

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC**

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment	)	WC Docket No. 17-84
by Removing Barriers to Infrastructure	)	
Investment	)	
	)	
Accelerating Wireless Broadband Deployment	)	WT Docket No. 17-79
by Removing Barriers to Infrastructure	)	
Investment	)	

**OPPOSITION TO PETITION FOR RECONSIDERATION OF THE COALITION OF  
CONCERNED UTILITIES**

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**I. INTRODUCTION AND SUMMARY**

The Fiber Broadband Association (“FBA” or “Association”)<sup>1</sup> hereby submits its opposition to the Petition for Reconsideration of the Coalition of Concerned Utilities (“Coalition”) in the above-referenced proceeding.<sup>2</sup> The Coalition seeks partial reconsideration of the Commission’s *Third Wireline Infrastructure Order*, which adopted a one-touch make-ready (“OTMR”) process for simple make-ready work in the communications space, codified longstanding Commission precedent regarding overbuilding, and implemented other pole attachment reforms to promote broadband deployment.<sup>3</sup> As the FBA previously explained, these

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<sup>1</sup> The FBA’s mission is to accelerate deployment of all-fiber access networks by demonstrating how fiber-enabled applications and solutions create value for service providers and their customers, promote economic development, and enhance quality of life. The Association’s members represent all areas of the broadband access industry, including telecommunications, computing, networking, system integration, engineering, and content-provider companies, as well as traditional service providers, utilities, and municipalities. As of today, the FBA has more than 250 entities as members. A complete list of FBA members can be found on the organization’s website: <https://www.fiberbroadband.org/>.

<sup>2</sup> Petition for Reconsideration of the Coalition of Concerned Utilities, WC Docket No. 17-84, WT Docket No. 17-79 (Oct. 15, 2018) (“Coalition Petition”).

<sup>3</sup> *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, WC Docket No. 17-84, WT Docket No. 17-79, Third Report and Order and Declaratory Ruling, FCC 18-111 (Aug. 3, 2018) (“*Third Wireline Infrastructure Order*”).

rules get to the heart of many of the most significant problems in the pole attachment process and will accelerate network upgrades and new deployments nationwide.<sup>4</sup>

As explained below, the Coalition fails to meet the standard for Commission reconsideration. The Coalition took advantage of multiple opportunities to comment on the proposals adopted in the *Third Wireline Infrastructure Order*, and the Commission took into account the Coalition's input when crafting the new rules.<sup>5</sup> Indeed, arguments relied on by the Coalition were fully considered and rejected by the Commission in this proceeding. The Commission therefore should deny the Coalition's petition to preserve the careful balance it struck in the *Third Wireline Infrastructure Order* between facilitating timely access to poles by new attachers and safeguarding wireline infrastructure and utility pole owner rights.

## **II. THE COMMISSION SHOULD NOT GRANT RECONSIDERATION**

The Coalition fails to meet the standard for reconsideration under Section 1.429 of the Commission's rules.<sup>6</sup> Reconsideration is appropriate "where the petitioner shows either a material error or omission in the original order or raises facts not known or not existing until after the petitioner's last opportunity to respond."<sup>7</sup> Petitions that rely on arguments that have

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<sup>4</sup> *Ex Parte* Filing of the Fiber Broadband Association on Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, 5 (July 20, 2018) ("FBA July 2018 Ex Parte"). *See Ex Parte* Filing of the Fiber Broadband Association on Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84 (Apr. 10, 2018) ("FBA April 2018 Ex Parte"); Comments of the Fiber Broadband Association on the Further Notice of Proposed Rulemaking, WC Docket No. 17-84 (Jan. 17, 2018) ("FBA Comments"); Reply Comments of the Fiber Broadband Association on the Further Notice of Proposed Rulemaking, WC Docket No. 17-84 (Feb. 16, 2018) ("FBA Reply Comments").

<sup>5</sup> *See, e.g.*, Comments of the Coalition of Concerned Utilities, WC Docket No. 17-84 (June 15, 2017); Reply Comments of the Coalition of Concerned Utilities, WC Docket No. 17-84 (July 17, 2017) ("Coalition Reply Comments").

