

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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
)	

**PETITION FOR RECONSIDERATION OR CLARIFICATION OF
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION,
COMPTEL AND TW TELECOM INC.**

Pursuant to sections 1.429 and 1.41 of the Commission’s rules, the National Cable & Telecommunications Association (NCTA),¹ COMPTEL,² and tw telecom inc. (tw telecom)³ hereby submit this petition for reconsideration or clarification of one aspect of the Commission’s pole attachment rules adopted in the above captioned proceeding.⁴ Specifically, NCTA, COMPTEL, and tw telecom respectfully request that the rules be clarified or amended by specifying the cost allocator to be applied based upon the number of attaching entities, as reflected in Attachment B. NCTA’s and COMPTEL’s member companies and tw telecom utilize pole attachments pursuant to section 224 of the Communications Act of 1934, as

¹ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks.

² COMPTEL is an industry association representing competitive facilities-based telecommunication service providers, emerging voice over Internet protocol (VoIP) providers, and integrated communications companies.

³ tw telecom is a provider of managed networking solutions to a wide array of businesses and organizations in 75 markets spanning 30 states and D.C.

⁴ 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. Apr. 7, 2011) (*2011 Pole Attachment Order*).

amended, (the Act) and are therefore interested parties for purposes of seeking reconsideration of the Commission's rules implementing section 224.⁵

NCTA, COMPTTEL, and tw telecom commend the Commission for its pro-consumer action on pole attachments, which represent one of the key building blocks for promoting the continued deployment of broadband services across the nation.⁶ In particular, the Commission's expressed intent of providing rate parity between telecommunications providers and cable operators by amending the telecommunications formula to produce rates comparable to the cable formula—thereby removing the threat of potential rate increases associated with new services and reducing the incentives for pole owners to dispute the legal classification of communications services—will provide much-needed regulatory certainty that will permit broadband providers to extend their networks to unserved communities while fairly compensating pole owners.⁷ As explained by the Wireline Competition Bureau in its order rejecting a request to stay the new

⁵ 47 U.S.C. § 224; 47 C.F.R. § 1.429.

⁶ *2011 Pole Attachment Order*, FCC 11-50, Statement of Chairman Genachowski at 138 (“Utility poles are essential to providing broadband service, wired and wireless, because that’s where communications companies string cables and, increasingly, place wireless antennas.”).

⁷ *Id.* at ¶ 3 (“[T]he wide disparity in pole rental rates distorts service providers’ decisions regarding deployment and offering of advanced services. For example, providers that pay lower pole rates may be deterred from offering services . . . that could fall into a separate regulatory category and therefore risk having a higher pole rental fee apply to the provider’s entire network.”); *id.*, Statement of Commissioner Copps, at 141 (“The disparities in pole attachment rates for different providers have also been a source of confusion and litigation, and hopefully the clarity we add today will discourage such outcomes.”); *id.*, Statement of Commissioner McDowell, at 142 (“[T]he Commission’s use of its authority under Section 224 of the Act to adopt a new telecommunications pole rental rate formula - generally lowering the attachment rate to the current ‘cable rate’ - will more effectively encourage competition in broadband deployment.”); *id.*, Statement of Commissioner Clyburn, at 143 (“[B]y addressing the disparate pole rental rates paid by service providers, we are establishing a more evenhanded opportunity for providers to compete with one another based on their offerings and prices.”).

pole attachment rules, there are significant public interest benefits of the Commission’s action to create rate parity:

Importantly, the Commission found that reducing the telecom rate to be lower and closer to uniform with the cable rate “will better enable providers to compete on a level playing field, will eliminate distortions in end-user choices between technologies, and lead to provider behavior being driven more by underlying economic costs than arbitrary price differentials.” Thus, the Commission recognized the effects the disparate telecom and cable rates had on cable operators’ incentives to use their existing networks to provide new, advanced services, some of which potentially could be classified as telecommunications services.⁸

As the Commission explained in the *2011 Pole Attachment Order*, modifying the telecommunications formula to produce rates comparable to cable pole attachment rates is consistent with statutory requirements,⁹ and represents sound policy because the cable rate has been found to provide just compensation to pole owners,¹⁰ is widely used by state public service commissions for pole rent calculations,¹¹ and has been endorsed by the National Association of

⁸ *Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order, DA 11-980, ¶ 12 (Wireline Comp. Bur., rel. June 1, 2011) (quoting *2011 Pole Attachment Order*, FCC 11-50 at ¶¶ 134, 147).

