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A PRACTICAL PRIMER ON POLE ATTACHMENTS

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Since the enactment of the federal Telecommunications Act of 1996, requests for attachments to utility poles, ducts, conduits, and rights of way have increased dramatically.¹ As a result, electric utilities have had to balance their own need to maintain and operate their utility systems in a safe and reliable manner with the often competing needs of a variety of attaching communications entities.² These efforts were complicated by imperfections in the federal pole attachment rules, as interpreted by the Federal Communications Commission (“FCC” or “Commission”).

In April 2011, the FCC adopted a massive *Report & Order*³ that overhauled the federal pole attachment rules in several significant ways that benefitted attaching entities at the expense

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¹ Following the practice of the Federal Communications Commission, we will refer to attachments to poles, conduits, ducts and rights of way collectively as “pole attachments,” unless otherwise specified.

² For the purposes of this primer, the term “public power” and/or “municipal entities” includes state, county and local governments; publicly-owned gas, water, electric and other utilities; and public commissions, councils, authorities, joint action agencies, and other bodies that own or operate poles, ducts, conduits or rights of way.

³ *In the Matter of Implementation of Section 224 of the Act, Report & Order and Order on Reconsideration*, WC Docket No. 07-245, FCC 11-50, released April 7, 2011. <http://fcc.us/dK05BR> The FCC’s revised rules are being challenged in federal court by

of pole owners and their utility ratepayers. Had the Commission's new rules been based on compelling national purposes, hard evidence, and sound reasoning, then the sacrifices that many public power utilities and their electric ratepayers may have to make sooner or later might be easier to justify and endure. But they are not. To the contrary, the Commission's *Report & Order* is full of factual errors and omissions, erroneous assumptions, poor reasoning, and result-driven conclusions. In the end, the Commission's new rules are not likely to result in any significant increases in broadband deployment, adoption, and use, but will merely result in a massive transfer of money from electric utility ratepayers to the major telecommunications and cable companies.

The new rules are currently under appeal, but the federal court of appeals reviewing the matter is not likely to issue a decision for at least 12-18 months. An appeal to the Supreme Court could follow, which would add another 12-18 months. In the meanwhile, utilities covered by the new rules must comply with them.

While the *Report & Order* expressly acknowledged that the new rules did not apply to government entities or cooperatives, which have been exempt from federal pole attachment regulation since 1978, it is likely that the new rules will have a significant indirect impact on them.⁴ For example, some states have incorporated features of the federal pole attachment rules into state statutes or administrative law. Elsewhere, attaching entities are likely to invoke the new federal rules as benchmarks of reasonableness in negotiating or seeking to renegotiate pole

several investor-owned utilities but until and unless the rules are overturned the new rules have been in effect since mid-June 2011.

⁴ As explained in greater detail below, Sections 224(a)(1) and (a)(3) of the Communications Act exclude government entities, cooperatives, and railroads from the definition of the utilities that are subject to federal pole attachment law.

attachment agreements. It is also possible that attaching entities will seek new federal or state legislation to eliminate the municipal/cooperative exemption.

To respond as effectively as possible in the various contexts in which their pole attachment rates and practices may be called into question, public power utilities should become familiar with the strengths and weaknesses of the new federal rules. Some may want to avoid or minimize the risks of protracted disputes over pole attachments by modifying their pole attachment rates and practices to align them more closely with the federal rules. Others may prefer to stand their ground and resist efforts by attaching entities to obtain lower rates or other advantages. To help utilities make this choice, we not only analyze the key features of new rules, but we also provide an extensive discussion of the history of federal pole attachment regulation, the arguments for and against the new rules, and the grounds for distinguishing public power utilities (and electric cooperatives) from investor-owned utilities.⁵

I. OVERVIEW OF FEDERAL REGULATION OF POLE ATTACHMENTS RATES

As is true of many areas of communications law, pole attachments are governed by an arcane mix of federal, state and local requirements. Here, we will focus primarily on the major federal requirements. We begin with a historical overview of federal pole attachment regulation, from the perspective of public power utilities.⁶ We then turn to the key features of the federal rules, as amended by the FCC's latest *Report & Order*.

⁵ Readers wishing to skip our discussion of the history of federal pole attachment regulation and our analysis of the arguments for and against the FCC's new rules should proceed directly to page 16.

⁶ In many respects, the interests of public power utilities and electric cooperatives are identical with respect to pole attachments.

A. Historical Background on FCC Pole Rate Regulation

Congress first addressed pole attachments in the Pole Attachment Act of 1978, which added Section 224 to the Communications Act. The cable industry was then in its fledgling stage, and Congress believed that federal pole-attachment legislation was necessary to protect cable systems from rate gouging by investor-owned pole owners. The new Section 224 did not provide cable operators a statutory right to make attachments to utility poles; it just set forth the principles that the Commission should apply in developing rules for determining the maximum rates that pole owners covered by Section 224 could charge when they voluntarily allowed cable systems onto their poles.

As explained in the same time, Congress had no similar concerns about consumer-owned poles – i.e., those managed by local governments and cooperatives. Congress exempted these poles from Section 224, explaining its rationale as follows:

... The committee considers the matter of CATV [Community Antenna Television] pole attachments to be essentially local in nature, and that the various state and local regulatory bodies which regulate other practices of telephone and electric utilities are better equipped to regulate CATV pole attachments. Regulation should be vested with those persons or agencies most familiar with the local environment within which utilities and cable television systems operate. It is only because such state or local regulation currently does not widely exist that federal supplemental regulation is justified.

...

Ultimately, CATV pole attachment rate-setting involves equity considerations. *Decisions regarding the allocation of pole costs among users should reflect in some rough sense the ability of cable subscribers and the utilities' customers to pay for costs which are passed along to them.* Another significant equity consideration is the relative importance of each of the respective services to the communities served. Considerations of equity should turn on the needs and interests of local constituents. Given the fact that state public service commissions or local regulatory bodies are better attuned to these needs and interests than a federal agency, jurisdiction over CATV pole attachments should rest with non-federal officials.

Because the pole rates charged by municipally owned and cooperative utilities are already subject to a decision making process based upon constituent needs and

interests, § 1547, as reported, exempts these utilities from FCC regulation. Presently cooperative utilities charge the lowest pole rates to CATV pole users. CATV industry representatives indicate only a few instances where municipally owned utilities are charging unsatisfactorily high pole rental fees. *These rates presumably reflect what local authorities and managers of customer-owned cooperatives regard as equitable distribution of pole costs between utilities and cable television systems.*

As to municipally owned utilities, in many cases the same local entity – the city council – is responsible finally for granting CATV franchises, and setting pole rates and electric and CATV subscriber rates. There are today approximately 2,228 local jurisdictions owning local public power systems. Of these, about 2,112 have the authority to grant CATV franchises as well, and about half or 1,008 of these municipal power systems have granted cable franchises. *Thus these localities are in the best position to determine the respective responsibilities of pole users for the costs of erecting and maintaining these facilities.*⁷

In Section 224(d), the Pole Attachment Act stated that "a rate is just and reasonable if it assures a utility of recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of usable space which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way." Following the enactment of this provision, the Commission developed what has come to be known as the "cable rate formula." In keeping with Congress's intent to foster growth of the cable industry, this formula heavily subsidized cable attachments. Under the formula, the Commission allocated capital and operating costs among attaching entities solely by reference to the "usable space" on the pole, and the Commission assumed that a typical pole had a total of 37.5 feet, that 13.5 feet of this was usable space, and that a cable system used one foot of the usable space. For example, if there were only two attachers on the pole – a cable system and the electric utility that owned the pole – the Commission's cable rate formula assigned 1/13.5 (7.4%) of the costs to the cable operator and 12.5/13.5 (92.6%) of the costs to the electric utility. That was so even though the

⁷ S. Rep. No. 95-580, 95th Cong., 1st Sess. 17-18 (1977) (emphasis added).

electric utility actually used far less than 12.5 feet of the usable space, and even though both the cable system and the electric utility benefited from the remaining “unusable” support space and safety space on the pole. The Commission’s formula was upheld in *Alabama Power Co. v. FCC*, 311 F.3d 1357 (D.C. Cir. 2002).

