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June 3, 2010

Jeff R. Derouen, Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602-0615

Re: Kentucky PSC Case Nos. 2009-548 (KU)
and 2009-549 (LG&E)

Dear Mr. Derouen:

Pursuant to the suggestion of the Commission in the 4/29/10 Orders denying its Motion for Full Intervention in the above-referenced proceedings, TW Telecom of Kentucky, LLC ("TWTC") hereby submits comments to be entered in the respective records of the above-referenced proceedings. The comments submitted herewith,

White Paper on Pole Attachment Rates Applicable to Competitive Providers of Broadband Telecommunications Services,

were prepared for, and filed in, FCC proceedings (RM-11293 and RM-11303) regarding pole attachment issues, by "Time Warner Telecom, Inc." which is now named "tw telecom inc." Because this Commission has asserted jurisdiction over pole attachment rates, the requests and comments therein directed to "the Commission" are pertinent to this body as well as to the FCC. TWTC thus prays that this Commission follow the roadmap set forth in the White Paper with respect to pole attachment rates.

Enclosed please find twelve (12) copies of the White Paper, and an additional original and ten (10) copies of this letter. A copy of this letter and the White Paper is also being mailed today to each person shown on the attached Service List. Finally, I have enclosed an extra copy of this letter; please stamp it with the date of the Commission's receipt and return it to me in the enclosed self-addressed, stamped envelop.

Sincerely,

Katherine K. Yunker

Enclosures

cc: Service List

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
The Petition of the United States Telecom	)	
Association for Rulemaking to Amend Pole	)	RM-11293
Attachment Rate Regulation and Complaint	)	
Procedures	)	
	)	
	)	
Petition for Rulemaking of Fibertech	)	RM-11303
Networks, LLC	)	

WHITE PAPER ON POLE ATTACHMENT RATES APPLICABLE TO COMPETITIVE PROVIDERS OF BROADBAND TELECOMMUNICATIONS SERVICES

TIME WARNER TELECOM, INC.

January 16, 2007

EXECUTIVE SUMMARY

In the past several years, the Commission has aggressively pursued policies designed to level the competitive playing field for facilities-based providers of broadband service. For example, the Commission has eliminated unbundling and *Computer Inquiry* regulations applicable to incumbent LECs for the purpose of ensuring that incumbent LECs are not subject to more extensive or costly regulation than their cable competitors when providing broadband services. In so doing, the Commission has used every means available to it under the Communications Act, including its authority under the "at a minimum" clause in Section 251(d)(2) and its forbearance powers under Section 10. More recently, the Commission classified broadband Internet access over power lines as an information service, in part to ensure that the service received the same regulatory treatment as services offered by ILEC and cable competitors. The Commission has pursued this "level playing field" as a critical component of promoting Congress' policy objective, codified in Section 706, that advanced services be deployed in a timely manner. The Commission has sought to eliminate, wherever possible, the inefficiencies of legacy regulation as applied to the existing marketplace.

Unfortunately, in its quest to eliminate unjustified differences in its treatment of broadband competitors, the Commission has overlooked one particularly egregious source of market distortions: discriminatory pole attachment rates. The Commission's existing pole attachment rules, as interpreted by the utilities, arbitrarily cause telecommunications carriers to pay pole attachment rates that are as much as two-to-three times higher than non-telecommunications carriers using the same poles and providing many of the same services as their carrier competitors. This is because a firm that uses a pole attachment to provide a telecommunications service is, by virtue of its provision of such service, deemed subject to a much higher pole attachment rate than firms that use pole attachments to provide only non-telecommunications services. For example, if firm A uses a pole to provide both a telecommunications service and a broadband information service and firm B, a cable operator that does not provide any telecommunications services, uses the same pole to provide the same broadband information service as the telecommunications service provider, A is subject to a much higher pole attachment rate than B. These differentials cause telecommunications carriers like Time Warner Telecom Inc. ("TWTC") to pay millions of dollars more in pole attachment fees each year than their non-carrier competitors. This is so notwithstanding the fact that telecommunications carrier attachments impose no greater costs on pole owners than the attachments subject to lower rates. In the most extreme (but unfortunately common) case, an existing pole attachment subject to the lower rate becomes subject to the higher telecommunications carrier rate when a carrier simply leases fiber within an existing attachment to provide a telecommunications service. Such a change is utterly transparent to the pole owner, and yet existing law allows the pole owner to double or even triple its pole attachment rate applicable to attachments used in this manner. Moreover, the rate increase is invariably paid solely by the telecommunications carrier leasing the fiber because fiber lease agreements allow lessors to pass through to lessees increased pole attachment fees resulting from the lessees' use of the fiber.

While the existing rules have created an incoherent and harmful pole attachment regime, this was not the intended purpose of Section 224, the Communications Act provision governing pole attachments. On the contrary, Congress adopted Section 224 for the purpose of eliminating

the competitive distortions caused by utilities' exercise of market power over poles. Section 224(b) broadly requires that the Commission "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." Section 224(d) establishes minimum and maximum cost-based rate formulas for pole attachments of cable systems used solely to provide cable service. Finally, and most importantly, Section 224(e) requires that the FCC establish regulations that ensure "just, reasonable, and nondiscriminatory rates" for pole attachments used by telecommunications carriers to provide telecommunications services.

These provisions, in particular Section 224(e), provide the Commission with ample authority to eliminate the competitive distortions caused by the current pole attachment rate regime. The most direct and appropriate means of addressing this problem would be for the Commission to rule that existing differentials in pole attachment rates are inconsistent with the Section 224(e) nondiscrimination requirement. To rectify this problem, the Commission could require that utilities charge the same rate to all attachers, regardless of the particular services the attachers provide. Alternatively, the Commission could eliminate or dramatically reduce the differential in pole attachment rates by eliminating unnecessary cost categories from the cost allocation formula used to set the rates charged for attachments under Section 224(e). Finally, the Commission could at least eliminate discriminatory rates for a subset of attachments by clarifying that the applicable pole attachment rate is determined solely by the services offered by an attacher and that services offered by lessees of dark fiber are irrelevant to determining the applicable pole attachment rate. Such a partial solution, while insufficient by itself, could be implemented while the Commission pursues a comprehensive reform of its pole attachment policies.

In all events, the Commission must take steps to eliminate the distortions caused by the discrimination in pole attachment rates as soon as possible. Each month that telecommunications carriers must pay inexplicably discriminatory and unreasonably high pole attachment rates increases the rising toll on consumer welfare. There is simply no policy basis and no legal requirement for retaining the *status quo*.

