



March 31, 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; A National Broadband Plan for Our Future;*
WC Docket No. 07-245, GN Docket No. 09-51**

Dear Ms. Dortch:

Pursuant to Commission rules, please include the attached letter from Walter B. McCormick, Jr. to Chairman Julius Genachowski filed in the above-referenced proceeding.

Sincerely,

A handwritten signature in blue ink that reads "Jonathan Banks".

Jonathan Banks
Senior Vice President, Law & Policy

cc: Commissioner Copps
Commissioner McDowell
Commissioner Clyburn
Commissioner Baker
Eddie Lazarus
Zac Katz
Margaret McCarthy
Christine Kurth
Angela Kronenberg
Brad Gillen
Sharon Gillett
Christie Shewman
Al Lewis
Austin Schlick
Diane Griffin-Harmon
Raelynn Remy
Marv Sacks
Jeremy Miller
Jennifer Prime
Wes Platt



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Ex Parte

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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

Dear Mr. Chairman:

On behalf of the United States Telecom Association, and its member companies, I want to express our appreciation for your continuing efforts to promote broadband investment, broadband deployment, and broadband adoption. In doing so, you are helping to expand our economy, create new jobs, and improve Americans' health, safety, and quality of life. When the Commission released the *National Broadband Plan* a little more than a year ago, USTelecom applauded its focus on eliminating impediments to the rapid deployment of broadband infrastructure. Your *Broadband Acceleration Initiative* has furthered this commitment to expediting broadband build-out and, as you know from my comments at the Commission's recent workshop, we both appreciate and enthusiastically support your efforts to identify and eliminate archaic regulatory barriers that add unnecessary cost or delay to carriers' construction of robust broadband networks. And, most recently, your proposal to assure parity and reasonableness in the fees charged by utilities for pole attachments is a direct and meaningful move toward providing the kind of regulatory environment that will produce concrete benefits for consumers in the form of wider availability, greater speeds, and more competitive pricing. Today, I write to you: 1) to support your efforts and confirm your concern that the lack of parity and reasonableness in pole attachment rates is an impediment to speedy broadband deployment; 2) to call upon the Commission to act boldly for change – change that will level-the-playing-field among competitors and set a 21st Century policy for pole attachments that will prioritize the importance of broadband deployment; and 3) to provide you with assurances that broadband consumers will be the ultimate beneficiary of such action.

There are at least five specific ways that the FCC can be assured that consumers will receive the benefits of reductions in attachment rates from putting incumbent LECs on a parity footing with other broadband providers: 1) by reducing broadband deployment and operation costs in rural areas, the FCC will reduce demand for universal service financial support, resulting in a lowering of the contribution factor on consumer bills; 2) where carriers are rate-of-return regulated, by reducing costs, the FCC opens the possibility for reductions in consumer prices; 3)

in broadband markets where there are already competitive offerings today, there are strong market-based incentives for ILECs to use cost savings in a pragmatic way that benefits consumers by improving broadband speeds and/or lowering end-user prices in order to meet their competition; 4) in markets where terrestrial wireline broadband is only offered by cable systems, by lowering the costs of ILEC use of poles, the FCC will incentivize ILEC deployment of competing broadband offerings resulting in increased consumer choice and a strengthening the competitive dynamic to the benefit of consumers; and 5) finally, as the Commission has recognized, access to capital is a particular challenge for those seeking to deploy broadband, particularly in rural areas. By lowering pole costs, the FCC will be providing an immediate source of capital for expansion, and our member companies have expressed their interest in using such savings expressly for such purposes – expanded broadband deployment, broadband upgrades, and to meet competitive challenges – each of which directly benefits consumers.

The Problem

As the *National Broadband Plan* itself recognizes, many of its recommendations are outside of the Commission’s existing authority and instead require action by Congress, other agencies or state and local governments. Fortunately, however, one of the very significant factors affecting the cost of broadband deployment is also one with respect to which the Commission has clear legal jurisdiction—ensuring that all broadband providers have access to the poles owned by investor owned electric utilities on just and reasonable rates, terms and conditions. Indeed, Section 224 of the Communications Act not only provides the Commission with authority in this regard, but actually establishes a mandate that the Commission “shall” take actions to ensure such protections.

