BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 16-1683

AMEREN CORPORATION, ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Congress vested in the FCC broad authority to regulate the rates for "pole attachments" – *i.e.*, the charges that utility companies levy on cable companies and telecommunications carriers for the right to attach wires and other equipment to a utility's poles. 47 U.S.C § 224(b), (d)(1), (e)(2)-(3). In 2011, the FCC amended its regulations implementing Section 224 to lower the pole attachment rates paid by telecommunications carriers to the rate paid by cable companies after finding the disparity in rates had discouraged broadband deployment and hindered competition. In *American Electric Power Service Corporation v. FCC*, 708 F.3d 183, 188-90 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 118 (2013), the D.C. Circuit affirmed that decision, finding that the FCC reasonably exercised its discretion under Section 224 to "eliminate [market] distortion" resulting from disparate pole attachment rates.

In the Order under review, the FCC modified the rules upheld in *American Electric Power* after finding that they did not work as intended. The rules, as amended, share the same structure and the same purpose as the 2011 rules. Accordingly, they are no less lawful than the rules at issue in *American Electric Power*, and this Court should follow the D.C. Circuit's reasoning in that case to avoid a circuit split.

The FCC requests 15 minutes for oral argument.

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BRIEF FOR RESPONDENTS

JURISDICTION

The *Order* on review was released on August 18, 2015, and published in the Federal Register on February 3, 2016. *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 30 FCC Rcd 13731 (2015) ("*Reconsideration Order*"); 81 Fed. Reg. 5605 (Feb. 3, 2016), as corrected by 81 Fed. Reg. 7999 (Feb. 17, 2016). The petition for review was timely filed on March 18, 2016. This Court's jurisdiction rests on 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

INTRODUCTION AND QUESTION PRESENTED

Pole attachment rates are the charges that owners of utility poles assess when cable companies, telecommunications carriers, and others attach their lines to the utility's poles. In the Communications Act, Congress directed the FCC to prescribe regulations to ensure that pole attachment rates are "just and reasonable." 47 U.S.C. § 224(b).

Historically, the FCC's regulations implementing Section 224 allowed pole owners to charge telecommunications carriers a higher rate than cable companies. But in 2011, the FCC amended its rules to eliminate that discrepancy after finding that it deterred the deployment of new services and discouraged network investment. *See Implementation of Section 224 of the Act*; *A National Broadband Plan for Our Future*, 26 FCC Rcd 5240 (2011) ("*2011 Order*"). The D.C. Circuit affirmed those rules in *American Electric Power Service Corporation v. FCC*, 708 F.3d 183, 188-90 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 118 (2013).

Soon thereafter, the FCC learned that one of the factual assumptions underlying those rules was flawed. Consequently, telecommunications carriers still paid rates for pole attachments that exceeded the rates paid by cable companies – sometimes by as much as 70 percent.

This continuing disparity in pole attachment rates became a more pressing problem after the FCC classified broadband Internet access services as telecommunications services. That decision gave utilities an incentive to demand that cable companies providing broadband Internet access service pay the higher pole attachment rates paid by telecommunications carriers. The FCC predicted that the resulting large and sudden increase in pole attachment rates could destabilize cable companies' plans to deploy broadband facilities, particularly in underserved rural areas. To forestall that result, the Order under review modified the FCC's rules to ensure that the rates for pole attachments used to provide telecommunications service would better approximate the lower rates for pole attachments used solely to provide cable service, as the agency had intended in 2011.

Petitioners, a group of electric utilities subject to Section 224's obligation to allow third parties to attach wires, cables, and other equipment to their poles, now petition for review.

The question presented is:

Whether the FCC lawfully exercised its rate-setting authority under 47 U.S.C. § 224(b) and (e) when it modified a formula it previously had used for computing the "cost" of providing space on a pole for purposes of establishing a just and reasonable rate for telecommunications attachments.

Most apposite statutory provisions:

- 47 U.S.C. § 224(b), (d)(1) & (e)(2)-(3).

Most apposite cases:

- *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183, 188-190 (D.C. Cir.), *cert. denied*, 134 S. Ct. 118 (2013).
- *Verizon Commc'ns v. FCC*, 535 U.S. 467, 500-501 (2002).
- *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330 (2002).

STATUTES AND REGULATIONS

The pertinent statutory provisions and regulations are set forth in the addendum to this brief.

COUNTERSTATEMENT

I. THE FCC'S AUTHORITY TO REGULATE POLE ATTACHMENT RATES

A. Regulation Prior to the 1996 Act

Utility poles provide a convenient and often essential means for communications providers to deploy the lines, wires, and other network equipment they need to reach potential customers. Concerned that owners of utility poles – generally electric utilities – were abusing their market power by charging cable television providers "monopoly rents" to attach cable television wires to their poles, *see Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330 (2002), Congress in 1978 added Section 224 to the Communications Act, 47 U.S.C. § 224. That provision granted the FCC

the authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable" and to "hear and resolve complaints concerning such rates, terms, and conditions." 47 U.S.C. § 224(b)(1).

As originally enacted, Section 224 applied only to attachments by cable companies. Pub. L. No. 95-234, § 6, 92 Stat. 33, 35 (1978). In Section 224(d)(1), Congress specified two alternative cost-based standards under which the FCC could set what is generally referred to as the "cable rate" (*i.e.*, the pole attachment rate paid by cable companies solely to provide cable service). 47 U.S.C. § 224(d)(1). At the upper bound, the rate cannot be more than "the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole" multiplied by "the percentage of the total usable space" occupied by the attachment. 47 U.S.C. § 224(d)(1). At the lower bound, the cable rate cannot be "less than the additional costs of providing pole attachments." *Id.* In other words, Section 224(d)(1) establishes a "range of reasonableness" for the cable rate that is between the cable operator's share of the "fully allocated cost of construction and operation of the pole" (at the upper end) and the "marginal costs of attachments" (at the lower end). *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987). In a

series of orders, the FCC implemented a formula to determine a maximum just and reasonable pole attachment rate (the "cable rate formula").

