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July 26, 2018

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 - 12th Street, S.W.
Washington, D.C. 20554

Ex Parte

Re: Notice of Ex Parte Presentation, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84.

Dear Ms. Dortch:

The Utilities Technology Council (“UTC”) is providing the following written ex parte notification in the above-referenced proceeding in accordance with Section 1.1206 of the Commission’s Rules. As described in detail below, UTC respectfully requests that the Commission consider the following modifications and clarifications to the Draft Third Report and Order regarding the Commission’s pole attachment rules.¹ UTC supports the filings on the record by utilities and the Edison Electric Institute (“EEI”), which also seek modifications and clarifications to the Draft Order.

In summary, UTC supports certain provisions in the Draft Order, including one-touch-make-ready (“OTMR”) and advance notice of overlashing, but UTC has concerns about the details of some of these provisions. UTC also supports certain changes to the existing pole attachment processes, but it has serious concerns regarding 1) the self-help remedy allowing third party attachers to make attachments on any part of the pole when the survey and make-ready deadlines are not met, 2) the rule requiring utilities to provide detailed estimates and final invoices for make-ready costs, and 3) the rule reducing the time for completion of make-ready for attachments in the communications space and for attachments above the communications space on the pole. In that regard, UTC objects to the inclusion of pole replacements within the definition of complex make-ready because pole replacements are simply not a type of make-ready. UTC supports the rule requiring third party attachers to provide advance notice of overlashing, but it recommends more time than merely 15-days and it opposes requiring utilities to approve overlashing when there is a pre-existing safety violation on the pole. Finally, UTC echoes utilities and EEI that the Commission should limit the application of its presumption favoring regulated rates for ILEC attachments so that it only applies to new pole attachment agreements and not to existing joint use agreements. UTC agrees with the Commission’s conclusion that ILECs receive additional benefits under joint use agreements, and that the mutually negotiated terms of those agreements should not be abrogated by imposing regulated

¹ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Public Draft, Third Report and Order and Declaratory Ruling, FCC-CIRC1808-03 (July 12, 2018)(“Draft Order”)

rates. UTC remains concerned that as a practical matter, ILECs will simply pocket the margin from reduced rates for pole attachments, and reducing rates will discourage investment in pole infrastructure that helps to ensure the safe and reliable delivery of communications and electric services.

One-Touch-Make-Ready

The Commission's Draft Order would establish a process for OTMR under which utilities would be provided 15 days to process an application and complete a survey, including three-business days for utilities to provide notice to the new attacher and any existing attachers to participate in the survey.² UTC agrees with utilities that urge the Commission to extend the timeframe under OTMR to process the application. Generally, 15 days is too short a timeframe to process a complete application, and the OTMR process does not account for projects where different categories of make-ready are involved. For example, aspects of simple communications space make-ready, complex communications space make-ready, and power supply space make-ready can all be involved on one application. However, it is not clear whether and to what extent a utility may deny an application based on one category of make-ready or another.³ The Draft Order also fails to account for multiple applications that involve the same poles, and whether that would affect the timeline for processing applications under the OTMR process.⁴ UTC echoes the request for clarification by utilities of this issue. Moreover, UTC echoes the concerns of EEI and utilities that the timeline for the application review period for OTMR is too short.⁵ Therefore, UTC supports establishing a uniform 45-day (with appropriate extensions for large orders) for the review and approval of all pole attachment applications.⁶ In addition, UTC echoes the comments by utilities expressing concern about requiring utilities to determine whether communications space make-ready is simple or complex, and it supports allowing utilities to consult with existing attachers as needed in order to ensure

² Draft Order at ¶35 and ¶49. Note that the Commission does permit utilities to meet the survey notice timeline by electing to use surveys previously prepared on the poles in question by new attachers. Note also that the survey notice timeline also applies to non-OTMR applications, as well.

³ Letter from Robin F. Bromberg, counsel for American Electric Power and Georgia Power to Marlene Dortch, Secretary, FCC in WC Docket No. 17-84 at 1-2 (filed Jul. 23, 2018)(“AEP and Georgia Power Ex Parte”)(“It is unclear how the Commission intends the OTMR process to unfold where a single application involves various categories of make-ready, including simple communications make ready, complex communications make ready, and power supply space make ready.”)

