

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

In the Matter of)	
)	
Implementation of Section 224 of the Act;)	WC Docket No. 07-245
Amendment of the Commission's Rules and)	
Policies Governing Pole Attachments)	RM-11293
)	
)	RM-11303

**COMMENTS OF AMEREN SERVICES COMPANY AND VIRGINIA ELECTRIC AND
POWER COMPANY**

Charles A. Zdebski
Raymond A. Kowalski
Eric J. Schwalb
TROUTMAN SANDERS LLP
401 Ninth Street, N.W., Suite 1000
Washington, DC 20004-2134
(202) 274-2950 (telephone)
(202) 274-2994 (fax)

March 7, 2008

SUMMARY

Ameren Services Company and Virginia Electric and Power Company long for an end to the costly litigation with attaching entities that has continued for some thirty years. The Commission has the opportunity in this proceeding to bring about that result.

We agree with the Commission's perception that today virtually all attachments, regardless of the legacy business of the attaching entity, are now used to offer broadband Internet access service, that is, the ability of an end user to receive information from and/or send information to the Internet at information transfer rates exceeding 200 kilobits per second in at least one direction. This is a service for which there is no established rental rate formula. Accordingly, we agree that the Commission has the authority to establish a new rental rate formula that applies to attachments that are used to offer broadband Internet access service. We urge the Commission to establish a rebuttable presumption that all attachments are used to offer broadband Internet access service.

The supporting infrastructure of poles and conduits is of vital importance to all who use it, not just to the utility that happens to own it. All who use the infrastructure have a stake in the safety and reliability of the infrastructure and should share meaningfully, though not necessarily equally, in the cost to operate, maintain and defend that infrastructure. We propose a new regulatory paradigm of infrastructure partnership, under which all stakeholders cooperate in practices and procedures that ensure the integrity of the infrastructure.

The "common space" on a pole benefits all stakeholders. The costs associated with that space should be allocated equally among them. Attaching entities also benefit in accordance with the space they use. Based on typical and representative usage patterns that we have observed in our service territories, we propose that the broadband rental rate be a percentage of

the dollar amount of the carrying charges associated with owning a pole. Based on our experience, that percentage would be approximately 20.6%.

We oppose the creation of access rights or a regulated rental rate for ILECs. First, the Pole Attachments Act provides no authority for the Commission to establish a right of access or a regulated rental rate. Second, ILECs and electric utilities are traditional pole owners. The principles and practices for the joint use of wood poles of “[electric] supply and communications companies” go back to at least 1926 and have resulted in the harmonious relationship that one would expect from two companies that are equally dependent on the existence and reliability of each other’s infrastructure.

We urge the Commission to use this opportunity to establish a regulatory regime that is characterized by a similar harmonious relationship between pole owners and attaching entities, in place of the litigious atmosphere that has existed to date.

TABLE OF CONTENTS

Page No.

SUMMARY i

INTRODUCTION..... 1

COMMENTS 4

 I. The Commission Should Adopt a Policy of Infrastructure Partnership as the New Model
 of Pole Attachment Policy 4

 A. The Importance of Protecting Infrastructure..... 4

 1. Historic Preference for Communications Deployment Over Infrastructure Safety 4

 2. Growing Appreciation for the Importance of Infrastructure..... 5

 B. Toward an Infrastructure Partnership 7

 C. Policy Changes By Fibertech Are Unnecessary..... 11

 1. Safety and Reliability of Pole Attachments 12

 a. Deference to Pole Owners 12

 b. Deference to State Regulation..... 12

 2. FCC Adjudication of Alleged Discrimination Remains Effective 13

 II. The Majority of Attachments Have Evolved into Broadband Attachments..... 15

 A. Broadband 15

 B. Broadband Proliferation..... 15

 C. Rebuttable Presumption of Broadband Attachments..... 17

 III. The Commission Has Authority to Establish a New Rental Rate for Broadband
 Attachments..... 19

 A. The Pole Attachments Act Contains No Rate for Attachments Used to Offer
 Broadband Internet Access Service and the Commission May Establish Such a
 Formula 19

 B. The Rental Rate Formula for Attachments Used to Offer Broadband Internet Access
 Service May Yield a Rate Greater than the Rate Yielded by the Rental Rate Formula
 for Telecommunications Attachments 23

 IV. ILECs Have No Federal Right of Access or Regulated Joint Use Rates..... 27

 A. Section 224 Unambiguously Exempts ILECs from Attaching Rights 29

 B. The Legislative History of Section 224 Illustrates that Congress Did Not Intend to
 Provide Attaching Rights to ILECs..... 32

 C. The Commission Should Maintain Its Precedent That Denies ILECs Rights as
 Attaching Entities 35

 V. Wireless Attachments..... 37

CONCLUSION..... 39

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

In the Matter of)	
)	
Implementation of Section 224 of the Act;)	WC Docket No. 07-245
Amendment of the Commission’s Rules and)	
Policies Governing Pole Attachments)	RM-11293
)	
)	RM-11303

COMMENTS OF AMEREN SERVICES COMPANY AND VIRGINIA ELECTRIC AND POWER COMPANY

Ameren Services Company (“Ameren”)¹, and Virginia Electric and Power Company d/b/a Dominion Virginia Power (“Dominion Virginia Power”)² respectfully submit these comments in the above-captioned proceeding.

INTRODUCTION

In these Comments, Ameren and Dominion Virginia Power posit a new paradigm to govern pole attachment regulations and pole attachment relationships. Deemed an “infrastructure partnership,” the paradigm recognizes that, when Congress sought to aid fledgling cable operators in the mid-1970’s with legislation to help them deploy their networks, it could not have foreseen that, for 30 years, cable operators, telecommunications providers, and electric utilities would grapple with the law, seeking advantage or refuge in its provisions. Congress

¹ Ameren Services Company is a service subsidiary of Ameren Corporation and is filing these comments on behalf of four utility operating subsidiaries of Ameren Corporation (Union Electric Company d/b/a AmerenUE, Central Illinois Light Company d/b/a AmerenCILCO, Illinois Power Company d/b/a AmerenIP and Central Illinois Public Service Company d/b/a AmerenCIPS. These utility operating companies provide electric power service to over 2.3 million customers throughout a 64,000 square mile service territory in Missouri and Illinois. Ameren has over 9,000 employees.

² Dominion Virginia Power provides service to over 2.4 million electricity customers in Virginia and North Carolina, who are reached by over 54,000 miles of distribution lines. Dominion Virginia Power employs over 7,100 people.

could not have foreseen the constant and continuing litigation in state and federal courts, and before appellate courts including the United States Supreme Court, arising from the Pole Attachments Act. And Congress could not have foreseen the dramatic advancements in technology that have altered the competitive relationships between attaching entities on the poles, and which have led to unimagined strain on utility infrastructure.

To be sure, the Commission and its bureaus have attempted from time-to-time to get out in front of these issues, by promulgating policies and regulations for pole attachments and by adjudicating complaints, and issuing non-binding pronouncements on various issues. Despite these efforts, after three decades, the federal pole attachment regime satisfies no one.

Accordingly, Ameren and Dominion Virginia Power applaud the Commission for opening this comprehensive proceeding to reform pole attachment regulation. Yet Ameren and Dominion Virginia Power believe that the last thing the Commission needs to entertain are comments rearguing cases won and lost in the long history of pole attachment litigation and regulation.

Ameren and Dominion Virginia Power's support for an infrastructure partnership seeks to move beyond these disputes by refocusing the debate on its essence: the need for reliable pole infrastructure. Although electric utilities seem to be increasingly becoming the custodians of the vast majority of pole infrastructure in the United States, the need for reliable pole infrastructure benefits all parties, their customers, and public safety first responders, all of whom rely upon the communications and electric facilities strung upon and run within utility infrastructure.

