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VIA ELECTRONIC FILING

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

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

Dear Ms. Dortch:

On July 24, 2018, Allen Bell (Distribution Manager, Georgia Power), Natalie Beasman (Senior Counsel, Georgia Power), Pam Ellis (Utility Business Development Service Manager, American Electric Power Service Corporation), Anne Vogel (Managing Director Federal Energy Policy, American Electric Power Service Corporation), Karen Flewharty (Joint Use Manager, Oncor Electric), Andy Russell (Lead Engineer, Duke Energy), and I met with the following members of the Wireline Competition Bureau regarding the draft Third Report and Order in the above-referenced docket: Annick Banoun, Adam Copeland, Lisa Hone, Dan Kahn, and Michael Ray. Separately our aforementioned group also met with the following members of Commission Staff:

- Jamie Susskind, Chief of Staff to Commissioner Carr;
- Betsy McIntyre, Deputy Division Chief, Competition and Infrastructure Policy Division, Wireless Telecommunications Bureau, and advisor to Commissioner Rosenworcel; and
- Erin McGrath, Legal Advisor, Wireless, Public Safety and International to Commissioner O'Rielly.

During each of our meetings, we expressed our appreciation for the Commission's time and attention to the matters addressed in the draft order, and discussed the substantive issues set forth below.

Revisions to the Existing Access Process

In our meetings with staff, we relayed our support the draft order's (1) retention of the 45-day period for review of applications, (2) clarification that communications

space make-ready coordination is the responsibility of the new attacher, and (3) elimination of the previous rule requiring electric utilities to maintain a list of contractors for communications space make-ready work. We expressed concerns, though, with many of the other revisions to the existing process included within the draft order.

At a high level, we believe this level of regulatory micro-management—especially as it relates to electric utility pole owners—is not the solution for efficient deployment of the next generation of advanced communications infrastructure. In fact, we believe this level of regulatory micro-management will have the exact *opposite* of the intended effect. As we have said before, we think incentives to act, rather than penalties that put the electric system at risk, is the solution.

- Self-Help Remedy for Power Supply Space Make-Ready

On a more granular level, we expressed our strong opposition to the new self-help remedy above the communications space. We have serious concerns that this rule could result in injury or death to contractors and have a detrimental effect on the reliability of the electric grid. Although the draft rule requires attachers to use a contractor approved by the electric utility, this is insufficient protection because it gives control of the make-ready to an entity whose primary motivation is speed to market—not safety and reliability. As explained by Ms. Pam Ellis of AEP, a three-day notice that the attacher intends to exercise its self-help remedy is insufficient to ensure the detailed level of coordination required for work in the power space, including ensuring that electric lines are deenergized for the work.

Further, although the self-help remedy above the communications space is not available unless the electric utility has failed to perform within 60 days, there are some situations under which electric utilities will be unable to meet this new, shortened timeline. We are particularly concerned that electric utilities will not be able to meet the timeline if it is intended to apply to pole replacements. The Commission's previous precedent made clear that pole replacements are not included in power space make-ready timelines, but the new definition of make-ready in Rule 1.1402(o) includes pole replacements. To the extent the Commission intended to include pole replacements within the scope of the self-help remedy, this would be at odds with the Commission's specific finding in the OTMR context that pole replacements are "usually not simple or routine and are more likely to cause service outages or facilities damage." (Draft Order, ¶18). Further, we are unsure of how such a self-help remedy would even work from a materials procurement perspective. Given the obvious dangers to worker and public safety and the reliability of the electric system, if the Commission includes pole replacements within the self-help remedy, some electric utilities may be forced to deny applications that will require a pole change-out due to insufficient capacity under 47 U.S.C.§ 224(f)(2). While we

oppose a self-help remedy in the electric supply space under any circumstances, if the Commission intends to proceed with this dangerous and half-baked remedy, it should at a minimum make clear that pole replacements are not included within that remedy.

