BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
The United States Telecom Association	)	RM No. 11293
	)	
Petition for Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures	)	
	)	

To: The Commission

JOINT OPPOSITION OF AMERICAN ELECTRIC POWER SERVICE CORPORATION, DUKE ENERGY CORPORATION, WPS RESOURCES CORPORATION, AND XCEL ENERGY INC.

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EXECUTIVE SUMMARY

The plain language, legislative history, and interpretive precedent by the Federal Communications Commission ("FCC") establish that Incumbent Local Exchange Carriers ("ILECs") are considered utilities for the purposes of Section 224 and are specifically excluded from *any* rights as attaching entities. The rights, access, rates, terms and conditions of joint use between electric utilities and ILECs are governed by state public utility commissions.

The United States Telecom Association ("USTelecom") Petition relies upon the flawed assumption that the phrase "provider of telecommunications service" in Section 224(a)(4) has a broader and different meaning than the term "telecommunications carrier" in Section 224(f). However, the plain language of the term "telecommunications carrier" under the Communications Act expressly includes "any provider of telecommunications service." The two terms, therefore, are synonymous. As ILECs are specifically excluded from one term (Section 224(a)(5)), they must logically be excluded from the other.

Unlike cable television ("CATV") systems and competitive telecommunications carriers, Congress intended that ILECs would have no right under Section 224 to attach their facilities to poles owned by other utilities under the rates regulated by the FCC. Instead, the Pole Attachments Act, as amended by the Telecommunications Act of 1996, was intended to promote competition by ensuring that **new** entrants in the telecommunications market, not existing ILECs who were already present in the market both as pole owners and as attaching entities under joint use agreements, had access to poles owned by incumbents, including ILECs, at the same rate available to cable systems providing telecommunications services.

The FCC's own interpretation of the Pole Attachments Act confirms that ILECs are not covered by the regulated rate provisions of Section 224. If the FCC were to re-interpret the Pole

Attachments Act to assume authority over rates for attachments by ILECs, it would not only act counter to the plain meaning and congressional intent in establishing the Pole Attachments Act, but would also reverse the agency's own interpretation and practice. In addition, it would radically alter the long-standing history of mutually beneficial and freely negotiated joint use and joint ownership agreements that have effectively allowed electric utilities and telephone companies to share the costs of maintaining the infrastructure needed to support communications services. Finally, it would usurp the historical jurisdiction of state utility commissions over the joint use agreements of electric and telephone utilities, and their oversight of cross subsidization and the rates for consumers of such utilities.

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Pursuant to Section 1.405 of the Federal Communications Commission's ("FCC" or "Commission") Rules,[1] American Electric Power Service Corporation, Duke Energy Corporation, WPS Resources Corporation, and Xcel Energy Inc. (collectively, the "Utilities"), by and through their undersigned attorneys, hereby submit their Joint Opposition in the above-captioned proceeding in response to the Petition for Rulemaking filed by the United States Telecom Association ("USTelecom").

[1] 47 C.F.R. § 1.405.

I. INTRODUCTION

American Electric Power Service Corporation is a wholly-owned subsidiary of American Electric Power Company, Inc. American Electric Power Service Corporation is a supplier of administrative and technical support services to American Electric Power Company, Inc. and its subsidiaries. American Electric Power Company, Inc. owns more than 36,000 megawatts of generating capacity in the United States and is one of the nation's largest electricity generators. American Electric Power Company, Inc. is also one of the largest investor-owned electric utilities in the United States, with more than 5 million customers linked to American Electric Power Company, Inc.'s 11-state electricity transmission and distribution grid covering 197,500 square miles. American Electric Power Company, Inc. is based in Columbus, Ohio.

Duke Energy Corporation is a diversified energy company with a portfolio of natural gas and electric businesses, both regulated and unregulated, and an affiliated real estate company. Duke Energy Corporation supplies, delivers, and processes energy for customers in North America and selected international markets.

WPS Resources Corporation provides electricity and natural gas to more than 400,000 customers within an 11,000 square mile, 20 county service territory which consists of a large portion of northeast and central Wisconsin and a small part of Upper Michigan.