DISCUSSION

I. POLE ATTACHMENTS ARE AN ESSENTIAL INPUT FOR BROADBAND COMPETITORS.

Although they currently receive little attention in the discourse concerning the nation's telecommunications infrastructure, pole attachments are a critically important input for the deployment of wireline broadband facilities. Unfortunately, the economics of pole deployment are such that only a single pole can be efficiently deployed in a particular location. The need for access combined with a single source of supply in each location means that pole attachments are, as the Eleventh Circuit has explained, "essential facilities" – inputs that facilities-based cable

companies, telecommunications carriers, and broadband providers need to compete on an equal basis.[1]

The need for third-party access to pole attachments first arose in the early development of cable service (then referred to as community antenna television or "CATV"), when CATV operators sought to attach their newly-deployed wires to the poles owned by incumbent LECs, power companies, and other "utilities."[2] It was soon clear that, left to their own devices, pole owners would "charge monopoly rents"[3] to unaffiliated attachers such as cable companies. It was also clear that discriminatory pole attachment rates would cause significant harm to competition in downstream retail markets. In fact, to prevent such distortions in the CATV retail market, the FCC, and then later Congress, went so far as to ban telephone companies (which owned poles) entirely from providing CATV service.[4] The FCC explained its decision as necessary to preserve "a competitive environment for the development and use of broadband

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[1] *See Ala. Power Co. v. FCC*, 311 F.3d 1357, 1361 (11th Cir. 2002). *See also* S. Rep. No. 95-580, 1978 U.S.C.C.A.N. 109 (1978) (explaining that Congress enacted the Pole Attachment Act to combat monopolistic practices by utilities); *Implementation of Section 703(e) of the Telecommunications Act of 1996,* Report and Order, 13 FCC Rcd 6777, ¶ 31 (1998) ("*Telecom Order*"), *aff'd in part, rev'd in part, Gulf Power Co. v. FCC,* 208 F.3d 1263 (11th Cir. 2000), *rev'd & remanded, Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) ("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, *i.e.*, to remedy the inequitable position between pole owners and those seeking pole attachments. The nature of this relationship is not altered when the [attacher] seeks to provide additional service.")

[2] *Gulf Power Co.*, 534 U.S. at 330.

[3] *Id.*

[4] *See Applications of Telephone Companies for Section 214 Certificates for Channel Facilities*, Final Report & Order, 21 F.C.C.2d 307, 324-25 (1970) ("*1970 Order*"), *aff'd sub nom. Gen. Tel. Co. of S.W. v. United States*, 449 F.2d 846 (5th Cir. 1971); 47 C.F.R. § 64.601 (1971) (codifying ban on ILEC cross-ownership and entry restrictions). The FCC based its decision to bar telephone companies from the CATV market on the fear that the ILECs' control of "pole lines (or conduit space)" would allow ILECs to "preempt the market" for CATV through discriminatory rates and access. *See 1970 Order* at 324. *See also Gen. Tel. Co. of S.W.*, 449 F.2d at 851 ("The Commission was of the opinion that by reason of their control over utility poles or conduits, the telephone companies were in a position to preclude or substantially delay an unaffiliated CATV system from commencing service and thereby eliminate competition."); Arthur Bresnahan, *The (Unconstitutional) Telco-Cable Cross-Ownership Ban: It Seemed Like a Good Idea at the Time*, 1 Mich. Telecomm. Tech. L. Rev. 79, 81 (1995) ("Thus, the FCC banned telephone companies from providing CATV service, fearing that they would exclude competitors from the CATV market by engaging in discriminatory provision of pole and conduit access.").

cable facilities and services" and as necessary to achieve its goal of "nondiscriminatory" access to pole attachments.[5]

Today, third-party access to pole attachments continues to be critically important to competition. For example, TWTC provides broadband information and telecommunications services over fiber that it deploys or leases. Access to poles is usually the most efficient and often the only means of deploying these fiber transmission facilities. As a result, TWTC relies on hundreds of thousands of pole attachment arrangements for which it pays millions of dollars in attachment fees annually. As TWTC expands its network footprint, including expansion through acquisitions, its reliance on poles will only increase.

TWTC has two kinds of pole attachment arrangements. In areas where TWTC leases fiber from cable companies,[6] usually Time Warner Cable (a former affiliate), the cable company attaches its own cables to poles. Under its fiber agreements with cable companies, TWTC must pay any increases in pole attachment fees owed by the cable company that result from TWTC's provision of service over cable company fiber. In areas not covered by such leasing arrangements, TWTC has established pole attachment arrangements directly with utility pole owners.

II. THE FCC'S POLE ATTACHMENT RULES HARM COMPETITION IN THE PROVISION OF BROADBAND SERVICE AND ARE FLATLY INCONSISTENT WITH THE FCC'S OWN BROADBAND POLICY.

Section 224 of the Communications Act constitutes the current legal framework established by Congress for limiting utility pole owners' opportunities to abuse their control over these essential inputs.[7] Section 224 requires the FCC to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable."[8] When first adopted in the Pole Attachment Act of 1978, Section 224 only applied to attachments by "cable television system[s]."[9] In 1996, however, Congress recognized that the development

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[5] *See 1970 Order*, 21 F.C.C.2d at 325, 327.

[6] TWTC obtains access to cable company fiber pursuant to a variety of legal arrangements, including indefeasible rights of use, leases and license agreements. For simplicity, these arrangements are referred to herein as lease arrangements.

[7] *See* 47 U.S.C. § 224 (1978). *See also* S. Rep. No. 95-580, 1978 U.S.C.C.A.N. 109 (1978) (explaining that Congress enacted the Pole Attachment Act to combat monopolistic practices by utilities); *Telecom Order*, ¶ 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, *i.e.*, to remedy the inequitable position between pole owners and those seeking pole attachments."); *id.* ¶¶ 2-3 (explaining that Congress enacted the Pole Attachment Act to ensure that bottleneck facilities do not block the deployment of competitive communications networks).

[8] 47 U.S.C. § 224(b)(1).

[9] *Gulf Power Co.*, 534 U.S. at 331.

of facilities-based entry by telecommunications carriers required that the scope of the statute be expanded to include "any attachment by a . . . provider of telecommunications service."[10]

Section 224, as amended in 1996, includes three main subparts dealing with pole attachment rates that are relevant here:

- Section 224(b) broadly requires that the FCC "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable;"[11]

- Section 224(d) establishes a specific rate formula for "any pole attachment used by a cable television system solely to provide cable service;"[12] and

- Section 224(e)(1) requires that the Commission establish regulations governing pole attachments used by telecommunications carriers to provide telecommunications services. It states that "[s]uch regulations shall ensure that a utility charges *just, reasonable, and nondiscriminatory rates* for pole attachments."[13] Aside from these requirements, Section 224(e)(2) and (3) establish cost apportionment formulas for utilities that provide pole attachments used by telecommunications carriers to provide telecommunications services.[14]

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[10] *Id. See* 47 U.S.C. § 224(a)(4).