In addition, the Commission's draft rule providing a self-help remedy in the supply space is a bit of a surprise given that the Commission did not propose a draft rule on this issue, no such rule was proposed by the BDAC, and, to our knowledge, no state has adopted such a rule. We believe this rule is a solution in search of a problem. Electric utility make-ready is simply not what causes delays in the make-ready process; and it represents a small minority of the overall work to be performed in that process. *See* the Electric Utilities' June 15, 2017 Initial Comments, 4-5 (stating that in Duke Energy's and AEP's service territories, an average of 82% of all make-ready is comprised of communications space make-ready only).

If the Commission feels strongly that a self-help remedy in the supply space is necessary, we urge the Commission to issue a Further Notice of Proposed Rulemaking on this issue and allow all interested parties to develop a robust and precise record on the issue. This would allow any future rule to provide more finite parameters, given the grave risk to safety and reliability. We would also like the opportunity to develop an alternative proposal for rules that incentivize timely performance, rather than penalizing untimely performance with an affront to the safety and reliability of the electric system. For example, the Commission could incentivize faster power space make-ready by authorizing electric utilities to recover more than mere incremental costs where those utilities complete power space make-ready prior to applicable deadlines.

- <u>Per-Pole Make-Ready Estimates and Invoices</u>

We also expressed concern regarding the draft rule relating to make-ready cost estimates. The rule that requires pole-by-pole estimates and charges will increase both the administrative costs of creating estimates and the actual cost estimates themselves. Fixed costs—like traffic-control, lock-out/tag-out, and rolling a truck to the work site—would ordinarily be priced into the total job (which almost always includes multiple poles). These fixed costs cannot be allocated on a pole by pole basis, because the costs do not change just because one pole is removed from the job. There are also other costs that are neither fixed nor per pole, but affect more than one pole—*e.g.*, resagging a conductor to meet mid-span clearance requirements. The Commission is setting up a situation where the required estimates simultaneously *increase* costs and offer *less* certainty to attachers. With this rule, the Commission is also insisting on a level of itemization and detail (1) that is incompatible with existing work order systems and (2) that even an electric utility's core electric customers do not receive with respect to contributions in aid of construction (CIAC).

In order to address our concerns, we propose the following changes to draft Rule 1.1412(d):

> (d) *Estimate*. Where a new attacher's request for access is not denied, a utility shall present to a new attacher a detailed, itemized ~~pole-by-pole~~ estimate (on a per-pole basis, where reasonably possible) of charges to perform all necessary make-ready within 14 days of providing the response required by §1.1412(c), or in the case where a new attacher has performed a survey, within 14 days of receipt by the utility of such survey. ~~Where the utility determines that make-ready charges will not vary from pole-to-pole, the utility may aggregate individual charges rather than present a pole-by-pole estimate for those charges.~~ The utility shall provide documentation that is sufficient to determine the basis of all estimated charges, including any projected material, labor, and other related costs that form the basis of its estimate.

We also urged the Commission to remove the draft requirement that invoices issued by electric utilities for make-ready include actual costs. Many electric utilities invoice for projects based on the work order estimate, without a true-up except in unusual circumstances. This is similar to how electric utilities bill their core electric service customers for CIAC. Electric utilities should not be required to invoice attachers differently than they bill their electric customers, and requiring them to do so will result in higher costs. Further, billing based on estimates eliminates any potential "sticker shock" issues. Accordingly, we propose the following edits to proposed Rule 1.1412(d)(3):

> (3) *Final invoice.* After the utility completes make-ready, if the final cost of the work differs from the estimate, it shall provide the new attacher with a detailed, itemized final invoice of the ~~actual~~ make-ready charges incurred (on a pole-by-pole basis where reasonably possible) to accommodate the new attacher's attachment. ~~Where the utility determines that make-ready charges did not vary from pole-to-pole, the utility may aggregate individual charges rather than present a pole-by-pole invoice for those charges~~.

