ISSUES IN TELECOMMUNICATIONS COMPETITION

HEARING

BEFORE THE

SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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SUBMITTED MATERIAL

ISSUES IN TELECOMMUNICATIONS COMPETITION

TUESDAY, JULY 22, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:10 p.m., in room 2123 of the Rayburn House Office Building, Hon. Edward J. Markey (chairman) presiding.

Members present: Representatives Markey, Gonzalez, Stearns, Upton, Pickering, and Terry.

Staff present: Amy Levine, Tim Powderly, Colin Crowell, David Vogel, Philip Murphy, Neil Fried, Ian Dillner, and Garrett Golding.

OPENING STATEMENT OF HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF MASSACHUSETTS

Mr. MARKEY. I am going to now convene to order this Subcommittee on Telecommunications and the Internet hearing, and today's hearing is about several issues affecting telecommunications competition. This hearing comes several hearings after other hearings dealing with these issues including two last year that examined telecommunications competition in the United States as well as broadband lessons from abroad.

Looking back, observers increasingly recognize that the United States started out on the right path by implementing provisions in the 1996 Telecommunications Act that were specifically intended to jump-start competition between and among technology platforms. When the Telecommunications Act was enacted in 1996, residential consumers did not have any broadband offerings in the marketplace. Nineteen ninety-six, no broadband offerings for any consumers. Yet soon after enactment, deployment by cable and competitive new entrants prompted the incumbent phone companies to finally deploy such services to residential consumers. By 2000, the United States was ranked first in the world, but subsequently regulators began the ill-considered action of taking the market opening rules off the books and the United States started to slide down in international broadband rankings. People may quibble with the methodology used in such rankings, but regardless of how you slice it—price, speed, percentage of subscribers—the United States is clearly no longer on top. Ironically, our foreign competitors are now enjoying broadband success stories by adopting and implementing many of the policies that were embodied in the Telecommunications Act but that the FCC has subsequently abandoned.

Several pressing competition issues including pole attachment rates, interconnection issues, number of reporting time frames, copper wire retirement, and forbearance legislation are before the subcommittee today, and each of these issues, if resolved correctly, can help promote greater broadband deployment, speeds, and consumer choice. These issues also highlight the repercussions caused by the FCC's regulatory reclassification of services such as broadband access to the Internet. This semantic confusion and the ensuing regulatory uncertainty leave countless carriers and industry participants without clear direction as to their legal rights and obligations under the law. The fact that one incumbent provider, Vermont Telephone, felt that it was empowered to deny interconnection to another provider shows how far some in the industry as well as at the FCC have strayed from the intent of Congress in the Telecommunications Act of 1996.

The continued invocation of intuited ancillary authority under Title I of the Telecommunications Act to alternatively modify, waive or plug statutory holes in our Nation's communications laws and regulations is untenable in the long term, in view. Congress should address these issues and others including broadband consumer protection issues comprehensively in the next Congress as part of overarching broadband policy legislation.

Today's hearing is also a formal legislative hearing on H.R. 3914, a bill offered by Chairman John Dingell and myself addressing forbearance issues. This legislation fixes a glaring problem in the Telecommunications Act by removing the so-called "deem granted" provision contained in section 10 of the Telecommunications Act. This provision currently permits automatic deregulation of duly enacted statutes if the Commission fails to act within the statutory time period. This can occur even if a tie vote demonstrates no clear majority supports such deregulation. With the Commission having permitted forbearance on a two-two tie previously and possibly having just four commissioners serving early next year, this concern is not purely theoretical. If there is a clear majority to support forbearance on specific obligations, then let us have the FCC act in timely fashion with written justification to approve such forbearance. But an agency's inability to act should not result in the removal of statutory duties that may have taken Congress years and a clear Congressional majority to enact.

In addition, I continue to be concerned about the process by which the Commission considers forbearance petitions. In the past, industry petitioners have gained the proceeding by filing amendments to their petitions so late in the time period for consideration that effective parties and the public have no meaningful opportunity to consider and respond to the proposed amendments. The Commission has an open proceeding to reform this obvious abuse to the process, and I urge the Commission to act to protect the integrity of the proceedings and the public interest.

I want to thank all of our distinguished witnesses for their willingness to participate here today.

I now turn to recognize the ranking member of the Subcommittee on Telecommunications and the Internet, the distinguished gentleman from Florida, Mr. Stearns.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. STEARNS. Good afternoon and thank you, Mr. Chairman, and I welcome all our witnesses this afternoon. The main focus of this hearing frankly is on Chairman Dingell's bill, which is H.R. 3914, to eliminate the deemed granted language from the Communications Act forbearance provision. And with this panel, I am sure we will get a balanced treatment on both sides, and Mr. Chairman, you brought out several points. I hear you continually mention how the United States is lagging in broadband. I am reminded that Dr. Ford, who testified at one of our hearings, who used to work for the FCC and now is with a think tank, he showed that the OECD ranking misrepresents the degree of broadband deployment in the United States. We have more broadband subscribers than any other nation. I don't know that I can let that go because I think there is some question about the United States lagging so much but I know we can certainly do better.

We have more competition and better technology than ever before, my colleagues, and the market is evolving faster than either the FCC or Congress themselves can keep up with. Consumers clearly benefit from the accelerating convergence of technologies that allow for vibrant, cross-platform competition in voice, video and broadband. As Congress and the FCC evolve the regulatory environment, they should do so on a technologically neutral basis that creates parity among the different types of providers regardless of the platform.

The deemed granted language was designed to ensure that the FCC would not let petitions for deregulation languish and so that Congress would not need to go through the time-consuming legislative process every time the market outpaced the law, which as we have seen over the last two decades is quite a common occurrence.

Our posture prior to 1996 was regulating unless it could be proven that regulation was not necessary. This led to overregulation and stifled growth and innovation. With the 1996 Act, as the chairman pointed out, flipped it and instead of regulating by default, the burden was switched to the FCC to defend regulation of telecommunications carriers. This change led to the elimination of many arcane and unnecessary regulations and is partly responsible for the tremendous growth and innovation we have seen in the past 12 years. In this market environment, the FCC should have the burden to demonstrate that its regulations are still necessary.

The deemed granted provision is having the intended effect. Various segments of the industry including both incumbent and alternative providers have filed 91 petitions. Under the threat of petitions being deemed granted, the FCC has ruled on 96 percent of them. Moreover, the FCC has not been granting petitions indiscriminately. Of the 87 petitions the FCC acted on, it denied a percent in whole or part and approved 23 percent. So without the deemed granted language, the FCC is unlikely to have ruled in as timely a manner as they did, if at all. The result: we would still be stuck with many outdated and overly burdensome regulations that do not apply to the new 21st century technology. Perhaps much of the innovation we have seen would not have occurred.

The deemed granted language should be retained because it is critical to ensuring the FCC acts in a timely way. My colleagues, nevertheless, some in industry have raised questions about the FCC's procedure for evaluating these petitions. We need to work to reform the process, not gut the language that makes the provision work. That is why last October I and a number of my colleagues authored a letter asking the FCC to improve and reform the process so that all parties and the FCC can evaluate all the factual evidence in support or opposition of a particular forbearance request. The letter expressed concern with the current forbearance proceedings and whether or not adequate procedures are in place to ensure that a rigorous analysis is conducted. Sometimes petitions are incomplete when they are filed and only at the last minute is all the information submitted. We should be focusing our attention on that kind of FCC process reform, not striking the deemed granted.

Another issue that needs further examination is pole attachments. I do not know what the right answer is but the rules that govern attaching communications equipment to poles are a mess. The FCC needs to start to clear this up while keeping in mind that any rate increase could damage broadband penetration. I hope our witnesses today can help us better understand the issues here today and help us to move forward.

So Mr. Chairman, I think this is a very timely hearing. While I do not necessarily support eliminating the statutory deemed granted provision, the FCC's forbearance process is in need of reform and I look forward to working with you and other committee members to get it conducted fairly and greater transparency in the forbearance process. Thank you, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from Texas, Mr. Gonzalez.

Mr. GONZALEZ. I waive opening.

Mr. MARKEY. The gentleman's time will be reserved. The chair recognizes the gentleman from Mississippi, Mr. Pickering.

OPENING STATEMENT OF HON. CHARLES W. "CHIP" PICKERING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSISSIPPI

Mr. PICKERING. Mr. Chairman, I thank you for this hearing and want to commend you for the effort.

Forbearance is a good and necessary thing as part of the 1996 Act so that we can update and modify as markets change and evolve but there are possible problems with the deemed granted that if we could have a Commission with only four instead of having the full five and that could be a very real possibility coming the first of this year. We would not want to see a loophole created where a rash of petitions are filed and then the inability to really thoughtfully act on the forbearance petitions as has been done in large part so far to date.

So I commend the chairman of the subcommittee for this effort. I think it closes a loophole. It gives certainty. It maintains deadlines and the forcing requirement that the FCC truly act on these petitions. I think it is a good balanced way with this bill that we can have a workable forbearance policy, certainty in the market and that the FCC is still required to act in a timely way, and so I commend you for this hearing and look forward to hearing the witnesses today on the panel, not only on forbearance but other issues that are affecting competition in the marketplace, and with that, I yield back, Mr. Chairman.

Mr. MARKEY. Great. The gentleman's time has expired. The chair recognizes the gentleman from Michigan, Mr. Upton.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Well, good afternoon, and it is nice to be back. I appreciate that we are having this hearing today and seeing our former colleague, Mr. Salmon, among us. So nice to have you here, Matt.

I am interested in hearing from our witnesses regarding this legislation. The trend in the telecommunications sector is toward development of advanced technologies and increased competition. Deregulation has successfully promoted investment, innovation and more competition, benefiting consumers across the board. In my view, the addition of section 10, the deemed granted forbearance provision to the Communications Act, was indeed a very positive development. It is clear to me that as the level of competition in the market increases, the amount of government regulation should decrease, and I hope that we would all agree that markets do a better job of protecting consumers than regulators do, and in a competitive market we should permit market forces to work and not interpose government regulators between providers and consumers. All that does is impede the competition that we all want to see.

The number of consumer choices and services available has significantly grown as we trend away from regulation. When competition is present, we must continue the course away from regulation, and as new services and technologies become available, we must avoid the lure of government red tape.

Yet it seems that the FCC is sometimes reluctant to pull back and allow those market forces to work. It sometimes inserts itself between consumers and providers, frustrating the operation of market forces. I believe that it is important that FCC decisions should be made deliberately and that a written explanation of the Commission's rationale should be made available to the public. But the deregulatory process of section 10 helps to correct the regulatory bias of the Commission, and in my view, the deemed granted language should be retained. It is a pro-consumer provision that helps to keep the agency from interfering with the relationship between buyers and sellers and allows the consumers to benefit from the operation of market forces including both incumbent and alternative providers to make sure that they have run through the full process, and as my colleague from Florida, Mr. Stearns, indicated, the FCC has issued orders for 96 percent of the petitions. Without the deemed granted language, the FCC is unlikely to have ruled on the petitions in as timely a manner, if not at all. Only four petitions have been deemed granted. Only one was controversial of those, and of the other three, one was unopposed and two facilitated telephone relay services for people with disabilities.

Some in the industry have questioned the FCC's procedures for evaluating petitions. The answer, I think, is to reform the FCC process and not gut the language that makes the statutory provision work, and I yield back the balance of my time.

Mr. MARKEY. The gentleman's time has expired.

All time for opening statements from members has expired.

We are now going to turn to our very distinguished panel, and our first witness is the Hon. Matt Salmon, who is the President of Comptel, a trade association representing competition broadband providers. Mr. Salmon served in the U.S. House of Representatives from 1995 to 2001, and at the time was the only member of Congress in history to speak Mandarin Chinese, which is pretty close to the skill level you need to understand telecommunications regulations. So we welcome you, sir. Whenever you are ready, please begin.

STATEMENT OF MATTHEW SALMON, PRESIDENT, COMPTEL

Mr. SALMON. Thank you. I might as well give my speech in Mandarin, then nobody can argue with anything I say.

Chairman Markey, Ranking Member Stearns, other members of the subcommittee, it is an honor to be here today. As Chairman Markey said, my name is Matt Salmon. I am the President of CompTel. As many of you know, Comptel is the face of the competitive telecommunications industry. Our members are telecommunications service providers and their supply partners and they offer a wide range of wireline, wireless, and VoIP services. Our industry expanded exponentially when passage of the 1996 Telecommunications Act made competitive entry into the local telecommunications market possible. I am proud to say that our members have competed and continue to compete vigorously and with innovative technology. Although DSL technology was sitting on the shelf collecting dust in the Bell world, the new entrants were the first to deploy that technology. Only after competitors took action to respond to what consumers wanted and needed, the Bell companies finally responded to deploy DSL. This is the hallmark of the competitive telecommunications industry. Our companies push for and deploy innovative technologies before the big phone companies deem those consumers worthy of such services. Other examples are triple play, Ethernet over copper, fixed wireless, nationwide high-speed services over advanced fiber networks, and the list can go on and on.

I cannot overemphasize that the competitive industry has spent billions investing in broadband technologies and infrastructure. It is not just the phone and cable companies, as some would like Congress to believe, and the investment is not solely in just deploying new infrastructure. Our companies also maximize existing infrastructure including the legacy copper facilities that we lease from the Bells. For the telecommunications future of the United States, it is all about broadband, and without the competitive industry, this Nation will continue to drop in the broadband ratings. The policy and goal of giving all American consumers and businesses access to broadband options and services depends on numerous platforms competing, not just two.

Mr. Chairman, I believe I have a unique perspective because before running for Congress I spent 13 years as a telecommunications executive for one of the Bells. I began my career with Mountain Bell, which after the breakup of the Bell system became U.S. West. As many of you know, they are the predecessor to Qwest Communications. And during the creation and passage of this Act that we are talking about today, they and the other Bell companies were all about competition. They wanted to compete in the very lucrative long-distance markets. As such, the deal for Qwest and other Bells to open their networks to competitive companies like ours seeking to enter into the local markets was struck.

I am familiar with this deal as I was a member of Congress from the First Congressional District in Arizona, when we were lobbied intensely by Qwest and other Bells during the passage of that act. During my 6-year tenure in Congress, I remember few issues that were lobbied more intensely or where more promises were made by the Bell companies. In fact, it reminded me of an old poem my father used to recite to me: "Just Before Christmas, I'm As Good As I Can Be." The ink was not even dry on the President's signature before the Bells challenged the constitutionality of the Act. Furthermore, a full decade of costly litigation ensued at the FCC on the rules the Commission crafted to implement the Act. These rules are the reason competition exists in a market where the majority of the lines to consumers and businesses are owned by a handful of large companies.

While many aspects of the Act enabled and propelled competition, section 10 has been really troubling. This small section actually has the ability to undo all the good the rest of the Act seeks to accomplish. I commend Chairman Dingell for his introduction of H.R. 3914, which addresses one of the most troubling parts, and you have talked about that. I would just ask you on the whole deemed granted issue, imagine a committee or a subcommittee here in these hallowed halls in Congress where a tie vote is enough to pass the bill or where three bills are scheduled, only two are heard, and because of that, all three pass. We would all say that was ludicrous, and it would be, but essentially that is the type of process that we have to deal with at the FCC, and passage of 3914 would go a long way toward fixing this deemed granted provision, and we would all hope that action could also be taken to stop the revolving door of multiple filings of forbearance petitions on exactly the same issues. For example, less than 100 days after Verizon's forbearance requests were soundly defeated at the FCC, they filed again in two of those markets. Nothing really changed. Not only do these frivolous petitions diminish the Commission's time and capacity to focus on critical issues like USF reform, media ownership, digital transition, and other issues of high importance to Congress and the American people, they forced the competitive industry to use valuable capital fighting these frivolous petitions. We would rather use the millions upon millions of dollars that we spend advancing our issues and research and development in growing our companies and helping our customers.

One final note on section 10 of the Act. I don't believe we ever envisioned when we passed the Telecom Act that we would have a provision that could unilaterally undo the very act itself. Essentially that is what is happening. What we need to do is focus on this fact: there is virtually only one wholesale provider that gives us access to the last mile, the Bell Company. Once reasonable access to the last mile is taken away, the marketplace is left with a full monopoly on access to business customers' services and a duopoly between cable and the Bells on residential services. How does that protect consumers and how is that in the public good, as Section 10 purports to do?

Mr. Chairman, our membership is diverse but our needs are very uniform. Whether it is dealing with special access, unbundled network elements, interconnection or pole attachments, all we are asking for is to continue to have access to the monopoly infrastructure at the cost-based rates, the very rights provided for our companies under the Act. Our members did not build out networks in a monopoly world, and under the old telecommunications welfare program where state commissions provided a guaranteed rate of return. Every penny invested in infrastructure by the Bells before the Act was met with a guaranteed rate of return. Unlike the Bell companies, we did not inherit a government-sponsored network. Our investors bore all the risk with starting our companies and building our networks. We are not asking for any handouts or giveaways, and heaven forbid, we are not asking for any earmarks. We do not come before Congress and ask for the rules to change before we invest in broadband. We come before Congress to say we are investing in broadband and we will continue to invest. Please don't change the competitive provisions and rules of the Act. The regulatory environment after years and decades of the Bell Company sponsored litigation is now relatively stable and we want it to remain that way so the competition can continue to thrive, technological innovations can continue and grow, and more and more Americans can have access to advanced technologies. As I said before, it is all about broadband, and whether all customers and businesses have the access and the range of choices that meets their needs, that will happen with the competitive industry.

Thank you, Mr. Chairman. I appreciate this opportunity.

[The prepared statement of Mr. Salmon follows:]

STATEMENT OF

MATT SALMON

PRESIDENT

COMPTEL

Before the Subcommittee on Telecommunications and the Internet

Committee on Energy and Commerce

Hearing on Issues in Telecommunications Competition

Tuesday, July 22, 2008

Good afternoon Chairman Markey, Chairman Dingell, Ranking Members Stearns and Barton, and other distinguished members of the subcommittee. My name is Matt Salmon, and I am the President of COMPTEL. As many of you know, COMPTEL is the face of the Competitive Telecommunications Industry. Our members are telecommunication service providers and their supplier partners and they offer a wide range of wireline, wireless and VoIP services. Our industry expanded exponentially when passage of the 1996 Telecommunications Act made competitive entry into the local telecommunications market possible. I am proud to say that our members have competed and continue to compete vigorously and with innovative technology. Although DSL technology was sitting on the shelf, collecting dust in the ILEC world, the new entrants were the first to deploy that technology. Only after competitors took action to respond to what consumers wanted and needed did the Bell Companies finally deploy DSL. This is the hallmark of the competitive industry; our companies push for and deploy innovative technologies that bring consumers the services and choices that they are demanding before the big phone companies deem those consumers worthy of such services. Other examples are: VoIP, triple play and Ethernet over copper, fixed wireless, nationwide high-speed services over advanced fiber networks, and the list can go on and on.

I cannot over-emphasize that the competitive industry has spent billions investing in broadband technologies and infrastructure – it is not just the phone and cable companies as some would like Congress to believe. And the investment is not solely in deploying new infrastructure – our companies also maximize existing infrastructure including the legacy copper facilities that we lease from the ILECs. For the telecommunications future of the U.S., it is all about broadband. And without the competitive industry, this nation will continue to drop in the world's broadband ratings. The policy goal of giving all American consumers and businesses access to broadband options and services depends on numerous platforms competing – not just two.

