

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Implementation of Section 224 of the Act	)	WC Docket No. 07-245
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51

To: The Commission

**OPPOSITION OF THE EDISON ELECTRIC INSTITUTE AND  
THE UTILITIES TELECOM COUNCIL TO PETITION FOR RECONSIDERATION OR  
CLARIFICATION OF THE NATIONAL CABLE & TELECOMMUNICATIONS  
ASSOCIATION, COMPTEL AND TW TELECOM INC.**

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## SUMMARY

Although the new telecom rate formula already reduces by one-third to more than one-half of the costs that utilities would otherwise recover under the old telecom rate formula in urban and rural areas respectively, the Petition seeks to increase this windfall for telecommunications providers even more. The Petition seeks to ensure that telecommunications companies will only pay the cable rate for all attachments everywhere, regardless of the actual number of attaching entities on the pole. The Petition speciously argues that the rationale behind the Commission's new rate formula logically requires the Commission to further adjust the telecom rate formula down to the cable rate based upon the number of attaching entities, rather than based upon whether the poles are in urban or rural areas.

However, the Petition's requests contradict the statute by violating provisions within section 224(e) that allocate the costs of the unusable space among all attaching entities and that require that the regulated rate recover two-thirds of the unusable space. This new proposal would violate these provisions by effectively nullifying them -- artificially adjusting the telecom rate using a sliding scale of percentages that are designed to offset the "number of attaching entities" denominator in the "other than usable space" allocator within the telecom rate formula so that the formula always produces a rate that approximates the cable rate, even if there are two, three, four or five attaching entities (or any non-whole number in between) on a pole in any area, urban or rural. Moreover, there is no basis in the language of the statute for five or six different definitions of the word "cost", nor is there any case law supporting a definition of costs that changes like this, and no economic reason for multiple definitions of costs.

The Petition would also violate the Commission's stated rationale for providing the 66/44% deduction to the existing telecom rate. The Commission did not specify the cost allocators based upon the number of attaching entities; instead it redefined cost based upon urban and rural areas in such a way that, according to the Commission, was intended *both* to give meaning to the section 224(e) cost allocators *and* reduce the telecom rate to the cable rate.<sup>1</sup> In addition, the Petition would also violate an underlying part of the Commission's rationale for providing the 66/44% deduction for telecom attachments, because it would not provide the further subsidization for attaching entities to deploy facilities and services into rural unserved areas. Instead, the Petition takes a new approach that would give increasingly steeper discounts for attachments to poles that have fewer attaching entities, regardless of whether the poles are in rural or urban areas.

Furthermore, the percentages proposed in the Petition are inherently arbitrary and capricious and upset the balance that the Commission sought to achieve in its approach to a new telecom rate. The percentages are purely designed to keep the telecom rate down with the cable rate, regardless of the number of attaching entities; and they are conjured up out of thin air without any basis in law or fact (let alone any record evidence). Moreover, using such an approach would upset the delicate balance between the interests of communications attachers and the interests of utilities that the Commission tried to strike in that they would further reduce cost recovery by interjecting additional arbitrary percentages into the rate formula.

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<sup>1</sup> EEI and UTC note this does not imply that the FCC's approach to defining "cost" by reference to geographic areas is reasonable. Contrary to statute and the FCC's new rule, Petitioners seek to expand this distinction beyond the rationale that the FCC adopted for its new rule and to solely base cost allocators on the number of attaching entities.

Finally, the FCC should recognize the Petition's alternative request is akin to the "shortcoming" in its original white paper to simply define costs as incremental costs. Presumably, the Commission understood that defining costs as incremental costs would make the new rate even more vulnerable for attack on appeal and therefore chose to define costs according to urban and rural areas (i.e., the 66/44% deduction) in a way that at least paid lip service to the meaning of section 224(e). However, the Petition would remove any pretense that the new rate is in conflict with the statutory provisions in section 224(e), and would expose it as an arbitrary and capricious set of percentages that are purely designed to further subsidize the communications industry at the expense of utilities and their customers. Therefore, EEI and UTC respectfully submit that the Commission must deny the Petition.

