

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	WC Docket No. 07-245
Implementation of Section 224 of the Act)	
)	GN Docket No. 09-51
A National Broadband Plan for Our Future)	FCC 10-84

**JOINT INITIAL COMMENTS
OF THE
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION;
THE ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL
TELECOMMUNICATIONS COMPANIES;
WESTERN TELECOMMUNICATIONS ALLIANCE; AND
EASTERN RURAL TELECOM ASSOCIATION**

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The National Telecommunications Cooperative Association (NTCA), the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), the Western Telecommunications Alliance (WTA) and the Eastern Rural Telecom Association (ERTA) (collectively, the Associations)¹ respond to the May 20, 2010 Order and Further Notice of Proposed Rulemaking (FNPRM) released by the Federal Communications Commission (Commission or FCC) seeking comment on proposed changes to the Commission's pole attachment rules.²

¹ The National Telecommunications Cooperative Association (NTCA) is a national trade association representing more than 580 rural rate-of-return regulated telecommunications providers. The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) is a national trade association representing approximately 470 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. The Western Telecommunications Alliance (WTA) is a trade association that represents over 250 small rural telecommunications companies operating in the 24 states west of the Mississippi River. The Eastern Rural Telecom Association (ERTA) is comprised of a united group of rural telephone companies operating in the Eastern United States as well as businesses that provide services or products to the member telephone companies.

² *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, FCC 10-84, Order and Further Notice of Proposed Rulemaking (rel. May 20, 2010) (Order and FNPRM).

Pole attachment rates, terms, and conditions play an integral role in the broadband deployment strategies of the Associations' members. The Commission should adopt the lowest telecom rate for broadband connections. The Commission should also create a mechanism to resolve incumbent local exchange carrier (ILEC) disputes regarding pole attachment rates, terms and conditions. For pole access requests under 100 per batch, the proposed five-stage make-ready timeline is appropriate. Finally, the Commission must consider the regulatory burden of new pole attachment rules on small rural ILECs.

I. THE FCC'S POLE ATTACHMENT RULES HAVE A LONG HISTORY AND ANY CHANGES IN THE RULES WILL IMPACT SMALL RURAL ILECS.

The Commission, in its May 20, 2010 Order and FNPRM, clarified in the Order portion that utilities must allow pole attachers to use the same attachment techniques that the utility uses itself in similar circumstances, retaining the right to limit uses to ensure safety, reliability, and sound engineering.³ The FCC also held that pole owners must be granted just and reasonable access to poles, which includes the preparation of poles for attachment (called "make-ready").⁴

The FNPRM portion seeks comment on a number of aspects concerning pole attachment, including revisions to the pole attachment dispute resolution process and pole rental rates, and ways to improve the make-ready timeline.⁵ Understanding these proposed revisions requires a brief review of the statutory foundation and rulemaking process for the Commission's pole attachment rules.

³ Order and FNPRM, ¶ 9.

⁴ *Id.* at ¶ 17. "Make-ready" is defined in the Order and FNPRM as "any rearrangement of equipment and attachments in order to make room on either an existing pole or a new, different pole for a new attacher." *Id.* at ¶ 8, fn. 37.

⁵ *Id.* at ¶¶ 78-81; 110-148; 25-54.

Congress enacted the Pole Attachment Act of 1978 (47 U.S.C. Section 224 or Section 224) to regulate the rates that utilities can charge for pole attachments. Section 224 does not require utilities to offer access to their poles – but if they do provide access to their poles, the utilities must ensure the rates are just and reasonable. Section 224 allows the FCC to regulate pole attachments if not regulated by a state. Municipally or cooperatively-owned poles are exempted from Section 224. Wireless carriers, however, are subject to Section 224.

The Telecommunications Act of 1996 expanded pole attachment regulation to apply to telecommunications service providers. The 1996 Act requires utilities to provide cable systems and telecommunications providers access to their poles, ducts, and conduits in a non-discriminatory manner. As a result, the FCC established a formula to govern charges for pole attachments used to provide telecommunications services.