America's dependency on its critical infrastructure was vividly brought to the fore by the terrorist events of September 11, 2001, and Hurricane Katrina in August, 2005. After the communications and power outages that resulted from these and other major events, the country

has come to understand the vitally important role of the pole and conduit infrastructure in supporting the delivery of electric and communication services. These disasters made it clear that the nation's infrastructure must be used in a sound manner, aggressively maintained, and affirmatively defended against all foreseeable threats, whether normal wear and tear, severe weather or deliberate destruction. The "Report and Recommendations to the Federal Communications Commission" of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks,³ called for "a proactive, rather than reactive program for network reliability and resiliency." Ameren and Dominion Virginia Power argue that a reliable and resilient communications network depends upon a reliable and resilient supporting infrastructure.

Ameren and Dominion Virginia Power believe that a reaffirmation of respect for the pole infrastructure, coupled with a rate regime that creates parity for similar service offerings of attaching entities, will serve to eliminate virtually all of the animosity in pole attachment relationships that have marked the last 30 years of pole attachment regulation. Accordingly, Ameren and Dominion Virginia Power urge the Commission to adopt the recommendations made herein.

³ Available at <http://www.fcc.gov/pshs/docs/advisory/hkip/karrp.pdf>, see recommendations, p. 31.

COMMENTS

I. The Commission Should Adopt a Policy of Infrastructure Partnership as the New Model of Pole Attachment Policy

A. The Importance of Protecting Infrastructure

1. Historic Preference for Communications Deployment Over Infrastructure Safety

For many years, electric utilities have been viewed merely as providers of a ubiquitous and available infrastructure that has excess capacity to support non-electric uses. The prevailing belief has been that unused space on poles or in conduits was simply lying fallow. Therefore it was in the public interest to make this space available to certificated or franchised entities at the lowest constitutionally defensible cost. The electric utilities would derive a benefit, the reasoning went, because some income, no matter how meager, helped to defray costs that the electric utilities would have incurred anyway.

The result of this thinking was decades-long disagreements between pole owners and attaching entities. The root of these disputes arose from the need of an attaching entity to build, overbuild or rebuild its network as quickly as possible in order to meet its competition. Facing those pressures, the attaching entity typically alleged that the pole owning utility moved too slowly to approve permits or perform make-ready work. Conversely, the pole owning utility alleged that the attaching entity would cut corners and ignore safety and industry construction standards in an effort to expedite its network deployment.

This tension led to considerable litigation. In complaints brought before the Commission, state public utility commissions and state and federal courts, pole owners and attaching entities argued over conflicting policies and practices including: attachments without an agreement with the pole owner, *i.e.*, trespassing, or attachments without the permits required under their

agreement with the pole owner⁴; attachments without proper preparation of the pole; attachments, including overlashed attachments, that overload facilities attachments in violation of the National Electrical Safety Code; and attachments that disregard sound engineering practices or the pole owner's safety and engineering requirements. Nearly all of these issues are contained in the recent case of *Arkansas Cable Telecommunications Association et al. v. Entergy Arkansas, Inc.* EB Docket No. 06-53, designated for hearing on March 2, 2006, which demonstrates that harmony is not at hand and the Commission's dispute resolution resources are still being consumed, even after thirty years of regulation and adjudication.

In short, despite the Commission's rulings, utilities continue to find that attaching entities jeopardize the infrastructure and attaching entities continue to believe that pole owners are an impediment to their network deployment.

The present pole attachment rulemaking largely focuses on broadband deployment and how that goal can be advanced via pole attachment regulation. Several of the Commissioners note the ability of the rulemaking to "unleash[] the deployment of competitive broadband throughout the country,"⁵ and how pole attachments regulation can serve to "promot[e] the deployment of broadband infrastructure."⁶ Although Ameren and Dominion Virginia Power support these goals of the Commission, they caution that such deployment must be concurrent with equally strong support for utility infrastructure by all parties and that, if not handled properly, such deployment could engender yet more litigation.

2. Growing Appreciation for the Importance of Infrastructure

⁴ See, e.g., the Mile Hi Cable Partners cases that culminated in *Public Service Company of Colorado v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

⁵ Separate Statement of Commission Michael J. Copps.

⁶ Statement of Commissioner Deborah Taylor Tate.

The Commission appears headed in this direction. In his statement to the NPRM, Chairman Martin cautions that advancement of the Commission's broadband goals cannot come at the expense of utility infrastructure: "Pole attachments provide an important means for the deployment of broadband and other services to Americans. However, the safety and reliability of critical electric infrastructure is a paramount concern. Our work on telecommunications reliability should not come at the expense of other public safety systems." NPRM, Statement of Chairman Kevin J. Martin.

Ameren and Dominion Virginia Power support the Chairman's statement, and note also that his comments are the most recent in a line of recognition by the government regarding the importance of the utility infrastructure that supports the nation. During the prior administration, for example, in Executive Order 13010 President William J. Clinton recognized that "certain national infrastructures are so vital that their incapacity or destruction would have a debilitating impact on the defense or economic security of the United States."⁷ The Executive Order instructed federal agencies to ensure that entities, including electrical power systems, were protected.

More recently, and subsequent to Hurricane Katrina, the Commission's Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks released a report supporting "a proactive, rather than reactive program for network reliability and resiliency." Along with broadband deployment, a policy of protecting the nation's network infrastructure must be a concurrent goal for the Commission as it examines its pole attachment policy in this rulemaking.

⁷ Exec. Order No. 13,010, 61 Fed. Reg. 37,347 (Jul. 15, 1996).

B. Toward an Infrastructure Partnership.

The Commission can support critical infrastructure, and move past the spate of litigation that has found the interests of the pole-owning utilities and the attaching communications companies diametrically opposed, by supporting policy that illustrates instead how their interests in the integrity of the infrastructure are, or should be, aligned. Electric utilities and communications companies alike need a safe, sound and reliable infrastructure to support their facilities. Failures of electricity and communications networks in major disasters, and in more commonplace weather events like ice storms and tornadoes, serve as a constant reminder of the vitally important role of the pole and conduit infrastructure in supporting the delivery of electric and communication services. These events illustrate that the infrastructure must be used in a sound manner, aggressively maintained, and affirmatively defended against all foreseeable threats, whether normal wear and tear, severe weather or deliberate destruction.

The Commission can alleviate the tension between the two industries and help create sound infrastructure policy for the 21st Century by helping the parties to work toward a true infrastructure partnership. A policy of infrastructure partnership requires the Commission not to see electric utilities merely as the providers of infrastructure, as though the infrastructure were available on a tariff. Instead, electric utilities must be viewed as the custodians and guardians of that infrastructure for the benefit of all who use it.⁸ Maintaining the soundness, safety and reliability of the infrastructure is in the best interests of all concerned, including electric utilities and cable and telecommunications franchisees, who depend on the infrastructure physically to support their plant; the customers, who expect uninterrupted delivery of electricity, telephone

⁸ Implicit in infrastructure partnership is the understanding that pole owners are not inhospitable to attaching parties. *See, e.g., First Report and Order*, 68 F.C.C.2d 1585, at 1601 (1978) (“Colony’s perspective seems to portray the typical utility as a generally uncooperative entity requiring substantial admonition to comply with our orders. We do not share this view.”).

service, video programming and broadband Internet access; and the country itself, which depends on these networks for security, information and coordination of public safety and civil defense activities, especially in the most difficult and threatening of circumstances.

A policy of infrastructure partnership embodies these concepts:

- The pole owner and all attaching entities have a stake in assuring the integrity, reliability and safety of the pole infrastructure;
- The pole owner and all attaching entities must share meaningfully (though not necessarily equally) in the cost of maintaining and defending the availability and integrity of the infrastructure;
- Electric utilities are the logical choice to be the custodians and defenders of the infrastructure, with primary, day-to-day responsibility for administration of that infrastructure, because electric utilities have the necessary maintenance crews and equipment; electric utilities have a culture of reliable service; there has been a recent trend toward electric utility ownership of the majority of poles; and electric utilities generally do not compete⁹ with cable and telephone companies.

