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Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: Ex Parte Letter in Response to US Telecom's November 21, 2017 and March 22, 2018 Submissions; WC Docket No. 17-84

Dear Ms. Dortch:

Please accept this letter in response to US Telecom's November 21, 2017 "Pole Attachment Rate and Pole Ownership Report" and US Telecom's March 22, 2018 ex parte letter. US Telecom relies upon irrelevant data, misunderstands the few relevant data points within its own report, and—as is the case with the entire ILEC argument in this docket—completely omits critical facts and data. This response is submitted on behalf of Ameren Services Company, American Electric Power Service Corporation, Duke Energy Corporation, Entergy Corporation, Oncor Electric Delivery Company LLC, Southern Company, Tampa Electric Company and Westar Energy, Inc. (collectively the "Electric Utilities").

A. US Telecom's Focus on the Recurring Rental Rate Overlooks Important Pieces of the Financial Consideration in Joint Use Agreements.

US Telecom's entire message is premised upon the false assumption that a difference in "rates" necessarily translates into a difference in competitive advantage. US Telecom takes the inaccurately narrow view that the **only** relevant contractual term for purposes of evaluating competitive neutrality is the recurring rate—as if the recurring rate that ILECs pay on a per pole basis is merely a higher version of what CATVs and non-ILEC telecom carriers pay. This simply isn't true, for the many reasons explained by the Electric Utilities in this docket and the many reasons explained by the electric industry in WC Docket 07-245 (in which the Commission, on a full record, specifically decided **not** to do what US Telecom now asks the Commission to do on a much smaller record). The recurring rate is only one piece of a much larger, sophisticated puzzle.

First, the term "rates" itself has a broader meaning than merely the recurring "rental" rate. The term "rates" also includes other financial transactions within the relationship, including but not limited to whether and how an attaching entity pays for make-ready. For the most part, **ILECs pay make-ready costs in a fundamentally different way than CATVs and non-ILEC telecom**

carriers. This fundamental difference begins when the pole line is first constructed: under joint use agreements, the electric utility builds its infrastructure to accommodate the needs of its ILEC joint use partner. Most joint use agreements are structured around the concept of a "standard pole" or a "basic pole" that meets the needs of both the ILEC and the electric utility. Under this built-to-suit arrangement, ILECs pay $0 in make-ready costs at the time of their initial access. CATVs and non-ILEC telecom carriers, on the other hand, pay whatever costs are necessary to create sufficient space to accommodate their access.

If an ILEC later requires more pole height or pole strength (for purposes of a facilities upgrade or otherwise), joint use agreements address the allocation of these costs in variable ways. Below are three examples of such provisions from different joint use agreements between the Electric Utilities and a major ILEC joint use partner:[1]

> **Example #1**:
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> For a pole erected hereunder to replace a joint use pole solely because such other pole is not tall enough or not of the required strength to provide adequately for Licensee's requirements, and where such joint use pole at the time of its erection or by attachment thereto by Licensee had been pronounced satisfactory and adequate for Licensee's requirements, Licensee shall thereupon pay Owner the excess of the cost of the replacement pole over the current in-place cost of a new pole of the size and class replaced plus the then in-place value of the pole replaced.
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> **Example #2**:
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> When an existing pole is prematurely replaced with a new pole for reasons other than damage or decay solely for the benefit of Joint User, or in order to permit joint use, the reasonable cost of the new pole, as well as the cost of transferring Pole Owner's Facilities and removal of the replaced pole, less salvage value of the replaced pole, will be borne by the Joint User. The Pole Owner will remove and may retain or dispose of such pole.
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> **Example #3**:
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> The cost of any replacements necessary due solely to the existing joint use pole being of insufficient strength or height shall be borne by the parties as follows:
>
> (1) If the additional strength or height is necessary due to the Licensee's requirements, the Licensee shall pay the Owner the then in-place value of the existing pole, such value being computed from Table II of Exhibit A, plus the cost of the required additional class over the existing pole as computed from Table I of Exhibit A.

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[1] Each of these exemplar agreements is an existing agreement between a different operating company (from different members of the Electric Utilities) and a different ILEC. For purposes of consistency, the same three exemplar agreements are also referenced in Sections C. and D. below.

