Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Petition of	)	
	)	
The United States Telecom Association	)	**RM-11293**
	)	
For a Rulemaking to Amend Pole	)	
Attachment Rate Regulation and	)	
Complaint Procedures	)	

OPPOSITION OF FIRSTENERGY CORPORATION TO PETITION FOR RULEMAKING OF UNITED STATES TELECOM ASSOCIATION

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FirstEnergy Corporation ("FirstEnergy"), by its attorneys, hereby submits this Opposition to the Petition for Rulemaking ("Petition") filed by the United States Telecom Association ("USTelecom") in the above-captioned matter on October 11, 2005.[1] In urging the Federal Communications Commission ("FCC" or "Commission") to grant certain pole attachment rights to Incumbent Local Exchange Carriers ("ILECs"), the USTelecom Petition grossly distorts decades of "joint use" arrangements between electric utilities and ILECs and effectively re-writes the Pole Attachment Act of 1978 and the 1996 Amendments thereto.[2] No rulemaking proceeding is necessary to explore USTelecom's unfounded allegations or its strained statutory construction. The Petition should be rejected as a false attempt to gain pole attachment rights to which ILECs are not entitled and which they do not deserve, all at the expense of electric utilities and the safe and efficient operation of the nation's electric distribution system.

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[1] *See* FCC Public Notice, Report No. 2737 (Nov. 2, 2005).
[2] Pole Attachment Act, Pub. L. No. 95-234, 92 Stat. 33 (1978); Telecommunications Act of 1996, Pub. L. No. 104-104, 104 Stat. 56, 149-151 (Feb. 8, 1996).

I. SUMMARY

As USTelecom would have it, the Commission made a grievous error in implementing the Telecommunications Act of 1996. Unknown to the Commission and all interested parties (including the ILECs themselves) ten years ago, Congress actually intended to confer expansive pole attachment rights on USTelecom's ILEC members, similar to those granted to Competitive Local Exchange Carriers ("CLECs"). Ten years later, USTelecom has "discovered" the Commission's mistake.

This self-serving notion is contrary to the language of the Act, the legislative history of the Act, the FCC's interpretation of the Act, and the ILECs' own interpretation of the Act. It also defies common sense. As has been clear to everyone for the past ten years, Congress and the Commission used the terms "telecommunications carrier" and "provider of telecommunications services" interchangeably. In fact, the term "telecommunications carrier" is specifically defined in the Communications Act -- unequivocally and beyond any argument by USTelecom -- as "any provider of telecommunications services." There is no doubt on this issue, despite USTelecom's obfuscations.

By ignoring substantial differences between pole attachment and joint use arrangements, the Petition attempts to paint a false picture of the relationship between electric utilities and ILECs. Unlike CLECs, ILECs own and control distribution poles. They actually own and control *millions* of distribution poles across the country. To distribute their respective services, electric utilities and ILECs are dependent upon each other for access to the other's poles. This mutual dependency motivates each to treat the other in a fair and nondiscriminatory manner, on mutually acceptable terms and conditions. There is no need for government intervention to

prevent abuses. In many instances, such mutually negotiated agreements have been in place for 50 years or more.

Ironically, it is the ILECs -- not the electric utilities as claimed by USTelecom -- who in recent years have been shirking their joint use responsibilities at the expense of electric utilities and the safe and efficient operation of the nation's electric distribution system. With rare exception, FirstEnergy's ILEC partners have gradually disassociated themselves from equitable participation in joint use, relying instead on FirstEnergy to set most of the poles, provide emergency responses, restore pole lines after storms, police the system and ensure safe operation. Some ILECs have refrained from making necessary and appropriate capital improvements to their pole lines. The result, of course, is that FirstEnergy, like many other electric utilities, has been forced by the ILECs to bear the overwhelming burden of joint use.