In 1996, Congress revisited Section 224 in the course of enacting the Telecommunications Act of 1996. Seeking to foster robust competition in all communications markets, Congress expanded Section 224 to give cable systems and telecommunications carriers not only rate protection but also attachment rights. At the same time, recognizing that the cable rate formula was unfair to pole owners, Congress acted to mitigate some of this unfairness.

By 1996, the cable industry was no longer a fledgling industry that needed special protection.⁸ Indeed, cable operators had become so dominant in their markets, that Congress had amended the Cable Act in numerous significant ways in 1992 to curb the cable industry’s monopolistic practices.⁹ Nevertheless, in amending Section 224 in 1996, Congress did not require the Commission to amend the cable rate formula to take this into account. Instead, expecting cable operators to enter the telecommunications business in the near future, as they had often told Congress they planned to do, Congress did three things: (1) it prescribed a new full-cost based “telecommunications rate formula” for providers of telecommunications service;¹⁰ (2) it limited the protection of the cable rate formula to cable systems that “provide solely cable service,” and (3) it required cable systems to use the telecommunications rate

⁸ See, e.g., *In the Matter of Telephone Company-Cable Television Cross-Ownership Rule ...*, *Third Report & Order*, 10 FCC Rcd. 7887, 1995 WL 302326 (F.C.C.) (“Since 1970 ... the cable industry has grown from a fledgling service to a more mature industry that now serves a majority of households and has replaced over-the-air broadcast television as the primary provider of video programming” (inner quotations omitted)).

⁹ Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385 (1992).

¹⁰ 47 U.S.C. §§ 224(d), (e) respectively.

formula when they became providers of telecommunications services. Congress also reaffirmed and extended the exemption from federal pole attachment regulation for state and local governments, cooperatives, and railroads.

More specifically, in amending Section 224, Congress recognized that the cable rate did not provide full compensation to utility pole owners and that the new telecommunications rate should be based on a fully-allocated cost approach that recognizes the value of the common space to all users of the pole. For example, the House Conference Report that accompanied the adoption of the Telecommunications Act of 1996 described the nature and purposes of the House's proposed amendments to Section 224 as follows:

Second, it amends section 224 to direct the Commission, no later than one year after the date of enactment of the Communications Act of 1995, to prescribe regulations for ensuring that utilities charge just and reasonable and nondiscriminatory rates for pole attachments to all providers of telecommunications services, including such attachments used by cable television systems to provide telecommunications services.

The new provision directs the Commission to regulate pole attachment rates based on a "fully allocated cost" formula. In prescribing pole attachment rates, the Commission shall: (1) recognize that the entire pole, duct, conduit, or right-of-way other than the usable space is of equal benefit to all entities attaching to the pole and therefore apportion the cost of the space other than the usable space equally among all such attachments; (2) recognize that the usable space is of proportional benefit to all entities attaching to the pole, duct, conduit, or right-of-way and therefore apportion the cost of the usable space according to the percentage of usable space required for each entity; and (3) allow for reasonable terms and conditions relating to health, safety, and the provision of reliable utility service.

This new provision further provides that, to the extent that a company seeks pole attachment for a wire used solely to provide cable television services (as defined by section 602(6) of the Communications Act), that cable company will continue to pay the rate authorized under current law (as set forth in subparagraph (d)(1) of the 1978 Act). If, however, a cable television system also provides telecommunications services, then that company shall instead pay the pole attachment rate prescribed by the Commission pursuant to the fully allocated cost formula.¹¹

¹¹ H.R. Conf. Rep. 104-458, 104th Cong, 1st Sess., at 136-137 (emphasis added).

While the legislation that Congress ultimately adopted only contained an apportionment of two-thirds of the other than usable space, the law nevertheless reflected the House view that the telecommunications rate should more closely approximate a fully-allocated cost approach than is utilized in the cable rate.

In 1998, the Commission ruled that even though Congress had expressly limited the cable rate formula to cable systems that “solely provide cable service,” cable systems would not lose the benefit of that formula if they used their attachments to provide Internet access service in addition to cable service.¹² From the standpoint of electric rate payers, this ruling was a triple blow: it further entrenched the cable industry’s access to unneeded subsidies for cable television service, it expanded the subsidy to cover Internet access service, and it gave telecommunications carriers grounds for arguing that, to maintain a level playing field between the cable and telecommunications industries, the Commission should provide telecommunications carriers similar subsidies.

In 2007, the Commission launched a proceeding to address a broad range of complaints that it had received about its pole attachment rules. In its *Notice of Proposed Rulemaking*, the Commission tentatively concluded that there was a “critical need to create even-handed treatment and incentives for broadband deployment” and that this need “warrant[s] the adoption of a uniform rate for all pole attachments used for broadband Internet access service.”¹³ The Commission also tentatively concluded that “the rate should be higher than the current cable rate,

¹² *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, at ¶¶ 13 FCC Rcd. 6777, 1998 WL 46987 (F.C.C.), *aff’d*, *Nat’l Cable and Telecommunications Ass’n v. Gulf Power Co.*, 534 U.S. 327 (2001).

¹³ *In the Matter of Implementation of Section 224 of the Act, Amendment of the Commission’s Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking*, WC Docket No. 07-245, at ¶ 36, released November 20, 2007.

yet no greater than the telecommunications rate.”¹⁴ Furthermore, the Commission recognized that by taking into account only the usable space on a pole, the cable rate implicitly provided a subsidy to cable operators at the expense of electric customers, and the Commission questioned whether such a rate should continue to be extended to cable services.

We seek comment on the extent to which the current cable rate formula, whose space factor does not include unusable space, results in a subsidized rate, and, if so, whether cable operators should continue to receive such subsidized pole attachment rate at the expense of electric consumers. More importantly, we seek comment on whether cable operators should continue to qualify for the cable rate where they offer multiple services in addition to cable service.¹⁵

Following the completion of the comment period, but before the Commission issued its ruling, Congress enacted the American Recovery and Reinvestment Act of 2009, which required the Commission to propose a National Broadband Plan to Congress within one year. The Commission did so on March 17, 2010. In the Plan, the Commission addressed pole attachments in Chapter 6. With respect to pole attachment rates, the Commission stated (among other things):

Different rates for virtually the same resource (space on a pole), based solely on the regulatory classification of the attaching provider, largely result from rate formulas established by Congress and the FCC under Section 224 of the Communications Act of 1934, as amended (“the Act”). The rate structure is so arcane that, since the 1996 amendments to Section 224, there has been near-constant litigation about the applicability of “cable” or “telecommunications” rates to broadband, voice over Internet protocol and wireless services.

