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November 8, 2010

Ms. Marlene Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Implementation of Section 224 of the Act, WC Docket No. 07-245; A National
Broadband Plan for Our Future, GN Docket No. 09-51

Legislative History of Section 224(e)

EX PARTE LETTER

Dear Ms. Dortch:

In the FNPRM, the Commission proposed to reinterpret the section 224(e) telecom rate by excluding capital costs and taxes from the meaning of “cost.” The Florida IOUs explained in their August 2010 comments (1) that the plain language of Section 224 does not support this interpretation, (2) that this interpretation is contrary to established ratemaking principles, and (3) that the legislative history of Section 224(e) prohibits the Commission’s proposed reinterpretation.¹

The Florida IOUs’ citation to section 224(e)’s legislative history generated several reply comments from attaching entities, including allegations from Bright House Networks that the Florida IOUs were presenting “a shocking misrepresentation of the legislative history.”² Because this issue is critical to the Commission’s proposed reinterpretation of the telecom rate, the Florida IOUs submit this *ex parte* letter to further aid the Commission in its consideration of section 224(e)’s legislative history.

I. The “Cost” at Issue in Section 224(e) is the “Cost of Providing Space.”

The Commission proposes to reinterpret the telecom rate based on its finding that the term “cost” in section 224(e) is ambiguous.³ The term “cost,” though, is not used in a vacuum. In the context of Section 224(e), it is used as “the cost of providing” either “space other than

¹ Florida IOU Comments, at pp. 61-64.

² Bright House Reply Comments, at p. 8.

³ FNPRM, FCC 10-84 (May 20, 2010), ¶ 131 (“We agree with commenters that the Commission has discretion to reinterpret the ambiguous term ‘cost’ in section 224(e) and modify the cost methodology underlying the telecom rate formula to yield a different rate.”).

usable space” or “usable space.” The meaning Congress intended for the term “cost” confines the Commission’s interpretation of the term and therefore the Commission’s authority to reinterpret the telecom rate.⁴ The Commission’s exercise of discretion must fall within the bounds established by Congress. The legislative history confirms what Section 224’s plain language states—that the telecom rate must be based on a “beneficiary” rather than a cost-causation, methodology and that “cost” must be derived from the *pole* rather than the incremental cost of attachments.

The Florida IOUs’ August 2010 comments quoted a discussion contained in the Conference Report for the purposes of illustrating that section 224(e) “cost” was based on a beneficiary model.⁵ On reply, Comcast and NCTA argued that the various versions of section 224(e) did not support the Florida IOUs’ point. Though the Florida IOUs appreciate the manner in which Comcast and NCTA presented their arguments, those arguments ultimately fail.⁶ Bright House on the other hand, apparently either afraid of a substantive analysis or unwilling to expend the energy necessary to complete one, instead resorted to unsupported bluster and accusations against the Florida IOUs.⁷ Setting aside its hyperbole, Bright House’s main point was that the portion of the Conference Report quoted by the Florida IOUs was contained in a section discussing a prior House version of Section 224(e), not the Senate version with modifications that was ultimately accepted. This point does nothing to diminish the impact of the legislative history.⁸

Contrary to what Bright House would have the Commission believe, the portion of the Conference Report cited by the Florida IOUs is neither misleading nor unpersuasive. More importantly, the legislative history *as a whole* confirms the point that the Florida IOUs were making - the term “cost” as used in section 224(e) requires full allocation on a beneficiary basis. Additionally, and contrary to Bright House’s heated rhetoric, the Florida IOUs were not the first to conclude that section 224(e) required fully allocated costs. The Commission reached this conclusion on its own as early as August 1996:

The 1996 Act also created a distinction between pole attachments used by cable operators solely to provide cable service and pole attachments used by cable operators or by any telecommunication carrier to provide any telecommunications service. The Act prescribed a new methodology for determining pole attachment

⁴ Florida IOU Comments, at pp. 62-63 (discussing extensively Congress’ use of the terms “space” and “pole” to modify “cost,” and quoting the portion of the Conference Report discussing the House version of the bill to explain the meaning attributed to these terms).