Xcel Energy Inc., through its affiliated operating companies, generates, transmits, and distributes electricity and distributes natural gas to its customers. Xcel Energy Inc. offers a comprehensive portfolio of energy-related products and services to 3.3 million electricity customers and 1.8 million natural gas customers across 10 Western and Midwestern states. Xcel Energy Inc. operates more than 70 power plants that generate about 15,295 megawatts of electric power.

Each of the Utilities owns or controls poles in states that are governed by the FCC's pole attachment authority. As such, they are vitally interested in those issues affecting the integrity and use of their electric plants for communications purposes.

II. THERE IS NO STATUTORY AUTHORITY IN THE POLE ATTACHMENTS ACT OR THE TELECOMMUNICATIONS ACT OF 1996 AMENDMENTS FOR EXTENDING REGULATED RATE COVERAGE TO ILEC ATTACHMENTS

A. The Plain Language of Section 224 Confirms that ILECs are not Entitled to Obtain Regulated Rates for Pole Attachments

The Commission's authority to regulate attachments to electric utility-owned poles under the Pole Attachments Act, 47 U.S.C. § 224, is governed by the plain language of Section 224 as enacted by Congress.[2] For purposes of regulating pole attachments, Section 224(a)(5) expressly provides that the definition of telecommunications carrier "does not include any incumbent local exchange carrier."[3] Despite this clear statutory prohibition, USTelecom asserts that Incumbent Local Exchange Carriers ("ILECs") are entitled to regulated rates under Section 224(b)(1), which gives the FCC authority to regulate the rates, terms, and conditions for "pole attachments."[4] Section 224(a)(4) in turn defines "pole attachments" to include any attachment by a "provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."[5] USTelecom's entire argument is premised on the flawed assumption that the phrase "provider of telecommunications service" in Section 224(a)(4) has a different and broader meaning than term "telecommunications carrier" used in Section 224(f), which establishes a right of nondiscriminatory access. It does not.

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[2] *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 859-862 (1984).

[3] 47 U.S.C. § 224(a)(5).

[4] 47 U.S.C. § 224(b)(1).

[5] 47 U.S.C. § 224(a)(4).

In support of this argument, USTelecom erroneously relies upon the definition of "telecommunications service" in Section 153(46) of the Communications Act as evidence that ILECs fall within the "broader" category of "provider of telecommunications service." The term "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public."[6] According to USTelecom, ILECs offer telecommunications for a fee directly to the public and are therefore "providers of telecommunications service" under Section 224 entitled to regulated rates. However, USTelecom's argument fails because it completely ignores the basic fact that "any provider of telecommunications service" is by its very definition a "telecommunications carrier" under the Communications Act.

The term "telecommunications carrier" is defined in Section 153(44) of the Communications Act as "any provider of telecommunications services," which is exactly the phrase used in Section 224(a)(4).[7] Thus, the phrase "provider of telecommunications service" as it used in Section 224(a)(4) means precisely the same thing as "telecommunications carrier." They are interchangeable terms whose contours overlap precisely, and accordingly one is not a subset of the other.

This clear statutory imperative and the FCC's understanding of the synonymous nature of these terms is supported by the FCC's own prior treatment of these terms and the rights and obligations associated with them. In discussing the duties imposed on "telecommunications carriers" by Section 251(a) of the Communications Act, the FCC has previously concluded "that to the extent a carrier is engaged in providing for a fee domestic or international telecommunications, directly to the public or to such classes of users as to be effectively available directly to the public, the carrier falls within the definition of 'telecommunications

[6] 47 U.S.C. § 153(46).

[7] 47 U.S.C. § 153(44).

carrier.'"[8] Even if an ILEC is a "provider of telecommunications service," as USTelecom contends, because the ILEC provides telecommunications for a fee to the public, then the ILEC is necessarily also within the definition of "telecommunications carrier" under Section 153(44) of the Communications Act and is excluded from Section 224 entirely. The term "provider of telecommunications service" in Section 224(a)(4) has exactly the same meaning as "telecommunications carrier" in Section 224(f). Accordingly, even under USTelecom's analysis, ILECs are excluded from regulated rate coverage as provided by Section 224(a)(5).

