June 6, 2018

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

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

Dear Ms. Dortch:

The USTelecom Association (USTelecom) submits this filing in response to the ex parte notice filed with the Federal Communications Commission (Commission) by a group of Investor Owned Utilities ("Electric Utilities") on April 24, 2018 ("Electric Utilities Filing").[1] USTelecom has explained that the Commission can promote broadband deployment and regulatory parity by adopting a presumption that ILECS should pay the new telecom rate. In November 2017, USTelecom submitted an analysis and evidence confirming that ILECs should pay the new telecom rate ("USTelecom Analysis").[2]

The Electric Utilities Filing attempts to cast doubt on the detailed USTelecom Analysis, but fails to provide any plausible arguments or evidence. As noted below, the Electric Utilities Filing does not alter or otherwise refute the core findings of the USTelecom Analysis, specifically, that: 1) rates charged to ILECs by power companies remain largely unchanged since, and in spite of, the Commission's 2011 and 2015 reforms;[3] 2) there is an increasing disparity in pole ownership in which ILECs own significantly fewer poles than IOUs; and 3) ILECs pay significantly greater attachment rates than their cable and CLEC counterparts.

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[1] *See*, Ex Parte Notice, from Eric Langley, Langley Bromberg, to Marlene Dortch, Federal Communications Commission, WC Docket No. 17-84 (submitted April 24, 2018) (*Electric Utilities Filing*).

[2] *See*, Ex Parte Notice, from Kevin G. Rupy, USTelecom, to Marlene Dortch, Federal Communications Commission, WC Docket No. 17-84 (submitted November 21, 2017) (*USTelecom Analysis*).

[3] Report and Order and Order on Reconsideration, *Implementation of Section 224 of the Act*, 26 FCC Rcd. 5240, 76 FR 40817, FCC 11-50, ¶ 1 (released April 7, 2011) (*2011 Pole Attachment Order*). *See also*, Order on Reconsideration, *Implementation of Section 224 of the Act*, 30 FCC Rcd. 13731, 81 FR 7999, FCC 15-151 (released November 24, 2015).

I. The Electric Utilities Confirm that ILECs Have Not Received the Rate Adjustments the Commission Sought in its 2011 Order

1. A Reduction in Pole Attachment Rates Paid by ILECs Has Not Occurred

The Commission's 2011 Pole Attachment Order anticipated that incumbent local exchange companies (ILECs) would save over $300 million if they paid pole attachment rates similar to the regulated rates paid by their direct competitors.[4] As the USTelecom Analysis shows, this has not occurred.

The Electric Utilities Filing quibbles that, because the nominal rates ILECs pay have stayed essentially the same, those rates have dropped in real terms (due to inflation).[5] In fact, the Electric Utilities Filing simply confirms that ILECs have not received the material reduction in pole attachment rates the Commission intended in the 2011 Pole Attachment Order, despite years of operating under that Order. This is because IOUs have fought such changes by, for example, refusing new contracts, claiming that new contracts will apply only to new attachments, or refusing new rates until parity ownership is reached.

During this same time, the ILECs' competitors have seen their rates drop through the Commission's action in the 2011 Pole Attachment Order. To be clear, USTelecom does not seek rates that are necessarily identical to non-ILECs, but rather a presumptive just and reasonable rate for "providers of fundamentally identical services making fundamentally similar attachments"[6] unless the IOU can demonstrate with clear and convincing evidence that the "benefits to the [ILEC] far outstrip benefits accorded to other pole attachers."[7] USTelecom agrees with the Commission's assessment that rationalizing our members' infrastructure costs can increase the deployment of broadband, particularly to rural areas, where deployment costs are the largest.[8]

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[4] *2011 Pole Attachment Order*, ¶ 208.

[5] *Electric Utilities Filing* p. 3. The Electric Utilities' use of the Handy-Whitman index to benchmark rates against inflation is an improper application of cost indexing, and the Commission should give it no credit. The Handy-Whitman index measures the growth in the cost of deploying new poles during each period of the time series based on prevailing labor and materials costs at the time of construction. Such an index is irrelevant for assessing the rates for poles whose costs were sunk when they were originally constructed, in many cases several decades previously.

