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
	)	

JOINT COMMENTS OF CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC, DOMINION ENERGY VIRGINIA AND FLORIDA POWER & LIGHT COMPANY

Charles A. Zdebski
Brett Heather Freedson
Robert Gastner
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue, 12th Floor
Washington, D.C. 20006
(202) 659-6600 (telephone)
(202) 659-6699 (facsimile)

Counsel to CenterPoint Energy Houston Electric, LLC, Dominion Energy Virginia and Florida Power & Light Company

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EXECUTIVE SUMMARY

CenterPoint Energy Houston Electric, LLC ("CEHE"), Florida Power & Light Company ("FPL"), and Virginia Electric and Power Company d/b/a Dominion Energy Virginia (formerly, Dominion Virginia Power) ("Dominion Energy Virginia"), together, the Pole Owners Working for Equitable Regulation ("POWER") Coalition provide the following comments in response to the recently released Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. The POWER Coalition supports common-sense and reasonable revisions to the Commission's rules. However, the POWER Coalition objects to certain rule proposals that are unnecessary under present conditions, shift costs from communications service providers to electric ratepayers, or are flagrantly in violation of Section 224, or the current administration's Executive Order limiting the Commission's authority to promulgate new rules.

First, the Commission should not further reduce the time frames within which pole access requests must be processed. The proposed rule modifications almost certainly would not expedite access to poles, but at the same time, ***would*** seriously compromise the right of pole owners to assess the safety, reliability, engineering, and capacity implications of all pole access requests. The time and resources required to evaluate each individual pole attachment application are substantial. However, the Commission's rules do not provide any mechanism that enables pole owners to recover the enormous costs that would be associated with expedited pole access.

Moreover, the NPRM is premised on the falsehood that access to poles is delayed as the result of pole owner inaction. However, delays in the application review process are in most cases attributable to incorrect or incomplete pole attachment applications, and, from the point at which pole access is granted, the greatest impediment to construction is the attacher's failure to timely accept the pole owner's make-ready fee estimate, or remit the make-ready fees due for its approved attachment. Thus, the proposed rule modifications would do nothing to expedite access to poles.

Second, the Commission should adopt alternative pole attachment processes for routine projects on the portion of the pole commonly known as the Communication Space, and should accord similar rights and remedies to IOU pole owners where attachers fail to, or refuse to transfer their attachments within requested time frames.

Third, the POWER Coalition believes that Commission is not authorized under Section 224 to require that any pole owner expand the capacity of its plant beyond what is constructed to meet the needs of its core business. Under 47 U.S.C. § 224(f)(2), an electric utility maintains absolute discretion to deny an attachment to its pole where it determines that insufficient pole capacity exists, or where the proposed attachment would be unsafe, or compromise the reliability of the electrical facilities.

Fourth, the Commission should not require broad public disclosure of pole and conduit locations. A complete and accurate data collection would: (i) take years, and hundreds of millions to create; (ii) require costly annual updates at the sole expense of the pole owner; and (iii) be outdated, and of limited value to attachers, due both to natural events, and actions of unauthorized attachments that compromise the integrity of the data collection.

Fifth, the Commission should not further regulate rates for make-ready. Because actual charges for make-ready vary greatly based on a multitude of factors, requiring such a uniform schedule of charges on a nationwide scale or even a statewide scale is unworkable. The Commission also must not require reductions to make-ready fees below current levels, as such reductions would cause cross-subsidization, and would likely harm electric consumers. The Commission should not now attempt to wade into the area of how make-ready fees are calculated and whether they accurately reflect the cost of labor, material and overhead. The pricing for such private construction work is beyond the Commission's purview and expertise.

Sixth, the Commission should not further regulate the treatment of capital costs. There is no issue with respect to capital costs that requires the Commission's intervention. Electric utilities properly account for capital costs in accordance with the FCC's orders on the issue and there is no evidence to the contrary. The NPRM also asks whether there should be a regulation that specifically excludes capital costs that are not otherwise recoverable through make-ready fees from the upper-bound cable and telecommunications pole attachment rates. Again, there is no demonstrable need for such a regulation. Moreover, the exclusion of additional capital costs from pole access rates would likely serve as a hindrance to the further deployment of broadband and wireline telecommunications infrastructure.

Seventh, the Commission should not entitle ILEC joint users to the presumption of a regulated attachment rate. Placing the burden of proof on respondent pole owners would violate clearly established judicial precedent. Previously, the Commission properly placed the burden of proof on the ILEC challenging the rate to which it agreed, consistent with the customary and accepted proper approach under the law. The NPRM's proposed approach to the burden of proof issue now reverses fundamental principles firmly establish by courts — including the United States Supreme Court — that have examined this issue.

Eighth, ILECs should not be rewarded for failing to fulfill promises made prior to the Commission's 2011 Pole Attachment Order. The Commission in the 2011 Pole Attachment Order reversed 15 years of prior precedent when it determined that it would consider incumbent LEC complaints regarding the terms and conditions of joint use agreements. It did so largely in reliance on ILEC claims that reducing the joint use rates would result in savings to public utility consumers through lower prices for broadband Internet access service. However, since the release of the 2011 Pole Attachment Order, there is no record that ILECs have passed any savings onto the public or increased investment in broadband. In fact, the record is just the opposite.

Ninth, the Commission's proposed 180-day Complaint Shot Clock should be applied only where pole access is completely denied. The POWER Coalition does not oppose the 180-day time limitation recommended in the NPRM for "pole access complaints," defined as "complaint[s] that allege complete denial of access to a utility pole." However, whatever rules or policies may be adopted, the Commission must make clear that all other complaints (including, but not limited to complaints alleging unreasonable rates, terms or conditions, and including complaints alleging unreasonable construction standards) are subject to full process.

Finally, the NPRM proposes at least eight new regulations. It neither proposes regulations to eliminate nor calculates the cost of the proposed new regulations combined with the cost reduction of eliminating existing regulations (which it cannot do because it has not identified any existing regulations to eliminate). The NPRM is therefore unlawful because it fails to satisfy the mandates of Executive Order 13771 which requires such measures.

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CenterPoint Energy Houston Electric, LLC ("CEHE"), Florida Power & Light Company ("FPL"), and Virginia Electric and Power Company d/b/a Dominion Energy Virginia (formerly, Dominion Virginia Power) ("Dominion Energy Virginia"), together, the Pole Owners Working for Equitable Regulation ("POWER") Coalition, through their undersigned counsel, and pursuant to the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding,[1] respectfully submit these comments. The members of the POWER Coalition each are investor-owned electric distribution utilities ("IOUs"), and pole owners within their respective geographic service areas.

CenterPoint Energy Houston Electric, LLC ("CEHE"). CEHE is a wholly-owned subsidiary of CenterPoint Energy, Inc., a publicly traded company on the New York Stock Exchange under the ticker symbol ""CNP." CEHE provides electric transmission and distribution services in the Texas Gulf Coast area, which includes the city of Houston. CEHE maintains the wires, poles and electric infrastructure used to serve its 5,000-square-mile electric service territory, all of which are impacted directly or indirectly by the FCC's pole attachment rules and jurisdiction.

Florida Power & Light Company ("FPL"). FPL is a subsidiary of NextEra Energy, Inc., a Juno Beach, Florida-based publicly traded company on the New York Stock Exchange under the

[1] *In the Matter of Accelerating Broadband Deployment by Removing Barriers to Infrastructure Investment* (WC Docket No. 17-84), Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, FCC 17-37, WC Docket No. 17-84, 2017 WL 1426086 (Apr. 21, 2017)("NPRM").

ticker symbol NEE. FPL, now the third largest electric utility in the United States, serves approximately 4.9 million customer accounts, or an estimated 10 million people, across nearly half of the state of Florida. FPL also is a leading employer in its home state of Florida, with approximately 8,900 local employees. FPL owns a substantial number of utility poles, and other electric distribution facilities in the state of Florida, all of which are impacted directly or indirectly by the FCC's pole attachment rules and jurisdiction.

Virginia Electric and Power Company d/b/a Dominion Energy Virginia ("Dominion Energy Virginia"). Dominion Energy Virginia, formerly known as Dominion Virginia Power, is a wholly-owned subsidiary of Dominion Energy, Inc. ("Dominion Energy"), a publicly traded company on the New York Stock Exchange under the ticker symbol "D." Dominion Energy Virginia is an electric transmission and distribution company that serves customers in the Commonwealth of Virginia. Dominion Energy North Carolina, an affiliate of Dominion Energy Virginia, and a wholly-owned subsidiary of Dominion Energy, is an electric transmission and distribution company that serves customers in the state of North Carolina. The operating subsidiaries of Dominion Energy together serve over 2.6 million electric customers, using more the 57,600 miles of distribution lines, and own a substantial number of utility poles and other electric distribution facilities in the state of North Carolina and the Commonwealth of Virginia, all of which are impacted directly or indirectly by the FCC's pole attachment rules and jurisdiction.

I. INTRODUCTION

The need to amplify the Commission's current pole attachment rules is unclear. The mandates of the 2011 Order now have taken full effect, and communications service providers are granted timely access to poles, at rates that are the lowest possible under the Pole Attachment Act framework. Furthermore, the construction services that POWER Coalition members provide are billed at cost, and the rates are verifiable. Even where the pole attachment rules do not control a specific aspect of the attachment process, members of the POWER Coalition have endeavored to voluntarily assist attachers in planning their routes, submitting their applications, and in certain cases, even setting or replacing poles to make available space for new attachments. It is seldom in the case of the POWER Coalition members that any pole access dispute is escalated above field-level management personnel. The introduction of pole attachment rules that would further micro-manage the relationships between IOU pole owners and attachers most certainly would harm, and not help the current state of cooperation as it relates to broadband deployment.