Furthermore, in Sections 224(d)(3) and (e)(1) of the Communications Act, Congress used the phrases "to provide any telecommunications service" and "to provide telecommunications services," respectively, to define telecommunications carriers. Section 224(d)(3) provides that the just and reasonable rate for attachments by a CATV system solely to provide cable service applied, until regulations were subsequently promulgated, to any pole attachment used by "any telecommunications carrier . . . to provide any telecommunications service."[9] Similarly, Section 224(e)(1) directs the FCC to prescribe regulations to govern pole attachments "used by telecommunications carriers to provide telecommunications service."[10] Thus, it is evident that Congress understood the plain meaning of "telecommunications carrier" as "any provider of telecommunications service" and used both terms interchangeably in the statute.

The premise that the phrase "provider of telecommunications service" applies to a broader category of entities than "telecommunications carrier" is inconsistent with the requirement that statutory provisions must be read in context. To determine whether statutory

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[8] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15988, ¶ 992 (1996) ("*Local Competition Order*").

[9] 47 U.S.C. § 224(d)(3).

[10] 47 U.S.C. § 224(e)(1).

language is plain, courts must look to "the language itself, *the specific context in which that language is used, and the broader context of the statute as a whole.*"[11] To imply that telecommunications carriers are a smaller subset of "providers of telecommunications" would render other provisions of the Pole Attachments Act nonsensical. For example, take the safety and reliability exclusion set forth in Section 224(f)(2). Because Section 224(f)(2) applies only to attachments by CATV systems and attachments by any "telecommunications carrier," USTelecom's position would create a peculiar scheme whereby ILECs, as "providers of telecommunications" but not "telecommunications carriers" were somehow exempt from the capacity, safety, reliability or engineering constraints of Section 224(f). Given the strictly circumscribed nature of the FCC's authority over pole attachments and the trepidation with which Congress gave the FCC the ability to oversee any portion of an electric utility's plant, it is inconceivable that Congress would have created a scheme whereby it would regulate rates for ILECs, but strip the electric utility of its statutory rights to address the ILEC's presence on its poles and their manner of attachment in the first instance.

Finally, USTelecom's assertions regarding *National Cable and Telecommunications Association v. Gulf Power* also miss the mark. While the Supreme Court determined that the FCC could prescribe a just and reasonable rate for an additional services provided by a cable television system– an entity already entitled to the protection of the Pole Attachments Act – under its Section 224(b)(1) authority, the Court did *not* suggest that Section 224(b)(1) was unbounded or that the FCC has a "general mandate" to set just and reasonable rate irrespective of

[11] *United States v. Ickes*, 393 F.3d 501, 504-505 (4th Cir. 2005) (*citing Robinson v. Shell Oil Co.*, 519 U.S. 337, 341(1997)) (emphasis added).

the nature of the attacher.[12] Rather, the Supreme Court specifically tied the FCC's authority to the nature of the provider in the first instance, finding that because the attacher in question was a "cable television system," the addition of cable modem services did not alter the character of the *attacher* such that it was no longer subject to the Pole Attachments Act.[13] Similarly, the Supreme Court's decision with respect to wireless carriers was dependent on their status as telecommunications carriers in the first instance.[14] In other words, the entity must first be entitled to the protection of the Pole Attachments Act before it is entitled to regulated access *or* regulated rates. Because ILECs are not "telecommunications carriers" due to the specific exclusion of Section 224(a)(5), and are accordingly also not "providers of telecommunications" as these terms are coextensive under Section 153(44), Section 224(b)(1) does not apply to ILECs.

B. Congress did not Intend to Extend Coverage to Incumbent Local Exchange Carriers

The plain language of the statute compels the conclusion that ILECS are not entitled to the protection of Section 224. However, even assuming *arguendo* that the FCC believes the statutory language is ambiguous, the Commission must also look to the legislative history and purpose of the Pole Attachments Act to address the scope of the agency's jurisdiction over utility owned poles.[15] As originally enacted, in addition to addressing electric utility obligations, the Pole Attachments Act was designed to address the perceived superior bargaining position

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[12] USTelecom Petition at 15-16. Compare, *National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 334 (2002) ("*NCTA*").

[13] *NCTA*, 534 U.S. at 333 ("The addition of a service does not change the character of the attaching entity -- the entity the attachment is 'by.' And this is what matters under the statute.").

[14] *Id.* at 340.

