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
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COMMENTS OF THE EDISON ELECTRIC INSTITUTE

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June 15, 2017

EXECUTIVE SUMMARY

The Federal Communications Commission ("Commission" or "FCC") seeks comments on various proposed regulatory changes that it believes will, among other things, remove barriers to infrastructure investment and ultimately to lead to more affordable and available Internet access and other broadband for consumers and businesses.[1] The Edison Electric Institute ("EEI") submits these comments in support of the Commission's goals of promoting broadband deployment and infrastructure investment for the benefit of consumers and businesses. However, the Commission should not adopt the proposed regulations regarding pole attachments with its narrow focus on "broadband providers"[2] and its proposed treatment of enterprise customers, such as electric utilities with regard to the retirement of copper wires.

In developing pole attachment policies, the Commission must ensure that public safety is not negatively affected, but also must also take into account the impact on billions of dollars of investment in smart infrastructure investment, the electric grid, and ultimately telecommunications consumers who are also electric utility ratepayers. Unfortunately, the Commission's proposed policies will have the unintended effect of impeding nationwide efforts to deploy smart grid infrastructure and develop smart communities by unnecessarily increasing costs to be borne by electric residential and commercial customers and diverting resources away from grid modernization. The Commission also should not adopt proposals that undermine the core mission of the electric industry, threaten public safety, or impose an undue burden on electric utility customers. This will ultimately turn out to be counterproductive.

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[1] Notice of Proposed Rulemaking, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, at ¶ 2 (Released April 21, 2017).

[2] 47 U.S.C. § 224(f) requires utilities to provide nondiscriminatory access to cable systems and telecommunications carriers. The Commission does not have statutory authority to require utilities to provide Title I information service providers with such access under § 224. These latter attachments are handled through individual negotiations.

First and foremost, as is clear to the Commission, the issues raised by the Notice of Proposed Rulemaking and the Notice of Inquiry are complex. The impact of any rule changes will extend far beyond the traditional telecommunications markets and will affect not only energy markets and consumers and local governments, but others as well. Therefore, prior to taking action, the Commission should first refer its pole attachment reform questions to the Broadband Deployment Advisory Committee to develop industry consensus on reasonable recommendations. Otherwise, the Commission's decisions may not fully benefit from the Committee's specific expertise and advisement.

Allowing this Committee to develop consensus recommendations also is warranted because the Commission's proposed rule changes will not address the Commission's basic concerns. There is simply no need to shorten the current timeframes. The complaints noted by the Commission are at best anecdotal. To the contrary, the vast majority of delays associated with pole attachments are not caused by electric utilities, but instead by continuing problems such as attachers submitting faulty data at each step, slow responses by attachers and their contractors, and the failure of competing attachers to cooperate. These problems become even more complicated with regard to large buildouts and wireless attachments.

In fact, the single greatest cause of delay in completing pole attachment buildout for a new attacher is the completion of make-ready work by the existing attachers in the communications space. Consequently, to the extent that One-Touch Make-Ready is used only in the communications space, it may prove beneficial and this should be considered by the Committee among other recommendations to the Commission.

The Commission should abandon its attempts to require standardized data disclosure. As it has previously recognized, such data disclosure proposals would jeopardize critical national

infrastructure and potentially impose unnecessary costs. The Commission likewise should not adopt its proposals for re-examining rates for make-ready work and pole attachments. These proposals would not achieve the results the FCC desires and reflect inaccuracies in the way these rates are currently calculated. Many factors contribute to the final make-ready costs charged to new attachers and standardizing make-ready costs would not lead to just and reasonable compensation for utilities. Such standardization may also lead to inconsistent and inequitable charges for attachers. Further, the FCC's proposals to exclude capital expenses from pole attachment rates could harm broadband deployment and presume utility charging policies that are incorrect. Adopting a pole attachment rate formula for Incumbent Local Exchange Carriers ("ILECS") benefits ILECs at the expense of utilities and utility rate payers and would reduce utility and ILEC interest in beneficial joint use agreements.

With regard to copper retirements, the Commission should not eliminate the requirement that retail customers, such as utilities, receive direct and sufficient notice of proposed copper retirements. Electric utilities are not like residential customers or small businesses with fewer lines. Given the complexities and scope of utility communications facilities, as well as the tens of millions of dollars involved in transition, electric utilities need sufficient notice so that they can begin the planning and implementation process.

Finally, in the Notice of Inquiry, the Commission seeks comment on whether it has authority under Section 253 to preempt state and local laws on such matters as deployment moratoria, rights-of-way negotiations and approval processes, permitting, and other fees. It does not. These are all fundamental decisions left by Congress to the States.

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COMMENTS OF THE EDISON ELECTRIC INSTITUTE ON NOTICE OF PROPOSED RULEMAKING AND NOTICE OF INQUIRY

Pursuant to sections 1.415 and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules, the Edison Electric Institute ("EEI"), on behalf of its member companies, hereby submits these comments to address questions and issues in the Commission's Notice of Proposed Rulemaking ("NPRM") and Notice of Inquiry ("NOI") released in the above-referenced proceeding on April 21, 2017.[3]

I. INTRODUCTION

EEI is the trade association that represents all U.S. investor-owned electric companies. Our members provide electricity for 220 million Americans, operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than 7 million jobs 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. In addition to its domestic members, EEI also has more than 60 international electric companies as international electric company members, and 250 industry suppliers and related organizations as Associate Members. Organized in 1933, EEI provides public policy leadership,

[3] Notice of Proposed Rulemaking, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (Released April 21, 2017).

strategic business intelligence, and essential conferences and forums. As the owners and operators of a significant portion of the U.S. electricity grid, EEI has filed comments before the Commission in various proceedings affecting the pole attachment interests of its members, who are subject to FCC and state pole attachment jurisdiction. Accordingly, EEI and its members have a strong interest in the Commission's proposals to change its rule and policies related to pole attachments.[4]

The relationship between electric distribution assets and competitive communications markets is still fundamentally a relationship of common use of these assets by electric utilities and participants in competitive markets for communications services. Although investor owned electric utilities and communications service providers use the same physical network of poles, ducts, conduits and rights of way, investor owned electric utilities are not generally engaged in offering broadband services to the public on a commercial basis. To the extent that these utilities own or use broadband and other communications technologies, with rare exceptions, such use is only for the purposes of electric grid operation and not to participate as providers or competitors in the market for communications services. Moreover, pole attachment service is not a separate profit center for electric utilities because the revenue received from pole attachment fees typically are a direct offset to a utility's overall revenue requirements in a traditional cost-of-service rate proceeding. Therefore with respect to electric utilities, this is not a relationship between facilities-based competitors that have an incentive to seek an advantage through control of access to needed facilities. The core mission of electric utilities is to provide a safe, reliable supply of electricity to customers at reasonable prices in a manner such that the costs of pole

[4] *See e.g.* Comments of the Edison Electric Institute and the Utilities Telecom Council, WC Docket 07-245 *et al.* (August 16, 2010).

infrastructure are fully and fairly allocated. Therefore, it is not contrary to the interest of electric utilities to accommodate attachments to their poles.

Unfortunately, under the Commission's current regulatory framework, the benefits and responsibilities of pole use are misaligned because of the disproportionate allocation of costs and responsibilities to electric utilities. Under current rate structures, jurisdictional-attaching entities receive competition-distorting subsidies to varying degrees. Current regulations actually provide perverse incentives for individual attachers to disregard basic notice and safety requirements and thereby gain an unfair and unlawful competitive advantage against other, more responsible competing attachers. The relative allocation of pole costs among attaching entities and the degree of compliance by communications attachers with notice, safety and engineering requirements can affect the competitiveness of communications attachers in specific markets. By avoiding notice, safety, and engineering requirements for the sake of expediency, whether by design or neglect, a rival attacher may obtain a competitive advantage over a competitor that fully complies with the same requirement, while potentially compromising the safety and integrity of the shared pole plant. Competitive advantages can include cost savings by avoiding engineering survey fees, non-payment of pole attachment fees, unless and until caught, and, in some cases, faster time-to-market than their competitors.

Inadequate notice requirements and a low cap on penalties utilities can charge for violations of notice and safety have resulted in widespread and serious problem of unauthorized and unsafe attachments. These attachments not only pose serious safety and reliability threats, but also provide a competitive advantage to companies that make attachments without complying

with the requirements that apply to all attachers.[5] Failure by communications attachers to move or transfer their existing attachments often causes delays in access by other competitors.

To a large extent, both electric and communications providers require the same facilities to support their attachments. A cable system or a Title II entity such a telecommunications carrier or an incumbent local exchange carrier ("ILEC s") [also referred to as "Section 224 Companies"] may occupy only one or two feet on an electric utility pole, but such attachments would be useless unless the common portions of the pole were not in place. These entities, like electric utilities, must have poles that are of sufficient height to comply with applicable clearance requirements and otherwise comply with applicable safety and engineering requirements. Although different providers may occupy varying amounts of so-called "useable "space (*i.e.*, the space in which attachments are directly made), both types of providers generally require poles that meet the same minimum ground clearance requirements. In other words, each provider that occupies space on the pole has an equivalent need for common space on the pole. In addition, the common space includes the communication worker safety space, which exists for the benefit of communications workers. Thus, this physical infrastructure not only provides a space for individual attachments, but also a very valuable, interconnected, physical network necessary for reliable electric and communications services.