To support the goal of broadband deployment, rates for pole attachments should be as low and as close to uniform as possible. The rate formula for cable providers articulated in Section 224(d) has been in place for 31 years and is “just and reasonable” and fully compensatory for utilities. Through a rulemaking, the FCC should revisit its application of the telecommunications carrier rate formula to yield rates as close as possible to the cable rate in a way that is consistent with the Act.¹⁶

¹⁴ *Id.*

¹⁵ *Id.*, at ¶ 19.

¹⁶ *Connecting America: The National Broadband Plan* (2010), at 110.

In accordance with the recommendations in the National Broadband Plan, the Commission reopened its proceeding. Now, however, the Commission no longer proposed to establish uniform rates that would be “higher than the current cable rate, yet no greater than the telecommunications rate.” Rather, the Commission stated in the *FNPRM* that

We decline to pursue the approach proposed by the *Pole Attachment Notice* for several reasons. We believe that pursuing uniformity by increasing cable operators’ pole rental rates—potentially up to the level yielded by the current telecom formula—would come at the cost of increased broadband prices and reduced incentives for deployment. Instead, by seeking to limit the distortions present in the current pole rental rates by reinterpreting the telecom rate to a lower level consistent with the Act, we expect to increase the availability of, and competition for, advanced services to anchor institutions and as middle-mile inputs to wireless services and other broadband services.¹⁷

Specifically, the Commission proposed to revise the telecom rate formula by eliminating capital costs from the costs that are included in the calculation of a utility’s costs in providing unusable space on a pole under Section 224(e). The Commission noted that while Section 224(e) requires a utility to apportion the cost of providing space on a pole, the law does not define “the cost of providing space.” The Commission observed that this differs from the cable rate under Section 224(d), which specifies that the relevant costs of usable space as “the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole.” The Commission indicated that it initially implemented Section 224(e) by interpreting “cost” to include the same cost categories that it was using in the cable rate formula, relying on a fully-distributed cost approach, but that this had resulted in rate disparities between telecommunications and cable services and has impacted communications service providers’ investment decisions.¹⁸

¹⁷ *FNPRM*, at ¶ 118.

¹⁸ *FNPRM*, ¶ 130.

At the heart of the Commission's proposal to eliminate capital costs from the telecommunications rate formula was the Commission's assumption that "most, if not all, of the past investment in an existing pole would have been incurred regardless of the demand for attachments other than the owner's attachments."¹⁹ In a footnote, the Commission elaborated as follows on this remarkable statement:

*[W]e note that section 224 imposes no obligation on pole owners to anticipate the need to accommodate communications attachers when deploying poles. At the same time, there is uncertainty surrounding future attachment demand, and therefore there is the risk that the additional cost of extra pole capacity installed in anticipation of additional demand would not be recovered, leading us to believe that such extra capacity typically would be not be installed in advance purely to accommodate possible telecommunications carrier or cable attachers. It thus seems more likely that utilities would install poles based on an assessment of their own needs, and, to the extent that future attachments could not be accommodated on such poles, leave it to the new attacher to pay the cost of the new pole, to the extent that one is installed. The pole attacher therefore likely causes none, or at most a minimal portion, of the cost of the available space on an existing pole used to satisfy the attachment demand.*²⁰

As discussed below, at least insofar as public power utilities are concerned, this statement could not be further from the truth.

B. Public Power's Response to the FCC's Proposal to Eliminate Capital Costs from the Telecommunications Rate Formula

Despite the statutory exemption enjoyed by municipal utilities and cooperatively-owned utilities, the American Public Power Association ("APPA") and the National Rural Electric Cooperative Association ("NRECA") both recognized that adoption of the Commission's pole attachment rate proposals could have a significant negative impact on their members and electric ratepayers. Accordingly, both APPA and NRECA actively participated in the Commission's rulemaking.

¹⁹ *Id.*, at ¶135.

²⁰ *Id.*, at fn. 365 (emphasis added).

1. The FCC's assumption that pole owners install poles only for their own purposes is incorrect as to members of public power utilities

Both APPA and NRECA noted that Congress has repeatedly recognized that federal pole attachment regulation is inappropriate and unnecessary for municipal and cooperative pole owners. Among other things, these entities are the representatives of the consumers who not only own the poles but also benefit from the services provided over the facilities attached to these poles. As a result, they have every incentive to apportion the costs of constructing and maintaining the pole attachments in an equitable manner among attaching entities. Furthermore, attachers that are dissatisfied with the practices of municipal pole owners can readily appeal to the appropriate local decision-making bodies, which are better suited than the Commission to address what Congress has always considered an essentially local issue.

In keeping with Congress's intent, APPA noted that public power utilities have administered millions of pole attachments over the decades in accordance with their own rules and procedures or pursuant to applicable state requirements, and they have encountered relatively few disputes. They generally make attachments available to all financially and technically qualified entities that seek access, including providers of Internet access service or dark fiber that may not currently have federal pole attachment rights. APPA explained that as electric utilities, public power utilities are also well aware of their need to balance the interests of their electric ratepayers with the interests of consumers of communications services.

In particular, APPA noted that its members have always treated their poles as resources for providers of all kinds. Thus, APPA argued the Commission's suggestion that pole owners make their investment decisions based solely on their own core needs is completely unfounded and incorrect as to municipal electric utilities. First, for at least the past thirty years most municipal electric utility distribution poles have had a minimum of three users – the electric

utility, a telephone provider, and a cable company. Indeed, the FCC's own rules assume that, in non-urbanized areas, the average number of attaching entities is three, and in urbanized areas, the average number is five.²¹ It thus makes no sense, APPA concluded, to assume that, in making purchasing decisions, utilities do not anticipate the need to accommodate attachments by third-parties. Further, APPA argued that the FCC's assumption that all of these additional costs are somehow captured during the make-ready process ignores the fact that the make-ready process only imposes a cost if necessary to make a change to accommodate the new attachment. For example, if a utility purchases a pole with sufficient size for the 40 inch safety space that is necessary to accommodate communications attachments, no additional cost will be reflected in make-ready costs to the attaching party.

APPA indicated that its members uniformly confirm that, in making their purchasing decisions for new poles, their specifications include poles of a larger size and class than they would otherwise require in accommodating their own needs. Rather, in every case, they consider the anticipated and potential uses of the poles by multiple third-party communications providers. This includes maintaining a warehoused inventory of such poles for new installations and replacing poles damaged in storms and accidents. Indeed, as APPA noted, some of its members order their poles with pre-drilled bolt holes in the communications space in order to accommodate third-party communications attachments. It would make no sense to do otherwise, given the prevalence of communications attachments on utility poles.

The FCC's assumption that utilities would install poles only tall enough to meet their own needs and leave it to new attachers to pay for replacement poles if their attachments could not be accommodated, suggests that utilities use no foresight in their operations about pole replacement and utility infrastructure. Electric utilities plan and construct their networks to

²¹ 47 C.F.R. § 1.1417(c)

ensure long term reliability, and cost issues aside, the preference of utilities is not to unnecessarily expend time and resources constantly replacing and rearranging poles.

Moreover, public power utilities do not seek to impose unnecessary costs on communications providers by making them constantly install new larger poles. Public power utilities and the communities that they serve are highly supportive of the widespread availability of affordable cable, broadband, and telecommunications services, and work with these entities to ensure that the necessary infrastructure is available to meet their needs. Indeed, APPA argued that contrary to the FCC's assumption, it is precisely because municipal utilities assume the existence of third-party attachments, and believe that the poles are of equal value to all users, that the true costs of the pole need to be fully-allocated among all attaching entities, and this necessarily includes the capital costs of the pole.