Now six years after the 2011 Order, out of only approximately a half-dozen complaints filed total, it is interesting to note that only two complaints remain before the Enforcement Bureau – neither of which relate to pole access, and neither of which relate to the regulated rates that IOUs charge to the entities which Congress intended to reap the benefits of Section 224. Rather, both complaints were filed by Fortune 500 companies, claiming to be the victims of coercion in decades old voluntary joint use relationships that provided unfettered access to hundreds of thousands of poles. The Commission opened this "Pandora's box" in 2011, perhaps believing that reduced pole attachment rates would support the incumbent LECs' business case for expanding broadband. Instead, these companies have systematically divested their existing plant, or in some cases, simply allowed it to fall into disrepair. Certainly, on this record, the Commission cannot continue down the path of granting incumbent LECs even further Section 224 protections.

The Commission's proposed new rules, and rule amendments also are problematic to the extent that they shift costs from communication service providers to utilities, and ultimately, to the electric ratepayers that support them. Indeed, *all* of the NPRM proposals would impose some cost on an IOU pole owner that could not be recovered through either make-ready fees, or annual pole attachment fees. For example, the resources that the pole owner would be required to invest in (i) expedited processing of attachment applications; (ii) administering a single make-ready contractor; (iii) maintaining a real-time collection of pole data; and (iv) maintaining a schedule of make-ready fees are not recoverable under any mechanism that the Commission currently allows, or proposed in this proceeding.

Finally, the proposed new rules, and rule amendments are unlawful. First, certain of the Commission's proposals clearly overstep the bounds of its jurisdiction under Section 224. In particular, any requirement that an IOU pole owner proactively make space available on its poles for the sole benefit of an attacher would squarely contradict the statute itself, and well-settled judicial precedent. Second, the eight or more proposed new regulations that would impose additional costs on IOUs, without eliminating any existing regulations in contravention of both Executive Order 13771 and the policies of this administration to reduce regulations.

The members of the POWER Coalition do not oppose reasonable pole attachment rules that properly account for the safety, reliability, engineering and capacity that Section 224 requires. However, nothing in the statute permits the Commission to micro-manage the operations of electric utilities for the sole benefit of communications service providers — even under the auspices of its broadband service objectives.

II. THE COMMISSION SHOULD NOT FURTHER REDUCE THE TIME FRAMES WITHIN WHICH POLE ACCESS REQUESTS MUST BE PROCESSED.

In its 2011 Pole Attachment Order, the Commission prescribed firm deadlines for specific phases of the pole access process. For pre-construction phases, the current rules require that pole owners fully review, and approve or reject most pole access requests within 45 days of the date on which an application is submitted, and then provide to the attacher an estimate of make-ready fees no more than 14 days after pole access is granted; and that the attacher accept the estimate of make-ready fees no more than 14 days after the date on which such estimate is delivered.[2] The individual members of the POWER Coalition, each with modifications to its internal processes, fulfilled the Commission's 2011 mandates, and continue to provide timely pole access in close to 100% of all cases. In fact, these companies report ***zero*** complaints over the now six years in which firm time frames for pole access have been in place. However, despite this record of successful coordination between pole owners and attachers, the Commission now proposes to reduce the time allocated for pre-construction phases of the pole access process by more than half — to an overall time period of no more than 28 days.[3] The proposed rule modifications almost certainly would not expedite access to poles, but at the same time, ***would*** seriously compromise the right of pole owners to assess the safety, reliability, engineering, and capacity implications of all pole access requests.

A. The Proposed Rule Modifications Could Not be Implemented Without Substantial Cost to Electric Utilities and Their Ratepayers.

The time and resources required to evaluate each individual pole attachment application are substantial. For members of the POWER Coalition, each pole attachment not only must be designed and engineered precisely for the pole on which it will be installed, but also must strictly conform to company-specific construction standards that are intended to mitigate unique safety and reliability concerns characteristic of their respective service territories. For example, in the case of FPL, each attachment must meet the commitments made in its Florida PSC-approved storm hardening plan.[4] To that end, FPL's application review process mandates for each proposed installation an analysis under the NESC's standards for extreme wind loading.[5] Consistent with the Florida Code, FPL's

2 47 CFR § 1.1420.

3 NPRM, ¶¶ 7-10.

4 Florida Power & Light Company, Electric Infrastructure Storm Hardening Plan (March 15, 2016), available at https://www.floridapsc.com/library/filings/16/01382-16/01382-16.pdf.

5 Fla. Admin. Code r. 25-6.0342(3)(b)]

storm hardening plan also requires design specifications demonstrated to mitigate storm-related damages resulting from floods or storm surge.[6] To ascertain that each element of its storm hardening plan is properly executed, FPL requires that *all* such pre-construction evaluation is performed by dedicated FPL professionals, or FPL's own contractors.

CEHE and Dominion Energy Virginia each use on-site inspection as the most common process to review the majority of pole attachment applications. This process requires an in-person visit to each pole indicated on the application, an evaluation of the pole's physical condition, and an assessment of existing clearances on the pole. At a minimum, the pole owner's project engineer must measure the clearances (i) between the ground and the lowest communications line; (ii) between the highest communications line and the lowest power line; and (iii) between existing attachments on the pole. Where local conditions demand (such as portions of CEHE's service area on the Texas Gulf Coast), a pole loading analysis is performed in addition to an on-site inspection, as needed to determine if exceptional safety, reliability and engineering factors exist relative to the pole requested. Similar to FPL, CEHE and Dominion Energy Virginia each mandate that all critical elements of the pre-construction evaluation process requiring company-specific expertise be performed only by their respective professionals.

The members of the POWER Coalition each maximize all of their available labor resources to meet the pole access time frames ordered in 2011. However, these resources are now fully utilized, and cannot be further stretched to meet shorter deadlines without compromise to critical attachment evaluation processes, or the manner in which such processes are executed. Moreover, the POWER Coalition anticipates ***more*** pole attachment requests in the years ahead – not less. FPL reports that the number of poles permitted in its service area tripled over the past three years,

[6] Fla. Admin. Code r. 25-6.0342(3)(c).

from 1860 in 2014, to 3852, in 2016. Similarly, Dominion Energy Virginia reports that the number of permits in its service area increased almost 50% from 1397 in 2012 to 2071 in 2016. Therefore, in consideration of the complexities associated with each individual pole access request, the POWER Coalition members foresee no reasonable option other than to expand their respective labor forces, at their own cost, and ultimately at the expense of their ratepayers, if current pole access deadlines are reduced.

The Commission's rules do not provide any mechanism that enables pole owners to recover the enormous costs associated with expedited pole access. Utilities are still subject to rate-of-return regulation by state authorities, and, as a result, any additional costs shifted from attachers to pole owning utilities must be passed on to ratepayers in the form of a higher rate. Although pole owners are entitled to recover the costs associated with specific make-ready work through one-time fees, the cost of an expanded labor force dedicated to processing pole access requests could not be similarly allocated. Moreover, even if cost recovery were possible, qualified labor is limited within certain markets, and sufficient resources could not be guaranteed to manage periodic surges in pole access requests.

B. The Proposed Rule Modifications Will Not Expedite Access to Poles.

The NPRM is premised on the falsehood that access to poles is delayed as the result of pole owner inaction. However, as stated above, the members of the POWER Coalition report that close to 100% of all pole attachment applications are processed within the time frame required under the Commission's current rules. The members of the POWER Coalition also report that estimates of make-ready fees associated with electrical equipment generally are provided at the time that access to the pole is approved, but in no event later than fourteen (14) days after that date. In fact, if pole access is untimely at all, it is attributable entirely to circumstances beyond the control of the pole owner.

The members of the POWER Coalition report that delays in the application review process are in most cases attributable to incorrect or incomplete pole attachment applications. For the 2016 calendar year, CEHE reports that 22% of all applications contained errors that impacted its initial application review process; and for the 2017 calendar year, that metric increased to 33%. The most common errors that CEHE observed included critical data omitted, incorrect or inconsistent data and maps, and incorrect designations of pole ownership. The current rules permit the pole owner to reject an application even prior to the application review phase if it is incorrect or incomplete.[7] However, it the practice of CEHE, as well as Dominion Energy Virginia, to instead correct the application, and to advise the attacher on the proper completion of the application for future reference. This voluntary action saves the attacher the time and expense of re-submitting its application, but, at the same time, delays the pole owner's attention to subsequent applications.

From the point at which pole access is granted, the greatest impediment to construction is the attacher's failure to timely accept the pole owner's make-ready fee estimate, or remit the make-ready fees due for its approved attachment. Consistent with the FCC's current rule,[8] the members of the POWER Coalition require full payment for all make-ready work before any work order will be released. Dominion Energy Virginia reports that attachers require an average of 26 days before make-ready fees are paid. FPL reports that most accepted make-ready fee estimates remain unpaid even after 45 days. Although the current rule permits any make-ready fee estimate to be withdrawn after the 14 day time frame required for the attacher's acceptance,[9] the POWER Coalition members

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[7] 47 CFR § 1.1403(b).
[8] 47 CFR § 1.1420 (d).
[9] 47 CFR § 1.1420 (d)(1).

generally will honor make-ready estimates for longer periods, to spare an attacher the time and expense of re-submitting its application.