[11] 47 U.S.C. § 224(b).

[12] *Id.* § 224(d)(3).

[13] *Id.* § 224(e)(1) (emphasis added). *See Telecom Order*, ¶ 7 ("Separately, Section 224(e)(1), the subject of this *Order*, governs rates for pole attachments used in the provision of telecommunications services. . . . Section 224(e)(1) states that such regulations 'shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for such pole attachments.'") (quoting 47 U.S.C. § 224(e)(1)).

[14] 47 U.S.C. § 224(e)(2)-(3).

In implementing Section 224, the Commission has adopted two specific rate formulas.[15] The FCC's "Cable Rate Formula" implements Section 224(d) and sets minimum and maximum rates for pole attachments subject to that provision.[16] Section 224(d) caps an allowable maximum rate at "an amount determined by multiplying the percentage of the total usable space . . . occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole."[17] The FCC has held that the sum of "the operating expenses and capital costs" may "also be expressed as a percentage of pole investment."[18] Accordingly, FCC regulations calculate the sum of "operating expenses and capital costs" by multiplying "the cost of a bare pole and the carrying charges attributable to the cost of owning a pole."[19] Applying these factors, the FCC uses the following formula (the "Cable Rate Formula") to calculate maximum pole attachment rates under § 224(d):

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[15] *See* 47 C.F.R. §§ 1.1409(e)(1)-(2) (2006) (rate formulas). *See Amendment of Commission's Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of The Telecommunications Act of 1996,* Consolidated Partial Order on Reconsideration, CS Dkt. Nos. 97-98, 97-151, 16 FCC Rcd 12103 (2001) ("*Reconsideration Order*"); *Amendment of Rules and Policies Governing Pole Attachments,* Report and Order, CS Dkt. No. 97-98, 15 FCC Rcd 6453 (2000) ("*Fee Order*"); *Telecom Order*, CS Dkt. No. 97-151, 13 FCC Rcd 6777 (1998), *aff'd in part, rev'd in part, Gulf Power v. FCC,* 208 F.3d 1263 (11th Cir. 2000), *rev'd & remanded, Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, CC Dkt. No. 96-98, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*"), *aff'd, Order on Reconsideration of Pole Attachment Access*, 14 FCC Rcd 18049 (1999), *rev'd in part, Southern Co. v. FCC,* 293 F.3d 1338 (11th Cir. 2002); *Implementation of Section 703 of the Telecommunications Act of 1996,* Report and Order, CS Dkt. No. 96-166, 11 FCC Rcd 9541 (1996) ("*Report & Order*"); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles,* Report and Order, CC Dkt. No. 86-212, FCC 87-209, 2 FCC Rcd 4387 (1987) ("*Pole Attachment Order*"), *aff'd*, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 468 (1989); *Adoption of Rules for the Regulation of Cable Television Pole Attachments,* Memorandum Opinion and Order, CC Dkt. No. 78-144, 77 FCC 2d 187 (1980) ("*Third Report & Order*"); *Adoption of Rules for the Regulation of Cable Television Pole Attachments,* Memorandum Opinion and Second Report and Order, CC Dkt. No. 78-144, 72 F.C.C.2d 59 (1979) ("*Second Report & Order*"); *Adoption of Rules for the Regulation of Cable Television Pole Attachments,* First Report and Order, CC Dkt. No. 78-144, 68 F.C.C.2d 1585 (1978) ("*First Report & Order*").

[16] *Compare* 47 U.S.C. § 224(d) (2006), *with* 47 C.F.R. § 1.1409(e)(1).

[17] 47 U.S.C. § 224(d)(1).

[18] *Pole Attachment Order*, ¶ 6 (citing 47 C.F.R. § 1.404(g)(9) (1987)).

[19] *Id.*

Maximum Rate = Space Factor x Net Cost of a Bare Pole x Carrying Charge Rate[20]

Where "Space Factor" = $\frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}}$

Section 224(d) applies "to the rate for any pole attachment used by a cable television system solely to provide cable service."[21] Section 224(d) does not therefore apply to cable system pole attachments used to provide cable service as well as other services such as cable modem services. Nevertheless, the Commission decided to rely on its discretion to set "just and reasonable rates" under Section 224(b)(1) to require that utilities charge cable system attachers rates based on the same Cable Rate Formula when they use an attachment to provide cable modem service as well as cable service.[22] The Supreme Court subsequently upheld this decision in the *Gulf Power* case.[23] Thus, cable broadband Internet access service providers receive the benefit of the Section 224(d) Cable Rate Formula.[24]

The FCC has implemented a separate rate formula that applies to telecommunications carriers that use pole attachments to provide telecommunications services.[25] The FCC has held that this rate formula applies to an attachment used to provide a telecommunications service, regardless of whatever other services (e.g., broadband information services) that the attacher may provide *via* the attachment. This "Telecom Service Rate Formula" is based on the FCC's interpretation of the cost apportionment guidelines set forth in 47 U.S.C. § 224(e)(2) and (3).[26] Unlike Section 224(d)(1), however, these provisions do not require the FCC to calculate cost by adding "operating expenses" to the "actual capital costs" of the utility, as is the case with Section 224(d).[27] Indeed, Section 224(e)(2) and (3) do not mention any particular cost categories; they

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[20] 47 C.F.R. § 1.1409(e)(1).

[21] 47 U.S.C. § 224(d)(3).

[22] *See Telecom Order*, ¶ 33 ("We emphasize that our decision to apply the Section 224(d)(3) rate is based on our regulatory authority under Section 224(b)(1)."). *See also* 47 U.S.C. § 224(b)(1) (allowing the FCC to set just and reasonable rates for pole attachments).

[23] *See Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002).

[24] *See Telecom Order*, ¶ 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."); *Gulf Power Co.*, 534 U.S. at 333-42 (affirming FCC's decision to set rates for commingled services under Section 224(b)(1)).

[25] *See* 47 C.F.R. § 1.1409(e)(2).

[26] *See Telecom Order*, ¶¶ 43-44 (establishing the Telecom Rate); *Reconsideration Order*, ¶¶ 55-56 (2001) (simplifying the Telecom Rate).

