BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	))	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	))	WT Docket No. 17-79
	)	

REPLY COMMENTS OF THE EDISON ELECTRIC INSTITUTE AND THE UTILITIES TECHNOLOGY COUNCIL

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SUMMARY

EEI and UTC support the petition for reconsideration by the Coalition of Concerned Utilities. Specifically, EEI and UTC agree that the Commission should not adopt a presumption in favor of providing ILECs with regulated rates for newly renewed joint use agreements and the Commission should not cap the rate at the pre-2011 Telecom rate in the event that a utility rebuts the presumption. As the Coalition explained in its petition, the Commission erred by extending the presumption to newly-renewed joint use agreements, because it inappropriately enables ILECs to continue to enjoy the additional benefits they receive under existing joint use agreements. Similarly, capping the rate for ILEC attachments at the pre-2011 Telecom rate (even if the presumption is rebutted) systematically prevents utilities from fully recovering their costs attributable to ILEC attachments.

EEI and UTC also support the Coalition's request that the Commission reconsider its decisions to require overlashing even when there are pre-existing violations. As the Coalition explained in its petition, this requirement threatens public safety and operational reliability, contrary to the Section 224(f)(2), which allows utilities to deny access for reasons of safety and reliability, as well as generally accepted engineering practices. Similarly, EEI and UTC agree with the Coalition that allowing self-help in the electric space is also dangerous, because the Commission has failed to provide sufficient safeguards. Specifically, the rule fails to ensure contractor qualification and moreover it fails to ensure adequate notice to the utility so that the work is performed safely and in compliance with all applicable standards.

Finally, EEI and UTC support the Coalition's suggestions for improving the process by providing greater advance notice for overlashing, as well as requiring that a professional engineer certify the performance of make ready work. Similarly, EEI and UTC support the Coalition's suggestions for reducing double wood and for relieving utilities of the burden of

providing make ready estimates and collecting reimbursement for the cost of performing make ready by third party contractors.

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I. Introduction Summary

The Edison Electric Institute ("EEI") and the Utilities Technology Council ("UTC") respectfully submit these reply comments in support of the Petition for Reconsideration of the Coalition of Concerned Utilities ("Coalition") in the above referenced proceeding,[1] EEI and UTC support the Coalition's request for the Commission to reconsider portions of its August 3, 2018, *Third Report and Order*,[2] including rules that require access for overlashing and that allow third parties to conduct make ready in the electric space even if there are preexisting violations. EEI and UTC also support the Coalition's request that the Commission reconsider its decision to establish a presumption in favor of entitling Incumbent Local Exchange Carriers ("ILECs") with regulated

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[1] *See* Petition for Reconsideration of the Coalition of Concerned Utilities, WC Docket No. 17-84, WT Docket No. 17-79 (Oct. 15, 2018) ("Petition").

[2] *See Third Report and Order and Declaratory Ruling*, FCC 18-111, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment (WC Docket No. 17-84), Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (WT Docket No. 17-79), August 3, 2018 ("*Third Report and Order*"). The Order portion was published in the Federal Register on September 14, 2018, 83 Fed. Reg. 46812.

rates, which can only be rebutted by clear and convincing evidence. In supporting the Coalition's requests for reconsideration, EEI and UTC also urge the Commission to reject the oppositions filed against the Coalition. Contrary to these oppositions, the Commission's new rules for overlashing and self-help in the electric space raise significant safety, reliability, capacity and other engineering concerns that contradict Section 224(f)(2) of the Communications Act as well as state law and general principles of public policy. Similarly, the Commission's new rules that effectively extend regulated rates to ILECs are contrary to Section 224(a)(5) and (b)(1) of the Communications Act, as well as the Fifth Amendment to the Constitution by systematically and without due process taking utility property without just compensation.

EEI is the trade association that represents all U.S. investor-owned electric companies. Collectively, EEI's members provide electricity for 220 million Americans, operate in all 50 states and the District of Columbia, and directly and indirectly employ more than seven million people in communities across the United States. EEI's members invest more than $100 billion each year to build a smarter energy infrastructure and to transition to even cleaner generation resources. As the owners and operators of a significant portion of the U.S. electricity grid, EEI has filed comments with the Commission in various proceedings affecting the interests of its members who are subject to Commission and state pole attachment jurisdiction. Accordingly, EEI and its members have a strong interest in the Commission's proposals to change its rules and policies related to pole attachments.

