

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054**

In the Matter of

IMPLEMENTATION 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

**REPLY COMMENTS OF THE
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE**

To the Commission:

I. INTRODUCTION

The Independent Telephone & Telecommunications Alliance (ITTA) hereby submits reply comments in the above-captioned proceeding. Comments in this docket from a broad variety of providers support the general proposition that current Commission rules often operate to deprive incumbent local exchange carriers (ILECs) of lawful treatment by utility pole owners, despite the fact that the relevant statute provides ILECs with a right to just and reasonable rates, terms, and conditions for pole attachments. Accordingly, ITTA urges the Commission to revise its rules to reflect the statutory imperative, and to provide a right of action for ILECs to pursue remedies when lawful rates, terms, and conditions are withheld.

II. THE EXPERIENCES OF PROVIDERS DEMAND, AND THE STATUTE DIRECTS, COMMISSION ACTION TO PROVIDE RELIEF FROM ONEROUS POLE ATTACHMENT CONTRACTS.

A. A BROAD RANGE OF PROVIDERS DESCRIBE ONEROUS TREATMENT BY UTILITIES.

Comments submitted to the Commission reflect a consensus among providers of various types and sizes, all of whom describe difficulty in achieving fair and lawful treatment by utility pole owners. For example, the United States Telecom Association, which represents telephone carriers of all sizes, reports that its survey “confirmed the existence of a broad disparity in pole attachment rates,” including “instances where ILECs pay more than 1,400% more for pole attachments than cable counterparts.”¹ The National Telecommunications Cooperative Association (NTCA), which represents exclusively small carriers, describes disadvantages its members face.² While NTCA suggests that smaller carriers may face disproportionate difficulty in this regard,³ ITTA clarifies that mid-sized and large carriers are also disadvantaged by the current rules that fail to incorporate the statute’s provision for just and reasonable ILEC rates, terms, and conditions. CenturyTel, for example, describes in great detail the difficulties it faces in achieving just and reasonable rates, terms, and conditions,⁴ as guaranteed by the Communications Act of 1934, as amended.⁵ Likewise, Windstream explains that its

¹ Comments of the United States Telecom Association at 7.

² Comments of NTCA at 4, 5.

³ “Excessive pole attachment charges to small rural companies cannot be spread among large customer base, as can mid-sized and large carriers.” NTCA at 5.

⁴ See Comments of CenturyTel at 3-5.

⁵ 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

competitive local exchange carrier (CLEC) and ILEC “pay pole attachment rates, respectively, 607 percent and 824 percent higher than what Windstream charges cable companies to attach to its ILEC poles in the same state.”⁶ Even Verizon, the Nation’s second-largest telephone company, states that “[t]he ‘negotiated’ rates are generally significantly higher than the rates that non-incumbent carriers and cable television systems pay;”⁷ Verizon urges the Commission to impose greater protections against the “exploitation of ILECs on pole attachment rates, terms, and conditions.”⁸ In sum, these descriptions are consistent with Frontier’s assessment that “a number of electric utilities are treating ILECs as captive customers from which they can extract a rich revenue stream.”⁹ Together with others, including the Wireless Communications Association (WCA), they justify the need for Commission action on these issues.¹⁰ The experiences of so many evince a regulatory model that fails to meet to statutory ideals, and effectively encourages unreasonable treatment of ILECs. Accordingly, the Commission should act now to ensure the rights of ILECs as provided for by the Act.

B. THE STATUTE DIRECTS JUST AND REASONABLE RATES, TERMS AND CONDITIONS FOR ILEC POLE ATTACHMENTS

As explained in ITTA’s initial comments, proper reading of the statute supports the proposition that ILECs are among the entities that are guaranteed pole attachments at

the 1996 Act, will be referred to as “the Act,” and citations to the Act will be to the Act as it is codified in the U.S. Code.

⁶ Comments of Windstream at 4.

⁷ Comments of Verizon at 4.

⁸ Verizon at 17.

⁹ Comments of Frontier at 2.

¹⁰ *See, i.e.*, Comments of the Wireless Communications Association at 2; *see, also*, Comments of Knology at 23.

rates, terms, and conditions that are just and reasonable.¹¹ The arguments of various utilities to the contrary must be rejected; claims that ILECs are not entitled to regulated pole attachment rates under the Act are flawed. For example, several utilities confuse a right to access with a right to rates, terms, and conditions that are just and reasonable.¹² These utilities argue incorrectly that since an ILEC cannot compel a utility to accept an attachment, the utility is likewise not obligated to provide just and reasonable rates, terms, and conditions. Those arguments are undermined by the language of the statute and relevant case law. As ITTA explained in its initial comments, the exclusionary language of Section 224(a)(5) is wholly distinguishable from the right to rates, terms, and conditions that are just and reasonable.¹³ Verizon articulates this fact by explaining,

The effect of this amendment was to subject pole attachments by *all* providers of telecommunications service (including ILECs) to the Commission's Section 224(b)(1) authority over rates, terms, and conditions – even though Section 224(f)'s mandatory access right applies only to new entrant telecommunications carriers (other than ILECs) and to cable television systems.¹⁴

Attempts by utilities to evade their statutory responsibility to provide just and reasonable rates, terms, and conditions must not be countenanced. Several utilities claim that the Commission has previously excluded ILECs from those with rights to just and reasonable pole attachment rates, terms, and conditions. For example, Pacific Corp. *et al.*, justifies its position by citing Commission Orders which provide that “ILECs were not entitled to

¹¹ See Comments of ITTA at 2-5.

