Docket Nos. 18-72689 (L), 19-70490

In the

United States Court of Appeals

For the

Ninth Circuit

AMERICAN ELECTRIC POWER SERVICE CORPORATION, CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC, DUKE ENERGY CORPORATION, ENTERGY CORPORATION, ONCOR ELECTRIC DELIVERY COMPANY LLC, SOUTHERN COMPANY, TAMPA ELECTRIC COMPANY, VIRGINIA ELECTRIC AND POWER COMPANY and XCEL ENERGY SERVICES INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

VERIZON and USTELECOM-THE BROADBAND ASSOCIATION,

Respondents-Intervenors.

On Petition for Review of Order of the Federal Communications Commission, No. 18-111

JOINT OPENING BRIEF FOR PETITIONERS

ERIC B. LANGLEY, ESQ.
ROBIN F. BROMBERG, ESQ.
LANGLEY & BROMBERG LLC
2700 U.S. Highway 280, Suite 240E
Birmingham, Alabama 35223
(205) 783-5750 Telephone

Attorneys for Petitioners, American Electric Power Service Corporation, Duke Energy Corporation, Entergy Corporation, Oncor Electric Delivery Company LLC, Southern Company, and Tampa Electric Company

BRETT H. FREEDSON, ESQ.
CHARLES A. ZDEBSKI, ESQ.
ROBERT J. GASTNER, ESQ.
ECKERT SEAMANS CHERIN & MELLOTT, LLC
1717 Pennsylvania Avenue NW 12th Floor
Washington, District of Columbia 20006-4604
(202) 659-6600 Telephone

Attorneys for Petitioners, CenterPoint Energy Houston Electric, LLC and Virginia Electric and Power Company d/b/a Dominion Energy Virginia and d/b/a Dominion Energy North Carolina

Additional Counsel Listed Inside Cover

COUNSEL PRESS · (213) 680-2300 PRINTED ON RECYCLED PAPER

DAVID D. RINES, ESQ.
KEVIN M. COOKLER, ESQ.
LERMAN SENTER PLLC
2001 L Street, NW, Suite 400
Washington, DC 20036
(202) 429-8970 Telephone

Attorneys for Petitioner,
Xcel Energy Services Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the undersigned counsel for Petitioners discloses the following:

American Electric Power Service Corporation ("AEP Service Corp.") is a wholly owned subsidiary of American Electric Power Company, Inc. ("AEP"), which is a publicly traded corporation.

CenterPoint Energy Houston Electric, LLC ("CenterPoint") is a wholly owned subsidiary of CenterPoint Energy, Inc., which is a publicly traded corporation.

Duke Energy Corporation ("Duke Energy") has no parent company and there are no publicly held companies that have a 10% or greater ownership interest in Duke Energy.

Entergy Corporation ("Entergy") has no parent company and there are no publicly held companies that have a 10% or greater ownership interest in Entergy.

Oncor Electric Delivery Company LLC ("Oncor") is majority-owned by Sempra Energy Inc. which is a publicly traded corporation.

Southern Company ("Southern") has no parent company, and there are no publicly held companies that have a 10% or greater ownership interest in Southern.

Tampa Electric Company ("Tampa Electric") is a wholly owned subsidiary of TECO Energy, Inc. which is a wholly owned subsidiary of Emera, Inc., a publicly traded corporation.

Virginia Electric and Power Company d/b/a Dominion Energy Virginia, and d/b/a Dominion Energy North Carolina ("Dominion") is a wholly owned subsidiary of Dominion Energy, Inc. a publicly traded corporation.

Xcel Energy Services Inc. ("Xcel Energy") is a wholly owned subsidiary of Xcel Energy Inc., a publicly traded corporation.

Dated: June 24, 2019

s/Eric B. Langley
Eric B. Langley
Langley & Bromberg LLC
2700 U.S. Highway 280, Suite 240E
Birmingham, Alabama 35223
(205) 783-5750
eric@langleybromberg.com

Counsel for Petitioners American Electric Power Service Corporation, Duke Energy Corporation, Entergy Corporation, Oncor Electric Delivery Company LLC, Southern Company, and Tampa Electric Company

All other parties on whose behalf this filing is submitted concur in its content. *See* 9th Cir. R. 25-5(e).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Petitioners believe that this case raises significant statutory issues, and that oral argument may assist the Court in resolving those issues. Petitioners respectfully request oral argument, pursuant to 9th Cir. R. 34(a).

GLOSSARY

Act	The Pole Attachments Act, 47 U.S.C. § 224, as amended
CATV	Cable television provider
CLEC	Competitive Local Exchange Carrier (as distinguished from an incumbent local exchange carrier, or "ILEC")
FCC	Federal Communications Commission
ILEC	An incumbent local exchange carrier as defined by 47 U.S.C. § 251(h)(1); former Bell telephone companies, such as AT&T and Verizon are ILECs within their ILEC service territories
make-ready	Make-ready refers to the work necessary to prepare a pole for a proposed additional attachment. Such preparations typically involve rearranging existing attachments to make room for the new attachment.
NESC	National Electric Safety Code, Institute of Electrical and Electronics Engineers, Inc. (2017)
NPRM	*Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, WC Docket No. 17-84, 32 FCC Rcd. 3266 (April 21, 2017)
Order	*Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, FCC 18-111, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd. 7705 (Aug. 3, 2018) The Order was adopted by the FCC on August 2, 2018, released on August 3, 2018, and entered on September 14, 2018 (via publication in the Federal Register). 83 Fed. Reg. 46812 (September 14, 2018)
overlashing	Overlashing means the tying, draping, twisting, lashing, wrapping or otherwise affixing of fiber optic cable, coaxial cable or other wires over or around existing messenger strand or other cables or wires already attached to a pole
preexisting violation	A violation of applicable codes or standards by an existing attacher that was not caused by the attacher seeking to make the new attachment
Telecom Rate	The annual pole attachment rate yielded by the FCC's telecommunications formula, 47 C.F.R. § 1.1406(d)(2) pursuant to 47 U.S.C. § 224(e)

1996 Order	*Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Report and Order, 11 FCC Rcd. 15499 (1996)
1998 Order	*Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, 13 FCC Rcd. 6777 (1998)
2001 Order	*Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-98, 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103 (May 25, 2001)
2011 Order	*Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd. 524 (April 7, 2011); the 2011 Order was subsequently published in the Federal Register at 76 Fed. Reg. 26620 (May 9, 2011)

JURISDICTIONAL STATEMENT

This appeal seeks review of an order by the FCC: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, FCC 18-111, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd. 7705 (Aug. 3, 2018) (the "Order").[1]

The subject matter of the Third Report and Order within the Order is the FCC's rules and policies governing pole attachments, as promulgated pursuant to Section 224 of the Communications Act of 1934, (codified as 47 U.S.C. § 224). The Petitioners are each investor-owned electric utilities and pole owners that are subject to the FCC's pole attachment jurisdiction under § 224. Each of the Petitioners participated in the rulemaking proceeding underlying the Order. The Order is an appealable final agency action. This Court has jurisdiction pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

The Third Report and Order within the Order was released by the FCC on August 3, 2018, entered on September 14, 2018 via publication in the Federal Register, 83 Fed. Reg. 46812 (Sept. 14, 2018), and became effective March 11, 2019, 84 Fed. Reg. 2460 (Feb. 7, 2019) with respect to the new ILEC complaint rule

[1] Case No. 19-70490 seeks review only of the Third Report and Order within the *Order*. Case No. 18-72689 seeks review of the Declaratory Ruling portion and is being briefed separately. Order of Appellate Commissioner Shaw, No. 19-70490 (Apr. 18, 2019), Dkt Entry 45 ("Briefing Order").

and May 20, 2019, 84 Fed. Reg. 16412 (April 19, 2019) with respect to the non-ILEC pole attachment rules. The Petition for Review was timely filed on October 18, 2018, pursuant to 28 U.S.C. § 2344, in the United States Court of Appeals for the Eleventh Circuit. On March 1, 2019, the Eleventh Circuit transferred the case to this Court (Dkt Entry 1 in No. 19-70490). On March 20, 2019, this Court consolidated this case with case No. 18-72689 (Dkt Entry 20 in No. 19-70490).

STATEMENT OF THE ISSUES

1) Whether the FCC's new "preexisting violation" rules—which prohibit an electric utility pole owner from denying access to a pole, delaying completion of make-ready, or preventing an attacher from overlashing because of a "preexisting violation" on the pole—conflict with the plain language of 47 U.S.C. § 224(f)(2), which allows electric utilities to deny access "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes"?

2) Whether the FCC's new rules regarding overlashing— which purport to prevent an electric utility from a) denying the proposed overlashing for those reasons set forth in 47 U.S.C. § 224(f)(2), b) requiring the overlasher to provide the technical and engineering specifications of the materials it intends to overlash, and c) recovering the cost of performing an engineering evaluation of the overlashing—are inconsistent with § 224 and/or arbitrary and capricious?

3) Whether the FCC's new "self-help" remedy in the electric supply space—which allows an attacher to move electric facilities in the electric supply space on a utility pole where the electric utility has not performed make-ready within the deadlines set forth in the FCC's rules—exceeds the FCC's authority under 47 U.S.C. § 224 and/or is arbitrary and capricious?

4) Whether the FCC's new ILEC complaint rule—which adopts a presumption that ILECs are "similarly situated to" "telecommunications carriers"

(even though 47 U.S.C. § 224(a)(5) expressly excludes ILECs from the meaning of "telecommunications carrier" for purposes of § 224)—is inconsistent with the plain language of the Act and the underlying record?

STATEMENT REGARDING ADDENDUM

Pertinent statutes and regulations are set forth in the addendum bound hereto in accordance with Ninth Cir. R. 28-2.7.

STATEMENT OF THE CASE

1. Statement of the Facts

The facts related to each of the issues under review are set forth below:

Preexisting Violations Issue

The Act states that an electric utility may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way on a nondiscriminatory basis "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C. § 224(f)(2). Congress implemented this exception to ensure that the placement of attachments on existing utility poles would not endanger or compromise the safety of the public or the safety, reliability and integrity of the nation's electric and communications infrastructure. *See*, *e.g.*, 2011 Order, 26 FCC Rcd. at 5277, ¶ 80 (citing 1996 Order, 11 FCC Rcd. at 16081, ¶ 1177).

In certain circumstances, a hazardous condition may exist on a pole which, for reasons of safety, must be corrected before any new attachments can be made. However, the FCC's new rules prohibit a utility from denying access to its pole for reasons of safety (either by preventing an attacher from overlashing or delaying completion of make-ready) where such a condition arises from a so-called

"preexisting violation" of an applicable standard. 47 C.F.R. § 1.1411(c)(2) (2018). This prohibition directly contradicts the plain language of 47 U.S.C. § 224(f)(2).

Overlashing Issue

"Overlashing" is the tying, draping, twisting, lashing, wrapping or otherwise affixing of fiber optic cable, coaxial cable or other wires over or around existing messenger strand or other cables or wires already attached to a pole. *See* 1998 Order, 13 FCC Rcd. at 6805, ¶ 59. Overlashing results in the modification and expansion of an existing wireline attachment in terms of its surface area, thickness and weight dimensions. Though the FCC has previously determined that an overlash is not a new attachment for purposes of the permitting process and the attachment rate, the FCC has also confirmed that a utility can deny access to overlashers for reasons of insufficient capacity, safety, reliability, or generally applicable engineering purposes pursuant to § 224(f)(2) of the Act. *See* 1998 Order 13 FCC Rcd. at 6808, ¶ 64; *see also S. Co. Services, Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002).

The FCC asserts that its new rule is intended to codify its long-standing policy on overlashing. As adopted, however, certain provisions of the new rule deviate sharply from this long-standing policy and undermine an electric utility's right to deny access to overlashers for reasons of insufficient capacity, safety, reliability, or engineering purposes pursuant to § 224(f)(2).

Supply Space Self-Help Remedy Issue

The space above minimum grade clearance on an electric utility pole is divided into three areas: the communications space, the communication worker safety zone, or "safety space", and the electric space (also commonly referred to as the "supply space"):

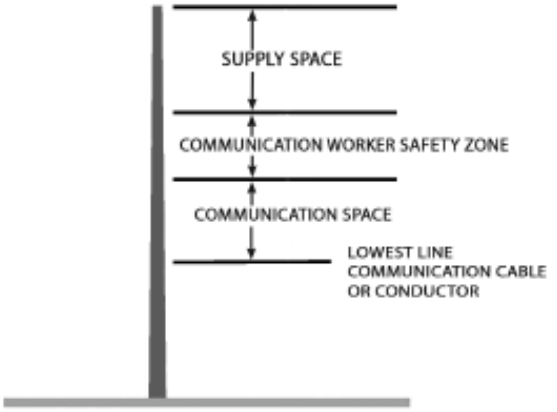

Figure D-1—Communication space

NESC, Figure D-1 (2017). Power lines are almost exclusively located on the upper-most portion of utility poles (*i.e.* the "supply space"), and historically, the equipment (predominantly wires) of telecommunications carriers and cable system operators are located lower on the pole beginning at the required minimum grade clearance (*i.e.* the communications space). *See Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C.2d 59, 69–70 (1979). In between the electric space and communications space, there is the "safety space," (typically forty (40) inches per the NESC). *See id*. The safety space is

intended to minimize the likelihood of physical contact between employees working on communications lines and the potentially lethal voltage carried by the electric lines. *Id*. at 70. Occasionally, the make-ready work necessary to accommodate a new communications attachment involves the rearrangement of energized facilities within the electric supply space (such as adjusting the electric facilities upward on the pole).

