National Broadband Plan at 110.

[17] *Id.*

charged pole attachment rates 500 percent higher than that paid by cable in the same area, and 300 percent higher than the competitive local exchange carrier ("CLEC") rate.[18] USTelecom identified instances where ILECs pay more than 1400% more for attachments than cable competitors, and up to 900% more than CLEC competitors.[19] Windstream reported that its own CLEC and ILEC pole attachment rates are 607% and 824% higher, respectively, than what it is allowed to charge cable companies for similar attachments.[20] Other ILECs, including Frontier and Verizon, explained that ILECs are unable to obtain reasonable rates through negotiations.[21]

CenturyLink's experience is no better. CenturyLink is both an owner of poles and an attacher on poles owned by electric utilities. Its service territories cover portions of 33 states -- from Florida to Washington, from New Jersey to Nevada, and from Texas to Minnesota. CenturyLink's experience provides a picture of ILECs nationwide. Across

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[18] *See* Comments of ITTA at 5 & n.14, *Implementation of Section 224 of the Act: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-2455, RM-11293, RM-11303 (filed Mar. 7, 2008).

[19] Comments of USTelecom at 7-9 at 7-9, *Implementation of Section 224 of the Act: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-2455, RM-11293, RM-11303 (filed Mar. 7, 2008). USTelecom provided data from thirteen states, showing the gross disparity in average rates among cable, CLEC, and ILEC attachments.

[20] *See* Comments of Windstream at 4, *Implementation of Section 224 of the Act: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-2455, RM-11293, RM-11303 (filed Mar. 7, 2008).

[21] *See* Comments of Frontier at 2; Verizon at 4, *Implementation of Section 224 of the Act: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-2455, RM-11293, RM-11303 (filed Mar. 7, 2008).

its states, the median attachment rate it pays for attachments on utility-owned poles is over $20, although too often it pays as much as twice that amount.

In contrast, the median rate that CenturyLink receives from CLECs for their attachments on CenturyLink-owned poles is under $16. The median attachment rate that it receives from cable companies for attachments on CenturyLink-owned poles is closer to $5. The figures vary, but CenturyLink pays, on average, a per-attachment rate that is close to *five times* as high as what its cable competitors pay for the same attachments, and often is even higher. Moreover, CenturyLink is largely rural, and rural carriers necessarily have proportionately many more attachments per customer, which makes this rate disparity even more troubling.[22]

Because there is no default formula for ILEC attachment rates, there is no cap on what utilities may charge ILECs. These higher rates mean utilities can end up recovering from attachers (and mainly from the ILEC) more than 100 percent of the costs they incur to own and carry their jointly-occupied poles. In fact, ILECs often pay a higher share of the electric company's costs than the utility itself does, even though electric utilities ordinarily require three or even four times as much pole space as an ILEC needs. CLECs pay a much lower rate for similar attachment space on the same poles. At the same time, cable television companies pay only a small *fraction* of the ILEC rate. They enjoy artificially cheap access to the same poles and are receiving a forced subsidy from utilities or ILECs for the attachments they use to provide their competing, cable-based broadband services.

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[22] FNPRM at ¶ 144.

This system puts ILECs at a real disadvantage in competing against CLECs and cable television systems to provide similar services. Artificially high pole attachment rates for ILECs mean they are forced to incur higher costs to provide all of their services to customers when competing against CLEC and especially against cable-based providers. By having such disparate rates for broadband attachments, the current regime is plainly harmful to competition, discourages investment, and undermines the interests of consumers.

CenturyLink supports the FNPRM's conclusion that, to promote deployment, investment, and adoption, pole attachment rates should be "as low and close to uniform as possible."[23]

(2) A low, unified rate cap for pole attachment rates will promote broadband investment, especially in rural areas.

The current pole attachment regime has been interpreted to allow utilities to charge ILECs profoundly discriminatory rates for pole attachments. ILECs are dependent on electric utilities' control over pole facilities and are unable to obtain reasonable rates through negotiation. ILECs commonly are forced to pay far more for pole attachments than their direct competitors. Not only does that place ILECs at an artificial competitive disadvantage -- purely because of their regulatory classification -- but it also artificially inflates their costs in providing telecom and broadband services.

High attachment rates unquestionably discourage investment. They prevent ILECs from deploying broadband in some unserved areas that would otherwise be viable

[23] FNPRM at ¶¶ 48, 129.

for service and many underserved areas that would otherwise be viable for more advanced services. They handicap investment and network upgrades in all areas, by leaving fewer dollars available for actual infrastructure investment. Furthermore, by placing ILECs at this artificial disadvantage, high attachment costs reduce competitive market incentives for other providers to invest, to upgrade, and to innovate.

In rural America, this problem is "particularly acute."[24] ILECs are consumers' only realistic option for broadband services. Cable systems focus on towns, CLECs limit service to the larger towns, wireless broadband is not available in deeply rural areas, and satellite services remain out of reach for many consumers because of their higher cost. For ILECs, it is already difficult to justify investment in broadband infrastructure in the most high-cost, low-density service areas. Artificially high costs for pole attachments create "distortionary effects arising from the differences in current pole rental rates."[25]

The National Broadband Plan also notes that the "arcane rate structure" has led to "near-constant litigation about the applicability of 'cable' or 'telecommunications' rates." That "uncertainty" may discourage cable systems from extending their networks for fear they may "risk having a higher pole rental fee apply to their entire network."[26] Cable companies, of course, have nothing to complain about compared to ILECs, which have carrier of last resort obligations and no choice but to incur pole attachment costs throughout even the most low-density portions of their extensive service territories.

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[24] National Broadband Plan at 110.

[25] FNPRM at ¶ 110.

[26] National Broadband Plan at 110.

For too long, the Commission's existing rules -- as interpreted and applied -- have served only to frustrate broadband investment by the service providers otherwise most likely to invest in rural America: the ILECs that currently serve those areas. Artificially high rates for ILEC attachments actively discourage broadband deployment in areas that otherwise could probably be economically served, and discourage network upgrades in areas already served, by adding to the costs of deployment and provision of service.

By definition, rural areas incur proportionately far higher attachment costs per customer served. The National Broadband Plan notes attachment costs incurred to serve a rural broadband customer are nearly three times as high for ILEC attachments, compared to cable attachments.[27] That assessment presumes a density of 15 households per linear mile. In much of America, the average household linear density is actually much lower than that figure. CenturyLink's average density nationwide is under 21 households per square mile, yielding an actual density far below 15 per linear mile.[28] Furthermore, only a fraction of homes passed can be expected to subscribe to broadband services, no matter how much a provider invests in the network and in marketing the service.

(3) A low, unified rate cap for pole attachment rates will promote affordability and adoption.

The National Broadband Plan estimates that, in that typical rural area with 15 homes per linear mile, ILEC attachment costs per subscriber served would fall more than

[27] National Broadband Plan at 111.

[28] CenturyLink's service territories have an average population density of just 54 people per square mile.

$8 per month. If that "differential ... were passed on to consumers, the typical monthly price of broadband for some rural consumers could fall materially."[29] Eliminating artificially high attachment rates charged to ILECs "could have the added effect of generating an increase -- possibly a significant increase -- in rural broadband adoption."[30] With even basic broadband service averaging $39 per month,[31] even a few dollars will have impact.

Attachment costs are a material part of the cost of deploying and providing broadband in much of America. The National Broadband Plan notes that, "[c]ollectively, the expense of obtaining permits and leasing pole attachments and rights of way can amount to 20% of the cost of fiber optic deployment," as well as a significant portion of the cost providing ongoing broadband service.[32]

High attachment rates inevitably lead to higher broadband prices, hurting affordability for consumers. That necessarily reduces adoption of broadband services. Although CenturyLink continues to add net subscribers as it expands and upgrades its broadband network, broadband adoption nationwide was flat between from 2009 and 2010,[33] despite continued investment and marketing by service providers.

