Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054

In the Matter of

IIMPLEMENTATION OF SECTION 224	**)**	**WC Docket No. 07-245**
OF THE ACT: AMENDMENT OF THE	**)**	
COMMISSION'S RULES AND POLICIES	**)**	**RM-11293**
GOVERNING POLE ATTACHMENTS	**)**	**RM-11303**

COMMENTS OF THE

INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

To the Commission:

I. INTRODUCTION

The Independent Telephone & Telecommunications Alliance (ITTA) hereby submits comments in the above-captioned proceedings. ITTA members are mid-size local exchange carriers that provide a broad range of high-quality wireline and wireless voice, data, Internet, and video telecommunications services to 25 million customers in 44 states.

ITTA and its member companies have demonstrated previously that the Commission's current rules fail to recognize the rights of incumbent local exchange carriers (ILECs) to be free from unreasonably discriminatory pole attachment rates, terms, and conditions.[1] In addition to fundamental concerns that current Commission rules do not fulfill the statutory intent of guaranteeing just and reasonable pole

[1] *See, Petition of United States Telecom Association for Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures; Petition for Rulemaking of Fibertech Networks: Ex Parte Presentation of Independent Telephone & Telecommunications Alliance*, RM-11293, RM-11303 (filed Feb. 20, 2007).

attachment rates, terms, and conditions, the residual effect of pole attachment policies on the deployment of advanced services must be considered. ILECs frequently rely upon pole attachments for broadband deployment, and improper provision of pole attachments to ILECs can thwart efforts to increase broadband availability. The Commission has long recognized the importance of broadband,[2] and its statutory mandate to promote the deployment of broadband.[3] A properly crafted remedy in the instant matter can benefit that greater goal.

II. ACTION TO ACHIEVE SYMMETRY BETWEEN COMMISSION RULES AND THE ACT IS NECESSARY TO PREVENT UNJUSTLY DISCRIMINATORY TREATMENT THAT HINDERS BROADBAND DEPLOYMENT AND ENGENDERS OTHER ADVERSE EFFECTS.

A. THE ACT GUARANTEES JUST AND REASONABLE RATES, TERMS, AND CONDITIONS FOR ILEC POLE ATTACHMENTS.

The Telecommunications Act of 1996 (Act)[4] guarantees just and reasonable rates, terms, and conditions for ILEC pole attachments. Section 224(a)(4) of the Act defines "pole attachment" as "any attachment by a cable television system or *provider of telecommunications service* to a pole, duct, conduit, or right-of-way . . ."[5] ILECs are

[2] The Commission addresses broadband in the instant proceeding, *see Implementation of Section 224 of the Act; Amendment of Commission's Rules and Policies Governing Pole Attachments: Notice of Proposed Rulemaking,* WC Docket No. 07-245, RM-11293, RM-11303, FCC 07-187, at para. 13 (rel. Nov. 20, 2007). The increasing role of broadband was also noticed in *Federal-State Joint Board on Universal Service Seeks Comment on Long Term, Comprehensive High-Cost Universal Service Reform,* Public Notice, CC Docket No. 96-45, FCC No. 07J-2, at para. 8 (rel. May 1, 2007).

[3] Telecommunications Act of 1996, § 706, 47 USC 157 nt.

[4] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (1996 Act). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1996, as amended by the 1996 Act, will be referred to as "the Act."

[5] 47 USC § 224(a)(4) (emphasis added).

providers of telecommunications service.[6] Although Section 224(a)(5) excludes ILECs from the definition of "telecommunications *carriers*" (emphasis added) for certain purposes of Section 224, ILECs, as "provider[s] of telecommunications service," are nonetheless entitled to just and reasonable rates, terms, and conditions for their pole attachments.

The exclusionary language of Section 224(a)(5) can be read to exclude ILECs from rights to *access* poles (*see* Section 224(f)), which is wholly distinguishable from the right to rates, terms, and conditions that are just and reasonable. Section 224(f)(1) requires that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it;"[7] ILECs are excluded from that group, pursuant to Section 224(a)(5).[8] The construction of the statute, however, provides that once a pole attachment has been secured by a "provider of telecommunications service" (which an ILEC is), then the rates, terms, and conditions for that attachment must be just and reasonable.

---

[6] *Implementation of the Telecommunications Act of 1996: Report and Order*, 11 FCC Rcd 15499, 15988-15989 (1996). The Act defines "telecommunications service" as "the offering of *telecommunications* for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used, *see* 47 USC § 153(46) (emphasis added)." Local exchange carriers are defined by the Act as "engage[ing] in the provision of telephone exchange service . . . ", *see*, 47 USC § 153(26), which in turn is defined as service "by which a subscriber can originate and terminate a telecommunications service," *see* 47 USC § 153(47). Telecommunications is defined by the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received," *see* 47 USC § 153(43).

