

Case Nos. 18-72689 & 19-70123 (and consolidated cases)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**THE CITY OF PORTLAND, OREGON,
*Petitioner***

v.

**FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
*Respondents***

**SPRINT CORPORATION,
*Petitioner***

v.

**FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
*Respondents***

On Petitions for Review of an Order
of the Federal Communications Commission

**Brief of Petitioner
The American Public Power Association (Case No. 19-70339)**

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Corporate Disclosure Statement

Pursuant to the United States Court of Appeals for the Ninth Circuit Rule 26.1 and the Federal Rules of Appellate Procedure Rule 26.1, the American Public Power Association (“APPA”) hereby submits this Corporate Disclosure Statement. APPA is a non-profit service organization representing the interests of not-for-profit, public power utilities throughout the United States. APPA issues no stock, has no parent corporation, and is not owned in whole or in part by any publicly held corporation.

Respectfully submitted,

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GLOSSARY OF COMMONLY USED ABBREVIATIONS

APPA – The American Public Power Association

APPA-E.R. – American Public Power Association Excerpts of Record

FCC or Commission – Federal Communications Commission

LGP -- Local Government Petitioners

NBP – National Broadband Plan

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Petitioner, the American Public Power Association (“APPA”), believes that this case presents straightforward issues that can readily be decided as a matter of law in APPA’s favor. Nonetheless, APPA respectfully requests oral argument, pursuant to 9th Cir. R. 34(a), to respond to any questions that the Court may have.

JURISDICTIONAL STATEMENT

On September 27, 2018, the Federal Communications Commission (“FCC” or “Commission”) released its *Declaratory Ruling and Third Report and Order, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79 and WC Docket No. 17-84, FCC 18-133 (“*Order*”) (APPA-E.R. 2-117). A summary of the *Order*, as well as the new regulations promulgated in the *Order*, were published in the Federal Register on October 15, 2018. *See* 83 Fed. Reg. 51867.

On November 14, 2018, the American Public Power Association (“APPA”), on behalf of the nation’s more than 2,000 publicly-owned electric utilities (“public power” or “public power utilities”), filed in the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) a petition for review of the *Order* pursuant to 5 U.S.C. § 706, 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1) and 2344, and Rule 15(a) of the Federal Rules of Appellate Procedure. Venue in the D.C. Circuit was proper pursuant to 28 U.S.C. § 2343.

On February 5, 2019, by order of the D.C. Circuit, APPA’s petition for review of the *Order* was transferred to this Court. On February 6, 2019, this Court docketed APPA’s petition for review (Case No. 19-70339), and on March 20, 2019, the Court consolidated it with Case No. 19-70123.

EXCERPTS OF RECORD

Pursuant to Ninth Cir. R. 30-1 *et seq.*, concurrent with the filing of this brief APPA has filed an Excerpt of Record. References to the APPA Excerpts of Record in this brief are designated as “APPA-E.R.”

STATEMENT OF THE ISSUES

1. Did the Commission err in holding that Section 253 and/or Section 332 of the federal Communications Act implicitly give it authority to regulate rates, terms, and conditions of access to public power utility poles even though Section 224 of the same Act expressly deprives the Commission of any such authority?

2. Did the Commission err in holding that Section 253 and/or Section 332 apply to proprietary activities of state and local governmental entities?

3. Did the Commission err in holding that public power utility control over the rates, terms, and conditions of access to public power utility poles is a governmental activity rather than a proprietary activity?

4. Did the Commission err in failing to apply this Court's determination in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 ("County of San Diego") (9th Cir. 2011) that both Sections 253(a) and 332 require that a plaintiff show an actual or effective prohibition, rather than the mere possibility of a prohibition?

5. Did the Commission err in determining that compensation for attachments to public power utility poles is limited to costs?

6. Did the Commission err in imposing "shot clocks" on public power utility reviews of wireless carrier application requests to access utility poles and by

requiring that such review periods be undertaken simultaneously with any required local government permitting or zoning reviews?

STATEMENT OF THE CASE

For over forty years, the Commission, Congress, and the courts have repeatedly recognized that the Commission does not have regulatory authority over the rates, terms, or conditions of access to public power utility poles. In its *Order*, however, the Commission executed an abrupt logic-defying U-turn from any and all existing laws and precedent and found that it does have such authority after all. The Commission is mistaken.

The Commission's authority to regulate electric utility pole attachments is found in Section 224 of the Communications Act (47 U.S.C § 224). Section 224(a)(1), which specifies the utilities that are subject to the Commission's jurisdiction expressly exempts government-owned utilities. Public power utilities are government-owned utilities. Thus, public power utilities are explicitly exempted from the Commission's pole attachment regulations and excluded from its jurisdictional authority.

As demonstrated below, over the past forty years since the enactment of Section 224, the Commission has repeatedly acknowledged that it "does not have authority to regulate attachments to poles that are municipally or cooperatively

owned.” *Report and Order, In the Matter of Implementation of Section 224 of the Act*, WC Docket No. 07-245, Appendix B, ¶ 46, released April 7, 2011 (*2011 Pole Order*). In fact, the Commission has until now considered this limitation on its authority to be so clear and unambiguous that it has cited the public power exclusion in support of the point that “where Congress did not intend for the Commission to regulate rates, terms and conditions in a particular respect, it stated this clearly.” *Id.* at ¶ 210 and fn.363.

The Commission now suggests that Sections 253 and 332 of the Communications Act somehow override the restrictions on its authority over public power utility poles. As demonstrated below, the Commission’s argument cannot be reconciled with the statutory language, legislative history, court, decisions and repeated prior Commission pronouncements.

Neither Section 253 nor 332 even mentions government-owned electric utility poles, ducts, or conduits, much less does either of these provisions purport to empower the Commission to regulate rates, terms, and conditions of access to such facilities. Faced with this conspicuous silence, the Commission suggests Section 253 and Section 332 implicitly authorize it to step in and regulate access to these facilities. The Commission completely ignores the fact that Congress expressly withheld such authority from the Commission elsewhere in the same Title of the Communications Act.

As the Supreme Court noted in *United States v. Gonzales*, 520 U.S. 1, 5 (“*Gonzales*”) (1997), “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion,” quoting *Russello v. United States*, 464 U.S. 16, 23 (1983).

Congress clearly understood the distinction between, on the one hand, state and local government regulation of public rights-of-way, and on the other hand, government entities controlling access to government-owned facilities, such as utility poles, that are used in a proprietary capacity. In the Telecommunications Act of 1996, Congress *at the same time* dealt with the former in Section 253 and the latter in Section 224. Congress thus presumably acted “intentionally and purposely” in excluding public power utility pole attachments from the scope of Commission’s jurisdiction allowed under Section 253 of the Communications Act.

Moreover, in holding that Sections 253 and/or 332 apply to public power utility poles, the Commission concluded that: (1) Section 253 and/or 332 apply to proprietary as well as governmental activities; and (2) that public power utilities own, operate, and control access to their utility poles in a regulatory rather than a proprietary capacity. These conclusions are wrong.

The Commission’s conclusions ignore explicit court and Commission findings that Sections 253 and 332 only apply to state and local government entities

acting in their regulatory capacity and do not apply to government entities when engaging in proprietary activities. As further explained below, the Commission also misconstrues and misapplies the “market participant doctrine” and demonstrates a fundamental misunderstanding of the nature, powers, and manner in which public power utilities operate.

Simply put, the Commission’s overly expansive interpretation of the scope of Section 253 and 332 is arbitrary, capricious, an abuse of discretion, and not in accordance with its statutory authority; poses significant risks to safe, secure, and reliable electric utility operations; and interferes with the proprietary rights of public power utilities to determine the terms and compensation for use of their utility assets by private wireless carriers.

While the *Order* broadly relies on both Section 253 and 332 for the Commission’s assertion of authority over government-owned facilities, the *Order* only specifically references Section 253 as a source of authority to regulate access to public power utility poles in direct contravention of the Section 224 public power exemption. For this reason, this brief primarily focuses on the failings in the Commission’s analysis of Section 253 as it relates to the Section 224 public power exemption. Arguments for the use of Section 332 would fail for many of the same reasons.

STATEMENT OF THE FACTS

I. BACKGROUND ON PUBLIC POWER UTILITIES

A. Overview of Public Power Utilities

Public power utilities are not-for-profit, community-owned utilities that provide electric service to more than 49 million people and businesses in over 2,000 towns and cities nationwide. Approximately 70 percent of public power utilities serve communities with less than 10,000 residents.