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[29] National Broadband Plan at 110.

[30] *Id.*

[31] A. Smith, *Home Broadband 2010*, Pew Research Center (2010) at 9 ("Home Broadband 2010").

[32] National Broadband Plan at 109, 110.

[33] Home Broadband 2010 at 9.

That is evident in the take rates associated with different speeds of broadband services from the same providers. Prices necessarily, and appropriately, are higher for higher speed services. Yet as prices rise, even with higher service capability, take rates decline sharply. Given the competitive market, broadband providers like CenturyLink cannot publicly disclose take rates, but the Commission can readily confirm the obvious. For many reasons, including costs, some consumers will not subscribe to broadband services. The Pew Foundation's latest study confirms that more than one in five people who are not yet online cite cost as their principal reason.[34]

Among those that do subscribe, consumers remain highly price-sensitive. Only a fraction of subscribers will opt for higher speed, higher cost services. Where CenturyLink offers 25-megabyte service, for example, most subscribers continue to opt for lower priced, lower speed services at basic or intermediate tiers, whether ordered individually or in a bundle.

C. The Commission's revised, unified telecom rate proposal is more more appropriate than the USTelecom, AT&T/Verizon, or TWTC proposals.

Ensuring a uniform rate treatment for all broadband attachers -- including ILECs -- is essential to the National Broadband Plan's goals. Other avenues to ILEC broadband attachment rate relief are obsolete. That includes each of the three proposals the Commission received after the 2008 *Pole Attachment Notice.*

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[34] Home Broadband 2010 at 10. Many respondents were skeptical whether promoting universally available, affordable broadband service should be a government priority, likely because of the perceived cost.

USTelecom submitted a proposal that would allocate costs among attachers differently than today, based on assumptions about the numbers of attachers and the space each uses on the pole.[35] Under the current cable rate formula, attachers (excluding the pole owner) pay an average 7.4 percent of the costs of the pole. Under the current telecom rate formula, attachers pay an average of 11.2 percent of annual costs in urban areas and 16.89 percent in non-urban areas. USTelecom's proposal suggested applying a allocating 11 percent to each attacher, regardless of the number of attachers or the space used. This approach has had the benefit of simplicity and certainty, while reducing, but not eliminating, the payment disparity among attachers. AT&T and Verizon submitted a separate but very similar proposal.[36] Under their approach, each attacher (other than the pole owner) would be charged 18.67 percent of the pole's annual costs.

Both approaches reflect an effort to provide greater uniformity in attachment rates among broadband competitors, while reducing the widely unreasonable rates incurred by ILEC broadband attachments. CenturyLink appreciates the goals behind both efforts, and the simplified approach they suggested made sense as an interim step toward larger reform of broadband attachment policies. Neither, however, goes far enough to promote the Commission's broadband policy goals. A better approach is FNPRM's tentative conclusion that the Commission should "limit distortions present in the current pole

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[35] Letter from Jonathan Banks (USTelecom) to Marlene Dortch (FCC), WC Docket No. 07-245 (filed Oct. 27, 2008) ("USTelecom Ex Parte").

[36] Letter from Robert Quinn (AT&T) and Suzanne Guyer (Verizon) to Marlene Dortch (FCC), WC Docket No. 07-245 (Oct. 21, 2008).

rental rates by reinterpreting the telecom rate to a lower level consistent with the Act."[37] This will expand promote competition, increase investment, and promote affordability and adoption. Seeking uniformity by increasing cable attachment rates to the current level yielded by the current telecom rate would frustration the Commission's goals by leading to "increased broadband prices and reduced incentives for deployment."[38]

Similarly, CenturyLink does not endorse TWTC's alternate proposal. To its credit, TWTC legitimately would help "eliminate or dramatically reduce the differential in pole attachment rates."[39] TWTC's approach relies on redefining the "cost of providing space" as incremental cost. Unfortunately, it appears inconsistent with the section 224(e) framework for allocating costs, and could even lead a pole owner to recover less than its incremental cost.

D. Other issues affecting attachments.

(1) Joint use agreements do not provide ILECs competitive "advantages" and cannot justify imposing higher attachment rates.

The FNPRM invites comment on whether ILEC attachment leases and joint use agreements provide ILECs advantages that help offset the admittedly higher attachment rates they incur under the current regime.[40] CenturyLink participates in joint use agreements with investor-owned electric utilities across the country, both for utility-

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[37] FNPRM at ¶ 119.

[38] *Id.*

[39] *Id.* at ¶ 123. *See* TWTC White Paper, RM-11293 at 3, 20.

[40] FNPRM at ¶¶ 145-146.

owned poles and CenturyLink-owned poles. Joint use agreements make economic sense given that both companies have the trained personnel, equipment, and expertise to manage the dangerous business of attachments. They do not, however, give ILECs advantages, as cable companies have sometimes pretended.

To start, the current regime is not based on competitively neutral policies. ILECs cannot negotiate fair or reasonable attachment rates, and do not enjoy negotiated terms and conditions giving them any advantage over cable or CLECs. ILECs paying an unregulated, inflated attachment rate do not somehow receive greater benefits than cable companies enjoying a more realistic, lower attachment rate. Joint use agreements also impose obligations and burdens on ILECs. The notion that joint use agreements give ILECs any meaningful market advantages is sorely mistaken.

(2) The Commission should not exempt existing attachment agreements from rate review.

In adopting attachment rate reform, the Commission must ensure that application of a new low and unified rate is not limited to expiring contracts. Leaving existing agreements in place would render pole attachment rate reform meaningless, and it would frustrate the very goals of the FNPRM and of the National Broadband Plan.

Today's "arcane rate structure" has been left "in place for 31 years."[41] The need to promote broadband investment is immediate. Because of the explosive growth in bandwidth demand, broadband providers must invest staggering sums simply to maintain today's network capabilities. Expanding deployment and upgrading existing broadband

[41] National Broadband Plan at 110.

network requires even more. Given that huge investment requirement, delaying the effects of a low, uniform rate will frustrate the purposes of this reform. The Commission recently concluded that the deployment of advanced services capability to all Americans is not proceeding at a reasonable and timely pace, despite huge industry investment that has expanded wireline broadband availability from 8 million to 200 million Americans since 2000.[42] The Commission's new *Section 706 Report* reached this conclusion, for the first time ever, chiefly because it concluded broadband deployment is inadequate in lower density, higher cost rural areas.[43] Those are the very places where high attachment rates frustrate deployment and network upgrades.

The Commission should not exempt existing agreements from rate review. The Commission should address evergreen/everblack provisions. ILEC attachers, in particular, should have leeway to reopen rates in existing agreements. This is especially important given that existing agreements often have long terms. At the same time, however, other aspects of attachment agreements generally should be left in place, because of the logistics and practical difficulties involved. Unlike other contracts, pole attachment agreements involved relatively little give and take affecting the lease rate. Leaving other terms of agreement in place will ensure stability that benefits all parties by

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[42] *E.g.,* Press Release: FCC Report on Broadband is Misleading, July 19, 2010.

[43] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, FCC 10-129 (rel. July 20, 2010) ("706 Report").

minimizing unnecessary issues, simplifying negotiations, reducing disputes, and speeding the public benefits of attachment rate reform.

(3) The Commission should ensure a low, unified broadband attachment rate applies whether or not the attachment is also used for other services.