The actions (or inactions) of existing attachers on the requested pole also may frustrate the application review process. For example, a pole that an attacher expects to be available based on current records may in fact be unavailable upon inspection, due to an unauthorized attachment, or some other condition not reported to the pole owner. Similarly, in cases where an existing attacher failed to remediate its violation upon the pole owner's request, the hazard present on the pole may preclude new installations. As further discussed in Section III, the POWER Coalition also attributes to the actions (and inactions) of existing attachers delays in the make-ready process itself.

C. Pole Owners Must Have Discretion to Place Reasonable Limitations on the Scope of All Attachment Applications.

Under the current rule, time may be added to the pole access evaluation phase, and to the make-ready phase for "large" attachment orders, defined as orders for the lesser of over 3,000 poles, or .5 percent of the pole owner's poles in the state.[10] This definition of "large" orders, decided in the 2011 Pole Attachment Order, has proven arbitrary in practice, and far exceeds the number of individual attachment requests that most pole owners can process within the Commission-ordered time frames now in place. In contrast, Dominion Energy Virginia reports, based on internal analysis,[11] that no more than 40 fiber attachments, and no more than one wireless attachment could be assured processing within the pole access time frames established in 2011. If multiple applications are submitted at the same time, by the same attacher, Dominion Energy

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[10] 47 CFR § 1.1420 (g).

[11] Following the 2011 Pole Attachment Order, Dominion Energy Virginia studied the average time required to process an attachment request, travel to the site of the requested pole, take all field notes, design the attachment, and prepare an estimate of make-ready fees, taking into account attacher requested deadlines, and current work load. Based on its analysis, Dominion Energy Virginia determined that optimum results could be reached if fiber attachment applications were limited to 40 poles, and wireless attachment requests limited to 1 pole.

Virginia will work with the attacher to develop priorities, and in all cases, has managed such requests to the attacher's satisfaction. The case of Dominion Energy Virginia presents an important example of how large attachment requests can be accommodated without Commission regulation and oversight.

III. THE COMMISSION SHOULD ADOPT ALTERNATIVE POLE ATTACHMENT PROCESSES FOR ROUTINE PROJECTS.

The framework for pole attachment make-ready prescribed in the 2011 Attachment Order is flawed. On one hand, the current rule requires, both explicitly and implicitly, that the pole owner coordinate and police make-ready transactions between attachers on its pole. The members of the POWER Coalition, like all other IOUs, have no direct stake in pole attachment construction within the portion of the pole designated as the Communications Space. If the final attachment meets the specifications approved in the attachment application, the pole owner is not harmed, and does not benefit from the make-ready process itself. Because the members of the POWER Coalition do not generally maintain equipment in the Communications Space, and do not provide communications services, these companies are not regular participants in what currently is understood to constitute the make-ready process.

On the other hand, the current rule fails to eliminate the most blatant disincentive for nearly all communications attachers to cooperate with make-ready requests: it is not rational for any one of the communications attachers on a pole to invest time and resources into making space available for its competitor. It is for this reason that new attachments so often are stalled in the construction phase, and it is for this reason that communications carriers seem to be the only opponents of "one touch" make-ready, and similar proposals that certainly would expedite routine make-ready in the Communications Space. The Commission can, and should in this docket, adopt an alternate make-ready framework that accounts for the realities of the communications marketplace.

A. The Commission Should Adopt Modified Rules for Make-Ready Work in the Communications Space.

The members of the POWER Coalition, and IOUs generally, support the principle that all jurisdictional communications attachers should have both the right, and the duty to coordinate and control the make-ready process for new attachments. However, this right must be limited to ensure that workers on the pole are not exposed to, and do not create unsafe conditions, or act in a manner that threatens the reliability of electric infrastructure. To that end, the Commission must prescribe a clear definition of "make-ready" that covers only transferring, rearranging, modifying, replacing, and removing existing cables for the purpose of making space available for a new attachment; and that expressly excludes: (i) all work above the Communications Space; (ii) all work that requires an outage, or interruption of electrical service;[12] and (iii) all work associated with any wireless, or RF-emitting attachment, wherever installed. Because the latter make-ready work requires special expertise, such work must be performed by the pole owner, the pole owner's approved contractor for electrical work, or in the case of (iii), the owner of the RF-emitting device.[13]

For any approved attachment, the members of the POWER Coalition support the Commission retaining the current rule contained in 47 C.F.R. § 1.1420(e), with certain notable exceptions that enable alternate make-ready processes. First, the notice now required of the pole owner under subsection (e)(1) should instead be required of the new attacher. In most cases, make-ready work in the Communications Space involves direct transactions between the new attacher, and various communications entities already present on the pole. Therefore, the new attacher is in the better position to manage the work of existing attachers, to impose reasonable deadlines, and

[12] NPRM, ¶ 14 (defining Complex Make Ready).

[13] CEHE maintains in the Communications Space RF-emitting wireless devices that support its automated metering functionalities.

to negotiate compensation for the work performed. Moreover, because the new attacher – and not the pole owner – has a direct interest in timely performance, it is the new attacher – not the pole owner – that should complete make-ready that is past due.[14]

To expedite the make-ready process, the modified rule should accord the new attacher sole discretion to set reasonable time frames for individual make-ready projects, consistent with its own business plans, and construction schedule. Upon receiving written notice of such time frames, the affected party must be provided the option to (i) perform the requested work within the time frame indicated; *or* (ii) authorize the work to be performed by the new attacher's contractor. In the event that an existing attacher fails to respond to such notice, or fails to timely complete make-ready, the new attacher's remedy shall be to complete all work disclosed in its written notice on behalf of the existing attacher, and at the existing attacher's expense. In all cases, the Commission's rules must permit attachers to observe make-ready performed on their facilities, and to inspect all completed work.[15]

The rule modifications supported by the POWER Coalition must not impact any attacher's current duty to construct and maintain each of its attachments in accordance with applicable laws, regulations, codes, and company-specific construction standards. Moreover, the pole owner must, at all times, have the right to inspect attachments on its poles, and to mandate full remediation of any violation, defect, or incorrect or substandard construction, at sole cost of the attacher. If such conditions are discovered by an attacher through an inspection of make-ready that another attacher performed, it is reasonable that the existing attacher require remediation by the new attacher, and as appropriate, demand compensation for whatever damages are sustained. However, in no event

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[14] *See* 47 CFR § 1.1420(e)(1)(v). The members of the POWER Coalition generally do not opt to complete make-ready under the current rule.

[15] *See* 47 C.F.R. 1.1422(c), as proposed in NPRM.

should an attacher be entitled to assert another attacher's actions as a defense to non-compliance. To that end, the pole owner must have broad discretion to include in its pole attachment agreements penalties for non-compliance, including monetary fines, and in the case of repeated violations, the right to suspend processing of new applications until all existing violations are remediated.

The members of the POWER Coalition do not, under any circumstances, recommend, pre-approve, authorize, or select specific contractors for work in the Communications Space. It is both the right, and the duty of an attacher to determine the contractor that is best qualified to perform work in the Communications Space. Among other criteria, communications companies often base their selection of contractors on union affiliation. Where the pole owner is an IOU, in particular, it would be impossible to mandate the selection of "authorized" contractors for make-ready in the Communications Space, or to coordinate a single contractor for all attachers.[16] Moreover, because pole owners generally are unable to dictate the contractors hired for make-ready in the Communications Space, it is important that the Commission does not interfere with the rights of pole owners to require reasonable indemnification, consistent with state law.

B. The Commission Must Accord All Pole Owners the Analogous Right to Complete Transfers of Communications Attachments.

Under the current rule, the pole owner maintains an absolute right to require transfers of all communications attachments upon sixty (60) days' notice to the affected parties.[17] The members of the POWER Coalition each must exercise this right to execute mission critical work on their electric facilities. For example, poles are replaced or relocated regularly to remediate damage and ordinary wear and tear, to create space for new attachments, and to accommodate transportation projects at both the state and local levels. If all existing attachments are not transferred from the existing pole

[16] Dominion Energy Virginia in the past attempted, without success, to coordinate a single contractor for make-ready in the Communications Space.

[17] 47 C.F.R. § 1.1403(c)(3).

to the new pole in a timely manner, the existing pole must be maintained, at the pole owner's sole expense, even after the new pole is set and placed into use. The "double pole" situation that results has serious repercussions for the pole owner, and ultimately could impede the development of new pole infrastructure.

FPL approximates that 75,000 double poles currently exist in its service area, as the result of pole transfers that attachers failed to execute. In fact, some transfer requests have been pending for over ten years. CEHE and Dominion Energy Virginia each report similar problems of double poles. As pole owners, the members of the POWER coalition are presented with the difficult choice of investing resources in plant that is no longer in use, or allowing that plant to fall into disrepair. The latter choice, of course, creates safety hazards, and exposes pole owners to unacceptable risks and liabilities.[18] FPL also reports that local jurisdictions have become increasingly intolerant of the aesthetic impact of double poles, and have responded by withholding permits for the construction of new poles, or in some cases, even placing limitations on further infrastructure development. Against this backdrop, if the double pole issue is not soon remedied, broadband deployment certainly will stall.