B. Regulation After the 1996 Act

As part of its broad effort to promote infrastructure investment and competition, Congress expanded the reach of Section 224 of the Communications Act in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Congress added "provider[s] of telecommunications service[s]" as a category of attacher entitled to pole attachments at just and reasonable rates under Section 224. 47 U.S.C. § 224(a)(4), (b)(1).

The 1996 Act also added a new provision – Section 224(e) – to govern pole attachments "used by telecommunications carriers to provide telecommunications services." 47 U.S.C. § 224(e)(1). Congress instructed the FCC to "prescribe regulations" to "ensure that a utility charges just, reasonable, and nondiscriminatory rates" for such attachments. *Id*. Section 224(e) provides that those rates are to be determined based on the "cost" of providing space on a pole. 47 U.S.C. § 224(e)(2), (3). The statute directs how cost should be allocated between the pole owner and attacher, but unlike the cable rate formula in Section 224(d)(1), does not specify how "cost" should be computed before allocation among the parties. Thus, Section 224(e)(2) provides that the "cost of providing space on a pole … other than the usable

space" is to be apportioned among "all attaching entities" so that each attacher is allocated two-thirds of the *pro rata* cost of such unusable space. Section 224(e)(3) states that the "cost of providing usable space" is to be apportioned "among all entities according to the percentage of usable space required for each entity."

As initially implemented, the telecom rate formula generally resulted in higher pole attachment rates than the cable rate formula. *2011 Order* n.397 (App. 58). The historical discrepancy between the two rates largely stemmed from the different ways in which the two statutory formulas "allocate the costs associated with the *unusable* portion of the pole" – *i.e.*, the space on the pole (including the portion underground) that "cannot be used for attachments." *Id.* (emphasis added). Whereas the cable rate formula allocates such costs "based on the fraction of the usable space that an attachment occupies," the telecom rate formula apportions those costs based on the number of attachers. *Id.* This difference typically resulted in a telecom rate

that was higher than the cable rate under the historical approach of defining "cost" as fully allocated cost in both contexts.[1]

C. The *2011 Order*

The 1996 Act was designed to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 1 (1996). Consistent with that goal, Section 706 (later codified at 47 U.S.C. § 1302(a)), requires the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans … by utilizing … regulating methods that remove barriers to infrastructure investment." If the FCC finds that such "broadband" capability is not being sufficiently deployed, the statute mandates that the agency "shall take immediate action to accelerate

[1] To illustrate the historical relationship between the rates, assume a pole with an attachment used solely to provide cable service. That attachment takes up 10 percent of the usable space of the pole. Under the cable rate formula, 10 percent of the cost of the unusable space will be allocated to that attachment. Next, assume a pole with attachments used to provide telecommunications service. If there is one third-party attacher on the pole, that attacher pays two-thirds of the cost of the unusable space. If there are two third-party attachers, each pays one-third of the cost of the unusable space. And so on. Thus, only when there are a significant number of telecommunications attachments on a pole does each attacher's portion of the cost of unusable space decline to the point that it is commensurate with the cost of the unusable space allocated to each cable attachment.

deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." 47 U.S.C. § 1302(b).

The FCC in April 2011 adopted new rules to implement Section 224. *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240 ("*2011 Order*"). Citing Congress' directive under Section 706, the agency explained that the new rules were "designed to promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation." *2011 Order* ¶ 1 (App. 2). Among other reforms, the FCC adopted a new definition of the term "cost" in Section 224(e) to "yield[] a new 'just and reasonable' telecommunications rate" that "generally will recover the same portion of pole costs as the current cable rate." *Id.* ¶ 8 (App. 5).

The FCC found that, because "pole rental rates play a significant role in the deployment and availability of voice, video, and data networks," a new telecom rate was necessary to "promote competitive and technological neutrality, and hence more effective competition, resulting in more efficient investment, innovation, and service provision." *Id.* ¶¶ 172-173 (App. 77-78). As the FCC explained, "cable operators have been arbitrarily deterred from offering new, advanced services" because of the "financial impact" that could

result from application of a higher telecom rate. *Id.* ¶ 174 (App. 78). The FCC also found that "implementing a low and more uniform rate" will "eliminate competitive disadvantages that [telecommunications] carriers" face, *id.* ¶ 176 (App. 79), and will in turn "enable more efficient investment decisions in network expansion and upgrades, most notably in the deployment of modern broadband networks," *id.* ¶ 181 (App. 81-82).

Accordingly, the FCC rejected continued use in the telecom rate formula of the fully-allocated-cost approach it had imported from the cable rate formula. Instead, it adopted two alternate methods of measuring cost, with utilities receiving the benefit of the method that produces the higher rate.

First, the FCC recognized that the pole attachment rates paid by telecommunications carriers had historically contributed to the capital costs of the pole network, and it did not want the new telecom rate to "unduly burden [utility] ratepayers." *2011 Order* ¶ 149 (App. 65-66). Balancing that concern against the statutory goal of promoting broadband deployment, the FCC decided to "allow the pole owner to charge a monthly pole rental rate that reflects some contribution to capital costs" while also reducing the telecom rate so that it "will, in general, approximate the cable rate." *Id.* The FCC settled on an approach that defines costs "in terms of a percentage of the fully allocated costs" of the pole – specifically, 66 percent of fully allocated

costs in urban areas and 44 percent of costs in non-urban areas. *Id.* ¶ 149 (App. 65-66); *see* 47 C.F.R. § 1.1409(e)(2)(i). The FCC intended for this measure of cost to produce a rate that "will, in general, approximate the cable rate." *Id.*[2]

Second, the FCC established an alternative measure of cost that is based on the principle of "cost causation," under which the customer – the cost causer – pays a rate that covers the costs for which it is causally responsible. *Id.* ¶ 143 (App. 62). This approach permits a pole owner to recover its administrative and maintenance costs through the telecom rate, but not capital costs. *Id.*; *see* 47 C.F.R. § 1.1409(e)(2)(ii). The FCC noted that the capital costs caused by a telecommunications attacher have long been

[2] The telecom rate is calculated using the average number of attaching entities on a pole. "[T]o expedite the process of developing average numbers of attaching entities" and to "allow utilities to avert the expense of developing location specific averages," the FCC's rules "provide two rebuttable presumptive averages." *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103, 12139 (¶ 69) (2001) ("*2001 Pole Attachment Order*"), *pet. for review denied, S. Co. Servs., Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002); 47 C.F.R. § 1.1417(c). A utility may rebut those presumptions using "its own presumptive average number of attaching entities." 47 C.F.R. § 1.1417(d).

recovered through make-ready charges,[3] *id.*, which "the utility itself sets." *2011 Order* ¶ 185 (App. 83).