Mr. Chairman, I believe I have a unique perspective. Before running for Congress, I spent 13 years as a telecommunications executive for one of the RBOCs. I began my career with Mountain Bell which after the breakup of the Bell System became US West As many of you know, they were the predecessor to QWEST Communications. During the creation and passage of the 1996 Telecommunications Act, they and the other ILECs were all about competition. They wanted to compete in the then, very lucrative long distance markets. As such, the deal for Qwest and the other ILECs to open their networks to competitive companies seeking to enter into the local markets was struck.

I'm familiar with this "deal" as I was a member of Congress from the First Congressional District in Arizona when we were lobbied intensely by Qwest and the other ILEC's on the Act. During my six year tenure in Congress, I remember few issues that were lobbied more intensely or where more promises were made by the Bell Companies. In fact it reminded me of an old poem my father used to recite to me when I was a little boy; "Just Before Christmas, I'm As Good As I Can Be." The ink was not even dry on the President's Signature before the ILECs challenged the constitutionality of the Act. Furthermore, a full decade of costly litigation ensued at the FCC on the rules the Commission crafted to implement the Act. These rules are the reason competition exists in a market where the majority of the lines to consumers and businesses are owned by a handful of large phone companies.

While many aspects of the act enabled and propelled competition, Section 10 of that Act has been really troubling. This small section actually has the ability to undue all of the good that the rest of the Act seeks to accomplish. I commend Chairman Dingell for his introduction of HR 3914, which addresses one of the troubling parts of that section – the allowance of a petition to be "deemed granted" simply by a tie vote at the FCC , or no action at all by the Commission. Imagine a committee or subcommittee vote here in Congress in which a tie vote is enough for a bill to pass, or in which there are three bills on the schedule, but only two are heard and yet all three pass regardless. We would find that absurd, but that, essentially, is the state of the process at the FCC because of the deemed granted provision in section 10. Combined with the 12 month (plus an allowance for a 90 day extension) shot clock, Section 10 has opened the door for companies to leap-frog over the FCC's normal rulemaking procedures and actually dictate the Commissions time and resources to fulfill one particular company's anti-competitive goals.

Passage of HR 3914 will go a long way toward correcting these problems. In addition to correcting the "Deemed Granted" provision, we would also hope that action could be taken to stop this revolving door of multiple filings of forbearance petitions on the exact same issues. For example, less than 100 days after the FCC soundly rejected

Verizon's forbearance requests in Virginia Beach and Rhode Island, they re-filed again in both locations. In the legal realm, have you ever heard of a jury giving a verdict for the defense, and the plaintiff again files the very same suit within a few days. Again, we would find that absurd, but that is exactly what is occurring on these forbearance filings. Not only do these frivolous petitions diminish the Commission's time and capacity to focus on critical issues like USF reform, media ownership, digital transition, and other issues of high importance to this Committee and Congress, they force the competitive industry to use valuable capital to fighting every petition at the FCC and the courts. We would rather use the millions of dollars we expend in these legal and regulatory battles investing in our infrastructure and research and development, as well as delivering better services and lower prices to our customers.

I have one final note I would like to address on section 10 of the 1996 Telecommunications Act. I do not believe we envisioned a provision that could unilaterally undo the very Act itself. Essentially, that is what is happening. The arguments postured by the other side in support of these frivolous forbearance requests are a nothing more than red herrings. The Bell Companies argue that the 1996 Act deal should be undone because of penetration in the residential markets by cable and cut the cord wireless, but they ignore the fact that these service options all have to use the Bell network at some point to get to their customers. What we really need to focus on is this fact: There is virtually only one wholesale provider that gives us access to the final mile – the Bell Company. Once reasonable access to the final mile is taken away, the marketplace is left with a full monopoly on access to business customers' services and a duopoly between cable and the ILECs on residential services. How does that protect consumers and the "public good," as section 10's language purports to address?

Mr. Chairman, our membership is diverse, but our needs are very uniform. Whether it's dealing with special access, unbundled network elements, interconnection or pole attachments, all that we are asking for is to continue to have access to the monopoly "last mile" at the cost- based rates. The very rights provided for our companies under the 1996 Act. Our members did not build our networks in the monopoly world and under the old telecommunications welfare program where state commissions provided a guaranteed rate of return. Every penny invested in infrastructure by the ILECs before the 1996 Telecommunications Act was met with a guaranteed rate of return. Unlike the Bell Companies, we did not inherit a government sponsored network; our investors bore all the risk with starting our companies and building out our networks. We are not asking for any handouts or give-aways. We do not come before Congress and ask for the rules to change before we invest in broadband. We come before Congress to say we are investing now and will continue to invest – please do not change the competitive provisions and rules of the 1996 Act. The regulatory environment, after decades of Bell Company sponsored litigation, is now relatively stable and we want it to remain that way so that competition can continue to thrive, technological innovations can continue and more Americans can have access to advanced broadband technologies. As I said before, it's all about broadband and whether all consumers and businesses have the access and range of choices that meet their needs – and that will happen with the competitive industry.

Thank you very much Mr. Chairman, I will be happy to answer any questions.

Mr. MARKEY. Thank you, Mr. Salmon, very much.

And our next witness is Ms. Larissa Herda, who is the Chairman, President, and Chief Executive Officer of tw telecom, a $2 billion competitive broadband provider. She also serves on the Economic Advisory Council of the Federal Reserve Board of Kansas City. We welcome you, Ms. Herda. Whenever you are ready, please begin.

STATEMENT OF LARISSA HERDA, CHAIRMAN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, TW TELECOM, INC.

Ms. HERDA. Good afternoon, Chairman Markey, Ranking Member Stearns and distinguished members of the subcommittee. My name is Larissa Herda and I am Chairman, CEO, and President of tw telecom, formerly known as Time Warner Telecom. Thank you for the invitation to appear before you today.

Encouraging broadband deployment is an important national policy objective. Deploying fiber networks in the communities where we do business if the heart of tw telecom's business plan. Although we have spent billions of dollars deploying broadband infrastructure, we still have no choice but to rely on services provided by third parties in certain situations. For example, we have no choice but to purchase special access and interconnection from the ILECs. As many of you know, the forbearance provision of the Telecommunications Act and the FCC's implementation threaten to eliminate our ability to obtain these vital services.

I strongly support the legislation filed by Chairman Dingell and Chairman Markey and cosponsored by a bipartisan group of this committee. I appreciate the subcommittee's interest in reviewing the forbearance process, which is in drastic need of reform. In addition to passing legislation that removes the deemed granted language, please do what you can to convince the FCC that it is critical that they adopt procedural rules to govern the forbearance process.

Today, however, I would like to focus my opening comments on our need to attach our fiber facilities to utility-owned poles. In order to deploy fiber and deliver broadband services to our customers, tw telecom must be able to obtain access to poles at nondiscriminatory rates. Unfortunately, the current rules governing pole attachments are seriously flawed. Under the existing rules, pole owners charge two different regulated rates for pole attachments. One applies to telecom carriers and the other applies to cable companies. All of these entities provide broadband service to end-user customers and this is a very important point to emphasize. Both telecom carriers and cable operators provide these services. But pole attachment rates are determined based on which of the legacy regulatory classifications applies to the service provider, and the rates applied to a telecom carrier of broadband are two to three times higher than the rates applied to cable providers of broadband.

These rate differences exist even though pole attachments providing telecom service do not cause the pole owner to incur higher costs or use more space than is the case with the cable attachment. This produces particularly egregious results and instances where a cable company leases a fiber facility to us. Even though we are using the exact same attachment, our use of the cable company's facility to provide telecom services causes the rate for pole attachments supporting that fiber to increase two to three times, even though no additional space on the pole is required.

To the extent that tw telecom provides services like broadband Internet access in competition with cable operators, the different rates yielded by the pole attachment rules skew competition. They cause competitors to pay dramatically different rates for an identical input that they have no choice but to buy. In summary, I urge you to press the FCC to adopt a single rate that applies to all competitors that use pole attachments to provide service.

In January the FCC adopted an NPRM in which it tentatively concluded that it should adopt a single rate. Since that time, all industries including many pole owners have commented on the FCC's proposed rulemaking and all agree that a single rate is appropriate. We would appreciate the subcommittee using its oversight role to ensure that the Commission adopts a single pole attachment rate for all providers of broadband services. This will encourage deployment of broadband networks critical to a vibrant economy.

Thank you for your time and attention today.

[The prepared statement of Ms. Herda follows:]

Summary of Testimony Of Larissa Herda, President, CEO, Chairman of the Board, tw telecom inc. Before the United States House of Representatives, Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet

July 22, 2008

Introduction. Thank you Chairman Markey, Chairman Dingell and distinguished members of the Subcommittee for inviting me to appear before you today to discuss the role of pole attachments to the deployment of broadband services. My name is Larissa Herda, and I am the Chairman, CEO and President of **tw telecom,** formerly known as Time Warner Telecom.

tw telecom relies of poles to provide broadband. tw telecom has deployed, and continues to deploy, fiber networks in the 75 markets across 30 states in which it offers broadband service to business customers in the U.S. In order to deploy fiber for these purposes, tw telecom has no choice but to rely on pole attachments owned by utilities. Unfortunately, utilities usually have a monopoly over poles. This monopoly gives utilities the incentive to charge unreasonably high prices.

Existing FCC pole attachment rate regulation is discriminatory. Congress has granted the FCC the authority to impose effective regulatory constraints on utilities' pole attachment rates. Unfortunately, the existing FCC rules are discriminatory and skew competition in the provision of broadband.

The existing FCC rules establish two rate formulas for pole attachments: one for telecommunications carriers and one for cable operators that do not provide telecommunications services. The two formulas yield very different rates. The rates for attachments by telecommunications carriers are two-to-three times higher than the rates for attachments by cable operators.

This differential in rates skews the market for broadband deployment because both telecommunications carriers and cable operators provide broadband services to downstream retail customers. Moreover, telecommunications carrier pole attachments do not impose greater costs or burdens on pole owners than cable operator pole attachments.

The FCC Should Adopt A Single Rate For All Pole Attachments Used To Provide Broadband. In January, the FCC released a Notice of Proposed Rulemaking in which it tentatively concluded that all providers of broadband internet access should pay the same pole attachment rate. I applaud the FCC for taking this initiative. I urge this Committee to encourage the FCC to adopt final rules implementing its tentative conclusion.

Thank you.

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Before the United States House of Representatives

Committee on Commerce and Energy

Subcommittee on Telecommunications and the Internet

Testimony of

Larissa Herda

President, CEO, Chairman of the Board

tw telecom inc

July 22, 2008

I. INTRODUCTION

Good morning Chairman Markey, Chairman Dingell and distinguished members of the Subcommittee. My name is Larissa Herda and I am the Chairman, CEO and President of **tw telecom,** formerly known as Time Warner Telecom. Thank you for the invitation to appear before you today to discuss issues critical to the deployment of broadband services.

tw telecom provides voice, Internet and data services to business customers in 75 markets spanning 30 states and the District of Columbia. We have invested billions of dollars to construct networks and connect over 8500 buildings with our own fiber network – more than any other non-incumbent telecommunication carrier in the country. And, we continue to deploy fiber facilities directly to commercial buildings at a faster rate than any other competitor. We use the fiber facilities we deploy to provide our business customers with innovative and cost-effective broadband solutions that allow them to operate more efficiently. We have been recognized by many organizations as the best in the industry at what we do.

II. tw telecom inc. HAS NO CHOICE BUT TO RELY ON POLES TO DELIVER ITS SERVICES

I understand that encouraging broadband deployment is an important national policy objective. Deploying fiber networks in the communities where we do business is the heart of our business plan.

Nevertheless, we have no choice but to rely on services and inputs provided by third parties. We must obtain special access services and interconnection from the ILECs and pole attachments from utility pole owners. As you may recall from my testimony before this Committee last October, special access in particular is an extremely important issue for my company. I also applaud the Committee's interest in reviewing the Forbearance process, which is in drastic need of reform. Today, however, I would like, if I may, to focus my opening comments on pole attachments.

In order to deploy fiber and deliver broadband services to our customers, **tw telecom** must be able to obtain reasonable access to pole attachments. As Congress has long recognized, pole owners have a monopoly over poles. This is because most local governments only allow one pole owner in any particular location for both safety and aesthetic reasons.

Given their monopoly control over poles, pole owners have a natural and understandable incentive to charge high prices for pole access. Congress has granted the FCC powerful regulatory tools to limit the pole owners' ability to act on their incentives to charge unreasonably high rates. Congress first adopted pole attachment legislation in 1978, when its main objective was increase cable penetration of video services. In 1996, Congress added provisions for telecommunications carriers. The challenge today is to ensure that all of these provisions grant providers of broadband service reasonable and fair access to poles.

III. THE EXISTING REGULATORY REGIME FOR POLE ATTACHMENTS IS FLAWED

Unfortunately, the FCC's rules governing pole attachments are seriously flawed. Under the existing rules, pole owners charge two different regulated rates for pole attachments: one applies to telecommunications carriers like **tw telecom** and the other applies to cable companies that do not provide telecommunications services. All of these entities provide broadband service to end user customers, but their pole attachment rates are determined based on their legacy regulatory classifications.

This is a problem because the pole attachment rates for telecommunications carriers are two or three times higher than the rates applicable to cable companies. For example:

- One Georgia utility pole owner charges the cable companies $5.70 to attach to a utility pole, but it charges telecommunications carriers $13.86 in urban areas and $14.93 in rural areas.
- An Indiana utility pole owner charges a cable rate of $4.90, compared to a telecom rate of $18.21

- In North Carolina we've seen cable rates at $6.36 compared to a telecom rate of $13.64
- In Texas, we've seen $7.10 for cable compared to $16.00 for the telecom rate.

These rate differences exist even though the use of a pole attachment to provide telecommunications services does not cause the pole owner to incur higher costs than is the case with a cable service.

To the extent that **tw telecom** provides services like broadband internet access service in competition with cable operators, the different rates yielded by the pole attachment rules skew competition -- they cause competitors to pay dramatically different rates for an identical input that they have no choice but to buy. The effect on competition can be substantial given that **tw telecom** and other telecom carriers must establish tens of thousands of pole attachments to deploy the fiber they need to offer services to end user customers and expand broadband deployment.

IV. THE FCC SHOULD ADOPT A SINGLE RATE APPLICABLE TO ALL COMPETITOS USING POLE ATTACHMENTS

In light of the flaws in the existing rules governing pole attachment rates, I urge the Committee to press the FCC to adopt a single rate that applies to all competitors that use pole attachments to provide service.

In January the FCC adopted an NPRM in which it tentatively concluded that it should adopt a single rate applicable to all pole attachments used to provide broadband internet access services.

Since that time all industries, including many pole owners, have commented on the FCC's proposed rulemaking and all agree that a single rate is appropriate.

Any assistance the Committee can provide in its oversight role to ensure that the Commission adopts rules consistent with its NPRM as quickly as possible, will encourage investment in and deployment of the broadband networks critical to a vibrant economy.

Every day that passes in which telecommunications carriers pay higher pole attachment rates contributes further to the inefficiencies created by the current regime

Thank you for your time and attention today. I'd be happy to answer any questions.

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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

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

TIME WARNER TELECOM, INC.

January 16, 2007

EXECUTIVE SUMMARY

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

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

While the existing rules have created an incoherent and harmful pole attachment regime, this was not the intended purpose of Section 224, the Communications Act provision governing pole attachments. On the contrary, Congress adopted Section 224 for the purpose of eliminating the competitive distortions caused by utilities' exercise of market power over poles. Section 224(b) broadly requires that the Commission "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." Section 224(d) establishes minimum and maximum cost-based rate formulas for pole attachments of cable systems used solely to provide cable service. Finally, and most importantly, Section 224(e) requires that the FCC establish regulations that ensure "just, reasonable, and nondiscriminatory rates" for pole attachments used by telecommunications carriers to provide telecommunications services.

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

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

DISCUSSION

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

Although they currently receive little attention in the discourse concerning the nation's telecommunications infrastructure, pole attachments are a critically important input for the deployment of wireline broadband facilities. Unfortunately, the economics of pole deployment are such that only a single pole can be efficiently deployed in a particular location. The need for access combined with a single source of supply in each location means that pole attachments are, as the Eleventh Circuit has explained, "essential facilities" – inputs that facilities-based cable companies, telecommunications carriers, and broadband providers need to compete on an equal basis.[1]

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

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[1] *See Ala. Power Co. v. FCC*, 311 F.3d 1357, 1361 (11th Cir. 2002). *See also* S. Rep. No. 95-580, 1978 U.S.C.C.A.N. 109 (1978) (explaining that Congress enacted the Pole Attachment Act to combat monopolistic practices by utilities); *Implementation of Section 703(e) of the Telecommunications Act of 1996,* Report and Order, 13 FCC Rcd 6777, ¶ 31 (1998) ("*Telecom Order*"), *aff'd in part, rev'd in part, Gulf Power Co. v. FCC,* 208 F.3d 1263 (11th Cir. 2000), *rev'd & remanded, Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) ("The purpose of the amendments to Section 224 made by the 1996 Act was similar to the purpose behind Section 224 when it was first enacted in 1978, *i.e.*, to remedy the inequitable position between pole owners and those seeking pole attachments. The nature of this relationship is not altered when the [attacher] seeks to provide additional service.")

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

[3] *Id.*

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

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

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

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

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

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

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

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

[7] *See* 47 U.S.C. § 224 (1978). *See also* S. Rep. No. 95-580, 1978 U.S.C.C.A.N. 109 (1978) (explaining that Congress enacted the Pole Attachment Act to combat monopolistic practices by utilities); *Telecom Order*, ¶ 31 ("The purpose of the amendments to Section 224 made by the 1996 Act was similar to the purpose behind Section 224 when it was first enacted in 1978, *i.e.*, to remedy the inequitable position between pole owners and those seeking pole attachments."); *id.* ¶¶ 2-3 (explaining that Congress enacted the Pole Attachment Act to ensure that bottleneck facilities do not block the deployment of competitive communications networks).

[8] 47 U.S.C. § 224(b)(1).

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

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

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

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

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

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

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[10] *Id. See* 47 U.S.C. § 224(a)(4).

[11] 47 U.S.C. § 224(b).

[12] *Id.* § 224(d)(3).

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

[14] 47 U.S.C. § 224(e)(2)-(3).

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

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

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

[17] 47 U.S.C. § 224(d)(1).

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

[19] *Id.*

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

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

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

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

[20] 47 C.F.R. § 1.1409(e)(1).

[21] 47 U.S.C. § 224(d)(3).

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

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

[24] *See Telecom Order*, ¶ 32 ("We conclude, pursuant to Section 224(b)(1), that the just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate."); *Gulf Power Co.*, 534 U.S. at 333-42 (affirming FCC's decision to set rates for commingled services under Section 224(b)(1)).

[25] *See* 47 C.F.R. § 1.1409(e)(2).

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

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

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

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

Maximum Rate = Space Factor x Net Cost of a Bare Pole x Carrying Charge Rate[30]

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

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

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

[29] *See* 47 C.F.R. § 1.1409(e)(2).

[30] *Id.*

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

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

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

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

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

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

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

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

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

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

[35] *See Telecom Order*, ¶ 73.

[36] *See id.*

[37] *Id.*

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

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

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

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

[39] *Id.*

[40] *Id.*

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

[42] *Wireline Broadband Order*, ¶ 1.

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

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

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

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

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

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

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

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[45] 47 U.S.C. § 224(e)(1).

[46] *See id.* § 224.

[47] *Id.* § 224(e)(2), (3).

[48] *Id.*

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

> A *utility* shall apportion the *cost* of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all entities.

Id. § 224(e)(2) (emphasis added).