Under a policy of infrastructure partnership, the tug-of-war between electric utilities and attaching entities that has been going on for 30 years would be replaced with pole owners and attaching entities working together to preserve and protect the infrastructure. Every pole would be engineered and properly prepared to receive attachments without jeopardizing the integrity of the pole. The pole and conduit plant would be regularly inspected and maintained for the benefit

⁹ Some electric utilities have communications ventures, such as Broadband over Power Line affiliations, but even these are subject to strict regulation under state affiliate transactions regulations.

of all who use it. In other words, all attaching entities would share meaningfully in the responsibilities that go hand-in-hand with the use of the infrastructure.

To implement this new policy, the Commission must declare as a matter of policy that:

- No facilities should be on or in the infrastructure unless the facilities have been engineered to be there. That is, stresses have been calculated, capacity has been determined, the infrastructure has been prepared, if necessary, to receive the attachment, and the presence of the attachment and the identity of its owner have been recorded by the owner of the infrastructure. The attachment may be maintained, repaired or replaced without re-engineering, but no material change may be made in the attachment without re-engineering. The required engineering may be performed by the pole or conduit-owning utility or by a Registered Professional Engineer hired by the attaching entity, who must provide a written report to the owner of the pole or conduit before work to prepare the pole or conduit or to install or materially change the attachment can begin.
- Attachments by cable companies and telecommunications carriers who have entered into pole or conduit attachment agreements with pole or conduit-owning utilities must not make any attachments except in accordance with a permit issued pursuant to the pole or conduit attachment agreement. Such attachments include attachments that are to be overlashed to prior, permitted attachments. In the case of attachments to be made on a pole in or above the Communications Worker Safety Zone, as defined in the National Electrical Safety Code, the work must be performed by the pole owner or by a properly trained and qualified subcontractor, hired by the pole owner or the cable company or telecommunications carrier.

- All facilities, whether owned by a cable company, telecommunications carrier or pole or conduit owner, must comply with and be installed in accordance with the National Electrical Safety Code.
- All facilities, whether owned by a cable company, telecommunications carrier or pole or conduit owner, must comply with and be installed in accordance with applicable construction codes and guidelines, the applicable regulations of the state public utility commission and the policies and guidelines of the pole or conduit owner.
- The owner of the respective facilities on a pole or in conduit is responsible for the cost of any necessary make ready work, the cost of the facilities and the cost to install, repair, maintain, inspect, remove or replace the facilities. The cost to maintain, repair, replace, remove or inspect *the infrastructure* (pole or conduit) shall be shared among all entities that use the infrastructure, including the owner and attaching entities. The attaching entities' share of these costs shall be paid in the form of annual rent to the pole owner.
- Cable companies and telecommunications carriers that attach their facilities to the poles or conduits of pole or conduit-owning utilities without first entering into a pole or conduit attachment agreement with those pole or conduit-owning utilities, are mere trespassers, who are subject to all of the applicable civil and criminal remedies of the pole-owning utilities, including the right of the pole or conduit-owning utilities to remove the trespassing attachments without notice to their owners and to dispose of the attachments in accordance with local property law.

Attaching entities and pole owners would best be served by the Commission adopting policies that encourage infrastructure partnership. Only by supporting policies that encourage all

entities on a pole to work together will the FCC begin to see the relationship between pole owners and attaching entities improve, and the amount of litigation before the FCC diminish. Running against this idea, however, are the divisive pole attachment practices that Fibertech urges the Commission to adopt. For the reasons provided next, Ameren and Dominion Virginia Power oppose both the concept and specifics of Fibertech’s proposal.

C. Policy Changes By Fibertech Are Unnecessary

Unlike the policy of infrastructure partnership, which posits a positive working relationship between all parties on a pole regarding attachment and engineering issues, the request for extensive FCC oversight into engineering and safety issues advocated by Fibertech perpetuates the “us vs. them” mentality, and ignores the fact that all attaching entities, and the pole owner—be it an electric utility or an ILEC—have the same interest in the integrity of the pole infrastructure. NPRM, ¶ 37 *et seq.*

Ameren and Dominion Virginia Power oppose Fibertech’s requests for extensive Commission oversight into safety and engineering issues and believe that these issues should remain, as they have since the inception of the Pole Attachments Act, in the hands of the pole owner, which should work with attachers to make safe accommodations for access. Where issues arise regarding access or alleged discriminatory engineering practices, the Commission should continue, as it has since the inception of the Pole Attachments Act, to assert its adjudicative authority over such complaints, and over complaints brought by pole owners regarding improper attachment practices. Thus, the Commission should avoid adopting the additional regulation Fibertech seeks.

1. Safety and Reliability of Pole Attachments

a. Deference to Pole Owners

The Pole Attachments Act always has provided to pole owners the right to deny access to attaching entities for reasons of safety, reliability and engineering. *See* 47 U.S.C. § 224(f)(2). Accordingly, the Commission has avoided the direct regulation of safety, reliability and engineering standards and practices as “rates, terms or conditions” of pole attachments. *See, e.g., Order on Reconsideration*, 14 FCC Rcd 18049 (1999) (rejecting the suggestion that the Commission should specify minimum skills and performance requirements for technicians).

The Commission’s deference in these areas of safety and reliability is appropriate; it can claim no expertise as to the demands placed upon utility infrastructure in various environments.¹⁰ Indeed, over 3,170 electric utilities, including approximately 239 investor owned electric utilities, exist in the United States,¹¹ and each of these utilities faces an endless array of ever-changing operating circumstances due to climate, weather, terrain, loading, source of supply, economic resources, and even the aesthetic preferences of the community, among other things. These differing circumstances dictate differing primary voltages, standard conductor sizes, pole loading zones, standard construction materials, and a host of other variations. As a result, each electric utility has its own unique safety, reliability and engineering requirements.

b. Deference to State Regulation

To the extent utility engineering and safety requirements need to be regulated, state utility commissions already serve this role. In most states, issues of electric utility safety, reliability

¹⁰ The Court of Appeals for the Eleventh Circuit has held that the Commission cannot mandate capacity expansion, as such a mandate would be inconsistent with the plain meaning of the statute. *Southern Co. v. FCC*, 293 F.3d 1338, 1346-7 (11th Cir. 2002).

¹¹ *See* Electric Power Industry Overview, at <http://www.eia.doe.gov/cneaf/electricity/page/prim2/toc2.html>.

and engineering standards and practices are dealt with via regulation, policy making processes, complaint proceedings, investigations, general orders, policy statements, rate cases, and other mechanisms. The Commission has voiced its support for these regulations, which are best suited to taking into account the geographic and other differences that affect pole owners. *See Order on Reconsideration*, 14 FCC Rcd 18049, 18052 (1999) (“the Commission will presume state and local requirements affecting pole attachments to be reasonable, and are entitled deference even if the state has not sought to preempt federal regulations under section 224(c).”). The Commission should continue to embrace and defer to the comprehensive state regulation already in place and refrain from promulgating additional rules.¹²

2. FCC Adjudication of Alleged Discrimination Remains Effective.

Fibertech likely does not care for new FCC-promulgated regulations related to engineering and access. Fibertech’s concern, instead, is that without such regulation, pole owners remain able to reject attachment requests for engineering or safety reasons.

Ameren and Dominion Virginia Power submit that Fibertech is offering a solution in search of a problem. Save for a few anecdotal stories, no compelling evidence exists that attaching entities are routinely denied access to utility poles. In Ameren and Dominion Virginia Power’s experience, they have been willing to work with attaching parties to identify particularly troubling attachments, or poles at capacity, to work with the attaching party on a mutual solution that benefits both companies.

¹² Further, Commission implementation of rules governing safety, reliability and engineering standards and practices would create an unworkable dual regulatory structure. To the extent the Commission has any jurisdiction over safety, reliability and engineering standards and practices, arguably as “rates, terms or conditions” of attachment, the Commission’s jurisdiction would extend only to safety, reliability and engineering standards and practices related to attachments made by cable television providers and telecommunications carriers, not including ILECs. This would create in many jurisdictions conflict between state and federal regulations. Some attachments might be governed by federal safety, reliability and engineering regulations, while others would be subject to state regulation. This is a recipe for a state/federal jurisdictional showdown rather than safe and efficient utility operations.