⁴ Letter from David D. Rines, Counsel to Joint Commenters Xcel Energy Services, Inc., and Alliant Energy Corporation to Marlene H. Dortch, Secretary, FCC in WC Docket No. 17-84 at 3 (filed Jul. 26, 2018)(hereinafter “Xcel/Alliant Ex Parte”)(stating that, “in cases where there are overlapping or multiple requests for attachment to the same poles, this shorter mandatory timeframe could create an unfair advantage for OTMR applicants by enabling them to jump the line over first-in-time non-OTMR applicants.”)

⁵ EEI Ex Parte Letter from Philip Moeller and Aryeh Fishman, Edison Electric Institute to Marlene H. Dortch, Secretary, FCC in WC Docket No. 17-84 at 5 (filed Jul. 26, 2018)(hereinafter “EEI Ex Parte”).

⁶ See Xcel/Alliant Ex Parte at 4.

that no shortcuts are being taken and that all necessary safety, reliability and construction requirements are being met.⁷

Self Help Remedy

The Commission's Draft Order would "amend [the Commission's] rules to allow new attachers to invoke the self-help remedy for work above the communications space, including the installation of wireless 5G small cells, when utilities and existing attachers have not met make-ready work deadlines."⁸ To address the concerns from utilities about engineering, safety and reliability issues, the Commission's Draft Order would require that the new attacher use a qualified contractor to do the work, and allow utilities to "have the opportunity to identify and address any safety and equipment concerns when they receive advance self-help notice and post-completion notice from the new attacher."⁹

UTC echoes the concerns expressed by utilities and EEI that self-help should not apply to make-ready above the electric space. As the utilities have explained, there are unique engineering, safety and reliability issues associated with attachments in the electric space. In addition, extending self-help to apply to make-ready for pole attachments above the communications space would affect electric infrastructure, thereby threatening the safety and reliability of utility services. This concern is underscored to the extent that the Draft Order may be read to permit third party attachers to use the self-help remedy to replace poles. UTC opposes allowing third-parties to use the self-help remedy to conduct pole replacements, as more fully described below.

For make-ready above the communications space, it is not enough of a safeguard for the Commission to require third-parties to use qualified contractors and/or to allow utilities to express their concerns about safety and reliability after they receive advance self-help notice and post-completion notice from the new attacher. The Draft Order would only provide three business days advance notice for surveys and five days' advance notice of when self-help make-ready work would be performed.¹⁰ Similarly, the Draft Order would require attachers to provide notice within 15 days after completion of the make-ready to inspect the work that was done. Utilities and other attachers would only have 30 days to respond to the notice and respond within 14 days if they find any damage. There is no basis on the record for these timeframes, and procedurally there was no notice that the Commission would adopt these timeframes.

As utilities and EEI have explained, allowing third-party contractors to perform work in the electric space would still present undue risks to safety and reliability, notwithstanding the

⁷ See AEP and Georgia Power Ex Parte at 1. See also Xcel/Alliant Ex Parte at 3.

⁸ Draft Order at ¶91.

⁹ *Id.* at ¶93.

¹⁰ *Id.* at ¶94.

notice requirements and the qualified worker requirement.¹¹ Not only is UTC concerned about the sufficiency of notice and qualified contractors requirements as safeguards, but consistent with the concerns of utilities on the record, UTC recognizes that the Draft Order doesn't contemplate whether utilities would be allowed to object to safety and engineering issues (apart from damage to equipment), and it would limit recovery to the cost of repairing the damage.¹² Therefore, UTC agrees with utilities that the Commission should revise the Draft Order to clarify that the new attacher's responsibilities also include the correction of any safety violations or construction deficiencies arising from its work, regardless of whether there was any damage to a utility's or attacher's equipment. UTC also agrees with utilities that the Commission should revise the Draft Order to allow the re-inspection of corrective and remedial work performed by the new attacher and to hold the new attacher responsible for any further work that may be needed to come into compliance with applicable safety, reliability, and engineering requirements.¹³

Detailed Estimates and Final Invoices

The Draft Order would require detailed estimates of all make-ready charges and to include documentation that is sufficient to determine the basis for all charges, as well as similarly detailed post-make-ready invoices.¹⁴ Specifically, estimates would need to be completed by the utility, regardless of who completes the work and they would need to estimate the costs on a per-pole basis.¹⁵

UTC echoes the comments of utilities and others that this rule is unnecessary and represents an undue burden.¹⁶ As EEI explained, make-ready charges are not calculated on a per-pole basis, and utilities are not positioned to know the make-ready costs of work in the communications

¹¹ See EEI Ex Parte at 7-10 (“The Commission should not adopt a self-help remedy for the electric space.”) See also *Id.* at 9 (“Regardless of the Commission’s requirement that a new attacher must use a utility-approved contractor, provide utilities with completion notice and opportunity for post-construction inspection, new attacher directed contractors to performing work in the electric space would still present undue risks to safety and reliability.”)

