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
Amendment of the Commission's Rules and	)	
Policies Governing Pole Attachments	)	GN Docket No. 09-51

REPLY COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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EXECUTIVE SUMMARY

The Commission's proposal to set a fixed pole attachment rate for broadband services at the higher of the marginal cost proxy or the cable rate under Section 224(d) serves the critical national policies of increasing broadband competition, deployment and adoption and does so in a manner that is true to Section 224(e) and ensures that pole owners are fully compensated for any costs caused by attaching entities. For these reasons, NCTA strongly supports the Commission's proposal.

Pole owning utilities disagree and offer lengthy rhetorical attacks. They claim that the rates produced using the current cable formula, and even the current telecom formula, do not cover their costs and effect a subsidy. But despite specific Commission invitation, the utilities fail to offer any empirical evidence, supporting studies, expert analysis or relevant cost data to support their arguments. They instead rehash discredited arguments that have been repeatedly refuted and rejected by the Commission, the courts, state regulators, and consumer advocates. As NCTA and others have demonstrated, the evidence is clear that a uniform, lower pole rate will help to accelerate broadband deployment. It will not undermine energy independence, smart grids, cyber security, or any other policies invoked by the utilities. The Commission's proposal would more than compensate utilities for the costs actually caused by attaching entities – all that is required as a legal and economic matter – and any reductions in pole attachment revenues to conform with the proposed rate would have a negligible effect on the rates charged to electric customers.

Utilities are also wrong in their claims that the Commission lacks the authority to set a just, reasonable and non-discriminatory rate under Section 224(e) at anything lower than the current level. Congress granted the Commission broad discretion under Section 224(d) and even broader discretion under Section 224(e). In fact, Congress expressly rejected an approach that

would have established rates under Section 224(e) in the same way that "fully allocated" rates are established under Section 224(d). Instead, Congress gave the Commission broad authority to determine the "cost of providing space" for purposes of Section 224(e). This classic grant of rate making discretion more than supports the Commission's reasoned decision to set rates based on accepted principles of cost causation. In addition, the Commission has authority to forbear from enforcing Section 224(e)(2) and to adopt a rate equivalent to Section 224(d) for all broadband attachments and it can continue to apply the 224(d) rate to all commingled services.

Finally, NCTA continues to support pole attachment rules that provide both cable operators and telecom carriers access to poles upon rates, terms and conditions, that are just, reasonable and non-discriminatory. As previously stated, NCTA is not opposed to extending the uniform broadband rate to ILECs by allowing them to "opt in" and accept all the terms and conditions of a cable operator's agreement including its more favorable attachment rates. Parties that wish to transition from joint ownership agreements to nondiscriminatory access could negotiate with their counterparty/joint owner to adjust rates, terms and conditions as needed for equivalency. The Commission could then serve as a forum for resolving any unresolved disputes on a case by case basis.

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The National Cable & Telecommunications Association (NCTA)[1] hereby submits these reply comments pursuant to the Further Notice of Proposed Rulemaking issued in the above-captioned proceeding.[2]

INTRODUCTION

The record in this proceeding demonstrates that setting pole attachment rates using the cost causation principles proposed by the Commission in the *Further Notice* is necessary to meet the nation's important policy objectives of ubiquitous broadband coverage, increased broadband use and adoption and robust broadband competition. Cost studies submitted by attaching entities demonstrate that not only are lower rates necessary to incent further broadband investment by providers, but also that the rate approach proposed by the Commission in the *Further Notice* will not impact electric utility ratepayers or national policy objectives involving electric utilities.

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[1] NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service after investing over $160 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 22 million customers.

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

Indeed, decades of scrutiny by the Commission and courts of the cable rate formula – the floor proposed by the Commission in the *Further Notice* – have proven it to be fully compensatory to pole owners. In its opening comments, NCTA expressed strong support for the Commission's proposal to adopt a uniform pole attachment rate for all broadband services at the higher of the rate set using the telecommunications formula (modified to remove certain capital costs not caused by attachments) or the cable rate formula. NCTA also offered an economic study of the Commission's proposed formulas for both the upper and lower bound telecom rates, confirming that the Commission's approach (1) is just and reasonable, (2) produces rates that are near the top end of the range within which the Commission could faithfully implement the Act, and (3) is in fact quite generous in including overpayments for certain operating expenses that would be excluded under even more refined cost causation and cost allocation principles.[3]

Not surprisingly, the utilities oppose the Commission's proposed rate approach and advocate for rule changes that would enable them to charge increased rates and provide them with greater discretion in their dealings with attaching entities. As has been the case in the past, the utilities' pleadings are long on rhetoric and short on meaningful analysis. Not a single utility submitted a cost study or other economic analysis in response to the Commission's invitation to do so. Instead, they largely rehash arguments previously made to, and rejected by, the Commission and the courts. For all the reasons explained in NCTA's initial comments, as well as in all our previous filings in WC Docket No. 07-245, the Commission once again should reject these arguments and proceed expeditiously to adopt the rate proposal in the *Further Notice*.

[3] In addition, NCTA presented comments in support of retaining the sign and sue rule in its present form, countering utility arguments that they should be given unfettered discretion to impose additional penalties for attachments alleged to be unauthorized, and in support of adoption of remedies to incent utility compliance with governing rules and pre-complaint resolution.

