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

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The FCC attempts to thwart judicial review of its statutory authority by asserting that it "has not been afforded an opportunity to pass" on Petitioners' argument that Rule 1.1411(c)(2) contravenes the plain language of § 224(f)(2). FCC Br. 31 (citing 47 U.S.C. § 405(a)). Section 405, though, does not require that the FCC be afforded "an opportunity to pass on the issue 'in any particular manner.'" *Fones4All Corp. v. FCC*, 550 F.3d 811, 819 (9th Cir. 2008) (quoting *Coal. for Noncommercial Media v. FCC*, 249 F.3d 1005, 1008 (D.C. Cir. 2001)). Moreover, it is not required "that the *precise* issue be presented to the Commission in order to afford it a 'fair opportunity.'" *Time Warner Entm't Co. v. FCC*, 144 F.3d 75, 80 (D.C. Cir. 1998) (emphasis in original). Judicial review is permitted "[s]o long as the issue is necessarily implicated by the argument made to the Commission." *Id*. As the court in *Time Warner* explained, if a "petitioner makes a basic challenge to a Commission policy, but the formulation of the issue presented to us was not precisely as presented to the Commission, we ask whether a reasonable Commission necessarily would have seen the question raised before us as part of the case presented to it." *Id*. at 81; *see also Worldcall Interconnect, Inc.*

v. FCC, 907 F.3d 810, 820 (5th Cir. 2018) ("[Section 405(a)] does not 'require an argument to be brought up with specificity, but only reasonably 'flagged' for the agency's consideration.'") (quoting *NTCH, Inc. v. FCC*, 841 F.3d 497, 508 (D.C. Cir. 2016)).

Petitioner Xcel Energy stated that "the Commission should **clarify that utilities have the right to** stop all work on that pole and **prohibit physical access to that pole until the preexisting safety issue is resolved** and the pole is brought into compliance." July 26, 2018 Ex Parte Letter from Xcel Energy Services, Inc. and Alliant Energy Company, 7 (FER 36) (emphasis added)[1]. A substantially similar statement was made by Amicus Curiae Edison Electric Institute ("EEI"). Edison Electric Institute's July 26, 2018 Ex Parte Notice, 10 (FER 48) . These statements necessarily implicated the right of utilities to deny access under § 224(f)(2).[2] These statements also "reasonably flagged" the issue for the FCC insofar as the FCC expressly addressed and responded to these statements in its Order. Order, 33 FCC Rcd. 7705, 7767 at ¶ 122 n.456 (ER 63).[3] The FCC

[1] The courts have consistently held that *ex parte* notices can satisfy Section 405. *See, e.g.*, *Sprint Nextel Corp. v. FCC*, 524 F.3d 253, 257 (D.C. Cir. 2008).

[2] The FCC also **concedes** that parties raised the Section 224(f)(2) issue with respect to the "preexisting violation" rules governing overlashers, FCC Br. 30-31, and thus the FCC would reasonably be expected to see this as an issue for new attachments as well.

[3] *See* "Glossary" in Petitioners' Opening Brief for full citation. Pet'rs' Br. xiv.

therefore "had and indeed took the opportunity to pass upon the question" of its statutory authority to adopt Rule 1.1411(c)(2). *Sorenson Commc'ns, Inc. v. FCC*, 765 F.3d 37, 50 (D.C. Cir. 2014).

Further, the FCC discussed the specific provisions of § 224(f)(2) in several portions of its Order. *See, e.g.*, Order at ¶ 100; *id*. at ¶ 119; *id*. at n.11; *id*. at n.216; *id*. at nn.355-57; *id*. at n.428 (ER 171-72, 179, 3, 30, 49-50 & 59). The FCC concluded that it has "ample authority under section 224" to adopt its rules on preexisting violations – a conclusion that necessarily requires the FCC to contemplate *all* aspects of § 224, including § 224(f)(2). Order, ¶ 135 (ER 69). Thus, "[e]ven if no other party brought the matter to the agency's attention, the FCC's independent contemplation of the issue satisfies § 405's mandate." *Echostar Satellite LLC v. FCC*, 704 F.3d 992, 996 (D.C. Cir. 2012).

B. The FCC's New Interpretation of its Preexisting Violation Rules Does Not Resolve the Statutory Conflict.

In its brief, the FCC claims for the first time that they "simply prevent a utility from requiring a new attacher to address past safety violations **even in those circumstances where the pole would accommodate the new attachment without additional safety risk**." FCC Br. 35 (emphasis added). This interpretation appears nowhere in the text of the rules or the Order, and cannot serve as a basis for upholding the rule. *Arrington v. Daniels*, 516 F.3d 1106, 1112-13 (9th Cir. 2008), *superseded by regulation on other grounds*, (citing *Fed. Power*

Comm'n v. Texaco, Inc., 417 U.S. 380, 397 (1974)); *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d 1004, 1007 n.2 (D.C. Cir. 1996) ("We of course cannot affirm the Commission's order on the basis of a theory not embraced by it until litigation." (citing *SEC v. Chenery*, 318 U.S. 80, 88 (1943))). In any event, it is irrelevant under the plain language of § 224(f)(2) whether an issue of safety, reliability, capacity or engineering arises from a preexisting violation or from some other cause.