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

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

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

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

- "[W]here access is mandated, the *rates,* terms, and conditions of access must be uniformly applied to *all telecommunications carriers and cable operators* that have or seek access."[55]
- "Interpreting these terms in light of the 1996 Act's goal of promoting local exchange competition, and the benefits inherent in such competition, . . . these terms require [the utility] to provide [attachments] under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete."[56] "Such terms and conditions should serve to promote fair and efficient competition."[57] The FCC reached

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Id. § 224(e)(3) (emphasis added).

[50] *Id.* § 224(d)(1).

[51] *See id.*

[52] *See id.* § 224(e)(1).

[53] *See id.* § 224(e)(1)-(3).

[54] *See id.*

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

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

[57] *Id.* ¶ 315.

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

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

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

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

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[58] *Id.*

[59] *Id.*

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

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

[62] *See* 47 U.S.C. § 224(e).

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

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

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

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

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[64] *See* 47 U.S.C. § 224(e).

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

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

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

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

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

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

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

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

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

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

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

[72] 47 C.F.R. § 1.1410.

[73] *Id.*

[74] *Id.* § 1.1410(c).

[75] *See id.*

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

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

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

[77] 47 U.S.C. § 224(e)(1).

[78] *Id.* § 224(e)(2)-(3).

[79] *See id.*

[80] *See id.* § 224.

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

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

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

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

[85] *See id.* § 224(d)(1).

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

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

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

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

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

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[88] *See id.* § 224(e)(2).

[89] *See id.* § 224(e)(3).

[90] *See Fee Order*, ¶¶ 74-76.

[91] *Id.* ¶ 75.

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

[93] *Id.* ¶¶ 44-76.

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

[95] *See* 47 U.S.C. § 224(e)(2)-(3).

[96] *See id.*

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

[98] *Fee Order*, ¶¶ 71-73.

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

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

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

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

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

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[99] *Id.* ¶¶ 62-70.

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

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

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

[103] *See id.*

[104] *See id.* § 224(e)(1).

[105] *See* 47 C.F.R. § 1.1409(e).

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

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

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

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

[106] *See* 47 U.S.C. § 224(e).

[107] *See id.*

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

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

[110] *Telecom Order*, ¶ 73.

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

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

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

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

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

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

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

CONCLUSION

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

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

Mr. MARKEY. Great. We thank you so much.

And now our next witness, Mr. Carl Grivner, is the Chief Executive Officer of XO Communications, a competitive broadband provider with over 1 million miles of fiber deployed. Mr. Grivner has served in various positions with Ameritech Cable and Wireless and IBM.

STATEMENT OF CARL J. GRIVNER, CHIEF EXECUTIVE OFFICER, XO COMMUNICATIONS

Mr. GRIVNER. Good afternoon, Chairman Markey, Ranking Member Stearns and members of the subcommittee, and thank you for the opportunity to appear this afternoon. I also want to thank Chairman Dingell, who is not here, and Chairman Markey for introducing the bill, H.R. 3914. I think it addresses the problems of deemed granted forbearance petitions.

Forbearance is part of the broader issue of competition and broadband availability. Broadband availability is one of the most important challenges in telecom. The United States does lag behind many nations and is falling further behind. Other countries use all of their resources to make broadband widely available, but in the United States, the ILECs constrain broadband by fighting competitive access to the legacy network, and as we all know, competition is one of the key drivers of broadband.

XO is one of the key competitors in helping to accelerate broadband development in the United States established in 1996 as part of the Telecom Act. We have invested over $7 billion in building advanced networks. We have over 140,000 business customers across the United States and we provide a variety of IP services to our customer.

But one significant barrier to broadband deployment remains and that is the last mile access to those customers, and it is critical for competition. With the Act, Congress mandated access to the last mile because ratepayers financed legacy ILEC networks already in the ground. By putting capital into their networks, they were guaranteed a rate of return for basically 100 years, and still today in over 90 percent of the business market, the ILEC loop facilities are the only route into the building, and XO pays for that route. We pay hundreds of millions of dollars each year for that last mile of connectivity. Now, we prefer not to rely on the ILECs to fill out networks but it would cost over $50 billion to build to the 2.3 million buildings within reach of our network, and the FCC agrees that it is not cost-effective to duplicate existing facilities.

Copper networks aren't dead. They are alive and doing very well. Copper services most businesses and 100 million households. Seventy-five percent of all telephone access lines are home run copper. Copper facilities are a broadband resource. Copper has evolved over the years beyond analog, voice, and dial-up. It is now a leading broadband infrastructure. Us, XO, others at this table offer Ethernet over copper at speeds up to 10 megabits per second and soon you will have 100 megabits per second over those little copper wires that have been existing in the network for almost 100 years. Yet the Bells are leveraging their copper cartel to restrict access to that last mile. The ILECs control access to nearly all last mile facilities. They want to control the supply through copper removal.

They want to control access and pricing through the use of the forbearance petition and they want to squeeze out broadband competition.

So let us start with what is wrong with copper retirement. As ILECs deploy fiber, they disable the copper loop. It harms the public interest in at least three ways: it destroys an alternative broadband source, it threatens public safety—copper supplies its own power—and it poses a danger to national security. It removes redundancy in the event of an emergency. The FCC should adopt a formal process for approval of copper retirement. ILECs must prove that copper retirement is in the public interest. Current rules give the ILECs free reign. ILECs simply file notice to retire the copper and that is the end of it. Consumers, which we are concerned about, have no recourse.

If copper destruction is dire, forbearance is even more horrific. The 1996 Act included forbearance as a tool to eliminate obsolete policies. It worked until the ILECs hijacked forbearance to raise rates on the last mile and to take out competition. The most dangerous aspect is deemed granted. It is a decision through inaction: don't do anything and you will get what you want. It is a lack of an appealable order. The Committee has taken the right steps with H.R. 3914, which would eliminate forbearance deemed granted. But even with this legislation, there are still some problems with forbearance. Private parties can dictate the FCC's agenda and resources. Frivolous petitions are filed as placeholders to start the deemed granted clock. Supporting data is incomplete or filed months or even a year later, and just let us see what sticks. Petitions are filed at will. A rejected petition can be re-filed the next day: that didn't work; let us try this. Every frivolous ILEC petition places a heavy burden on the resources of the FCC and the industry. The lack of rules encourages forbearance petitions.

Last fall, XO and other competitors petitioned the FCC to create long-needed rules governing forbearance, and I want to thank the members for stressing the importance of having a deregulatory process based on rules and procedures. At a minimum, the rules should require a forbearance petition to be complete as filed, require the FCC to seek public comment on petitions, set guidelines for the treatment of confidential data, and forbid late filed data by petitioners.

I want to conclude my remarks and look forward to your questions. Thank you.

[The prepared statement of Mr. Grivner follows:]

SUMMARY STATEMENT OF
CARL J. GRIVNER

TUESDAY, JULY 22, 2008
Hearing on Issues in Telecommunications Competition

- The predominant issue for the United States and the telecommunications industry is access to broadband and next generation technologies. Since the passage of the 1996 Act, competitive telecommunications companies have been the source of billions of dollars of investment in broadband deployment and innovation. XO alone has invested over $7 billion in its own advanced fiber facilities as well as investing millions of dollars annually in leasing and maximizing the value existing incumbent local exchange carrier (ILEC) legacy infrastructure.

- Even with all this investment, one significant obstacle remains for broadband access and deployment of next generation technologies – the "last mile." The "last mile" is the ratepayer financed legacy ILEC network that is already in the ground and connecting buildings and residences to the ILEC serving wire center. In over 90% of the business market, the ILEC loop facilities are the only route into the building and constitute an absolute bottleneck facility.

- The Committee needs to understand the crucial fact that innovative electronics and competitive industry investment have turned the ILEC's copper loop facilities, which comprise most of the legacy network, into one of the most capable and economically efficient broadband resources available today. Nations that lead the U.S. in broadband deployment have done so by leveraging their legacy copper networks.

- Copper facilities are nearly ubiquitous, serving 100 million residences and 75% of all telephone access lines. XO can use these facilities to offer Ethernet-over-Copper at 10Mbps to businesses and is testing 45Mbps.

- ILEC efforts to retire copper loops threaten to eliminate a vital broadband asset. Consequently, the FCC needs to implement rules to subject ILEC copper retirements to a review process for public interest analysis.

- Forbearance: As part of the 1996 Act, Congress included Section 10 as a tool to enable companies to obtain waivers from the enforcement of antiquated regulations. The process, however, has been hijacked to rewrite central, pro-competitive requirements of the Act.

- Use of a "shot clock" with a "deemed granted" result if action does not occur coupled with a general lack of procedural rules allows unwarranted and frivolous petitions to dominate FCC time and resources and drain the industry of valuable capital to invest in broadband.

- **HR 3914 is an important step to fix the forbearance process.**

- **Congress must also encourage FCC to:**

    - **(1) amend its rules to preserve access to copper facilities by subjecting all retirement proposals to a formal review process**

    - **(2) encourage the FCC to implement necessary procedures to ensure the forbearance process is properly used**

STATEMENT OF

CARL J. GRIVNER

CHIEF EXECUTIVE OFFICER

XO COMMUNICATIONS

BEFORE THE

ENERGY AND COMMERCE COMMITTEE

SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

UNITED STATES HOUSE OF REPRESENTATIVES

ISSUES IN TELECOMMUNICATIONS COMPETITION

Tuesday, July 22, 2008

Chairman Markey, Ranking Member Stearns, and Members of the Subcommittee; thank you for the opportunity to appear before the Subcommittee today regarding Issues in Telecommunications Competition and HR 3914, the "Protecting Consumers through Proper Forbearance Procedures Act". My name is Carl Grivner, and I am CEO of XO Communications, one of the Nation's largest facilities-based telecommunications providers offering a comprehensive array of industry leading voice, data, and next generation IP services to small, medium, and large business customers in 75 metro area markets in 26 states.

As this Subcommittee knows all too well, there is no shortage of issues, regulatory or otherwise, when it comes to the telecommunications industry. However, if one steps back for a broader view of where the United States and its telecommunications industry should be heading in the 21st Century, the predominant issue here is broadband access and the variety of choices and services available to consumers. What is lacking is the freedom and opportunity for consumers and businesses to choose their particular broadband provider based on what their needs are – not what a particular company deems them to be. And with consumer demand for bandwidth accelerating and total Internet traffic expected to quadruple by 2011, the public is not in a waiting mood.[1]

Since the passage of the 1996 Act, the competitive industry has been the source of billions of dollars of investment in broadband deployment and innovation. Companies like XO have always been first to market with new products and services. Before, it was

[1] Source: Cisco, Global IP Traffic Forecast and Methodology, 2006-2011

DSL and bundled services; now its bandwidth based pricing, IP-VPN, Ethernet-over-Copper, and 10 Gbps wavelengths. And we will continue to invest in and deploy cutting-edge technologies that increase bandwidth capacity and deliver more of the advanced products and services that the market is demanding.

Since 1996, XO has invested heavily in building its own facilities, spending over $7 billion in constructing an advanced nationwide fiber network, with nearly $400 million invested in new services and increased network capacity since 2006. We now have multi-terabit capable IP and transport networks to meet growing demand. In addition to our advanced fiber network, we are also maximizing the potential of the existing legacy network by investing in soft switches, optical switches, and the most efficient multiplexing technology.

In building our networks, we have overcome obstacles city block by city block and office building by office building. However, there is one obstacle that remains as a significant barrier to entry for a competitive carrier like XO – the "last mile". Let me be clear, when I am talking about the "last mile" I am referring to the ratepayer financed legacy incumbent local exchange carrier (ILEC) network that is already in the ground and connecting buildings to the ILEC serving wire center. Everyone concedes loop facilities require such enormous amounts of capital to build that it is not cost-effective to duplicate existing facilities to the vast majority of customers. If XO were to attempt to build to the estimated 2.3 million buildings within reach of our network – the cost would be over $50 billion. And that is assuming building owners will negotiate for access and local governments do not impose construction bans or onerous fees. In over 90% of the business market, the ILEC loop facilities are the only route into the building and constitute an absolute bottleneck facility. XO pays hundreds of millions of dollars each year to lease portions of this legacy network under the provisions of the 1996 Act, and we have invested heavily in maximizing its use for broadband.

One integral part of this strategy for better utilization of the legacy network is the copper loop that currently serves almost all businesses and connects to over 100 million U.S. households. About 75% of all telephone access lines are provided from the local switch entirely by copper infrastructure; also known as "home run copper". The copper loop facilities are nearly ubiquitous and, although the wire itself has not changed, advancements in electronics have made it possible to deliver broadband over copper at speeds that were not thought possible just a few years ago. Innovative electronics and competitive industry investment have turned the legacy copper loop infrastructure into one of the most capable and economically efficient broadband resources available today. It is important to note that other countries who are leading the U.S. in broadband do so by leveraging their legacy copper facilities. This fact was highlighted at a previous Subcommittee hearing examining "broadband lessons from abroad".

Increasing Consumer Choice and Access to Broadband

Unlocking the Broadband Future of Copper

In the past few years, copper has far exceeded previous expectations in terms of the bandwidth it can deliver. Not too many years ago, copper was supposedly only good for analog voice and dial-up. Yet, new innovations continue at an incredible pace and it is expected that the bandwidth copper can deliver will exceed 100 Mbps in the not-so-distant future. In particular, XO currently deploys a 10 mbps Ethernet over Copper (EoC) service (with the ability to scale to 45mbps) for businesses that do not have access to a fiber network at a lower cost than a traditional T-1. So, as you can see, the power of copper is truly amazing.

It is important to note that the 1996 Act, and subsequent FCC decisions, provide competitive carriers the ability to access the copper loop at cost-based rates, which comprises the majority of so-called "last mile" facilities. Access to copper pairs is a critical component to the future growth of the competitive industry and is vital to consumers who seek advanced services and competitively priced broadband offerings. This is significant as it has been the competitive carriers that have pushed technological advancements to maximize use of the copper infrastructure. And this is a recurring story; just as our industry embraced and deployed DSL and bundled services long before the Bell Companies sought to do so, we are now embracing and deploying high-bandwidth Ethernet-over-Copper and other next generation copper technologies ahead of the ILECs. Furthermore, our customers are extremely satisfied with the speed, reliability, and lower cost of these services.

As copper technology is continually evolving, we have not seen the limit of what this legacy resource can accomplish in terms of increased speed and overall broadband availability. The problem, and this issue was discussed at a previous hearing, is that this legacy broadband resource is in danger of either being prematurely "retired" by the ILEC or the access to this resource being denied through the use of forbearance petitions.

The Threat of the Copper Cartel

An ongoing threat to the legacy copper loop infrastructure is what is known as "Copper Retirement". As the ILECs deploy fiber they are disabling the copper loop. In some instances they disconnect the copper at the customer premise; in other instances they remove the copper connection from the street to the home for "aesthetic purposes".[2] And in some cases, they retire copper loop facilities permanently. What the ILEC is actually doing is denying a vital broadband resource that other industry participants can use to bring broadband services to the customers that either the ILEC chooses not to serve or chooses to serve with products that may not meet the needs of the customer. The ILECs are behaving like a "Copper Cartel"; controlling the supply and pricing of a vital resource. Current FCC rules require only limited notice of the ILEC's intention to retire a copper loop. There is no opportunity for consumers or affected companies to seek review to ensure the proposed copper retirement is in the public interest. As a result, critical network infrastructure which can be used to provide alternative broadband services to consumers and businesses will be lost.

It is also important to emphasize that the copper loops are unique in that they are "line-powered". In other words, copper conducts electricity, including electricity sent from

[2] Answering questions from Chairman Markey at an October 2, 2007 hearing, Verizon Executive Vice President, Tom Tauke, stated that Verizon does "in some cases" remove the aerial copper to the home for "aesthetic" reasons.

central office and mobile generators. That is why your basic phones continue to work even if homes or businesses lose electric power. This vital public safety feature is not available for fiber (optical) transmissions, though a limited back-up battery is available for some services. Copper is also a redundant facility, which can serve the crucial need for government and businesses to maintain continuity of operations in the event of a public safety emergency. As you know, Congress instructed the General Services Administration (GSA) to require owned and leased federal buildings to have diverse network facilities.[3]

At the very time when federal policymakers are calling for greater investment in broadband technologies and availability, along with increased network redundancy (and, of course, greater broadband competition), it is unconscionable that a handful of companies can proceed unchecked in the destruction of an economic and national security asset. For once legacy copper facilities are removed, destroyed or permanently disabled, competitive entrepreneurs, consumers and business, who are willing to explore purchasing and maintaining these facilities, are deprived of the ability to use this valuable resource. In particular, the Office of Advocacy of the U.S. Small Business Administration has voiced concern on this issue: *"We believe the heightened pace of copper retirement warrants further economic analysis. Such an analysis may show that allowing companies to continue to develop and utilize the copper network will further the Administration's broadband policy goals"*.[4]

[3] P.L. 108-447; §414 - General Provisions—General Services Administration.

[4] Office of Advocacy of the U.S. Small Business Administration's letter, go to http://www.sba.gov/advo/laws/comments/fcc07_0510.pdf.

Currently, there is a petition before the FCC asking the Commission to amend its rules to preserve access to copper facilities by subjecting all retirement proposals to a formal review process and a presumption that such retirements are not in the public interest. Congress should encourage the FCC to act on this petition immediately to prevent any further squandering of this valuable broadband asset.

Protect Copper Facilities and Consumer Access To Broadband

As previously mentioned, the 1996 Act, and subsequent FCC decisions, provide competitive carriers the ability to access the copper loop and other portions of the ILEC "last mile" legacy network. It is imperative to point out that our success in unlocking the broadband capabilities of the copper facilities in the legacy network, in addition to the billions invested in our own facilities, can be wiped away with a single petition to the FCC under a provision of the 1996 Act that was intended for a much different purpose. In order to encourage further broadband innovation, deployment, and consumer access to broadband choices; the Forbearance Process must be reformed.

As part of the 1996 Act, Congress included a provision that was intended to be a tool to enable companies to obtain waiver of antiquated, legacy regulations that were no longer necessary as the industry moved away from rate-of-return regulation. And, in the early days this provision was used according to its purpose with a positive effect on the marketplace. However, in recent years we have seen the use of the forbearance provision morph into an attempt by incumbent companies to legislate, filing petition after petition, in order to game the system using the strict timelines and the "deemed granted" threat of Section 10 to rewrite central pro-competitive requirements of the Act.

This Committee has rightly stepped forward to amend the forbearance statute with the introduction of HR 3914, the ''Protecting Consumers through Proper Forbearance Procedures Act.'' I commend Chairmen Dingell and Markey for introducing this bill as it removes one of the most troubling portions of Section 10 – permitting a forbearance petition to be "deemed granted". Their leadership and effort to highlight these problems are extremely helpful and timely. Building upon their efforts, I would like to note that there are a number of additional issues and concerns regarding the implementation of the forbearance statute that also require the attention of Congress and, thus, really appreciate the opportunity this hearing provides to illuminate the full range of issues at hand.