I. THE COMMISSION'S PROPOSED RATE FORMULA FOR BROADBAND SERVICES ADVANCES IMPORTANT FEDERAL POLICIES WHILE ENSURING JUST COMPENSATION TO POLE OWNERS

The Commission proposes to establish a fixed rate for broadband services at the higher of the marginal cost proxy or the cable rate.[4] Adoption of this proposal would serve critical national policies of increasing broadband competition, deployment and adoption, and would do so in a manner that is true to Section 224(e) and which ensures that pole owners are fully compensated for any costs caused by attaching entities.

A. Reasonable Pole Attachment Rates Will Promote Increased Broadband Deployment, Adoption and Competition

In 2009, Congress instructed the Commission to devise a strategy for achieving broadband affordability and maximizing broadband use to advance "consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, employee training, private sector investment, entrepreneurial activity, job creation and economic growth and other national purposes."[5] The National Broadband Plan that was developed in response to this directive establishes specific imperatives to achieve Congress' objectives.[6] Among these recommendations are a number of proposals to ensure more efficient use of poles. The Plan

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4 *Further Notice* at ¶ 141.

5 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(D), 123 Stat. 115, 516 (2009); *Connecting America: The National Broadband Plan*, GN Docket No. 09-51, at xi, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf (Omnibus Broadband Initiative, Mar. 16, 2010) (National Broadband Plan).

6 National Broadband Plan at xi – xii. As more fully described in the Broadband Plan, these imperatives are: (1) fostering broadband competition; (2) ensuring efficient allocation and use of government- owned and government-influenced assets, including spectrum and physical infrastructure such as poles, conduits, rooftops and rights of way; (3) creating incentives for universal availability and adoption of broadband; and (4) maximizing broadband use for national priorities such as health care, education, public safety and homeland security.

correctly recognizes that "[t]o support the goal of broadband deployment, rates for pole attachments should be as low and as close to uniform as possible."[7]

The Commission's proposed approach, which would establish pole attachment rates that are as low and close to uniform as possible, meets Congress' objectives and the Plan's imperatives. There is strong evidence in the record of this proceeding that low, uniform pole attachment rates will help to accelerate broadband deployment.[8] Increased deployment by competitive providers necessarily will produce more affordable options for consumers and national priority users, resulting in increased use and adoption. Indeed, consumer advocates agree that increasing attachment rates for broadband services would be "contrary to 'the nation's commitment to achieving universal broadband deployment and adoption.'"[9]

A number of electric companies suggest that pole attachment rates do not impact the cost of broadband deployment and that the Commission's proposals here are unnecessary.[10] These arguments are not credible. There is strong evidence in the record that a uniform, lower pole rate will help to accelerate broadband deployment. Although some utilities take issue with the

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7 National Broadband Plan at 110.

8 Comments of the National Cable & Telecommunications Association, WC Docket No. 07-245, GN Docket No. 09-51 at 8-9 (Aug. 16, 2010) (NCTA Comments); American Cable Association Comments, WC Docket No. 07-245, GN Docket No. 09-51 at 3 (Aug. 16, 2010) (American Cable Association Comments) ("Retention of the existing cable pole attachment rate for cable operators providing commingled services is essential, as it has been instrumental in the ability of smaller cable operators to deploy broadband facilities and offer advanced services in smaller markets and sparsely populated rural areas."); Comments of Bright House Networks, WC Docket No. 07-245, GN Docket No. 09-51 at 7, 21 (Aug. 16, 2010) (Bright House Comments); Comments of Charter Communications, Inc., WC Docket No. 07-245, GN Docket No. 09-51 at 3, 7 10 (Aug. 16, 2010) (Charter Comments); Comments of Comcast Corp., WC Docket No. 07-245, GN Docket No. 09-51 at 3-9, 11, 20 (Aug. 16, 2010) (Comcast Comments); Comments of Time Warner Cable, Inc., WC Docket No. 07-245, GN Docket No. 09-51 at 1-5 (Aug. 16, 2010) (Time Warner Comments).

9 NCTA Comments at 7 & n.17 (quoting Reply Comments of the National Association of State Utility Consumer Advocates, WC Docket No. 07-245 at 1-2, 5 (Apr. 22, 2008) (NASUCA Reply Comments)).

10 *See, e.g.*, Coalition of Concerned Utilities Comments at 118 (claiming that pole attachment leasing does not add 20% to the cost of fiber deployment); Comments of the American Public Power Association, WC Docket No. 07-245, GN Docket No. 09-51 at 4, 17 (Aug. 16, 2010) (American Public Power Association Comments); Oncor Electric Delivery Company LLC's Initial Comments, WC Docket No. 07-245, GN Docket No. 09-51 at 8-10 (Aug. 16, 2010) (Oncor Comments).

Commission's broadband priorities, even dismissing the National Broadband Plan as a "one-sided" "policy piece,"[11] the Plan's pole attachment recommendations are based on actual cost data and studies,[12] including extensive cost information demonstrating that the cost of deploying broadband networks depends significantly on the costs incurred for accessing poles, conduits and rights of way.[13] The utilities' criticisms provide no reason for the Commission to second guess the pole attachment policy recommendations in the National Broadband Plan or the proposals in the *Further Notice*.