Only where this process fails should the Commission step in, and only via adjudication, not rulemaking. The Commission should continue to view issues of safety, reliability and engineering standards and practices only in terms of whether they have been used in a non-discriminatory fashion and not as to whether the practices in and of themselves were or were not safe from an engineering standpoint. *See, e.g., Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, 15 FCC Rcd 9563, at 9572, *vacated by* 17 FCC Rcd 24414 (2002) (examining alleged discriminatory applications of extension arm and boxing prohibitions, rather than whether these techniques were safe or sound); *Bell South*, 13 FCC Rcd 20599 (1998), (Bell South provided non-discriminatory access to poles and conduits by committing “to inform competitive LECs of the precise date when any necessary make-ready work can be completed, and to complete the necessary provisioning work ‘in a nondiscriminatory manner’” *Id.* at 20709; *Local Competition Order*, 11 FCC Rcd 15499, at 16083 (1996); *Local Competition Reconsideration Order*, 14 FCC Rcd 18049, at 18079 (1999) (utilities may apply non-discriminatory training qualifications to non-utility personnel working in proximity to electric lines in relation to pole attachments).

Implicit in Fibertech’s Petition is the notion that pole owning utilities are intransigent and unyielding to the Commission’s authority. All parties need to move past the perceived impasse Fibertech posits in its Petition and work together to reach amicable solutions to pole attachment issues—as the vast majority of pole owners and attaching entities already are doing. With this understanding, the existing deference in the Pole Attachments Act to pole owners regarding safety and engineering, and the Commission’s extant regulations and procedures for ensuring such bases are not discriminatorily applied, provide ample regulatory cover for all entities involved.

II. The Majority of Attachments Have Evolved into Broadband Attachments

Beyond the concept of infrastructure partnership, articulated above, Ameren and Dominion Virginia Power believe the next biggest issue remaining between pole owners and attaching entities is the nature of the attachments used to provide broadband and Internet-based telephone service. Indeed, a brief review of the cases now pending before the Commission shows several involving this issue.

Ameren and Dominion Virginia Power believe that the FCC can resolve these complaints, and the remaining key issue between parties, by adopting a third, broadband formula for pole attachments. This formula rate, which would be paid by a telecommunications carrier or a cable operator for their broadband offerings, would eliminate the competitive disparity between those parties and vastly simplify the pole attachment fee billing and collection process.

A. Broadband

The creation of a broadband rate of attachment must begin with a determination of what constitutes broadband. Ameren and Dominion Virginia Power believe the Commission should retain for pole attachment regulation its existing definition of broadband: “a line (or wireless channel) that terminates at an end-user location and enables the end user to receive information from and/or send information to the Internet at information transfer rates exceeding 200 kilobits per second (kbps) in at least one direction.”¹³

B. Broadband Proliferation

According to the Commission’s October, 2007, report on “High-Speed Services for Internet Access,”¹⁴ there were 25 million ADSL (telephone) broadband lines, 32 million cable modem broadband lines and 22 million wireless channels providing broadband Internet access in

¹³ FCC Form 477, Local Telephone Competition and Broadband Reporting Form.

¹⁴ Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-277784A1.pdf

the country. Fiber, a separate category, accounted for another 1 million broadband lines. These numbers, totaling 80 million lines or channels, demonstrate that the overwhelming majority of poles are used to support facilities that are used to offer broadband Internet access.

In Ameren's and Dominion Virginia Power's service territories, virtually all cable companies with attachments on their facilities offer broadband cable modem service; virtually all telecommunications carriers with attachments on their facilities offer broadband DSL service or fiber optic connections; and virtually all wireless companies with attachments on their facilities offer broadband Internet access. *See* Declaration of Michael Roberts, Dominion Virginia Power Joint Use Manager ("Roberts Declaration"), Attachment 1; Declaration of Scott Liebel, AmerenUE Joint Use Manager ("Liebel Declaration"), Attachment 2. In the experience of Ameren and Dominion Virginia Power, broadband service may be offered as a stand-alone service or bundled in a package of services that may include video programming or telephony.

Broadband Internet access was formerly provided by cable companies through their cable modem service and telephone companies through their DSL service as supplements to their traditional, legacy services. Today "[c]onvergence fueled by broadband services has blurred the lines that differentiated companies in various sectors from one another and served as the historical basis for legacy regulatory models. Cable companies now provide voice and data services over the same lines that carry their video programming services. Telephone companies do the same as do satellite and wireless providers."¹⁵

With so many services offered to a customer via various platforms, viewing the attached facilities strictly with regard to whether they support or provide a 200 kbps information transfer rate simplifies and clarifies the Commission's regulatory regime. This basic analysis is vastly

¹⁵ Report of the National Telecommunications and Information Administration, January 2008, "Networked Nation: Broadband in America 2007," p.8, available at www.ntia.doc.gov/reports/2008/NetworkedNationBroadbandinAmerica2007.pdf.

preferable to attempting to determine the regulatory classification of the content that is being transferred at any given time by different classes of providers. Taking this one step would eliminate all of the cases before the Commission regarding the regulatory classification of Voice over Internet Protocol (“VoIP”) provided by cable operators.

It makes sense, therefore, for 21st Century regulatory policy to focus on the information transfer rate supported by the attached facilities, without regard to the legacy services of the entity providing the broadband connection and without regard to whether broadband Internet access service is “a part of a bundled package of services.”¹⁶

C. Rebuttable Presumption of Broadband Attachments

Understanding that most cable operators and most telecommunications companies are offering broadband services, and should be subject to the Commission’s third rate, one remaining issue is how to count the number of pole attachments in a service area offering such services. Ameren and Dominion Virginia Power believe that this matter can most easily be addressed by adopting a rebuttable presumption that all pole attachments are used to offer broadband and are, therefore, subject to the broadband rate.

Attaching entities may prefer to equate the number of attachments with the number of actual customers. This process, however, has no support in the Commission’s rules and ignores the basic fact that even if there were *no* customers subscribing to the available broadband service running past their homes, the attachments are still being used to *offer* broadband service.

Attaching parties pay per attachment, regardless of whether they have even a single customer. It is the offer of service via the attachments, not the uptake of that service, that

¹⁶ NPRM, ¶ 36, fn. 108.

requires an entity to pay a pole attachment fee. Commission rules indicate that it is the offer of service, not the number of customers accepting the offer, that is invoked in Section 224.¹⁷

As a practical matter, the calculation of a pole attachment invoice under the “number of customers” approach would be nearly impossible. The number of broadband customers might vary from month to month, or year to year, making it difficult for the pole owner to bill the attaching party. Moreover, the pole owner would have to require certification of the number of broadband customers, or otherwise have available to it a method to audit the veracity of such statements.

The broadband rate formula must apply to all attachments that provide or support the provision of broadband Internet service, regardless of how many customers actually take the service. Put another way, if ones and zeros are flowing in a line at a rate of 200 kbps, every place where that line is attached to a pole or conduit is a broadband attachment, regardless of whether or not any customer has chosen to subscribe to broadband Internet service from the attaching cable company or telecommunications carrier. The Commission has tentatively concluded that the broadband rate should apply to “those pole attachments that are *used to offer* broadband Internet access service”¹⁸ and Ameren and Dominion Virginia Power agree.

Ameren and Dominion Virginia Power also agree with the Commission and NTIA that, in their experience, there are exceedingly few attachments today that are not used to provide broadband Internet access. *See*, Liebel Declaration and Roberts Declaration. So thorough has the transformation and convergence been since 1996 that it would be realistic and appropriate to establish a rebuttable presumption that *all* attachments are broadband attachments and are subject

¹⁷ *See, for example*, “Cable operators must notify pole owners *upon offering* telecommunications services.” 47 C.F.R. § 1.1403(e) (emphasis added).

