

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Accelerating Wireline Broadband Deployment) WC Docket No. 17-84
by Removing Barriers to Infrastructure)
Investment)

COMMENTS OF THE UTILITIES TECHNOLOGY COUNCIL

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SUMMARY

Utilities help to promote broadband in a variety of ways, including a long history of providing pole attachments to communications service providers. UTC supports certain proposals in the *NPRM* to promote speedier access to pole attachments. However, UTC is in strong opposition to the shorter timelines proposed and to any further reduction in the rates for pole attachments as envisioned under the *NPRM*. The proposed timelines are infeasible and unnecessary and the regulated rate is already below what the Communications Act of 1934 requires. Moreover, UTC opposes the proposal to grant to ILECs regulated rates, which is also contrary to the pole attachment provisions of the Communications Act and to sound public policy. Finally, UTC opposes the proposal to adopt a shot-clock for pole attachment complaint proceedings, because it is concerned that any deadline will discourage or prevent the Enforcement Bureau from sufficiently considering the evidence on the record in a complaint proceeding. If the Commission does adopt a shot-clock, UTC urges the Commission to continue to address the issues on a case-by-case basis rather than through rules of general applicability and to start and stop the clock so that the parties may present their evidence and negotiate with each other and so the Enforcement Bureau be able to fully consider the evidence presented.

In addition, UTC opposes the Commission's proposals regarding eliminating or diluting the requirements that carriers provide direct notification to consumers well in advance of a copper replacement or other network change; as well as the requirements that carriers not only provide sufficient notice that they plan to discontinue a service, but also that they show there are adequate replacements that provide the same or better functionality as the legacy service that is being discontinued. Utilities need sufficient advance notice prior to the replacement of copper services and they need to ensure that replacement services will provide the same or better

functionality as the existing services that they currently receive from carriers. They also need similar protections as carriers continue to discontinue services, particularly in remote areas where utilities have critical assets and lack reasonable alternatives to communicate with those critical assets as well as personnel in the field. Safety, reliability and security is jeopardized without adequate safeguards during the IP Transition, as carriers replace copper networks and discontinue services that they provide to utilities.

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The Utilities Technology Council (“UTC”)¹ hereby files the following comments in response to the Federal Communication Commission’s (“FCC” or “Commission”) *Notice of Proposed Rulemaking* in the above-referenced proceeding.² Utilities help to promote broadband in a variety of ways, including a long history of providing pole attachments to communications service providers. UTC supports certain proposals in the *NPRM* to promote speedier access to pole attachments. However, UTC is in strong opposition to the shorter timelines proposed and to any further reduction in the rates for pole attachments as envisioned under the *NPRM*. The proposed timelines are infeasible and unnecessary and the regulated rate is already below what the Communications Act of 1934 requires. Moreover, UTC opposes the proposal to grant to ILECs regulated rates, which is also contrary to the pole attachment provisions of the Communications Act and to sound public policy.

In addition, UTC opposes the Commission’s proposals regarding eliminating or diluting

¹ UTC was formerly the “Utilities Telecom Council”. See www.utc.org.

² *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry and Request for Comment, WC Docket No. 17-84 (rel. April 21, 2017). See also Federal Communications Commission, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 82 Fed. Reg. 22453 (May 16, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-05-16/pdf/2017-09689.pdf>.

the requirements that carriers provide direct notification to consumers well in advance of a copper replacement or other network change; as well as the requirements that carriers not only provide sufficient notice that they plan to discontinue a service, but also that they show there are adequate replacements that provide the same or better functionality as the legacy service that is being discontinued.

There is a fundamental disconnect between the FCC and many of its fellow government agencies that is highlighted in this *NPRM*. Other agencies such as the Department of Energy (DOE), the Department of Homeland Security (DHS), the Federal Energy Regulatory Commission (FERC), and the Department of Defense (DoD) believe that electricity is the most critical of critical infrastructures for purposes of national security, economic security, and the health and safety of our citizens. Even the recent “Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure” Executive Order states, “It is the policy of the executive branch to use its authorities and capabilities to support the cybersecurity risk management efforts of the owners and operators of the nation’s critical infrastructure,”³ specifically highlighting the electric sector.⁴

While the pole attachments issue itself also underscores the interdependencies that exist between the electricity and communications sectors, electricity is the lifeblood of modern communications infrastructure. As such, the treatment of utility poles should be of utmost concern to utilities and their attachers, and especially to the regulators. The FCC has instead created a situation in previous rulemakings that will only be exacerbated under this proposal whereby: 1) the federal pole attachment rate is so low that utility customers are subsidizing for-

³Presidential Executive Order on Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure, May 11, 2017, Section 2 (a).

⁴ *Id.* Section 2 (e).

profit communications corporations for purposes of maintenance—for-profit electric utilities are rate regulated, unlike communications providers, so the relationship to customers is direct and in the case of not-for-profit utilities, this subsidization also flows directly to utility customers; 2) safety is secondary. When safety is secondary, workers are at risk, and; 3) electric reliability will suffer when the infrastructure on which reliability depends is over-utilized to support other functions or when utility resources are diluted. None of this is in keeping with the assessment by other government agencies about the vital nature of electricity to our security.

I. Introduction and Background

UTC is the international trade association for the telecommunications and information technology interests of electric, gas and water utilities and other critical infrastructure industries. UTC's members include large investor-owned utilities who serve millions of customers across multi-state service territories, as well as smaller rural electric cooperative utilities and municipal utilities who may serve only a few thousand customers in isolated communities or spread out over remote areas. All of these members own, manage and control extensive infrastructure that they use to support the safe, reliable and secure delivery of essential services to the public at large.

Some utilities are subject to FCC pole attachment jurisdiction, while others are excluded. Investor-owned utilities are required to provide access for pole attachments by cable television operators and telecommunications service providers at rates, terms and conditions that are just and reasonable. Not-for-profit rural electric cooperatives and public power utilities are excluded from FCC pole attachment jurisdiction because of their local and state governance models, but the FCC's pole attachment rules can affect some of them directly and indirectly because certain states follow the FCC rules, which in turn brings these types of utilities under them. In any

event, all utilities, whether they are directly subject to pole attachment regulations or not, are responsible for ensuring that pole attachments are made in compliance with the National Electric Safety Code (NESC), radio frequency exposure standards, and other utility safety standards. As such, UTC has a substantial interest in this proceeding, and has been an active participant in numerous previous proceedings at the FCC involving pole attachments.

Utilities facilitate broadband services in various ways, including providing the majority of the infrastructure for third-party pole attachments, offering the use of decommissioned gas piping, and deploying their own fiber optic networks, particularly in areas that lack access to broadband.⁵ Thus, utilities are enablers of broadband and have a unique perspective to offer in this proceeding.