- Requiring Electric Utilities to Estimate Communications Space Make-Ready Costs

We also stated that the rule requiring electric utilities to estimate communications space make-ready just doesn't make sense. We understand from our discussion with the Wireline Competition Bureau that the Bureau's intent was not that electric utilities generate the communications space make-ready estimate themselves (as electric utilities obviously have no visibility into the labor, material, or other costs of existing attachers), but that electric utilities serve as a clearing house to gather

estimates from each of the existing attachers and present them to the new attacher. This proposal, however, is completely at odds with the Commission's decision to place the burden on the new attacher to coordinate make-ready. The proposed rule also ignores the fact that it is the new attacher, not the electric utility, that is motivated to obtain estimates from the existing attachers to the pole so that it can proceed with its work.

Existing Violations

We expressed concern about the draft order's discussion regarding the cost responsibility for correcting existing violations, specifically the last sentence of ¶ 113, which states: "We also clarify that a utility cannot delay completion of make-ready while the utility attempts to identify or collect from the party who should pay for correction of the pre-existing violation." (Draft Order, 113). We whole-heartedly agree that the new attacher to the pole should not be responsible for the cost of remedying existing communications space violations. But there is more to it. This text seems to put the onus on the electric utility to push forward with correcting the violation and hope to recover the cost later.

There are at least two problems with this approach. First, by allowing make-ready to proceed before the cost-causer is identified, the draft rule would deprive the existing attacher of its contractual right to be notified of the violation and pursue a less-costly remedy, such as removal of the attachment. Second, if the violation is corrected before the attacher is notified, there is no "evidence" to back-up the assignment of cost causation. This becomes particularly important when the corrective action is a pole change-out (which is often a situation where the existing violator will simply choose another aerial route or an underground solution).

Further, such an approach would shift a tremendous cost-burden onto electric utilities. For example, Allen Bell of Georgia Power described that when Google Fiber undertook its build-out in Atlanta, Georgia, there were hundreds of existing violations discovered during the surveys that had to be corrected; shifting the cost of correcting those communications space violations onto Georgia Power would have been unfair and burdensome.

We believe that the Commission should instead adopt one of two alternative approaches. First, the Commission could clarify that the proper way to address existing violations is to give the new attacher the option of either (1) waiting for the corrective action process to run its course, or (2) covering the cost of correcting the violation, without recourse, if time is of the essence. Second, and if the Commission is interested in addressing the real reason for the delay in correcting existing violations—that is, existing attachers' anticompetitive motive—the Commission could adopt a rule that existing attachers must correct violations identified by a utility within 15 days of notice to the existing attacher of same, and providing that

where the existing attacher fails to do so, the new attacher can proceed with correcting the violation at the existing attacher's sole expense (and regardless of whether the existing attacher would have preferred a lower cost alternative such as removal of the existing attachers' attachment).

<u>One-Touch Make-Ready</u>

We expressed our support for the Commission's proposed adoption of its one-touch make-ready ("OTMR") rules, which we believe to be the most effective tool the Commission can use to expedite broadband deployment. We agree that OTMR is properly limited to make-ready within the communications space.

We did, though, raise one practical concern—proposed Rule 1.1412(j)(2)(ii)) appears to make the pole owner the arbiter of what constitutes "complex make-ready" within the communications space. Electric utilities are not in a position to determine what constitutes complex make-ready in the communications space. In fact, the electric utility is the least appropriate party to make this determination. We suggested that the Commission task a different party—whether the existing attacher, the new communications attacher and/or its qualified contractor—with making the final determination of whether communications space make-ready is simple or complex. Or, at a minimum, we request the Commission clarify that the electric utility is not required to opine on whether communications space make-ready is simple or complex.

<u>Joint Use Agreements between Electric Utilities and ILECs</u>

In our meetings, we expressed our agreement with the sharp distinction drawn by the Commission in the draft order between new agreements/infrastructure and existing agreements/infrastructure with respect to ILEC joint use rates. The draft order acknowledges that the attachments made by ILECs pursuant to existing joint use agreements likely were made under different (and more advantageous) terms and conditions than those under which CATVs and CLECs make attachments to electric utility poles. We expressed our support for the proposition underlying the Commission's new presumption regarding new agreements/infrastructure—that where ILECs access electric utility poles on terms and conditions that are truly the same as those of CLECs and CATVs, ILECs should pay the same rates as CLECs and CATVs.