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 and public power utilities

which may serve only a few thousand customers in isolated communities or remote areas. All of our 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 of these members are subject to Commission pole attachment jurisdiction and would be directly affected by the rules that the Commission has adopted in the *Third Report and Order*, while others may be indirectly affected by pole attachment regulations adopted by states that follow the Commission's rules.

II. The Commission should not establish a presumption in favor of regulated rates for newly-renewed joint use agreements; and the Commission should not cap the rates at the pre-2011 Telecom Rate if the presumption is rebutted.

The Commission should reconsider its decision in the *Third Report and Order* that the new presumption that ILECs are "similarly situated" to Competitive Local Exchange Carriers (CLEC) third party attachers should apply to "newly-renewed" agreements. EEI and UTC agree with the Coalition that the Commission erred by extending the presumption beyond newly-negotiated agreements so that it would also apply to newly-renewed agreements. As the Coalition explained in its petition for reconsideration, it makes sense for the Commission to apply the presumption to newly negotiated agreements because it enables the electric company and ILEC to negotiate new terms and conditions that do not favor the ILEC over its competitors.[3] By contrast, extending the presumption to apply to newly renewed agreements does not make sense because it enables ILECs to continue to enjoy the additional benefits they receive under existing joint use agreements. [4] To be sure, ILECs enjoy significant and numerous benefits under joint use agreements that do not apply to CLECs and CATV operators under standard pole attachment agreements.[5] Thus, ILECs are clearly not similarly situated to other attaching entities on the pole and the Commission should not have

[3] *See* Petition at 5.

[4] *See Third Report and Order* at ¶ 123.

[5] *See* Petition at 4 and 5, n.15 (describing the benefits that ILECs enjoy under joint use agreements).

established a presumption that they are similarly situated.

EEI and UTC agree with the Coalition that this also gives ILECs an unfair competitive advantage over other communications service providers on the pole.[6] Worse, the presumption may only be rebutted by clear and convincing evidence, meaning that as a practical matter that utilities must prove that there is pole parity with ILECs. This sets a high standard that is contrary to basic rules of evidence that ordinarily 1) require the moving party (i.e. the ILEC) to bear the evidentiary burden and that 2) allow the responding party to rebut the presumption by a preponderance of the evidence.[7]

Finally, EEI and UTC agree with the Coalition that the Commission erred by capping ILEC pole attachment rates at the pre-2011 Telecom rate if the utility successfully rebuts the presumption. Of course, the intent of the Commission here is to discourage utilities from attempting to rebut the presumption, but this rule is plainly arbitrary and lacks any basis in the record, let alone reasonable decision-making. It functions as a prior restraint against the ability of the utility to produce evidence that ILECs enjoy benefits that are significantly greater under joint use agreements – and in the process it systematically denies utilities the recovery of their costs, contrary to the Fifth Amendment guarantee against a taking of property without just compensation.

Parties opposing the Coalition's claim argue that this is merely a rebuttable presumption and that utilities can simply show that ILEC attachments enjoy additional benefits, such that they are not

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[6] *Id*. at 4 (underscoring that "The Joint Use Attachment Rate Rules Should Be Modified to Level the Playing Field").

[7] *See* Reply Comments of UTC at 27 (stating that "this high standard (clear and convincing evidence) is higher than the standard that would usually apply in civil cases (preponderance of the evidence), and 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").

similarly situated with other attaching entities.[8] Moreover, they continue to argue that pole ownership by ILECs has declined since 2011 and that utilities enjoy an unfair bargaining advantage over ILECs.[9] Finally, they argue that the Commission was correct to cap the rate at the pre-2011 Telecom rate, if the utility rebuts the presumption.[10] None of these arguments withstand scrutiny.

It is disingenuous for these parties to suggest that the presumption can simply be rebutted by utilities. The presumption must be rebutted by clear and convincing evidence, which is a high standard; and moreover, it would be difficult for many utilities to prove pole parity (and hence equal bargaining power) under this standard. As a policy matter, this standard encourages and indeed rewards ILECs for getting out of the pole owning business, thereby skewing pole parity and the foundation upon which joint use agreements are based. As a practical matter, it also encourages ILECs to renew their existing joint use agreements so the post-2011 Telecom rate will apply to their attachments, despite enjoying numerous benefits that are significantly greater than are provided to other attaching entities under standard pole attachment agreements. Therefore, EEI and UTC support the Coalition's request to reconsider the rebuttable presumption as a general matter.