It should go without saying that a uniform broadband attachment rate should apply regardless of whether the attachment is also used for other services. It is unquestionably the only reasonable way to meet the Commission's stated goal of providing "even-handed treatment and incentives for broadband deployment."[44]

Equal treatment of attachments used to offer broadband Internet access service means the attachment rate must apply even if attachments are also used to offer other services. Section 706 does not require the Commission somehow "to separate out those pole attachments that are used to offer broadband Internet access service from those used for other services" when fashioning a unified broadband pole attachment rate.[45] On the contrary, section 706 instructs the Commission to promote broadband deployment by "removing barriers to infrastructure investment" wherever they are found, including in the Commission's own regulations and policies.[46] Any approach other than a unified rate for all attachments used to offer broadband Internet access service would require separating facilities and duplicating attachments. That would serve only to increase costs, discourage

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[44] NPRM at ¶ 36.

[45] *Id.*

[46] 47 U.S.C. § 157 nt.

investment, and frustrate the goals of Congress and the Commission to promote further expansion of broadband networks, especially in rural America.

(4) The Commission's new rate cap should include a rebuttable presumption that all attachments are eligible for the broadband rate.

In reforming the Commission's attachment policy, it should adopt a "rebuttable presumption" that attachments are subject to the broadband rate. A unified broadband pole attachment rate will often yield lower revenue for electric utilities, so they will have no incentive to apply that rate, particularly when they are uncertain about the services supported by any particular attachment. At the same time, cable companies currently enjoying lower attachment rates for attachments used for broadband services would have no incentive to identify where they should be subject to the higher rate.

If the Commission is to promote its goals of encouraging broadband deployment and ensuring technological neutrality, the Commission needs to ensure that the uniform rate is actually applied, and in a timely and cost-effective way. Realistically the best way to do that is to provide that all attachments of a cable television system or a provider of telecommunications service shall be entitled to the uniform broadband attachment rate, absent a showing by either the attaching party or the pole owner that the attachment is *not* used to offer broadband Internet access service.

This approach is a reasonable one. First, cable companies and ILECs already offer broadband service to the great majority of customers on their networks, so most pole attachments are already being used to offer broadband Internet access service. Comcast offers broadband service to 48 million residences. Comcast, Cox, and Time

Warner Cable all offer broadband Internet access service to 99 percent of addresses in their territories.[47] Charter likewise offers broadband service to more than 94 percent of households in its service areas.[48] Nationally, ILECs offer broadband service to the large majority of people in their territories. AT&T and Windstream provide broadband to more than 80% of customers served by their networks.[49] Despite being chiefly rural, CenturyLink currently offers broadband to more than 80 percent of its potential customers, and it is continuing to expand its broadband network wherever it can be economically justified.[50] Nationally, 97 percent of U.S. ZIP codes have broadband services available from two or more providers, and 95 percent of the U.S. population lives in homes with access to wireline broadband infrastructure capable of supporting download speeds of at least 4 Mbps.[51]

Second, without this presumption, either the pole owner or the attacher would have to determine time and time again whether the broadband rate is applicable. That

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[47] *See* Press Release, *Comcast Reports 2007 Results and Provides Outlook for 2008*, at Table 6 (Feb. 14, 2008); *Time Warner Cable Reports 2007 Full-Year and Fourth Quarter-Results*, at Table 4 (Feb 6.2008) *About Cox: SEC Filings, 10-K*, at 6 (Mar. 29, 2006).

[48] Press Release: *Charter Reports Third Quarter Financial and Operating Results* (Nov. 8, 2007) at 1.

[49] *See* AT&T 2006 Annual Report: IP and Broadband; Windstream Communications, SEC Filings, 2006 Annual Report.

[50] Thanks to its commitment to broadband investment, CenturyLink now offers broadband at 3 Mbps or higher download speed to more than 75% of eligible access lines in its territory.

[51] Indus. Anal. & Technology Div., Wireline Competition Bureau, *High-Speed Services for Internet Access: Subscribership as of Dec. 31, 2006* (Oct. 2007) at Table 15; Press Release: FCC Report on Broadband is Misleading, July 19, 2010.

process could be an expensive and needless administrative headache. Pole owners often cannot verify the types of services being provided using a particular attachment, and may not be motivated to do so. Pole attachers would face an even larger headache if they had to demonstrate eligibility on a pole-by-pole basis, especially if the pole owner is uncooperative. A rebuttable presumption would minimize disputes for both parties.

(5) Third party attachment does not create undue pressure on pole height or pole investment.

The Commission should recognize that third party attachment demand does not create undue pressure on pole height or pole investment. A primary impediment to pole investment is not a function of pole height or height requirements, but the cost of rearranging facilities. It makes little sense to replace a pole when attachments can be reconfigured to provide additional usable space. Brackets, cross arms, boxing, and top-mounting in appropriate instances can also introduce additional usable space, though these cannot be presumed appropriate for all poles. Attachments must be reconfigured to meet safety guidelines to protect utility workers and the public. CenturyLink takes NESC compliance very seriously, and the costs of such compliance are necessary investment in employee and public safety.

Third party attachment does sometimes lead to earlier replacement of smaller or aging poles. Costs of replacement are appropriately included in a rate formula.

II. THE COMMISSION HAS AMPLE STATUTORY AUTHORITY TO ADOPT A UNIFORM RATE CAP FORMULA FOR ATTACHMENTS FOR ALL PROVIDERS OF BROADBAND SERVICES.

A. Section 224(b) gives the Commission broad authority to cap pole attachment rates for all broadband providers.

The National Broadband Plan properly recognizes that the Commission has authority to regulate pole attachment rates for all broadband providers.[52] That makes sense, given the scope of section 224.

Under section 224(f)(1), a cable telecommunications system or "any telecommunications carrier" is entitled to nondiscriminatory access to a utility's poles, ducts, conduit, or rights of way. Section 224(a)(5), however, expressly excludes ILECs from the definition of "telecommunications carrier." For that reason, the Commission's existing pole attachment rules are silent about attachments sought by ILECs.[53] As a practical matter, that silence has forced ILECs to negotiate the terms, conditions, and rates for their attachments with utility pole owners, without clear recourse to the Commission if the terms, conditions, or rates are unreasonable. USTelecom explained this in its rulemaking petition almost five years ago.[54]

Utilities and some cable and CLEC competitors have long tried to argue that ILECs have no attachment rights or that Commission regulation of ILEC attachments is

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[52] National Broadband Plan at 110.

[53] *See* 47 C.F.R. §§ 1.1401-1.1418.

[54] *United States Telecom Association Petition for Rulemaking*, RM-11293 (filed Oct. 11, 2005).

somehow prohibited by section 224(f)(1).[55] However, sections 224(b)(1) and 224(a)(4) give any "provider of telecommunications service" an independent right to pole attachments, and that the "just and reasonable" standard for attachments applies to all telecommunications providers, ILECs among them. The Commission accordingly has ample statutory authority to adopt rules to regulate the reasonable rates, terms, and conditions of pole attachments by ILECs.

The central statutory issue is whether section 224's use of "telecommunications carrier" and "provider of telecommunications service" have different meanings. The statute defines "pole attachment" to include "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."[56] The next definition defines "telecommunications carrier" to exclude ILECs.[57]

Had Congress intended to exclude ILEC attachments from any Commission oversight, it would have limited the term "pole attachments" to those made by a cable television system or a "telecommunications carrier." Instead, Congress chose not to use those terms, but used the broader term, "provider of telecommunications service," which includes ILECs. Although section 224(a)(5) may exclude ILECs from the definition of

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[55] *E.g.,* Comments of American Electric Power, et al. at 3; Comments of Alpheus, et al. at 4; Comments of Comcast at 48; Comments of Time Warner Cable at 47, *Implementation of Section 224 of the Act: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-2455, RM-11293, RM-11303 (filed Mar. 7, 2008).

