Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Section 224 of the Act

A National Broadband Plan for Our Future

WC Docket No. 07-245

GN Docket No. 09-51

REPLY TO OPPOSITION

The National Cable & Telecommunications Association (NCTA), COMPTEL, and tw telecom inc. (tw telecom) (“Petitioners”), pursuant to section 1.429 of the Commission’s rules, hereby reply to the opposition submitted by Edison Electric Institute and the Utilities Telecom Council (“Utilities”) to Petitioners’ Petition for Reconsideration of the 2011 Pole Attachment Order. For the reasons explained below, the Commission should reject the Utilities’ arguments and grant the Petition.

INTRODUCTION

To promote broadband deployment, the National Broadband Plan recommended that the Commission establish pole attachment rates that are as low and as uniform as possible and that it establish new rules to govern the make-ready process to facilitate access to poles. In the 2011 Pole Attachment Order, the Commission took a number of steps to implement the National Broadband Plan’s recommendations. In particular, to provide rate parity between

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telecommunications providers and cable operators, the Commission amended the telecommunications formula to produce rates comparable to the cable formula.\(^3\) The Commission found that this change would promote broadband deployment by eliminating the threat of potential rate increases associated with new services, reducing the incentives for pole owners to dispute the legal classification of communications services, and providing regulatory certainty for broadband providers that extend their networks to unserved communities, while at the same time fairly compensating pole owners.\(^4\)

Petitioners fully support the Commission’s effort to provide parity in attachment rates between cable operators and telecommunications carriers. But as described in the Petition, an omission in the new rule could produce unreasonably high rates in situations where the number of attaching parties is not exactly three (in rural areas) or five (in urban areas).\(^5\) Petitioners’ proposal is a straightforward clarification that would achieve the Commission’s intended result of rate parity even in cases when the number of attaching parties is two, four, or some other number.\(^6\)

The Utilities acknowledge that Petitioners’ proposal would achieve the Commission’s goal of rate parity and that it would eliminate disputes about the number of attaching entities.\(^7\) But they nevertheless argue that the Commission cannot, and should not, adopt the proposal. The Utilities appear to welcome a pole rent regime in which disputes continue to rage over entity counts and classification of services, and in which pole rents for advanced services could be set

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\(^3\) *2011 Pole Attachment Order* at 5244, ¶ 8.

\(^4\) *Id.* at 5316-21, ¶¶ 172-81.

\(^5\) Petition at 4-6.

\(^6\) *Id.* at 6-7.

\(^7\) Utilities Opposition at 2.
well above costs and far in excess of just and reasonable rates. The Utilities stand alone in opposition to the proposed modification and they offer no sound basis for their opposition. For the reasons explained below, the Commission should reject the Utilities’ arguments and grant the Petition.

THE UTILITIES PROVIDE NO BASIS FOR DENYING THE PETITION FOR RECONSIDERATION

The Utilities advance a variety of arguments in opposition to the simple fix advocated by Petitioners. As we explain in this section, none of these arguments has any merit.

A. The Proposed Modification Is Consistent With Congressional Intent

The Utilities assert that modifying the telecommunications formula to produce rates comparable to the cable formula would be contrary to Congressional intent. Specifically, they argue that the proposed modification would “eliminate all meaning” from the unusable space allocator identified in section 224(e) of the Communications Act of 1934, as amended (the Act). There is no merit to this argument.

As the Utilities acknowledge, the rule adopted by the Commission did not eliminate the section 224(e) cost allocator. Rather, the rule redefined the costs to which that allocator would apply. The clarification proposed by Petitioners follows the same approach as the Commission’s rule in that it modifies the costs that are considered. We have proposed no change in the

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8 Id. at 6, n.14.
9 AT&T supports this clarification, and no other commenting party opposes it. See AT&T Inc.’s Response to Petitions for Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, at 10 (July 5, 2011).
10 Utilities Opposition at 6. Under Section 224(e)(2), utilities are required to apportion the cost of providing space so that “two-thirds of the cost of providing space other than usable space” is allocated “under an equal apportionment of such costs among all attaching entities.” 47 U.S.C. § 224(e).
11 Utilities Opposition at 5-6. See 47 C.F.R. §1.1409(e)(2)(i). The Commission specifically explained that its approach gave “meaning to the methodology for allocating costs under sections 224(e)(2) and (e)(3).” 2011 Pole Attachment Order, 26 FCC Rcd at 5310, ¶ 161.
statutory allocator, as evidenced by the continued use of that allocator in the proposed rule included as Attachment B to the Petition.

Because the Petitioners’ proposal does not eliminate the statutory allocator, the Utilities instead argue that Petitioners’ proposed modification to the costs that would be considered violates congressional intent because it renders meaningless the statutory allocator. Put differently, the Utilities object to defining “costs” in any manner that would vary according to the number of attachers on the pole.12 This argument ignores both the judgment vested in the Commission and the actual operation of the formula.