⁹ *2011 Pole Attachment Order*, FCC 11-50 at ¶¶ 155-171. A group of utility companies has filed a petition for review of the *2011 Pole Attachment Order* in the U.S. Court of Appeals for the District of Columbia Circuit, arguing that “certain rules, guidelines and statements of policy [adopted by the Commission] exceed or are inconsistent with the FCC’s jurisdiction and statutory authority, violate the Administrative Procedures Act, and are arbitrary, capricious, an abuse of discretion or otherwise contrary to law.” *Am. Elec. Power Serv. Corp. et al. v. FCC*, Petition for Review, Case No. 11-1146 (filed May 18, 2011, D.C. Cir.). Commenters in the rulemaking proceeding demonstrated that the Commission has jurisdiction under the statute to reinterpret the term “cost” in section 224(e) of the Act, and NCTA has filed a motion to intervene in the court case. See NCTA Comments at 14-15; tw telecom and COMPTel Comments at 4-10; NCTA Reply Comments at 8-15; tw telecom and COMPTel Reply Comments at 5-12; NCTA Motion to Intervene, Case No. 11-1146 (filed June 2, 2011, D.C. Cir.).

¹⁰ *2011 Pole Attachment Order*, FCC 11-50 at ¶ 129 (“In 1987, the U.S. Supreme Court found that the cable rate formula adopted by the Commission provides pole owners with adequate compensation, and thus did not result in an unconstitutional ‘taking.’”).

¹¹ *Id.* at ¶ 177 (“[M]any [states that exercise jurisdiction over pole attachments] apply a uniform rate for all attachments used to provide cable and telecommunications services, and have done

State Utility Consumer Advocates (NASUCA), which represents the interests of utility ratepayers.¹² Allocating costs within the telecommunications formula to produce rates that are comparable to those produced through the cable formula also is appropriate because the record demonstrates that the previous method of determining “cost” under section 224(e) significantly overstates the true economic carrying costs for providing space on a pole.¹³ If capital costs are included in the calculation of that cost, and the capital cost and operating expense inputs are measured in accordance with accepted principles of cost causation and cost allocation, a more accurate measure of costs for providing space on a pole produces a rate that is equal to or less than the cable rate.¹⁴

There is, however, one aspect of the Commission’s rules that may result in unintended departures from the Commission’s stated goal of producing telecom rates that “generally will recover the same portion of pole costs as the current cable rate.”¹⁵ Specifically, the Commission’s newly adopted section 1.1409(e)(2) provides that the telecommunications pole attachment rate should be the higher of the “lower bound” rate (with capital costs excluded) and a “just and reasonable telecom rate,” with both capital and operating costs included but adjusted

so by establishing a rate identical or similar to the Commission’s cable rate formula.”); *see also* NCTA Comments at Attach. B.

¹² *2011 Pole Attachment Order*, FCC 11-50 at ¶ 147 (“NASUCA recommends that the cable rate ‘should be used for all pole attachments.’” (quoting NASUCA Reply Comments, WC Docket No. 07-245, RM-11293, RM 11-303 at 5 (filed Apr. 22, 2008))).

¹³ *See, e.g.*, NCTA Comments at Attach. A, Patricia D. Kravtin Report, 9-27, 40-43; Letter from Thomas Jones, Counsel for Time Warner Telecom Inc., to Marlene H. Dortch, Secretary, FCC, RM-11293, RM-11303, Attach. at 17-20 (filed Jan. 16, 2007).

¹⁴ NCTA Comments at Attach. A, Kravtin Report, 9-27, 40-43. If calculating costs based on maintenance and administrative expenses under the “lower bound” rate formula produces rates higher than the cable rate, those higher rates would apply.