[56] 47 U.S.C. § 224(a)(4) (emphasis added).

[57] 47 U.S.C. § 224(a)(5).

"telecommunications carriers," ILECs unquestionably remain "provider[s] of telecommunications services." Section 224(f)(1) requires the "utility [to] provide a cable television system or *any telecommunications carrier* with nondiscriminatory access to any pole duct, conduit, or right-of-way owned or controlled by it."[58]

The statute thus distinguishes between the right to *access* utility-owned poles and the right to just and reasonable rates, terms, and conditions. Whether or not section 224(a)(5) may be understood to somehow exclude ILECs from an automatic rights to access poles, once given access, they -- like all "providers of telecommunications service" -- are entitled to just and reasonable rates, terms, and conditions. If Congress had meant to limit those rights just to "telecommunications carriers" within section 224(a)(5)'s definition, it would not have used a different, broader term -- "provider of telecommunications service" -- in section 224(a)(4).

The Supreme Court's *Gulf Power* ruling shows that the Commission has authority under 224(b) to regulate rates, terms, and conditions of pole attachments for ILECs.[59] In that case, the Commission had adopted a rate for pole attachments by cable providers offering both cable television and Internet services, and it had added wireless carriers' attachments to section 224. The Court rejected the 11th Circuit's conclusion that section 224 denies the Commission authority to set any rates for pole attachments beyond those

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[58] 47 U.S.C. § 224(f)(1).

[59] *National Cable & Telecom. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002),.

expressly set out in the statute. The Court found that "this conclusion has no foundation in the plain language of 224(a) and (b)."[60]

Though Congress prescribed specific formulas for "just and reasonable" rates for certain attachments by cable television providers and telecommunications carriers, "nothing about the text of [sections] 224(d) and (e), and nothing about the structure of the Act, suggest that these are the exclusive rates allowed."[61] Once any "provider of telecommunications services" -- including an ILEC -- receives access to a pole, then the rates, terms, and conditions must be just and reasonable. The Commission has authority, and the duty, to regulate those rates, terms, and conditions to ensure a level competitive playing field.

Section 224(b)'s prohibition of unreasonable rates, terms, and conditions reaches to all broadband attachments, including ILEC attachments. Section 224(b) is broader than the more specific provisions in section 224(d), (e), and (f). In light of *Gulf Power*, the Commission's regulatory authority is not limited to the statutory rates for attachments used for cable television services or CLEC services, but extend to any rates, terms, and conditions that the Commission believes are warranted to promote the deployment of broadband. As the Supreme Court explained, sections 224(e) and (f) "work no limitation on" Commission authority under section 224(b) to adopt a unified rate for all attachers, ILECs included.[62] The fact that Congress did not specify the rate formula that the

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[60] 534 U.S. *at* 335, *rev'g Gulf Power Co. v. FCC*, 208. F. 3d 1263, 1276, n. 29 (11th Cir. 2000).

[61] 534 U.S. at 335 (citation omitted).

[62] 534 U.S. at 337.

Commission must apply does not somehow limit its authority to regulate attachments by ILECs. The 1996 amendments to section 224 did not decrease the Commission's jurisdiction. "To the contrary, the amendments' new provisions extend the Act to cover telecommunications."[63] Congress, however, provided the Commission very broad authority under section 224(b)(1), and broadened the definition of pole attachment precisely to ensure the Commission could prevent unfairness in pole attachment charges.

B. Section 224 directs the Commission to ensure broadband attachment rates are just and reasonable for all broadband competitors.

Section 224(b)(1) provides that "[t]he Commission *shall* regulate the rates , terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions."[64] The National Broadband Plan recognized that section 224 gives the Commission authority, and a mandate, to regulate a unified rate for attachments used for broadband Internet access services.[65] *Gulf Power* confirms the Commission has authority to set a distinct rate for pole attachments that support broadband services. Section 224, the Court noted, has formulas for determining "just and reasonable" rates for particular attachments by cable

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[63] 534 U.S. at 336.

[64] 47 U.S.C. § 224(b)(1) (emphasis added).

[65] National Broadband Plan at 110.

television providers and telecommunications carriers, and therefore the statute signaled that these were not "the exclusive rates allowed."[66]

C. Section 706 further supports the Commission's authority to ensure attachment rates are just and reasonable for all broadband competitors.

Beyond section 224, section 706 gives the Commission additional authority to apply pole attachment rates for ILECs' use to promote broadband competition and to encourage additional investment in broadband deployment and upgrades. Congress directed the Commission to take all appropriate steps to promote the rapid deployment of broadband services in all parts of the country. Section 706 provides that

> The Commission ... shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing, in a manner consistent with the public interest, convenience, and necessity, ... measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[67]

The Supreme Court also held in *Gulf Power* that section 706 "reinforces the Commission's expansive jurisdiction to regulate pole rates."[68] The Commission itself "has consistently recognized the critical importance of broadband services to the nation's

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[66] 534 U.S. at 336 (citation omitted).

[67] Pub. L. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 157 nt.

[68] 534 U.S. at 339.

present and future prosperity and is committed to adopting policies to promote the development of broadband services, including broadband Internet access services."[69]

D. Commission precedent does not preclude the Commission from adopting a low, unified rate for all broadband pole attachments.

As the National Broadband Plan and the FNPRM propose, the Commission should act on its authority to regulate the rates, terms, and conditions of ILEC pole attachments, and it should set a low, unified rate for all pole attachments for broadband Internet access services, including ILEC attachments on utility-owned poles. The existing regulatory system creates serious competitive distortions, suppresses investment, slows deployment, and hurts affordability and adoption.

Some electric utilities have argued that the Commission cannot apply a unified rate to ILEC attachments on utility-owned poles without violating "long-standing [Commission] precedent" and "Commission practice."[70] In effect, they contend that because the Commission has not acted until now to address the unfairness in the rates charged ILECs for broadband attachments, it can never do so. In fact, the Commission has previously acknowledged its authority and its obligation under section 224(b) and 224(a)(4) to ensure that pole attachment rates are just and reasonable for cable companies

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[69] *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to all Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice Over Internet Protocol Subscribership*, Notice of Proposed Rulemaking, WC Docket No. 07-38, FCC 07-17 at ¶ 17 (2007).

[70] Comments of Edison Electric Institute at 9, 121; Comments of American Electric Power, et al. at 3, *Implementation of Section 224 of the Act: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-2455, RM-11293, RM-11303 (filed Mar. 7, 2008).

providing Internet service and for wireless carriers providing telecommunications service. Again, *Gulf Power* confirmed the Commission's broad authority under section 224. Certainly, the Commission has never previously found that it *lacks* authority to regulate rates, terms, and conditions for ILEC broadband attachments on utility-owned poles for ILECs. There is no precedent to preclude the Commission from including ILECs within a unified broadband attachment formula applicable to all "providers of telecommunications services," and statutory and Commission policy both dictate that it should do so. On the contrary, the Commission's findings in the latest Section 706 Report would dictate that the Commission must take steps to provide a rate for all broadband attachments that is as low and as close to uniform as possible.

III. OTHER FEDERAL RULES GOVERNING TERMS AND CONDITIONS OF ATTACHMENT ACCESS ARE PREMATURE AT BEST AND MAY BE UNWARRANTED.

In the past, however, the Commission has rejected various detailed rules for timelines and provisioning. It found that existing Commission guidelines are sufficient to ensure attaching parties timely and non-discriminatory access to poles.[71] The Commission realized that "there are simply too many variables to permit any other approach with respect to access to the millions of utility poles and untold miles of conduit in the nation."[72] The Commission should not adopt new rules on timelines, databases,

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[71] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and order, 11 FCC Rcd 15499 at ¶ 1143 (1996) (subsequent history omitted).

