

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of  
Implementation of Section 224 of the Act  
A National Broadband Plan for the Future

WC Docket No. 07-245

GN Docket No. 09-51

**REPLY COMMENTS OF AT&T INC.**

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## INTRODUCTION AND SUMMARY

With the exception of the electric company commenters, most of the commenters in this proceeding have agreed with the Commission's fundamental premise that rates for pole attachments should be as low and as close to uniform as possible.<sup>1</sup> In fact, these commenters whole-heartedly agree with the Commission's observation that different rates based on the classification of the attacher "distorts attachers' deployment decisions," especially "with regard to integrated, voice, video, and data networks."<sup>2</sup> And they embrace the many other good public policy reasons for adopting a low, uniform broadband pole-attachment rate for all attachers. In spite of the consensus (or maybe because of it), these same commenters, however, resist applying this same reasoning to pole attachments by ILECs. Those who resist applying this reasoning to ILECs attempt to justify their obvious intellectual dishonesty by clinging to the assertion that this result is driven by the terms of § 224. They are mistaken.

In its comments, AT&T demonstrated that the Telecommunications Act of 1996, specifically § 224(b), granted the Commission the authority to regulate the rates, terms, and conditions of pole attachments both by a cable television system and by a provider of telecommunications service. And AT&T demonstrated that it was Congress's intent that pole attachments by ILECs be covered by this grant of authority, because ILECs are included within the term "provider of telecommunications service." Arguments to the contrary are flatly wrong.

*First*, the Act is unambiguous. Applying the most basic rules of statutory construction AT&T and others have demonstrated that, by using two different terms—"telecommunications carrier" and "provider of telecommunications service"—within the text of the Act, Congress intended that ILECs fall within the purview of the Commission's authority to regulate pole attachments. Arguments based on the contention that these two terms are synonymous and, therefore, identical fall under the weight of decades of statutory construction jurisprudence. The

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<sup>1</sup> National Broadband Plan (NBP) , p. 110.

<sup>2</sup> *Id.*

positions taken by many electric companies in this regard fly in the face of Supreme Court precedent interpreting the Act and the authority of the Commission under it.

*Second*, because the Act is unambiguous, there is no need for the Commission to resort to legislative history to divine Congressional intent. Cherry-picked citations by some supporting a view that Congress intended only to facilitate competitive-LEC pole attachments misses the point. Congress intended to give the Commission broad authority to regulate pole attachments in order to allow the Commission to be able to respond to the changes in a post-monopoly dynamic telecommunications market, as well as to allow it to meet its obligations under § 706.

*Third*, the Commission's prior § 224 rulings do not now bind the Commission's hands in addressing both a radically different telecommunications market place and a vastly different utility pole market place. The point of the United States Telecom Association Petition for Rulemaking filed in 2005, and the comments of the ILECs in support of it, has been to demonstrate how much these markets have changed. Where, as here, the Commission is contemplating lowering the pole attachment rates even more for some, the effect would be to further distort these markets and frustrate the aims of both the NBP and § 706 of the Act.

In addition to challenging the plain meaning of § 224, these same commenters have sought to overstate the benefits of the joint-use agreements between electric companies and ILECs. They do so to dissuade the Commission from meeting its § 224 and § 706 obligations. Most of the purported benefits of joint-use agreements, however, are either insignificant—especially when compared to the rates ILECs pay to electric companies under them—or are the natural outgrowth of external circumstances peculiar to pole-owning ILECs. In any event, whatever benefits the ILECs might still enjoy under joint-use agreements, they do not justify ILECs' paying significantly more for broadband pole attachments than other attachers.

By virtue of the authority granted the Commission under the Telecommunications Act of 1996, Congress had fully equipped the Commission with sufficient power to address the obligations it has imposed on it, specifically under § 706. And, by adopting a uniform, across-the-board pole-attachment rate for all attachers, including ILECs, the Commission can meet the

twin goals of § 706 and the aims of the National Broadband Plan of removing barriers to broadband infrastructure deployment and of promoting competition in the telecommunications market.