¹⁵ *2011 Pole Attachment Order*, FCC 11-50 at ¶ 8.

down to approximate the cable rate.¹⁶ As illustrated in paragraph 149 and note 453 of the *2011 Pole Attachment Order*, the new formula adjusts the cost basis to 66 percent in urban service areas and to 44 percent in rural service areas.¹⁷ When paired with the presumptions that there are five entities attached on urban poles and three entities on rural poles,¹⁸ the illustrative calculation almost exactly equals the cable rate, and ensures that all cable and telecom attaching entities will contribute roughly 7.4 percent of the costs of the pole to the pole owner.¹⁹

The Commission wrote the illustration into rule, essentially addressing only the cases of the presumed three and five attaching entities. However, the presumptive number of attachers can be, and often is, rebutted by the pole owner. Information submitted in the record suggests that there may be fewer, and in the case of urban areas, significantly fewer attaching entities than are accounted for by the Commission's presumptions.²⁰ In that case, the revised telecom rate formula would not yield rates that approximate the cable rate. For example, using 2.6 as the number of attaching entities, as one utility recently has done in calculating its telecom pole

¹⁶ *Id.* at ¶¶ 149-154, App. B, 108-109.

¹⁷ *Id.* at ¶¶ 149, 150 n.453.

¹⁸ 47 C.F.R. § 1.417(c) (providing a presumptive average number of attaching entities of three in non-urban areas, and a presumptive average number of attaching entities of five in urban areas).

¹⁹ *2011 Pole Attachment Order*, FCC 11-50 at ¶ 149 (“[T]he specific percentages we select provide a reduction in the telecom rate, and will, in general, approximate the cable rate, advancing the Commission policies identified above.”); *id.* at ¶ 131 n.399 (“Under the cable formula, each attacher, other than the pole owner, pays about 7.4% of the annual cost of a pole.”); *id.* at ¶ 150 n.453 (“Under the definition of ‘cost’ as 66% of fully allocated costs in urban areas, the new telecom rate recovers approximately 7.4% of the fully allocated costs of the pole. By defining ‘cost’ as 44% of fully allocated costs in non-urban areas, the new telecom rate likewise recovers approximately 7.4% of the fully allocated costs of the pole in those areas.”).

²⁰ *See* Comments of American Electric Power Service Corp., *et al.*, WC Docket No. 07-245, RM-11293, RM-11303, at 19-28 (filed Mar. 7, 2008) (showing number of attaching entities for several utility companies ranging from 2.28 to 3.08).

attachment rates,²¹ the rate formula adopted by the Commission would result in a telecom rate that is *70 percent higher* than the cable rate for most poles.²²

Without clarification or revision, the rule would leave in place the very rate increases, uncertainty and incentives for dispute that the Commission intended to remove.²³ To achieve the Commission's goal of providing pole attachment rates that are as close to uniform as possible, and to ensure that all attachers contribute similar costs to pole owners, the telecom rate formula should be expanded to include not only instances where there are three and five attaching entities, but should also provide the corresponding cost adjustments scaled to other entity counts. Specifically, NCTA, COMPTTEL, and tw telecom respectfully request that the rules be clarified or amended by specifying the cost allocator to be applied based upon the number of attaching entities, as reflected in Attachment B. 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. This approach increases the certainty that pole rates will be as close as possible to the cable rate, meets the Commission's intended

²¹ Dominion Virginia Power 2011 CATV & Telecom Pole Rental Rate Spreadsheet, line 58 (Apr. 21, 2011).

²² We illustrate this in Attachment A, which compares the cable rates of the eight utilities listed in Appendix A of the *2010 Pole Attachment FNPRM* with the telecom rate that would result from using the Commission's adopted formula with the presumptive number of attaching entities, and from using 2.6 as the number of attaching entities. *Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11930, App. A (2010) (*2010 Pole Attachment FNPRM*).

²³ For example, Ameren is suing Suddenlink in Missouri, claiming that Suddenlink should pay substantially higher pole rental rates than the cable rate because Suddenlink is providing VoIP service. *Union Electric Company d/b/a/ Ameren Missouri v. Cequel III Communications, II, LLC, d/b/a/ Cebridge Connections*, Petition (21st Jud. Cir. Ct. St. Louis County, filed Jan. 10, 2011). Although Ameren's state court petition is styled as against "Cequel III Communications, II, LLC, d/b/a/ Cebridge Connections," in the body of its petition Ameren alleges that the claim is against "Cequel III Communications, II, LLC, d/b/a/ Suddenlink." *See id.* at opening sentence and ¶ 2.

purposes, and makes the calculation more readily administrable by eliminating the need to distinguish urbanized and non-urbanized areas.