While electric utilities and Section 224 Companies have a common need for this critical infrastructure, these entities also have a common responsibility for this critical infrastructure

[5] The Commission should allow utilities to impose substantial liquidated damages for unauthorized and unsafe attachments in violation of applicable safety and reliability requirements. The Commission should consider the Oregon Public Service Commission's approach to these types of penalties. OR. ADMIN. R. § 860-028-0120 to 860-028-0160 (2008). This was discussed in Comments of the Edison Electric Institute and the Utilities Telecom Council, WC Docket No. 07-245, *et al.*, (Mar. 7, 2008).

because responsible use by both parties of utility infrastructure avoids wasteful duplication of facilities on public or private rights of way and reduces costs and other impacts on customers. As the Commission has stated, "[i]n the aftermath of Hurricane Katrina, Americans were reminded of the importance of reliable, readily available, and interoperable communications . . . ."[6] Thus both electric and communications providers depend not only on the existence of pole infrastructure, but also on routine pole maintenance, including tree-trimming, right-of-way clearance, safety inspections, and compliance with applicable codes and standards for pole plant.

Also, significantly, when one or more poles are downed, both electric and communications providers depend on prompt repair or replacement of the damaged poles to ensure the reestablishment of safe and reliable service. When the physical network provided by electric distribution infrastructure is damaged as a result of storm, vehicle impacts, or other causes, communications networks are frequently disrupted until electric infrastructure is restored. Both electric and communications providers depend on prompt restoration of such pole infrastructure to ensure continuity of the respective service that they provide to their customers, protect costly wireline plant and associated capital equipment, and comply with applicable ground clearance safety requirements. However, jurisdictional attachers bear a proportionately small share of the operational responsibilities and costs associated with owning and maintaining the pole plant required for all attachers.

It bears emphasis that electric utilities face a very real challenge of building and maintaining electric distribution infrastructure. This is a very resource and labor intensive enterprise that has become more so as the industry has experienced and increase not only in the

[6] *See* Federal Communications, Strategic Goals: Public Safety and Homeland Security, *available at* http://www.fcc.gov/homeland.

number of communications pole attachment applications, but also an increase in the number, weight and variety of the requested attachments. This means that there is an even greater need for analysis of pole strength and loading, as well as make-ready work,[7] before adding new attachments. This is because each wire and device attached or strung along a distribution network, including overlashed wires adds physical stress to the poles in terms of weight, wind loading, and ice loading. This results in an extra layer of complexity for pole construction for the electric distribution system operator. It also increases the risk associated with pole ownership from the standpoint of reliability, safety and maintenance.

II. THE FCC'S POLE ATTACHMENT POLICIES MUST BOTH ENSURE PUBLIC SAFETY AND TAKE INTO ACCOUNT IMPACTS ON SMART INFRASTRUCTURE INVESTMENT, THE GRID, AND ULTIMATELY THE CUSTOMERS

EEI is pleased that throughout the NPRM the FCC has indicated its concerns about the need to protect the safety and property interests of utilities and the customers.[8] In deciding pole attachment policies, the FCC must both consider the potential impact of its regulations on the reliability and security of the electricity grid, as well as electricity customers. Public safety must also be a consideration an important factor to consider given the real prospects for serious injuries to linemen and the public.[9]

Unfortunately, the FCC's inquiries are deficient with respect to smart grid investments, customers and safety. First, the approach taken by the FCC proposal fails to take into account in any meaningful fashion the role that electric utilities serve in managing critical infrastructure.

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[7] Make-ready charges are non-reoccurring costs associated with preparing the pole infrastructure to accommodate the attachment.

[8] *See e.g.* NPRM at ¶ 15.

[9] The Commission's public interest obligation under Section 1 of the Communications Act permits it to look beyond its telecom carrier/ILEC focus and consider the broader implications of its policies.

Likewise, the proposed policies ignore that the electric industry is already highly regulated at both the state and federal level. In addition to complying with FCC mandated timelines, utilities also have to meet even more pressing federal and state safety, security, reliability, restoration, and quality of service requirements, among others. Consequently, electric utilities already have significant resources dedicated to ensuring that they meet their fundamental mandatory obligations as providers of last resort to offer ubiquitous electric service, to meet all federal, state and local applicable regulations, and to ensure the security and reliability of this nation's electric grid. The FCC unnecessarily seeks to impose more regulations on the electric industry – which it does not directly regulate – while at the same time moving to deregulate much of the provision of broadband which it directly regulates.[10] These proposed regulations are not necessary to ensure reliable service and have the potential to increase costs to electric customers.

Second, the FCC's sole focus on the potential needs of Section 224 Companies undermines the importance of the deployment of smart energy infrastructure by diverting resources. In Chapter 12 of the National Broadband Plan ("NBP"), the Commission recognized the importance of constructing a modern grid and that as a result the "smart grid" was a national priority.[11] Unfortunately, in the NPRM, the FCC has seemingly not taken into account the NBP's conclusions regarding the national importance of the smart grid for all communities. As the FCC anticipated, innovative technologies have developed with one of the results being that multi-use poles are becoming an essential element not only in the deployment of the smart grid but in the broader development of smart infrastructure designed to facilitate smart communities.

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[10] *In the Matter of Restoring Internet Freedom*, WC Docket 17-108, FCC 17-60 (released May 23, 2017).

[11] NBP Chapter 12, https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf.

III. THE COMMISSION'S PROPOSED POLICIES WILL HAVE THE UNINTENDED EFFECT OF IMPEDING NATIONWIDE EFFORTS TO DEPLOY SMART GRID INFRASTRUCTURE AND DEVELOP SMART COMMUNITIES

The electric industry supports the Commission's ultimate goal of expanded broadband deployment in order, among other things, to promote more affordable and available Internet access and to realize economic benefits for consumers and businesses. However, EEI is concerned that the Commission's proposed regulatory changes will not only fail to achieve these goals, but will also unintentionally impede the deployment of the smart grid infrastructure, which the Commission has previously declared to be an important national priority,[12] delay the buildout of smart communities, and infringe upon state utility commission policies.

EEI's members are not newcomers to telecommunications issues. They make extensive use of communications as providers of critical infrastructure industry ("CII") services, both as owners and operators of private communications systems, and as end-users of commercial communications networks. Electric utilities are in fact among this nation's largest users of communications networks and services.[13]

The electricity grid provides essential services that nearly all other networks and systems rely on in order to operate. It truly is the backbone of our economy providing critical services

[12] *See gen.*, NBP Chapter 12.

[13] For example, in addition to the typical line workers with their ever-present communications devices, each day electric utilities have thousands or hundreds of thousands of external communications with their customers. There are millions of smart meters connected to the grid via commercial or utility private wireless networks or using unlicensed spectrum. Likewise, there are thousands of substations and transmission facilities that are monitored and controlled on a nearly instantaneous basis through electric companies' use of fiber and wireless networks combined with other communications and IoT technologies. Electric utilities also license fiber from their private networks to telecommunications providers. Moreover, the reliance of electric utilities on communications technologies is growing exponentially in light of the growth of distributed energy resources.

deemed essential for life. Today, a tremendous transformation is occurring as electric companies are developing a smart grid that empowers customers of all types, ensures reliability, reinforces resiliency, and integrates distributed energy resources ("DERs"). As part of their efforts to modernize the electric grid, electric companies are investing broadly in smart grid technologies in order to improve the reliability and efficiency of the nation's electric infrastructure.

Investing in a digital, robust, flexible, dynamic, and secure electricity grid is essential. According to projections, EEI's member companies invested $52.8 billion in the grid's transmission and distribution infrastructure in 2016. This level of investment is more than twice what it was a decade ago and is continuing to grow. These investments have a direct economic impact in every state in the form of jobs created and taxes paid. Grid modernization is a multi-billion dollar, multi-year effort that is already making the electricity grid more dynamic, more reliable, more secure, cleaner, and smarter by using an array of new technologies.

As noted above, the electric industry supports the Commission's ultimate goals. In order to achieve these goals, however, the FCC must not continue to prioritize broadband providers above all other stakeholders. Specifically, the Commission must recognize the convergence of electric and communications technologies by implementing policies that not only facilitate investment by cable systems, telecommunications carriers and ILECs, but also the electric industry, which relies on robust and reliable communications in order to modernize the electricity grid. Moreover, without forward-looking policies that recognize the need to expand and encourage the deployment of smart grid infrastructure across the United States, such grid improvement could be substantially slowed, or possibly made impractical in some areas. As the Commission recognized in the NBP, such policies will unleash tremendous innovation and

greatly benefit the nation.[14] Unfortunately, as presently drafted, the FCC's proposed pole attachment policies not only could significantly and negatively impact grid reliability and security, but they could also impede the deployment of multi-use poles and smart infrastructure integrated into connected-city platforms for the sole purpose of supporting a narrowly focused approach that is quickly becoming technologically obsolete.

