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Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Polices Governing Pole Attachments,* WC Docket No. 07-245

***EX PARTE* LETTER**

Dear Ms. Dortch:

Please accept this letter in response to the recent rate proposals submitted by AT&T/Verizon and United States Telecom Association ("USTA") on October 21, 2008 and October 27, 2008, respectively. The USTA and AT&T/Verizon proposals (1) gloss-over the threshold issue of whether the Commission has jurisdiction to regulate the relationships between ILECs and electric utilities, (2) ignore the statutory parameters established by Section 224(e) of the Pole Attachment Act, (3) reject the undisputed operational realities surrounding joint use relationships between ILECs and electric utilities, and (4) perpetuate the myth that ILECs are no different than their CATV and CLEC competitors.

USTA's proposal is a non-starter in all respects. AT&T/Verizon's proposal, though suffering from several legal and practical infirmities itself, *could* serve as a starting point for developing a unified broadband rate for jurisdictional (CATV and CLEC) wireline attachments. Though the rate formula proposed by AT&T/Verizon cannot apply to ILEC attachments, a slight variation of the formula could be applied to CATV and CLEC broadband attachments. While this solution would not satisfy any stakeholder entirely, it would still advance the Commission's goal of competitive neutrality by equalizing the rates paid by two of the three major broadband providers (CATV and CLEC), and reducing the subsidies currently afforded to ILECs' competitors.

This letter is submitted on behalf of Tampa Electric Company, Florida Power & Light Company, Progress Energy Florida, and Oncor Electric Delivery Company (collectively the "electric utilities"). The electric utilities submitted comprehensive initial comments, reply comments, and record evidence in this proceeding. The electric utilities also have participated actively in the *ex parte* phase of this proceeding, meeting with the offices of all five Commissioners, as well as the Wireline Competition Bureau. The electric utilities remain engaged in this important proceeding, and concerned about its outcome. Though this proceeding presents many issues of importance to the electric utilities, this letter addresses only the recent rate proposals from USTA and AT&T/Verizon.

The Threshold Jurisdictional Issue

Since the 1978 Pole Attachment Act, ILECs have been treated as pole owners rather than pole *attachers*. Even after the 1996 amendments to the Act, the Commission noted:

> The 1996 Act ... specifically excluded incumbent local exchange carriers ("ILECs") from the definition of telecommunication 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 respect to the pole of other utilities***. This is consistent with Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants.

In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd. 6777, 6781 (FCC 1998).

In light of the plain language of the Act, the Commission's interpretation of the plain language, and the fact that the meaning of this language has remained unchallenged until this proceeding, it is hard to imagine how AT&T/Verizon and USTA describe the Commission's authority to adopt their proposals as "ample." (AT&T/Verizon Proposal, p. 4; USTA Proposal, p. 8). Even under the most generous characterization possible, the Commission's exercise of jurisdiction in this area would reverse field on 30 years of regulatory history, and long-settled statutory interpretation (not to mention 10+ years of silence on the part of ILECs).

AT&T/Verizon and USTA now urge that the terms "provider of telecommunications service" and "telecommunications carrier" have different meanings under the Pole Attachment Act. But even indulging this argument for the sake of discussion, it still does not explain-away the underlying Congressional intent of the 1996 Act – to promote competition by "***new*** telecommunications entrants." ILECs, by their very definition, are not "new telecommunications entrants."[1]

As explained in the comments submitted by the electric utilities, ILECs and CLECs are like apples and oranges.[2] Their histories are different, their infrastructure is different, their

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1 *See also In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd. at 6802 ("[T]he amendments to Section 224, like many of the amendments to the 1996 Act, are directed to new entrants.").