[72] *Id.* at ¶ 1124.

use of contractors, or penalty provisions. Nor should the Commission alter the "sign and sue" provisions in place today.

A. The Commission's proposed provisioning timeline is unnecessary and unrealistic.

The FNPRM proposes a five-stage timeline for processing and provisioning pole attachments.[73] Specific timelines are unwise, and the proposed timeline is unrealistic. Of 20 states that regulate pole attachments, no more than five have any timelines or deadlines. Timelines are best negotiated, and unreasonable delays should addressed on a case-by-case basis.

First, imposing a mandatory timeline overlooks the many delays that are beyond a pole owner's control. Permitting requirements routinely cause delays. In CenturyLink's Nevada service territories, it routinely takes 45 days to receive NDOT, Clark County, City of Las Vegas, and North Las Vegas permits. Yet the FNPRM's proposed timeline includes no allowance for such third-party delays. The aggressive timetable has no allowance for weather delays. In CenturyLink's service areas in Minnesota and Montana, winter weather routinely precludes inventorying any poles for weeks. Additionally, prospective attachers often create their own delays, by providing incomplete information, proposing a route that needs adjustment or correction, or by requesting changes after submitting a request. Rather than adopt a rule with a provision to "stop the clock,"[74] the Commission should decline to impose any mandatory timeline.

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[73] FNPRM at ¶¶ 29, 31.

[74] *Id.* at ¶ 51.

Second, the proposed timeline underestimates the time needed to complete these steps. In many instances, the timetable would allow too little time to confirm the attacher's proposed route, inventory poles on the route, determine space availability, identify and confirm unauthorized attachments, assess steps pole condition and appropriate attachment techniques, determine the necessary make-ready work, and estimate make-ready costs. The timeline would presume that pole owners have easy access to complete and accurate information about pole inventory. In reality, even the best inventory records are not wholly accurate and must be checked in the field.

Third, the timeline assumes all utilities are alike, and ignores the practical problems faced by ILECs with territories that include vast, noncontiguous, and rural areas. The proposed timeline appears based on compact, contiguous, urban or suburban utility profile. While that may not be unreasonable for many larger, investor-owned electric utilities, it is widely unrealistic for utilities whose service territories that are lower density, more widely spread out, and noncontiguous. CenturyLink provides service in portions of 33 states, but it has an average household density of under 21 per square mile and an average line density under 24 per square mile.[75] It has many service areas that are necessarily handled by a relatively small crew, covering vast and often non-adjacent territories. As a mandatory timetable for ILECs, it is unduly aggressive even in higher-density areas, but it is plainly unreasonable for low-density and noncontiguous territories.

[75] CenturyLink's service territories collectively cover more area than Texas and Oklahoma combined.

Fourth, a mandatory timeline cannot accurately reflect the reasonableness of an attachers' request, even with a threshold for the size of the request.[76] The FNPRM acknowledges that a timeline may be unreasonable if a prospective attacher's route involves hundreds of poles, instead of a handful of them. But it overlooks the many potential complexities that commonly arise. What may be reasonable to expect for one request will be unreasonable in another. For example, a realistic timeline for poles in an urban area is often unreasonable in an out-of the-way locale, where staff and resources are especially limited. The appropriate timeline for a request cannot be evaluated without knowing the individual facts of the case, and that makes a rigid rule impractical. A hard-and-fast requirement timeline for all pole owners is ill-advised, with or without a threshold number of poles.

Rather than impose a mandatory timeline, the Commission should encourage allow a reasonable measure of flexibility. These issues are best evaluated and addressed on a case-by-case basis. If a utility's processing or provisioning performance timelines are unreasonable, or if delayed are excessive, an attacher can bring a complaint to the Commission. The Commission's proposal to allow attachers to move a utility's facilities after 45 days is utterly unreasonable, potentially irresponsible. It invites disputes, service interruptions, and safety hazards to contractors, carrier and utility employees, and the public.

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[76] FNPRM at ¶ 49.

B. The Commission should not adopt rules requiring collection and disclosure of pole information in a national database.

The National Broadband Plan notes that there are literally hundreds of entities that own and/or use poles, conduits, ducts, and public and private rights of way. The FNPRM asks whether it would be appropriate to develop a database of information about this infrastructure, "such as the ownership of, location of, and attachments on a pole." It also asks what information might be collected, and whether the Commission or other parties might be suited to this task.[77]

It is possible the Commission may not fully appreciate the magnitude, and the huge cost, that a national database would involve. There are an estimated 134 million utility poles in the United States, and an untold number of other facilities supporting the provision of broadband network. The FNPRM implies that there detailed records exist identifying pole facilities nationwide. There are not.

Although many utilities participate in the National Joint Utilities Notification System (NJUNS) or Alden Systems' Joint Use services,[78] there is no complete, much less accurate, inventory of poles nationwide. Nor is it realistic to expect one. The FNPRM asks about the "challenges to creating and maintaining such a database."[79] Those challenges are huge.

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[77] FNPRM at ¶ 75.

[78] National Joint Utilities Notification System -- NJUNS, Inc., http://www.njuns.com/NJUNS_Home/default.htm; Letter from John Sciarabba (Alden Systems) to Marlene Dortch (FCC), WC Docket No. 07-245; GN Docket No. 09-51 (filed Apr. 26, 2010).

[79] FNPRM at ¶ 76.

Security issues, access for prospective attachers, and the burden on small utilities -- noted in the FNPRM -- are all genuine and major concerns. CenturyLink opposes the idea for each of those reasons. However, an additional concern is the staggering cost of developing and maintaining such a database, especially given the limited benefit such a database would provide to industry and the public.

The amount and quality of data available to pole owners today varies. Different carriers have maintained different classes of information; there is little standardization. In some areas, a carrier's data on its pole inventory may be complete and current. In others, data may be incomplete or out-of-date. CenturyLink has acquired facilities from a variety of different ILECs over the years. Records among small rural carriers and utility companies are often incomplete. Of course, virtually by definition, no carrier's records show unauthorized attachments.

Any plan to utilize poles, ducts, conduits, or rights of way requires inspection of those facilities to confirm the accuracy of the data, assess the condition of the facility, estimate the cost of any make-ready work, and determine the appropriate technique for attachment. It requires an assessment of the safety of the facility and the site, including access, placement of utility vehicles, and management of traffic and site safety. A national database, consequently, would deliver surprisingly little benefit for the cost.

The Commission's proposal to require pole owners to provide data on facilities would require spending huge sums to inventory poles -- including millions of poles in rural areas where third party attachments are rare. It would divert personnel and resources from provisioning attachments and providing end user installation and

maintenance and repair service. It would consume resources that could otherwise be invested in broadband network.

The FNPRM asks whether the Commission should establish an information collection program to monitor the performance of its pole access, enforcement or pricing rules.[80] The Commission could issue a periodic Public Notice or Notice of Inquiry to invite industry comment. It should not, however, impose mandatory data collection or ongoing reporting. The costs associated with such measures are virtually certain to outweigh their benefits.

C. The Commission should not alter the existing "sign and sue" rule.

Commission rules and precedent allow an attacher to enter a pole attachment agreement, and then later challenge a provision in the agreement in a complaint proceeding.[81] The rules also empower the Commission to strike an unjust and reasonable rate, term, or condition and substitute a just and reasonable replacement. The policy reflects the reality that an attacher may have no choice but to accept an unreasonable or discriminatory contract term in order to gain access.

The Commission should retain this policy.[82] First, however, it should ensure that ILECs are able to use complaint procedures -- and receive the benefit of this rule -- just as other attachers can.

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[80] FNPRM at ¶ 77.

[81] 47 C.F.R. § 1.1410(a), (b).