Contrary to opponents, the Commission should not have extended the presumption to apply to newly-renewed agreements. EEI and UTC echo the Coalition that this rule makes no sense, because applying regulated rates to existing joint use agreements enables ILECs to continue enjoy a competitive advantage over other attaching entities, not to mention systematically shortchanging utilities for the benefits they enjoy. Moreover, the record evidence does not support the Commission's conclusion that ILECs lack bargaining power, such that the presumption should

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[8] *See e.g.,* Opposition of AT&T; Opposition of ITTA – The Voice of America's Broadband Providers; Opposition of NTCA-the Rural Broadband Association; and Opposition of US Telecom.

[9] *See e.g.,* Opposition of US Telecom; Opposition of Verizon.

[10] *Id.*

apply to existing agreements as well as newly negotiated agreements. As EEI and UTC as well as numerous utilities have commented on the record, the percentage of pole parity has remained relatively stable since 2011. Moreover, the US Telecom survey upon which the opponents and the Commission rely only indicates a small increase in the rates that ILECs pay for pole attachments under their joint use agreements since 2011. As such, EEI and UTC submit that there is insufficient evidence on the record to support the Commission's decision to establish a presumption that would apply to newly renewed joint use agreements.

Finally, opponents fail to counter the Coalition's arguments that the Commission erred in capping ILEC rates at the pre-2011 Telecom rate if utilities successfully rebut the presumption. EEI and UTC agree that this rule is plainly arbitrary and capricious. The Commission summarily decided to cap the rates without any basis in the record that the pre-2011 Telecom rate would provide just compensation to utilities for ILEC pole attachments. Therefore, EEI and UTC support the Coalition and urge the Commission to reconsider this decision, which systematically denies utilities from receiving just compensation for ILEC pole attachments.

In conclusion, EEI and UTC have consistently warned the Commission that adopting a pole attachment formula for ILECs benefits ILECs at the expense of utilities and utility rate payers and would reduce utility and ILEC interest in beneficial joint use agreements.[11] Moreover, EEI and UTC continue to disagree with the premise that electric utilities owning more poles affords utilities with more bargaining power in negotiations with ILECs because electric utilities are typically stuck with their ILEC counterparts given they cannot remove existing ILEC attachments even if joint use agreements terminates.[12] Nevertheless, EEI and UTC appreciate the Commission's underlying

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[11] *See* Comments of EEI at 44-46.

[12] *See Third Report and Order* at ¶¶ 124-136; *See also* EEI Reply Comments at 16.

rationale for allowing ILECs to enter into new pole attachment agreements with electric utilities at comparable rates, terms and conditions to other similarly-situated cable and telecommunications attachers. Although less than ideal from the perspective of the electric industry, the decision to establish a rebuttable presumption for newly negotiated joint use agreements, does offer a way for ILECs to pay comparable attachment rates under standard pole attachment agreements.

Finally, given that without a change of course in the Commission's policy, joint use agreements are likely to be terminated, a major concern is what rate an electric company will have to pay for its attachments on ILEC poles. Thus, EEI and UTC agree with the Coalition that the Commission should clarify what ILECs can charge electric utilities to attach to ILEC poles.[13] The Petition is correct to point out that existing Commission guidance is unclear and subject to multiple interpretations. Leaving this ambiguity in the Commission's policies will do nothing but exacerbate disputes between ILECs and electric utilities. This is simply a recipe for disputes that do not ultimately advance the Commission's goals.