Finally, APPA argued that, as a practical matter, the Commission's proposal to preclude pole owners from recovering their capital costs would also be completely counterproductive. Under such a rule, utilities would indeed have the incentive to purchase the smallest poles that would serve their own purposes, leaving it to attaching entities to pay for larger poles. Few potential attaching entities were likely to be willing or able to incur such costs. As a result, the Commission's proposal would ultimately lead to fewer and more expensive pole attachments.

In summary, APPA asserted that the Commission's proposal to eliminate capital costs from the telecommunications rate formula was a thoroughly bad idea. Because pole attachments are equally essential to communications service providers and utilities, the Commission should treat all attaching entities in an equitable manner. Specifically, APPA urged the Commission to require that all attaching entities pay rates based on full cost recovery for pole owners and that attachments at such rates be offered to entities of all kinds. This would also effectively remove

the Commission's concerns about potential market distortions created by disparate pole attachment rates for competing service providers.

2. Several other FCC assumptions are also incorrect

APPA went on to catalogue several other flaws in the assumptions underlying the Commission's rate proposal. As an initial matter, APPA noted that the record did not support the Commission's assumption that lowering pole attachment rates would lead to faster deployment or greater adoption and use of broadband. There were only a handful of unsupported claims, and no empirical studies, suggesting that pole costs significantly impact broadband investment decisions. In contrast, many public power utilities had reported that communications service providers were thriving in their communities, even though they were paying uniform attachment fees based on fully allocated costs. APPA also observed that if the low pole attachment rates really do stimulate broadband deployment in rural areas, then by now the cable rate formula should have spurred cable operators to deploy broadband throughout rural America. They have not done so because pole attachment fees pale in comparison to the other deployment costs involved.

APPA further noted that the Commission's proposal rested on the untenable assumption that communications companies would pass through to their customers any savings in pole attachment costs. Nothing required attachers to pass through cost savings, and they were unlikely to do so voluntarily. Even if they did, the savings per household were likely to be so small that they would have no appreciable impact on broadband adoption and use.

Finally, APPA contended that the Commission's proposal was overly broad. According to the Commission's National Broadband Plan, "[t]oday, 290 million Americans – 95% of the U.S. population – live in housing units with access to terrestrial, fixed broadband infrastructure

capable of supporting actual download speeds of at least 4 Mbps.”²² Thus, for the vast majority of Americans, pole attachments fees cannot be said to have retarded broadband deployment or availability. Yet, the Commission’s new rules would not just apply in areas in which broadband was unavailable, but throughout the United States. In the areas where 95% of the population lives, the rules would thus simply provide cable and telecommunications service providers a massive windfall, at the expense of electric ratepayers.

While APPA recognized that communications companies and their customers are the Commission’s primary constituency, APPA noted that the Commission is charged with making communications policy in the public interest, which encompasses all of the public, including electric customers. In particular, APPA emphasized, consumer-owners of public power utilities should not be required to subsidize competitive for-profit services.

C. The FCC’s *Report & Order* – Rate Issues

Despite vigorous opposition from all sectors of the utility industry, the FCC nevertheless adopted its proposal to eliminate capital costs from the telecommunications rate formula. In its *Report & Order*, the FCC summarized its conclusion as follows:

Rational Firm Behavior. We find that a third-party pole attacher causes none of the capital cost of the available space on an existing pole used to satisfy the attachment demand. We base this finding on basic economic theory and the absence of evidence in the record to support a contrary conclusion. We first discuss economic theory. As we noted in the *Further Notice*, section 224 imposes no obligation on pole owners to anticipate the need to accommodate communications attachers when deploying poles. We agree with commenters who claim that there is uncertainty surrounding future attachment demand, and therefore there is the risk that the additional cost of extra pole capacity installed in anticipation of additional demand would not be recovered. Moreover, as discussed, the rules we adopt would impose no unrecoverable cost on the utility, but rather would provide a benefit to the utility, insofar as a utility that has not considered third party demand is able to install a new pole at the new attacher’s expense. Therefore, we agree with TWTC [Time Warner Telecom] that utilities typically would not install such extra capacity in advance purely to accommodate

²² *Connecting America: The National Broadband Plan*, at 20 (2010), <http://bit.ly/bpYOdP>.

possible telecom-munications carrier or cable attachers. Rather, we conclude that utilities would install poles based on an assessment of their own needs and, to the extent that future attachments could not be accommodated on such poles, leave it to the new attacher to pay the cost of the new pole. In this manner, utilities are certain to recover the full cost of the additional capacity through make-ready charges.

Report & Order at ¶ 188 (footnotes omitted).

In arriving at this conclusion, the Commission brushed aside the comments of the utilities. According to the Commission, the utilities had merely put forward anecdotal statements concerning their purchasing practices and had not presented any comprehensive cost studies to support their statements. *Report & Order* at ¶ 190. The Commission ignored the fact that neither it nor any of the supporters of removing capital costs from the telecommunications rate formula had presented *any* evidence supporting the Commission's assumptions, let alone comprehensive cost studies.

1. New telecom rate

Under the new rules, the Commission will allow covered pole owners (investor-owned utilities) to recover some but not all capital costs. Specifically, the Commission has amended the telecom formula as follows: (a) in urban areas, utilities can now recover 66% of the fully allocated costs²³ used for purposes of the pre-existing telecom rate; and (b) in non-urban areas utilities can recover 44% of the fully allocated costs used for purposes of the pre-existing telecom rate.²⁴

²³ As specified in the pre-existing telecom rate formula, this is the net cost of a bare pole times the carrying charge rate. 47 C.F.R. § 1.1409(e)(2).

²⁴ An urbanized service area has 50,000 or higher population, while a non-urbanized service area has under 50,000 population. 47 C.F.R. § 1.1417(c). "If any part of the utility's service area within the state has a designation of urbanized (50,000 or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities." *Id.*

The new federal telecommunications rate formula can be represented as follows:

$$\text{Rate} = \text{Space Factor} \times \text{Cost}$$

Where Cost

in Urbanized Service Areas = 0.66 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Non-Urbanized Service Areas = 0.44 x (Net Cost of a Bare Pole x Carrying Charge Rate)

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

The new telecommunications formula will yield a pole attachment rate that is roughly the equivalent of the existing cable attachment rate. The Commission estimates that the rate will generally fall between \$5 and \$7 per pole.

Significantly, the *Report & Order* is silent on whether the new rate methodology is prospective only or whether it also applies to existing agreements. In subsequent statements, however, the FCC has strongly suggested that the new rate methodology only applies to new pole attachment agreements, except where existing agreements have reopener clauses based on changes of law.

As discussed below in Section V, the new rates adopted by the Commission in its *Report & Order*, while somewhat problematic to public power utilities, are by no means the only option for many public power entities. In most states public power utilities retain the ability to provide a fair allocation of costs for the benefit of their consumers/owners, while at the same time allowing for reasonable access rates by attaching entities.

2. The new rates apply to wireless attachments

Between 1996 and April 2011, the Commission often interpreted Section 224 as providing federal attachment rights to wireless telecommunications carriers, but it never sought to prescribe a specific rate methodology for wireless attachments. Instead, the FCC left negotiation of wireless attachment rates to the parties, with the Commission's complaint process available to address any unresolvable disputes. In its *Report & Order*, the Commission concluded that the newly revised telecommunications rate formula shall also apply to wireless pole attachments, including wireless attachments on the pole top above the electric lines.