The FCC observed that the first of these two measures of cost will produce a higher telecom rate "in most cases." *2011 Order* ¶ 149 (App. 65-66).

D. *American Electric Power*

A number of utilities (including one of the petitioners here) filed petitions for review of the *2011 Order* in the D.C. Circuit. That court rejected petitioners' challenge to the new definition of "cost" in the telecom rate formula, finding that "the term 'cost' in § 224(e)(2) and (e)(3) is necessarily ambiguous," and that it was reasonable for the FCC to define "cost" to eliminate the historical disparity between cable and telecom rates for pole attachments. *American Electric Power*, 708 F.3d at 188-190. In doing so, the court approved "the Commission's fundamental proposition that artificial, non-cost-based differences in the prices of inputs among competitors are bound to distort competition, handicapping the disfavored competitors and at

[3] "'Make-ready' generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities." *2011 Order* n.42 (App. 09).

the margin causing market share and capital to flow to less efficient firms." *Id*. at 190.

E. The Reconsideration Petition

While litigation over the *2011 Order* was pending, the National Cable and Telecommunications Association, CompTel, and tw telecom, inc. filed a petition seeking administrative reconsideration or clarification of that order. The NCTA Petition asserted that the 66 percent and 44 percent cost allocators adopted in the *2011 Order* produce telecom rates that replicate cable rates when applied in tandem with a presumption in the FCC's rules that there are, on average, 5 attachers on a pole in an urban area and 3 attachers on a pole in a non-urban area. *Reconsideration Order* ¶ 13-14 (App. 286-87); *see* 47 C.F.R. § 1.1417(c). But the NCTA Petition further asserted that poles typically have fewer attachments (2.6 on average), and that the mismatch between the presumptive number of attachments and the actual number of attachments had resulted in telecom rates that frequently exceeded cable rates. *Reconsideration Order* ¶ 13 (App. 286-87). NCTA therefore asked the FCC to either clarify that the 66 and 44 percent allocators "are mere illustrations of the new rule," or to add cost allocators for poles with 2 and 4 attachers, to ensure that cable and telecom pole attachment rates are comparable. *Id*. ¶ 14 (App. 287).

F. The *Open Internet Order*

On February 26, 2015, the FCC adopted the *Open Internet Order*, which, *inter alia*, classified "retail broadband Internet access service" as "an offering of a 'telecommunications service'" under the Communications Act. *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) ("*Open Internet Order*"), *aff'd, United States Telecom Ass'n v. FCC*, ___ F.3d ___, 2016 WL 3251234 (D.C. Cir. June 14, 2016). That decision, the FCC recognized, gave pole owners an incentive to demand that cable companies providing broadband Internet access service pay the telecom rate (as opposed to the cable rate) for pole attachments. *Id.*, 30 FCC Rcd at 5832-33 (¶¶ 482-484). Noting NCTA's observation that the telecom rate formula still failed to eliminate rate disparity, the FCC expressed concern that the *Open Internet Order* could inadvertently lead to increases in pole attachment rates that would stifle future investment in broadband infrastructure. *Id.* at 5833 (¶¶ 483-484). The FCC thus committed to "monitoring marketplace developments" and "promptly tak[ing] further action" regarding pole attachment rates "if warranted." *Id.* at 5833 (¶ 483). It also issued a public notice asking parties to refresh the record with regard to the NCTA Petition. *See* Public Notice, 30 FCC Rcd 4615 (WCB 2015) (Supp. App. 2).

II. THE *RECONSIDERATION ORDER*

On November 24, 2015, the FCC released the *Reconsideration Order*. In response to the NTCA Petition, the order "broaden[ed] the use of cost allocators in the telecom rate formula" by introducing new cost allocators for poles with 2 attachers (31 percent of fully allocated cost) and 4 attachers (56 percent of fully allocated cost). *Reconsideration Order* ¶ 16 (App. 288). The FCC found that this "multiple cost-allocator approach" would "fulfill [its] intent … to bring cable and telecom rates for pole attachments into parity at the cable-rate level," consistent with its finding in the *2011 Order* that "[l]ower pole rental rates serve to encourage broadband investment." *Id.* ¶¶ 16, 20 (App. 288, 290-91).

Three considerations motivated that decision. *Id.* ¶¶ 20-27 (App. 290-94). First, the FCC found "widespread agreement" in the record "that the real average number of attaching entities" on a pole "is regularly far lower than" the presumptive number of attachers in the FCC's rules – a "disparity" that the record showed "causes rates calculated with the telecom rate formula to be around 70 percent higher than rates calculated with the cable rate formula." *Id.* ¶ 18 (App. 288-89). The FCC found it notable that "[n]o commenter dispute[d]" NCTA's assertion that pole owners routinely rebut the FCC's presumptions with an average of "2.6 attaching entities" in all areas.

Id. That uncontested record evidence, the FCC explained, "cast[] doubt not only on the credibility of" the presumptive number of attachers in its rules, but also on the underlying presumption that there are more attachers on a pole in an urban area (5) than in a non-urban area (3). *Id.*; *id.* ¶ 23 (App. 292).