While utilities support broadband, they are also responsible for ensuring the safety, reliability and security of their infrastructure and operations. Unfortunately, the record in various FCC proceedings and many state public utility commission proceedings has shown that third-party attachments often violate the NESC/utility safety codes and/or are made without authorization by the utility, the latter which is necessary to maintain the safety and reliability of the electric grid. Fortunately, the FCC and the states have adopted policies that support the use of penalties in order to incent third-party attaching entities to properly obtain permits and to install and maintain their attachments in compliance with safety codes. However, utilities remain concerned that pole attachment violations will continue and, indeed may increase as more and more wireless devices are attached. Specifically, ILECs are allowing their legacy copper

⁵ Rural electric cooperative utilities and public power utilities are, in some areas, deploying fiber to the home networks and offering gigabit Internet access at prices that are affordable. They are seeing high rates of customer adoption in those areas that were previously unserved or underserved by broadband. Investor-owned utilities and other larger utilities, such as federal power authorities, offer wholesale capacity on their fiber networks to third-party broadband service providers. Similarly, some electric cooperatives and public power utilities also offer wholesale capacity on their fiber networks.

networks and poles to degrade as they shift their capital investments to support more profitable wireless services, and in turn, the proliferation of wireless attachments – particularly above the communications space on the pole – will increase both the probability of violations and the magnitude of the risk of an accident due to violations. The FCC must ensure that its policies protect the safety, reliability and security of critical infrastructure.⁶

Utilities provide access to pole attachments on a neutral and non-discriminatory basis. Unlike ILECs who are competitors with other third-party attaching entities, utilities do not have any incentive to delay the make ready or modification process. That is why utilities have supported the use of one-touch-make-ready, while ILECs have opposed it. Moreover, utilities recognize that the volume of pole attachments is likely going to increase, and improvements on the process are going to be necessary to accommodate pole attachments in the future. That is why utilities support the use of qualified third-party contractors by the permitter to perform the communications space work in order to be able to keep up with increasing demands for pole attachments.

Utilities are already subject to timelines for application processing and make ready. UTC is concerned that the Commission’s proposal to impose shorter timelines ignores the reality that communications space make ready delays are often caused by third-party attaching entities and other factors that are out of the control of the utility.⁷ The Commission must not adopt timelines that arbitrarily assign all of the responsibility on the utility. The FCC should also recognize that

⁶ See NPRM at ¶13 (“We also seek comment on potential remedies, penalties, and other ways to incent utilities, existing attachers, and new attachers to work together to speed the pole attachment timeline.”). UTC supports policies that would incent attachers to comply with safety codes. Specifically, the Commission should uphold penalties against third-party attachments that are in violation of utility safety codes and/or the NESC.

⁷ For example, utilities report that a significant percentage of make ready projects are cancelled by attachers after utilities perform the engineering review and provide the cost estimate. Many of them fail to approve the estimate within prescribed timelines. Moreover, attachers often request extensions of time on make ready projects. State and local permitting are also significant factors in make ready delays.

existing third-party attaching entities bear responsibility for compliance with the timelines, and that there are other factors, such as shortages in qualified communications contractors, state and local permit processing, and the sheer size of the project(s) that need to be considered. In sum, the process is more complex than it may appear and the Commission should not further reduce the timelines; or alternatively, it should provide flexibility in the timelines that accounts for delays that are beyond the control of the utility and are not reasonably foreseeable.

While utilities support many of the proposals for speedier access, utilities object to any further reductions in the regulated rates for pole attachments and/or restrictions on reimbursement for the costs of make ready. The Commission has further reduced regulated pole attachment rates to levels that deny utilities just compensation, and in doing so, the Commission has exceeded its statutory authority and contradicted congressional intent, as explained below. Similarly, the Commission should not systematically restrict utilities from recovering their make ready costs, which are incurred by utilities in order to accommodate third-party pole attachments. Utilities are entitled to full reimbursement of these make ready costs, which are approved in advance by third-party attaching entities and are clearly just and reasonable.

Further reductions in the rates for pole attachments and restrictions on recovery of costs from make ready will only lead to further disputes. In that regard, the Commission operates from a false premise when it asserts that providing regulated rates to ILECs will reduce disputes. There have only been a handful of pole attachment complaints involving ILECs, and only one – recently – has been decided in favor of the ILEC. This hardly justifies the Commission's proposal to presume that all ILECs are entitled to regulated rates, unless a utility can prove otherwise by clear and convincing evidence to the contrary. The fact is that ILEC pole attachments are generally treated differently from other attachments and the access rights that

they enjoy are very different from other attaching entities. Therefore, UTC opposes any further reductions in the regulated rate for pole attachments and/or restrictions on reimbursement for the costs of make ready, and UTC strongly objects to presuming that ILECs are entitled to regulated rates, as well.

Therefore, UTC is pleased to offer the following comments in response to the Commission's *NPRM* and looks forward to working with the Commission to speed access to poles by third-party attaching entities, while ensuring safety, reliability and security of utility infrastructure and recovering all of the utility's fully allocated costs of providing pole attachments.

II. Access to Poles

A. Timelines

In the *NPRM*, the Commission invites comment on the appropriate timelines for various different stages in the pole attachment process, starting from the initial application stage. Whereas currently, the rules provide for 45 days to process an application and approve or deny it in writing, the Commission is now proposing to reduce that time period to a span of 15-30 days. The Commission also proposes to provide an extra 15 days to process applications for a large number of pole attachments, but that would serve as the cap and would apply to orders larger than 3,000 poles or five percent of the pole inventory in a state.⁸ In addition, the Commission is proposing to reduce the timeline for the stage when the utility prepares the estimate of the make

⁸ See *NPRM* at ¶8. (inviting comment on whether 15-30 days is a reasonable timeframe for utilities to act on a completed pole attachment application), See *NPRM* at ¶9 (inviting comment on whether to continue to provide utilities with an extra 15 days for large orders, but proposing to cap at 45 days the total time for utility review of those pole attachment applications that are larger than the lesser of 3,000 poles or five percent of a utility's poles in a state.) Currently, the FCC defines a large order as up to the lesser of 3,000 poles or five percent of the utility's poles in a state. If the application is for more the 3,000 poles or five percent of the utility's poles in a state, the FCC allows the parties to negotiate in good faith to set a timeline for processing the application.

ready costs and the third-party attaching entity approves it.⁹ Finally, the Commission is proposing to reduce the timeline for performing the communications space make ready, so that there would only be 15 days for small orders and 45 days for medium size orders.

At the outset, UTC submits that the Commission should continue to recognize that there are circumstances which will limit the utility's ability to meet the shorter timelines, and the utility will incur additional costs in meeting the shorter timelines. UTC is concerned that shorter timelines will be infeasible, particularly as there will likely be insufficient resources available to complete the work.¹⁰ UTC is particularly concerned about resources if the Commission makes the timelines applicable to orders that are larger than 3,000 poles or five percent of the pole inventory in a state.¹¹ UTC believes that an increase in these types of larger orders is likely to occur due to the large number of small cell devices that wireless carriers plan to deploy on utility poles. To meet that increased demand for pole attachment access, as well as any necessary make ready, extra personnel and equipment will be necessary, which may not be available and which may delay the process beyond the timelines.¹² Moreover, UTC believes that the definition of a "large order" should be significantly reduced, so that a large order would include an application for 100 poles or more.¹³

⁹ The Commission proposes to eliminate altogether the survey time and/or reduce the timeline for the estimate/acceptance to a 14-day (or 10-day) period. The current time period is 14 days for the estimate plus 14 days for acceptance.

¹⁰ Examples of insufficient resources would include lack of personnel to perform the work and lack of specialized equipment. Utilities have reported that there is a particular lack of qualified personnel for wireless attachments, and that utility linemen are also in scarce supply.

¹¹ See *NPRM* at ¶9.