I. Introduction and Background of Section 10 Forbearance

Enacted as part of the Telecommunications Act of 1996, the forbearance provision[5] was intended to facilitate the elimination of dated and unnecessary regulations

[5] The law, 47 U.S.C. 160, requires the FCC to forbear from "applying any regulation or provision" of the Act to a telecommunications carrier or service if it determines: (1) enforcement is not necessary to ensure rates are just and reasonable and not unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is in the public interest. The Commission may grant a petition seeking forbearance in whole or in part and must explain its decision in writing. It is required to reach a decision within one year from filing, a period which can be extended by 90 days.

without legislative intervention. However, the statute essentially shifts the balance in regulatory proceedings, effectively allowing private parties to set in motion proceedings of their own crafting under a fixed and compulsory timeline to overturn laws adopted by Congress. Moreover, Section 10 may permit complete deregulation of a single provider simply by FCC inaction[6] – resulting in incongruent regulatory treatment of similar entities. Even the current FCC Chairman has called the statute "unusual".[7]

Not only is the statute unusual, but the Commission has not established procedural rules to govern the forbearance process. Its related orders and many of its decisions have raised questions about interpretations of the law, the precedential impact of forbearance determinations, receipt and use of confidential and late-filed information, and the timely release of decisions. These problems are even more acute because forbearance petitions are being filed with increasing frequency by incumbent carriers and

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To force Commission action, the law provides that if a decision is not reached by this deadline, the requested forbearance is deemed granted.

6 This aspect of Section 10 has already produced perverse results. Certain Commissioners find "inaction" so fundamentally antithetical to the decision-making process that they have decided it is preferable to vote in favor of granting certain forbearance petitions rather than have those petitions take effect through the "deemed granted" process notwithstanding their grave concerns with granting the requested relief. *See* Concurring Statement of Commissioner Copps, *Fones4All Corp. Petition for Expedited Forbearance*, Memorandum Opinion and Order, 21 FCC Rcd 11125 (2006) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267678A2.pdf ("*Fones4All Order*").

7 *See*, Speech of FCC Chairman Kevin J. Martin to the 2006 ABA Administrative Law Conference, Washington, D.C. (Oct. 26, 2006) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268089A1.pdf. The Chairman gave several reasons for this conclusion. First, Section 10 delegates to the Commission the authority to essentially waive statutory provisions – a task normally left to Congress. Second, it does not expressly require the use of notice and comment rulemaking procedures or other Administrative Procedure Act ("APA") safeguards. Third, petitions are deemed granted if the Commission fails to act within the statutory deadline.

because these petitions seek to terminate the enforcement of provisions vital to the development of competition and innovative choices and lower prices for all telecommunications consumers. In effect, the forbearance provision has become a way to "short-circuit" the intent of Congress, and it is time for Congress to reassert its authority.

II. Specific Problems with FCC Implementation of the Forbearance Provision

Problem #1: "Deemed Granted" Forbearance Petitions

The language of Section 10, which provides that a forbearance petition is automatically "deemed granted" if the Commission does not act by the statutory deadline, has probably generated the most legal controversy. This situation has arisen only a few times to date, but one instance in particular has impacted all subsequent forbearance proceedings.

In March 2006, the Commission, with only four members at the time, failed to issue a decision by the statutory deadline, permitting a Verizon petition[8] seeking deregulation for its high-capacity broadband services to be "deemed granted". A one-paragraph News Release and three statements from the FCC commissioners were all that commemorated the event.[9] Other carriers seeking the same relief as Verizon then relied on the

8 *Petition of Verizon Telephone Companies for Forbearance under 47 U.S.C. 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 (filed Dec. 20, 2004).

9 *See Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, News Release (Mar. 20, 2006) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264436A1.pdf.

Commission's "inaction" as precedent, filing "me too" forbearance petitions.[10] Shortly before the expiration of the statutory deadline for action, Verizon had notified the Commission that it wished to narrow the scope of the forbearance it sought. Since the Commission did not issue a decision on the merits of the Verizon petition, and since Verizon never formally amended its petition, however, the scope of the forbearance "deemed granted" to Verizon, and the precedent, if any, that "deemed grant" created, is unclear.

Problem #2: Lack of Procedural Requirements for Forbearance

Since the forbearance provision was enacted, the Commission has received numerous requests for it to adopt procedural and substantive requirements to provide explicit guidance to interested parties and a consistent framework for its consideration of forbearance requests. While the Commission has managed to make correct decisions on some forbearance petitions, the lack of a specific procedural framework has made the Commission's job that much more difficult. Implementing basic rules could settle a variety of outstanding questions and concerns. For instance, rules could deal with how the Commission treats the use of confidential information. This issue first surfaced during consideration of the *Anchorage Forbearance Petition*[11] when the Commission

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[10] ACS, AT&T, Citizens Telecom, Embarq, Frontier, and Qwest each filed "me too" forbearance petitions based on the Verizon default grant.

[11] *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Section 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2007) ("*Anchorage Forbearance Order*"). In this petition, ACS sought and was partially granted forbearance from certain dominant carrier obligations and local network unbundling requirements.

refused a request by interested parties to utilize the confidential information from its recently decided *Omaha Forbearance Order*[12] even though this information established the framework used in determining the outcome. The Omaha framework has been cited in support of subsequent forbearance requests of a similar nature, and the Commission has relied largely on that framework. Most recently, the Omaha framework was utilized in the proceeding addressing Verizon's petitions for forbearance from unbundling and dominant carrier obligations in six major markets.[13] Confidential information must be protected, but interested parties should be able to know what standard is being used to determine whether forbearance is warranted.

Rules can also address the problem of "late" filed information – that is, information filed by the petitioner far past the initial filing date, including *ex parte* submissions close to (or even on the eve of) the statutory deadline. Such late filings in some cases have been used as key support to justify the Commission's decisions, but the information has been filed so late as to not permit adequate time, if any, for review or response by interested parties. Given the recent proliferation of forbearance petitions, the statutory deadline, and the

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[12] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005). ("*Omaha Forbearance Order*"), *aff'd sub nom. Qwest Corp. v. FCC*, Case No. 05-1450b (D.C. Cir. Mar. 23, 2007) *available at* http://pacer.cadc.uscourts.gov/docs/common/opinions/200703/05-1450b.pdf.

[13] *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172 ("*Verizon Six Market Forbearance Petition*"). Most recently Qwest has filed similar petitions for forbearance in the Denver, Minneapolis, Phoenix, and Seattle markets (the "*Qwest Four Market Forbearance Petition*") and Verizon has filed petitions seeking forbearance for the entire state of Rhode Island and the Virginia Beach MSA. The same issue is likely to resurface yet again in the context of those petitions.

significant resource burden forbearance petitions impose on the Commission, carriers should be required to submit "complete as filed" petitions at the outset of a proceeding or be subject to "resetting the clock" upon the filing of a complete record.

In the Omaha, Anchorage, and the Verizon Six Markets forbearance proceedings, the initial filings by the incumbent carrier in support of its petitions provided insufficient, irrelevant, and unverifiable data to support relief. This severely limited the value of comments filed by interested parties in response to those petitions, and it forced the Commission to request that the petitioner submit to the record additional support for its requested forbearance. The problem caused by the inadequacy of initial forbearance petitions is compounded due to the statutory deadline under which the FCC is required to act upon these petitions.

The procedural issues mentioned above also are compounded by the fact that incumbents can file and refile forbearance petitions at will. If a company's petition is rejected by the Commission, it can immediately refile that petition with only minor adjustments from the rejected petition. This places an enormous strain on FCC staff and resources as the Commission is obligated to devote significant resources to each petition when their efforts could be better focused on policy initiatives such as universal service reform or intercarrier compensation reform. Finally, the cost to the industry to fight each and every petition drains valuable capital that could be better spent on broadband investment.

On November 30, 2007, in response to a petition filed by XO and other competitive carriers, the FCC released a Notice of Proposed Rulemaking ("NRPM") seeking comment on whether forbearance procedures are necessary and what rules should be implemented. Members of this Subcommittee have expressed a desire that the FCC implement these procedures. I'd like to thank Congressman Stearns for his leadership last year in highlighting the need for the FCC to implement these rules. I'm confident that the Congressional interest is what spurred the FCC to issue the NPRM. Now, it is time for the Commission to issue an order adopting such rules.

The competitive industry will continue to be a major source of investment for broadband technologies and delivering advanced services to consumers and businesses. As Congress considers policies to encourage broadband access and next generation deployment there are two fundamental issues that must be addressed:

- **Protect legacy copper infrastructure as a valuable broadband resource**

  Congress should encourage the FCC to amend its rules to preserve access to copper facilities by subjecting all retirement proposals to a formal review process and a presumption that such retirements are not in the public interest. This is a necessary step for the U.S. to take, if it is to regain its position as a broadband leader.

- **Reform Section 10 of the 1996 Telecommunications Act**

  The introduction of HR 3914 is an important step to reform Section 10 by removing the "deemed granted" language. Congress should also encourage the FCC to implement necessary procedures to ensure the forbearance process is properly used.

By addressing these fundamental issues, Congress and the FCC can ensure certainty and stability in the telecommunications market and consumers and businesses will continue to benefit from competition, innovation and choice in broadband services. Thank you for the opportunity to appear before the Subcommittee today.

Mr. MARKEY. Thank you, Mr. Grivner, very much.

Our next witness is Ms. Cathy Avgiris, who is Senior Vice President and General Manager for voice services for Comcast. In addition to being the Nation's largest broadband provider, Comcast is also the Nation's fourth largest residential phone provider. We welcome you. Whenever you are comfortable, please begin.

STATEMENT OF CATHERINE AVGIRIS, SENIOR VICE PRESIDENT AND GENERAL MANAGER, VOICE SERVICES, COMCAST CABLE

Ms. AVGIRIS. Good afternoon, Mr. Chairman and members of the subcommittee. Thank you for the opportunity to testify today. My name is Catherine Avgiris and I am the Senior Vice President and General Manager of Voice Services for Comcast Corporation. I am currently responsible for overseeing all aspects of Comcast voice business. I last testified before the subcommittee on the E911 bill last year and I would like to congratulate this subcommittee and Congress for passing this important piece of legislation. It is good to be back with you today.

I am pleased to report that since I last testified, Comcast's voice service continues its rapid growth, as the cable industry continues to provide consumers with their first real competitive choice to the incumbent telephone companies since Congress passed the Telecommunications Act of 1996. Today, Comcast's voice service alone reaches more than 44 million homes nationwide. In just the last 3 years, more than 5 million customers have chosen the great savings, reliability, and convenience that our competitive service provides, and as a result of this phenomenal consumer demand, we are now the largest facilities-based competitive provider of residential voice service in the United States.

Facilities-based competition from all cable providers is delivering real savings for consumers and competition that has been delayed for nearly a decade by litigation and regulatory gamesmanship. Economic experts estimate that households will save $95 billion over the last 5 years and small businesses will save $16 billion as a result of this expanded competition in the voice business. That is a total of more than $111 billion in savings. Our actions and our investments prove that we believe in competition and we would rather compete with the incumbent local telephone companies in the marketplace than engage in regulatory battles with the FCC or in the halls of Congress. But the incumbents are still dominant with an 88 percent share of the market, and this gives them the ability and the incentive to frustrate innovation, choice, and competition, especially in those remaining areas where effective competition is dependent on mutual cooperation with competing providers.

Let me give you three examples. First, cable providers such as Comcast have to rely on incumbent telephone companies to interconnect with our network in order to provide true competitive choice. Interconnection on terms that are not just, reasonable, and non-discriminatory is tantamount to stopping competition dead in its tracks. Unfortunately, the incumbents continue to use interconnection as a weapon for impeding competition. For example, we are currently in a dispute with an incumbent that is refusing to interconnect with us. Put simply, denial of interconnection means denial of competition and denial of consumer choice. Other local telephone companies use their own tactics to delay or frustrate our entry, and as more consumers choose Comcast, the incumbents become more creative in developing roadblocks to competition.

Second, consumers find it critically important to keep their phone numbers when they switch providers. Incumbent telephone companies cannot be allowed to drag their feet to impede the number porting process. They must cooperate with their competitors to ensure that porting works smoothly. While wireless carriers have voluntarily agreed to allow their customers to switch their phone numbers to a new wireless provider in a few hours, the current industry standards for wireline providers allow the incumbents to take up to 4 business days to switch a number. But the reality is that customers typically have to wait a week to port their wireline number to Comcast, even though this transaction requires no more than a few hours, at most, to complete. Customers expect and should be given wireline porting that is as convenient and hassle-free as wireless porting. To that end, the FCC has proposed cutting the standard interval in half and Comcast strongly supports that proposal. Unfortunately, most of the incumbents have opposed that initiative. We hope that Congress or the FCC will implement this pro-consumer proposal, and I remind the Committee that number porting is a mutual obligation on both incumbents and competitors. We are ready, willing and able to port numbers more quickly as well.

Third, we know that one incumbent telephone company has attempted to undermine the number porting process through a practice known as retention marketing. Confidential information exchanged between carriers for the sole purpose of affecting the port is being used to keep existing customers from switching their voice service to a competitor. In response to a complaint, the FCC recently concluded that this practice is improper, and just last week the D.C. Circuit Court rejected Verizon's attempt to stay that important ruling. As these examples show, Congress and the FCC cannot assume that just because facility-based voice competition has emerged, all is well. The incumbents will continue to look for ways to stifle competition, even as they call for less regulation of their own voice business.

In closing, we note our support of H.R. 3914 and believe that there should be no regulatory forbearance by default. Thank you again for the opportunity to testify today and I look forward to answering any questions.

[The prepared statement of Ms. Avgiris follows:]

Summary of Written Testimony of Catherine Avgiris
July 22, 2008

Comcast is the largest facilities-based competitive provider of residential voice service in the United States, attracting more than five million customers in the last three years. Comcast's ability to enter the marketplace and to compete with incumbent telephone companies was made possible by Congress's passage of the landmark Telecommunications Act of 1996 ("the Act").

Comcast is not the same company it was a decade ago – we have invested billions of dollars in our network, spawning a multitude of exciting and cutting-edge innovations. These investments have spurred innovation by our communications industry competitors and resulted in great consumer benefits. Economic experts estimate that households will save $95 billion over the next five years, and small businesses will save $16 billion, as a result of this expanded competition in the voice business – that's a total of more than $111 billion in residential and small business savings.

Comcast believes in competition in the marketplace, but the dominance of the local telephone companies has given them the ability and incentive to frustrate innovation, choice, and competition, especially in those few remaining areas where effective competition is dependent on mutual cooperation with competing providers. The dominance of the incumbent telephone companies can be seen in three examples.

First, cable providers such as Comcast have to rely on incumbent telephone companies to interconnect with Comcast's network in order to provide true competitive choice. This reliance is often used as a weapon by the incumbent telephone companies to impede fair and open competition. Second, incumbent telephone companies take longer to process number ports than is reasonable. Comcast supports the FCC's efforts to reduce the time it takes to port a number and to eliminate burdensome rules that frustrate the process. Third, we know that one incumbent telephone company has attempted to undermine the number porting process through a practice known as "retention marketing," whereby the incumbent uses confidential information to keep existing customers from switching their voice service to a competitor. This practice has long been forbidden by the FCC and should remain so.

As these examples show, Congress and the FCC cannot assume that just because facilities-based voice competition has emerged, all is well. The incumbents will continue to look for ways to stifle competition – even as they call for less regulation of their voice business because of the emergence of competition. The incumbents cannot earn deregulation if they persist in behaving anti-competitively, and we urge this Congress to send that message in no uncertain terms.

Part and parcel of sending that message is passing H.R. 3914, which requires the FCC to consider and expressly rule on the competition factors in the current law before it grants forbearance, rather than having forbearance granted automatically if the FCC does not act within the statutory time period. Several key provisions of the Act often are still necessary to foster innovation, competition, and value in the voice communications market. There should therefore be no forbearance by default.

Testimony of Catherine Avgiris
Senior Vice President and General Manager of Voice Services
Comcast Corporation

before the

Committee on Energy and Commerce
Subcommittee on Telecommunications and the Internet
United States House of Representatives

"Issues in Telecommunications Competition"
July 22, 2008

Good afternoon Mr. Chairman and Members of the Committee. Thank you for the opportunity to testify today on "Issues in Telecommunications Competition."

My name is Catherine Avgiris and I am the Senior Vice President and General Manager of Voice Services for Comcast Corporation. I am currently responsible for overseeing all aspects of Comcast's voice business. I last testified before the Committee on the E911 bill last year, and I congratulate this Committee and Congress for passing this important piece of legislation. It is good to be back with you today.

I am pleased to report that since I last testified, Comcast's voice service continues its rapid growth, as the cable industry continues to provide consumers with their first real competitive choice to the incumbent telephone companies since Congress paved the way for that competition through the passage of the landmark Telecommunications Act of 1996 ("the Act"). Today, Comcast's voice service alone reaches more than 44 million homes nationwide. In just the last three years, more than five million customers have chosen the great savings and convenience that our competitive service provides, and, as a result of this phenomenal consumer demand, we are now the largest facilities-based competitive provider of residential voice service in the United States and the fourth largest voice provider in America. Comcast Digital Voice has been the driving force behind the success of Comcast's "Triple Play" package, which offers consumers the option of receiving digital voice, cable, and high-speed Internet services from one company, for one low price, with innovative features. We also serve more than 24 million cable customers and more than 14 million high-speed Internet customers.

We are not the same company we were a decade ago – we have invested billions of dollars in our network, spawning a multitude of exciting and cutting-edge innovations. We now offer consumers more cable channels, more video-on-demand, more high-definition video programming, and more advanced digital video recorders than ever before. In addition, more than 99% of our customers have access to our leading residential broadband Internet service, and we routinely increase our upload and download broadband speeds for the benefit of our customers.

Our investments have spurred innovation by our communications industry competitors as well and resulted in great consumer benefit – bringing more features and advanced services to consumers at better prices. Our investments have paved the way for the creation of exciting new online business models such as eBay and Amazon.com, large networking communities such as Facebook and MySpace, and powerful Internet technology leaders like Google.

The demand for voice competition – competition that was delayed for nearly a decade after the Act was passed by litigation and regulatory gamesmanship – has been met by cable's facilities-based competition. Just as cable's investment in fiber-based networks drove the broadband revolution in America, so too have we driven a revolution in voice services and consumer savings. Economic experts estimate that households will save $95 billion over the next five years, and small businesses will save $16 billion, as a result of this expanded competition in the voice business – that's a total of more than $111 billion in residential and small business savings.

Our actions prove that we believe in competition, and that we would rather compete with the incumbent local telephone companies for customers in the marketplace than engage in regulatory battles at the FCC or in the halls of Congress. But the incumbents are still dominant and their continued market dominance gives them the ability and incentive to frustrate innovation, choice, and competition, especially in those few remaining areas where effective competition is dependent on mutual cooperation with competing providers. Let me give you three examples.

First, for voice competition to work, the 12% of residential customers who so far have chosen cable voice and other competitive voice providers must be able to connect to the 88% of residential customers who still take voice service from the incumbent telephone companies. Interconnection of our networks with theirs remains a prerequisite for competition. Interconnection on terms that are not just, reasonable, and non-discriminatory is tantamount to stopping competition dead in its tracks. Unfortunately, the incumbents continue to use interconnection as a weapon for impeding competition. For example, we are currently in a dispute with an incumbent that is refusing to interconnect with us, as required under the Act. Put simply, denial of interconnection means denial of competition and consumer choice. Other local telephone companies use their own tactics to delay or frustrate our entry, and as more consumers choose Comcast, the incumbents become more creative in developing roadblocks to competition.