Section 224(b)(1) of the Act states that the Commission “shall regulate the rates, terms and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions.” “Pole attachment” is defined in Section 224(a)(4) as “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.” The Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public.” ILECs offer telecommunications for a fee directly to the public and are thus considered “providers of telecommunications service” for whom the protections of 224(b) were intended.

Congress permits the Commission to regulate the rates, terms and conditions of pole attachments for cable television systems, unless the state assumes jurisdiction and regulates these

matters.⁶ To date, twenty states and the District of Columbia have certified to the Commission that they have regulations in place to determine the rates, terms, and conditions for pole attachments. The Commission has noted that such certification preempts the Commission from accepting pole attachment complaints.⁷ The states that now regulate pole attachment rates are Alaska, Arkansas, California, Connecticut, Delaware, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Utah, Vermont, and Washington.⁸ The FCC's pole attachment rules may not directly affect the District and the twenty states that have agreed to regulate pole attachments, but these entities may have tied some of their regulations to the FCC's path.

The FCC's formula for computing pole attachment rates for cable operators, 47 C.F.R. §1.1409(e)(1), results in a lower rate than the rate generated by the formula specified for telecommunications carriers, 47 C.F.R. §1.1409(e)(2). The FCC also decided that cable operators providing commingled video/Internet services would pay the lower cable pole attachment rate, instead of the higher telecommunications rate. This rate disparity between cable and telco providers for pole attachments created significant controversy at the FCC as more and more cable providers started offering telecommunications services in direct competition with existing telcos. Complaints to the FCC also centered on Section 224's failure to give ILECs the same pole attachment access rights that CLECs and cable television systems had.

Small rural ILECs operating in states that have not certified their control over pole attachments, such as Arizona and North Carolina, have experienced difficulty in negotiating pole access on just and reasonable terms and find that they lack an express procedural remedy for

⁶ Order and FNRPM, ¶ 4.

⁷ 47 U.S.C. § 224(c); 47 C.F.R. §§ 1.1401-1.1418.

⁸ *Id.* at ¶ 28, fn 97.

unjust and unreasonable pole attachment rates, terms, and conditions. For rural ILECs that provide service in certified states, such as Kentucky, New Hampshire, Vermont, Massachusetts, and Ohio, the Commission's actions regarding reasonable rates, terms, and conditions provide influential guidance to the state public service commissions on handling ILEC pole attachment complaints. The Associations' members have consistently reported encountering pole attachment agreements that include high rates and increasingly onerous terms and conditions that unnecessarily raise costs and impose barriers on further broadband deployment in rural areas.

The federal telecom rate for non-urbanized (rural) attachers such as the Associations' members affect rural telco decisions on whether and when wired broadband attachments can occur. Four key pole attachment issues are the focus of this comment: 1) the need to establish a low telecom rate for broadband connections; 2) the need to establish an ILEC dispute resolution mechanism; 3) the appropriateness of the proposed make-ready time-line; and 4) the need to ensure a minimal regulatory burden of new rules on small rural ILECs.

II. FOUR KEY COMPONENTS OF THE FNPRM WILL STRONGLY AFFECT SMALL RURAL ILECS.

A. The Commission Should Adopt The Lowest Telecom Rate for Broadband Connections.

The Commission seeks comment on pole rental rates, a key point of contention between pole owners and attachers.⁹ Currently, the FCC's cable rate is 7.4% of annual pole costs, and the telecom rate is 11.2% of urban and 16.89% of non-urban annual pole costs.¹⁰ The Commission provides a simplified table of rates in its Appendix A to the Order and FNPRM.¹¹ The FCC

⁹ *Id.* at ¶ 110.

¹⁰ *Id.* at ¶ 119.