The electric industry, along with a number of communities, has begun to deploy smart infrastructure as part of a nationwide effort.[15] Cities, towns, and counties are looking to cut costs, enhance safety, and ensure that communities are vibrant and appealing for economic development. In order to do so, they are increasingly relying on a smarter grid enabled by energy/communications technologies to provide smart solutions in areas such as transportation; safety; lighting; energy, water and waste; building and housing; health; education; tourism and economic development.[16] The projects are varied and range from smarter street lighting and virtual power plants to microgrids.[17]

Consequently, utility poles no longer simply serve the critical function of connecting users to this nation's electric grid. Now, integrated municipal multi-use poles (lights, small cell, traffic management, electric sensors, etc.) connected with other municipal assets can serve multiple community needs beyond communications, and providing both social and economic benefits while being at the same time aesthetically sensitive.

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[14] NBP at 253-256 (https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf).
[15] *See e.g.*, *ComEd, mayors Caucus to build smart city together,* Smart Grid Today (May 2, 2017).
[16] Deloitte, *Smart Cities How rapid advances in technology are reshaping our economy and society* (Nov. 2015) at 15, https://www2.deloitte.com/content/dam/Deloitte/tr/Documents/public-sector/deloitte-nl-ps-smart-cities-report.pdf.
[17] *The Promise of Smart Cities*, Electric Perspectives at 35-36 (January/February 2017).

The FCC's proposed regulations will impose needless cost and revenue risk to electric utilities, as well as cause operational problems, all of which will impede deployment of smart infrastructure. The FCC's proposed policies will increase the rates paid by utility customers who are also telecommunications customers. However, the electricity customers who will bear the costs of the Commission's proposed policies are not always the customers of the telecommunications companies and attachers who will benefit from these policies, particularly as wireline usage continues to decline. Because electricity customers may receive increases to their utility bill for benefits to telecommunication services they do not receive, this represents an unanticipated cost shift from one customer to another akin to a pole attachment tax – albeit one that is not fairly or uniformly imposed. At the same time, the electric customer may believe that their electric bill is rising because of increased electric supply costs, when in actuality it may be due to the communications attachments.

The electric industry is already spending in excess of $50 billion annually on investments in smart infrastructure. The additional revenue pressure caused by non-compensable rates, combined with the additional resources which would be needed to comply with the FCC's proposed shortened timelines, will have the effect of needlessly impeding the deployment of new smart infrastructure.

The FCC's proposed policies will likely also negatively affect state commission policies. As an example, neither utility financial nor manpower resources are infinite. The demands of the FCC's shortened timelines will cause delays in the deployment of new utility infrastructure, as well as in the maintenance and repair of existing plant potentially raising service quality issues at the state commission level. Likewise, state commissions will likely have to determine how to

handle telecommunications-caused cost shifts which may be of no benefit to most or some ratepayer/consumers but nevertheless reflected in their electric utility rates.

IV. THE COMMISSION SHOULD REFER POLE ATTACHMENT REFORM TO THE BROADBAND DEPLOYMENT ADVISORY COMMITTEE TO DEVELOP INDUSTRY CONSENSUS ON REASONABLE RECOMMENDATIONS

The Commission has recently established a Broadband Deployment Advisory Committee ("BDAC"). This federal advisory committee is intended to provide an effective means for stakeholders with interests in this area to exchange ideas and develop recommendations to the Commission on broadband deployment and includes a representative from an EEI member utility. EEI welcomes and appreciates inclusion of representatives of investor-owned utilities in this committee and their ability to collaborate on the development of strategies to increase broadband deployment across the country without harming other interests of customer and stakeholders. Development of such strategies, however, will take time and the participation of all involved stakeholders. Among the issues being considered by the committee are "further reforms of the Commission's pole attachment rules" and "further reform within the scope of the Commission's authority." Because the Commission correctly included pole attachment regulations as a topic to be considered by BDAC when it advises on reforms that could affect broadband deployment across the country, the present NPRM seems premature. EEI hopes for broad consensus on balanced recommendations of the BDAC, but does have some concern that the makeup of the committee with so few representatives of the electric industry may lead to recommendations skewed towards the telecom interests. Nevertheless, even with this reservation, it is appropriate that the BDAC should have an opportunity to consider the pole attachment issues of concern to the FCC in order to reach an industry consensus prior to any decision by the Commission.

V. THE FCC'S PROPOSALS FOR SPEEDING ACCESS TO THE POLES WILL NOT ADDRESS THE COMMISSION'S CONCERNS

The Commission's current four-stage timeline for wireline and wireless requests to access the communications space[18] on utility poles provides for periods that do not exceed: application review and engineering survey (45 days), cost estimate (14 days), attacher acceptance (14 days), and make-ready (60-75 days). The current regulations also allow timeline modifications for wireless attachments above the communications space and for large requests.[19] In the NPRM, the FCC seeks comments on whether it should significantly shorten these timelines. The time period for application review would be shortened to 15-30 days,[20] the time period for survey, cost estimate and acceptance to 10-14 days,[21] and the make-ready period to 30-45 days.[22]

A. The Commission has not shown that there is a need to shorten current timelines.

Electric utilities have no incentive to delay attachments. Moreover, only competing attachers benefit from such delays. It is to the benefit of electric utilities to be able to process and resolve attachment requests quickly, so as to be able to free up limited utility manpower resources.

More importantly, there also is no data demonstrating that the current Commission timelines are deficient, that they serve as regulatory barriers to infrastructure investment, or that

[18] The FCC must make clear that its policies apply only to the communications space on the poles and not the utility space. Public safety as well as the security and reliability of the grid would be negatively impacted by attachers doing work in the supply space. Further, the FCC has no jurisdiction over the utility space on poles and it was never Congress' intention to grant such power to the Commission.
[19] *See* NPRM at ¶ 7.
[20] *Id.* at ¶ 8.
[21] *Id.* at ¶ 10.
[22] *Id.* at ¶ 11.

utilities are not generally meeting their obligations under the timelines. Any comments by Internet Service Providers ("ISPs") are anecdotal, may not reflect actuality,[23] and are not consistent with comments from utilities and their line workers.

Before finalizing any changes to the current timelines, the Commission should develop a more complete record on how the current pole attachment framework operates. This record should be data driven and the input all various stakeholders. Accordingly, this is one of the matters which the Commission should first refer to the BDAC to develop consensus on reasonable pole attachment reform initiatives, should they be needed, prior to any Commission final action.

B. The application review timeline should not be shortened.

The current 45-day application review time period already effectively gives priority to communications attachers over critical utility operations. In practice, however, current timelines have proven to provide both attachers and utilities sufficient flexibility,[24] In most cases, utilities are able to meet their requirements under the current FCC time frame.[25] Therefore, utilities should not be required to act on completed pole attachment applications within 15–30 days.[26]

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[23] *See e.g.*, "*Houston Mayor Criticizes Pai's Super Bowl Comments*" (TRDaily 15 May, 2017).
[24] It is essential that individual utilities continue to make pole-by-pole determinations regarding the safety, reliability, and generally applicable engineering purposes.
[25] For instance, Tucson Electric Power Company ("TEP") has data that supports a 99% success rate in meeting the 45-day window for completion of its application review and engineering survey, and, although not required, also includes cost estimate work in this timeframe despite the additional 14 days for this work allotted in the current timeframe. Oncor Electric Delivery ("Oncor") similarly reports a 95% success rate in meeting the 45-day application review and engineering survey time frame and a 99% success rate in meeting the 14-day cost estimate requirement. Mississippi Power and Gulf Power report an average time of 30 days to complete their engineering surveys. Alabama Power reports an average time of 21 days.
[26] NPRM at ¶ 8.

As a preliminary matter, such tight timelines do not recognize that electric utilities often encounter situations beyond their control, such as outages and other force majeure type events that require them to engage in major restoration efforts, including mutual assistance to other electric and telecommunications companies. During these crises, electric utilities must be able to prioritize the restoration of existing services, both electric and telecommunications, before expending resources to allow for new communication space pole attachment services. Any further shortening of the review period would impose unnecessary burdens on utilities because it would not address the fundamental causes of most delays *i.e.,* utilities are dependent upon existing attachers to complete work associated with their own equipment and many, if not most, of the problems have been caused by this existing attacher work.

In the experience of electric companies, existing and new attachers, and not utilities, tend to be the cause of delays in utilities' review of applications. The primary causes of delay are two-fold. In many instances, the pre-survey data submitted by attachers is faulty. Such deficient applications must be returned by the electric utility to the applicant and make it more difficult to complete the necessary studies to determine if access is feasible. For example, TEP estimates that approximately 10% of applications received contain errors that need to be addressed. Oncor estimates that 80% of permit applications received will contain errors. Typical errors include attachers using outdated maps, listing incorrect addresses and pole locations, listing incorrect pole numbers, or simply submitting incomplete application information. In the case of one contractor, up to 60% of applications had errors even after a year of training provided by the utility. In such cases, shortening the time period will not facilitate moving the application forward expeditiously. Utilities cannot act on incomplete and inaccurate applications.

Other delays are caused by the failure of attachers to cooperate with each other. For example, delays are frequently due to the failure of an attaching entity to respond in timely manner to a utility's request for additional information, or failure of an existing attacher to cooperate in moving its facilities to accommodate a new attacher. Additionally, some applications may necessitate modifications of a facility or to bring it up to code or address previously unknown safety violations. These also can contribute to delays.