Second, consumers feel it is critically important to be able to keep their current phone numbers when they switch providers, and the incumbents need to cooperate with the competitors to ensure that this number porting works smoothly. We support the FCC's efforts to reduce the time it takes to port a number and to eliminate burdensome rules that frustrate the process. Incumbent providers cannot be allowed to drag their feet to impede the number porting process. While wireless carriers have voluntarily agreed to allow their customers to switch their phone numbers to a new wireless provider in a few hours, the current industry standard for wireline providers allows the incumbents to take up to four business days to switch a number. The reality is, though, that customers typically have to wait a week to port their wireline number to Comcast, even though this transaction requires no more than hours, at most, to complete. Customers expect, and should be a given, wireline porting that is as convenient and hassle-free as wireless porting. To that end, the FCC has proposed cutting the standard interval in half, and Comcast strongly supports that proposal. Unfortunately, most of the incumbents have opposed that initiative. We hope the FCC will implement this pro-consumer proposal, and I remind the Committee that number porting is a mutual obligation on both incumbents and competitors. We are ready, willing, and able to port numbers more quickly, too.

Third, we know that one incumbent has attempted to undermine the number porting process through a practice known as "retention marketing." Here is the truth behind "retention marketing": when a customer decides to switch from an incumbent like Verizon to a competitor like Comcast, Comcast shares that fact with Verizon so that the phone number can be ported over to Comcast. Over the last year, Verizon has used this confidential information, which is supposed to be used solely to make a quick and efficient number port, to do everything it could to keep the customer from leaving Verizon. The FCC has long forbidden retention marketing during the porting interval, because the potential for abuse is obvious. But starting last year, Verizon unilaterally and openly defied the FCC's ban. In response to a complaint from competitors, the FCC recently strongly reinforced that this practice is improper, harmful to competition, and violates the Communications Act of 1934, as amended. And just last week the DC Circuit rejected Verizon's attempt to stay that important ruling.

As these examples show, Congress and the FCC cannot assume that just because facilities-based voice competition has emerged, all is well. The incumbents will continue to look for ways to stifle competition – even as they call for less regulation of their own voice business because of the emergence of competition. The incumbents cannot earn deregulation if they persist in behaving anti-competitively, and we urge this Congress to send that message in no uncertain terms.

And that leads to my closing point: Comcast supports H.R. 3914, which requires the FCC to consider and expressly rule on the competition factors in the current law before it grants forbearance, rather than having forbearance granted automatically if the FCC does not act within the statutory time period. Several key provisions of the Act often are still necessary to foster innovation, competition, and value in the voice communications market. There should be no forbearance by default.

Thank you again for the opportunity to testify today and I look forward to answering any questions.

Mr. MARKEY. Thank you very much.

And our final witness is Mr. Jonathan Banks, who is Senior Vice President for Law and Policy at U.S. Telecom, a trade association consisting of the Nation's largest phone companies. Prior to joining U.S. Telecom, Mr. Banks held positions with Bell South and with the Federal Trade Commission. We welcome you, sir. Whenever you are ready, please begin.

STATEMENT OF JONATHAN BANKS, SENIOR VICE PRESIDENT, LAW AND POLICY, UNITED STATES TELECOM ASSOCIATION

Mr. BANKS. Thank you, Chairman Markey, Ranking Member Stearns and members of the subcommittee, and thank you for the opportunity to testify before you.

Consumers today are clearly benefiting from an accelerating convergence of technologies that have created the sort of competition that we were all looking for in 1996. Today, Comcast has over 5 million voice customers, Verizon has over 1 million video customers, and 16 percent of the households in this country have cut their wired connection to the telephone world. Telecoms are in the video business, cable is in the voice business, and telecom, cable and wireless are all in the broadband business. Our companies' investment in network upgrades and competitive video platforms is one example of how consumers are benefiting from lower prices and higher quality service today that we all would have envied in 1996. And let me say, there is nothing that is more important to our companies than winning new broadband subscriptions in the market and they are doing everything they can to sign up customers, as is Comcast, other cable companies, and wireless companies.

This progress has created the urgent need for regulatory parity more broadly than just within the telephone industry but across all these platforms. The United States Telecom Association represents broadband service providers from the very largest to the very small companies, from urban providers to purely rural providers, and our members provide broadband on both a fixed basis and on a mobile basis. We have companies that are very small that are providing IP-based video services in competition with cable. We have companies that are small and large operating wireless broadband networks.

So let me step back for a second and give you an overall perspective of how we see all of our industries contributing to the economy. The last several years have brought telecom, media and technology together into one ecosystem where each of our sectors depends on the other for innovation and for developing products to attract consumers. Telecom, media, and technology, or TMT, is now the fourth largest gross domestic product, and it is the leading contributor for growth and productivity across our entire economy. About half of our Nation's productivity growth comes from the TMT sector. The TMT sector also generates over 10 million jobs, many of which are high paying and in high-growth sectors of the economy. In fact, if you take the annual investment made by the U.S. government to put a man on the moon, add to it the annual investment to create the interstate highway system, you will find that that comes in today's dollars to less than half of what our private companies are investing in broadband networks, in software, and in technology, and it is that investment that is driving the economic growth in jobs that come from our sector. So when we look at policy issues, we look to see that this healthy investment trend will not be harmed by regulatory decisions, and a key ingredient to the continued success of the investment and the pro-consumer benefits are regulatory parity across the sectors so that the possibilities for innovation are as wide as possible.

Our members support the goal of H.R. 3914 to improve the forbearance process. Congress created the process in 1996 in recognition of the fact that the communications industry was changing rapidly and that many FCC regulations were either obsolete in 1996 or would soon be obsolete. In fact, Congress viewed the importance of regular review of FCC rules to be so important that not only did they pass section 10 but they added section 11 to the Act, which required the FCC biannually to review its rules and regulations and get rid of the rules and regulations that were no longer necessary to the public interest. The FCC has effectively read section 11 out of the Act, leaving only section 10as a vehicle for updating telecommunications regulations.

I think we have discussed some of the statistics here. Since 1996, there have been 87 petitions that the FCC has issued orders on, and the orders have roughly put a third of the petitions in the denied status, a third in granted, and roughly a third in partial grants or denials. So the FCC has acted judiciously on these petitions. We are certainly aware of the Verizon petition and the controversy that that has engendered, which I do think is in large part due to the absence of any accompanying written order making review difficult for Congress or the courts and difficult for anyone to ascertain the exact scope of the order. However, the FCC has taken some steps to improve this process. They have issued a notice of proposed rulemaking to improve the procedures for forbearance and this Congress is considering H.R. 3914, which to us does establish a read deadline for FCC action, and without a real deadline, FCC action can be delayed easily for years, putting the industry that labors under a lot of regulations at a distinct disadvantage.

My written testimony discusses a number of the important issues that you have set out here for comment and that the other panelists have commented on, and I would be happy to discuss those with you. Thank you.

[The prepared statement of Mr. Banks follows:]

Statement of

Jonathan Banks
Senior Vice President, Law & Policy
United States Telecom Association

To The
Subcommittee on Telecommunications and the Internet
Committee on Energy and Commerce
U.S. House of Representatives

July 22, 2008

Chairman Markey, Ranking Member Stearns, members of the subcommittee: Thank you for this opportunity to appear before you to discuss competition issues and comment on H.R. 3914, the "Protecting Consumers through Proper Forbearance Procedures Act."

Consumers are clearly benefiting from the accelerating convergence of technologies that allows for vibrant, cross-platform competition in voice, video and broadband. This progress also creates the urgent need for regulatory parity to ensure that consumer choices, rather than uneven policies, shape the future of this vibrant and innovative marketplace and drive the investments needed to expand and enhance the nation's communications infrastructure.

The United States Telecom Association represents broadband service providers in urban and rural areas, as well as manufacturers and suppliers. Our member companies provide broadband on a fixed and mobile basis, and offer an array of voice, data, and video services. Put simply, we design, build, and manage the advanced networks that bring broadband's many possibilities into communities across this country.

The last several years have brought the once separate worlds of telecom, media, and technology together, where the health of each segment—its ability to innovate and invest—has a ripple effect on the health of the others and their capacity to deliver new choices to consumers and to our economy—advancements ranging from entertainment to education, health care to jobs.

Telecom, media, and technology—the TMT sector—is a linchpin of our economy. TMT is the fourth largest contributor to our GDP, and it is <u>the</u> leading driver of growth and productivity in our economy. About one-half of our economy's productivity growth comes from this sector. In addition, the TMT sector generates over 10 million jobs, providing 8% or more of non-farm employment. Many of these jobs are high-wage jobs in high-growth areas. Within TMT, the two biggest employers are the wireline and semiconductor segments, each generating half a million jobs.

The key to the vitality of this sector, and the jobs, economic growth, and innovation it creates, is ongoing and robust investment. Over the last five years, investment in this sector has returned to the levels reached during the heights of the Internet boom. Today, the TMT industry is investing about $400 billion in software and equipment on an annual basis accounting for about 40% of total U.S. non-structural investment. That is, leaving out investment in things like buildings and bridges, the technology, media, and telecom industries are responsible for 40 cents of every dollar invested in our economy.

Investment in communications equipment also has returned to levels not seen since the heyday of the 1990s Internet boom. These investments are no longer driven by speculation and the hope of getting rich quick. Instead, responding to a pro-investment climate and competitive forces, firms are deploying fiber in the last mile of the network and a broad array of network upgrades to bring consumers improved broadband and video services. The Yankee Group recently analyzed investment trends in our sector. That analysis clearly demonstrates the breadth and depth of communications provider investments and the competitive pressures driving them. Key investors include the AT&T, Verizon, T-Mobile and Sprint, XO and Century Tel, Sprint and Clearwire, and cable companies. The Yankee Group is now forecasting $60 billion worth of U.S. communications infrastructure investment this year and more than $70 billion next year.

If you take the annual investment made by the U.S. government to put a man on the moon...add the annual taxpayer investment in building the interstate highway system across our nation...and convert the sum into today's dollars...it's about half what private broadband companies will invest this year in our nation's communications infrastructure—and hence, in the choices and service available to consumers across this country.

When we examine policy issues, we look to see that this healthy trend in investment and competition will, at a minimum, not be harmed. Our economy's health, growth and global competitiveness depend on continued investment and innovation. Regulatory parity is essential to this outcome, and the efforts both here in Congress and at the FCC to achieve regulatory parity among competing providers have been extremely important to creating the climate that has supported today's levels of investment. The FCC's 2005 order removing regulatory handicaps on telecom-provided broadband in order to level the playing field with cable-provided broadband is a case study on the public benefits of parity. Following that Order, consumers began choosing telecom broadband at increasing rates, service offerings increased, and prices fell.

There are number of telecom competition issues you have asked us to address, including the appropriate role of forbearance, and I would like to offer some comments on each.

H.R. 3914, Protecting Consumers through Proper Forbearance Procedures Act.
Mr. Chairman, we appreciate the opportunity to comment on H.R. 3914, the "Protecting Consumers through Proper Forbearance Procedures Act." Our members support the goal of this proposed legislation to improve the forbearance process at the FCC. Congress created the forbearance process in the 1996 Act in recognition of the fact that the communications industry was entering a period of rapid change in which FCC rules and regulations could quickly become obsolete. The forbearance process created a route for

companies to bring to the FCC's attention regulatory burdens that no longer serve consumers and competition. The statute provides a clear set of public interest criteria for the FCC to use in evaluating petitions as well as a deadline for decision. The one year statutory deadline, which provides ample time for resolution, is routinely extended by the FCC for an additional 90 days, and rulings on forbearance petitions are generally issued only at the end of this extended 15 month period.

There are currently 12 forbearance petitions pending at the FCC – six filed by what were traditionally Bell companies and six by smaller wireline and wireless carriers and a VoIP provider. Since 1996, the FCC has issued orders addressing 87 petitions, acting on about seven petitions per year. The FCC has granted 20 petitions, or 23%, denied 32, or 37%, and granted in part and denied in part the remaining 35 petitions. Since 1996, only four petitions have been deemed granted. One was unopposed, two involved service for the disabled, and the remaining one concerned a petition for broadband relief that was deemed granted based on a tied vote.

Our member companies view forbearance as one of the important tools created by Congress in the 1996 Act to ensure that outdated regulations that are no longer in the public interest are removed from the FCC's regulatory playbook. Section 11 of the Act shares a similar aim of removing outdated regulations, requiring the FCC to conduct a biennial review of communications regulations and to jettison those that no longer serve the public interest. Unfortunately, section 11 has been all but read out of the statute, increasing the importance of maintaining a viable and speedy forbearance process.

There has been controversy over the FCC's processes for evaluating forbearance petitions. In response to a petition from a number of CLECs, in November of last year, the FCC began a rulemaking proceeding to consider changes in its forbearance procedures. In addition, the deemed granted status of the Verizon broadband petition – a single petition out of 87 that the FCC has acted on – has also occasioned controversy. That controversy is due in large part to the absence of an accompanying written order, making it more difficult for Congress or the courts to ascertain the exact scope of relief granted or the legal rationale supporting the agency action.

The controversy over that one unusual outlier, however, should not obscure the fact that the forbearance process for removing rules and regulations that are no longer in the public interest is important to keeping communications regulation in synch with a rapidly changing market. As the pace of change in communications continues to accelerate in our broadband world, there must be some means for obtaining relatively quick review and elimination of rules and regulations that stand in the way of competition and the public interest. We look forward to working with the Committee to ensure that the forbearance process achieves its goals in a way that also provides competitors and the public with the clarity and transparency they deserve.

Pole Attachments

The current methodology for regulating pole attachments is in dire need of reform. Today, companies can pay wildly different rates for attaching to poles to provide directly competing broadband services. A broad survey of our members covering millions of poles corroborates the general consensus that incumbent local exchange carriers companies generally pay the highest rates, and on average, those carriers pay roughly four times what cable companies pay, and double what competitive local exchange carriers pay, despite the fact that all of these companies are competing for the same broadband customers. From a policy perspective, this lack of parity is indefensible as it imposes higher costs on one set of competitors, skews broadband deployment, and denies consumers the benefits of a level competitive playing field.

The FCC has recognized that its current silo approach to pole attachment pricing is not in the best interests of consumers or competition, and has issued a proposed notice of rulemaking that tentatively concludes that all broadband pole attachments should be treated on a parity basis. USTelecom strongly supports this conclusion and the Commission's legal authority to implement it. Section 224 requires the Commission to ensure that "the rates, terms and conditions for pole attachments" are just and reasonable. This is a broad mandate that applies to pole attachments by "cable television systems" and all providers of "telecommunications services." Using this authority to advance broadband parity, deployment and competition is fully consistent with the Commission's overall mandate and its responsibility to serve the public interest.

Pole attachment rates should be based on a methodology applicable regardless of the attacher's historical status as a telephone company, cable television system, or competitive carrier, or the type of service it once delivered. In today's broadband world, this means a methodology for broadband services that ensures competitive parity. Of course, any methodology must ensure that pole owners, including electric utilities that own the decided majority of poles, are adequately compensated for their facilities. USTelecom believes that the Commission can put competing broadband providers on a parity footing for pole attachments within a framework that maintains current revenue levels for pole owners and, importantly, helps drive broadband investment and build-out in those regions of the country most in need of it – namely, rural America.

Retention Marketing

Retention marketing is also about competition and parity. This marketing benefits the consumer and spurs competition by allowing a customer's current service provider to reach out to its customer and make its best offer to keep that customer. The customer is in the driver's seat to make the best deal. It is the essence of free market competition and consumer choice.

A recent FCC order has tilted the playing field away from the consumer and towards cable companies. Cable companies are ramping up their retention marketing techniques to keep their customers, but voice providers have been barred from doing the same when their customers decide to take their phone numbers to cable.

The Commission's order greatly restricts the ability of communications providers to make consumers better offers during this time period. The Commission ruled that the customer information used in the number porting process is the proprietary information of the new service provider. This is not the case when consumers are undertaking to transfer their business from cable television providers to competitive providers. Number porting is a consumer service, in which the carrier is acting as the customer's agent. But because cable companies force their video customer to contact them directly to make a switch, they have a retention marketing advantage that the Commission's recent order denies to other communications companies. If the company learns about the customer's decision to switch providers through the number porting process rather than from the customer directly, it means the company cannot engage in truthful speech to its own customer during that critical time between when the customer decides to switch to a new carrier and when the switch takes place. The lack of regulatory parity created by this ruling distorts competition and means consumers lose opportunities to get better value from their communications companies.

Number Porting

USTelecom and its member companies have been instrumental in bringing number portability to American consumers and have made significant contributions toward making portability more efficient. For over a decade, our members have seen number portability become an increasingly important facet of a competitive telecommunications service marketplace. However, the introduction of new communications platforms has made the process more complex. Our members have a strong interest in improving the efficiency of the number porting process, and we agree that intermodal porting is an important component of porting in general.

As long ago as 2003, USTelecom formed a joint working group with CTIA to address wireline-wireless porting issues. The group made a number of improvements to the intermodal porting process. The industry continues to work through the North American Numbering Council and the Ordering and Billing Forum to further improve and streamline the porting process. The FCC's recent order reducing the number of mandatory fields of information for porting has further reduced the burdens of submitting a porting request.

The FCC is currently considering a rulemaking to shorten the interval for simple wireline ports from four days to 48 hours, the current standard for ports between wireless carriers. Two issues in particular deserve careful consideration when evaluating a mandate for shorter porting intervals. The first is consumer benefit. Currently, the vast majority of porting requests received by our members set port dates that are longer than the current four day interval. Second, the costs of mandating quicker ports are worth careful consideration. Currently, many of our members do not have mechanized systems in place to handle port requests. The North American Numbering Council has determined that in order to meet a 48 hour deadline, these companies would have to install computerized systems to handle porting requests. The costs of these forced upgrades will be disproportionate to the relatively small number of requests these carriers receive. It is inappropriate to burden these carriers and their customers with costs of this magnitude. At a minimum, a means should be provided for these companies to recover the costs of creating new computerized systems without burdening their retail customers.

Phantom Traffic

Comprehensive reform of the system under which carriers compensate each other for carrying traffic is long overdue. The Commission continues to consider comprehensive reform, and the broadly-supported Missoula Plan continues to provide the best model for that reform. While we are hopeful that the Commission will address comprehensive reform this November, the particular problem posed by phantom traffic must be dealt with this year.

When a customer makes a call, it travels over the facilities of the company to which the customer subscribes, and often over the facilities of one or more other companies. A system of intercarrier compensation is used to compensate the companies whose network facilities are used to complete the call. Currently, a significant amount of telephone (voice) traffic that is originated by the customers of one company and terminated to the customers of another company is not adequately identified, making appropriate billing for that traffic difficult or impossible.

The rapid growth in this unbillable or "phantom" traffic was first brought to the Commission's attention nearly three years ago. In the absence of Commission action, many carriers report that the amount of traffic being received without calling party identifying information has continued to grow. USTelecom members report the percentage of traffic received without calling party number information ranges from a low of 10% to a high of 39.75%. Moreover, some USTelecom members report that they receive higher levels of phantom traffic in areas with higher rates—suggesting that some companies are intentionally stripping signaling information in order to avoid paying these charges.

In proceedings before the FCC, it has been estimated that phantom traffic is costing telecom companies that terminate calls anywhere from $600 million to $2 billion annually in uncollectible charges. Because unidentified traffic has continued to grow, and because small and mid-size carriers are particularly hard-hit by these revenue losses, this problem presents an increasing risk to broadband deployment for consumers in those areas of the country most in need of new capital investment – namely, unserved and underserved communities, particularly in rural America.

Though there are differences in some details, a broad array of communications associations support improved call-signaling rules including: USTelecom, NECA, ITTA, CTIA, NCTA, COMPTEL, and the VON Coalition, as well as a broad cross-section of companies. USTelecom has put before the Commission a detailed proposal on phantom traffic that enjoys very broad support. The proposal applies six straightforward obligations on all traffic originating on or terminating to the public switched telephone network (PSTN). In broad summary form, the proposal consists of the following elements:

• Every originating provider must transmit in its signaling, where feasible, the telephone number received from or assigned to the calling party.