Public power utilities may take several different shapes and forms, but they are all government-owned and operated, and they all provide safe and reliable electric service to their communities. Some function as offices or departments of a municipality, county, or other governmental entity. Some are governed by independent or semi-independent boards or commissions. Some are organized as public utility districts, irrigation districts, state-created entities, or other lawful configurations. While some public power utilities operate within a single jurisdiction or portion of a local jurisdiction, many others operate across multiple jurisdictions.

In short, while all public power utilities are government-owned, they do not act in a regulatory capacity. This is significant because public power utilities do not possess the kind of regulatory authority over the public rights-of-way that the Commission assumed in its *Order*. In particular, they do not exercise franchising,

zoning, or other regulatory authority over access to, or use of, the public rights-of-way by communications service carriers.

More specifically, public power utilities are often separate entities from the local governments that may own the underlying public rights-of-way where the utilities operate. For example, public utility districts in Washington state are typically not owned by a municipality and must obtain an authorization from the local government to occupy the public rights-of-way.

RCW 54.04.040

Utilities within a city or town—Restrictions.

A district shall not construct any property to be utilized by it in the operation of a plant or system for the generation, transmission, or distribution of electric energy for sale, on the streets, alleys, or public places within a city or town without the consent of the governing body of the city or town and approval of the plan and location of the construction, which shall be made under such reasonable terms as the city or town may impose. All such properties shall be maintained and operated subject to such regulations as the city or town may prescribe under its police power.

Revised Code of Washington Title 54, Chapter 04.040.

Moreover, even with municipal utilities, the electric service territory of the utility may extend well beyond the corporate territorial boundaries and jurisdiction of the municipality that created them. For example, the electric service territory of CPS Energy, the public power utility owned by the City of San Antonio, Texas, spans the City of San Antonio, thirty-one (31) other municipal jurisdictions in and

around the greater San Antonio metropolitan area, and various unincorporated portions of surrounding counties. *CPS Energy Ex Parte*, March 1, 2018 (APPA-E.R. 308). Similarly, the municipal electric utility based in Wilson, NC, serves a territory that includes six of the state's counties.

In such cases as those mentioned above, the public power utility typically must obtain access to the public rights-of-way from each local jurisdiction in which it provides service in a similar manner as other users of the rights-of-way, and it certainly has no regulatory control over the use of the public rights-of-way by telecommunications carriers.

B. Public Power Utilities Operate in a Proprietary Capacity

Government entities are found to act in a proprietary rather than a governmental capacity when they engage in commercial activities in the same manner as other private sector market participants rather than to advance regulatory objectives or public policies. “A public entity acts in a proprietary rather than a governmental capacity when it engages in businesslike activities that are normally performed by private enterprise; whereas, governmental functions are those generally performed exclusively by governmental entities.” *City of Wenatchee v. Chelan County Public Utility Dist. No. 1*, 325 P.3d 419, 432 (Wash. Ct. App. 2014).

While public power utilities are governmental entities, they are generally deemed to be acting in a proprietary capacity in their provision of electric service

and operation of electric utility facilities. See *San Antonio Indep. Sch. Dist. v. City of San Antonio*, 550 S.W.2d 262, 264 (Tex. 1976) (“[a] city which owns and operates its own public utility does so in its proprietary capacity.”); *Washington Pub. Power Supply Sys. v. General Elec. Co.*, 113 Wash. 2d 288, 301 (1989) (“In the production and sale of electricity, a municipal corporation acts in its proprietary capacity.”); *Memphis Power & Light Co. v. City of Memphis*, 172 Tenn. 346, 112 S.W.2d 817 (TN. 1937) (“The texts and cases hereinabove referred to cite innumerable authorities supporting our conclusion that the city of Memphis, in constructing and operating an electric plant, functions as a private or business corporation.”).

C. Pole Attachment Agreements

Public power utilities, like investor-owned electric utilities (“IOUs”) and cooperatively-owned electric utilities, own and operate electric distribution facilities, including millions of electric utility poles that are often located within the public rights-of way.

Public power utilities, like all other electric utilities, routinely enter into pole attachment agreements that authorize attachments of cables and other communications facilities to their poles. Among the wide range of attaching entities are wireline and wireless telecommunications carriers, cable service providers, broadband internet access service providers, private network operators, other utilities, and police and fire agencies.

As with private utilities, public power utility pole attachment agreements recognize that the primary purpose of the utility poles is to provide electric service, and the ability of third-parties to make and maintain pole attachments is therefore contingent on: the availability of sufficient unencumbered space on the pole; compliance with applicable safety standards,; avoidance of interference to the provision of reliable electric service; and fair and reasonable compensation for the rental of utility property.

Public power utilities have been entering into pole attachment agreements with wireless providers and are willing to continue to do so. Wireless facilities, however, raise a number of unique safety and operational issues that are not present with traditional wireline pole attachments, so they do not lend themselves to the rushed processes contemplated by the Commission's *Order*.

For example, unlike wireline attachments, which are typically located in the "communications space" well below and away from the electric facilities, wireless carriers often seek to place their antennas and other equipment above the electric facilities. This necessarily raises heightened safety and engineering issues that are not present with wireline attachments. The presence of the wireless antennas above the electric lines and the associated wireless equipment attached vertically on the

pole – encompassing up to 28 cubic feet of space¹ – create numerous challenges for work on and around the pole for both the electric utility and other attaching entities. The location on the pole and the size of these wireless facilities must be carefully studied and expertly engineered to ensure that the poles can withstand these new devices to avoid electric reliability issues that may be caused because of improper pole loading. The location and size also may have a preclusive effective on the use of the pole for future electric and other operations. All of these considerations make these agreements distinct from traditional pole attachment agreements and warrants different treatment.

Further complicating the issue is the fact that most public power utilities are relatively small and may lack the resources to address large scale wireless deployments.

In attempting to shoe-horn public power utilities into its *Order*, the Commission arbitrarily and capriciously ignored all of these considerations.

¹ See the *Order's* definition of “Small Wireless Facilities.” Para. 11, fn. 9 (APPA-E.R. 5).

II. THE COMMISSION LACKS AUTHORITY OVER GOVERNMENT-OWNED ELECTRIC POLES AND OTHER UTILITY FACILITIES

A. FCC Had No Authority Over Attachments to Electric Utility Poles Before 1978

In the late 1970s, the Commission wrestled with the question of whether it had authority to regulate attachments to electric utility poles. At that time, cable television was a nascent communications platform, which the Commission was seeking to encourage and facilitate. In pursuit of this effort, the Commission launched a lengthy and detailed analysis of its authority to regulate pole attachments. The Commission concluded that it did not have such authority, noting that the “Communications Act confers broad and expansive powers upon this Commission to regulate all forms of electrical communication, whether by telephone, telegraph, cable, or radio,” but this “authority is ‘not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority.’” *In Re: California Water and Telephone Co.* 64 F.C.C.2d 753, 1977 WL 38620 (1977), quoting *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 617 (D.C. Cir. 1976).

In its *California Water* decision, the Commission found that it does not have general authority to regulate access to public or private property or facilities that may be useful for communications, except where such authority is specifically granted. The Commission also found that it did not have authority over

communications attachments to electric utility poles: “[We] have concluded that this activity does not constitute ‘communication by wire or radio,’ and is thus beyond the scope of our authority.” *California Water*, at 758.

Significantly, the Commission rejected arguments by cable companies seeking Commission regulation of utility pole attachments simply because the utility poles were convenient or even necessary for cable deployment:

The reading of these sections urged by petitioners is overbroad, and would bring under the Act activities never intended by Congress to be regulated. *The fact that cable operators have found in-place facilities convenient or even necessary for their businesses is not sufficient basis for findings that the leasing of those facilities is wire or radio communications.*

Id., at 758 (*emphasis added*). The Commission went on to state,

Our finding that pole attachment arrangements do not constitute wire or radio communications precludes our regulation under any of the theories offered by petitioners. Such a foundation is a prerequisite to our jurisdiction. The affirmance of our authority over cable television itself was premised on the finding that it constitutes interstate communications. *Southwestern Cable*, 392 U.S. at 168-69. Our powers cannot be extended beyond the terms and necessary implications of the Act. If broader powers be desirable they must be conferred by Congress. *They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions.*

Id., at 760 (citing *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 649 (1930)) (*emphasis added*). In response, Congress did confer broader powers to the Commission by passing Section 224. Those powers, however, specifically excluded the power for the Commission to regulate access to public power utility poles.

B. The Pole Attachment Act of 1978

In the aftermath of the Commission's determination that it did not have authority to regulate attachments to electric utility poles, Congress enacted the Pole Attachment Act of 1978, which was codified in Section 224 of the Communications Act (47 U.S.C. § 224). The legislative history of the Act underscored the Commission's recognition that it lacked jurisdiction to regulate pole attachments absent specific congressional action to explicitly provide that authority.