The Commission should retain its rules regarding pole attachment application timelines in the case of large orders.[27] The challenges related with reviewing applications for large pole attachment orders are even more complex than those related to smaller projects due to the number of poles involved and the type of attachments required. The 45-day period is sometimes difficult to meet if a large number of permit applications by multiple attachers are submitted at approximately the same time, or if the contractor's workload is already heavy. For example, several years ago Texas-New Mexico Power Company ("PNM/TNMP") received an application for a project consisting of more than 5,000 poles which, in order to comply with the FCC timelines and meet the attacher's request, was rushed through without sufficient time to review and ensure that applications were complete. Final inspections found hundreds of errors (violations) that are still being fixed in the field years after the project was completed. Thus, shortening time periods and speeding the application review process, especially for larger projects, can cause greater concerns, including but not limited to those related to significant safety and compliance problems.

[27] NPRM at ¶ 9.

The utility manpower concerns to which the Commission has alluded are real.[28] The electric industry is required by law to first ensure that it is able to provide safe, reliable, secure electric service, while meeting all state and federal regulatory obligations associated therewith. A utility must be able to prioritize its resources, including available manpower, to ensure compliance with all of these objectives—not just for accommodating pole attachment requests--and there must be some recognition that the resources are finite. All EEI member utility companies who have provided information to EEI have stated that they would need to hire or contract more qualified personnel if the Commission's proposed shortened timelines are approved.

From a practical standpoint, there may also simply not be enough qualified additional workers to hire. There is currently a shortage of properly trained technicians to do supply space line work. Training additional workers is not an easy task. Training linemen to deal only with communications equipment may take just six months, but qualifying electric journeymen for electric utility line work takes five to six years due to the high worker safety standards utilities are required to maintain and the progressive complexity of the work.[29] This problem will only be exacerbated in the coming years as about a third of the nation's qualified linemen are set to retire in the next decade.[30]

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[28] NPRM at ¶ 12.

[29] *See* Dave Johnson, Lack of Lineworkers Raises Safety Risks, Industrial Safety and Highway News (Apr. 22, 2016) (quoting Utility Department International Representative Don Hartley, "The job of utility linemen is varied and complex. It takes five years to train a lineman to a journeyman level, and most in the industry acknowledge that it takes ten years to become a well-rounded lineman. There is much to learn."), http://www.ishn.com/articles/103790-lack-of-line-workers-raises-safety-risks.

[30] *See* Frank Morris, Help Wanted: Must Like Heights and High Voltage, NPR, Nov. 11, 2015 (http://www.npr.org/2015/11/11/454893604/help-wanted-must-like-heights-and-high-voltage).

To the extent that any of the timelines (including the timeline for application review) are shortened, utilities would be required to either hire more employees or contract companies thereby increasing costs which would be passed on to either the attachers or the customers through the ratebase. Therefore, it would be important for the FCC to make clear that any additional expenses associated with a utility's procurement of additional workforce needed to meet the demands imposed by attachers in order to comply with shortened timelines should be borne solely by the attachers and not by the utility or their customers.

Moreover, in some instances it is unclear whether utilities would be permitted by public utility commissions to take up action in order to meet the proposed shortened timeframes. It does not appear that the Commission has sufficiently considered whether existing labor agreements would constrain a utility's ability to hire qualified linemen needed under a reduced Commission timeframe. Utilities may also be unable to "ramp up" quickly due to competing obligations and requirements imposed by federal and state electric utility regulators.

C. Shortening the period allowed for survey, cost estimate and acceptance would serve no purpose.

The review period for pole attachment applications should still include time for the utility to survey the poles for which access has been requested. The timeframe for estimate and acceptance steps should not be condensed from 28 days to 10 – 14 days; nor should these steps be eliminated.[31]

Faulty survey data submitted by attachers is a major problem. For example, FirstEnergy Services Company ("FirstEnergy") estimates that approximately 15% of surveys it receives are faulty. TEP similarly estimates that 10% of the surveys it receives contain errors, including

[31] NPRM at ¶ 10.

incorrect pole sequences and missing poles, incorrectly identified TRSQ (Township Range, Square, Quarter) pole unit numbers, to more common problems identified while in the field including incorrect design locations, cable sizes, and a lack of sufficient information to properly gauge the work needed for the new attachment build. In some cases attachers fail to do the type of evaluation which would identify possible problems that would lead to make-ready work. For example, Empire District (a utility providing electric service in SE Kansas, NE Oklahoma, NW Arkansas and SW Missouri) should receive applications with the pole locations marked. Often, however, the pole UFLID number is not even identified and the drawing simply contains information that is pertinent to the attacher but of no use to the utility. As a result, utilities often have to redo the surveys which are submitted to avoid engineering errors.

In addition, once a utility completes the survey, applicants may make changes based on the findings, causing rework from the original route submitted. For example, after completing the survey, PNM/TNMP has in the past corrected mistakes on applications, but, given difficulties caused by repeated inaccurate applications, has recently stopped the practice and has begun to reject applications and return them back to the contractor to fix. This, however, results in additional delay (although not due to the fault of the utility), but the FCC timeline does not stop as a result. In other instances, a contractor does the inspection/analysis and engineering for required make-ready work because a company, such as Empire, does not have the manpower to handle sporadic permit applications.

A further challenge is that attachers and contractors tend to use the entire 45 day period to do their work, often leaving no time within that 45 day period for the utility to conduct their review and complete their make-ready report. In such circumstances, utilities end up utilizing the 14-day cost estimate period for this purpose.

It also bears explaining that many utilities require that supply space make-ready fees be paid in advance. As a result, delays related to cost estimates and acceptances are usually caused by the inability of attachers (many of whom have slow procurement processes) to make quick decisions and timely payments.

In sum, shortening the period allowed for survey, cost estimate and acceptance could lead to engineering errors that may impact public safety and utility reliability. Further, as was the case with application review, if this time period were shortened, utilities would be required to hire more employees or contract companies thereby increasing pass-through costs.

D. The communications space make-ready timeline should not be shortened.

The Commission should not shorten the current 60 day make-ready timeframe to 30 – 45 days.[32] The full make-ready periods are needed and should be maintained.

Generally, make-ready work is generated when there is insufficient vertical space on a pole to accommodate a new attachment. The work normally consists of rearranging existing attachments to more efficiently utilize the existing space on the pole. Yet, in rural or underserved areas, there is little need for make-ready work. Poles in these areas often only have installations belonging to the utility company, with, perhaps, only a phone company cable attached also. The vast majority of make-ready work takes place in areas having high population densities; areas of high interest to communications companies. In these areas, utility poles have multiple entities attached or applying to attach, which drives the need for vertical space and make-ready work.

Make-ready work can occur in both the communications space and in the supply space. Most utilities do not involve themselves in Communications Space make-ready work. Work

[32] NPRM at ¶ 11.

performed in this area is the purview of the communications companies, both existing and new attaching entities. Make-ready work may, however, be performed in the supply space, primarily consisting of raising the utility's own facilities to create sufficient space for a new attachment.

The current 60-day period (which does not include supply space make-ready) is not realistic in many cases due to circumstances outside of the control of the utility. As an example, it can take four to six weeks to obtain permits to work on local roads and highways. Moreover, many projects need to comply with the National Environmental Policy Act ("NEPA") which can be a time consuming and resource-intensive process. While TEP estimates that the average time delay for securing permits that include a traffic control plan is 30 days.

Delays can be caused by inaccurate pre-inspection surveys (conducted by attachers) that fail to identify issues with poles, etc. For example, PNM/TNMP routinely receives inaccurate/incomplete/incorrect applications. Attachers fail to do field measurements, fail to properly and accurately document actual field conditions, fail to do a site visit, submit inaccurate information (such as the wrong size poles), *etc*. This means that utilities cannot move forward with the inaccurate application. Communications space make-ready delays are also caused by the failure of an applicant to notify existing attachers and the failure of the attachers to coordinate and work cooperatively with one another.

Once again, if the make-ready time period were shortened, utilities would be required to hire more employees or contract companies thereby increasing pas through costs. Moreover, in some instances make-ready would also be delayed to ensure compliancy with existing labor agreements that preclude the use of outside contractors. Accordingly, longer maximum periods for existing attachers and utilities to complete make-ready work in the case of large pole

attachment orders should be retained.[33] There is no justification for reducing the timeline for large pole orders. The problems caused by such orders, particularly when rushed and not subjected to standard review processes, are magnified because of the number of poles and the size of the areas involved.

E. The extended timeframe for wireless attachments should be retained.

It is critical that the Commission maintain the current time periods for wireless attachments above the communications space.[34] In general, wireless attachments operate in a different timeframe because they are more complex, attachers use different types of equipment, the attachments require special skills, and the projects usually involve a large number of poles. There are simply too many types of technologies and configurations for wireless equipment attachments to create a standardized, shortened timeframe for action. Further, wireless attachments pose special operational and safety problems, including preservation of necessary clearance space and potential for exposure to radiofrequency ("RF") radiation. Engineering studies demonstrate that electric and communications wires may often be close enough to pole-top wireless antennas to pose a safety hazard to utility and communications line workers. Accordingly, specially-trained/qualified installers are required. Not all utilities have such personnel or are practically able to train existing personnel.

