



March 31, 2011

EX PARTE

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:

USTelecom takes this opportunity to rebut recent assertions by some electric utility commenters in this proceeding that, in contrast to the plain meaning of Section 224 of the Communications Act, the Commission lacks jurisdiction to ensure just and reasonable pole attachment rates for incumbent local exchange carriers. As numerous commenters have explained, the Commission should apply the cable rate to all broadband-capable attachments, including those used by incumbent carriers.¹ We respectfully emphasize that this result, which comports with the principle of competitive neutrality by treating all broadband providers similarly and would advance the cause of broadband deployment, is not only good policy but affirmatively *required* by federal law.

Section 224(b)(1) provides that the FCC “shall” provide “just and reasonable” rates for “pole attachments,” including all broadband-capable attachments used by covered providers. 47 U.S.C. § 224(b)(1). The record now confirms that incumbent carriers are in fact *not* being charged just and reasonable rates. Rather, the record demonstrates that electric utilities are charging incumbent carriers rates *up to 14 times as high* as the rate they charge cable companies for the same broadband-capable attachments, without any substantive basis for the vast differential. This glaring disparity in charges for the same type of attachments on the same poles does not satisfy the statutory standard under Section 224. Accordingly, the FCC must establish a uniform rate formula for all essentially identical pole attachments of broadband providers. Failure to do so would violate the core Congressional directive and underlying purpose of Section 224. Importantly, setting a clear, uniform broadband attachment rate in this unique

¹ See, e.g., Verizon Comments at 10-21; CenturyLink Comments at 4-5 (“The Commission should adopt the current cable rate for all broadband attachments.”); see also Reply Comments of Verizon at 8-17; see also Letter from Kathleen Grillo, Verizon Wireless, to Marlene H. Dortch, FCC, WC Docket No. 07-245, GN Docket No. 09-51 (March 16, 2011) (“Verizon March 16 Ex Parte”).

regulatory context would facilitate private negotiations between broadband service providers and pole owners, with the Commission's complaint process serving as a meaningful backstop to market negotiations.

Indeed, failure to apply the cable rate formula to all broadband attachments would be arbitrary and capricious under the Administrative Procedure Act, U.S.C. § 701 *et seq.* (the "APA"). Among other things, it would treat similarly-situated persons differently without justification and constitute an unexplainable departure the agency's prior decision to apply the cable rate to other broadband-capable attachments. Moreover, there is no lawful basis for the Commission simply to assert that the rates contained in existing joint agreements are *per se* just and reasonable, effectively exempting them from remediation under Section 224. In order to reach any conclusion about the justness and reasonableness of these rates, the Commission would, at the bare minimum, have to consider the agreements themselves and the rates contained therein. Absent this analysis, the Commission's conclusion would be plainly unsustainable under the APA's reasoned decision-making requirement. For the Commission would not just have failed to make a "rational connection between the facts found and the choice made,"² as is often alleged in litigation, it would not have engaged in any analysis *at all* of the relevant facts regarding the substantive lawfulness of the rates at issue.

For all these reasons, the Communications Act and the APA require the establishment of a uniform rate formula at the cable rate level for all broadband-capable attachments and, in any event, clearly prohibit any finding that rates contained in joint agreements are *per se* just and reasonable.

I. Section 224(b)(1) Requires The FCC To Establish A Just And Reasonable Rate For All Broadband-Capable Pole Attachments, Including Those Used By Incumbent Carriers.

As an initial matter, Section 224 requires the FCC to establish just and reasonable pole attachment rates for all broadband-capable pole attachments, which include those used by incumbent carriers. Section 224(b)(1) expressly provides that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable."³ Section 224(a)(4), in turn, defines "pole attachment" as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."⁴ Incumbent carriers (along with wireless carriers and competitive carriers) are defined as "provider[s] of

² *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-43 (1983) (requiring "rational connection between the facts found and the choice made") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

³ 47 U.S.C. § 224(b)(1).

⁴ 47 U.S.C. § 224(a)(4).

telecommunications service.”⁵ Thus, when read in conjunction with Section 224(a)(4), Section 224(b)(1) requires the Commission to ensure the justness and reasonableness of pole attachment rates for incumbent carriers, as well as cable television systems, wireless carriers, and competitive carriers.