<sup>6</sup> 47 C.F.R. § 1.429.

<sup>7</sup> *Amendment of Section 73.3555(e) of the Commission's Rules, Nat'l Television Multiple Ownership Rules*, MB Docket No. 13-236, Order on Reconsideration, 32 FCC Rcd 3390, para. 16 (2017) ("*UHF Discount Reconsideration Order*"). *See Connect Am. Fund; ETC Annual Reports and Certifications*, WC Docket Nos. 10-90, 14-58, Report and Order and Order on Reconsideration, 32 FCC Rcd 1642, paras. 68-70 (2017) (granting

been fully considered and rejected by the Commission do not warrant consideration.<sup>8</sup> The Commission is entitled to substantial deference when engaging in regulatory “line-drawing” to develop balanced solutions to complex issues.<sup>9</sup> Thus, if the Commission fully considered all “important arguments” in a proceeding to develop “a reasoned basis for its conclusion,” reconsideration is unwarranted.<sup>10</sup>

The Coalition argues that reconsideration is necessary to “better achieve the goals” of the *Third Wireline Infrastructure Order*.<sup>11</sup> But the Coalition fails to demonstrate that the Commission committed a material error or omission in its decisions. The Commission fully considered the arguments raised in the record, including many of those offered by the Coalition, when adopting the new rules. The Commission also often looked to the recommendations of its Broadband Deployment Advisory Committee (“BDAC”), which represent hours of work to develop consensus pole attachment proposals.<sup>12</sup> Consequently, the petition represents an attempt to re-litigate the Coalition’s preferred pole attachment policies – policies that will only further delay the wireline broadband deployment spurred by the *Third Wireline Infrastructure Order* – and should be denied.

The following sections detail key issues for the FBA on which the Coalition sought reconsideration and explain why reconsideration is unwarranted.

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reconsideration when petitioner raised issues demonstrating sufficient public interest benefits in overturning prior Commission policy determinations) (“*CAF Reconsideration Order*”).

<sup>8</sup> 47 C.F.R. § 1.429(l).

<sup>9</sup> *CAF Reconsideration Order* at para. 27, n.57. See *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000) (holding that the Commission possesses “wide discretion to determine where to draw administrative lines”).

<sup>10</sup> *UHF Discount Reconsideration Order* at para. 17.

<sup>11</sup> Coalition Petition at 2.

<sup>12</sup> *Third Wireline Infrastructure Order* at para. 2 (citing Letter from Paul D’Ari, Designated Federal Officer, Broadband Deployment Advisory Committee, FCC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, Attachment (July 3, 2018) (“January 2018 BDAC Recommendations”)).

### **A. OTMR Procedures and Timeframes**

The Coalition requests that a Professional Engineer be required to certify that OTMR work is “simple” when the utility does not maintain a list of approved contractors, claiming that communications contractors are unqualified to make such a determination.<sup>13</sup> The Coalition also requests additional time to participate in OTMR surveys, review OTMR applications, and monitor OTMR work.<sup>14</sup>

The Commission should not disturb its OTMR procedures or timeframes. The prior make-ready process was a model of inefficiency, where new attachments were delayed and unnecessary costs incurred as multiple attachers each took a turn to “touch” a pole.<sup>15</sup> The Coalition provides no support for its assertion that communications contractors lack the ability to determine whether OTMR work is simple. Nothing in the record shows that communications contractors are unable to assess whether OTMR work will cause service outages or facility damage, making the work “complex.” In fact, the Commission rejected arguments made by the Coalition and others that new attacher contractors do not possess adequate incentives to properly assess OTMR work.<sup>16</sup> The Commission instead concluded that new attacher contractors will be conservative in their determinations of whether OTMR work is simple or complex in order to avoid liability for damages and preserve ongoing relationships with utility pole owners and other attachers.<sup>17</sup> The Commission also took targeted steps to ensure that new attacher contractors perform OTMR work in a safe and reliable manner. The Commission required that, if a utility

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<sup>13</sup> Coalition Petition at 23.