FirstEnergy is in no position to discriminate against any ILEC. FirstEnergy and ILECs share the joint use of approximately 1,617,000 poles. Of these, FirstEnergy is completely dependent on the ILECs for access to 564,000 poles, or 35% of the total.

Granting USTelecom's Petition would give ILECs unfair leverage over electric utilities, significantly harming electric utilities, electricity ratepayers, and the safety and reliability of the nation's electric distribution grid. A better solution to any anticompetitive concerns of the ILECs is to require all attachers to pay a more equitable share of pole attachment costs, as is required, for example, by the Maine Public Utilities Commission's pole attachment regulations.

No rulemaking is required to explore USTelecom's unfounded allegations or its strained statutory construction. The Petition should be denied.

II. INTRODUCTION

FirstEnergy is a diversified energy company headquartered in Akron, Ohio. Its subsidiaries and affiliates are involved in the generation, transmission and distribution of electricity; marketing of natural gas; and energy management and other energy-related services. Its seven electric utility operating companies comprise the nation's fifth largest investor-owned electric system, serving 4.4 million customers within 36,100 square miles of Ohio, Pennsylvania and New Jersey. Its seven operating companies are Ohio Edison, The Illuminating Company, Toledo Edison, Penn Power, Penelec, Med-Ed, and Jersey Central Power & Light.

FirstEnergy shares the use of approximately 1,617,000 poles with ILECs pursuant to joint use agreements. Of these, approximately 1,053,000 (65% of total) are owned by FirstEnergy and 564,000 (35% of total) are owned by the ILECs.

III. ARGUMENT

A. The USTelecom Petition Confuses Joint Use Agreements With Pole Attachment Agreements, Which Are Separate And Distinct And Serve Entirely Different Purposes.

Contrary to the implications in the USTelecom's Petition, ILECs do not simply attach to electric utility poles as do competitive local exchange carriers ("CLECs"). Unlike CLECs, which do not generally own their own distribution poles, ILECs do own and control millions of distribution poles across the country. CLECs -- and electric utilities -- rely on access to ILEC-owned poles in order to distribute their respective services to consumers.

ILECs share the use of their poles with electric utilities -- and in turn electric utilities share the use of their poles with ILECs -- pursuant to well established joint use arrangements

often dating back 50 years or more. A joint use arrangement is fundamentally different than a pole attachment agreement.

Under a pole attachment agreement, an attacher is dependent on the pole owner for access to its customers (since the attacher controls no poles of its own), but the pole owner is not similarly dependent on the attacher. In a joint use arrangement, however, both parties are dependent on the other for access to customers, because both parties are pole owners in their own right.[3] As a result, a natural governor limits abuse in any joint use arrangement: each party is dependent upon access to the other's poles, so each is motivated to treat the other in a fair and nondiscriminatory manner on mutually acceptable terms and conditions.

This mutual dependency explains why joint use agreements contain vastly different terms and conditions than pole attachment agreements. Pursuant to most joint use agreements, each party is expected to set an equal number of new poles, replace them when they become defective, and expend the necessary resources to maintain those poles.[4] Because of this mutual dependency, joint use agreements, unlike pole attachment agreements, often require that the agreement stay in effect for all existing attachments, even after the term of the agreement has expired.

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[3] Congress has been aware of the special relationship between electric and telephone utilities since enactment of the 1978 Pole Attachment Act. The Senate Report notes that approximately 70% of poles owned by electric or telephone utilities are subject to joint use arrangements. S. Rep. No. 95-580, at 12 (1977).

[4] For example, in the case of FirstEnergy's joint use referenced above, a detailed and longstanding (since 1953) "Operating Routine" governs how the poles owned by each party must be operated and maintained so as to ensure that the other party's attachments can be accommodated. The Operating Routine includes provisions for establishing joint use of poles, maintaining joint use poles and attachments, and replacing, relocating, removing and abandoning joint use poles.