[82] FNPRM at ¶¶ 104-105.

Attachers' negotiating leverage is limited. When rolling out expensive, time-sensitive build-outs or plant upgrades, an attacher may be unable to withstand protracted negotiations or litigation necessary to ensure just and reasonable rates, terms, and conditions. Under the current regulatory regime, ILECs have particularly little negotiating leverage. Broadband deployment and network upgrades should not be held hostage to unreasonable rates, terms, and conditions for pole attachments. While there are many reasonable ILEC attachment contracts, some were not "voluntarily negotiated" but signed only to preserve the ILEC's right of access to the pole. Such contracts often contain rates, terms, or conditions that deviate from the Commission's rules.

The FNPRM asks whether the policy should be changed to add a deadline by which an attacher must bring any challenge. Such a provision would be unfair and unreasonable if applied to ILECs. Some attachment contracts have been in place for many, many years. They may incorporate antiquated rate and term provisions that do not comply with Commission rules. ILECs have been unable -- and even now remain unable -- to correct these antiquated issues by renegotiation because of the uncertain legal status of ILECs. The fact that ILECs have not had a clear right to bring complaints to the Commission (and to many state commissions) -- all because of an erroneous interpretation of the statute -- should not be used to disadvantage an ILEC's ability to reform unreasonable agreement to bring them into conformance with law and into parity with its competitors.

The "sign and sue" policy also provides major benefits to the pole attachment process by letting an attacher party that cannot reach agreement sign the disputed agreement, deploy the broadband attachments, and provide service efficiently to

consumers, then invoke the normal complaint processes to resolve the parties' rights. This procedure gives the Commission and the parties a reasonable period of time to make their legal arguments and present their costs to show whether rates, terms, and conditions are unjust or unreasonable, without delaying broadband deployment or delaying consumers' ability to receive service.

At the same time, as the FNPRM recognizes, this policy does not envision "an unfettered right to 'cherry pick' contractual terms they wish to disavow, while retaining the benefits of more favorable terms."[83] The Commission's policy has always been required that the attacher establish that a rate, term, or condition is unlawful, not simply unfavorable. The Commission has also found that a pole owner may have made a valuable concession in return for the challenged provision. The Commission will not overturn that bargain.[84]

The "sign and sue" rule has been reviewed and upheld on appeal.[85] The rule has not led to any deluge of complaints; pole attachment complaints at the Commission have been relatively few. There is nothing in the record to suggest that circumstances have changed materially since the Commission first found the rule to be warranted.

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[83] FNPRM at ¶ 106.

[84] *Southern Co. Servs. v. FCC*, 313 F.3d 574, 582-84 (D.C. Cir. 2002) (holding that the Commission's "limited authority to review negotiated settlements is consistent with the statute and it does not interfere with any of the rights afforded petitioners under the Act").

[85] *Southern Co. Servs.*, 313 F.3d at 583.

D. The Commission should not adopt penalty or damages provisions.

The FNPRM invites comment on whether and how to penalize unauthorized attachments or a pole owners' provisioning delays or failure to provide access to poles.[86] Pole owners should be able to approve pole attachments to ensure they are safely and properly made and conform with NESC and other proper standards. Pole owners also have the right to ensure that they receive compensation for attachments.

Unauthorized attachments are a serious and widespread problem. Their prevalence is difficult to estimate because it is impractical to survey the nation's 134 million poles. Unauthorized attachments, and safety violations on existing attachments, typically are discovered in the course of other utility work, including repairs, preparation for new attachments, and facilities replacement. Unauthorized attachments raise legitimate safety concerns for pole owners. They can affect the safety of utility employees, pose actual hazards, and compromise service reliability. Violation of clearance standards, installation of inappropriate hangers and hardware, and removal or alteration of existing attachments by unauthorized attachers create a wide range of problems.

Not all ostensibly-unauthorized attachments raise safety issues, however. Many properly placed attachments -- including attachments installed many years ago -- are actually just problems in record-keeping. Moreover, many ostensibly-unauthorized attachments are neither deliberate nor abusive -- nor necessarily a fault of the attacher. The fact that a pole owner is not receiving a rental payment for a particular attachment

[86] FNPRM at ¶¶ 89, 97-98.

does not necessarily mean that the attachment was truly unauthorized. The problem may result from a failure to bill, or some other record error. Consequently, unauthorized attachments must be addressed on a case-by-case basis. In CenturyLink's experience, most such issues are resolved reasonably and amicably. Pole attachment agreements often include provisions to address this issue, as well as provisions to enforce safety standards on such attachments. If parties are unable to negotiate a resolution, then parties can bring a lawsuit to seek resolution.

The Commission should not adopt any provisions that impose penalties for unauthorized attachments or even for safety violations. Creating a penalty system creates an incentive for pole owners to find and impose penalties as a revenue enhancement, and could needlessly multiply disputes. Liability for back rent, and civil liability for correction of safety violations, costs of repair, and damage to facilities, should generally be sufficient.

Oregon's penalty of $500 per pole, cited by the FNPRM, is not the answer to this problem.[87] The results of the Oregon experiment show that such a rule can be abused. In fact, the Oregon Public Utility Commission had to substantially modify and scale back its original penalty rules precisely because of such abuse.[88] The genuinely abusive and most dangerous attachments could be better addressed by rescinding the licenses of the

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[87] FNPRM at ¶¶ 95-96.

[88] *Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment Use and Safety (AR 506) and Rulemaking to Amend Rules in OAR 860, Division 028 Relating to Sanctions for Attachments to Utility Poles and Facilities (AR 510),* Order No. 07-137, at 23-26 (Pub. Util. Comm. Or., Apr. 10, 2007).

offending contractors, to force unscrupulous or incompetent installers to improve their practices or quit the business. Such operators, and their clients, can be identified.

The Commission should not adopt any provisions that permit pole owners to levy penalties for unauthorized attachments or safety violations, at least until such provisions can be freely negotiated between the parties.[89] It is very problematic to allow a pole owner unilaterally to impose a fine on an attacher without due process or fact finding by a neutral arbiter. Failure to pay a disputed "penalty" could lead to threats of termination of the attachment agreement and ultimately to threats of attachment removal, risking delivery of service to the public. This is a particularly troubling prospect given that ILECs have carrier-of-last-resort responsibilities that could be jeopardized through such private penalty provisions. Alternatively, if penalties are to be utilized, it would be more appropriate to require that they be paid into a public fund, to eliminate improper incentives while benefiting the public. A pole owner should not be able to force an attacher to pay any penalty that is disputed absent bringing such a situation to the Commission for neutral adjudication based on the particular facts.

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[89] The Commission in the past has refused to permit imposition of penalties for violation of a pole attachment agreement. *See, e.g., Salsgiver Comm'ns v. North Pittsburgh Tel. Co.,* 22 FCC Rcd 20536 at ¶ 28 (2007) (finding $250 penalty for unauthorized attachment is unreasonable).

E. The Commission should not adopt rules allowing contractors the right to perform make-ready work.

Contrary to the FNPRM's suggestion,[90] it would be unreasonable to require pole owners always to allow third party contractors to conduct make-ready work. Make-ready work should be the responsibility of the pole owner, absent agreement with the attacher.

The hazards of substandard performance by contractors to the public and to utility employees are real, as are the risks of service outages caused or exacerbated by substandard work. Liability exposure and costs of outage and repair -- such as from improper line clearance -- are genuine problems. Pole owners are not in a position to police contractors' work, so many deficiencies and hazards can go undiscovered for years. Given the magnitude and seriousness of the potential issues, CenturyLink believes genuinely that employee and public safety and network reliability issues should be addressed by pole owners on a per-request basis. Contractors should not be presumed authorized to perform this function, absent agreement with the pole owner.

