Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

OPPOSITION OF ITTA – THE VOICE OF AMERICA'S BROADBAND PROVIDERS

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ITTA – The Voice of America's Broadband Providers (ITTA) hereby submits its opposition to or comments on several arguments advanced in the Coalition of Concerned Utilities' (Electric Coalition) petition for reconsideration of the Commission's *Third R&O* geared towards accelerating broadband deployment by removing barriers to infrastructure investment.[1] The Electric Coalition Petition challenges numerous aspects of the *Third R&O*'s modifications to the Commissions' pole attachment rules.

I. INTRODUCTION AND SUMMARY

ITTA's members are broadband providers that also provide wireline and wireless voice, video, and other communications services, but whose roots lie as incumbent local exchange carriers (ILECs). In that capacity, they are pole owners, existing attachers, would-be new attachers, or any combination thereof. As such, ITTA is positioned to analyze changes to the Commission's pole attachment rules from diffuse perspectives.

[1] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, FCC 18-111 (Aug. 3, 2018) (*Third R&O*); Petition for Reconsideration of the Coalition of Concerned Utilities, WC Docket No. 17-84, WT Docket No. 17-79 (filed Oct. 15, 2018) (Electric Coalition Petition).

ITTA greatly appreciates this Commission having taken in the *Third R&O* the long overdue action of eliminating disparities between the pole attachment rates ILECs must pay compared to other similarly-situated telecommunications attachers that are ILECs' competitors. Having finally taken this action, the Commission should stay the course and not succumb to baseless, hyperbolic calls to undo these pro-competitive and pro-broadband deployment measures. The Commission should also decline to impose upon communications attachers contractor specifications that would exceed reasonable safety and reliability protections, and hamper broadband deployment efforts by introducing unnecessary delays and diverting limited capital towards frivolous compliance costs.

There are, however, some modifications to the *Third R&O* that may be appropriate. The Commission should clarify new attacher cost sharing obligations as suggested by the Electric Coalition, and also adopt common sense rules addressing costs to rectify violations. And if the Commission grants reconsideration on the issues of immediate replacement of red-tagged poles and double wood situations, it should concomitantly implement timelines and ensure its rules pertaining to double wood situations apply equally to electric utilities and communications attachers.

II. DISCUSSION

A. The Commission Should Reject the Electric Coalition's Attempt to Perpetuate Long Outdated Disparities in the Pole Attachment Rate Structure

In the *Third R&O*, the Commission revised its rules to establish a presumption that, for newly-negotiated and newly-renewed pole attachment agreements between ILECs and utilities, an ILEC will receive comparable pole attachment rates, terms, and conditions as similarly-situated telecommunications attachers. The utility can rebut the presumption, however, with clear and convincing evidence that the ILEC receives net benefits under its pole attachment

agreement with the utility that materially advantage the ILEC over other telecommunications attachers.[2]

In 2011, the Commission concluded that reducing the telecom rate to be lower and more uniform with the cable rate better enables providers to compete on a level playing field, eliminates competitive distortions between different providers of the same services, and fosters broadband deployment by ensuring that provider behavior is driven more by underlying economic costs than arbitrary price differentials.[3] When cable companies or other competitive telecommunications providers pay pole attachment fees at a rate that is generally lower than for ILECs, this discrepancy frustrates broadband deployment by enabling utility pole owners to levy much higher rates on ILECs than their direct competitors. Consistency in rate regulation is needed to increase regulatory parity, diminish disruptive market signals, and preempt inappropriate regulatory advantages. By removing regulatory mechanisms that impose upon providers varying obligations that are not substantially related to actual costs, the Commission is able to promote the pro-competitive and deregulatory goals of the Telecommunications Act of 1996 (1996 Act) that led to significant amendments to Section 224 of the Communications Act of 1934, as amended (the Act).[4]

Prior to the *Third R&O*, the Commission's pole attachments regulatory regime, which enabled different rate formulae for identical attachments, was no longer appropriate as intermodal and intramodal competition flourished. Accordingly, the Commission properly

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[2] *See Third R&O* at 63-64, para. 123.