## DISCUSSION:

### **The Commission Should Accept Its Section 224 Responsibility for Guaranteeing Just and Reasonable Rates for All Pole Attachments, Including ILEC Attachments**

***1. The Commission must acknowledge that the same rationale that justifies lowering the telecom rate applies equally to pole attachment rates charged to ILECs.***

With the notable exception of some electric companies,<sup>3</sup> most commenters recognized the value of lowering pole-attachment rates. Indeed, most commenters sang the praises of lower pole-attachment rates as “eliminating barriers to facilities deployment,”<sup>4</sup> providing “regulatory certainty,”<sup>5</sup> “attaining technological neutrality,”<sup>6</sup> “reducing costs” of broadband deployment,<sup>7</sup> “promot[ing] infrastructure investment and competition,”<sup>8</sup> “advancing key national objectives,”<sup>9</sup> “expediting the build-out of affordable broadband infrastructure,”<sup>10</sup> “directly cutting . . . costs,”<sup>11</sup> creating a “more efficient allocation of resources,”<sup>12</sup> “producing . . . greater choices among new and innovative broadband services, enhanced productivity and economic development opportunities for the national and local economies,”<sup>13</sup> “eliminating marketplace distortions,”<sup>14</sup> “reducing significant indirect costs caused by the existing differences between” the rates paid by competitors,<sup>15</sup> “level[ing] the playing field” between competitors,<sup>16</sup>

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<sup>3</sup> Comments of the Coalition of Concerned Utilities, p. 119 (Coalition); Comments of the American Public Power Association, p. 17 (APPA).

<sup>4</sup> Comments of Charter Communications Inc., p. iii. (Charter)

<sup>5</sup> *Id.* See also Comments of National Cable & Telecommunications Association, p. 18 (NCTA).

<sup>6</sup> *Id.* at p. iv.

<sup>7</sup> *Id.* at p. 2. See also, Comments of The United States Telecom Association (USTA).

<sup>8</sup> Comments of Comcast Corp., p. 5 (Comcast)

<sup>9</sup> *Id.* at p. 40.

<sup>10</sup> NCTA, pp. 1-2.

<sup>11</sup> *Id.* at p. 7.

<sup>12</sup> *Id.* at p. 16.

<sup>13</sup> *Id.*

<sup>14</sup> Comments of Time Warner Cable Inc., p. 2 (Time Warner).

<sup>15</sup> *Id.* at p. 4.

<sup>16</sup> Comments of Verizon, p. 1 (Verizon). See also, Comments of Qwest Communications International Inc., p. 15 (Qwest).

“facilit[ating] private negotiations between broadband service providers and pole owners and . . . resolution of pole attachment complaints,”<sup>17</sup> and “further[ing] the Commission’s long standing policy of ‘technological neutrality’ [and it’s] goal of developing a consistent regulatory framework across broadband platforms.”<sup>18</sup> Because of the obvious benefits of a lower pole-attachment rate, especially for broadband attachments, it is not surprising that some competitors may wish to deny them to ILECs. And those utilities facing reduced pole-attachment rental incomes may also wish to thwart efforts to include ILECs in the benefits of any new, lower broadband pole-attachment rate. But good broadband policy should not be subverted by those seeking to gain an advantage in the marketplace through regulatory fiat. Good broadband policy eliminates barriers to investment in broadband infrastructure and promotes fair and equal competition for all, including ILECs. The Commission can take the first step toward a good broadband policy by acknowledging its responsibilities under §§ 224 and 706 and by setting an across-the-board, uniform broadband pole-attachment rate for all attachers, including ILECs.

***2. The Commission should reject attempts to distort the plain meaning of § 224 and should acknowledge that it has the authority to regulate the rates, terms, and conditions of pole attachments by ILECs.***

In their comments, the electric companies attempt to undermine the ILEC’s central argument—that the Commission has the authority under § 224 to regulate the rates, terms, and conditions of pole attachments by ILECs. They seek to do this primarily by arguments focused on the text of § 224, the legislative history of § 224, and the Commission’s own § 224 rulings. These attempts are misplaced and seek to obscure the plain meaning of the Telecommunications Act of 1996, which gives power to the Commission to regulate any pole attachment by a cable television system or a provider of telecommunications service.

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<sup>17</sup> *Id.* at p. 3.

<sup>18</sup> *Id.* at p. 12.

***(a) The plain meaning of § 224 gives the Commission the authority to regulate the rates, terms, and conditions of pole attachments by ILECs.***

Before addressing the electric companies' arguments, it might be helpful to reiterate the summary of the ILEC position. Under § 224(b), the Commission is authorized to regulate the rates, terms and conditions for “pole attachments.”<sup>19</sup> Pole attachment, in turn, is defined as “*any attachment by a cable television system or a provider of telecommunications service to a pole, duct, conduit or right of way owned or controlled by a utility.*”<sup>20</sup> As ILECs are clearly providers of telecommunications service,<sup>21</sup> the Commission has authority to regulate the rates, terms and conditions of pole attachments by ILECs.

