March 18, 2011

**EX PARTE**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Portals II, Room TW-A325
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

Dear Ms. Dortch:

This is to inform you that on March 17, 2011, Walter B. McCormick, Jr., Jonathan Banks and Glenn Reynolds of USTelecom met with Commissioner Robert M. McDowell and his Legal Advisor Christine Kurth, in connection with the proceedings identified above.

USTelecom emphasized that by far the most important step the Commission could take in this proceeding to facilitate broadband deployment would be to implement the recommendation of the National Broadband Plan to ensure that pole attachments rates for all attachers, including ILECs, are "as low and close to uniform as possible."[1] Indeed, ensuring that ILECs are afforded the same protections of just and reasonable rates, terms, and conditions under Section 224(b) of the Act as are its broadband competitors is the only policy objective the Commission could implement in this proceeding to significantly improve the economics of rural broadband deployment. Failure to do so would not only be affirmatively harmful to continued rural broadband deployment, but would also impose unnecessary costs on the Commission's proposed Connect America Fund and leave rural America paying broadband costs that are *unnecessarily* higher than in urban and suburban areas of the country. Indeed, an increased disparity between the pole attachment rates paid by cable and CLEC attachers, and those paid by ILECs, will simply serve to accentuate the differences in broadband accessibility in rural area when compared to urban/suburban areas.

It is for precisely these reasons that the National Broadband Plan recommended that the Commission "establish rental rates for pole attachments that are as low and close to uniform as possible…to promote broadband deployment." In particular, USTelecom highlighted the Commission's finding in the National Broadband Plan that rate disparity in pole attachments is particularly acute in rural areas where there are fewer homes per mile of plant. The National Broadband Plan concluded that if lower cable rates were applied to attachers, the typical monthly

[1] National Broadband Plan, Recommendation 6.1, p. 110.

price of broadband for some rural consumers "could fall materially."[2] The Commission should not fail to implement the recommendations of the National Broadband Plan here and thereby miss one of its best opportunities to increase broadband availability to all Americans.

USTelecom also addressed some of the points raised in its prior advocacy in this proceeding. In particular, USTelecom noted that the Commission has a statutory obligation to ensure just and reasonable pole attachment rates, terms and conditions for all attachers, including Incumbent Local Exchange Carriers.[3] USTelecom also dismissed erroneous assertions from the utility industry regarding the full scope of the Commission's authority and appropriate statutory interpretation.[4]

Please let me know if you have any questions.

Sincerely,

Glenn T. Reynolds

Attachment

cc: Robert M. McDowell
Christine Kurth

[2] National Broadband Plan, p. 110.
[3] *See e.g.*, USTelecom Comments, WC Docket No. 07-245, pp. 16 – 18 (Aug. 16, 2010).
[4] *See*, USTelecom Ex Parte, WC Docket No. 07-245 (Feb. 16, 2011).