The only concern we expressed with the text of the draft order (unrelated to the language of the actual rule) is that ILECs have a proven history of leveraging any remote ambiguity within the Commission's orders no matter how contradictory to the otherwise plain text and intent of the order. To that end, we requested that the Commission consider opportunities to eliminate ambiguities—however remote—in the draft order, and specifically, footnote 397, regarding which we propose the following changes:

> . . . Despite this argument, we decline to apply the presumption to pre-existing, freely-negotiated joint use agreements. The presumption we adopt today will offer incumbent LECs another option for new attachments going forward, when current agreements expire or in cases where an incumbent LEC does terminate an agreement and enter into a new agreement with the electric utility….

AT&T's July 25, 2018 ex parte letter argues that the Commission should reverse course on its draft order and adopt the presumption that the new telecom rate is the just and reasonable rate 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.

AT&T Ex Parte Letter, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Docket No. 17-84, p. 4 (July 24, 2018). But with respect to historical joint use agreements, as the Commission has recognized, "these long-standing agreements generally were entered into at a time when incumbent LECs concede they were in a more balanced negotiating position with electric utilities, at least based on relative pole ownership." (2011 Order, ¶ 216).[1] And, perhaps more importantly, ILECs have *already* obtained access to electric utility poles under these favorable, long-standing agreements. The only way "rate parity" works is when the other terms and conditions for access are identical (or at least very similar). As has been demonstrated over and over and over, this is hardly ever the case for ILEC attachments made under legacy joint use agreements. Granting ILECs the same rates as CLECs and CATVs would give ILECs a massive competitive advantage over CATVs and CLECs because ILECs gained access to the poles under decidedly different terms and conditions, and ILECs continue to enjoy distinct benefits under the joint use agreements.

In its ex parte letter regarding the draft order, CenturyLink takes a similar tack to AT&T, arguing that:

> The last seven years have proven that the better course now is for the Commission to afford ILECs the same type of mandatory and automatic rate relief that is enjoyed by their competitors. The Commission should move toward a uniform regulatory framework and rate structure

[1] Report and Order and Order on Reconsideration, *Implementation of Section 224 of the Act; A Nat'l Broadband Plan for Our Future,* 26 FCC Rcd 5240 (2011) (the "2011 Order").

> governing pole attachments of all competing communications providers by a date certain. As an initial step toward this goal, the Commission should immediately establish the pre-2011 upper bound telecommunications rate for all ILEC pole attachment agreements, at least as those agreements are renewed (including through auto renewal), extended, or renegotiated, and without need to examine whether the ILEC is similarly situated to other attachers. In fact, the Commission already established such an upper bound, tied to the pre-2011 Pole Attachment Order telecommunications carrier rate, for complaint proceedings in which the ILEC fails to show that it is similarly situated to other attachers. The draft order would now apply this upper bound for situations when an electric utility rebuts the presumption that an ILEC is similarly situated to other attachers. To the extent existing ILEC agreements provide ILECs benefits not available to other telecommunications attachers, those benefits do not justify denying ILECs just and reasonable pole attachment rates.

(CenturyLink Ex Parte Letter, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Docket No. 17-84, p. 5-6 (July 24, 2018)). Leaving aside for a moment CenturyLink's incorrect statement of precedent (the Commission stated in the 2011 Order that the pre-2011 telecom rate is a "reference point" in the case of new joint use agreements only), CenturyLink's brazen demand to apply the pre-2011 telecom rate to all joint use attachments, while also recognizing that joint use agreements contain benefits, makes clear that ILECs are only interested in a windfall. No ILEC in this proceeding or any other proceeding has presented evidence contradicting the obvious and undeniable benefits of joint use. In fact, as CenturyLink makes clear in its statement above, ILECs wish to retain the provisions of joint use agreements that benefit them vis-à-vis their competitors while simultaneously paying the same "rate" as their "competitors," and retaining their already built network of poles.