[27] *Compare* 47 U.S.C. § 224(e)(2), (3), *with id.* § 224(d)(1).

only describe how a utility should apportion "the cost of providing space on a pole" and "the cost of providing usable space" on a pole.[28]

Although Section 224(e) and (d) include different "cost" standards, the Commission's *rules* require inclusion of the same cost categories in both the Telecom Service Rate Formula and the Cable Rate Formula. The only difference between the two formulas adopted by the FCC is the manner in which the costs associated with the unusable portion of the pole are allocated.[29] In the Cable Rate Formula, the costs of the unusable portion of the pole are allocated based on the percentage of the total usable space occupied by an attachment. The Telecom Service Rate Formula divides those costs by the total number of attachers and then multiplies that amount by two thirds. Thus, the Telecom Rate Formula is as follows:

$$\text{Maximum Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate}^{30}$$

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

The dollar amount yielded by the Space Factor equation in this formula is consistently higher than the dollar amount yielded by the Space Factor equation that is applied under the Cable Rate Formula. Moreover, because the Telecom Service Rate Formula uses the same definition of costs as the Cable Rate Formula, the pole attachment rates yielded by the Telecom Service Rate Formula ("Telecom Service Rates") are consistently much higher than the pole attachment rates yielded by the Cable Rate Formula ("Cable Rates"). In TWTC's experience, the rates yielded by the Telecom Service Rates are as much as *three times higher* than the rates yielded by the Cable Rate Formula Cable Rates. Examples of rate differentials experienced by TWTC are as follows:[31]

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[28] *See* 47 U.S.C. § 224(e)(2), (3).

[29] *See* 47 C.F.R. § 1.1409(e)(2).

[30] *Id.*

[31] These rates are derived from TWTC internal data. TWTC has knowledge of the different rates because, as mentioned, it leases fiber from cable companies, which ordinarily pay the Cable Rate. Where this is the case, TWTC has been thought to "use" the same pole attachments as the cable company (as explained below, a strong argument can be made that TWTC does not "use" pole attachments in this circumstance). Accordingly, utilities have argued that the Telecom Service Rate should apply to the attachments purportedly "used by" both TWTC and cable companies in lease arrangements.

State	Cable Rate	Telecom Service Rate
Georgia	$5.70	$13.86 for urban areas $14.93 for rural areas
Indiana	$4.90	$18.21
North Carolina	$6.26	$13.64
Wisconsin	$4.57	$10.41
Texas	$7.10	$16.00
Florida	$5.63	$17.87 (proposed)

This substantial differential in Telecom Service Rates and Cable Rates, for which there is no policy basis, causes competitors to pay vastly different pole attachment rates. This is the case, for example, where cable operators use cable system pole attachments to provide broadband information services (as explained, cable attachments used for this purpose are subject to the Cable Rate) in competition with carriers that also provide broadband information services. According to the Commission, competition between firms that pay the Cable Rate and the Telecom Service Rate appears to be growing. In particular, the Commission has held that cable companies increasingly serve the same customers as carriers like TWTC.[32] Again, cable operators offering service via cable system attachments pay the Cable Rate while TWTC must pay the Telecom Service Rate.[33]

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[32] *See Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496, ¶ 22 (2004) ("[C]able operators have had success in acquiring not only residential and small-business customers, but increasingly large business customers as well."). *See, e.g.,* Time Warner Cable, *Business Class Services, available at* http://www.timewarnercable.com/kansascity/products/bizclass/.

[33] *See Telecom Order*, ¶¶ 22-33, 73. In addition, to the extent that providers of transmission on a private carriage basis (providers of "telecommunications" in the parlance of the 1996 Act) compete with telecommunications carriers, such private carriers would enjoy the same preferential treatment under the pole attachment rules as providers of information services that do not provide telecommunications service. For example, the Commission has held that fixed wireless services increasingly compete in the provision of local transmission services such as those that TWTC offers. *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶¶ 33, 56-57 (2005) ("*Wireline Broadband Order*"). Many such fixed wireless providers rely heavily on wireline transmission services and offer service on a private carriage basis. *See, e.g.*, XO Holdings, Inc., Form 10-Q, *available at* http://www.sec.gov/Archives/edgar/data/1111634/000095013306004845/w26867e10vq.htm;

The absurdity of this situation is most evident where TWTC relies on leased cable company fiber. So long as the cable company does not offer telecommunications services in a particular area, it pays the Cable Rate. However, where TWTC leases a strand of fiber to provide telecommunications services, the rate applicable to the pole attachment increases up to two-to-three times to the Telecom Service Rate.[34] Under TWTC's fiber agreements with Time Warner Cable and other cable systems, TWTC is required to pay the entire differential in pole attachment rates resulting from TWTC's provision of telecommunications services. Utility pole owners are allowed to force TWTC to pay extra in these situations even though TWTC's use of the poles to provide telecommunications service imposes no additional costs or burdens on the pole owner.[35] Indeed, TWTC's use of leased fiber to provide telecommunications services is utterly transparent to a utility pole owner.[36] As the Commission has itself explained, "[t]here is a general consensus among cable operators and telecommunications carriers that the leasing and use of dark fiber by third parties places no additional spatial or physical requirements on the utility pole."[37]

Notably, the discrimination found in pole attachment rates does not exist for rates charged by utilities for access to conduit, even though conduit rates are subject to the same statutory provisions as pole attachments. The FCC applies a uniform, non-discriminatory formula for conduit rates. *See* 47 C.F.R. § 1.1409(e)(3) ("The following formula shall apply to attachments to conduit by cable operators *and* telecommunications carriers.") (emphasis added). As a result, when a firm utilizing utility conduit provides a telecommunications service, it pays the same lease charges as the non-telecommunications service providers with which it competes in the provision of downstream retail services.

The Commission's failure to treat pole attachment rates in the same way that it treats conduit rates is flatly inconsistent with its oft-repeated public policy goal of leveling the regulatory playing field for competitors in the provision of broadband and other services. There is simply no way that imposing higher input costs on broadband competitors that provide telecommunications services relative to those that do not, is consistent with this policy objective. As Chairman Martin has explained, the FCC has made broadband deployment its "highest

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IDT Corp., Form 10-K, Commission File, *available at* http://www.sec.gov/Archives/edgar/data/1005731/000119312506208487/d10k.htm

[34] Similarly, if the Commission were to classify one of the services a cable company offers as a telecommunications service, the Telecom Rate would suddenly apply to the attachments the cable company uses to provide the newly-classified telecommunications service. This would be so even if the cable company provided the service in exactly the same way it had in the past and even though the pole owner would experience no increased burden and incur no increased costs as a result of the FCC's classification decision.

[35] *See Telecom Order*, ¶ 73.