<sup>14</sup> *Id.* at 24.

<sup>15</sup> FBA April 2018 Ex Parte at 2-3. *See* FBA July 2018 Ex Parte at 2-3.

<sup>16</sup> *Third Wireline Infrastructure Order* at para. 25.

<sup>17</sup> *Id.* at para. 55.

does not maintain a list of approved contractors,<sup>18</sup> the new attacher must certify to the utility that its contractor satisfies certain safety and reliability criteria recommended by the BDAC.<sup>19</sup> These criteria include adherence to National Electrical Safety Code (“NESC”) and utility guidelines, compliance with all applicable laws and regulations, and maintenance of adequate insurance or a performance bond.<sup>20</sup> The criteria do not include a requirement that a Professional Engineer sign off on OTMR work.

The Coalition asserts that the contractor certification is “meaningless” unless a Professional Engineer approves the OTMR work.<sup>21</sup> But the Commission already found that the criteria “materially reduce safety and reliability risks,” rejecting arguments that the safeguards would not adequately protect against substandard OTMR work.<sup>22</sup> While utilities retain the right to veto a new attacher contractor, the veto must be grounded in “reasonable” safety concerns related to the contractor’s inability to meet the Commission’s criteria or the utility’s safety standards.<sup>23</sup> Citing the Coalition’s comments, the Commission cautioned that utilities should only be able to disqualify new attacher contractors “that raise concrete workmanship dangers.”<sup>24</sup> The Coalition fails to show that all communications contractors are unable to complete OTMR work in a safe and reliable manner in the absence of a Professional Engineer’s review. The Coalition does not demonstrate that new attachers should be obligated to incur the time and

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<sup>18</sup> The Coalition acknowledges that it is “helpful” that the *Third Wireline Infrastructure Order* permits utilities to maintain lists of approved contractors to perform simple make-ready work. Coalition Petition at 23.

<sup>19</sup> *Third Wireline Infrastructure Order* at para. 40. See January 2018 BDAC Recommendations at 26.

<sup>20</sup> *Third Wireline Infrastructure Order* at para. 39.

<sup>21</sup> Coalition Petition at 22.

<sup>22</sup> *Third Wireline Infrastructure Order* at para. 39. See *id.* at para. 29.

<sup>23</sup> *Id.* at para. 42.

<sup>24</sup> *Id.* See *id.* at para. 57 (stating that a utility pole owner’s objection to a contractor’s determination that OTMR work is simple should not be made “without adequate support or in bad faith”).

money necessary to secure the services of a Professional Engineer (if one is even reasonably available) in order to move forward with OTMR work.

The Commission also should deny the Coalition's requested OTMR timeframe extensions. The Coalition provides no basis for lengthening the OTMR timeframes, except its bare assertion that 15 days is "too short" a period for a utility to review its poles.<sup>25</sup> The Coalition does not suggest that utilities are unable to meet the OTMR timeframes or that critical pole upgrades or other work will be skipped or delayed due to the timeframes. The Commission examined the arguments raised in the record and found that the OTMR timeframes adequately protected wireline infrastructure and utility pole owner rights while granting timely pole access to new attachers.<sup>26</sup> The Coalition does not show that the Commission committed a material error or omission when balancing these interests and raises no new facts warranting reconsideration.

The Commission acknowledged that its OTMR procedures and timeframes "cannot fully align the incentives of new attachers with those of existing attachers and utilities," but it decided that, on balance, the benefits of faster, more efficient broadband deployment outweighed utility concerns.<sup>27</sup> Consequently, the Commission fully considered the arguments raised in the record to develop reasonable OTMR procedures and timeframes. The Commission should deny the Coalition's attempt to overturn such reasoned decisionmaking.

## **B. Overlapping**

The Coalition argues that overlashers should be forced to submit engineering studies, identify the materials to be overlashed, and deliver a Professional Engineer certification that the

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<sup>25</sup> Coalition Petition at 23.

<sup>26</sup> See, e.g., *Third Wireline Infrastructure Order* at paras. 54 (regarding survey notice), 63 (regarding application review), 66 (regarding make-ready monitoring).