• Every provider must transmit without alteration, except where not feasible, or where PSTN industry standards would dictate otherwise, the telephone number information that it receives from another provider in signaling.

• It should be deemed an unreasonable practice for a provider to route traffic for the purpose of disguising the identity of the financially responsible provider or the traffic's originating jurisdiction.

• The carrier passing traffic to the terminating carrier is responsible for performing a local number portability query before passing the call to the local network of the terminating carrier.

• The Commission should provide incumbent local exchange carriers the ability to invoke the 251/252 negotiation/arbitration process with other carriers with which they exchange traffic.

• The Commission should commit to aggressively enforce these rules and obligations.

I am pleased to report the USTelecom proposal has received a very positive response from other segments of the telecommunications industry. ITTA, representing a number of mid-sized carriers (including Qwest, Embarq and CenturyTel) who have been very active advocates of Commission action to address phantom traffic, has filed in unqualified support. Additionally, CTIA has filed in support of USTelecom's proposal with what we believe to be very minimal qualifications. NuVox Communications, One Communications Corp. and XO Communications, some of the most prominent facilities-based competitive LECs, have also filed jointly in support of nearly all of USTelecom's phantom traffic proposal, noting the rules in USTelecom's proposal are consistent with previous filings they have made on this issue.

We thank and commend the eight bipartisan Members of the Energy and Commerce Committee, led by Representatives Baldwin and Terry, who in March 2007 recognized the importance of this issue and wrote to the FCC urging quick action to address the phantom traffic problem.

To that end, in the Senate, S.2919, "The Signaling Modernization Act of 2008," creates an obligation that voice communications service providers ensure that calls contain sufficient information to facilitate intercarrier billing. It requires the FCC to establish rules implementing these requirements within 12 months of enactment. USTelecom supports enactment of this legislation, which has seven bipartisan cosponsors on the Senate Commerce Committee. While there is no House companion bill, we hope that upon Senate approval this Committee will act quickly and favorably on the bill.

Mr. Chairman, I thank you for the invitation to join you and to share our perspective. We look forward to working with you and the members of the Committee on policies aimed at bringing the full promise of broadband to all Americans.

Mr. MARKEY. Thank you, Mr. Banks, very much. Now we will turn to questions from the subcommittee members.

Ms. Avgiris, your testimony states that H.R. 3914, the legislation that Mr. Dingell and I have introduced, would prevent forbearance by default and force the Commission to expressly rule on a petition so that it is not automatically granted. Does Comcast support passage of H.R. 3914?

Ms. AVGIRIS. Yes.

Mr. MARKEY. Mr. Salmon, could you give us a yes or no on that?

Mr. SALMON. Unequivocally yes.

Mr. MARKEY. Ms. Herda?

Ms. HERDA. We agree as well.

Mr. MARKEY. Mr. Grivner?

Mr. GRIVNER. Yes.

Mr. MARKEY. Mr. Banks?

Mr. BANKS. We would like to work with the Committee to ensure that there is some way that the FCC has a real deadline to act.

Mr. MARKEY. Mr. Banks, your testimony indicates that you support the goal of H.R. 3914 to improve the forbearance process at the FCC, and I agree that the forbearance process does need reform. But H.R. 3914 does not address the FCC process but rather the deemed granted loophole. Do you support elimination of the deemed granted loophole or not?

Mr. BANKS. We are concerned that simply eliminating the deemed granted status without some other inducement to force the FCC to act would leave us with outdated regulations for years and years and years and no way to get out of them.

Mr. MARKEY. So even with good congressional oversight, you don't think that we can keep the FCC accountable to our intent?

Mr. BANKS. I think congressional oversight helps but the FCC's past record suggests that things do sit for years after court remands, for example, without action.

Mr. MARKEY. Mr. Banks, under section 10, do you agree that automatic forbearance from interconnection, for instance, could occur on a two-to-two tie?

Mr. BANKS. Yes.

Mr. MARKEY. Don't you agree that such sweeping action is unfair on a tie vote or through agency inaction?

Mr. BANKS. There is clearly legitimate concern over agency inaction and tie votes, yes.

Mr. MARKEY. If for 221 years the Supreme Court on a four-to-four tie had to agree with the person who had brought the case and whoever brings a case can get it to four-to-four wins rather than forcing a five-to-three vote to change the laws of the United States, that that would be quite a different America that we would live in if you did not have to have a majority of the Supreme Court to change a law. Four-to-four would change it. And so that is kind of at the heart of what we are doing. On our committee here, if it is 27 to 27, you lose. If it is eight to eight, you lose. If it is four to four, you lose. You have to get a majority to change the status quo. So this standard I don't think should be any different for the FCC, do you think, Mr. Banks?

Mr. BANKS. I think you have a very fair point about the difference between the Supreme Court rules, for example, and the FCC rule on forbearance here.

Mr. MARKEY. Now, Ms. Herda, you have heard proposals from others that pole attachment rates should be made uniform by making cable operators pay more and telecom companies a little less. What, in your view, are the implications for broadband deployment of such a plan?

Ms. HERDA. Well, I think that with regard to the pole attachment rates, I am not an expert in that area, but I understand that the FCC has gone through quite a process to establish the cable rate, and that various PUCs have also agreed that the cable rate is the appropriate rate and it has been held up in the federal courts, so we advocate the cable rate there. But I think at the end of the day there needs to be a process to determine if that rate is the correct rate and that a fair cost recovery is appropriate.

Mr. MARKEY. Should we insist on a rate that is uniform and also promotes broadband deployment?

Ms. HERDA. Yes.

Mr. MARKEY. You think we should?

Ms. HERDA. Yes.

Mr. MARKEY. Mr. Grivner, what are the implications for your business and others if Verizon and others disable the copper loop facilities to the home or business?

Mr. GRIVNER. Well, for our business, it removes our ability to provide broadband access to our customers, and the copper loop, as I said in my opening remarks, is alive and doing very well. There have been technologies developed in this country that have expanded the capabilities of copper loops from, as I said earlier, 10 megabit, now up to 100 megabits of capability out of simple copper that exists in the ground today. So I think it would be devastating certainly for our businesses but I think it is devastating—when we talk about broadband availability, I think it is. The availability is there, it is just a matter of using the technology that exists.

Mr. MARKEY. But they don't allow the copper to be dug up in Japan or in Great Britain, but here in the United States where we are supposed to be the leader——

Mr. GRIVNER. We got a notice in the mail that the copper has been removed and good luck.

Mr. MARKEY. How much have you invested in your network already, Mr. Grivner?

Mr. GRIVNER. We have invested over $7 billion and actually have increased our spending over the last 2 years. We have invested another $400 to $500 million over the last 2 years in IP technologies to bring broadband to our customers.

Mr. MARKEY. Thank you. My time has expired. The chair recognizes the gentleman from Florida, Mr. Stearns.

Mr. STEARNS. Thank you, Mr. Chairman.

You know, listening to both sides, and I think Ms. Avgiris makes some good points. I can empathize with both sides, but what we have here is, the question is, do we need to regulate? Affirmative action is needed to prove that we need to regulate here. Now, there is a possibility that we could have a compromise, so I think that is what myself and my staff are looking at here. Knowing the strong opinions of both sides here, but Mr. Banks, wasn't the whole point of the deemed granted language to make sure the FCC acts on forbearance petitions?

Mr. BANKS. Yes, sir.

Mr. STEARNS. So let me just go to each of you, a question for each person on the panel, and just give me your honest answer. I think it is critical that we need the deemed granted language but I agree that the FCC process needs to be reformed. I think, Mr. Chairman, there is a possibility we can get bipartisan legislation here, and here is what I would suggest. Short of eliminating the deemed granted language, the question would be for the panel, what kind of reforms would you suggest to make sure that the forbearance process with the FCC is more transparent and runs smoothly? That is, for example, when the process is nearing the end, no one can come back at the last minute and submit a whole new affirmative plan in which you don't know anything about it and then you have to answer, which goes on. So wouldn't things like deadlines for the filing of amendments and additional evidence address most of the concerns that have been expressed here and wouldn't that be the crux of what we could do as reform so that you folks, and I am talking to Ms. Avgiris, your folks would not be surprised. So I am offering here what I think might be a compromise language which is reform at the FCC.

So why don't I start with Mr. Salmon and then I work on down, just what do you think of the suggestion I had?

Mr. SALMON. Thank you, Mr. Chairman, Ranking Member Stearns. You pose some very, very provocative thoughts. We would love to see widespread reform of section 10 but we believe very, very strongly that Chairman Dingell's bill is a very, very good start. I think Chairman Markey probably put it as good as I can put it. It is a very undemocratic process to allow a two-two vote to constitute a victory or a majority. There is no other body ever in a democratic society that I know of where that kind of thought process goes on. It certainly never went on here. It doesn't go on in the Supreme Court. But additionally, Mr. Banks said that their goal is to get rid of antiquated rules and regulations. If all the forbearance process was used for was cleanup language we would probably be a little bit more comfortable with the process, but the whole forbearance process is used to completely undo the entire Act. It is used to completely obfuscate all the other rules and get rid of the——

Mr. STEARNS. You know I don't have much time, so I need for everybody else to have a chance, but I ask each of now, Ms. Herda, the compromise I suggest, do you think that would be something you could accept?

Ms. HERDA. I think obviously process improvements would certainly help but the problem that we have is that when the FCC fails to act, it is the competitors that get hurt in the process with the deemed granted, and we get punished for that. I am not sure that any process improvement is going to improve that situation.

Mr. STEARNS. So things like deadlines for the filing of amendments, real deadlines, and additional evidence, you think that would be an improvement?

Ms. HERDA. I think they should have deadlines. I think that is—

Mr. STEARNS. I mean real deadlines.

Ms. HERDA. But if they don't meet the deadlines, then to grant it after things aren't met is the problem.

Mr. STEARNS. Let me go to Mr. Banks because I think you are alone here. Mr. Banks, go ahead. I will give you an opportunity to speak.

Mr. BANKS. I think the FCC is an open docket in which they have gotten lots of suggestions for process improvements and we have to keep in mind that the people who use forbearance are some of the big telephone companies but many of the small- and medium-size companies who use it, right now there are 12 forbearance petitions pending at the FCC.

Mr. STEARNS. No, take my suggestion. What about deadlines for the filing of amendments, real deadlines so that the CLECs could see this early on, know what is at stake and there is no further going on.

Mr. BANKS. So there are definitely some process improvements that I think——

Mr. STEARNS. Do you think the process improvements I talked about you could accept?

Mr. BANKS. Yes.

Mr. STEARNS. Do you think that is a compromise?

Mr. BANKS. Yes.

Mr. STEARNS. I hear from you that you are willing to work on the Dingell bill but you are not necessarily a supporter of it as are these folks, so I am offering you sort of compromise that you are saying you could accept?

Mr. BANKS. Yes.

Mr. STEARNS. OK. Mr. Grivner?

Mr. GRIVNER. I think we need to fix this. I think we need to fix it all the way. What you are suggesting are certainly good suggestions relative to the process but deemed granted as has been mentioned, if it is still hanging out there, so you meet the rules but you are still going to get what you want, in the end is a flawed process.

Mr. STEARNS. OK. And——

Ms. AVGIRIS. I also believe that having strict deadlines and providing evidence for the record on a sooner basis helps improve the process, but when you get down to it, if a default provision is granted of forbearance when you have a two-two tie, only the competitors are hurt that way.

Mr. STEARNS. Thank you, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from Texas, Mr. Gonzalez.

Mr. GONZALEZ. Thank you very much, Mr. Chairman, and I commend the ranking member, Mr. Stearns, for coming up with a good idea. I don't believe it goes far enough. That should be in place regardless. To be honest with you, I don't know of a process where you can amend at any time and it especially lends itself to a great deal of mischief if someone wanted to play it that way and to game the system. Everybody knows how to complicate matters and almost assure because of the complication it extends time, consideration, and then if you have a deemed granted result, you can see where all this is going to lead us.

Mr. Salmon, Mr. Banks, let me ask you, on the deemed granted, now, the FCC hears other petitions and disputes and requests, not just forbearance petitions, right? In those other settings, in those other conditions, do we have anything like a deemed granted provision?

Mr. SALMON. I know of no other process where there is a deemed granted provision, and additionally, when a forbearance petition is filed, because of the deemed granted language, the Commission, if it is working on another project, whether it is USF or digital, any other number of things, they have to pool all their resources and put it out to the issue that has a gun to their head. That is why—it is just policy.

Ms. HERDA. What we have also found is that we have no recourse in the courts, as we have seen, that we have no right to appeal. In the case of the Verizon issue, it was determined that we couldn't even appeal it.

Mr. GONZALEZ. Mr. Banks, back to that question, do you know any other hearing, dispute, petition consideration, anything that also has a mechanism such as a deemed granted if it is not acted on timely?

Mr. BANKS. I think there are a number of procedures at the Commission involving enforcement actions and maybe some other things where the Bureau makes a decision, and unless the Commission rejects it, the decision becomes effectively a Commission order.

Mr. GONZALEZ. Somewhat a cousin to this, so I wouldn't say you have something is almost direct procedurally. I am just curious. But there are many aspects of this but it just seems that you could really do something with a system that automatically grants the relief just because the decisionmaker in this case doesn't act, and I don't think we have to go to the Supreme Court or the United States Congress. We can just look within the confines of the FCC and find that this may be very unique. But something of this importance, even if it is not, and we find something that may be similar, as Mr. Banks may have pointed out, we are talking about something that really, and I agree with Mr. Markey, I think could truly impact competition.

Let me ask Mr. Grivner, I was surprised, and this is my own ignorance, I just look at the copper wire line as a thing of the past, but you are talking about speeds that basically would come under premium category classification by the FCC. Is that true?

Mr. GRIVNER. Yes, absolutely. This copper technology, actually Mr. Banks worked at a company, Bell South, that also deployed it many years ago, and it has developed here in the good old United States by several companies. They have taken existing cop repairs. We are selling it to our customers. We sell—you would have to sell six or seven T1s at extraordinary pricing to be the equivalent of what we are able to get out of simple twisted cop repairs. It is just great technology and customers love it as well.

Mr. GONZALEZ. It is surprising when you indicated what was being offered and what was being explored, and I don't know if other members were surprised about the speed or the capacity and the ability of copper wire.

Ms. Herda, in today's environment, who owns most of the utility poles? I mean, my assumption is in the old days you had the incumbents more——

Ms. HERDA. You have a combination of incumbent and utility providers.

Mr. GONZALEZ. And today is it utilities have more ownership of more poles or——

Ms. HERDA. I think that is what I understand. That is what I have heard. I think the incumbents have gotten rid of some of theirs, a bunch of theirs.

Mr. GONZALEZ. I come from San Antonio. Our utility company is actually by the municipality so I am thinking of other settings, which is difficult for me sometimes. But I am just thinking of the relationships that municipalities may have with utility companies and such, right away easement and so on, but in other aspects too, I am thinking in terms of, I know of partnerships with municipalities to build out, let us say, Wi-Fi and maybe even WiMAX and such. I am just thinking in terms of giving an unfair edge to any particular provider, any particular technology, all using that same pole because of the relationships. Do you fear anything of that nature?

Ms. HERDA. Actually, as a matter of fact, we have services that sometimes compete with the providers who own the pole and so when we are asking them to actually do the work, they are in no rush because certainly it is to their advantage to delay our construction of our fiber networks. So there is, in addition to the rates associate with it, which we think everybody should be paying the same rates, we think that there should be terms and conditions that mandate behavioral conditions.

Mr. GONZALEZ. Thank you very much.

And I want to pronounce the name right and I apologize because I met you right before the hearing. Is it Avgiris? Ms. Avgiris, regarding, you all called it the portability. I just call it transferring your phone number. And what you are telling me is that wireline or wireless can do it in a number of hours but not so in other circumstances, and that right now we are looking at 4 days.

Ms. AVGIRIS. That is correct, 4 business days.

Mr. GONZALEZ. What do you suspect might be the reason for that? Because I am going to ask Mr. Banks obviously. And I have a minute and 40 seconds, but——

Ms. AVGIRIS. So I will take a minute and 40 of that. Consumers want faster porting. They want it because they want to be able to purchase services at retail, self-install. Our service provides new feature functionality that is not what is available with basic telephone. And they have gotten accustomed to being able to make decisions on their own timeline, and the whole wireless industry and their porting within voluntary means to port within a number of hours means that that capability is there. Comcast as a provider is ready, willing, and able to port a customer's number away from Comcast if they want within the next day. I see no reason why everyone can't.

Mr. GONZALEZ. Mr. Banks, do you disagree?

Mr. BANKS. I think faster porting is good for consumers. Right now when our companies get ports from other customers, we don't get them in 4 days. When other companies ask us to port numbers to them, they don't ask us to port them in 4 days. So I think there is some reason to think we ought to get to the 4 days first and then be careful how we put this requirement on smaller telephone and smaller cable companies that would have to mechanize their back offices and spend a lot of money to do things that aren't really how they do business in small companies.

Ms. AVGIRIS. If I could just clarify?

Mr. GONZALEZ. You have 24 seconds in your response.

Ms. AVGIRIS. The three largest providers, telecom companies, are all electronically bonded. Those are the companies that we believe should have a faster porting interval of 1 day. The smaller companies we can work with.

Mr. GONZALEZ. Thank you very much.

Yield back, Mr. Chairman. Thank you, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from Mississippi, Mr. Pickering.

Mr. PICKERING. Thank you, Mr. Chairman.

Mr. Banks, let us try to get to the compromise again but from a different direction. Earlier in your testimony, you had said that you could do away possibly with the deemed granted if you had strict timelines of certainty that the FCC had to act on a date certain. Is that something that you could accept?

Mr. BANKS. Yes. I mean, our whole—the whole function of the deemed granted is to force the Commission to act in a world that has changed.

Mr. PICKERING. So if you had appropriate forcing timetable shot clocks as part of reform, then you could support removing the language deemed granted?

Mr. BANKS. If it would serve to give that incentive, a real incentive to the FCC to act, yes.

Mr. PICKERING. Mr. Chairman, maybe that is the compromise, the right balance. I think everyone is concerned that in the first 3 months of next year while we have a new Administration, it is very likely that we could have four Commissioners for an indefinite period of time. You could actually have congressional inaction combined with FCC inaction that would create a deadlocked Commission, and I think during that period of time, you could have a lot of unintended consequences of gaming of the current process that is not what anyone who is involved in the 1996 Act intended. I do think that we want regulatory certainty, and to the degree that we can force the FCC to act within a certain time period, I think that that is in everyone's best interest, competitors and incumbents alike.

Mr. Grivner, I was going to ask one other question, Mr. Banks. I saw you shaking your head when Ms. Avgiris said that the three largest can do electronic porting within 1 day. Is that something that you could support?

Mr. BANKS. I am not sure about the 1 day but it is true that the largest carriers are electronically bonded in a way that lets them do lots more things than the carriers that are smaller than that.

Mr. PICKERING. Right now, is it a 4-day?

Mr. BANKS. Right now, it is a 4-day for, right, ports involving wireline companies.

Mr. PICKERING. But for the largest and best for the consumers in competition, we could probably change that to 1 or 2 days?

Mr. BANKS. I think the easiest thing to move down is the people that have the bonding rather than the mid-sized and smaller carriers—well, carriers and cable companies both have more troubles.

Mr. PICKERING. Thank you, Mr. Banks.