¹² A related problem regarding staffing is the cyclical nature of pole attachment requests. There may be periods of time when there are few requests for pole attachments. In order to be prepared for large orders, utilities would need to keep on staff a large number of personnel. Those costs are attributable to pole attachments and would be subject to recovery through increased pole attachment rates and fees.

¹³ This would be much more consistent with the make ready rules in other states. See e.g. WAC 480-54-030

The Commission should allow the timelines to be tolled when there are insufficient resources. Currently, the timelines are tolled if there is good and sufficient cause due to circumstances that are not reasonably foreseeable. The Commission does not include lack of resources as good and sufficient cause for tolling the timeline because the Commission has concluded it is a reasonably foreseeable event.¹⁴ Contrary to this previous ruling, UTC urges the Commission to recognize that the timelines should be tolled for reasons of lack of resources.¹⁵ Although arguably foreseeable, there is a real and demonstrable shortage of contractors, particularly power qualified contractors, who are qualified to make attachments in the electric space on utility poles, which could delay the completion of make ready for projects involving wireless attachments.¹⁶ Therefore, the timelines should be tolled to allow for lack of sufficient resources, particularly for large projects. UTC submits that there must be flexibility in the timelines to address this scarcity of qualified personnel.¹⁷

(providing that the time periods only apply to requests for access to up to three hundred poles or 0.5 percent of the owner's poles in Washington, whichever is less. The timelines for requests for more poles than that are subject to good faith negotiations.)

¹⁴ See *2011 FCC Pole Attachment Order* at ¶68 (stating that “[f]or example, utilities may toll the timeline to cope with an emergency that requires federal disaster relief, *but may not stop the clock* for routine or foreseeable events such as repairing damage caused by routine seasonal storms; repositioning existing attachments; bringing poles up to code; *alleged lack of resources*; or awaiting resolution of regulatory proceedings, such as a state public utilities commission rulemaking, that affect pole attachments.”)(emphasis added).

¹⁵ UTC also submits that the number and size of pole attachment requests can vary significantly, making it hard to foresee and prepare for large orders. One utility has informed UTC that a national wireless carrier had planned to deploy 500 small cells by the end of the first quarter of this year, but it actually only applied for a small fraction of that number. Subsequently, the wireless carrier projected filing 70 applications covering more than 1,300 node poles by end of year. These highly fluctuating and inaccurate projections illustrate the reality that it is not reasonably foreseeable to project the number and size of applications for pole attachments. The same utility also has informed UTC that the cancellation rate for applications for towers has historically been about 50 percent over the last 15 years. Again, this presents real challenges for utilities who must prepare with staff and other resources to meet the deadlines.

¹⁶ There is a widespread shortage of linemen that are qualified to make pole attachments in the supply space on the pole. Moreover, the scarcity of qualified personnel is worse in remote areas, and it may take weeks before contractors can travel to these remote areas to perform make ready in the supply space and make pole top attachments.

¹⁷ Note that when the Commission established the rule for tolling the timelines, the Commission claimed that the

Moreover, the Commission should recognize that utilities are entitled to recover all of their additional costs – including additional equipment and labor -- that are related to meeting any shorter timelines that the Commission adopts. Shorter timelines will mean additional staffing to be able to process applications and perform make ready more quickly. It may also require additional equipment, including specialized equipment for setting taller poles above 40 feet, as necessary. All of these additional resources impose added costs that utilities', and ultimately their customers, will incur as a result of pole attachments. These costs are directly attributable to pole attachments, and are entitled to recovery under the Communications Act and the Fifth Amendment of the Constitution.

Fundamentally, UTC is opposed to the Commission's proposals to further reduce the timelines for application processing and make ready because they overlook the reality that many of the delays in application processing are due to errors by the applicant,¹⁸ and the sheer number of the poles and/or the type of attachments involved. Similarly, many of the delays in make ready are due to existing third-party attaching entities that fail to construct and/or approve the estimated make ready costs and that do not participate in the modification of the pole on a timely basis in order to accommodate an additional attachment.¹⁹ The Commission needs to address these underlying issues before imposing any shorter timelines on utilities.

rule provided flexibility in part because it would not restrict utilities from tolling the timeline for exceptionally large orders for reasons of a lack of resources. As such, if the Commission eliminates the cap on large orders and applies the timelines to large orders greater than 3000 poles or five percent of the pole inventory in a state, it would thus be appropriate for the Commission going forward to allow utilities to toll the timeline for lack of resources.

¹⁸ Common errors by applicants include incomplete applications and inaccurate surveys, which utilities ultimately have to correct and which can significantly delay the application process. Utilities have informed UTC that the rate of errors is very high, some utilities finding that 100% of the applications contain errors.

¹⁹ Due to the failure of attaching entities to complete construction or agree to estimated costs of power space make ready on a timely basis, utilities' permit processes incur significant delays and expenses due to third-party attaching entities. Utilities uniformly report this is a common problem among attaching entities, leaving the utilities to guess when and if attaching entities will ever follow through on their applications and completing construction.

That said, UTC seeks clarification of certain terms that are specific to the various stages in the Commission’s timelines. With regard to the initial 45-day period for processing applications, UTC seeks clarification of what constitutes a “large order.” Is it the same for wireline attachments and wireless attachments? UTC submits that the timeline should be longer for large orders involving wireless attachments, particularly considering that there are likely to be a high volume of small cell attachments. With regard to the 60-90 day period for performing make ready, UTC seeks clarification of the definition of “make ready.” UTC submits that the term make ready should not include pole change outs or any power space work, and should be limited to work in the communications space. UTC also seeks clarification of what would constitute “small pole attachment requests” that would be subject to a 15-day timeline or “medium-size requests” that would be subject to a 45-day timeline.²⁰

If the Commission, despite our strong objection, does adopt shorter timelines for application processing and make ready, UTC urges the Commission to provide more time for processing applications for projects that require a railroad crossing or state or local permitting. Utilities are finding that the time to obtain state and local permitting has increased from four months to 8-12 months. Worse, getting a railroad crossing permitted can take 12 months. Similarly, UTC suggests that the shorter timelines for make ready involving small pole attachment requests or medium pole attachment requests should only apply if there are no complicating factors involved, such as compliance with the National Environmental Policy Act (NEPA), which is a frequent cause of delays in the pole attachment process. This would be consistent with the Commission’s *2011 Pole Attachment Order*, in which the Commission observed that some utilities were able to meet a 45-day deadline for make ready *absent*

²⁰ *NPRM* at ¶11.

complicating factors and which refrained from adopting shorter timelines as a rule for such small and medium-sized pole attachment requests due to insufficient evidence on the record that utilities were able to meet shorter timeframes for power space or communications space make ready in general.²¹

B. Alternative Pole Attachment Processes

In the *NPRM*, the Commission invites comment generally on possible alternatives to the Commission’s current pole attachment process that might speed access to poles.²² It also seeks comment on potential remedies, penalties, and other ways to incent utilities, existing attachers, and new attachers to work together to speed the pole attachment timeline.²³ Specifically, the Commission invites comment on the use of utility-approved contractors to perform make ready work, and asks “whether it would be reasonable to expand the use of utility-approved contractors to perform make-ready work, especially earlier in the pole attachment process.”²⁴ Under this approach, the Commission is considering allowing a new attacher to perform the make ready work after an existing attacher fails to meet its make ready deadline.²⁵ The Commission recognizes that some attaching entities have opposed this approach due to concerns about damage to their attachments by the new attacher, and the Commission invites comment on ways to mitigate the potential for damages.²⁶

²¹ *2011 Pole Attachment Order* at ¶32.