The members of the POWER Coalition note that the same disincentives that exist for make-ready work exist for transfers as well. In the vast number of cases, the construction of new poles benefits new attachers; and the influx of new attachers means the introduction of new options for service. Therefore, pole owners, like new attachers, must have available similar remedies for those attachers that refuse to participate in the transfer process. First, in cases where an attacher fails to respond within sixty (60) days to its transfer request, the pole owner must be permitted to transfer

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[18] *See Petition of Communications Workers of America requesting the Commission to open an Investigation of the safety, adequacy, and reasonableness of service provided by Verizon Pennsylvania LLC*, PA PUC Docket No. P-2016-2537078 (October 21, 2015), available at http://www.puc.state.pa.us//pcdocs/1388794.pdf.

an existing attachment using its own contractor, at the attacher's expense, and without liability to the attacher. Second, pole owners must be permitted to include in their pole attachment agreements reasonable incentives to execute transfers in a timely manner, including monetary penalties, and a right to suspend applications for new attachments pending compliance.

IV. THE COMMISSION LACKS JURISDICTION TO REQUIRE LARGER POLES, RESERVATIONS OF POLE SPACE, OR ATTACHMENT TECHNIQUES THAT EXPAND POLE CAPACITY FOR THE SOLE BENEFIT OF ATTACHERS.

The Commission is not authorized under Section 224 to require that any pole owner, in any manner whatsoever, expand the capacity of its plant beyond what is constructed to meet the needs of its core business. Under 47 U.S.C. § 224(f)(2), an electric utility maintains the right to deny an attachment to its pole where it determines that insufficient pole capacity exists, or where the proposed attachment would be unsafe, or compromise the reliability of the electrical facilities.[19] In examining this statute, courts have uniformly rejected proposals by the Commission that would require electric utilities to create pole space for the exclusive benefit of communications attachers. In particular, the United States Court of Appeals for the 11th Circuit in *Southern Co.* held that any action by the Commission that would "mandate capacity expansion is outside of the purview of its authority under the plain language of the statute." *See S. Co. v. F.C.C.*, 293 F.3d 1338, 1347 (11th Cir. 2002). The Court reasoned that "it is hard to see how this provision [*i.e.* 47 U.S.C. § 224(f)(2)] could have any independent meaning if utilities were required to expand capacity at the request of third parties." *Id*. Consistent with the well-established principles in *Southern Co.*, the Commission rightly refrained in the past from requiring that electric utilities replace poles, or implement novel

[19] "Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C. § 224(f)(2).

space-saving practices for the sole benefit of communications attachers.[20] The Commission should not suddenly alter its course here.

The Commission's proposal to encourage electric utilities to "proactively" make available pole space for future attachments violates the Act, judicial precedent, and the current policies of the Commission.[21] In particular, certain of the NPRM's rule recommendations, including reservations of space on new poles, and replacements of existing poles,[22] would have the effect of requiring that electric utilities expand their capacity through the construction of additional, or larger facilities that would not be needed "but for" future communications attachments. Moreover, it would be patently unfair to mandate that electric utilities reserve space for the attachments of third parties, and at the same time, to prohibit similar reservations of space for electrical facilities.[23] At bottom, Section 224 certainly cannot be construed to require that ratepayer-funded electric distribution infrastructure be custom-built to meet the tentative needs of communications providers, ultimately to the detriment of the electric utilities that constructed it.

Importantly, however, further Commission regulation is not needed to ensure that electric utilities cooperate with the communications industry to construct new pole space, where feasible, and to the extent consistent with applicable safety, reliability, and engineering considerations. For example, each member of the POWER Coalition reports that it will, in many scenarios, voluntarily

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[20] *In the Matter of Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, FCC 11-50, 26 FCC Rcd. 5240, 5282, ¶ 95 (April 7, 2011) (2011 Pole Attachment Order); *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, ¶¶ 8-16 (2010) (2010 Pole Attachment Order).

[21] NPRM, ¶ 11.

[22] The NPRM appears to propose, by reference to the white paper titled "Technical Strategies for Facilitating Public or Private Broadband Construction in Your Community" that electric utilities should be required to replace poles, as may be needed to accommodate additional communications attachments.

[23] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC 96-325, 11 FCC Rcd 15499, ¶¶ 1168-69 (1996). Importantly, even in situations where a *bona fide* use arises, communications attachers generally refuse to, or delay relocating equipment from reserved space. As a practical matter, therefore, electric utilities rarely are able to reclaim excess capacity constructed to accommodate their own facilities.

replace its existing pole at an attacher's request, provided that the attacher covers the full cost of the new pole. In the case of Dominion Energy Virginia, it is also current practice to provide notice to all existing attachers that a pole will be replaced with a taller pole, and to offer such attachers additional space on the new pole. Thus, the Commission should not proceed to adopt its NPRM proposals, but instead, should promote the voluntary infrastructure partnerships that have developed over time.

V. THE COMMISSION SHOULD NOT REQUIRE BROAD PUBLIC DISCLOSURE OF POLE AND CONDUIT LOCATIONS.

In the 2011 Pole Attachment Order, the Commission wisely rejected its proposal to require that pole owners make publicly available information about the locations and availability of poles, conduit, and rights-of-way.[24] Based on an extensive record, the Commission ultimately determined that the burdens associated with such a data collection would outweigh the potential benefits.[25] In particular, the Commission acknowledged that a complete and accurate data collection would: (i) take years, and hundreds of millions to create; (ii) require costly annual updates at the sole expense of the pole owner; and (iii) be outdated, and of limited value to attachers, due both to natural events, and actions of unauthorized attachments that compromise the integrity of the data collection. Furthermore, the Commission appreciated pole owners' legitimate concerns about making critical infrastructure and proprietary information available to the public. For the same reasons, the Commission must again reject its proposal to require publicly available pole data collections.[26]

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[24] 2011 Pole Attachment Order, ¶ 89.
[25] *Id*.
[26] NPRM ¶ 27.

VI. THE COMMISSION SHOULD NOT FURTHER REGULATE RATES FOR MAKE-READY

In the NPRM, the Commission proposes additional regulations for pole owners to adhere to regarding make ready costs and fees. Primarily, the Commission proposes that it: (1) require utilities to establish and publish a schedule of common make-ready charges; and (2) limit make-ready fees charged by utilities to new attachers, allowing utilities to set a standard charge per pole and requiring them to publish schedules of common make ready charges.[27]

Neither additional set of regulations is warranted at this time. In the early days of the implementation of the 1996 Telecommunications Act and the FCC's regulations implementing the Act's pole attachment regime, there were indeed major disputes over make-ready processes and costs.[28] This is no longer the case and the public record is devoid of make-ready disputes between pole owners and attachers. Additional specific reasons militate against each of the Commission's two general proposals regarding make-ready rates.

A. Pole Owners Should not be Required to Make Available Schedules of Common Make-Ready Charges.

The Commission proposes that it require utilities to establish and publish a schedule of common make-ready charges so that new attachers can benefit from greater transparency in the process. The Commission, however, has already considered and rejected such proposals in the past. In its 2011 Order, the Commission found as follows:

> 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

[27] NPRM, ¶¶ 30-36.

[28] *See, e.g., Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, File No. PA 01-006, FCC 03-292, 18 F.C.C. Rcd. 24615 (2003); *In re Cavalier Tel., LLC*, Order, File No. PA-99-005, DA 02-3319, 17 F.C.C. Rcd. 24414 (2002).

> not outweigh the burdens it would impose on utilities, and we decline to adopt it at this time.[29]

Except for a request by INCOMPAS,[30] the NPRM does not cite to any development or change since 2011 which would now make the imposition of a fixed schedule for make ready costs appropriate. Indeed, nothing has changed. Actual charges for make ready still vary greatly based on a multitude of factors. The changes in geography and environment alone in a large state such as California, Texas, Florida or Virginia can result in an enormous variation in make ready charges due to the relative difficulties inherent in the geology of particular localities.[31] Indeed, even experts for an ILEC such as Verizon explain that pole attachment related costs in one area have nothing to do with such costs in another area, due to variables as mundane as "the soil."[32] For example, setting a pole in sand is not the same a setting the same pole in a mountainous area. Setting a pole in a rural area is not the same as setting the same pole in an urban environment.

Other variations include the costs related to the type of the installation proposed, the number of existing attachments on a pole, and the relative scarcity of competent labor. Imposing such a uniform schedule of charges requirement on a nationwide scale or even a statewide scale was unworkable in 2011, and it is unworkable now. Deciding otherwise with no substantial basis for a reversal of the FCC's position would be arbitrary and capricious.

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29 2011 Pole Attachment Order, ¶ 86.

30 NPRM, ¶ 30 n.46. The INCOMPAS letter, in fact, states nothing more on the make-ready cost issue than the sentence quoted in paragraph 30 of the NPRM. In addition, the letter provides no support for its assertion.

31 The NPRM suggests that some utilities already make information regarding common make ready charges on request. NPRM, ¶ 34. It is true that this may be feasible for particular companies providing service in a circumscribed service area with a relatively homogenous topography and climate. However, requiring that such information be produced on a nationwide level by utilities with far-ranging service territory would be unwieldy, unworkable and unreasonable.

32 Deposition of Timothy J. Tardiff, Transcript 147:1-10 (March 10, 2017), attached hereto as Exhibit A ("Tardiff Transcript").

Surely the Commission does not seek to tip the scales so that on one side a huge regulatory and data management burden is placed on pole owners simply to balance, on the other side, an unsupported desire from INCOMPAS for more predictability.[33] The FCC should therefore continue the policy and restraint reflected in its 2011 Order and refrain from imposing any standard change for make ready or requiring the publication of set schedule of common make ready charges.

B. The Commission Should not Take Extraordinary Measures in an Effort to Reduce Make-Ready Charges.

The second proposal in the NPRM regarding make-ready charges is to find a way to limit make-ready charges, either by mandating that they be assessed only at actual cost or set at a per-pole charge.[34] The Commission cannot and should not institute any such measures.

