RICHARD CORDRAY
OHIO ATTORNEY GENERAL

August 19, 2010

Submitted via Electronic Comment Filing System

Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Corrected* Comments submitted on behalf of the Public Utilities Commission of Ohio in WC Docket No. 07-245 and GN Docket No. 09-51

Dear Commission:

Enclosed please find Corrected Comments on behalf of the Public Utilities Commission of Ohio. These corrected comments are not intended to supplant the original comments filed on August 16, 2010, but instead to clarify those comments. The corrections serve strictly to clarify the division of sections in the original document. The only change is the addition of a heading labeled "II. Uniform Pole Attachment Rate" found on page 4. No substantive changes to the comments have been made.

Sincerely,

/s/ Rebecca L. Hussey

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Enc.

Before the

Federal Communications Commission

Washington, D.C. 20554

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

CORRECTED COMMENTS
SUBMITTED ON BEHALF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

Dated: August 19, 2010

TABLE OF CONTENTS

Page

Before the

Federal Communications Commission

Washington, D.C. 20554

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

COMMENTS
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INTRODUCTION AND SUMMARY

On May 20, 2010, the Federal Communications Commission ("FCC") issued an Order and Further Notice of Proposed Rulemaking ("FNPRM") in the above captioned proceedings. The FNPRM considers revisions to its pole attachment rules in order to lower the costs of telecommunications, cable, and broadband deployment and to promote competition, as recommended in the National Broadband Plan ("NBP"). In particular, the FCC proposes timelines to obtain pole attachments in order to reduce the time required to prepare a pole for access and seeks comment on ways to improve communications between attachers and pole owners and improve dispute resolution processes. The FCC also seeks comment on suggested ways to reduce the variation between the telecommunication and cable pole access rates, as well as its authority under section 224 of the Telecommunications Act ("Act") to implement a blended pole attachment rate for

commingled services. The FCC believes the proposed revisions will lower costs and provide faster access to pole attachments, which will, in turn, benefit customers in terms of broadband availability under the NBP. The Public Utilities Commission of Ohio ("Ohio Commission") hereby submits its comments and recommendations.

DISCUSSION

I. Dispute Resolution Processes

In the FNPRM, the FCC requests comment on the adoption of additional rules or procedures to address formal complaints and dispute resolution processes pertaining to pole attachments.[1] Through its experience, the Ohio Commission has found that it is often in the best position to handle complaints between carriers, including complaints regarding pole attachments. Pursuant to the authority granted to the states in section 224 of the Act, the Ohio Commission has promulgated an administrative rule implementing an expedited carrier-to-carrier complaint process for this purpose.[2] Under Ohio's rule, a requesting carrier may petition the Ohio Commission for an expedited ruling when disputes arise that directly affect the carrier's ability to offer uninterrupted service or otherwise prevent the carrier from provisioning any service.[3] A hearing is then held no later

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1 *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, FCC 10-84 ("FNPRM*")* at 35, ¶79 (rel. May 20, 2010).

2 See *The Establishment of Carrier-to-Carrier Rules*, Case No. 06-1344-TP-ORD (Opinion and Order) (2007).

3 *See* Ohio Admin. Code § 4901:1-7-28 (West 2010).

than 30 days from the filing of the complaint, and the attorney examiner is required to draft a written decision for consideration by the Ohio Commission no later than 30 days following the close of a hearing or the filing of briefs, if requested. The Ohio Commission has found its dispute resolution process to be effective in handling and resolving pole attachment disputes and believes that the FCC would meet with comparable success if it implemented a similar process. Accordingly, the Ohio Commission believes that the FCC should consider revising its dispute resolution process for pole attachment complaints accordingly for use as a default dispute resolution process.