²² *NPRM* at ¶13.

²³ *Id.*

²⁴ *Id.* at ¶14

²⁵ *Id.*

²⁶ *Id.* at ¶15 (suggesting liability safe harbors, such as surety bonds, indemnifications for outages and damages, and self-help remedies for utilities and existing attachers to fix problems caused by new attacher contractors.)

Similarly, the Commission distinguishes routine make ready from complex make ready work, and it invites comment on whether it would be reasonable to allow new attachers to use utility-approved contractors to perform routine or complex make ready work; and coupled with that, whether utilities should be required to keep a separate list of contractors authorized to perform this specialized make ready work. Finally, the Commission asks whether utility-approved contractors who work for new attachers should be allowed to perform make ready work on wireless attachments above the communications space on a pole.²⁷ In that regard, the Commission proposes to: 1) require all impacted attachers (new, existing, and utilities) to agree on a single contractor that the new attacher could use to perform make ready work; and/or 2) require that existing attachers (or their contractors) be given the reasonable opportunity to observe the make ready work being done on their existing equipment by the new attachers' contractors.²⁸

At the outset, UTC takes this opportunity to express its appreciation for the Commission's efforts to address the safety and property concerns of existing attachers and utilities.²⁹ Moreover, UTC supports allowing new attachers to use utility-approved contractors when an existing attacher fails to meet its make ready deadline – provided that the make ready is in the communications space and not in the electric space on the pole. While UTC believes that new attachers should be allowed to use approved contractors to perform routine make ready in the communications zone, it does not support allowing them to perform make ready involving work in the electric space on the pole.³⁰ However, UTC is opposed to allowing third-party

²⁷ *Id.* at ¶16.

²⁸ *Id.* at ¶17.

²⁹ *Id.*

³⁰ Note that the Nashville Ordinance defines complex make ready as “Make Ready that will cause or would

contractors to perform loading analysis as part of the make ready process.³¹ Utilities need to ensure that the loading analysis is performed correctly, because the loading analysis is critical to safety, reliability and infrastructure integrity. Allowing third parties to conduct the loading analysis would possibly lead to errors that could undermine the safety and reliability of the poles.

UTC agrees with comments on the record that express concerns about the potential for damage to existing attachments resulting from make ready in the communications area as well as in the electric space on the pole, and supports the Commission's suggestion to allow existing attachers and pole owners to require new attachers to indemnify, defend and hold harmless existing attachers for damages or outages that occur as a result of make ready work on their equipment.³² In order to mitigate against the risk of damage to existing attachments further, UTC provides qualified support for the Commission's proposal for the impacted entities to agree on a single contractor to perform the make ready, and to adopt a post-make ready timeline that would provide as few as 14 days for existing attachers to inspect the make ready work of the new attaching entity's contractor. Additional clarification is needed about the details for the process, but in any event, utilities should not be put in the position of managing this process on a going-forward basis. That said, UTC believes that these proposals reasonably balance the goal of increasing speed to access poles against the need to protect the safety, reliability and security of utility infrastructure from improper make ready work.

UTC urges the Commission to incent third parties to comply with utility safety standards, radio frequency exposure standards, and the NESC when making pole attachments or

reasonably be expected to cause a customer outage.” See Ordinance No. BL2016-343 at § 13.18.020.

³¹ Third-party contractors performing pole loading must be under the supervision of the utility. Utilities have experience with third-party contractors that have submitted erroneous engineering data.

³² *NPRM*, at ¶19.

conducting make ready.³³ Utilities continue to find that a significant percentage of attachments are made without authorization and/or in violation of utility safety codes and/or the NESC.

While the Commission has established policies to incent attaching entities to comply with the permitting process by enforcing penalties for unauthorized attachments, the Commission has refrained from sanctioning penalties for safety violations. As the Commission seeks to find ways to incent the parties to work together on pole attachments, it should take this opportunity to address this issue and clarify that penalties for pole attachment violations may be enforced by utilities under the terms of pole attachment agreements.

III. Re-examining Rates for Make-Ready Work and Pole Attachments

A. Reasonableness of “Make-Ready” Costs

UTC opposes the Commission’s proposal to regulate rates for make ready by requiring utilities to post a schedule of standard fees and charges. Make ready costs vary considerably depending on a variety of factors, especially on the geographic area of the country and the availability of contractors in the area.³⁴ Geographically there are differences in soil and vegetation conditions and access to the pole itself whether next to the road, in an alley or in a backyard or other location that is not vehicle accessible. When contractors are available to support this type of work, they charge varying rates based on type of work, labor requirements, equipment used and travel time to the jobsite. They are not suited to a standardized schedule of fees and charges, and while some utilities may provide sample make ready charges to attaching entities upon request, most utilities do not publicly provide a standard list of charges for make

³³ *Id* at ¶13 (inviting comment on “potential remedies, penalties, and other ways to incent utilities, existing attachers, and new attachers to work together to speed the pole attachment timeline.”)

³⁴ As noted above, there is a shortage of available contractors in many areas, which can affect the costs of make ready.

ready.³⁵ New York is the only state that requires utilities to post their make ready charges publicly.³⁶ However, even New York does not require that the make ready charges be standardized in any way.

For similar reasons, UTC opposes regulating make ready charges in such a way that would require utilities to set a standard charge per pole that a new attacher may choose in lieu of a cost-allocated charge.³⁷ As explained above, make ready costs can vary considerably, and utilities must be fully reimbursed for their make ready costs. Standard charges per pole risk under recovering make ready costs. Utilities often provide a true-up for make ready overpayments by third-party attaching entities. As such, requiring utilities to set standard charges for make ready is unnecessary and counterproductive. Instead, the Commission should continue to allow utilities to submit estimates of the make ready costs for approval by the attaching entities, and require attaching entities to approve or deny the estimate within 14 days.

Also, UTC opposes requiring utilities to reimburse third-party attaching entities for benefits that the utility subsequently realizes from their make ready work. Such a requirement would be unworkable in practice, because of the extensive accounting it would require. Further, the benefits to the utility would be difficult to quantify and would likely result in far more disputes. Finally, UTC agrees with the Commission that the pole attachment rules already require utilities to contribute to make ready to the extent that they join in the modification of the pole and benefit from it at that time. Therefore, any benefits from adopting a rule or

³⁵ See Comments of Oncor Electric Delivery Company, LLC, Dairyland Electric Cooperative and Idaho Power Company in WC Docket No. 07-245.

³⁶ See New York Public Service Commission Case 03-M-0432, Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues, Order Adopting Policy Statement on Pole Attachments, Appendix A at 4 (Aug. 6, 2004) (“Make-ready charges shall be in each Owner's operating agreement and posted on its website.”)

³⁷ See *NPRM* at ¶33 (inviting comment on whether it would be reasonable to allow utilities to set a standard charge per pole that a new attacher may choose in lieu of a cost-allocated charge.)

reinterpreting existing rules to require reimbursement of third-party attaching entities from a utility that subsequently benefitted from make ready would be outweighed by the burden that it would create in administering it. As such, UTC opposes requiring utilities to reimburse third-party attaching entities for any potential benefits that the utility realizes from make ready by third-party attaching entities.