Second, the FCC found that the flawed presumptions underlying its cost definition, in combination with the *Open Internet Order*, could have the "unintended consequence" of increasing pole attachment rates for cable companies that also offer broadband Internet access services. *Id.* ¶¶ 21, 35 (App. 291, 296-97). As the NCTA Petition observed, utilities "have increased incentives" to rebut the FCC's attaching entity presumptions now that cable companies – which "'are responsible for the substantial majority of pole attachments'" – may be subject to the telecom rate. *Id.* ¶ 21 (App. 291) (citing NCTA Petition at 6; *id.* n.65 (App. 288-89) (quoting NCTA Public Notice Reply Comments at 9). The FCC concluded that "[a]ligning rates produced by the two rate formulas" would eliminate disputes over the number of attaching entities on a pole and thus "forestall[a] potential increase" in pole attachment rates. *Id.* ¶ 21 (App. 291). It also would lower the pole attachment rates paid by telecommunications carriers, including broadband providers newly classified as telecommunications carriers by the *Open Internet Order*. *Id.*

Third, the FCC found that perpetuating the unintended disparity between cable and telecom rates could "deter[] investment" in some states relative to others. *Id.* ¶ 22 (App. 291-92). Under 47 U.S.C. § 224(c), states have authority to regulate pole attachments under certain conditions. The FCC observed that many states exercising that authority "'apply a uniform rate'" that is "'identical or similar to'" the FCC's cable rate "'for all attachments used to provide cable and telecommunications services.'" *Reconsideration Order* ¶ 22 (App. 291-92) (quoting *2011 Order* ¶ 177 (App. 80)). This discourages providers of telecommunications services, which now include broadband Internet access services, from investing in states subject to the higher FCC-established pole attachment rates. *Reconsideration Order* ¶ 22 (App. 291-92). The FCC concluded that lowering the telecom rate to the cable rate level corrects such "marketplace distortions." *Id.*

Utilities opposed the FCC's further refinement of the telecom rate formula on the ground that it would "unfairly reduce their revenue from pole attachments." *Id.* ¶ 28 (App. 294). The FCC found that argument "unpersuasive," noting that prior to the *Open Internet Order*, "[t]elecommunications carriers account[ed] for only a little more than 10 percent of attaching entities." *Id.*; *see also 2011 Order* ¶ 151 (App. 66)

(explaining that "there are far more attachments by cable companies than by telecommunications carriers paying the telecom rate"). In light of the fact that a significantly larger number of pole attachments were subject to the cable rate, the FCC concluded that reducing the telecom rate to the cable rate "disrupts settled expectations far less" than raising the cable rate to the telecom rate. *Reconsideration Order* ¶ 28 (App. 294).

Utilities also disputed the FCC's determination that lower pole attachment rates promote broadband deployment. *Id.* ¶¶ 26-27 (App. 293-94). They argued that capital expenditures, not pole attachment rates, drive investment in broadband. *Id.* ¶ 26 (App. 293). The FCC acknowledged that the record "d[id] not include quantifiable information" concerning the effect of existing pole attachment rates on broadband deployment. *Id.* ¶ 27 (App. 293-94). But it predicted that a "large and sudden pole attachment rate increase" could "destabliz[e]" cable companies' plans to deploy broadband facilities, particularly in underserved rural areas. *Id.* Also, the FCC found that it "[could not] afford to dismiss the importance of even potentially small increments" of broadband deployment given that "[t]here remains room for improvement in the rate of broadband expansion."

SUMMARY OF ARGUMENT

Petitioners challenge the FCC's authority to define the "cost" used in the telecom rate formula so that all broadband providers pay equivalent pole attachment rates. Similar arguments were rejected by the D.C. Circuit in *American Electric Power*, 708 F.3d 183. This Court should follow that decision in this case.

1. In the *2011 Order*, the FCC defined "cost" in the telecom rate formula in terms of two percentages of the fully allocated cost of a pole, with the intent that the pole attachment rates paid by telecommunications carriers would approximate the rates paid by cable companies. The D.C. Circuit affirmed that decision in *American Electric Power*, holding that the term "cost" in Section 224(e)(2) and (3) is ambiguous; the FCC has significant discretion to define "cost" in Section 224(e); the FCC reasonably exercised that discretion in defining the "cost" used in the telecom rate formula as a percentage of the fully allocated costs of a utility pole; and that reducing the disparity between the telecom and cable rates to "eliminate [market] distortion" was a reasonable "policy justification" for the FCC's "chosen methodology." 708 F.3d at 188-90.

Subsequently, the FCC found that a loophole in the telecom rate formula, in combination with the agency's classification of broadband

Internet service access as a telecommunications service, could unintentionally increase the rates paid for millions of existing pole attachments – an outcome the FCC predicted could discourage broadband deployment. To avoid that result, the *Reconsideration Order* refined the *2011 Order*'s definition of cost.

Petitioners contend that because Section 224 sets forth different rate formulas for cable companies and telecommunications carriers, cable companies and telecommunications carriers must pay different rates for pole attachments. That does not follow. Different formulas can produce the same result where, as here, one subsection of the statute defines the "cost" used in the rate formula, *see* 47 U.S.C. § 224(d)(1), and another subsection does not, *see* 47 U.S.C. § 224(e)(2)-(3). Because Section 224(e)(2) and (3) do not delimit "cost," the FCC had discretion under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to adopt a definition of "cost" designed to eliminate the market distortions that result when competitors pay different prices for inputs like pole attachments. *See American Electric Power*, 708 F.3d at 190.

Petitioners further argue that the FCC unreasonably defined "cost" in a manner that varies based on the number of attachers on a pole. But the D.C. Circuit upheld a similarly variable definition of cost when it affirmed the *2011 Order*. *American Electric Power*, 708 F.3d at 189. On reconsideration,

the FCC added cost allocators for service areas where poles have 2 and 4 attachers on average, supplementing the *2011 Order*'s cost allocators for poles with an average of 3 and 5 attachers. In both cases, Section 224(e)'s broad language allows the FCC to adopt a "cost" definition designed to equalize telecommunications carriers' and cable companies' pole attachment rates.