¹² See, *i.e.*, Comments of Coalition of Concerned Utilities at 63, 64; Edison Electric Institute and the Utilities Telecom Council at 110 (Edison); Florida Power & Light and Tampa Electric at 2.

¹³ See ITTA at 3.

¹⁴ Verizon at 10.

access,” or, “[t]he 1996 Act . . . specifically excluded incumbent LECs from the definition of telecommunications carriers with rights as pole attachers.”¹⁵ Those description, however, extend only so far as the right to *attach*, but do not exclude an ILEC’s right to just and reasonable rates, terms, and conditions. The fact that the Commission rules do not extend certain dispute protections to ILECs only compounds and encourages inappropriate utility behavior. Even if the Commission has ruled previously that ILECs are not included within those who can utilize the dispute resolution processes, the Commission must revisit and revise its interpretation of the statute. In the instant matter, the statutory language clearly supports regulated pole attachment rates for ILECs, and the Commission should act accordingly to incorporate Congressional directive in its rules.

Electric utilities and Comcast are simply wrong that the structure and language of the Act preclude regulation of pole attachment rates by ILECs. The statute’s use of disparate terms (“telecommunications carriers”¹⁶ vs. “providers of telecommunications services”¹⁷) is consequential; arguments to the contrary conflict with basic principles of statutory interpretation. As explained in ITTA’s initial comments, Congress’s choice of language must be viewed to reflect intentional selection, rather than arbitrary use.¹⁸

Although Comcast argues that the different terms are a “stylistic distinction . . . rather

¹⁵ *See, i.e.*, Comments of PacificCorp, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation at 7 (internal citations omitted) (Hereinafter, PacificCorp, et al).

¹⁶ 47 USC § 224(a)(5).

¹⁷ 47 USC § 224(a)(4).

¹⁸ ITTA at 4.

than a substantive difference,”¹⁹ such an approach is antithetical to statutory construction as conducted by the courts: different phrases have different meanings. The use of different terms in the different sections of the statute evinces Congress’s intent to establish distinct policies for different situations, specifically, the access to a pole, and the conditions to which such access when obtained is subject. As demonstrated by Verizon, “[t]he use of the term ‘provider of telecommunications service’ is both significant and intentional, given that Congress was making the two sets of changes simultaneously and chose to use two different terms.”²⁰ Moreover, even the basic definition of telecommunications carrier in Section 4(44) of the Act demonstrates that there are certain types of providers of telecommunications services that are not also telecommunications carriers under the Act.²¹ Accordingly, the Commission must ensure that its rules reflect the statute, that pole owners act accordingly, and that ILECs be accorded the protections due to them under the law.

III. THE “PER ATTACHMENT” RECOMMENDATION THREATENS EXPONENTIAL COST INCREASES AND NEEDLESS ADMINISTRATIVE BURDEN.

Edison proposes that “in the case of an attachment of any additional device or equipment, the Commission should allow a utility to take into account all additional space 'required' for such device or equipment in calculating rates.”²² This proposal should be rejected because it threatens to inflate exponentially the cost of pole

¹⁹ See Comments of Comcast at 50.

²⁰ Verizon at 10, citing *Clay v. United States*, 537 US 522, 528, 529 (2003); *Russello v. United States*, 464 US 16, 23 (1983); *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

²¹ 47 USC § 153(44).

²² Edison at 109.

attachments, since it could be read to include a separate charge for each anchor, riser, overhead, or service drop. Edison illustrates the extent to which this could inflate rates by specifying that charges would also include the “clearance space between each attachment.” Accordingly, a single pole attachment that utilizes multiple pieces of equipment, no matter how small, would each be subject to a separate charge. To illustrate, the multi-ground neutral is a grounding connection at the bottom of utility poles that is a safety requirement from the NESC. If pole owners could charge “per attachment” instead of “per pole,” then total pole expenses would rise dramatically. Additionally, such a rate methodology would inevitably lead to debates – at the base of every pole in the Nation – about “what is an attachment” and “how many are on each pole.” In a “per attachment” environment, an overhead guy, service drop, riser, and MGN would be separately chargeable attachments. Moreover, this approach would require tracking of how many attachments are on each pole, and which belong to a cable provider, an ILEC, a CLEC, a wireless provider, and others. Overall, the proposal recommends a difficult, burdensome, and expensive process that would likely cause confusion during audits and billing debates. By contrast, the current per pole approach is more efficient and economically efficient.

IV. CONCLUSION

The statute assures ILECs just and reasonable rates, terms, and conditions for pole attachments. As set forth in its initial comments and these reply comments, ITTA urges the Commission to revise relevant rules to reflect that statutory imperative and ensure lawful rates and dispute resolution mechanisms for ILECs.

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: April 22, 2008