The complaint process does provide a sufficient mechanism to ensure that make ready charges are in fact just and reasonable.³⁸ Third-party attaching entities may request the underlying cost data for make ready charges to determine if they are just and reasonable. Moreover, utilities must produce such information in response to a pole attachment complaint. As such, the fees and charges for make ready are verifiable and if they are determined to not be just and reasonable, they will be subject to reimbursement through the complaint process. Therefore, the Commission should not be requiring utilities to use standard fees and charges for make ready and should not be adopting rules that affirmatively require utilities to reimburse attaching entities for subsequent benefits they realize from make ready, because the pole attachment complaint process provides an effective means for resolving make ready disputes involving fees and charges.

B. Excluding Capital Expenses from Pole Attachment Rates

In the *NPRM*, the Commission proposes to codify a rule that excludes capital costs that utilities already recover via make ready fees from pole attachment rates, and it also considers entirely excluding capital costs from the pole attachment rental rate, so that only incremental costs would be recovered. The Commission is specifically concerned that the capital costs of changing out a pole through the make ready process are not excluded from the accounts that are

³⁸ See *NPRM* at ¶34 (asking whether the Commission's complaint process provides a sufficient mechanism by which to ensure that make-ready costs are just and reasonable.)

used to calculate the rental rate, and it invites comment on a number of related questions. Moreover, the Commission is specifically concerned about the extent to which utilities incur capital expenses other than through make ready, and if not, whether third parties should only pay incremental costs generally under the pole attachment rate.³⁹

UTC opposes the exclusion of capital costs from the pole attachment rental rate, and it does not believe that it is necessary for the Commission to codify a rule that excludes reimbursed make ready capital costs from use in the pole attachment rate. To be sure, utilities are not permitted to double recover their make ready costs through both the pole attachment rate and make ready fees and charges. But, utilities are careful to avoid the inclusion of reimbursed make ready costs from their capital accounts that are used to calculate the pole attachment rental rate.⁴⁰ Moreover, utilities do incur capital costs that are not recovered through make ready, which must be included in the pole attachment rate in order to provide utilities with just compensation for pole attachments. To exclude these capital costs from the pole attachment rate would violate the express terms of the statute, as well as the Fifth Amendment of the United States Constitution. Excluding such costs would be inequitable and would further subsidize the communications industry at the expense of utility ratepayers.

The capital costs that should be included in the pole attachment rate formula include those FERC accounts that are currently included in the pole attachment rate formula. The pole attachment formula calculates the total pole investment and then derives the pole attachment rate based on the percentage of the pole space that is occupied by the attachment. UTC continues to

³⁹ NPRM at ¶¶35-37

⁴⁰ As a matter of practice, utilities will typically credit back the payment by the attaching party for make ready to the FERC 364 capital accounts for poles, towers, and fixtures, which prevents double recovery of make ready expenses in the regulated pole attachment rate.

believe that the Commission's rate formula fails to recover the full costs of the pole that are associated with pole attachments, such as the 40 inch space on the pole for the communications worker safety zone. UTC also continues to believe that the Commission's rate formula fails to recover the costs of the unusable space on the pole that is nonetheless necessary for pole attachments and which Congress directed the Commission to include to apply to telecommunications attachments and to attachments by cable television operators that provide telecommunications service. As such the Commission's rate formula denies just compensation and is contrary to the express terms of the statute, as well as Congress's intent. Therefore, UTC continues to urge the Commission to include these costs in the pole attachment rate formula.

Moreover, the Commission must not strip all capital costs from the pole attachment rate formula. Doing so would exacerbate the systematic under recovery of utilities' costs associated with pole attachments under the current rate formula. As explained above, it is also contrary to the express terms of the statute that provide for reimbursement of the capital costs of pole attachments and with Congress's intent for the recovery of a pro-rata portion of the unusable space costs. Some parts of the Commission's current rate formulae are under appeal and pending review by the courts, and other parts of the rate formulae have been upheld, largely due to deference by the courts to the FCC's interpretation of its pole attachment authority. It is unlikely that judicial deference would apply, however, to an interpretation that is directly contrary to the express terms of the statute, particularly where the resulting rate would restrict utilities to recovering their incremental costs. Courts are increasingly reluctant to extend legislative authorities to administrative agencies such as are contemplated here.

C. Pole Attachment Rates for Incumbent LECs

In the *NPRM*, the Commission proposes that "the 'just and reasonable rate' under Section 224(b) for incumbent LEC (ILEC) attachers should presumptively be the same rate paid by other

telecommunications attachers, *i.e.*, a rate calculated using the most recent telecommunications rate formula.”⁴¹ The Commission’s stated basis for this proposal is to reduce disputes between ILECs and utilities. Under the Commission’s approach, an ILEC “would no longer be required to demonstrate it is ‘comparably situated’ to a telecommunications provider or a cable operator; instead the incumbent LEC would receive the telecommunications rate unless the utility pole owner can demonstrate with clear and convincing evidence that the benefits to the incumbent LEC far outstrip the benefits accorded to other pole attachers.”⁴² The Commission invites comment on a variety of related questions, including examples of the kind of evidence needed to meet the utility’s burden of proving that the regulated rate for telecommunications attachments should not apply, and if it should not apply, what the rate should be. In general, the Commission also invites comment on alternative pole attachment rate formula approaches for incumbent ILECs, including specific inputs and methodology that could be used in such a formula.⁴³

UTC opposes the Commission’s proposal to extend the regulated rate for telecommunications attachments to ILECs. There is insufficient basis for the Commission’s proposal, which would radically alter the joint use and joint ownership relationship between utilities and ILECs and abrogate the rates, terms and conditions of mutually negotiated joint use agreements that have been in place for decades. Moreover, the stated basis for this proposal is misplaced.⁴⁴ Far from avoiding disputes, it would create disputes. It would ignore the significant differences that exist between ILEC attachments and other attachments on the pole, which would

⁴¹ *Id.* at ¶42.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at ¶41 (stating that the *2011 Pole Attachment Order* has led to “repeated disputes between incumbent ILECs and utilities over appropriate pole attachment rates,” and that providing a presumption that ILECs are entitled to regulated rates instead, will “end this controversy.”)

justify differences between the ILEC joint use rate and the regulated rate for telecommunications attachments.⁴⁵ It would also establish a high standard for utilities to meet in order to overcome the proposed presumption that the telecommunications rate should apply to ILEC attachments.⁴⁶ This would unfairly stack the odds against utilities, presumably allowing an ILEC to prevail unless the utility could show that there was relative balance in pole parity between the ILEC and the utility.⁴⁷ For all of these reasons, UTC opposes the Commission's proposal to presume that the regulated rate for telecommunications attachments should be the rate for ILEC attachments.

