HUNTON & WILLIAMS

HUNTON & WILLIAMS LLP
1900 K STREET, N.W.
WASHINGTON, D.C. 20006-1109

TEL 202 • 955 • 1500
FAX 202 • 778 • 2201

SEAN B. CUNNINGHAM
DIRECT DIAL: 202-778-2225
EMAIL: scunningham@hunton.com

March 31, 2011

ELECTRONIC SUBMISSION

The Honorable Julius Genachowski
Chairman, Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Notice of Written Ex Parte Communication: Seven Unintended Consequences of Creating a Regulated Rate for ILEC Attachments Are Inconsistent With the FCC's Own Policy Goals in This Proceeding
WC Docket No. 07-245 ("Pole Attachment Proceeding")
GN Docket No. 09-51 ("National Broadband Plan")

Dear Chairman Genachowski:

On behalf of the Alliance for Fair Pole Attachment Rules (the "Alliance"),[1] we write urgently to express our concern that the draft pole attachment order purportedly includes a radical rule change that was never clearly proposed in the record of this proceeding, is contrary to the plain language of the Communications Act, would harm broadband competition, and would result in a several-hundred-million-dollar windfall for ILECs at the expense of electric consumers.

The trade press and other sources are abuzz with reports that the Federal Communications Commission ("FCC" or "Commission") is considering new rules to create a right to regulated rates for ILEC attachments on electric utility poles and that such rate would be equivalent to the "low-end telecom rate" proposed for CLECs and cable broadband providers.[2]

---

[1] The Alliance is comprised of American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services, Inc., Florida Power & Light Company, Progress Energy, and Southern Company.

[2] *See, e.g.*, Lynn Stanton, *FCC Looks to Telcos to Return Pole Attachment Savings to Consumers*, TRDAILY, Mar. 23, 2011, at 5-6; Paul Kirby & Ted Gotsch, *FCC Plans to Consider Roaming Pole Attachment, Booster Items April 7*, TRDAILY, Mar. 17, 2011, at 1-4; *see also*

These reports contradict the Commission's statement in its Further Notice of Proposed Rulemaking ("FNPRM")[3] in this proceeding that it "do[es] not propose specific rules in this Further Notice that would alter the Commission's current approach to the regulation of pole attachments by incumbent LECs."[4] The Commission's "current approach" to the regulation of ILEC attachments is not to regulate them at all. The Commission's only publicly noticed proposal to create a regulated rate for ILECs (the November 20, 2007 Notice of Proposed Rulemaking's ("NPRM")[5] uniform rate proposal) was summarily abandoned by the FNPRM.[6]

These reports also contradict the Commission's discussions in the record of what a rate for ILECs *could* be *if* the Commission had any authority to create such a rate. As the attached analysis explains, the Commission has never suggested it would (or could) give a cable-rate equivalent to the ILECs and, in fact, has discussed various proposals only for a rate substantially higher than the cable rate.

Of course it would be procedurally improper for the Commission to issue a final rule on a matter that would have a major impact on the public interest without giving prior public notice of such change. We urge you to investigate this matter prior to the Commission's April 7 meeting and to remove any proposed rule change that would run afoul of this basic principle of procedural fairness.

In the event that such rumors are true, we would be obliged to inform the Commission of the consequences that would likely follow from such a decision. Specifically, if the Commission were to create a right to regulated rates for ILEC attachments on electric utility poles in this proceeding, seven consequences could result:

1. Until overturned in federal court (see # 7), the rule would result in a massive transfer of wealth—estimates range from several hundred million to a half billion or more dollars *per year*—from electricity consumers to ILECs.

2. States that do not wish to see their electricity consumers fleeced for the benefit of ILECs will exercise their reverse preemption right under section 224(c), leaving the FCC with no pole attachment authority at all in those States.

Rebecca Arbogast & David Kaut, *FCC Eyes Pole-Attachment Order That Could Ease Telco Burdens; Utilities Opposed*, STIFEL NICOLAUS, Mar. 17, 2011.

[3] *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 09-51, Order and Further Notice of Proposed Rulemaking, FCC 10-84 (2010) (hereinafter FNPRM).

[4] *Id.* at para. 143 .

[5] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245; RM-11293; RM-11303, Notice of Proposed Rulemaking, 22 FCC Rcd 20195, 20198-99 (2007) (hereinafter NPRM).

[6] FNPRM, *supra* note 2, at para. 118 ("We decline to pursue the approach proposed by the *Pole Attachment Notice* . . . .").

3. The victory for ILECs could prove to be pyrrhic because ILECs—who admit they have no statutory right of access—may be denied access to electric utility poles for new attachments, rendering the rule useless for its intended purpose of promoting incremental broadband build-out in rural areas.

4. Broadband competition will be skewed because, in addition to achieving "parity" with their Cable and CLEC competitors, ILECs will achieve the additional competitive advantage of being able to charge electric utilities a far higher (unregulated) rate for electric attachments on ILEC poles.

5. The ILECs' ability to charge a natural monopoly rent for electric attachments on ILEC poles would also virtually guarantee that the low-end telecom rate for ILEC attachments would, in effect, be well below the "zone of reasonableness" for just and reasonable pole attachment rates and thereby result in an unconstitutional confiscation of electric utility property in violation of the U.S. Constitution.

6. To the extent the new low-end regulated rate would have any positive impact on broadband deployment and end-user broadband prices, it would constitute an untargeted, implicit subsidy in direct violation of section 254 of the Communications Act.