The FCC seeks comment on the use of dispute resolution forums for issues and complaints relating to pole attachments, the role of the FCC and/or its staff in that process, and whether the forums should engage in mediation of such disputes.[4] The Ohio Commission supports the idea of alternative dispute resolution forums for resolving pole attachments disputes and has found that using alternative dispute resolution forums is a useful, efficient, and successful means of resolving pole attachment issues in a timely manner. The Ohio Commission staff has played, and continues to play, a significant role in mediating and settling these disputes. The Ohio Commission believes that the FCC should consider dispute resolution forums for pole attachment complaints for those states that have not established their own dispute resolution process and believes that, like the Ohio Commission staff, the FCC staff could play an important role in mediating settlements of disputes.

[4] FNPRM at 35, ¶ 80.

II. Uniform Pole Attachment Rate

As noted in the FNPRM, AT&T/Verizon and USTelecom have proposed rate formulas that are different from the formulas set forth in section 224 of the Act.[5] In doing so, it is argued that the FCC "'is not limited to the particular rate formulas…in [s]ection 224(d) and (e)….'"[6] In particular, USTelecom argues that the FCC may develop its own view of what constitutes a just and reasonable pole attachment rate.[7] The FCC seeks comment on its authority under section 224 of the Act, particularly in the context of the *Gulf Power* case,[8] to establish a uniform rate for all pole attachments used to provide broadband internet access service, including those by telecommunications service providers.[9] The Ohio Commission believes that under *Gulf Power*, the FCC has the flexibility pursuant to section 224 to determine "just and reasonable" pole attachment rates and establish a uniform rate; however, this flexibility is not unlimited and is bound by the plain language of section 224 (d) and (e).

Among other matters, at issue in *Gulf Power* was the question of whether or not the Act, specifically Section 224, applies to attaching facilities that provide high-speed internet access to poles at the same time as cable television.[10] While the Court found that

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5 FNPRM at 50-51, ¶¶ 119-120.

6 *Id*. at 51, ¶ 120.

7 *Id*.

8 *Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co., et al*., 534 U.S. 327, 151 L. Ed.2d 794, (2002).

9 FNPRM at 50-51, ¶ 119-120.

10 *Gulf Power*, 534 U.S. at 333.

adding a service to an attachment does not change the character of the entity attaching the service – noting the use of the word "by" rather than "of" – the Court also chose to address an interpretation of Section 223 not raised by the respondents before the Court of Appeals.[11] In doing so, the Court addressed the question of what the attachment actually is intended to do and whether this is covered by section 224.[12] The Court found that commingled services – that is, services that are not telecommunications services or services solely to provide cable television services – are, in fact, covered by section 224.[13]

In recognizing section 224 as applying to commingled services, the *Gulf Power* Court disagreed with Court of Appeals' reasoning that "[t]he straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates…no other rates are authorized."[14] Rather, the Court found that while section 224 does set forth two very specific rate formulas for two specific categories set forth in subsections (d) and (e), there was nothing in the Act to suggest that these are the only pole attachment rates permitted.[15] Further, the Court found that the 1996 amendments to the Act[16] did not limit or decrease the FCC's jurisdiction under subsections (a)(4) and (b).[17]

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11 *Gulf Power*, 534 U.S. at 333-335.

12 *Id.* at 333.

13 *Id*. at 334-338.

14 *Id*. at 335 quoting *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1276, n. 29 (11th Cir. 2000).

15 *Id*. at 335.

16 Among other things, the 1996 amendments expanded the Act to cover pole attachments by providers of telecommunications services. *Id.* at 331.

While subsection 224(d) is limited to attachments used solely to provide cable service, attachments of commingled services such as cable service and internet service remain covered by subsections 224(a)(4) and (b).[18] Under these subsections, the FCC is obligated to determine "just and reasonable" pole attachment rates for services that do not fall under the rate formulas of subsections (d)(1) and (e)(3).[19] The Court recognized that Congress, unsure of the direction in which these commingled service offerings would evolve, may have thought it prudent not to modify the FCC's discretion in calculating "just and reasonable" pole attachment rates for commingled services.[20] With the anticipated convergence of technologies and services in an IP-based network, this foresight seems all the more prescient as the lines between telecommunications service providers, cable TV operators, and broadband service providers are blurred often to the point of being indistinguishable.