C. The FCC's Attempt to Analogize the Preexisting Violation Rules to the Reservation of Capacity Rule in the *Southern Company* Case Is Without Merit.

The FCC states:

> In asserting that these new rules contradict the 'plain language' of Section 224(f)(2)…petitioners emphasize that the statute permits utilities to deny access to new attachers "for reason of safety."…The Eleventh Circuit rejected a similar argument in *Southern Company*, finding nothing in the statutory text to support the claim that "utilities enjoy the unfettered discretion to determine when capacity is insufficient" under Section 224(f)(2).

FCC Br. 32 (citing *S. Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002)).

This case **is** like *Southern Company*, but **not** for the reasons the FCC asserts. In *Southern Company*, the court held that an FCC regulation requiring electric utilities to expand capacity was contrary to the plain language of § 224(f)(2). *S. Company v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002). Similarly, the FCC's preexisting violation rules, which require utilities to allow access even in the face

of safety, reliability, capacity or engineering violations, is in direct contravention of § 224(f)(2). Further, the statement in *Southern Company* that utilities do not have unfettered discretion to define the term "insufficient capacity," *id*. at 1348, is not analogous to the instant dispute regarding the preexisting violation rules. Here, unlike in *Southern Company* with respect to "insufficient capacity," there is no dispute regarding the existence of a preexisting violation. Its existence is presumed by the very nature of the rule.

II. The FCC's Restrictions on Advance Notice of Overlashing Cannot be Saved by the Ability of Parties to Contract Around Them, are Unjustified, and Are Now Ripe for Review.

A. The FCC's Argument that Parties Can Contract Around the Overlashing Rules Underscores the Arbitrary and Capricious Nature of Those Rules.

The FCC mischaracterizes its new overlashing rule as "even more accommodating to utilities" than its previous policy, asserting, among other things, that "the new rule permits utilities **for the first time** to require attachers to provide advance notice of overlashing." FCC Br. 40 (emphasis added). However, the FCC has expressly permitted utilities to require advance notice of overlashing since at least 2001. *See* 2001 Order, 16 FCC Rcd 12103, 12144-45;[4] *S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir 2002) (noting that "FCC rules do not preclude [pole] owners from negotiating with pole users to require notice before

[4] *See* "Glossary" in Petitioners' Opening Brief for full citation. Pet'rs' Br. xv.

overlashing"). In truth, the FCC's new approach to overlashing is far **less** accommodating to the legitimate needs of utilities. Among other things, the new rule restricts a utility's ability to request basic information necessary to conduct any meaningful review of potential capacity, safety, reliability or engineering issues raised by the proposed overlashing.

The only response that the FCC can muster is that utilities "remain free 'to reach bargained solutions that differ from [FCC] rules,' including agreements that require overlashers to perform engineering studies and submit specifications in advance." FCC Br. 40 (internal citation omitted). This position is undermined by the FCC's own long-standing "sign and sue" precedent, under which "an attacher may execute a pole attachment agreement with a utility, and then later file a complaint challenging the lawfulness of a provisions of that agreement." *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd. 11864, 11905 at ¶ 99 (May 20, 2010) ("2010 FNPRM"). If the FCC determines that the allegedly unlawful rate, term or condition is not "just and reasonable," the FCC may terminate that provision and prescribe or substitute a rate, term or condition established by the FCC, regardless of what the parties may have negotiated. *See id*.; 47 C.F.R. § 1.1407(a). Thus, even if a utility and an attacher were to negotiate an agreement

whereby the attacher would provide engineering studies or specifications with its overlashing notice, the attacher would remain free to file a complaint with the FCC seeking rescission of those requirements.

B. None of the FCC's Justifications for Preventing a Utility from Charging a Fee to Review a Proposed Overlash Pass Muster.

The FCC defends its prohibition against charging a fee to evaluate a proposed overlash on the grounds that such fees "would increase the costs of deployment…" FCC Br. 41 (internal quotation marks and citation omitted). The FCC continues to ignore the fact that these are costs that would not be incurred **but for** the overlashing project and **but for** the existing attachment. The FCC further ignores that this new cost-shifting rule is inconsistent with the principles of cost-causation that underpin the FCC's pole attachment regulations and the Act itself. As the FCC previously held:

> Under cost causation principles, if a customer is causally responsible for the incurrence of a cost, then that customer – the cost causer – pays a rate that covers this cost. This is consistent with the Commission's existing approach in the make-ready context, where a pole owner recovers the entire associated costs through make-ready fees.

2011 Order, 26 FCC Rcd 5240, 5301 at ¶ 143 (internal citations omitted).[5] The costs of evaluating a party's proposed overlash for capacity, safety, reliability and

[5] *See* "Glossary" in Petitioners' Opening Brief for full citation. Pet'rs' Br. xv.

engineering purposes are no different than other costs for which the FCC already permits recovery.

The FCC further argues that its prohibition against recovering the cost of evaluating overlashing proposals is no different than the FCC's decision to prohibit recovery of costs associated with review of new attachers' OTMR and self-help work. FCC Br. 41. The FCC is wrong. Under both the FCC's OTMR and self-help rules, the attacher is required to perform the engineering/survey and meet "complete application" requirements through the use of an approved contractor. *See, e.g.*, 47 C.F.R. § 1.1411(j)(1)&(3); *id*. at § 1.1411(i)(1). However, in the case of overlashing, the FCC not only prohibits cost recovery for evaluating the proposed overlash, but also prohibits the utility from requiring that the overlasher submit an engineering evaluation with the overlashing notice. *See* Order, ¶ 119 (ER 61-62). The FCC is thus comparing apples to oranges.

