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Via Electronic Filing

Ex Parte Communication

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Portals II, Room TW-A325
Washington, DC 20554

Re: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84

Dear Ms. Dortch:

On July 19, 2018, the undersigned met by telephone with Jay Schwarz, Wireline Advisor to Chairman Pai, to discuss the Federal Communications Commission's *Draft Third Report and Order*.[1] I explained that the record supports making the following changes to the language of the *Draft Third Report and Order*:

1. A transition period to implement the new timelines is warranted. The *Draft Third Report and Order* would modify the Commission's existing timelines for application review, make-ready, and self-help and adopt new timelines for pre-application surveys, OTMR, and post OTMR and self-help inspection and repair. Industry members utilize automated electronic systems, such as NJUNS as well as similar internal systems, to track and coordinate pole attachment workflow and activities. These systems are crucial to pole owners' ability to efficiently and effectively process the applications received per month covering hundreds of poles. Experience shows that system changes are not immediate and can take a year or more to implement. A similar timeline is likely needed to update tracking systems to distinguish between different types of make-ready, track different timelines, identify new attacher contractors, and otherwise accommodate the modified timelines and new processes imposed by the *Draft Third Report and Order* and for new attachers, which will now be responsible for conducting surveys and coordinating make-ready work, to adopt their own systems. The requirement to provide make-ready estimates and invoices per pole will drive changes in other systems, which are estimated will take up to 18 months. For those reasons, the implementation date for the rule changes affecting the pole attachment

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

timelines should be 12 months after release of the *Draft Third Report and Order*, with an additional 6 months transition to modify estimate and invoice systems.

2. Make-ready estimates and invoices that are itemized by pole are burdensome and unnecessary. The *Draft Third Report and Order* would require pole owners to provide new attachers with estimates and invoices itemized by pole for complex and above communications space make-ready (non-OTMR") charges. This is burdensome and impractical and will increase make-ready costs. Non-OTMR is performed by existing attachers, which are best positioned to estimate the costs of transferring their facilities. A wireless company will more accurately estimate the cost of transferring its radios and antennas than an electric utility pole owner and an electric utility will more accurately estimate the cost of transferring its power lines and transformers than a local exchange carrier ("LEC") pole owner. Thus, those existing attachers, not the pole owner, should develop and submit make-ready estimates to the new attacher. This direct interface between a new attacher and existing attachers would remove the pole owner as the middle man and give new attachers control over the estimate process. It would also more closely align with the Commission's expectations that the new attacher would coordinate make-ready work, such as "negotiate[ing] compensation for the work performed."[2]

Estimates and invoices itemized by pole would be burdensome for pole owners, which would be forced to make substantial financial investments to upgrade their systems to estimate costs and generate charges by pole location and otherwise provide the level of detail required by the *Draft Third Report and Order*.[3] AT&T estimates that it would take approximately 18 months and up to $2 million to modify its systems. Alternatively, pole owners' employees will spend an excessive amount of time recording estimated and final make-ready costs by pole, which will increase administrative costs that are passed through to the new attacher. AT&T estimates that manual work-arounds would increase engineering time per pole by about 45 minutes and cost about $144 per pole. The benefits from a per pole itemization of make-ready costs, as opposed to a total project estimate, is questionable considering not all new attachers seek this level of detail and because AT&T and some other pole owners true-up their charges in the final invoice to reflect actual costs and prevent overcharging.

3. A LEC pole owner should be able to object to a new attacher's simple make-ready determination. The *Draft Third Report and Order*, would allow electric utility pole owners to object to a new attacher's simple make-ready determination, but without justification, rejects granting LEC pole owners the same right. All pole owners, including LECs, should be allowed to object to incorrect simple make-ready determinations. Arguably, as providers operating in the communications space, LECs are better positioned

[2] *Draft Third Report and Order*, ¶88.

[3] AT&T is unable to reliably predict the cost to upgrade these systems due to the limited time before the sunshine date.

than electric utilities to assess whether make-ready in the communications space is simple. Requiring all pole owners to explain such decisions in good faith, with specificity and all relevant evidence and supporting information, and in writing would effectively address concerns that the LEC, which is usually also an existing attacher, may be incented to delay new attacher deployments.

4. The FCC should clarify that the overlash rule applies to overlashing the facilities of approving host attachers and overlashers should bear responsibility for an engineering analysis.[4] The *Draft Third Report and Order* and draft rule section 1.1416 would allow an overlasher, with 15-days' prior notice, to overlash its own existing cables without the pole owner's advance approval. AT&T supports this determination. AT&T proposes that the Commission, consistent with its prior rulings, modify draft rule section 1.1416 to clarify that this determination also applies to overlashing the facilities of a host attacher that has granted prior approval, which the host attacher is under no obligation to do. This common-sense modification would be consistent with prior Commission rulings.[5]

The *Draft Third Report and Order* and draft rule section 1.1416(c) makes the overlasher responsible for complying with "reasonable safety, reliability, and engineering practices."[6] Consistent with that principle, the Commission's regulations should allow pole owners to require overlashers to confirm in the advance notice that they have fulfilled their responsibility. Pole owners that perform their own engineering analysis to validate the overlasher's certification would do so at their own cost. However, if an overlasher fails to confirm in the advance notice that the pole can support the overlash, Commission regulations should allow the overlash to proceed but give pole owners the ability to perform the engineering analysis at the overlasher's cost within 45 days. A pole owner is unlikely to be able to perform within the 15-day notice period an engineering analysis that takes up to 45 days during the application and survey stage for a non-OTMR project.