The fact that, for purpose of § 224(e), the term “telecommunications carrier” expressly excludes ILECs does not act as an impediment to the Commission’s authority to regulate pole attachments by ILECs. In the *NCTA* case,<sup>22</sup> the Supreme Court ruled that, when it comes to the question of the Commission’s authority to regulate pole attachments, what matters is the entity doing the attaching. In that case, the entity was a cable television system using attached facilities to provide commingled services—cable service and high-speed Internet access service. The language of § 224(d)(3)—“used by a cable television system solely to provide cable service”—was not deemed to limit the power of the Commission to regulate any pole attachment conferred by § 224(b). Likewise, the language of § 224(e) cannot be deemed to limit the authority of the Commission to regulate pole attachments under § 224(b), because both § 224(d)(3) and § 224(e) are merely subsets of the broad authority granted the Commission under § 224(b).

Applying the statutory construction principle of disparate inclusion and exclusion, the presumption is that Congress intended to use particular language in one part of the statute—“a provider of telecommunications service” in § 224(a)(4)—and omit it in another—

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<sup>19</sup> 47 U.S.C. § 224(b)

<sup>20</sup> 47 U.S.C. § 224(a)(4) (emphasis added).

<sup>21</sup> See 47 U.S.C. § 153(44), definition of telecommunications carrier.

<sup>22</sup> *Nat’l Cable & Tele. Ass’n v. Gulf Power Co.*, 534 U.S. 327 (2002) (*NCTA*).

“telecommunications carrier” in § 224(e)(1).<sup>23</sup> Here Congress intended to *include* ILECs generally within the Commission’s power to regulate pole attachments under § 224(b) (which expressly includes all “provider(s) of telecommunications service) but to *exclude* ILECs from the telecom rate formula set forth in § 224(e).<sup>24</sup> Had Congress intended to exclude ILECs from the rights of pole attachers generally, as claimed by electric companies, it could have easily done so by using the term “telecommunications carrier” in the § 224(a)(4) definition of pole attachment, in lieu of the term “a provider of a telecommunications service.”

In its initial comments filed in this docket, AT&T supported this contention with references to not only the plain meaning of the text, summarized above, but also to the structure § 224 and to the legislative intent, as well.<sup>25</sup>

***(b) An analysis of the text of § 224 demonstrates that the Commission has the authority to regulate pole attachments by ILECs.***

The electric companies’ principal argument based on the text of § 224 is that “telecommunications carriers” and “provider of telecommunications service” are *synonymous*.<sup>26</sup> The implication being that “*identical words* used in different parts of the same act are intended to have the same meaning.”<sup>27</sup> But just the opposite is true in this case.

Of course, besides not being “identical words,” the fact that Congress wrote the text of § 224 using these different terms is critical. While the electric companies never assert that Congress was guilty of sloppy draftsmanship, that is what they imply.<sup>28</sup> Starting with two

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<sup>23</sup> See, *Russello v. U.S.*, 464 U.S. 16, 23 (1983).

<sup>24</sup> By “exclude,” AT&T means to refer to the fact that an express formula is not provided. Nevertheless, there is no reason to presume that the rates ILECs pay other utilities for attaching to their poles couldn’t be the same as that paid by telecommunications carriers or by cable providers.

<sup>25</sup> AT&T Comments, pp. 25-33 (Mar. 7, 2008) (AT&T 2008 Comments).

<sup>26</sup> Comments of Edison Electric Institute and the Utilities Telecom Council, p. 79. See also, Coalition, p. 139. Faced with the fact that the term “pole attachment” in § 224(b) refers to “*any* pole attachment,” the electric companies are seeking to limit the meaning of the term “provider of a telecommunications service,” because they realize that they cannot limit the meaning of the term “any,” which means “all.” See, *Southern Co. v. FCC*, 293 F.3d 1338, 1349-50 (11<sup>th</sup> Cir. 2002) (We have noted that “the adjective ‘any’ is not ambiguous; it has a well established meaning. . . .Read naturally, the word ‘any’ has an expansive meaning. . . . ‘any’ means ‘all.’”).

<sup>27</sup> *Sorenson v. Sec’y of the Treasury*, 475 U.S. 851, 860 (1986) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)) (emphasis added).