Unlike pole attachment agreements, joint use agreements typically provide for a sharing of all pole costs, including costs related to both usable and unusable space.[5] This arrangement makes eminent sense (since each party is reliant on access to the other's poles) and is part of the shared access concept that has been at the heart of joint use contracts for decades.[6] Requiring both parties to share in the costs attributable to the entire pole is mutually satisfactory because each party otherwise would be required to incur far greater costs by setting its own lines of duplicative poles. Moreover, without joint use the public would be burdened unnecessarily by dual poles on rights of way and private easements throughout the country.

Pursuant to most joint use agreements entered into by FirstEnergy and its ILEC partners, the ILEC is allocated between 2-3 feet of space on the pole for its attachments, and the electric utility is allocated 8 feet due to safety and operational requirements. Unlike pole attachment agreements, the ILECs typically are entitled to rent portions of their allocated space to other telecommunications attachers. Joint use contracts also often specify which pole owner will pay for stronger or taller poles that may be required by one of the parties or by a government entity.

USTelecom's Petition completely ignores the substantial differences between pole attachment and joint use arrangements. By not recognizing these differences, the Petition paints a false picture of the relationship between electric utilities and ILECs and attempts to mislead the Commission into substituting a CLEC-type pole attachment regime for well established and publicly beneficial joint use arrangements.

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[5] In FirstEnergy's above-referenced joint use agreements, for example, the annual rental that each party must pay to the other recognizes the disparity in the gross amount of usable space allocated to each party by basing pole rentals on a defined and specified Ratio of Space. However, both parties are required to share equally in the costs attributable to the unusable space on the pole, which can account for the majority of pole costs.

[6] For this reason, a "cousin" to the Joint Use Agreement is a Joint Ownership Agreement, a contracted sharing of the full cost of the jointly owned and operated pole plant.

B. The Terms "Telecommunications Carriers" And "Providers Of Telecommunications Services" Are Interchangeable, As Congress, The Commission And The ILECs Themselves Have Recognized.

The USTelecom Petition rests on the mistaken notion that Congress, at the time that it enacted the Telecommunications Act of 1996, intended to draw some fine line, hitherto undiscovered distinction between the terms "telecommunications carrier" and "provider of telecommunications services." Claiming that providers of telecommunications services are not *really* telecommunications carriers, the Petition seeks to persuade the Commission that Congress intended to confer different rights and obligations upon the two different entities within the context of pole attachments. This self-serving notion is contrary to the language of the Act, the legislative history of the Act, the FCC's interpretation of the Act, and the ILECs' own interpretation of the Act. It also defies common sense. As has been clear to everyone for the past ten years, Congress used the two terms interchangeably and intended that they be treated as synonyms.

USTelecom's attempt to explain that Congress somehow intended to treat "telecommunications carriers" differently than "providers of telecommunications services" is belied by the clear, unequivocal language of the statute itself:

> The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.[7]

The term "telecommunications carrier," therefore, is defined in the Communications Act as *"any provider of telecommunications services"* (except for aggregators of telecommunications

services). An entity, therefore, cannot be a provider of telecommunications services without also being a telecommunications carrier. Except in the limited case where an entity qualifies as an aggregator of telecommunications services, the two phrases are absolutely synonymous.

ILECs are not aggregators of telecommunications services; that phrase applies only to Section 226 of the Act (Telephone Operator Services),[8] which has no bearing at all on the pole attachment provisions of Section 224. For pole attachment purposes, therefore, the terms "telecommunications carrier" and "provider of telecommunications services" are synonyms.[9] They are one and the same.

USTelecom's interpretation of Section 224 defies the language of the statute, as well as the legislative history, and makes little sense in and of itself. USTelecom asserts that Congress did NOT intend to grant ILECs any rights to attach to electric distribution poles but DID intend to grant ILECs full rights to insist on regulated rates, terms and conditions for such attachments. Had Congress intended such an bizarre anomaly, it is safe to assume that some explanation (or even passing recognition) of it would have occurred in the legislative history of the 1996 Act. But no such explanation exists. Instead, Congress unequivocally defined "telecommunications carriers" as "providers of telecommunications services" and specifically exempted them from the panoply of pole attachment rights conferred on CLECs and cable companies.