<sup>27</sup> *Id.* at para. 30.



planned overlashing complies with the NESC in advance.<sup>28</sup> The Coalition also contends that utilities should be reimbursed for their costs to review overlashing work.<sup>29</sup>

The Commission should reject the burdensome overlashing requirements proposed by the Coalition, which will undermine its goal of “hasten[ing] deployment by resolving disagreements over whether utilities may impose procedural requirements on overlashing.”<sup>30</sup> Overlashing expedites deployments, often taking half the time of installing a new pole attachment, and lowers the cost of deployments by as much as 30 percent.<sup>31</sup> Overlashers also possess strong incentives to preserve pole integrity and avoid violations because they (or parties permitting third-party overlashing) already have attachments on the poles and must indemnify utility pole owners for any damages.<sup>32</sup>

The Coalition acknowledges that many of the overlashing arguments and analyses presented in its petition were raised in its earlier comments in this proceeding.<sup>33</sup> The Coalition raises no new facts warranting consideration. Moreover, the Commission considered the Coalition’s prior claims, but stated it was “unpersuaded . . . by arguments that utility pre-

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<sup>28</sup> Coalition Petition at 12.

<sup>29</sup> *Id.* In addition, the Coalition requests that the Commission require existing attachers to remove unused facilities prior to overlashing. *Id.* at 13. The Commission did not address this issue directly in the *Third Wireline Infrastructure Order*, indicating that it would “take further action as warranted in this proceeding to address outstanding issues.” *Third Wireline Infrastructure Order* at para. 130. The Coalition therefore fails to show that the Commission committed a material error or omission regarding this issue and reconsideration should be denied.

<sup>30</sup> *Third Wireline Infrastructure Order* at para. 115.

<sup>31</sup> FBA Reply Comments at 2-3. *See* FBA Comments at 2-3; FBA July 2018 Ex Parte at 3; FBA April 2018 Ex Parte at 2.

<sup>32</sup> FBA Reply Comments at 4-6. *See* FBA Comments at 4-6; FBA July 2018 Ex Parte at 3; FBA April 2018 Ex Parte at 2; *see also Third Wireline Infrastructure Order* at para. 120 (allowing utilities to bill an overlasher for the correction of any damage or code violations caused by its work or require the overlasher to complete any remedial work at its own expense).

<sup>33</sup> *See* Coalition Petition at 11-12.

approval for overlashing is necessary to ensure safety.”<sup>34</sup> Pre-approval was not required for overlashing under the prior rules and nothing in the record showed that significant safety or reliability issues resulted from the application of the Commission’s longstanding precedent. The Commission therefore banned prior approval requirements for overlashing, as they would unnecessarily increase costs for attachers and delay deployments.<sup>35</sup>

However, far from ignoring the Coalition’s overlashing concerns, the Commission cited them as the basis for allowing utilities to require up to 15 days’ advance notice of overlashing.<sup>36</sup> The Commission found that advance overlashing notice would “allow the utility to protect its interests without imposing unnecessary burdens on attachers.”<sup>37</sup> Thus, any concerns a utility may have with an overlashing should be addressed through the advance notice process, not through pre-approval obligations inconsistent with longstanding Commission precedent. But the Coalition should not be allowed to use the advance notice process to require overlashers to provide engineering studies, identify the materials to be overlashed, submit a Professional Engineer certification, or pay additional fees. The Commission was clear that utilities “may not use advanced notice requirements to impose quasi-application or quasi-pre-approval requirements.”<sup>38</sup> The Commission explicitly prohibited utilities from requiring engineering studies, finding this requirement unnecessary because the overlasher ultimately is responsible for

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<sup>34</sup> *Third Wireline Infrastructure Order* at para. 117.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at para. 116. The FBA opposed an advance overlashing notice requirement. *See, e.g.*, FBA July 2018 Ex Parte at 3; FBA Comments at 8-9; FBA Reply Comments at 8-9. However, the FBA recognizes that the Commission must balance the arguments raised in the record to adopt reasonable solutions to complex issues.