Recognizing this convergence, the impetus for the FCC establishing a uniform pole attachment rate would be the NBP's goal of ubiquitous broadband deployment and access. A uniform broadband pole attachment rate would likely prove to be an important part of this process, as it would help eliminate barriers to market entry in unserved areas. If broadband service is reclassified as a telecommunications service, as proffered in the

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17 *Gulf Power*, 534 U.S. at 336.

18 *Id*.

19 *See id*. at 337-338.

20 *Id*. at 338.

FCC's recent Notice of Inquiry (NOI),[21] then it would appear, as alluded to in the FNPRM, that a uniform rate could not be applied to broadband pole attachments, as subsection(e)(3)'s rate formula would apply.[22] Considering the "self-described scope" of subsection (e)(3) and the *Gulf Power* Court's silence on the issue of telecommunications services commingled with non-telecommunications services, the establishment of a uniform broadband rate that includes telecommunications services is clearly open to challenge.

If the Title I information services classification is maintained, the Ohio Commission believes that a uniform broadband rate could be established depending upon whether broadband itself is the only service being attached, or if it is simply one of several commingled services being attached. The NBP implies that broadband connectivity service is the sole service to be provided by broadband service providers with other traditional services, such as voice service and video service, being applications

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21 *Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, FCC 10-114 at 33, ¶ 67 (rel. June 17, 2010).

22 *See* FNPRM at 51, ¶ 120.

accessed through this service.[23] If this view of broadband service is adopted, then a single rate for broadband service could be established under subsection (b). However, if the latter view prevails, broadband would be commingled with other services. If one presumes that these services include any telecommunications services, then once again subsection (e)(3)'s rate formula would apply.[24]

While the Ohio Commission supports the FCC's Third Way proposal, with caveats, it has also expressed its belief that broadband reclassification will be challenged.[25] Potential challenges to a uniform pole attachment rate if broadband connectivity service is reclassified further underscore the need for Congress to take action to definitively address broadband service and the numerous issues surrounding it.

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23 Omnibus Broadband Initiative, Federal Communications Commission, Connecting America: The National Broadband Plan, at 16 ("Users benefit directly from the applications and content they access through broadband networks."), at 135 ("Everyone in the United States should have access to broadband services supporting a basic set of applications that include sending and receiving e-mail, downloading Web pages, photos and video, and using simple video conferencing."), at 143 ("The federal government should…provide financial support…for broadband platforms that enable many applications, including voice.") (2010), *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf ("NBP").

24 The NBP indicates that broadband platforms must provide voice service. *See id.* at 143. The FCC has declined to classify VOIP service as a telecommunications service. *See, e.g., IP-Enabled Service,* WC Docket No. 04-36, Report and Order, 24 FCC Rcd. 6039, 6051, n. 21 (2009). Consequently, as VOIP service would be the voice component of a broadband service offering, it is debatable whether any telecommunications service would actually be included in any commingled service offering.

25 *Framework for Broadband Internet Service,* Comments Submitted on Behalf of the Public Utilities Commission of Ohio at 10 (filed July 14, 2010).

III. Modification to the Telecommunications Service Rate Formula

As an alternative approach to a uniform rate, the FCC has requested comments regarding the current pole rental rates and ways to minimize the differences between them, including a reinterpretation of the telecommunications rate formula.[26] As noted, the current pole attachment rate formulas are set forth in section 224 of the Act.[27] Under this section, there is a rate formula for use by telecommunications carriers to provide telecommunications service and a rate formula for use by cable television systems solely to provide cable service, with the resulting rate for telecommunications service being the significantly higher of the two.[28]

The pole attachment rate for telecommunications service is seen by many, especially in the cable TV industry, as an impediment to broadband deployment.[29] To promote deployment of broadband service, the NBP recommends the establishment of pole attachment rates that are "as low and close to uniform as possible."[30] The Ohio Commission generally agrees with the notion that lowering the telecommunications service rate would spur an increase in the deployment of broadband services, as this would allow the broadband service providers to provide telecommunications services over their networks without incurring an incremental increase in the cost for pole attachments. The

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26 FNPRM at 46, 52, ¶¶ 110, 122.