¹¹ *Id.*, Appendix A. This appendix does not reflect rates that small rural ILECs pay for pole access.

seeks comment on several broadband attachment proposals. Under the US Telecom proposal, any attacher, other than the pole owner, pays 11% of the annual pole costs. The AT&T/Verizon proposal, on the other hand, recommends that each attacher, other than the pole owner, pays 18.67% of the annual pole costs.¹² Another proposal from Time Warner Telecom, Inc. (TWTC) suggests the rate costs should exclude rate of return, depreciation and taxes in its calculation.¹³ The FCC seeks input on the TWTC Proposal and on the FCC's own "lower bound / upper bound" rate proposal, which uses a range of rates and changes the definition of allowable costs in the calculation.¹⁴ The Commission also seeks other alternative rate formulas.¹⁵

The Commission should set the lowest telecom rate for broadband attachments to encourage broadband deployment in rural areas. The Associations' members have reported poor results in negotiating pole attachment contracts with utilities, especially those that are investor-owned. The Associations' members face difficulties in negotiating and, in some cases, litigating contractual terms for pole attachments. Of specific concern to the Associations' small company members are the high rates charged by utilities that fail to provide just and reasonable cost-based rates.

Small rural ILECs do not have the leverage necessary to procure fair terms and cannot afford protracted litigation, ultimately paid by consumers, over pole attachment rates in state or federal court or before the state public service commission. Unreasonable and unjust rates for pole attachments are not only expensive to small rural ILECs, but they are also burdensome when passed on to the rural consumers the companies serve. For example, nearly half of NTCA

¹² Order and FNPRM, ¶ 119, fn. 326.

¹³ *Id.* at ¶ 124.

¹⁴ *Id.* at ¶¶ 127, 128.

¹⁵ *Id.* at ¶ 142.

members serve between 1,000 and 5,000 lines.¹⁶ The population density in most NTCA member service areas is in the range of 1 to 5 customers per square mile.¹⁷ Excessive pole attachment charges to small rural companies cannot be spread over a large customer base, as they can with large, urban-based carriers. Rural customers of small ILECs, consequently, feel a disproportionate impact from unreasonably high pole attachment rates when compared to their urban counterparts.

An ILEC from rural North Carolina described to the Associations the challenges it has faced dealing with the increasing trend toward "hidden" charges. In addition to the rental rates, this ILEC reports that the trend is for utilities to include additional charges for application fees, make-ready costs, security costs, inspection costs, insurance costs, etc. While the Commission has said a reasonable application fee might be appropriate, this ILEC has contended that those additional costs should generally be included in the rental rate. Since North Carolina has not certified its readiness to assume pole attachment jurisdiction, this small ILEC is struggling for a remedy.

This is just one example of the disproportionate harm that small rural ILECs experience in attempting to negotiate pole attachment rates, terms and conditions with utilities. Small rural ILECs may not have the financial or personnel resources to detect, negotiate, and challenge successfully the excessively high pole attachment rates and onerous terms and conditions.

Furthermore, the Commission should bar the assessment of charges for connections to poles that do not produce revenue and do not increase costs for pole owners. For example, many pedestals and other equipment that are located near poles are grounded to those poles according

¹⁶ NTCA 2009 Broadband/Internet Availability Survey, p. 4, available at <http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2009ntcabroadbandsurveyreport.pdf>.

¹⁷ *Ibid.*

to recommended best practices.¹⁸ In such cases, a simple grounding wire is connected to a bolt at the base of the pole. Such routine safety measures do not incur costs for pole owners or impact the line carrying capacity of the pole. Therefore, pole attachment charges should not apply in these instances.

The Commission should recognize that small rural ILECs and their customers are more economically sensitive to unjust and unreasonable high pole attachment rates. Consequently, the Commission should adopt the lowest rate for broadband connections.