[15] *Chevron*, 467 U.S. at 859-862.

incumbent local telephone companies had over CATV systems in negotiating rates, terms, and conditions for pole attachments. The expected introduction of broadband cable services represented a competitive threat to incumbent telephone companies and Congress was concerned that the "pole attachment practices of telephone companies could, if unchecked, present realistic dangers of competitive restraint in the future."[16] In particular, cable industry representatives testified to Congress that they were dependent on access to poles owned by incumbent telephone company poles in order to build out their systems and that cable companies were forced into "virtual contracts of adhesion."[17] CATV representatives also testified to Congress that "the pole attachment controversy exists, in part, because telephone companies consider the cable industry to be a potential competitor, and pole disputes are the result of anticompetitive conduct."[18]

The FCC's jurisdiction, however, was narrowly tailored. Congress explained that the expansion of FCC regulatory authority over pole attachments is "strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems."[19] It did not grant the FCC general jurisdiction over other aspects of electric utilities' operations, or their contracts with other parties interested in their pole facilities, such as state and local departments of transportation, municipalities or telephone companies.

Thus, in addition to addressing access to electric utility facilities by cable systems, Congress intended the 1978 Act to address the relationship between the CATV industry on one hand, and the telephone companies on the other. Congress did not, however, provide incumbent

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[16] Communications Act Amendments of 1978, S. Rep. No. 95-980, at 13 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 124.

[17] Utility Pole Attachments, H.R. Rep. No. 95-271, at 3, (1977) (emphasis added).

[18] *Id.*

[19] S. Rep. No. 95-980, at 15.

telephone companies any rights to attach their equipment to electric utility poles or to obtain regulated rates under Section 224. Telephone companies already had access to electric utility poles pursuant to joint use agreements, many of which had their origins decades before the Pole Attachments Act. The pole attachment rate established by the Pole Attachments Act was specifically designed to spur the growth of the cable industry, which was then in its infancy and controlled less than 10,000 poles.[20] On the other hand, telephone companies controlled slightly less than half of the 10 million utility poles then in use, and 72 percent of all cable systems leased space from the Regional Bell Operating Companies ("RBOCs").[21] Furthermore, Congress did not extend the regulated rate provisions to incumbent telephone companies because the incumbent telephone companies were not in an inferior bargaining position versus the electric utilities because most poles were owned by telephone companies and electric utilities with shared use pursuant to joint use or joint ownership agreements.[22]

Similar to the original purpose of the 1978 Pole Attachments Act to facilitate the growth of new entrants into the newly developing CATV market, the 1996 Telecommunications Act[23] was designed to promote competition by supporting new entrants into the local telephone service market to compete with the incumbents.[24] Overall, the 1996 Act was intended to "eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to

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[20] Communications Act of 1995, H.R. Rep. No. 104-204, pt. 1, at 91 (1995); S. Rep. No. 95-580, at 13.

[21] S. Rep. No. 95-580, at 13.

[22] Regulations of Pole Attachments and Penalties and Forfeitures, H.R. Rep. No. 94-1630, at 4 (1976).

[23] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 156, codified at 47 U.S.C. §§ 151, *et. seq.*

[24] *Verizon Comm., Inc. v. FCC*, 535 U.S. 467, 475 (2002).

impede free market competition."[25] Among other things, new Section 251 required the RBOCs to open their networks to competition, provide interconnection, offer access to unbundled elements of their networks, and offer retail services at wholesale rates for resale. Congress also enacted Section 271 to require the RBOCs to demonstrate that they had opened their networks to new entrants before the RBOCs could offer long distance service in the areas where they provided local telephone service. As part of the 14 point competitive checklist, Section 271(c)(2)(B)(iii) requires ILECs to provide nondiscriminatory access to their poles at just and reasonable rates.[26] As demonstrated by these measures, the underpinning of the 1996 Act was to provide incentives to *new* entrants to spur competition. The 1996 Act regulates ILECs as incumbent utilities owning poles and having existing networks and not as new entrants needing mandatory access at regulated rates.

In order to facilitate facilities-based competition by competitive local exchange carriers ("CLECs"), Congress extended the FCC's Section 224 jurisdiction "to pole attachments for telecommunications carriers and expanded access to utility poles for the purposes of providing cable and telecommunications services."[27] As Senator Hollings noted, it was expected that "cable companies will soon provide telephony, and telephone companies will soon offer video services; . . . electric utility companies will offer telecommunications services."[28] The expansion of the FCC's pole attachment jurisdiction was "intended to remedy the anomaly of current law, under which cable systems providing telecommunications systems are able to obtain a regulated

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[25] *Local Competition Order*, 11 FCC Rcd 15499, 15506, ¶ 4.