<sup>28</sup> See, *Russello*, 464 U.S. at 23 (“Had Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in the immediately following subsection

synonymous terms and then redefining one of them to distinguish it from the other is not, however, an indication of sloppy draftsmanship but of express intent. This goes to the heart of the disparate inclusion-exclusion rule of statutory construction. Congress clearly intended to limit the effect of certain sections of the Pole Attachment Act (*e.g.*, § 224(e)) without restricting the Commission’s authority over pole attachments generally. Consequently, the Commission’s general authority to regulate pole attachments in § 224(b) is not limited by the formula set out in § 224(e) or the use of the more limited term “telecommunications carrier” in § 224(e) or elsewhere in the Pole Attachment Act.<sup>29</sup>

One company argues that “it makes little sense that Congress granted ILECs rights to regulated pole attachment rates but failed to ‘drop the other shoe’ by specifying an applicable rate.”<sup>30</sup> This assertion, however, is contrary to the explicit ruling in *NCTA* where the Supreme Court held that the Commission’s power to regulate pole attachments was not circumscribed by the absence of an express formula for commingled services.<sup>31</sup> For such attachments, the Commission still possesses the “authority to fill gaps where the statute[ is] silent” and its “customary discretion in calculating . . . ‘just and reasonable’ rate[s].”<sup>32</sup> As in the case of commingled services, there is no reason to presume that the absence of an express statutory formula for attachments by ILECs means that the Commission lacks authority over them.<sup>33</sup>

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(a)(2)[Authority omitted.] In the latter case, *id.*, at 773, the Court said: ‘The short answer is that Congress did not write the statute that way.’ *We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.*’).

<sup>29</sup> Obviously, the Commission’s authority is circumscribed by the definition of “pole attachment,” which only refers to the attachments by “a cable television system” or “a provider of telecommunications services.” 47 U.S.C. § 224(a)(4).

<sup>30</sup> Coalition, p. 140.

<sup>31</sup> *NCTA*, 534 U.S. at 339.

<sup>32</sup> *Id.*

<sup>33</sup> In this same vein, the Coalition argues that, since the term “utility” includes ILECs, the ILECs’ interpretation of § 224 would lead to the “oddity” of the Commission regulating “ILEC attachments to their own poles.” Coalition, p. 141. But the term “utility” also includes “any person who is a local exchange carrier . . .” 47 U.S.C. § 224(a)(1). Consequently, this reasoning could apply equally to facilities-based CLECs that own or control “poles, ducts, conduits, or rights-of-way.” Regardless, there would be no rates, terms, and conditions for the Commission to regulate when it comes to attaching to one’s own poles.

Meeting the demands of an evolving market place, as well as addressing the § 706 directive, is what the Commission’s § 224 authority to regulate the rates, terms and conditions of *any and all pole attachments* is meant to achieve. The absence of a specific formula merely reflects the Congress’s intent to give the Commission the flexibility to respond to the unanticipated directions in which the market has and will continue to evolve.

***(c) The Commission doesn’t need to rely on selective quotations from the legislative history of the Telecommunications Act of 1996 because § 224 is unambiguous.***

Some electric companies cite legislative history to bolster their contention that ILECs are not among the group of attachers whose attachments are within the purview of the Commission to regulate.<sup>34</sup> Citing to legislative history is unnecessary where, as is the case here, the statute itself is unambiguous.<sup>35</sup> Regardless, these citations represent little more than selective snippets from the legislative history or conclusory statements of Congressional intent.<sup>36</sup>

It’s important not to get caught up in a battle over competing quotations. While legislative history can be a helpful tool in uncovering Congressional intent when faced with an ambiguous statute—not really an issue here—legislative history is not necessarily determinative. In fact, the Supreme Court has previously held that, in divining Congressional intent, not “every permissible application of a statute [need] be expressly referred to in its legislative history.”<sup>37</sup> In

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<sup>34</sup> Coalition, pp. 140 n.156, 143; Florida IOUs, p. 73; and Oncor, p. 66.