Talking about regulatory certainty and timely action, I am going to come back to you, Mr. Grivner.

Ms. Herda, pole attachments, one of my favorite subjects of all time.

Ms. HERDA. I am sure.

Mr. PICKERING. That is currently now pending before the FCC?

Ms. HERDA. I am sorry?

Mr. PICKERING. That proceeding on pole attachments is now in front of the FCC?

Ms. HERDA. Yes.

Mr. PICKERING. And how long has that been there?

Ms. HERDA. Since January.

Mr. PICKERING. Since January. Is there any announced time of action that they will take action?

Ms. HERDA. No.

Mr. PICKERING. But you want uniformity?

Ms. HERDA. Yes.

Mr. PICKERING. One rate?

Ms. HERDA. Everybody to have the same rate.

Mr. PICKERING. And then the certainty of FCC action?

Ms. HERDA. Right.

Mr. PICKERING. And what that rate is, you are somewhat flexible?

Ms. HERDA. Just the rate, to reimburse them for costs obviously. It shouldn't be a profit center for the pole owners but it should be fair and equitable.

Mr. PICKERING. And right now you have the utility rate, the telecom rate and the cable rate. Is that correct?

Ms. HERDA. Yes.

Mr. PICKERING. So somewhere in between?

Ms. HERDA. That is for the FCC to decide.

Mr. PICKERING. But they need to decide soon.

Ms. HERDA. Yes.

Mr. PICKERING. Mr. Grivner, talking about regulatory certainty, you have invested $7 billion, and this goes back to the forbearance and why this is so important. If we had a change in regulatory policy that basically wiped out $7 billion of investment—for example, you have to have loops in transport to do your business. The $7 billion that you have invested in facilities, one regulatory decision could wipe out billions of dollars of investment and wipe out competitive choices.

Mr. GRIVNER. Well put. The $7 billion that we have invested leads you right up to that customer promise and it is all behind that so that last piece of connectivity is critical to that $7 billion of investment.

Mr. PICKERING. So decisions should be made correctly, thoughtfully, majority vote, and a certain process of transparency. I think that we can get there.

Mr. Chairman, this panel has been very helpful. I look forward to working with you to get the right balance.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from Michigan, Mr. Upton.

Mr. UPTON. Well, thank you, Mr. Chairman, and again, I appreciate the testimony from all of our witnesses and some of the questions here.

I can remember when the 1996 Act was written and this provision was included, and I have to say as I listen to the testimony today—as Mr. Banks said to one of the responders, one of the questions, we all want a deadline. We are fed up when the deadlines pass us by. And I have to say, at least from my vantage point, I think it is worse today than it ever was in the 1990s. I can't tell you how many times I have seen some of the Commissioners or we have made a call or written a letter, talked to them about some deadline, you are assured that it is going to come by and it doesn't happen, and consequently, as you look at the different petitions that have been deemed granted, 91 petitions have been filed. Only four have been deemed granted, and as the staff has looked into those four, three of them were not controversial at all and the one that was, was this one that was on a two-two vote and that was before Commissioner McDowell had been on, so someone didn't recuse themselves so it was a two-to-two tie, and as I understand it, Mr. Copps and Adelstein had wanted to prevent the entire petition from being deemed granted. They probably, I am guessing, could have reached for a compromise at least in some part as it related to the denial in that part and I guess you could see a parallel between what happened when we had a two-two split over the AT&T/Bell South deal when of course McDowell did take himself out, recusal, which I remember that deadline went on forever as well. So when you know something like that is going to happen, but the question I have, if it ain't broke, why fix it if it is only really one. Is there only really one so far of this 91? Is the staff correct that it is only really one of 91 that are in rough water?

Mr. BANKS. Yes, your numbers are correct. There is only the Verizon petition that has caused any controversy, but the controversy has been among the FCC people. I don't know that there has been any controversy in the marketplace about the effect of that order. Verizon, as I understand it, has gone out and used the freedom to sign contracts with customers.

Mr. UPTON. But what this provision did was, it really put the gun to the FCC's head that they really had to live by the shot clock that they wanted, right?

Mr. BANKS. Yes, and to be fair, I think it is difficult to identify anything else that will really make the FCC act but that is the crux of the problem.

Mr. UPTON. We have tried. We have sent them brownies. We have done a bunch of different things. We have gone down to visit. Let me ask one other question, Mr. Banks, and this I think came up in a related question I think to Mr. Salmon. Isn't the deemed granted provision similar to the statutory sunset provision like program access except that it gives the added protection of giving the FCC the opportunity to prevent the sunset if they so desire?

Mr. BANKS. That is a very interesting point, and Congress put a number of sunset provisions in the 1996 Act including on some of the special extra long-distance safeguards and those expired after 3 years, the ones I can think of. So you are absolutely correct that is like the sunset provisions.

Mr. UPTON. That is a good note for me to end on. I yield back my time. Thank you.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from Nebraska, Mr. Terry.

Mr. TERRY. Thank you, Mr. Chairman, and I would agree with several of the comments made. I have empathy for everyone here. Mr. Grivner, I especially appreciate the level of investment. I came right after the passage of the 1996 Telecom Act but I engaged in the discussions that undoubtedly occurred during passage of what to do if the FCC doesn't act. I think that, as Mr. Upton pointed out, a very real concern as we develop policies and one of the policies in the 1996 Act was opening up the incumbents' networks, their infrastructure for competition because we wanted competition, and I still think we want competition today, especially as there is a convergence or merging within the incumbent industries. So working through this, though if there is some unnecessary or unfair regulation that is hindering the ability of the incumbent to compete, and I come from an area where there is good competition between capable and the incumbent. In fact, the incumbent is the minority carrier now. So I come from a different world or perspective. But I am just wondering as we work through some options here if a deadline really works. What are the consequences to the FCC if we say you have to do this by 90 days of the filing of the petition, and then there is consequence. Then they still go to a year or 6 months or whatever, and I am sure that the deemed granted was to put in a consequence. So I am not sure we gain anything here if we just put in a date or shot clock without any consequence.

So, Mr. Banks, I want you to get to that next question of what should be the consequence if the FCC misses the deadline that is set? What would be the world without the deemed granted if there are no consequences?

Mr. BANKS. I think without the deemed granted, we are likely to be in a world where the FCC would not have changed any of the rules for Omaha, even though the market had basically flipped head over heels. So without consequences, I think the fact that we have consequences here is why the FCC has ruled on essentially every forbearance petition that has come before it or along the lines of the numbers Mr. Stearns gave. So it has been effective and it has left us with the one Verizon issue out of the 89 petitions.

Mr. TERRY. I appreciate that.

Mr. Grivner, during one of your answers to the questions to Mr. Stearns, when you were working through the possibilities of compromise, you mentioned that it is a flawed process, and what went through my mind when you said that is whether or not the incumbent should ever receive forbearance.

Mr. GRIVNER. Should ever receive forbearance?

Mr. TERRY. Should receive forbearance. I guess what I am trying to ask you is, do they deserve it in any situation?

Mr. GRIVNER. Well, I actually referred to it as forgiveness because really what forbearance has been is a peeling back of the 1996 Act piece by piece. So if we go back and look at the complete history—by the way, everybody you ask that was here in 1996 and you ask about forbearance, no one raises their hand as being the author of that, which I find interesting. But if you peel it back, there were certain conditions that had to be met on both sides to create a competitive landscape, and as the years have gone by, those kind of even-steven things have been pulled back from the competitive industry, and forbearance is just a very, very strange process where a two-two vote, whether it be the Supreme Court, and God forbid——

Mr. TERRY. But eliminating the two-two vote discussion here, because I think we all pretty much agree that needs remedied in some way but——

Mr. GRIVNER. I think there has to be a reasonable and complete submission of data that has to be analyzed by the FCC staff. Let us make it a fight. Let us make it a game. Let us not make it a basketball game where two teams show up and only two referees show up and the other team says I win because only two showed up. Let us make it a real game and let us make it a fight, put your stuff on the floor.

Mr. TERRY. Thank you.

Mr. MARKEY. Mr. Grivner, were you a basketball player at some point?

Mr. GRIVNER. As I understand it, Mr. Chairman, you used to be one but a series of injuries have hobbled you.

Mr. MARKEY. I am feeling your pain, Mr. Grivner.

So we will go another round here, if we can, for maybe 3 minutes a piece from the members if they have any additional questions, and I will just say, Mr. Terry, we have been trying actually for years to find out which Senator actually stuck in these words over in the Senate during this conference committee, but again, they had a code of omerta over there which protects each other on a bipartisan basis, but there is kind of a Rosemary's Baby quality to this one provision that everyone accepts the fact that it is an incredibly important storyline but no wants to take credit for the law of unintended consequences taken to the pluperfect form that it has resulted in. But that is the way the Senate operates.

Let me turn to you, Ms. Avgiris. Recently Vermont Telecommunications Company denied interconnection on the basis that it only had to do so for telecom carriers. So here is Comcast, the fourth largest telephone provider in America, being told you are not a telecommunications company, and as a result, they can deny you interconnection. Can you talk about the implications of the Federal Communications Commission determining that Comcast is not a telecommunications company for the purposes of interconnection in terms of what that represents for competition in Vermont and in other States?

Ms. AVGIRIS. Well, regardless of regulatory classification, interconnection is the fundamental ability of our company to serve our customers and exchange traffic with other people so everyone can call everyone else. Specifically in the Vermont telephone company case, it is not the affiliate, and every company has affiliates. We have a retail affiliate that provides an information service which is called Comcast Digital Voice that provides features and functionality that is much different than what basic telephone is. They are not the ones that asked for interconnection. There is another affiliate of Comcast that is a certificated telecommunications carrier in each of the 38 States that it provides telecommunications services to its clients. That is the entity that asked for it. It meets all the obligations of being a telecommunications carrier, supports the State 911 universal service fund, interconnection, local number porting, and that is where the rub comes because it is—they are a certificated CLEC and have the rights and responsibilities to interconnect with everyone.

Mr. MARKEY. I think it is a perfect example of how something has gone terribly awry when the people of Vermont are denied this competitive opportunity that would give them alternative service and potentially lower prices and higher quality of service. It just is perverse to me that a very narrow interpretation of what is a qualifying company should be able to affect consumers so negatively.

Let me turn to you, Mr. Banks. When we get to this question of whether or not your telephone number is portable, if somebody wants to switch from one cell phone company to another cell phone company, it takes 2 hours to switch the number, and the cell phone companies, that is the large telephone companies that you are here representing, although you are not here representing them in that form, but they are able to do it in 2 hours. So the question I have for you Mr. Banks is why do the same companies take 4 days if the same consumer wants to move their wireline service over to another company? Why should it take so long? What is the technological problem at these companies?

Mr. BANKS. I think it revolves around companies' operating systems. The wireless carriers are essentially the envy of everyone in terms of the newness of their networks and the newness of their——

Mr. MARKEY. But they are the same companies in terms of their CEO, their executive vice president, their chief technology officers. They are all the same people. Why can't they figure out how to cut it down from 4 days down to 2 hours the way their cell phone wing does in ensuring that consumers keep their same cell phone number as they switch companies?

Mr. BANKS. Well, you are right that they are owned by the same people but they grew up in different worlds and built themselves different systems and are in different places in terms of their capital and who can invest in upgrading systems and which part of the company is a growth part. So there are systems issues. But it is true that the largest carriers have better systems and the medium-sized and smaller carriers——

Mr. MARKEY. But how hard can it be just to e-mail to someone else inside of the telephone company and say this customer wants to switch companies? How long does that take inside of Verizon or AT&T? Is that a 4-day process to e-mail?

Mr. BANKS. No. Verizon and AT&T do this process generally in under 4 days and report the data on that to every State as part of their 271 filing.

Mr. MARKEY. Do they ever have meetings, I am wondering, at Verizon or AT&T where they bring the cell phone executives over to talk to the wireline executives about how they do it? Do they ever have meetings like that?

Mr. BANKS. Well, the North American Numbering Council has meetings all the time.

Mr. MARKEY. I am talking about inside the company. Do any of these executives ever meet and talk and they can explain the new modern system that the cell phone wing uses in order to do number portability?

Mr. BANKS. Yes, and I think at those meetings the wireless people say that 16 percent of your customers have dropped you and come to us, so ha ha.

Mr. MARKEY. But it takes 4 days. Aha, they say back. That is our revenge. We don't allow it to happen overnight. But I bet you it doesn't take 4 days inside a company.

Mr. Grivner?

Mr. GRIVNER. Same question?

Mr. MARKEY. No, I am fine. I thought you had your hand up.

Mr. GRIVNER. No, no.

Mr. MARKEY. My time has expired. Let me turn and recognize the gentleman from Florida.

Mr. STEARNS. Thank you, Mr. Chairman.

This is a question for the entire panel again and it is dealing with pole attachment rates. I think a lot of us agree there is no rhyme or reason towards the pole attachment rates that are currently being applied, and I guess the question for each of you is, shouldn't the FCC create a uniform pole attachment regime and perhaps what would that regime look like? Mr. Banks, I will start with you and then I will go down.

Mr. BANKS. So I am in complete agreement with Time Warner Telecom that that the system needs to be rationalized, that people that are attaching to a pole to provide a broadband service with the same attachment ought to pay the same price, and that is just a matter of rationalizing the prices and applying them uniformly to everyone. I think that would certainly help our companies that pay an awful lot more than others with our broadband deployment.

Mr. STEARNS. Ms. Avgiris?

Ms. AVGIRIS. It is well established both at the FCC and in the Supreme Court that the cable rates that have been established for pole attachments are more than compensatory, so while we absolutely support a uniform rate and it has to be fair and cost-based for the same attachment, we believe it should be the cable rate. Otherwise all you are doing is adversely impacting cable broadband customers.

Mr. STEARNS. You just raised another question with me. Would you support amending the forbearance provision so it grants cable companies deregulatory relief as well?

Ms. AVGIRIS. As it relates to forbearance, the video space is much more competitive. In the voice space, which is what I am here to talk about, there are a lot of complex provisions, and we believe that the safeguards that are there to protect certain rules need careful analysis and so I think the same rules apply.

Mr. STEARNS. Mr. Grivner, going back to the original question dealing with the pole attachment rates.

Mr. GRIVNER. Uniform pricing and also uniform service level agreements as well.

Mr. STEARNS. Ms. Herda?

Ms. HERDA. Same thing, uniform pricing, uniform service agreements, and we agree with Ms. Avgiris with regard to the cable rates.

Mr. STEARNS. Matt?

Mr. SALMON. Same thing, and on the whole idea of the shot clock, we would like a shot clock for that. We would also like a shot clock for special access where we are paying exorbitant rates and they haven't fixed that problem, a shot clock for USF reform. I could go on and on and on, but what is fit for the goose is fit for the gander.

Mr. STEARNS. Do you think that should be deemed granted?

Mr. SALMON. I am sorry?

Mr. STEARNS. Do you think it should be deemed granted?

Mr. SALMON. No, I just don't think that is good policy, and on the whole deemed granted, let me just take a second because Congressman Upton pointed out that there are very few instances where deemed granted has actually kicked in. That is only part of the problem. The bigger part of the problem with the whole deemed granted language is that it encourages companies to file incomplete petitions because it is one of the only things that has a shot clock and a deemed granted provision. So they filed these frivolous petitions that are incomplete and then at the very last minute they throw a bunch of stuff, and like Chairman Markey pointed out, pray that something sticks. That is the bigger part of the problem that it just runs the whole process askew.

Mr. STEARNS. Thank you, Mr. Chairman. As Mr. Salmon just pointed out, I think what I talked about earlier about a legitimate compromise here, just making the deadlines for filing amendments and additional evidence just stark and these deadlines are real deadlines and they cannot be amended or changed, and by then you would know everything and you wouldn't be concerned about what the final outlook was because during the comment period everybody knows, so I hope, Mr. Chairman, that perhaps the suggestion I make would be part of the process here. Thank you.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from Texas, Mr. Gonzalez.

Mr. GONZALEZ. Thank you very much, Mr. Chairman.

Ms. Herda, I am going to ask a basic question and everybody in the audience probably knows the answer but I am trying to figure it out. I want to switch service, I come to you, and so there has to be an effective termination date communicated to my old carrier and an effective start date with you, right?

Ms. HERDA. Right.

Mr. GONZALEZ. How then does this portability timeframe play into that equation?

Ms. HERDA. It is different for our services since we sell business services and they are complex telephone services, so I think it is a bit different from what Comcast is looking for. It is more likely that we would need more time to be able to port those services.

Mr. GONZALEZ. I guess the curiosity is just one starts at a certain time, and the calculation. I guess maybe I am missing the whole concept about the portability of numbers, the way you identified it, in other words, so that people will continue the same business and so on. I mean, that is the whole convenience part of it. I am just saying that it has to end at a certain time with the old carrier and then the new service has to then assume that that new number is fully operable. Is there some caveat out there to the customer, hey, listen before all that can be accomplished, it is going to take X amount of time?

Ms. HERDA. Yes. When we communicate with our customers——

Mr. GONZALEZ. So that would mean then I would be carried with my old service for a longer period of time because there is this 4-day interval?

Ms. HERDA. Generally with our services, since we focus on selling to just business customers, we also have a facility that is going into that customer that takes some time to construct, so we set time-frames for intervals for service which are generally longer than few hours. It is very different from the wireless business or maybe the very small business customers that Comcast services.

Mr. GONZALEZ. Does anybody else wish to comment just on the observation that time plays to the advantage of someone in that particular scenario and maybe even a bottom line?

Ms. AVGIRIS. The local number interval does present a beginning and an end date and the beginning date is when the competing carrier requests the number to be exchanged from the incumbent carrier, and they set a firm order commitment for a particular date and it is a question of what is the process internally to complete that transaction, share that information between the carriers and expedite the port request of the consumer to change service because the whole point behind local number portability is to enable competition and to enable choice.

Mr. GONZALEZ. The longer it takes to complete the transaction to get the number ported or whatever it is, obviously then I am being carried by my old service——

Ms. AVGIRIS. And I may not get the savings that I could otherwise get.

Mr. GONZALEZ. Thank you very much. Yield back.

Mr. MARKEY. The chair recognizes the gentleman from Mississippi, Mr. Pickering.

Mr. PICKERING. Mr. Chairman, thank you, and just for historical context, I believe it was Senator Dole and Senator Pressler who came up with the forbearance provision, and I happen to think that the forbearance process is actually a healthy way to keep the Act alive, dynamic, organic, as things change, it can evolve, but it needs to be done right and your bill addresses how to do it right.

And to Mr. Banks and Congressman Gonzalez, I think the bottom line on the portability——

Mr. MARKEY. By the way, if I may, if the gentleman would yield, the gentleman from Mississippi was on Senator Lott's staff at the time and he would have access to meetings that I as a Democrat would not have had access to. So we thank him for clarifying the historical reference.

Mr. PICKERING. Just for history.

Mr. Banks and to Congressman Gonzalez, I think the real issue here is—you said something interesting—you said the difference between wireless and wireline, they grew up differently, different cultures, but wireless is the growth part of their business, and the more they port, the more they grow. The faster they port, the faster they grow, and what Verizon and AT&T have found out, once they get down to number portability on wireless is that they benefited from that. They are growing because more people are switching to them. Now, on the other hand, on their wireline side, as cable enters, they are losing customers so that is the losing side of their business, and this gets to their bottom line. They want to slow down what they lose and they want to speed up what they gain, and I think the fair thing to do is to have some uniformity of wireline and wireless porting. If this was not technologically feasible to do one issue but this is fairness, level playing field, procompetitive, pro-consumer, pro-choice for everybody and I think that we ought to get a portability policy that is same whether it is wireless or wireline or something comparable that is reasonable with some differences between small companies and large companies. That was more of a comment than a question.