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ASSOCIATION, COMPTEL AND TW TELECOM INC.**

Pursuant to sections 1.429 and 1.41 of the Federal Communications Commission’s (“FCC” or “Commission”) Rules, the Edison Electric Institute (“EEI”)<sup>2</sup> and the Utilities Telecom Council (“UTC”),<sup>3</sup> on behalf of their respective member companies, hereby submit this opposition (“Opposition”) to the Petition for Reconsideration or Clarification (“Petition”) filed by the National Cable & Telecommunications Association, COMPTEL and tw telecom inc. (collectively the “Petitioners”) in the above-captioned proceedings regarding the Commission’s

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<sup>2</sup> EEI is the association of the United States investor-owned electric utilities and industry associates worldwide. Its U.S. members serve almost 95 percent of all customers served by the shareholder-owned segment of the U.S. industry, about 70 percent of all electricity customers, and generate about 70 percent of the electricity delivered in the U.S. EEI frequently represents its U.S. members before Federal agencies, courts, and Congress in matters of common concern, and has filed comments before the Commission in various proceedings affecting the pole attachment interests of its members, who are subject to FCC and state pole attachment jurisdiction.

<sup>3</sup> UTC is the international trade association for the telecommunications and information technology interests of electric, gas and water utilities and other critical infrastructure industries, including pipeline companies. Its members include investor-owned, municipal and cooperatively organized utilities. Thus, UTC advocates for the interests of all utilities in pole attachments.

rules and policies governing pole attachments.<sup>4</sup> EEI and UTC urge the Commission to deny the Petition on procedural grounds and on its merits since it is inappropriate to raise a new proposal at this stage of the proceeding, and the proposal is contrary to the statute and arbitrary and capricious on its merits.

## DISCUSSION

The Petition asks the Commission to clarify or amend the new telecom rate rule by “specifying the cost allocator to be applied based upon the number of attaching entities.”<sup>5</sup> Essentially, the Petition asks the Commission to ensure that attachers to electric utility poles get the mathematical equivalent of the cable rate regardless of how many attaching entities are on a pole. To accomplish this, the Petition urges the Commission to insert yet another layer of non-statutory variables into the new telecom rate formula to ensure the same result is yielded whether there are two, three, four or five attaching entities per pole. As a result, electric utilities would have no reason to rebut the existing rural and urban presumed numbers of attaching entities (which are still three attaching entities for rural areas and five for urban areas). As discussed below, the Commission should deny the Petition as procedurally defective, contrary to the intent of Congress, arbitrary and capricious, and contrary to the Commission’s stated policy goals.

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<sup>4</sup> 47 C.F.R. §§ 1.429, 1.41; *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, FCC 11-50 (rel. April 7, 2011) (“*2011 Pole Attachment Order*”). The *2011 Pole Attachment Order* was published in the Federal Register on May 9, 2011, 76 Fed. Reg. 26620.

<sup>5</sup> Petition for Reconsideration or Clarification of the National Cable and Telecomm Association, COMPTTEL, and tw telecom inc. in WC Docket No. 07-245 at 1 (filed June 8, 2011)(“Petition”).

**I. The Commission should deny the Petition because it is procedurally defective.**

EEI and UTC urge the Commission to find that the Petition does not warrant reconsideration or clarification by the Commission and to deny the Petition as procedurally defective. The issue presented in the Petition urging the Commission to specify new cost allocators based upon the number of attaching entities is plainly beyond the scope of the order of which reconsideration or clarification has been requested. Moreover, given that over four years have passed since Time Warner Telecom Inc. (“TWTC”) filed its white paper on pole attachment rates,<sup>6</sup> it is inappropriate for Petitioners to lodge a new proposal to specify new cost allocators. Petitioners have had ample opportunity to advance such a proposal in the years since this proceeding commenced. Petitioners present no new facts or arguments that would justify reconsideration or clarification.

Hence, the Petitioners clearly rely on facts and arguments that could have been presented previously to the Commission or its staff, but were not. There is no reason for the Commission at this late date to entertain further attempts, as explained below, to arrive at a rate formula that ignores Congressional intent and the Commission’s stated goals of balancing interests between utilities and communications attachers.

**II. The Commission should deny the Petition because it is contrary to Congressional intent and is arbitrary and capricious.**

To be clear, EEI and UTC believe the Commission’s new telecom rate rule violates the plain language of section 224(e), thwarts Congressional intent and is arbitrary and capricious for all of the reasons previously set forth in the filings of EEI, UTC and other electric utilities; but the Petition’s proposal is even worse. The Commission should deny the Petition on the basis that

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<sup>6</sup> Letter from Thomas Jones, Counsel for TWTC, to Marlene Dortch, Secretary, FCC, RM-11293 (filed January 16 2007).

the relief it seeks would contradict section 224(e) and on the basis that the proposed percentage rates to be applied are arbitrary and capricious.