<sup>35</sup> *NCTA*, 534 U.S. at 333 (finding § 224 unambiguous). *Milavetz, Gallop, & Milavetz P.A. v. U.S.*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1324, 176 L.Ed.2d 79 n.3 (2010) (noting that legislative history is not needed when the statute is unambiguous). *See also, Lamie*, 540 U.S. at 536 (“We should prefer the plain meaning since that approach respects the words of Congress. In this manner we avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history.”); *Bruesewitz v. Wyeth Inc.*, 561 F.3d 233, 244 (3d Cir. 2009), *cert. granted*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1734, 176 L.Ed.2d 211 (2010). (“We have recognized that legislative history is not without its shortcomings as a tool of interpretation. ‘As a point of fact, there can be multiple legislative intents because hundreds of men and women must vote in favor of a bill in order for it to become a law.’ *Morgan v. Gay*, 466 F.3d 276, 278 (3d Cir. 2006); *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) (noting that ‘legislative history is itself often murky, ambiguous, and contradictory,’ and that it ‘may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to . . . secure results they were unable to achieve through the statutory text’).”)

<sup>36</sup> In its 2008 Comments, AT&T referred the Commission to other quotations from House and Senate conference reports wherein the members expressed the intent to cover the attachments of “all providers of telecommunications services.” 2008 AT&T Comments, pp. 29-30, citing H.R. Rep. No. 104-458, at 206; S. Rep. No. 104-230, at 206 (1996).

<sup>37</sup> *Moskal v. U.S.*, 498 U.S. 103, 111 (1990).

short, a statute can and often does have much broader application than the legislative history might indicate.<sup>38</sup>

Some electric companies argue that § 224 was intended to benefit competitive LECs.<sup>39</sup> Undoubtedly it is true that an immediate aim of § 224 was to make poles and conduits available quickly and at non-monopolistic prices to facility-based CLECs. And there are plenty of references in the legislative history to support this. Nevertheless, the electric companies miss the bigger picture. Congress amended § 224 as part of its efforts to open up the telecommunications market. When it did this, Congress cracked open a “technical, complex, and dynamic” market that “might be expected to evolve in directions . . . it [Congress] could not anticipate.”<sup>40</sup> To meet that challenge, Congress gave the Commission ample power to regulate that dynamic and evolving market, including the power to regulate any pole attachments. And as pointed out in AT&T’s comments in this docket, § 224 is one of the tools the Commission has to address the § 706 directive to “promote competition in the local telecommunications market” and to “remove barriers to infrastructure investment” for deployment of advanced telecommunications capabilities.<sup>41</sup> The limited analysis of the legislative history proffered by the electric companies distorts the plain meaning of the statute, leading to a result that would only unnecessarily tie the Commission’s hands and limit the Commission’s response to changes in this dynamic market place.

***(d) The Commission’s prior § 224 rulemakings do not change the fact that the Act is unambiguous and applies to pole attachments by ILECs.***

The Coalition points out that the Commission’s pole-attachment regulations apply to “telecommunications carriers” only and fail to refer to “providers of telecommunications

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<sup>38</sup> *PGA Tour v. Martin*, 532 U.S. 661, 689 (2001) (“[T]hat a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth,” citing, *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998)).

<sup>39</sup> Florida IOUs, p. 73; Oncor, p. 66 n.277.

<sup>40</sup> *NCTA*, 534 U.S. at 339.

<sup>41</sup> 47 U.S.C. § 157 nt. AT&T, pp. 8-9.

services” at all,<sup>42</sup> and that the ILEC community’s failure to seek reconsideration of these regulations written solely for “telecommunications carriers” is an indication that the position taken by the ILECs and their trade associations is “insincere” and is merely a “recent concoction . . . to rewrite the statute as well as the FCC’s implementation of it.”<sup>43</sup> This is a patent distortion of the position of the ILECs.

*First*, without a doubt, the intense focus of the Commission and the industry shortly after the passage of the Telecommunications Act of 1996 was on implementing the provisions of the Act that would inject immediate competition into the market place. This meant, among other things, prescribing the regulations expressly called for in § 224(e)(1) (applicable to telecommunications carriers) to facilitate the attachment of facility-based CLEC plant to poles. As for the ILECs, their attention back then was largely concentrated on making sure that those newly prescribed regulations for telecommunications carriers were consistent with their reading of the Act and based on good public policy. The absence of regulations governing pole attachments by ILECs is not at all odd given both the Commission’s immediate goals and the then state of the market place.

*Second*, the meaning of a statute doesn’t depend on whether third parties did or did not take certain actions to fully actualize the law or on whether they may have allegedly failed to see the potential of a law in some timely fashion. The only test for the interpretation of a law is the intent of the legislative body that enacted it. And, when the statute in question is unambiguous, as is the case here, that intent is derived from the text of the law itself.<sup>44</sup> The Coalition’s new and unique rule of statutory interpretation—most charitably described as the “use it or lose it”

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<sup>42</sup> Coalition, p. 141.