B. The Proposed Approach Does Not Harm Electric Ratepayers or Programs

Utility commenters oppose the Commission's approach, labeling it a "colossal" subsidy.[14] They claim that the cable rate does not allow pole owners to recover their costs, and that even the current telecom rate provides a "substantial subsidy" at the expense of electric consumers.[15] They argue that lower pole rates will impair Smart Grid and other electric technology programs,[16] and that, instead of reducing rates as proposed in the *Further Notice*, pole rents should be increased for all service providers.[17] But while oft-repeated, these utility claims are unsubstantiated and demonstrably wrong.

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[11] Oncor Comments at 63.

[12] *See* National Broadband Plan Ch. 6 Endnotes.

[13] *Id.* at Endnotes 3, 11, 13, & 14.

[14] *See, e.g.*, Comments of the Coalition of Concerned Utilities, WC Docket No. 07-245, GN Docket No. 09-51 at 115 (Aug. 16, 2010) (Concerned Utilities Comments); Comments of the Alliance for Fair Pole Attachment Rules, WC Docket No. 07-245, GN Docket No. 09-51 at 78 (Aug. 16, 2010) (Alliance Comments).

[15] *See, e.g.*, Comments of the Edison Electric Institute and the Utilities Telecom Council, WC Docket No. 07-245, GN Docket No. 09-51 at 74 (Aug. 16, 2010) (EEI/UTC Comments).

[16] *See, e.g., id.* at 5-7; Comments of the National Rural Electric Cooperative Association, WC Docket No. 07-245, GN Docket No. 09-51 at 3, 12-15 (Aug. 16, 2010) (National Rural Electric Cooperative Association Comments).

[17] Coalition of Concerned Utilities Comments at 126 ("A rate higher than the Telecom rate for more than telecom services would provide a much fairer allocation of costs and eliminate subsidies for cable operators and CLECs alike."); EEI/UTC Comments at 78 ("[T]he FCC should require that each overlashing be counted an additional attachment for which the attaching entity must pay a separate, additional rate."); American Public Power

Despite specific invitation by the Commission,[18] the utilities provide absolutely no meaningful economic evidence (e.g., no cost studies or economist statements) to support these rhetorical claims. As set forth in the NCTA's opening comments, utility claims that the cable rate is a "subsidy" have been repeatedly refuted and rejected by the Commission, the courts, state regulators, and consumer advocates.[19] In contrast, these same bodies repeatedly have concluded that the cable rate – the floor under the Commission's current proposal – provides just compensation to the pole owner.[20]

The utilities' other arguments are equally unavailing. No utility offers any evidence that the pole attachment recommendations in the Plan or the Commission's proposed rate structure will undermine energy independence, smart grids, cyber security, or any other National priorities.[21] The Commission's proposal would more than compensate utilities for the costs actually caused by attaching entities.[22] The evidence in the record shows that any reductions in

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Association Comments at 17, 19, 20 ("The Commission should require all attaching entities to pay rates based on full cost recovery for pole owners. . . . APPA supports the application of a single, uniform rate formula for all attachments of the same physical type and nature irrespective of the specific service being provided by the attachments. . . . Any such rate formula must, however, be based on a fully allocated cost approach that recognizes that the common, nonusable space on a pole is of equal value to all users of the pole.").

[18] *See Further Notice* at ¶ 136 & n.371 ("To the extent that pole owners contend they do, in fact, incur significant capital costs outside the make-ready context solely to accommodate third party attachers, we seek comment on the nature and extent of these costs. . . . We . . . invite parties to submit studies that isolate and quantify the effect of third-part attachment demand on pole height and therefore pole investment."); *id.* at ¶ 138 & n.377 ("We . . . invite parties to submit studies that isolate and quantify the effect of third-party attachment demand on operating expenses.").

[19] NCTA Comments at 6 & n.16.

[20] NCTA Comments at Attachment B.

[21] Oncor claims to calculate an economic impact, but it has neither presented the actual pole revenues it currently receives, nor confronted the unanimous regulatory, economic and judicial conclusions that the cable rate, which serves as a floor to the Commission's rate approach, provides just compensation without any subsidy or adverse impact on utility rate payers. In combination with make-ready payments that by themselves cover all incremental costs of attachment, the annual rents established under the Cable Rate Formula undoubtedly place electric companies in a better position financially than if there were no attachments on their poles. *See* Oncor Comments at 64.