It would contradict section 224(e) by providing a variable menu of cost allocators that effectuates a new and different statutory definition of "costs" every time the number of attachers changes. While the Petitioners make policy arguments, there is no basis in the language of the statute for five or six different definitions of the word "cost," no case law supporting a definition that changes like this, and no economic reason for multiple definitions. In addition, the Petition would contradict section 224(e) by effectively nullifying the cost allocators that apportion the costs of the unusable space among all of the attaching entities completely. It is arbitrary and capricious because it would interject an arbitrary range of percentages that is solely designed to ensure that the telecom rate mirrors the cable rate in areas where there are less than five attaching entities in urban areas or three attaching entities in rural areas. This arbitrary range of percentages would have no correlation to the actual apportioned share of the unusable space costs, and in fact are designed to offset the apportioned share of those costs based upon the number of attaching entities.

**A. The Petition is contrary to Congressional intent.**

Section 224(e)(1) states that the Commission's "regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments."<sup>7</sup> In determining the just and reasonable rate that a telecommunications carrier must pay for the unusable space for pole attachments, section 224(e)(2) states that:

A utility shall apportion the cost of providing space on pole, duct, conduit, or right-of-way other than usable space among *entities* so that such apportionment equals *two-thirds* of the costs of providing space other than

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<sup>7</sup> 47 U.S.C. § 224(e)(1).

the usable space that would be allocated to such *entity* under an *equal apportionment of such costs among all entities*.<sup>8</sup>

There are two important points here: (1) Congress intended that the costs of the unusable space would be apportioned among all entities equally and allocated to each entity on the pole; and (2) two-thirds of the costs of the unusable space would be recovered through the telecom rate. In addition, Congress intended “simple and expeditious” rate regulation and it did not want the Commission to “embark upon a large-scale ratemaking proceeding in each case brought before it, or by general order.”<sup>9</sup> As more fully described below, the Petition violates the provisions of the statute, is arbitrary and capricious, and is contrary to Congressional intent.

**1. The Petition violates section 224(e)(2) by effectively nullifying the cost allocators for sharing the unusable space costs.**

Recognizing that Congress intended for different rates to apply based on the number of attaching entities, in implementing section 224(e), the Commission developed presumptions for the number of attaching entities in urban and rural areas. These presumptions were rebuttable, and designed as alternatives to actual counts.<sup>10</sup> As the Commission explained, “this approach is

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<sup>8</sup> 47 U.S.C. § 224(e)(2) (emphasis supplied). H.R. Rep. No. 104-458 at 207, *reprinted in* 1996 U.S.C.C.A.N. at 221 (briefly explaining new subsections 224(e)(1)-(2), (g), (h), and (i)) (“The conference agreement adopts the Senate provision with modifications. The conference agreement amends Section 224 of the Communications Act by adding new subsection (e)(1) to allow parties to negotiate the rates, terms, and conditions for attaching to poles . . . New subsection 224(e)(2) establishes a new rate formula charged to telecommunications carriers for the non-useable space of each pole. Such rate shall be based upon the number of attaching entities.”)

<sup>9</sup> S. Rep. No. 580, 95th Congress, 1st Sess. at 21 (1977) (1977 Senate Report), *reprinted in* 1978 U.S.C.C.A.N. 109 (“1978 Senate Report”).

<sup>10</sup> The Commission explained that, “these presumptions help to reduce reporting requirements and record-keeping, and are more efficient so there is less administrative burden on all parties. The use of presumptions provides a level of predictability and efficiency in calculating the appropriate rate. Fairness is preserved because the presumptions may be overcome through contrary evidence. We seek to maintain predictability, efficiency and fairness in determining the costs of unusable space on a pole.” *Telecom Order*, 13 F.C.C.R. 6777 at ¶ 74.

consistent with the language of the statute and comports with Congress' intent to count *all attaching entities* when allocating the costs of usable space.”<sup>11</sup> The Commission's *2011 Pole Attachment Order* did not do away with apportioning the costs among all attaching entities, nor could it without contradicting section 224(e).<sup>12</sup> As the Commission explained, it “define[s] cost in a manner that—*once apportioned pursuant to the section 224(e) methodologies*—yields a rate that comes closer to approaching the incremental costs of attachment (although the actual rate charged under the new telecom rate typically will be higher than that).”<sup>13</sup> Therefore, it did not eliminate the cost allocators in section 224(e), under the new telecom rate formula.