2 *See* Initial Comments of Florida Power & Light and Tampa Electric Regarding ILECs and Pole Attachment Rates, pp. 3-4; Oncor Electric Delivery Company's Initial Comments, p. 24.

leverage is different, their maturity of deployment is different, and their set of contractual pole sharing rights (far beyond the rate structure) is different. Congress deliberately excluded ILECs from the categories of attachers with "rights under Section 224 with respect to poles of other utilities." *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd. at 6781. The argument that overlapping provision of functionally equivalent services somehow alters the underpinning of the regulatory landscape is without merit, considering the very purpose of the 1996 Amendments was to facilitate provision of overlapping services (*i.e.*, CLEC competition with ILECs).

<u>The Parameters of Section 224(e)</u>

Looking past the jurisdictional barrier for a moment, any unified broadband rate formula which departs from Section 224(e) is unworkable from a regulatory perspective because telecom carriers are required to pay the 224(e) rate -- no more, and no less. While the Commission has authority, per *NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002), to establish a "third rate" for cable television system attachments used to provide something other than "solely" cable service, such flexibility does not exist with respect to telecom carriers. Section 224(e) applies to "pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. § 224(e)(1). Unlike Section 224(d), Section 224(e) does not use the term "solely" to limit its mandatory service-based applicability.[3] In short, telecom carriers are locked-in to the rate parameters established by Section 224(e); cable television systems are not so statutorily wed to Section 224(d).

Both AT&T/Verizon and USTA note in their submissions that *NCTA v. Gulf Power Co.*, supports the Commission's authority to implement a "third rate" for cable television system attachments used to provide broadband. (USTA Proposal, p. 9; AT&T/Verizon Proposal, p. 4). But nothing in *NCTA v. Gulf Power* says or suggests the same is true for telecom carrier attachments used to provide broadband. Importantly, the Court was addressing the scope of the Commission's jurisdiction in the context of attachments by a *cable television system* – not attachments by a telecommunications carrier. The Court itself even framed the issue as follows: "does the Act reach attachments that provide both cable television and high-speed (broadband) Internet service?" *Gulf Power Co.*, 534 U.S. at 331.

Though the Commission indeed has authority to establish a rate other than the 224(d) rate for CATV + broadband, it does not have similar authority to go beyond 224(e) for telecom + broadband. This statutory constraint is neglected, to varying degrees, by both the AT&T/Verizon and USTA proposals.

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[3] Section 224(d)(3) provides: "This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service."

The USTA Proposal

The USTA proposal suggests a flat rate per *attacher* (rather than per *attachment*) equal to 11% of the annual pole cost, without regard to the number of attachers, and without regard to the cost allocation principles in 224(e). Even if this was otherwise acceptable (which it is not), it would run afoul of Section 224(e) and therefore could not, as a statutory matter, apply to telecom carriers. To put this in perspective, under the Commission's current Telecom Formula (and assuming an average of three attachers per pole, as assumed by USTA's proposal) the annual pole cost recovery is 16.9% per *attachment*.

The USTA proposal also is based on flawed premises. The fundamental premise of USTA's proposal is that electric utilities occupy 78% of the usable space on a pole. (USTA Proposal, p. 3). USTA's math relies in part on allocating the entire Communication Workers Safety Zone (which need not exist but for communications attachments) to the electric utility. This runs afoul of a long-standing principle behind most joint use agreements – equal sharing of the cost of safety space. Furthermore, USTA's proposed allocation of the remaining 22% of annual pole cost assumes ILECs place a burden on the pole similar to CATV and CLEC attachers. Not only does this assumption contradict the negotiated space allocations in existing joint use agreements (where the space allocated to an ILEC is typically between 2 and 3 feet), but it also contradicts the evidence in this proceeding showing that ILECs in fact place a higher burden on the pole (in terms of vertical space and pole loading capacity) than their competitors.[4]

USTA talks as if an ILEC is "just another attacher" which, due to historical classification, is forced to pay higher costs for the same rights as their competitors. The evidence in this proceeding shows otherwise. ILECs have greater space allocations under existing joint use agreements, have a higher number of attachments per pole, use more pole space, and place a higher burden on pole loading capacity than their competitors. Consequently if ILECs are allowed to pay the same as their competitors, it will move the parties in the opposite direction of competitive neutrality.