<sup>43</sup> *Id.*, p. 143.

<sup>44</sup> *U.S. v. Goldenberg*, 168 U.S. 95, 102 (1897) (“The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he used. He is presumed to know the meaning of words and the rules of grammar.”). See also, *Lamie*, 540 U.S. at 534; and, *Dodd v. U.S.*, 545 U.S. 353, 359 (2005) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000): “[W]hen the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”).

rule of statutory construction—is not only bizarre but flatly inconsistent with decades of American jurisprudence.

*Third*, and most important, times have changed. The thrust of the U.S. Telecom petition and the comments of the ILECs filed in this proceeding since 2007 has been to illuminate the changes in the current utility pole market and the effect these changes have had on the ability of ILECs to compete, in particular in the broadband market. These changes include the dramatic increase in the space requirements on the poles (electric companies versus ILECs), the multiplication of the number of attachers occupying space on poles (from two to five), and the change in the relative ownership of the poles (from rough parity to electric company domination).<sup>45</sup> All of these changes have culminated in decreased value in the so-called benefits of joint-use poles—see below—and sky-rocketing pole attachment rates. Without revisiting all the details that AT&T has placed in this record of this proceeding, we remind the Commission that electric companies are demanding ever increasingly higher pole rental rates for the ILEC’s “reserved” space on the pole—a space used by other attachers whose rental rates do nothing to lower the rates paid by ILECs.<sup>46</sup> Electric companies have not denied this. In fact, they see these pole assets as “profit centers” and hope to maximize their profits by trying to take advantage of the Commission’s failure to recognize its obligations under § 224.

Now the Commission is contemplating lowering pole-attachment rates even further, giving electric companies more incentive to seek higher rental rates from ILECs. Without active participation from the Commission in its statutory role, the utility pole market will swing even more wildly out of kilter further distorting the telecommunications market place in direct violation of the Commission’s § 706 obligations and contrary to the Commission’s stated goals in this proceeding and in the NBP.

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<sup>45</sup> Estimates of ILEC pole ownership go as low as at least 25% of the total number of privately owned utility poles.

<sup>46</sup> The ILECs’ effective space is roughly 1’ to 1½’ per pole. In short, the ILEC space on the pole is shrinking due to improved technology and due to the attachments of others in the communications space. See AT&T 2008 Comments and 2008 Reply Comments, generally, including the Declarations of Veronica Mahanger MacPhee and Philip Jack Gauntt.

To summarize, these attempts by the electric utilities to attack the ILECs' central argument in favor of the Commission's adopting a comprehensive and uniform broadband pole-attachment rate for all (including ILECs) is based on a calculated misreading and distortion of the text and meaning of § 224. Not only does the Commission have the authority to adopt such a rate, it must do so in light of the potential harm it would cause for the Commission to further distort the utility pole market place by lowering the rate for some and leaving ILECs to fend for themselves in the face of electric utilities' rapacious demand for higher and higher pole rentals. The failure to adopt an across-the-board, uniform broadband pole attachment rate for all attachers, including ILECs, would be both bad public policy and a breach of the Commission's § 706 obligation to remove barriers to broadband infrastructure investment and promote competition in the telecommunications market.

***3. The perceived benefits of JUAs do not justify the exorbitant rates demanded of ILECs by electric utilities.***

In its comments, the Coalition seeks to dissuade the Commission from accepting its statutory obligation to guarantee just and reasonable rates, terms, and conditions for ILEC pole attachments and from addressing advanced telecommunications under § 706 by mudding up the record in this proceeding on the status of joint-use agreements.<sup>47</sup>

***(a) Some commenters purposefully confuse "joint ownership" and "joint use."***

Joint-ownership agreements are fundamentally different from joint-use agreements and license agreements. Joint ownership is based on all joint-ownership parties having an equity stake in each joint-ownership pole. Under this arrangement, each owner pays a percentage of the costs associated with installation, inspection, and maintenance of the pole. There are no rate negotiations or formulae to determine what each party will pay. In addition, in most situations, the joint-ownership parties share in the revenue from third-party attachers. This arrangement is profoundly different from the joint-use arrangement and is not anywhere near as pervasive.

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<sup>47</sup> Coalition, pp. 134-38.