The FNPRM proposes that, when attachers use contractors for surveys and make-ready work, the attacher must invite a representative of the pole's owners "to accompany and observe the contractor."[91] Certainly, if the Commission is to create these needless hazards by opening make-ready work to contractors, allowing pole owners to observe makes sense. However, the Commission should ensure the contractor cannot proceed without realistic, sufficient notice to the pole owner. The Commission states that "[f]or electric utilities and other non-incumbent LEC pole owners," attachers using contractors

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[90] FNPRM at ¶ 65.

[91] *Id.* at ¶ 68.

for surveys and make-ready work "should mutually agree regarding the amount of notice to the utility."[92] At a minimum, the Commission should confirm that the similar agreement must be reached with ILEC poles owners.

Final judgment on safety and proper attachment configuration must be left to the pole owner in all cases. While the Commission gives "electric utilities and other non-incumbent LEC pole owners" the right to "exercise final authority to make all judgments that relate directly to insufficient capacity or safety, reliability, and sound engineering, subject to any otherwise-applicable dispute resolution process."[93] The proposal, however, denies such authority to ILECs for their poles, proposing that "the incumbent LEC shall not have final decision-making power."[94] This approach is unreasonable. The Commission speculates that ILEC pole owners "may have strong incentives to frustrate and delay attachment."[95] However, as technology advances and service capabilities evolve, electric utilities and other non-ILEC pole owners could become competitive telecommunications services providers, and some already have done so. If an ILEC acts unreasonably for anticompetitive reasons, the attacher has recourse to the Commission and to state authorities.

If contractors were to be allowed to conduct surveys and make-ready work, the Commission should provide that:

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[92] FNPRM at ¶ 67.

[93] *Id.*

[94] *Id.* at ¶ 68.

[95] *Id.*

> (1) It is certified by utilities in the community, appropriately licensed, and utilizes properly trained, licensed, and bonded personnel.[96]
>
> (2) The pole owner may require a post-construction inspection, at the contractor or client's expense, to prevent NESC violations and to avoid safety hazards and reliability risks.
>
> (3) Where deficiencies are found, cost of repair or reconfiguration must be reimbursed by the contractor or its client.
>
> (4) Pole owners may deny contractors access to their facilities in the event of continued substandard work posing a hazard to safety or reliability.

CenturyLink supports requiring that the FNPRM's tentative finding "that all utilities may deny access by contractors to work among the electric lines, except where the contractor has special communications-equipment related training or skills that the utility cannot duplicate."[97] It is appropriate, absent utility agreement, to limit attachers and their contractors to the communications space and the safety space below the electric space.

F. The Commission should not dictate that "boxing" or standoff brackets are presumed to be reasonable practices.

The Commission has, by order, provided "that the statutory nondiscriminatory access requirement allows communications providers to use space- and cost-saving attachment techniques where practical and consistent pole owners' use of those

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[96] The Commission's proposal limits contractor certification to non-ILEC utilities. FNPRM at ¶ 61.

[97] FNPRM at ¶ 69.

techniques."[98] This means that, under section 224(f)(1), for example, a utility must let cable companies and telecommunications carriers to utilize "the same attachment techniques that the utility itself uses in similar circumstances." However, the Commission appropriately provided that "utilities retain the right to limit their use when necessary to ensure safety, reliability, and sound engineering."[99]

Boxing involves attaching of communications lines on opposite sides of a pole. To provide ostensibly easier and cheaper access to existing poles, the FNPRM asks whether boxing may be presumed reasonable if the utility has discontinued the practice.[100] CenturyLink believes boxing cannot reasonably be presumed to be a proper practice for all poles, regardless of past practice. Standards legitimately change as pole owners learn from experience and as poles age. The suitability of boxing should be left to the judgment of pole owners.

For example, CenturyLink believes boxing should be restricted to poles that do not carry electric primary service attachments. This is necessary for the safety of line technicians. Boxing limits room for ladders and climbing space. It also adds serious difficulty when assisting or lowering an injured technician. Boxing can also lead to damage of attachments during pole replacement. Where boxing has been used, poles of a larger class cannot be placed up between existing attachments without creating unreasonable hazards to workers and the public.

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[98] FNPRM at ¶ 7.

[99] *Id.* at ¶ 9.

[100] *Id.* at ¶ 74.

Similarly, measures like use of standoff-type hanger brackets should not be presumed acceptable,[101] but should be left to the reasonable judgment of pole owners. Bracketing can create undue safety hazards for technicians that must work above or below the bracket. They can place additional strain on old poles. Drilling the additional mounting holes they require can weaken poles and increase risk of pole failure in wind or ice loading. Pole owners know that some locations are particularly at risk of wind or ice damage.

For these reasons, pole owners must have a sizeable measure of discretion -- within the bounds of their obligations not to act in a discriminatory manner -- to restrict or even prohibit boxing or bracketing on a given pole. That some old attachments fail to meet today's safety and engineering standards does not mean those standards should be ignored. The fact that boxing was used on a pole without electric lines does not mean it is appropriate on one with electric hazards. The fact that bracketing was used on a young pole, or in an area not prone to wind or ice loading, does not mean that boxing should be presumed appropriate for an old pole, one compromised by prior fasteners, or one at greater risk of wind or ice loading. Attachment policies vary based on facts, and it is often impractical for a pole owner to provide those policies for any given facility before receiving a specific attachment request.

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[101] FNPRM at ¶ 74.

IV. THE COMMISSION SHOULD ALLOW ALL PARTIES ACCESS TO ITS COMPLAINT PROCEDURES, BUT NEED NOT ADOPT NEW RULES OR PROCEDURES.

A. Rather than creating specialized, new dispute resolution forums, the Commission should clarify that ILECs can use existing complaint procedures to challenge unreasonable attachment rates, terms, and conditions.

The FNPRM asks "whether the Commission should modify its existing procedural rules governing poles attachment complaints," and whether it should adopt "specialized forums" to address them.[102] CenturyLink believes before changing dispute resolution rules, a more sensible step would be to ensure its existing rules to cover ILEC attachment disputes.[103] The National Broadband Plan's discussion of pole attachments dispute resolution overlooks the fact that the chief problem in addressing broadband attachments disputes is that ILECs are denied access to the Commission's existing complaint procedures on pole attachment disputes.[104]

Section 224(b)(1) requires the Commission to ensure all providers of telecommunications services have access to pole attachments on rates, terms, and conditions that are just and reasonable.[105] The Commission's existing rules, however, fail to make explicit that ILECs have the same rights as all other providers of telecommunications services to be free from unreasonably discriminatory pole

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[102] FNPRM at ¶¶ 78-80.

[103] *Id.* at ¶ 148.

[104] *See* National Broadband Plan at 112.

[105] 47 U.S.C. § 224(d)(1) provides the Commission guidelines for just and reasonable pole attachment rates.

attachment rates. Accordingly, before considering "specialized forums and processes for attachment disputes,"[106] the Commission should, even as an interim measure, confirm that as "providers of telecommunications services,"[107] ILECs are entitled to just and reasonable pole attachment rates. By the Act's own definitions, ILECs are "providers of telecommunications service" covered by the statutory protections of section 224(b). The use of that term, distinct from "telecommunications carrier," in the 1996 Act's amendments to section 224 shows that Congress was making the two sets of changes at the same time.[108]

Existing rules have been misinterpreted to limit the Commission's ability to remedy unjust and unreasonable discrimination by utility pole owners, by denying ILECs standing (wrongly, in CenturyLink's view) to bring a complaint. At the same time, state authorities too often have been unwilling or unable to hear these disputes. Consequently, ILECs have been left without any effective recourse when utilities unreasonably raise rates and discriminate against ILECs.