Unlike wireline attachments where the equipment to be attached has been generally been standardized (essentially a wire bolted safely to the pole), wireless providers each have a different equipment profile requiring different accommodations at the pole to handle their specific attachment wireless build out. Additionally, while workers dealing with wireline

[33] *See* NPRM at ¶ 12.
[34] *Id.* at ¶ 12.

attachments can move from pole to pole more easily due to the attachments generally falling in a designated line of utility poles, to generate coverage wireless attachments are dispersed throughout a pole network requiring increased time to reach each pole to begin attachment work. Wireless attachment work is significantly more complex and time consuming than wireline work, justifying the extended wireless timelines.

Further, it would be inappropriate to modify the timeframes given the pending deployment of 5G. It can be expected that an increase in the volume of wireless attachment requests due to 5G deployments will exacerbate pole attachment delays due to the complex nature of the installations and the number of poles involved.

To date, most of the new wireless requests have been for small cells in urban areas. EEI is not aware that there have been any problems in rural areas because of the low number of attachers. Therefore, to the extent that the Commission is adopting the proposed policies in order to speed rural wireless broadband deployment they are unnecessary and counterproductive because of the costs that will be imposed on rural customers.

Moreover, based on estimates of the increase in workload due to small cell applications, wireline build out to provide backhaul support, *etc*., it is anticipated to be more than the electric industry's existing resources can handle even within the current FCC timeframe structure. Shortening the timeframes would create unnecessary burdens on the electric utilities and their customers and would impact the industry's ability to allocate the resources necessary to maintain safe, reliable electric utility service.

F. Utilities should not be required to pre-approve contractors.

In the NPRM, the Commission has seeks comment on the use of utility-approved contractors to do communications space make-ready work.[35] The Commission must recognize that utilities do not pre-approve contractors or endorse one contractor over another for work in the communications space due to legal, liability and business reasons. Utilities cannot be required to be responsible, even in part, for work performed on behalf of attachers, and any "approval" of contractors in this context would have the ultimate impact of exposing utilities to liability as a result of that "approval" in the event there is ever an issue arising out of the "approved" contractors' work.

G. The Commission's proposals to address the safety and property concerns of existing attachers and utilities are not practical and fail to differentiate between supply space and communications space make-ready work.

In the NPRM, the Commission seeks it seeks comment on alternative proposals: (1) requiring all impacted attachers (new, existing, and utilities) to agree on a contractor or contractors that the new attacher could use to perform communications space make-ready work; and/or (2) requiring that existing attachers (or their contractors) be given the reasonable opportunity to observe the communications space make-ready work being done on their existing equipment by the new attachers' contractors. The purpose of these proposals is to address the safety and property concerns of existing attachers and utilities.[36]

Neither of these proposals should be adopted. Not only is the proposed process too complicated, it is also unclear as to who will administer the process. Moreover, it is neither appropriate nor fair for the utilities to be the administrators and/or enforcers of this process.

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[35] *See* NPRM at ¶¶ 13-14.
[36] *Id.* at ¶ 17.

Utilities should not be forced to be "traffic cops." The burden should fall to the new attacher to initiate the process, with the burden for coordination and cooperation falling to both the new and existing attachers, and the "clock" should be stopped with regard to timelines applicable to the utility for the duration of time during which the attachers are navigating this process. Also, if adopted, it should be made clear that these proposals would only apply to the communications space and not to the utility supply space.

If the FCC wishes to ensure protections for existing attachers and utilities, as well as to expedite the process, utilities should be permitted to impose penalties for noncompliance, as they have no ability to freeze applications or take other action to encourage compliance. Oregon, for instance, has adopted specific sanction rules that can be imposed by the pole owner. Such sanction rules are targeted to address these very types of issues and might serve as a model for the Commission to use as an appropriate first step towards adopting a needed sanction framework.[37] Currently, there is no mechanism to ensure that the attachers do not abuse the process, resulting in the utility having to expend disproportionate resources and time on activities not directly related to the provision of safe, reliable, and secure electric service. The lack of such a mechanism forces a company to make difficult decisions because, as a regulated utility, it is also held accountable by multiple regulatory and administrative bodies, and is subject to penalties for noncompliance.

Also, separate attachments owned by the same attacher should be consolidated and/or bundled and removed when no longer used (*e.g.*, coax/fiber). This would benefit both attachers and utilities but would require the cooperation and coordination of existing and new attachers, and any new rule would need to include a framework for this.

[37] *See* Oregon Administrative Code at § 860-028-0000, *et seq.*

H. To the extent that One-Touch Make-Ready is used only in the communications space, it will prove beneficial.

The single biggest cause of delay in completing a pole attachment buildout for a new attacher is the completion of make-ready work by the existing attachers in the communications space. For instance, on one large fiber buildout involving 20,000 poles in the state of Georgia, make-ready work for the supply space was finished in two to four weeks. Completion of make-ready work by an ILEC, competing telecoms, and local government in the communications space, however, took one to six months. Utilities are only responsible for their own make-ready work in the pole's supply space, and it is the responsibility of each existing attacher in the communications space to adjust their own equipment to make the pole ready for the incoming communications attacher. Whereas make-ready work in the pole's supply space is often completed quickly by the utility pole owner, make-ready work in the communications space requires coordination and cooperation between multiple competing entities with little incentive to allow a new competing entity to expand into the existing attacher's service area. With few remedies available to the utility pole owners or a new attacher, it is unsurprising that existing attachers often fail to timely address make-ready requests for additional new attachers.

With each new attacher that is added to the pole, the process becomes that much harder for additional new attachers to complete work, given the increased complexity of make-ready work needed for the pole, the coordination efforts needed to organize a schedule for make-ready work between the existing attachers in the communications space, and the potential that an existing attacher will hold up the process. Utilities also have noted that delays by existing attachers may increase the likelihood of unauthorized attachments in the communications space. EEI's members have noted an increase in unauthorized attachments discovered on their poles.

Many of these unauthorized attachers, however, appear to be attachers who have initiated pole attachment requests, but due to delays by existing attachers in the communications space, have become frustrated and elected to (oftentimes improperly) add their attachments before the needed work was completed. Often this unauthorized attachment is not discovered until much later, and can cause additional make-ready delay to fix the issue for a subsequent attacher, as well as serious safety and reliability issues for all attachers to the pole.

When establishing One-Touch Make-Ready standards, the Commission also should consider how the process could be used to address the "double wood" problem faced by utilities as a result of unresponsive existing communications attachers. Utilities often must replace their existing poles with new poles for a variety of reasons, including relocating due to road-widening projects, replacing damaged poles, and, in some cases, increasing pole capacity to accommodate new communications attachments. During the time period in which the transfer of existing electric and communications attachments is taking place, the new pole is set side-by-side with the old pole. The old pole is sawed off above the communications line, creating a "stub pole," which is left in the field because the communication companies did not remove or relocate their lines during normal construction timelines. This situation, referred to as "double wood," is permissible only on a temporary basis. Once the new pole is built and the electric wires are in place, all attaching communications entities are obliged, upon notice, to transfer their facilities to the new pole. Due to safety codes, right-of-way limitations, liability and other restrictions under state and local laws, the old pole cannot permanently remain next to the new pole.

Communications attachers, frequently simply ignore transfer notices, resulting in a period of double wood "limbo" in which the utility is required under local law to remove the old pole,

but cannot do so until the communications attachers have all transferred their facilities.[38] This situation causes significant operational and safety problems for electric utilities. Many of these existing stub poles are rotten and in very poor condition and some have fallen over while others remain standing because the phone and cable lines are the only things supporting them.

This situation also potentially causes a problem for a communications provider that seeks to comply with the utility's request that its communications wire be transferred, but cannot do so because another communications provider with a wire at a higher point on the stub pole refuses to respond to the utility's notice. In such a case, the utility has no ability to force competing communications providers to coordinate with each other in the transfer of their communications facilities to a new pole.

Additionally, EEI believes the ILECs cause more double poles than utilities. For example, the Staff of the Maryland Public Service Commission found that at one point Verizon owned 20,000 double poles while Baltimore Gas & Electric, the largest utility in the state, owned only 12,000 and other utilities combined owned less than 4,000.[39] The proposed timeline changes do not address this problem.

To the extent coordination efforts among existing attachers causes delay to final pole access for a new attacher or lead to double wood problems associated with utility pole replacements, such delay may be solved by establishing Commission mandated One-Touch Make-Ready protocols. Due to the varied attachment requirements for attachers at the pole and varied interests involved, however, developing these protocols will require input from all parties

[38] If the telecom carrier does finally pull the old pole after transferring, it seldom notifies companies that the work has been completed. Utilities, like Empire, receive many customer complaints about old poles that are still waiting for transfer work to be completed.
[39] Staff of the Maryland Public Service Commission, "A Report on Utility Pole Attachments in Maryland" at 8-9 (2016).

involved and consensus should be developed through the BDAC for One-Touch Make-Ready standards that best work for all parties.

I. The Commission's data disclosure proposals exceed statutory authority and would jeopardize critical national infrastructure and potentially impose unnecessary costs.