[22] NCTA Comments, Attachment A at ¶¶ 17, 140-41 (Report of Patricia A. Kravtin) (Kravtin Report); Comcast Comments at ¶ 36 (Declaration of Timothy S. Pecaro); Comments of the National Cable & Telecommunications

pole revenues to conform with the cable rate formula would have a negligible effect on the rates charged to electric customers.[23]

C. Regulation of Pole Attachment Rates Is As Critical As Ever

While there is no evidence that the Commission's approach to pole rates will impair utilities, the record reflects a continuing need to thwart their attempted abuses of attaching parties. Regardless of the current size and maturity of the broadband industry, an imbalance in bargaining power still exists.[24] As recognized by the Supreme Court earlier this decade, "[s]ince the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents."[25]

In the opening comments in this proceeding, the utilities themselves make the case for circumscribing monopoly abuse. In arguing that incumbent local exchange carriers ("ILECs") should not be afforded the protections of Section 224, they state:

> Because electric utilities are vitally dependent upon ILECs for access to a great number of ILEC poles, this disparity in pole attachment rights would provide the ILECs with enormous, unfair leverage. ILECs could restrict electric utility access to ILEC poles and demand that electric utilities pay outrageously high attachment rates and other fees. They could require electric utilities to set all new poles,

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Association, WC Docket No. 09-154, GN Docket No. 09-51, WC Docket No. 07-245, WC Docket No. 04-36, App. B, at ¶ 10 (Sept. 24, 2009) (Declaration of Dr. Michael D. Pelcovits) (NCTA Petition Comments).

[23] Comments of National Cable & Telecommunications Association, WC Docket No. 07-245 at 12, App. A at 1-5 (Mar. 7, 2008) (NCTA First Round Comments) (citing State Public Service Commissions and other findings addressing the reasonableness of cable pole attachment rates).

[24] *Further Notice* at ¶ 104 ("The record does not demonstrate that the potential for utilities to exert such coercive pressure in pole attachment agreement negotiations is less significant today than when the Commission first adopted the sign and sue rule.").

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

> replace ILEC poles, maintain ILEC facilities, monitor and correct ILEC safety violations . . . .[26]

The utility's own hypothetical pointedly illustrates pole attachment abuses routinely encountered by cable operators and tempered only by the protections afforded by Section 224 and the Commission's rules.[27] Ironically, therefore, the utilities themselves have made the case for how the discipline of Commission regulations can check the unrelenting efforts of utilities, as the Supreme Court has said, "to charge monopoly rents."

Pole attachment regulation has facilitated billions of dollars in investment by cable operators in broadband networks over the last three decades as well as the introduction of exciting video, voice, and data services to virtually every American home. More broadband investment promises even greater consumer benefit and thousands of additional jobs.[28] The utilities have failed to produce any counter evidence and thus, the Commission's proposed approach, with refinements suggested by NCTA in its opening comments, should be adopted.

II. UTILITY ARGUMENTS THAT THE COMMISSION'S PROPOSED RATE FORMULA FOR BROADBAND SERVICES EXCEEDS ITS DISCRETIONARY AUTHORITY UNDER SECTION 224(E) ARE WITHOUT MERIT

Utility commenters further oppose the Commission's approach on the theory that the Commission lacks the authority to set a just, reasonable and non-discriminatory rate under Section 224(e) at anything lower than the level established under the current telecommunications

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[26] Coalition of Concerned Utilities Comments at 130.

[27] Likewise, the utility's example supports the need for the Commission to retain its "sign and sue" rule. Rather than inundating the FCC with complaints, the rule has served as a bulwark against the utilities' relentless efforts to apply terms that exceed FCC bounds. That effort is evident once again in the utilities' proposal to move "contract" claims and unauthorized attachment clauses away from the FCC and into court, where they hope to be free of national policies that arrest their abuses. Repealing the sign and sue rule would only undermine the FCC's ability to effectuate the sound policy it is pursuing. The only barrier to good faith negotiation that currently exists is the utilities' relentless efforts to apply terms that exceed the bounds of FCC rules.

[28] Robert W. Crandall & Hal J. Singer, *The Economic Impact of Broadband Investment*, Broadband for America, at 2-4, 8, 10, 37-42, Feb. 23, 2010 (http://www.ncta.com/PublicationType/ExpertStudy/The-Economic-Impact-of-Broadband-Investment.aspx).

formula. But the Commission has broad discretion under Section 224(e) to adopt regulations that ensure that pole attachment rental rates are just, reasonable and non-discriminatory, regardless of the services provided over the attached facilities. In exercising this discretion, the Commission has proposed an approach that produces a uniform pole attachment rate for all broadband services, ensures that pole owners recover the true costs caused by attachments, and remains true to the unusable space allocation requirements set forth in Section 224(e). In particular, as set forth in NCTA's opening comments, the specific modifications made by the Commission to the Carrying Charge Factor of the lower bound formula (i.e., elimination of the capital costs pertaining to depreciation, taxes and return on investment) are economically sound and fully consistent with cost causation principles.[29] The resulting rate, which is the higher of the rate produced using a formula based on cost causation principles or the rate produced by the cable formula, ensures that the utility is justly compensated.

The Commission appropriately took a fresh look at what is meant by the term "cost of providing space" in Section 224(e) and reasonably concluded that such costs were not bound by the costs currently used to calculate the high end of permissible rates in Section 224(d). In their opposition to this approach, utility pole owners seek to constrain the Commission's discretion to interpret "costs," arguing that the costs in Section 224(e) must be based on the fully allocated costs used to calculate the high end of permissible rates in Section 224(d). However, nothing in the statutory language or legislative history supports these arguments and, in fact, the legislative history shows that Congress considered and rejected limiting the costs in (e) to fully allocated costs.

[29] NCTA Comments at 16.