B. A Pole Attachment ILEC Dispute Resolution Mechanism Will Enhance Rural Broadband Deployment.

The Commission asks in the FNPRM whether it should revise its existing procedural rules governing pole attachment complaints.¹⁹ The Commission also seeks comment on whether ILECs “should have ‘the same right as competitive LECs, wireless providers, and cable television systems to file complaints before the Commission to enforce their right to reasonable pole attachment rates, terms and conditions for poles in which they lack on ownership interest.’”²⁰

Many of the Associations’ members are ILECs who own poles, but they also seek to attach to poles owned by various utility companies. In some rural areas, the key concerns and difficulties that arise in pole attachment negotiations come from the advantage in bargaining power held by utilities.

¹⁸ See, United States Department of Agriculture, Rural Utilities Service Bulletin 1751F-815, *Electrical Protection of Outside Plant*, ¶10.1, http://www.usda.gov/rus/telecom/publications/pdf_files/1751f815.pdf.

¹⁹ Order and FNPRM, ¶ 79.

²⁰ *Id.* at ¶ 148.

The Associations contend that reasonable rates, terms, and conditions for pole attachments are key to broadband deployment in rural areas, especially because the rise of smart grid applications will encourage some utilities to impose unreasonable rates, terms, and conditions for access to their poles. Utilities are revamping portions of the electric grid, their internal usage of telecommunications facilities, and deploying fiber optics in order to bring broadband to some communities through smart-grid electric usage applications. These utilities are in a position to stifle broadband services competition by barricading their poles through unreasonable and unjustified rates, terms, and conditions. Yet, ILECs who seek to attach to these utilities' poles have no adequate dispute resolution mechanism where the federal pole attachment rules apply.

Small rural ILECs and their customers are entitled to just and reasonable rates, terms and conditions for pole attachments. Thus, rural ILECs need and deserve a remedy mechanism by which they can present claims of unjust and unreasonable pole attachment rates, terms and conditions imposed by utilities.

Rural ILECs depend on pole attachments for broadband deployment, so excessive rates and onerous terms and conditions can discourage and delay broadband deployment in rural communities. Consumers of broadband will benefit the most when the artificial handicap of rate discrimination is removed. When broadband providers compete directly, consumers benefit from the lower prices, higher speeds, and better quality of service.

The Commission's current pole attachment rules effectively deny rural ILECs a remedy against unreasonable pole attachment provisions which has a significant economic impact on a substantial number of small rural ILECs. The Regulatory Flexibility Act (5 U.S.C. §601)

requires the FCC to consider alternative rules that will reduce the economic impact on small entities. The Associations' request for an ILEC dispute mechanism would reduce the economic impact on small rural communications providers. The proposed resolution process will also promote the public interest, convenience, and necessity through increased competition and diversity in the communications market.

C. The Proposed Five-Stage Make-Ready Time Line Appears Appropriate For Requests Under One Hundred Poles.

In the Order, the Commission clarified that communications providers have a statutory right to use space- and cost-saving techniques (e.g., boxing, bracketing) that are consistent with the pole owner's use of the techniques.²¹ This addresses the nondiscriminatory use of pole attachment techniques. The Commission also said that communications providers have a statutory right to timely access to pole attachments.²² In the FNPRM, the Commission seeks comment on pole access rules regarding a make-ready time line of 105 – 149 days, based on the New York State pole attachment rules.²³ The proposed five-stage time line includes 45 days for survey, 14 days for estimates, 14 days for acceptance, 45 days for performance, and 30 days for multiparty coordination efforts.²⁴

The Associations agree that, for requests of fewer than 100 poles, the Commission's proposed make-ready time-line is fair, reasonable, and adequate. Though many of the Associations' members own poles, most of their concerns, as they relate to this FNPRM, are focused on the member companies trying to attach to poles owned by large investor-owned

²¹ Order and FNPRM, ¶¶ 8, 9.

²² *Id.* at ¶ 17.