[3] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5303, para. 147 (2011) (*2011 Pole Attachment Order*); *see also id.* at 5320, para. 181 ("largely eliminating the difference in prices charged to cable operators and telecommunications carriers will significantly reduce the extent to which investment and deployment choices by such providers, and competition more generally, are distorted based on regulatory classifications").

[4] *See* 1996 Act § 703 (amending Section 224 of the Act, 47 U.S.C. § 224).

adopted a uniform rate structure that is unrelated to the classification of the attaching entity. The practical effect of this action is that the ILEC will receive the telecommunications rate unless the utility owner can demonstrate with clear and convincing evidence that the benefits to the ILEC far outstrip the benefits accorded to other pole attachers. Shifting the burden to the pole owner to demonstrate that the ILEC should not enjoy the telecommunications rate, and requiring the pole owner to support its showing with clear and convincing evidence, similarly should reduce the costly disputes and regulatory gamesmanship that plagued the prior formulation, whereby the Commission evaluated ILEC complaints on a case-by-case basis to determine whether the rates, terms, and conditions imposed on ILEC pole attachments are consistent with Section 224(b) of the Act.

The Commission should reject the Electric Coalition's calls effectively to regress this framework to the status quo ante. Exempting newly-renewed agreements from the framework, as advocated by the Electric Coalition,[5] would provide electric utilities every incentive to rebuff ILEC attempts to renegotiate joint use agreements, and would thwart realization of the policy goals that the Commission enunciated in 2011, but mistakenly thought would come to fruition via the regulatory regime it adopted in the *2011 Pole Attachment Order*. As the *Third R&O* provides, the record "clearly demonstrates" that ILEC pole ownership continues to decline, and combined with record evidence that ILEC pole attachment rates have increased since 2008 while the rates of other telecommunications attachers have decreased, the Commission appropriately concluded that ILEC bargaining power in the pole attachments market has continued to decline, including vis-à-vis electric utilities.[6] The Electric Coalition's specious claims to the contrary –

[5] *See* Electric Coalition Petition at 6.

[6] *See Third R&O* at 64-65, paras. 125-26.

relegated to footnotes in its petition[7] -- attempt to refute this conclusion with an unsupported theory that ILECs have systematically succeeded in pushing more and more of the burden of pole ownership onto electric utilities.[8] Aside from relying merely on bald allegations as support for its preferred conclusion, it also fails to account for the increase in ILEC attachment rates imposed by electric utilities over the past decade. Accordingly, the Electric Coalition's charges should be paid no heed.

The Electric Coalition's other arguments concerning ILEC rates are equally groundless. It protests the capping of the ILEC rate at the pre-*2011 Pole Attachment Order* level, contending that "such a cap would grant ILECs an unfair advantage over their CLEC and cable company competitors."[9] However, the Commission applied such a cap only where the electric utility successfully rebuts the presumption that the ILEC is similarly situated to other telecommunications attachers.[10] Such a situation would lead to the ILEC being subject to a disadvantageous rate as compared to its telecommunications attacher competitors. At the same time, due to capping of the rate, the rate would not revert to the prior ILEC rate that fostered competitive distortions between different providers of the same services, promoted regulatory gamesmanship, and deterred broadband deployment.[11] The *Third R&O* struck the correct balance, and the Electric Coalition's arguments should be disregarded.

The Commission also should discard the Electric Coalition's request that the Commission specify that "any percentage reduction in the per pole attachment fees ILECs pay to electric utilities should be matched by the same percentage reduction in the per pole amount electric

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[7] *See* Electric Coalition Petition at 4-5 nn.13, 15.

[8] *Id.* at 5 n.15.

[9] *Id.* at 6.

[10] *See Third R&O* at 67, para. 129.