D. Pole Attachment “Shot Clock” For Pole Attachment Complaints

The Commission has proposed to establish a 180-day “shot clock” for Enforcement Bureau resolution of pole access complaints filed under Section 1.1409 of the Commission's rules.⁴⁸ It seeks comment on when the shot clock should stop and when it should pause for circumstances outside of the control of the Enforcement Bureau.⁴⁹ The Commission also seeks comment on the establishment of pre-complaint procedures to narrow the scope of the complaint proceeding and to discuss the process for discovery and related issues ahead of time.⁵⁰ Finally,

⁴⁵ In general, ILECs enjoy rights as pole owners to access their pole attachments, unlike cable television and competitive telecommunications carriers, who must submit applications through the permitting process when making pole attachments. That provides competitive advantages in terms of speed to market. Moreover, ILECs typically occupy more space on the pole and they typically are the lowest attachment on the pole which is another advantage when making and maintaining pole attachments. These are just some of the distinctions between ILEC attachments that justify different rates for ILEC attachments.

⁴⁶ The FCC is proposing that clear and convincing evidence would be required to overcome the presumption that the regulated rate should apply to ILEC attachments. *Id.* at ¶44.

⁴⁷ Percentage of pole ownership is among the factors the FCC is proposing to consider in order to rebut the presumption that ILECs should be entitled to regulated rates. *Id.* (asking for comment on whether an incumbent LEC would have to own a majority of poles in a joint ownership network in order to show that the ILEC is not entitled to the regulated rate).

⁴⁸ *Id.* at ¶44.

⁴⁹ *Id.* at ¶¶45-46.

⁵⁰ *Id.* at ¶47.

the Commission seeks comment on whether the 180-day shot clock should apply to pole attachment complaints other than those related to access.⁵¹

UTC opposes the adoption of a shot clock, because it is concerned that any deadline will discourage or prevent the Enforcement Bureau from sufficiently considering the evidence on the record in a complaint proceeding. At the outset, pole attachment issues are inherently fact intensive, which the Commission itself has recognized.⁵² Imposing a shot-clock will potentially interfere with the fact finding process and the Bureau's evaluation of the facts at issue. Moreover, the Bureau should be considering the specific facts on a case-by-case basis, rather than generically. Each case is unique and the Commission must have all relevant information necessary to conduct a thorough case-by-case review, including specific information concerning an allegedly unjust or unreasonable term or condition, data and information in support of a complaint that a rate is unjust or unreasonable, affidavits supporting factual allegations made in a complaint or other information normally required by the Commission in a complaint case. Finally, there is no need to mandate that parties complete their negotiations within a certain timeframe. Nor should the Commission limit the information that complainants are required to file as part of a complaint case. Nothing prevents the Bureau from establishing its own timelines for discovery and adjudication of the complaint as appropriate; and the record has not shown that the pole attachment complaint process acts as a barrier to broadband deployment. As such, the Commission need not and should not rush to judgment on pole attachment complaints.

If the Commission does adopt a shot clock, the Bureau must continue to be permitted to

⁵¹ *Id.* at ¶48.

⁵² Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, WC Docket No. 07-245, GN Docket No. 09-51, *Order and Further Notice of Proposed Rulemaking*, 25 FCC Rcd 11864 at ¶22 (2010) (*2010 Order or Further Notice*)(This enforcement process has not always led to clear standards, due to the incentives to reach negotiated settlements as well as the *fact-intensive nature of many disputes.*")(emphasis added).

address the issues on a case-by-case basis rather than through rules of general applicability. The shot clock should begin to run from the date that the complaint and all responsive pleadings have been filed. As the Commission itself recognized, “[s]tarting the clock at these later junctures [i.e. subsequent to the filing of the initial complaint] would allow the Enforcement Bureau sufficient time to review the relevant issues involved in a pole access complaint and would not disadvantage the timing of the Enforcement Bureau’s review if the pleading cycle or discovery takes longer than expected.”⁵³ The Commission should pause the shot clock for a variety of reasons, including but not limited to: when the parties need additional time to provide information requested by the Bureau, as well as when the parties are pursuing informal dispute resolution, when the parties engage in significant discovery or briefing of the disputed issues that prolongs the complaint process; or when the complaint involves large pole access requests of a complex nature that necessitate Enforcement Bureau requests for significant additional information from the parties in order to resolve the complaint.⁵⁴ Finally, UTC supports the Commission’s proposal to require pre-complaint procedures, such as working with Enforcement Bureau staff before a complaint is filed to narrow the factual and legal issues in a particular dispute; discussing the need to exchange relevant documents and discovery and the timeframe for doing so; and agreeing on various case management issues, such as the entry of a protective order for the exchange of confidential information.⁵⁵

As the Commission has observed, the existing rules require similar pre-complaint processes, and they have resulted in the complaint process proceeding much more smoothly.⁵⁶

⁵³ *Id.* at ¶45.

⁵⁴ *See id.* at ¶46.

⁵⁵ *See id.* at ¶47.

⁵⁶ *Id.*

Therefore, if the Commission does adopt a shot-clock, it should ensure that the adjudicatory process is balanced and flexible by: 1) continuing to rely on case-by-case review of the specific facts at issue; 2) starting the clock after the record is complete and the Enforcement Bureau has sufficient time to analyze the submissions of the parties; 3) pausing the clock when the parties need more time or are negotiating informal settlements; and 4) requiring the parties to engage in pre-complaint processes to narrow the scope of the complaint proceeding and arrange scheduling of discovery, as appropriate.

IV. Expediting the Copper Retirement and Network Change Notification Process.

The Commission asserts that relatively recent changes to the Part 51 rules “appear to unnecessarily extend, rather than expedite, the copper retirement process, ‘diverting scarce capital from new networks to old.’”⁵⁷ Based on this premise, the Commission proposes revisions to its Part 51 network change disclosure rules to allow providers greater flexibility in the copper retirement process and to reduce associated regulatory burdens, to facilitate more rapid deployment of next-generation networks. First, the Commission proposes to eliminate some or all of the changes to the copper retirement process adopted by the Commission in the *2015 Technology Transitions Order*, changes codified in Section 51.332 of the Commission’s rules.⁵⁸ As the Commission explains in the *NPRM*, the new rules doubled the time period during which an incumbent LEC must wait to implement a planned copper retirement after the Commission’s release of public notice from 90 days to 180 days, required direct notice to retail customers, states, Tribal entities, and the Secretary of Defense, and expanded the types of information that

⁵⁷ *Id.* at ¶53.

⁵⁸ *Id.* at ¶54. See also *Technology Transitions et al.*, GN Docket No. 13-5 *et al.*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 30 FCC Rcd 9372, 9545 (2015) (Statement of Commissioner Ajit Pai) (*2015 Technology Transitions Order*).

must be disclosed. These notice requirements were extended to apply to non-residential customers, including utilities and other business/enterprise customers, as well as interconnecting carriers.⁵⁹ In addition to eliminating some or all of the rules pertaining to copper retirements, the Commission also seeks comment on streamlining and/or eliminating provisions of the more generally applicable network change notification rules.⁶⁰

The Commission’s proposal to repeal Section 51.332 operates from a faulty premise.⁶¹ The rules established in the *2015 Technology Transitions Order* do not unnecessarily delay carriers from retiring copper networks and transitioning to IP-based services. Far from it, the rules are necessary to protect consumers – including utilities and other business/enterprise customers, as well as retail customers. As UTC has explained in its comments to the rulemaking that led to the *2015 Technology Transitions Order*, utilities are threatened by the elimination of legacy carrier circuits and services, which utilities rely upon to support mission critical communications for remote monitoring and control of electric substations, as well as protective relaying applications. Some utilities lease hundreds of these legacy carrier circuits, and they lack adequate alternatives – particularly in remote areas where many of the substations and other electric critical assets are located. Utilities are under strict regulatory requirements to meet reliability standards, and they must be able to maintain communications with their critical assets in order to ensure operational safety, reliability and security. Therefore, Section 51.332 is

⁵⁹ *2015 Technology Transitions Order* at ¶62, citing comments by UTC and other electric utility industry stakeholders (explaining that extending the advance notice requirement for a planned discontinuance of service to non-residential customers “should allow non-residential retail customers sufficient time to evaluate the impact of the planned network change on the service they would continue to receive and whether they need to seek out alternatives.”)