If the Commission were to adopt the Petitioners' sliding scale, however, it would violate section 224(e)(2) and (3) by eliminating any meaning to the allocators in section 224(e).<sup>14</sup> No matter what the actual number of attaching entities on the pole, the rate would still be the cable rate, rendering actual counts meaningless for purposes of calculating the rate. The sliding scale does this by providing various percentage figures that could be used to adjust and effectively

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<sup>11</sup> *Telecom Order*, 13 F.C.C.R. 6777 at ¶ 46.

<sup>12</sup> Instead, the Commission incorporates the number of attaching entities as part of the formula and then adjusts the resulting rate based on whether the attachment is in an urban area or a rural area. For an urban area the rates are adjusted so that only 66% of the fully-allocated costs may be recovered. For a rural area the rates are adjusted so that only 44% of the fully-allocated costs may be recovered.

<sup>13</sup> *2011 Pole Attachment Order* at ¶160, n. 483 (emphasis added).

<sup>14</sup> Note that the Commission's approach by adopting an adjustment factor that negates the unusable space factor when the number of attaching entities is either three or five in practice does the same thing. However, given that in some cases, utilities can produce data on the actual number of attaching entities on a pole and develop a rate that is more than the cable rate does give some meaning to the apportioning provisions in section 224(e)(2) and (3), which the Commission claims it attempted to do in order to balance interests.

offset the telecom rate formula so that the result always equals the cable rate.<sup>15</sup> As such, this mechanism impermissibly renders the cost allocators of section 224(e)(2) meaningless.

**2. The Petition violates the provisions within section 224(e)(2) for recovery of two-thirds of the unusable space costs.**

In implementing section 224(e), the Commission recognized that “[t]his statutory language requires an equal apportionment of two-thirds of the costs of providing other than usable (“unusable”) space among all attaching entities.”<sup>16</sup> Since the two-thirds requirement in section 224(e) is unambiguous the Commission expressly adopted it as part of the formula, stating “[w]e believe this formula most accurately determines the apportionment of cost of unusable space. As mandated by Congress, it equally apportions two-thirds of the costs of unusable space among attaching entities.”<sup>17</sup> The two-thirds requirement has remained a part of the telecom rate formula ever since, and the Commission has never questioned it in developing the new telecom rate. Therefore, Congress clearly intended that the telecom rate formula recover two-thirds of the unusable space costs and the Commission has implemented that two-thirds requirement as part of the telecom rate formula.<sup>18</sup>

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<sup>15</sup> See Petition at 6 (stating that “The proposed language scales the cost allocator from 0.661 in service areas where the number of attaching entities is five, down to 0.309 in service areas where the number of attaching entities is two.”)

<sup>16</sup> *Telecom Order*, 13 F.C.C.R 6777 at ¶43 (emphasis added), citing 7 U.S.C. §224(e)(2) which requires that “[a] utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.”

<sup>17</sup> *Id.*

<sup>18</sup> To be sure, there has been debate over how the two-thirds unusable space costs are allocated across the “number of attaching entities”, but there has never been any dispute that total cost recovery should be two-thirds of the cost of the unusable space. See e.g. *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*, Consolidated Partial Order on

The sliding scale in the Petition would prevent the telecom rate from recovering two-thirds of the unusable space costs, contrary to section 224(e), because it scales the cost allocator from 0.661 in service areas where the number of attaching entities is five, down to 0.309 in service areas where the number of attaching entities is two.<sup>19</sup> Thus, the substantive impact of the sliding scale is directly contrary to section 224(e), because it would prevent the recovery of two-thirds of the unusable space costs under the telecom rate formula.

The main thrust of the Petitioners' argument is policy (i.e., keeping the telecom rate the same as the cable rate) but there is no basis in the language of the statute for five or six different definitions of the word "cost," no case law supporting a definition that changes like this, and no economic reason for multiple definitions. Moreover, the Petitioners' policy arguments mischaracterize and attempt to subvert the intent of the Commission's rationale. The Petitioners imply that the Commission had adjusted the rate based on the presumptive number of attaching entities in rural and urban areas, and argue that the Commission should "also provide the corresponding cost adjustments scaled to other entity counts."<sup>20</sup> However, this is contrary to the Commission explanation in the Order -- that it had defined costs as 66% in urban areas and that it had adopted a different definition of costs (i.e., 44%) in rural areas as a means to promote broadband deployment in rural areas.