[11] *See id.* at 65, para. 126.

utilities pay ILECs."[12] The support the Electric Coalition conjures for this request is hyperbole, such as ILECs "cannot be permitted to charge electric utilities whatever they want to attach to ILEC poles," and its request "will prevent ILECs from price gouging electric utilities."[13] The credibility of these pronouncements is defeated, however, by the *Third R&O*'s conclusion that since 2011 ILEC "bargaining power vis-à-vis utilities has continued to decline" from a posture where the ILECs were already at a disadvantage.[14] Because the Commission has found that electric utilities currently enjoy a bargaining advantage relative to ILECs, the Commission should short-circuit the Electric Coalition's doom-and-gloom rhetoric, and deny its request.

B. If the Commission Grants Reconsideration on the Issue of Immediate Replacement of "Red-Tagged" Poles, it Must Correspondingly Adopt a Timeline for Replacement of Such Poles

The *Third R&O* holds that "utilities may not deny new attachers access to the pole solely based on safety concerns arising from a pre-existing violation."[15] The Electric Coalition contends that the accompanying footnote, stating that this "includes situations where a pole has been red-tagged, and new attachers are prevented from accessing a pole until it is replaced,"[16] would force the pole owner to replace the pole immediately, which, the Electric Coalition avers, is tantamount to requiring the pole owner to expand capacity. This, in turn, according to the Electric Coalition, is inconsistent with the provision in Section 224 of the Act enabling utilities to deny access to a pole for reasons of lack of capacity and safety.[17] Therefore, the Electric

[12] Electric Coalition Petition at 7.

[13] *Id.*

[14] *Order* at 65, para. 126; *see also id.* at 64, para. 124.

[15] *Id.* at 63, para. 122.

[16] *Id.* at n.455.

[17] *See* Electric Coalition Petition at 13-14 (citing 47 U.S.C. § 224(f)(2)).

Coalition "requests the Commission to reconsider and reject this ruling requiring premature pole replacement."[18]

ITTA does not take a position regarding this request. ITTA does observe, however, that the *Third R&O* defines a "red-tagged" pole as one "found to be non-compliant with safety standards *and placed on a replacement schedule*."[19] In other words, were the Commission to grant the requested relief, presumably it would be doing so with the understanding that the red-tagged pole would be replaced within a finite and reasonable timeframe, such that the new attacher would not be denied access for an extended period of time. Unfortunately, there is record evidence that red-tagged poles "may be placed on replacement schedules spanning many years, or are sometimes simply red-tagged . . . with no concurrent planned replacement or repair date. . . . [W]hen certain utilities red tag a pole, they do not provide a timeline for when the pole will be replaced, leaving potential attachers in limbo."[20] In the event the Commission does grant reconsideration on this issue, it must correspondingly plug this loophole by adopting a rule dictating a timeframe within which a pole owner must replace the unsafe, red-tagged pole or repair it when the pole owner denies a new attacher access to it. ITTA urges that such timeframe be 60 days for poles involving only wireline attachments among the communications attachments, and 90 days for those involving wireless attachments.[21]

[18] *Id.* at 14.

[19] *Third R&O* at 62, para. 121 n.450 (emphasis added).

[20] Letter from Kenneth J. Simon et al., Senior Vice President and General Counsel, Crown Castle International Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket No. 17-79, at 3 (filed July 25, 2018).

[21] *Cf. id.* at 4 (suggesting 30 days for poles involving only wireline attachments among the communications attachments, and 60 days for those involving wireless attachments).

C. The Commission Should Issue the Electric Coalition's Requested Clarification Concerning New Attacher Cost-Sharing Obligations, and Grant Reconsideration on Two Other of Its Requests Regarding Costs to Rectify Violations

The Commission adopted a new Section 1.1411(d)(4) of its rules in the *Third R&O*.[22] It also recently redesignated longtime Section 1.1416(b) as Section 1.1408(b).[23] While Sections 1.1408(b) and 1.1411(d)(4) could be viewed as somewhat contradictory, or at least in tension, the Electric Coalition suggests that, read together, these provisions prohibit utilities from charging a new attacher to correct preexisting violations (Section 1.1411(d)(4)), but at the same time state that any existing attacher or pole owner that pays for a modification must be able to recover a proportionate share "from all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification" (Section 1.1408(b)), including the new attacher.[24] To reconcile these provisions, the Electric Coalition requests that the Commission clarify that "even while [section] 1.411(d)(4) prevents the new attacher from being charged by the utility for the costs to replace a pole with a preexisting violation, the new attacher retains a reimbursement obligation to existing attachers or the pole owner under section 1.1408(b)" to cover its access to the replaced pole.[25] ITTA concurs with the Electric Coalition's harmonization of these two rules, and supports the requested clarification.