3. Rates for attachments used for multiple purposes

Section 224(d) provides that the cable rate is for "any pole attachment used by a cable television system solely to provide cable service." Nevertheless, as discussed previously, the Commission allowed cable systems to continue to benefit from the cable rate formula even if they also used their attachments to provide broadband Internet access service. Based on this ruling and the failure of the Commission to classify Voice over Internet Protocol (VoIP) for regulatory purposes, the cable industry has routinely refused to pay higher telecommunications rates for their attachments used to support commingled cable service and VoIP. In the new *Report & Order*, the Commission expressly confirmed that attachments used to provide VoIP will be subject to cable rates if the provider is a cable system or to the new telecommunications rates if the provider is a telecommunications carrier.

4. Overlapping

The FCC concluded in the *Report & Order* that overlapping of an existing, authorized attachment, by either the owner of the underlying attachment or a third-party, does not constitute a separate attachment for the purposes of allocating the costs of either usable or unusable space. The Commission assumed that any additional burdens on the pole could be handled through

standard engineering practices. An overlasher need not enter into a separate agreement with the utility. The Commission also determined that overlashing results in no additional recoverable costs to the pole owner, such as costs associated with increased loading.

5. Conduits

While Section 224 of the Pole Attachment Act has applied to utility-owned ducts and conduits since its enactment in 1978, the FCC did not establish a rate formula for such attachments until the Telecommunications Act became law in 1996. This was in large part attributable to the fact that cable systems typically attached their cables to poles and rarely used underground ducts and conduits. But since 1996, the increase in telecommunications competition, coupled with the preference of many local governments for undergrounding, particularly in urban markets, has led to a sharp increase in the number of entities seeking access to utility ducts and conduits.

In the *Report & Order*, the Commission essentially adopted the same methodology for ducts and conduits as it utilizes for poles, except that it changed some of the presumptions. Each entity that installs one or more wires in a duct or duct bank counts as a separate attaching entity for purposes of allocating unusable conduit space, regardless of the number of cables installed or the amount of space occupied. The Commission initially concluded that conduit space reserved for maintenance and emergency circumstances should be treated as unusable space. In an *Order on Reconsideration*, however, the FCC reversed this and concluded that *all* conduit space should be considered usable.

For the allocation of the usable space, the FCC adopted a controversial presumption that each cable or telecommunications attacher occupies one half of a duct. According to the FCC, this assumption was appropriate because telecommunications carriers increasingly utilize inner duct, which supports multiple attachments within a single duct. In adopting this presumption,

the FCC ignored arguments by the utility industry that electric cables and telecommunications cables generally cannot occupy the same duct and that the use of a utility's duct for a telecommunications attachment therefore effectively precludes the use of that duct by the utility for electric purposes.

6. Rights of way

Because there have been relatively few “pole attachment” complaints involving access to underlying utility rights of way, and because rights of way are largely governed by state and local law, the FCC initially declined to provide standards to govern rates for utility rights of way. Rather, the FCC has indicated that it will consider utility right-of-way issues and develop guidelines on a case-by-case basis.²⁵

II. MAKE-READY AND OTHER OPERATING REQUIREMENTS

The FCC first construed the access provisions of the Telecommunications Act in 1996 in its *First Report & Order* implementing the “interconnection” obligations of local exchange telephone carriers.²⁶ In that document, the FCC aggressively resolved virtually all questions of interpretation in favor of requiring pole owners to provide access to their facilities.

Among other things, the FCC found that even if a covered electric utility had uniformly denied all outsiders access to its facilities for any purpose, it would now have to make *all* of its facilities available for pole attachments by cable systems and telecommunications carriers if it used *any* of its facilities for wire communications, including internal wire communications used

²⁵ *Pole Attachment Rate Order*, ¶¶ 120-21. In *Cable Television Association of Georgia v. Georgia Power, Co.*, 18 FCC Rcd. 16333, 16340-41 (Enforcement Bureau 2003), the FCC held that a utility is not entitled to any additional compensation beyond the rate formula for a cable operator's use of a private utility easement.

²⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report & Order*, CC Docket No. 96-98, released August 8, 1996 (“*Interconnection Order*”).

solely for the provision of electric service.²⁷ Since almost every utility has at least some communications wires on some of its poles, the practical implication of this interpretation was that essentially all investor-owned utilities must provide access to all of their poles, ducts, conduits, and rights of way, even those not currently being used for wire communications of any kind.

A. Access Timeline Rules

Given the many potential fact situations that utilities and attachers may face, the FCC did not attempt to prescribe comprehensive access rules in its *First Report & Order*. Instead, it set forth five principles of general applicability and left it up to utilities and attaching entities to find ways to apply them. In its new *Report & Order*, however, the FCC concluded that its prior rules concerning access practices were not specific enough to promote rapid deployment, adoption, and use of broadband infrastructure and services. Accordingly, the Commission adopted a mandatory timeline and various standards that covered utilities must meet in their application, review, and make-ready processes.

In adopting its new timeline, the Commission observed that “evidence in the record reflects that, in the absence of a timeline, pole attachments may be subject to excessive delays.” The “evidence” on which the Commission relied was not a comprehensive study but purely anecdotal statements by a handful of attaching entities. Notably, the FCC largely ignored the

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In a subsequent decision the FCC concluded that while the mandatory access provision is triggered by the use of the utility’s facilities for any *wire* communications, the access itself is not limited to wire-based telecommunications providers. Instead, because the Act states that a utility shall provide “any telecommunications carrier with nondiscriminatory access,” the FCC has determined that wireless providers such as cellular, PCS, and distributed antenna system providers, are entitled to nondiscriminatory access to utility poles, ducts, conduits and rights of way as long as they provide telecommunications services. *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*, CS Docket No. 97-151, *Report & Order*, FCC 98-20 (rel. February 6, 1998) (“*Pole Attachment Rate Order*”). This decision was upheld by the U.S. Supreme Court in *National Cable & Telecommunications Assn., Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002).

extensive comments by all sectors of the utility industry, including public power providers, that the current pole attachment access process is generally working well, and that the development of cookie-cutter, one-size-fits-all rules is both unnecessary and potentially harmful to the maintenance of a safe and reliable electric system.

1. Four-stage timeline

The Commission's *Report & Order* adopts the following four stage timeline:

Stage 1: Survey: 45 days. During the 45-day survey phase, the pole owner conducts an engineering study to determine whether and where attachment is feasible, and what make-ready is required. This period is 15 days longer for "large orders," as defined below. These time periods apply to both wireline and wireless attachments in or above the communications space.

The 45- and 60-day timelines do not start until a completed application is submitted, and there is flexibility for larger orders. To constitute a "request for access" necessary to trigger the timeline, a requester must submit a complete application that provides the utility all of the information necessary under its procedures to begin to survey the poles. The Commission will require pole owners to provide timely notification of errors in an application.

If a utility denies an attachment request, it must provide a written explanation of its denial that includes all supporting evidence and information as to why the attachment request was denied. The utility must explain how the evidence and information relate to reasons of lack of capacity, safety, reliability, or engineering standards.

Stage 2: Estimate: 14 days. If a utility does not deny a request for access, it must present to a requesting entity an estimate of charges for performing all necessary make-ready work within 14 days of providing its Stage 1 response—or within 14 days after the requesting entity delivers its own survey to the pole owner, as it may do if the pole owner fails to meet the timeline's Stage 1 deadline.