The relevant statutory provision refers to the “cost of providing space” and the Commission explained that it had focused “on those costs arising from the actual provision of space for pole attachments, as opposed to costs that arise regardless of the absence or presence of attachments.”13 The Commission reasonably concluded that the term “the cost of providing space” is ambiguous and that, as the agency charged with administering the Act, it has the authority to interpret that ambiguous term.14 The Commission also recognized that the “costs” included in the Commission’s prior rate formula are overstated and that there was a need for a new approach that more carefully delimits those costs.15

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12 Utilities Opposition at 5-9.
13 47 U.S.C. §§ 224(e)(2), (3); 2011 Pole Attachment Order, 26 FCC Rcd at 5312, ¶ 165. As the Supreme Court explained in the context of section 252, “the unadorned term” “cost” “is ‘a mere chameleon’ and a ‘virtually meaningless’ term.” Verizon Commc’ns, Inc. v. FCC, 535 U.S. 467, 500-01 (2002) (internal citations omitted). Likewise, the D.C. Circuit has noted that the “generality” of terms such as “just and reasonable” does not lend itself to an immutable meaning but rather “opens a rather large area for the free play of agency discretion, limited of course by the familiar ‘arbitrary’ and ‘capricious’ standard in the Administrative Procedure Act.” Bell Atl. Tel. Cos. v. FCC, 79 F.3d 1195, 1202 (D.C. Cir. 1996). In upholding an earlier Commission action applying the cable rate to broadband attachments, the Supreme Court concluded that section 224 gives the Commission broad authority to establish just and reasonable rate levels. Nat’l Cable & Telecomms. Ass’n v. Gulf Power, 534 U.S. 327 at 336, 338–89 (2002).
15 Id. at 5308, ¶ 157.
This is exactly what Congress expected the Commission to do. Congress anticipated that that there would be “difficulties . . . in determining some cost components associated with erecting and maintaining pole line plant, and allocating those costs,” and understood that it was giving the Commission considerable flexibility in making its “best estimate” of some costs for determining just and reasonable pole attachment rates.\textsuperscript{16} Despite specific invitation by the Commission,\textsuperscript{17} the Utilities provided no meaningful economic evidence (\textit{e.g.}, no cost studies or economist statements) to support any claim that they were not recovering more than their costs under the prior formula.\textsuperscript{18} Even now, they still provide no support for their claims of unrecovered costs.

Pole rents could have been set at a lower bound rate that is even less than the rate produced by the cable formula. The Commission explained that utilities should recover at least the “cost of providing space” in all areas, but that such costs should no longer include certain capital costs for the pole.\textsuperscript{19} But to minimize any potential undue burden on utility ratepayers that the exclusion of capital costs might entail,\textsuperscript{20} the Commission’s revised formula allows utilities to recover the \textit{greater} of (1) the “cost of providing space” (which excludes capital costs) or (2) a percentage of fully allocated costs (including capital costs) that varies in a manner designed to


\textsuperscript{17} See \textit{Implementation of Section 224 of the Act, A National Broadband Plan for Our Future}, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11921, ¶136 and n.371 (2010) (\textit{2010 Pole Attachment FNPRM}) (“To the extent that pole owners contend they do, in fact, incur significant capital costs outside the make-ready context solely to accommodate third party attachers, we seek comment on the nature and extent of these costs. . . . We . . . invite parties to submit studies that isolate and quantify the effect of third-party attachment demand on pole height and therefore pole investment.”); \textit{id.} at 11922, ¶138 & n.377 (“We . . . invite parties to submit studies that isolate and quantify the effect of third-party attachment demand on operating expenses.”).

\textsuperscript{18} See, \textit{e.g.}, Reply Comments of NCTA, WC Docket No. 07-245, GN Docket No. 09-51, at 6 (Oct. 4, 2010); Letter of Steven F. Morris to Marlene H. Dortch, WC Docket No. 07-245, GN Docket No. 09-51 (Mar. 14, 2011).

\textsuperscript{19} \textit{2011 Pole Attachment Order}, 26 FCC Rcd at 5301-02, ¶ 144.

\textsuperscript{20} \textit{Id.} at 5304, ¶ 149 (quoting S. Rep. No. 95-580, at 21 (1977)).
bring the rate up to the cable rate – a rate that has universally been found to be just, reasonable, and non-confiscatory.\textsuperscript{21} The cost computation the Utilities contest is a variable designed to benefit the pole owner, not to deny it fair compensation, and the modification proposed by Petitioners preserves this approach.