ITTA also supports two additional rules proposed by the Electric Coalition and on whose omission from the *Third R&O* it seeks reconsideration. First, it requests a ruling that unauthorized attachers be presumed responsible for violations on poles to which they attach

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[22] 47 CFR § 1.1411(d)(4).

[23] 47 CFR § 1.1408(b); *see* FCC, Formal Complaint Proceedings to the Enforcement Bureau, 83 Fed. Reg. 44831, 44841 (Sept. 4, 2018).

[24] *See* Electric Coalition Petition at 15-16.

[25] *Id.* at 16.

without authorization, and therefore responsible for the costs associated with correcting the violations. Second, it requests a ruling that if it cannot be determined who caused a violation, the costs should be shared by any communications attacher which reasonably might have caused the violation.[26] These are common sense approaches to real-world problems, which equitably place the cost burdens of correcting violations in the first case on an entity that is trespassing on the pole, and in the second case on those who reasonably may be deemed accountable but without forcing any particular one to shoulder all the burdens in the absence of proof of its accountability. Both also should result in expediting dispute resolution, thereby removing sources of delay in broadband infrastructure deployment.[27]

D. The Commission Should Adopt Reciprocal Rules to Address "Double Wood" Situations

When an existing pole is being replaced and not all of the attachments on the existing pole are timely transferred to the new one, a "double wood" situation is created. As the Electric Coalition aptly depicts, this condition "is an eyesore, is potentially unsafe, creates numerous customer complaints, is disfavored by many local municipalities and states, and makes it more difficult for new attachers to attach."[28] To remediate these situations and mitigate the numerous – yet avoidable – ills, the Electric Coalition proposes "that the pole owner provide notice to communications companies of the need to transfer, and then be entitled to hire a utility-approved

[26] *See id.* at 16-17.

[27] *See* Comments of ITTA, WC Docket No. 17-84, at 27 (June 15, 2017) (ITTA June 2017 Comments) ("notwithstanding the Commission's attempt to address unauthorized attachments via more substantial penalties, unauthorized attachments persist as a common problem, which certainly hinders timely completion of make-ready work").

[28] Electric Coalition Petition at 20.

contractor at the communications attachers' expense to move all communications facilities that have not been timely transferred."[29]

ITTA supports this proposal with two major stipulations. First, any provisions the Commission adopts in this regard must be reciprocal, applying in the same manner and under the same terms and conditions to laggard electric utilities that likewise cause undue delays in transferring electric facilities to the new pole.[30] Second, details need to be fleshed out regarding the provision of notice, reasonableness of expenses, and the contours of what constitutes "timely" or "untimely" transfer of the subject facilities. In particular as to the latter, ITTA suggests action within 60 days of notice be deemed timely, with self-help remedies only kicking in in the event of a transfer not completed during that period.

E. The Commission Should Refrain from Imposing Unnecessary and Onerous Specifications for Communications Attachment Contractors

The *Third R&O* retains the prior requirement to maintain a list of approved contractors that new attachers may use to perform "complex" make-ready construction work.[31] Notwithstanding that longstanding mandate, the *Third R&O* recognizes that some utilities have not made such a list available. Thus, in the *Third R&O*, the Commission adopted "a protective measure to prevent the utility list from being a choke-point that prevents deployment" – namely, that new and existing attachers may request that qualified contractors be added to the utility's list and that the utility may not unreasonably withhold its consent for such additions.[32]

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[29] *Id.*

[30] *Cf.* ITTA June 2017 Comments at 26-27 ("One ITTA member reports a situation where the make-ready work associated with a power line attachment has been backlogged for six *years*."). All other things being equal, delays by electric utilities have even a greater impact than delays by communications attachers, because communications attachers cannot transfer their facilities until the electric facilities are transferred.