The AT&T/Verizon Proposal

The AT&T/Verizon proposal, though it cannot apply to ILEC attachments due to jurisdictional constraints, provides a glimmer of hope for resolving the broadband rate issue with respect to jurisdictional wireline attachments (CATV and CLEC).

The AT&T/Verizon proposal suggests using the existing Telecom Formula with two exceptions (both impacting the space allocation factor): (1) revising the existing presumptions of three (non-urbanized) and five (urbanized) attaching entities to a single presumption of four

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[4] *See* Reply Comments of Florida Power & Light, Tampa Electric, and Progress Energy Florida, pp. 16-17; *see also* Reply Comments of Alabama Power, et al., pp. 8-11.

attaching entities; and (2) apportioning *all* of the common space equally among the four presumed attaching entities (rather than merely the 2/3 apportioned under the existing formula). The AT&T/Verizon formula would yield an annual rate of 18.7% of the annual pole cost.[5] While the AT&T/Verizon common space apportionment is a welcome recognition of the oddity in "lopping-off" 1/3 of the common space from the allocation, there is still a potential statutory problem. Section 224(e)(2) provides:

> A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

The Commission has interpreted the term "attaching entities" (which is not specifically defined in the Act) to include the pole owner. *See In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 FCC Rcd. 12103, 12133 (FCC 2001) ("We clarify our position that all utilities should be counted as attaching entities."). Under the current regulatory framework, this results in the pole owner bearing the cost not only of the "missing" 1/3 of common space, but also an additional allocation of the remaining 2/3 allocated to "attaching entities." Where there are three presumed attaching entities, the pole owner bears the cost of 56% of the common space; where there are five presumed attaching entities, the pole owner bears the cost of 47% of the common space – even though Congress has said the unusable space on a pole "is of *equal benefit* to all entities attaching to the pole." *See* House Report No. 104-204, at 92 (emphasis added).

While the Commission cannot ignore the "two-thirds" language in Section 224(e)(2), the Commission *does* have discretion to revise its interpretation of the term "attaching entities" to exclude the pole owner.[6] Such a revised interpretation would have the net result of the pole owner bearing 1/3 the cost of common space in every instance, with the remaining 2/3 being allocated to the other presumed (or actual) attachers through the formula.

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[5] It is not entirely clear from the AT&T/Verizon proposal whether this is meant to be a per *attachment* rate or a per *attacher* rate. The position taken in this letter assumes the proposal is per attachment, since this would be consistent with the Commission's existing regulations.

[6] In its initial rulemaking following the 1996 Amendments, the Commission actually excluded electric utilities from the definition of "attaching entities" unless the electric utility provided telecommunications services. *See In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd. at 6802. On reconsideration, the Commission changed course, and determined that an electric utility was an "attaching entity" whether it provided telecommunications services or not. *See In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 FCC Rcd. 12103, 12133 (FCC 2001). ("We clarify our position that all utilities should be counted as attaching entities."). On appeal, the D.C. Circuit upheld the Commission's interpretation on *Chevron* deference grounds. *See Southern Co. Services, Inc. v. FCC*, 313 F.3d 574, 580-81 (D.C. Cir. 2002).

Borrowing from the rationale in the AT&T/Verizon proposal, this would mean 2/3 of the common space is allocated equally to three presumed attaching entities (if the pole owner is excluded, this drops AT&T/Verizon's proposed 4 attaching entities down to 3, with a corresponding decrease in the total common space allocated to attaching entities). Even a presumption of three attaching entities (excluding the pole owner) is too high, and more importantly, at odds with the undisputed record evidence in this proceeding. As USTA notes in its proposal, the record reflects numbers closer to two (excluding the pole owner), but in no event higher than 3. (USTA Proposal, p. 4 n. 9 & 10).[7] If the Commission were to use the conservative mid-point of 2.5 attaching entities as a rebuttable presumption,[8] this would yield an annual rate of 19.7% of the annual pole cost ((((24x2/3)/2.5)+1)/37.5=19.73%). This is very close to the 18.7% proposed by AT&T/Verizon, and has the added benefit of meeting the requirements of Section 224(e).