⁵ Florida IOU Comments, at p. 63.

⁶ See, e.g., Comcast Reply Comments, at pp. 8-12; NCTA Reply Comments, at pp. 11-14.

⁷ See Bright House Reply Comments, at pp. 8-9.

⁸ Bright House was never confused by the Florida IOU’s quotation; it had already cited the *same* Conference Report in its initial Comments. See Bright House Comments, at pp. 18-19. Bright House also ignores the obvious, which is that the Florida IOUs block quoted the entire discussion (including the portion that clearly shows the quote was referring to a prior version of the bill – the reference to an equal allocation of unusable space costs as opposed to the 2/3 allocation in the final section 224(e)). See Florida IOU Comments, at p. 63. To the extent that the *form* of the citation actually caused any confusion, it was unintentional.

rates for the latter group. *The new formulas will require that, in addition to paying their share of a pole's usable space, these telecommunications service providers also must pay their share of the fully allocated costs associated with the unusable space of the pole, duct, conduit, or right-of-way.* In order to implement these new formulas, Congress directed the Commission to issue new pole attachment formulas within two years of the effective date of the 1996 Act.⁹

The reference to “formulas” in the italicized sentence above is unmistakably a reference to the *statute itself*. Otherwise, the last sentence of the block quote above would be meaningless.

II. The Discussion of “Cost” in the Proposed House Version of Section 224(e) is an Important Aid in Determining Congress’ Intent.

Bright House, Comcast, and NCTA attack the Florida IOUs’ arguments because the cited legislative history was within a discussion of an amendment that was not ultimately adopted. But this does not mean the discussion is irrelevant:

Generally, the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment. However, such rejection may occur *because the bill already includes those provisions*. Other interpretive aids may indicate that this is the case.¹⁰

Importantly, *every* version of section 224(e) including the versions existing at the time of the Conference Report cited by the Florida IOUs—used the term “space” to modify “cost” and included unusable space in the formula.¹¹ There is nothing in the legislative history that suggests the Conference Committee saw any distinction between the meaning of the word “cost” in the House version, the Senate version, or the final version of section 224(e).¹² Further, the Senate version was not part and parcel of the final version of section 224(e); the formula was significantly modified to produce a result much more like the original House version.¹³

⁹ *In re Implementation of Section 703 of the Telecommunications Act of 1996*, FCC 96-327, CS Docket No. 96-166 (Aug. 6, 1996), ¶ 6 (emphasis added).

¹⁰ Southerland Statutory Construction 48:18 (emphasis added).

¹¹ See Sen. Rep. No. 104-23 (Mar. 30, 1995); House Rep. 104-204 (July 24, 1995); House Amendment to S. 652, 141 Cong. Rec. H9989 (October 12, 1995); 142 Cong. Rec. H1080 (daily ed. Jan. 31, 1996).

¹² Contrary to Bright House’s bald assertion, there is no evidence that the House’s interpretation of “cost” was rejected; one would be hard pressed to reach that conclusion because the “cost” terminology remained substantively unchanged through every version of the bill.

¹³ Comcast states that a comparison of the House and Senate versions of the bill shows “the Senate had a very different and more flexible view - one designed to preserve Commission discretion to fashion appropriate rates.” Comcast Reply Comments, at 8. Both versions included substantively similar “cost” language. (The House version included “cost of the space other than the usable space” and “cost of the usable space,” and the Senate version referred to the “cost of space” and the “cost of providing space”. See House Rep. 104-204, at p. 87; S. 652, 142 Cong. Rec. H1080 (daily ed. Jan. 31, 1996)). Comcast does not explain how the Senate version showed greater “flexibility,”