Similarly, it makes little sense that Congress granted ILECs rights to regulated pole attachment rates but fail to "drop the other shoe" by specifying an applicable rate. Section 224

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[7] 47 U.S.C. § 153(44).
[8] 47 U.S.C. § 226.
[9] The fact that Congress used these terms interchangeably is evidenced by Senate Bill S. 652, which used the term "telecommunications carriers," and included within that term cable television systems which specified that the Commission must ensure that utilities charge just, reasonable and nondiscriminatory rates to "telecommunications carriers," and included within that term cable television systems which "provide telecommunications services." Certain cable systems, therefore, which are "providers of telecommunications services" were also considered to be "telecommunications carriers" that were entitled to regulated rates. *See* S. Rep. No. 104-23, at 40, 86-87 (1995).

provides the rates for cable-only attachments and for attachments by "telecommunications carriers," but not for attachments by ILECs or "providers of telecommunications services." Neglecting to specify such a rate would have been a glaring omission indeed, yet Congress did not recognize such an omission, much less explain it.

Another unexplained oddity is that, in USTelecom's view, the FCC was granted jurisdiction to regulate attachments by ILECs *to their own poles*. Section 224 defines a "pole attachment" as an attachment by a "provider of telecommunications services" to poles, ducts, conduits or rights-of-way owned or controlled by a "utility."[10] The term "utility" is defined to include ILECs.[11] Accordingly, USTelecom's unique interpretation of Section 224 requires the Commission to regulate ILEC attachments to their own poles. Once again, this oddity is not recognized in any way let alone explained by Congress.

The fact that USTelecom's interpretation of ILEC pole attachment rights defies the language of the statute and makes little sense may explain why no ILEC or other interested party raised this far-fetched theory during the course of the last ten years. In August 1996, the FCC promulgated regulations to implement the 1996 Telecommunications Act.[12] Those regulations extended pole attachment rights to "telecommunications carriers" only. The phrase "provider of telecommunications services" is not mentioned in the regulations at all.[13] When promulgating these regulations, it understandably never occurred to the Commission that a distinction should be drawn between the two phrases, since Congress never drew any such distinction in the statute.

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[10] 47 U.S.C. § 224(a)(4).

[11] 47 U.S.C. § 224(a)(1).

[12] Implementation of Section 703 of the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd 9541 (1996) ("August 1996 Report and Order").

[13] *See* 47 C.F.R. §§ 1.1401 *et seq.*

In fact, the Commission believed its regulations to be so noncontroversial that it decided that they were self-implementing and that proposed rules were unnecessary.[14]

Because the Commission's regulations only employ the phrase "telecommunications carrier," they draw no distinction between "access" granted to "telecommunications carriers" and "regulated rates, terms and conditions" granted to "providers of telecommunications services." Section 1.1401, for instance, combines the two different rights and grants them to "telecommunications carriers" by stating that the rules are designed "to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable."[15] Moreover, the entire pole attachment complaint process is open only to "telecommunications carriers" without any mention of "providers of telecommunications services." Section 1.1402(d), for example, defines "complaint" as the filing by "a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or any association of telecommunications carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable."[16] Section 1.1404(d)(1) provides that "[t]he complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable system operator or telecommunications carrier and the utility."[17] And section 1.1404(d)(2) provides that the complaint should be accompanied by a "statement that the cable television system operator or telecommunications carrier currently

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[14] August 1996 Report and Order at ¶ 2 ("We are revising these rules without providing prior public notice and an opportunity for comment because the rule modifications do not involve discretionary action on the part of the Commission but rather, simply conform our rules to the applicable provisions of the 1996 Act.")
[15] 47 C.F.R. § 1.1401.
[16] 47 C.F.R. § 1.1402(d).
[17] 47 C.F.R. § 1.1404(d)(1).

has attachments on the poles, ducts, conduits or rights-of-way."[18] Throughout Title 47 of the Code of Federal Regulations, no FCC pole attachment rules grant any unique rights to "providers of telecommunications services."