<sup>37</sup> *Third Wireline Infrastructure Order* at para. 116.

<sup>38</sup> *Id.* at para. 119.

any damage or code violations resulting from its work.<sup>39</sup> The Commission similarly barred utilities from requiring overlashers to identify the materials to be overlashed, concluding that such a requirement would “unduly slow deployment with little offsetting benefit.”<sup>40</sup> While not directly addressed by the Commission, the Coalition’s proposed Professional Engineer certification requirement also should be rejected for the reasons detailed above regarding OTMR work. Under the advance notice process, the utility must provide specific documentation establishing that a particular overlashing creates a safety issue after it receives notice.<sup>41</sup> The process does not permit utilities to impose pre-approval certification requirements. Finally, the Commission considered and rejected forcing overlashers to reimburse utilities for the costs to review an overlashing. After balancing the arguments in the record, the Commission found that a reimbursement obligation would unnecessarily increase deployment costs, dismissing the argument that pre-overlashing engineering analyses represented an incremental cost caused by the new attacher that is recoverable by utilities.<sup>42</sup> The Commission should affirm the well-considered decisionmaking underpinning its overlashing regime.

### **C. Preexisting Violations**

The Coalition asserts that the Commission’s approach to preexisting violations unlawfully requires utilities to replace poles prematurely to expand pole capacity and unfairly exempts new attachers from sharing in pole replacement costs.<sup>43</sup> Utilities misused the prior pole

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<sup>39</sup> *Id.* at para. 119, n.444. Similarly, the Commission determined that a utility may not deny access to overlash due to a preexisting violation on the pole, noting that a party that chooses to overlash on a pole with a preexisting violation and causes further damage will be responsible for any necessary repairs. *Id.* at para. 116, n.429.

<sup>40</sup> *Id.* at para. 119, n.444.

<sup>41</sup> *Id.* at para. 116.

<sup>42</sup> *Id.* at para. 116, n. 431.

<sup>43</sup> Coalition Petition at 13-16. The Coalition also asks the Commission to adopt rules: (a) establishing a presumption that unauthorized attachers caused a preexisting violation and must pay to correct it; (b) requiring

attachment notice process to try to get new attachers to pay for the correction of preexisting violations,<sup>44</sup> despite the fact that Commission precedent dictated that such practices were unreasonable.<sup>45</sup> The Commission therefore clarified, consistent with the BDAC’s recommendations, that a new attacher is not responsible for the costs associated with bringing poles or third-party equipment into compliance, so long as the violation existed prior to the new attachment.<sup>46</sup>

In the *Third Wireline Infrastructure Order*, the Commission stated, in response to a question from Lightower, that utilities may not deny new attachers pole access solely based on preexisting violations, including when a pole has been “red tagged” for replacement.<sup>47</sup> The Coalition previously commented on Lightower’s question and there is no reason to assume that the Commission did not consider the Coalition’s input in its decisionmaking.<sup>48</sup> Nothing in the *Third Wireline Infrastructure Order* mandates that utilities replace poles to expand capacity prematurely. The Commission afforded new attachers access to poles with preexisting violations; it said nothing about when and how utilities should replace their “red tagged” poles. As the Commission correctly pointed out, denying a new attacher access to poles with

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that, if it cannot be determined who caused a preexisting violation, then the costs for correction should be shared by all entities that reasonably might have caused it; and (c) obligating new attachers to pay to correct an existing violation and seek reimbursement from the existing attachers responsible for it. *Id.* at 16-17. The Coalition provides no new facts or arguments supporting these proposals beyond stating that the Commission should “reconsider” them. *Id.* The Coalition therefore fails to show that the Commission committed a material error or omission regarding these issues and reconsideration should be denied.

<sup>44</sup> FBA Comments at 9, n.36; FBA Reply Comments at 5, n.25.

<sup>45</sup> See *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, File Nos. PA 99-001, PA 99-002, Consolidated Order, 14 FCC Rcd 11599, 11606-07, para. 19 (1999).

<sup>46</sup> *Third Wireline Infrastructure Order* at para. 121. See January 2018 BDAC Recommendations at 24.