²³ *Id.* at ¶¶ 25-44.

²⁴ *Ibid.*

utilities. The Associations report difficulties in working with the larger utilities in reaching agreement on prompt pole access, especially due to the absence of a federal make-ready timeline. From both sides of the equation – pole owner and pole attacher – the proposed make-ready timeline is appropriate and will help speed broadband deployment by providing more predictability in the pole attachment process. The Associations urge the Commission to adopt the proposed make-ready timeline for requests of fewer than 100 poles.

D. The Commission Must Consider the Economic Impacts of New Pole Attachment Rules On Small Rural ILECs.

The Commission should strive to mitigate the regulatory burdens on small business entities, including the Associations’ members, under the Regulatory Flexibility Act, 5 U.S.C. § 603, which may arise from new pole attachment rules. Rule modifications may impact small rural telco providers. These small telcos, many of whom are the Associations’ members, qualify as “small business entities” under the definitions protected by the federal Regulatory Flexibility Act (RFA).²⁵ The US Circuit Court of Appeals for the District of Columbia, in *NTCA v. FCC*, reviewed the Commission’s obligations in 2009 in the context of the RFA and the federal Administrative Procedures Act (APA) when considering rules that may impact small business entities.²⁶ According to the federal appellate court,

The Regulatory Flexibility Act requires that agencies issuing rules under the Administrative Procedure Act publish a final regulatory flexibility analysis. See 5 U.S.C. § 604. Such an analysis must meet certain statutory requirements. It must state the purpose of the relevant rule and the estimated number of small businesses that the rule will affect, if such an estimate is available. In addition, each analysis must summarize comments filed in response to the agency’s initial regulatory flexibility analysis, along with the agency’s assessment of those comments. Finally, each analysis must include “a

²⁵ 5 U.S.C. § 604.

²⁶ *National Telephone Cooperative Association v. the Federal Communications Commission*, U.S. Court of Appeals, D. C. Circuit, Slip Opinion No. 08-1071, (D.C. Cir. 2009) (*NTCA v. FCC*) (rel. Apr. 28, 2009).

description of the steps the agency has taken to minimize the significant economic impact” that its rule will have on small businesses, “including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.” § 604(a)(5).²⁷

The Court also held that:

The Regulatory Flexibility Act makes the interests of small businesses a “relevant factor” for certain rules. Therefore, the APA together with the Regulatory Flexibility Act require that a rule’s impact on small businesses be reasonable and reasonably explained.²⁸

Any rule changes the Commission adopts as a result of this proceeding must comply with the strictures of the RFA. The D.C. Circuit correctly observed that the Commission must analyze the economic impacts, and list its steps taken to minimize significant economic impacts of its proposed rules on small business entities like the Associations’ members. The Commission’s final regulatory analysis of the “factual, policy, and legal reasons for selecting the alternative adopted in the final rule” will help ensure that small rural ILEC pole owners are not subjected to unreasonably burdensome rules regarding pole attachments. Adhering to the Associations’ recommendations will assist in minimizing the regulatory burden on small rural ILECs. The Commission should follow these recommendations.

²⁷ *Id.* at 5.

²⁸ *Id.* at 6-7.

III. CONCLUSION.

For these reasons, the Associations urge the Commission to adopt the lowest telecom rate for broadband connections. The Commission should also establish an ILEC dispute resolution mechanism regarding pole attachment rates, terms, and conditions. For pole access requests under 100 per batch, the proposed five-stage make-ready timeline is appropriate. Finally, the Commission must consider the regulatory burden of new pole attachment rules on small rural ILECs.

Respectfully submitted,

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August 16, 2010

CERTIFICATE OF SERVICE

I, Adrienne L. Rolls, certify that a copy of the foregoing Comments of the National Telecommunications Cooperative Association in WC Docket No. 07-245 and GN Docket No. 09-51, FCC 10-84, was served on this 16th day of August 2010 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

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