In the alternative, and consistent with the Commission's unanimous conclusion that adopting a telecom rate that approximates the cable rate "advance[es] the Commission's principles,"²⁴ the Commission could adopt the proposal in the *2010 Pole Attachment FNPRM* to 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).²⁵ The record demonstrates that a rule setting the telecom rate based on the higher of the two calculations satisfies the "just and reasonable" requirements of section 224(b), while also implementing the language of section 224(e).²⁶

²⁴ *2011 Pole Attachment Order*, FCC 11-50 at ¶ 149.

²⁵ *2010 Pole Attachment FNPRM*, 25 FCC Rcd at 11917-24, ¶¶ 128-141; 47 C.F.R. § 1.1409(e)(1), (2). The Commission could accomplish this result by revising section 1.1409(e)(2) as set out in Appendix B of the *2010 Pole Attachment FNPRM*. *2010 Pole Attachment FNPRM*, 25 FCC Rcd at 11932, App. B.

²⁶ 47 U.S.C. § 224(b), (e); *see, e.g.*, NCTA Comments at Attach. A., Kravtin Report, pp. 9-27, 40-43; tw telecom and COMPTTEL Comments at 8-10.

For the reasons stated above, NCTA, COMPTTEL, and tw telecom request that the Commission adopt the changes and clarifications requested.

Respectfully submitted,

/s/ Rick Chessen

Rick Chessen
Steven F. Morris
Jennifer K. McKee
National Cable
& Telecommunications Association
25 Massachusetts Avenue, NW – Suite 100
Washington, DC 20001-1431

Paul Glist
Maria T. Browne
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue NW, Suite 800
Washington, DC 20006-3401
*Attorneys for National Cable
& Telecommunications Association*

/s/ Karen Reidy

Karen Reidy
COMPTTEL
900 17th Street NW, Suite 400
Washington, DC 20006

/s/ Thomas Jones

Thomas Jones
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, DC 20006
Attorneys for tw telecom inc.

June 8, 2011

ATTACHMENT A

Utility Pole Attachment Rates, Based on FERC Data
(\$ per attachment per year)

All Costs	Gulf Power	Alabama Power	Georgia Power	Tampa Electric	Jersey Central	Metro Edison	Penn Electric	NSTAR
Cable Rate	6.31	8.00	5.77	8.24	8.21	8.69	8.01	6.90
New Telecom Rate - Urbanized (5 attachers)	6.30	7.98	5.76	8.22	8.19	8.67	7.99	6.89
New Telecom Rate - Non-Urbanized (3 attachers)	6.33	8.03	5.79	8.27	8.24	8.72	8.04	6.92
New Telecom Rate - Urbanized (2.6 attachers)	10.73	13.60	9.81	14.01	13.95	14.77	13.62	11.73
New Telecom Rate - Non-Urbanized (2.6 attachers)	7.15	9.07	6.54	9.34	9.30	9.85	9.08	7.82
Proposed Telecom Rate - (Clarified Approach, 5 attachers)	6.31	8.00	5.77	8.24	8.21	8.69	8.01	6.90
Proposed Telecom Rate - (Clarified Approach, 3 attachers)	6.32	8.01	5.78	8.25	8.22	8.70	8.02	6.91
Proposed Telecom Rate - (Clarified Approach, 2.6 attachers)	6.31	8.00	5.77	8.24	8.21	8.69	8.01	6.90

ATTACHMENT B

§ 1.1409 Commission consideration of the complaint.

* * * *

(e) * * *

(2) With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by section 1.1409(e)(2)(i) or 1.1409(e)(2)(ii) of this Part.

(i) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in section 1.1409(e)(2)(ii):

Rate = Space Factor x Cost

Where Cost

in Service Areas where the number of Attaching Entities is 5 = 0.661 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 4 = 0.556 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 3 = 0.439 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 2 = 0.309 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is not a whole number = N x (Net Cost of a Bare Pole x Carrying Charge Rate), where N is interpolated from the cost allocator associated with the nearest whole numbers of Attaching Entities

$$\text{Where Space Factor} = \left[\frac{\left(\frac{\text{Space Occupied}}{\text{Pole Height}} \right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right]$$