¹⁸ NPRM at ¶ 36, emphasis added.

to the unique broadband rental rate formula established in this proceeding. The rare cable company that is providing only video programming and no broadband connectivity over its attachments and the rare telecommunications carrier that is providing no broadband connectivity over its attachments, should carry the burden of proof that they do not fall into the broadband category of pole attachments regulation. In service areas where the attaching entity can establish it is offering only cable, or only telecommunications, attachments, those respective rates would apply.

III. The Commission Has Authority to Establish a New Rental Rate for Broadband Attachments

Ameren and Dominion Virginia Power support the creation of a third rental rate, which would apply to all attachments in service areas where broadband service is offered. Although Ameren and Dominion Virginia Power believe the Commission has the authority to fill gaps in the Pole Attachments Act, they do not find evidence that the statute somehow confines the rate arising from the new rate formula to a place between rates derived from the existing formulas.

A. The Pole Attachments Act Contains No Rate for Attachments Used to Offer Broadband Internet Access Service and the Commission May Establish Such a Formula.

As recounted in Section II of the NPRM, from 1978 until 1996, if CATV companies were allowed by utilities to make attachments to utility poles, the rent charged for those attachments was required under the Pole Attachments Act to be “just and reasonable.” To provide guidance as to a just and reasonable rate, the Commission developed a formula, commonly called the “cable formula” or sometimes the “cable rate.” This formula captured the costs associated with the space on the pole where attachments could be made, as well as a factor for the utility’s rate of return, and yielded a dollar amount for the attacher’s use of a foot of that space.

In 1996, the Pole Attachments Act was amended to make access by cable companies mandatory. In addition, mandatory access was also granted to telecommunications carriers. The Commission was directed by Congress to develop a new rental formula to be paid by telecommunications carriers and by cable companies if they too began to provide telecommunications service. The difference between the two formulas is that the so-called “telecom formula” or sometimes “telecom rate,” was not limited to the costs associated with the space on the pole where attachments could be made.

Because the telecom formula captured a greater percentage of the costs associated with ownership of the pole, any given utility’s telecom rate would always be higher than its cable rate. For example, the telecom rate for Dominion Virginia Power for 2008 is \$15.67 per pole per year. Dominion Virginia Power’s cable rate is \$6.08 per pole per year. *See*, Roberts Declaration.

Not surprisingly, the disparity in the two rates has led to litigation between attaching cable companies and pole owners over whether the attaching cable companies have disclosed the nature and extent of their attachments that are used to provide telecommunications service¹⁹ and related litigation over whether telephone service, provided by attaching cable companies by means of Voice over Internet Protocol (“VoIP”), is properly classified as telecommunications service.

Both rental rate formulas assume that the linear attachment, whether made by a cable company or by a telecommunications carrier, can go only in the space that is usable for communications attachments. This attachment space is located at a point that begins 40 inches below the electric power lines on the pole and extends downward to a point on the pole that is 18

¹⁹ See, for example, *Bright House Networks, LLC v. Tampa Electric Company*, File No. EB-06-MD-003.

feet above grade. There is a presumption in both formulas that the space usable for attachments comprises 13.5 feet of pole space and that the attachment uses 1 foot of this space.²⁰

As the Commission notes at paragraph 4 of the NPRM, although the Supreme Court has ruled that the cable rate does not result in an unconstitutional “taking,” that only means that the rate is just and reasonable and not confiscatory. It is obvious from just the considerable difference produced by the two formulas, however, that the cable rate is a subsidized rate.

The telecom rate is not confiscatory either, but it captures more of the costs associated with the support of the attachment space on the pole than does the cable rate. The 13.5 feet of attachment space are not suspended in mid-air. That segment of the pole is supported by the 18 feet of pole that is visible above grade and another 6 feet of pole that is buried below grade. The telecom rate allocates a share of the costs associated with this non-attachment space to telecom carriers that benefit from the existence and maintenance of this part of the pole. The cable rate does not allocate a share of the costs associated with this non-attachment space to the cable companies whose attachments similarly benefit from the existence and maintenance of this part of the pole. Those undistributed costs are necessarily being absorbed by the electric utility’s customers for the benefit of the cable company and its customers. This is a subsidy for the cable company.

Ameren and Dominion Virginia Power agree with the Commission that a new category of service, broadband Internet access service, has emerged since 1996. The provision of broadband service by cable companies and telecommunications carriers does not affect their respective access rights to the poles and conduits,²¹ but neither is broadband service among the services for

²⁰ See the *Consolidated Partial Order on Reconsideration*, 16 FCC Rcd 12103 (2001), especially Appendices D-2 (cable formula) and E-2 (telecom formula).

²¹ *National Cable & Telecommunications Association, Inc. v. Gulf Power Co. et al.*, 534 U.S. 327 (2002) (“*Gulf Power*”). “The addition of a service does not change the character of the attaching entity...”

which Congress described the rental rate methodologies in Sections 224(d)(1) and 224(e)(2) of the Pole Attachments Act.

As found in the NTIA Broadband Report, both cable companies and telecommunications carriers today offer broadband service to the same customers, yet cable companies pay much less than telecommunications companies for their foot of space in the very same attachment zone on a pole. This broadband service is not video programming, although it can be. It is not telephone service, although it can be. Quite simply, broadband service can be any product that is capable of being delivered in digital, Internet protocol form. It is a service that transcends cable and telecommunications and is its own, new service. There is no formula methodology for this service in the Pole Attachments Act and, as the Commission has noted, the Commission has the discretion (and perhaps the blessing) of the U.S. Supreme Court to do so. In *Gulf Power*, where the Supreme Court was considering the effects of a cable company offering commingled Internet service, the Court said that, in setting forth the formula for cable service, Congress may well have declined to establish formulas for other services that “might be expected to evolve in directions Congress knew it could not anticipate....as a general rule, agencies have authority to fill gaps where the statutes are silent...It might have been thought prudent to provide set formulas for telecommunications service and ‘solely cable service’, and to leave unmodified the FCC’s customary discretion in calculating a ‘just and reasonable’ rate for commingled services.”²²

As foreseen by the Supreme Court, broadband service has “evolved” into its own service. It is now more than “Internet service” that can be supported on the same cable and commingled with “solely cable service.” It is a service that subsumes cable service (and other services).

²² *Gulf Power* at 339.

Regulatory parity and common sense require a rental formula for attachments that are used to offer broadband Internet access service.

B. The Rental Rate Formula for Attachments Used to Offer Broadband Internet Access Service May Yield a Rate Greater than the Rate Yielded by the Rental Rate Formula for Telecommunications Attachments.

Although the Commission has posited that a broadband rate must fall somewhere between the cable and telecommunications rates, Ameren and Dominion Virginia Power do not believe that this is a necessary starting point. As discussed above, the cable rate is a subsidized rate that utterly fails to pass on a meaningful share of the cost of the infrastructure to cable companies. The telecommunications rate does pass on a meaningful share of the cost of the infrastructure to telecommunications carriers, but there are two reasons why even this rate would not pass on a sufficient share of the cost of the infrastructure to entities who use their attachments to offer broadband Internet access.

First, the telecommunications formula only passes on two-thirds of the cost of the “unusable space” to the attaching entities. This might be equitable because, perhaps, the pole owner should be responsible for at least one-third of the cost of the unusable space. However, the Commission counts the pole owner as an attaching entity, meaning that the pole owning utility is responsible not only for at least a third of the cost of the unusable space, but also for a share of the cost of two-thirds of the cost of the unusable space.

Second, the telecommunications formula computes the share of the cost of the unusable space by dividing it among a presumptive average number of attaching entities – 5 in urbanized areas and 3 in non-urbanized areas. Not only does this presumptive average number of attaching entities include the pole owning utility as an attacher, but it presumes a number of attaching entities that has not met the Commission’s expectations when it made this determination in

2001.²³ In Ameren’s experience, the average number of attaching entities (not including the electric utility and the ILEC) is 2.2. Similarly, in Dominion Virginia Power’s experience, the average number of attaching entities²⁴ is also 2.6. *See*, Liebel Declaration and Roberts Declaration.