In the 2011 Order, the FCC first adopted a "self-help" remedy for new attachers, but specifically limited the remedy to work within the communications space. The FCC did not allow attaching entities to perform work "among the electric lines, for historical, statutory, and safety reasons." 2011 Order, 26 FCC Rcd. at 5277, ¶ 80. Even the Order acknowledged that "[w]ork in the electric space generally is considered more dangerous than work in the communications space." Order, ¶ 6 (ER 3-4). However, the Order dramatically changed course and created a "self-help remedy" to allow new attachers to use a utility-approved contractor to complete required make-ready work above the communications space (including in the electric supply space), when utilities and existing attachers have not met the FCC's make-ready work deadlines to perform work preparing a pole for a new attachment. Order, ¶ 97 (ER 47-48).

The FCC first revealed this shift in position via the draft version of the Order that it released shortly before finalizing and voting on the order. It was not

addressed in the NPRM that precipitated the rulemaking. *See* NPRM, 32 FCC Rcd. 3266. It was also not discussed or recommended by the Broadband Deployment Advisory Committee ("BDAC") formed by the FCC. *See* Broadband Deployment Advisory Committee, FCC, Report of the Competitive Access to Broadband Infrastructure Working Group (2018).[2]

ILEC Complaint Rule Issue

Since the advent of their respective services, telephone and electric utilities have shared pole networks for the deployment of their respective services. These arrangements between telephone and electric utilities are historically embodied in privately negotiated "joint use agreements." Under these joint use agreements, the telephone and electric utilities have access to each other's poles in their overlapping service areas. Each party agrees to share the capital costs necessary to build the pole network and the ongoing operating costs of the network. Joint use agreements eliminated the need for each party to build its own redundant pole network, saving each party (and their customers) money and sparing the public from an aesthetic nuisance.

---

[2] Available at: https://ecfsapi.fcc.gov/file/107030255502405/Competitive%20Access%20to%20Broadband%20Infrastructure%20Report.pdf. The BDAC was established by the FCC in January 2017 to advise on how best to remove barriers to broadband deployment. Order, ¶ 9 (ER 6).

The Act, as first enacted by Congress in 1978, gave the FCC limited authority to regulate the rates, terms, and conditions for cable television attachments to telephone and electric utility poles. In 1996, as part of the Telecommunications Act of 1996, Congress amended the Act in three important ways. First, Congress added a new entity entitled to specific regulatory protections—the "telecommunications carrier" (which, for purposes of the Act, specifically excludes "any incumbent local exchange carrier as defined in section 251(h) of this title"—*i.e.* the incumbent telephone utilities whose poles were subject to the FCC's jurisdiction). 47 U.S.C. § 224(a)(5). Second, Congress gave cable operators and telecommunications carriers a mandatory right of access to electric utility and ILEC poles. *See id.* at § 224(f)(1). Third, Congress added attachments by a "provider of telecommunications service" to the definition of "pole attachment" (over which the FCC has jurisdiction under § 224(b)(1)). *See id.* at §§ 224(a)(4), 224(b)(1).

The purpose of the amendments was to allow the ILECs' competitors access to utility poles at regulated rates. *See* S. Rep. No. 103-367, 22 (1995) (stating that the bill that formed the basis for the Telecommunications Act of 1996 "includes revisions to Section 224 of the 1934 Act to allow competitors to the telephone companies to obtain access to poles owned by utilities and telephone companies at rates that give owners of the poles a fair return on their investment"). In an early

rulemaking implementing the 1996 Act, the FCC noted: "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**." 1998 Order, 13 FCC Rcd. at 6781, ¶ 5 (emphasis added).

In April 2011, the FCC, for the first time, concluded that:

> …incumbent LECs…are entitled to rates, terms and conditions that are "just and reasonable" in accordance with section 224(b)(1)…We therefore allow incumbent LECs to file complaints with the Commission challenging the rates, terms and conditions of pole attachment agreements with other utilities.

2011 Order, 26 FCC Rcd. at 5328, ¶ 203. The FCC reasoned that under § 224, the terms "telecommunications carrier" and "provider of telecommunications services" mean two different things. *See id.* at 5331-332, ¶¶ 209-211. According to the FCC, an ILEC is not a "telecommunications carrier" entitled to mandatory access under § 224(f)(1) or the telecom rate under § 224(e), but an ILEC is nonetheless a "provider of telecommunications services" as the phrase is used within the definition of "pole attachments." Because the FCC's jurisdiction under § 224(b) extends to "the rates, terms and conditions for pole attachments," the FCC reasoned that it thus has jurisdiction over the rates, terms, and conditions for ILEC pole attachments to electric utility poles. *See id*. The actual rule adopted by the FCC in the 2011 Order stated, in part:

> …In complaint proceedings where an incumbent local exchange carrier (or an association of incumbent local exchange carriers) claims that it is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) [*sic*] or a cable television system for purposes of obtaining comparable rates, terms or conditions, the incumbent local exchange carrier shall bear the burden of demonstrating that it is similarly situated by reference to any relevant evidence, including pole attachment agreements.

47 C.F.R. § 1.1424 (2011), replaced with 47 C.F.R § 1.1413 (2018).

The D.C. Circuit upheld the FCC's finding in the 2011 Order that it had jurisdiction to "regulate the rates, terms, and conditions for pole attachments" by ILECs. *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183, 187 (D.C. Cir. 2013). The D.C. Circuit also noted, however, that "because § 224(a)(5) excludes ILECs from the definition of 'telecommunications carriers,' the newly reformulated rates do not directly affect the rates chargeable to ILECs." *Id.* at 185.[3]

In paragraphs 123-129 of the Order, the FCC again changed its position. The FCC adopted a new rule applicable to pole attachment complaints filed by ILECs against electric utilities, which (1) establishes a presumption that ILECs are "similarly situated" to cable television systems and non-ILEC telecommunications carriers, (2) establishes a presumption that ILECs are entitled to the telecom rate, (3) flips the burden of proof in pole attachment complaint proceedings regarding ILEC "rates" to the electric utility, and (4) requires an electric utility to disprove

[3] "New reformulated rates" refers to regulatory revisions the FCC made to the telecom rate formula in the 2011 Order.

the presumptions by "clear and convincing" evidence. 47 C.F.R. § 1.1413(b); Order, ¶¶ 123-29 (ER 63-67).

2. Procedural History

The FCC initiated the rulemaking proceeding underlying this appeal on April 20, 2017 by adopting the NPRM. The FCC sought comment on, among other things: revisions to the pole attachment timeline; alternative pole attachment make-ready processes, including one touch make ready ("OTMR"); and creating a new rate presumption favoring ILECs. *See* NPRM, 32 FCC Rcd. at 3266, 3268-76, 3279-80, ¶¶ 7-31, 44-46 (ER 4-18, 24-25). On November 16, 2017, the FCC adopted a Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking seeking comment on the treatment of overlashing by utilities. *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC Rcd. 11128, 11188-89, ¶¶ 160-62 (2017).

On August 3, 2018, the FCC released the Order. The Order also contained a Declaratory Ruling that does not address or relate in any way to the Petitioners or any other investor owned electric utility. *See* Order, ¶¶ 140-168 ("Declaratory Ruling") (ER 71-86). While the Declaratory Ruling was entered and appealable on August 3, 2018 (*see* 47 C.F.R. § 1.4(b)(2); 47 C.F.R. § 1.103), the Third Report and

Order portion of the Order was entered via publication in the Federal Register on September 14, 2018. 83 Fed. Reg. 46812.

On October 2, 2018, the City of Portland filed its petition for review of the Declaratory Ruling in the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"). *See The City of Portland, Oregon v. FCC, et al.*, Case No. 18-72689 (9th Cir., Oct. 2, 2018). On October 18, 2018, the Petitioners filed a Petition for Review in the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") concerning the Order, and seeking review of certain pole attachment rules and policies adopted therein. Pet. for Review, *American Elec. Power Serv. Corp., et al. v. FCC*, No. 18-14408 (11th Cir. Oct. 18, 2018). On October 30, 2019, the FCC filed a Motion to Transfer the Petitioners' appeal to the Ninth Circuit. Mtn. to Transfer, *American Elec. Power Serv. Corp.*, No. 18-14408 (11th Cir. Oct. 30, 2018). On March 1, 2019, the Eleventh Circuit granted the FCC's motion and transferred the instant appeal to this Court. Order, *American Elec. Power Serv. Corp.*, No. 18-14408 (11th Cir. Mar. 1, 2019).

STANDARD OF REVIEW

Under the Administrative Procedure Act ("APA"), final agency action must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if it is in excess of statutory jurisdiction, authority, or limitations…." 5 U.S.C. §§706(2)(A)&(C). *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)[,] generally sets forth the framework by which a court reviews an agency's interpretation of a statute. *Id.* at 842–44, 104 S.Ct. 2778. Under this framework at the first step we determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43, 104 S.Ct. 2778. "[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." *Id.* at 843, 104 S.Ct. 2778.

In addition, an agency must have "examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (internal citations, quotation marks, and alterations omitted). Moreover, "[a]n 'unexplained inconsistency' in agency policy

is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)) (alteration omitted).

Even if an agency's decision does not qualify for *Chevron* deference, courts generally still give "considerable weight" to the "well-reasoned views of the agencies implementing a statute," in proportion to "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *United States v. Mead Corp.,* 533 U.S. 218, 227–28, 234–235, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (citing *Skidmore v. Swift & Co.,* 323 U.S. 134, 139–40, 65 S.Ct. 161, 89 L.Ed. 124 (1944)) (footnotes and internal quotation marks omitted). However, in the absence of any reasoned analysis by the agency, a court cannot give the agency's decision significant weight under *Mead* and *Skidmore. See Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1005 (9th Cir. 2010).

SUMMARY OF THE ARGUMENT

Preexisting Violations Issue

Section 224(f)(2) of the Act establishes that "a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C. § 224(f)(2). "Section 224(f)(2) carves out a **plain exception** to the general rule that a utility must make its plant available to third-party attachers." *S. Co. v. FCC*, 293 F.3d 1338, 1346-47 (emphasis added). The FCC's new rules prohibiting utilities from denying access for pole attachments or overlashing for *any* reason based on a preexisting violation—even for safety, reliability, capacity, and engineering concerns—directly contradict the plain language of § 224(f)(2). Because the FCC's attempt to restrict a utility's ability to deny access as provided for under § 224(f)(2) is "outside of the purview of its authority under the plain language of the statute," any inquiry on this issue "need not extend beyond the first step of the *Chevron* test." *S. Co.*, 293 F.3d at 1347.

Overlashing Issue

The FCC's rule permitting a utility to require advance notice of overlashing purports to allow utilities to determine whether the proposed overlash would create

a capacity, safety, reliability or engineering issue. 47 C.F.R. § 1.1415(c) (2018); Order, ¶ 116 (ER 58-59). As adopted, however, the rule undermines an electric utility's ability to evaluate the capacity, safety, reliability and engineering issues raise by the proposed overlashing, and completely eliminates the ability to exercise the statutory right to deny access to overlashers pursuant to § 224(f)(2). First, the rule appears to permit an overlasher to proceed despite a utility's documented safety, reliability, engineering, or capacity concerns, thus circumventing the express provisions adopted by Congress to protect the safety of the public and the safety, reliability and integrity of the nation's electric infrastructure. This is inconsistent with the plain language of § 224(f)(2) as well as with long-standing FCC policy and precedent. *See, e.g.*, Order, ¶ 57 (ER 30); 2011 Order, 26 FCC Rcd. at 5269, ¶ 59.

The Order further imposes restrictions that would prohibit utilities from requiring the information necessary to conduct any meaningful review of potential capacity, safety, reliability or engineering issues raised by the proposed overlashing, thus interfering with their ability to exercise their statutory rights under § 224(f)(2) of the Act. *See* Order, ¶ 119 n. 444 (ER 61). The FCC's justification for these restrictions is arbitrary and capricious and ignores the clear intent of Congress in enacting § 224(f)(2). *See id.* The Order also prohibits utilities from recovering the cost of evaluating the proposed overlash, even though

these costs would not be incurred but for the proposed overlash. 47 C.F.R. §1.1415(c); Order, ¶ 116 (ER 58-59). This arbitrary and capricious cost-shifting rule undercuts the purpose of § 224(f)(2) and is entirely inconsistent with the principles of cost-causation that underpin the FCC's pole attachment regulatory regime and the Act itself.