A. The Commission Has Broad Discretion Under Section 224(e) to Adopt an Attachment Rate Based on a Reasoned Definition of the "Cost of Providing Space"

The Commission has clear authority to define "the cost of providing space" under the express language of Section 224(e).[30] As used in this provision, this phrase is a classic grant of ratemaking discretion. The Commission correctly found that "words like 'cost' give rate setting commissions broad methodological leeway" in determining a particular rate.[31] Nothing in Section 224(e) or its legislative history supports utility claims that costs must be set at the highest fully allocated cost level, as currently established under 224(d).

The utilities argue that the "cost of providing space" in Section 224(e) is limited by the Commission's decision to set rates initially under Section 224(d) at the higher end of the range of just and reasonable rates.[32] However, neither the statute nor the legislative history supports this view. The term "cost of providing space" is not used in Section 224(d), nor is it defined or limited elsewhere in the statute. Moreover, even under Section 224(d), the Commission has authority to make cost judgments differently than it does today. Congress clearly left to the Commission discretion to determine the precise costs, rates, and relationship to rights under Section 224(d).[33] The Commission has confirmed this discretion to adopt an attachment rate

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[30] By contrast, Section 224(d)(1) prescribes the categories of costs (expenses and capital costs) that comprise the maximum rate a utility may charge for cable attachments.

[31] *Further Notice* at ¶ 131 & n.352 (citing *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 500-01 (2002)).

[32] EEI/UTC Comments at 65; Coalition of Concerned Utilities Comments at 107-08.

[33] Communications Act Amendments of 1978, Sen. Rep. 95-580, P.L. 95-234, 92 Stat. 33, 97th Cong., 2d. Sess., *reprinted in* 1978 U.S.C.A.A.N. 109, 128-29 (Communications Act Amendments of 1978) ("There will remain some dispute, it is anticipated, as to whether a particular capital or expense item is 'attributable' to the pole . . . As to some of these factors the committee expects that the Commission will have to make its best estimate of some of the less readily identifiable actual capital costs. . . . In regard to the rate-setting formula set forth in S. 1547, as reported, the committee wishes to make one point very clear. The particular methodology selected in this bill is only one of many plausible approaches to assigning pole costs to a CATV system, and should not be considered to reflect the committee's judgment that allocation of pole costs according to relative use is the optimal methodology." Congress also authorized the Commission to rule on rates "judged in relation to other contract provisions.").

falling within a range of possible rates in several cases.[34] Thus it makes no sense to presume that Congress intended the Commission's exercise of its discretion under Section 224(d) to somehow restrict the exercise of its broader discretion under Section 224(e).

If anything, the legislative history demonstrates that Congress expressly rejected proposals to specifically define the costs in Section 224(e) as "fully allocated." Certain utilities resort to quoting language culled from the House Report,[35] but that Report described a bill that ultimately was rejected by Congress. The proposed House bill stated that unusable space on the pole was of equal benefit to attaching entities and owners alike,[36] but the Senate rejected that approach and its version, which charged the Commission with determining the cost of providing space, was adopted in conference.[37] Given that history, the House version cannot be resurrected to interpret the Act in a way specifically rejected by Congress.[38]

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[34] *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Second Report and Order, FCC Docket No. 78-144, Memorandum Opinion and Second Report and Order, 72 FCC 2d 59, ¶¶ 26-28 (1979) (discussing "the basis of the upper boundary" and "the lower just and reasonable rate boundary"); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CC Docket No. 86-212, Report and Order, 2 FCC Rcd 4387, ¶ 4 (1987) ("Congress grants the Commission discretion to fix the rate somewhere between the incremental costs of the utility and the cable operator's share of the utility's fully allocated costs" and "to establish a formula based on the Commission's best judgment as to how to allocate costs between the utility and the cable operator.").

[35] *See, e.g.*, Oncor Comments at 61-63 (citing H.R. Rep. 104-204, at 92 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 58-59); Florida Investor-Owned Electric Utilities Comments at 61-62; H.R. Rep. No. 104-548, 104th Cong., 1st Sess., at 207 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 221; S. Rep. No. 104-230, 104th Cong., 2d Sess., at 71 (LEXIS 1996) (Conf. Rep.) (rejecting "equal benefit" language that describes fully allocated costs from Communications Act of 1995, H.R. 1555, 104th Cong. § 105(4)(d)(1)(A)).

[36] H.R. 1555, 104th Cong. § 105(4)(d)(1)(A) ("Such regulations shall – recognize that the entire pole, duct, conduit, or right-of-way other than the usable space is of equal benefit all entities attaching to the pole and therefore apportion the cost of the space other than the usable space equally among all such attachments . . . .").

[37] The Conference Report rejected the House approach and opted instead to give more discretion to the FCC to define what is meant by "apportioning" the "cost of providing space." *See* S. Rep. No. 104-230, at 71, 139 (LEXIS 1996) (Conf. Rep.) (adopting language form the Telecommunications Competition and Deregulation Act of 1995, S. 652, 104th Cong. § 204(4)(e)(1) (June 15, 1995) that was codified at 47 U.S.C. § 224(e)(1) stating: "The Commission shall, no later than 2 years after the date of enactment of the Telecommunications Act of 1995, prescribe regulations in accordance with this subsection to govern the charges for pole attachments by telecommunications carriers. Such regulations shall ensure that utilities charge just and reasonable and non-discriminatory rates for pole attachments.").