As part of their effort, the Commission staff that put together the *National Broadband Plan* collected an unprecedented amount of data concerning the costs of deploying broadband networks. Through its analysis of this data, the Plan determined that pole attachment and rights-of-way expenses can amount to 20% of broadband deployment costs. This data also confirmed evidence previously provided to the Commission concerning the disincentives to deployment created by the Commission’s existing disparate regulatory treatment of USTelecom’s member companies with respect to the protections of just and reasonable pole attachment rates. Specifically, the data gathered by the Commission demonstrated that, on average, incumbent local telephone companies paid pole attachment rates that were nearly three times those of cable companies.

While these averages are themselves more than sufficient to distort competition and impose unreasonable and unnecessary burdens on broadband consumers, they actually understate the impact on broadband deployment in many areas of the country. For example, one of our member companies has stated in the record of this proceeding that it “pays, on average, a per-attachment rate that is closer to *five times* as high as what its cable competitors pay for the same attachments, and often is even higher.”¹ Verizon has identified in the record specific instances

¹ See, CenturyLink Comments at 8.

where it pays attachment rates that are six-times, eight-times, and eleven-times the rate paid by the cable companies for attachments to the same poles.² And a USTelecom survey of its member companies found instances where the ILEC was being charged as much as *14 times* the rate cable providers are charged for their broadband attachments.³ Moreover, the evidence in the record indicates that the rates paid by our member companies are actually increasing—in many cases substantially.⁴ It is beyond the pale to suggest, as some investor-owned utilities have, that these differentials somehow reflect other terms in the contract—indeed, numerous filings in this docket demonstrate that these other terms more often place burdens on the ILECs rather than offer benefits.⁵ Instead, this wide discrepancy, without justification and with no distinguishing basis, simply cannot be considered just and reasonable.

Moreover, the *National Broadband Plan* correctly identified that the impact of these rate differentials “can be particularly acute in rural areas, where there often are more poles per mile than households.” Based on the data collected during this effort, the *Plan* determined that based on the differential between the average pole attachment rates paid, ILECs incur additional infrastructure costs of more than \$8.00 per month for each household passed than do cable companies in rural areas with 15 households per linear mile. (It should be noted in this context that 15 households per linear mile is really more “exurban”— and ILECs serve many, many areas of the country with densities that are much lower than this.) Of course, it is precisely the most rural areas of the country that the Commission has identified as a priority for the deployment of robust and affordable broadband.

The Solution

The *National Broadband Plan* emphasized that applying different pole attachment rates based upon a company’s regulatory classification “distorts attachers’ deployment decisions...[especially] with regard to integrated, voice, video and data networks.” Accordingly, and in light of all the data identified above, the *National Broadband Plan* concluded that in order

² See, Verizon Comments at 2.

³ See, USTelecom Comments at 1, 7.

⁴ See, e.g., Letter from Michael D. Saperstein, Jr., Frontier Communications, to Marlene H. Dortch, FCC, WC Docket No. 07-245, GN Docket No. 09-51 (Mar. 15, 2011) (*Frontier Ex Parte*) (North Carolina utility attempting to unilaterally increase rates from \$36.05 per pole to \$64.75 per pole). And one of USTelecom small, rural companies reports that its average company-wide rate for attaching to electric utilities has increased by 92% since 2006.

⁵ See, e.g., *Frontier Ex Parte* (stating that “utilities have gained significant leverage in joint use agreements that they have used to dramatically increase the pole attachment rates for ILEC”); Windstream March 29 *Ex Parte* at 2 (describing how the “imbalance in pole ownership has allowed [electric companies] to claim significantly enhanced bargaining power in pole attachment negotiations”); Verizon March 16 *Ex Parte* at 2 (discussing the costs of pole ownership and the obligations imposed by joint agreements); see also Verizon Comments at 18 (discussing the offsetting burdens and obligations imposed by joint ownership agreements); Letter from John E. Benedict, CenturyLink, to Marlene H. Dortch, FCC, WC Docket No. 07-245, GN Docket No. 09-51 (Mar. 17, 2011) (explaining that “joint use agreements, far from providing ILECs any meaningful benefits, have become disadvantageous to ILECs”).

“to support the goal of broadband deployment, rates for pole attachments should be as low and as close to uniform as possible.”