Under the concept of infrastructure partnership, advocated herein by Ameren and Dominion Virginia Power, the pole owner and attaching entities would share meaningfully, although not necessarily equally, in the cost of the infrastructure. Because the Commission is fashioning a new rate for broadband attachments, there is no need to begin with or import concepts from the other two rates, which bring with them a considerable amount of regulatory “baggage.” Thus, there is no need to discuss, for example, bifurcation between the cost of usable space and the cost of unusable space. The rate should be keyed to the benefit derived from the very existence of the entire pole.

Further, the Commission is not constrained by a Constitutional duty toward attaching entities; only the pole owners need to be protected from any “taking.” The rate paid by broadband attachers should certainly be “just and reasonable,” but, as the Supreme Court observed, the Commission, in a notice and comment rulemaking, has a great deal of latitude within which to apply its expertise to determine a just and reasonable formula.

Ease of administration of the formula is an important consideration and the “presumptive values” approach adopted by the Commission for use in the cable and telecom formulas is one way to achieve ease of administration. However, in developing a broadband formula, it would

²³ *Consolidated Partial Order on Reconsideration*, 16 FCC Rcd 12103 (2001).

²⁴ Although ILECs have no pole attachment rights, ILECs pay rent to electric utilities (and vice-versa) under “joint use” agreements, in which the rental rate is negotiated, not determined by FCC formula.

be equally valid to achieve ease of administration by considering a pole owner's typical and actual experience in determining a percentage of cost to be borne by the attaching entity.

In the case of Dominion Virginia Power and Ameren, the most common circumstance is that the pole is occupied by the electric utility, an ILEC joint user, and two linear attaching entities, usually a cable company and a CLEC. Variations in the actual space used by each type of entity come about as a result of the space needed by the respective parties, which will have an effect on the size of the pole required. For instance, if the electric utility has only a primary wire on a pole, the electric utility may need only 56 inches of attachment space and a 36 foot pole might suffice. On the other hand, if the utility also has a transformer on a pole, the utility may require 96 inches of attachment space and a 39 foot pole might be needed.

The linear attaching entities customarily use one foot of space for their attachments. The ILEC typically needs 2 feet of space for its attachments, although occasionally the ILEC may need 3 feet of space. In the transformer example above, a 3-foot ILEC space would increase the pole requirement to 40 feet.

While some pole dimensions are affected by usage requirements, other pole dimensions are somewhat standard. For example, as described above, the lowest attachment on the pole usually begins at 18 feet (216 inches) above grade. Six feet (72 inches) of the pole are normally sunk below grade. There are 40 inches of Communications Worker Safety Zone pole space separating the energized electrical lines from the lower communications lines. Every user of the pole benefits from the existence of these pole segments or "common space" and it makes sense to allocate the costs associated with these common space segments equally among all four customary users. Thus each user's base cost responsibility is for one-fourth of the common space or 82 inches of pole space. Note, this approach is very similar to that adopted by the State

of Maine, which allocates a “standard allocation of common space” responsibility to each pole user.²⁵

The 12 inches of space used by attaching entities that is presumed in the Commission’s cable and telecom formulas comports with Ameren’s and Dominion Virginia Power’s actual experience. The State of Maine agreed with this space allocation as well. Thus 12 inches could be added to the base responsibility of 82 inches, making a total of 94 inches of pole responsibility for each attaching entity.

The final step is to convert the 94 inches of attacher pole responsibility into a percentage of pole costs. That determination depends, of course, on the usage requirements of the pole owner and joint user and the resulting height of the pole required. Ameren and Dominion Virginia Power have looked at typical scenarios, ranging from a 40 foot pole, accommodating an electrical transformer and 3 feet of ILEC space, to a 36 foot pole, accommodating only a primary electrical wire and 2 feet of ILEC space. In the first case, the total pole responsibility of each attaching entity (including its share of common space and one foot of assigned space) would be 19.42%. (The pole responsibility of the electric utility would be 36.78% and the pole responsibility of the ILEC would be 24.38%.) In the other case, the total pole responsibility (including common space and assigned space) of each attaching entity would be 21.76%. (The pole responsibility of the electric utility would be 31.94% and the pole responsibility of the ILEC would be 24.54%.)

Taking the average of the two extremes in the interest of ease of administration, the total pole responsibility (including common space and assigned space) of each attaching entity would

²⁵ Code Me. R § 65-407 Ch. 880.

be 20.59%. The electric utility's pole responsibility would be 34.36%. The ILEC's pole responsibility would be 24.46%.

To put this approach into perspective, Ameren and Dominion Virginia Power have applied these percentages to Dominion Virginia Power's actual FERC data for 2007, which show that the net cost of a bare pole is \$244.16 and the annual carrying charges are 33.64%. Thus, the charges to be absorbed by entities that use the poles are \$82.14 per pole. Each broadband provider would absorb \$16.91 of this cost. Dominion Virginia Power's present annual rental rate for cable attachments, computed under the cable formula, is \$6.08; the rental rate for telecom attachments, computed under the telecom formula, is \$15.67. The putative broadband rate, \$16.91, is \$1.24 higher than the telecom rate, but certainly within reason. More to the point, the broadband rate better captures a fair share of all of the costs associated with the pole and equitably distributes those costs in reasonable approximation and proportion to the space used by each entity for its lines and to the benefit derived from the totality of the pole.

The annual broadband rental rate per pole proposed by Ameren and Dominion Virginia Power can be expressed as follows:

$$\text{Annual Broadband Rental} = (\text{Net cost of a bare pole}^*) \times (\text{Total carrying charges}^*) \times 20.59\%$$

*As computed under the present cable and telecom formulas

IV. ILECs Have No Federal Right of Access or Regulated Joint Use Rates

The principles and practices for the joint use of wood poles of “[electric] supply and communications companies” go back to at least 1926. See Attachment 3, “Reports of Joint General Committee of Edison Electric Institute and Bell Telephone System on Physical Relations Between Electrical Supply and Communication Systems,” reissued July, 1945. These

principles and practices have resulted in the harmonious relationship that one would expect from two companies that are equally dependent on the existence and reliability of the wood pole infrastructure. If Congress had intended to bring about a sea change in the relationship between these industries in the Telecommunications Act of 1996, it would have been apparent long before the United States Telecom Association dreamed up its petition nearly 10 years later.

The Commission has entertained in this proceeding the attempt by ILECs to insert themselves into the Pole Attachments Act as attaching entities. Unlike the statutory gaps the Commission is able to fill regarding broadband attachments, however, Section 224 expressly prohibits ILECs status as attaching entities.

Although ILECs and cable television companies now compete to deliver the same broadband services to the same customers, cable television companies generally enjoy a cost advantage with respect to their use of poles where joint use fees exceed the cable rate. ILECs have attempted to narrow this advantage, however, largely by reducing their pole ownership.

In the NPRM, the Commission inquires into whether it has the authority to extend any form of attaching rights, from regulated rates of access to mandates for just and reasonable terms of such access, upon ILECs. NPRM, ¶ 23. The impetus for the reexamination of Section 224 and its potential application to ILEC attachment rights was instigated by USTelecom, which filed a Petition seeking attachment rights parallel to its competitors in the telephone, cable, and broadband markets. *See* United States Telecom Association Petition for Rulemaking, RM-11293 (filed Oct. 11, 2005) (“USTelecom Petition”). Section 224, its legislative history, and the Commission’s precedent all demonstrate, however, that the Commission does not have such authority pursuant to Section 224.