27 *See* 47 U.S.C. § 224(d)(1), (e)(3) (2010).

28 47 U.S.C. § 224(a)(4), (d)(1)(3), (e)(1)(2)(3) (2010).

29 FNPRM at 48-49, ¶¶ 115-116.

30 *Id.* at 115.

Ohio Commission also understands that cable operators may be deterred from offering new services with telecommunications elements based on the possible negative financial impact if they are required to pay the difference between the telecommunications rate and the cable service rate. From purely a cost standpoint, the Ohio Commission also agrees that the telecommunications pole attachment rate and the cable pole attachment rate should be similar, as the difference in the actual cost to the pole owner of providing these two types of attachments would be negligible or even non-existent. The Ohio Commission further recognizes that lowering the telecommunications rate would likely promote the NBP's objective of ubiquitous broadband deployment in the short-run. However, the Ohio Commission does not necessarily agree that the telecommunications rate should be set at the cable TV rate.

While there is some anecdotal evidence that cable TV providers have chosen not to offer services commingled with telecommunications components because of the difference between the cable service pole attachment rate and the much higher telecommunications service pole attachment rate, if the cable service rate was increased to the telecommunications service rate, there would be no incremental cost associated with pole attachments should the cable operator begin offering telecommunications service. Certainly, the Ohio Commission does not advocate raising the cable service rate to that of the telecommunications service rate, but the Ohio Commission does believe that the FCC should consider the reasons the cable service rate is lower before moving the telecommunications rate in that direction.

At the time the cable service rate was established, cable companies were not direct competitors of utilities, which are required to allow access to their poles. Consequently, a utility providing cable attachments to its poles would not be at a disadvantage if it recovered only the incremental cost of providing that attachment. On the other hand, it was recognized with the establishment of the telecommunications service rate formula that attachers providing telecommunications services would be direct competitors of the incumbent local exchange carriers (ILECs). Consequently, a generally higher allocation of the unusable space on a pole was allocated among all attachers to account for this. Decreasing the telecommunications service rate to approximate the cable service rate would allow the telecommunications service provider to recover only the incremental cost of the attachment, which may put the telecommunications service provider at a competitive disadvantage to attachers who are its direct competitors. For instance, a competitive telecommunications service provider in direct competition with an ILEC that pays a rate equivalent to the cable rate would pay approximately 7.4% of the fully distributed annual cost of the pole.[31] If there is only one attacher other than the ILEC, then the ILEC would be responsible for the remaining 92.6% of the fully distributed cost of the pole.[32] From this perspective, one could argue that the competitive telecommunications service provider attaching to the ILEC's pole has a competitive advantage over the ILEC with respect to the cost of pole attachments. While the same scenario occurs when the tele-

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31 *See* 47 C.F.R. §§1.1409(e)(1)(2)(3), 1.1418 (2010).

32 *See id.*

communications service rate formula is used, the magnitude of the disparity between the portion of the fully-distributed cost the attacher would pay and the portion for which the pole owner would be responsible is much smaller.

The Ohio Commission also recognizes the argument that the ILECs are, in fact, made whole through the rates assessed to their end-use customers, both retail and wholesale. Under incremental costing models, the cost of poles is included as a shared cost. Under these models, the only cost that is not recovered is the incremental cost of the pole attachment, which, arguably, does not place the utility at a disadvantage and is the only additional cost it should recover. Instead, since the ILECs' end-use customers – retail and wholesale – are making the ILECs whole through assessed rates for the cost of the poles used by the ILECs' cable competitors, these customers are the parties that may, in fact, be placed at a disadvantage. The Ohio Commission believes that if the current telecommunications pole attachment rate is maintained, the objectives of the NBP would likely be frustrated, as broadband deployment would be discouraged. However, one may argue that any pole cost recovery received under the current rate should be accounted for in any incremental cost model to prevent a double recovery by the ILEC.