[38] *See Cable Invest. Inc. v. Woolley*, 867 F.2d 151, 158 (3d Cir. 1989) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (internal quotations and citations omitted) ("Few principles of statutory construction are

The Commission is, therefore, well within its discretion to take a fresh look at the telecom rate formula. Its proposed approach is based on accepted economic principles of cost causation. As set forth in NCTA's opening comments and economic study, cost causation is a reasonable and appropriate approach in ratemaking to determine the "cost of providing space" on a pole for purposes of Section 224(e).[39] Part 64 of the Commission's rules provides a methodology dealing with the allocation of costs between regulated and non-regulated activities. Under Part 64, carriers are instructed to allocate costs on a direct basis whenever possible, and to allocate indirect costs (such as common costs defined as costs that cannot be directly assigned to either regulated or non-regulated activities) "based upon an indirect, cost-causative linkage to another cost category (or group of cost categories) for which a direct assignment or allocation is available."[40] Consistent with the Part 64 methodology, it is far more appropriate from a cost allocation/cost causation perspective to allocate administrative and general (i.e. overhead) expenses in proportion to direct operations expense. Such an approach better reflects the cost causation principle, because of its direct linkage to costs that "but for" pole attachments the utility or ILEC would otherwise not incur.

The utilities argue that cost causation is not an appropriate standard because the costs in 224(e) must be fully allocated.[41] But as described above, the statute does not require the Commission to interpret the "cost of providing space" to mean fully allocated costs. The 1996 Conference Report does not constrain the Commission to define "costs" in only this way.

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more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."); *Cable Ariz. Corp. v. CoxCom*, 261 F.3d 871, 875 (9th Cir. 2001); *Nat'l Pub. Radio v. FCC*, 254 F.3d 226, 231 (D.C. Cir. 2001) ("[W]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

[39] NCTA Comments at 2, 10, 13, 16-22 & Kravtin Report, Attachment A at ¶¶ 22-24, 36-37, 62-69.

[40] 47 C.F.R. § 64.901(b)(3)(i).

[41] *See, e.g.*, Alliance Comments at 90-91; EEI/UTC Comments at 65-66; Oncor Comments at 61-63.

Indeed, even the utilities believe the Commission has broad discretion to set rates since they request the Commission to amend the formula to produce even higher rental rates.[42]

Utility arguments that the Commission cannot adopt a cost causation approach for the telecom formula after years of following a fully allocated cost approach are equally unfounded.[43] Under well established principles of agency rulemaking as articulated in *Chevron*, the Commission has discretion to change its approach and adjust to changing circumstances.[44] When there is ambiguity in the statutory language, the Court will defer to a permissible interpretation of the regulatory body charged with interpreting the statute.[45] Considerable weight must be afforded to the regulatory agency's interpretation and the interpretation need not be the only permissible interpretation.[46] In this case, where the Commission has developed an approach that is based on established economic principles of cost causation, that meets Congress' assignment to ensure ubiquitous broadband, and ensures that utilities recover their costs and thus are justly compensated, its approach will withstand scrutiny.

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[42] *See, e.g.*, Coalition of Concerned Utilities Comments at 126; EEI/UTC Comments at 75-78.

[43] *See, e.g.*, Oncor Comments at 61-63; Florida Investor-Owned Electric Utilities Comments 57-64; Alliance Comments at 92-93.

[44] *Chevron USA, Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).

[45] *Id.* at 863-64 ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.").

[46] *Id.* at 843-45. In *FCC v. Fox Television Stations, Inc*., 129 S.Ct. 1800 (2009), the Supreme Court found that the Administrative Procedure Act does not impose a higher level of scrutiny for agency actions that undo or revise initial actions except in limited circumstances, including where "its prior policy has engendered serious reliance interests that must be taken into account." *FCC v. Fox Television Stations, Inc*., 129 S.Ct. at 1811. In this case, utilities have not demonstrated that such reliance interests exist. Even if they could make such a showing, the Commission, in its *Further Notice*, reasonably justifies its departure, explaining that its initial telecommunications rate formula "resulted in rate disparities and disputes over which formula applies and impacted communications service providers' investment decisions." *Further Notice* at ¶ 130. The Commission also gives important reasons for its rationale declining to pursue the approach proposed in its 2007 Notice of Proposed Rulemaking in WC Docket No. 07-245 – primarily, that the prior approach "would come at the cost of increased broadband prices and reduced incentives for deployment." *Id*. at ¶ 118. *See id*. at ¶¶ 115-118 (further explaining departure). The National Broadband Plan, cited by the Commission throughout the *Further Notice*, devotes an entire chapter to the need for lower, uniform rates for broadband attachments. *See* National Broadband Plan at Ch. 6. Accordingly, a Commission decision adopting the proposal in the *Further Notice* would be safe from reversal under the standards set forth in *Fox*.