C. Rule 1.1415(c) Contravenes the Purpose of § 224(f)(2) and is Ripe for Review.

The FCC's new overlashing rule, *as written*, fails to explicitly preserve the right of the pole owner to deny an overlash for reasons of capacity, safety, reliability, or engineering, thus circumventing the plain language of § 224(f)(2). Pet'rs' Br. 28-29. The FCC and Intervenors argue the rule "is not ripe for adjudication" because it is contingent on future facts or events. FCC Br. 37-38; Int. Br. 50-51. "A claim is fit for decision if the issues raised are primarily legal,

do not require further factual development, and the challenged action is final." *US West Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999) (quoting *Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989)).

In this case, the rule is a final agency action that is ripe for review because it raises a primarily legal issue – *i.e.*, the statutory right of utilities to deny access for reasons of safety, capacity, reliability, and engineering under § 224(f)(2). Attaching entities will undoubtedly interpret the new rule as prohibiting a utility from denying access of a proposed overlash pursuant to § 224(f)(2). Interpretation of the rule, and whether it violates the plain language of the statute, is primarily a legal issue for the Court, not a factual issue contingent upon future events. Furthermore, delayed judicial review of this rule would cause hardship to utilities by undermining their statutory authority to prevent significant safety or reliability issues associated with overlashing even though the FCC found that concerns that overlashing may cause pole overloading were "valid and supported by the record." Order, ¶ 116 (ER 58-59).

III. The Court Should Hold Unlawful the Power Supply Space Self-Help Remedy Adopted by the FCC.

A. The FCC Ignores the Unambiguous Statutory Boundaries of Its Authority to Mandate Access Imposed by § 224.

In their opening brief, Petitioners explained that the FCC's new power supply space "self-help" remedy exceeds its authority because the FCC's

jurisdiction is limited under the Act to regulating "the rates, terms, and conditions for pole attachments," 47 U.S.C. § 224(b)(1), and the Act defines a "pole attachment" as "any attachment by a cable television system or provider of telecommunications service…." *Id*. at § 224(a)(4). Instead of addressing Petitioner's statutory construction arguments regarding § 224(a)(4) and (b)(1) head on, the FCC instead argues it has sufficient authority to adopt the power supply space self-help remedy under 47 U.S.C. § 224(b)(2) & (f)(1). Resp. Br. 43-44.

Section 224(b)(2), which provides that the FCC may "prescribe by rule regulations to carry out the provisions of this section," is nothing more than a general delegation of rulemaking authority to the FCC to implement the Act. The notion that Section (b)(2) somehow expands the FCC's jurisdiction under the Act is not supported by the text. Moreover, it strains credulity to suggest that Congress would take the time to carefully craft one statutory provision specifically detailing the scope of the Act (*i.e.* Section (b)(1)) only to have that provision rendered meaningless by the provision immediately following it.

Section 224(f)(1) is similarly unavailing as a statutory basis for the FCC's expanded self-help remedy. Section 224(f)(1) imposes the 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). Under the FCC's logic, the FCC could adopt any rule so long as it facilitated access to utility poles.

However, there must be a limiting principle, and that limit is the language of subsection (b)(1), the unambiguous purpose of which is to define the "authority of [the] Commission." 47 U.S.C. § 224(b)(1).

The Supreme Court previously found that 224(b)(1) and 224(a)(4) are unambiguous. *Nat'l Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 333 (2002). In *Nat'l Cable & Telecommunications Ass'n, Inc.*, the Court squarely addressed the issue of the types of attachments to which the Act applies, finding that the relevant inquiry in determining whether it had jurisdiction over a particular attachment is "the character of the attaching entity—the entity the attachment is 'by.'" *Id.; see also Mozilla Corp. v. FCC*, 2019 U.S. App. LEXIS 29480, at *150-53 (D.C. Cir. Oct. 1, 2019) (finding FCC lacks pole attachment jurisdiction over attachments by broadband-only providers under §§224(b)(1) and (a)(4) because, under current law, such entities are neither cable television systems nor providers of telecommunications service). Here, the attachments the FCC has purported to regulate (and is allowing third parties to move) are "by" electric utilities, not cable television providers or telecommunications carriers. *See* 47 U.S.C. §§ 224(a)(4) & (b)(1).

Moreover, as noted above, in § 224(f)(2), the Act imposes a further restriction on whatever authority is granted to the Commission by § 224(f)(1). Section 224(f)(2) establishes that once an electric utility pole owner has established

that a particular attachment practice or request creates an issue with respect to insufficient capacity, safety, reliability or engineering, the statute permits the electric utility to restrict the use of that practice in a manner that addresses its particular concern. Here, it is undisputed that third-party access to the electric supply space presents a "safety" issue. *See* Order, ¶ 20 ("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….there is broad agreement that more complex projects and all projects above the communications space may raise substantial safety and continuity of service concerns.") (ER 12).