<sup>47</sup> *Third Wireline Infrastructure Order* at para. 122, n.455.

<sup>48</sup> See Coalition Reply Comments at 21.

preexisting violations does nothing to correct the underlying safety issues.<sup>49</sup> It is not the fault of the new attacher that a preexisting violation exists on a pole, and the Commission rejected claims that utilities should be allowed to halt all pole work and prohibit access until the preexisting violation is resolved.<sup>50</sup> Accepting the Coalition’s view would place new attachers in the same “unacceptable position” they occupied prior to the *Third Wireline Infrastructure Order* of delaying deployment until the pole is replaced or paying to resolve the safety issues themselves.<sup>51</sup>

Referencing comments submitted by the Coalition and other utility interests, the Commission considered and rejected cost-shifting from utilities to new attachers for preexisting pole violations. As the Commission noted, “[t]he new attachment may precipitate correction of the preexisting violation, but it is the violation itself that causes the costs, not the new attacher.”<sup>52</sup> Thus, holding the new attacher responsible for pole replacement costs necessitated by preexisting violations unfairly penalizes it for problems it did not cause, deters deployment, and provides no incentive for existing attachers and utility pole owners to proactively review and address violations. The Commission therefore should dismiss the Coalition’s claims and affirm its prohibition on cost-shifting for preexisting pole violations.

#### **D. Detailed Make-Ready Estimates and Invoices**

The Coalition asks the Commission to turn its make-ready process on its head by requiring new attachers to submit make-ready estimates or bear any additional utility costs

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<sup>49</sup> *Third Wireline Infrastructure Order* at para. 122.

<sup>50</sup> *Id.* at para. 122, n.455.

<sup>51</sup> *See id.* at para. 122, n.457.

<sup>52</sup> *Id.* at para. 121.

incurred in providing such detailed information.<sup>53</sup> These requests repackage arguments already presented to the Commission by the Coalition and should be denied.<sup>54</sup>

The Coalition states that requiring new attachers to obtain make-ready estimates is “consistent with existing practice.”<sup>55</sup> This makes little sense, as utilities were responsible for providing new attachers with make-ready cost information under the rules prior to the *Third Wireline Infrastructure Order*.<sup>56</sup> The Coalition also contends that new attachers are better positioned to obtain make-ready estimates from existing attachers.<sup>57</sup> But the Commission already considered claims by utilities, including the Coalition, regarding the difficulties in providing make-ready estimates for third parties and found that “utilities are best positioned to compile and submit these make-ready estimates . . . due to their pre-existing and ongoing relationships with the existing attachers on their poles.”<sup>58</sup> As a result, the Commission balanced the arguments raised in the record and determined that utilities, not new attachers, should be responsible for providing make-ready estimates and invoices. The Coalition offers no new arguments for why this reasonable balancing of burdens should be reconsidered.

The Commission also referenced concerns raised by the Coalition and other utility interests about the cost and time necessary to provide make-ready estimates and invoices on a detailed, pole-by-pole basis.<sup>59</sup> The Commission recognized that some utilities currently may not

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<sup>53</sup> Coalition Petition at 17-18.

<sup>54</sup> Coalition Reply Comments at 19.

<sup>55</sup> Coalition Petition at 17.

<sup>56</sup> *Third Wireline Infrastructure Order* at para. 109 (citing 47 C.F.R. § 1.1411(d)).

<sup>57</sup> Coalition Petition at 17.

<sup>58</sup> *Third Wireline Infrastructure Order* at para. 111.

<sup>59</sup> *Id.* at para. 112.

have the accounting systems necessary to generate pole-by-pole estimates and invoices.<sup>60</sup> Nevertheless, the Commission found that the balance of interests weighed in favor of requiring utilities to provide detailed make-ready estimates and invoices “to enable new attachers to understand the costs of deployment and to make informed decisions.”<sup>61</sup> The Commission explained that, if it only required utilities to provide detailed make-ready costs when “reasonable” through current systems, then some utilities would never provide make-ready costs on a pole-by-pole basis, resulting in delayed or inefficient deployments based on inadequate information.<sup>62</sup> As the Coalition concedes, new accounting system costs are not recoverable through the annual pole rental rate.<sup>63</sup> The Commission should not create an exception making new attachers responsible for such costs in response to the Coalition’s petition.