⁶⁰ *Id.*

⁶¹ See *NPRM* at ¶55 (proposing to eliminate Section 51.332 entirely and returning to a more streamlined version of the pre-*2015 Technology Transitions Order* requirements for handling copper retirements subject to Section 251(c)(5) of the Act.)

necessary to protect utilities and other consumers during the IP Transition.

As the Commission has recognized, the IP Transition is a real problem for consumers – particularly in rural areas, where carriers are discontinuing services or allowing their networks to degrade to the point that reliability is affected. More specifically, utilities are contending with unique challenges brought about by the IP Transition. Not only do they have a large number of circuits that are at risk of discontinuance, but these circuits can stretch for miles across multiple states and running over multiple carrier networks. As a result, it is challenging for utilities to manage the process as different carriers transition at different times, sometimes over the same circuit. Moreover, utilities have stringent performance requirements for latency and reliability, and they need to be sure that a replacement service from a carrier will be able to meet these performance requirements. Given the complexity of the IP Transition as well as the sheer number of circuits and services involved, utilities need sufficient notice and additional time to be able to prepare to transition to alternative communications, which as a practical matter may be the utility’s own fiber or microwave networks in many cases where the carriers have decided to discontinue services and are the carrier of last resort in some of these remote areas.

As the Commission explained in the *NPRM*, repealing Section 51.332 would eliminate the direct notice requirement in so far as it currently extends to utilities, as well as to other entities besides telephone exchange carriers.⁶² Repealing this provision would also eliminate the requirement that carriers provide notifications regarding their *de facto* retirement of services,⁶³ as well as their retirement of the feeder portion of copper loops and subloops.⁶⁴

⁶² *NPRM* at ¶58.

⁶³ *De facto* retirement of services is defined as “the failure to maintain copper loops, subloops, or the feeder portion of such loops or subloops that is the functional equivalent of removal or disabling” of services. 47 C.F.R. §51.331(a)

⁶⁴ *NPRM* at ¶57.

UTC opposes the Commission's proposal to eliminate Section 51.332 and in the process no longer require carriers to provide direct notification of network changes to their customers, nor require them to provide network change notifications regarding *de facto* retirement of services. Going back to the old rules is not a good direction for the FCC to be headed. In those days prior to the implementation of the *2015 Technology Transitions Order*, utilities did not find out that carriers were retiring services until after the fact or far too late for utilities to find adequate replacement services – thus threatening the safety, reliability and security of electric, gas and water services.⁶⁵ Utilities also discovered that carriers were failing to maintain their networks and/or not fixing outages quickly enough. If the FCC eliminates Section 51.332, UTC is concerned that carriers will go back to their old ways of transitioning their services without providing utilities with adequate (or any) notice ahead of time. Eliminating Section 51.332 will also allow carriers to fail to maintain their networks and disregard the SLAs that they have for lines that they lease to utilities. Due to these concerns, UTC opposes the elimination of Section 51.332.

The Commission is considering two alternatives to eliminating Section 51.332. It is considering eliminating all differences between copper retirement and other network change notice requirements, which would render copper retirement changes subject to the same long-term or, where applicable, short-term network change notice requirements as all other types of network changes subject to Section 251(c)(5).⁶⁶ It is also proposing to amend Section 51.332 to streamline the process, provide greater flexibility, and reduce burdensome requirements for

⁶⁵ See e.g. Reply Comments of the Edison Electric Institute in WT Docket No. 07-245

⁶⁶ *Id.* at ¶59.

incumbent LEC copper retirements.⁶⁷

UTC opposes these alternative proposals, because they would still mean the elimination of the direct notification requirement for many of the same reasons that it opposes the Commission's proposal to eliminate Section 51.332 entirely.⁶⁸ These alternative proposals would effectively negate important consumer protections during the IP Transition, including direct notice to consumers such as utilities about planned copper retirements. Moreover, there is nothing to suggest that these consumer protections have substantially delayed carriers from transitioning nor have they imposed an undue burden on carriers in terms of compliance. In order to adequately protect consumers (including utilities), UTC recommends that the Commission should refrain from reducing the requirement for carriers to provide advance notice of copper replacements and from eliminating the "deemed denied" rule when objections are filed against carrier applications for copper replacement.

The Commission also proposes other revisions to its network change notification rules, which also threaten to remove important consumer protections. Specifically, the Commission proposes to eliminate Section 68.110(b), which requires that "[i]f . . . changes [to a wireline

⁶⁷ *Id.* at ¶60. The Commission is proposing specific amendments that would only require ILECs to notify telephone exchange service providers that directly interconnect with the incumbent LEC's network, as was the case under the predecessor rules, rather than "each entity within the affected service area that directly interconnects with the incumbent LEC's network."; reduce the waiting period to 90 days from 180 days after the Commission releases its public notice before the incumbent LEC may implement the planned copper retirement; and provide greater flexibility regarding the time in which an incumbent LEC must file the requisite certification. The Commission's proposal would also amend Section 51.332 to reduce the waiting period to 30 days where the copper facilities being retired are no longer being used to serve any customers in the affected service area; eliminate the requirement that the copper retirement notice include a description of any changes in prices, terms, or conditions that will accompany the planned changes; and eliminate the "good faith communication" requirement.

⁶⁸ Note that the proposal to amend Section 51.332 would not eliminate *de facto* retirement, but the proposal to eliminate the distinction between copper retirements and other network change notification requirements would eliminate *de facto* retirement from requiring notification. The proposal to eliminate the distinction between copper replacements and other network changes would also reduce advance notification from 90 days to 10 days, and it would potentially eliminate the "deemed denied" rule that would apply when an objection is filed against a carrier copper replacement application.

telecommunications provider's communications facilities, equipment, operations or procedures] can be reasonably expected to render any customer's terminal equipment incompatible with the communications facilities of the provider of wireline telecommunications, or require modification or alteration of such terminal equipment, or otherwise materially affect its use or performance, the customer shall be given adequate notice in writing, to allow the customer an opportunity to maintain uninterrupted service."⁶⁹ UTC is concerned that the elimination of this provision could undermine the reliability and security of utility applications that are supported by carrier services, if the replacement service is incompatible with the utility's terminal equipment. As such, it is important that utilities be provided notification of such changes, but the Commission's proposal would eliminate that requirement. Hence, UTC opposes the Commission's proposal to eliminate Section 68.110(b).

