



PUBLIC NOTICE

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PARTIES ASKED TO REFRESH RECORD REGARDING PETITION TO RECONSIDER COST ALLOCATORS USED TO CALCULATE THE TELECOM RATE FOR POLE ATTACHMENTS

WC Docket No. 07-245
GN Docket No. 09-51

Comment Date: 21 days after publication in the Federal Register

Reply Date: 31 days after publication in the Federal Register

By this Public Notice, the Wireline Competition Bureau (Bureau) seeks to refresh the record on a petition for reconsideration or clarification filed by the National Cable and Telecommunications Association (NCTA), COMPTEL, and tw telecom inc. (Petitioners) on June 8, 2011 in the above-referenced proceedings.¹

With respect to the rule concerning the calculation of pole attachment rates charged to telecommunications providers pursuant to section 224(e) of the Communications Act, Petitioners request that “the rules be clarified or amended by specifying [that] the cost allocator to be applied [will be] based on the number of attaching entities”² In support of this request, Petitioners state that, in the *2011 Pole Attachment Order*, “the new formula adjusts the cost basis to 66 percent in urban service areas and to 44 percent in rural service areas. When paired with the presumptions that there are five entities on urban poles and three entities on rural poles, the illustrative calculation almost exactly equals the cable rate.”³ Petitioners assert, however, that as written the rule may be read to address only the cases of the presumed three and five attaching entities.⁴ Therefore, Petitioners request that the Commission clarify or expand the telecom rate formula to “provide the corresponding cost adjustments scaled to other entity counts.”⁵ Petitioners request, alternatively, that “the Commission could adopt the proposal in the *2010 Pole Attachment FNPRM* to establish the maximum just and reasonable rate as the higher of the cable rate

¹ Petition for Reconsideration or Clarification of the National Cable and Telecommunications Association, COMPTEL, and tw telecom inc., WC Docket No. 07-245, GN Docket No. 09-51 (filed June 8, 2011), <http://apps.fcc.gov/ecfs/document/view?id=7021686399> (NCTA Petition).

² *Id.* at 1, Attach. B. (proposing revision of 47 C.F.R. § 1.1409, which includes the pole attachment rates formulas).

³ *Id.* at 5. See also *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (*2011 Pole Attachment Order*).

⁴ NCTA Petition at 5.

⁵ *Id.* at 6.

. . . or the ‘lower bound’ telecom rate obtained by excluding capital costs from the definition of ‘cost of providing space’ in the existing telecom rate formula.”⁶

A public notice released on June 20, 2011 announced the comment cycle for the Petition.⁷ The Commission subsequently published that public notice in the Federal Register.⁸ The Commission received comment both for and against the Petition.⁹

After the close of the comment cycle concerning the Petition, on February 26, 2013, the U.S. Court of Appeals for the D.C. Circuit upheld the *2011 Pole Attachment Order*, including the Commission’s rule for calculating the pole attachment rate for providers of telecommunications services.¹⁰ Among other things, the Court determined that the term “cost,” as used in section 224(e), is open to a wide range of reasonable interpretations; that the Commission’s methodology for apportioning “cost” among pole attachers for purposes of the telecom rate is consistent with section 224(e); and that the Commission’s justifications for its decision concerning the telecom rate were reasonable. In addition, the Commission’s 2015 *Open Internet Order* discussed the concern raised in the Petition regarding consequences to the goals of the *2011 Pole Attachment Order* if the cost allocation rule were interpreted to apply fully only in instances where there are three and five attaching entities.¹¹ With regard to any possible adverse effect on investment incentives from such an interpretation, the *Open Internet Order* stated that the Commission would be “concerned by any potential undermining of the gains the Commission achieved by revising the pole attachment rates paid by telecommunications carriers” in 2011 and accordingly would be “monitoring marketplace developments . . . and can and will promptly take further action in that regard if warranted.”¹² Given the time that has elapsed since the filing and original comment cycle on the NCTA Petition, as well as the subsequent events discussed above, we seek to ensure that the record reflects current viewpoints on the issues raised in the NCTA Petition.

Comments are due on or before **21 days after publication in the Federal Register**, with reply comments due on or before **31 days after publication in the Federal Register**. All pleadings are to reference **WC Docket No. 07-245 and GN Docket No. 09-51**.

Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before the date indicated on the first page of this document.

⁶ *Id.* at 7. See also *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11917-24, paras. 128-141 (2010) (*2010 Pole Attachment FNPRM*).

⁷ *Petitions for Reconsideration of Action in Rulemaking Proceeding*, WC Docket No. 07-245, GN Docket No. 09-51, Public Notice, Report No. 2931 (Cons. & Gov’t Affairs Bur. 2011).

⁸ *A National Broadband Plan for Our Future*; Petition for Reconsideration, 76 Fed. Reg. at 44495 (July 26, 2011).

⁹ See, e.g., AT&T Inc.’s Response to Petitions for Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, at 10 (filed July 5, 2011); Opposition of the Edison Electric Institute and the Utilities Telecom Council to Petition for Reconsideration or Clarification of the National Cable & Telecommunications Association, COMPTEL and tw telecom inc., WC Docket No. 07-245, GN Docket No. 09-51 (filed Aug. 10, 2011); Reply to Opposition, Reconsideration of the National Cable & Telecommunications Association, COMPTEL and tw telecom, Inc., WC Docket No. 07-245, GN Docket No. 09-51 (filed Aug. 22, 2011).

¹⁰ *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183, 189-191(D.C. Cir. 2013).

¹¹ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, para. 483 (rel. Mar. 12, 2015) (*Open Internet Order*).

¹² *Id.*

Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. Because more than one docket number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington D.C. 20554.

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This proceeding continues to be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.¹³ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that

¹³ 47 C.F.R. §§ 1.1200 *et seq.*

proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

For further information, please contact Jonathan Reel, Competition Policy Division, Wireline Competition Bureau at (202) 418-0637, or via email at jonathan.reel@fcc.gov.

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