III. Congress Intended Section 224(e) to be a Beneficiary-Based Methodology, Rather than Cost-Causation Methodology.

A main point in the Florida IOUs' August 2010 comments regarding the Commission's proposed reinterpretation of the telecom rate was that section 224(e) is a beneficiary-based cost methodology.¹⁴ Congress intended the formula to be based on who was *benefiting* from the pole, not based on who *caused* the incremental cost of attachment. The portion of the Conference Report discussing the House's version confirms this point. But even setting aside that particular discussion, the entirety of the legislative history shows that Congress defined section 224(e) on a beneficiary basis. The text of the prior versions (Senate and House) show that the apportionment of costs was designed to "recognize" the "benefit" of the pole. The Conference agreement portion of the very Conference Report that has been the focus of the attaching entities' reply comments states: "Such rate shall be based upon the number of attaching entities."¹⁵

The legislative history shows that the various versions of the bill embodied a variety of positions on which entities benefit, and how much they benefit. But all versions focused on the beneficiary-based approach. Take, for example, the early Senate version of section 224(e) contained a two-step process for apportioning the cost of unusable space, requiring the Commission to:

recognize that the entire pole...other than the usable space is of equal benefit to all attachments of entities that hold an ownership interest in the pole...and therefore apportion the cost of the space other than the usable space equally among all such attachments; and (B) shall recognize that an entity that obtains an attachment through a license or other similar arrangement benefits from the entire pole...other than the usable space and therefore apportion to such entity a portion of the cost of the space other than the usable space in the same manner as the cost of usable space is apportioned to such entity."¹⁶

If "cost" included only those costs directly attributable to attachers, then what "cost" was the Senate equally apportioning amongst the pole owners?

Further jockeying over which entities benefit and how much they benefit continued through each version of section 224(e). There was no debate, on the other hand, over the meaning of "cost."¹⁷ Further, the early legislative history indicates that the general understanding

¹⁴ Florida IOU Comments, pp. 61-62.

¹⁵ Sen. Rep. 104-230, at 207.

¹⁶ Sen. Rep. No. 104-23, at 87.

¹⁷ Bright House seems to understand this distinction itself where it states: "Congress could have determined that the apportionment factor was a different coefficient -- one-half or three-fourths -- but it directed it to be two-thirds. Usable space, in contrast, is apportioned according to the percentage of usable space required for each entity." Bright House Reply Comments, at p. 7. In other words, the versions may contain a different apportionment of costs,

of “costs” included both capital and O&M costs, and the disagreement was over *apportionment* of those “costs.”¹⁸ Thus, the apportionment factor ultimately chosen (two-thirds) represented a compromise on how much of these total “costs” the utility would be able to recover. No such compromise was ever needed on the meaning of “cost” because it was clear from the earliest drafts.

Comcast argues that the “cost of space” from the House version is different from the “cost of providing space” in the Senate and final versions of section 224(e).¹⁹ This argument ignores important history. First, “cost of space” was present in early Senate versions of the formula as well.²⁰ Second, the last Senate version (the first to employ the term “providing”) said the utility should apportion “the cost of *providing* space on a pole” by adding together two-thirds “the costs of providing space” other than the usable space and “the costs of space” multiplied by the percentage of usable space required by each entity.²¹ Thus:

$$\begin{array}{r} \frac{2}{3} \times (\text{Cost of Providing Space}) \\ + \\ \% \text{ usable space} \times \text{Cost of Space} \\ \hline \text{Cost of Providing Space} \end{array}$$

If “cost of providing space” meant something different than “cost of space,” basic math demonstrates that the “cost of providing space” would have been the *more* inclusive term, because it encompassed the “cost of space” in addition to whatever additional “cost of providing space” included.