7. After lengthy and resource-intensive litigation, the rule would likely be overturned in federal court because it is contrary to the plain language of the statute and an arbitrary and capricious reversal of 15 years of clear Commission precedent.[7]

One consequence will result: the stated policy goals of the National Broadband Plan and the FNPRM will *not* be achieved. The FNPRM's stated reasons for lowering pole attachment rates are to promote broadband deployment and reduce broadband end-user rates. Yet the record, with the exception of various citations to the National Broadband Plan, which is essentially a report to Congress with no evidentiary value, provides no evidence that lower rates for ILEC pole attachments will achieve these goals. Even assuming that lower rates for ILECs *could* advance these goals, whether they *do* advance them or not depends on whether it is in the interest of the ILECs themselves to apply their windfall gain to broadband deployment and lower broadband rates. According to *TRDaily*, an FCC official has warned that ILECs must "demonstrate how any significant potential reduction in pole attachment rates would provide a meaningful benefit to consumers, which could take the form of incremental broadband deployment and/or lower end-user rates."[8] However, the Commission has no authority to compel this outcome using its section 224 authority. In sum, no significant, verifiable, or enforceable gains for broadband deployment or broadband consumers will result from the ILECs' coveted *several-hundred-million-dollar windfall*.

---

[7] *See* Attachment Part II.

[8] Lynn Stanton, *FCC Looks to Telcos to Return Pole Attachment Savings to Consumers*, TRDAILY, Mar. 23, 2011, at 5.

In light of the foregoing, we urge the Commission not to create a regulated rate for ILEC attachments. Instead, the Commission should reaffirm its finding in the 1998 pole attachment Report and Order: "[b]ecause, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier . . . *the ILEC has no rights under Section 224 with respect to the poles of other utilities*."[9] We respectfully submit, and request the Commission's consideration of, the attached analysis provided herein, which more thoroughly addresses the issues set forth in this letter.

We appreciate your attention to these important matters.

Sincerely,

/s/Sean B. Cunningham
Sean B. Cunningham

Counsel for the Alliance for Fair Pole Attachment Rules

Attachment

cc: Zachary Katz

---

[9] *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, FCC 98-20, para. 5 (1998) (hereinafter 1998 Report and Order) (emphasis added).

ATTACHMENT

ANALYSIS: SEVEN UNINTENDED CONSEQUENCES OF CREATING A REGULATED RATE FOR ILEC ATTACHMENTS ARE INCONSISTENT WITH THE FCC'S OWN POLICY GOALS IN THIS PROCEEDING

I. THE RECORD IN THE PROCEEDING PROVIDES NEITHER ADEQUATE NOTICE NOR SUBSTANTIAL EVIDENCE FOR CREATING A REGULATED RATE FOR ILEC ATTACHMENTS. 1

A. THE FNPRM DOES NOT PROPOSE TO CREATE A REGULATED RATE FOR ILEC ATTACHMENTS. 1

B. THE COMMISSION HAS NEVER PROPOSED TO APPLY THE CABLE RATE OR THE EQUIVALENT "LOW-END TELECOM RATE" TO ILECS. 2

C. NOTHING IN THE RECORD EXPLAINS HOW THE COMMISSION CAN IGNORE THE PLAIN LANGUAGE AND STRUCTURE OF SECTION 224 *AS A WHOLE*. 2

D. NOTHING IN THE RECORD RESPONDS TO THE COMMISSION'S REQUEST FOR AN EXPLANATION OF HOW THE LEGISLATIVE HISTORY SUPPORTS A FLIP-FLOP ON ILEC RATES 15 YEARS DOWN THE ROAD. 3

E. NOTHING IN THE RECORD PROVIDES ANY SUPPORT FOR A RATE AT THE LEVEL OF THE CABLE RATE OR THE "LOW-END" TELECOM RATE. 6

1. As Even the ILECs Admit, an Attachment Rate Gutted of Capital Costs Would Be Contrary to the Statute and Bad Policy. 6

2. ILECs Admit that They Use More Space and Have Other Advantages under Existing Joint Use Agreements. 7

II. SEVEN UNINTENDED AND UNDESIRABLE CONSEQUENCES WOULD LIKELY RESULT IF THE COMMISSION ADOPTS THE RUMORED PROPOSAL. 7

A. CONSEQUENCE #1: THE RULE WOULD GIVE THE ILECS A MASSIVE WINDFALL. 7

B. CONSEQUENCE #2: TO PROTECT THEIR CONSUMERS, STATES COULD TAKE AWAY FROM THE FCC WHAT LITTLE AUTHORITY IT STILL HAS OVER POLE ATTACHMENTS. 8

C. CONSEQUENCE #3: BECAUSE—AS ALL PARTIES CONCEDE—ILECS HAVE NO UNDERLYING RIGHT OF *ACCESS*, A PURPORTED RIGHT TO REGULATED RATES WOULD ONLY HINDER, NOT HELP, BROADBAND DEPLOYMENT. 9

D. CONSEQUENCE #4: COMPETITION WOULD BE SKEWED BECAUSE THE ILECS WOULD RECEIVE AN ADDITIONAL WINDFALL IN THE FORM OF UNREGULATED RATES CHARGED TO ELECTRIC UTILITIES FOR ELECTRIC ATTACHMENTS ON ILEC POLES. 10

E. CONSEQUENCE #5: THE ILECS' DOUBLE WINDFALL AT THE EXPENSE OF THE ELECTRIC UTILITY WOULD MAKE THE LOW-END TELECOM RATE UNCONSTITUTIONALLY CONFISCATORY. 10

F. CONSEQUENCE #6: ANY BENEFIT FOR BROADBAND DEPLOYMENT OR BROADBAND RATES WOULD CONSTITUTE AN UNTARGETED, IMPLICIT SUBSIDY IN DIRECT VIOLATION OF SECTION 254(E). 11

G. CONSEQUENCE #7: THE RULE WOULD BE OVERTURNED IN FEDERAL COURT BECAUSE IT CONTRADICTS THE PLAIN LANGUAGE OF SECTION 224, RESULTS IN TEXTUAL ABSURDITIES, AND WOULD BE AN ARBITRARY AND CAPRICIOUS REVERSAL OF LONGSTANDING FCC PRECEDENT. 12

1. Drawing a counter-textual distinction between "telecommunications carriers" and "providers of telecommunications services" would result in numerous absurd anomalies. 12

a. Assuming that "Providers of Telecommunications Service" Are Something Other than "Telecommunications Carriers" Results in an Internal Contradiction in Section 251. 12

b. Severing the Right of Access from the Right to Just and Reasonable Rates, Terms, and Conditions Creates a Jurisdictional Anomaly in the Text of Section 224(c). 13

2. There is No Rational Connection between the Commission's Stated Goal of Promoting Broadband Deployment and USTA's Proposed Rule Change. 14

I. THE RECORD IN THE PROCEEDING PROVIDES NEITHER ADEQUATE NOTICE NOR SUBSTANTIAL EVIDENCE FOR CREATING A REGULATED RATE FOR ILEC ATTACHMENTS.