Supply Space Self-Help Remedy Issue

The FCC's expansion of its "self-help" remedy to allow an attacher to perform make-ready work in the electric space on the pole goes beyond the scope of the FCC's authority under the Act. The Act provides the FCC with the authority to regulate the rates, terms, and conditions for "pole attachments," 47 U.S.C. § 224(b)(1), which are defined in the Act as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4). Because the Act limits the FCC's authority only to matters attendant to "pole attachments" and defines the term "pole attachment" in such a way as to exclude attachments made by an electric utility pole owner, the FCC does not have the authority to regulate any equipment maintained by an electric utility and its attempt to do so is *ultra vires*.

This jurisdictional question also exposes an important safety and reliability issue. If the FCC has authority to allow third parties to rearrange energized

facilities within the electric supply space, where does its authority end? Does the FCC also have authority to dictate the manner in which an electric utility constructs its electric supply facilities in the first instance? Though the Court need not necessarily answer the preceding questions, these questions expose an essential premise: there is a limit on the FCC's authority. And a rule allowing third parties into the electric supply space exceeds that limit.

ILEC Complaint Rule Issue

The FCC's new rule applicable to pole attachment complaints filed by ILECs against electric utilities (1) establishes a presumption that ILECs are "similarly situated" to cable television systems and non-ILEC telecommunications carriers, (2) establishes a presumption that ILECs are entitled to the new telecom rate, (3) flips the burden of proof in pole attachment complaint proceedings to the electric utility, and (4) requires an electric utility to disprove the presumptions by "clear and convincing" evidence. This rule is not due any deference by this Court because the FCC failed to even mention the Pole Attachments Act (47 U.S.C. § 224) in the portion of the Order adopting the rule, let alone explain whether or how the rule complies with the Act. *See Smith v. City of Jackson*, 544 U.S. 228, 264-65 (2005).

Furthermore, the presumption that ILECs are "similarly situated" to CLECs (competitive local exchange carriers) and CATVs (cable television providers) does

not bear a "sound factual connection" to the facts and is not supported by the record. *Holland Livestock Ranch v. United States*, 714 F.2d 90, 92 (9th Cir. 1983). Instead, the FCC adopted the presumption to meet underlying policy goals. But "unlike a legislative body, which is free to adopt presumptions for policy reasons…an agency may only establish a presumption if there is a sound and rational connection between the proved and inferred facts." *Chem. Manufacturers Ass'n v. DOT*, 105 F.3d 702, 705 (D.C. Cir.1997) (internal citations omitted).

Even under *Chevron*, Rule 1.1413(b) should still be reversed and remanded. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984). The text of § 224 indicates Congress' intent to treat "providers of telecommunications service" (which, according to the FCC, now includes ILECs) *different* from "telecommunications carriers" (which all parties agree does *not* include ILECs) for purposes of the Pole Attachments Act. While Congress was silent as to what rate (if any) applies to ILECs, Congress *has* specifically spoken to the types of entities entitled to the telecom rate and specifically excluded ILECs from that group. *See Am. Elec. Power Serv. Corp.*, 708 F.3d at 185; 47 U.S.C. § 224(a)(5) and § 224(e)(1).

The rule also fails as arbitrary and capricious, as it is inconsistent with the FCC's prior reasoning and premised upon flawed assumptions. In 2011, when the FCC first asserted jurisdiction over the rates, terms, and conditions for ILEC

attachments on electric utility poles, the FCC recognized "the need to exercise that authority in a manner that accounts for the potential differences between incumbent LECs and telecommunications carrier or cable operator attachers." 2011 Order, 26 FCC Rcd. at 5334, ¶ 214. The FCC has now abandoned this position without explanation. The FCC has also adopted a prior version of the telecom rate formula as a "hard cap" on the rate electric utilities and ILECs can negotiate where an electric utility has rebutted the new presumption that ILECs are similarly situated to CLECs and CATVs. Because the previous telecom rate is wholly unmoored from the value of the benefits an ILEC receives where the presumption is rebutted, and because it was never intended to apply to ILECs (given that they are not "telecommunications carriers" for purposes of § 224(e), that rule is the very definition of arbitrary.

ARGUMENT

I. The FCC's Rules on Preexisting Violations Directly Contradict the Plain Language of § 224(f)(2).

A. The FCC's New Rule Prohibiting Electric Utilities from Denying Access for a New Attachment Due to a Preexisting Violation Directly Contradicts the Plain Language of § 224(f)(2).

The Act places a general obligation on utilities to provide cable television systems and telecommunications carriers with nondiscriminatory access to their poles. 47 U.S.C. § 224(f)(1) (2018). The Act then establishes, however, that "a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis, where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C. § 224(f)(2). In other words, "Section 224(f)(2) carves out a plain exception to the general rule that a utility must make its plant available to third-party attachers." *S. Co. v. FCC*, 293 F.3d at 1346-47. Congress implemented this provision to ensure that the placement of attachments on existing utility poles would not endanger or compromise the safety of the public or the safety, reliability and integrity of the nation's electric and communications infrastructure. 2011 Order, 26 FCC Rcd. at 5277, ¶ 80 (citing 1996 Order, 11 FCC Rcd. at 16081, ¶ 1177).

The FCC's new rule provides: "A utility may not deny the new attacher pole access based on a preexisting violation not caused by any prior attachments of the

new attacher." 47 C.F.R. § 1.1411(c)(2); *see also* Order, ¶ 122 (ER 63) ("We also clarify that utilities may not deny new attachers access to the pole solely based on safety concerns arising from a preexisting violation …").[4] This rule contravenes the express language of § 224(f)(2), the entire purpose of which is "to specify the conditions under which the general rules mandating access for third parties do not apply." *S. Co.*, 293 F.3d at 1347.[5] The FCC provides no justification for this arbitrary restriction on the statutory right of utilities to deny access under the conditions specified in § 224(f)(2) other than a general, unsupported assertion that "denying new attachers access prevents broadband deployment and does nothing to correct the safety issue." Order, ¶ 122 (ER 63).

To allow work on a pole with a preexisting safety violation endangers the safety of life and property and can lead to injury, death or damage that cannot be

---

[4] The FCC's new rules further state that a utility "cannot delay completion of make-ready because of a preexisting violation on an affected pole not caused by the new attacher." 47 C.F.R. §1.1411(h)(2) (2018). As above, this rule provides no exception for capacity, safety, reliability or engineering reasons, nor does the FCC in any way address why the conditions specified in § 224(f)(2) should not constitute "good and sufficient cause" to deviate from the make-ready time limits specified in the FCC's rules.

[5] The new rule also contradicts the NESC, which requires that "All electric supply and communication lines and equipment shall be designed, constructed, operated, and maintained to meet the requirements of these rules." NESC § 1, ¶ 012(a). However, where there is a preexisting violation, and a new attachment is permitted to be made without correction of that preexisting violation and thereby compounds it, the new attachment is being constructed in violation of the NESC.

remedied with after-the-fact repairs. Electric Utilities' Reply Cmts. on Overlashing, 9-11 (ER 874-876). The FCC's blanket prohibition on the denial of access for any reason, including safety, based on a preexisting violation not only directly contradicts Congress' intent as expressed in the plain language of § 224(f)(2), but ignores this provision of the Act entirely. In fact, in discussing its adoption of the rule on preexisting violations, the FCC makes no mention of § 224(f)(2) whatsoever. Order, ¶ 121-122 (ER 62-63).

B. Prohibiting Utilities from Denying Overlashing Due to Preexisting Violations Violates the Plain Language of § 224(f)(2).

As with the general rule on preexisting violations discussed above, the FCC's new rule on overlashing provides: "A utility may not prevent an attacher from overlashing because another existing attacher has not fixed a preexisting violation." 47 C.F.R. § 1.1415(b); *see also* Order, n. 429 (ER 59). However, both the FCC and the U.S. Court of Appeals for the D.C. Circuit have held that a utility can deny access to overlashers for reasons of insufficient capacity, safety, reliability and generally applicable engineering purposes pursuant to § 224(f)(2) of the Act. *S. Co. Servs., Inc.*, 313 F.3d at 582; 2001 Order, 16 FCC Rcd. at 12141, ¶ 73.

The only justification that the FCC provides for this arbitrary restriction is that "a party that chooses to overlash on a pole with a safety violation and causes damage to the pole or other equipment will be held responsible for any necessary

repairs." Order, ¶ 116 n. 429 (ER 59). The entire purpose of § 224(f)(2), however, is to protect people and property by enabling utilities to mitigate risk before any injury or damage can occur. Overlashing into a preexisting violation is a dangerous practice: (1) it can endanger the safety of the communications worker performing the overlashing (*e.g.*, causing the worker to be in unsafe proximity to energized electric facilities); (2) it can endanger the safety of the public by compounding existing violations (*e.g.*, low hanging wires over a roadway); and (3) it can threaten the reliability of the electric infrastructure by compounding an existing problem. *See, e.g.*, Electric Utilities' Cmts. on Overlashing, 20-22 (ER 763-765); Electric Utilities' Reply Cmts. on Overlashing, 9-11 (ER 874-876). The fact that overlashers are responsible for after-the-fact repairs does nothing to protect those who are harmed by accidents that § 224(f)(2) was enacted to *prevent*.

C. The FCC's Preexisting Violation Rules Fail at *Chevron* Step 1.

The FCC's preexisting violation rules not only directly contradict Congress' intent as expressed in the plain language of § 224(f)(2), but ignore that provision of the Act entirely. "[I]t is a 'cardinal principal of statutory construction' that courts should 'give effect, if possible, to every clause and word of a statute.'" *Liquidating Trust Comm. of the Del Baggio Liquidating Trust v. Freeman*, 834 F.3d 1003, 1013 (9th Cir. 2016) (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)) (emphasis added). In this case, the plain meaning of the statute is clear, and by

extending general rules on preexisting violations "into an area where the statutory text clearly directs that they not apply, the FCC is subverting the plain meaning of the Act." *S. Co.*, 293 F.3d at 1347. The FCC's attempt to restrict an electric utility's rights under § 224(f)(2) is therefore "outside of the purview of its authority under the plain language of the statute" and any inquiry on this issue "need not extend beyond the first step of the *Chevron* test." *Id.*

II. The FCC's Restrictions on Advance Notice of Overlashing Frustrate the Purpose of § 224(f)(2).

A. Allowing an Attacher to Overlash Despite the Fact that an Overlash Would Create a Capacity, Safety, Reliability, or Engineering Issue Violates the Plain Language of § 224(f)(2).

The FCC's new rule allows a utility to require advance notice of overlashing so that a utility may evaluate whether the proposed overlash would create a capacity, safety, reliability or engineering issue. 47 C.F.R. § 1.1415(c); Order, ¶ 116 (ER 58-59). The new rule does *not*, however, allow a utility to deny access if an issue of capacity, safety, reliability or engineering were to be identified. Rather, a utility must provide specific documentation of the issue to the party seeking to overlash, and the party seeking to overlash must address any identified issues "either by modifying its proposal or by explaining why, **in the party's view**, a modification is unnecessary." 47 C.F.R. § 1.1415(c); Order, ¶ 116 (ER 58-59) (emphasis added). On its face, the FCC's rule does not explicitly permit a utility to deny access to overlash pursuant to § 224(f)(2). Instead, the rule appears to permit

an overlasher to render a final determination with respect to any safety, capacity, reliability or engineering concern raised by an electric utility pole owner, and to proceed despite a documented safety, capacity, reliability or engineering concern.

The Court should invalidate the FCC's overlashing rule because it is inconsistent with the plain language of § 224. Alternatively, at a minimum, the Court should remand to the FCC to modify § 1.1415(c) of its rules to clarify that, where there is disagreement about whether a proposed overlash would create a capacity, safety, reliability or engineering issue, the utility may make the final binding decision, subject to FCC review through the agency's complaint process. This would be consistent with the plain language of § 224(f)(2) as well as with long-standing FCC policy and precedent. *See, e.g.*, Order, ¶ 57 (ER 30); 2011 Order, 26 FCC Rcd. at 5269, ¶ 59 ("If the electric utility and the attacher are unable to reach agreement, or to find a suitable alternative, the electric utility may make the final decision on such a matter, subject to Commission review through our complaint process.").

B. The FCC's Restrictions on the Information that a Utility can Require in an Overlashing Notice Undermine an Electric Utility's Statutory Right to Evaluate Safety, Reliability, Capacity, and Generally Applicable Engineering Concerns.

In adopting the new overlashing rule, the FCC found the concerns expressed by utilities over the potential impact that overlashing can have on the safety and reliability of existing infrastructure "to be valid and supported by the record" and

that advance notice of overlashing would allow a utility "to better monitor and ensure the safety, integrity, and reliability of its poles both before and after the overlash is completed without overburdening overlashers." Order, ¶¶ 116, 118 (ER 58-60); *see also* Order at ¶ 119 (ER 61) (citing 2001 Order, 16 FCC Rcd. at 12140, ¶ 73) ("[p]oorly performed overlashing can create safety and reliability risks, and the Commission has consistently found that overlashers must ensure that they are complying with reasonable safety, reliability, and engineering practices."). In the Order, though, the FCC states that utilities may not use advance notice requirements "to impose quasi-application or quasi-pre-approval requirements, such as requiring engineering studies." Order, ¶ 119 (ER 61). In a footnote, the FCC further states that "[r]equiring engineering studies, pre-certifications, or any other similar requirement **is unnecessary because the overlasher is ultimately responsible for any necessary repairs subsequently discovered** by the pole owner." Order, ¶ 119 n.444 (ER 61) (emphasis added). The FCC's position is akin to finding that speed limits and traffic regulations are unnecessary because the driver is ultimately responsible for any damage that he causes.