2. Petitioners also contend that the agency's action was arbitrary and capricious because it failed to establish a link between pole attachment rates and broadband deployment. The FCC established that link in the *2011 Order*, however, and it did not revisit it in the administrative proceeding leading to the *Reconsideration Order*. Petitioners' argument therefore is time-barred under the Hobbs Act, 28 U.S.C. § 2344, and the Communications Act, 47 U.S.C. § 402(a).

The argument lacks merit, in any event. The FCC in the *2011 Order* found that lowering pole attachment rates reduces broadband providers' costs, which helps make the business case for broadband investment. Applying that finding in the *Reconsideration Order*, the FCC reasonably predicted that raising broadband providers' pole attachment rates would dampen their incentive to invest in new facilities, particularly in rural areas where costs are higher. The FCC saw no reason why utilities should enjoy a "windfall" from

an unrelated regulatory action when the resulting increase in rates would deter broadband deployment and undermine the agency's policies.

STANDARD OF REVIEW

Judicial review of the FCC's interpretation of the Communications Act is governed by the familiar *Chevron* framework. Under *Chevron*, if the intent of Congress is clear, "the court, as well as the agency, must give effect to [that] unambiguously expressed intent." *Chevron*, 467 U.S. at 842-843. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. The agency's "view governs if it is a reasonable interpretation of the statute – not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009).

Under the Administrative Procedure Act, the FCC's analysis must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). "[T]he ultimate standard of review is a narrow one," and the "court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Judicial deference to the

FCC's "expert policy judgment" is especially appropriate where, as here, the "subject matter … is technical, complex, and dynamic." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1002-1003 (2005) (internal quotation marks omitted); *accord Gulf Power*, 534 U.S. at 339; *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 577 (8th Cir. 2007).

Finally, "[b]ecause agency ratemaking is far from an exact science and involves 'policy determinations in which the agency is acknowledged to have expertise' [judicial] review thereof is particularly deferential." *Time Warner Entm't Co. L.P. v. FCC*, 56 F.3d 151, 163 (D.C. Cir. 1995).

ARGUMENT

I. THE FCC LAWFULLY MODIFIED ITS POLE ATTACHMENT RULES

The FCC revised the cost definition affirmed in *American Electric Power* after finding that the telecom rate formula for pole attachments was not working as intended – a problem that took on increased significance after the agency classified broadband Internet access service as a telecommunications service.

Petitioners' challenges to the *Reconsideration Order* (and implicitly, to the decision in *American Electric Power*) fall short. Judicial review of the

FCC's rate-setting decisions is highly deferential, and Petitioners have not come close to demonstrating that the agency abused its discretion in this case.

A. The FCC Has Broad Rate-Setting Authority under Section 224(e)

Section 224(e)(1) requires the FCC to adopt telecom rates that are "just, reasonable, and nondiscriminatory." To achieve that result, Section 224(e)(2) and (3) describe how the FCC is to apportion among attaching entities the "cost of providing usable space," 47 U.S.C. § 224(e)(3), and the "cost of providing space on a pole … other than the usable space," *id*., (e)(2).

Although Section 224(e) "prescribes the apportionment criteria rather specifically, it nowhere defines the term 'cost.'" *American Electric Power*, 708 F.3d at 189. Absent a specific definition, "the word 'cost' … is a chameleon, … a virtually meaningless term" whose use signifies an intent to "give rate-setting commissions broad methodological leeway," but "say[s] little about the method employed to determine a particular rate." *Verizon Commc'ns v. FCC*, 535 U.S. 467, 500-501 (2002) (internal quotation marks and citation omitted). Thus, when the "unadorned term … cost" is an element "in the calculation of just and reasonable rates," "regulatory bodies required to set rates expressed in these terms have ample discretion to choose methodology." *Id.* at 499-500 (internal quotation marks omitted); *see also S.W. Bell Tel. Co. v. FCC*, 153 F.3d 523, 537, 547 (8th Cir. 1998)

(acknowledging "the FCC's 'broad discretion in selecting methods … to make and oversee rates'") (quoting *MCI Telecomms. Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982)).

The D.C. Circuit in *American Electric Power*, 708 F.3d at 189-90, recognized the FCC's broad discretion to set rates under Section 224(e). The court noted that Section 224(e)(2) and (3), unlike Section 224(d)(1), do not define the cost to be used to calculate pole attachment rates. *Id.* at 188-89. Explaining that "the term 'cost,' without more, is open to a wide range of interpretations," that court held that the *2011 Order* reasonably defined the term "cost" in Section 224(e)(2) and (3) to eliminate the distortions that result when cable companies and telecommunications carriers pay different pole attachment rates. *Id.*

The FCC subsequently learned that the *2011 Order* reduced, but did not eliminate, the gap between the rates for telecom and cable pole attachments. *Reconsideration Order* ¶¶ 17-19, 21-23 (App. 291-92, 288-90). It found that continuing rate disparity, in combination with the *Open Internet Order*'s classification of broadband internet access as a telecommunications service, could give pole owners an incentive to raise the rates for millions of existing pole attachments, *Reconsideration Order* ¶¶ 21, 23, 35 (App. 291, 292, 296-97) – particularly those of cable companies providing

telecommunications services. *Id*. n.65 & ¶ 28 (App. 288-89, 294). The resulting increase in pole attachment costs, the FCC predicted, could dampen broadband providers' incentives to extend facilities to unserved or underserved areas. *Id*. ¶ 27 (App. 293-94); *see also 2011 Order* ¶¶ 174-175, 178 (App. 78-79, 80). To prevent that from happening, the *Reconsideration Order* revised the FCC's methodology for calculating the telecom rate. *Reconsideration Order* ¶¶ 20-28 (App. 290-94).

Thus, the *Reconsideration Order* refined the *2011 Order*'s cost definition to achieve the earlier order's objective – ending the marketplace distortions and barriers to broadband deployment that resulted from inequivalent pole attachment rates.