[36] *See id.*

[37] *Id.*

priority" over the past decade.[38] The Commission has "worked hard to create a regulatory environment that promotes broadband deployment."[39] It has "removed legacy regulations, like tariffs and price controls, that discourage carriers from investing in their broadband networks."[40] Equally important, the FCC has "worked to create a *level playing-field among broadband platforms*."[41]

The FCC has reworked regulations in recent years to encourage intermodal broadband competition. For example, in the *Wireline Broadband Order*, the FCC freed facilities-based wireline broadband Internet access service providers from a host of legacy regulatory restrictions to allow them "to respond to changing marketplace demands effectively and efficiently, spurring them to invest in and deploy innovative broadband capabilities that can benefit all Americans, consistent with the Communications Act of 1934, as amended."[42] In eliminating these legacy restrictions, the FCC stated its intent to "regulate like services in a similar manner so that all potential investors in broadband network platforms, and not just a particular group of investors, are able to make market-based, rather than regulatory-driven, investment and deployment decisions."[43] Most recently, the Commission classified Broadband over Power Line-enabled Internet access service as an unregulated information service in order to "further[] the Commission's goal of developing a consistent regulatory framework across broadband platforms."[44]

The Commission must now extend the logic of these decisions to pole attachment regulation. While the discrimination caused by the current rules appears to have been more the result of historic accident than intentional policy, the Commission must now focus on this problem and address it. Importantly, this is a problem faced by the very firms whose growth and development the Commission should encourage: competitors that deploy facilities or take advantage of the efficiencies of leased fiber to offer service to all members of the public on a common carriage basis. There is simply no basis in sound public policy for arbitrarily raising

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[38] *See* Chairman Martin's Statement Before the Senate Committee on Commerce, Science & Transportation, at 3 (Sept. 12, 2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267390A1.pdf.

[39] *Id.*

[40] *Id.*

[41] *Id.* (emphasis added).

[42] *Wireline Broadband Order*, ¶ 1.

[43] *Id.* ¶ 45. *See also id.* ¶¶ 79, 97 (finding that the FCC should treat the wireline and cable broadband providers the same in the provision of certain services).

[44] *See United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service,* Memorandum Opinion and Order, WC Dkt. No. 06-10, ¶ 2 (rel. Nov. 7, 2006).

these firms' costs above those of others that compete for the same customers by offering service distinguished only by regulatory classification.

III. THE FCC HAS THE AUTHORITY TO PREVENT THE ARBITRARY AND HARMFUL DISCRIMINATION IN EXISTING POLE ATTACHMENT RATES.

The Commission has ample authority to mandate that utilities cease charging telecommunications carriers pole attachment rates far in excess of the rates paid by their non-carrier competitors. There are several legal bases under the statute for achieving this outcome.

A. The Commission May and Should Rely On Its Duty To Ensure That Utilities Charge Telecommunications Carriers "Nondiscriminatory" Rates To Eliminate The Differential In Pole Attachment Rates.

The most appropriate way to address the differential in pole attachment rates is for the Commission to rely on the mandate in Section 224(e)(1) that it adopt regulations ensuring that telecommunications carriers pay "just, reasonable and nondiscriminatory rates for pole attachments."[45] This passage is the sole regulatory directive for the ultimate "rates" that carriers must pay under Section 224(e).[46] Section 224(e)(2) and (3) establish cost apportionment formulas for utilities.[47] These subsections, however, do not specifically address the ultimate "rates" that carriers must pay for pole attachments nor do they address the ultimate regulations that the FCC must adopt for "rate" regulation.[48] Instead, Section 224(e)(2) and (3) simply explain how a "utility" should apportion the "cost" of providing non-usable (Section 224(e)(2)) and usable space (Section 224(e)(3)).[49]

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[45] 47 U.S.C. § 224(e)(1).

[46] *See id.* § 224.

[47] *Id.* § 224(e)(2), (3).

[48] *Id.*

[49] Section 224(e)(2) provides as follows:

> 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 entities.

Id. § 224(e)(2) (emphasis added).

Section 224(e)(3) likewise provides as follows:

> A *utility* shall apportion the *cost* of providing usable space among all entities according to the percentage of usable space required for each entity.

The terms and structure of Section 224 support the conclusion that the nondiscrimination requirement is independent of the cost allocation requirements in Section 224(e). For example, Section 224(d) states that a Cable Rate shall be just and reasonable if it is based on the cost allocation formula set forth in Section 224(d).[50] Thus, the cost allocation formula in Section 224(d) determines whether rates are just and reasonable.[51] Importantly, Section 224(d) does not include a requirement that rates be nondiscriminatory. In contrast, Section 224(e) does of course include a "nondiscrimination" requirement in addition to a "just and reasonable" requirement. It follows that the nondiscrimination requirement in section 224(e)(1) is an independent mandate that is not tied to compliance with the cost allocation guidelines in Section 224(e)(2) and (3).[52] The logical implication is that rates set in accordance with Section 224(e)(2) and (3) are not always "nondiscriminatory."[53] Where the cost allocation guidelines yield discriminatory rates, the nondiscriminatory mandate must trump Section 224(e)(2) and (3).[54]

In addition, the Commission's own prior statements regarding the purpose of Section 224(e) reflect the agency's understanding that subsection (e) is designed to eliminate, not create, differential treatment among competitors. For example, in delineating the scope of the pole attachment "nondiscriminatory" requirement, the Commission has explained as follows:

- "[W]here access is mandated, the *rates,* terms, and conditions of access must be uniformly applied to *all telecommunications carriers and cable operators* that have or seek access."[55]

- "Interpreting these terms in light of the 1996 Act's goal of promoting local exchange competition, and the benefits inherent in such competition, . . . these terms require [the utility] to provide [attachments] under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete."[56] "Such terms and conditions should serve to promote fair and efficient competition."[57] The FCC reached

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Id. § 224(e)(3) (emphasis added).

[50] *Id.* § 224(d)(1).

[51] *See id.*

[52] *See id.* § 224(e)(1).

[53] *See id.* § 224(e)(1)-(3).

[54] *See id.*

[55] *Local Competition Order*, ¶ 1156 (emphasis added).

[56] *Id.* ¶ 315. The FCC incorporated this paragraph (and indeed the entire section) in defining the term "nondiscriminatory" for purposes of 47 U.S.C. § 224. *See id.* ¶ 1156 n.2832 ("*See supra*, Sections IV.G. and V.G. for a discussion of the meaning of 'nondiscriminatory.'").

[57] *Id.* ¶ 315.

"this conclusion because providing new entrants, including small entities, with a meaningful opportunity to compete is a necessary precondition to obtaining the benefits that the opening of local exchange markets is designed to achieve."[58]

- Thus, the FCC should set rates that "promote fair and efficient competition."[59]

The legislative history similarly confirms that Congress enacted the original Pole Attachment Act and the Telecommunications Act amendments to Section 224 to improve competition by putting companies on a level playing field.[60] As the Senate Report for the original Pole Attachment Act explained, Congress enacted the Pole Attachment Act in response to "pole attachment practices" that, if unchecked, could "present realistic dangers of competitive restraint in the future."[61] Applying disparate rates to broadband competitors creates a realistic danger of competitive restraint, especially as prices and margins decline over time and pole attachment rates remain unchanged. For example, disparate rates give firms like TWTC an incentive to discontinue offering telecommunications services and to focus solely on providing information services. This sort of "competitive restraint" runs directly counter to the purposes of the Pole Attachment Act and the Telecommunications Act.