[T]he Federal Communications Commission has recently decided that it has no jurisdiction under the Communications Act of 1934, as amended, to regulate pole attachment and conduit rental arrangements between CATV systems and nontelephone or telephone utilities. (*California Water and Telephone Co., et al.*, 40 R.R. 2d 419 (1977).) This decision was the result of over 10 years of proceedings in which the Commission examined the extent and nature of its jurisdiction over CATV pole attachments. *The Commission's decision noted that, while the Communications Act conferred upon it expansive powers to regulate all forms of electrical communication, whether by telephone, telegraph, cable or radio, CATV pole attachment arrangements do not constitute "communication by wire or radio," and are thus beyond the scope of FCC authority.*

Senate Report 95-580, 95th Congress (1st Session) November 2, 1977 at 14.

As enacted in 1978, Section 224 provided the Commission explicit authority to regulate rates, terms, and conditions of pole attachments by cable television service providers. It did not, however, provide cable operators a statutory right to make attachments to utility poles; it just set forth the principles that the Commission

should apply in developing rules for rates, terms, and condition when pole owners covered by Section 224 voluntarily allowed cable systems onto their poles.

At the same time, Congress made clear that it did not want the Commission to regulate rates, terms, and conditions for attachments to consumer-owned utility poles – i.e., poles owned by public power utilities and electric cooperatives. Congress expressly exempted such poles from regulation by the Commission by excluding such entities from Section 224(a)(1)'s definition of “utility.”

Sec. 224. (a) As used in this section:

- (1) The term 'utility' means any person whose rates or charges are regulated by the Federal Government or a State and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication. *Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.*

- (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.

47 U.S.C. §§ 224(a)(1) and (3) as enacted in the 1978 Pole Attachment Act (*emphasis added*). 47 U.S.C. § 224(a)(1) (*emphasis added*). Public power utilities are government owned. Thus, public power utilities are explicitly excluded from the Commission's pole attachment regulations and authority.

The legislative history of the public power pole attachment exemption demonstrates that Congress intended that rates, terms, and conditions of access to

public power utility poles be addressed not by the Commission, but at the local level by the consumer owners of the utility. During deliberations on the Pole Attachment Act, Congress explained its rationale as follows:

S. 1547 as amended in committee exempts telephone and electric cooperatives and municipally owned utilities from FCC regulation. *It is believed that these utilities are of a different type than investor-owned utilities in that they are closer to the grassroots level of government whose discretion in this matter the bill seeks to protect.*

Because the pole rates charged by municipally owned and cooperative utilities are already subject to a decision-making process based upon constituent needs and interests, *S. 1547 precludes substitution of the Commission's judgment for that of locally elected managers of municipal utilities and the managers of customer-owned cooperatives.*

Cong. Rec. S964, at S966 (Jan. 31, 1978) (*emphasis added*).

C. Amendments to Section 224 in the Telecommunications Act of 1996

In 1996, Congress revisited Section 224 in the course of enacting the Telecommunications Act of 1996. Seeking to foster robust competition in all communications markets, Congress expanded Section 224 to give not only cable systems, but also telecommunications carriers, both statutory attachment rights and rate protection. Significantly, Congress also reaffirmed and extended the Section 224(a)(1) exemption from Commission jurisdiction over attachments to utility poles owned by governmental entities, cooperatives, and railroads.

In the forty years between the enactment Pole Attachment Act of 1978 and the Commission's adoption of the *Order* in 2018, the Commission has repeatedly

and consistently acknowledged that the public power exemption in Section 224 prevents the Commission from exercising jurisdiction over attachments to public power utility poles.²

For example, in its 2010 “National Broadband Plan” (“NBP”), the Commission undertook an exhaustive analysis of existing laws, regulations, and policies impacting broadband deployment, and it made recommendations to Congress for changes in the law where the Commission lacked authority to carry out its policy objectives. Among the changes the Commission urged Congress to consider was removing the exemption from federal pole attachment regulation of public power- and cooperatively-owned utility poles, stating:

Recommendation 6.5: Congress should consider amending Section 224 of the Act to establish a harmonized access policy for all poles, ducts, conduits and rights-of-way.

Even if the FCC implemented all of the recommendations related to its Section 224 authority, additional steps would be needed to establish a comprehensive national broadband infrastructure policy. As previously discussed, without statutory change, the convoluted rate structure for

² Similarly, courts have consistently held that the 224(a)(1) exemption places public power utilities and electric cooperatives outside the scope of federal pole attachment regulation. For example, in *TCI Cablevision of Washington v. City of Seattle*, No. 97-2-02395-5SEA, Superior Court (May 20, 1998) (appeal dismissed), the court noted that federal law specifically exempted public power utilities from Commission rate regulations. See also, *Time Warner Entertainment-Advance/Newhouse Partnership v. Carteret-Craven Electric Membership Corporation*, 506 F.3d 304, 309 (4th Cir. 2007), holding that electric cooperatives are exempt from federal pole attachment regulations.

cable and telecommunications providers will persist. Moreover, due to exemptions written into Section 224, a reformed regime would apply to only 49 million of the nation's 134 million poles. *In particular, the statute does not apply in states that adopt their own system of regulation and exempts poles owned by co-operatives, municipalities and non-utilities.*

The nation needs a coherent and uniform policy for broadband access to privately owned physical infrastructure. Congress should consider amending or replacing Section 224 with a harmonized and simple policy that establishes minimum standards throughout the nation—although states should remain free to enforce standards that are not inconsistent with federal law. The new statutory framework could provide that:

➤➤ All poles, ducts, conduits and rights-of-way be subject to a regulatory regime addressing a minimum set of criteria established by federal law.

Connecting America: the National Broadband Plan, at 112 (*emphasis added*) (adopted Mar. 15, 2010), available at <http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>.

Then, in its *2011 Pole Order*, the Commission adopted various amendments to the federal pole attachment rules in an effort to implement the policy recommendations in the NBP. The Commission explicitly acknowledged, however, that it “does not have authority to regulate attachments to poles that are municipally or cooperatively owned.” *2011 Pole Order*, at Appendix B ¶ 46. Notably, in the course of rejecting certain recommendations by other commenters, the Commission contrasted the lack of clarity of the statutory language on which they relied with the clear and unambiguous specificity of the public power exemption. In that part of the

Order, the Commission said, “where Congress did not intend for the Commission to regulate rates, terms and conditions in a particular respect, it stated this clearly.” *2011 Pole Order*, at ¶ 210.

Similarly, in a 2016 speech before he became the current chairman of the Commission, Ajit Pai, then in the Republican minority on the Commission, acknowledged that the Commission lacked jurisdiction over public power utility poles and urged Congress to eliminate the Section 224 exemption.

Congress should also expand the Commission’s authority over pole attachments. Right now, *we don’t have jurisdiction over poles owned by government authorities, whether federal, state, or local*, nor poles owned by railroads. Unsurprisingly, I have heard from ISPs that many pole-attachment disputes arise from these particular pole owners, who may have little interest in negotiating just and reasonable rates for private actors to access their rights of way. This is a gap that Congress could easily fix.

Remarks of FCC Commissioner Ajit Pai, At the Brandery, “*A Digital Empowerment Agenda*,” Cincinnati, Ohio, September 13, 2016 (*emphasis added*).

In January 2017, the Commission’s Office of Strategic Planning and Policy Analysis released a paper with policy prescriptions and recommendations for “Improving the Nation’s Digital Infrastructure.” With respect to pole attachments, the paper acknowledged the lack of Commission authority over public power utility poles and recommended that Congress eliminate the exemption.

4. Municipally-Owned Poles.

Section 224 of the Communications Act requires investor-owned utilities to provide telecom carriers and cable systems with access to poles, ducts, conduits, and rights of way, but municipally and coop-owned poles are not subject to those requirements.

Proposed legislative approach: Remove the exemption for municipal and coop-owned facilities.

Improving the Nation's Digital Infrastructure, by Paul de Sa, Chief, FCC Office of Strategic Planning and Policy Analysis (Jan. 17, 2017) (*emphasis added*).

In October 2017, S. 3157, Senators John Thune (R-SD) and Brian Schatz (D-HI) introduced the “STREAMLINE Small Cell Deployment Act.” The bill would have amended the Communications Act to provide for regulated rates, terms, and conditions of access to publicly owned facilities located within the public rights-of-way.³ The introduction of this demonstrates that Congress does not believe that the Communications Act currently provides for access to government-owned facilities within the public rights-of-way, otherwise there would be no perceived need for the bill.

³ S.3157 was not enacted. In early June 2019, the STREAMLINE Act was re-introduced in the Senate.

