

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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

REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. (Qwest) submits these reply comments with respect to the Federal Communications Commission's (Commission) *Order and Further Notice of Proposed Rulemaking* in the above-captioned proceedings.¹

I. INTRODUCTION AND SUMMARY

As expected, many comments were filed in response to this *NPRM* addressing the many issues raised therein. Qwest replies briefly to address a few key issues raised in those comments as well as issues that were discussed during the Commission's September 28, 2010 workshop on pole attachments. The Commission conducted this workshop to learn from the experience and insights of state regulators that directly regulate pole attachments.

First, in regard to pole attachment rates, Qwest has generally refrained from taking a position on the establishment of a preferred pole attachment rate formula. Based on comments filed in response to the *NPRM*, Qwest now advocates that the Commission adopt a uniform pole attachment rate formula that: i) produces attachment rates no lower than those that would result

¹ *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, FCC 10-84, rel. May 20, 2010 (*NPRM*); 75 Fed. Reg. 41338 (July 15, 2010); Order, WC Docket No. 07-245, GN Docket No. 09-51, rel. Sept. 2, 2010.

from applying the current cable rate formula; ii) this formula should be applied equally to all pole owners; and iii) the rates resulting from the formula should be applied equally to all attachers. In contrast, establishing a new formula that yields rates lower than the cable rates would necessarily involve excluding legitimate capital-related costs or reducing the unusable space apportionment in the existing cable formula. Qwest opposes doing either, since such actions would not lead to a competitively neutral formula, and said actions would introduce a bias into the rate determination that would be unfairly detrimental and discriminatory to pole owners. Second, as argued by many companies in their initial comments, the Commission should extend the applicability of Section 224 of the Act to incumbent local exchange carrier (ILEC) attachers, such as Qwest. Some commenters argue that this action is unnecessary because of the favorable pole attachment arrangements available to ILEC attachers through their joint use agreements with electric utilities. But, as discussed below, Qwest's joint use agreements *do not provide* Qwest more favorable rates than the rates that would result if the Commission adopts a uniform pole attachment rate formula applicable to all pole owners based upon either the Telecom formula or the Cable formula. In order to dispel the mistaken notion that joint use agreements provide some advantage to ILEC attachers, one only needs to assess the evidence and the increasing trend of the pole attachment charges made by electric utilities. A review of this trend will show that there can be no objection to the principle that parity among competitors, whether pole owners or pole attachers, is essential. And, this essential principle of parity counsels for the extension of the applicability of Section 224 to ILEC attachers.

II. THE COMMISSION SHOULD ADOPT A COMMON RATE FORMULA THAT PRODUCES RATES NO LOWER THAN THE CABLE FORMULA.

During the Commission's September 28, 2010 workshop on pole attachments, Dr. John Harvey of the Utah Public Service Commission (Utah PSC) staff discussed the pole attachment

rulemaking proceeding in Utah that resulted in the current Utah PSC rules.² Qwest participated in this Utah pole attachment rulemaking proceeding which addressed many of the same issues that are being addressed in this *NPRM*, and, therefore, the results of the Utah proceeding provide the Commission with valuable guidance on how to address these pole attachment issues. Specifically, as a result of the proceeding, the Utah PSC adopted rules that established the pole attachment rate formula, modeled after the Commission's Cable formula. In establishing the rate formula adopted in its rules, it is apparent that the Utah PSC recognized the need to balance the interests of pole owners, who are incentivized to seek rates as high as possible, with the interests of attachers, who are incentivized to seek rates as low as possible. The rule also reflects the proposition that the Utah PSC wanted to provide pole owners a reasonable opportunity to recover the costs of its poles, with attachers paying for their portion of the costs; otherwise pole owners may lose the incentive to remain a pole owner. Based upon the various comments that were filed in the Utah PSC proceeding³ and the discussions during the various workshops, the Utah PSC adopted the Commission Cable formula as the formula that applies equally to all pole owners.

While previously not taking a position on the applicable pole attachment rate formula, Qwest has long advocated the position that the Commission should move to a single, reasonable rate for all pole attachments, including ILEC attachments. This single, reasonable rate should, as noted above, be no lower than rates resulting from the current Cable formula set forth in Section 224 of the Act. If the Commission creates or adopts a rate formula that results in rates lower than the rates the current Cable formula would produce, as suggested by some parties in their

² Utah PSC Rule R746-345 Pole Attachments: <http://www.rules.utah.gov/publicat/code/r746/r746-345.htm>. Additionally the Commission in this *NPRM* has referenced sections of the Utah PSC pole attachment rules.