Moreover, the FCC’s obligation to ensure just and reasonable rates under Section 224(b)(1) extend to all attachments used by these covered providers, including their broadband-capable attachments. As noted above, the statute expressly defines “pole attachment” as “*any attachment by*” a covered provider.⁶ Regardless of whether a covered entity uses its attachment to provide broadband on a stand-alone basis or commingled with a traditional cable or telecommunications service, Section 224(b)(1) requires the FCC to establish a just and reasonable rate for the attachment.

This reading of Section 224 is confirmed by controlling FCC and Supreme Court precedents.⁷ 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. As in the current proceeding, 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.

⁵ See 47 U.S.C. § 153(46) (defining “telecommunications service”). Some electric utility commenters have argued that Section 224(b)(1) does not authorize the FCC to establish just and reasonable rates for attachments used by incumbent carriers because Section 224(a)(5) excludes incumbents from the definition of “telecommunications carrier.” See, e.g., Comments of The Edison Electric Institute and The Utilities Telecom Council at 78. As already established, this argument is incorrect. See, e.g., USTelecom Comments at 12-13. Section 224(a)(4) defines the scope of the FCC’s Section 224(b)(1) duty to ensure just and reasonable rates, and this provision uses the term “provider of telecommunications service” (which includes incumbent carriers)—not the narrower term “telecommunications carrier.” Although the electric utilities assert that Congress intended the two terms to be interchangeable, this is not correct. Throughout the Telecommunications Act of 1996, Congress made clear that the terms are not coterminous. See, e.g., 47 U.S.C. § 256(b)(1) (directing the FCC to establish rules for “telecommunications carriers and other providers of telecommunications service”); see also 47 U.S.C. § 256(a)(1)(A).

⁶ 47 U.S.C. § 224(a)(4) (emphasis added); see also Verizon Comments at 5-10.

⁷ 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 (1998) (“*1998 Implementation Order*”); see also *National Cable & Telecomm Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002).

The FCC disagreed, based on the plain text of Section 224. The Commission explained 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.⁸ 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.’”⁹ The Court explained that “what matters under the statute” is “the character of the attaching entity—the entity the attachment is ‘by.’”¹⁰ 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.”¹¹ 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.”¹² 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.¹³

Thus, as long as the attaching entity is included in Section 224(a)(4)’s definition, the Commission is required by Section 224(b)(1) to regulate the rates applied to that entity’s pole attachments, including their broadband-capable attachments.

Finally, in Section 224, Congress provided that the Commission “shall” take action “to provide” rates for covered pole attachments that are “just and reasonable.”¹⁴ This duty is mandatory, not discretionary.¹⁵

⁸ *1998 Implementation Order*, 13 FCC Rcd at 6793-94 (¶ 30).

⁹ *Gulf Power Co.*, 534 U.S. at 333 (citation omitted).

¹⁰ *Id.*

¹¹ *Id.* at 335 (citation omitted).

¹² *Id.* at 336.

¹³ *Id.* at 336, 337.

¹⁴ 47 U.S.C. § 224(b)(1).

¹⁵ *See, e.g., Association of Civil Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (“The word ‘shall’ generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.”); *see also Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (stating that the term “shall” “normally creates an obligation impervious to . . . discretion”).

Thus, in the face of record evidence that providers of broadband services are paying wildly varying attachment rates, lacking any relationship to the amount of usable space occupied, the costs related to the pole, or some other rational basis for the disparity, the Commission must establish a uniform rate formula for all broadband attachments such that the rates charges for the attachments meet the mandate of Section 224's "just and reasonable" standard. And the record established in this proceeding now clearly confirms that incumbent carriers are not in fact being charged just and reasonable rates for broadband-capable attachments.

In particular, the record establishes that pole owners are charging incumbent carriers exorbitant rates, numerous multiples above the rates charged other broadband providers, and far above any possible compensatory level.¹⁶ A USTelecom survey filed in this proceeding shows that incumbent carriers are charged up to *14 times* the rate cable providers are charged for their broadband attachments.¹⁷