Engineering studies are necessary to determine whether a proposed overlashing will overload a pole line or create a clearance or other safety violation. *See e.g.*, Electric Utilities Cmts. on Overlashing, 18-22 (ER 761-765); Joint Cmts. of CenterPoint Energy Houston Electric, LLC and Dominion Energy, 6 (ER 723);

Xcel Energy Services Inc. Cmts., 4-6 (ER 732-33). Accordingly, there is no valid reason why a utility should be prohibited from requiring an overlasher to provide an engineering study to ensure that the overlasher is "complying with reasonable safety, reliability, and engineering practices." Order, ¶ 119 (ER 61).

Similarly, the FCC prohibits utilities from requiring an overlasher to submit with its notice the specifications of the materials to be overlashed, asserting without support that "[s]uch a requirement could unduly slow deployment with little offsetting benefit." Order, ¶ 119 n.444 (ER 61). It is unreasonable to expect that a utility would be able to perform any meaningful evaluation of the potential capacity, safety, reliability and engineering issues raised by a proposed overlashing (especially within the 15-day time period set forth in Rule 1.1415(c)) if the utility does not know – and is not allowed to ask – what is being overlashed to the existing infrastructure. There is an enormous variety of fiber bundles and materials that could be overlashed, with significantly different impacts on loading, clearances, capacity, and other issues. *See e.g.*, Utility Coalition on Overlashing Reply Cmts., 3-4 and Exhibit A (ER 894-895, 904) (providing a chart of the different loading impact of different sizes of fiber). Utilities have a right to know what materials are being installed on their poles and must be able to obtain this information in order to exercise their rights under § 224(f)(2). *See* 2001 Order, 16 FCC Rcd. at 12144, ¶ 82 ("We agree that the utility pole owner has a right to know

the character of, and the parties responsible for, attachments on its poles, including third party overlashers.").

The FCC's restrictions are based on flawed assumptions and entirely fail to consider important aspects of a utility's ability to conduct any meaningful review of potential capacity, safety, reliability or engineering issues raised by overlashing. Not only do these restrictions prevent utilities from exercising their statutory rights under § 224(f)(2), they are arbitrary and capricious. *See Ctr. for Biological Diversity v. DOI*, 623 F.3d 633, 650 (9th Cir. 2010); *see also Turtle Island Restoration Network v. United States*, 878 F.3d 725, 732 (9th Cir. 2017) (citing *Motor Vehicle Manufacturers. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

C. Preventing a Utility from Charging a Fee to Review a Proposed Overlash is Arbitrary and Capricious

The FCC's new rule also prohibits utilities from recovering their cost of performing an engineering review of the proposed overlash. 47 C.F.R. § 1.1415(c); Order, ¶¶ 116, 119 n.444 (ER 61). The FCC justifies this restriction with the assertion that "such fees will increase the cost of deployment." Order, ¶ 116 (ER 61). The FCC ignores the fact that the costs of reviewing a proposed overlash are costs that would not be incurred *but for* the overlashing. This rule is not only arbitrary and capricious, but also inconsistent with the principles of cost-

causation that underpin the FCC's pole attachment regulatory regime and the Act itself.[6]

The FCC inaccurately characterizes this rule as consistent with its approach to "one-touch make-ready" ("OTMR") and "self-help." Order, ¶ 116, 119 n.444 (ER 61). In the context of OTMR and self-help, however, the FCC's rules requiring the utility to bear its own costs applies only to the utility's review (if any) of the attacher's completed make-ready work, not to the utility's pre-construction review and analysis. Order, ¶ 116 n.430 (ER 59). Allowing a utility to recover its costs for a pre-construction review is entirely consistent with the requirements of § 224(f)(2) – as well as with the principle of cost causation – because a pre-construction review is directly related to a utility's exercise of its statutory rights to deny access *before* construction starts for reasons of insufficient capacity, safety, reliability or general engineering principles.

[6] *See, e.g.* 47 U.S.C. § 224(d)(1) (ensuring "recovery of not less than the additional costs of providing pole attachments"); *see also* § 224(h) & (i).

III. The FCC's New Power Space Self-Help Rule is not Supported by the Statutory Text and Constitutes Arbitrary and Capricious Rule Making.

A. The FCC Does Not Have the Statutory Authority to Regulate Work Performed on Electrical Equipment Above the Communications Space.

The Order introduces new rules that if the utility does not complete make-ready work on its own facilities located above the communications space within the FCC's specified time period, an attacher may now do so through an approved contractor. *See* 47 C.F.R. §§ 1.1411(i)(2), 1.1411(e)(2).[7] This unprecedented step poses serious issues with respect to both the safety and reliability of electric infrastructure. Work in the electric space in close proximity to live electric wires

[7] The FCC's rule providing a self-help remedy in the electric supply space came as a complete surprise to many affected parties because the FCC never issued a proposed rule on this sensitive topic. The FCC's promulgation of the rule failed to comply with the notice requirements of 5 U.S.C. § 553. The FCC maintains that it did provide sufficient notice of its intended supply space self-help rule, but the language the FCC cites is so vague it could not possibly have put affected entities on notice—particularly given the FCC's dramatic departure from its past precedent. *See* Order, ¶ 97 n.340 (ER 48) (citing NPRM, 32 FCC Rcd. at 3268, ¶¶ 6-7). Although not cited by the FCC in the Order (*see Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 688 (9th Cir. 2007)), the NPRM referenced a potential self-help remedy *with respect to work needed to be performed on wireless equipment* located above the communications space. NPRM, 32 FCC Rcd. at 3271, ¶ 16. However, nothing the FCC released indicated that it would mandate that third parties be allowed to directly work *on utilities' electric distribution equipment*. If the FCC feels strongly that a self-help remedy in the electric supply space is necessary, this Court should remand this issue to the FCC and require it to publish a Further Notice of Proposed Rulemaking to allow all interested parties to develop a robust and precise record on the issue.

and equipment is exponentially more dangerous than work performed solely in the communications space. *See* Order, ¶ 20 (ER 12). Safety issues in the electric space are literally a matter of life and death. Moreover, with respect to reliability, the interconnected nature of an electric grid means that an incident involving the equipment on one utility pole can result in service outages to hundreds or even thousands of customers. The FCC lacks both the agency expertise and the statutory authority to address such issues.

The FCC's new self-help requirement goes well beyond the FCC's statutory authority. The Act explicitly limits the FCC's regulatory mandate to the "the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1). The Act defines a "pole attachment" as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4). Thus, because the Act limits the FCC's authority in this area only to matters attendant to "pole attachments" and defines the term "pole attachment" in such a way as to exclude attachments made by an electric utility pole owner, the FCC simply does not have any authority to regulate attachments made by an electric utility, and its attempt to do so is clearly *ultra vires*.

In fact, not only does the FCC's expansion of its authority conflict with the clear language of the Act, it also violates well-established canons of statutory construction.[8] In essence, the FCC's position would require that Congress, *sub silentio,* intended the FCC's authority to extend to attachments by electric utilities despite its failure to include any reference to such attachments in the relevant statute. *See, e.g.,* Antonin Scalia & Brian A. Garner, Reading Law: The Interpretation of Legal Texts 93–100 (2012) (explaining semantic canon that "[n]othing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered."); *id.* at 107–111 (explaining the "negative-implication canon" which suggests that "[t]he expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)."); *see also Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

The FCC broadly asserts that its "rules are designed to facilitate timely and non-discriminatory access to poles for attachments, and the action we take herein falls well within the Commission's jurisdiction." Order, ¶ 100 (ER 49-50) (emphasis added). However, whatever the FCC's intent may have been in enacting

[8] *Putnam Family P'ship v. City of Yucaipa, Cal.*, 673 F.3d 920, 928 (9th Cir. 2012) ("In determining whether a statute is ambiguous, we apply the traditional tools of statutory construction…") (citing *Chevron,* 467 U.S. at 843 n.9).

its new requirements for electric power facilities, it is Congress's intent rather than the FCC's that controls the extent of the FCC's jurisdiction. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) ("Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction.") (internal citations and quotation marks omitted). Deference is due to an agency's exertion of jurisdiction only where "a statute is ambiguous and when Congress has not expressed any intent on the issue before the court." *U.S. Dep't of Commerce v. FERC.*, 36 F.3d 893, 896 (9th Cir. 1994) (internal citation omitted).

After the initial passage of the Act, it was amended several times, most notably by the Telecommunications Act of 1996 ("1996 Act"). *See* 110 Stat. 56 (1996). The 1996 Act made several important revisions to the Act, three of which are relevant to this issue: 1) it revised subsection (a)(4) to add attachments by a "provider of telecommunications service" to the Act's definition of "pole attachment"; 2) it added subsection (f)(1) stating that a "utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it"; and 3) it added subsection (f)(2) stating "a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is

insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." *See* S. Rep. No. 104-230 (1996).

Thus, the 1996 Act expanded the scope of the Act to apply to attachments of not just cable service providers but also attachments by providers of telecommunications service. It also provided both cable service providers and telecommunications carriers (as defined by 47 U.S.C. § 224(a)(5)) with the right to nondiscriminatory access to electric utilities' infrastructure, but then conditioned that right by allowing utilities to deny access for several reasons including safety and lack of capacity. However, at no point did the 1996 Act grant the FCC the right to regulate the attachments of electric utilities.

Moreover, as noted above, Congress implemented subsection 224(f)(2) and maintained utilities' right to deny access to their infrastructure to ensure third party attachments would not endanger public or worker safety or the reliability of the electric grid. The FCC's new supply space self-help make-ready rule undermines these goals. Work on utilities' electrical distribution equipment is highly dangerous, and utilities have observed, based on years of experience, that telecommunications providers do not place the same emphasis on safety that utilities do. *See* Order, ¶ 20 (ER 12) ("We recognize that work above the communications space may be more dangerous for workers and the public and that impacts of electric outages are especially severe… all projects above the

communications space may raise substantial safety and continuity of service concerns."); 2011 Order, 26 FCC Rcd. at 5277, ¶ 80 ("…electricity is inherently more dangerous than communications services…safety concerns must take priority when communications equipment is installed among or above potentially lethal electric lines."); Coalition of Concerned Utilities July 26, 2018 Ex Parte Notice, Letter from Thomas R. Pryatel, P.E., First Energy Service Co., to Chairman Pai, 1 ("First Energy Letter") (ER 952). The fact that the work will be performed by an approved contractor does not render it safe—in fact, some electric utilities require their own work on electric facilities outside of the pole attachment context to be done by an in-house employee rather than a contractor when a particular task is more complicated. First Energy Letter at 2; *see also* Electric Utilities' July 26, 2018 Ex Parte Notice, 2 (ER 953) ("Although the draft rule requires attachers to use a contractor approved by the electric utility, this is insufficient protection because it gives control of the make-ready to an entity whose primary motivation is speed to market—not safety and reliability.").

Without careful planning and supervision, mistakes involving electrical distribution facilities can quickly leave hundreds or thousands of customers without power. First Energy Letter, 2 (ER 953). In most states, there are statutes and/or detailed regulatory regimes governing electric reliability performance that could conflict with the FCC's self-help mandate, which the Order fails to even

acknowledge. *Id.* *See Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43 (noting that an agency decision is arbitrary and capricious if it "entirely fail[s] to consider an important aspect of the problem.").

B. The FCC Changed its Position without Providing an Adequate Rationale.

The Order also represents a dramatic departure from the FCC's past position. In 2011, the FCC specifically rejected a supply space self-help remedy, stating:

> We find that the phrase "proximity of electric lines" where attachers may engage contractors for attachment means up to and including the safety space, **but not among the electric lines, for historical, statutory, and safety reasons.** The NESC requires 40 inches of clearance between electric power lines and communications cable on the same pole. Because the *Local Competition Order [the 1996 Order]* does not discuss attachment of facilities above the communications space or endorse in any way attachers' contractors entering the electric space, we read "proximity of electric lines" to refer to the 40-inch "safety space," and not to the region above it. Also, as we discuss above, the statute provides electric utilities the right to deny access where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes. **The *Local Competition Order* considered this provision of the statute to reflect congressional acknowledgment that capacity, safety, reliability and engineering issues raise heightened concerns when electricity is involved, because electricity is inherently more dangerous than communications services. We affirm this interpretation today, and likewise maintain that safety concerns must take priority when communications equipment is installed among or above potentially lethal electric lines.**

2011 Order, 26 FCC Rcd. at 5277, ¶ 80 (emphasis added). The FCC is free to change policies delegated to its discretion if it provides a rational basis for doing

so. However, the APA forbids the agency to "depart from a prior policy *sub silentio*." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). If the facts remain the same, the FCC could rationally reach a different conclusion only if its view of the law now differed. Yet the Order articulates no new facts that would moot the safety issues referenced by the 2011 Order, and it did not present any relevant new interpretation of the pertinent statutory provisions.