Irrespective of whether the Commission opposes the Section 224 exemption on policy grounds, the fact is that unless and until Congress amends the public power exemption in Section 224, the Commission is bound by it.⁴

D. Section 253

At the same time that Congress amended Section 224 in the Telecommunications Act of 1996 to expand its scope to include a non-discriminatory pole attachment access requirement (but retained the public power exemption), Congress also created Section 253 to address state and local government regulatory “barriers to entry.” Section 253 provides in pertinent part:

SEC. 253. REMOVAL OF BARRIERS TO ENTRY.

(a) **IN GENERAL.** -- *No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.*

...

(c) **STATE AND LOCAL GOVERNMENT AUTHORITY.** -- *Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.*

⁴ While this is neither the appropriate time or the place to argue the merits of the Section 224 public power exemption, APPA and its members vigorously disagree with the Commission’s conclusions and support congressional retention of the public power exclusion.

47 U.S.C. § 253 (*emphasis added*).

The prohibition in Section 253(a) applies to state or local “statutes,” “regulations,” and “legal requirements.” For the more than twenty years since enactment this provision, the Commission and courts have consistently concluded that these provisions relate to state and local governments when they are acting in a regulatory capacity – e.g., regulating use of private property subject to zoning requirements or issuing permits for the use of the public rights-of-way – as opposed to when they are acting in a proprietary capacity, such as when they lease or rent space on building rooftops or utility facilities. *See, e.g., Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only “regulatory schemes”). Indeed, citing these decisions, the Commission affirmed this distinction in its *Wireless Siting Order* in 2014, in which it imposed various limitations on the ability of State and local governments to regulate the siting of wireless facilities:

Discussion. As proposed in the Infrastructure NPRM and supported by the record, we conclude that Section 6409(a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities. As discussed in the record, courts have consistently recognized that in “determining whether government contracts are subject to preemption, the case law distinguishes between actions a State entity takes in a proprietary capacity—actions similar to those a private entity might take—and its attempts to regulate.” As the Supreme Court has explained, “[i]n the absence of any express or implied implication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and when analogous private conduct

would be permitted, this Court will not infer such a restriction.” Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances. *We find that this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt “non regulatory decisions of a state or locality acting in its proprietary capacity.”*

In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, 29 FCC Rcd. 12865 (F.C.C.), 30 FCC Rcd. 31, 2014 WL 5374631 at ¶ 239 (“*Wireless Siting Order*”) (*emphasis added*) (internal citations omitted), released October 21, 2014.

E. Section 332(c)(7)

In the Telecommunications Act of 1996, Congress also enacted Section 332(c)(7), entitled “Preservation of Local Zoning Authority,” which in pertinent part provides that “[t]he regulation of the placement, construction, and modification of personal wireless service facilities” by state and local governments shall not “unreasonably discriminate among providers of functionally equivalent services” or “prohibit or have the effect of prohibiting the provision of personal wireless services.” 47 U.S.C. § 332(c)(7)(B)(i)(I)-(II).

As with Section 253, courts and the Commission have found that the restrictions in Section 332(c)(7) apply only to state or local regulatory activities.

See, e.g., Wireless Siting Order at ¶ 239, citing *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002).

III. THE COMMISSION'S ORDER

In its *Order*, the Commission seeks to facilitate the deployment of new and anticipated wireless broadband services by removing supposed “regulatory barriers” that “inhibit the deployment of infrastructure necessary to support these new services.” *Order*, at ¶ 1 (APPA-E.R. 3). In order to accomplish this goal, the Commission has concluded, for the first time, that it is empowered under Sections 253 and 332 of the Communications Act to impose regulatory conditions on government-owned property, including public power utility poles.

We confirm that our interpretations today extend to state and local governments’ terms for access to public ROW that they own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, *as well as their terms for use of or attachment to government-owned property within such ROW, such as new, existing and replacement light poles, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities*

Id. ¶ 92 (APPA-E.R. 48) (*emphasis added*).

In reaching this conclusion, the Commission all but ignored Section 224’s explicit exemption of government-owned utility poles from the scope of the Commission’s jurisdiction. Indeed, the Commission simply brushed Section 224 aside with the following footnote:

Some have argued that Section 224 of the Communications Act’s exception of state-owned and cooperative-owned utilities from the

definition of “utility,” “[a]s used in this section,” suggests that Congress did not intend for any other portion of the Act to apply to poles or other facilities owned by such entities. *City of Mukilteo, et. al. Ex Parte Comments on the Draft Declaratory Ruling and Third Report and Order*, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018); Letter from James Bradford Ramsay, General Counsel, NARUC to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79 at 7 (filed Sept. 19, 2018). We see no basis for such a reading. Nothing in Section 253 suggests such a limited reading, nor does Section 224 indicate that other provisions of the Act do not apply. We conclude that our interpretation of effective prohibition extends to fees for all government-owned property in the ROW, including utility poles. *Compare* 47 U.S.C. § 224 *with* 47 U.S.C. § 253. We are not addressing here how our interpretations apply to access or attachments to government-owned property located outside the public ROW.

Order, at 92, fn.253 (APP-E.R. 170).

Remarkably, this is the sole substantive reference in the entire *Order* to Section 224. Nowhere in the *Order* does Commission even address, let alone try to reconcile its new position with, its decades of prior determinations that Section 224 acts as a bar to any such authority.⁵ Nor does the *Order* address, acknowledge, or even reference the detailed and exhaustive arguments that APPA (and others) made on this issue in their comments, reply comments, and *ex parte* meetings. *See, e.g.*, APPA Comments at 2-3, 6-12 (APP-A-E.R. 128-129, 132-138); National Association of Regulatory Utility Commissioners Comments at 5-6, 8-9 trumps (APP-A-E.R. 160-161, 163-164); APPA Reply Comments at 2-9 (APP-A-E.R. 176-183); and

⁵ The Commission only claims that Section 253 takes priority over the Section 224 exemption. It does not rely on Section 332 for that purpose.

Smart Community Reply Comments, at 32-33, 73-74 (APPA-E.R. 247-248, 288-289).⁶

As discussed in greater detail in the Argument below, the Commission's conclusion that it has authority over public power utility poles under Section 253 and Section 332 is based on its novel interpretation that these sections do not just apply to government entities acting in a regulatory capacity, but also to government entities acting in a proprietary capacity. *Order*, at ¶¶ 92-95 (APPA-E.R. 48-51). This conclusion dismissively brushes aside prior Commission and court interpretations to the contrary.

The Commission's alternate theory of jurisdiction is that even if Section 253 and Section 332 are limited to governmental regulatory activities, governmental entities, including public power utilities, control access to their property located in the public rights-of-way in a regulatory capacity and not in a proprietary capacity. *Order*, at ¶¶ 96-97 (APPA-E.R. 51-52). In reaching this sweeping and unsubstantiated conclusion, the Commission did not address or even reference APPA's detailed arguments in the proceeding demonstrating that public power utilities do, in fact, operate in a proprietary capacity and satisfy the "market

⁶ APPA had *ex parte* meetings with the Wireline Competition Bureau, the Wireless Telecommunications Bureau, and the office of every Commissioner. At each of these meetings, APPA specifically discussed the public power exemption in Section 224. (APPA-E.R. 299-305.)

participant” doctrine as set out in *Boston Harbor*. APPA Reply Comments, at 16-20 (APPA-E.R. 190-194).

IV. IMPACT OF THE *ORDER* ON PUBLIC POWER UTILITIES

By adopting its new and expansive interpretation of its jurisdiction under Sections 253 and 332, the Commission has sought to assert authority to regulate the rates, terms, and conditions of access to public power utility poles -- including the imposition of regulatory shot clocks – in direct contradiction to Congress’s explicit denial of such authority under Section 224.

If upheld, the *Order* would effectively commandeer public power utility facilities for use by wireless carriers. The *Order* is disrupting what were generally good working relationships between public power utilities and wireless carriers. Before the Commission issued its *Order*, public power utilities typically sought to accommodate requests for access to their utility poles by wireless companies, and they usually found ways to do so. Now, wireless companies are approaching members of APPA and attempting to use the *Order* as a cudgel to demand rushed access to utility poles at below-market rates and/or to invalidate the terms and conditions of existing pole attachment agreements that had been working well for all concerned.