#### **E. Application Review**

The Coalition contends that 10 business days to review an attachment application for completeness is too short a timeframe and risks harming the public and the electric distribution system.<sup>64</sup> The Coalition instead advocates for a 15-day timeframe, with additional time granted for *force majeure* events and other circumstances “beyond the pole owner’s control.”<sup>65</sup>

The Commission’s attachment timeline is meaningless if new attachers cannot get a utility to agree that the threshold action in the process – having a utility deem an application complete – is achieved.<sup>66</sup> The Commission therefore adopted the 10-day application review

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<sup>60</sup> *Id.* at para. 112, n.402.

<sup>61</sup> *Id.* at para. 112.

<sup>62</sup> *Id.* at para. 112, n.402.

<sup>63</sup> Coalition Petition at 18, n.61.

<sup>64</sup> *Id.* at 24.

<sup>65</sup> *Id.*

<sup>66</sup> FBA July 2018 Ex Parte at 3; FBA April 2018 Ex Parte at 3.

timeframe based on the BDAC's recommendations.<sup>67</sup> The Commission noted that the 10-day timeframe provided predictability regarding the start of the application process and would avoid unnecessary delays.<sup>68</sup> The Commission further argued that the 10-day timeframe would incentivize utilities to better communicate to new attachers what is needed for a "complete" attachment application.<sup>69</sup> Critically, the Commission reviewed the record and determined that "the timeline we adopt balances the interests of new attachers in the speedy processing of applications and of utilities in needing sufficient time to review the applications."<sup>70</sup>

The Coalition provides no new facts or arguments to support its sweeping assertion that the 10-day timeframe endangers public safety and electric infrastructure while a 15-day timeframe is sufficient. The Coalition complains that applicants often include incorrect pole numbers in their applications, requiring utilities to spend time to ascertain the correct pole locations.<sup>71</sup> Even if true, this claim provides no basis for extending the 10-day timeframe. First, an application that contains incorrect pole numbers presumably is incomplete, as it fails to "provid[e] the utility with the information necessary under the utility's procedures . . . to make an informed decision on the application."<sup>72</sup> The Commission's rules allow the utility to return such an application to the new attacher and request that it correct the deficient pole numbers. The Coalition fails to explain why this corrective process is insufficient. Second, the FBA notes

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<sup>67</sup> *Third Wireline Infrastructure Order* at paras. 62 (for OTMR applications), 79 (for non-OTMR applications). See January 2018 BDAC Recommendations at 32.

<sup>68</sup> *Third Wireline Infrastructure Order* at paras. 63, 79.

<sup>69</sup> *Id.* at para. 63.

<sup>70</sup> *Id.*

<sup>71</sup> Coalition Petition at 24.

<sup>72</sup> *Third Wireline Infrastructure Order* at para. 60.



that utilities, unlike new attachers, should possess comprehensive information regarding the locations of their poles and should be able to identify incorrect pole numbers in a timely manner.

The Coalition contends that utilities have “chaotic schedules” and requests the authority to extend the application review timeframe in response to events beyond the pole owner’s control.<sup>73</sup> The FBA recognizes that disaster-recovery efforts and other *force majeure* events may draw resources away from application review efforts and new attachers can work with utilities to develop solutions in order to not unduly delay broadband deployment under such circumstances. But granting utilities unchecked authority to automatically suspend the application review timeframe for unforeseen circumstances would engender disputes and create opportunities for “bad faith practices intended to delay the start of the pole attachment timeline” that the Commission sought to end when establishing predictable application review deadlines. The Commission therefore should retain its current application review timeframe, while allowing utilities and new attachers to develop alternative procedures by mutual agreement to respond to extreme circumstances.