Interpreting the nondiscrimination mandate in this manner does not mean that Section 224(e)(2) and (e)(3) play no role in setting rates. Absent evidence of discrimination, the statute permits utilities to charge telecommunications carriers pole attachment rates yielded by the allocation of costs pursuant to the guidelines in subsections (e)(2) and (e)(3).[62] Theoretically at least, the higher rates yielded by application of these guidelines might not have resulted in discrimination among similarly-situated firms where telecommunications carriers did not compete with cable systems in the provision of, for example, broadband information services. But such competition is now developing and the Commission has a continuing obligation to ensure that its regulations track marketplace developments.[63] Given the manner in which the competitive landscape has developed, a "rate" based solely on the utility cost allocation guidelines in subsections (e)(2)-(3) no longer results in "nondiscriminatory" treatment for telecommunications service providers that compete in the provision of broadband services with cable operators that do not provide telecommunications services. The mandate embodied in

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[58] *Id.*

[59] *Id.*

[60] *See Ala. Power Co.*, 311 F.3d at 1361. *See also* S. Rep. No. 95-580, 1978 U.S.C.C.A.N. 109 (1978).

[61] S. Rep. No. 95-580, 1978 U.S.C.C.A.N. at 121.

[62] *See* 47 U.S.C. § 224(e).

[63] *See, e.g., Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) (requiring the FCC to take account of the marketplace, technological, and regulatory changes).

Section 224(e) requires that this conclusion lead the Commission to the formulation of non-discriminatory rates.[64]

Where applicable, the nondiscrimination requirement prohibits any differences in rates. The term "nondiscriminatory" means an "absence of discrimination."[65] The term "discrimination," in turn, refers to "differential treatment -- especially a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored."[66] No reasonable distinction exists for treating cable broadband providers and telecommunications carrier broadband providers differently with respect to their pole attachments. Doing so only distorts market outcomes and encourages "regulatory-driven investment and deployment decisions."[67]

It is also significant that the Commission has interpreted the term "nondiscriminatory" in Section 251(c)(2)(D), (3) and (6) as establishing an absolute bar on any differential treatment.[68] In reaching this conclusion, the Commission ruled that "nondiscriminatory" treatment requires a more exacting standard than the prohibition in Section 202(a) against "unjust or unreasonable discrimination." The canons of statutory construction require that an agency give the same meaning to identical terms appearing in different sections of the same statute unless there is a reasonable basis for adopting a different interpretation in a particular context.[69] Given that the purpose of the nondiscrimination requirements in both Section 224(e) and Section 251(c) is to prevent a wholesale provider of essential facility inputs from raising entry barriers to the provision of telecommunications services, the term "nondiscriminatory" should have the same meaning in both contexts. Indeed, the FCC has already held the term "nondiscriminatory" has

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[64] *See* 47 U.S.C. § 224(e).

[65] *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed.).

[66] BLACK'S LAW DICTIONARY (8th ed. 2004).

[67] *See Wireline Broadband Order*, ¶ 45.

[68] *Local Competition Order*, ¶¶ 217-218. The FCC incorporated this paragraph (and indeed the entire section) in defining the term "nondiscriminatory" for purposes of 47 U.S.C. § 224. *See id.* ¶ 1156 n.2832 ("*See supra*, Sections IV.G. and V.G. for a discussion of the meaning of 'nondiscriminatory.'").

[69] *See, e.g., Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (applying the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning") (internal citations and quotations omitted); *Dep't of Revenue of Or. v. ACF Indus.*, 510 U.S. 332, 342 (1994) (same); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (same); *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning.'") (citation omitted); *Transactive Corp. v. United States*, 91 F.3d 232, 238 (D.C. Cir. 1996) ("[I]n the absence of some showing to the contrary, a term used in one aspect of the rules governing a particular subject should have a similar meaning if used in another aspect of those same rules.").

the same meaning in Sections 224(e) and 252.[70] Thus, just as the FCC does not allow differential treatment under Section 252, the FCC should not allow differential treatment in the Section 224(e) context.[71]

Nor is there any question that the Commission has the authority to promptly eliminate discriminatory rates. Under Section 1.1410 of the Commission's rules, the FCC has the authority to "prescribe" just and reasonable pole attachment rates.[72] The Commission also has the authority to "terminate" unjust and unreasonable pole attachment rates and to "substitute" proper rates in pole attachment agreements.[73] In addition, the FCC has the authority to issue a "refund" under Section 1.1410(c) of its rules.[74] The Commission should use this broad authority to substitute the rates that utilities currently charge telecommunications carriers with the Cable Rate.[75] Both the FCC and the Supreme Court have already held that the Cable Rate is "just and reasonable," and, as shown, it is also nondiscriminatory if applied to all competitors.[76] Such an approach would treat similarly-situated parties equally and would allow telecommunications carriers to provide information services and telecommunications services on an equal basis with non-carriers.

B. The Commission Can Also Comprehensively Reform Its Pole Attachment Rate Regulations By Revising Its Cost Allocation Rules.

Although a prohibition on any differential in rates charged to competitors pursuant to the nondiscrimination requirement in Section 224(e) is the simplest solution to the pole attachment rate differential problem, the Commission could also accomplish a comprehensive reform of its pole attachment rules by changing its flawed pole attachment cost allocation rules. As discussed above, Section 224(e)(1) imposes an independent obligation on the FCC to "ensure that a utility

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[70] *See Local Competition Order*, ¶ 1156 n.2832 ("*See supra*, Sections IV.G. and V.G. for a discussion of the meaning of 'nondiscriminatory.'").

[71] *See id.* ¶¶ 213-220; *id.* ¶¶ 298-316.

[72] 47 C.F.R. § 1.1410.

[73] *Id.*

[74] *Id.* § 1.1410(c).