As referenced in Example #3 above, many of the costs allocated through joint use agreements are based on **<u>scheduled</u>** costs, as opposed to **<u>actual</u>** costs. Scheduled costs (so called because they appear in a "schedule" or a table or appendix to the joint use agreement) not only are categorically lower than actual costs, but also bring predicitability and stability to the pricing. Scheduled costs, unlike actual costs, are not sensitive to volatility in labor or material markets. CATVs and non-ILEC telecom carriers, on the other hand, pay the entire actual cost of the work—whatever it may be at the time the work is performed.

The difference in whether and how make-ready costs are paid is just one of the many differences between joint use agreements (between ILECs and electric utilities) and traditional pole license agreements (between electric utilities and CATVs/non-ILEC telecom carriers). And, importantly, joint use agreement are not uniform. The variations in how costs are allocated within joint use agreements are as numerous as the relationships themselves. This is why **<u>any</u>** generalization about joint use relationships is a disservice to the details of any particular relationship and exactly why joint use relationships are poorly suited for rules of general applicability such as the proposed revisions to Rule 1.1424. This is precisely why the Commission rejected in 2011 what US Telecom (again) urges here.

B. US Telecom's Data Reveals That ILEC Contributions to Pole Costs Have Decreased Since 2008 and that ILECs are Saving Significant Money By Owning Fewer Poles.

US Telecom posits that the Commission needs to adopt revisions to Rule 1.1424 because the version of the rule adopted in 2011 has not yielded any relief to ILECs. In support of this proposition, US Telecom points to data gathered from its members showing that average joint use rental rates have increased from $26 in 2008 to $26.12 in 2017. (November 21, 2017 US Telecom Report, p. 2). **<u>The change from $26 to $26.12, though, is actually a significant *decrease* relative to pole costs</u>**. Between 2008 and 2017, the cost of electric utility poles increased by more than 15% based on the Handy-Whitman Index (a widely accepted means of indexing electric utility costs, subdivided by FERC Account number). Given that cost-based rates increase and decrease according to costs, a $26 rate in 2008 would translate into a $30 rate in 2017. Thus, even according to US Telecom's own data, ILEC network cost contributions have decreased by roughly $4/pole since 2008.

As a preliminary matter, and as the Electric Utilities have repeatedly explained, the recurring "rate" in a joint use agreement is most often merely a proxy for pole ownership. If each party owns its contractual share of poles in the jointly used network, then neither party pays a "rate" to the other. This begs the question: if ILECs owned their contractual share of poles in the joint use network (in other words, if ILECs were in "parity" of pole ownership), would the Commission even consider reallocating ownership percentages and forcing an electric utility to purchase poles from the ILEC? This question reveals the inherent flaw in what US Telecom urges. It also underscores the need for the Commission to address joint use relationships, if at all, on a case-by-case basis.

US Telecom repeatedly compares the $26.12 figure to the amount ILECs charge CATVs and non-ILEC telecoms for pole attachments. (See, e.g., November 21, 2017 US Telecom Report, p. 4). This is a meaningless comparison because the rates paid by CATVs and non-ILEC telecoms for

access to ILEC poles are based on the ILEC's pole cost (not the electric utility's pole cost). But US Telecom's data proves what the electric utilities have been saying all along: **ILECs are saving significant money by owning fewer poles**.

US Telecom's report indicates that the average rate paid by CATVs to ILECs is $3. (November 21, 2017 US Telecom Report, p. 3). A $3 rate under the Commission's cable rate formula equates to an annual pole cost of $40.49. In other words, according to US Telecom, it costs an ILEC $40.49/year on average to own a single pole. **This means that ILECs are saving more than $14 per pole per year for each joint use pole they don't own** ($40.49-$26.12=$14.37). And this is in addition to the avoided capital cost associated with the installation of a joint use pole. On the flip side, the weighted average annual pole cost for the Electric Utilities is $94.54.[2] This means that for each joint use pole that an electric utility owns beyond its contractual share of joint use poles, the electric utility is required to spend a net $68 additional per pole per year ($94.54-$26.12=$68.42). In other words, **not only are ILECs saving significant money by owning fewer poles, but electric utilities also are incurring significantly more costs as a result of declining ILEC pole ownership.**

US Telecom's data also shows that, on average, electric utilities pay ILECs $27.18 per pole. (November 21, 2017 US Telecom Report, p. 9). This means that, on average, electric utilities are paying more than 67% of an ILEC's annual pole cost through the recurring rate ($27.18/$40.49=67.13%). In other words, according to US Telecom's data, ILECs are over-recovering their costs from electric utilities relative to the space occupied by electric utilities. Though the manner in which costs are calculated and allocated within a joint use agreement differ from the Commission's pole attachment formulas, under US Telecom's logic, an ILEC should be recovering between 52-59% of its pole cost from an electric utility (based on the 7-8 feet of usable space US Telecom alleges electric utilities occupy, divided by the Commission's presumption of 13.5 feet of usable space). (November 21, 2017 US Telecom Report, p. 8). Instead, ILECs are recovering more than 67% of their pole costs from electric utilities. US Telecom's own data thus renders its complaint regarding the similarity of "rates" between ILECs and electric utilities uninformed at best. (See November 21, 2017 US Telecom Report, p. 9).