In addition to lacking a statutory basis and being a bad policy choice, it would be a procedural error for the Commission to create a right to regulated rates for ILEC attachments. To comply with notice requirements under the Administrative Procedure Act, a final rule must be a logical outgrowth of the proposal set forth in the rulemaking notice. In this case, the FNPRM is, at best, fundamentally ambiguous, posing a number of questions relevant to a policy it says the Commission is *not* proposing to adopt. Now, at the eleventh hour, *TRDaily* seems to know something about which the Alliance could have only speculated on the basis of the FNPRM.

A. THE FNPRM DOES NOT PROPOSE TO CREATE A REGULATED RATE FOR ILEC ATTACHMENTS.

Trade press, investment analysts, and unnamed FCC officials all appear to have inside knowledge that the FCC's draft order includes language that will create a right to a cable-rate equivalent attachment rate for ILEC attachments on electric poles.[1] But where is this proposal in the record? Indeed, the Commission has never advanced such proposal. On the contrary, the May 20, 2010 Further Notice of Proposed Rulemaking ("FNPRM")[2] correctly states that it does not propose to "alter the Commission's current approach to the regulation of pole attachments by incumbent LECs."[3] No one denies the Commission's "current approach": it does not regulate ILEC attachments at all.

Although the Commission had previously proposed to establish a uniform rate for all broadband providers, including ILECs, in its November 20, 2007 Notice or Proposed Rulemaking ("NPRM"),[4] it declined in its FNPRM to adopt the NPRM's proposal.[5] The only proposals to regulate ILEC rates that the FNPRM arguably addresses—but does not embrace as its own proposal—are two ILEC proposals.[6] However, it is not even clear that the Commission

---

[1] *See, e.g.,* Lynn Stanton, FCC Looks to Telcos to Return Pole Attachment Savings to Consumers, TRDAILY, Mar. 23, 2011, at 5-6; Paul Kirby & Ted Gotsch, FCC Plans to Consider Roaming Pole Attachment, Booster Items April 7, TRDAILY, Mar. 17, 2011, at 1-4; see also Rebecca Arbogast & David Kaut, FCC Eyes Pole-Attachment Order That Could Ease Telco Burdens; Utilities Opposed, STIFEL NICOLAUS, Mar. 17, 2011.

[2] *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 09-51, Order and Further Notice of Proposed Rulemaking, FCC 10-84 (2010) (hereinafter FNPRM).

[3] *Id.* at para. 143.

[4] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245; RM-11293; RM-11303, Notice of Proposed Rulemaking, 22 FCC Rcd 20195, 20198-99 (2007) (hereinafter NPRM).

[5] FNPRM, *supra* note 3, at paras. 117-18.

[6] *Id*. at paras. 119-27.

regards these proposals as applying to ILECs, because the Commission refers to them as proposals "to establish a uniform rate for all pole attachments used to provide broadband Internet access services, including those by *telecommunications carriers*."[7] As even the ILECs still concede, ILECs are not telecommunications carriers for purposes of section 224.[8]

B. THE COMMISSION HAS NEVER PROPOSED TO APPLY THE CABLE RATE OR THE EQUIVALENT "LOW-END TELECOM RATE" TO ILECS.

Neither the FNPRM nor the NPRM has proposed to give ILECs a cable-rate equivalent rate. As the FNPRM acknowledges, the NPRM did not propose anything like a cable-rate equivalent for ILECs. Rather, the NPRM's proposal was for a uniform rate "higher than the current cable rate."[9]

The only proposals to regulate ILEC rates that the FNPRM addresses—but does not embrace as its own proposal—are two ILEC proposals, both of which propose, not a cable rate equivalent, but a far higher rate.[10]

C. NOTHING IN THE RECORD EXPLAINS HOW THE COMMISSION CAN IGNORE THE PLAIN LANGUAGE AND STRUCTURE OF SECTION 224 *AS A WHOLE*.

Rather than propose a rate for ILECs, the FNPRM cautions that the issues related to ILEC rates "raise complex questions, and although the National Broadband Plan noted the possible effects of these rate disparities, the Plan did not include a recommendation specifically addressing this matter."[11] Seeking to shed light on these questions, the FNPRM requests that commenters "refresh the record" regarding questions raised in the 2007 Notice of Proposed Rulemaking ("2007 NPRM"). Although the FNPRM does not propose a rate for ILECs, it does—by its reference to the 2007 NPRM—indirectly seek comment on several questions that would be relevant to such a proposal. However, the record evidence in response to these questions overwhelmingly favors the Commission's current position that ILECs have no rights with respect to the poles of electric utilities.

Specifically, the 2007 NPRM seeks comment on whether it is "plain from the text and structure of section 224" that ILECs are excluded from all its protections. The NPRM, in turn,

---

[7] *Id*. at para. 119.

[8] *See, e.g.*, FNPRM Proceeding, Comments of AT&T Inc. at 7 (filed Aug. 16, 2010) ("it is true that the § 225(a)(5) definition of 'telecommunications carrier' expressly excludes ILECs . . . .") ("AT&T Comments").

[9] FNPRM, *supra* note 3, at para. 117 (citing NPRM, *supra* note 5, at para. 36).

[10] The FNPRM notes that, under the cable formula, attachers pay an average of 7.4 percent of the annual costs of a pole. By contrast, under the USTA and AT&T proposals filed in October 2008, attachers would pay 11 percent and 18.67 percent, respectively (regardless of the number of attachers or amount of space used. *See id.* at para. 119.