The FCC previously declined to permit such a practice due to the significant safety concerns involved. *See* FCC Br. 46 (citing 2011 Order, 26 FCC Rcd at 5262, ¶ 42); *see also* 2011 Order, 26 F.C.C. Rcd. at 5277, ¶ 80. In adopting its expanded self-help remedy in the 2018 Order, the FCC continued to "recognize the valid concerns of utilities regarding the importance of safety and equipment integrity, particularly in the electric space…" Order, ¶ 99 (ER 48-49). Even in its Response Brief, the FCC does not challenge the validity of Petitioners' safety concerns. *See* FCC Br. 47. Rather, the FCC argues that, in enacting its expanded self-help remedy, the agency's goal was to "balance[] the benefits of the rule against any potential safety concerns, which it sought to mitigate." *Id*.

However, this is precisely what the plain language of § 224(f)(2) prevents the FCC from doing. As noted above, *Southern Company* case held that an FCC regulation requiring electric utilities to expand capacity was contrary to § 224(f)(2) and thus *ultra vires*. *See S. Co.*, 293 F.3d at 1346–47. The instant matter is almost identical to *Southern Company* except that the rule in question touches on an issue of "safety" rather than "insufficient capacity"—both of which are enumerated grounds for denial of access under 224(f)(2). In support of its position, the FCC cites to the D.C. Circuit's opinion in the *Gulf Power* case. FCC Br. 45 (citing *Gulf Power Co. v. F.C.C.*, 669 F.3d 320, 324 (D.C. Cir. 2012)). However, unlike the parties in *Southern Company*, the parties in *Gulf Power* disputed whether or not the underlying facts presented an issue of "insufficient capacity." *See Gulf Power Co.*, 669 F.3d at 325. Thus, the issue in *Gulf Power* became whether the FCC's interpretation of "insufficient capacity" was correct. *See id*. Because the FCC does not dispute the validity of the Petitioners' safety concerns in this matter, the D.C. Circuit's holding in *Gulf Power Co.* is of no relevance. *See id*.

B. The FCC Has Failed to Demonstrate the Requisite Level of Expertise Regarding Electric Distribution Facilities to Warrant Deference by the Court.

As described in the *Amicus Curiae* Brief filed by the Edison Electric Institute, Utilities Technology Council, and National Rural Electric Cooperative Association in this matter ("Trade Assoc. Br."), the safety issues implicated by the

FCC's expanded self-help remedy "have traditionally been subject to the police power of the states and are regulated by the states, including states that have not reverse-preempted the Commission by filing a certification under Section 224(c)." Trade Assoc. Br. 9. Both the plain language and structure of the Act indicate Congress's intent to defer to both electric utilities and the states with respect to safety issues. *See id*. at 8; *see also* 47 U.S.C. §§ 224(c) & (f)(2). The FCC simply lacks expertise regarding such issues and has long acknowledged this fact. Trade Assoc. Br. 6.

This lack of expertise is on startling display in the FCC's characterization of the expanded self-help remedy as a strong motivation for electric utilities to comply with the FCC's timelines. *See* FCC Br. 42-43; Int. Br. 43-44. The FCC's recognition that the remedy will be motivating to electric utilities underscores the danger of the remedy. An electric utility's motives for maintaining control over work in the electric supply space relate exclusively to safety and reliability of the electric grid—not the anti-competitive motives that birthed the self-help remedy in the communications space. "[E]lectric power companies … are typically disinterested parties with only the best interest of the infrastructure at heart…." 2010 FNPRM, 25 FCC Rcd. at 11893-94, ¶ 68.

As stated by First Energy in the record below following issuance of the draft order:

> Work in the communications space alone is already quite dangerous, as dozens of workers are badly injured or killed each year. It is abundantly clear to FirstEnergy through years of experience that its telecommunications provider partners simply do not place the same emphasis on safety that FirstEnergy does, and many of them do not have electrical or structural engineers on staff qualified to direct power space construction by contractors…..

July 20, 2018 Letter from Thomas R. Pryatel, P.E., First Energy Service Co., to Chairman Pai, 1 (ER 952); *see also* Electric Utilities' July 26, 2018 Ex Parte Notice, 2 (ER 940) ("We have serious concerns that this rule could result in injury or death to contractors and have a detrimental effect on the reliability of the electric grid."). Where it is literally a matter of life and death—to say nothing of the reliability of the electric system—the FCC should not be permitted to use such "motivational" tactics.

C. Neither the FCC nor Intervenors Identified Any Language in the Record Providing Adequate Notice of the FCC's Intent to Adopt the Remedy.

Petitioners argued in their opening brief that the FCC failed to comply with the notice requirements of 5 U.S.C. § 553 because it did not provide sufficient notice of its intent to extend the self-help remedy into the electric supply space. Pet'rs' Br. 34 n.7. In response, the FCC argues that paragraph 6 of the NPRM[6] provided sufficient notice:

> Several proposals to speed pole access allow telecommunications and cable providers seeking to add equipment to a utility pole (a "new

[6] *See* "Glossary" in Petitioner's Opening Brief for full citation. Pet'rs' Br. xiv.

> attacher") to adjust, on an expedited basis, the preexisting equipment of the utility and other providers already on that pole ("existing attachers").