The Commission has proposed various data disclosure requirements,[40] all of which are either beyond the Commission's jurisdiction and/or would threaten the security of the electric grid. In addition, these new requirements would force utilities to devote significant resources and expense without providing any corresponding benefit to the negotiation process or the resolution of pole attachment disputes. Moreover, utilities already provide relevant information upon request to prospective pole attachment customers.

As a preliminary matter, the FCC lacks jurisdiction to require utilities to assemble databases. The Commission's jurisdiction over electric utilities is extremely limited. The FCC's proposals go well beyond the FCC's statutory authority to regulate the rates, terms, and conditions of access. The language of section 224 of the Communications Act is unambiguous and makes clear that the statute does not give the FCC the authority to regulate how a utility manages its assets.[41] The proposals do not fall within the FCC's jurisdiction because a database is not a rate, term, or condition of access, nor would they facilitate resolution of disputes over such rates, terms, or conditions.

Moreover, given the fact that the grid is acknowledged as being critical infrastructure, it would be contrary to the public interest for the FCC to require utilities to assemble databases

[40] *See* NPRM at ¶ 27.
[41] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 2781 (1984).

disclosing the location and availability of poles. In the wrong hands such information could serve as a roadmap to disaster.

Maps of utility networks could potentially include "Critical Infrastructure Information" that is protected under Title II, Subtitle B of the USA Patriot Act. To the extent a database is required, it implicates a Freedom of Information Act ("FOIA") concern. Such information is currently exempt from FOIA disclosure. However, if such information was held by the Commission in a database, it could potentially be subject to FOIA requests. The FCC should not take action that would preempt, interfere or be inconsistent with efforts by other agencies such as the Department of Homeland Security ("DHS") and Federal Energy Regulatory Commission ("FERC") to adopt procedures and standards for protecting critical energy infrastructure information. Hence, the FCC itself should recognize that a requirement for public disclosure of such information has a far greater potential to cause harm to the public interest than to be of any possible benefit to the FCC's stated goal of promoting broadband deployment.

Even if utilities collected the information the Commission proposes to require them to disclose, such information would be of little commercial value. Due to the rapidly changing specifics of utility pole networks, collected information would become out of date and stale soon after publication. While the burden to utilities and threat to public safety in collecting and disclosing the information the Commission seeks is high, it would not provide meaningful information that could be used to aid broadband deployment.

VI. THE FCC'S PROPOSALS FOR RE-EXAMINING RATES FOR SUPPLY MAKE-READY WORK AND POLE ATTACHMENTS WOULD NOT ACHIEVE THE RESULTS THE FCC DESIRES AND REFLECT INACCURACIES IN THE WAY THESE RATES ARE CURRENTLY CALCULATED.

A. Standardizing make-ready costs would not lead to just and reasonable compensation for utility providers.

Many project-specific factors contribute to the final make-ready costs charged to new attachers. Consequently, standardizing make-ready costs would not lead to just and reasonable compensation for utility providers. Such standardization may also lead to inconsistent and inequitable charges for attachers.

Although section 224(b)(1) of the Communications Act generally requires pole attachment make-ready charges be just and reasonable,[42] as the Commission points out in the NPRM, currently make-ready fees are not subject to a set formula[43] and costs generally are calculated on a case-by-case basis specifically tailored to the work performed for each new pole attachment application. The lack of make-ready formulas, however, is not a detriment to communication providers. Rather, it is a benefit. Due to the high variance in costs associated with make-ready work from pole to pole, allowing utility and existing attachers to continue to charge for the actual costs associated with individual new pole attachment agreements ensures rates charged to the new attachers are fair and reasonable to all parties.

The NPRM has sought comment on ways in which make-ready costs might be standardized for prospective new communications attachers. Specific standardization proposals include requiring utilities to make available a schedule of "common" make-ready charges,[44] as

[42] 47 U.S.C. § 224(b)(1).
[43] *See* NPRM at ¶ 32.
[44] *Id.* at ¶ 33-34.

well as potentially offering a standard per-pole rate.[45] This schedule would be, in effect, a pole attachment tariff, which is something the Commission has traditionally avoided for telecommunication carriers. While some of these proposals may work for a few utility pole owners, setting such requirements nationwide would not be equitable to utility pole owners, nor potential new communications attachers. For the majority of utility pole owners, make-ready costs from pole to pole and project to project are not easily standardized. As the Commission previously recognized in its 2011 Report and Order:

> Actual charges vary depending on numerous unique factors, including material and labor costs which fluctuate. As such, the price of make-ready does not lend itself well to a fixed schedule of charges. Plus, many utilities already make information about common charges available upon request. Thus, we conclude, on balance, that the limited benefit of this proposal would not outweigh the burdens it would impose on utilities, and we decline to adopt it at this time.[46]

The type of installation proposed, number of existing attachments, and terrain present at the pole are just a few variables utilities encounter that create large discrepancies in the final costs associated with make-ready work. For instance, in New Mexico and Texas, terrain covering a single pole attachment buildout can vary significantly over deserts, grasslands, and mountains. Moreover, in rocky terrain, the costs involved are significantly higher than those in softer ground. Southern Company similarly notes that in their territory in the state of Georgia, the terrain ranges from mountainous to coastal and traffic can be as congested as Atlanta or as light as Enigma, Georgia. It is not uncommon for costs from pole to pole and project to project to vary significantly due to such variables.

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[45] *Id.* at ¶ 36.

[46] Report and Order and Order on Reconsideration, *In the Matter of Implementation of Section 224 of the Act A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, at ¶ 86 (Released April 7, 2011).

When considering total make-ready work charged to a new attacher, it is important to note that, of the total make-ready costs associated with a build, only the supply space make-ready portion of these costs are invoiced by the utility pole owner. Utilities typically only charge for make-ready work needed in a pole's supply space. Make-ready work needed in the communications space to move existing attacher equipment is typically negotiated between the new and existing attacher and is handled separately from the supply space make-ready costs invoiced by the utility pole owner. Although utility pole owners are generally not privy to rates charged between existing and new attachers for the movement of existing attacher equipment, these charges may be a significant percentage of the overall make-ready costs paid by the new attacher for completion of a proposed buildout. Attachers in the communications space all have individualized equipment requiring specialized knowledge and skill to move to appropriately make ready the pole for the new attachments. Make-ready costs therefore will likely differ greatly depending on the number of attachers currently present in the pole communication space, who they are, and the specific equipment they are using.

Standardization of these third party communications space make-ready costs, therefore, is not likely feasible due to the individualized nature of the work required. Additionally, it is likely is infeasible for pole owners to standardize all potential communication space make-ready costs is not likely feasible because: (1) utilities do not have the specialized knowledge and manpower to perform this work for the new and/or existing attachers and are unaware of the individualized costs involved; and (2) due to the high variance of cost from one specific third-party attacher to another, publishing standardized rates would be difficult and would likely not reflect an accurate true cost to the utility owner, existing attachers, nor the new attacher.

The NPRM proposes instituting a national requirement for utilities to make available schedules of common supply make ready-charges.[47] In stating this proposal, the Commission correctly points to the fact that some utilities currently already prepare and make available such schedules either voluntarily or to comply with state regulations imposed. Utilities that currently provide this information typically operate in areas of the country with more homogenous terrain where charges are more easily estimated. As previously stated, however, many other utilities operate across large areas with both varying terrain and differing levels of current broadband penetration. Requiring utility pole owners in such areas to also develop a list of their "common" standardized make-ready costs would prove to be difficult and would not likely result in a list a new attacher could adequately use to predict the cost of their proposed pole attachment plan.

The Commission also contemplates requiring the offering of standard per pole make-ready rates that new attachers could choose instead of a cost-allocated charge.[48] Such an option would be unfair to utilities as well as harmful to broadband deployment. While it may be hard for new attachers to accurately predict the specific make-ready costs ultimately charged for a build, it is not difficult to determine those areas of the country where new attacher make-ready costs are likely to be higher than average. Make-ready work of all types depends heavily on the number of existing attachers at the pole due both to incremental costs associated with moving the current existing attachers, as well as potential costs associated with pole change-outs and in-line builds when no space is available to accommodate the new attacher. Thus, any standard per-pole make-ready rate would be selected almost exclusively in highly competitive urban areas resulting

[47] *Id.* at ¶ 33-34.
[48] *See* NPRM at ¶ 36.

in non-compensatory rates, and not in less competitive rural areas where broadband deployment is most needed.

B. The FCC's proposals to exclude capital expenses from pole attachment rates could harm broadband deployment.

While utility pole owners are not currently recovering capital expenses associated with make-ready work, they do include non-make-ready capital expenses in their pole attachment rates as contemplated by the existing pole attachment rate formulas. As noted in the NPRM, the Commission previously found it appropriate to allow non-make-ready capital cost recovery through inclusion of these costs in both the cable and the telecommunication pole attachment rate formulas.[49] The current NPRM, however, proposes eliminating inclusion of these non-make-ready capital costs from utility pole attachment rates altogether.[50] EEI strongly opposes this proposal. Excluding non-make-ready capital costs from the pole attachment rates would render these rates are not "just and reasonable" as required by the Telecommunications Act. More importantly, exclusion of these costs would only serve to hinder broadband deployment by discouraging ILEC pole ownership, therefore reducing the amount of poles available nationwide.