V. Streamlining the Section 214(a) Discontinuance Process

The Commission also proposes to strip away Section 214 provisions that protect consumers as carriers plan to discontinue communications services. Specifically, the Commission proposes a 10-day period for applications that seek authorization to "grandfather" low-speed legacy services for existing customers.⁷⁰ It also proposes to streamline the auto-grant period, such that all applications seeking to grandfather low-speed legacy services would be automatically granted on the 25th day after filing unless the Commission notifies the applicant that such a grant will not be automatically effective. Finally, the Commission proposes expanded eligibility for grandfathered services to receive streamlined processing, and it would at a minimum, "apply any streamlined discontinuance process to grandfathered low-speed TDM

⁶⁹ *NPRM* at ¶67, *citing* 47 CFR § 68.110(b).

⁷⁰ *Id.* at ¶¶70-71 (inviting comment on whether expediting the review and authorization of applications to grandfather low-speed services offers benefits to discontinuing carriers generally.)

services at DS1 speeds or lower (1.544 Mbps or less), as these are services that are rapidly being replaced with more advanced or higher-speed IP-based services.”⁷¹ The Commission also invites comment on additional steps, including granting an application immediately after it is filed or dispensing with the application process entirely.⁷²

At the same time that it is considering these changes with respect to carrier applications to “grandfather” existing customers, the Commission proposes to streamline the process for applications to discontinue legacy voice services, where alternative voice service is available. Specifically, the Commission is proposing to make discontinuance applications for legacy voice services under Section 214(a) eligible for shorter comment and automatic grant time periods, provided that the discontinuing carrier is able to meet a two-part test demonstrating the availability of alternative voice services. Under that two-part test, the carrier application will be automatically granted provided it is able to demonstrate: (1) that it provides interconnected VoIP service throughout the affected service area, and (2) that at least one other alternative voice service is also available in the affected service area. The Commission plans to use this two-part test to replace the recent *2016 Technology Transitions Order*’s “adequate replacement” test for automatic grant of Section 214 applications that seek to discontinue a legacy TDM-based voice service as part of a transition to a new network technology.⁷³ Finally, the Commission is proposing to reduce the time period for comments and automatic grants, if the carrier’s application meets the FCC’s proposed two-part test. The public comment period would be reduced to 10 days for all applications seeking to discontinue legacy voice services where

⁷¹ *Id.* at ¶76.

⁷² *Id.* at ¶77.

⁷³ *Id.* at ¶83. The Commission invites comment on whether its proposed two-part test should replace the current three-part “adequate replacement” test adopted in the *2016 Technology Transitions Order*. *Id.* at ¶90.

alternative voice services are also available, regardless of whether the provider filing the application is a dominant or non-dominant carrier.⁷⁴ Alternatively, the Commission is considering automatically granting approval of certain legacy voice discontinuance applications upon acceptance for filing, without soliciting public comment at all.

The Commission would also streamline processing of applications to discontinue previously grandfathered legacy data services. Specifically, it proposes to adopt a streamlined uniform comment period of 10 days and an auto-grant period of 31 days for both dominant and non-dominant carriers. Going forward carriers would only need to take into account the carrier's own retail end users when evaluating whether the carrier will "discontinue, reduce, or impair service to a community, or part of a community."⁷⁵ A carrier would not need to consider the impact on another carrier's retail customers. Finally, the Commission is inviting comment on other ways to further streamline the process for reviewing Section 214 discontinuance applications.⁷⁶

UTC opposes the Commission's proposals to streamline the Section 214 process for reviewing a carrier's application to discontinue services. Just as UTC is concerned about the impact of copper replacement and other network changes on the safety, reliability and security of utility communications systems, UTC is also concerned that the proposed changes to the process for reviewing carrier applications to discontinue services will further threaten utility communications. The proposed changes fail to balance fairly the interests of consumers including non-residential customers such as utilities. Instead, they are premised on the

⁷⁴ *Id.* at ¶87.

⁷⁵ *Id.* at ¶90.

⁷⁶ *Id.* at ¶104.

assumption that they impose costs on carriers that discourage investment in modernizing communications systems. The Commission should seriously question whether the regulatory requirements associated with advance notice requirements and proof that adequate replacements exist before discontinuing services really hold back investment by the carriers in modernizing their networks. There are larger economic forces at work here, and the ILECs began backing out of rural areas decades before the *2015 Technology Transitions Order* or the *2016 Technology Transitions Order*. That aside, removing these underpinnings or diluting them will not sufficiently protect utilities that need communications systems for day-to-day operations as carriers implement the IP Transition.

Case in point is the proposed removal of the adequate replacement test that was established in the *2016 Technology Transitions Order*. While the proposed two-part test is simpler and would only require the carrier to show that it offers VoIP in the area and that at least one other alternative provider offers voice in the area; the three-part test established in the *2016 Technology Transitions Order* covers other factors that are clearly important to ensuring that consumers are able to receive the same functionality and reliability from replacement services that they had from their legacy analog services.⁷⁷ Specifically, the three part test describes issues regarding functionality, which clearly goes to the substance of the issue for utilities – i.e. reliability. Utilities must ensure that the replacement services will be able to meet their performance requirements. It's not enough that they merely offer VoIP and that there is an alternative voice provider in the area. For this and other similar reasons, UTC opposes the

⁷⁷ Under the three part test, a carrier must show that “one or more replacement service(s) offers all of the following: (i) substantially similar levels of network infrastructure and service quality as the applicant service; (ii) compliance with existing federal and/or industry standards required to ensure that critical applications such as 911, network security, and applications for individuals with disabilities remain available; and (iii) interoperability and compatibility with an enumerated list of applications and functionalities determined to be key to consumers and competitors.” *2016 Technology Transitions Order*, 31 FCC Rcd at 8305, para. 65.

Commission's proposals to eliminate this and other requirements related to the Section 214 discontinuance process.

VI. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, UTC urges the Commission not to adopt its proposal for regulated rates for ILEC attachments, and it requests that the Commission avoid adopting shorter timelines for application processing and make ready without providing flexibility to address factors which may delay the process and are beyond the control of the utility. If the Commission does adopt shorter timelines, it must ensure that utilities are able to recover their additional costs associated with meeting those shorter deadlines. UTC appreciates the Commission's stated interest in protecting the safety, reliability and security of critical infrastructure, while it attempts to adopt changes to the pole attachment rules to speed access to poles and reduce the cost of make ready and the annual rental rate for pole attachments. UTC underscores that safety, reliability and security must remain paramount, and that the Commission should not adopt policies that would compromise critical infrastructure. In addition, UTC underscores that utilities are enabling broadband by providing pole attachments to third-party communications providers, and by providing broadband services on a wholesale or retail basis, including in areas that would otherwise be unserved. As such, the Commission should appropriately balance the interests of utilities along with the interests of communications service providers when considering its proposed rules for pole attachments.

In addition, UTC urges the Commission to preserve Section 51.332 consumer protections that carriers provide direct notification to consumers well in advance of a copper replacement or other network change; as well as the requirements that carriers not only provide sufficient notice that they plan to discontinue a service, but also that they show there are adequate replacements

that provide the same or better functionality as the legacy service that is being discontinued. Utilities need sufficient advance notice prior to the replacement of copper services and they need to ensure that replacement services will provide the same or better functionality as the existing services that they currently receive from carriers. They also need similar protections as carriers continue to discontinue services, particularly in remote areas where utilities have critical assets and lack reasonable alternatives to communicate with those critical assets as well as personnel in the field. Safety, reliability and security is jeopardized without adequate safeguards during the IP Transition, as carriers replace copper networks and discontinue services that they provide to utilities.

Respectfully,

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