B. The FCC's Interpretation of Section 224(e) Is Consistent with the Language and Structure of Section 224

Petitioners contend that the FCC's rules are at odds with the text and structure of Section 224. Br. 25-30. According to Petitioners, by "ensur[ing] that the Telecom Rate equates to the Cable Rate in all circumstances," the FCC's "new definition of 'cost' renders § 224(e)(2) a nullity." Br. 27. Not so. Section 224(e)(2) neither defines "cost" nor specifies rates; it only prescribes how costs – however defined – should be apportioned between the pole owner and an attaching entity. *See Reconsideration Order* ¶ 41 (App. 300-01); *2011 Order* ¶ 156 (App. 69); *American Electric Power*, 708 F.3d at 189.

The FCC thus gives full effect to Section 224(e)(2) when it applies that provision's apportionment criteria to the "cost" specified in its rules. *See* 47 C.F.R § 1.1409(e)(2)(i)-(ii).

Petitioners assert that because Section 224 "sets forth different statutory formulas for different types of attachments," it evidences an "unambiguous congressional intent" that the statute "yield different rates." Br. 20. But depending on how they are expressed, nothing prevents two formulas from resulting in the same rate. Thus, to use a basic algebraic example, x + 4 = y and 2x = y are two different formulas. But if x is 4, y will equal 8 in both cases.

The structure of Section 224 also cuts against Petitioners' contention that the statute mandates different rates for cable companies and telecommunications carriers. As the D.C. Circuit explained, "Section 224(e), the statutory basis for the telecom rate, is in important respects less specific than § 224(d)." *American Electric Power*, 708 F.3d at 188. In sharp contrast to Section 224(d), which explicitly mandates two alternative measures of cost for purposes of the cable rate (*i.e.*, fully allocated cost and marginal cost), *see* 47 U.S.C. § 224(d)(1), Section 224(e) "nowhere defines cost," *American Electric Power*, 708 F.3d at 189. By leaving "cost" undefined, Congress

assigned the FCC the task of "fill[ing] [the] gap[] where the statute[] [is] silent." *Gulf Power*, 534 U.S. at 339.

Petitioners further assert that if Congress had intended that cable companies and telecommunications carriers pay the same pole attachment rate, it simply could have "adopt[ed] the § 224(d)(1) rate for telecommunications carriers." Br. 29. But that would have required the FCC to ensure that the two rates are the same in all circumstances. The inclusion of two distinct rate formulas in Section 224 reflects Congress's intent that cable and telecom rates *may* be different; not, as Petitioners contend, that those rates *must* be different. The structure of Section 224 thus provides the FCC ample discretion to determine whether the cable and telecom rates should diverge at any given time based on relevant policy considerations. *Reconsideration Order* ¶ 41 (App. 300-01).[4]

Petitioners also contend that the FCC erred in interpreting Section 224(e) to further its "policy objectives," which they assert "ha[ve] no place in *Chevron* step one." Br. 28. To the contrary, the FCC's interpretation of the

[4] For the same reason, Petitioners find no support in the legislative history of the 1996 amendments to Section 224. Br. 29. The Conference Report cited by Petitioners provides that a cable provider using a pole attachment for cable services will pay the cable rate and a cable operator using a pole attachment for telecommunications services will pay the telecom rate. *Id*. It does not mandate different rate levels.

ambiguous term "cost" is governed by *Chevron* step two, and under that framework, it was reasonable for the agency to rely on policy rationales to give meaning to that term. *See American Electric Power*, 708 F.3d at 189-90; *see also Gulf Power*, 534 U.S. at 339 (the FCC may interpret Section 224 in light of "Congress' general instruction to the FCC to 'encourage the deployment' of broadband Internet capability") (quoting 47 U.S.C. § 1302(a)).

In any event, as Petitioners concede, the telecom rate and the cable rate can vary. Br. 28. Under the 2011 rules, as revised by the *Reconsideration Order*, the telecom rate is established by a comparison of the rates yielded by two calculations. *See* 47 C.F.R. § 1.1409(e)(2). The first calculation uses a percentage of the fully allocated costs of the pole that changes depending on the number of attaching entities, 47 C.F.R. § 1.1409(e)(2)(i), and the second uses the costs "caused" by an attacher, 47 C.F.R. § 1.1409(e)(2)(ii). Although the FCC anticipated that telecom rates would approximate cable rates under Rule 1.1409(e)(2)(i), the utility can instead charge the rate produced by Rule 1.1409(e)(2)(ii), where that rate is higher. *See 2011 Order* ¶¶ 152, 161 (App. 66-67, 71-72). Rule 1.1409(e)(2)(ii) thus gives meaning to Section 224(e)(2) under Petitioners' own reading of the statute because it can produce telecom

rates that diverge from cables rates using a non-variable definition of cost. *See Reconsideration Order* ¶ 40 (App. 300); *2011 Order* ¶ 161 (App. 71-72).[5]

Finally, Petitioners' statutory construction arguments cannot be squared with *American Electric Power*, which affirmed the *2011 Order*. Petitioners try to distinguish the *2011 Order* on the basis that it "at least left open the possibility that the § 224(e) formula could yield a rate higher than the § 224(d) formula where the utility rebutted Commission's presumptions regarding the average number of attaching entities." Br. 27. But nothing in *American Electric Power* turned on that possibility. To the contrary, the D.C. Circuit upheld the FCC's interpretation of "cost" because it advanced the agency's policy "of eliminating the differences between the cable and telecom rates." 708 F.3d at 189.