[7] 47 USC § 224(f)(1).

[8] 47 USC § 224(a)(5).

The Commission must conform its rules to the statute. In a 2005 *Petition for Rulemaking*, USTelecom demonstrated that the variant language in the subsections of the statute must be read as written, and not attributed to an inadvertent draftsman's error:

> In a case where there was differing language in two subsections of a statute, one subsection immediately following the other subsection, the Supreme Court has stated that it "refrain[ed] from concluding . . . that the differing language in the two subsections has the same meaning in each. [It] would not presume to ascribe this difference to a simple mistake in draftsmanship." *Russello v. United States*, 464 US 16, 23 (1983). Similarly, where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).[9]

The Commission's rules, however, fail to account for the perceptible difference between rights to access and rights to just and reasonable rates, terms, and conditions. For example, Section 1.1402 of the Commission's rules includes "telecommunications carrier" among the entities that can file a pole attachment complaint,[10] but not "provider of telecommunications service," notwithstanding the fact that "provider of telecommunications service" is guaranteed just and reasonable rates, terms, and conditions for pole attachments by Section 224(a)(4) of the Act. A similar omission attends to Section 1.1404 (Complaint)[11] and Section 1.1409 (Commission consideration of complaint), and Section 1.1410 (Remedies).[12] As a result, for those pole attachment

[9] *Petition of the United States Telecom Association for a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures*, RM-11293, at n.21 (filed Oct. 11, 2005).

[10] 47 CFR § 1.1401(e).

[11] *See* 47 CFR § 1.1404(d)(2).

[12] *See* 47 CFR § 1.1409(e)(2).

complaints filed with the Commission,[13] ILECs are left without an adequate remedy. In fact, the remedies afforded by Section 1.1410 would enable ILECs to excise from a pole attachments agreement provisions to which the ILEC agreed under threat of being evicted from the pole. The "sign and sue" provision of Section 1.1410(b) would discourage pole owners from imposing unjust and unreasonable rates, terms, and conditions upon ILECs.

Commission action is necessary. In the absence of Commission direction, ILECs are left without recourse when utilities impose unreasonable rates, terms, and conditions and otherwise discriminate against ILECs. The Commission should amend 47 CFR 1.1402 and 1.1404 to include ILECs among the parties that can bring a pole attachment rate complaint to the Commission, and should similarly expand 47 CFR 1.1409(e)(2) to establish that the default rate described there applies to ILECs.

B. INCUMBENT LECS ARE SUBJECT TO UNJUST DISCRIMINATORY TREATMENT.

ITTA members include nine local exchange carriers that collectively provide service in 44 states. Certain of ITTA members have been subject to pole attachment rates as high as 500 percent more than the rate paid by cable in the same area local area, and 300 percent more than the competitive local exchange carrier (CLEC) rate.[14] The discriminatory treatment, however, does not end at simply charging exorbitant rates.[15] ITTA members can also point to a catalogue of heavy-handed tactics employed by pole

[13] Section 224(c) of the Act preempts Commission jurisdiction where states assert regulation of pole attachments.

[14] *Petition of the United States Telecom Association for a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures: Notice of Ex Parte of CenturyTel,* RM-11293 (filed Feb. 21, 2007).

[15] *See* 47 USC § 224(d)(1), specifying the parameters within which pole attachment rates are considered "just and reasonable."

owners, including: expectations that ILECs shoulder 50 percent of liability; forcing ILECs to bear the costs of larger poles where increases in size are not necessary to meet the needs of the ILEC, and; permitting ILEC use of only one side of a pole in order to facilitate line-crew work, but without concomitant reduction in the rate. These circumstances are particularly egregious since ILECs have no clear path toward dispute resolution within the processes of the Commission. In these cases, an ILEC's only option is to either vacate the pole or begrudgingly accept such treatment.

This disparate treatment places ILECs at a clear competitive disadvantage. ILECs are competing directly with cable and other voice, video, and data providers, and the broadband market is evolving rapidly. Congress recognized the critical need to ensure just and reasonable rates, terms, and conditions for pole attachments, and defined "pole attachment" *specifically* to include "any attachment by a cable television system or *provider of telecommunications service . . .*"[16] The failure of the Commission's rules to include ILECs within the ambit of entities that are guaranteed just and reasonable rates, terms, and conditions places ILECs at a distinct disadvantage, particularly where an ILEC cannot install its own poles due to zoning or costs. Continued regulatory disparity frustrates Congressional intent, and hinders broadband deployment.