[11] *Id.* at para. 43.

asks whether "the terms 'telecommunications carrier' and 'provider of telecommunications service,' as used in section 224, unambiguously refer to different groups . . . ." To shed light on this question, the NPRM asks commenters to "address the relationship between section 224 and the statutory definition in section 3, which states that a 'telecommunications carrier' is a 'provider of telecommunications services.'"[12] Given that the Commission has maintained for the past 15 years that the plain language certainly excludes ILECs, the Commission's questions warrant substantial comment. The Alliance, numerous other electric industry parties, and Comcast have filed extensive comments explaining why the plain text and structure of section 224 exclude rights for ILECs. Our comments have gone unrebutted.

Instead of resolving these questions, ILECs simply claim, over and over, that the operative term in section 224(b) is "provider of telecommunications services" (which, according to the ILECs, includes them), not "telecommunications carrier." This selective reading of section 224 does not resolve the question at issue. The ILECs have failed to explain in the record how these terms refer to different groups. A critical element of this question is the meaning of the underlying definition of "telecommunications carrier" in section 3(44), which is expressly cross-referenced in section 224(a)(5). The ILECs have completely ignored section 3(44), which states, "[t]he term 'telecommunications carrier' *means* any provider of telecommunications services." Rather, to the extent they acknowledge the definition of "telecommunications carrier" in section 224, they quote only part of the text of 224(a)(5), using an ellipsis in place of the phrase "(as defined in section 3 of this Act)."[13] Nowhere do the ILECs even mention the definition of "telecommunications carrier" in section 3(44). If that is the best explanation the ILECs can give, their argument falls short.

D. NOTHING IN THE RECORD RESPONDS TO THE COMMISSION'S REQUEST FOR AN EXPLANATION OF HOW THE LEGISLATIVE HISTORY SUPPORTS A FLIP-FLOP ON ILEC RATES 15 YEARS DOWN THE ROAD.

The NPRM acknowledges that the Commission has "relied on the legislative history of section 224 in prior orders" in concluding that ILECs are excluded from the rights provided under section 224.[14] The Commission asks, "in light of previous construction of statutory intent by the Commission or the courts, what does the history of the Act show regarding Congress's concerns?"[15] In the process leading to the passage of the 1996 Act, it hardly needed to be stated

---

[12] NPRM, *supra* note 5, at para. 25.

[13] *See, e.g.,* FNPRM Proceeding, USTA Ex Parte Letter at 1-2 (filed Mar. 7, 2011) ("USTA Ex Parte Letter"). On the related question of whether the terms "telecommunications carrier" and "provider of telecommunications services" refer to different groups of entities, the ILECs claim in ex parte letters that they have explained to Commission staff that in "other sections" of the Communications Act the terms have different meanings. No other sections are cited. The most important section is ignored: section 3(44) defines "telecommunications carrier" as "any provider of telecommunications services," the only exception being the specifically enumerated exclusion of aggregators.

[14] NPRM, *supra* note 5, at para. 25.

[15] *Id.*

that the ILECs were considered the bottleneck, not the beneficiary, with respect to section 224 attachment rights.

When originally enacted, the Pole Attachments Act of 1978 included two opposite groups of entities: (1) attachers, a group which was, until 1996, limited to "cable television operators;"and (2) pole owners, i.e., "utilities."[16] The term "utility" meant—and still means—both electric and telephone utilities. The provision was intended to facilitate expansion of an "infant" cable television industry and, in 1996, a growing CLEC industry. There was no intention of allowing ILECs to claim pole attachment rights for themselves.

The Telecommunications Act of 1996 did nothing to bridge the inherent divide between attachers and utilities. The 1996 act expanded section 224 to encompass pole attachments by competitors to ILECs, but it did not grant pole attachment rights to ILECs themselves. For example, a Senate report on the legislation stated that the bill "includes revisions to section 224 of the 1934 Act to allow *competitors to the telephone companies* to obtain access to poles owned by utilities and telephone companies at rates that give the owners of poles a fair return on their investment."[17] Prior to the passage of the 1996 Act, "the telephone companies," of course, could only mean the ILECs. Thus, it is clear that Congress intended to provide pole attachment rights to the ILECs' competitors, not to the ILECs themselves.

The universe of intended beneficiaries of the section 224 amendments in the the 1996 Act was comprised of two groups: (1) cable companies that were beginning to enter markets for telecommunications services;[18] and the newly minted "competitive" LECs ("CLECs"). As the Commission itself on numerous occasions has stated unequivocally, the purpose of the 1996 Act amendments to the Pole Attachment Act was to accommodate these cable companies and CLECs, not to give "incumbent" telephone companies attachment rights. As early as 1996, for example, the Commission stated:

> Section 224 does not prescribe rates, terms, or conditions governing access by an incumbent LEC to the facilities or rights-of-way of a competing LEC. Indeed, section 224 does not provide access rights to incumbent LECs. We cannot infer that section 251(b)(4) restores to an incumbent LEC access rights expressly withheld by section 224. We give deference to the specific denial

---

[16] *See* Cong. Rec. Vol. 23 (1977) at 35006, comments of Rep. Wirth ("H.R. 7442 will resolve a longstanding problem in the relationship of cable television companies on the one hand, and power and telephone utilities on the other.").

[17] S. Rpt. 103-367 on S. 1822, Communications Act of 1995, July 24, 1995 (emphasis added).

[18] See H.R. Conf. Rep. 104-458 (explaining that the Senate version that was ultimately adopted in conference requires that poles, ducts, conduit, and rights-of-way that are owned or controlled by utilities are made available to cable television systems at rates, terms and conditions that are just and reasonable, regardless of whether the cable system is providing cable television or telecommunications services." (emphasis added)).