Although ten years ago the FCC's regulations clearly granted pole attachment rights only to "telecommunications carriers" without mentioning "providers of telecommunications services," not a single reconsideration of these regulations was requested by USTelecom or any ILEC. This omission is telling; the silence is deafening. One would certainly think that USTelecom or an individual ILEC whose pole attachment rights had been completely eliminated by the FCC would have sought prompt reconsideration of the FCC's regulations since they were so far off base from what Congress actually had intended. The fact that they did not is clear and convincing evidence that neither USTelecom nor any ILEC ever believed that ILECs had any such rights. USTelecom's Petition, therefore, is a patently insincere, recent concoction by the ILECs to rewrite the statute as well as the FCC's implementation of it.[19]

C. USTelecom's Petition Is A False Attempt To Gain Pole Attachment Rights To Which It Is Not Entitled And Which It Does Not Deserve.

USTelecom claims repeatedly that Congress desired to constrain "utilities" from imposing unreasonable rates, terms and conditions,[20] but forgets that Congress expressly included ILECs in the definition of "utilities" under Section 224.[21] In that way, Congress recognized that ILEC pole owners and electric utility pole owners were similarly situated for pole attachment purposes. Congress viewed all utility pole owners, electric utilities and ILECs

[18] 47 C.F.R. § 1.1404(d)(2).

[19] No member of Congress voiced any objection to the FCC's regulations. Certainly, if Congress intended the FCC to grant pole attachment rights to ILECs, the FCC's elimination of those rights would have caused an uproar.

[20] Petition at 4-5, 10.

alike, as having the potential to abuse their positions by denying access to attachers, charging unreasonable rates or imposing unreasonable terms and conditions. Indeed, the potential for abuse by "monopoly" pole owners appears to have been the prime motivation for the entire statutory pole attachment program.

USTelecom claims variously that "energy utilities are able to leverage their position to effect arbitrage and impose unreasonable rates on ILECs;"[22] that ILECs need a right of action in the Commission's pole attachment rules to prevent energy utilities from imposing unreasonable rates, terms and conditions upon them;[23] and that energy utilities can unreasonably discriminate against ILECs with respect to pole attachments.[24]

These arguments are nonsense. FirstEnergy is in no position to discriminate against any ILEC. As explained, approximately 1,617,000 poles are subject to joint use arrangements between FirstEnergy and an ILEC. Of these, FirstEnergy is completely dependent on the ILECs for access to 564,000 poles, or 35% of the total. Because each party to these joint use agreements is dependent on the other for access to the other's poles, both parties are in equal bargaining positions.[25] In fact, FirstEnergy has been actively encouraging ILECs to set more poles which can result in decreasing rental charges. In light of their equal bargaining positions, there is no need for government intervention to prevent abuses.

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[21] 47 U.S.C. § 224(a)(1).
[22] Petition at 12.
[23] Petition at 13.
[24] Petition at 15.
[25] The fact that FirstEnergy currently owns more joint use poles than the ILECs does not grant FirstEnergy any particular leverage, since each side still relies on access to the other's pole in order to serve customers. As will be discussed in more detail *infra*, in many cases ownership was in greater parity when the agreements were first negotiated, but the ILECs' failure to set poles has skewed the ratio and thereby increased rentals owed by ILECs to utilities. Some ILECs have requested to purchase poles to even the ratio.

D. ILECs Have Shirked Their Joint Use Responsibilities At The Expense Of Electric Utilities And The Safe And Efficient Operation Of The Nation's Electric Distribution System.