[31] *See Third R&O* at 52-53, paras. 105-06.

[32] *Id.* at 53, para. 107.

As an initial matter, the Electric Coalition revolts against the requirement that it maintain a list of approved contractors.[33] Apparently attempting to seize upon the *Third R&O*'s concession that there are "heightened safety and reliability risks that may arise in non-simple work,"[34] it then pushes the Commission to layer on additional conditions to new and existing attachers' ability to request that qualified contractors be added to the utility's list. Such additional specifications include requiring that a Professional Engineer stamp accompany all survey and construction work performed by a contractor hired by a communications attacher, entitling electric utilities to require a "ramp-up" period to evaluate any new contractor, and requiring that any attacher hiring non-union personnel reimburse the pole owner for union contract costs.[35] ITTA opposes all of these extravagances.

As ITTA has pointed out previously, the paucity of qualified contractors to perform make-ready work in some areas already presents an obstacle to timely broadband deployment.[36] Implementing additional hurdles through superfluous costs will add barriers in a proceeding designed to remove them, either by needlessly diverting capital to help overcome these hurdles, or by deterring attachers from proposing new contractors, and then having deployment delayed due to lack of a sufficient roster of contractors. The rules adopted in the *Third R&O* enable electric utilities to self-select contractors that the utilities themselves have vetted to confirm that they are properly trained and appropriately certified consistent with all current standards and codes. Doing so, and simply maintaining a list of such contractors, will negate the need for ramp-up periods or attachers incurring the cost and time of Professional Engineers double-

[33] *See* Electric Coalition Petition at 21.

[34] *Third R&O* at 53, para. 107 n.380.

[35] *See* Electric Coalition Petition at 22.

[36] *See* ITTA June 2017 Comments at 27.

checking all work. And especially where the utility can help avoid the issue by maintaining a list that includes union personnel where contractually required, the proposal for attachers to cover the pole owner's union contract costs is particularly audacious. There are no grounds to effectively subject communications attachers to contractual provisions to which they are not a party and for which they took no part in bargaining, and the proposal flies in the face of the *Third R&O*'s discussion in the similar one-touch-make-ready context of why the Commission will not require new attachers to use existing attachers' union contractors.[37]

In sum, adoption of these gambits would threaten to be a choke-point that hinders deployment, and undermine the Commission's avowed purpose of enabling new and existing attachers to request that qualified contractors be added to the utility's list in the first place. The Commission should refrain from doing so.

III. CONCLUSION

For the foregoing reasons, the Commission should resist the Electric Coalition's entreaties to backslide on its long-overdue relief for ILECs from outdated rate disparities, and to heap on communications contractor specifications that serve no legitimate purpose and can largely be avoided by the electric utility maintaining a useful and comprehensive list of approved contractors, as required by the Commission's rules. If the Commission grants reconsideration on the issues of immediate replacement of red-tagged poles and double wood situations, it should concomitantly implement timelines and ensure its rules pertaining to double wood situations apply equally to electric utilities and communications attachers. The Commission should clarify

[37] *Cf. Third R&O* at 26, para. 47 ("It is the new attacher's contractor that will be performing the make-ready work, so the [existing attacher's collective bargaining agreement] is not implicated."); *see also generally id.* at 25-27, paras. 47-50 (e.g., opportunities to be present for surveys and make-ready work and to conduct post-make-ready inspections on the work performed provide safeguards against facility damage and harms that could result from contractor mistakes).

new attacher cost sharing obligations as suggested by the Electric Coalition, and also adopt common sense rules addressing costs to rectify violations.

Respectfully submitted,

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Certificate of Service

I, Michael J. Jacobs, hereby certify that on this 9th day of November 2018, I have caused a copy of the foregoing Opposition to be served by electronic mail upon:

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