³ Website link to Utah Docket No. 04-999-03: <http://www.psc.state.ut.us/utilities/electric/elecindx/2000-2005/0499903indx.html>.

comments, such a rate would preclude the pole owner's recovery of capital costs. Precluding pole owners from equitably recovering a reasonable portion of their capital costs from attachers who benefit from the use of those poles would be patently unjust and give attachers an unfair competitive advantage over pole owners as they vie for customers. This is especially true given that cable companies, competitive local exchange carriers (CLECs) and ILECs all provide broadband services in direct competition with each other.

In Section 224(b)(1), Congress requires the Commission to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable."⁴ The Commission has adopted unique rate formulas, the Cable formula and Telecom formula, both of which provide for the inclusion of capital costs⁵ and a contribution toward unusable space recovery. Eliminating recovery of any of these costs from the annual pole carrying charge would result in rate levels that would be significantly lower than those produced by either the existing Telecom or Cable formulas.⁶ Failure to incorporate capital-related costs in the attachment rate opens the door to an unwarranted subsidization among competitors and their customers.

Given the status of competition in the industry and the ever increasing difficulty in knowing or discerning how an attacher's lines are actually used, the need for, and use of, multiple rates based on type of provider or service (or a range of rates as is being proposed) is not warranted, necessary or desirable. Rather, simplification should come from the adoption of a

⁴ 47 U.S.C. § 224(b)(1).

⁵ Costs related to the utility's pole plant depreciation, rate of return on pole plant investment, and the associated taxes which are not covered in make-ready charges (*i.e.*, pole replacement or rearrangements).

⁶ Capital-related costs (ROR, depreciation & taxes) comprise a significant portion of the pole rates today (for Qwest approximately 36% to 75% of the current rates, depending on the State and the State's cost of capital component effect, are capital-related).

single rate formula for enforcing the provisions of Section 224, equally applicable to pole owners and attachers. This simplification is ripe for action now, and is one that can be easily accomplished without delving into the creation a new rate range for pole attachments.

The establishment of a single pole attachment formula and rate, *e.g.*, one that includes a contribution for capital-related costs and a common approach in defining the apportionment of unusable space on the poles, constitutes a simplistic, yet “just and reasonable” means of ensuring equitable pole attachment charges and a competitive fairness in the provision and use of pole attachments, which could also spur broadband deployment. From Qwest’s perspective, using one of the existing pole attachment rate formulas could accomplish that objective.

III. THE COMMISSION SHOULD APPLY SECTION 224 TO QWEST AS A POLE ATTACHER.

As proposed by Qwest in its comments, as well as in the comments of many other companies, the Commission should further stimulate broadband deployment by exercising its authority under Section 224(b) of the Act to justly and reasonably regulate the rates, terms and conditions for ILECs as pole attachers. As demonstrated in the attached Declaration of Dianne Costello for Qwest, Qwest owns substantially fewer poles than the electric utilities. Electric utilities are able to leverage their larger inventory of poles to exact more favorable terms under joint use agreements. In particular, Qwest’s experience is that it does not obtain rates that are more favorable than the rates that would result from a uniform rate formula based upon either the Cable formula or the Telecom formula. In short, the telecommunications world of today has evolved much differently than the one assumed in the current implementation of Section 224. It therefore no longer makes sense -- to the extent it ever did -- to treat pole attachers and pole owners differently based on who they are, and the Commission should adjust its rules to ensure that all attachers have access to pole attachments at comparable rates, terms and conditions. It

can accomplish this by adopting the Telecom or Cable formulas as the uniform rate formula applicable to all pole owners with the rates that result from the formula applying equally to all attachers.

Because Qwest owns or jointly owns fewer poles than the non-owned poles to which it attaches, and it currently does not get the benefit of Section 224, Qwest is already at a significant disadvantage in negotiating as a pole attacher. In the *NPRM*, the Commission suggests that such disadvantages may not be a problem, because the ILECs' joint use agreements with electric companies "historically provide more favorable terms and conditions to attaching incumbent LECs than competitive LECs and cable operators receive from electric companies under license agreements."⁷ However, that has not been the experience in Qwest's ILEC region, based upon a review of Qwest's joint use agreements in the ten in-region states where poles remain subject to the jurisdiction of the Commission. Of the more than one million poles subject to those agreements, electric utilities own 62% of the joint use poles, while Qwest owns only 38% of those poles. In other words, the electric utilities own almost twice as many poles subject to the joint use agreements than does Qwest.⁸ Given this disparity, Qwest is experiencing increased pressure from electric utilities that have significantly raised their pole attachment rates. Therefore, even if Qwest is able to match the rates established by the power companies in charging the power companies for their attachments on Qwest poles, Qwest would still be at a financial disadvantage because it owns significantly fewer poles than the power companies.