The record evidence is overwhelmingly in accord with the USTelecom survey. CenturyLink stated that it "pays, on average, a per-attachment rate that is close to *five times* as high as what its cable competitors pay for the same attachments, and often it is even higher."¹⁸ AT&T stated that, as a result of higher pole attachment rates, "ILECs are paying approximately \$273 million to \$364 million per annum more in infrastructure costs than cable providers."¹⁹ An electric utility in Pennsylvania charges Verizon a pole attachment rate of \$96.36.²⁰ By contrast, the rate this utility is allowed to charge cable providers for their broadband-capable attachments is approximately \$8.70.²¹ In other words, the electric utility is charging Verizon an attachment rate that is 11 times the cable rate.²² This wide discrepancy, with no distinguishing basis, is not just and reasonable. Nor is it unique. A utility in Texas charges Verizon \$38.52 per attachment, even though its cable rate is approximately \$6.90.²³ Similarly, a utility in Virginia charges Verizon \$47.21 per attachment, while its cable rate is about \$6.00.²⁴ The wide gulf between the rates incumbent carriers and cable providers pay for hanging the same broadband-capable

¹⁶ See, e.g., Verizon Comments at 3-5; Verizon Reply Comments at 3-4; Verizon March 16 Ex Parte at 1-2.

¹⁷ See USTelecom Comments at 1, 7.

¹⁸ See, e.g., CenturyLink Comments at 8.

¹⁹ AT&T Comments at 2.

²⁰ See Verizon Comments at 4 (citing Declaration of Mr. James Slavin and Mr. Steven Frisbie at ¶ 15 (the "Aug. 12 Declaration")).

²¹ See *id.* (citing Aug. 12 Declaration at ¶ 15).

²² See *id.* (citing Aug. 12 Declaration at ¶ 16).

²³ See Aug. 12 Declaration at ¶ 17.

²⁴ See Aug. 12 Declaration at ¶ 19.

attachments is not “just and reasonable” within the meaning of Section 224(b)(1). It is regulatory arbitrage.

Moreover, there is no cost or other lawful justification that can account for the enormous discrepancy. The rates electric utilities charge incumbent carriers lack any lawful nexus to the pole owners’ costs or the amount of usable space the attachments take up, despite the FCC’s recognition that pole attachment rates are supposed to be based on these considerations.²⁵ For instance, in the Pennsylvania example cited above, the incumbent’s attachments occupy less than 8 percent of the usable space on the pole, yet it pays about 80 percent of the electric utility’s total pole costs.²⁶ Similarly, the Commission’s own *National Broadband Plan* found that cable companies pay, on average, \$7 per foot of pole space per year, while incumbent carriers pay \$20.²⁷

Under Section 224, then, the FCC must act to ensure that the rates for broadband-capable attachments paid by incumbent providers are just and reasonable in relation to those paid by their broadband competitors, such as cable companies providing broadband services. Failure to do so would violate the core Congressional directive in Section 224. Importantly, adopting a uniform broadband attachment rate formula in this unique regulatory context would facilitate private negotiations between broadband service providers and pole owners, with the Commission’s complaint process serving as a meaningful backstop to negotiations.²⁸ 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.”²⁹ The Commission has also rightly recognized that a clear rate formula “assists the Commission when it addresses complaints.”³⁰ 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.

²⁵ See, e.g., *In the Matter of Implementation of Section 224 of the Act*, 25 FCC Rcd 11864, 11909 (¶ 110) (2010) (“*FNPRM*”) (discussing the cost basis for pole attachment rates); see also *id.* at 11910-11 (¶ 113) (“The cable rate formula and the telecom rate formula both allocate the costs of usable space on a pole based on the fraction of the usable space that an attachment occupies.”).

²⁶ See Aug. 12. Declaration at ¶¶ 15 - 16.

²⁷ *National Broadband Plan* at p. 110.

²⁸ See Verizon Comments at 16-19.

²⁹ *1998 Implementation Order*, 13 FCC Rcd at 6783-84 (¶¶ 9, 11).

³⁰ *Id.* at 6823 (¶ 102).

II. The APA Requires The FCC To Apply The Cable Rate To All Broadband-Capable Attachments.

As explained above, Section 224's just and reasonable requirement requires that there not be a gross disparity among pole attachment rates for broadband providers. The proper policy and only legal solution for doing so is to establish a uniform rate formula for all broadband-capable attachments that is the same as the cable rate formula.³¹ The APA, which states that reviewing courts shall set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"³² also requires this result for several reasons.