"Make-ready" is the construction work that must be done to an existing pole to "make it ready" for additional attachments.[35] For electric utilities subject to rate regulation by their state regulatory commission, make-ready is a form of private work for a customer that is subject to rate regulation. Electric utilities charge the fully allocated cost for make-ready, including labor, material and overhead; no more, no less. Payments for make-ready are generally considered contributions in aid of construction ("CIAC") for state rate-making purposes. Electric utilities are incentivized and supervised in charging a fair and reasonable rate for make-ready, and not to over-recover or under-recover. If they do over-recover or under-recover, those amounts will likely affect the electric rates to consumers allowed by the state regulator. The electric utility itself will receive no real benefit either way.

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[33] One jurisdiction that requires each pole owner to post a schedule of standard make ready charges on its website is New York. This approach is at least manageable for an electric utility in New York such as Consolidated Edison Company of New York, which has two largely homogenous segments of its service territory – New York City and Westchester County.

[34] NPRM, ¶¶ 32-33.

[35] "Make-ready" does not include pole replacement for any purpose.

In other words, for make-ready charges, "it is what it is," as the saying goes. The Commission cannot act to limit make-ready fees because electric utilities already must and do charge the fully allocated costs for make-ready. Reducing the amount electric utilities can charge for make-ready would likely harm electric consumers.

Similarly, setting a flat fee for make-ready on a per pole basis would also be unworkable. The flat fee likely will not equal the actual fully allocated cost for the make-ready and will cause the pole owner to over-recover or under-recover, either of which is an unacceptable result.

Indeed, the Commission has never suggested that it has jurisdiction to determine the appropriate calculation or amount for the fully allocated costs of make-ready charges. Dictating such charges is arguably beyond the Commission's jurisdiction. Instead, the Commission has held that it has the authority to determine what types of make-ready fees are assessed, whether they are properly assessed on a party and how they should be allocated among parties. In the Commission's words: "Utilities are entitled to recover their costs from attachers for reasonable make-ready work necessitated by requests for attachment. Utilities are not entitled to collect money from attachers for unnecessary, duplicative, or defective make-ready work."[36]

The Commission should not now attempt to wade into the area of how make-ready fees are calculated and whether they accurately reflect the cost of labor, material and overhead. The pricing for such private construction work is beyond the Commission's purview and expertise. To be sure, the current industry system for calculating and charging for make-ready is not broken and it does not need to be "fixed." Rather, "fixing" it by attempting to regulate the specific amounts of make-ready costs is what will actually break the system.

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[36] *Knology, Inc.*, 18 F.C.C. Rcd. at 24625.

VII. THE COMMISSION SHOULD NOT FURTHER REGULATE THE ACCOUNTING FOR CAPITAL COSTS BY POLE OWNERS

The NPRM seeks comment on whether the Commission should further regulate the treatment of capital costs in several ways. It should not.

A. Capital Costs Recovered Through Make-Ready Fees

The NPRM notes that is has been 40 years since the promulgation of the rule excluding capital costs for make-ready that are covered by make-ready fees from also being recovered via attachment rental fees.[37] It also notes that in the 2011 Pole Attachment Order the Commission defined "costs" for telecommunications rate purposes to exclude certain capital costs, unlike the formula for cable attachment fees which includes "actual capital costs." In defining the current perceived problem, the NPRM states only that "it appears that not all attachers benefit from lower rates in these circumstances . . . ."[38]

Unlike joint use fees, however, where the NPRM notes that there have been several disputes over the appropriate rate, the NPRM does not cite or discuss any instances of disputes, whether since 40 years ago or 6 years ago, between parties regarding the proper accounting treatment of capital costs. There simply is no problem here, much less one which needs to be solved by additional layers of unjustified regulation. Electric utilities properly account for capital costs in accordance with the FCC's orders on the issue and there is no evidence to the contrary.

The reason that electric utilities properly account for make-ready fees they receive is that they are required to do so by existing applicable law. Specifically, federal regulations provide the accounting requirements for contributions made by others (including attaching entities) towards the cost of construction of electric facilities:

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37 NPRM, ¶ 35.
38 NPRM, ¶ 35.

> The electric plant accounts shall not include the cost or other value of electric plant contributed to the company. Contributions in the form of money or its equivalent toward the construction of electric plant shall be credited to accounts charged with the cost of such construction. Plant constructed from contributions of cash or its equivalent shall be shown as a reduction to gross plant constructed when assembling cost data in work orders for posting to plant ledgers of accounts. The accumulated gross costs of plant accumulated in the work order shall be recorded as a debit in the plant ledger of accounts along with the related amount of contributions concurrently recorded as a credit.[39]

As a result, all contributions made by attachers for electric utility construction (e.g., make-ready work, pole replacement costs, etc.) are required to be recorded, such that they offset or reduce the cost of construction, resulting in a lower plant account balance (*e.g.*, for poles, Account 364) than what otherwise would have existed without a contribution. For example, if make-ready and/or pole replacement construction resulted in the addition of $1,000 of capital value to Account 364 and the electric utility received $1,000 from an attacher to reimburse that construction cost, the net impact of this work on Account 364 would be $0. When the pole owner thereafter calculates attachment rates, no attacher will experience an increase in its rate as a result of this work.

As a corollary to this issue, the NPRM asked how do existing attachers know when the utility has collected the full amounts owed for make-ready costs from new attachers so that those expenses are wholly excluded from rates going forward. The example of one POWER Coalition member, FPL, provides a typical situation to show that make-ready costs are fully recovered and excluded from pole attachment rates. With FPL, make-ready costs are charged and collected in advance of performing any make-ready work, so whether the make-ready costs have been fully recovered is never an issue. Then, as explained above regarding FERC Account 364, the recovered

39 18 CFR Pt. 101, Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act, Electric Plant Instructions, ¶ 2 (D).

make ready fees are credited to the account, thus ensuring that existing attachers are not unfairly paying capital costs caused by others.

B. Capital Costs Not Recovered Through Make-Ready Fees.

The NPRM also asks whether there should be a regulation that specifically excludes capital costs that are not otherwise recoverable through make-ready fees from the upper-bound cable and telecommunications pole attachment rates.[40] Again, there is no documented need for such a regulation.

In addition, a regulation codifying such an exclusion would be an unwarranted deviation from past Commission precedent. In its 2011 Pole Attachment Order, the Commission expressly stated that:

> …we find it appropriate to allow the pole owner to charge a monthly pole rental rate that reflects some contribution to capital costs, aside from those recovered through makeready fees. As noted above, for example, regulated pole attachment rates historically have included such a contribution, and we are concerned that adopting a telecom rate that no longer permits utilities to recover such capital costs would unduly burden their ratepayers. We are also mindful of the possible adverse impact of other pole attachment reforms. For one, our regulation of rates for attachments by incumbent LECs could reduce the amount of costs that utilities are able to recover from other sources. Moreover, in conjunction with the pole access reforms adopted above, we are mindful of Congress' expectation that the priority afforded an attacher's access to poles would relate to its sharing in the costs of that infrastructure.[41]

The concerns that the Commission identified in 2011 are just as valid today in 2017. The exclusion of capital costs not otherwise recovered through make-ready fees from pole attachment rates would still frustrate Congress' expectation that an attacher's right to access poles be predicated on it sharing in the costs of pole infrastructure, and such an exclusion would still unduly burden utility ratepayers. The NPRM cites no filing, case or other record support for a change

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[40] NPRM, ¶ 40.
[41] 2011 Pole Attachment Order, ¶ 149.

from its previously articulated policy, and doing so without such support would be arbitrary and capricious.

Moreover, electric utilities in 2017, just as they were in 2011, are still subject to rate-of-return regulation by state authorities. As a result, any additional costs shifted from attachers to pole owning utilities necessarily "would unduly burden their ratepayers" in the form of higher electric rates. Attaching entities do not normally face such regulatory restrictions and are free to utilize cost savings from lower attachment rates as they see fit. They may use the cost savings to improve their infrastructure, they may pass the cost savings on to consumers in the form of lower rates, or they may simply pass the costs savings on to their shareholders in the form of higher profits or dividends. The Commission's stated goal in pursuing the reforms in its NPRM is to foster the deployment of broadband. Nothing about shifting certain capital costs from attachers to electric ratepayers is proximately related to the Commission's goal.

In addition, the exclusion of additional capital costs from pole access rates would likely serve as a hindrance to the further deployment of broadband and wireline telecommunications infrastructure. It is logical and appropriate to conclude "that the priority afforded an attacher's access to poles would relate to its sharing in the costs of that infrastructure." Moreover, elsewhere in the NPRM the Commission seeks suggestions on how to "encourage utilities to proactively make room for future attachers."[42] Excluding unrecovered capital costs for attachment fees will not encourage proactive infrastructure sharing.

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[42] NPRM, ¶ 11.

VIII. THE COMMISSION SHOULD NOT ENTITLE ILEC JOINT USERS TO THE PRESUMPTION OF A REGULATED ATTACHMENT RATE.

The NPRM proposes that the "just and reasonable rate" under Section 224(b) for incumbent LEC attachers should presumptively be the same rate paid by other telecommunications attachers; *i.e.*, a rate calculated using the most recent telecommunications rate formula.[43] In other words, the NPRM proposes that ILECs will pay the "new telecom rate" ordered in 2015 unless the electric utility in the joint use relationship can prove that a different rate should apply.