Utility companies are not the only entities that own poles available for broadband provider attachment. ILECs also own pole networks across the country and have entered into beneficial joint use and joint ownership pole agreements with utility companies. Maintaining poles available for communications attachments is an expensive endeavor and pole owners routinely incur capital costs associated with needed pole replacements, maintenance, and buildouts of additional poles to needed areas. Eliminating non-make-ready capital costs will only serve to further discourage ILEC pole ownership and may reduce the amount of poles

[49] *Id.* at ¶ 40 (citing *2011 Pole Attachment Order*, 26 FCC Rcd at 5304, ¶ 149.).
[50] *Id.* at ¶ 40-43.

available for communications attachment across the country as ILECs reduce investment in their own poles and elect instead to attach to exclusively owned utility poles through increasingly lopsided joint use agreements or sharing costs of ownership with utilities through joint ownership agreements.

In addition to reducing incentives to create more available communications space, exclusion of non-make ready capital costs further moves pole attachment rates outside the realm of the "just and reasonable" compensation to which utilities are entitled for use of their poles and would serve as a subsidy benefiting section 224 Companies paid by utility customers. Excluding non-make-ready capital costs from the rate of return available to utility pole owners, by definition, reduces available revenue to utilities. Where permitted by state commissions, this cost will likely result in bigger bills to customers for cost recovery. State regulators may decline to allow electric companies to recover these costs for electric customers, meaning that FCC policies could give rise to a regulatory taking. More importantly, such unrecovered costs would reduce utility investments in smart grid technology, to the detriment of electric and communications customers across the country.

As explained in previous proceedings before the Commission, the current pole attachment rates now do not provide for "just and reasonable" compensation to utility pole owners as required by the section 224 of the Telecommunications Act. In an economic analysis, submitted previously by EEI associated with the pole attachment rate updates eventually implemented in 2011, the current rates fail to equitably apportion the full capital costs and

operational expenses across attachers to shared poles.[51] Furthermore, as explained in this report, the current rates also do not equitably apportion expenses across the entire length of the pole. Despite the fact that all attachers to a pole equally benefit from the 24 feet of unusable (or "common") space on the pole that is necessary to plant the pole six feet in the ground and to raise everyone's attachments at least 18 feet in the air, the rate formulas do not equally apportion this common space between all attachers.[52] Additionally, the Commission treats the 40-inch communication worker safety space required by the NESC and that electric companies set aside to protect attachers' workers as usable space occupied by the electric company despite the fact that electric utilities would not be required to provide this space, but for the presence of the non-electric attachment.[53]

While the pole attachment rate formulas of 2011 did not provide for equitable cost allocation, which were further reduced following the 2015 adjustment, the current proposals to reduce pole attachment rates more through exclusion of non-make-ready capital costs would, further undermining rates ability to provide utilities "just and reasonable" compensation.

[51] *See* Report of Kaustuv Chakrabarti; ¶¶ 5-13; filed December 14, 2010, *In the Matter of Implementation of Section 224 of the Act*, WC Docket No. 07-245; A National Broadband Plan for our Future, GN Docket No. 09-51.
[52] *Id.* at ¶ 9.
[53] *Id.* at ¶ 12. Note, however, that some State laws and local ordinances (as well as proposed legislation) would require utilities to allow ancillary equipment that may be quite substantial (*e.g.*, 28 cubic feet) to be installed in this portion of the pole rendering it rather useful. For example, see Virginia Senate Bill SB 1282 passed on April 26, 2017. https://legiscan.com/VA/text/SB1282/2017.

C. Adopting a pole attachment rate formula for ILECs unfairly benefits ILECs and would discourage utility and ILEC joint use agreements.

The Commission correctly refrained from establishing pole attachment rates for ILECs in the *2011 Pole Attachment Order,*[54] and it should not seek to do so now.[55] Much of ILEC use of utility owned poles is governed not by pole attachment rate agreements, but by "joint use" or "joint ownership" agreements for mutual use (or ownership) of telecommunications and utility owned poles. Through these agreements, ILECs and electric utilities have shared the costs of installing pole plant to accommodate both of their needs and have freely negotiated various rates associated with mutual use of both utility and ILEC owned poles. ILECs enjoy the benefits of both pole ownership and joint use relationships not shared by other third party attachers.

Joint ownership agreements are different from ordinary, commission-jurisdictional pole attachment agreements in important respects. First, both joint use and joint ownership agreements are typically based on contractually allocated space, not on space occupied, which provides greater value and flexibility to an ILEC than it would have it if paid only on the basis of space occupied. In many cases, joint use agreements allocate two to three feet of space to the ILEC, but the ILEC often occupies only two feet of space. By comparison, CATVs and CLECs generally occupy only one foot of space.

Second, many joint use and joint ownership agreements have been in effect for many years, or even decades in some cases. In some cases, the rate is a "stated" rate with no formula to account for increased costs. In some cases, after many years (or in some cases decades), these historic agreements have recently been renegotiated to reflect increase costs.

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[54] *2011 Pole Attachment Order*, 26 FCC Rcd at 5286, ¶ 5286, ¶ 102 & nn.317-18.
[55] *See* NPRM at ¶¶ 44-46.

Third, joint use and joint ownership agreements inherently reflect the fact that each party has an ownership interest in the pole plant. These agreements, because they involve ownership of public utility assets, are regulated under state and local laws and subject to regulations applicable to utility franchises. Some localities mandate pole parity agreements or otherwise restrict ownership proportions.

Fourth, joint use and joint ownership agreements impose a mutual obligation. The electric utility has obligations towards its ILEC tenant, and the ILEC tenant has the same obligation towards its electric utility tenant. In some cases, despite owning a portion of the pole plant, the ILECs rely on the electric utility to perform pole maintenance and restoration, as well as to ensure compliance with applicable safety codes and other regulatory requirements.

Joint use and joint ownership agreements historically have both incentivized utility and ILEC investment in increased amounts of poles as well as increased the size of poles that allow for additional attachment space.[56] As the NPRM correctly notes, however, the percentage of pole ownership in these joint use agreement has shifted over time to greatly favor utility pole ownership as the percentage of pole plant owned by ILEC decreases each year. This change further supports the notion that current pole attachment rates do not equitably distribute costs across the pole and that utilities are subsidizing third party attachers. If various make-ready costs and pole attachment rate returns were excessive and served as a profit mechanism for pole owners, then it would be expected that ILEC pole ownership would have increased over time, not decreased. The fact that, despite possessing the other benefits which ILECs enjoy through pole ownership and negotiated fee utility joint use agreements, they instead elect to attach

[56] *See* Supplemental Declaration of Jonathan Orszag and Allen Shampine, ¶¶ 8-12, ; filed December 14, 2010, *In the Matter of Implementation of Section 224 of the Act*, WC Docket No. 07-245; A National Broadband Plan for our Future, GN Docket No. 09-51.

equipment to utility owned poles through pole attachment agreements regulated at the standard FCC rate demonstrates that neither the current nor the proposed lower pole attachment rates are just and reasonable.

Allowing ILECs to receive the lower telecommunications rate without a corresponding rate reduction for utilities' use of ILEC owned poles is inequitable. It will further drive ILECs to pole attachment rate agreements instead of negotiated joint use agreements. As is the case with subsidized third party attachers' rates, allowing ILECs to adopt the telecommunication pole attachment rate will further reduce utility revenues and impact ratepayer/consumers. Furthermore, because ILECs can receive the utility subsidized FCC pole attachment rate they will have little incentive to remain pole owners and maintain and invest in their own pole networks—if for no other reason because they would have to share these networks with competitors. Such a result will likely reduce the number of poles throughout the country thereby reducing available existing space for broadband attachment, harming broadband competition and unjustly shifting even further the responsibility and expense of pole ownership to electric utilities.

VII. THE COMMISSION SHOULD NOT ELIMINATE THE REQUIREMENT THAT RETAIL CUSTOMERS RECEIVE DIRECT AND SUFFICIENT NOTICE OF COPPER RETIREMENTS.

Section 51.332 of the Commission's regulations provides that ILECs must give retail customers, such as utilities 180 days' notice of planned copper retirements. Moreover, the notice must provide sufficient information to enable the retail customer to make an informed decision as to whether to continue subscribing to the service to be affected by the planned network changes. Such notice is critical for electric utilities that may have thousands of lines affected.

Although electric utilities are moving forward with grid modernization, in many instances they still rely on copper. Nearly every electric utility relies on frame relay and other time-division multiplexed ("TDM") enterprise wireline carrier services to support critical control data. If the new IP service replacing copper does not meet utility functional requirements, it may prevent these companies from being able to adequately monitor and control substations and other critical facilities. If the service is discontinued entirely, the utility may lack communications connectivity to critical infrastructure facilities. The consequences of inadequate or inoperable communications would create vulnerabilities that threaten safety and reliability.

Furthermore, for utilities, the switch from copper to fiber is not as simple as it might be for residential customers. The required network and equipment re-engineering could be very time-consuming for utilities in that in a typical electric utility anywhere from several individual to several thousand substations and thousands of voice circuits could be involved. In 2015, it was estimated that the IP transition can result in additional costs of $60-$85 million for some companies which must be recovered by electric utilities in state rate cases.[57] Consequently, it is important that as CII entities utilities be given the maximum notice of planned copper retirements.