[26] 47 U.S.C. § 271(c)(2)(B)(iii).

[27] *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777, 6806, ¶ 61 (1998) ("*Telecom Order*").

[28] S. Rep. No. 104-23, at 67.

pole attachment rate under Section 224 of the 1934 Act, while other providers of telecommunications services are unable to obtain a regulated pole attachment rate under Section 224."[29]

Congress, however, specifically declined to extend Section 224 coverage to *all* telecommunications carriers. Rather, Congress explicitly excluded attachments by ILECs from the regulated pole attachment rates and access provisions available under Section 224.[30] As discussed above, the 1996 amendments to the Pole Attachments Act were part of a broader package of changes designed to open the infrastructure of ILECs to new competitors. The purpose of a new rate for telecommunications carriers was to provide the means and incentive for CLECs to compete in the local telephone markets and to make the access provisions of Section 224(f) meaningful by preventing ILECs from using their control over poles to disadvantage new competitors. Accordingly, the amendments expanded the scope of Section 224 to include CLECs and implemented a revised standard for determining a just and reasonable annual rental fee for CLECs and CATV companies providing telecommunications services to lease space on electric utility or ILEC-owned telephone poles.

The right of *access* under Section 224(f) and the regulated *rates* for pole attachments under Sections 224(b)(1), (d) and (e) are inextricably linked together. Without a statutory right of access, the right to obtain regulated rates is meaningless. USTelecom, however, concedes that ILECs are not contemplated as beneficiaries of the mandatory access provisions of the Act.

Further, during the negotiations for the pole attachment revisions, "telephone companies continu[ed] to express concern that the revised formula will not compensate them adequately for

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[29] Communications Act of 1994, S. Rep. No. 103-367, at 65 (1994).

[30] 47 U.S.C. § 224(a)(5).

their costs of building and maintaining the poles."[31] Thus, it was evident to all parties, including the ILECs, that Congress intended to limit the right of regulated pole attachment rates under Section 224 to new entrants that did not own poles and were perceived to lack bargaining power to access the infrastructure owned by electric utilities and ILECs. There is simply no support for the proposition that the legislative history demonstrates Congressional intent to provide favorable regulated pole attachment rates to ILEC attachments.

III. THE FCC HAS INTERPRETED SECTION 224 TO EXCLUDE ILEC ACCESS RIGHTS OR RATE REGULATION COVERAGE TO ILEC ATTACHMENTS

In the various rulemaking proceedings implementing the 1996 amendments to the pole attachment provisions, the FCC consistently confirmed that Section 224 does not extend to attachments rates for ILECs on poles owned by electric utilities or other local exchange carriers.[32] As the FCC explained:

> 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 respect to the poles of other utilities.* This is consistent with Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants.[33]

This well-established FCC precedent compels the Commission to deny USTelecom's Petition for Rulemaking.

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[31] Telecommunications Competition and Deregulation Act of 1995, S. Rep. 104-23, at 69 (1995).

[32] *Chevron*, 467 U.S. at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[33] *Telecom Order*, 13 FCC Rcd 6777, 6781, ¶ 5 (emphasis added).

In further defining the changes brought about by the 1996 Act, the FCC concluded that "[w]hile previously the protections of Section 224 had applied only to cable operators, the 1996 Act extended those protections to telecommunications carriers as well,"[34] and has never suggested that there is a third "broader" class of beneficiaries beyond these two categories. As Congress intended, the FCC proceeded to develop a scheme of rate regulation for cable operators and *competitive* telecommunications carriers pursuant to their mandatory right of access and regulated attachment rates.

The FCC itself has also consistently illustrated its understanding that the terms "provider of telecommunications service" and "telecommunications carrier" are synonymous for purposes of Section 224, and accordingly ILECs are excluded from both terms. For example, in addressing Section 224(e)(1), which applies to the rates for telecommunications carriers, the FCC stated that its regulations will ensure "that a utility complies with the Pole Attachments Act's requirements for just and reasonable rates, terms, and conditions and nondiscriminatory access for pole attachments *used to provide telecommunications services*."[35]

Each of the FCC's rulemaking proceedings regarding the right to obtain mandated access at regulated rates has underscored the fact that Congress was primarily concerned with the ability of ILECs to frustrate competition by virtue of their monopoly status and their incentive to discriminate against fledgling competitive telecommunications carriers. For example, the Commission interpreted the statutory requirement of nondiscriminatory access as preventing ILECs from favoring themselves over competitors with respect to the provision of

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[34] *Id.* at ¶ 4.