By contrast, ILECs are paying less than 28% of an electric utility's annual pole cost through the recurring rate ($26.12/$94.54=27.63%). This figure further evidences the erosion of electric utility cost recovery, given that most joint use agreements are structured to allocate between 40-50% of the joint use network costs to the ILEC.

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[2] This is an aggregated figure based on data from the Electric Utilities' 21 operating companies within states subject to the Commission's pole attachment jurisdiction. The range was $55.63 to $186.03, with all but 4 of the operating companies falling within the range of $63.27 to $112.49. These figures correspond to the data used in the chart set forth at p. 51 of the Initial Comments filed by the Electric Utilities on June 15, 2017, with the addition of data for Westar Energy, Inc.

C. US Telecom's Report Relies on a Contrived Narrative Regarding the Threat of Removal of Attachments.

Aside from its self-defeating and/or non-probative data, the US Telecom's submissions also include some blatant falsehoods. For example, as supposed evidence that investor-owned electric utilities are unfairly wielding their superior joint use pole ownership (which, as noted above, turns out to be a ***HUGE*** economic advantage for ILECs), US Telecom states:

> Moreover, CenturyLink notes that many IOUs are increasingly cancelling joint use agreements. It notes that the termination notices sent to the ILECs by IOUs are typically coupled with demands that attachments be removed unless the ILEC enters into a new license agreement at higher rates.

November 21, 2017 US Telecom Report, p.10 (citing July 17, 2017 Reply Comments of CenturyLink, WC Docket No. 17-84, pp. 3-4). CenturyLink, though, was talking about public power companies—not investor-owned electric utilities. As if the context of CenturyLink's reply comments itself wasn't sufficient to reveal this, the portion of CenturyLink's comments cited by US Telecom makes this abundantly clear:

> As CenturyLink's number of poles owned in areas shared with municipal and rural electric companies continues to erode, public power companies increasingly are cancelling joint use agreements. Typically, termination notices are coupled with demands that attachments be removed unless CenturyLink enters into a new license agreement at higher rates.

July 17, 2017 Reply Comments of CenturyLink, p.4. This may, in fact, be a problem with public power companies (which are outside the Commission's pole attachment jurisdiction). It is not the case with the Electric Utilities.

To deepen the falsehood, US Telecom immediately follows its misrepresentation of CenturyLink's reply comments with the following sentence:

> Verizon reported a similar trend in its comments, and notes that ILECs are faced with a "Hobson's choice: live with insupportably high attachment rates that distort competition, or risk major disruption of their networks to obtain even the chance of a reasonable renegotiation."

November 21, 2017 US Telecom Report, p. 10 (citing June 15, 2017 Comments of Verizon, WC Docket No. 17-84, p. 11). US Telecom's intent is clear: to suggest that the "risk" of "major disruption to their networks" is a demand by investor-owned electric utilities to remove attachments. This not only is textbook false juxtaposition, but also omits a more important substantive point—**in almost all joint use agreements, investor-owned electric utilities have no**

<u>right to demand removal of attachments upon termination</u>. For example, the same three exemplar joint use agreements referenced above contain the following provisions, respectively:

Example #1:

Subject to the provisions of Article X herein, this agreement shall continue in full force and effect through December 31, 1975, and shall continue thereafter until terminated insofar as the right to attach to additional joint use poles is concerned by either party giving to the other one (1) year's notice in writing in intention to terminate the right of both parties to attach to additional joint use poles. **<u>Any such termination of the right to attach to additional joint use poles shall not abrogate or terminate the right of either party to attach to existing joint use poles or to maintain existing attachments</u>**, and all such attachments shall continue thereafter to be maintained, pursuant to and in accordance with the terms of this agreement, which agreement shall, so long as such attachments are continued, remain in full force and effect solely and only for the purpose of governing and controlling the rights and obligations of the parties with respect to such attachments.