Some utilities argue that the phase-in for rate increases in Section 224(e)(4) necessarily means that Congress intended that all rates for telecom services would be higher than for cable.[47] That position is not supported in the text or the legislative history of the 1996 amendments to Section 224, and is contradicted by the Commission's implementing regulations. That there is a phase-in for increases in Section 224(e)(4) does not lead to the conclusion that there is a statutory requirement that rates increase. It only recognizes that, depending on the formulae then in force under Sections 224(d) and (e), and the number of new attaching entities, there could be a rate increase, in which case the increase would be phased-in. The potential for no increase resulting from the new rate is evident from the Commission's implementing rule, which states that any rate decreases must be implemented immediately.[48]

After analyzing a range of rate approaches that could be within a zone of reasonableness for agency ratemaking discretion, the Commission has proposed to adopt a just, reasonable, and nondiscriminatory rate as called for by Section 224(e)(1) at the higher of the marginal cost proxy or the cable rate.[49] As set forth in the *Further Notice,* in determining whether rates are just and reasonable, courts and regulatory bodies with similar ratemaking authority will first assess whether the "regulatory scheme produces rates that fall within a zone of reasonableness."[50] The Commission's approach sets a just, reasonable and nondiscriminatory rate within the zone of ratemaking discretion that the Commission has always had under the Pole Act.[51]

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[47] Alliance Comments at 85; Coalition of Concerned Utilities Comments at 108; Florida Investor-Owned Electric Utilities Comments at 59.

[48] 47 C.F.R. § 1.1410(f).

[49] *Further Notice* at ¶ 128.

[50] *Id*. at ¶ 129.

[51] *See e.g.* S. Rep. No. 95-580, *reprinted in* 1978 U.S.C.C.A.N. at 129 ("The committee believes that the open standard of 'just and reasonable' is at the same time sufficiently precise and flexible to permit the Commission to make determinations when presented with specific contractual provisions alleged to be excessively onerous or unfair.").

B. The Commission's Approach Is More Generous to Utilities than Is Required Under Section 224

The rate resulting from the Commission's proposed approach is, in fact, more generous to pole owners than is required under Section 224. The Commission did not propose setting the rate at marginal costs, but instead would allow utilities to charge the cable rate, where that rate is higher than the marginal cost proxy. Moreover, as explained in the Kravtin Report attached to NCTA's opening comments, the Commission's proposal still would allow utilities to recover certain expenses that have nothing to do with pole attachments.[52]

Specifically, in her cost study, Ms. Kravtin commends the Commission's proposed approach for "following the principles of cost causation and economically efficient marginal cost pricing."[53] She demonstrates that the Commission's approach produces rates that are near the top end of the range within which the Commission could faithfully implement the Act. She explains further that the Commission's approach in fact remains generous to pole owners by including costs that are not caused by pole attachments. As explained by Ms. Kravtin, the carrying charge factor included in the Commission's proposal continues to "overstate[] the true economic carrying costs associated with pole attachment, by including many types of expenses that are widely acknowledged as being non-pole related or that pertain entirely to the conduct of the electric enterprise business and are not impacted by the presence of third-party attachments."[54] Accordingly, Ms. Kravtin demonstrates that justifiable refinements to the lower bound formula would reduce the carrying charges for maintenance and administrative expenses to more closely match the actual costs caused by pole attachments.

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[52] NCTA Comments at 18-21 & Kravtin Report, Attachment A at ¶¶ 13, 20-49, 55-56.

[53] Kravtin Report, Attachment A at ¶ 11.

[54] *Id*. at ¶ 27.

C. The Commission Has Ample Authority to Invoke Forbearance or Adopt the Cable Rate for Commingled Services

As set forth in NCTA's opening comments, the Commission also has authority to invoke forbearance.[55] Utilities argue that that the Commission may not forbear from enforcing Section 224(e) with the intended effect of requiring utilities to charge the 224(d) rate because the utility, and not the attacher, is the entity regulated by Section 224(e).[56] The utility position on forbearance, however, is not only inconsistent with the statute, as explained in NCTA's opening comments,[57] it is also undermined by their argument that 224(e) was intended by Congress to be a consequence that attaches to a cable operator providing telecom services.[58]

If, as the utilities argue, Section 224(e) was intended by Congress to establish rates higher than Section 224(d) for entities providing telecommunications services, then it is indeed telecommunications that are regulated by this provision. As explained in NCTA's opening comments, while the wording of subpart (e)(2) may direct the utility to apportion costs in a particular manner, these subparts are encompassed in the broader instruction in (e)(1) to the Commission "to prescribe regulations ... to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services."[59] By the utilities' own argument, Section 224(e) imposes a rate-related obligation on the telecom service provider. Accordingly, the Commission possesses broad authority to forbear from applying Section 224(e)(2) "to a telecommunications carrier or telecommunications service" because enforcement

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[55] *See* NCTA Comments at 32-37; *see also EarthLink, Inc. v. FCC*, 462 F.3d 1, 6-7 (D.C. Cir. 2006) ("[T]he FCC made clear that its forbearance analysis is 'informed' by section 706's mandate to encourage deployment of broadband services.").

[56] *See, e.g.*, Alliance Comments at 99 (authority to exercise forbearance is limited to regulations governing carriers); Florida Investor-Owned Electric Utilities Comments at 69-70 ("The entity being regulated by section 224 is the utility, not the telecommunications carrier").

[57] NCTA Comments at 32-37.

[58] *See, e.g.*, American Public Power Association Comments at 7-8; Alliance Comments at 86.