Petitioners invite this Court to disregard the D.C. Circuit's reasoning in *American Electric Power*. There is no reason to do so. This Court "strive[s] to maintain uniformity in law among circuits, whenever reasoned analysis will allow." *In re Miller*, 276 F.3d 424, 428-29 (8th Cir. 2002) (internal quotation

[5] Petitioners discount the effect of the cost-causation calculation in Rule 1.1409(e)(2)(ii) on the ground that it "yields a rate even *lower* than the § 1.1409(e)(2)(i) formula or the Cable Rate formula." Br. 28. Although that might be true "in the majority of cases," it will not be true in every case – for example, where a sizable fraction of a utility's poles have been almost fully depreciated. *2011 Order* ¶¶ 144 n.430, 161 (App. 62-63, 71-72).

marks and citation omitted). "Th[at] interest … is especially strong" in cases like this one, where "potentially conflicting decisions" among the circuits "would present different interpretations of federal law intended to be uniformly applied on a nationwide scale." *Nat'l Indep. Meat Packers Ass'n v. EPA*, 566 F.2d 41, 43 (8th Cir. 1977); *see also Duluth, Winnipeg, and Pac. Ry. Co. v. City of Orr*, 529 F.3d 794, 796 (8th Cir. 2008) (following other circuits' interpretation of "essentially local safety hazard" in 49 U.S.C. § 20106(a) to avoid a circuit split).

C. The FCC's Interpretation of Section 224(e) Is Reasonable

Petitioners further assert that even if the FCC's interpretation of "cost" in Section 224(e)(2) is not inconsistent with the language of the statute, it is unreasonable because it defines cost in a way that varies based on the number of attachers on a pole. *See* Br. 31-35.[6]

[6] The reasonableness of the FCC's interpretation of Section 224 is reviewed under *Chevron* step two, not the APA. *See, e.g., Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 410 (5th Cir. 1999); *N.W. Envt'l Advocates v. EPA*, 537 F.3d 1006, 1014 (9th Cir. 2008). That said, a court's "'inquiry at the second step of *Chevron*, *i.e.*, whether an ambiguous statute has been interpreted reasonably, overlaps with the arbitrary and capricious standard.'" *Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005) (quoting *Chamber of Commerce of the U.S. v. FEC*, 76 F.3d 1234, 1235 (D.C. Cir. 1996)).

In *American Electric Power*, the D.C. Circuit rejected the utilities' argument that "'cost' must necessarily refer to" a fixed cost – in that case, "the pole's fully allocated cost." *American Electric Power*, 708 F.3d at 189; *see* Brief of Petitioners, D.C. Cir No.11-1146, at 39 (filed April 9, 2012). Instead, it found that the FCC reasonably defined the ambiguous term "cost" in Section 224(e)(2) as two different percentages of fully allocated cost (*i.e.*, 66 percent of the fully allocated cost of a pole in an urban area and 44 percent of the fully allocated cost of a pole in a non-urban area), "priced differently due to the difference in quantity of attachments likely to occur." *Id.* at 189.

The *Reconsideration Order* did nothing more than modify the already variable definition of cost upheld in *American Electric Power*. The two cost allocators at issue in that case presumed 5 attachers on poles in urban areas and 3 attachers on poles in non-urban areas. *2011 Order* n.517 (App. 75). Those presumptions proved incorrect and frustrated the agency's goal of harmonizing rates. Accordingly, the *Reconsideration Order* introduced two additional cost allocators, for poles with 2 attachers (31 percent of fully allocated cost) and 4 attachers (56 percent of fully allocated cost). *Reconsideration Order* ¶¶ 13, 16, 19 (App. 286-87, 288, 289-90).

Petitioners in effect contend that Section 224(e)(2) is flexible enough to accommodate two cost allocators but not four. Br. 32-33.[7] But the statute imposes no such artificial limit on the agency's broad discretion to establish pole attachment rates.

Petitioners differentiate the cost allocators in the *2011 Order* as "at least arguably supported by a theoretical connection between the location of the pole (urbanized v. non-urbanized) and 'cost.'" Br. 32. However, that "connection" was merely the FCC's effort to estimate the number of attachers to any given pole, not a determination that the costs differed based on whether a pole was located in an urbanized setting. The validity of those presumptive numbers of attachers in the FCC's rules was discredited by the evidence on reconsideration, which showed that an average pole only has 2.6 attachers, regardless of whether the pole is located in an urban or non-urban

[7] Petitioners' assertion that the FCC adopted an "infinite number of meanings" of the term "cost" in the *Reconsideration Order*, Br. 21-22, *see also* Br. 32, is incorrect. In that order, the FCC adopted cost allocators for poles with two, three, four or five attachers. To be sure, the FCC's rules also provide for "interpolated [cost] allocators" where the average number of attachers is not a whole number (*e.g.*, 2.6). *See Reconsideration Order* ¶ 19 (App. 289-90); 47 C.F.R. § 1.1409. But that provision only is given effect if an attacher or a utility choose to calculate an actual, fractional average number of attachers in a service area (and a corresponding cost allocator) rather than relying on the four default cost allocators in the FCC's rules. *See Reconsideration Order* ¶ 37 (App. 297-98).

area. *Reconsideration Order* ¶ 18 (App. 288-89). In light of that evidence, it was reasonable for the FCC to stop calculating the "cost" of a pole based on its location. *See Am. Pub. Gas Ass'n v. FPC*, 567 F.2d 1016, 1036 (D.C. Cir. 1977) ("As circumstances change and analytical techniques improve, methods … which once seemed sound … may be perceived as imperfect", and "[p]recedent cannot … block the search for a model more reflective of economic reality."); *Southwestern Bell*, 153 F.3d at 553 (FCC reasonably "shift[ed] from an arbitrary usage estimate number … to a more precise measure of actual usage that is consistent with [its policy] goals").

To be sure, under the *Reconsideration Order*, "the same pole in the same place" can "have a variable cost depending on the number of entities attached." Br. 34. That is preferable to the prior regime, which forced competitors with attachments on the same pole to pay different rates – an outcome that both the FCC and the D.C. Circuit found distorts end-user choices between broadband technologies, erects a barrier to the deployment of new services, and discourages network investment. *See 2011 Order* ¶ 147 (App. 64-65); *American Electric Power*, 708 F.3d at 190. The FCC made a "reasonable policy" choice, and under *Chevron* step two, "that is all that counts." *Verizon*, 535 U.S. at 523.