The *Order* assumes an immediate need for ubiquitous access to utility poles despite the fact that in many areas of the country wireless carriers are simply not yet

seeking to deploy wireless small cell facilities. This is particularly true in the rural and smaller communities that comprise the majority of public power utility service territories.⁷

The *Order* limits the “compensation” that public power utilities may receive for the rental of their facilities. Specifically, the *Order* limits public power pole attachment rental fees to cost recovery. Moreover, the Commission has adopted a presumptively reasonable \$270 “safe harbor” amount for recurring annual rental fees. The Commission has indicated that this is the total combined amount that may presumptively be charged for both the use of government-owned poles and facilities, and the use of the underlying public rights-of-way. *Order*, at ¶ 79 (APPA-E.R. 43). In reaching this conclusion, the *Order* assumes that the same local governmental entity owns and/or controls both the poles and the underlying public rights-of-way. The *Order* does not address APPA’s arguments that public power utilities do not have regulatory or permitting authority over access to the public rights-of-way where

⁷ Next-generation wireless technologies will require massive investments in fiber optic cable to backhaul the information sent and received by the wireless facilities. Many rural areas lack the density to make such investment in fiber feasible. See, e.g., “5G Wireless as Rural Solution: Not any time soon,” by Bill Coleman, Blandin on Broadband, February 6, 2017, <https://blandinonbroadband.org/2017/02/06/5g-wireless-as-rural-solution-not-any-time-soon/>; and “How 5G May Widen the Rural-Urban Digital Divide, by Km Hart,” Axios, September 22, 2018, <https://www.axios.com/5g-digital-divide-19b70d34-4978-44df-a1cb-ae9222d113ef.html>.

their poles are located even within their own local jurisdiction, much less when they provide utility services outside of their local jurisdictions. By conflating local government regulatory authority over access to the underlying public rights-of-way with the separate and distinct authorizations needed from the public power utility to make attachments to particular poles located in the rights-of-way, the *Order* effectively caps the amount that many public power utilities will be able to charge for the use of their poles to whatever remains of the \$270 safe harbor amount after the local government imposes annual rights-of-way rental fees.

Similarly, the Commission has amended and expanded the scope of its “shot-clock” requirements that dictate the time periods within which government entities must review and respond to requests for the right to install wireless facilities. Under the *Order*, the shot-clocks also apply to the time periods within which all government entities, including public power utilities, must respond to requests to make attachments to government facilities within the public rights-of-way. The *Order* sets forth the types of requests and authorizations that are subject to the shot clock under Section 332(c)(7), which applies to “any request for authorization to place, construct, or modify personal wireless service facilities . . .” While Section 332(c)(7) is entitled “Preservation of Local Zoning Authority,” the *Order* interprets the word “any” broadly to conclude that the shot clocks would apply to “more than just zoning permits.” *Order*, at ¶ 133 (APPA-E.R. 70-71).

[M]ultiple authorizations may be required before a deployment is allowed to move forward. For instance, a locality may require a zoning permit, a building permit, an electrical permit, a road closure permit, and an architectural or engineering permit for an applicant to place, construct, or modify its proposed personal wireless service facilities. All of these permits are subject to Section 332's requirement to act within a reasonable period of time, and thus all are subject to the shot clocks we adopt or codify here.”

Order, at ¶ 144 (APPA-E.R. 76).

Thus, the *Order* requires that all of these various reviews and authorizations run concurrently. The *Order* does not reflect any consideration by the Commission of the impracticality of such a requirement, since many such reviews must necessarily be undertaken sequentially rather than concurrently. For example, it makes no sense to review an engineering permit application prior to confirming that the actual engineering design being reviewed meets zoning and architectural requirements. Further, the *Order* again does not address the fact that public power utilities are often different governmental entities than the local governments that will be reviewing the rights-of-way permitting and zoning applications. Therefore, a public power utility faced with a pole attachment request may have no practical ability to control or coordinate the applicable local government's review of the siting request with the utility's own pole attachment make-ready review, let alone ensure that both reviews are undertaken concurrently and within the Commission's prescribed shot-clock timeframes.

Moreover, despite the lack of small cell wireless pole attachment requests in many areas of the Country, the *Order* effectively requires all public power utilities to expend time and resources to immediately ramp up their staff and capabilities in order to be prepared to meet the *Order's* mandatory shot-clock directives should a siting request actually be received.

SUMMARY OF THE ARGUMENT

APPA concurs and joins the legal arguments made by the Local Government Petitioners (“LGP”) with respect to the Commission’s improper and overbroad interpretations of its authority under Sections 253 and 332. This petition focuses on the reasons that the *Order* is invalid and must be vacated with respect to its application to public power utilities in particular.

1. For over forty years, the Commission, Congress, and the courts have repeatedly recognized that the Commission does not have regulatory authority over the rates, terms, or conditions of access to public power utility poles. In its *Order*, however, the Commission executed an abrupt U-turn from established law and found that it does have such authority. The Commission is mistaken.

The Commission’s desire to facilitate the deployment of wireless broadband services does not provide it with authority that it does not otherwise possess. As the Commission found in its *California Water* decision, the Commission does not have

authority to regulate access to property or facilities that may be useful for communications, except where such authority is specifically granted.

The Commission's authority to regulate rates, terms, and conditions of access to electric utility poles is found in Section 224. Section 224(a)(1) specifically exempts government-owned public power utilities from the scope of the Commission's pole attachment authority. In exempting public power utilities Congress expressly withheld authority from the Commission to regulate the rates, terms, and conditions of access to public power utility poles, and in the Telecommunications Act of 1996, Congress reaffirmed and extended the public power exemption. Nothing has happened in the intervening years to alter this limitation on the Commission's authority.

2. The Commission's claim that Sections 253 and 332 provide it a previously unrecognized source of Commission authority to regulate access to public power electric utility poles that Section 224 explicitly denies is not supported by a review of Sections 253 or 332 under traditional canons of statutory construction.

First, as the Supreme Court noted in *Gonzales*, “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion,” at 5 quoting *Russello*. Here, Congress clearly

understood the distinction between access to utility property and access to public rights-of-way.

Second, Section 253(a) applies to state or local “statutes,” “regulations,” or “legal requirements.” For twenty years the Commission and courts have consistently held that these provisions relate to state and local governments when they are acting in their regulatory capacity as opposed to when they are acting in a proprietary capacity. The Commission now holds that Section 253 applies to both governmental and proprietary activities finding that the “market participant” doctrine does not apply to Section 253. The Commission’s arguments are based on a faulty application of the market participant doctrine as articulated by the Supreme Court in *Boston Harbor* and subsequent cases. It is clear that Section 253 is aimed at governmental regulatory activities or as this Court has held “regulatory schemes.” While public power utilities are government entities, they are not local governments and do not have regulatory authority or control over the use of public rights-of-way.

Third, the Commission’s alternate conclusion that access to and control over all government-owned facilities, including utility poles, is a governmental activity and therefore subject to Section 253 is equally flawed. The record, Commission precedent, and relevant case law demonstrate that public power utilities operate in a proprietary capacity.

3. The Commission has adopted an overly broad interpretation of what constitutes a “barrier to entry” under Section 253(a). The *Order* runs counter to the specific findings of this Court that “a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.” *County of San Diego*, at 578.

4. There is nothing in Section 253 that limits the “compensation” that government entities, including public power utilities, can obtain for the rental of their property by private entities to cost recovery. APPA concurs with and adopts the arguments on compensation made by the LGP.

5. The shot clocks adopted by the Commission are unreasonable and arbitrary as applied to public power utilities.

6. In applying its Section 253 and Section 332 authority to public power utilities, the Commission has also acted in an arbitrary and capricious manner. The Commission not only ignored the legal and factual arguments put forward by APPA, but it also failed to engage in any meaningful analysis of the practical implications and harms that its *Order* will cause to public power utilities.

STANDARD OF REVIEW

The *Order* should be set aside if this Court determines that the Commission’s action was “arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law” or “in excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C. § 706(2).

The *Order*'s interpretation of its authority and the scope of Sections 253 and 332 must be reviewed under the two-step *Chevron* analysis. First, the Court must determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, the Court must give effect to the unambiguously expressed intent of Congress. If the Court finds that the statute is silent or ambiguous with respect to the matter at issue, the Court must then determine whether the Commission's interpretation is based on a permissible construction of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under the findings of this Court in *County of San Diego*, the requirement that a plaintiff must show an actual or effective prohibition, rather than the mere possibility of prohibition, “rests on the unambiguous text” of Section 253(a) (*County of San Diego*, at 578), and therefore under *Chevron* no deference is due to the Commission's conclusions to the contrary.

ARGUMENT

I. THE COMMISSION DOES NOT HAVE REGULATORY AUTHORITY OVER PUBLIC POWER UTILITY POLES

A. Public Power Utilities Are Not Subject to Federal Pole Attachment Regulation

No matter how strongly the Commission may wish to regulate public power utility poles, it cannot exercise authority that it does not have. As the Commission found in its *California Water* decision, the Commission does not have authority to regulate access to public or private property that may be useful for communications, except where such authority is specifically granted.