[35] *Amendment of the Commission's Rules Governing Pole Attachments, Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket Nos. 97-98,97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12106, ¶ 2 (2001) ("*Reconsideration Order*") (emphasis added).

telecommunications or cable services. In particular, the FCC explained that it was "unlikely that Congress intended to allow an incumbent LEC to favor itself over its competitors with respect to attachments to the incumbent LEC's facilities, given that Section 224(a)(5) has just the opposite effect in that it operates to preclude the incumbent LEC from obtaining access to the facilities of other LECs."[36]

The FCC also set forth guidelines regarding the ability of utilities, including ILECs, to reserve space on their facilities to meet future needs. In doing so, the FCC noted that Congress did not intend to benefit ILECs on account of their ownership and control of poles because "Congress seemed to perceive such ownership and control as a threat to the development of competition."[37] Therefore, "[p]ermitting an incumbent LEC, for example, to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC" in violation of Congress' intent.[38]

Similarly, USTelecom's assertions with respect to the significance of the inclusion of ILECs when apportioning the costs associated with unusable space are overstated.[39] Inclusion of ILECs in this formulation did not hinge on whether ILECs provided telecommunications services, but focused on whether the term "attaching entity" was limited to those entities with "pole attachments" as defined by the Act.[40] The FCC ultimately determined that "any contact"

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[36] *Local Competition Order*, 11 FCC Rcd 15499, 16074, ¶ 1157.

[37] *Id.* at 16079, ¶ 1170.

[38] *Id.*

[39] USTelecom Petition at 17. USTelecom also overlooks that the language it relies upon here was rejected on reconsideration. *See*, *Reconsideration Order*, 16 FCC Rcd 12103, 12133-12134, ¶¶ 58-59.

[40] *Id.*

to the pole should be counted, regardless of whether the entity had a "pole attachment." Accordingly, electric utilities and government entities, which are not eligible for mandatory access at regulated rates under the Pole Attachments Act, are nevertheless counted as attaching entities, for the purposes of determining the allocation of unusable space. They are counted even though they do not have "pole attachments."[41] This division of costs, therefore, is irrelevant for purposes of determining who is entitled to regulated access and rates.

USTelecom's current argument that they are entitled to regulated rates to their attachments on electric utility poles conflicts with the prior positions that USTelecom and its member organizations have taken in the FCC's pole attachment rulemakings in which they recognize that ILECs are utilities/facilities owners for purposes of the Act, rather than an entity entitled to the benefits of Section 224. Moreover, when USTelecom made a similar argument in its comments in the *Fee Order* docket, CS Docket No. 97-98,[42] urging the FCC to extend the rate provisions of the Act to cover ILECs despite the FCC's determination in the *Local Competition Order*[43] that ILECs were not entitled to access under Section 224(f), the FCC declined to address this assertion.[44] The FCC should similarly decline to address these arguments now as unsupported in law, precedence and fact.

The history of the FCC's interpretation and application of Section 224 is consistent with Congress' view that ILECs are not entitled to access rights *or* regulated rate coverage for their

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[41] *Id.*

[42] *See, e.g.*, Reply Comments of USTA, CS Docket No. 97-151 (filed Oct. 21, 1997).

[43] Comments of USTA, CS Docket No. 97-98, at pp. 11-16 (filed June 27, 1997). *Local Competition Order*, 11 FCC Rcd 15499, 16104, ¶ 1231 ("...no incumbent LEC may seek access to the facilities or rights-of-way of a LEC or any utility under either section 224 or section 251(b)(4).").

[44] *Local Competition Order*, 11 FCC Rcd 15499, 16104, ¶ 1231 ("...no incumbent LEC may seek access to the facilities or rights-of-way of a LEC or any utility under either section 224 or

pole attachments. Congressional intent and FCC precedent demonstrate that the purpose of Section 224 is to force ILECs to open their networks to competitors. Congress did not intend to alter the relationship between electric utilities and ILECs, which is based on mutual benefits and responsibilities due to the joint ownership of poles and subject to the jurisdiction of state utility commissions.