# FCC Pole Attachment Proceeding

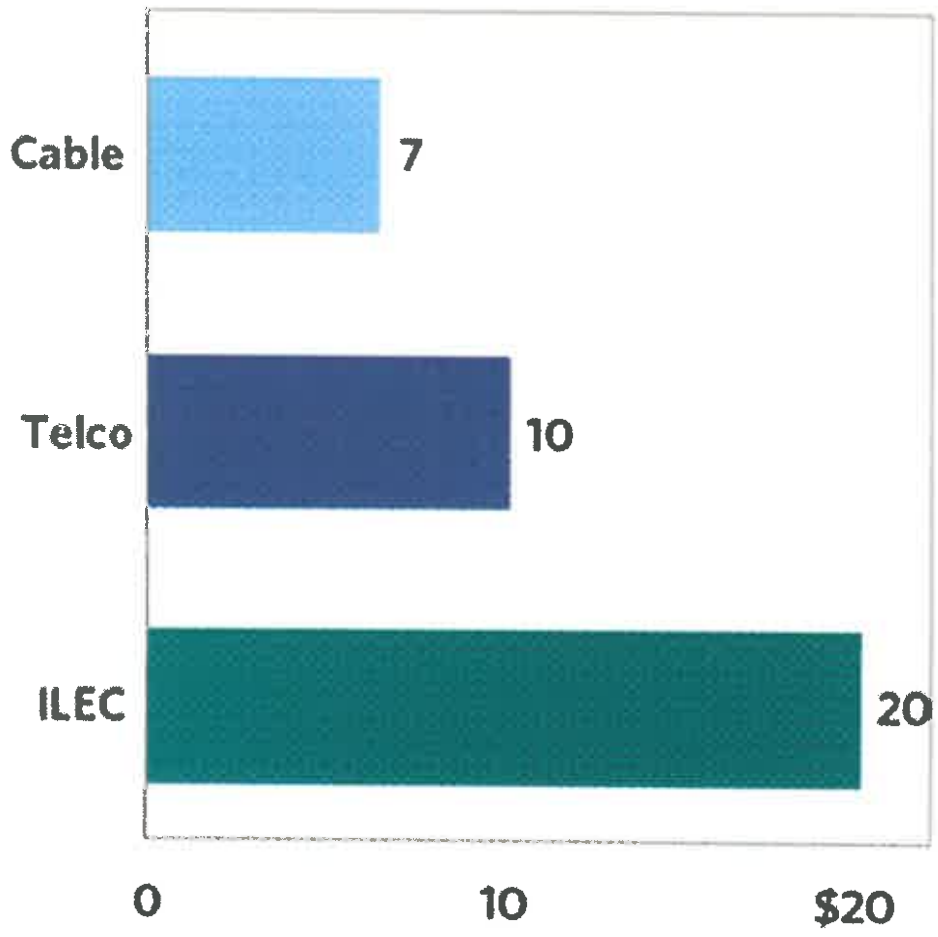
WC Dkt 07-245

**USTelecom**

March 2011

**Average pole attachment rates**

Dollars per foot of pole space per year



# National Broadband Plan
# Findings & Recommendations

- "Collectively, the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20% of the cost of fiber optic deployment."
- "Applying different rates based on whether the attacher is classified as a "cable" or "telecommunications" company distorts attachers' deployment decisions. *This is especially true with regard to integrated, voice, video, and data networks*."
- "The impact of these rates can be particularly acute in rural areas, where there are often more poles per mile than households."

--*National Broadband Plan,* Section 6.1.

# National Broadband Plan
# Findings & Recommendations

- "In a rural area with 15 households per linear mile, data suggest that the cost of pole attachments to serve a broadband customer can range from $4.54 per month per household passed(if cable rates are used) to $12.96 (if ILEC rates are used)."

- Reducing the average attachment rates paid by ILECs to that paid by cable companies *"could have the added effect of generating an increase – possibly a significant increase – in rural broadband adoption."*

➢ ***"To support the goal of broadband deployment, rates for pole attachments should be as low and as close to uniform as possible."***

-- *National Broadband Plan*, Section 6.1

# Section 224(b)

(1) Subject to the provisions of subsection (c) of this section, the Commission **shall regulate** the rates terms and conditions for pole attachments [*defined as "any attachment by a cable television system or* ***provider of telecommunications service"***] 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…

(2) The Commission **shall prescribe** by rule regulations to carry out the provisions of this section.

# Section 224

(a)(4) The term "pole attachment" means any attachment by a cable television system or **provider of telecommunications service**...

(a)(5) For purposes of this section, the term "**telecommunications carrier**"...does not include any incumbent local exchange carrier...

# "Provider of telecommunications service" and "telecommunications carrier" have distinct meanings in the '96 Act

- Electric Utilities assert that the two terms are "interchangeable" but they are used distinctly throughout the '96 Act.
- § 256(b)(1) directs the FCC to establish rules for "network planning by **telecommunications carriers *and other providers of telecommunications service*...**"
- § 10 requires the Commission to forbear from applying regulations "to a telecommunications carrier" and shall consider whether forbearance "will enhance competition among providers of telecommunications service."
- Other examples include §§ 11, 251, 254, 255, and 257.

# Nor Are §224(b) and §224(f) "Inseverable"

- §224(b) is a broad mandate to ensure that "***rates, terms, and conditions* are just and reasonable**"
- §224(f) requires that utility pole owners provide "**nondiscriminatory *access***"
- §224(c) underscores that the statutory scheme views these as separate and distinct by removing Commission "jurisdiction with respect to *rates, terms, and conditions,* ***or*** *access* to poles" where States have certified their intent to regulate.
- The Commission has found that §224(f) ensures that pole owners allow "the same pole attachment ***techniques***" used by the owner, such as boxing and bracketing. *See, May 10 Order*

# Sections 224(d) and (e) "work no limitation on" the scope of §224(b)– *Gulf Power*

- The Electric Utilities argument would make §224(b) completely superfluous.
- Instead, §224(b) is intended to be the safety net provision to ensure just and reasonable rates terms and conditions for attachments outside the specific provisions of subsections (d) and (e), including:
  - Attachments by cable companies of facilities providing services other than cable television, and thus falling outside §224(d), as previously established by the FCC and upheld by the S.Ct. in the *Gulf Power* decision.
  - Attachments by telecommunications carriers other than for the provision of telecommunications services, such as for broadband, and thus falling outside §224(e).
  - Attachments by providers of telecommunications services that are neither cable companies nor telecom carriers as defined in the statute—which, here, includes ILECs.