The sole source of the Commission's jurisdictional authority to regulate attachments to electric utility poles is Section 224 of the Communications Act. Section 224 only provides the Commission federal pole attachment authority to regulate entities that meet the statutory definition of "utility" in Section 224(a)(1), and this definition specifically excludes government-owned utilities, as well as cooperatives and railroads, from the definition of utilities. Thus, as government-owned utilities, public power utilities are specifically exempt from Section 224 and are therefore outside of the only source of specific jurisdictional authority that the Commission has over attachments to electric utility poles.

Moreover, it was arbitrary and capricious for the Commission to abruptly reverse its prior determinations regarding the impact of the limitations on its

authority under Section 224 without explanation or analysis beyond a single cursory footnote. This is particularly true given the detailed and substantive arguments that APPA and others raised in their comments on this issue that the Commission did not even acknowledge, let alone address.

B. Section 253 Does Not Apply to Public Power Utility Poles

In the *Order*, the Commission for the first time finds that, notwithstanding Section 224, Section 253 provides the Commission authority to regulate the rates, terms, and conditions of access to public power electric utility poles.

Section 253 was enacted as part of the Telecommunications Act of 1996 and has been in place for over twenty years. Until now, it was never interpreted as authorizing the Commission to regulate access to government-owned facilities. In the *Order*, however, the Commission found:

We confirm that our interpretations today extend to state and local governments' terms for access to public ROW that they own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, *as well as their terms for use of or attachment to government-owned property within such ROW, such as new, existing and replacement light poles, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities*

Order, at ¶ 92 (APPA-E.R. 48) (*emphasis added*).

The Commission is mistaken, and a review of Section 253 statutory language and purposes under traditional canons of statutory construction demonstrate that

the *Order's* findings impermissibly broaden the well-established scope of the Commission's statutory authority under that section.

1. Government-owned facilities cannot be commandeered simply because they are located within the public rights-of-way and would be useful for communications carriers

First, the Commission apparently assumes that all it need do is cite some benefit to communications, and its authority to regulate to achieve that benefit will follow *ipso facto*. But as shown above at II.A., this assumption flies directly in the face of the Commission's recognition in *California Water* that the Commission does not acquire authority to regulate electric utility pole attachments simply because the utility poles were convenient or even necessary for cable deployment:

The reading of these sections urged by petitioners [cable operators] is overbroad and would bring under the Act activities never intended by Congress to be regulated. *The fact that cable operators have found in-place facilities convenient or even necessary for their businesses is not sufficient basis for findings that the leasing of those facilities is wire or radio communications.*

California Water, at 758 (*emphasis added*). As also noted above, the Commission went on to state,

If broader powers be desirable they must be conferred by Congress. *They cannot be merely assumed by administrative*

officers; nor can they be created by the courts in the proper exercise of their judicial functions.

Id. at 760 (*emphasis added*). In response, Congress did confer broader powers to the Commission in the form of Section 224, but those powers specifically excluded the power for the Commission to regulate access to public power utility poles.

2. The *Order* Violates Well-Established Principles of Statutory Construction

In Section 224, Congress explicitly stated that the Commission has no jurisdiction over poles owned by public power utilities. The Commission does not deny that this is what Section 224 says, but it suggests that Section 253 implicitly enables the Commission to do precisely what Section 224 expressly prohibits it to do – regulate the rates, terms, and conditions of attachments to public power electric utility poles. In making this argument, the Commission ignores several traditional canons of statutory construction.

First, both Section 253 and the current version of Section 224 are contained within Title II of the federal Communications Act and were enacted at the same time. As the Supreme Court observed, “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion

or exclusion,” *Gonzales*, at 5.⁸ Congress clearly understood the distinction between rights-of-way and poles, as is evidenced by the fact that Section 224, which was amended in the 1996 Telecommunications Act at the same time as Section 253 was enacted, explicitly applies to “poles, ducts, conduits and *rights-of-way* owned or controlled by a utility,” whereas Section 253 only mentions “public rights-of-way.” The Court should presume that Congress acted “intentionally and purposely” in excluding pole attachments from the scope of Commission’s jurisdiction allowed under Section 253. As the Commission noted with regard to Section 224’s public power exemption, “where Congress did not intend for the Commission to regulate rates, terms and conditions in a particular respect, it stated this clearly.” *2011 Pole Order*, at ¶ 210.

Second, in *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974), the Supreme Court developed the oft-cited tenet of statutory construction that “[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by

⁸ The FCC has similarly held that “[w]hen Congress uses explicit language in one part of a statute . . . and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing.” *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, *Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 98-27, ¶ 32 n.113 (rel. February 26, 1998), quoting *Cabell Huntington Hospital, Inc. v. Shalala*, 101 F.3d 984, 988 (4th Cir. 1996).

a general one, regardless of the priority of enactment.” *See also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, (1992) (“[...]it is a commonplace of statutory construction that the specific governs the general,”); *Westlands Water Dist. v. Nat. Res. Def. Council*, 43 F.3d 457, 461 (9th Cir. 1994); and *Cuero v. Cate*, 850 F.3d 1019, 1034 (9th Cir. 2017).

Here, Congress set forth very specific limitations in Section 224 on the Commission’s jurisdiction over public power utility poles and there is no clear statement to the contrary in Section 253. Accordingly, the specific exemption for public power utilities in Section 224 is not overridden by the broad general grant of authority under Section 253.

Third, if the Commission’s decision were correct, it would effectively nullify the Section 224 exemption. This goes against the requirement that a court must assume that Congress intends that every provision of its laws be given effect. *United States v. Menasche*, 348 U.S. 528, 538 (1955); *Wilshire Westwood Assocs. v. Atl. Richfield Corp.*, 881 F.2d 801, 804 (9th Cir. 1989); *United States v. LKAV*, 712 F.3d 436, 440 (9th Cir.2013).

Fourth, the Supreme Court has held that when a statute is clear, it must be applied as written, even if the choices Congress made as embodied in the law as written run counter to the Commission’s current policy objectives. “[T]he choice is not ours to make. *Congress wrote the statute it wrote.*” *CSX Transport v. Alabama*

Department of Revenue, 562 U.S. 277 at 295 (2011) (*emphasis added*). The clarity of Section 224 should also settle the matter here.

3. Sections 253 and 332 Only Apply to Regulatory Activities

Section 253(a) applies to state or local “statutes,” “regulations,” and “legal requirements.” For twenty years, the Commission and courts have consistently held that Section 253 applies to state and local governments when acting in a regulatory capacity – e.g., when issuing permits or zoning authorizations for the use of the public rights-of-way – and not when acting in a proprietary capacity – e.g., when leasing or renting out access to utility facilities. *See, e.g., Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) finding that Section 253(a) only preempts “regulatory schemes.” Similarly, in *Sprint Spectrum*, the Second Circuit held that Section 332(c)(7) “does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity”. *Sprint Spectrum*, at 421.

Indeed, citing these and other decisions, the Commission affirmed this distinction in its *Wireless Siting Order* in 2014, in which it imposed various limitations on the ability of State and local governments to regulate the siting of wireless facilities:

As proposed in the Infrastructure NPRM and supported by the record, we conclude that Section 6409(a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities. As

discussed in the record, courts have consistently recognized that in “determining whether government contracts are subject to preemption, the case law distinguishes between actions a State entity takes in a proprietary capacity—actions similar to those a private entity might take—and its attempts to regulate.”⁶⁴⁴ As the Supreme Court has explained, “[i]n the absence of any express or implied implication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and when analogous private conduct would be permitted, this Court will not infer such a restriction.”⁶⁴⁵ Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances. We find that this conclusion is consistent with judicial decisions holding that *Sections 253 and 332(c)(7) of the Communications Act do not preempt “non-regulatory decisions of a state or locality acting in its proprietary capacity.”*⁶⁴⁶

⁶⁴⁴ See, e.g., *Alexandria et al.* Comments at 49 (citing *American Airlines v. Dept. of Transp.*, 202 F.3d 788, 810 (5th Cir. 2000)).

⁶⁴⁵ *Building & Construction Trades Council of Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island Inc.*, 507 U.S. 218, 231-32 (1993).

⁶⁴⁶ *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only “regulatory schemes”); *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002) (finding that Section 332(c)(7) “does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity”).

Wireless Siting Order, at ¶ 239 (*emphasis added*).

In its *Order*, however, the Commission abruptly reversed twenty years of prior determinations and held that Sections 253 and 332 apply to both governmental and proprietary activities, thereby allowing the Commission to regulate proprietary

activities undertaken by government entities. In support of this position, the Commission argues that the “market participant” doctrine does not apply to Sections 253 or 332. The Commission’s arguments are incorrect in multiple ways.