First, the APA prohibits the FCC from treating similarly situated persons differently.³³ Controlling law makes clear that "[a]n agency cannot meet the arbitrary and capricious test by treating type A cases differently from similarly situated type B cases The treatment . . . must be consistent. That is the very meaning of the arbitrary and capricious standard."³⁴ The FCC's own precedents underscore this APA requirement. In numerous agency orders, the Commission has committed to applying a symmetrical regulatory structure across broadband platforms and recognized the benefits associated with this symmetrical approach.³⁵

³¹ Although some commenters contend that the FCC cannot apply the cable rate to commingled attachments used by competitive telecom carriers, this is not correct. As the Supreme Court determined in *Gulf Power*, Section 224 only requires the FCC to apply the competitive telecom rate "within its self-described scope." *Gulf Power*, 534 U.S. at 336. Since Section 224(e)(1) is silent with respect to broadband-capable attachments, its "self-described scope" does not encompass those attachments. At most, Section 224(e)(1) is ambiguous with respect to broadband-capable attachments, and the FCC would have discretion to find that it does not apply to those attachments. See, e.g., *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984).

³² See 5 U.S.C. § 706(2)(A).

³³ See, e.g., *Etelson v. Office of Personnel Mgmt.*, 684 F.2d 918, 926 (D.C. Cir. 1982) ("Government is at its most arbitrary when it treats similarly situated people differently.").

³⁴ *Independent Petroleum Ass'n of America v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996); see also *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965).

³⁵ See, e.g., *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, 5902 (¶ 2) (2007) ("establish[ing] a consistent regulatory framework across broadband platforms by regulating like services in a similar manner"); *In the Matter of United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281, 13281-82 (¶ 2) (2006) ("This Order also furthers the Commission's goal of developing a consistent regulatory framework across broadband platforms by regulating like services in a similar manner.") ("*BPL Internet Access Order*"); *In the Matters of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853, 14855 (¶ 1) (2005) ("[T]he framework we adopt in this Order furthers the goal

With respect to the rates utilities charge incumbent carriers and cable providers for hanging the same broadband-capable attachments, the record shows that these providers are indeed similarly situated.³⁶ They are affixing the same attachments to the same poles to provide the very same service to consumers. And, as noted above, there is no possible cost or other rational justification for the gross disparities in the charges. Indeed, the Commission previously found that the “critical need to create even-handed treatment . . . for broadband deployment would warrant the adopting of a uniform rate for all pole attachments used to provide broadband Internet access” and noted the importance of “regulating like services in a similar manner.”³⁷ Similarly, the Commission found in the National Broadband Plan that having non-uniform broadband attachment rates “distorts attachers’ deployment decisions” and creates uncertainty that “deter[s] broadband providers . . . from extending their networks or adding capabilities.”³⁸ As a result, the Commission cannot rationally apply one rate to a cable provider’s broadband-capable attachment and a different, higher rate to an incumbent carrier’s attachment.

Although some parties have argued that these providers are not similarly situated because incumbents derive unique benefits from pole attachment arrangements (either because they receive revenue from attachers on their own poles or by virtue of joint agreements), this argument is erroneous. As noted above, the record in this proceeding establishes that the alleged benefits associated with its status as a pole owner are offset by the costs of pole ownership, and any advantages it enjoys under joint agreements are offset by the burdens and obligations those agreements impose.³⁹ Moreover, incumbent carriers do not enjoy any historical or “incumbent”

of developing a consistent regulatory framework across platforms by regulating like services in a similar functional manner [.]”); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, 4802 (2002) (“[W]e seek to create a rational framework for the regulation of competing services that are provided via different technologies and network architectures . . . [and w]e strive to develop an analytical approach that is, to the extent possible, consistent across multiple platforms.”). As explained below, it is a violation of the APA for the FCC to depart from agency precedent without providing a reasoned explanation.

³⁶ See, e.g., Verizon March 16 Ex Parte; see also Verizon Comments at 18.

³⁷ *In the Matter of Implementation of Section 224 of the Act*, 22 FCC Rcd 20195, 20209 (¶ 36) (2007) (stating that “[d]ue to the importance of promoting broadband deployment and the importance of technological neutrality, we tentatively conclude that all categories of providers should pay the same pole attachment rate for all attachments used for broadband Internet access service”).

³⁸ FCC, *Connecting America: The National Broadband Plan*, at 110 (rel. March 17, 2010) (“National Broadband Plan”).

³⁹ 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) (stating that

advantage when it comes to deploying new broadband capable attachments. Broadband is a relatively new service, and no one set of providers has any “legacy” networks or advantages in this area.