The Commission could eliminate this problem by confirming that ILECs -- like other attachers -- can use existing complaint processes and procedures to challenge unreasonable pole attachment rates, terms, and conditions. A rule change, frankly,

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[106] FNPRM at ¶ 78.

[107] 47 U.S.C. § 224(a)(4).

[108] The decision of Congress to use the different terms "telecommunications carrier" and "provider of telecommunications service" within section 224 must be followed. *See Clay v. U.S.*, 537 U.S. 522, 528-29 (2003) (noting that "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of particular language in different sections of the statute), quoting *Russello v. U.S.*, 464 U.S. 16, 23 (1983).

should be unnecessary if the Commission adequately clarifies that the existing complaint rules and procedures also apply to ILEC attachments to utility-owned poles.[109]

B. Staff-supervised informal mediation may be helpful in many disputes, but the Commission must address disputes on a case-by-case basis.

CenturyLink recognizes that the National Broadband Plan proposes broader changes to Commission rules and processes to "expedite" resolution of attachment disputes.[110] The most important issue is to ensure all parties -- including ILECs -- have recourse to the Commission to hear attachment disputes against pole owners. At present, ILECs are largely unable to bring complaints to the Commission as an attacher on other parties' poles, even though other parties may file complaints there against ILECs as pole owners. Again, that needs to change.

The FNPRM notes that the Commission has often encouraged disputing parties to utilize informal dispute resolution, mediated by Commission staff.[111] This option has helped some parties resolve and settle pole attachment disputes without incurring the "time and expense attendant to formal litigation."[112] CenturyLink supports voluntary informal mediation -- whether facilitated by a third party arbitrator or facilitated by

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[109] Alternatively, the Commission could amend its rules to make this explicit. *See* 47 C.F.R. §§ 1.1402, 1.1404, and 1.1410 (outlining complaint and remedy processes) and § 1.1409 (setting default rate formula).

[110] National Broadband Plan at 110.

[111] FNPRM at ¶ 81. "The Commission has always encouraged negotiation in pole attachment disputes." *Id.* at n.216. Commission rules require anyone filing a complaint to outline measures taken to resolve the dispute. 47 C.F.R. § 1.1404(k).

[112] FNPRM at ¶ 81.

Commission staff -- including disputes brought by ILECs as attachers. Commission mediation or third party arbitration should be encouraged, but it should not necessarily be required before filing a complaint. Many pole attachment disputes may be well-suited to these voluntary procedures. Some attachment disputes, however, involve issues or precedent that are not conducive to arbitration. Compelling mediation before a complaint may actually delay resolution of the issue. Moreover, disagreement over a major issue in dispute may legitimately preclude settling other, lesser issues.

The FNPRM asks whether the Commission could facilitate third party arbitration by "develop[ing] a set of best practices."[113] Such a measure would probably be impractical and likely would have little impact. Pole attachment disputes are necessarily fact-specific and involve subjective judgments. Developing a Commission set of "best practices" -- even for safety and engineering issues only -- could prove too generalized to be helpful or too specific to be useful. Pole attachment disputes, even on engineering and safety issues, are better suited to use of qualified experts that can testify to the specific facts involved, within the context of NESC standards, industry practice, and engineering sense. Safety and engineering issues are best left to experts that have access to the facts.

Again, the most important measure for helping reduce and resolve pole attachment disputes will be ensuring that ILECs have access to the Commission's complaint procedures. By helping level the negotiating playing field, that overdue step ultimately will lead to fairer agreements and fewer disputes.

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[113] *Id.*

V. THE COMMISSION SHOULD PRESS CONGRESS TO EXTEND ITS AUTHORITY OVER ALL OWNERS OF POLES, DUCTS, CONDUITS, AND RIGHTS OF WAY.

Even once the Commission adopts low, unified pole rate for broadband pole attachments within its jurisdiction, the underlying problem will be only partly addressed. The Commission's authority, though admittedly broad, is limited by exemptions in section 224.

A very large percentage of the nation's poles are owned or controlled by electric cooperatives, municipalities, public utility districts, and similar entities, as well as non-utilities. Due to exemptions in section 224, only about 49 million of the estimated 134 million poles in the United States -- just 37% of the total -- would be subject to a new, reformed Commission system.[114] This is a particular problem in rural areas, where such entities to play a very major role in providing electric utility service. In CenturyLink's experience, many of the highest rates and the most abusive practices -- even threats of removal -- are suffered at the hands of such organizations. Not all of such organizations are abusive, and CenturyLink is proud of its positive relationships with cooperatives, public utility districts, and municipalities around the country. But nationwide, a surprisingly large and ever-growing percentage of cooperatives, public utility districts, and municipalities treat ILECs with impunity, especially in today's soft economy.

Rental rates with cooperatives, public utility districts, and municipalities have become increasingly problematic. Dramatic, unilateral increases in already-inflated

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[114] National Broadband Plan at 112 (noting that "the statute does not apply in states that adopt their own system of regulation and exempts poles owned by co-operatives, municipalities and non-utilities").

rental rates are commonplace. CenturyLink recognizes that these are difficult times. Electric cooperatives face pressures to offset rising energy costs by finding other revenue. Many municipalities have declining tax revenues. Nevertheless, too many of these pole owners -- and too many municipalities -- see ILECs in particular as easy targets for extracting ever-higher rentals to subsidize their operations. They know that ILECs have no choice but to use their poles and rights of way. They know that ILECs lack clear recourse to complaint procedures at the Commission.[115]

Additionally, some states have certified that they regulate pole attachments, but, however well-meaning, they have been unable or unwilling to take sufficient steps to police attachment rates, terms, and conditions. To CenturyLink's knowledge, none has yet taken the necessary steps to reduce and unify pole attachments rates in a manner consistent with the National Broadband Plan. As the National Broadband Plan suggests, the Commission should ask Congress to ensure it has authority to promote "a coherent and uniform policy for broadband access to privately owned physical infrastructure" used in The Commission should ask Congress to

The National Broadband Plan recognizes that these current statutory exemptions from Commission authority undermine broadband investment and deployment, especially in rural areas. It calls on Congress to "consider amending Section 224 of the Act to establish a harmonized access policy for all poles, ducts, conduits and rights of way." It envisions a unified federal regulatory regime under Commission authority. The Commission should engage Congress and encourage and endorse prompt statutory reform

[115] In some cases, they may be raising rental fees in order to subsidize their own competing broadband services, or to help subsidize operating losses.

to end the exemptions claimed by pole owners currently outside the Commission's authority -- notably cooperatives, public utility districts, and municipalities

CONCLUSION

CenturyLink applauds the FNPRM's tentative conclusion that there should be a unified rate for pole attachments used to offer broadband services. The Commission needs to act to ensure all providers of broadband Internet access service qualify for the same pole attachment rate cap for attachments used for broadband Internet access service. The Commission has existing statutory authority to regulate pole attachments for all providers of telecommunications services, including ILECs. It should exercise that authority to benefit competition and to promote broadband investment and deployment in rural America, where infrastructure investment is otherwise most difficult to justify. The Commission should also engage Congress and encourage and endorse prompt statutory reform to end the exemptions claimed by pole owners currently outside the Commission's authority.

The Commission does not need to issue other detailed rules governing other terms and conditions of pole attachments. The Commission has found such specific rules are unnecessary, and new rules would do little to improve conditions of pole attachments. Inevitably, such details must be addressed through negotiation and, where necessary, through the Commission's complaint process for pole attachments.

Respectfully submitted,

CENTURYLINK, INC.

By: _____

David C. Bartlett
Jeffrey S. Lanning
John E. Benedict
801 Pennsylvania Ave., NW, Suite 612
Washington, DC 20004
(202) 393-1516

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