#### **F. Joint Pole Surveys**

The Coalition argues that the joint survey obligations do not comport with “operating realities” and require reconsideration.<sup>74</sup> The attachment process can be expedited by increasing cooperation among utilities, existing attachers, and new attachers.<sup>75</sup> Joint surveys allow all relevant parties to collaborate before pole attachment work begins, reducing the risk that disputes will arise, especially regarding the extent to which make-ready work will be necessary.<sup>76</sup> To

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<sup>73</sup> Coalition Petition at 24.

<sup>74</sup> *Id.* at 19.

<sup>75</sup> FBA July 2018 Ex Parte at 4.

<sup>76</sup> FBA April 2018 Ex Parte at 4.

facilitate such collaboration, the Commission adopted the BDAC’s recommendation that utilities make commercially reasonable efforts to provide at least three business days’ notice to a new attacher and all existing attachers of any pole surveys.<sup>77</sup> As with other procedures adopted in the *Third Wireline Infrastructure Order*, the Commission reviewed the record and concluded that the joint survey requirements “strike[] the right balance” between the needs of new attachers and utilities.<sup>78</sup>

The Coalition asserts that “many new attachers” do not want to participate in joint surveys and the Commission should make the joint survey notice optional.<sup>79</sup> The Coalition fails to identify the new attachers that do not want to participate in joint surveys. The FBA submits that its members highly value the opportunity to participate in joint surveys as a way to head off make-ready disputes before they arise.<sup>80</sup> In any event, there is no reason why the Coalition could not have raised this argument in its prior submissions to the Commission and it should not serve as a basis for reconsideration now. The Coalition also maintains that utilities may not know which attachers are on a given pole and requests that the Commission’s require new attachers to obtain existing attacher information before submitting attachment requests.<sup>81</sup> As explained above, the Commission found that utilities, not new attachers, are in the best position to know the existing attachers on their poles. More importantly, the Commission specifically considered this argument and determined that “[t]he failure of a utility to maintain adequate records to enable the utility to identify the attachers on its poles . . . is not a sufficient reason for us to

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<sup>77</sup> *Third Wireline Infrastructure Order* at para. 82.

<sup>78</sup> *Id.*

<sup>79</sup> Coalition Petition at 19.

<sup>80</sup> See FBA July 2018 Ex Parte at 4; FBA April 2018 Ex Parte at 4.

<sup>81</sup> Coalition Petition at 19.

eliminate the [survey] notification requirement.”<sup>82</sup> The Commission therefore already rejected the Coalition’s argument to push its joint survey responsibilities onto new attachers and the Commission should not allow the Coalition to take another “swing” on this issue through its petition. Finally, the Coalition requests that the joint survey notice timeframe be reduced to no more than 24 hours in order to provide maximum scheduling flexibility to utilities.<sup>83</sup> Not only does this request threaten to undermine the careful “balance” struck by the Commission in adopting the three-day notice timeframe, it ignores the fact that utilities are not obligated “to set a date for the survey that is convenient for the affected attachers,” although the Commission encourages parties to work together to find mutually-agreeable survey times.<sup>84</sup> Thus, the joint survey process already provides utilities with sufficient flexibility, and the Coalition failed to demonstrate a material error or omission on the part of the Commission when adopting the timeframe.

### **III. CONCLUSION**

For all of the above-stated reasons, the FBA respectfully requests that the Commission deny the Coalition’s petition and preserve the carefully considered balance of spurring

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<sup>82</sup> *Third Wireline Infrastructure Order* at para. 82, n.299.

<sup>83</sup> Coalition Petition at 19.

<sup>84</sup> *Third Wireline Infrastructure Order* at para. 82.

broadband deployment by new attachers while preserving public safety and utility pole owner rights struck in the *Third Wireline Infrastructure Order*.

Respectfully Submitted,

FIBER BROADBAND ASSOCIATION

A handwritten signature in cursive script, reading "Lisa R. Youngers".

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November 9, 2018

## **CERTIFICATE OF SERVICE**

I hereby certify that, on November 9, 2018, a true and correct copy of the foregoing Opposition to Petition for Reconsideration of the Coalition of Concerned Utilities was provided via first class U.S. mail to:

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