Instead, the Order relies upon the FCC's assertion that the deployment of next-generation wireless technology (*i.e.* 5G technology) is sufficiently important to now ignore what it previously characterized as an "historical, statutory and safety concern" regarding work performed in close proximity to "potentially lethal electric lines." *See* 2011 Order, 26 FCC Rcd. at 5277, ¶ 80; *see* Order, ¶ 97 (ER 47-48). However, the record was devoid of evidence that rearrangement of electric supply facilities was in any way part of the alleged access delay. *See Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1145-46 (D.C. Cir. 2005) (agency cannot adopt rule with "little apparent connection to the inadequacies it purports to address."); *see also Tucson Herpetological Soc. v. Salazar*, 566 F.3d 870, 878 (9th Cir. 2009) ("While our deference to the agency is significant, we may not defer to an agency decision that 'is without substantial basis in fact.'") (internal citations omitted). In fact, the FCC specifically notes that even though it has provided a complaint process with respect

to missed deadlines for work above the communications space since 2011, no such complaint has ever been filed with the Commission. Order, ¶ 98 n.343 (ER 48).[9] As such, the FCC has not pointed to any change in the facts that could rationally support its change in position. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43 ("Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"); *see also Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966-67 (9th Cir. 2015); *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1024–25 (9th Cir. 2011).

Perhaps the most troubling aspect of the FCC's assertion of authority over work on electric distribution facilities is that the FCC provides absolutely no limit to this newfound jurisdiction. Nothing in the FCC's reasoning would prevent it in the future from regulating where and how a utility's equipment can be deployed so long as the FCC can make some sort of tenuous connection to broadband

[9] The BDAC, organized by the Commission to advise on how best to remove barriers to broadband deployments, recommended that any work above the communications space "not be eligible" for the Commission's new OTMR process because of the safety and reliability risks. Order, ¶ 27 (ER 16-17). The Commission acknowledged these concerns and did not include work above the communications space in its OTMR rule. *Id*. Notably, the BDAC also did not recommend that the FCC's self-help remedy be extended into the electric space. *See* Report of the Competitive Access to Broadband Infrastructure Working Group, 30-31 (Jan 23-24, 2018) (ER 808-809).

deployment. In the past, courts have routinely rejected similar agency power grabs outside their core competencies. *See Whitman v. Am. Trucking Associations, Inc.*, 531 U.S. 457, 468 (2001) ("Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes."). If Congress had intended the FCC to dabble in the regulation of our nation's electric grid, it would have clearly said so and not hidden its intent in some alleged statutory ambiguity only to be discovered more than twenty years after the passage of the act in question.

IV. The New ILEC Complaint Rule Contains Presumptions that Are Contrary to the Proven Facts, Is Inconsistent with 47 U.S.C. § 224, and Is Arbitrary and Capricious.

A. Rule 1.1413(b) Is Not Entitled to Deference because the FCC Did Not Actually Interpret the Pole Attachments Act In Adopting It.

Rule 1.1413 is not due any deference by this Court because the FCC failed to even mention the Pole Attachments Act in the portion of the Order adopting the rule, let alone explain whether or how the rule complies with the Act. The Supreme Court has stated:

> Under *Chevron*, we will defer to a reasonable agency interpretation of ambiguous statutory language…The rationale for such deference is that Congress has explicitly or implicitly delegated to the agency responsible for administering a statute the authority to choose among permissible constructions of ambiguous statutory text…The question now before us is…whether § 4(a)(2) of the ADEA authorizes disparate impact claims. **But the EEOC statement does not purport to interpret the language of § 4(a) at all. Quite simply, the agency has not actually exercised its delegated authority to resolve any**

> **ambiguity in the relevant provision's text, much less done so in a reasonable or persuasive manner. As to the specific question presented, therefore, the regulation is not entitled to any deference**.

Smith v. City of Jackson, 544 U.S. 228, 264-65 (2005) (O'Connor, J., Kennedy, J., and Thomas, J., concurring) (internal citations omitted) (emphasis added); *see also N. Cal. River Watch v. Wilcox*, 620 F.3d 1075, 1085-88 (9th Cir. 2010) (declining to grant deference where agency had not interpreted statutory phrase at issue).

By way of analogy, in *Telesaurus VPC, LLC v. Power,* 623 F.3d 998, 1005 (9th Cir. 2010), the district court below had "concluded that the 'Regulatory Status: PMRS' notation on Radiolink's license was a determination by the FCC, entitled to deference under *Chevron*…that Radiolink was not a common carrier for purposes of Telesaurus's suit." The Ninth Circuit found that the notation was neither entitled to *Chevron* deference, nor "considerable weight" under *United States v. Mead Corp*., 533 U.S. 218, 227-28, 234-235 (2001).[10] *Telesaurus*, 623 F.3d at 1005. The Court reasoned it was "not aware of…any authority indicating that the FCC's notation on Radiolink's license constitutes an interpretation entitled to *Chevron* deference" and stated that in "the absence of any reasoned analysis by the FCC explaining the 'PMRS' notation, we cannot give it

[10] In *Mead*, the Supreme Court held that even if an agency's decision does not qualify for *Chevron* deference, courts still give "considerable weight" to the "well-reasoned views of the agencies implementing a statute," in proportion to "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." 533 U.S. at 227-28, 234-235.

significant weight under *Mead* and *Skidmore*." *Telesaurus*, 623 F.3d at 1005. The Court concluded that the PMRS notation on the license was therefore "not entitled to deference." *Id.* at 1006. Similarly, here, the FCC has not interpreted the statutory language of the Pole Attachments Act in adopting the presumptions in Rule 1.1413(b), much less provided a reasoned and persuasive explanation of its presumptions, and thus the Court should afford the rule no deference.

Though nothing in the portion of the Order adopting Rule 1.1413 cites, references or otherwise mentions 47 U.S.C. § 224, the FCC, in a glancing blow presumably intended to address the entirety of its pole attachment rulemaking authority, included the following in a separate section that states in its entirety:

> **E. Legal Authority**
> 135. We conclude that we have ample authority under section 224 to take the actions above to adopt a new pole attachment process, amend our current pole attachment process, clarify responsibility for pre-existing violations, and address outdated rate disparities. Section 224 authorizes us to prescribe rules ensuring that the rates, terms, and conditions of pole attachments are just and reasonable. We find that the actions we take today to speed broadband deployment further these statutory goals.

Order, ¶ 135 (ER 69). This sort of conclusory statement does not constitute an interpretation of § 224 entitled to deference. *See, e.g., SEC v. Sloan*, 436 U.S. 103, 117-18 (1978) (declining to afford Securities and Exchange Commission order deference where "it is not apparent from the record that…the Commission actually addressed in any detail the statutory authorization under which it took that

action…the mere issuance of consecutive summary suspension orders, without a concomitant exegesis of the statutory authority for doing so, obviously lacks power to persuade as to the existence of such authority…") (emphasis added) (internal citations and quotation marks omitted).

B. The Presumption that ILECs are Similarly Situated to CATV and CLEC Attachers Does Not Bear the Required Connection to the Facts.

"In reviewing the validity of a presumption, [courts] must determine whether a 'sound factual connection' exists between the facts giving rise to the presumption and the facts then presumed." *Holland Livestock Ranch v. United States*, 714 F.2d 90, 92 (9th Cir. 1983) (citing *NLRB v. Baptist Hospital, Inc*., 442 U.S. 773, 787 (1979)). In addition, "…the courts have the duty to review [agency] presumptions both for consistency with the Act, and for rationality." *Baptist Hospital, Inc.*, 442 U.S. at 787 (internal citations and quotation marks omitted).

The presumption in Rule 1.1413(b) that ILECs are "similarly situated" to CLECs and CATVs, in addition to being inconsistent with the Pole Attachments Act for the reasons set forth in Section IV.C.1. below, does not bear a "sound factual connection" to the facts here. ILECs, unlike CLEC and CATV pole licensees, own numerous poles to which electric utilities are attached. Further, ILECs, unlike CLEC and CATV pole licensees, obtained access to electric utility poles under joint use agreements pursuant to which ILECS and electric utilities share space on each other's poles. Even the FCC tacitly acknowledges ILECs are

not similarly situated to CLECs and CATVs in the very same Order establishing the presumption:

> As the Commission has recognized, historically, incumbent LECs owned approximately the same number of poles as electric utilities and were able to ensure just and reasonable rates, terms, and conditions for their attachments by negotiating long-term joint use agreements with utilities. These joint use agreements may provide benefits to the incumbent LECs that are not typically found in pole attachment agreements between utilities and other telecommunications attachers, such as lower make-ready costs, the right to attach without advance utility approval, and use of the rights-of-way obtained by the utility, among other benefits.

Order, ¶ 124 (ER 64). Further, the record in the underlying rulemaking is replete with evidence that ILECs are not similarly situated to CLEC and CATV attachers. *See, e.g.,* Electric Utilities' Cmts., 26-30 (ER 537-541); Joint Cmts. of Alliant Energy Corp., WEC Energy Group, Inc., and Xcel Energy Services Inc., 45-46 (ER 255-256); Edison Electric Institute Cmts., 44-46 (ER 497-499); Coalition of Concerned Utilities Cmts., 45-49 (ER 313-317); Conterra Broadband Services, Southern Light LLC and Uniti Group Inc. Reply Cmts, 9 (ER 591).

By way of contrast, the FCC, in adopting the presumption that ILECs are "similarly situated to" CLEC and CATV attachers, fails to cite to even one piece of record evidence supporting that presumption. Instead, the FCC cites to its (incorrect) factual findings that decreases in ILEC pole ownership have resulted in decreases in ILEC bargaining power, which have resulted in increased pole attachment rates for ILECs. Order, ¶¶ 125-126 (ER 64-65). However, those

"facts" (even assuming they are true, which they are not) do not support, and are logically disconnected from, the presumption adopted by the FCC that ILECs are "similarly situated to" CLEC and CATV attachers. Instead, the FCC adopted the presumption to meet the FCC's underlying policy goals:

> We find that applying the presumption in these circumstances will promote broadband deployment and serve the public interest; we agree with USTelecom that greater rate parity between incumbent LECs and their telecommunications competitors "can energize and further accelerate broadband deployment."
> …
> We conclude that, by applying the presumption to new and newly-renewed agreements, we will give incumbent LECs parity with similarly-situated telecommunications attachers, and encourage infrastructure deployment by addressing incumbent LECs' bargaining power disadvantage.

Id. at 126-27 (ER 65-66) (internal citations omitted). But "unlike a legislative body, which is free to adopt presumptions for policy reasons…an agency may only establish a presumption if there is a sound and rational connection between the proved and inferred facts." *Chem. Mfrs. Ass'n v. DOT*, 105 F.3d 702, 705 (D.C. Cir. 1997) (citing *Baptist Hosp., Inc.,* 442 U.S. at 787 (additional internal citations omitted)).

Further, the presumption in Rule 1.1413(b) that ILECs are "similarly situated" to CATV and CLEC attachers is at odds with the FCC's own findings just seven years earlier, based on a significant and more comprehensive record:

- "Given that **incumbent LECs often can be differently situated from other attachers,** both due to the terms of existing joint use agreements and because of their continuing pole ownership, **we conclude that it would not be appropriate to treat them identically** to telecommunications carrier or cable operator attachers in all circumstances." 2011 Order, 26 FCC Rcd. at 5328, ¶ 203 (emphasis added).

- "Having found that section 224(b) enables the Commission to ensure that pole attachments by incumbent LECs are accorded just and reasonable rates, terms and conditions, **we recognize the need to exercise that authority in a manner that accounts for the potential differences between incumbent LECs and telecommunications carrier or cable operator attachers**… incumbent LECs also own many poles and historically have obtained access to other utilities' poles within their incumbent LEC service territory through 'joint use' or other agreements." 2011 Order, 26 FCC Rcd. at 5333-34, ¶ 214 (emphasis added).

- ". . .some commenters contend that joint use agreements give incumbent LECs advantages that offset any increased rates they might pay for pole access in certain circumstances. . . As examples of incumbent LEC advantages, these parties cite: 'Paying significantly lower make-ready costs; No advance approval to make attachments; No post-attachment inspection costs; Rights-of-way often obtained by electric company; Guaranteed space on the pole; Preferential location on pole; No relocation and rearrangement costs; and Numerous additional rights such as approving and denying pole access, collecting attachment rents and input on where new poles are placed.' Comcast Reply at 25. Electric utilities also contend that existing joint use arrangements—in contrast to cable or telecommunications carrier pole lease agreements—reflect a decades-old contractual responsibility of incumbent LECs to share in infrastructure costs and also account for the fact that incumbent LECs still own many poles today…." 2011 Order, 26 FCC Rcd. at 5335, ¶ 216 n.654.