The requesting entity may consider the estimate for 14 days after receiving it before the utility may withdraw the offer. Both offer and acceptance may be made sooner than the maximum 14 days. Estimates will not expire automatically after 14 days, but rather must be actively withdrawn by the utility. If an estimate is withdrawn by the utility, the prospective attacher must resubmit its application for attachment.

Stage 3: Attacher Acceptance: 14 days. The attacher has up to 14 days to approve the estimate and provide payment. The Commission had initially proposed to require that utilities accept installment payments for make-ready work as a way to incent utilities to complete make-ready in a timely manner. In the final rules, however, the Commission agreed with utility commenters, including APPA, that the decision whether to accept installment payments or require an advance payment in full should be left to the individual pole owners.

Stage 4: Make-Ready: 60 days. Under most circumstances the Commission will require a utility to complete routine make-ready within sixty (60) days of receipt of payment.

2. Rearrangement/relocation of existing attachments

Upon receipt of payment from the attacher, a utility is required to notify in writing all known entities with existing attachments that may be affected by the planned make-ready. The notice must:

- (1) Specify where and what make-ready will be performed;
- (2) Set a date for completion of make-ready no later than 60 days after notification (or 105 days after notification in the case of larger orders) for attachments in the communications space, or no later than 90 days after notification (or 135 days after notification in the case of larger orders) for wireless attachments above the communications space;

- (3) State that any entity with an existing attachment may add to or modify the attachment before the date set for completion of make-ready;
- (4) State that the utility may assert its right to 15 additional days to complete make-ready and that, for attachment in the communications space, the requesting entity may complete the specified make-ready itself if make-ready is not completed by the date set by the utility (or, if the utility has asserted its 15-day right of control, by the date 15 days after that completion date); and
- (5) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

3. Exceptions and limitations

As APPA and other utilities noted, practical considerations make compliance with the timelines listed above very difficult or impossible in certain circumstances. As a result, the Commission's *Report & Order* created some exceptions to the access timelines.

a. Limit on order size

The Commission adopted limits on the size of attachment requests that are subject to the access timelines. Specifically, the Commission applied the timeline to orders up to the lesser of 0.5 percent of the utility's total poles within a state or 300 poles within a state during any 30-day period. For larger orders – up to the lesser of 5 percent of a utility's total poles in a state or 3,000 poles within a state – the Commission added 15 days to the timeline's survey period and 45 days to the timeline's make-ready period, for a total of 60 days. For in-state orders greater than 3,000 poles, the Commission required parties to negotiate in good faith regarding the timeframe for completing the job. To determine the size of an attacher's request, the pole owner must aggregate all of the attacher's requests from a utility within the state during the period in question.

b. Stopping the clock

The *Report & Order* recognizes that emergencies and certain other events during the make-ready phase can be beyond a utility's control. As a result, the Commission adopted a "good and sufficient cause" standard under which a utility may toll the timeline for no longer than necessary where conditions render it infeasible to complete the make-ready work within the prescribed timeframe. For example, a utility may toll the timeline to cope with an emergency that requires federal disaster relief, but it cannot stop the clock for routine or foreseeable events, such as repairing damage caused by routine seasonal storms; repositioning existing attachments; bringing poles up to code; lack of resources; or awaiting resolution of regulatory proceedings, such as a state public utilities commission rulemaking, that affect pole attachments.

When a utility stops the clock, it must notify the requesting entity and other affected attachers as soon as practicable. The clock does not stop until a utility provides notice to all relevant parties that the deadline must be deferred. A notification may be brief, but it must be in writing and include the reason for, and the date of, the stoppage. As soon as the reason for the stoppage no longer exists, the utility must notify affected entities of the new deadline and the date that the clock will restart. The clock stoppage may be no longer than necessary based on the nature of the event, and the clock must restart no later than the date when the utility returns to routine operations.

The Commission also recognized that, in the aftermath of an emergency, a utility will naturally and reasonably prioritize public safety and restoration of electric service. The Commission noted, however, that once the utility resumes normal operations, "nondiscrimination

requires a utility to resume pole attachment projects in place with internal work orders in the utility's queue."²⁸

4. Performance of make-ready

Under the new *Report & Order*, utilities may fulfill their access obligation by performing make-ready themselves, by contracting out the direction and management of make-ready, or by cooperating with existing attachers' contractors to ensure make-ready is timely.

If make-ready is not completed by the date specified in the utility's notice to entities with existing attachments, a utility, prior to the expiration of the 60-day notice period (or 105-day notice period in the case of larger orders), may notify the requesting attacher in writing that it intends to assert its right to complete all remaining work within 15 days. In such cases, the utility will have an additional 15 days to complete make-ready. If make-ready remains unfinished at the end of the 15-day extension, the attacher may assume control of make-ready at that point (Day 148 of the timeline, or Day 193 in the case of larger orders). The use of outside contractors by attaching entities is discussed in more detail below.

5. Wireless attachments

The *Report & Order* authorizes wireless attachers to access the space above what has traditionally been referred to as the "communications space" on a pole. The *Report & Order* expressly bars blanket prohibitions on pole-top access for wireless attachments. For wireless attachments above the communications space on a pole, the Commission's timeline provides an extra 30 days for make-ready, for a total of 90 days. In recognition of the safety and operational concerns, the Commission prohibited wireless carriers from resorting to self-help measures through the use of contractors for attachments above the communications space if an electric

²⁸ *Report & Order* at ¶ 72.

utility does not meet the 90 day make-ready timeframe. Instead, wireless carriers must file a complaint with the FCC.

6. Timeline not applicable to ducts, conduits, and rights of way

The Commission decided not to extend the timeline requirements to access to ducts, conduits, and rights-of-way at this time. The Commission agreed with APPA that access to ducts and conduits raises different issues than access to poles and that the record did not demonstrate that a substantial number of attachers were currently unable to obtain timely or reasonable access to ducts, conduits, and utility rights of way.

B. Use of Outside Contractors

1. General right to hire contractors

If a utility does not meet its deadline to complete a survey or make-ready established in the timeline, the new *Report & Order* allows an attacher to hire contractors to complete the work in the communications space. In adopting this rule, the Commission indicated that it was not persuaded by contentions of electric utilities that use of contractors is impractical and raises safety and operational concerns. As a result, the Commission required utilities to make available a current and reasonably sufficient list of contractors that are competent to perform surveys or make-ready on their poles. If a utility fails to provide a list of approved contractors, attachers may use contractors that have the “same qualifications, in terms of training, as the utility’s own workers.”

While an attacher may use a contractor to attach a wireless antenna above the communications space and associated safety space, the Commission found that that an attacher may only use a contractor that has the proper qualifications and has received the utility’s prior approval to perform such work. Utilities are not required to keep a separate list of contractors for this purpose, but must be reasonable in approving or disapproving contractors. Accordingly,

contractors can work in the communications space if they have the “same qualifications” as the utility’s own personnel, but they can work in the electric space only if they meet the higher utility-approved standard.

2. **Utility oversight**

To guard against substandard work, the *Report & Order* requires attachers to provide the utility an opportunity to have a representative accompany and consult with the attacher and the attacher’s authorized contractor whenever the contractor visits a pole. The utility representative may monitor a contractor’s work and insist that the work meet utility specifications for safety and reliability, including requirements that may exceed NESC standards.