Resp. Br. 42 n.22 (citing NPRM, 32 FCC Rcd. 3266, 3268 at ¶ 6 (ER 143)).[7] However, neither the Notice nor the Order identified any proposals to allow attachers to do **anything** in the power supply space. Moreover, the NPRM's language is disproportionately vague and unimpactful as compared to the dramatic change in FCC policy resulting from the new supply space self-help remedy. If the FCC was contemplating taking the far-reaching and heretofore uncontemplated step of allowing attachers to move electric facilities in the supply space, the FCC should have devoted more discussion to it than a vague allusion, at best, in the NPRM. In layman's terms, this is a **big deal**, and the FCC should have treated it as such.

[7] Intervenors point to paragraphs 13 and 14 of the NPRM as providing adequate notice of the supply space self-help remedy. Int. Br. 42 (citing NPRM, 32 FCC Rcd. at 3270, ¶¶ 13-14 (ER 145)). However, these paragraphs address "complex" make-ready work, which is a specifically defined type of make-ready work on communications facilities within the communications space—it is not the same as make-ready work on electric facilities in the power supply space. *See* 47 C.F.R. § 1.1402(p). Nothing in these paragraphs indicates that the FCC was contemplating a rule that would allow attachers to enter the power supply space for the purpose of moving electric facilities. The FCC's expanded self-help remedy was not a "a logical outgrowth of the notice…" *See Hodge v. Dalton*, 107 F.3d 705, 712 (9th Cir. 1997) (quoting *Rybachek v. EPA*, 904 F.2d 1276, 1288 (9th Cir. 1990)).

IV. The Court Should Hold Unlawful Rule 1.1413(b) regarding ILEC Rates.

A. The FCC and Intervenors Failed to Rebut Petitioners' Argument that Rule 1.1413(b) Is Not Entitled to Deference.

1. The FCC's Statutory Analysis in the 2011 Order Is Insufficient to Invoke *Chevron* Deference.

In their opening brief, Petitioners argued that Rule 1.1413(b) is not entitled to *Chevron* deference because, in adopting that rule, the FCC "d[id] not purport to interpret the language of [§224] at all." Pet'rs' Br. 43-44 (quoting *Smith v. City of Jackson*, 544 U.S. 228, 264-65 (2005) (O'Connor, J., Kennedy, J., and Thomas, J. concurring)). In response, the FCC asserts that the analysis in its 2011 Order regarding whether it had jurisdiction over the rates, terms and conditions for ILEC attachments gives it "ample authority" to adopt the new presumptions in Rule 1.1413(b). FCC Br. 51 (internal citations omitted). Importantly, though, the FCC's 2011 analysis was limited to this specific, threshold jurisdictional question. *See* 2011 Order, 26 FCC Rcd. at 5238-34, ¶¶ 204-213. As stated by the D.C. Circuit in its decision regarding the 2011 Order:

> **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), which authorizes the Commission to regulate the rates, terms and conditions of "pole attachments" and assure that they are "just and reasonable." 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.

Am. Elec. Power Serv. Corp. v. FCC, 708 F.3d 183, 186 (D.C. Cir. 2013). In the Order, the FCC has now done the exact things it declined to do in the 2011 Order: it has adopted the § 224(e) rate as the presumptive rate for ILECs and adopted a presumption that there are no "distinctions between ILECs and other pole attachers." 47 C.F.R. § 1.1413(b).

Both the FCC and Intervenors presume that because the FCC has determined that it has jurisdiction over the rates, terms, and conditions for ILEC attachments, it now has free reign to exercise that jurisdiction in any way it chooses. *See* FCC Br. 51; Int. Br. 25-27. Not so. The FCC is still bound by the guardrails of § 224 and cannot allow a general devise of jurisdiction to trump other specific limitations in the statute. *See* 5 U.S.C. § 706(2)(C) (requiring agency action to be set aside if "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"). The FCC failed to address whether Rule 1.1413(b) was even permissible under the statutory parameters of § 224. "Quite simply, the agency has not actually exercised its delegated authority to resolve any ambiguity in the relevant provision's text…therefore, the regulation is not entitled to any deference." *Smith*, 544 U.S. at 265 (internal citations omitted).

2. Neither Paragraph 5 Nor Paragraph 135 of the 2018 Order Contain Any Interpretation by the FCC of a Statutory Term or Phrase.

The FCC and Intervenors collectively offer up paragraphs 5 and 135 of the 2018 Order as providing the requisite statutory analysis. *See* FCC Br. 51-52; Int. Br. 24-26. In the 2018 Order, the FCC merely states:

> **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 preexisting 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). Even assuming, *arguendo*, that the above language means the FCC was interpreting the phrase "just and reasonable" in § 224(b)(1) when adopting Rule 1.1413(b), the FCC failed to engage in a reasoned analysis and explanation. *See, e.g.*, *SEC v. Sloan*, 436 U.S. 103, 117-18 (1978) (refusing to extend deference to order where agency failed to address "in any detail the statutory authorization under which it took that action…"). For example, the FCC did not analyze whether it was permissible to adopt a presumption that ILECs are "similarly situated" to "telecommunications carriers," provided that § 224(a)(5) states "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"—in other words, whether it makes sense to presume that ILECs are similarly situated to the very thing § 224(a)(5) says they are **not**. Nor did the FCC analyze § 224(e) to determine whether a rate formula intended "to govern pole attachments used by telecommunications carriers" was appropriate for application to an entity that is **not** a "telecommunications carrier."