Over the past several years, neither FirstEnergy nor the ILECs have modified any existing joint use contracts to change any attachment rental rates, terms and conditions. In fact, many of FirstEnergy's joint use agreements with ILECs extend back to the 1950's or earlier. Over this same period, however, some of FirstEnergy's ILEC partners have gradually disassociated themselves from equitable participation in joint use, relying instead on FirstEnergy to set most of the poles, provide emergency responses, restore pole lines after storms, police the system and ensure safe operation. During this period, some ILECs have largely refrained from making necessary and appropriate capital improvements to their pole lines. The result, of course, is that FirstEnergy has been forced by the ILECs to bear the overwhelming burden of joint use.

Although the contracts between FirstEnergy and its ILEC partners in many cases do not establish a specific percentage of poles that each party is required to own, they affirm the intention and obligation of both parties to set and own joint use poles. In fact, some agreements do express the intention that the parties strive towards equal ownership. Over the past several years, however, ILECs often have reneged on this obligation, forcing FirstEnergy to set and replace approximately 90% of all new poles. This gross imbalance has resulted in FirstEnergy processing up to *nine times* as many applications for attachment, conducting up to *nine times* as much engineering work, and performing up to *nine times* as much make-ready work to accommodate ILEC attachments than ILECs are required to incur in accommodating FirstEnergy's attachments. All of this is occurring in a joint use environment that USTelecom claims is somehow "abusive" to ILECs.

FirstEnergy has not even been reimbursed adequately by the ILECs for some of these additional expenses, with some ILECs refusing to pay after claiming that FirstEnergy's costs are "too high." This is especially true during emergency responses when costs are higher due to the necessity of paying overtime rates. For safety and reliability reasons, FirstEnergy uses in-house crews to perform pole setting and make ready work. FirstEnergy's employees are better trained and better qualified than many outside contractors to work on utility poles carrying electric lines. ILECs believe that FirstEnergy's costs should be based on those of contractors who can perform these jobs less expensively, regardless of FirstEnergy's actual costs. ILECs have routinely resisted payment of these actual costs. The result is that FirstEnergy is not being reimbursed for millions of dollars of engineering and make-ready expenses for which the ILECs are enjoying a free ride.

After years of neglect, FirstEnergy's ILEC partners have grossly scaled back their joint use programs, all to the detriment of FirstEnergy. They are not prepared to move quickly, or to respond to emergency situations. They have cut their internal resources supporting joint use and have reduced their joint use staffing. Not only have the ILECs been failing to set their fair share of new poles, they have not been transferring their attachments to new facilities when necessary, creating a significant "double wood" problem (whereby two poles unnecessarily stand side-by-side to support all attaching entities). FirstEnergy also has been forced by the ILECs to bear a disproportionate amount of the expense required to clear new space and perform routine tree trimming and pole inspections.

In addition, FirstEnergy's ILEC partners have installed far more unauthorized attachments than FirstEnergy. The ILECs have often failed to submit necessary applications for new attachments that are made in the field. This fact may explain in part why the ILECs have

resisted FirstEnergy's efforts to perform pole audits to determine ownership of attachments and poles. Rather than fully cooperate in such audits, ILECs have refused to participate, refused to pay their fair share of audit costs, refused to accept the results of audits and failed to recognize and be responsible for their fair share of pole ownership and attachments.

In sum, ironically, it is the ILECs -- not the electric utilities as claimed by USTelecom -- who have been shirking their joint use responsibilities. Having no regard for the unfair burden they already have placed on their electric utility joint use partners, the ILECs' national trade association now seeks to abandon the entire joint use concept altogether by asking the Commission to confer pole attachment rights on its members. The Petition should be rejected outright.

E. Granting USTelecom's Petition Would Give ILECs Unfair Leverage Over Electric Utilities, Significantly Harming Electric Utilities, Electricity Ratepayers, And The Nation's Electric Distribution Grid.