Since the release of the Plan, we have been gratified by your public statements demonstrating your understanding of this very basic but critically importance issue. We applaud the fact that in several recent speeches, you have emphasized “encourage[ing] private investment,” by providing “economical access to poles”; identified pole attachment reform as one of the “important steps in the priority area of lowering the costs of broadband buildout”; and discussed the importance of focusing the Commission policy on the “nuts-and-bolts issues” like pole attachments that are not “sexy,” but are nevertheless “very important” and can often make a “huge difference,” in lowering broadband costs.”⁶ Last month’s Broadband Acceleration Conference and the Notice of Inquiry the Commission will be considering next week, further illustrate your appreciation of the importance of eliminating basic regulatory barriers to broadband deployment. Indeed, I believe you captured the essence of this issue in an interview with a writer from New York Magazine, where you explained that pole attachment reform is the “blood and guts of making sure we can drive as much investment as fast as possible in our networks.”⁷

USTelecom and our member companies are grateful for, and fully supportive, of this reform effort, particularly as it is reflected in the recommendation of the National Broadband Plan that one of the best ways to incent affordable and wide-spread broadband is to ensure that all broadband providers have access to attachment rates that are as low and as close to uniform as possible.

The Public Benefit

By and large, the degree to which the Commission’s imminent action on pole attachments effectuates positive consumer welfare will stem from the extent to which it actually results in the reduction of *ILEC* pole attachment rates to the same levels as cable and *CLEC* competitors. To be clear, USTelecom is fully supportive of ensuring low just and reasonable attachment rates for cable and competitive telecommunications companies. However, with respect to cable companies, such rates would merely be maintaining the *status quo* that the Commission granted to cable broadband attachments *over a decade ago* under the same statutory authority of section 224(b) and for the same express policy purpose—to incent the deployment of broadband

⁶ Prepared Remarks of Chairman Julius Genachowski, 72nd Communications Workers of America Conference, Washington, D.C., p. 4 (July 26, 2010) (available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-300320A1.pdf) (visited March 29, 2011); Prepared Remarks of Chairman Julius Genachowski, Our Innovation Infrastructure: Opportunities and Challenges, NARUC Annual Meeting, Atlanta, GA, p. 6 (November 15, 2010) (available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-302802A1.pdf) (visited March 29, 2011).

⁷ Thomas Claburn, *Web 2.0 Summit: FCC Chairman Sees Past Hindering Broadband Future*, InformationWeek, November 17, 2010 (available at: <http://www.informationweek.com/news/government/policy/showArticle.jhtml?articleID=228300092>) (visited March 31, 2011).

infrastructure.⁸ And while there would be some modest reduction to CLEC attachment rates, those rates are already only half of what ILECs pay.

Moreover, in those rural areas of the country which the Commission has identified as the most difficult to deploy broadband--and, relatedly, the areas where the impact of high pole rates can be most acute--it is ILECs that are by far the most likely to be pushing broadband into communities where the economics are extremely daunting.

The benefits of bold Commission action that clearly articulates that ILECs are entitled to the same low but compensable pole attachment rate formula as cable and CLEC attachers--and does so in a manner that allows them to effectuate those rights in a workable and timely manner--would have tremendous benefits to broadband consumers.

Based upon an analysis of data from USTelecom's survey of its member companies, the record in this proceeding, and the conclusions in the *National Broadband Plan*, ILECs today are being overcharged by \$320 million to \$350 million every year for their attachments to the poles within the Commission's regulatory authority when compared to the just, reasonable and fully compensable cable rate.⁹ This estimate is at the high end of a range estimated by AT&T in its

⁸ In its *1998 Implementation Order*, the FCC considered whether Section 224(b)(1) requires it to establish just and reasonable rates for covered providers (there, cable television systems) offering commingled broadband and traditional cable service. Some pole-owning utilities argued that Section 224(b)(1) neither required nor authorized the FCC to establish just and reasonable rates for these types of attachments. They noted that the Pole Attachment Act includes two specific rate formulas—the Section 224(d)(3) cable rate and the Section 224(e) competitive telecom rate—and they argued that these provisions are the only sources of FCC authority to establish pole attachment rates. Since cable providers' broadband-capable attachments did not fit within the scope of these formulas, the pole owning utilities argued that the FCC had no jurisdiction to establish just and reasonable rates. The FCC disagreed, based on the plain text of Section 224, explaining that “[t]he definition of ‘pole attachment’ does not turn on what type of service the attachment is used to provide. Rather a ‘pole attachment’ is defined to include any attachment by” a covered provider. The FCC determined that, as long as the attaching entity is a covered provider, Section 224(b)(1) requires it to establish just and reasonable rates for its broadband-capable attachments.