Moreover, even under the *2011 Order*, adjacent poles could have a different "cost." Br. 21, 34-35. The FCC's rules provide that if an attacher's territory includes urban and non-urban areas, the entire territory is categorized as urban if the utility "is unable to identify a separate service area as non-urbanized." *2001 Pole Attachment Order*, 16 FCC Rcd at 12137 (¶ 66); 47 C.F.R. § 1.1417(c). Applying that policy to Petitioners' example, Br. 34-35, if Attacher B's territory is non-urban, and Attacher A's territory is a mix of urban and non-urban areas, Attacher A's poles and Attacher B's poles would have "a different 'cost'" in the overlapping non-urban territory (*i.e.*, 66 percent and 44 percent of fully allocated cost, respectively).

Finally, the FCC found "wide agreement in the record that the average number of attachers in a relevant area frequently is below three" and "unlikely to approach five." *Reconsideration Order* n.137 (App. 297). It thus reasonably "s[aw] no need to address" utilities' "surpassingly unlikely scenario" of nine attachers on a pole. *Id.*; *see* Br. 35. The FCC "need not address every comment" – rather, only those "that raise significant problems." *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 550 (D.C. Cir. 2006); *see Ark Initiative v. U.S. Forest Serv.*, 660 F.3d 1256, 1262 (10th Cir. 2011).

II. THE FCC REASONABLY DETERMINED THAT HIGHER POLE ATTACHMENT RATES COULD DISCOURAGE BROADBAND DEPLOYMENT

Lastly, Petitioners contend that "[t]here is simply no evidence in the record sufficient to support a determination" that uniform pole attachment rates "will meaningfully encourage or accelerate broadband deployment." Br. 39. That argument is both time-barred, and unsound on the merits.

The FCC five years ago found that reducing the telecom rate to the cable rate would promote investment in broadband infrastructure in the *2011 Order* ¶¶ 126, 172-181 (App. 56, 77-82). To challenge that finding, Petitioners had to file a petition for review of that order within 60 days of its publication in the Federal Register, 28 U.S.C. § 2344; 47 U.S.C. § 402(a). Their failure to do so bars review by this Court. *See Cosby v. Burlington Northern, Inc.*, 793 F.2d 210, 212 (8th Cir. 1986); *Nebraska State Legislative Bd., United Transp. Union v. Slater*, 245 F.3d 656, 658-59 (8th Cir. 2001).

To be sure, there is an exception to that bar for cases in which the FCC has "reopened" its original rulemaking. *See Kennecott Utah Copper Corp. v. United States Dep't of Interior*, 88 F.3d 1191, 1214 (D.C. Cir. 1996); *Charter Commc'ns, Inc. v. FCC*, 460 F.3d 31, 38 (D.C. Cir. 2006). This case does not fall within that exception. Nothing in the public notices seeking comment on the NCTA Petition suggested that, in considering further revisions to the

definition of "cost" used in the telecom rate formula, the FCC intended to revisit its earlier finding that uniform pole attachment rates promote broadband deployment. *See* Public Notice, WC Docket No. 07-245 & GN Docket No. 09-51 (Cons. & Gov't Affairs Bur. 2011) (Supp. App. 1); Public Notice, 30 FCC Rcd 4615 (WCB 2015) (Supp. App. 2). Nor did the FCC reopen the question whether pole attachment rates affect broadband deployment when it responded to Petitioners' argument that they do not. *See Reconsideration Order* ¶¶ 25-30 (App. 293-95); *Kennecott*, 88 F.3d at 1213 (an agency does not "reopen an issue by responding to a comment that addresses a settled aspect of some matter, even if the agency had solicited comments on unsettled aspects of the same matter").

In any event, Petitioners are wrong in arguing that because pole costs represent a small portion of broadband deployment costs, an increase in pole attachment rates is inconsequential. Br. 38. The FCC in 2011 found that "[r]educing input costs improves the business case for broadband deployment at the margin," with "[t]he effect of a reduction in one type of input cost becom[ing] even more significant as the [agency] undertakes additional steps to accelerate broadband deployment." *2011 Order* ¶ 179 (App. 80-81). Thus, the FCC concluded, "the absolute level of pole rental rates is likely to be relevant to decisions regarding what services are provided." *Id*.

Further, Petitioners do not dispute the FCC's finding that pole attachment rates can skew the distribution of broadband facilities. The FCC found in 2011 and again in 2015 that the continuing disparity between telecom and cable pole attachments rates could discourage broadband investment in states subject to FCC pole regulation relative to those that are not. *Reconsideration Order* ¶ 22 (App. 291-92); *see 2011 Order* ¶ 177 (App. 80). The D.C. Circuit upheld the FCC's "effort to eliminate [such] distortion" by equalizing the rates for cable and telecom pole attachments. *American Electric Power*, 708 F.3d at 190. The *Reconsideration Order* merely continued the FCC's effort to eliminate that distortion.

Finally, Petitioners cannot credibly argue that the *Reconsideration Order* "comes at the expense of the electric ratepayers." Br. 40. The order largely maintains the status quo: cable companies – which "'are responsible for the substantial majority of pole attachments'" – pay the same rate for the same pole attachments before and after the order. *Reconsideration Order* n.65 (App. 288-89) (quoting NCTA Reply Comments at 9); *id*. ¶ 28 (App. 294). The Supreme Court concluded that rate (the cable rate) is just, reasonable, and not confiscatory. *See Florida Power*, 480 U.S. at 254. Hence, the only thing Petitioners "lost" was the opportunity to take advantage of flawed presumptions underlying the FCC's 2011 rules to raise the rates for millions

of existing pole attachments. The *Reconsideration Order* reasonably denied Petitioners that "windfall," which would come at the expense of broadband deployment. *Reconsideration Order* ¶ 38 (App. 298-99).

CONCLUSION

The petition for review should be denied.

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August 5, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMEREN CORPORATION, ET AL., PETITIONERS, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NO. 16-1683

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 8,221 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times Roman font.

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CIRCUIT RULE 28A(H) TECHNICAL CERTIFICATION

I, Maureen K. Flood, hereby certify that with respect to the foregoing:

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IN THE UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I, Maureen K. Flood, hereby certify that on August 5, 2016, I filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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