III. The Commission should strengthen protections for public safety.

The Coalition is correct that the *Third Report and Order* requirements for contractor qualifications, notice to utilities and the ability to post-inspect (without reimbursement by the cost-causing attaching entity) are all insufficient and "ad hoc oversight of potentially hazardous electric space activity is simply inadequate to ensure this work is performed safely."[14]

A. The Commission should reconsider self-help in the electric space.

One-Touch Make-Ready OTMR, if enacted with care, could prove to be beneficial to furthering the Commission's goals, but the Commission should reconsider its decision to allow self-

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[13] *See* Petition at 7

[14] *See id.* at 9.

help in the electric space.[15] The risk to safety and distribution system reliability presented by allowing 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 their make-ready work deadlines is not adequately mitigated by either the timeline for the electric company to complete work before the self-help remedy is triggered or other requirements.[16]

For make-ready above the communications space, the Coalition is correct that the guidelines in the *Third Report and Order* regarding contractor qualifications, notice to utilities and the ability to post-inspect (without reimbursement) are not sufficient and no party has shown how these requirements eliminate any liability for the electric company. There has been no showing that communications companies have sufficient training or expertise in electric distribution systems. Moreover, the requirement that a new attacher must use a utility-approved contractor is not the equivalent of a utility managed make-ready project. There is also no demonstration on the record that it is typical for contractors today to regularly and safely work on broadband and power attachments.[17] The Coalition is also correct that five days' notice of self-help is inadequate to provide utilities with time to coordinate oversight of this work.[18] Five days' notice is particularly irrational in the context of electric system outages. Furthermore, no party has shown how providing utilities with completion notice and opportunity for post-construction inspection eliminates the safety and reliability risks that may be presented prior to completion of the project. The Coalition is

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[15] *See* Petition at 7-10.

[16] See *Third Report and Order* at ¶ 99. *See also*, Opposition of Verizon at 9-11.

[17] *See* Opposition of Verizon at 10.

[18] The Commission should adopt the Coalition's proposal for ten days' notice, which is a reasonable amount of time for coordination among the various stakeholders.

right that the ability for an electric company to post-inspect does not prevent potential for injury, damage or outages to the detriment of the public.[19]

The Coalition is correct that poorly performed surveys present a significant risk to the safety and reliability of the electric distribution system.[20] For electric companies to be able to exercise their responsibilities to ensure safety and reliability they must have accurate information about their distribution network and any potential modifications to the distribution network. Thus, it is entirely reasonable for the Commission to require a licensed Professional Engineer to certify the accuracy of the survey data, not simply be on a utility-approved list.[21]

Finally, the Coalition is right to ask the Commission to permit reimbursement of survey costs and other out-of-pocket expenses associated with the self-help survey. Similarly, electric companies should have no liability for damage to property, injury or death that may result from the self-help remedy. None of these types of costs would be incurred but for the attacher and it would be entirely inequitable to shift these costs onto electric companies and their customers.[22]

B. The Commission should clarify its policy for cost responsibility for preexisting violations.

EEI and UTC urge the Commission to clarify that its policy that new attachers are not responsible for preexisting violations does not require electric companies to immediately replace red-tagged poles which would constitute an expansion of capacity contrary to the Pole Attachment

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[19] *See* Petition at 9.

[20] *See id.* at 10.

[21] *See id.* at 10 and 22.

[22] *See id.* at 10, n.26.

Act.[23] The Coalition is correct that the *Third Report and Order* should be clarified to explain that the Commission's decision that "utilities may not deny attachers access the pole solely based on safety concerns arising from a preexisting violation"[24] does not mean that electric companies must change the replacement schedule as a result of receiving advance notice of an overlash. A pole replacement completed before it is scheduled constitutes an expansion of capacity, even if the pole is no longer safe, as long as the pole in question remains at full capacity. Therefore, the Commission should clarify it has not decided to require red-tagged poles to be replaced immediately.[25]

The Coalition correctly identifies how the Commission's rules governing liability for preexisting violations and the costs of modifying a facility should be harmonized.[26] The Petition proposes that the Commission may reconcile its rules by concluding that while the new attacher cannot be charged by the utility for the costs of replacing a pole with a preexisting violation, the new attacher retains a reimbursement obligation under section 1.1408(b) to cover the new attacher's access to the replaced pole.[27] This interpretation reasonably reconciles the Commission's determination that an electric company cannot charge any attacher to correct preexisting violations without shifting costs to the pole owner.

Unauthorized attachers like any other attacher should be responsible for their costs associated with make-ready, including the correction of violations. However, where a pole owner

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[23] *See* Petition at 13-14 (among other things, citing to *Southern Co. v. FCC*, 292 F.3d 1338, 1347 (11th Cir. 2002) wherein the 11th Circuit held the plain language of Section 224(f)(2) prevents the Commission from mandating pole replacements.

[24] *See Third Report and Order* at ¶ 122.