On appeal, the Supreme Court reached the same conclusion, finding that Section 224 unambiguously requires the Commission to establish just and reasonable rates for covered providers' broadband-capable attachments. The Court held that Section 224(b)(1) “requires the FCC to ‘regulate the rates, terms, and conditions for pole attachments,’ and [Section 224(a)(4)] defines these to include ‘any attachment by a cable television system.’” The Court explained that “what matters under the statute” is “the character of the attaching entity—the entity the attachment is ‘by.’” The Court stated that “Congress did indeed prescribe two formulas for ‘just and reasonable’ rates in two specific categories; but nothing about the text of §§ 224(d) and (e), and nothing about the structure of the Act, suggest that these are the exclusive rates allowed.” The Court concluded that “[t]he sum of the transactions addressed by the rate formulas . . . is less than the theoretical coverage of the Act as a whole.” While the FCC must apply the specific rate formulas within their “self-described scope,” the Court made clear that the two formulas “work no limitation” on Section 224(b)(1)'s broad mandate.

⁹ This estimate is based upon an examination of the approximate number of electric utility poles that are in states that have not “reverse pre-empted,” and are not owned by municipal or cooperative electric companies. *See, e.g., National Broadband Plan*, Recommendation 6.5 (finding that approximately 49 million of the nation's 134 million poles are within the Commission's jurisdiction). Of course, any benefits to ILECs from Commission action to lower attachments rates will be offset by decreases in the rates paid by CLECs to attach to ILEC-owned poles. This is likely to reduce ILEC pole revenues by approximately \$20 million per year if CLECs are moved to the cable rate.

comments in this proceeding based upon an extrapolation from the Commission's own estimate in the *FNPRM* that applying the current telecom rate to cable companies instead of the cable rate (a difference of only approximately \$3) would increase infrastructure costs for the cable industry by approximately \$90 million to \$120 million annually.¹⁰

The Commission has already correctly determined that consumers will be the ultimate beneficiaries of such lower pole attachment rates. In its *1998 Implementation Order*, the Commission found that providing cable companies with low attachment rates pursuant to the "just and reasonable" provisions of Section 224(b) would encourage providers "to make Internet services available to their customers."¹¹ In fact, the Commission specifically concluded that applying the low but compensable cable rate to broadband attachments "will encourage greater competition in the provision of Internet service and greater benefits to consumers."¹² Moreover, the Commission's view is supported by an economic analysis which rejects the notion that low attachment rates are somehow a "subsidy," and instead demonstrates that economic pricing principles support "the same rates be paid by firms that offer the same services" and that such rate "should be established at level below the current telecommunications or cable rate."¹³ The Phoenix Center paper emphasized that "such a result would *promote overall economic efficiency and increase consumer welfare.*"¹⁴

In light of the tremendously competitive marketplace for broadband services throughout the country -- including competition from CLECs, cable, wireless and satellite broadband providers -- USTelecom's member companies are making major investments to deliver consumers more robust broadband services.¹⁵ But, as the *National Broadband Plan* recognizes, one of the major hurdles facing ILECs is access to the capital necessary to meet the competitive challenges presented by next generation broadband networks that have been deployed by cable companies who enjoy the benefit of lower attachment rates today. This is particularly critical as most ILECs are simultaneously experiencing declines in their traditional lines of business. Putting ILECs in a parity position in this regard will make these companies more competitive and free up capital. In short, an order from the Commission that offers ILECs regulatory parity with other broadband providers will produce benefits flowing through to consumers in the form of stronger, more viable competitors, increased capital expenditures on broadband infrastructure

¹⁰ Comments of AT&T at 2 (estimating ILEC overpayments of approximately \$273 million to \$364 million per annum based upon extrapolations from the Commission data).

¹¹ See *Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, 6781 (para. 5) (1998) (*1998 Implementation Order*).

¹² *Id.*

¹³ George S. Ford, Thomas M. Koutsky and Lawrence J. Spiwak, *The Pricing of Pole Attachments: Implications and Recommendations*, PHOENIX CENTER POLICY PAPER No. 34, pp. 19, 24 (December 2008) (available at: <http://www.phoenix-center.org/pcpp/PCPP34Final.pdf>) (visited March 31, 2011) (*Phoenix Study*).

¹⁴ *Phoenix Study*, p. 4 (emphasis added).

¹⁵ The impact of this competition stretches across a broadband provider's entire service territory when the provider sets prices on a regional or national basis -- which is generally the case.

or lower consumer prices -- if for no other reason than the market demands it in order for these companies to compete for customers.