Similarly, Intervenors argue that the FCC engaged in statutory interpretation sufficient to support *Chevron* deference in paragraph 5 of the Order. *See* Int. Br. 25-26. But paragraph 5 is another conclusory allegation of authority, not a reasoned interpretation of an ambiguous statutory term:

> Section 224 of the Act grants us broad authority to regulate attachments to utility-owned and -controlled poles, ducts, conduits, and rights-of-way. The Act authorizes us to prescribe rules to: ensure that the rates, terms, and conditions of pole attachments are just and reasonable; require utilities to provide nondiscriminatory access to their poles, ducts, conduits, and rights-of-way to telecommunications carriers and cable television systems (collectively, attachers); provide procedures for resolving pole attachment complaints; govern pole attachment rates for attachers; and allocate make-ready costs among attachers and utilities….

Order, ¶ 5 (ER 3); *see Sloan*, 436 U.S. at 117-18. Intervenors also cite to *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013) for the proposition that "*Chevron* deference applies to '*all* the matters the agency is charged with administering.'" Int. Br. 25. However, in *City of Arlington*, unlike here, the FCC actually interpreted the precise statutory provision at issue (47 U.S.C. § 332(C)(7)(B)(ii),

requiring state or local governments to act on wireless-siting applications "within a reasonable period of time"). *See id*. at 294-95.

B. The FCC and Intervenors Ignore the Fact that § 224(e)(1) Specifically Excludes ILECs.

Petitioners explained in their opening brief that Rule 1.1413(b) violates the express terms of the Pole Attachments Act because § 224(e)(1) specifically **excludes** ILECs from its coverage. Pet'rs' Br. 51-54. The FCC responds:

> [N]othing in [Section 224(e)(1)] prohibits the FCC from prescribing the same rates for other attachers. For example, even though Section 224 mandates the use of different formulas to calculate the cable rate and the telecom rate, *see id*. § 224(d), (e), courts have held that the FCC can permissibly adopt telecom rates that are essentially identical to cable rates. Similarly, **nothing in Section 224 unambiguously bars the FCC from concluding that ILECs are entitled to the same attachment rates as similarly situated telecommunications attachers**.

FCC Br. 52. (emphasis added) (internal citations omitted).

Section 224(e)(1) provides "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…." 47 U.S.C. § 224(e). For purposes of § 224, though, the term "telecommunications carrier" "does not include any incumbent local exchange carrier…." Thus, the § 224(e)(1) rate applies, by its own terms, to a specific group of entities ("telecommunications carriers") that does *not* include ILECs. If it is true, as the FCC contended in its 2011 Order (and as the D.C. Circuit upheld in *AEP v FCC*)

that Congress intentionally used the term "telecommunications carrier" to mean a limited subset of "providers of telecommunications services," then Congress's choice to associate the Section 224(e) rate formula only with "telecommunications carriers" (and not with "providers of telecommunications services") should be given effect. *See* 2011 Order, 26 FCC Rcd. at 5329-32, ¶¶ 207-211; *Am. Elec. Power Serv. Corp.*, 708 F.3d at 188.

C. The FCC's Inconsistency on ILEC Rates Over a Short Period of Time Erodes Any Deference to Which It Might Otherwise Be Entitled.

In their Opening Brief, Petitioners asserted that "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." Pet'rs' Br. 55. In response, the FCC argues that its change in position is "not fatal" because "the FCC both acknowledged its change in approach and explained the reason for the change." FCC Br. 53. However, even the *Resident Councils of Washington* case cited by the FCC recognizes that:

> An 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.

Resident Councils v. Leavitt, 500 F.3d 1025, 1036 (9th Cir. 2007) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)).

The FCC's position with respect to ILEC rates has been anything but consistent. *See Cardoza-Fonseca*, 480 U.S. at 446 n.30 ("[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.") (internal quotation marks and citations omitted).[8] To recap, the FCC's position on ILEC rates has changed over time as follows:

- **Prior to 2011**: The Commission consistently held: "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**." 1998 Order, 13 FCC Rcd. 6777, 6781 at ¶ 5 (emphasis added).[9]
- **2011**: The Commission asserted jurisdiction over ILEC attachments, but stated "…we recognize the need to exercise that authority in a manner that accounts for the potential **differences between incumbent LECs and**

[8] Petitioners inadvertently failed to note in their Opening Brief that the language cited in *Marmolejo-Campos v. Holder*, 558 F.3d 903, 919-20 (9th Cir. 2009) for the proposition that "…agencies are *not* free, under *Chevron*, to generate erratic, irreconcilable interpretations of their governing statutes and then seek judicial deference" was contained within the dissent of that opinion. That proposition of law, though, is nonetheless a good one. *See, e.g., Natural Res. Def. Council v. EPA*, 526 F.3d 591, 605 (9th Cir. 2008) (noting that "the consistency of an agency's position is a factor in assessing the weight that position is due…").

[9] *See* "Glossary" in Petitioner's Opening Brief for full citation. Pet'rs' Br. xv.

telecommunications carrier or cable operator attachers." 2011 Order, 26 FCC Rcd. at 5333-34, ¶ 214 (emphasis added).

- **2018**: The Commission adopted presumptions that ILECs are "similarly situated" to telecommunications carriers and that ILECs may be charged no higher than the § 224(e) telecom rate. *See* 47 C.F.R. § 1.1413(b).