¹² See Xcel/Alliant Ex Parte at 4-5 (stating that “even when no damage has been incurred, improperly performed make-ready can still create unsafe conditions or violations on a pole. The Commission should therefore revise its rules to clarify that the new attacher’s responsibilities also include the correction of any safety violations or construction deficiencies arising from its work, regardless of whether there was any damage to a utility’s or attacher’s equipment.”)

¹³ *Id.*

¹⁴ Draft Order at ¶101.

¹⁵ *Id.* at ¶¶103-104.

¹⁶ Xcel/Alliant Ex Parte at 6 (stating “[t]he level of detail, itemization, and granularity that would be required under the new rule exceeds what electric utilities provide to their own customers and even to their respective state regulatory commissions.”) See also Letter from Frank S. Simone, Vice President Federal Regulatory for AT&T to Marlene H. Dortch, Secretary, FCC in WC Docket No. 17-84 at 2 (filed Jul. 23, 2018)(stating that “make-ready estimates and invoices that are itemized by pole are burdensome and unnecessary”).

space.¹⁷ Moreover, the requirement that utilities provide this information in 14 days is impractical. Utilities have millions of distribution poles, and requiring detailed estimates and invoices on a per-pole basis would require utilities to expend substantial resources (which would result in increased costs attributable to attachers for the preparation of make-ready estimates) and would need more than the 14 days provided under the current rules to prepare and provide estimates.¹⁸ Even AT&T, which (unlike electric utilities) has access to information about the cost of make-ready in the communications space, estimates that it would take 18-months to implement changes to its systems to comply with this rule.¹⁹

Similarly, the requirement that utilities invoice make-ready costs is impractical because utilities don't know the costs of make-ready in the communications space. Not only do electric utilities typically not have access to that information, but as Xcel Energy and Alliant Energy explained, placing sole responsibility for the invoicing of all make-ready work on the utility effectively requires utilities to become clearinghouses responsible for handling all invoices and all payments between all of the parties on a pole. As such, the Commission should not require utilities to be responsible for invoicing the costs of make-ready.

Overlapping

UTC supports the provisions in the Draft Order that require third-party attachers to provide utilities with 15-days advance notice of overlapping, but urges the Commission to clarify that utilities are not required to permit overlapping where there is an existing safety violation on the pole. As utilities explained on the record, it would be better if the 15-day advance notice period were extended, but requiring attachers to provide 15-day advance notice of overlapping gives utilities an opportunity (albeit short) to address potential engineering and safety issues.²⁰ Further, UTC echoes utilities and CenturyLink who are seeking clarification that the rules for

¹⁷ See e.g. EEI Ex Parte at 11 (stating “[t]ypically, contractors do not charge on a pole-by-pole basis so a better solution would be for the Commission to clarify that utilities may average the estimated total costs and apportion them by pole.”) See also *Id.* (stating that the “Draft Order’s assumption that utilities are in the best position to provide estimates of existing attachers’ communications space work costs based on past project experience with existing attachers is flawed.”) See also Xcel/Alliant Ex Parte at 6 (“The requirement for electric utilities to provide cost estimates and final invoices for all make-ready work – regardless of which party is responsible for performing it – is both arbitrary and unrealistic. The Commission cannot mandate that utilities provide information that they do not have and cannot reasonably obtain.”)

¹⁸ See e.g. Xcel/Alliant Ex Parte at 5 (stating that “Alliant Energy has over 1,000,000 individual distribution poles across the states of Iowa and Wisconsin. Generating the detailed documentation required under the new rule on a per-pole basis for each of the over 1,000,000 poles owned by each of these two companies is neither practical nor feasible. In order to achieve that level of detail, utilities would be required to expend substantial resources (which would result in increased costs attributable to attachers for the preparation of make-ready estimates) and would need more than the 14 days provided under the current rules to prepare and provide estimates.”)

¹⁹ Letter from Frank S. Simone, Vice President Federal Regulatory for AT&T to Marlene H. Dortch, Secretary, FCC in WC Docket No. 17-84 at 1 (filed Jul. 23, 2018).