A. Section 224 Unambiguously Exempts ILECs from Attaching Rights

USTelecom concedes in its Petition that Section 224 is unambiguous. *See*, USTelecom Petition at 10 (“...when measured against the clear language of the statute...”). Despite its claim as to the Pole Attachment Act’s clarity, however, the USTelecom Petition nonetheless attempts to inject vagueness into Section 224 by focusing on one phrase in one subsection of the Act: the use of the phrase “provider of telecommunications service” in the definition of “pole attachment” found in Section 224(a)(4), in lieu of the term “telecommunications carrier,” as a basis to expand the scope of Section 224. Upon a closer analysis of Section 224, this distinction provides no support for extending the attachment rights found in the statute to ILECs.

Section 224 must be read as a whole, and in the context of the entire Telecommunications Act of 1996. The Commission should “not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and,” if ambiguity exists, “to its object and policy.” *United States Nat’l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993), quoting *United States v. Boisdore’s Heirs*, 49 U.S. 113 (1850). Moreover, a reading of the entire *Telecommunications Act of 1996* makes clear that Congress did not intend to confer attaching rights upon ILECs.

First, Section 224(a)(1) defines “utility” as “any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.” ILECs, as pole owners, fall squarely within this definition. This definition also places ILECs and electric utilities squarely on the pole owner side of the pole attachment relationship.

Second, Section 224(a)(4) defines a “pole attachment” as “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit or right-of-

way owned or controlled by a utility,” as defined in section (a)(1). This definition does not include attachments between utilities, such as an electric utility line to an ILEC pole, but only attachments to utility infrastructure by an entity other than a utility.

Finally, Section 224(a)(5) specifically excludes ILECs from the term “telecommunications carrier” under the statute: “For purposes of this section, the term ‘telecommunications carrier’ (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.” An ILEC, therefore, is excluded from the rights granted to telecommunications carriers under the Act.

In these Section 224 definitions, Congress drew a bright line between the rights and responsibilities of utilities (including ILECs and electric utilities), and non-pole owning telecommunications carriers and cable companies. Congress did so to encourage the expansion of these then fledgling cable and telecommunications companies and to foster competition in the marketplace. Accordingly, Section 224(e) regulates “...the charges for pole attachments used by telecommunications carriers to provide telecommunications services,” to ensure that fledgling telecommunications companies would be guaranteed regulated rental rates for access to utility infrastructure to deploy their networks. This regulation of rates for attachments is precisely the relief that USTelecom seeks for ILECs in its Petition, despite the fact that the Act makes clear that such rates are available only to telecommunications carriers. Because Section 224(a)(5) specifically excludes ILECs from the definition of a “telecommunications carrier” under the Act, Congress did not intend ILECs to be the beneficiary of regulated rates for their pole attachments.

Similarly, an analysis of Section 224(f), which requires a utility to “provide a cable television system or any telecommunications carrier” with nondiscriminatory access to poles and conduit, results in the same outcome. Section 224(f) provides for nondiscriminatory access by

cable television system operators and telecommunications carriers to the poles and conduit of utilities. Because ILECs are excluded from the definition of “telecommunications carrier” in Section 224, ILECs are not entitled to mandatory access to utility facilities.

Interestingly, USTelecom concedes that ILECs have no right of mandatory access under the Act because the definition of “telecommunications carrier” in Section 224(f) excludes ILECs. *See* USTelecom Petition at 5. Yet, USTelecom rejects the notion that identical language found in Section 224(e) defeats its claim for regulated attachment rates for ILECs. USTelecom’s rationale is, apparently, the definition of “pole attachment” found in Section 224(a)(4). It would have the Commission read into the Act an exception to the exclusion of ILECs from rights of attachment because of the phrase “provider of telecommunications service” found in Section 224(a)(4) rather than the words “telecommunications carrier.”

Even if the Commission were to place some import on the use of the phrase “provider of telecommunications service” in the definition of “pole attachment,” the specific section of the Act requiring regulated rates for pole attachments applies only to “pole attachments used by telecommunications carriers.” (Emphasis Supplied). Thus, even assuming *arguendo* that “pole attachments,” as defined, includes pole attachments made by ILECs, the Act is nonetheless clear that for purposes of regulated rates and mandatory access, only “pole attachments of telecommunications carriers,” which expressly excludes ILECs, are entitled to such regulated rates and mandatory access.

The phrase that is the cornerstone of USTelecom’s argument, “provider of telecommunications services,” is found in the Telecommunications Act of 1996, which reflects that the phrase is synonymous with, and in fact definitive of, the term “telecommunications carrier.” Under the Act, as amended by the Telecommunications Act of 1996, the term

“telecommunications carrier” is given the meaning ascribed to it at 47 U.S.C. § 153(44), which provides that 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 of this title).” (Emphasis Supplied). The use of the phrase “provider of telecommunications services” in the definitions portion of the Act provides no different outcome in the interpretation of the statute than use of the words “telecommunications carrier.” The definition of “pole attachment” is clearly an attachment by a telecommunications carrier, which the Act makes clear excludes ILECs.

B. The Legislative History of Section 224 Illustrates that Congress Did Not Intend to Provide Attaching Rights to ILECs.

The legislative history of the Pole Attachments Act confirms that Congress always intended for ILECs and electric utilities to be treated as pole owning utilities, not as attaching entities, for purposes of the Pole Attachments Act. Although USTelecom suggests that a snippet of language found in the legislative history reflects an intent by Congress to expand the protections of the Act against unreasonable rates, terms and conditions to all telecommunications service providers, including ILECs, *see* USTelecom Petition at 8, a review of the history of the Act shows otherwise.

Conceived in the mid-1970s at a time when small cable television operators sought to bring an equivalent to television antenna service to underserved parts of the country, the Act provided cable operators with ready access to poles owned by electric utilities and ILECs to facilitate their network expansion. Initially, cable operators were the sole beneficiaries of the Act:

“...if the legislative intent of this bill is merely to remedy pole attachment problems which are of importance to the cable television industry, then its application should be so

limited, preferably by inserting the term ‘cable television system’ as defined by 47 C.F.R. 76.5(a) in lieu of ‘wire communication.’”

H. Rep. 94-1630 on H.R. 15372, Regulations of Pole Attachments and Penalties and Forfeitures, September 20, 1976, at 30-31. Nowhere in the Act did Congress grant attachment rights to either the electric utility or incumbent telecommunications carrier. Rather, the Act placed pole owners on one side of the equation and cable operators on the other:

“H.R. 7442 will resolve a longstanding problem in the relationship of cable television companies on the one hand, and power and telephone utilities on the other.”

Congressional Record Vol. 23 (1977) at 35006 (comments of Rep. Wirth of Colorado).

“S.1547, as reported, would empower the Commission to hear and resolve complaints regarding the arrangements between cable television systems and the owners or controllers of utility poles. A pole attachment, for purposes of this bill, is the occupation of space on a utility pole by the distribution facilities of a cable television system—coaxial cable and associated equipment—under contractual arrangements whereby a CATV system rents available space for an annual or other periodic fee from the owner or controller of the pole—usually a telephone or electric power company.”

S. Rep. 95-580 on S.1547, November 2, 1977, at 110.

This distinction was retained by the 1996 amendments to the Act, made as part of the overall Telecommunications Act of 1996 that sought to introduce competition into telecommunications fields once monopolized by ILECs. The Telecommunications Act of 1996 extended the scope of Section 224’s mandatory access and rate regulation for attachments to include a new class of competitors to ILECs.

USTelecom has made much of language in the legislative history of the Telecommunications Act of 1996 that it claims expands Section 224 to “all providers of

telecommunications services,” presumably including ILECs. *See* USTelecom Petition at 8. The balance of the legislative history, however, contradicts the notion that ILECs were to be included as beneficiaries of the attaching rights granted by the Act:

“S.1822 includes revisions to section 224 of the 1934 Act to allow competitors to the telephone companies to obtain access to poles owned by utilities and telephone companies at rates that give the owners of poles a fair return on their investment.”