Let me go back to pole attachments. Ms. Herda, Mr. Grivner, Ms. Avgiris, I think you are all on record of supporting the current cable rate. Is that correct?

Ms. HERDA. Yes.

Mr. PICKERING. And that does have something to do with competition. The more you pay in pole attachments, the less you can build out, deploy and compete in other areas, and I think that that would be the same for you, Mr. Salmon. So you all would support the current cable. Mr. Banks, you would support some uniform compromise. Is that correct?

Mr. BANKS. Yes. I do think that it is important that we also remember that this money goes to support facilities, utility poles that we need and it is important to ensure that pole owners, which are principally utilities, get enough money that we do have poles when we need them.

Mr. PICKERING. I see that my time is running out. The last thing that I would encourage, I do hope that we can get an interconnection policy, Mr. Chairman, if not this Congress, then the next Congress. It is a basic fundamental. It makes the market function. Without interconnection policy, we really ought to go home and pack it up. It is just a simple, fair way to make all consumers be able to complete a call on one network to another and it ensures a functioning marketplace. With that, I yield back, Mr. Chairman.

Mr. MARKEY. I thank the gentleman, and I know the gentleman is going home and packing it up, but it all depends on what kind of going home and packing it up you are talking about. If the Federal Communications Commission is going home and packing it up without actually providing interconnection, that is not a good thing.

So we are going to finish up by asking each one of you to give us a 1-minute summation of what it is that you want us to remember out of this hearing. We will start with you, Mr. Salmon, if you could give us your 1-minute summation.

Mr. SALMON. We have been asked what our druthers are, and I think our druthers are, we would like to see section 10 scrapped altogether, but this is a good first step and one that we support. I think that all of us understand that the most important thing that we want in public policy is to make sure that America continues to prosper and continues to grow with technological advancements in the telecommunications realm. We would like to be first in the world. That is only going to happen with a very, very competitive, robust telecommunications sector, and we are proud to be part of that and we would like to move forward in tandem with the ILECs as friends singing Kumbaya. Unfortunately, that doesn't happen all the time.

Mr. MARKEY. Thank you, Mr. Salmon.

Ms. Herda.

Ms. HERDA. Yes, I would agree with Mr. Salmon in that I believe that forbearance basically gives the FCC authority to rewrite the Act and I think that is Congress's job. I am uncomfortable delegating that rewriting the Act to the FCC. With regard to pole attachments, we are just looking for a unitary rate for everybody to be on a level playing field so that when we all compete, we are coming from the same set of cost base, and that is it.

Mr. MARKEY. Thank you.

Mr. Grivner.

Mr. GRIVNER. Move 3914 forward. Copper is not dead and electronic bonding is possible for all companies whether they are wireless or wireline. Thank you.

Mr. MARKEY. That is a Kumbaya moment, electronic bonding.

Ms. Avgiris.

Ms. AVGIRIS. Comcast is all about pro-competition, pro-consumer choice. All of our positions on local number porting are about more choice for consumers. Interconnection provides us the ability to complete, and without that we really would be waving away the $111 billion that consumers can save.

Mr. MARKEY. And Mr. Banks, you have the final word.

Mr. BANKS. The presumption in 1996 was that regulation shouldn't stay through inertia and that is why we have section 10 and that is why we have section 11. The world has changed now when Comcast is the number 4 phone company. So there is no reason to keep regulations through inertia. Of the 91 forbearance petitions filed, most are narrow. They deal with discreet sub-issues of telecom regulation, and the Commission has successfully come out with orders in all but one of those and that is the Verizon thing. I think the process is working and it is getting orders out of the FCC. I point you to the court remand that took three years of the FCC reporting every month to the district court before a court hearing and an order so we do something to make the FCC work.

Mr. MARKEY. Thank you, Mr. Banks, very much. We thank all of you. We do have a looming problem because we could have a two-to-two vote at the FCC by the end of this year. In fact, it is very likely that that is going to be the case and that would be absolutely historically unacceptable, and it is important for us to get this policy right because, as you said, Mr. Banks, in your testimony, 50 percent of the growth in the American economy comes in this telecommunications and technology sector. It is not widely understood that 50 percent of the growth comes there but it does and it makes all of these decisions central to whether or not we are going to continue to see the job growth here and the lowering of the cost of communications to all industries.

With that, we thank this panel and this hearing is adjourned.

[Whereupon, at 3:52 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

PREPARED STATEMENT OF HON. JOHN D. DINGELL

Today we examine the state of competition in the telecommunications marketplace. Sound telecommunications policy should spur competition between providers, bringing lower prices, more innovative services, and better service quality to consumers. But ill-conceived or poorly executed policy represents a lost opportunity for such consumer gains.

Section 10 of the Communications Act, which we will discuss today, was added by Congress to ensure that the statute kept pace with changes in technology and in the marketplace. It permits providers to request that the Federal Communications Commission (FCC) forbear from enforcing certain laws or regulations, when such laws or regulations are no longer necessary to protect the consumer. It further provides that if the FCC does not act on a forbearance petition by a date certain, then the provider's request that the FCC not enforce a particular law or regulation is automatically granted.

This provision is dangerous and bad policy because it allows agency action to take effect without any formal vote or supporting record. Consumers and companies then have no right or recourse when the lack of enforcement harms consumers.

We are familiar with the episode in 2006 when a four-member Commission was evenly divided on the merits of a forbearance petition and was therefore unable to act. Because the deadline passed with no Commission action, the petition was deemed granted and a host of regulations were tossed aside. Making matters worse, the Commission failed to issue an Order explaining the scope of relief granted, which prevented Congress from conducting appropriate oversight and precluded meaningful judicial review.

This must not happen again. At any time we could find ourselves with just four commissioners having to address forbearance petitions under the "deemed granted" regime.

In an effort to remedy this problem, Chairman Markey and I introduced H.R. 3914, the "Protecting Consumers through Proper Forbearance Procedures Act." Our bill simply removes the "deemed granted" language from the statute to ensure that agency decisions are fully transparent and that affected parties—including consumers—have full legal recourse.

I am also concerned with the Commission's process for reviewing forbearance petitions. The Commission must ensure that the forbearance process is fair, open, and transparent. Too often, industry petitioners have rigged the process, by filing amended petitions late so that opposing parties have no meaningful opportunity to respond. I applaud the Commission for opening a proceeding to reform the process, and I urge that it be concluded in a manner that serves the public interest and protects consumers.

We will also consider several other issues today, and I am disappointed that some of the companies most interested in these issues declined our invitations to testify. For example, Verizon has spent considerable time discussing the issue of retention marketing, and Verizon and AT&T have lobbied the Commission about pole attachments. I am disappointed that we will not benefit from their expertise as we consider these important issues.

Furthermore, this is a legislative hearing on H.R. 3914, which I understand these two companies do not support. I am saddened they are not here to more fully explain their views and to answer polite questions I intended to ask them.

I thank the Chairman once again for considering these important matters. I hope that the panel will assist us in building a sound record so that we may thoughtfully move forward with carefully crafted legislation.

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EEI EDISON ELECTRIC INSTITUTE 75 YEARS

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THOMAS R. KUHN
President

August 14, 2008

The Honorable Edward J. Markey
Chairman, Subcommittee on Telecommunications and the Internet
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

On behalf of the Edison Electric Institute, which represents U.S. shareholder-owned electric utilities, I am submitting the enclosed statement for the record of the Committee's July 22 hearing on "Issues in Telecommunications Competition."

EEI's statement responds to several pole attachment issues that were raised at the hearing, and which are the subject of a pending Federal Communications Commission (FCC) rulemaking proceeding. Also, while the FCC is appropriately considering reforms to its implementation of the Pole Attachment Act, EEI believes Congress may need to act if the Commission does not adequately address several critical issues of importance to electric utilities and their customers. Specifically, our statement addresses the importance of critical electric infrastructure safety and reliability, the adverse effects on reliability and competition of unauthorized attachments and other violations of notice and safety requirements, competition-distorting rate subsidies at the expense of electric consumers, and the FCC's lack of statutory authority to regulate ILEC attachments.

We look forward to further discussions with you regarding these matters as the Subcommittee continues to focus on important telecommunications competition and infrastructure issues.

Sincerely,

Tom Kuhn

Thomas R. Kuhn

TRK:coc

Enclosure

cc: The Honorable Cliff Stearns, Subcommittee Ranking Member

**STATEMENT FOR THE RECORD
SUBMITTED BY
EDISON ELECTRIC INSTITUTE
TO THE
HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET**

**HEARING ON
"ISSUES IN TELECOMMUNICATIONS COMPETITION"**

JULY 22, 2008

The Edison Electric Institute (EEI) is pleased to submit this statement for the record to the Subcommittee. EEI is the trade association of U.S. shareholder-owned electric companies and has international affiliate and industry associate members worldwide. Our U.S. members serve 95% of the ultimate customers in the shareholder-owned segment of the industry and represent about 70% of the U.S. electric power industry. The electric industry's core mission is to provide safe, reliable electric service to its customers at reasonable prices. To fulfill this mission, electric utilities own and maintain a growing majority of the poles, ducts, conduits, and rights-of-way that are part of the nation's critical infrastructure. While some electric companies have tested some broadband applications in pilot projects, over the last decade electric utilities have not become "competitors" in broadband markets in any meaningful sense and therefore do not have an interest in limiting competition in these markets.

Through this statement, EEI seeks to ensure that the hearing record reflects a complete and accurate view of important pole attachment issues, including matters under consideration in a pending Federal Communications Commission (FCC) pole attachments rulemaking proceeding. While EEI is pleased with the FCC's recognition that changes may be necessary in the way it has implemented the Pole Attachment Act (Section 224 of the Communications Act)[1] , Congress may

[1] For example, to protect and maintain safety and reliability of critical infrastructure and facilitate responsible use of such infrastructure by jurisdictional attaching entities, EEI believes

need to act if the FCC fails to adequately address several critical issues of importance to electric utilities and their customers. Specifically, we believe it is important to highlight the following issues: (1) the importance of allowing the states and electric utilities the necessary flexibility to effectively maintain the safety and reliability of critical infrastructure; (2) the adverse effects on reliability and competition of widespread unauthorized attachments and other violations of notice and safety requirements that are not being addressed; (3) the existence of competition-distorting rate subsidies at the expense of electric consumers, and; (4) Congress's clear intent that the FCC not regulate Incumbent Local Exchange Carrier (ILEC) attachments.

Current Pole Attachment Practices and Policies Jeopardize Critical Electric Infrastructure Safety and Reliability and Undermine Competition

The electric industry's paramount concern in pole attachment matters is maintaining the safety and reliability of the nation's critical electric infrastructure. Electric utilities have and continue to place the highest priority on the safety, reliability and fair cost allocation of costs related to their pole infrastructure. As a result of events during the past decade, Congress has enacted specific legislation to assure electric system reliability and protection of critical infrastructure. Accordingly, Congress and the FCC should not allow pole attachment issues to undermine the electric industry's commitment to safety and reliability.

In this regard, the FCC's pole attachment regulations should be reformed to address the problem of unauthorized (i.e., without a license agreement or without prior notice) attachments, which is serious and threatens both critical infrastructure reliability and worker safety. EEI's member companies report widespread violation of notice and safety requirements by

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that the FCC should reform its pole attachment rules to clarify its notice requirements and to allow electric utilities to impost contractual penalties sufficient to deter unauthorized and unsafe attachments. The FCC should also reform its rules to eliminate competition distorting rate subsidies and ensure full and fair cost allocation among all jurisdictional attachers.

communications attachers under the FCC's jurisdiction. Indeed, many electric utilities report that a substantial percentage of all attachments made by communications companies are unauthorized. Additionally, this problem also distorts competition between broadband service providers. Attachers who fail to provide notice have the ultimate subsidy – they pay nothing unless caught. Communications attachers that violate safety rules gain an unfair competitive advantage over other attachers that comply with notice and safety requirements.

Any FCC rulemaking should allow for stricter pre-attachment notice requirements, contractual penalties sufficient to deter violations, and appropriate deference to State, local, and utility-specific engineering standards. The states and electric utilities themselves are best situated and most qualified to monitor and regulate the safety and reliability of electric distribution infrastructure to which cable and communications wires are attached, and the FCC's regulatory framework should complement and encourage compliance with safety and reliability standards and programs that are implemented by states and utilities. The FCC should not become the arbiter of safety and reliability decisions related to pole attachments or take any action that would further undermine the ability of electric utilities to ensure safety and reliability. For the sake of safety and reliability, as well as competition, it is time to assure that attachment procedures and processes are complied with.

Current Pole Attachment Rates Subsidize Telecommunications Giants at the Expense of Electricity Consumers

Currently, electric utility customers continue to bear the greatest burden of federally-required subsidized pole attachment rates for cable and, to a lesser extent, non-ILEC telecommunications service providers (i.e., Competitive Local Exchange Carriers or CLECs). Most witnesses at the Subcommittee's July 22 hearing called for a single regulated pole attachment rate equivalent to the Cable Rate (the lowest, most heavily-subsidized regulated rate) on the premise that this could stimulate further deployment of broadband services. A single technology-neutral rate formula for jurisdictional attachers has appeal with respect to establishing "regulatory parity" among jurisdictional attachers, but moving all regulated rates down to the Cable Rate would not only unfairly perpetuate and expand federal pole attachment subsidies at the expense of electric customers, it would also fail to address the relatively more significant cost barriers to the deployment of broadband services, such as the enormous costs of head-end equipment and communications systems upgrades.

In the hearing, contrary to congressional intent and relevant case law, as explained below, a cable industry witness claimed that the Cable Rate is not a subsidy rate, and that, if the FCC adopts a single rate for all broadband attachers, it should be the Cable Rate. The witness also erroneously asserted that, because the Supreme Court has "upheld the cable rate," the cable rate formula is compensatory and thus does not result in subsidy rates. This claim is incorrect because the legislative history and text of the 1996 Act shows both that Congress established the Cable Rate to subsidize a not-yet-mature industry and that Congress did not intend the Cable Rate to apply to a mature cable industry, i.e., a cable industry that has entered competitive markets for telecommunications services. The hugely successful growth and expansion of the cable and telecommunications industry since the enactment of the 1996 Act requires revising the Commission's pole attachment regulations to eliminate the historic subsidies inherent in the Cable Formula.

A House Committee report accompanying legislation that ultimately became the basis of the 1996 Act characterized the Cable Rate as providing "cable companies a more favorable rate for attachment than other telecommunications service providers," and made clear that "[t]he beneficial rate to cable companies *was established to spur the growth of the cable industry, which in 1978 was in its infancy*."[2] Furthermore, the statute expressly provides for a transition to a higher rate for cable

[2] H. Rpt. 104-204, Committee on Commerce Report to Accompany H.R. 1555, the Communications Act of 1995 (July 24, 1995) (emphasis added) ("Committee Report").

companies that enter competitive telecommunications markets. Sections 224(d)(3) and 224(e)(1) require a transition from the Cable Rate to the higher telecommunications rate for a cable system that provides "any telecommunications service."[3] This transition provision shows that Congress contemplated the convergence of services offered by the telecommunications industry, and intended that cable companies that mature into full-fledged providers of telecommunications services should pay a higher rate. As the Committee Report states: "to the extent that a company seeks pole attachment for a wire used solely to provide cable television services . . . that cable company will continue to pay the rate authorized under current law . . . . If, however, a cable television system also provides telecommunications services, then that company shall instead pay the pole attachment rate prescribed by the FCC pursuant to the fully allocated cost formula."[4]

Prior court decisions do not support extending the Cable Rate to all broadband attachments and do not limit either the FCC's or Congress's authority to eliminate subsidies.[5] The courts have upheld the FCC's discretion to apply both the Cable Rate and the Telecom Rate, but have not addressed the question of whether either rate results in a "subsidy." Moreover, the courts have acknowledged that the higher Telecom Rate is just and reasonable. In *Alabama Power Company v. FCC*, the court upheld the FCC's application of the Telecom Formula and agreed with the FCC that

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[3] 47 U.S.C. §§ 224(d)(3), 224(e)(1).

[4] Committee Report at 206.

[5] *NCTA v. Gulf Power*, 534 U.S. 327 (2002), was a case of statutory interpretation regarding whether the Commission could apply the Cable Rate to cable systems that offer commingled cable television and internet service. The question of whether the cable rate is a subsidy rate was not before the Court and, indeed, the Court's opinion nowhere uses the term "subsidy." The court simply deferred to the Commission to apply the Cable Rate to commingled cable and internet attachments, but the court did not hold that the Commission must apply the Cable Rate in that situation, and did not address whether the Cable Rate is a subsidy rate, or even whether the rate is just and reasonable.

"Congress used its legislative discretion in determining that cable and telecommunications attachers should pay different rates."[6]

In addition to eliminating the Cable Rate formula, the FCC should reform the application of the Telecom Rate formula to reflect the realities of telecommunications industry trends in the past decade. The most important of these reforms is to recognize that the FCC regulatory presumption that there would be five attachers per pole has proven to be wrong, which results in a significant distorting effect on pole attachment rates at the expense of electric consumers. The reality is that there is an average of fewer than three attachers (including the utility) per pole in both rural and urban areas. Accordingly, each attacher should pay its full and fair share of the costs of the common space on the pole.

<u>Congress' Reasons for Excluding ILEC Attachments from Section 224 Remain Valid Today</u>

The goal of providing "even-handed treatment" for all broadband competitors is admirable, however the reasons that Congress amended section 224 in 1996 still remain valid today.[7] Unlike electric utilities and telephone companies, cable/wireless/CLEC entities do not own the poles upon which they wish to attach and cannot enter into joint-use arrangements in the manner that electric and

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[6] *Alabama Power v. FCC*, 311 F.3d at 1371 n23, *citing In the Matter of Ala. Cable Telecomm. Ass'n*, 16 FCC Rcd. 12,209, ¶ 49. Furthermore, in *Georgia Power v. Teleport*, the court held that the Telecom Rate provides just compensation. *Georgia Power v. Teleport Comm. Atlanta*, 346 F.3d 1033 at 1047 (11th Cir. 2003). The court also recognized that, under the Telecom Rate, "rent can be assessed for the unusable space on a utility pole (essentially the part of the pole near the ground where no attachments can be placed) but which is nonetheless necessary to support the remainder of the pole, where attachments can be placed." *Id.* at 1037.

[7] In section 224(a)(5), Congress specifically excluded ILECS from the statute's regulated rate formula by making clear that under the statute an ILEC is not a "telecommunications carrier." Moreover, the statutory text, legislative history, and a decade of the Commission's regulatory practice make clear that ILEC attachments are not covered by section 224.

telephone companies may do in order to access each others poles.[8] Hence, it is still necessary to allow "competitors to the telephone companies to obtain access to poles owned by utilities and telephone companies at rates that give the owners of the poles a fair return on their investment." See S. Rpt 103-367 on S.1822, Communications Act of 1995, July 1995. Thus, Congress clearly did not contemplate allowing ILECs themselves to obtain any pole attachment rights under the statute, and the FCC should not ignore Congress' specific statutory exclusion of ILECS under the statute.

Conclusion

EEI and its member companies appreciate this opportunity to outline our views and supplement the hearing record on pole attachment issues. We look forward to working with the Members of the Subcommittee to address the issues we have raised.

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[8] Electric utilities, in contrast to telephone companies, need access to poles to support the provision of electric service, not to compete in the provision of communications services for the public at large.