To justify this proposal, the Commission notes that its previous formulation of a "just and reasonable rate" led to 'repeated disputes between incumbent LECs and utilities over appropriate pole attachment rates."[44] However, none of the referenced complaint proceedings has resulted in a final decision determining that the rate paid by the incumbent LEC was in fact not "just and reasonable." In fact, in the only two decisions touching on the rate issue in six years, one held that an ILEC had failed to meet its burden of proof that a joint use rate was unjust and unreasonable and the other decided as an interim order that an existing joint use rate was unjust and unreasonable on the facts, without deciding what a just and reasonable rate should be.[45] Thus, the Commission is justifying its proposed new presumption on a series of inconclusive disputes, in which the Enforcement Bureau provided no definitive guidance on how an electric utility *could* establish a just and reasonable rate for the voluntary right of pole access, and other benefits that ILECs presently receive nationwide as part of their joint use relationships. The proposed burden-shifting rule is an unlawful solution in search of a problem.

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[43] NPRM, ¶ 45.

[44] NPRM, ¶ 44.

[45] See In the Matter *of Verizon Florida LLC, Complainant*, Memorandum Opinion and Order, Docket No. 14-216, File No. EB-14-MD-003, 30 F.C.C. Rcd. 1140,¶¶ 20-21 (rel. Feb. 11, 2015); *In the Matter of Verizon Virginia, LLC & Verizon S., Inc., Complainants*, Proceeding No. 15-190, File No. EB-15-MD-006, DA 17-39566 Communications Reg. (P&F) 1086 (rel. May 1, 2017).

The proposed burden-shifting rule violates United States Supreme Court precedent as to which party bears the burden of proof where a statute is silent on the issue: "Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." *Shaffer v. Weast*, 546 U.S. 49 (2005). Furthermore, establishing a presumption that ILECs are entitled to be charged sharply reduced rates under Section 224(e) rewards ILECs for violating the Commission's directive in the 2011 Pole Attachment Order that consumer benefits promised by ILECs as a result of lower attachment rates would be realized. Indeed, ILECs have provided the Commission no evidence that promised consumer benefits such as increased broadband deployment and investment in ILEC networks and infrastructure have occurred. The available evidence shows just the opposite.

A. Placing the Burden of Proof on Respondent Pole Owners Would Violate United States Supreme Court Precedent.

In *Shaffer v. Weast*, the United States Supreme Court evaluated which party had the burden of proof in an administrative hearing under a federal statute which was silent on the issue. The statute required that public schools receiving federal money create an appropriate Individualized Education Plan ("IEP") for eligible students with special learning needs. The petitioners argued that when the student, through his or her parents, challenged whether the IEP was appropriate in an administrative hearing, the burden of proof should be on the respondent school system that was responsible for creating the IEP with the student. The United States Supreme Court disagreed and explained the longstanding and routine approach on which party bears the burden of proof.

> **When we are determining the burden of proof under a statutory cause of action, the touchstone of our inquiry is, of course, the statute. The plain text of IDEA is silent on the allocation of the burden of persuasion. We therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.** McCormick §337, at 412 ("The burdens of pleading and proof with regard to most facts have and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure or proof or persuasion"); C. Mueller

> & L. Kirkpatrick, Evidence §3.1, p. 104 (3d ed. 2003) ("Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims").
>
> **Thus, we have usually assumed without comment that plaintiffs bear the burden of persuasion regarding the essential aspects of their claims.** For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e—2 *et seq.*, does not directly state that plaintiffs bear the "ultimate" burden of persuasion, but we have so concluded. *St. Mary's Honor Center* v. *Hicks,* 509 U.S. 502, 511 (1993); *id.*, at 531 (Souter, J., dissenting). In numerous other areas, we have presumed or held that the default rule applies. See, *e.g.*, *Lujan* v. *Defenders of Wildlife,* 504 U.S. 555, 561 (1992) (standing); *Cleveland* v. *Policy Management Systems Corp.*, 526 U.S. 795, 806 (1999) (Americans with Disabilities Act); *Hunt* v. *Cromartie,* 526 U.S. 541, 553 (1999) (equal protection); *Wharf (Holdings) Ltd.* v. *United Int'l Holdings, Inc.*, 532 U.S. 588, 593 (2001) (securities fraud); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (preliminary injunctions); *Mt. Healthy City Bd. of Ed.* v. *Doyle,* 429 U.S. 274, 287 (1977) (First Amendment). **Congress also expressed its approval of the general rule when it chose to apply it to administrative proceedings under the Administrative Procedure Act, 5 U.S.C. § 556(d)**; see also *Greenwich Collieries, supra,* at 271.[46]

The Court summarized the petitioners' requested approach to the burden of proof issue and rejected it as follows: "Petitioners in effect ask this Court to assume that every IEP is invalid until the school district demonstrates that it is not. The Act does not support this conclusion."[47] Ultimately, the Court reached its conclusion by explaining that it is "extremely rare" to place the entire burden of proof on the opposing party at the outset of the proceeding and, to do so, there must be evidence of Congressional intent: "Decisions that place the *entire* burden of persuasion on the opposing party at the *outset* of a proceeding–as petitioners urge us to do here–are extremely rare. Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief."[48]

[46] *Weast*, 546 U.S. at 534 (emphasis added).
[47] *Id*. at 536.
[48] *Id*. at 534-35.

The result can be no different here. A joint use agreement, like an IEP, is a document prepared jointly by the parties. Also similar to an IEP, which must be "appropriate," a joint use agreement must be "just and reasonable." Just as IDEA allows a student to challenge the IEP when there is a disagreement as to whether it is appropriate, Section 224 allows the ILEC to challenge the justness and reasonableness of the rate in the joint use agreement in an administrative hearing before the Commission "when the parties fail to resolve a dispute over such charges."[49] Section 224, also just like IDEA, is silent as to which party bears the burden of proof.

Previously, the Commission properly placed the burden of proof on the ILEC challenging the rate without hesitation;[50] the customary and accepted proper approach under the law. The NPRM's proposed approach to the burden of proof issue now reverses that approach in a manner identical to that of the petitioners and rejected by the Court in *Weast*. The ILEC, the party challenging the rate in the parties' joint use agreement and thus the one which "seeks to change the present state of affairs", would receive the new telecom rate "unless the utility pole owner can demonstrate with clear and convincing evidence that the benefits to the incumbent LEC far outstrip the benefits accorded to other pole attachers."[51] The challenged joint use agreement would therefore be presumptively invalid, a presumption the *Weast* court rejected for the IEP at issue in that case. And the proposed regulation would not merely "place the *entire* burden of persuasion on the opposing party at the *outset* of a proceeding," but would do so by a clear and convincing evidence standard. Such a situation would be not only "extremely rare," but unsupported by any evidence that Congress intended it to exist. Under the United States Supreme Court's decision in *Weast*, the Commission must reject its approach proposed in the NPRM. The Commission should

49 47 U.S.C. § 224(e)(1).
50 2011 Pole Attachment Order, ¶ 215.
51 NPRM, ¶ 42.

follow *Weast* and decide: "Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief."

B. ILECs Should not Be Rewarded for Failing to Comply with The Commission's 2011 Pole Attachment Order.

The Commission in the 2011 Pole Attachment Order reversed 15 years of prior precedent when it determined that it would consider ILEC complaints regarding the terms and conditions of joint use agreements. It did so in part in reliance on ILEC claims that reducing the joint use rates would result in savings to public utility consumers through lower prices for broadband Internet access service. At that time, however, the Commission cautioned that it "would be concerned if these consumer benefits were not realized." [52] In the more than six years since the 2011 Pole Attachment Order, ILECs have saved millions of dollars in joint use fees, yet there is no evidence that consumers have seen a reduction in the price of broadband service, or an increase in deployment to under-served areas.[53]

In the 2011 Pole Attachment Order, the FCC based its fundamental sea change in jurisdictional interpretation on the belief that rate regulation would provide more ubiquitous broadband by fostering the deployment of "advanced telecommunications" to underserved areas. The Commission stated:

> actions to reduce input costs, such as pole rental rates, can expand opportunities for investment, especially in combination with other actions, which is particularly important given the up to 24 million Americans that do not have access to broadband today.[54]

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52 2011 Pole Attachment Order, ¶ 208.

53 *Thomson Reuters Street Events Edited Transcript - Verizon at Guggenheim Securities Symposium* – Comments of Lowell McAdam**,** Verizon Communications Inc. - Chairman & CEO (Jun. 21, 2012)(articulating Verizon's intention to reduce its wireline infrastructure in rural and sparsely populated areas), attached as Exhibit B.

54 2011 Pole Attachment Order, ¶ 208.

The ILECs claimed "that, in aggregate, they annually pay pole attachment rates that are $320 to $350 million greater than they would pay at the cable rate."[55] In exchange for receiving rate regulation from the Commission, ILECs such as Verizon promised five specific benefits:

> (1) reduced demand on the universal service fund arising from reduced incumbent LEC costs;
>
> (2) automatic flow-through of cost reductions to the regulated rates of rate-of-return of incumbent LECs;
>
> (3) use of cost savings to improve service and/or lower prices for broadband services in areas with competition;
>
> (4) increased broadband deployment in areas where incumbent LECs currently do not provide broadband due to the improved business case; and
>
> (5) a source of capital for expansion.[56]

Six years after the 2011 Pole Attachment Order, the ILECs have provided no evidence of any one of the five promised benefits. It is safe to say that if there were any such benefits, ILECs would have made sure the Commission and public knew about them. This is directly contrary to the Commission's directive and express statements.