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Reconsideration, CS Docket No. 97-98 and CS Docket No. 07-151, 16 F.C.C.R. 12103 at ¶¶60-68 (concluding on reconsideration that "attaching entities" includes, without limitation, and consistent with the Pole Attachment Act, any telecommunications carrier, incumbent or other local exchange carrier, cable operator, government agency, and any electric or other utility, whether or not the utility provides a telecommunications service to the public, as well as any other entity with a physical attachment to the pole.)

<sup>19</sup> Petition at 6.

<sup>20</sup> *Id.*

Although it is highly unlikely that lower pole attachment rates will promote rural broadband deployment, the Commission's approach is designed to provide a greater discount (i.e., the 44% deduction factor) for attachments in rural areas. The Petitioners' approach is inconsistent with this proposed incentive because it would reward telecom attachers regardless of whether the telecom attachment was in a rural or urban area. Hence, the Petitioners' policy arguments operate from a faulty premise (i.e., that the Commission's 66/44% discount was based on the number of attaching entities) and stands in contrast to the Commission's approach since their proposal does not even attempt to favor deployment in rural areas.

**3. The Petition runs contrary to Congress's intent to create a simple and expeditious regulatory regime for pole attachments.**

In implementing the new telecom rate, the FCC also explained that “[d]efining cost in terms of a percentage of the fully allocated costs previously used for purposes of the telecom rate is a readily administrable approach, and consistent with Congress’ direction that the Commission’s pole attachment rate regulations be “simple and expeditious” to implement.”<sup>21</sup> By contrast, Petitioners would create five different adjustment factors to be used based upon the number of attaching entities on the pole, instead of the two relatively basic adjustment factors established by the Commission for urban and rural areas under the new telecom rate. As a matter of statutory interpretation, this would violate the plain meaning of the text of the statute by adopting five or six different definitions of “cost” that have no basis in the language of the statute.<sup>22</sup> As a practical matter, this would also further complicate the telecom rate formula,

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<sup>21</sup> *Id.* at ¶149, *citing* 1978 Senate Report at 21.

<sup>22</sup> Moreover, there is no case law supporting a definition of “costs” that changes based on the number of attaching entities, and no economic reason for multiple definitions, either.

making it more difficult to administer and potentially lead to further disputes – all of which the Commission sought to avoid when it set out to set rates as low and uniform as possible.

**B. The Petition is arbitrary and capricious.**

The Petition also is arbitrary and capricious by proposing a sliding scale of adjustment factors that lack any basis in law or fact with regard to pole attachments, and are solely designed to reduce telecom attachment rates down to the cable rate. The only basis for these factors is that they offset precisely the amount by which the rate would change, if the number of attaching entities changed from five attaching entities in urban areas or three attaching entities in rural areas. Moreover, the sliding scale proposed in the Petition would adjust the meaning of “cost” based solely on the number of attaching entities -- a result that not only would render section 224(e)(2) meaningless but also is unconnected to any stated policy objective or pole cost data.

Petitioners fear that if the utilities use actual counts of the attaching entities on a pole, they will be able to charge higher rates than the cable rate on those poles.<sup>23</sup> However, nothing in the statute precludes such a result, and in fact the statute clearly contemplates such a result by apportioning the cost of the unusable space on the pole among all attaching entities. Congress clearly intended that telecom attachers should pay their pro rata share of the unusable space costs, which would inevitably lead to various different rates for different telecom attachments on different poles depending on the number of attaching entities on the pole. Furthermore, the FCC has based its telecom rate formula upon such apportionment of unusable space costs, and this rate formula has been used since 1998 when section 224(e) was implemented.