The rates that FirstEnergy's operating subsidiaries may charge its business and retail customers are regulated. As a result, FirstEnergy, like many of its ILEC partners, would not and cannot simply recover its expenses by blithely passing them along to ratepayers. At the same time, FirstEnergy's regulators have focused increasingly on the reliability of FirstEnergy's electric distribution system. FirstEnergy, therefore, must improve and maintain its electric distribution system at the same time its ILEC partners routinely neglect their joint use duties and require FirstEnergy to bear a far greater share of joint use expenses. FirstEnergy can ill afford to bear the ILECs' expenses, nor should it be required to do so. Joint use is the responsibility of all pole owners, not just electric utility pole owners.

Interestingly, while USTelecom urges the Commission to grant pole attachment rights to ILECs on utility poles, it remains completely silent on the issue of access by electric utilities to ILEC poles. If granted, USTelecom's Petition would create a one-way street by guaranteeing regulated rates, terms and conditions to ILECs for access to electric utility poles, but conferring no such rights on electric utilities with respect to ILEC-owned poles. Electric utilities would be left to fend for themselves in their attempts to gain much needed access to ILEC-owned poles. Duplicative facilities would need to be constructed to the detriment of both parties' customers.

Because FirstEnergy is vitally dependent upon ILECs for access to approximately 564,000 ILEC poles, this disparity in pole attachment rights would provide the ILECs with enormous, unfair leverage. ILECs could restrict electric utility access to ILEC poles and demand that electric utilities like FirstEnergy pay outrageously high attachment rates and other fees. They could require electric utilities to set all new poles, replace ILEC poles, maintain ILEC facilities, monitor and correct ILEC safety violations, surrender space needed for electric attachments, and otherwise hinder the ability of electric utilities to provide service to their customers in a safe and reliable manner.

ILECs already are failing to comply with existing joint use arrangements. It is the electric utilities that need relief from ILEC abuses, not the other way around.

F. The Solution To Resolving ILEC Concerns Is To Require All Attachers To Pay A More Equitable Share Of Pole Costs, Not To Burden Already Overstrained Electric Utilities.

USTelecom's Petition appears to be motivated in large part by the ILECs' competitive concerns that they cannot enjoy the benefits of regulated pole attachment rates, terms and conditions, as do CLECs. USTelecom ignores the fact, however, that ILECs and CLECs are

different entities. Unlike ILECs, CLECS do not own their own distribution poles. CLECs, in fact, do not own many of the other facilities that ILECs own that are necessary for CLEC operations, such as local loops, local and tandem switches, interoffice transmission facilities, network interface devices, signaling and call-related database facilities, operations support systems functions, and operator and directory assistance facilities. For that reason, the FCC required ILECs to grant CLECs nondiscriminatory access to these network elements on an unbundled basis. In that sense, ILEC-owned distribution poles are no different than the other ILEC facilities that are made available to CLECs.

That being said, if USTelecom believes that existing pole attachment regulations place them at a disadvantage with respect to CLECs, the solution is to require the CLECs to pay for their fair share of the costs of owning and maintaining the ILEC and electric utility distribution systems, not to make a bad situation worse by granting ILECs pole attachment rights similar to CLECs. CLECs, like cable operators and other attachers, do not bear the expense of setting and maintaining these poles, but nevertheless enjoy full use of these poles to provide service to their customers. Because CLECs (and cable operators) do not need to build their own distribution systems, they save an enormous amount of money by relying on their government-guaranteed access to and use of the distribution systems of others. It would not be unreasonable to require them to pay a more appropriate share of the costs for one of the key components of their networks: their distribution system.

Instead, the burden of owning and maintaining the distribution systems on which CLECs and cable operators depend falls in large part on electric utilities and ILECs. This burden already has increased considerably for electric utilities in recent years as some ILECs have failed to pay their fair share and pull their own weight in a joint use environment. Rather than imposing

additional one-sided requirements on electric utilities, a better way of reversing these inequities is to require all attachers to pay a more equitable share of pole costs. Such a division of pole costs would recognize the value of the distribution system to each of the attachers, and require each of them to pay for a share of the costs based on that value.