As the Supreme Court explained in *Boston Harbor*, “in the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction.” *Boston Harbor* 232.

The Commission appears to have fundamentally misconstrued the application of this standard. The Commission concludes that the market participant doctrine is not applicable because “both Sections 253(a) and Section 332(c)(7)(B)(i)(II) expressly address preemption, and neither carves out an exception for proprietary conduct.” *Order*, at ¶ 93. The question, however, is not whether the statute contains an express statement of preemption but, rather, whether there is an “express or implied indication” by Congress that the proprietary conduct is itself preempted. If not, then the governmental entity may engage in the proprietary conduct if a private entity would be allowed to engage in such activity. *Boston Harbor*, at 232.

Under this application of the standard, it is clear that neither Section 253 nor Section 332 apply to government entities engaged in proprietary activities. First, there is no express statement in Sections 253 or 332 that these statutes are intended

to preempt proprietary activities. Second, contrary to the Commission’s suggestion, neither the language nor the structure of Sections 253 or 332 indicate that Congress intended that these provisions should prohibit proprietary activities. Third, private electric cooperative utilities, which are also expressly exempt from the Commission’s Section 224 pole attachment authority, engage in the exact same pole attachment leasing activities as public power utilities.

The operative language of Section 253(a) preempts “state [and] local statute[s] [and] regulation[s]” and “other State [and] local legal requirement[s]” that prohibit or have the effect of prohibiting entities from providing telecommunications service. Taken together, these terms and phrases can best be understood as being aimed at governmental regulatory activities or as this Court has held “regulatory schemes.”

The Commission seizes upon the phrase “legal requirement” and argues that legal requirements are not limited to statutes, ordinances, and regulations, noting that it has previously held that Section 253(a) can prohibit legal requirements contained within agreements that would constitute a barrier to entry. In support of this argument, the Commission points to its *Minnesota Order*, in which the Commission held that it would not be permissible under Section 253 for the State of Minnesota to enter into an agreement granting a single entity the exclusive right to construct fiber in the state’s rights-of-way. *Petition of the State of Minnesota for a*

Declaratory Ruling regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights of Way, Memorandum Opinion and Order (“Minnesota Order”), 14 FCC Rcd 21697, 21707, para. 18 (Dec. 1999).

In that decision, the Commission rejected the State’s argument that the agreement was a proprietary action and not a “legal requirement” under Section 253(a), holding instead that the scope of Section 253(a)’s “legal requirement” language is broad and not limited to “regulations.”

The Commission’s reliance on the *Minnesota Order* is misplaced. While it is true that Section 253(a) applies to state and local legal requirements, this does not provide unbounded authority to the Commission to preempt any and all legal requirements of state and local governmental entities – especially those related to public power utility pole attachments, which are explicitly exempted from Commission jurisdiction. The *Minnesota Order* concerned an effort by Minnesota to manage access to and construction in state rights-of-way. As such, the State’s contract was not a vehicle to advance its proprietary interests, but one intended to further a regulatory policy objective related to the use of the public rights-of-way. In short, the *Minnesota Order* did not apply to all contracts, but only to those that implement regulatory schemes.

The Commission also points to the provision in Section 253(c) that preserves the ability of local governments to “manage” the public rights-of-way in a non-discriminatory manner. According to the Commission, no matter whether such management is a regulatory or proprietary activity, Section 253 empowers the Commission to regulate “any conduct that bears on access to and use of those ROW, notwithstanding any attempts to characterize such conduct as proprietary.” *Order*, at ¶ 94. (APPA-E.R. 49.)

The Commission’s argument underscores the fundamental flaw in its blanket assertion that Section 253 applies not only to governmental activities, but also to proprietary activities of government entities within the rights-of-way. Public power utilities do not “manage” the public rights-of-way. They do not possess regulatory authority and do not have the ability to control access to the public rights-of-way. While many public power utilities are units of a municipal government, they themselves do not have or exercise regulatory authority or control over the use of public rights-of-way. Further, in many instances, public power utilities are separate corporate entities from the local governments that own the public rights-of-way where the public power utility facilities are located and must themselves obtain an authorization from the local government to occupy the public rights-of-way. Similarly, the electric service territory of many municipal electric utilities extends well beyond the corporate territorial boundaries of their municipal parent. In such

instances, the municipal utility must itself obtain access to the rights-of-way from the applicable local government.

For all of the reasons discussed above, the Commission's conclusion that Section 253 applies to proprietary activities is untenable. There is simply no evidence, let alone sufficiently compelling evidence, to conclude that Congress intended Section 253 to authorize the Commission to assert control over facilities that a government owns and operates in a private and proprietary capacity merely because such facilities are located in the public rights-of-way.

Moreover, in attempting to ascertain the scope of Congressional intent to preempt, courts should presume that the governmental entity has the authority to engage in proprietary activities. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (“Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law”). *Boston Harbor*, at 232. Thus, where, as here, there is no express evidence that Congress intended to preempt proprietary activities, and any such evidence is at the most ambiguous, the Court must conclude that Congress did not intend to displace such authority.

4. Public Power Utilities Operate in a Proprietary Capacity

Recognizing the weakness of its conclusion that Section 253 applies to both regulatory and proprietary activities, the Commission has put forward an alternate, and equally novel interpretation of Section 253 as a source of authority to assert

jurisdiction over government-owned facilities. The Commission found that even if Section 253 does not apply to proprietary activities, managing access to and control over government-owned facilities, including utility poles, is a governmental activity and therefore subject to Section 253.

[I]n the alternative, even if Section 253(a) and Section 332(c)(7) were to permit leeway for states and localities acting in their proprietary role, the examples in the record would be excepted because they involve states and localities fulfilling regulatory objectives. In the proprietary context, “a State acts as a ‘market participant with no interest in setting policy.’” We contrast state and local governments’ purely proprietary actions with states and localities acting with respect to managing or controlling access to property within public ROW, or to decisions about where facilities that will provide personal wireless service to the public may be sited.

We believe that Section 253(c) is properly construed to suggest that Congress did not intend to permit states and localities to rely on their ownership of property within the ROW as a pretext to advance regulatory objectives that prohibit or have the effect of prohibiting the provision of covered services, and thus that such conduct is preempted.

Order, at ¶¶ 96-97 (internal citations and footnotes excluded) (APPA-R.E. 51-52).

The Commission’s sweeping conclusion that essentially all government-owned property located within the public rights-of-way is controlled in a regulatory capacity and/or is managed to advance a regulatory objective is simply incorrect and unsupported by the record.

With respect to public power utilities in particular, the Commission’s conclusion represents a fundamental misunderstanding of how public power utilities

operate. Public power utilities operate in a proprietary capacity. Public power utilities construct, own, and maintain their electric utility facilities as market participants in a commercial activity, not to advance a regulatory agenda or policy. In other words, public power utilities act in precisely the manner that the Supreme Court in *Boston Harbor* and the Commission have characterized as proprietary activities. APPA explained this at length in its comments and reply comments, but the Commission's *Order* neither addressed these arguments nor even acknowledged them. (See APPA Comments at 12-14 and Reply Comments at 16-20 (APPA-E.R. 138-140 and 190-194 respectively).

Under *Boston Harbor*, in the absence of an express or implied indication by Congress to the contrary, a governmental entity may pursue a purely proprietary interest if “analogous private conduct would be permitted.” *Boston Harbor*, at 232. As the court in *Sprint Spectrum* observed, in order to determine whether “a class of government interactions with the market [is] so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out,” a court must consider (1) whether “the challenged action essentially reflect[s] the entity’s own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances,” and (2) whether “the narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather

than address a specific proprietary problem.” *Sprint Spectrum*, at 420, quoting *Cardinal Towing & Auto Repair, Inc., v. City of Bedford*, 180 F.3d 686, 691, 693-94 (5th Cir. 1999).

Applying this test to public power utilities, it is clear that public power utilities act in an analogous manner to private entities in similar circumstances. First, in entering into pole attachment agreements public power utilities, like investor-owned utilities and cooperative utilities, seek to establish rates, terms, and conditions of access to their poles that will provide them with compensation for the use of their property and ensure that the attached facilities will not interfere with the operation of the utility’s electric facilities or services.

Second, as with all electric utilities, public power utility pole attachment agreements are negotiated as “master attachment agreements” that set out the base terms and conditions of access for a defined universe of poles subject to the utility’s review of requests to obtain access to specific poles. The fact that these agreements typically cover multiple poles does not alter this analysis since the use of master agreements is the routine and preferred business practice of public and private utilities and attaching entities alike, as it is a logical method for parties to agree to a controlling terms and conditions for the lease of a large number of utility poles.