The Conference agreement supports the very point about the connectivity between “space” and “cost” that the Florida IOUs have been making all along (and rejects the analysis offered by Comcast and other attachers): “New subsection 224(e)(2) establishes a new rate formula charged to telecommunications carriers *for the non-usable space of each pole.*”²² This statement, in the context of the detailed development of the cost language outlined above, shuts the door on attachers’ arguments that somehow “cost of providing space on a pole” was intended

but that apportionment is separate from the meaning of “cost.” The same “cost” is apportioned two different ways depending on whether the space is usable or unusable. The Florida IOUs’ point is that, regardless of the difference of opinion between the House and Senate (and the ultimate decision) on apportionment, the meaning of “cost” remained unchanged throughout.

¹⁸ S. Rep. 104-23, at 69 (“The utilities and the telephone companies continue to express concern that the revised formula will not compensate them adequately for their *costs of building and maintaining the poles.*”) (Statement of Senator Hollings) (emphasis added).

¹⁹ Comcast Comments, at pp. 10-11.

²⁰ See S. Rep. 104-23, at 72 (“cost of the space”).

²¹ S. 652, at 83 (142 Cong. Rec. H1080 (daily ed. Jan. 31, 1996)) (emphasis added).

²² S. Rep. 104-230, at 207 (emphasis added).

to give the Commission discretion to limit costs to only those attributable to attachments. The “costs” allocated (as the plain language of the statute indicates) are for the pole, not for the incremental cost of attachments.

IV. Comcast’s Argument Regarding the Deletion of the Language from a Bill Cuts Both Ways.

Comcast argues that the deletion of particular language that was present in earlier drafts indicates that Congress did not intend costs be “fully allocated.”²³ For the reasons explained above, although there were slight modifications in the language used, the ultimate meaning remained the same. The attachers’ arguments in this respect cut both ways, though. As Comcast points out, an early version of the bill apportioned costs of non-usable space among only “entities that hold an ownership interest in the pole.”²⁴ The ultimate rejection of this language, according to Comcast’s own arguments, is that such a limitation does not exist. And if such a limitation does not exist, it is because Congress recognized that all attachers benefit from the unusable space and must share its costs fully and on an equal basis (although statutorily limited to two-thirds of that equal share).

Similarly, the original version of Section 224 produced by the Senate Committee in fact included only one revised rate, applicable to “pole attachments provided to all telecommunications carriers and cable operators,”²⁵ and Senator Hollings described the purpose as “to ensure that all users pay the same amount.”²⁶ This single-rate provision was not, of course, included in Section 224 as enacted; in fact, Section 224 contains separate provisions for cable and telecom rates. Referencing the final version of Section 224 agreed-upon in conference, the Senate record makes clear that a higher telecom rate was neither accidental nor optional: “Cable companies may continue to pay the same rate as long as they provide only cable service; once cable companies start to provide telephone service, a higher rate will phase in over ten years.”²⁷ Given this history, and in light of Comcast’s argument, the Commission cannot manufacture a telecom rate equivalent to the cable rate.

V. Conclusion

The Florida IOUs hope this *ex parte* letter clarifies the legislative history of section 224(e). A complete review of the legislative history shows that the meaning of “cost” in section 224(e) always included fully allocated pole costs—not attachment costs—and that there was never any disagreement between the various versions of the bill on that point. The legislative history further shows that beneficiary-based methodology, not cost-causation methodology, was Congress’ intent.

²³ Comcast Reply Comments, at p. 11.

²⁴ Comcast Reply Comments, at p. 9.

²⁵ S. Rep. 104-23, at 87.

²⁶ *Id.* at 69.

²⁷ Under the heading “Telecommunications Bill Resolved Issues,” this was the resolution provided for “pole attachments”. 142 Cong. Rec. S689 (Feb. 1, 1996) (Unanimous-Consent Agreement).

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The Florida IOUs encourage the Commission to abandon its proposed reinterpretation of the telecom rate because it is contrary not only to the plain language of the statute but also to Congress' intent as shown by the legislative history.

Sincerely,

A handwritten signature in black ink, appearing to read "E. Langley", written in a cursive style.

Eric B. Langley

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