

**CONCURRING STATEMENT OF
COMMISSIONER AJIT PAI**

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

In February, when the Commission scrapped the twenty-year bipartisan consensus that we should allow the Internet to flourish unfettered by government regulation, it was clear that decision would discourage investment in broadband networks, especially in rural America. And we've already seen marketplace evidence that Internet service providers are pulling back.

One reason: the rising cost of pole attachments. Before Internet service providers (ISPs) can offer service to customers, they must string fiber optics, coaxial cables, and other wires on utility poles and through underground conduit. The rates for such attachments are determined by one of two formulas set forth in section 224 of the Communications Act. The first applies to "cable television systems" and has been historically lower (the cable rate). The second applies to "telecommunications services" and has been historically higher (the telecom rate). By reclassifying Internet access service as a telecommunications service, the Commission gave utilities the go-ahead to charge the higher telecom rate to cable and other non-telecom ISPs, costing American consumers up to \$200 million a year¹ in higher prices and slowing the deployment of high-speed broadband.

Today, the Commission starts to repair some of this damage by lowering the telecom rate to the cable rate. That's a good thing for all broadband providers and their consumers.

But our work here is not done. *For one*, the *Order* may be vulnerable in court because the legal rationale for this new, lower rate is rather odd. To achieve its result, the *Order* interprets the word "cost" in the telecom rate² to mean whatever percentage of capital and operating expenses is needed to equate the telecom and cable rates for any number of pole attachments.³ So if there are five pole attachments, the *Order* interprets "cost" in the telecom rate to mean 66% of capital and operating expenses; if there are two pole attachments, "cost" means 31% of those expenses.⁴ The *Order*'s interpretation of the same word ("cost") in the same provision (the telecom rate) to mean different things in different circumstances appears to violate the canon of consistency.⁵ And the result that the two statutory formulas always arrive at the same rate appears to violate the canon against surplusage.⁶

¹ See Letter from Steven F. Morris, Vice President and Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, WC Docket No. 07-245, at 2 (Jan. 22, 2015).

² Communications Act § 224(e)(2)–(3) (explaining how utilities must "apportion the cost of providing space on a pole duct, conduit, or right-of-way" among attaching telecommunications carriers).

³ *Order* at para. 36.

⁴ New Rule 1.1409(e)(2)(i) (establishing percentages for two, three, four, and five attaching entities and stating that if the number of attaching entities is not a whole number, the percentage must be interpolated from the percentages associated with the nearest whole numbers).

⁵ See *Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one."); cf. Frank Costanza and Elaine Benes, *Seinfeld*, "The Little Kicks" (1996) (Frank: "What the hell does that mean?" Elaine: "That means whatever the hell you want it to mean."), available at <https://www.youtube.com/watch?v=R95tj5O0voU>. Notably, we interpret the same word ("cost") in that same provision (the telecom rate) to have yet another meaning in certain circumstances with our cost-causation-based principle. See *Order* at para. 33; 47 C.F.R. § 1.1409(e)(2)(ii).

⁶ See *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are thus reluctant to treat statutory terms as surplusage in any setting." (internal quotation marks and brackets omitted)). Although the *Order* points to our cost-causation-based principle in rule 1.1409(e)(2)(ii) to suggest the rates will sometimes diverge, Congress itself included a cost-

For another, even after the *Order*, ISPs and their customers will be paying too much for pole attachments. That's because the new telecom rate still includes payments for the capital expenses of the pole owner even when the pole owner has already recovered them separately.⁷

As such, I would have preferred a different course. I believe the word "cost" in the telecom rate should be read to exclude all capital expenses. This interpretation would lower pole attachment rates even further, reducing broadband prices and spurring deployment. And it would comport with the canons of statutory construction, interpreting the word "cost" consistently regardless of the number of pole attachments and ensuring that neither the telecom rate nor the cable rate is surplusage.

Because the *Order* does not adopt this interpretation, I can only concur, holding out hope that the courts will allow us to mitigate the higher pole attachment rates that the reclassification order made possible.⁸

causation-based principle in the cable rate. *See* Communications Act § 224(d)(1) (setting the cable rate so that "it assures a utility the recovery of not less than the additional costs of providing pole attachments").

⁷ *See 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, 5301, para. 143 (2011) ("[I]f rearrangement or bracketing is performed to accommodate a new attachment, the new attacher is responsible for those costs. Likewise, pole owner recovers the entire capital cost of a new pole through make-ready charges from the new attacher when a new pole is installed to enable the attachment." (internal footnote omitted)).

⁸ *Cf. American Electric Power Service Corp. v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013) (giving the Commission broad deference to interpret the word "cost" in the telecom rate).