Example #2:

After the expiration of the Initial Term of this Agreement, either Party may terminate, upon six (6) months' notice in writing to the other Party in accordance with Paragraph 33, the right to make new Attachments. **<u>Any termination of this Agreement will not, however, abrogate or terminate the right of either Party to maintain the permitted Attachments that exist at the time of termination</u>**, and all such Attachments will continue to be maintained in accordance with the terms of this Agreement, which Agreement will, so long as said Attachments are continued, remain in full force and effect solely for the purpose of governing and controlling the rights and obligations of the Parties with respect to said Attachments.

Example #3

This agreement shall continue in full force and effect until terminated insofar as the making of additional attachments is concerned by either party giving to the other one (1) year's notice in writing of intention to terminate the right of making additional attachments. **<u>Any such termination of the right to make additional attachments shall not, however, abrogate or terminate the right of either party to maintain the attachments theretofore made on the poles of the other</u>** and all such prior attachments shall continue thereafter to be maintained, pursuant to and in accordance with the terms of this agreement, which shall, so long as said attachments are continued, remain in full force and effect solely and only for the

> purpose of governing and controlling the rights and obligations of the parties with respect to said attachments.

US Telecom triples-down on the false innuendo by recycling the falsehood in two more places: (1) through unspecified (and wholly non-existent) "IOU threats to force ILECs to remove attachments" (November 21, 2017 US Telecom Report, p. 11); and (2) through unspecified (and wholly non-existent) efforts "to terminate existing joint use agreements" (November 21, 2017 US Telecom Report, p. 13). The massive irony here is that, in the experience of the Electric Utilities, it is almost always the **<u>ILEC</u>** terminating the joint use agreement. The Commission need look no further than the records of the relatively few complaint proceedings between ILECs and electric utilities as proof of this point. One of two things is happening, here: either US Telecom doesn't understand the facts, or US Telecom just doesn't care about the facts.

D. The Proposed Revisions to Rule 1.1424 Would Distort Competition and Disrupt Broadband Deployment.

The proposed revisions to Rule 1.1424 will not, as US Telecom alleges, "introduce greater certainty into the marketplace"—it will disrupt the marketplace by upending settled contract expectations and favoring ILECs with a massive advantage over their broadband competitors. Further, retention of the existing version of Rule 1.1424 (under which ILECs have the right to prove that any particular joint use agreement is unjust and unreasonable) will not lead to "increased infrastructure costs" or "extensive delays to broadband deployment."

Though there may indeed be outlier joint use agreements, under the vast majority of existing joint use agreements, **<u>there are no additional costs to the ILEC to deploy new broadband facilities and no delays in their deployment</u>**. And the ILECs have pointed to none. Under most joint use agreements, an ILEC can quite literally deploy a new network or enhance an existing network without notice or additional payment to its electric utility joint use partner so long as the deployment does not exceed the space allocation or capacity of the "standard" or "basic" pole.

For example, and keeping with the same three exemplar joint use agreements referenced above, the ILEC space allocations are described as follows:

> **Example #1**:
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> STANDARD SPACE ALLOCATION means an allocation of sufficient space on a joint use pole for use of each party taking into consideration requirements of the Code and is more particularly defined as follows:
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> ….
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> For Telephone Company, the exclusive use of 2 ½ feet of space on 35-foot poles and 3 feet of space on 40-foot poles, measured upward from the point of attachment on the pole required to provide at all times the Code minimum clearance above ground for the lowest horizontally run line-wire or cable attached in such space except where by mutual agreement of the field representatives of the parties sound engineering practices dictate a higher minimum clearance.

> **Example #2**:
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> [ILEC] Space. The vertical space on a pole for [ILEC's] Attachments. [ILEC] space will typically be located between the elevations of eighteen feet (18') and twenty-one and a half feet (21'6") above ground level and will provide basic ground clearance.
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> **Example #3**:
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> STANDARD SPACE ALLOCATION – means an allocation of sufficient space on a joint use pole for use of each party, taking into consideration requirements of the current National Electrical Safety Code, more particularly defined as follows:
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> ….
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> For Telephone Company, the use of two and one half (2 ½) feet of space at sufficient distance below the space of the Electric Company to provide at all times the minimum clearance required by the Code, and one (1) foot of space, allocated or unallocated, for the use of a third party such as a cable TV Company. This space measured from the ground upward to the point of attachment on the pole is required to provide the National Electric Safety Code's minimum clearance above ground for the lowest horizontally run linewire or cable attached in such space unless, by mutual agreement of the field representatives of the parties, sound engineering practices dictate a higher minimum clearance.