Second, failing to apply the cable rate to broadband-capable attachments would represent an unjustifiable departure from FCC at least two settled lines of FCC precedent, which is a clear violation of the APA.⁴⁰ As noted above, the Commission has committed to applying “a consistent regulatory framework across broadband platforms by regulating like services in a similar manner.”⁴¹ Yet, by failing to apply the cable rate to all broadband-capable attachments, the FCC would be imposing a decidedly asymmetrical regulatory structure across broadband platforms. After consistently following its precedents over a number of years, the FCC simply cannot articulate any lawful basis for departing from those precedents. There is nothing in this record that the FCC could use to persuade a reviewing court that adhering to its symmetrical regulatory approach no longer makes sense.

By not applying the cable rate to all broadband-capable attachments, the FCC would be turning heel on a separate line of FCC precedent. In its *1998 Implementation Order*, the FCC determined that the Section 224(b)(1) “just and reasonable” rate for a broadband-capable attachment is the Section 224(d)(3) cable rate.⁴² The FCC found that applying the cable rate would encourage providers “to make Internet services available to their customers.”⁴³ The FCC further determined “that specifying a higher rate might deter an operator from providing

“utilities have gained significant leverage in joint use agreements that they have used to dramatically increase the pole attachment rates for ILEC”); 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); Windstream March 29 Ex parte at 2 (describing how the “imbalance in pole ownership has allowed [electric utilities] to claim significantly enhanced bargaining power in pole attachment negotiations”).

⁴⁰ *See, e.g., FCC v. Fox Television Stations, Inc.* 129 S.Ct. 1800, 1810-12 (2009); *see also State Farm*, 463 U.S. at 41-43; *see also Telecommunications Research and Action Center v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986) (“When an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms.”); *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 300 (D.C. Cir. 2009) (“If the FCC changes course, it ‘must supply a reasoned analysis’ establishing the prior policies and standards are being deliberately changed.” (citation omitted)).

⁴¹ *See, e.g., BPL Internet Access Order*, 21 FCC Rcd 13281-82 (¶ 2).

⁴² *1998 Implementation Order*, 13 FCC Rcd at 6794 (¶ 32) (“We conclude, pursuant to Section 224 (b)(1), that the just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate.”).

⁴³ *Id.*

non-traditional services” and that “[s]uch a result would not serve the public interest.”⁴⁴ “[S]pecifying the Section 224(d)(3) rate,” the FCC found, “will encourage greater competition in the provision of Internet service and greater benefits to consumers.”⁴⁵ Similarly, the *National Broadband Plan* determined that “[t]he cost of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way.”⁴⁶ The Commission then concluded that “[t]o support the goal of broadband deployment, rates for pole attachments should be *as low . . . as possible*.”⁴⁷ All of this is equally true here, if not more so, given the current state of increased of competition in the broadband marketplace.⁴⁸ There is thus no lawful basis for departing from this precedent and deciding not to apply the cable rate formula to all broadband-capable attachments.

Third, the APA requires rational decision-making, supported by substantial evidence,⁴⁹ and the D.C. Circuit has held that “[r]ational decision-making . . . dictates that the agency simply cannot employ means that actually undercut its own purported goals.”⁵⁰ The record shows there is no reasoned basis for declining to apply the cable rate to all broadband-capable attachments and that doing so would undermine the FCC’s critical broadband goals. As set forth above, the record shows that electric utilities are charging incumbent providers arbitrary and exorbitant rates that are completely divorced from pole owners’ costs and the usable space occupied by incumbent carriers. This is having a direct and negative impact on the deployment of broadband offerings and the prices consumers pay for broadband.⁵¹ Moreover, the record evidence and

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *National Broadband Plan* at 109.

⁴⁷ *Id.* at 110 (emphasis added).

⁴⁸ Although the *1998 Implementation Order* addressed the issue of cable attachments used to offer commingled broadband and cable service, the FCC’s holding is not limited to cable providers’ attachments. The FCC’s core holding was that Section 224(b)(1) applied to broadband-capable attachments, that no specific rate formula applied to those attachments, and that Section 224(b)(1) required the FCC to apply the cable rate to those types of attachments for “pro-competitive reasons.” *See 1998 Implementation Order*, 13 FCC Rcd at 6791-96 (¶¶ 26-34).

⁴⁹ *See, e.g., Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 921 (D.C. Cir. 1985) (“Under the arbitrary and capricious standard we look to see if the agency has . . . articulated a rational explanation for its action.”); *see also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (an “agency must make findings that support its decision, and those findings must be supported by substantial evidence”).