[25] *See* Petition at 14.

[26] *See id.* at 15.

[27] *Id.*

cannot determine who caused the preexisting violation, it is reasonable that the costs are shared by any attacher that might reasonably have caused the violation. These attachers may then resolve among themselves a more specific determination of cost responsibility. This may discourage parties from postponing necessary repairs and to address the problem of unauthorized attachments.

C. The Commission should reconsider its overlashing rules to protect safety and reliability.

EEI and UTC agree that the Commission should reconsider and either eliminate or modify its ruling that an electric company "may not deny access to overlash due to a pre-existing violation on the pole."[28] To allow work on a pole with preexisting violations overlooks the risk to human life that may not be remedied after the fact as can be done with respect to damage to equipment. The Petition provides substantial support that overlashing has caused significant safety and reliability issues. Moreover, the Coalition is correct to point out the unsafe practices have the additional adverse result of burdening future attachers with additional cost and risks.[29]

The Coalition identifies and substantiates significant risks and potential costs resulting from the Commission's new rules on overlashing that cannot be ignored.[30] To enable better monitoring of overlashing installations and prevent risk and harm to human life, the Commission should modify its rules as requested by the Coalition and clarify that where there is disagreement about whether an overlash creates issues of safety, reliability, engineering or capacity, the electric company has final say under 47 U.S.C. § 224(f)(2) as the Commission has previously recognized with respect to "regular" attachments.

[28] *See* Petition at 12 (citing to *Third Report and Order* at n.429).

[29] *See id.* at 11-12.

[30] *See id.* at 10-12.

Electric utilities must be able to deny access for safety reasons.[31]. To be able to exercise their responsibility, electric companies need notice and time to evaluate the proposed overlashing.[32] The Commission should find, as a function of notice, that utilities should be able to have a PE certify that the project will comply with the NESC engineering studies and attachers should identify the materials that will be overlashed on the poles.[33] Electric utilities should be able to require information on the materials to be installed on the poles as part of an attacher providing notice to the pole owner. Electric utilities have a right to know what is going on their poles and it is not reasonable to expect that a utility can do any kind of assessment without knowing what is being installed. Providing this information to the pole owner places no additional burden on attachers because they should know what they are going to install 15 days in advance.

Finally, electric companies should be able to recover the cost of inspecting overlashing. The Commission should consistently apply principles of cost-causation in the *Third Report and Order* recognizing that these are costs that would be not be incurred but for the attacher providing advanced notice of overlashing. The Coalition is entirely correct that these costs are no different than any other make ready and inspection expense for which the Commission already permits recovery.[34]

D. The Commission should reconsider its rules on utilities collecting make-ready estimates for new attachers.

EEI and UTC continue to believe that the Commission's determination that an electric company must provide estimates for all make-ready work to be completed, regardless of what party

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[31] *See* 47 U.S.C. § 224(f)(2)(2010).

[32] *See* Petition at 12.

[33] *See e.g.,* Opposition of Fiber Broadband Association at 6.

[34] *See* Petition at 12.

completes the work,[35] will not result in the sought-after benefits to broadband deployments. Besides, pole owners should not be penalized for behavior outside their control, such as when an existing attacher (who may be a competitor with the new attacher) fails to timely supply an estimate after a pole owner's request.[36] Moreover, the Coalition is correct that to encourage existing attachers to supply an estimate on a timely basis upon a request by an electric company, pole owners should be able to impose reasonable penalties on existing attachers for non-compliance with the timelines.

E. The Commission should allow electric companies to act to solve the problem of "double wood."

To expedite broadband deployments, EEI and UTC support the Coalition's proposal that the Commission require a pole owner to provide notice to existing attachers of the need to transfer and then be able to hire an electric company-approved contractor at the expense of the existing attachers to move all the communications facilities that have not been timely transferred.[37] Double wood is a problem throughout the nation, not only a problem for electric companies, as it potentially causes problems for attachers that seek to comply with a request to move wires but cannot do so, because another existing attacher refused to respond in a timely manner.

[35] *See Third Report and Order* at ¶ 111.

[36] *See* Petition at 18.

[37] *See id.* at 20.

V. Conclusion

EEI and UTC respectfully request that the Commission consider these comments in support of the Petition and ensure that the final rule in this proceeding is consistent with them.

Respectfully submitted,
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