D. The Primary Factual Basis upon which the FCC Relies Undermines, Rather than Supports, the Presumptions Adopted in Rule 1.1413(b).

In their opening brief, Petitioners argued that a presumption that ILECs are "similarly situated" to telecommunications carriers does not bear a "sound factual connection" to the facts. Pet'rs' Br. 46-47. In response, the FCC relies primarily—if not exclusively—upon a November 21, 2017 "report" submitted by USTelecom (one of the Intervenors here). FCC Br. 54 (citing US Telecom's November 21, 2017 Ex Parte Notice); *see also* Order, ¶¶ 125-126 nn.467-70 (ER 64-65). Specifically, the FCC cites the USTelecom report for the following "facts" in support of a "sound factual connection" to the presumption: (1) ILEC pole ownership has declined over the past decade; (2) the average attachment rate paid by ILECs increased from $26.00 per pole in 2008 to $26.12 per pole in 2017; and (3) the average attachment rate paid by non-ILECs **to the ILECs** decreased from 2008 to 2017. *See* FCC Br. 54-55.

The FCC's reliance on this data is, itself, arbitrary because: (1) it relies on changes from 2008 to 2017 to justify a change in a rule adopted in 2011 (if this data were relevant at all, the relevant starting period would have been 2011); and (2) it relies on a decrease in the rates paid by non-ILECs **to the ILECs** as evidence of a growing disparity between the rates paid by ILECs and non-ILECs to electric utilities.

Moreover, the FCC arbitrarily failed to address any of the issues raised in the April 24, 2018 response to the USTelecom report that directly rebutted the "facts" relied upon by the FCC. *See generally* Electric Utilities' April 24, 2018 Ex Parte Letter in Response to US Telecom Submissions ("Electric Utilities' Response") (FER 20-29). It is well established that "[a]n agency must consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015); *see also ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987) ("Notice and comment rulemaking procedures obligate the FCC to respond to all significant comments, for the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.") (internal quotation marks and citation omitted). Because it challenges the factual cornerstone of the FCC's new presumption and is the only submission that squarely addressed the USTelecom

report, the April 24, 2018 response to the USTelecom report is undoubtedly a "significant comment."

For example, the FCC cites the USTelecom report to demonstrate that, as pole ownership has decreased, ILECs have correspondingly been forced to pay higher attachment rates. However, the Electric Utilities' Response points out that the USTelecom report's raw data reveals that the average rate paid by ILECs has *decreased* since 2008:

> US Telecom posits that the Commission needs to adopt revisions to Rule [1.1413] because the version adopted in 2011 has not yielded any relief to ILECs. In support of this proposition, US Telecom points to data gathered from its members showing that average joint use rental rates have increased from $26 in 2008 to $26.12 in 2017…**The change from $26 to $26.12, though, is actually a significant decrease relative to pole costs**. Between 2008 and 2017, the cost of electric utility poles increased by more than 15% based on the Handy-Whitman Index (a widely accepted means of indexing electric utility costs, subdivided by FERC Account number). Given that cost-based rates increase and decrease according to costs, a $26 rate in 2008 would translate into a $30 rate in 2017. Thus, even according to US Telecom's own data, ILEC network cost contributions have decreased by roughly $4/pole since 2008.

Electric Utilities' Response, 2 (FER 22).

The FCC also cites the USTelecom report to illustrate that, while ILEC rates have allegedly increased, rates paid by non-ILEC attachers have decreased over the same period:

> US Telecom repeatedly compares the $26.12 figure [i.e., the alleged average attachment rate paid by ILECs] to the amount ILECs charge CATVs and non-ILEC telecoms for pole attachments…This is a

> meaningless comparison because the rates paid by CATVs and non-ILEC telecoms for access to ILEC poles are based on the ILEC's pole cost (not the electric utility's pole cost).

Electric Utilities Response, 3-4 (FER 22-23). The FCC relies upon this false juxtaposition in the 2018 Order to support Rule 1.1413(b). *See* Order, ¶ 65 (ER 64). However, as pointed out in the Electric Utilities' Response, comparing the rates CLECs and CATVs are paying on ILEC poles to the rates ILECs are paying on electric utility poles is comparing apples and oranges.

Parroting the USTelecom report, the FCC also alleges that a decline in ILEC pole ownership has led to a decline in ILEC bargaining power, which has allowed investor-owned utilities to charge ILECs ever higher rates. FCC Br. 53-55. The FCC's reliance on an alleged decrease in bargaining power to justify its new presumptions is unreasonable because the FCC has never explained how bargaining power matters given that, in most instances, **neither** party can change the agreement with respect to existing joint infrastructure. *See* Electric Utilities' Cmts., 36 (ER 547) ("Most joint use agreements contain provisions stating that the terms of the joint use agreement will continue to govern existing joint use poles even after termination of the joint use agreement. Without a specific mechanism for relief, electric utilities could be stuck with a lower rate and the continuing obligations of the joint use agreement."). In other words, with respect to existing

infrastructure, both parties' bargaining power is zero which means that neither party's bargaining power can be higher than the other's.

E. The FCC's Justifications for Setting the Preexisting Telecom Rate as a "Hard Cap" Cannot Overcome Its Failure to Analyze the Sufficiency of That Rate.