Overlashing

We expressed our gratitude to the Commission for bringing clarity to the issue of whether electric utilities can require advance notice of overlashing. While we believe that 45 days is a more reasonable timeframe within which to perform the engineering and analysis necessary to determine whether the proposed overlash can be made without make-ready, we recognize that 15 days is better than no advance notice at all.

In our meetings, we requested that the Commission clarify that electric utilities can require an overlasher to submit the specifications of the materials to be overlashed with the notice of overlashing. We also expressed our concern regarding the

Commission's statement in the draft order that "utilities may not use advanced notice requirements to impose quasi-application or quasi-pre-approval requirements, *such as requiring engineering studies*." (Draft Order, ¶ 111) (emphasis added). Some electric utilities conduct engineering studies themselves after receiving notice of an overlash, but others, and particularly smaller utilities, require that the overlasher provide an engineering study with its notice of overlashing. The whole point of advance notice of overlashing is so that the proposed overlashing can be pre-engineered to ensure that it is safe to proceed. The Commission itself stated in the draft order that it found pole owners' concerns regarding the cumulative effect of overlashing on pole loading "to be valid and supported by the record" and stated that where "a utility determines, through its own engineering analysis" that the proposed overlash should be denied pursuant to 47 U.S.C. § 224(f)(2), the utility can deny the overlashing. (Draft Order, ¶ 108). It discriminates against smaller electric utilities that do not have sufficient staff on hand to require that those utilities perform the pre-engineering themselves and prohibit them from requiring the attacher to obtain the engineering study from an approved engineer and to submit that study with the attacher's notice of overlashing. The practical effect of this rule is that smaller electric utilities will not be able to pre-engineer overlashing, and safety and reliability will suffer.

The utilities also requested that the Commission clarify that an electric utility may impose a reasonable penalty (akin to the 2011 Order's treatment of unauthorized attachments) where an overlasher fails to comply with an electric utilities' advance notice requirement. Clarifying that electric utilities may impose such a penalty will ensure that advance notice requirements have "teeth" and that electric utilities can truly protect against the safety and reliability issues attendant to overlashing recognized by the Commission.

Further, we discussed in our meetings the American Cable Association's ("ACA") proposal in its July 23, 2018 ex parte notice of an addition to the draft overlashing rule stating that "A utility may not charge a fee to the existing attacher for reviewing its proposed overlash." (ACA Ex Parte Letter, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Docket No. 17-84, Appx. A, p. 19 (July 23, 2018)). ACA states that such a rule would be in line with the Commission's existing precedent. *Id.* at 5. In fact, the Commission's precedent is that utilities are entitled to recover their incremental costs caused by an attacher.[2]

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[2] *See, e.g.* Consolidated Partial Order on Reconsideration, *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103, 12119 n. 120 (F.C.C. 2001) ("The Commission has never held that the Pole Attachment Act, which anticipates a range of reasonable rates, prohibits a utility from being directly compensated by an attacher for . . . incremental, non-recurring costs."); Notice of Proposed Rule Making, *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the*

The costs of performing pre-engineering in association with a review of a proposed overlash are clearly caused by the proposed overlasher, and electric utilities are clearly entitled to recover them. In light of the apparent confusion (and ACA's misunderstanding of Commission's precedent regarding an electric utility's right to recover the non-recurring, incremental costs associated with a pole attachment), the Commission should affirm that pole owners may recover their incremental costs associated with performing engineering analysis regarding proposed overlashing.

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The positions and data we discussed in our meeting were consistent with the positions and data set forth in the initial comments and reply comments filed by the Electric Utilities on the NPRM and FNPRM in this proceeding.

This ex parte notification is being filed electronically in the above-referenced docket pursuant to section 1.1206(b) of the Commission's rules. Please let me know if you have any questions.

Very Truly Yours,

s/ Robin F. Bromberg

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Commission's Rules and Policies Governing Pole Attachments, 12 FCC Rcd 11725, 11727-11728 (F.C.C. July 1, 1997) ("Incremental costs include pre-construction survey, engineering, make-ready and change-out costs incurred in preparing for cable attachments. Congress expected pole attachment rates based on incremental costs to be low because utilities generally recover the make-ready or change-out charges directly from cable systems.").