- "As discussed above, **the historical joint use agreements between incumbent LECs and other utilities implicate rights and responsibilities that differ from those in typical pole lease agreements between utilities and telecommunications carriers or cable operators.**" 2011 Order, 26 FCC Rcd. at 5336, ¶ 217 (emphasis added).

The FCC also noted in both of its only two decisions under the original ILEC complaint rule, that joint use agreements typically provide ILECs with a number of advantages not afforded CLECs or CATVs. *See In the Matter of Verizon Virginia, LLC v. Virginia Electric and Power Company*, 32 FCC Rcd. 3750, 3751 (May 1, 2017) (citing 2011 Order, 26 FCC Rcd. at 5335, ¶ 216 n.654); *Verizon Florida LLC v. Florida Power and Light Co.*, 30 FCC Rcd. 1140, 1148, ¶ 21 (Feb. 11, 2015) ("In the *Pole Attachment Order*, the Commission repeatedly noted that joint use agreements are not analogous to lease agreements between competitive LECs and electric utilities because…incumbent LECs receive unique benefits under joint use agreements that are not available to competitive LECs).

There is no way of reconciling the FCC's statements between 2011 and 2018 with the presumption adopted in the Order. That is because the FCC never actually made a finding in the Order that ILECs are now similarly situated to CLEC and CATV attachers. Instead, the FCC merely sought to advance a policy goal by adopting the presumption, without regard to the facts or the evidentiary record.

C. The Court Should Strike Down Rule 1.1413 under *Chevron.*

Even if *Chevron* applies, Rule 1.1413(b) should still be stricken.

1. Congress Unambiguously Excluded ILECs from the Types of Entities Entitled to the § 224(e) Telecom Rate Formula as a Matter of Right.

Under *Chevron* Step 1, courts:

> …must first determine whether Congress has directly spoken to the precise question at issue…If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress….

N. Cal. River Watch, 620 F.3d at 1081 (internal citations and quotation marks omitted). Further, as previously stated by the Ninth Circuit:

> It is clear that regulations, in order to be valid must be consistent with the statute under which they are promulgated…and the agency's interpretation of the statute cannot supersede the language chosen by Congress. The power of an administrative…agency to…prescribe rules and regulations…is not the power to make law…but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute, and **a regulation which operates to create a rule out of harmony with the statute, is a mere nullity**.

Pac. Gas & Elec. Co. v. United States, 664 F.2d 1133, 1136 (9th Cir. 1981) (emphasis added) (internal citations and quotation marks omitted).

Here, it is clear than Congress intended to exclude ILECs from the categories of attaching entities entitled to the § 224(e) telecom rate formula. Section 224(e)(1), pursuant to which the FCC promulgated the telecom rate formula set forth in 47 C.F.R. § 1.1406(e), states:

> The Commission shall…prescribe regulations in accordance with this subsection to govern the charges for pole attachments used **by telecommunications carriers** to provide telecommunications services, when the parties fail to resolve a dispute over such charges….

47 U.S.C. § 224(e)(1) (emphasis added). 47 U.S.C. § 224(a)(5), located within the definitions section of the Pole Attachments Act, states, in turn:

> For purposes of this section, the term "telecommunications carrier" (as defined in section 153 of this title) **does not include any incumbent local exchange carrier** as defined in section 251(h) of this title.

(emphasis added). Nevertheless, new FCC Rule 1.1413(b), states:

> …there is a presumption that incumbent local exchange carriers (or an association of incumbent local exchange carriers) may be charged no higher than the rate determined in accordance with § 1.1406(e)(2).

In other words, the presumption is specifically at odds with the statutory exclusion of ILECs from the types of entities entitled to the § 224(e) rate formula. Even the ILECs have previously admitted that Congress intended to exclude ILECs from entitlement to the telecom rate formula. *See* AT&T Reply Comments, WC Docket No. 07-245, 4 (Oct. 4, 2010) (ER 129) ("Congress intended to…*exclude* ILECs from the telecom rate formula set forth in § 224(e)") (emphasis in original). While Congress was silent as to what rate formula applies to ILECs, Congress *has*

specifically spoken to the types of entities entitled to the telecom rate and specifically excluded ILECs from that group. 47 U.S.C. §§ 224(a)(5) & (e)(1).[11]

Additionally, consideration of the various sub-provisions of § 224, when taken together, makes clear that Congress intended to treat ILECs *differently* than non-ILEC telecom carriers, rather than as "similarly situated to" such carriers, as Rule 1.1413(b) presumes. If there is, in fact, a distinction between a "provider of telecommunications services" and a "telecommunications carrier" for purpose of § 224 (as the FCC found in the 2011 Order and as upheld in *Am. Elec. Power Service Corp.*) then it can only evidence Congress' specific intent to treat "providers of telecommunications service"—*i.e.* ILECs *and* CLECs, different from telecommunications carriers—*i.e. CLECs only,* for purposes of the Pole

[11] Petitioners continue to believe that *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183, was wrongly decided, and that the reason § 224 is silent regarding the rate to which ILECs are entitled is that Congress did not intend ILECs to be subject to the protections of the Pole Attachments Act *at all*. And even in *Am. Elec. Power Serv. Corp*., the court noted:

> We reiterate, to make clear just what the Commission has and has not done, that it has not purported to bring ILECs under the new telecom rate adopted under § 224(e)(1). The Order simply classifies ILECs as among the potential beneficiaries of § 224(b)(1)…For now, noting the existence of possible distinctions between ILECs and other pole attachers, the Commission says that it will handle any complaints by ILECs "on a case-by-case basis."

Id. at 186.

Attachments Act. Either (a) they are the same, in which case *Am. Elec. Power Service Corp.* was wrongly decided, or (b) they are different, in which case the presumptions in Rule 1.1413 are at odds with the plain language of the Act.

The distinction Congress intended to draw between ILECs and non-ILEC telecom carriers is clear not only in the exclusion of ILECs from the group of entities entitled to the § 224(e) rate formula, as set forth above, but also in the nondiscriminatory access provision of the Act. Section 224(f)(1) provides that "A utility shall provide a cable television system **or any telecommunications carrier with nondiscriminatory access** to any pole, duct, conduit, or right-of-way owned or controlled by it." (emphasis added). There is no dispute that the foregoing right of mandatory access is not applicable to ILECs. *See, e.g.,* 2011 Order, 26 FCC Rcd. at 5332-33, ¶ 212.

2. Rule 1.1413(b) Constitutes Arbitrary and Capricious Rule Making by the FCC.

Even if Rule 1.1413(b) was to survive step one of *Chevron*, it fails under step two. As previously stated by the Ninth Circuit:

> …at step two of *Chevron* when applicable, we recognize that if a statute is silent or ambiguous with respect to the issue at hand, then the reviewing court must defer to the agency so long as the agency's answer is based on a permissible construction of the statute….In such a case an agency's interpretation of a statute will be permissible, unless arbitrary, capricious, or manifestly contrary to the statute.

Wilderness Soc'y v. United States Fish & Wildlife Serv., No. 01-35266, 2003 U.S. App. LEXIS 27248, *16 (9th Cir. Dec. 30, 2003) (internal citations and quotation marks omitted).

a. Rule 1.1413(b) Is Inconsistent with the FCC's Prior Reasoning.

The Court should give the FCC's new ILEC complaint rule considerably less deference than it would ordinarily be afforded because the FCC's position on this issue has changed so dramatically over a relatively short duration. As stated by the Ninth Circuit in *Marmolejo-Campos v. Holder*, 558 F.3d 903, 919-20 (9th Cir. 2009):

> …agencies are *not* free, under *Chevron*, to generate erratic, irreconcilable interpretations of their governing statutes and then seek judicial deference. Consistency over time and across subjects is a relevant factor at *Chevron* Step Two, when deciding whether the agency's current interpretation is "reasonable." *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30… (1987) (observing that the Court would not need to defer to the INS's interpretation of the term "well-founded fear" at *Chevron* Step Two because "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view.")

(emphasis in original) (additional internal quotation marks omitted); *see also Natural Res. Def. Council v. EPA,* 526 F.3d 591, 605 (9th Cir. 2008) (stating "On the other hand, the consistency of an agency's position is a factor in assessing the weight that position is due…", and finding EPA rule to be arbitrary and capricious

where EPA's position on the issue reflected in the rule was inconsistent and conflicting) (internal citations and quotation marks omitted)).

Prior to 2011, the FCC's position had always been that ILECs had no rights as attaching entities under the Pole Attachments Act. *See, e.g.,* 1998 Order, 13 FCC Rcd. at 6781, ¶ 5 ("Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier … **the ILEC has no rights under Section 224 with respect to the poles of other utilities**.") (emphasis added). In 2011, for the first time, the FCC asserted that it *did*, in fact, have jurisdiction over the rates, terms, and conditions for ILEC attachments on electric utility poles, but stated:

> …we recognize the need to exercise that authority in a manner that accounts for the potential **differences between incumbent LECs and telecommunications carrier or cable operator attachers**…We therefore decline at this time to adopt comprehensive rules governing incumbent LECs' pole attachments, finding it more appropriate to proceed on a case-by-case basis.

2011 Order, 26 FCC Rcd. at 5333-34, ¶ 214 (emphasis added). In the Order, the FCC has yet again reversed positions by abandoning its acknowledgement of the "differences between incumbent LECs and telecommunications carrier or cable operator attachers" and instead adopting a presumption that ILECs are "similarly situated to" CLECs or CATVs "for purposes of obtaining comparable rates, terms, or conditions." Rule 1.1413(b). The FCC's "erratic, irreconcilable interpretations" of the "rates" to which ILECs are entitled under § 224 should be given little deference by this Court. *Marmolejo-Campos*, 558 F.3d at 919-20.

b. Imposition of the Preexisting Telecom Rate Formula as a "Hard Cap" Where Electric Utilities Rebut the Presumption in Rule 1.1413 is Arbitrary and Capricious.

The FCC states in the Order (though not in Rule 1.1413 itself) that "If the presumption we adopt today is rebutted, the pre-*2011 Pole Attachment Order* telecommunications carrier rate is the maximum rate that the utility and incumbent LEC may negotiate." Order, ¶ 129 (ER 67). The FCC stated it was adopting such a "hard cap" even where electric utilities rebut the presumption that an ILEC is similarly situated to CLEC or CATV attachers because "we agree with commenters that establishment of…an upper bound will provide further certainty within the pole attachment marketplace, and help to further limit pole attachment litigation." *Id.* (internal citations and quotation marks omitted).

Adoption of the preexisting telecom rate formula as a "hard cap" on what electric utilities can recover from ILECs in situations where an electric utility has proven that the ILEC gains access to its poles on terms and conditions that materially advantage it vis-à-vis CATV and CLEC licensees is arbitrary and capricious because it cannot possible account for the variety of scenarios that might exist in a joint use agreement between an ILEC and an electric utility. For example, a "hard cap" could result in the electric utility recovering less than the incremental cost attributable to the ILEC, a result that would be at odds with the Act. *See Gulf Power Co. v. FCC*, 208 F.3d 1263, 1272 (11th Cir. 2000) (*rev'd* on

other grounds), (citing 47 U.S.C. § 224(b), (d)(1)) ("Under the 1996 Act, the lowest rent that may be considered just and reasonable is an amount equal to the incremental cost of adding the new attachment to the utility's pole…"). This was, in fact, the reason the FCC did not establish a rate or formula when it first asserted jurisdiction over this relationship in 2011. 2011 Order, 26 FCC Rcd. at 5333-34, ¶ 214 (noting the "complexities" in the joint use relationships between ILECs and electric utilities). Furthermore, the FCC did not even attempt to justify imposition of the preexisting telecom rate formula as a "hard cap" where electric utilities rebutted the § 1.1413 presumption. The FCC did not, for example, engage in any kind of factual analysis to determine whether the preexisting telecom rate formula would yield sufficient recovery in all instances. Instead, the FCC reasoned that the adoption was necessary because it would provide certainty in negotiations and reduce the number of complaint proceedings. Order, ¶ 129 (ER 67).

CONCLUSION

For those reasons set forth herein, the FCC's new rules regarding preexisting violations, overlashing, electric supply space self-help make-ready, and ILEC complaints violate the plain language of 47 U.S.C. § 224 and are arbitrary and capricious. Petitioners respectfully request that the Court hold unlawful, vacate, enjoin and set aside the portions of the Order and rules addressed herein, including

but not limited to those portions of new rules 47 C.F.R. §§ 1.1411(c)(2), 1.1411(h)(2), 1.1415(b), 1.1415(c), 47 C.F.R. § 1.1411(i)(2), and 47 C.F.R. § 1.1413(b) addressed herein.