In the 2011 Pole Attachment Order, the Commission stated:

> We expect these promised consumer benefits to occur, and we encourage incumbent LECs to provide data to the Commission on an ongoing basis demonstrating the extent to which these benefits are being realized. We would be concerned if these consumer benefits were not realized. We will continue to monitor the outcomes of this Order, and **in the absence of evidence that expected benefits are being realized**, we may, among other things, revisit our approach to this issue.[57]

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[55] *Id.*
[56] *Id.*
[57] *Id.*

There is no record that, despite the Commission's unambiguous goal to "encourage" submission of such data, ILECs have provided data "demonstrating the extent to which these benefits are being realized." Despite the Commission's ongoing attention to each of the five areas above, ILECs have ignored its directive, and have not reported or shown evidence of any of the five promised benefits.

On the other hand, ILECs' savings on joint use fees have a direct adverse impact on the regulated utility to which it has attached its wires and, more importantly, on the regulated utility customers. FPL provides a good example of this situation. FPL's joint use revenues are recorded pursuant to the Federal Energy Regulatory Commission's ("FERC") Uniform System of Accounts ("USofA") in Account No. 454 as Other Electric Revenues. These revenues are netted against the expenses associated with operating the electric system in developing the revenue requirement used in determining the rates to be paid by FPL's customers. Joint use rental revenue affects FPL's revenue requirements. This is required by the Florida Public Service Commission ("FPSC") pursuant to Order No. 8721, Docket No. 780326-PU, at 2 (Feb. 16, 1979) (quoting *GTE v. NY PSC*, 406 N.Y.S.2d 909, 911-12 (1978) ("The revenues that a utility receives from renting pole space to cable television operators must be taken into account by the Public Service Commission in fixing utility rates. Pole attachment revenues are properly used to offset the utility costs that are reflected in the rates paid by utility customers.")).[58] There is therefore no doubt that an ILECs' savings of millions of dollars of joint use payments directly impacts FPL and the people of Florida

[58] The Senate Committee report accompanying the legislation enacting section 224 explicitly recognized FERC and State public utility commission ratemaking proceedings as appropriate sources for determining inputs for pole attachment rates. *See* S. REP. 95-580, 22, 1978 U.S.C.C.A.N. 109, 130 ("In determining the lawfulness of a utility's rate, terms, and conditions for CATV pole attachments, the Commission may accept in whole or in part the depreciation rates, property valuations, systems of accounts, rates of return and the like established or determined by any State or local agency or any agency of the Federal government.").

who rely on FPL's electric service. The situation with FPL is typical of other IOUs affected by this proceeding.

Verizon provides a particularly egregious example of the ILECs' broken promises to provide concrete benefits to consumers if the Commission reduces joint use pole attachment rates. Verizon's broken promises are established by a large body of publicly available evidence showing that: there have not been any improvements in broadband service and prices as a result of lower joint use rates; Verizon has not increased its efforts to deploy wireline broadband in the last three years; and there is no evidence that Verizon has used the capital saved on joint use rates for the expansion of wireline broadband. Indeed, all of the evidence shows that Verizon is abandoning its efforts to build out wireline broadband, and allowing its wireline assets to fall into disrepair. Verizon, in fact, has made clear that it intends to be out of the wireline business within the next ten years, conveying this clear intent to regulated utilities in negotiations over joint use issues and explaining that Verizon no longer wants to be a pole owner. Indeed, Verizon sold to Frontier of all of its wireline assets in three states.[59] Tellingly, one focus of the parties' comments and the Commission's inquiry in the proceeding for approval of that proposed transaction was on how the transaction would affect broadband deployment.[60]

While Verizon's transition to a fully wireless business may be encouraged and fostered by public policy, the price of that progress should not be the abandonment of wireline customers, contractual obligations and promises to the Commission and misuse of savings from joint use fees.

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[59] Consolidated Application for the Partial Assignment and Transfer of Control of Domestic and International Section 214 Authorizations, WC Docket No. 15-44 (Feb. 24, 2015), available at https://ecfsapi.fcc.gov/file/60001033477.pdf.

[60] *See e.g.*, Letter from Randy Clarke, Chief, Competition Policy Division Wireline Competition Bureau to Kathleen Grillo, Senior Vice President, Federal Regulatory and Legal Affairs, Verizon, Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control, WC Docket No. 15-44 (June 17, 2015)(seeking additional information regarding the effect of the proposed transaction on broadband development).

Publicly available evidence as to Verizon's approach to its transition abounds. In New York state, on May 3, 2013, in the aftermath of Hurricane Sandy, Verizon took the opportunity caused by hurricane damage to attempt to shed its obligation to provide wireline service in its New York service territory, and replace it with wireless Voice Link service in the event that its facilities were destroyed or if the company found that offering only wireless service was otherwise "reasonable." Voice Link service does not provide broadband.[61] Verizon similarly planned to move its customers in Florida from wireline service to wireless service. It sought to provide wireless service not only in communities where storms damaged Verizon's wires, "but also in other areas where it would rather not continue to maintain the old copper wires."[62]

In fact, Verizon's efforts to eliminate wireline service in New York became so egregious that New York State Attorney General Eric T. Schneiderman filed petitions to stop Verizon. In an April 25, 2012 petition to the New York State Public Service Commission, Attorney General Schneiderman sought to stop Verizon's efforts based on evidence that Verizon was disregarding landline service as more and more wireline phone customers switched to wireless service, thereby allowing Verizon to focus on its far more lucrative wireless service.[63] The Petition filed by AG Schneiderman went on to state:

> [T]elephone competition in New York is not robust, and at best can be characterized as a duopoly. Moreover, Verizon's own actions have demonstrated a disinterest in

[61] *Tariff filing by Verizon New York Inc. to introduce use of wireless technology as an alternative to repairing damaged facilities*, Order Conditionally Approving Tariff Amendments In Part, Revising In Part, And Directing Further Comments, NYPSC Case No. 13-C-0197 (May 16, 2013) ("Digital Subscriber Line (DSL) services will not be available [with Voice Link].").

[62] *See* Patrick McGeehan, *Wireless Home Phones: A Plan Strikes a Chord*, NEW YORK TIMES (May 20, 2013), available at http://www.nytimes.com/2013/05/21/nyregion/verizon-hopes-to-nudge-some-from-wired-to-wireless.html (last visited Jun, 29, 2015).

[63] *See* http://www.nbcnewyork.com/news/local/Verizon-Complaints-Telephone-New-York-Attorney-General-Action-149160245.html (last visited March 31, 2014); Petition of Attorney General Eric T. Schneiderman to Modify the Verizon Service Quality Improvement Plan ("AG Schneiderman Petition"), at 31 available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7bE46EDB40-99B2-4664-8BE4-A9646D09BBBF%7d (last visited March 31, 2014).

> continuing to compete for wireline customers or invest in traditional telephone service. Instead, the company's resources and management focus is concentrated on its wireless affiliate, to the detriment of Verizon's wireline customers. For too many years, Verizon has steadily reduced the workforce needed for outside plant maintenance and telephone repair . . . .[64]

Verizon then sought to push its wireless Voice Link service to New York's Catskill region. AG Schneiderman again filed a petition with the New York Public Service Commission, "asking that Verizon be blocked from 'illegally installing' its Voice Link service for customers in the Catskill region because the Voice Link "wireless system cuts Internet access, home alarm systems and is susceptible to power failures . . . ."[65]

There should be no doubt, however, that Verizon's strategy to abandon wireline service in favor of wireless service extends beyond New York and Florida and beyond storm-damaged communities and rural areas. Indeed, that strategy includes virtually all of Verizon's service territory in, for example, the state of New Jersey. There, Verizon made another bold effort to end further wireline broadband deployment.[66]

In 1993, the New Jersey Board of Public Utilities ("NJ BPU") agreed to Verizon's "Opportunity New Jersey" (ONJ) petition for alternative rate regulation under which Verizon was required "to achieve ONJ in its entirety, including full broadband capability, by the year 2010, specifically, switching technologies matched with transmission capabilities to support data rates

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[64] *See* Mathew Gormley, *NY Seeks Action Over Verizon Service* (Apr. 24, 2012) http://www.nbcnewyork.com/news/local/Verizon-Complaints-Telephone-New-York-Attorney-General-Action-149160245.html (last visited June 29, 2015); Petition of Attorney General Eric T. Schneiderman to Modify the Verizon Service Quality Improvement Plan ("AG Schneiderman Petition"), at 31 available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7bE46EDB40-99B2-4664-8BE4-A9646D09BBBF%7d (last visited March 31, 2014).

[65] *See* Verizon Rural Service Swap Must Stop, New York Says, http://www.bloomberg.com/news/2013-06-26/verizon-rural-service-swap-must-stop-new-york-says.html (last visited March 31, 2014).