While a broadband rate of 19.7% of annual pole cost (as calculated using the Commission's methodology) does not reach the full and fair value of the space provided CATVs and CLECs, it comes much closer to fair than anything heretofore proposed by any stakeholders (other than electric utilities themselves).

<u>Conclusion</u>

The ILECs cannot be included as a Section 224 "attacher" in any broadband rate solution under the existing statute. If the ILECs truly believe regulation of their pole attachment rates is necessary, the solution is legislative. Of course, this entire discussion ignores the fact that under most joint use agreements, ILECs pay no rental at all so long as they are in parity of pole ownership with their electric utility partners. The fact that many ILECs have fallen out of parity cannot be blamed on electric utilities, nor can electric ratepayers be expected to bear the cost consequences.

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[7] *See also* Initial Comments of Florida Power & Light and Tampa Electric Regarding ILECs and Pole Attachment Rates, pp. 15-16 (TECO's average number of attaching entities is 2.08; FPL's average number of attachments per pole is slightly more than 2); Initial Comments of Alabama Power, et al., pp. 20-23 (Georgia Power's average number of attaching entities – including only poles with at least one foreign attachment – for urban areas is 2.83, and 2.58 in rural areas; Gulf Power's average number of attaching entities for poles with at least one foreign attachment is 2.74; Alabama Power's average number of attachments per pole is 1.5); Initial Comments of American Electric Power Service Corporation, et al., pp. 19-29 (AEP's average number of attaching entities for all operating companies ranged from 2.44 to 2.99; Progress Energy's average system-wide number of attachments for its various geographic regions ranged from 2.28 to 2.44; Xcel Energy's average number of attaching entities per pole for its two reported geographical regions were 2.47 and 2.61); Initial Comments of Idaho Power Company, pp. 16-17 (average number of attaching entities is 2.4 for both urban and rural areas); Initial Comments of the Coalition of Concerned Utilities, pp. 13-18; Initial Comments of Ameren Services Company and Virginia Electric and Power Company, pp. 23-24; Initial Comments of the Edison Electric Institute and the Utilities Telecom Council, pp. 45-48, 105-108; Initial Comments of PacifiCorp, et al., pp. 19-21; Initial Comments of the Utilities Telecom Council, pp. 9-10, 23-24.

[8] All presumptions should remain rebuttable, for the protection of all parties.

To the extent the ILECs' ability to compete is genuinely impaired by a disparity in rates, a solution well within the Commission's authority is to reduce the existing subsidies given to ILECs' broadband competitors (CATV and CLEC). Implementing the "revised" AT&T/Verizon formula for CATV and CLEC broadband attachers would go a long way toward achieving this end, and move closer to the Chairman's vision of eliminating the subsidies electric consumers currently provide broadband companies.[9] In fact, this solution might obviate any need for the ILECs to seek legislative remedy, as their competitors would at least be paying something closer-to-fair. This solution might have the additional benefit of mooting, as a practical matter, pole attachment rate disputes currently pending before the Commission.

The electric utilities greatly appreciate the Commission's attention to these matters. We look forward to further dialogue in an effort to reach sensible, equitable solutions which comport with the Act, further the goal of competitive neutrality, and reduce the subsidies provided by the current regulatory framework.

Respectfully submitted,

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J. Russell Campbell

EBL:lk

cc: Amy Bender
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[9] *See* NPRM Statement of Chairman Kevin J. Martin ("I do not think electric consumers should be subsidizing broadband companies.").