²⁰ AEP and Georgia Power Ex Parte at 2 (stating that “[w]hile we believe that 45 days is a more reasonable timeframe within which to perform the engineering and analysis necessary to determine whether the proposed overlap can be made without make ready, we recognize that 15 days is better than no advance notice.”)

overlapping do not apply to strand-mounted wireless equipment.²¹ At the outset, strand-mounted attachments should not be considered as a form of overlapping. They raise unique loading and safety issues, and they take many different forms and configurations. As such, the Commission should clarify that its rules for overlapping do not apply to strand mounted attachments.

Rates for ILEC Attachments

UTC also takes this opportunity to oppose those parties who argue that the Commission should grant ILECs regulated rates for pole attachments without allowing utilities an opportunity to demonstrate that a higher rate should apply based on benefits that ILECs receive for their pole attachments that are different from those of other attaching entities.²² As UTC and others explained in comments on the record, shifting the presumption from ILECs to utilities is contrary to fundamental principles of contract law that place the evidentiary burden on the party seeking relief from the provision of the agreement. In addition, setting a standard of clear and convincing evidence for utilities to overcome the presumption is contrary to contract law that generally requires that the party seeking relief (i.e. the ILEC) provide a preponderance of evidence in support of its case. As UTC explained in its comments, there are no changed circumstances that justify shifting the burden onto utilities, and doing so would only encourage disputes that would as a practical matter delay the deployment of broadband infrastructure and services. In sum, providing regulated rates for ILEC pole attachments would deprive utilities from receiving just compensation and would unfairly advantage ILECs over other competitors who do not enjoy the same benefits to pole attachments as they do under their joint use agreements.

While UTC maintains that the Commission should not adopt a presumption in favor of regulated rates for ILECs, if the Commission does so, it should ensure that the presumption would only apply to newly-negotiated pole attachment agreements going forward and would not apply retroactively to existing joint use agreements. This is consistent with the Draft Order, which declined to adopt a “rigid rule” requiring utilities to provide ILECs with regulated rates for pole attachments and that also declined to extend the rebuttable presumption to existing joint use agreements between utilities and ILECs. UTC agrees with the Commission’s recognition that “existing joint use agreements give incumbent LECs benefits beyond those granted to other parties,” and were mutually negotiated between ILECs and utilities.²³ In this regard, UTC echoes the filings by utilities and EEI that agree with the Commission that the presumption should only apply to new ILEC attachments going forward, and should not abrogate the terms of existing joint use agreements. UTC also echoes the concerns expressed by utilities on the record that ILECs have a proven history of leveraging ambiguities and that the Commission should eliminate ambiguities in the Draft Order.

²¹ See Letter from Nicholas G. Alexander, Associate General Counsel, CenturyLink to Marlene H. Dortch, Secretary, FCC in WC Docket No. 17-84 at 1-2 (filed Jul., 23, 2018).

²² See Letter from Kevin Rupy, Vice President, Law & Policy US Telecom to Marlene Dortch, Secretary, FCC in WC Docket No. 17-84 (filed Jul., 25, 2018)(proposing that “the modified telecom rate should be the presumptive just and reasonable rate for ILEC attachers in all joint use agreements.”)

²³ Draft Order at ¶118.

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While UTC agrees with limiting the presumption to apply to newly negotiated pole attachment agreements between ILECs and utilities, UTC is concerned that ILECs will simply break their existing joint use agreements in order to obtain regulated rates under the new rules in the Draft Order, a concern that is substantiated by ILEC filings on the record. UTC fears that the practical effect of such wholesale abandonment of joint use agreements will be to undermine investment in the very infrastructure upon which all attaching entities depend to provide their services safely and reliably.²⁴ In that regard, UTC reiterates its comments on the record that the Commission should be developing long-term policy solutions rather than proposing short-term ideas that will not advance the Commission's broader goals of promoting broadband. Restoring balance to the rules for pole attachment rates and access will help to promote broadband deployment by encouraging investment in infrastructure and promoting cooperation among the parties, which will, in turn, result in fewer disputes and better safety and reliability.²⁵

Thank you for your help in this matter. If there are any questions concerning this matter, please let me know.

Respectfully,

A handwritten signature in cursive script that reads "Brett Kilbourne".

Brett Kilbourne

²⁴ See Reply Comments of the Utilities Technology Council in WC Docket No. 17-84 at 8 (filed Jul. 17, 2017) (“extending regulated rates to ILECs and undermining joint use agreements will remove incentives for utility pole owners to invest and maintain their infrastructure, which are key components for broadband deployment.”)

²⁵ *Id.*