[75] *See id.*

[76] *See Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) (upholding application of § 224(d) rate to cable broadband services). *See also FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987) (approving the rate established under § 224(d)); *Reconsideration Order*, ¶ 17 ("We have been presented with no persuasive evidence that utility owners do not recover a just and reasonable compensation for pole attachments from use of the *Cable Formula*. The application of the well-established *Cable Formula*, with technical adjustments adopted from time to time, is consistent with establishing a just, reasonable, and nondiscriminatory maximum pole attachment rate as envisioned by Congress.").

charges just, reasonable, and nondiscriminatory rates for pole attachments."[77] While Section 224(e)(2) and (3) describe how a "utility shall apportion the cost of providing" non-usable and usable space on a pole,[78] neither subsection explains how the utilities must actually calculate the "cost" of providing space.[79] No other provision elsewhere identifies how utilities must actually calculate costs.[80] The absence of such specific statutory guidance means that the Commission has the authority to adopt any reasonable definition of the "cost of providing" non-usable and usable space on a pole.[81] In fact, as mentioned, the FCC has already relied on its authority to ensure equal, nondiscriminatory rates for *conduits* under Section 224(e).[82] The fact that the FCC's current method of calculating *pole attachment* costs leads to wildly discriminatory, unjust, and unreasonable rates for carriers suggests that the FCC should exercise that authority by reappraising how it calculates costs to ensure that all carriers pay just, reasonable, and nondiscriminatory rates.[83]

Section 224(d) and Section 224(e) include important textual differences regarding the required costs.[84] For example, Section 224(d)(1) allows the FCC to set a maximum rate based on "the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole."[85] As mentioned above, the FCC has explained that it calculates this number by multiplying "the cost of a bare pole" and the "carrying charges attributable to the cost of owning a pole."[86] Section 224(e), however, does not require the calculation of rates or costs based on "the sum of the operating expenses and actual capital costs."[87] Instead, Section 224(e)(2) only

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[77] 47 U.S.C. § 224(e)(1).

[78] *Id.* § 224(e)(2)-(3).

[79] *See id.*

[80] *See id.* § 224.

[81] *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984).

[82] *See* 47 C.F.R. § 1.1409(e)(3)(2005) ("The following formula shall apply to attachments to conduit by cable operators *and* telecommunications carriers") (emphasis added).

[83] *See* 47 U.S.C. § 224(e)(1) (requiring " nondiscriminatory rates" for pole attachments).

[84] *Compare id.* § 224(d)(1), *with id.* § 224(e).

[85] *See id.* § 224(d)(1).

[86] *See Pole Attachment Order*, ¶ 6 (citing 47 C.F.R. § 1.404(g)(9) (1987)).

[87] *Compare* 47 U.S.C. § 224(d)(1), *with id.* § 224(e).

requires that utilities apportion "the cost of providing space on a pole" other than usable space.[88] Section 224(e)(3) requires utilities to apportion "the cost of providing usable space."[89]

Despite these critical textual differences, the FCC currently includes the same cost categories in its implementing regulations for Sections 224(d) and (e). As a result, the FCC currently considers a host of factors in calculating "costs" for purposes of the Telecom Service Rate Formula that find no basis in the text of Section 224(e). For example, the FCC includes a "Rate of Return Element" in its definition of "cost" in the Telecom Service Rate Formula.[90] But "Rate of Return" could more appropriately be characterized as the *difference* between revenues and costs (*i.e.*, "profit" or "return"). More strikingly, the FCC has set a "default rate" for this element at *11.25%* -- a percentage that has absolutely nothing to do with the actual "cost" of providing space on poles for pole attachments.[91]

Other cost factors included in the Telecom Service Rate Formula similarly have nothing to do with the cost of "providing space" on utility poles for pole attachments.[92] In calculating costs, the FCC currently directs utilities to include a "Carrying Charge Rate."[93] In defining the term, the FCC has explained that it refers to "those costs incurred by the utility in owning and maintaining poles *regardless of the presence of pole attachments.*"[94] Including these costs in a rate formula does not comport with the text of Section 224(e)(2) and (3).[95] If a utility incurred these costs "regardless of the presence of pole attachments," then by definition these costs bear no relation the "cost of providing space" for pole attachments.[96] Indeed, the factors that utilities consider in calculating the "Carrying Charge Rate" have nothing to do with pole attachment "space."[97] Among other things, the Carrying Charge Rate requires carriers to pay the utility's tax bill,[98] and it requires carriers to pay for pole depreciation that has nothing to do with the

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[88] *See id.* § 224(e)(2).

[89] *See id.* § 224(e)(3).

[90] *See Fee Order*, ¶¶ 74-76.

[91] *Id.* ¶ 75.

[92] *Compare* 47 U.S.C. § 224(e)(2)-(3), *with Fee Order*, ¶¶ 44-76.

[93] *Id.* ¶¶ 44-76.

[94] *Id.* ¶ 44 (emphasis added) (citing *Amendment of Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking*, 12 FCC Rcd 7449, ¶ 11 (1997)).

[95] *See* 47 U.S.C. § 224(e)(2)-(3).

[96] *See id.*

[97] *Compare id., with Fee Order*, ¶¶ 44-76.

[98] *Fee Order*, ¶¶ 71-73.

attachments themselves.[99] Indeed, none of these "costs" has anything to do with actually providing "space" on a pole for pole attachments because a utility would incur these costs "regardless of the presence of pole attachments."[100]

Instead of imputing all of these additional factors to carriers, the FCC should follow the terms of Section 224(e) and set ultimate rates that bear a reasonable relation to actually providing "space" for pole attachments.[101] In other words, the FCC should require utilities to determine how much *extra* a utility must incur to provide non-usable and usable space on poles for pole attachments (in both construction and maintenance costs)[102] and then fully allocate those costs based on the cost-apportionment formulas under Section 224(e)(2) and (3).[103] If the FCC followed these standards, a cost-apportionment-only rate formula under Section 224(e) would yield rates more consistent with the "just, reasonable and nondiscriminatory" requirement in Section 224(e)(1).[104]

C. The FCC May Also Interpret Section 224(e) To Mean That Only the Services Provided By the Attaching Entity Itself Determine the Relevant Pole Attachment Rate.

Finally, the Commission could eliminate discrimination in existing pole attachment rates for at least a subset of pole attachments by interpreting Section 224(e) and its pole attachment rules[105] to mean that only the services provided by the attaching entity itself determine the applicable pole attachment rate. This approach advances the goal of efficient competition and the efficient use of pole attachments, and it is also consistent with the terms of the statute and the Commission's rules. Moreover, while this approach is not sufficient to address the full scope of the discrimination caused by the current rules, it could be adopted and implemented while the Commission works on designing and implementing comprehensive reform.

Section 224(e) establishes rates applicable to "pole attachments used by telecommunications carriers to provide telecommunications services," but it does not specify

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[99] *Id.* ¶¶ 62-70.

[100] *Compare* 47 U.S.C. § 224(e)(2)-(3), *with Fee Order*, ¶¶ 44-76.

[101] *See* 47 U.S.C. § 224(e)(2)-(3).

[102] In so doing, the Commission must narrowly and specifically define the costs that utilities may include in cost categories for purposes of pole attachment rates. In particular, the Commission should only allow utilities to include costs directly attributable to the attachments themselves. It should not allow utilities, for example, to include general pole construction or replacement costs in the cost categories used to establish pole attachment rates.

[103] *See id.*

[104] *See id.* § 224(e)(1).