Thus, at least for Qwest, the perceived advantages enjoyed by ILECs under joint use agreements are no longer a reality. Because Section 224 is not currently applied to Qwest as an ILEC attacher, and because the balance of pole ownership now significantly favors the electric

⁷ *NPRM* ¶ 145 (citation omitted).

⁸ Declaration of Dianne Costello ¶ 3.

utilities, Qwest ends up paying a premium for attaching to a significant number of poles owned by electric utilities in the conduct of its business. As a result, Qwest is often forced to pay pole attachment rates that are higher than what it would pay if the Commission were to adopt a uniform rate formula consistent with either the Cable formula or the Telecom formula. If the Commission were to adopt a rate formula and make it only applicable to non-ILEC broadband providers, this would place an ILEC like Qwest at a competitive disadvantage and dampens its incentive and ability to deploy broadband. Extending Section 224(b) to ILECs as an attacher would thus ensure that ILECs pay comparable attachment rates as their competitors and further the Commission's broadband objectives.

Respectfully submitted,

QWEST COMMUNICATIONS
INTERNATIONAL INC.

By: /s/ Tana K. Simard-Pacheco
Craig J. Brown
Tana K. Simard-Pacheco
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6654
craig.brown@qwest.com
tana.simard@qwest.com

Its Attorneys

October 4, 2010

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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

DECLARATION OF DIANNE COSTELLO

1. My name is Dianne Costello. My business address is 700 W. Mineral Ave., Nm M3013, Denver, Colorado 80120. I am employed by Qwest Corporation (Qwest) as a Supervisor, General Accounting for Joint Use Poles in the Finance Organization. In that capacity, I am responsible for various functions related to joint use agreements, poles attachment rent expense, rent revenue, contract negotiations and joint use relationships with pole owners and pole attachers. I have worked for Qwest and its predecessors for fifteen years. I have spent four years working with pole attachment issues.

2. Qwest recently performed an analysis of joint use pole agreements in ten of its fourteen states. The ten states include: Arizona, Colorado, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Dakota and Wyoming which are subject to the jurisdiction of the FCC in regard to pole attachments. The other four in-region states excluded from the analysis are Idaho, Oregon, Utah and Washington. In those states the respective state commissions have exercised jurisdiction over pole attachments.

3. The following summarizes the results of that review: Of the more than one million poles encompassed in the Qwest and electric utilities' joint use agreements, the electric utilities own 62% of the poles, while Qwest only owns 38%. In other words, the electric utilities own close to twice as many of the poles covered by the joint use agreements than does Qwest. This disparity undermines Qwest's general ability to negotiate attachment rates that

would be more favorable than the rates that Qwest believes would result if the Telecom formula or the Cable formula became the uniform rate formula applicable to all pole owners and if the rates derived from the uniform rate formula applied equally to all attachers pursuant to Section 224.

4. Moreover, based on my experience, Qwest is encountering an increase in the number and the magnitude of year over year pole attachment rate increases effected by electric utilities. For example, one electric utility with whom Qwest has a joint use agreement recently applied a per pole attachment rent increase of 337% in 2009, followed by a subsequent increase of 37% in 2010. In fact, Qwest believes that in many cases it is now seeing rate increases from power companies that cause the rates to be significantly higher than the rates that would result from use of the Telecom formula or the Cable formula as the uniform rate formula applicable to all attachers.

I hereby declare that the foregoing is true and correct to the best of my knowledge,
information, and belief.


Dianne Costello

Executed on October 4, 2010

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY**
COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC. to be: 1) filed
with the FCC via its Electronic Comment Filing System in WC Docket No. 07-245 and GN
Docket No. 09-51; 2) served via e-mail on the Competition Policy Division, Wireline
Competition Bureau at cpdcopies@fcc.gov; and 3) served via e-mail on the FCC's duplicating
contractor, Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/ Richard Grozier

October 4, 2010