These space allocations ranging from 2.5 to 3.5 feet are not outliers. They are the norm. Based on the weighted average annual pole cost for the Electric Utilities referenced above, the Electric Utilities weighted average CATV rate using the Commission's formula is $7.00 (on a per foot basis). When this average rate is multiplied by the typical joint use space allocations of 2.5 to 3.5 feet, it yields rates between $17.50 and $24.50. Further, in most joint use agreements, neither party is limited to its allocated space; each party is free to use whatever space it needs so long as it does not interfere with the service needs of the other party. In other words, **<u>even with the massive make-ready cost advantage, and even with the other numerous advantages of joint use, ILECs are still paying pretty close to what CATVs and non-ILEC telecom carriers are paying on a per foot basis</u>**.

Further, if the Commission adopts Rule 1.1424, it will likely spell the end for joint use. To be clear, and as the Electric Utilities have repeatedly noted, joint use was the original economic model for ubiquitous deployment of communications services. The notion that destroying this economic model will somehow enhance broadband deployment is as backwards as the notion that ILECs should pay less towards infrastructure costs because they are already paying less towards infrastructure costs. The fact that either of these notions has gained any traction **<u>at all</u>** is a puzzling as it is troubling.

E. US Telecom's Submissions Continue to Trade in the Myths of "Repeated Disputes" and "Inadequate Bargaining Power."

US Telecom repeatedly decries the travails of "repeated disputes" between ILECs and electric utilities since 2011. (See, e.g. March 22, 2018 US Telecom Letter, pp. 2, 4 & 5). But in the past seven years since the 2011 Pole Attachments Order took effect, there have been only eight such pole attachment complaints filed with the Commission. All of them were filed by two ILECs: Frontier (six) and Verizon (two). And all of them have been resolved through settlement with the assistance of the personnel in the Enforcement Bureau, who are equipped to examine the facts and steer the parties to a sensible resolution under the circumstances of a particular case. This is exactly what the Commission had in mind in 2011 when it unanimously acknowledged that "issues related to rates for pole attachments by incumbent LECs raise complex questions" and that the Commission's authority over joint use relationships needed to be exercised "in a manner that accounts for the potential differences between incumbent LECs and telecommunications carrier or cable operator attachers." (2011 Order, ¶ 214).

US Telecom also continues to lament the disparity in pole ownership between ILECs and electric utilities. (See, e.g., November 21, 2017 US Telecom Report, pp. 6-11; March 22, 2018 US Telecom Letter, pp. 2-3). This is a complete red herring for at least two reasons. First, ILECs have never explained how pole ownership disparity translates into disparate bargaining leverage—especially given (as demonstrated above) that neither party can kick the other off its poles even after termination. Second, and perhaps most importantly, even assuming a disparity in pole ownership equates to disparity in bargaining power, this only matters if the electric utility is trying to change the deal. US Telecom has not even alleged (let alone demonstrated) that any investor-owned electric utilities are trying to change the deal. Instead, for all it appears, US Telecom is taking newfound exception to **existing** deals which, in many cases, have been in place for decades.

The actual import of the allegedly growing imbalance in pole ownership is that electric utilities are carrying more and more costs of jointly used poles. As explained above, on average, for every pole an ILEC falls out of parity, the Electric Utilities absorb an additional net \$68 per year in annual joint use pole ownership costs. Under this scenario, ILECs should be paying more towards the infrastructure costs—not less. This is especially true given the saving ILECs enjoy by **not** owning joint use poles. But because electric utilities cannot force their ILEC counterparts to remove attachments, and because the terms of the joint use agreements continue to apply to existing joint use poles even after termination, electric utilities have virtually no leverage to obtain a new deal. In short, ILECs currently have almost all of the bargaining leverage because both parties recognize, as a practical matter, that there are limited circumstances under which the Commission would hold that an electric utility's cost recovery in an existing joint use agreement was unjustly or unreasonably low.

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US Telecom's own data, as shown above, belies the conclusion it urges. US Telecom's shallow advocacy also fails to acknowledge (let alone address) the fact that **all joint use relationships are**

different. This is why the Commission declined to adopt a rule of general applicability in 2011 and why it should decline to adopt the proposed revisions to Rule 1.1424 now.

Please let me know if you have any questions or if there is further data or information we can provide to facilitate the Commission's analysis of this important issue.

Very truly yours,

/s/Eric B. Langley

Eric B. Langley
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EBL/lk

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