And as the National Broadband Plan summed up, these benefits “could have the added effect of generating an increase – possibly a significant increase – in rural broadband adoption.”¹⁶

But an equally important public policy benefit from lower ILEC pole attachment rates will be realized in its impact on the Commission’s Universal Service Fund and, particularly, on the proposed Connect America Fund. Specifically, under the Commission’s current proposal, it intends to spur immediate new broadband investment through the use of a “technology-neutral reverse auction,” whereby broadband providers would compete against one another by “bidding for the lowest amount of support they would require to provide service to unserved housing units.” Absent reforms to the Commission’s current pole attachment rate regime, however, such auctions would be anything but technology-neutral, since potential ILEC auction participants would be handicapped in submitting competitive bids due to the disparity in pole attachment rates between likely cable, wireless and CLEC auction participants. As a result, consumers residing in areas subject to an auction would not necessarily be receiving the most cost-effective broadband service. Absent reforms to pole attachment rates, in areas where the only bidders in Connect America Fund auctions are an ILEC and non-ILEC, the non-ILEC bidder would have little incentive to pursue a truly competitive bid, unnecessarily raising the costs to the Connect America Fund of providing broadband service to that area, while ILECs’ bids often would be higher than what would have been possible if they could have readily availed themselves for the Commission’s proposed pole attachment rate formula.

While quantifying the benefits to the Connect America Fund requires some assumptions, we estimate that approximately one-third to one-half of the current unreasonable electric utility pole attachments are in rural areas¹⁷ -- suggesting that a strongly and clearly articulated reduction of ILEC attachment rates to the cable benchmark ultimately *could reduce the burden on the proposed Connect America Fund by more than \$100 million each year*. And, of course, these savings flow through to consumers through their impact on the size of the assessment rate included on the bills of all telecommunications consumers.

Of course, as we have explained, the extent and timing under which these public benefits are realized will turn on the extent to which they are realized by the companies—and this in turn depends greatly upon the extent to which the Commission’s order clearly articulates the ILEC’s

¹⁶ *National Broadband Plan*, Section 6.1.

¹⁷ To estimate the portion of poles in rural areas, USTelecom utilized public road mileage statistics from the Department of Transportation, and estimated the distance between utility poles in rural and urban areas. According to this data, there are 2,977,222 miles of rural roads and 1,065,556 miles of urban road in the United States (creating a ratio of 2.8 to 1 for rural to urban roads). It is also estimated that rural poles are spaced every 300 feet while urban poles are spaced every 125 feet (creating a ratio of 2.4 to 1). Dividing the ratio of rural/urban road miles (i.e., 2.8) by the ratio of rural/urban pole distance (i.e., 2.4), establishes that there are 1.2 rural poles for every 1 urban pole in the United States. Thus, we estimate that rural poles represent approximately 54% of the poles in the country.

entitlement to the same just and reasonable rate as its cable and CLEC competitors. Some of our larger member companies each have hundreds of separate pole attachment agreements with electric utilities; and our smaller member companies certainly are not in the position to engage in lengthy litigation with large investor-owned utilities. In fact, it is important to recognize that if the Commission makes it more difficult for ILECs to exercise their rights to just and reasonable attachment rates than it does for cable and CLEC attachers, the short-term impact will actually negatively impact ILECs as the revenues from CLEC attachments to ILEC-owned poles are reduced before ILECs can avail themselves of any reductions in the rates they pay to electric utilities.

The Commission has correctly and consistently “encourage[d] parties to negotiate the rates, terms, and conditions of pole attachment agreements” and held that “negotiations between a utility and an attacher should continue to be the primary means by which pole attachment issues are resolved.”¹⁸ But a clear statement from the Commission that “just and reasonable” means precisely the same thing for all attachments offering mixed services – including ILECs – is an absolute prerequisite to such negotiations. Thus, by setting a clear, uniform rate as the default rate for negotiations, with the complaint procedure available in the event such negotiations fail, the Commission would further market negotiations over pole attachment rates and establish an efficient, administrable system for their administrative resolution if and when needed.

* * * * *

Again, I thank you for your continued understanding of this critical issue and urge the Commission to move forward with a strong, bold order that offers ILECs the benefits of low pole attachment rates that are already enjoyed by their competitors. USTelecom and its member companies are confident that broadband consumers will be the beneficiaries of such action.

Sincerely,



Walter B. McCormick, Jr.

¹⁸ 1998 *Implementation Order* at 6783-84 (paras. 9, 11).