⁵⁰ *Office of Commc’n of United Church of Christ v. FCC*, 779 F.2d 702, 707 (D.C. Cir. 1985) (holding that “[r]ational decision-making . . . dictates that the agency simply cannot employ means that actually undercut its own purported goals”).

⁵¹ *See, e.g., FNPRM*, 25 FCC Rcd at 11909 (¶ 110) (acknowledging “the distortionary effects arising from the difference in current pole rental rates”); *see also Verizon Comments* at 1

prior FCC determinations show that a uniform broadband rate pegged to the cable rate would spur the deployment of advanced offerings.⁵² There are no countervailing considerations since, as the Supreme Court has already found, electric utilities are adequately compensated when they are limited to charging the cable rate.⁵³ There is no rational basis for allowing electric utilities to enjoy windfall profits at the expense of broadband deployment.

Fourth and finally, there is, of course, no basis for any finding that pole attachment rates in existing joint agreements are just and reasonable simply by virtue of the fact that the rates are contained in such agreements. Any conclusion that the rates contained in joint agreements meet the just and reasonable standard of Section 224 would, at a bare minimum, require consideration of those actual rates and, for instance, their relationship to relevant factors such as usable space occupied or pole costs. Absent such analysis, it would be mere—and legally unsustainable—*ipse dixit* to decree such rates to be just and reasonable and effectively exempt them from Section 224’s protections.⁵⁴ Indeed, the very reason why Congress enacted Section 224 and required the FCC to regulate pole attachment rates was to influence the private negotiations taking place in this unique regulatory context.⁵⁵ To now find that the rates in all joint agreements—many of

(showing that “variation discourages broadband deployment”); *see also* USTelecom March 18 Ex Parte at 1 (“emphasiz[ing] that by far the most important step the Commission could take in this proceeding to facilitate broadband deployment would be . . . to ensure that pole attachments rates for all attachers, including ILECs, are as low and close to uniform as possible” (quotation marks omitted)); Verizon Reply Comments at 8 (“Many parties agree that setting a low, uniform attachment rate applicable to all providers of broadband services would accelerate the deployment of broadband services throughout the country and enhance competition for broadband services.”).

⁵² *See, e.g.*, CenturyLink Comments at 4-5 (stating that applying the cable rate to all broadband-capable attachments will spur broadband deployment); Verizon Reply Comments at 9-10 (stating that broadband deployment would be promoted by “establishing broadband attachment rates at the level determined by the Commission’s cable rate formula”); *see also* 1998 Implementation Order, 13 FCC Rcd at 6791-96 (¶¶ 26-34) (holding that applying the cable rate formula to broadband-capable attachments would spur deployment of advanced services, including broadband offerings).

⁵³ *See FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987); *see also* Comments of CenturyLink at 5.

⁵⁴ *Cf. State Farm*, 463 U.S. at 41-43 (1983) (requiring “‘rational connection between the facts found and the choice made’”) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

⁵⁵ *FCC v. Florida Power Corp.*, 480 U.S. 245, 247-48 (1987). The FCC’s 1996 amendments to Section 224, which extended Section 224(b)(1)’s right to just and reasonable rates to providers of telecommunications service, had the same purpose. *See, e.g.*, 1998 Implementation Order, 13

which were entered into before Congress enacted the Pole Attachment Act and thus were not negotiated against the backdrop of Section 224—are *per se* or presumptively just and reasonable for no reason other than the fact that they appear in joint agreements, without any analysis of the agreements or the rates contained therein, would undermine the very purpose of the Pole Attachment Act and constitute the “height of arbitrary and capricious decision making.”⁵⁶

* * * * *

USTelecom appreciates the Commission’s focus on the very important competition issue and encourages the Commission to move forward with an order that clearly articulates the rights of all broadband providers to the same just and reasonable pole attachment rates, consistent with the mandate of Section 224.

Sincerely,



Glenn Reynolds
Vice President - Policy

cc: Zac Katz
Sharon Gillett
Marcus Maher
Al Lewis
Christi Shewman
Christine Kurth
Brad Gillen
Angela Kronenberg
Margaret McCarthy
Austin Schlick
Diane Griffin Harmon
Raelynn Remy

FCC Rcd at 6794 (¶ 31) (“The purpose of the amendments to Section 224 made by the 1996 Act was similar to the purpose behind Section 224 when it was first enacted in 1978 . . .”).

⁵⁶ *Purepac Pharmaceutical Co. v. Thompson*, 354 F.3d 877, 884 (D.C. Cir. 2004).