C. Capacity, Safety, Reliability, and Applicable Engineering Limitations

Electric utilities retain the statutory right to deny access where there is insufficient capacity or for reasons of safety, reliability, or generally applicable engineering purposes. Where the attacher and an electric utility’s representative disagree, they are obligated to try to reach an accommodation within a reasonable amount of time, and disputes should be escalated within the companies when no agreement is reached on the ground. If the electric utility and the attacher are unable to reach agreement or to find a suitable alternative, the electric utility may make the final decision on such a matter, subject to Commission review through the complaint process. In determining whether capacity, safety, and other considerations apply, pole owners must utilize the same practices that they would use themselves.

As indicated above, a wireless carrier cannot resort to self-help measures to make attachments above the communications space through the use of a contractor if a utility fails to meet the access timeline. Instead, a wireless carrier must bring a pole attachment complaint.

D. Guidelines for Negotiating and Resolving Access Disputes

The FCC also adopted a number of "guidelines" and presumptions that it expects utilities subject to Section 224 to follow in negotiating pole attachment agreements.

1. **Capacity expansion.** Believing that a utility can and will expand capacity when it needs to do so for its own purposes, the Commission had concluded that the nondiscriminatory access requirements of Section 224(f)(1) require a utility to expand capacity upon request by other telecommunications carriers and cable operators. The U.S. Court of Appeals for the Eleventh circuit, however, rejected the FCC's interpretation of the law. In *Southern Company v. FCC*, 293 F.3d 1338 (11th Cir.), the court concluded that the FCC's interpretation is inconsistent with the plain language of the Act's statutory exemption from the requirement to grant access in instances where there is insufficient capacity. Accordingly, a utility need not expand capacity in order to accommodate a request for attachment if the utility would not otherwise undertake such expansion for its own purposes.

2. **Reservation of space.** The FCC will permit an electric utility to reserve space on a pole for its own use if such reservation is consistent with a *bona fide* development plan that reasonably and specifically projects a need for that space in the provision of the utility's core electric service, and *not in the provision of telecommunications service*. The utility must permit use of its reserved space by cable operators and telecommunication carriers until such time as the utility has an actual need for that space. At that time, the utility may recover the reserved space for its own use. The utility must give the displaced cable operator or telecommunications carrier the opportunity to pay for the cost of any modifications needed to expand capacity and to continue to maintain its attachment.

E. Modifications to the Pole

With respect to attachments requiring modifications to the utility pole, the Commission has adopted the following standards:

1. Absent a private agreement establishing notification procedures, written notification of a modification must be provided to parties holding attachments on the facility to be modified at least 60 days prior to the commencement of the physical modification itself. Notice should be sufficiently specific to apprise the recipient of the nature and scope of the planned modification. If the contemplated modification involves an emergency situation for which advanced written notice would prove impractical, the notice requirement does not apply. In these circumstances, the notice should be given as soon as reasonably practicable, which in some cases may be after the modification is completed. The burden of requiring specific written notice of routine maintenance activities would not produce a commensurate benefit;

2. To the extent the cost of a modification is incurred for the specific benefit of any particular party, the benefiting party will be obligated to assume the cost of the modification, or to bear its proportionate share of cost with all other attaching entities participating in the modification. If a user's modification affects the attachments of others who do not initiate or request the modification, such as the movement of other attachments as part of a primary modification, the modification cost will be covered by the initiating or requesting party. Where multiple parties join in the modification, each party's proportionate share of the total cost shall be based on the ratio of the amount of new space occupied by that party to the total amount of new space occupied by all of the parties joining in the modification;

3. If an entity uses a proposed modification as an opportunity to adjust its preexisting attachment, the "piggybacking" entity should share in the overall cost of the modification to reflect its contribution to the resulting structural change. A utility or other party

that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost;

4. If a modification would not have occurred absent the action of the initiating party, the cost should not be borne by those that did not take advantage of the opportunity by modifying their own facilities. An attaching party, incidentally benefiting from a modification, but not initiating or affirmatively participating in one, should not be responsible for the resulting cost;

5. A modifying party or parties can recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification. The proportionate share of the subsequent attacher should be reduced to take account of depreciation to the pole or other facility that has occurred since the modification;

6. Parties requesting or joining in a modification also will be responsible for resulting costs to maintain the facility on an ongoing basis;

7. In some cases a facility modification may create excess capacity that eventually becomes a source of revenue for the facility owner, even though the owner did not share in the costs of the modification. The owner would not, however, have to use those revenues to compensate the parties that paid for the modification.

F. Issues on Reconsideration Concerning Brackets and Extensions

On May 2010, the Commission ruled that utilities must allow other entities to the use of the same pole attachment techniques that the utility itself uses or allows, including boxing and bracketing.²⁹ In its *Report and Order* in response to a petition for reconsideration filed by a

²⁹ *In the Matter of Implementation of Section 224 of the Act, Order and Further Notice of Proposed Rulemaking*, 25 FCC Rcd. 11864, 2010 WL 2020770 (F.C.C.)

group of Florida Utilities, the Commission clarified that an electric utility's use of a particular attachment technique for facilities in the electric space does not obligate the utility to allow the same technique to be used by attachers in the communications space.

The Commission also clarified that, to the extent a utility uses or allows a certain attachment technique in one type of circumstance, it is not obligated to allow the same technique in any type of circumstance. The Commission explained that a utility may limit the circumstances in which a particular technique can be used so long as its standards are "clear, objective, and applied equally to both the utility and the attaching entity."

III. THE ENFORCEMENT PROCESS

A. Revising Pole Attachment Dispute Resolution Procedures

In its *Report & Order*, the Commission revised its rules to require that there be "executive-level discussions" (*i.e.*, discussions among individuals who have sufficient authority to make binding decisions on behalf of the company they represent) prior to the filing of a complaint at the Commission. In addition, parties are encouraged to meet face-to-face for these executive-level discussions. The new rule – 47 C.F.R Section 1.1404(k) – states:

The complaint shall include a certification that the complainant has, in good faith, engaged or attempted to engage in executive-level discussions with the respondent to resolve the pole attachment dispute. Executive-level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the company they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the complainant mailed a certified letter to the respondent outlining the allegations that form the basis of the complaint it anticipated filing with the Commission, inviting a response within a reasonable period of time, and offering to hold executive-level discussions regarding the dispute. A refusal by a respondent to engage in the discussions contemplated by this rule shall constitute an unreasonable practice under section 224 of the Act.

B. Unauthorized Attachments

Based on the comments of APPA and other utility groups, the Commission concluded in its *Report & Order* that there is a well-founded concern that requiring attachers of unauthorized attachments to pay only back rent provides little incentive for attachers to follow authorization processes, and that competitive pressure to bring services to market overwhelms any deterrent effect.

To address these concerns, the Commission stated that it will presume contract-based penalties for unauthorized attachments to be if they do not exceed an unauthorized attachment fee of five times the current annual rental fee per pole if the pole occupant does not have a permit and the violation is self-reported or discovered through a joint inspection. The Commission will also consider reasonable an additional sanction of \$100 per pole if the violation is found by the pole owner in an inspection in which the pole occupant has declined to participate. Further, the Commission will allow an unauthorized attachment fee of \$500 per pole for pole occupants without a contract (*i.e.*, when there is no pole attachment agreement between the parties). In order to enforce such penalties, a pole owner must provide specific notice of a violation (including pole number and location) before seeking relief against a pole occupant.