Respectfully submitted this 24th day of June, 2019.

s/ Brett Heather Freedson
Brett Heather Freedson
Charles A. Zdebski
Robert J. Gastner
Eckert Seamans Cherin & Mellot, LLC
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006
(202) 659-6600
CZdebski@eckertseamans.com
BFreedson@eckertseamans.com
RGastner@eckertseamans.com

Counsel for Petitioners CenterPoint Energy Houston Electric, LLC and Virginia Electric and Power Company d/b/a Dominion Energy Virginia and Dominion Energy North Carolina

s/ Eric B. Langley
Eric B. Langley
Robin F. Bromberg
Langley & Bromberg LLC
2700 U.S. Highway 280, Suite 240E
Birmingham, Alabama 35223
(205) 783-5750
eric@langleybromberg.com
robin@langleybromberg.com

Counsel for Petitioners American Electric Power Service Corporation, Duke Energy Corporation, Entergy Corporation, Oncor Electric Delivery Company LLC, Southern Company, and Tampa Electric Company

s/ David D. Rines
David D. Rines
Kevin M. Cookler
Lerman Senter PLLC
2001 L Street, NW, Suite 400
Washington, DC 20036
(202) 429-8970
drines@lermansenter.com
kcookler@lermansenter.com

Counsel for Petitioner Xcel Energy Services Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit R. 32-1, I hereby certify that: This brief complies with the type-volume limitation of Ninth Circuit R. 32-2(b) because the brief contains 13,502 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) as determined by the word-counting feature of Microsoft Word.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: June 24, 2019

s/ Eric B. Langley
Eric B. Langley
Langley & Bromberg LLC
2700 U.S. Highway 280, Suite 240E
Birmingham, Alabama 35223
(205) 783-5750
Eric@langleybromberg.com

Counsel for Petitioners American Electric Power Service Corporation, Duke Energy Corporation, Entergy Corporation, Oncor Electric Delivery Company LLC, Southern Company, and Tampa Electric Company

All other parties on whose behalf this filing is submitted concur in its content. *See* 9th Cir. R. 25-5(e).

STATEMENT OF RELATED CASES

The *Order* on appeal has not previously been the subject of review by this Court or any other court. All petitions for review of this *Order* have been consolidated before this Court under either *City of Portland v. FCC*, No. 18-72689, or *Sprint Corp. v. FCC*, No. 19-70123, as appropriate, and are being briefed pursuant to the Briefing Order for the cases.

Date: June 24, 2019

s/ Eric B. Langley
Eric B. Langley
Langley & Bromberg LLC
2700 U.S. Highway 280, Suite 240E
Birmingham, Alabama 35223
(205) 783-5750
eric@langleybromberg.com

Counsel for Petitioners American Electric Power Service Corporation, Duke Energy Corporation, Entergy Corporation, Oncor Electric Delivery Company LLC, Southern Company, and Tampa Electric Company

All other parties on whose behalf this filing is submitted concur in its content. *See* 9th Cir. R. 25-5(e).

ADDENDUM

TABLE OF CONTENTS

[ADDENDUM]

United States Code Annotated
Title 47. Telecommunications (Refs & Annos)
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter II. Common Carriers (Refs & Annos)
Part I. Common Carrier Regulation

47 U.S.C.A. § 224

§ 224. Pole attachments

Effective: February 8, 1996
Currentness

(a) Definitions

As used in this section:

(1) The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(5) For purposes of this section, the term "telecommunications carrier" (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that--

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments--

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter--

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) Determination of just and reasonable rates; “usable space” defined

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

ADDENDUM - 2

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

(e) Regulations governing charges; apportionment of costs of providing space

(1) The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

(2) 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.

(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

(4) The regulations required under paragraph (1) shall become effective 5 years after February 8, 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.

(f) Nondiscriminatory access

(1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory [1] basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

(g) Imputation to costs of pole attachment rate

A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(h) Modification or alteration of pole, duct, conduit, or right-of-way

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

(i) Costs of rearranging or replacing attachment

An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).

CREDIT(S)

(June 19, 1934, c. 652, Title II, § 224, as added Pub.L. 95-234, § 6, Feb. 21, 1978, 92 Stat. 35; amended Pub.L. 97-259, Title I, § 106, Sept. 13, 1982, 96 Stat. 1091; Pub.L. 98-549, § 4, Oct. 30, 1984, 98 Stat. 2801; Pub.L. 103-414, Title III, § 304(a)(7), Oct. 25, 1994, 108 Stat. 4297; Pub.L. 104-104, Title VII, § 703, Feb. 8, 1996, 110 Stat. 149.)

Notes of Decisions (45)

Footnotes

1 So in original. Probably should be “nondiscriminatory”.

47 U.S.C.A. § 224, 47 USCA § 224

Current through P.L. 116-21.

End of Document

ADDENDUM - 4

47 CFR 1.1411

This document is current through the January 10, 2018 issue of the Federal Register. Pursuant to 82 FR 8346 ("Regulatory Freeze Pending Review"), certain regulations will be delayed pending further review. See Publisher's Note under affected rules. Title 3 is current through December 31, 2017.

Code of Federal Regulations > *TITLE 47 -- TELECOMMUNICATION* > *CHAPTER I -- FEDERAL COMMUNICATIONS COMMISSION* > *SUBCHAPTER A -- GENERAL* > *PART 1--PRACTICE AND PROCEDURE* > *SUBPART J -- POLE ATTACHMENT COMPLAINT PROCEDURES*

§ 1.1411 Timeline for access to utility poles.

(a) Definitions.

(1) The term "attachment" means any attachment by a cable television system or provider of telecommunications service to a pole owned or controlled by a utility.

(2) The term "new attacher" means a cable television system or telecommunications carrier requesting to attach new or upgraded facilities to a pole owned or controlled by a utility.

(3) The term "existing attacher" means any entity with equipment on a utility pole.

(b) All time limits in this subsection are to be calculated according to § 1.4.

(c) Application review and survey--(1) Application completeness. A utility shall review a new attacher's attachment application for completeness before reviewing the application on its merits. A new attacher's attachment application is considered complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in requirements that are available in writing publicly at the time of submission of the application, to begin to survey the affected poles.

(i) A utility shall determine within 10 business days after receipt of a new attacher's attachment application whether the application is complete and notify the attacher of that decision. If the utility does not respond within 10 business days after receipt of the application, or if the utility rejects the application as incomplete but fails to specify any reasons in its response, then the application is deemed complete. If the utility timely notifies the new attacher that its attachment application is not complete, then it must specify all reasons for finding it incomplete.

(ii) Any resubmitted application need only address the utility's reasons for finding the application incomplete and shall be deemed complete within 5 business days after its resubmission, unless the utility specifies to the new attacher which reasons were not addressed and how the resubmitted application did not sufficiently address the reasons. The new attacher may follow the resubmission procedure in this paragraph as many times as it chooses so long as in each case it makes a bona fide attempt to correct the reasons identified by the utility, and in each case the deadline set forth in this paragraph shall apply to the utility's review.

(2) Application review on the merits. A utility shall respond to the new attacher either by granting access or, consistent with § 1.1403(b), denying access within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days in the case of larger orders as described in paragraph (g) of this section). A utility may not deny the new attacher pole access based on a preexisting violation not caused by any prior attachments of the new attacher.

(3) Survey.

(i)A utility shall complete a survey of poles for which access has been requested within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days in the case of larger orders as described in paragraph (g) of this section).

(ii)A utility shall permit the new attacher and any existing attachers on the affected poles to be present for any field inspection conducted as part of the utility's survey. A utility shall use commercially reasonable efforts to provide the affected attachers with advance notice of not less than 3 business days of any field inspection as part of the survey and shall provide the date, time, and location of the survey, and name of the contractor performing the survey.

(iii) Where a new attacher has conducted a survey pursuant to paragraph (j)(3) of this section, a utility can elect to satisfy its survey obligations in this paragraph by notifying affected attachers of its intent to use the survey conducted by the new attacher pursuant to paragraph (j)(3) of this section and by providing a copy of the survey to the affected attachers within the time period set forth in paragraph (c)(3)(i) of this section. A utility relying on a survey conducted pursuant to paragraph (j)(3) of this section to satisfy all of its obligations under paragraph (c)(3)(i) of this section shall have 15 days to make such a notification to affected attachers rather than a 45 day survey period.

(d) Estimate. Where a new attacher's request for access is not denied, a utility shall present to a new attacher a detailed, itemized estimate, on a pole-by-pole basis where requested, of charges to perform all necessary make-ready within 14 days of providing the response required by paragraph (c) of this section, or in the case where a new attacher has performed a survey, within 14 days of receipt by the utility of such survey. Where a pole-by-pole estimate is requested and the utility incurs fixed costs that are not reasonably calculable on a pole-by-pole basis, the utility present charges on a per-job basis rather than present a pole-by-pole estimate for those fixed cost charges. The utility shall provide documentation that is sufficient to determine the basis of all estimated charges, including any projected material, labor, and other related costs that form the basis of its estimate.

(1)A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented.

(2)A new attacher may accept a valid estimate and make payment any time after receipt of an estimate, except it may not accept after the estimate is withdrawn.

(3) Final invoice: After the utility completes make-ready, if the final cost of the work differs from the estimate, it shall provide the new attacher with a detailed, itemized final invoice of the actual make-ready charges incurred, on a pole-by-pole basis where requested, to accommodate the new attacher's attachment. Where a pole-by-pole estimate is requested and the utility incurs fixed costs that are not reasonably calculable on a pole-by-pole basis, the utility may present charges on a per-job basis rather than present a pole-by-pole invoice for those fixed cost charges. The utility shall provide documentation that is sufficient to determine the basis of all estimated charges, including any projected material, labor, and other related costs that form the basis of its estimate.

(4)A utility may not charge a new attacher to bring poles, attachments, or third-party equipment into compliance with current published safety, reliability, and pole owner construction standards guidelines if such poles, attachments, or third-party equipment were out of compliance because of work performed by a party other than the new attacher prior to the new attachment.

(e) Make-ready. Upon receipt of payment specified in paragraph (d)(2) of this section, a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.

(1) For attachments in the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready in the communications space that is no later than 30 days after notification is sent (or up to 75 days in the case of larger orders as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that if make-ready is not completed by the completion date set by the utility in paragraph (e)(1)(ii) in this section, the new attacher may complete the make-ready specified pursuant to paragraph (e)(1)(i) in this section.

(v) State the name, telephone number, and email address of a person to contact for more information about the make-ready procedure.

(2) For attachments above the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State that if make-ready is not completed by the completion date set by the utility in paragraph (e)(2)(ii) in this section (or, if the utility has asserted its 15-day right of control, 15 days later), the new attacher may complete the make-ready specified pursuant to paragraph (e)(1)(i) of this section.

(vi) State the name, telephone number, and email address of a person to contact for more information about the make-ready procedure.

(3) Once a utility provides the notices described in this section, it then must provide the new attacher with a copy of the notices and the existing attachers' contact information and address where the utility sent the notices. The new attacher shall be responsible for coordinating with existing attachers to encourage their completion of make-ready by the dates set forth by the utility in paragraph (e)(1)(ii) of this section for communications space attachments or paragraph (e)(2)(ii) of this section for attachments above the communications space.

(f)A utility shall complete its make-ready in the communications space by the same dates set for existing attachers in paragraph (e)(1)(ii) of this section or its make-ready

above the communications space by the same dates for existing attachers in paragraph (e)(2)(ii) of this section (or if the utility has asserted its 15-day right of control, 15 days later).

(g) For the purposes of compliance with the time periods in this section:

(1) A utility shall apply the timeline described in paragraphs (c) through (e) of this section to all requests for attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in a state.

(2) A utility may add 15 days to the survey period described in paragraph (c) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(3) A utility may add 45 days to the make-ready periods described in paragraph (e) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(4) A utility shall negotiate in good faith the timing of all requests for attachment larger than the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(5) A utility may treat multiple requests from a single new attacher as one request when the requests are filed within 30 days of one another.

(h) Deviation from the time limits specified in this section.

(1) A utility may deviate from the time limits specified in this section before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

(2) A utility may deviate from the time limits specified in this section during performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete make-ready within the time limits specified in this section. A utility that so deviates shall immediately notify, in writing, the new attacher and affected existing attachers and shall identify the affected poles and include a detailed explanation of the reason for the deviation and a new completion date. The utility shall deviate from the time limits specified in this section for a period no longer than necessary to complete make-ready on the affected poles and shall resume make-ready without discrimination when it returns to routine operations. A utility cannot delay completion of make-ready because of a preexisting violation on an affected pole not caused by the new attacher.

(3) An existing attacher may deviate from the time limits specified in this section during performance of complex make-ready for reasons of safety or service interruption that renders it infeasible for the existing attacher to complete complex make-ready within the time limits specified in this section. An existing

attacher that so deviates shall immediately notify, in writing, the new attacher and other affected existing attachers and shall identify the affected poles and include a detailed explanation of the basis for the deviation and a new completion date, which in no event shall extend beyond 60 days from the date the notice described in paragraph (e)(1) of this section is sent by the utility (or up to 105 days in the case of larger orders described in paragraph (g) of this section). The existing attacher shall deviate from the time limits specified in this section for a period no longer than necessary to complete make-ready on the affected poles.

