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April 30, 2018

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

Re: Ex Parte Notice
WC Docket No. 17-84

Dear Ms. Dortch:

On April 26, 2018, Pam Ellis (Utility Business Development Service Manager, American Electric Power Service Corporation), Tom St. Pierre (Associate General Counsel, American Electric Power Service Corporation), Allen Bell (Distribution Support Manager, Georgia Power), Natalie Beasman (Senior Counsel, Georgia Power) and I met with Billy Layton and Rick Mallen from the Office of General Counsel. During the meeting, we briefly discussed the structure of joint use relationships between electric utilities and ILECs, and also discussed the legal history leading to the Commission's adoption of the current version of Rule 1.1424. Most of the meeting, though, was devoted to discussing the proposed revisions to Rule 1.1424. A copy of the attached document, which shows the proposed revisions in red-line, was provided to Messrs. Layton and Mallen.

We explained that the presumption in the proposed revisions to Rule 1.1424 (i.e. that ILECS are "similarly situated" with CATVs and CLECs with respect to attachments on electric utility poles) would be at odds with the facts. Not only did Congress, in the 1996 Act, specifically treat ILECs differently than CATVs/CLECs, but the Commission also reached the same conclusion on a full record in 2011.

An agency presumption must rest upon a sound factual connection between the proved and inferred facts. *See NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 787 (1979) ("It is, of course, settled law that a presumption adopted and applied by the Board must rest on a sound factual connection between the proved and inferred facts."). The proved fact must make the existence of the inferred fact so probable that it is sensible to assume the truth of the inferred fact until disproved by the other party. *See Nat'l Mining Ass'n v. Babbitt*, 172 F.3d 906, 910 (D.C. Cir. 1999) ("As we have said repeatedly, an evidentiary presumption is 'only permissible if there is a sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence

of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact … until the adversary disproves it'.") (internal citations omitted). Where there is an alternate explanation for the proved fact that is also reasonably likely, the presumption is irrational. *See USX Corp. v. Barnhart*, 395 F.3d 161, 171 (3rd Cir. 2004) ("Presumptions are permissible 'if there is a sound and rational connection between the proved and inferred facts and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact until the adversary disproves it.... But if there is an alternate explanation for the evidence that is also reasonably likely, then the presumption is irrational….'") (internal citations omitted)). Moreover, a presumption cannot operate to deprive a party of its right to disprove the fact presumed. *See Chemical Mfrs. Ass'n v. DOT*, 105 F.3d 702, 705 (D.C. Cir. 1997) ("So also, [a presumption] must not, under guise or regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.") internal citations omitted).

The proposed revisions to Rule 1.1424 violate all of these principles. In short, we explained that the proposed presumption would be unlawful.

We also explained that, in addition to the presumption in the proposed revisions to Rule 1.1424 being unlawful, the Commission's NPRM proposed that an electric utility would be required to demonstrate by "clear and convincing evidence" that the benefits to ILECs under joint use agreements "far outstrip" the benefits afforded to CATVs/CLECs under pole license agreements. It is legally backwards for the party seeking to uphold an unambiguous contract to be required not only to prove that the contract is legitimate but also to prove by "clear and convincing" evidence that it is a great deal for the other party. This type of extraordinary burden might have made sense in the original version of Rule 1.1424 (in so far as the burden properly lay with the party seeking to unravel the unambiguous contract), but it makes no sense when paired with the proposed revisions to Rule 1.1424.[1]

We concluded the meeting by specifically requesting that the Commission discard its proposed revisions to Rule 1.1424 and retain the existing version of the rule. Though we believe the policy reasons for discarding the proposed revisions are overwhelming, the legal reasons alone are sufficient.

This ex parte notice is being filed electronically in the above-referenced docket pursuant to section 1.1206(b) of the Commission's rules.

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[1] Apparently, many ILECs still believe electric utilities could meet this burden, which is why many of them are asking for specific evidentiary burdens (such as proof ILEC-majority joint use pole ownership) that they know an electric utility could never meet with respect to its major ILEC joint use partners. See, e.g., US Telecom June 15, 2017 Comments, p.7, Verizon June 15, 2017 Comments, p. 12. This provides further evidence that the presumption within the proposed revisions to Rule 1.1424 is at odds with the facts.

Very Truly Yours,

/s/Eric B. Langley

Eric B. Langley

EBL/lk

Enclosure

cc: Billy Layton (william.layton@fcc.gov)
Rick Mallen (richard.mallen@fcc.gov)