Naturally, where an ILEC jointly owns a pole with other utilities, the ILEC would not need to seek regulatory review of the rates, terms, and conditions associated with the ILEC's attachments any more than it would if the ILEC were attaching to its own pole.

***(b) Many of the perceived benefits of joint-use agreements are either insignificant or are the result of external circumstances peculiar to pole-owning ILECs.***

Joint-use agreements and license agreements are not so fundamentally different from each other and, in fact, are becoming more similar with each new agreement. Each agreement involves rate negotiations, and rates are generally based on embedded costs, the amount of space occupied, and the costs associated with maintaining poles. The main difference in rate structures lies in the fact that electric utilities now leverage their ownership advantage—owning considerably more poles than ILECs—to charge unreasonably high attachment rates from ILECs, and, in the absence of Commission action, ILECs have little recourse but to accept and pay those rates.

This ownership advantage—*i.e.*, the fact that AT&T is attached to nearly 10 million electric utility poles while electric utilities are attached to three million AT&T poles—can be explained by examining the electric utilities' operational practices in the joint-use pole arena over the past few decades. Contrary to the electric companies' former practices when pole ownership was in rough parity and the telecommunications market was a "natural monopoly," many operational activities of electric utilities serve to inflate their dominance in pole ownership. *First*, electric utilities get a "leg up" on installing poles because they are contacted by customers before the construction of new facilities, while ILECs are not contacted until the actual building activity has begun or has been completed. This is so because of the widespread use of mobile phones and other wireless technologies, making wireline phone service less critical to construction crews. Electricity, on the other hand, is utilized by construction crews for lighting, machinery, and power tools.

*Second*, electrical utilities are usually contacted first after storms damage utility poles, and they replace all poles, regardless of ownership.

*Third*, when the need arises to replace an ILEC pole, some electrical utilities have admitted to replacing ILEC poles without contacting the ILEC, either before or after the replacement. This practice is usually uncovered during field inventories used to reconcile utility records used as a basis for payment of pole-attachment rental fees. All of these situations—none of which can be attributed to any purported ILEC unwillingness to maintain pole ownership levels—contribute to the ever increasing disparity in pole ownership levels between electric utilities and ILECs, a disparity that fuels the increase in electric company bargaining power and the concomitant higher pole-attachment rates.<sup>48</sup>

In addition to this ownership disparity that enhances electric company bargaining power for increasingly higher pole rental rates, the terms of joint-use agreements are not as favorable as they used to be. For example, while not universal, it is generally true that ILECs are not allowed to rent the communications space on electric utility poles to other attachers and collect rent. As a matter of fact, contract language usually prohibits this practice. This means that the electric companies are getting more revenue from other sources to offset the cost of installing and maintaining poles at the same time that the rates ILECs must pay to electric companies are increasing. ILECs don't see any rental income or reciprocal reduction in rental rate even though the so-called space "reserved" for ILECs is "sublet" to others.

It is true that ILECs do not generally pay application fees and project engineering and inspection costs, but unlike other attachers, ILECs have fulltime engineers and construction managers who perform field surveys and pole loading calculations, along with inspections of ongoing and completed pole construction.<sup>49</sup> The costs for these activities are built into the day-

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<sup>48</sup> AT&T has attempted to address pole ownership disparity in negotiations with electric utilities. Anecdotally AT&T can note that such requests are often met with flat-out refusals to negotiate or the electric utilities' counter proposal—*i.e.*, that AT&T simply install more poles to rebalance pole ownership levels—which is unrealistic for reasons stated in AT&T's 2008 Comments/Reply Comments and in these comments, as well.

<sup>49</sup> Similarly, ILECs do not require such fees of joint-use electric utilities. In cases where electric utilities do perform pole work on behalf of the ILECs, however, contracts specify that the ILEC will reimburse the electric utility based on the actual cost to perform the work.

to-day operational expenses of being a utility pole owner. Electric utilities aren't concerned about ILEC attachments because they know that, as a rule, they will be properly installed—often, if not always, in conformance with long-standing and well-proven Bell operating practices. Electric companies are more concerned about renegade attachments, which may not be permitted and which may be substandard. In short, because both ILECs and electric utilities have professional engineering departments and strict safety and installation practices, there is almost no concern that either party will improperly attach, making permits, fees, and inspections generally unnecessary.