[59] 47 U.S.C. 224(e)(1); NCTA Comments at 15.

of the provision is not needed to ensure the reasonableness of rates and practices of affected telecommunications carriers or to protect consumers of such carriers, and is otherwise in the public interest.[60]

Moreover, a decision to forbear from applying Section 224(e)(2) does not mean that the utility may simply charge market rates, as some utilities insist.[61] Instead, the Commission may adopt a rule, in this proceeding, to fill the void left by forbearance. The Commission would retain authority under Sections 224(e)(1) and (e)(3) to assure just, reasonable and non-discriminatory rates consistent with the Act and the recommendations of the National Broadband Plan.[62]

The Commission also has authority to invoke "commingling" under *Gulf Power*, as Verizon and Bright House Networks ("BHN") stated in their opening comments.[63] As set forth in BHN's comments, the Commission can and should continue to apply the cable rate to services that do not qualify as telecommunications services and are offered over the same facilities as cable television services. The *Gulf Power* case held that commingled services could be assigned the cable services rate under the Commission's Section 224(b) discretionary authority to adopt just and reasonable pole attachment rates.[64] The Commission has yet to decide whether certain innovative communications services fit the statutory definition of "telecommunications service" or "information service" and consequently these may be best described as unclassified services

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[60] 47 U.S.C. § 160(a).

[61] Alliance Comments at 86.

[62] *See* NCTA Comments at 15.

[63] Comments of Verizon, WC Docket No. 07-245, GN Docket No. 09-51 at 14 (Aug. 16, 2010); Comments of Bright House Networks Comments at 5-12.

[64] *Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Order, 13 FCC Rcd 6777 (1998) (*1998 Order*), *aff'd in part, rev'd in part, Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *rev'd sub nom. National Cable & Telecommunications Ass'n v. Gulf Power*, 534 U.S. 327 (2002).

for pole attachment purposes. VoIP and other fiber-based data point-to-point businesses, including cellular backhaul, are among the services that are being commingled. The Commission's application of the cable rate to all unclassified services commingled with cable service is consistent with the Commission's longstanding treatment of these services. Sound policy reasons that led the Commission in *Heritage* and *Gulf Power* to apply the cable rate to the commingled attachment continue to apply to today's innovative services.[65]

III. NCTA SUPPORTS RULES THAT PROVIDE ACCESS TO TELECOMMUNICATIONS CARRIERS ON TERMS THAT ARE NON-DISCRIMINATORY, JUST AND REASONABLE

NCTA continues to support pole attachment rules that provide both cable operators and telecommunications carriers access to poles at rates, terms and conditions that are just, reasonable, and non-discriminatory.[66] As previously stated, NCTA is not opposed to extending the uniform broadband rate to ILECs by allowing them to "opt in" and accept all the terms and conditions of an agreement based on the uniform rate, including its more favorable attachment rates.[67] However, implementation of a non-discriminatory approach that includes ILECs necessarily depends on the specifics of the existing agreement between the ILEC and its utility joint owner. Indeed, in its opening comments, AT&T confirmed that the terms and conditions in

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[65] *Gulf Power*, 534 U.S. at 339 ("Congress' general instruction to the FCC to encourage the deployment of broadband Internet capability and, if necessary, to accelerate deployment of such capability by removing barriers to infrastructure investment. . . . underscores the reasonableness of the FCC's interpretation: Cable attachments providing commingled services come within the ambit of the Act.") (internal quotations and citations omitted); *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Electr. Co.*, 6 FCC Rcd 7099, 7105 (1991) (concluding that the FCC's action "enhances cable operators' ability to compete against utility companies in the provision of data services"), *reconsideration dismissed*, 7 FCC Rcd 4192 (1992), *aff'd sub nom. Texas Utils. Electr. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

[66] NCTA Comments at 15.

[67] Reply Comments of the National Cable & Telecommunications Association, WC Docket No. 07-245 at 22 (Apr. 22, 2008) ("Companies that choose to opt in to a particular agreement would be required to accept all the terms and conditions in the agreement . . . .").

pole attachment agreements are not equivalent to the terms and conditions in joint use agreements governing ILEC attachments.[68]

Certain utilities argue that the opt-in proposal set forth in the *Further Notice* is unfair and unreasonable.[69] To address such concerns, the Commission could implement a process for establishing nondiscriminatory access by requiring parties that wish to transition from joint ownership agreements to nondiscriminatory access to negotiate with their counterparty/joint owner to adjust rates, terms and conditions as needed for equivalency. The Commission could then serve as a forum for resolving any unresolved disputes on a case by case basis. Such an approach could be balanced by affording joint owners flexibility to design their own agreements, with recourse to the Commission complaint process as needed.

CONCLUSION

The opening comments filed by utility interests in this proceeding fail to substantiate their rhetorical claims that the Commission's proposed rate structure will create subsidies and interfere with national objectives involving electric utilities. Instead, the evidence demonstrates

[68] Comments of AT&T, WC Docket No. 07-245, GN Docket No. 09-51 at 15, 18 (Aug. 16, 2010).

[69] EEI/UTC Comments at 82-83; Coalition of Concerned Utilities Comments at 151.

that reduced rates and improved regulatory protections will spur broadband investment, and that the proposed pole rates will fully compensate utilities for the costs of pole attachments.

Respectfully submitted,

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