> of access under section 224 over the more general access provisions of section 251(b)(4). Accordingly, no incumbent LEC may seek access to the facilities or rights-of-way of a LEC or any utility under either section 224 or section 251(b)(4).[19]

Then, in 1998, the Commission noted that ILECs are "utilities" under section 224, but confirms that Congress specifically excluded ILEC attachments for sound policy reasons:

> The 1996 Act, however, specifically excluded incumbent local exchange carriers ("ILECs") from the definition of telecommunications carriers with rights as pole attachers. Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though the ILEC has no rights under Section 224 with respect to the poles of other utilities. *This is consistent with Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants*.[20]

As recently as 2005, the Commission reiterated that Congress intended to protect *competitive* LECs from *incumbent* LECs:

> As amended by the 1996 Act, Congress in section 224 intended to ensure, *inter alia*, that incumbent LECs' control over poles, ducts, conduits, and rights-of-way does not create a bottleneck for the delivery of telecommunications services and certain other services. It therefore amended section 224 in 1996 to give competitive LECs and cable operators a right of access to utility poles, ducts, conduits and rights of way, in addition to maintaining a scheme to assure that the rates, terms and conditions governing such attachments are just and reasonable.[21]

Furthermore, noted the Commission, the ILEC exclusion is consistent with Congress's intent in this matter:

---

[19] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Report and Order, 11 FCC Rcd 15499, at para. 1231 (1996).

[20] *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order at para. 5, FCC 98-20 (1998) ("1998 Report and Order") (emphasis added).

[21] *In the Matter of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19464, para. 99.

> The 1996 Act … specifically excluded incumbent LECs from the definition of telecommunications carriers with rights as pole attachers. *See* 47 U.S.C. § 224(a)(5). Because an incumbent LEC is a utility and not a telecommunications carrier for purposes of section 224, an incumbent LEC must grant other telecommunications carriers and cable operators access to its poles, ducts, conduits, and rights-of-way, even though an incumbent LEC has no rights under section 224 with respect to those of other utilities. *This is consistent with Congress's intent that section 224 promote competition by ensuring the availability of access to new telecommunications entrants*.[22]

There is no evidence that Congress intended to give pole-owning ILEC utilities attachment rights under section 224. The ILECs have shown nothing to the contrary.

E. NOTHING IN THE RECORD PROVIDES ANY SUPPORT FOR A RATE AT THE LEVEL OF THE CABLE RATE OR THE "LOW-END" TELECOM RATE.

Even if the Commission *could* regulate ILEC attachments, and even if the Commission *had* proposed a cable-rate-equivalent rate for ILECs, the record does not support giving the cable rate or "low-end telecom rate" to ILECs.

1. As Even the ILECs Admit, an Attachment Rate Gutted of Capital Costs Would Be Contrary to the Statute and Bad Policy.

As the Alliance, EEI, and numerous other parties have explained, the FNPRM's proposed low-rent, "low-end telecom rate" is contrary to the text and structure of section 224. No substantive comments in this proceeding endorse the low-end telecom rate for ILECs. Ironically, the only ILEC that discusses the low-end telecom rate proposal *opposes* it on the grounds that that the rate formula should not exclude capital costs. According to Qwest, "there is no justifiable need to revisit pole rate formulae cost components or to assume that capital-related pole costs should be borne solely by the customers of the pole owner."[23] We agree with Qwest that "[t]he pole attachers should be required to share these costs with the pole owner, rather than allowed to ride for free."[24] Apparently not even the ILECs themselves want the no-capital-cost low-end telecom rate.

---

[22] *Id.,* n. 243, citing Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference, 104th Cong., 2d Sess. 98-100, 113. The Joint Explanatory Statement cited states, in relevant part, that the conferees intend to promote deployment of advanced telecommunications services: "by opening all telecommunications markets to competition."

[23] FNRPM Proceeding, Comments of Qwest Communications at 17 (Aug. 16, 2010).

[24] *Id*.

2. ILECs Admit that They Use More Space and Have Other Advantages under Existing Joint Use Agreements.

ILECs now claim that existing joint use agreements give them no special advantages relative to cable systems and CLECs. The record evidence shows that, on the contrary, ILECs have many advantages under ILEC-electric utility joint use agreements with respect to make-ready, storm recovery, and other matters. Often overlooked is the fact that ILECs reserve—and use—far more space on the pole than their cable and CLEC competitors. The Commission's existing regulations presume that a jurisdictional attaching entity uses one foot of space on the pole. In stark contrast, ILECs typically occupy three or more feet of space on the pole. In its recent ex parte letter, CenturyLink, for example, disclosed that "ILEC space remains 3'" per pole.[25]

II. SEVEN UNINTENDED AND UNDESIRABLE CONSEQUENCES WOULD LIKELY RESULT IF THE COMMISSION ADOPTS THE RUMORED PROPOSAL.

A. CONSEQUENCE #1: THE RULE WOULD GIVE THE ILECS A MASSIVE WINDFALL.

Last week *TRDaily* reported that a senior FCC official commented on the proposal to give ILECs the cable-rate equivalent: "[t]here's a real concern about the potential for windfall . . . ."[26] Indeed, there should be a concern about a windfall. According to the independent investment analysis firm Stifel Nicolaus, the proposed rule change will provide ILECs with "savings" of "several hundreds of millions of dollars industry-wide."[27] The sad truth, however, is that these "savings" for the ILECs will be entirely at the expense of ordinary consumers (i.e., electric consumers). Because electric utility pole attachment revenues offset electricity rates, every dollar an ILEC (such as Verizon or AT&T) "saves" is a dollar plucked from the pockets of the nation's electricity consumers.[28] "Electricity consumers" means virtually all consumers—including those who neither have nor want 500 channels or "the fastest internet in the U.S."[29] Estimates within the electric industry suggest that the wealth transfer from electric consumers to ILEC profits could be as much as half of one billion dollars *per year* nationwide.

The pending mergers of AT&T and T-Mobile USA ($39 billion) and CenturyLink-Qwest ($19 billion) demonstrate that these companies are no more in need of a windfall rate subsidy

---

[25] FNRPM Proceeding, CenturyLink ex parte letter and presentation, Mar. 17, 2011, slide 11.

[26] Lynn Stanton, *FCC Looks to Telcos to Return Pole Attachment Savings to Consumers*, TRDAILY, Mar. 23, 2011, at 5-6.

[27] Rebecca Arbogast & David Kaut, *FCC Eyes Pole-Attachment Order That Could Ease Telco Burdens; Utilities Opposed*, STIFEL NICOLAUS, Mar. 17, 2011.