In response to Petitioners' argument that the FCC's adoption of the preexisting telecom rate as a "hard cap" is unjust and unreasonable, the FCC focuses on "the great deference" afforded to the FCC in its rate decisions. FCC Br. 57. However, as set forth in Section IV(A) above, *Chevron* is inapplicable here because the FCC has not actually engaged in statutory interpretation in adopting Rule 1.1413(b).

Even assuming, *arguendo*, that the *Chevron* standard applies here, the FCC's adoption of the hard cap is arbitrary and capricious. The FCC writes in defense of the hard cap that:

> Section 224 simply requires the agency to ensure that ILECs' attachment rates are "just and reasonable."…The "generality" of this statutory language "open a rather large area for the free play of agency discretion."….Because [the preexisting telecom] rate is "higher … than the regulated rate available to telecommunications carriers and cable operators, it helps account for particular arrangements that provide net advantages to [ILECs] relative to" other attachers…While petitioners speculate that the capped rate may not cover all the "scenarios that might exist" in joint use agreements (Br. 57), the rate falls comfortably within "the broad zone of reasonableness permitted by" the statute's "just and reasonable standard."…The law requires nothing more.

FCC Br. 57-58 (internal citations omitted). The Fifth Circuit's decision in *Tex. Power & Light Co. v. FCC*, 784 F.2d 1265, 1269 (5th Cir. 1986), is instructive on this point:

> The Commission argues at the outset that any error committed by it in fixing the rate is presumptively harmless because (1) the statute requires only that pole attachment rates fall within a zone of reasonableness, and (2) the total rate fixed in this case has not been shown to be outside that zone, that is, to be either unjust or unreasonable…. The reason the argument fails is obvious. **The Commission is not permitted to "luck out" with respect to its decision to set a certain rate; it may not arbitrarily choose any figure within the ephemeral zone of reasonableness and set the rate there. Rather, what the Act requires, read in conjunction with the Administrative Procedure Act, is that the Commission reach a rational decision through rational means. And the Commission must be able to explain that decision, as well as the methods and factors used in reaching that decision, in a coherent and intelligible fashion.**

(Emphasis added).

The FCC, in adopting Rule 1.1413(b), purports to establish a "hard cap" for infrastructure electric utilities have already built based on the consideration set forth in the joint use agreements. Without a corresponding reformation of the electric utility's obligations under the joint use agreement, an electric utility may have contractual obligations to the ILEC that vastly exceed the economic value of the "hard cap." Accordingly, any kind of "hard cap"—especially one adopted without consideration of its sufficiency—is arbitrary and capricious.

In response to these concerns, the FCC merely states that the fact that the preexisting telecom rate is higher than the current telecom rate helps to account for potential benefits in joint use agreements. *See* FCC Br. 57-58; *see also* Int. Br. 29. The FCC wholly failed, either in the 2018 Order or in its brief, to even consider this issue, much less engage in any reasoned analysis of how applying even the preexisting telecom rate to existing joint use agreements is just and reasonable in light of the various financial bargains contained in those agreements.

Petitioners' also argued that the "hard cap" is arbitrary and capricious because, *inter alia*, it could result in an electric utility recovering less than the incremental cost attributable to an ILEC. Pet'rs' Br. 57-58. In response, the FCC argues:

> The only part of the statute that refers to incremental cost is Section 224(d)(1), which provides that "a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments." 47 U.S.C. § 224(d)(1). But Section 224(d) applies only to rates charged to cable systems. *See id.* § 224(d)(3). Petitioners do not— and cannot—claim that Section 224(d) applies to rates charged to ILECs.

FCC Br. 58 n.28. The FCC is wrong. Section 224 provides that "the additional costs of providing pole attachments" serves as the statutory minimum for **all** rates promulgated pursuant to the FCC's regulatory authority—not just those calculated under section 224(d).

Section 224(b)(1), which is the FCC's claimed basis for asserting jurisdiction over ILEC attachments, provides that the FCC shall regulate "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) (emphasis added). Congress further provided: "**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…" 47 U.S.C. § 224(d)(1) (emphasis added). Moreover, the FCC has repeatedly acknowledged incremental cost serves as the "floor" for pole attachment rates. *See, e.g.*, 2011 Order, 26 FCC Rcd. at 5300-01, ¶ 142-43; *In re Implementation of Section 224 of the Act; Nat'l Broadband Plan*, WC Docket No. 07-245, GN Docket No. 09-51, Order on Reconsideration, 30 FCC Rcd. 13731, 13736-37 at ¶¶ 11-12 (Nov. 24, 2015) (acknowledging that "incremental costs" serve as the "low end" for rates governed by § 224(e)(2) and (3)); 2010 FNPRM, 25 FCC Rcd. at 11919-20, ¶¶ 133-34; *see also Am. Elec. Power Serv. Corp.*, 708 F.3d at 189 (acknowledging that the telecom rate in §224(e) is subject to the lower bound defined in § 224(d)(1)). If the FCC is now contending that it can set rates at below incremental cost, then in addition to an APA problem, it has a constitutional problem on its hands.

CONCLUSION

For those reasons set forth herein and in Petitioner's opening brief, Petitioners respectfully request that the Court hold unlawful, vacate, enjoin and set aside the rules addressed therein.

Respectfully submitted this 4th day of October, 2019.

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FOR THE NINTH CIRCUIT

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