The Utilities also claim that fixing the rule as proposed by Petitioners is somehow inconsistent with the congressional goal of developing a “simple and expeditious” regime of rate regulation.\textsuperscript{22} As with the Utilities’ other arguments, there is no basis for finding that Petitioners’ proposal is inconsistent with congressional intent. The cost allocator is one small step in the Commission’s formula and the Utilities suggestion that switching from fixed factors that apply in two discrete scenarios to a variable set of factors that apply in all cases somehow makes the formula unduly complex is not credible. Indeed, the Utilities themselves acknowledge that Petitioners’ proposed approach will eliminate disputes regarding the number of attaching entities and that it results in rate parity, which will eliminate disputes about the classification of services.\textsuperscript{23} These are significant improvements in a process that is quite often more contentious than expeditious and there is no doubt they are consistent with congressional intent.

\textbf{B. The Utilities’ Other Arguments Are Unavailing}

The Utilities raise a number of additional arguments, but those arguments fare no better than their statutory arguments. First, the Utilities argue that the “sliding scale of adjustment

\textsuperscript{21} \textit{2011 Pole Attachment Order}, 26 FCC Rcd at 5296, ¶ 129 (“In 1987, the U.S. Supreme Court found that the cable rate formula adopted by the Commission provides pole owners with adequate compensation, and thus did not result in an unconstitutional ‘taking.’”); \textit{id.} at ¶ 177 (“[M]any [states that exercise jurisdiction over pole attachments] apply a uniform rate for all attachments used to provide cable and telecommunications services, and have done so by establishing a rate identical or similar to the Commission’s cable rate formula.”); ¶ 147 (“NASUCA recommends that the cable rate ‘should be used for all pole attachments.’”); \textit{see also} Comments of the National Cable & Telecommunications Association, WC Docket No. 07-245, GN Docket No. 09-51, at Attach. B (Aug. 16, 2010) (NCTA Comments).

\textsuperscript{22} Utilities Opposition at 9.

\textsuperscript{23} \textit{Id.} at 2.
factors” proposed by Petitioners is arbitrary and capricious because it is “solely designed to reduce telecom attachment rates down to the cable rate.”\textsuperscript{24} Given that reducing “telecom attachment rates down the cable rate” is a policy that Petitioners have been advocating for years, that the National Broadband Plan recommended in 2010, that the Commission proposed in its \textit{2010 Pole Attachment NPRM}, and that it adopted in the \textit{2011 Pole Attachment Order}, it is difficult to give much credence to the Utilities’ argument a modification that supports this policy objective is arbitrary and capricious. Indeed, much of the argument has nothing to do with the Commission’s policy but instead is simply a restatement of the Utilities’ argument that the proposed modifications are inconsistent with the statute.\textsuperscript{25} For all the reasons explained above, there is no merit to that argument.

The Utilities also claim that the Petition is procedurally defective and that Petitioners should have presented the proposed allocators during the course of the proceeding.\textsuperscript{26} There is no merit to this argument. The Commission adopted a rule in the \textit{2011 Pole Attachment Order} that was intended to achieve the same objective as the rule it proposed in the \textit{2010 Pole Attachment NPRM}, but that differed in the mechanics of achieving that objective. Petitioners identified an oversight in the new rule that would prevent it from achieving the intended result and we proposed a simple clarifying amendment intended to help the Commission achieve the end it thought it had achieved in the \textit{2011 Pole Attachment Order}. Even if Petitioners’ proposal were considered “facts which have not previously been presented” in the proceeding, the Commission may consider such facts when it “determines that consideration of the facts relied on is required

\textsuperscript{24} Id. at 10.
\textsuperscript{25} Id. at 10-11.
\textsuperscript{26} Id. at 3.
in the public interest." That is plainly the case here, as the proposed adjustments are necessary to achieve the policy objectives the Commission thought the 2011 Pole Attachment Order would achieve.

Finally, the Utilities assert that there is no basis for an alternative approach offered by Petitioners (i.e., the approach originally proposed by the Commission in the 2010 Pole Attachment NPRM) and they go so far as to suggest that the Commission already has rejected this approach. Although the Commission obviously chose not to adopt the approach that it had originally proposed, the record developed in this proceeding is more than sufficient to support such an approach should the Commission wish to adopt it on reconsideration. That approach offers a fully allocated cost method that can simplify the calculation and eliminate some of the variables with which the Utilities take issue and it would be fully consistent with congressional intent and Commission policy.

\[27\] 47 C.F.R. § 1.429(b)(3).

\[28\] Utilities Opposition at 13.

CONCLUSION

For the reasons stated above, NCTA, COMPTEL, and tw telecom request that the Commission adopt the changes and clarifications requested in the Petition for Reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 22, 2011, I served the following parties via postage prepaid, first-class mail.

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