IV. USTELECOM HAS FAILED TO PRESENT EVIDENCE THAT ILECS ARE BEING UNREASONABLY DISCRIMINATED AGAINST BY ELECTRIC UTILITIES

Even assuming, *arguendo*, that Congress provided statutory authority for the FCC to assume jurisdiction over rates for attachments by ILECs, the FCC cannot overturn thirty years of precedent unless it meets the heightened standard of review required when an agency reverses its settled course of interpretation.[45] The administrative record must contain sufficient substantial evidence to support new regulations expanding the Commission's jurisdiction over pole attachments by ILECs. The Administrative Procedure Act, 5 U.S.C. § 706(2)(A), requires that an agency's findings and conclusions must be supported by "substantial evidence on the record considered as a whole."[46] It is well established that an agency's "findings and conclusions will be set aside if they are 'arbitrary, capricious, an abuse of discretion' or 'unsupported by substantial evidence on the record.'"[47] USTelecom has not met this burden.

USTelecom makes numerous unsupported allegations against electric utilities regarding unreasonable rates, terms, and conditions forced on ILECs. Beyond reference to some alleged disputes regarding rates for ILEC attachments, however, USTelecom fails to present any

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[45] *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 464 U.S. 29, 42 (1983) (Holding that an agency "is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").

[46] *Id.* at 44.

[47] *Air Line Pilots Ass'n v. United States DOT*, 3 F.3d 449, 453 (D.C. Cir. 1993).

concrete evidence in support of its claim that electric utilities are improperly imposing substantial rate increases. As demonstrated by the comments submitted by the United Telecom Council ("UTC") in this docket, the experiences of UTC's members regarding ILEC joint use and joint ownership agreements do not support the allegations made by USTelecom.

There are a substantial amount of active, freely negotiated joint use and joint ownership agreements currently in place, with a large number of such agreements having been in place for more than 25 years. UTC members report overwhelmingly that they have not had any disputes with ILECs regarding the rates, terms, and conditions of pole attachments within the last five years that the parties have not been able to resolve themselves. In addition, UTC members have noted that recent negotiated rate changes with ILECs have resulted in rates that are still well below a fair allocation of the annual pole cost and any rates increases usually occur when the rate charged by the ILEC for utility attachments on its poles increases by a comparable amount.

For example, one situation where American Electric Power Service Corporation did raise its rates was designed primarily to address an imbalance whereby the original ILEC rate was well below the rate for CLEC attachments and was exacerbated by the fact that this ILEC had multiple facilities attached upon each pole. As is the case for most utilities, ILECs have a far greater number of attachments to American Electric Power Service Corporation's poles than CLECs or CATV systems. In this particular case, the parties reached a mutually satisfactory arrangement that implemented a cost sharing methodology and revised the attachment rental rates to properly align with current costs. Investor-owned utilities and ILECs have thousands of such interactions that occur in the normal course of business that result in the successful provision of electric and telecommunications services to their common customers.

Most of the joint use agreements between ILECs and electric utilities were based upon the concept of parity, *i.e.* the balanced ownership of poles between the ILEC and the electric utility, such that the parties were mutually advantaged by the joint use arrangement, no party was subsidizing the other, and no money would need change hands between the parties. Many of these joint use agreements contained nominal charges for imbalances in pole ownership as an incentive to encourage the party with the fewer number of joint use poles to increase its share of the ownership of joint use poles. These nominal charges were typically $2.00 or $3.00 per pole per year.

Over time ILECs began to see the $2.00 and $3.00 charges as a bargain pole attachment rate instead of their original purpose as simply an encouragement to comply with the parity requirement of the joint use agreement. As the ILEC proportion of pole ownership has declined, many utilities have renegotiated their joint use contracts to recover costs in lieu of the $2 and $3 pole charges. In such a renegotiation, USTelecom may correctly, but yet very misleadingly, state that a pole attachment rate has gone up over 500%, while concealing that a rate went from $2.00/pole/year to $10/pole/year, still less than the typical telecommunications rate for one foot of pole space. Duke Energy Corporation has had to renegotiate its joint use agreements with ILECs from these $2.00 and $3.00 rates to rates that reflected the amount of pole use and the cost of pole ownership, as the "parity" between its ILECs and Duke Energy Corporation has eroded to where Duke Energy Corporation owns 85% of all joint use poles. Nevertheless, Duke Energy Corporation has had no increase in its pole attachment rates with ILECs approaching 500% or that were anything other than increases pursuant to its rate determinations in its joint use agreements in the last decade.