[28] NPRM Proceeding, Comments of the Edison Electric Institute and Utilities Telecom Council in Response to NPRM at 9-10 (filed Mar. 7, 2008).

[29] Verizon, *A Network Ahead with Fiber Optics*, *available at* <http://www22.verizon.com/Residential/aboutFiOS/Overview.htm>.

today than they were in 1978 (when the Pole Attachment Act was enacted to benefit the "infant" cable industry) or in 1996 (when the Act was expanded to benefit CLECs struggling to compete against entrenched ILECs).

Recent ILEC filings assert that the Commission has an "obligation" to provide this windfall to ILECs. This claim is spurious. The Commission does, however, have an obligation to consider the impact of its proposed rule not only on broadband consumers but also on electric consumers. Assuming, *arguendo*, that the Commission were authorized to regulate ILEC attachment rates, it would be required to take into consideration the impact of its rules on electric consumers. Under general principles of just and reasonable rate regulation, a regulatory body is "obliged at each step of its regulatory process to assess the requirements of the broad public interests entrusted to its protection by Congress."[30] The "broad public interest" in this case is the interest of all consumers—not merely the ILECs' interest in broadband profits or even the interest of some consumers in the incremental broadband deployment, which will supposedly result from an across-the-board windfall in the form of lower rates for all existing attachments.

In the case of pole attachment regulation, Congress specifically addresses the concerns of electric utility consumers. Under section 224(c), a state that intends to regulate pole attachments must certify to the Commission that it "consider[s] the interests of the subscribers of the services offered via such attachments, *as well as the interests of the consumers of the utility services*."[31] This requirement presupposes the same duty on the part of the Commission to take into account the interests of electricity consumers. There is no evidence in the record of this proceeding to suggest that the Commission has considered the disproportionate impact of the ILECs' windfall proposal on electricity consumers.

B. CONSEQUENCE #2: TO PROTECT THEIR CONSUMERS, STATES COULD TAKE AWAY FROM THE FCC WHAT LITTLE AUTHORITY IT STILL HAS OVER POLE ATTACHMENTS.

Under Section 224, a State has the option of certifying that it regulates pole attachments. With respect to pole attachments in certified States, the FCC no longer has any regulatory authority.[32] To date, 21 States have already reverse preempted the FCC's pole attachment authority: Alaska, Arkansas, California, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Utah, Vermont, and Washington.[33]

---

[30] *Permian Basin Area Rate Cases*, 390 U.S. 747, 791 (1968). The regulator's decision making should not produce "arbitrary or unreasonable consequences." *Id*. at 800.

[31] 47 U.S.C. § 224(c)(2)(B) (2010) (emphasis added).

[32] 47 U.S.C. § 224(c)(1) (stating that "[n]othing in this section shall be construed to apply to, or give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State").

[33] *See States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, DA 10-893 (rel. May 19, 2010).

When the remaining 29 States learn that hundreds of millions of dollars from the pockets of millions of their consumers will be transferred to AT&T, Verizon, CenturyLink-Qwest, and other ILEC conglomerates, these States will, at a minimum, take notice. In some cases, these States could *serve* notice on the FCC that its wise and benevolent oversight of pole attachment matters in such States is no longer needed. While the Alliance cannot speak for State regulators in the States it serves, the Alliance notes that the eleven FCC-regulated States served by its companies will be among those whose electric consumers are most harmed by the proposed windfall rule.[34]

Surely the purpose of the Commission's pole attachment order is to reform Federal pole attachment rules, not to have them repealed. Yet if the FCC adopts USTA's proposal, it could, in the name of uniformity, actually *expand* the patchwork of State regulation of pole attachments.

C. CONSEQUENCE #3: BECAUSE—AS ALL PARTIES CONCEDE—ILECS HAVE NO UNDERLYING RIGHT OF *ACCESS*, A PURPORTED RIGHT TO REGULATED RATES WOULD ONLY HINDER, NOT HELP, BROADBAND DEPLOYMENT.

Even the ILECs admit that, because they are excluded from the definition of "telecommunications carrier," they have no right of access under section 224(f). If the FCC creates a regulatory environment in which ILECs have a "right" to file complaints regarding rates, terms, and conditions, *but no underlying right of access*, the result will be endless regulatory uncertainty, disputes, delays, and—justifiably—denial of access to ILECs for new attachments or even termination of agreements with respect to existing attachments.

The access right language in section 224(f) was added by amendment in the Telecommunications Act of 1996. Prior to 1996, cable companies had a right to regulated rates, terms, and conditions, but no right of access. Electric utilities had no obligation to allow cable companies to attach, or to remain attached, to electric utility poles. In 1987, the Supreme Court confirmed that electric utilities had no such obligation in *FCC v. Florida Power & Light*.[35] The Court held that nothing in section 224 "gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators."[36] If ILECs are now given a right to regulated rates, they will find themselves in exactly the same position as cable companies prior to the 1996 Act amendments to

---

[34] The Alliance companies serve customers in the following eleven FCC-regulated States: North Carolina, South Carolina, Florida, Georgia, Alabama, Mississippi, Texas, Oklahoma, Indiana, Virginia, and Tennessee.

[35] 480 U.S. 245 (1987).

[36] *Id.* at 251. The Court added that "[t]he language of the Act provides no explicit authority to the FCC to require pole access for cable operators, and the legislative history strongly suggests that Congress intended no such authorization." *Id.* at 256 n.6 (citing S. Rep. No. 95-580 at 16 (1977) ("The Act 'does not vest within a CATV system operator a right to access to a utility pole, nor does the bill, as reported, require a power company to dedicate a portion of its pole plant to communications use.'").

section 224—with no right of access. As a result, ILECs will be far less likely to build out in rural areas or other underserved areas where they do not already have access. Another surely unintended result of giving ILECs a right to regulated rates without a right of access would be that, because make-ready timelines are predicated on a right of access, ILECs would not be permitted to avail themselves of make-ready timelines for their new attachments on electric poles. Here again, the proposed policy does nothing to advanced the Commission's stated policy goal of supporting broadband deployment.