[66] *See In the Matter of Verizon New Jersey, Inc.'s Alleged Failure to Comply with Opportunity New Jersey Commitments*, Order Establishing Comment Period, State of New Jersey Board of Public Utilities, Docket No. TO12020155, 2014 WL 507371 (Jan. 29, 2014) attached Stipulation of Settlement at 2 ("Verizon NJ BPU Stipulation").

up to 45,000,000 bits per second and higher, which enables services, for example, that will allow residential and business customers to receive high definition video and to send and receive interactive video signals with complete deployment in 2010."[67] Verizon failed to honor its commitment to build out wireline broadband services and on March 12, 2012 the NJ BPU issued an Order to Show Cause directing Verizon NJ "to show cause why the Board should not find that it failed to comply with the PAR Order in providing full broadband capability in its service territory by 2010 . . . ."[68]

Verizon, quite simply, has failed to build out wireline broadband in New Jersey because Verizon has no interest in doing so. Instead, Verizon has reached a settlement via stipulation with the NJ BPU to relieve Verizon of its obligation to build out wireline broadband to New Jersey residents. Pursuant to that stipulation, Verizon will be allowed to satisfy any broadband build out requirements if a minimum of 35 customers in a defined service area who do not currently have broadband from cable service providers or "access to 4G-based wireless service" request broadband service from Verizon and Verizon provides broadband within nine months, including by "4G-based wireless" service.[69]

Finally, Verizon has willfully neglected its facilities in both Pennsylvania and Virginia. In Pennsylvania, a 2015 complaint to the state's Public Utilities Commission ("PUC") provided facts alleging that Verizon neglected its copper infrastructure and pole network and provided unsafe, inadequate service to its customers in order to maximize profits. Verizon recently entered a

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67 *In the Matter of Verizon New Jersey, Inc.'s Alleged Failure to Comply with Opportunity New Jersey Commitments*, Order to Show Cause, State of New Jersey Board of Public Utilities, Docket No. TO12020155, 2012 WL 1496039 (Mar. 12, 2012) available at http://www.nj.gov/bpu/pdf/boardorders/2012/20120312/3-12-12-4B.pdf (last viewed viewed June 15, 2017).

68 *Id.* at 3.

69 *See* Verizon NJ BPU Stipulation.

settlement with state officials and others that provides for the PUC to enforce Verizon's obligations to repair and replace bad cable, defective equipment, and faulty back-up batteries and to take down at least 15,000 double poles within three years.[70]

In Virginia, Verizon admits that its entire pole network is fully depreciated and that it does virtually nothing to maintain and replace poles. In other words, Verizon's pole network in Virginia is literally worthless.[71]

In light of the pervasive public evidence and the complete lack of evidence that any benefits promised by ILECs have been realized, the Commission should do as it indicated it would in the *2011 Order* and deny ILECs the regulatory benefits afforded by that order. At the very least, it should not further reward ILECs and provide them even lower rates and more benefits in reward for six years of neglect.[72]

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70 *See https://arstechnica.com/information-technology/2017/06/verizon-grudgingly-agrees-to-fix-thousands-of-copper-network-problems/* (last visited June 13, 2017).

71 *See* Exhibit A, Tardiff Transcript, 98:17-102:2.

72 In all events, the Communications Act does not provide the FCC jurisdiction over ILEC attachments, despite creative interpretive attempts to conclude otherwise. Section 224(b)(1) of the Communications Act provides that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions." 47 U.S.C. § 224 (b)(1). The statute defines a pole attachment as "any attachment by a cable television system or *provider of telecommunications service* to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4)(emphasis added). Section 224 does not define "provider of telecommunications service." Section 3(44) of the Communications Act, however, does define the term. 47 U.S.C. § 153(44). That section provides that a "telecommunications carrier" is "any provider of telecommunications service" except for "aggregators of telecommunications services . . . ." *Id.* The terms are synonymous except for the exclusion of aggregators as carriers. ILECs are not aggregators and therefore are, under the Section 3(44) definition, "telecommunications carriers" for all purposes under the Communications Act. However, Section 224(a)(5) of the Communications Act makes clear that "[f]or purposes of this section, the term 'telecommunications carrier' (as defined in Section 3 of this Act) does not include any incumbent local exchange carrier as defined in Section 251(h) of this Act." 47 U.S.C. § 224(a)(5). Because "telecommunications carrier" is synonymous with "provider of telecommunications service," except for aggregators, neither term can include an ILEC "for purposes of this section [224]." In turn, the definition of "pole attachment" under Section 224(a)(4) applies only to attachments by "providers of telecommunications service." 47 U.S.C. § 224(a)(4). As this phrase is synonymous with "telecommunications carrier" (except for aggregators), and ILECs are not telecommunications carriers under 224(a)(5), they do not have "pole attachments" under Section 224(a)(4). Section 224(b)(1)'s grant of jurisdiction over "pole attachments" therefore specifically excludes ILEC attachments. Any other interpretation would render Section 3(44) meaningless and superfluous, would not give equal dignity to the relevant provisions of the Adct and would read a meaning into 224(a)(4) which Congress did not intend and which conflicts with 224(a)(5). Given the plain language of the

IX. THE COMMISSION'S PROPOSED 180-DAY COMPLAINT SHOT CLOCK SHOULD BE APPLIED ONLY WHERE POLE ACCESS IS COMPLETELY DENIED.

The POWER Coalition does not oppose the 180-day time limitation recommended in the NPRM for "pole access complaints", defined as "complaint[s] that allege complete denial of access to a utility pole".[73] Because such complaints are more urgent than complaints alleging unreasonable rates, terms and conditions, and because the *only* meaningful remedy under such circumstances is the grant of immediate access to the requested poles, it is important that the Enforcement Bureau's complete review of the complaint is timely. However, whatever rules or policies may be adopted, the Commission must make clear that all other complaints (including, but not limited to complaints alleging unreasonable rates, terms or conditions, and including complaints alleging unreasonable construction standards) are subject to full process.[74]

X. THE COMMISSION'S NPRM IS UNLAWFUL BECAUSE IT VIOLATES EXECUTIVE ORDER 13771

The NPRM proposes at least eight new regulations.[75] However, it neither proposes regulations to eliminate nor calculates the cost of the proposed new regulations combined with the cost reduction of eliminating existing regulations (which it cannot do because it has not identified any existing regulations to eliminate). The NPRM is unlawful.

The President of the United States promulgated Executive Order 13771 on January 30, 2017 ("EO 13771").[76] EO 13771 states, in relevant part, as follows:

> Sec. 2. Regulatory Cap for Fiscal Year 2017. (a) Unless prohibited by law, whenever an executive department or agency (agency) publicly proposes for

Communications Act, ILECs are specifically excluded from the Commission's jurisdiction to regulate attachments under Section 224. *American Elec. Power v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013) misinterpreted the Communications Act and arrived at the wrong conclusion.

73 *See* NPRM ¶ 47 and n. 65.

74 *Id.*

75 *See* NPRM, Appendix A.

76 Fed. Reg. Vol. 82, No. 22 (February 3, 2017)

> notice and comment or otherwise promulgates a new regulation, **it shall identify at least two existing regulations to be repealed.**
> (b) For fiscal year 2017, which is in progress, the heads of all agencies are directed that **the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero,** unless otherwise required by law or consistent with advice provided in writing by the Director of the Office of Management and Budget (Director).
> (c) In furtherance of the requirement of subsection (a) of this section, **any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. Any agency eliminating existing costs** associated with prior regulations under this subsection **shall do so in accordance with the Administrative Procedure Act** and other applicable law.[77]

A valid executive order has the force of federal law.[78] The NPRM therefore should have proposed the elimination of at least 16 existing regulations and provided a calculation on the total incremental cost of the eight new regulations after offsetting the costs saved by eliminating the 16 existing regulations in accordance with the Administrative Procedure Act. The NPRM did none of that.

Instead, the NPRM proposes 7 new regulations that will certainly impose additional costs on electric utilities subject to FCC pole attachment and joint use regulation. These include the following proposed regulatory burdens that would require electric utilities to:

- devote sufficient time and personnel to respond to requests for pole attachments within 15 days;
- engage in pre-complaint discussions with potential complainants and FCC staff to work through procedural issues associated with the complaint process;
- prepare and maintain a schedule of common make-ready charges;

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[77] *Id.* (emphasis added).
[78] *Braden v. Univ. of Pittsburgh*, 343 F. Supp. 836, 840 (W.D. Pa. 1972), *vacated on other grounds,* 477 F.2d 1 (3d Cir. 1973).

- devote sufficient time and personnel to provide a make-ready cost estimate within 7 days to all pole attachers whose request for pole access has not been denied;
- identify, publish and maintain a current and specific list of contractors authorized to do make-ready above the communications space on poles; and
- provide ILECs with the lowest possible rate for telecommunications companies -- the "new telecom rate" -- and then in any rate complaint proceeding brought by an ILEC, carry the burden of proof as the respondent to show that the new telecom rate should not be the maximum applicable rate.

Each of these proposed new regulations will require electric utilities to devote time, money, personnel and other resources to compliance. For example, developing and maintaining a list of common make-ready charges may require electric utilities to pay employees or consultants with sufficient expertise to, among other things, identify and list what stakeholders see as "common" charges, calculate the current material costs for such charges, calculate the current labor costs for such charges, prepare a document reflecting such charges, publish and maintain that document, likely on a website, and revise the charges shown on the document each time the materials or labor costs change. In a utility with broad service territory covering an entire state, the costs for material and labor will vary from place-to-place around the state, necessitating multiple geographical specific cost lists for multiple charges that all need to be reviewed and revised regularly. And that is just one regulation.

The NPRM should be withdrawn at this time. It cannot and should not be published again until the FCC identifies 16 regulations to eliminate and calculates the overall cost of the new regulations and those to be eliminated and includes all information necessary under EO 13771 in its NPRM or further notice of proposed rulemaking.

CONCLUSION

WHEREFORE, the POWER Coalition respectively requests that the Commission consider these comments, and take actions, or adopt rules and policies consistent with the foregoing.

Respectfully submitted,

/s/ Charles A. Zdebski

Charles A. Zdebski
Brett Heather Freedson
Robert J. Gastner
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue, 12th Floor
Washington, D.C. 20006
(202) 659-6600 (telephone)
(202) 659-6699 (facsimile)

Counsel to CenterPoint Energy Houston Electric, LLC, Dominion Energy Virginia and Florida Power & Light Company

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