Adopting new regulations governing rates for ILEC attachments would seriously undermine the network of joint use and joint ownership agreements that have effectively allowed electric utilities and telephone companies to use each other's poles for decades to the benefit of consumers of both parties. Electric and telephone utilities frequently enter into joint use agreements to assign or transfer the right to contract out pole space to prospective attachers. These pole attachment joint use and ownership agreements between electric utilities and telephone companies are based on mutual benefits and responsibilities freely negotiated in the marketplace with oversight by state utility commissions. In fact, as a general rule most state public utility commissions already regulate the sale or lease of facilities between public utilities and have jurisdiction to exercise authority over joint use agreements where the ratepayers of one public utility are being treated unfairly.[48] There is, in short, no inequity and no evidence of any inequity that would require remediation as to the relationship between electric utilities and ILECs or that would merit the extraordinary remedy of imposing federal government regulation on an otherwise functioning market and state regulatory regime.

The proposal advocated by USTelecom would also impose significant additional burdens and responsibilities on the FCC that would more appropriately be dealt with by the various state public utility commissions that have substantial authority over, and experience with, both electric utilities and ILECs. In particular, it would require the FCC to devote additional resources to the arbitration of operational and engineering issues regarding infrastructure ownership issues, address complications associated with joint ownership, and become heavily involved in interpreting field inventory contractual issues. There is no evidence that these issues could be handled more expeditiously and efficiently at the federal level as opposed to the state level.

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[48] *See, e.g., 1997* OHIO PUC LEXIS 645 (1997) (citing ORC Ann. § 4905.48); *see also* Ind. Code Ann. § 8-1-2-84; W. Va. Code § 24-2-12.

V. CONCLUSION

In sum, the plain language and legislative history of Section 224, in conjunction with longstanding FCC precedent, demonstrate that the benefits and obligations of the pole attachment access and regulated rate provisions do not extend to attachments by ILECs to poles owned by other utilities. Congress established a regime whereby cable operators and telecommunications carriers (from which ILECs are expressly excluded) were given a mandatory right of access and the FCC was given authority to regulate the rates, terms, and conditions for such attachments. In doing so, Congress made policy judgments that certain measures were needed to ensure that new entrants could compete in the local telecommunications market.

There is no support for the proposition that ILECs are the intended beneficiaries of regulated rates because Section 224(a)(4) uses the phrase "providers of telecommunications service." As demonstrated above, the definition of "telecommunications carriers" is any "provider of telecommunications service." The two terms are co-extensive, and interchangeable. Thus, there is no distinction between the two terms in Section 224, and ILECs are excluded from both. Instead, ILECs are considered utilities and have no rights to regulated rates under Section 224 for attachments to poles owned by other utilities. Based on the reasons articulated in this Joint Opposition, the FCC should not initiate a rulemaking proceeding to extend its authority to regulate the rates, terms, and conditions for attachments by ILECs.

WHEREFORE, THE PREMISES CONSIDERED, American Electric Power Service Corporation, Duke Energy Corporation, WPS Resources Corporation, and Xcel Energy Inc. respectfully request that the Commission deny USTelecom's Petition for a rulemaking proceeding to amend the Commission's rules governing pole attachment rates, terms, and conditions.

Respectfully submitted,

AMERICAN ELECTRIC POWER SERVICE CORPORATION, DUKE ENERGY CORPORATION, WPS RESOURCES CORPORATION, and XCEL ENERGY INC.

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Dated: December 2, 2005

CERTIFICATE OF SERVICE

I, Kevin M. Cookler, do hereby certify that on the 2nd day of December, 2005, a copy of the foregoing Joint Opposition Of American Electric Power Service Corporation, Duke Energy Corporation, WPS Resources Corporation, And Xcel Energy Inc. in the Matter of The United States Telecom Association Petition for Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures RM No. 11293, was submitted electronically to the Federal Communications Commission and served via Certified U.S. Mail, return receipt requested, upon the following:

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Kevin M. Cookler

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