Electric utilities also complain that ILECs don't pay as much in make-ready costs as other attachers.<sup>50</sup> Pole-attachment contracts are written so that the cost causer is responsible for the costs associated with either rearranging facilities on a pole or replacing the pole with a taller or stronger pole to enable the attachment of the cost causer's facilities. ILECs do not enjoy immunity from this requirement under joint-use agreements. Assuming for the sake of argument that ILECs don't incur as much in make-ready costs as other attachers in the communications space, it is probably due to the fact that ILECs are not typically the cost causer because they are frequently the second attacher on the pole.<sup>51</sup> Nevertheless, they incur not only make-ready costs (even on their own poles) but they also incur costs these other attachers do not, such as the costs of installing and maintaining poles. And, as noted in AT&T's comments, while pole height has increased, ILEC space has decreased and "the obsolete rate[] arrangements in . . . joint use agreements still require ILECs to defray some 40-50 percent of the cost of [electric company]-owned joint use poles in the form of annual rental rates."<sup>52</sup> The ILECs' "ongoing expense of subsidizing their competitors" is a far greater burden than these attachers' "intermittent, episodic costs."<sup>53</sup>

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<sup>50</sup> Coalition, p. 135.

<sup>51</sup> One reason that the ILEC may be the second attacher is that, in most jurisdictions, ILECs are still the carrier of last resort.

<sup>52</sup> AT&T, pp. 15-16, citing MacPhee Reply Decl. para. 16.

<sup>53</sup> *Id.*

The concept of “reserved” space on poles for ILECs is quickly becoming a fond memory. There are two predominant reasons for this. *First*, room in the communications space cannot be guaranteed because pole owners have an obligation to provide an opportunity to others (CATVs and CLECs) to attach if any space is available on that portion of the pole. *Second*, technological advances in their networks (*e.g.*, increased use of fiber) have resulted in fewer attachments and a smaller diameter cable to serve a substantially larger group of customers, thereby eliminating the need to return and add more attachments. The opposite is true for electric companies. Technological advances on the electrical distribution side have resulted in a need for *more* space on poles.<sup>54</sup>

Negotiations between ILECs and electric companies over the joint-use agreement rates, terms, and conditions can vary. Depending on the electric companies and locations involved, joint-use agreement terms can now include increased make-ready costs; deletion of clauses guaranteeing continued occupancy after attachments have been installed, requiring ILECs to replace poles or vacate them in order to accommodate new attachments by the electric utility; and requiring permits for all installations (with the exception of service drop wires).

Many joint use agreements contain provisions that require the ILEC to remove all existing attachments from joint use poles upon termination. If the ILEC attempts to challenge electric utility demands for higher rates and onerous terms and conditions, the electric utility will threaten to terminate, and in many cases will terminate the agreement, insisting on a completely new agreement, rather than simply amending an existing agreement. Where ILECs are still required to be the provider of last resort and where the termination of the old joint-use agreement would bar any new attachments on the electric utility’s poles, the costs of providing wireline telephone service to consumers goes up substantially, even as ILECs continue to lose access lines by the thousands every quarter.

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<sup>54</sup> Electric companies use around 8 to 12’ per pole, where ILECs need only around 1.5’.

## **CONCLUSION:**

ILECs are forced to defend their pole attachment rights on two different fronts as a result of the current regulatory environment: as owners and as attachers. *As a pole owner*, ILECs are forced to provide access to their poles by competitors, at rates which are substantially lower than the rates that ILECs pay to attach to electric utility owned poles. Nothing in the legislation of the Telecommunications Act of 1996 suggests that rates paid by ILECs must be higher—much less substantially higher—than rates paid by cable providers or CLECs. *As a pole attacher*, ILECs must attempt to negotiate in a hostile environment with electric utilities, which have significantly increased power in the utility pole market. Coincidentally, as ILECs pay higher rates, the terms of the joint use agreements become increasingly less favorable to them.

The Commission needs to step up to its § 224 responsibilities to insure just and reasonable rates, terms, and conditions for all pole attachments, including pole attachments by ILECs on electric utility poles. And the Commission must meet its § 706 obligations to remove barriers to broadband infrastructure investment and promote competition in the telecommunications market. If the Commission believes that lowering pole attachment rates will promote deployment of broadband infrastructure and, in turn, further the NBP goals of increasing broadband speeds and availability, then the Commission needs to start with a uniform, across-the-board broadband pole attachment rate applicable to all § 224 pole attachment entities, which include ILECs.

Respectfully submitted,

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