[105] *See* 47 C.F.R. § 1.1409(e).

what it means to "use" a pole attachment in this manner.[106] For example, the statute does not specify whether the Telecom Service Rate applies only when the attacher itself uses the attachment to provide telecommunications services or whether it also applies when a third party that leases fiber from the attacher provides a telecommunications service.[107] Given this ambiguity, under *Chevron*, the Commission has the authority to adopt a reasonable interpretation of the phrase "used by" in Section 224(e).[108]

It would be reasonable for the Commission in this case to interpret Section 224(e) to mean that a telecommunications carrier only "uses" a pole attachment when the carrier is itself an attacher and provides telecommunications services over its own attachment. Under this interpretation, a lessee of fiber that does not have its own attachment does not "use" the attachment to provide telecommunications services; the lessee "uses" fiber to provide the service in question. It is the attacher that "uses" the attachment to provide the fiber to the lessee. This interpretation of the term "used" is common where one uses a product that consists of several inputs obtained from other sources. For example, a railroad would say that it uses trains to provide its service, but it would not say that it uses the steel or electronics that are inputs for trains. As this example illustrates, there is nothing unreasonable or unusual about interpreting the phrase "used by" to refer solely to the inputs directly relied upon to provide a service (fiber or trains) and not to refer to the inputs used further upstream to provide such inputs (pole attachments or steel/electronics).

The Commission's rules even today support this conclusion. Section 1.1409(e)(2) of the Commission's rules states that the Telecom Service Rate applies "to attachments to poles *by any telecommunications carrier . . . or cable operator providing telecommunications services.*"[109] The plain terms of this rule require that the service provided by the entity that owns the pole attachment determines whether the Telecom Rate applies.

Under this interpretation, the services provided by a third-party that leases fiber from the pole attachment owner would be irrelevant to determining whether the Telecom Service Rate or the Cable Rate applies. For example, where TWTC leases dark fiber from Time Warner Cable and other cable operators, it does not actually establish its own pole attachments for the fiber.[110] As the Commission has explained, attaching entities "may lease their dark fiber to third parties without such leases being considered separate attachments and without making an additional payment beyond the host's existing attachment rate."[111] As mentioned, TWTC generally

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[106] *See* 47 U.S.C. § 224(e).

[107] *See id.*

[108] *See Chevron*, 467 U.S. at 843-45.

[109] 47 C.F.R. § 1.1409(e)(2) (emphasis added).

[110] *Telecom Order*, ¶ 73.

[111] *See Reconsideration Order*, ¶ 86. *See also Telecom Order*, ¶ 73 ("We agree and conclude that the leasing of dark fiber by a third party is not an individual pole attachment separate from the host attachment").

establishes such lease arrangements with Time Warner Cable and other cable operators that often do not provide telecommunications services. Such attachers generally only provide cable and information services. Where this is the case, the Cable Rate should apply to the pole attachment and TWTC's use of leased dark fiber to provide a telecommunications service should be irrelevant. That is, the Supreme Court's ruling in *Gulf Power* that the Cable Rate can apply to attachments "by" a "cable system" even if the cable system uses the attachment to provide cable modem service should apply regardless of whether third parties use the cable system's fiber to provide telecommunications services.[112] This is of course sensible since, as explained, a third party lessee of dark fiber imposes no burdens on and has no contact with the pole owner.[113] Only the attacher itself interfaces with the pole owner.

Focusing solely on the services offered by the attacher itself (rather than third parties leasing fiber from the attacher) would yield other benefits as well. This approach would simplify pole attachment administration because it obviates the need to examine the types of services offered by all third parties. In addition, this interpretation would encourage companies to enter into leasing arrangements and to share facilities (*e.g.*, dark fiber), thus encouraging competition through the efficient use of existing fiber facilities. Customers would benefit by receiving more choices in their market area in accordance with the intent of the Telecommunications Act.[114] Doing otherwise would discourage companies from entering into leasing arrangements because of fear that they may have to pay higher pole attachment rates, even though they do not provide telecommunications services.[115]

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[112] *See Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002). *See also Telecom Order*, ¶ 33 (setting rates for pole attachments for commingled services based on § 224(b) and § 224(d)); 47 C.F.R. § 1.1409(e)(1) ("The following formula shall apply to attachments to poles by cable operators providing cable services.").

[113] *See Telecom Order*, ¶ 73 ("There is a general consensus among cable operators and telecommunications carriers that the leasing and use of dark fiber by third parties places no additional spatial or physical requirements on the utility pole. . . . We agree and conclude that the leasing of dark fiber by a third party is not an individual pole attachment separate from the host attachment.").

[114] *Id.* ("Cable operators, telecommunications carriers, and utility pole owners all contend that the use of dark fiber is a pro-competitive, environmentally sound and economical use of existing facilities. We agree . . .").

[115] *See id.* ¶ 32 (explaining that providing a "higher rate" might "deter an operator from providing non-traditional services").

CONCLUSION

The Commission's current regulations inexplicably and unreasonably require that telecommunications carriers like TWTC pay millions of dollars more in pole attachment fees each year than their non-carrier competitors. This arbitrary discrimination distorts competition and is clearly inconsistent with the Commission's policy of eliminating unjustified differences in the regulatory treatment of broadband competitors. Moreover, there is no legal basis for retaining the current discriminatory pole attachment rate regime. This problem requires a *comprehensive solution*, one that addresses all pole attachments subject to arbitrarily high Section 224(e) rates. Such comprehensive reform is most appropriately accomplished by interpreting the "nondiscriminatory" requirement in Section 224(e) as mandating that all attachers pay the Cable Rate. Alternatively, comprehensive reform could also be accomplished by adopting cost identification and allocation rules for the Telecom Service Rate Formula that yield Telecom Service Rates that are identical to or similar to Cable Rates, consistent with the language and intent of Section 224(e). To emphasize, TWTC believes that comprehensive reform and/or achieving rate parity through adjustment of cost identification and allocation rules for the Telecom Service Rate formula is essential. As a partial interim remedy, however, the Commission could also interpret Section 224(e) and its pole attachment rules to mean that only the services provided by the attaching entity itself determine the applicable pole attachment rate. Such a partial approach is not sufficient in and of itself, but it could be adopted at least to diminish the harmful consequences of the existing pole attachment rules while the Commission works on comprehensive reform.

In all events, the Commission must take steps to implement these changes as soon as possible. As the months and years pass, the accumulated differentials in pole attachment fees impose higher and higher costs on telecommunications carriers to the benefit of utility pole owner shareholders and the detriment of consumer welfare. The goal of eliminating the harmful consequences of the utilities' control over pole attachments, once viewed as a critical policy priority, must once again become a top priority for policy makers. This White Paper has set forth a roadmap for achieving that goal.