ILECs are not asking for special treatment or extraordinary consideration, but rather for equitable treatment. Toward that end, ITTA urges the Commission to clarify that ILECs are entitled to just and reasonable rates, terms, and conditions for pole attachments; are included within the complaint and remedy processes set forth in Sections

[16] *See* 47 USF § 224(a)(4) (emphasis added).

1.1402, 1.1404 and 1.410 of the Commission's rules; and can avail themselves of the default rate prescribed by Section 1.1409 of the Commission's rules.

C. CONSUMERS ARE HARMED BY UNJUST DISCRIMINATORY TACTICS THAT OBSTRUCT EFFECTIVE BROADBAND DEPLOYMENT.

Consumers share the brunt of unjust discriminatory tactics that obstruct effective broadband deployment. Disproportionately high pole attachment rates for ILECs reduce the incentive to invest in broadband network where some or all of the deployment depends on aerial cable. Moreover, consumers may face higher rates for broadband services. At a time when greater deployment of broadband is a common theme in several Commission proceedings, Commission clarification of pole attachment regulations is another way to facilitate further broadband deployment.

ITTA members serve communities in rural areas of the Nation. In many of those areas, trenching for underground fiber is uneconomical. Aerial cable continues to be the most cost-effective and efficient solution to furthering deployment of standard and advanced services. Yet, the inability for ILECs to obtain lawful rates, terms, and conditions under current Commission rules hobbles efforts to meet consumer demand. A major input into a carrier's decision to increase broadband deployment is the anticipated "take rate" of services. As ITTA has noted in other proceedings, many factors bear upon the success of advanced services. These include carrier access to video content[17] and

[17] *See, i.e., Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution – Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Tying Arrangements: Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, Independent Telephone & Telecommunications Alliance, Western Telecommunications Alliance, and Rural Independent Competitive*

support for the underlying telecommunications network.[18] Just and reasonable pole attachment rates, terms, and conditions are another crucial element in the drive to deploy advanced services further, particularly where price inelasticity would drive take-rates downward should unreasonable pole attachment rates force carriers to flow high costs back to consumers. The Commission can neutralize this obstacle simply by amending its rules to conform to the requirements of the statute. Moreover, the Commission can promote market-driven results by ordering a single rate for all attachments used to provide broadband internet access, including ILEC attachments.

"Broadband-by-wire" provides the most robust Internet experience. As described in a recent white paper, "Existing wireless networks are perfectly adequate for voice, email, or Internet surfing, but their limitations preclude high-quality video-phone applications and other bandwidth-intensive applications."[19] The Commission's interest in furthering National goals to deploy broadband will be promoted by confirming that ILECs can enjoy their statutory right to just and reasonable pole attachment rates, terms, and conditions. This action does not implicate a wholesale overhaul of policy but merely

---

Alliance, MB Docket Nos. 07-29, 07-198, at 4-7 (filed Jan. 4, 2008) (describing relationship between access to video content and broadband deployment).

[18] *See, Federal-State Board on Universal Service: Comments of the Independent Telephone & Telecommunications Alliance*, WC Docket No. 05-337, CC Docket No. 96-45, at 53 (filed May 31, 2007), *citing Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers: Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256*, CC Docket Nos. 96-45, 00-256, FCC 01-157, 16 FCC Rcd 11244, at para. 199 (2001) (describing Commission policies that support deployment of plant capable of providing access to advanced services).

[19] "Municipal Broadband: Demystifying Wireless and Other Fiber-Optic Options," Christopher Mitchell, The New Rules Project, at 3 (rev. Mar. 2008) (http://www.newrules.org/info/munibb.pdf) (last viewed Mar. 5, 2008).

clarifies existing rules in order to ensure their consistency with the Act. The experience of ILECs has demonstrated that in the absence of Commission action, ILECs will continue to be disadvantaged improperly.

III. CONCLUSION

The statute assures ILECs just and reasonable rates, terms, and conditions for pole attachments. ITTA urges the Commission to revise relevant rules to reflect that statutory imperative, and to provide a right of action for ILECs to pursue remedies when lawful rates, terms, and conditions are withheld.

Respectfully submitted,

s/*Joshua Seidemann*
Joshua Seidemann
Vice President, Regulatory Affairs
Independent Telephone & Telecommunications Alliance
975 F Street, NW, Suite 550
Washington, DC 20004
202-552-5846
www.itta.us

DATED: March 7, 2008