Thus, public power utility pole attachments agreements are like those of private utilities – i.e., they are “narrow[ly]” focused on “address[ing] a specific

proprietary” activity – the leasing of space on utility poles for compensation – and not “to encourage a general policy” objective in satisfaction of the *Cardinal Towing* standard.

Notably, the cases that the Commission cites in support of its argument that leasing of public property is tantamount to acting in a regulatory capacity involve contracts that are materially different from public power pole attachment agreements in that they involve efforts by the local government to produce regulatory objectives. For example, in *NextG of New York v. City of New York*, 2004 WL 2884308 (S.D.N.Y. 2004), the court found that the City was involved in a “general franchising scheme” that sought to protect the “public interest in a streetscape that is safe, not excessively cluttered in appearance, and otherwise consistent with City use of the relevant facilities and their surroundings.”

Further evidence that public power utility pole attachment activities are proprietary activities is found in the treatment of public power utilities in many of the recently adopted state laws regulating local government wireless siting and zoning requirements. Many of these laws specifically exclude public power utility poles from the scope of these regulations. In doing so, these state laws typically define local government-owned poles as “authority” owned poles and specifically exclude government-owned public power utility poles. For example, the Iowa Cell Siting Act defines an “Authority” as follows:

3. “*Authority*”, used as a noun, means a state, county, or city governing body, board, agency, office, or commission authorized by law to make legislative, quasi-judicial, or administrative decisions relative to an application. “*Authority*” does not include any of the following:

- c. *Any entities, including municipally owned utilities established under or governed by Title IX, Subtitle 4 of the Code, that do not have zoning or permitting jurisdiction.*

Codified at Chapter 120, Section 8.C2 of the Iowa Code (*emphasis added*).

Similarly, the Missouri “Uniform Small Wireless Facility Deployment Act” defines an “Authority” and an “Authority Pole” as excluding municipal electric utilities and municipal electric utility poles respectively. Codified at Chapter 67.5110 *et seq* of the Missouri Revised Statutes (*emphasis added*).

In exempting public power utility poles, these states have recognized that these government-owned facilities are owned and controlled in a matter distinct from public rights-of-way.

II. SECTION 253(a) REQUIRES AN ACTUAL OR EFFECTIVE PROHIBITION

The Commission has adopted an overly broad interpretation of what constitutes a “barrier to entry” under Section 253(a). The Commission’s interpretation improperly prohibits state and local government actions that merely have the potential to create a barrier to entry rather than an actual prohibition. This runs counter to the specific findings of this Court that “a plaintiff suing a

municipality under Section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.” *County of San Diego*, at 578.

Because the court in *County of San Diego* found that the requirement of an actual or effective prohibition “rests on the unambiguous text” of Section 253(a) (*id.*), under *Chevron*, the analysis is at an end and no deference is due to the Commission’s interpretation. “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.” *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 296 (2013). Moreover, the Court’s conclusion in *County of San Diego* that Section 253(a) is unambiguous overrides the *Order’s* contrary determinations. “A court’s prior construction of a statute trumps an agency construction” “if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 969 (2005).

The requirement that a carrier bringing a claim under Section 253(a) must demonstrate an actual or effective prohibition is particularly important in the context of any potential claims against public power utilities regarding wireless attachments. Given the ability to install wireless facilities on a wide variety of structures—including buildings, rooftops, new wireless support structures, etc.—it is highly

unlikely that the failure to obtain access to particular public power utility poles would actually or effectively prohibit a wireless carrier from providing service.

III. THE ORDER'S COMPENSATION REQUIREMENTS

In the interest of judicial economy and avoidance of repetition, as requested by the Case Management Conference Order of April 18, 2019 (Doc 55), APPA agrees with and adopts the arguments challenging the *Order's* fee and compensation provision made by the LGP.

APPA further maintains that it was arbitrary and capricious for the Commission to establish a safe harbor of \$270 for access to both public rights-of-way and public facilities, without considering that public power utilities often operate in the rights-of-way of local governments with which they have no relationship.

IV. THE ORDER'S SHOT CLOCK RULES

Finally, it was also arbitrary and capricious for the Commission to require that its shot clock requirements run concurrently for all necessary permits and applications. First, it often makes more sense for rights-of-way permit and application reviews and utility pole attachment make-ready and pole loading analyses to be undertaken sequentially rather than at the same time. Second, the fact that public power utilities are often distinct entities from the local governments that

own the underlying rights-of-way means that the utility has no means to require that all such reviews be undertaken simultaneously.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the Commission's *Order* in its entirety, and in particular with respect to its application to public power utility facilities.

Respectfully Submitted,



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STATEMENT OF RELATED CASES

Pursuant to Ninth Cir. Rule 28-2.6, APPA states that to the best of its knowledge the only cases pending in this Court that relate to the matters briefed in this case are as follows:

- *City of Portland v. FCC*, Case No. 18-72689. Appealing the *Declaratory Ruling* portion of FCC’s *Third Report and Order and Declaratory Ruling, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC 18-111, WC Docket No. 17-84, WT Docket No. 17-79 (re. Aug. 3, 2018) (“*Moratorium Order*”).
- *Sprint Corp. v. FCC*, Case No. 19-70123 (lead case). Appealing the FCC’s *Declaratory Ruling and Third Report and Order, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79 and WC Docket No. 17-84, FCC 18-133 (re. Sep. 27, 2018)(“*Small Cell Order*”). By Order of the Court the following cases appealing the *Small Cell Order* have been consolidated with the appeal of the *Moratorium Order*.
 - *Verizon v. FCC*, Case No. 19-70124
 - *Puerto Rico Telephone v. FCC*, Case No. 19-70125
 - *City of Seattle et al., v. FCC*, Case No. 19-70136
 - *City of San Jose et al., v. FCC*, Case No. 19-70144

- *City and County of San Francisco v. FCC*, Case No. 19-70145
- *City of Huntington Beach v. FCC*, Case No. 19-70146
- *Montgomery County v. FCC*, Case No. 19-70147
- *AT&T Services v. FCC*, Case No. 19-70326
- *American Public Power Association v. FCC*, Case No. 19-70339
- *City of Austin et al., v. FCC*, Case No. 19-70341
- *City of Eugene et al., v. FCC*, Case No. 19-70344
- *American Electric Power Corp. et al., v. FCC*, Case No. 19-70490. Appealing the *Report and Order* portion of FCC’s *Third Report and Order and Declaratory Ruling, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC 18-111, WC Docket No. 17-84, WT Docket No. 17-79 (re. Aug. 3, 2018) (“*Third Report and Order*”). Pursuant to the Order issued on April 18, 2019, by Appellate Commissioner Shaw, Case No. 19-70490 will be briefed separately from the cases on the *Moratorium Order* and the *Small Cell Order*.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 18-72689 & 19-70123 (and consolidated cases)
(Petitioners Case No. is 19-70339)

I am the attorney or self-represented party.

This brief contains 12,699 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature /s/Sean A. Stokes **Date** 06/10/2019
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CERTIFICATE OF SERVICE

I hereby certify that, on June 10, 2019, I filed the foregoing in the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. I further certify that all parties are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

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STATUTORY APPENDIX

SEC. 224. [47 U.S.C. § 224] REGULATION OF POLE ATTACHMENTS.

(a) 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 3 of this Act) does not include any incumbent local exchange carrier as defined in section 251(h).

(b)

(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 title III of the Communications Act of 1934, as amended.

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

(c)

(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), 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)

(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.

(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), 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)

(1) The Commission shall, no later than 2 years after the date of enactment of the Telecommunications Act of 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 the date of enactment of the Telecommunications Act of 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)

(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 basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

(g) 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) 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) 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).

SEC. 253. [47 U.S.C. § 253] REMOVAL OF BARRIERS TO ENTRY.

(a) **IN GENERAL.** —No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) **STATE REGULATORY AUTHORITY.** —Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) **STATE AND LOCAL GOVERNMENT AUTHORITY.** —Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) **PREEMPTION.** —If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission 47 USC 253 shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) **COMMERCIAL MOBILE SERVICE PROVIDERS.** —Nothing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers.

(f) **RURAL MARKETS.** —It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) that effectively prevents a competitor from meeting the requirements of section 214(e)(1); and

(2) to a provider of commercial mobile services.

SEC. 332 [47 U.S.C. § 332] MOBILE SERVICES.

(c) Regulatory treatment of mobile services

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of

radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions For purposes of this paragraph—

(i) the term “personal wireless services” means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term “personal wireless service facilities” means facilities for the provision of personal wireless services; and

(iii) the term “unlicensed wireless service” means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).