COMMENTS ON NOTICE OF INQUIRY

I. THE FCC SHOULD NOT ATTEMPT TO PREEMPT STATE AND LOCAL RULES.

In the NOI, the Commission seeks comment on whether under section 253[58] it should adopt rules preempting fundamental state and local authority with regard to pole attachment

[57] *See e.g.* Comments of the Edison Electric Institute, PS Docket 14-174 *et al.* (March 9, 2015).
[58] 47 U.S.C. § 253.

related rights-of-way negotiations and approval processes;[59] deployment moratoria;[60] rights-of-way, permitting, licensure fees, *etc.*[61] It cannot and should not.

The Pole Attachment Act was not intended to result in federal preemption of the entire field of state and local regulations pertaining to capacity, safety, reliability, and engineering. Instead, the statute was intended to fill gaps only with respect to matters that were not directly regulated by some states, namely pole attachments rates, and terms and conditions.[62] The Senate Commerce, Science and Transportation Committee Report on the amendments described the local nature of pole attachment regulation:

> "The Committee considers the matter of CATV pole attachments to be essentially a local in nature, and that the various state and local regulatory bodies which regulate other practices of telephone and electric utilities are better equipped to regulate CATV pole attachments. Regulation should be vested with those person or agencies most familiar with the local environment within which utilities and cable television systems operate. It is only because such state or local regulation currently does not widely exist that Federal supplemental regulation is justified."[63]

In addition, the Committee explained that the federal role was to fill any gap over rate-setting in the absence of state and local government regulation. The Committee Report also stated that "in absence of regulation by these state and local regulatory authorities of CATV pole attachments, the Federal Communications Commission should fill the regulatory vacuum to

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[59] NOI at ¶ 103.
[60] *Id.* at ¶ 102.
[61] *Id.* at ¶ 104.
[62] *See* Communications Act Amendments of 1978 S. REP. NO 95-580, at 123 (1977), reprinted in 1978 U.S.C.C.A.N. 109, 124 (stating FCC's regulatory authority over pole attachments is "strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems").
[63] *Id.*

assure that rates, terms, and conditions, otherwise free of governmental scrutiny are assessed on a just and reasonable basis.[64]

The Commission's jurisdiction is limited to adjudication of disputes over whether a utility has applied its safety, reliability, and engineering standards in a non-discriminatory manner as between jurisdictional attachers. The Commission's jurisdiction should not and does not extend to the content of such standards. The Commission has no jurisdiction to preempt or second-guess applicable state or local requirements. States and localities are better situated than federal regulators to understand and balance the interests of utility and communications attachers. Additionally, the Commission should recognize that many state laws, including those of states have not reverse preempted the Commission, apply to pole attachment safety and reliability issues. Examples include state occupational safety and health laws, high voltage line acts, and storm hardening regulations.

The Commission should clarify and acknowledge in the Final Order the limits of its jurisdiction with respect to matters of capacity, safety, reliability and engineering. Specifically, the Commission should expressly acknowledge that it does not have authority to preempt state and local regulations of capacity, safety, reliability and engineering matters relating to pole attachments. It should therefore establish a non-rebuttable presumption that such regulations are just and reasonable and may be included as terms and conditions of pole attachment agreements.

Consequently, the Commission should not adopt uniform, national requirements that would supersede the expertise of states, localities, and utilities in the above-referenced areas or with respect to the content and application of standards for safety, reliability, and engineering matters, including capacity and reliability regulations. States and localities must have flexibility

[64] *Id.*

to adopt requirements to respond to local conditions and circumstances. Matters of safety and reliability are best addressed by individual utility standards in concert with a utility's state regulatory commission. State commissions are in day-to-day contact with the utilities under their jurisdiction and are the most appropriate bodies with respect to evaluating and understanding local utilities and local operating conditions.

Many of the situations faced by localities are unique in nature and are not amenable to federally mandated prescriptions. For example, decisions pertaining to matters such as whether negotiation delays are excessive, conditions are unreasonable, declarations of moratoria in certain areas are valid, or negotiations are being conducted in bad faith are fact specific and very much dependent on, among other things, the parties, the demands of the telecommunications providers, the interests of local residents in their neighborhoods and the resources of the localities. These are fundamental state issues upon which the FCC should not intrude.

Decisions regarding zoning, rights-of-way, access to local streets and roads, and municipal local fees are properly subject to state and local jurisdiction. Federal preemption of state and local authority in these areas would frustrate Congress' intent when it established section 224(c), which allows for the states to reverse preempt the Commission's pole attachment jurisdiction. Additionally, federal preemption in this area would also frustrate Congress' intent when it established sections 332(c)(7) and 253(c), which preserve local authority over wireless siting and state and local authority over the management of rights-of-way.

Federal preemption here also would also contradict one of the Commission's fundamental principles that pole attachments are subject to state and local property law. The Commission has long held that state and local requirements affecting pole attachments are

entitled to deference.[65] Additionally, the Commission has recognized the scope of access is subject to utilities' ownership and control of the poles, ducts, conduits, and rights of way, which is a matter of state law.[66] Although the Commission may preempt state and local laws and regulations that create barriers to entry by telecommunications providers, it has recognized that the states may regulate rights-of-way on a non-discriminatory basis and impose restrictions to protect the public safety and welfare.[67] Accordingly, the Commission should not preempt state and local law regarding moratoria, negotiations, access to rights-of-way, permitting fees or other state and local laws regulating pole attachments. Likewise, the Commission should not use section 253 as a means to become involved in negotiations between utilities and others over things such as rights-of-way.

Further, the FCC cannot use its section 253 authority in states that regulate pole attachments under section 224(c).[68] The Communications Act is very clear on this subject. section 224(c) states that nothing in the section "shall . . . give the commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way . . . for pole attachments in any case where such matters are regulated by a State."[69] Likewise, section 224(a)(1) provides that cooperatives and states and municipalities are not subject to the FCC's pole attachment authority.

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[65] *See* Access Order, 11 FCC Rcd. 15499 at ¶ 1154 ("we conclude that state and local requirements affecting pole attachments are entitled to deference even if the state has not sought to preempt federal regulations under section 224(c). *See also In re Promotion of Competitive Networks*, 15 FCC Rcd. 22983 at ¶ 76 ("we note that Section 224 applied only to utilities, and was not intended to override whatever authority or control an MTE owner might otherwise retain under the terms of its agreements and state law").
[66] *Id.* at ¶ 1179. *See also In re Promotion of Competitive Networks*, 15 FCC Rcd. 22983 at ¶ 76.
[67] *Id.* at ¶ 1155.
[68] NOI at ¶ 108.
[69] 47 U.S.C. § 224(c).

It was clearly Congress' intention to exempt these states and municipalities from FCC oversight of pole attachments. Otherwise, under section 224(b)(1) the Commission would have the authority to regulate their pole attachment rates, terms, and conditions under a just and reasonable standard.[70] They are likewise exempt from section 224(f)'s[71] requirement that cable systems and telecommunications carriers be provided with nondiscriminatory access.[72]

The above-referenced provisions of section 224 do not square with the Commission's assertion that under section 253 the agency has authority over pole attachment rates such as right-of-way fees,[73] terms and conditions regarding rights-of-way negotiations and approval processes,[74] or access issues such as moratoria.[75] Likewise, the Commission cannot use section 253 as a backdoor by which it can assert authority over electric utilities in the exempted states.

It is a basic rule of statutory interpretation that section 253 must be read in harmony with section 224.[76] Where the statutory provisions relate to the same subject matter they should be construed in harmony with each other, as far as reasonably possible, so as to give force and

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[70] 47 U.S.C. § 224(b)(1).
[71] 47 U.S.C. § 224(f).
[72] Such issues can be addressed at the local level by state statutory and other means regarding the provision of broadband. *See e.g. Tennessee v. Fed. Commc'n Comm'n*, 832 F.3d 597, 614 (6th Cir. 2016).
[73] NOI at ¶ 104.
[74] *Id.* at ¶ 103.
[75] *Id.* at ¶ 102.
[76] *See e.g.*, *Wachovia Bank, N.A. v. United States*, 455 F.3d 1261 (11th Cir. 2006) (In interpreting statutes, the courts "do not read words or strings of them in isolation. We read them in context. We try to make them and their near and far kin make sense together, have them singing on the same note, as harmoniously as possible."); *Alabama Power Co. v. U.S. E.P.A.*, 40 F.3d 450, 455 (D.C. Cir. 1994) ("Statutory text is to be interpreted to give consistent and harmonious effect to each of its provisions.").

effect to each.[77] The only logical way to do so is to conclude that section 253 does not give the Commission authority over pole attachments which are exempt under section 224.

CONCLUSION

WHEREFORE, EEI respectfully requests that the Commission consider these comments and ensure that any future Commission action ordered as a result of this proceeding is consistent with them.

Respectfully submitted,

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Dated: June 15, 2017

[77] *See e.g. POM Wonderful LLC v. Coca-Cola Co.*, 679 F. 3d 1170 (9th Cir. 2012); *Wade v. Bd. of Sch. Comm'rs of Mobile County*, 336 F. Supp. 519 (S.D. Ala. 1971); *Durand v. N.L.R.B.*, 296 F. Sup. 1049 (W.D. Ark. 1969).