The Ohio Commission agrees that the FCC has the discretion to interpret the term "cost" in subsection 224(e) and modify the cost methodology underlying the telecommunications rate formula. However, the Ohio Commission urges the FCC, should it decide to modify this cost methodology, to carefully consider whether doing so will allow certain attachers to have an unfair competitive advantage over pole owners with respect to pole attachment costs. The Ohio Commission believes that this result may, in fact,

have the effect of deterring the deployment of broadband service in presently unserved areas.

IV. Timelines for Completing Pole Attachments

The Ohio Commission agrees with the FCC's assertion that delays in obtaining access to poles may not only affect a communications provider's ability to serve particular customers, but may also affect the provider's decision to serve a particular market at all.[33] Accordingly, the Ohio Commission supports the idea of establishing a timeline to manage the pole access process for attachers and finds the FCC's five-stage timeline to be a reasonable approach to addressing this issue.[34] Nonetheless, the Ohio Commission believes that the proposed timeline will be very difficult to follow and limitedly effective if the communication and notification process among prospective attachers and pole owners is not improved as well.

In recent years, the Ohio Commission noticed an increase in "two-pole" situations. That is, a protracted pole transfer and old pole removal process that results in two poles being in a particular location for an extended period of time. In 2005, the Ohio Commission staff, together with representatives from the regulated telephone and electric companies, the cable TV companies, the Ohio Cable Telecommunications Association, and the rural electric cooperatives, established the Pole Transfer and Removal Task Force ("Task Force") to address this issue. With few exceptions, the Task Force found that the

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33 *See* FNPRM at 13-14, ¶¶ 26.

34 *See id*. at 11-22, ¶¶ 21-45.

electric and telephone industries were generally unaware of the status of their poles, including which service providers were attached to them. This resulted largely from the lack of a uniform tracking and notification system. Most pole owners were using a paper notification process, rather than an automated electronic process, to notify attachers of needed transfer and pole removal activity.

The Ohio Commission believes the efficiency and integrity of joint use communication and management would be greatly enhanced by the use of an electronic notification system rather than the paper notification process. Some Ohio companies have begun using such a system. It seems that the FCC recognizes this concept as well, but rather than directly requiring an electronic notification system in its rules, it has proposed timelines that will likely be difficult to meet through the paper notification system. These difficulties may necessitate the implementation of an electronic system. The Ohio Commission is hopeful that electronic notification systems will result from the FCC's proposed pole attachment timelines and believes that, if so, the pole attachment process will become more efficient for the traditional regulated industries, and achievement of the NBP's objective of hastening broadband deployment will be significantly advanced.

CONCLUSION

Universal broadband deployment and access is an important goal that involves many challenges, including those pertaining to pole attachments. The Ohio Commission believes that addressing issues such as pole attachment access, dispute resolution, and rates, as the FCC has done in the FNPRM, is imperative to removing barriers to entry that would hinder broadband deployment and frustrate the implementation of the NBP. As such, the Ohio Commission has made recommendations and provided its thoughts regarding a pole attachment dispute resolution process, a uniform pole attachment rate, modification of the telecommunications pole attachment rate, and an electronic notification system in the context of the FCC's proposed timelines. The Ohio Commission appreciates the opportunity that the FCC has given it to share its thoughts on these matters and is pleased to submit its comments for consideration.

Respectfully submitted,

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Dated: August 19, 2010

Your submission has been accepted

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Proceedings

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09-51	In the matter of a National Broadband Plan for Our Future.

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Summary: Comments (Corrected) on behalf of the Public Utilities Commission of Ohio to be submitted to the FCC on August 19, 2010, on behalf of the Commission by Rebecca Hussey to be filed in WC Docket No. 07-245, In the Matter of the Implementation of Section 224 of the Act, and GN Docket No. 09-51, In the Matter of a National Broadband Plan for Our Future electronically filed by Kimberly L Keeton on behalf of Public Utilities Commission of Ohio