Because the Pole Attachment Act does not grant the Commission authority to modify pole attachment rates in a more equitable manner, Congress must amend the Act to permit fairer, more equitable rates. Such Congressional action is much needed, and preferable to the relief sought by USTelecom.

By way of example, a more equitable distribution of pole costs is in place in the State of Maine, where pole attachment regulations apportion the large majority of pole costs based on what it would cost each attacher to build its own distribution system.[26] Under the "stand-alone" formula used by Maine, it is assumed that each attacher might, as an alternative, construct its own stand-alone pole line. Under this formula, a comparison is made of the costs that each attacher would incur if it were to build its own stand-alone pole line. The Maine PUC determined that electric utilities need poles that are taller, stronger, and perhaps more closely spaced, when compared with poles required by telephone and cable companies. It was also determined that telephone companies have greater pole requirements than cable companies. Under the stand-alone cost formula, the majority of pole costs are shared based on that comparison. Thus, if construction of a pole line covering a certain distance costs $24,000 for an electric utility, $20,000 for a telephone utility, and $15,000 for a cable operator, the costs of the

[26] Maine's pole attachment regulations are codified at CMR 65-407-880 (2002), *et seq.*

construction of a single pole line should be shared in the ratio 24:20:15. The Maine PUC, in fact, adopted the 24:20:15 ratio to allocate pole costs.[27]

The Maine PUC justified its more equitable allocation of costs by recognizing that the cost benefit of using a single pole, as opposed to separate poles, is substantial, and that this benefit accrues to the attaching entity that does not have to build a separate distribution system. The public also benefits by not having multiple pole lines, as do the subscribers who pay less for all of the different types of services made available via pole distribution systems. The Maine PUC determined, however, that the federal attachment rates paid by cable operators had the effect of disadvantaging the electric and telephone ratepayers, who were, in effect, subsidizing other attachers.[28]

Maine's allocation of "common space" costs (similar to a joint use arrangement) was found to be justified because: (i) attachers enjoy the same benefit from that common space; (ii) those costs are "used and useful" to all attachers; (iii) a pole of a certain length would be needed by any entity seeking to construct its own distribution system; and (iv) those costs are fixed, and do not vary depending on the amount of usage.[29]

Whether or not Congress adopts a cost allocation similar to Maine's, a more equitable sharing of pole attachment costs is much needed and would be entirely appropriate. Such a solution is far preferable to USTelecom's attempt to transfer more ILEC responsibilities to electric utilities.

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[27] CMR 65-407-880, § 5 (2002). *See also* State of Maine, Public Utilities Commission, Order Adopting Rule Policy and Basis Statement, Docket No. 93-087, at 19-23 (Oct. 18, 1993) ("Maine Pole Attachment Order"); State of Maine, Public Utilities Commission, Notice of Rulemaking, Docket No. 93-087, at 15-19 (May 13, 1993) ("Maine Pole Attachment Notice of Rulemaking") (explaining why the FCC formula for allocating common (i.e. unusable) space is flawed).
[28] Maine Pole Attachment Notice of Rulemaking at 4, 7.
[29] *Id.* at 12-13.

IV. CONCLUSION

Congress never drew any fine line distinction between the terms "telecommunications carrier" and "provider of telecommunications services" and never conferred different pole attachments rights and obligations upon the two different entities, despite USTelecom's claims. Congress used the two terms interchangeably and treated them as synonyms. They are one and the same.

No rulemaking proceeding is necessary to explore the issues raised in USTelecom's Petition. The Petition should be denied as a false attempt to gain pole attachment rights to which ILECs are not entitled and which they do not deserve, all at the expense of electric utilities and the safe and efficient operation of the nation's electric distribution system.

Respectfully Submitted,

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