D. CONSEQUENCE #4: COMPETITION WOULD BE SKEWED BECAUSE THE ILECS WOULD RECEIVE AN ADDITIONAL WINDFALL IN THE FORM OF UNREGULATED RATES CHARGED TO ELECTRIC UTILITIES FOR ELECTRIC ATTACHMENTS ON ILEC POLES.

In addition to achieving "parity" with their Cable and CLEC competitors, ILECs will achieve the additional competitive advantage of being able to charge electric utilities a far higher (unregulated) rate for electric attachments on ILEC poles. Under existing joint use agreements between electric utilities and ILECs, in a given geographical area, the electric utility owns a certain number of poles, and the ILEC owns the remainder of those poles. Typically, one party owes a net amount to the other party. These agreements are privately negotiated and are not subject to the FCC's jurisdiction. In negotiating these agreements, both parties have leverage. While ILECs claim that electric utilities in some instances have superior bargaining leverage, adoption of their unilateral rate regulation proposal would result in the electric utility having no leverage at all. If ILEC attachments were to become subject to Commission regulation, the rates for an electric utility's attachments on ILEC poles would remain unregulated. As a result, while receiving a cable-rate equivalent compensation from ILECs, electric utilities would be required to pay whatever natural monopoly rent the ILEC demands. This additional windfall would only skew, not level, competition between ILECs and their broadband competitors.

E. CONSEQUENCE #5: THE ILECS' DOUBLE WINDFALL AT THE EXPENSE OF THE ELECTRIC UTILITY WOULD MAKE THE LOW-END TELECOM RATE UNCONSTITUTIONALLY CONFISCATORY.

Under basic principles of just and reasonable ratemaking, a rate that results in confiscation of the utility's property is unjust and unreasonable. Even if the low-end telecom rate were constitutionally sufficient in itself—which is a separate and legitimate question—the low-end telecom rate as applied to ILEC attachments would clearly result in a confiscation by leaving the electric utility in a position where it must pay the ILEC a far higher rate for its electric attachments on ILEC poles. The net result could be that the utility would receive less than zero dollars of compensation per ILEC attachment—an unusually egregious instance of confiscation by regulation.

F. CONSEQUENCE #6: ANY BENEFIT FOR BROADBAND DEPLOYMENT OR BROADBAND RATES WOULD CONSTITUTE AN UNTARGETED, IMPLICIT SUBSIDY IN DIRECT VIOLATION OF SECTION 254(e).

The underlying policy objective of lowering pole attachment rates is to "lower the costs of telecommunications, cable and broadband deployment."[37] More specifically, the Commission "expect[s] to increase the availability of, and competition for, advanced services to anchor institutions and as middle-mile inputs to wireless services and other broadband services."[38] The overarching policy goal is, in effect, universal service. As an FCC official told *TRDaily*, the ILECs will need to "demonstrate how any significant potential reduction in pole attachment rates would provide a meaningful benefit to consumers, which could take the form of incremental broadband deployment and/or lower end-user rates."[39] USTA argues that the only thing this pole attachment proceeding will do to improve the "economics" of rural broadband is to give ILECs lower pole attachment rates.[40] Higher ILEC rates, USTA argues, only accentuates disparities between "rural area[s] when compared to urban/suburban areas."[41] In other words, lower pole attachment rates for ILECs will *subsidize* rural broadband—at the expense of electricity consumers in urban, suburban, and rural areas.

However, under section 254(e) of the Communications Act of 1934, any Federal support for universal service must be "explicit." Implicit, untargeted subsidies are not permitted. An example of an explicit subsidy—permissible under the statute—would be the proposed Connect America Fund ("CAF"). USTA helpfully points out that it would be much cheaper for the Commission to use an (implicit) subsidy in the form of lower pole attachment rates for ILECs than to fund the CAF at levels sufficient to achieve goals of universal service. Warns USTA: "Failure to [lower ILEC rates to the same level as cable and CLEC rates would] . . . 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."[42]

---

[37] FNPRM, *supra* note 3, at para. 1.

[38] *Id.* at para. 118.

[39] Lynn Stanton, *FCC Looks to Telcos to Return Pole Attachment Savings to Consumers*, TRDAILY, Mar. 23, 2011, at 5.

[40] FNPRM Proceeding, United States Telecommunications Association Notice of Ex Parte at 1 (filed Mar. 24, 2011).

[41] *Id.*

[42] *Id*.

G. CONSEQUENCE #7: THE RULE WOULD BE OVERTURNED IN FEDERAL COURT BECAUSE IT CONTRADICTS THE PLAIN LANGUAGE OF SECTION 224, RESULTS IN TEXTUAL ABSURDITIES, AND WOULD BE AN ARBITRARY AND CAPRICIOUS REVERSAL OF LONGSTANDING FCC PRECEDENT.

A rule that creates a right to regulated rates for ILECs would be vulnerable on appeal because it would be (i) contrary to the plain language of the statute, (ii) an unreasonable construction of the the statute, and (iii) an arbitrary and capricious reversal of 15 years of precedent.

1. Drawing a counter-textual distinction between "telecommunications carriers" and "providers of telecommunications services" would result in numerous absurd anomalies.

The Alliance's previously filed comments explain why the plain language, legislative history, and structure of section 224 precludes the Commission from asserting jurisdiction over ILEC attachments.[43] In addition, we urge the Commission to consider the following points.

a. Assuming that "Providers of Telecommunications Service" Are Something Other than "Telecommunications Carriers" Results in an Internal Contradiction in Section 251.