C. The “Sign and Sue” Rule

In the *Report & Order*, the Commission reaffirmed its “sign and sue” rule, which allows attachers that believe they are being coerced into signing a pole attachment agreement to sign the agreement and then later selectively challenge some of its terms and conditions. The Commission declined to modify the rule to require an attacher to provide written notice during the negotiations of any objections that it might subsequently raise. The Commission found that such a requirement would probably make the negotiations more cumbersome, as attachers, to preserve potential complaints, would probably raise many more objections than they might

otherwise raise. The Commission also found that such a notice requirement would be unnecessary, as its rules require that parties considering the filing of a complaint give the prospective defendant at least 10 days prior notice.

IV. ILECs GIVEN THE BENEFIT OF LOWER RATES AND A FORUM FOR COMPLAINTS

Perhaps one of the most fundamental changes adopted in the *Report & Order* was the Commission's decision to give incumbent local exchange carriers (ILECs) the benefit of the new lower telecommunications rates, as well as access to the Commission's complaint process. Section 224(a)(5) of the Communications Act specifically excludes incumbent local exchange carriers from the definition of "telecommunications carrier" for purposes of federal pole attachment regulations. Accordingly, the requirement in Section 224(f)(1) that utilities provide "telecommunications carriers" nondiscriminatory access to utility poles would seemingly not require utilities to provide access to ILECs. The Commission interpreted the exclusion this way for many years, in recognition of the parity between electric utilities and ILECs as pole owners in negotiating attachment agreements.

In its *Report & Order*, however, the Commission distinguished between giving ILECs access to poles pursuant to Section 224(f)(1) and giving them the benefit of lower rates pursuant to Sections 224(b), where ILECs already have such access. The Commission found that Section 224(b) requires the Commission to ensure that the rates, terms, and conditions for pole attachments are just and reasonable, and Section 224(a)(4) defines a pole attachment as any attachment by a "provider of telecommunications services." The Commission reasoned that, unlike the definition of "telecommunications carrier," the definition of "telecommunications service" does not exclude ILECs. Accordingly, the Commission concluded that it has authority

to ensure that the rates, terms, and conditions of incumbent LECs' pole attachments are just and reasonable.

While the Commission might simply have said ILECs are entitled to the new telecommunications rates under Section 224(e), the Commission recognized that the relationship between utilities and ILECs may be very complex, particularly where joint use agreements exist. As a result, the Commission said that ILECs must file complaints with the Commission challenging the rates, terms, and conditions of pole attachment agreements with other utilities.

It is not clear at this point whether, and to what extent, the Commission will apply the same pole attachment requirements and regulations in determining the reasonableness of a complaint brought by an ILEC, or whether the Commission will consider offsetting considerations such as the additional rights that an ILEC may have as a pole owner. Nor does the Commission address the fact that its decision places electric utilities in a situation of having to obtain access to ILEC facilities for electric attachments without reciprocal rights of access.

V. OPTIONS FOR PUBLIC POWER ENTITIES

Unless state law requires a different result, the public power exemption gives municipal and other publicly-owned utilities the opportunity to reject any or all federal access, rate, and procedural requirements and interpretations – municipal entities need only avoid erecting unreasonable barriers to entry and act in a competitively neutral and non-discriminatory manner.³⁰ For example, public power utilities need not limit their rates to the levels prescribed by the FCC's formulas, and they need not respond to pole attachment requests in the manner

³⁰ Competitively neutral and non-discriminatory does not mean equal, as municipalities may charge different rates to persons in different circumstances. *AT&T Communications of the Southwest, Inc. v. City of Dallas, TX*, 8 F. Supp. 582, 593-94 (N.D. Tex. 1998), citing Barton-Stupak amendment to Section 253(c) and comments of Rep. Stupak, 141 Cong. Rec. H8425-27 (daily ed., Aug. 4, 1995); *accord TCG Detroit v. City of Dearborn, MI*, 16 F. Supp. 2d 785, 793 (E.D. Mich. 1998).

prescribed by the FCC, and they are not subject to the deadlines that the FCC imposes on covered utilities (although undue delay could amount to a barrier to entry). In short, the public power exemption allows public power entities to seize the “high ground” and do what they believe to be reasonable, fair, administratively workable, and free of the political compromises reflected in Section 224 and the FCC’s implementing requirements and policies.

For example, APPA has for many years supported the application of a single, uniform rate formula for all attachments irrespective of the specific service being provided. Consistent with Congressional intent, public power utilities should have the flexibility to develop their specific rate methodologies based on local needs. The use of a single rate methodology recognizes that all attachments are imposing essentially the same burden and costs on the poles, and that all attachments are of relatively similar value to the various attaching entities. Further, a single rate formula provides for competitive parity among increasingly competitive services, as well as administrative efficiency. To ensure fair allocation of costs to all attaching entities, including the electric utility, any such rate formula must be based on a fully allocated cost approach that recognizes that the common, unusable space on a pole is of equal value to all users of the pole.

Such an approach is consistent with a Washington state court decision that not only held that the FCC’s pole attachment rate methodologies were inapplicable to municipal utilities, but also that they were not cost-based or reasonable. In *TCI Cablevision of Washington v. City of Seattle*, No. 97-2-02395-5SEA, Superior Court (May 20, 1998) (appeal dismissed), the court found that a number of the assumptions and calculations contained in the federal pole rate methodologies are based solely on arbitrary political determinations aimed at ensuring a low rate for attaching entities. The court in *City of Seattle* concluded that a municipal utility is not obligated to follow the presumptions built into the federal pole attachment rate formulae, but

may instead adopt rates and methodologies that more accurately reflect the true value and cost of the use of its infrastructure. Specifically, in *City of Seattle*, the court upheld the pole attachment rates established by City Light of Seattle, even though City Light did not follow the FCC's formulas, treated all attaching providers the same, and rejected several of the FCC's interpretations, including its approach of allocating the safety space solely to the electric utility.

Consistent with the holding in *City of Seattle*, many public power utilities have employed a modified version of the FCC's telecommunications rate formula that differs from the FCC telecom rate formula in two key areas. First, it includes the 40-inch safety space as part of the non-usable, common space on a pole. Second, it apportions all of the non-usable space on an equal, per capita basis, among all users of the pole, including the utility.

At the same time, public power utilities should recognize that the FCC's recent changes to the telecommunications pole attachment rates and access rules will likely subject municipal utilities and cooperatives to much closer scrutiny. In particular, where a utility's fully-allocated cost-based rate approach results in substantially higher rates than the rates calculated under the current FCC cable and telecommunications formulas, attaching entities are likely to claim that the utility is seeking excessive rates that will undermine the national goal of stimulating broadband deployment, adoption, and use.

Faced with these new rules and increasing pressure at the state and national level to whittle away at the public power exemption, public power utilities have three options: (1) they can adopt a conservative approach and embrace the federal rules; (2) they can reject the approach in the new federal rules and seek to protect their electric ratepayers as much as possible, or (3) they can adopt some middle ground. However they may choose to proceed, public power utilities should become familiar with the FCC rate regulation and access rules and the questionable policy rationales behind them.

Further, municipal utilities must also apply their practices on a uniform, non-discriminatory basis with a close accounting of all applicable costs. In this way, public power utilities will be best positioned to maintain control over their facilities in a manner that ensures the safety and reliability of their electric systems and, if possible, obtain a full and fair allocation of costs for the benefit of their consumers/owners, while at the same time allowing for reasonable access by attaching entities.