(i) Self-help remedy--(1) Surveys. If a utility fails to complete a survey as specified in paragraph (c)(3)(i) of this section, then a new attacher may conduct the survey in place of the utility and, as specified in § 1.1412, hire a contractor to complete a survey.

(i)A new attacher shall permit the affected utility and existing attachers to be present for any field inspection conducted as part of the new attacher's survey.

(ii)A new attacher shall use commercially reasonable efforts to provide the affected utility and existing attachers with advance notice of not less than 3 business days of a field inspection as part of any survey it conducts. The notice shall include the date and time of the survey, a description of the work involved, and the name of the contractor being used by the new attacher.

(2) Make-ready. If make-ready is not complete by the date specified in paragraph (e) of this section, then a new attacher may conduct the make-ready in place of the utility and existing attachers, and, as specified in § 1.1412, hire a contractor to complete the make-ready.

(i)A new attacher shall permit the affected utility and existing attachers to be present for any make-ready. A new attacher shall use commercially reasonable efforts to provide the affected utility and existing attachers with advance notice of not less than 5 days of the impending make-ready. The notice shall include the date and time of the make-ready, a description of the work involved, and the name of the contractor being used by the new attacher.

(ii) The new attacher shall notify an affected utility or existing attacher immediately if make-ready damages the equipment of a utility or an existing attacher or causes an outage that is reasonably likely to interrupt the service of a utility or existing attacher. Upon receiving notice from the new attacher, the utility or existing attacher may either:

(A) Complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage; or

(B) Require the new attacher to fix the damage at its expense immediately following notice from the utility or existing attacher.

(iii)A new attacher shall notify the affected utility and existing attachers within 15 days after completion of make-ready on a particular pole. The notice shall provide the affected utility and existing attachers at least 90 days from receipt in which to inspect the make-ready. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage or code violations caused by make-ready conducted by the new attacher on their equipment. If the utility or an existing attacher notifies the new attacher of such damage or code violations, then the utility or existing attacher shall provide adequate documentation of the damage or the code violations. The utility or existing attacher may either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or code violations or require the new attacher to fix the damage or code violations at its expense within 14 days following notice from the utility or existing attacher.

(3) Pole replacements. Self-help shall not be available for pole replacements.

(j) One -touch make-ready option. For attachments involving simple make-ready, new attachers may elect to proceed with the process described in this paragraph in lieu of the attachment process described in paragraphs (c) through (f) and (i) of this section.

(1) Attachment application.

(i)A new attacher electing the one-touch make-ready process must elect the one-touch make-ready process in writing in its attachment application and must identify the simple make-ready that it will perform. It is the responsibility of the new attacher to ensure that its contractor determines whether the make-ready requested in an attachment application is simple.

(ii) The utility shall review the new attacher's attachment application for completeness before reviewing the application on its merits. An attachment application is considered complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-released requirements at the time of submission of the application, to make an informed decision on the application.

(A)A utility has 10 business days after receipt of a new attacher's attachment application in which to determine whether the application is complete and notify the attacher of that decision. If the utility does not respond within 10 business days after receipt of the application, or if the

utility rejects the application as incomplete but fails to specify any reasons in the application, then the application is deemed complete.

(B) If the utility timely notifies the new attacher that its attachment application is not complete, then the utility must specify all reasons for finding it incomplete. Any resubmitted application need only address the utility's reasons for finding the application incomplete and shall be deemed complete within 5 business days after its resubmission, unless the utility specifies to the new attacher which reasons were not addressed and how the resubmitted application did not sufficiently address the reasons. The applicant may follow the resubmission procedure in this paragraph as many times as it chooses so long as in each case it makes a bona fide attempt to correct the reasons identified by the utility, and in each case the deadline set forth in this paragraph shall apply to the utility's review.

(2) Application review on the merits. The utility shall review on the merits a complete application requesting one-touch make-ready and respond to the new attacher either granting or denying an application within 15 days of the utility's receipt of a complete application (or within 30 days in the case of larger orders as described in paragraph (g) of this section).

(i) If the utility denies the application on its merits, then its decision shall be specific, shall include all relevant evidence and information supporting its decision, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability, or engineering standards.

(ii) Within the 15-day application review period (or within 30 days in the case of larger orders as described in paragraph (g) of this section), a utility may object to the designation by the new attacher's contractor that certain make-ready is simple. If the utility objects to the contractor's determination that make-ready is simple, then it is deemed complex. The utility's objection is final and determinative so long as it is specific and in writing, includes all relevant evidence and information supporting its decision, made in good faith, and explains how such evidence and information relate to a determination that the make-ready is not simple.

(3) Surveys. The new attacher is responsible for all surveys required as part of the one-touch make-ready process and shall use a contractor as specified in § 1.1412(b).

(i) The new attacher shall permit the utility and any existing attachers on the affected poles to be present for any field inspection conducted as part of the new attacher's surveys. The new attacher shall use commercially reasonable

efforts to provide the utility and affected existing attachers with advance notice of not less than 3 business days of a field inspection as part of any survey and shall provide the date, time, and location of the surveys, and name of the contractor performing the surveys.

(ii)[Reserved].

(4) Make-ready. If the new attacher's attachment application is approved and if it has provided 15 days prior written notice of the make-ready to the affected utility and existing attachers, the new attacher may proceed with make-ready using a contractor in the manner specified for simple make-ready in § 1.1412(b).

(i) The prior written notice shall include the date and time of the make-ready, a description of the work involved, the name of the contractor being used by the new attacher, and provide the affected utility and existing attachers a reasonable opportunity to be present for any make-ready.

(ii) The new attacher shall notify an affected utility or existing attacher immediately if make-ready damages the equipment of a utility or an existing attacher or causes an outage that is reasonably likely to interrupt the service of a utility or existing attacher. Upon receiving notice from the new attacher, the utility or existing attacher may either:

(A) Complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage; or

(B) Require the new attacher to fix the damage at its expense immediately following notice from the utility or existing attacher.

(iii) In performing make-ready, if the new attacher or the utility determines that make-ready classified as simple is complex, then that specific make-ready must be halted and the determining party must provide immediate notice to the other party of its determination and the impacted poles. The affected make-ready shall then be governed by paragraphs (d) through (i) of this section and the utility shall provide the notice required by paragraph (e) of this section as soon as reasonably practicable.

(5) Post-make-ready timeline. A new attacher shall notify the affected utility and existing attachers within 15 days after completion of make-ready on a particular pole. The notice shall provide the affected utility and existing attachers at least 90 days from receipt in which to inspect the make-ready. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage or code violations caused by make-ready conducted by the new attacher on their equipment. If the utility or an existing attacher notifies the new attacher of such damage or code violations, then the utility or

existing attacher shall provide adequate documentation of the damage or the code violations. The utility or existing attacher may either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or code violations or require the new attacher to fix the damage or code violations at its expense within 14 days following notice from the utility or existing attacher.

(Approved by the Office of Management and Budget under control number 3060-1151)

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 227, 303(r), 309, 1403, 1404, 1451, and 1452.

History

[76 FR 26620, 26640, May 9, 2011; 76 FR 40817, July 12, 2011; redesignated and amended at 83 FR 44831, 44841, Sept. 4, 2018; 83 FR 46812, 46836, Sept. 14, 2018; 84 FR 16412, Apr. 19, 2019]

End of Document

47 CFR 1.1413

This document is current through the January 10, 2018 issue of the Federal Register. Pursuant to 82 FR 8346 ("Regulatory Freeze Pending Review"), certain regulations will be delayed pending further review. See Publisher's Note under affected rules. Title 3 is current through December 31, 2017.

Code of Federal Regulations > TITLE 47 -- TELECOMMUNICATION > CHAPTER I -- FEDERAL COMMUNICATIONS COMMISSION > SUBCHAPTER A -- GENERAL > PART 1--PRACTICE AND PROCEDURE > SUBPART J -- POLE ATTACHMENT COMPLAINT PROCEDURES

§ 1.1413 Complaints by incumbent local exchange carriers. [See publisher's note.]

[PUBLISHER'S NOTE: This section was formerly § 1.1424 and was redesignated as § 1.1413 at 83 FR 44831, 44842, Sept. 4, 2018, effective Oct. 4, 2018.]

(a) A complaint by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that it has been denied access to a pole, duct, conduit, or right-of-way owned or controlled by a local exchange carrier or that a utility's rate, term, or condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this part.

(b) In complaint proceedings challenging utility pole attachment rates, terms, and conditions for pole attachment contracts entered into or renewed after the effective date of this section, there is a presumption that an incumbent local exchange carrier (or an association of incumbent local exchange carriers) is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system providing telecommunications services for purposes of obtaining comparable rates, terms, or conditions. In such complaint proceedings challenging pole attachment rates, there is a presumption that incumbent local exchange carriers (or an association of incumbent local exchange carriers) may be charged no higher than the rate determined in accordance with § 1.1406(e)(2). A utility can rebut either or both of the two presumptions in this paragraph (b) with clear and convincing evidence that the incumbent local exchange carrier receives benefits under its pole attachment agreement with a utility that materially advantages the incumbent local exchange carrier over other telecommunications carriers or cable television systems providing telecommunications services on the same poles.

(Approved by the Office of Management and Budget under control number 3060-1151)

(Approved by the Office of Management and Budget under control number 3060-0392)

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 227, 303(r), 309, 1403, 1404, 1451, and 1452.

History

[76 FR 26620, 26640, May 9, 2011; 76 FR 40817, July 12, 2011; 82 FR 61453, 61477, Dec. 28, 2017; redesignated at 83 FR 44831, 44842, Sept. 4, 2018; 83 FR 46812, 46840, Sept. 14, 2018]

End of Document

47 CFR 1.1415

This document is current through the January 10, 2018 issue of the Federal Register. Pursuant to 82 FR 8346 ("Regulatory Freeze Pending Review"), certain regulations will be delayed pending further review. See Publisher's Note under affected rules. Title 3 is current through December 31, 2017.

Code of Federal Regulations > *TITLE 47 -- TELECOMMUNICATION* > *CHAPTER I -- FEDERAL COMMUNICATIONS COMMISSION* > *SUBCHAPTER A -- GENERAL* > *PART 1--PRACTICE AND PROCEDURE* > *SUBPART J -- POLE ATTACHMENT COMPLAINT PROCEDURES*

§ 1.1415 Overlashing.

(a) Prior approval. A utility shall not require prior approval for:

(1) An existing attacher that overlashes its existing wires on a pole; or

(2) For third party overlashing of an existing attachment that is conducted with the permission of an existing attacher.

(b) Preexisting violations. A utility may not prevent an attacher from overlashing because another existing attacher has not fixed a preexisting violation. A utility may not require an existing attacher that overlashes its existing wires on a pole to fix preexisting violations caused by another existing attacher.

(c) Advance notice. A utility may require no more than 15 days' advance notice of planned overlashing. If a utility requires advance notice for overlashing, then the utility must provide existing attachers with advance written notice of the notice requirement or include the notice requirement in the attachment agreement with the existing attacher. If after receiving advance notice, the utility determines that an overlash would create a capacity, safety, reliability, or engineering issue, it must provide specific documentation of the issue to the party seeking to overlash within the 15 day advance notice period and the party seeking to overlash must address any identified issues before continuing with the overlash either by modifying its proposal or by explaining why, in the party's view, a modification is unnecessary. A utility may not charge a fee to the party seeking to overlash for the utility's review of the proposed overlash.

(d) Overlashers' responsibility. A party that engages in overlashing is responsible for its own equipment and shall ensure that it complies with reasonable safety, reliability, and engineering practices. If damage to a pole or other existing attachment results from overlashing or overlashing work causes safety or engineering standard violations, then the overlashing party is responsible at its expense for any necessary repairs.

(e) Post-overlashing review. An overlashing party shall notify the affected utility within 15 days of completion of the overlash on a particular pole. The notice shall provide the affected utility at least 90 days from receipt in which to inspect the overlash. The utility has 14 days after completion of its inspection to notify the overlashing party of any damage or code violations to its equipment caused by the overlash. If the utility discovers damage or code violations caused by the overlash on equipment belonging to the utility, then the utility shall inform the overlashing party and provide adequate documentation of the damage or code violations. The utility may either complete any necessary remedial work and bill the overlashing party for the reasonable costs related to fixing the damage or code violations or require the overlashing party to fix the damage or code violations at its expense within 14 days following notice from the utility.

(Approved by the Office of Management and Budget under control number 3060-1151.)

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 227, 303(r), 309, 1403, 1404, 1451, and 1452.

History

[83 FR 46812, 46840, Sept. 14, 2018; 84 FR 16412, Apr. 19, 2019]

End of Document

CERTIFICATE OF SERVICE

I hereby certify that I caused to be filed electronically the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 24, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Eric B. Langley

Eric B. Langley
Langley & Bromberg LLC
2700 U.S. Highway 280, Suite 240E
Birmingham, Alabama 35223
(205) 783-5750
eric@langleybromberg.com

Counsel for Petitioners American Electric Power Service Corporation, Duke Energy Corporation, Entergy Corporation, Oncor Electric Delivery Company LLC, Southern Company, and Tampa Electric Company