As EEI explained in a recent ex parte letter, the ILEC argument that the terms "telecommunications carrier" and "provider of telecommunications services" refer to distinct groups of entities creates internal contradiction in Section 251(b)(4) of the Act, which provides that each local exchange carrier has the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224."[44] As EEI explains:

> According to the ILEC argument, the use of the term "provider of telecommunications service" in this provision would mean that local exchange carriers would have a duty to afford access to ILECs pursuant to Section 251(b)(4). However, as the ILECs themselves concede, ILECs do not have a right to nondiscriminatory access under Section 224 because nondiscriminatory access must only be provided to a "telecommunications carrier." Because the ILECs' interpretive approach would impose a duty on other local exchange carriers under Section 251(b)(4) to provide access to entities that do not have a right to access under Section 224 (*i.e.*, ILECs), an inconsistency is created between two separate provisions of the Communications Act. However, because the terms "telecommunications carrier" and "provider of telecommunications services" are synonymous, no such inconsistency arises. Specifically, the duty of local

[43] *See* FNPRM Proceeding, Reply Comments of the Alliance for Fair Pole Attachment Rules at 80-96 (filed Oct. 4, 2010)

[44] 47 U.S.C. § 251(b)(4); FNPRM Proceeding, Edison Electric Institute Notice of Written Ex Parte at 5-6 (filed Mar. 18, 2011).

> exchange carriers to afford access to "providers of telecommunications service" under Section 251(b)(4) is not inconsistent with the access provisions of Section 224(f)(1) because Section 224(f)(1) uses the synonymous term "telecommunications carrier"—which, as stated in Section 224(a)(5), does not include ILECs for purposes of the pole attachment provisions of Section 224. Therefore, a local exchange carrier can deny access to an ILEC without creating any inconsistencies with its obligations under Section 251(b)(4).[45]

b. Severing the Right of Access from the Right to Just and Reasonable Rates, Terms, and Conditions Creates a Jurisdictional Anomaly in the Text of Section 224(c).

If the Commission were to conclude that the right of access under section 224(f) is severable from the right to regulated rates, terms, and conditions under section 224(b), Section 224(c) would longer makes sense. Section 224(c)(1) provides that the Commission has no jurisdiction with respect to "rates, terms, and conditions, *or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f)*" within in any State that certifies to the Commission pursuant to section 224(c)(2) that it regulates pole attachments. However, under section 224(c)(2), the State that wishes to reverse preempt the FCC need only certify to the Commission that "it regulates such rates, terms, and conditions . . . ."[46] There is no requirement that the State certify that it regulates *access*. If access is distinct from rates, terms, and conditions, it appears that a State could regulate access without certifying to the Commission that it does so. Either Congress contemplated dual jurisdiction, which seems to contradict the whole scheme of Federal regulation under section 224, or this is an example of a "scrivener's error"—i.e., Congress made a mistake. However, courts are reluctant to conclude that Congress makes such mistakes. The doctrine of scrivener's error applies only in "unusual cases" where someone unfamiliar with the scope or purpose of the provision has made a typographical error—typically involving punctuation.[47] If access and rates are part of the same bundle of rights, as the Commission apparently presumed in its recent Declaratory Ruling on the right of timely access,[48] no such anomaly arises.

---

[45] *Id*. (footnotes omitted).

[46] 47 U.S.C. § 224(c)(2)(A). Section 224(c)(2)(A) repeats the same language ("in so regulating such rates, terms, and conditions, the State . . . .").

[47] *See U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993) ("[W]e are convinced that the placement of the quotation marks in the 1916 Act was a simple scrivener's error, a mistake made by someone unfamiliar with the law's object and design.") The only example of a scrivener's error in section 224 might be the extraneous insertion of a hyphen in "non-discriminatory" (read "nondiscriminatory") in section 224(f)(2).

[48] FNPRM Proceeding, Declaratory Ruling at para. 17 ("Declaratory Ruling").

2. **There is No Rational Connection between the Commission's Stated Goal of Promoting Broadband Deployment and USTA's Proposed Rule Change.**

Under the rule of *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,[49] when an agency changes course, it must articulate a "rational connection between the facts found and the choice made."[50] If the agency fails to do so, its action is arbitrary and capricious within the meaning of the APA. If the Commission adopts the ILECs' proposal in any final rule issued in this proceeding, it would result in a radical change of course.

The alleged fact found in this proceeding is that there is a need to "lower the costs of telecommunications, cable, and broadband deployment and to promote competition as recommended by the National Broadband Plan."[51] However, the rumored choice made in this case—giving ILECs the low-end telecom rate—would do nothing to lower deployment costs except potentially to provide an untargeted, implicit subsidy in violation of the Communications Act. Because ILECs have no right of access, it is unlikely that they will be afforded the opportunity to attach in high-cost-per-mile rural areas at the potentially confiscatory low-end telecom rate. Even while rural broadband build-out stalls, ILECs will nevertheless reap their windfall for existing attachments in urban and suburban areas. Will ILECs pass along their "savings" to their broadband customers? It strains credulity to think that ILEC broadband rates will decrease for any reason. As for competition, the proposal would undermine, not promote, competition, as explained above, by giving ILECs a new set of competitive advantages relative to cable and CLEC companies—all under the guise of "parity."

The only "evidence" for the proposition that lower pole attachment rates will result in additional broadband deployment or lower broadband rates is the repeated assertion by ILECs that the National Broadband Plan says it is so. The NBP is essentially a report to Congress, which itself has no evidentiary value in this proceeding. Even the NBP itself provides only one hypothetical example of how a uniformly low rate might promote broadband deployment. This example applies only to cable companies that are concerned that they may lose their eligibility for the historic cable rate subsidy if they begin offering telecommunications services.[52] This lone example has absolutely nothing to do with ILECs, who are—for purposes outside section 224—obviously already telecommunications carriers, i.e., providers of telecommunications services.

---

[49] 463 U.S. 29 (1983).

[50] *Id.* at 43.

[51] FNRPM, *supra* note 3, at para. 1.

[52] *Id*. at para. 115. The FNPRM focuses on "disputes about the applicability of 'cable' or 'telecommunications' rates to broadband" and gives one example: "The Plan found that '[t]his uncertainty may be deterring broadband providers that pay lower pole rates from extending their networks or adding capabilities . . . ,' based on the risk that, by doing so, a higher pole rental rate might be applied for their entire network." *Id*. Only cable systems pay the "lower pole rates" available under the Commission's current regulations. This scenario has nothing to do with ILECs.