It would be completely arbitrary and capricious for the Commission to go along with such a dramatic departure from the long-standing telecom rate formula, particularly given that it

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<sup>23</sup> Petition at 5-6.

would be so clearly contrary to the statute. While the Commission has adopted two adjustment factors for rural and urban areas as part of the new telecom rate, it would be a dramatic departure to adopt a sliding scale adjustment factor that is solely designed to offset the allocators in section 224(e) and render them meaningless. It would remove any pretense of legitimacy that might be accorded to the two adjustment factors that the Commission has applied to urban and rural areas, and would make the rate formula even more vulnerable for attack on appeal. Therefore, UTC and EEI respectfully suggest that the Commission must reject Petitioners' arbitrary sliding scale adjustment factor.

**III. The Commission should deny the Petition because it is contrary to the Commission's goals.**

EEI and UTC recognize that one of the Commission's goals was to "establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with [s]ection 224 of the [Act], to promote broadband deployment."<sup>24</sup> However, the Petition myopically ignores that the Commission was not solely focused on this interest, but rather was attempting to engage in a broader balancing of interests. The Commission made clear that it intended "to balance the goals of promoting broadband and other communications services with the historical role that pole attachment rates have played in supporting pole investment in pole infrastructures, and thus define the cost of providing space" on that basis.<sup>25</sup> Also as noted above, the Commission articulated that its new telecom rate reflected Congress's intention that pole attachment regulation is to be simple and expeditious.<sup>26</sup>

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<sup>24</sup> National Broadband Plan at 110.

<sup>25</sup> See *2011 Pole Attachment Order*, at ¶ 135.

<sup>26</sup> *Id.* at ¶¶ 136, 149.

Although the Commission did not permit utilities to recover 100 percent of apportioned, fully-allocated costs through the new telecom rate --- as it has since section 224(e) first was implemented more than thirteen years ago -- it did find it “appropriate to allow the pole owner to charge a monthly pole rental rate that reflects some contribution to capital costs, aside from those recovered through make-ready fees.”<sup>27</sup> It further explained that it was “concerned that adopting a telecom rate that no longer permits utilities to recover such capital costs would unduly burden their ratepayers,” and that other pole attachment reforms (e.g. regulation of ILEC attachments) “could reduce the amount of costs that utilities are able to recover from other sources.”<sup>28</sup> Finally, the FCC explained that it was “mindful of Congress’ expectation that the priority afforded an attacher’s access to poles would relate to its sharing in the costs of that infrastructure.”<sup>29</sup> Thus, it “balance[d] these considerations by adopting ... [its 66/44% definition of costs for purposes of section 224(e)].”<sup>30</sup>

The Petition threatens to upset the balance that the Commission sought to achieve in its approach. It would further limit cost recovery, thus further unduly burdening utility ratepayers. This would compound the potential losses that the Commission recognized from other pole attachment reforms, such as regulation of ILEC pole attachments. Finally, it would further reduce sharing of infrastructure costs between all attachers on the pole, which would run contrary to Congressional intent.<sup>31</sup> Therefore, the Commission should refrain from further reducing cost recovery, as Petitioners seek.

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<sup>27</sup> *Id.* at ¶149.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, citing 1977 Senate Report at 19, reprinted in 1978 U.S.C.C.A.N. at 127–28.

<sup>30</sup> *Id.*

<sup>31</sup> See 1977 Senate Report at 19, reprinted in 1978 U.S.C.C.A.N. at 127–28.

**IV. The Commission should deny the alternative relief sought in the Petition, because Petitioners present no new facts that would merit reconsideration of the issue.**

Alternatively, Petitioners argue that the Commission should simply “establish the maximum just and reasonable rate as the higher of the rate yielded by the cable rate pursuant to section 1.1409(e)(1) or the “lower bound” telecom rate obtained by excluding capital costs from the definition of “cost of providing space” in the existing telecom rate formula of section 1.1409(e)(2).<sup>32</sup> The Commission already proposed and then rejected this type of argument, stating that “we find that defining ‘cost’ as ‘incremental cost’ is a shortcoming of TWTC’s original rate proposal.”<sup>33</sup> The Petitioners present no new facts or arguments that would support reconsideration or clarification of this alternative relief.

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<sup>32</sup> *Id.* at 7.

<sup>33</sup> 2011 Pole Attachment Order at ¶160, n. 483.

**V. Conclusion**

**WHEREFORE**, the foregoing reasons, the Edison Electric Institute and the Utilities Telecom Council respectfully request that the Commission deny the Petitioners Petition for Reconsideration or Clarification.

Respectfully submitted,

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Dated: August 10, 2011

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 10, 2011, I served the following parties via postage prepaid, first-class mail.

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