5. The modified telecom rate should be the presumptive just and reasonable rate for incumbent LEC attachers in all joint use agreements. The *Draft Third Report and Order* would adopt the modified telecommunications rate as the presumptively "just and reasonable rate" for only "*newly-negotiated pole attachment agreements"* between

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[4] On overlashing, the July 19, 2018 telephone call addressed only the overlasher's responsibility for the engineering analysis.

[5] *See, e.g., Amendment of Commission's Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-98 and 97- 151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12141, para. 75 (2001) ("We affirm our policy that neither the host attaching entity nor the third-party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment."), *aff'd Southern Co. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002).

[6] *Draft Third Report and Order*, ¶111.

incumbent LEC attachers and electric utilities. The FCC should also adopt the presumption for existing joint use agreements because of the disparate bargaining position of ILECs relative to electric utilities and because not applying the presumption to existing agreements is antithetical to rate parity, would promulgate further pole attachment rate disparity between ILECs and other attachers, and hinder, rather than foster, broadband deployment.

The *Draft Third Report and Order* assumes that existing agreements give ILECs unique benefits that are not available to competitors. But, that assumption is inaccurate. Because joint use agreements were negotiated decades ago, many of the terms perceived as beneficial are in fact not. For example, ILECs' position as the lowest on the pole has resulted in damages not suffered by its competitors: when attachers improperly engineer or construct their facilities—and they do—resulting in a pole leaning, the ILECs' facilities then become low-hanging without notice and subject to being struck by large vehicles; and ILECs' attachments are more susceptible to damage by any workers ascending the pole to work on facilities above any ILEC. Another important point is that the ILECs' position is the result of the origin of joint use, not some special benefit. Those beginnings involved two attachers on utility poles, with the ILEC attaching at the lowest possible position and building upward, while electric companies attached near the top and built downward. This left the space between those two entities on the poles as the logical attachment point for CATV and CLEC attachers. Even if some benefits are provided, they have not been quantified, are not material, and do not justify the excessive (and increasing) pole attachment rates charged by electric utilities.

The option that would be provided in the *Draft Third Report and Order*—terminating existing joint use agreements and entering into new agreements—is risky and would leave ILECs in a virtual no-man's land. Unlike their competitors, ILECs have no mandatory right of pole access under Section 224. Thus, electric utilities do not need to enter into new agreements with ILECs and have no incentive to do so when it would mean lower rates. Even if new agreements are negotiated, they would likely take years and while, in the interim, ILECs have no right to new attachments, *hindering* rather than fostering broadband deployment, and leaving ILECs paying disparate higher rates. As AT&T explained in its comments, "the disparity in pole ownership may mean that, as a practical matter, ILECs may not have the leverage to renegotiate their agreements with IOUs to change those rates or other terms."[7]

6. LEC pole owners do not keep list of contractors for work above the communications space. The *Draft Third Report and Order* would require "utilities to . . . keep an up-to-date [sic] reasonably sufficient list of contractors it authorizes to perform complex and non-communications space self-help surveys and make-ready work."[8] AT&T supports this requirement for complex make-ready work in the communications space and

[7] Reply Comments of AT&T, WC Docket No. 17-84, at 11 (filed July 17, 2017).

[8] *Draft Third Report and Order*, ¶97.

has explained that "maintaining a list of pre-approved contractors eliminates potential disputes."[9] But, LEC pole owners are not in a position to know which contractors are best suited to perform make-ready work in the electric space and should not be required to maintain a list of contractors which perform that work. Moreover, the Commission should not require LECs to accept that potential liability. Instead, electric utilities should be required to maintain a list of approved contractors to work in the electric space and, consistent with the Commission's thoughtful decision to make new attachers responsible for coordinating make-ready work, those new attachers can coordinate with an electric company attacher (even on LEC-owned poles) to identify appropriate contractors to work above the communications space.

In addition to the above issues discussed on the telephone call, AT&T also believes that the prior notice of survey requirement should be removed from the final *Third Report and Order*. The *Draft Third Report and Order* would require pole owners and new attachers performing surveys to give at least 3 business days' prior notice to each other and to existing attachers for the purpose of beginning coordination efforts. Seemingly reasonable on its face, this requirement is impractical to fulfill because neither pole owners nor new attachers know the identity of existing attachers on a particular pole. That is one of the primary purposes of the survey. And, gathering that level of detail on every pole for purposes of providing "prior notice" would be overly burdensome, not worth the effort, and would not provide comprehensive data about pole occupancy. For that reason, pole owners and new attachers will be unable to provide the required notice.

Pursuant to Section 1.1206 of the Commission's rules, an electronic copy of this letter is being filed for inclusion in this docket.

Sincerely,

/s/ Frank S. Simone

cc: J. Schwarz
A. Bender
J. Susskind
T. Litman
K. Monteith
L. Hone

[9] AT&T Reply Comments at 10.