S. Rpt. 103-367 on S. 1822, Communications Act of 1995, July 24, 1995 (emphasis supplied).

In fact, the same legislative history to which USTelecom cites, at other points did not refer to “providers of telecommunications services,” but to “telecommunications carriers”:

“Section 204 further requires the Commission to prescribe additional regulations to establish rates for attachments by telecommunications carriers.”

S. Rpt. 104-230 on S.652, Telecommunications Act of 1996, February 1, 1996, at 206 (emphasis supplied). Further, and perhaps the most revealing of Congress’s intent, the Senate version of this legislation was adopted with the caveat that “telecommunications carrier” would specifically exclude ILECs:

“Sec. 703. Pole Attachments
Section 224 (47 U.S.C. 224) is amended—
[]
(3) by inserting after subsection (a)(4) the following:
‘(5) For purposes of this section, the term
‘telecommunications carrier’ (as defined in section
3 of this Act) does not include any incumbent local
exchange carrier as defined in section 251(h).’”

S. Rpt. 104-230 on S.652, Telecommunications Act of 1996, February 1, 1996, at 98.

A thorough review of the legislative history of the Act and the plain language of the statute confirm that ILECs are not entitled to regulated rates or mandatory access under the Act. Although the phrase “providers of telecommunications service” is mentioned in this history, that

same history also confirms the purpose of the 1996 amendments to give attaching rights to the ILECs' competitors, not to the ILECs. As noted above, this statutory scheme is consistent with other portions of the Telecommunications Act of 1996.

C. The Commission Should Maintain Its Precedent That Denies ILECs Rights as Attaching Entities.

The Commission repeatedly has held that it will not extend the attachment rights contained in the Pole Attachments Act to ILECs. In the 1998 implementation of the Telecommunications Act of 1996, the Commission held:

The 1996 Act, however, specifically excluded incumbent local exchange carriers ("ILECs") from the definition of telecommunications carriers with rights as pole attachers. Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though the ILEC has no rights under Section 224 with the respect to the poles of other utilities.

Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, Report & Order, 13 FCC Rcd 6777, 5 (1998) ("Telecom Order") (emphasis supplied); see also In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(E) of the Telecommunications Act of 1996, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12,103, n. 12 (2001) ("Consolidated Order on Reconsideration") ("See also 47 U.S.C. § 224 exempting pole attachments of telecommunications carriers who are also incumbent local exchange carriers ('ILECs')").

In explaining why the benefits of the Act do not extend to ILECs, the Commission reasoned that:

The exclusion in Section 224(a)(5) of ILECs from the term telecommunications carrier is directed to the purpose of amended Section 224, to provide an important means of access. ILECs generally possess

that access and Congress apparently determined that they do not need the benefits of Section 224.”

Telecom Order, 49; see also *In the Matter of Promotions of Competitive Networks in Local Telecommunications, Notice of Proposed Rulemaking and Notice of Inquiry*, 14 FCC Rcd 12,673, 33 (1999) (“...[T]he provisions for access to pole attachments in section 224, are intended to ensure that incumbent LECs will not be able to obstruct their potential competitors from offering service to customers.”). The rights of ILECs under Section 224 have been and remain clear, as is apparent from the lack of any instance in which the Commission has entertained a pole attachment complaint filed by an ILEC claiming rights as an attaching entity. Because Congress did not convey the same rate and access rights upon ILECs as upon telecommunications carriers, the Commission has continued to decline to do so on its own.

USTelecom seeks from the Commission something it cannot give, namely, regulated rates for ILECs as attaching entities under the Act. As the Commission is itself a creation of statute, it possesses only the authority affirmatively delegated to it by Congress. See *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act ... unless and until Congress confers power upon it.”). Accordingly, the Commission has no authority to adopt regulations that would change the underlying terms of the Act that it is charged with implementing. Accordingly, if the Commission were to decide otherwise, its determination would not be entitled to any deference pursuant to *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), because Section 224 is unambiguous as to the issue of the attaching rights of ILECs and leaves no room for administrative interpretation. *Id.* at 842-43.

As Ameren and Dominion Virginia Power have shown above, USTelecom’s request for ILEC attaching rights is strained and does not withstand scrutiny. Perhaps there has developed a disparity in competitive conditions between ILECs and cable companies, but conferring pole

attachment rights on ILECs is not among the remedies available to the Commission to grant. Doing so would not only be without authority, it also would destroy the symmetry of existing joint use agreements, unfairly leaving electric utilities, who still require access to poles owned by ILECs, as the only entities without access rights or a regulated attachment rate.

V. Wireless Attachments

The NPRM states that “[w]ireless telecommunications carriers urge the Commission to adopt rules explicitly stating that the Commission’s telecommunications rate formula applies to the attachment of wireless devices.” NPRM, ¶ 34. The Commission must note, however, that wireless telecommunications carriers are one of the leading providers of broadband; as noted above, they serve 22 million connections and are growing. Thus, wireless telecommunications carriers must also be subject to the rebuttable presumption that they are offering broadband services and therefore be subject to a broadband rate for their attachments.

Ameren and Dominion Virginia Power support the Commission’s proposal to apply a suitable multiple of the broadband formula rate where wireless attachments and associated devices take up more than the one foot of space that is allocated for linear attachments. Because wireless attachments can vary so much in their configuration and size requirements, the multiple applied should be left up to the parties to negotiate. There should be no doubt, however, that it is equitable for an attacher that takes up more than one foot of space to pay for more than one foot of space.

Unlike wireline attachments that must seek space on a pole, wireless attachers are free to seek access on any suitable building, tower or other structure. Even at a multiple of ten, the regulated pole attachment rate is far less than an equivalent market rate on a tower or rooftop.

Finally, requiring payment in proportion to the space used gives wireless providers a

continuing incentive to use utility poles only for smaller attachments, which present fewer engineering concerns such as wind loading. Indeed, in Ameren and Dominion Virginia Power's experience, wireless attachments generally are getting smaller as technology improves. This is beneficial to all attachers, and the pole owner, because smaller attachments cause less stress on a pole. Thus, the Commission should find that a reasonable multiple of the broadband rate for wireless attachments is an appropriate way for wireless attachers to pay for the space they use including appurtenances, cables and power supplies.

Finally, regarding pole top attachments, Ameren and Dominion Virginia Power urge the Commission to decline to *mandate* such attachments, but rather to leave such access to the discretion of the individual pole owner and the regulation of the state public utility commission. In many regions, electric utilities attach their facilities to the very top, flat, portion of the pole. This location of electric facilities makes any other attachment at this location impossible on every pole. Regulation to the contrary would require removal and relocation on millions of utility poles. Still other utilities and state utility commissions, including those in areas that are subject to a high likelihood of severe weather, simply do not allow any form of attachment at the top of the pole. The basic and well-supported rationale for a prohibition on such attachments is that their presence makes pole change-outs and other repair work more difficult. The Commission should make clear that, pursuant to Section 224(f)(2), pole owners should be permitted to reject all pole top attachments for system-wide reasons of engineering and safety.²⁶

²⁶ Regarding utilities that permit the practice, the Commission should review the charges for pole top attachments under a just and reasonable standard, as it would other attaching fees. Because of the varying nature of pole top attachments, applying the Commission's formulas seems an ill fit that would confound attaching parties and pole owners.

CONCLUSION

Ameren and Dominion Virginia Power encourage the Commission to adopt regulations that support the concept of infrastructure partnership. By adopting the guiding principles laid out in these comments, and by resolving issues related to attachments used to provide broadband, the Commission possesses the dual opportunity to advance broadband deployment and to better support utility infrastructure. These are worthy goals Ameren and Dominion Virginia Power gladly support.

Respectfully submitted,



Charles A. Zdebski
Raymond A. Kowalski
Eric J. Schwalb
TROUTMAN SANDERS LLP
401 Ninth Street, N.W., Suite 1000
Washington, DC 20004-2134
(202) 274-2950 (telephone)
(202) 274-2994 (fax)

*Counsel to Virginia Electric and Power Company,
d/b/a Dominion Virginia Power,
and to Ameren Services Company*

March 7, 2008