[6] *See*, Comments of USTelecom, WC Docket No. 17-84, p. 8 (submitted June 15, 2017).

[7] Notice of Proposed Rulemaking, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, ¶ 45 (April 21, 2017) (*Notice*).

[8] USTelecom's rate goals align with the Commission's own acknowledgement in this proceeding that "reduc[ing] pole attachment costs and speed[ing] access to utility poles would remove

2. The Competitive Broadband Marketplace Demands Greater Parity

Although the Electric Utilities Filing mischaracterizes USTelecom's call for greater rate parity as mere jockeying for better rates, in reality, competition plays a more fundamental role in the USTelecom Analysis. Many joint use agreements date back several decades and predate competitive local and broadband entry. At that time, ILECs and IOUs were government-sanctioned monopoly providers of local distribution facilities in the telephone and electric power industries, respectively.

Whereas IOU electric distribution providers remain government-sanctioned monopoly providers, ILECs today operate in a highly competitive broadband marketplace. The Telecommunications Act of 1996 irreversibly opened local telephone markets to competition, and paved the way for the then-nascent local broadband industry to evolve into an intensely competitive and innovative marketplace. As a result, today's broadband marketplace is characterized by multiple facilities-based providers competing intensely to offer local voice, video, and broadband services over their own wired and wireless distribution facilities.[9] In such a competitive broadband environment, rationalizing antiquated monopoly-era cost structures for pole inputs is necessary for efficient investment to bring more and better broadband infrastructure to a larger share of Americans, particularly in rural areas.

The Electric Utilities Filing demonstrates the need for Commission intervention when the Electric Utilities take the position that they are not being adequately compensated by ILECs paying less than an average of 28% of IOUs' annual pole cost, rather than the 40-50%

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significant barriers to broadband infrastructure deployment and in turn increase broadband availability and competition in the provision of high-speed services." *Notice*, ¶ 3.

[9] *See* Patrick Brogan, USTelecom, *USTelecom Industry Metrics and Trends 2018* (March 1, 2018) at pp. 4, 5, 6, and 19 (available at https://www.ustelecom.org/sites/default/files/USTelecom_Industry_Metric%20_and_Trends_2018.pdf) (visited May 31, 2018). *See also,* Frost & Sullivan, *North America Consumer Communication Services Tracker: Fourth Quarter 2017 (4Q17)* (March 2018) (subscription service). From the end of 2000 to the end of 2016 ILEC retail and wholesale switched access lines fell by 137 million, or 74 percent, from 186 million to 49 million. As of the end of 2016, ILECs had added approximately 39 million broadband connections, 13 million VoIP lines, and 12 million video subscribers. Thus, the combined number of broadband, voice, and video connections that ILECs have gained amount to less than half of the switched voice connections lost since 2000. At the same time, as of 2016, alternatives to wireline ILECs served significantly larger portions of subscribers in the markets for broadband (63 million cable, 3 million satellite and fixed wireless) and video (54 million cable, 35 million satellite). By the end of 2016, mobile wireless voice connections had grown to 341 million and mobile broadband connections had reached 270 million. Yet ILECs continue to pay pole attachment rates to IOUs as if they were still monopoly voice providers.

traditionally allocated under joint use agreements,[10] especially when compared to the 7.4% allocated to cable providers and CLECs under the Commission formulas.

II. The Electric Utilities Do Not Refute that Pole Ownership Disparities Continue to Widen

The Electric Utilities Filing does not dispute a central tenet of the USTelecom Analysis, which is that IOUs continue to enjoy an increasing advantage in pole ownership. The reasons for this disparity are many,[11] but the Electric Utilities do not refute it, or suggest any approach to reduce or eliminate it. The Commission already has acknowledged that the difference in bargaining power between IOUs and ILECs exists and continues to grow.[12]

In fact, ILECs have terminated existing joint use agreements in some cases to try to force IOUs to renegotiate, but IOUs then deny ILECs the access needed for new deployments. Further, IOUs take the position that ILECs then must pay the exorbitant joint use agreement rates for all existing attachments in perpetuity, relying on the very provisions that the Electric Utilities claim prevent them from removing ILEC attachments.[13] Thus, ILECs "genuinely lack the ability to terminate an existing agreement and obtain a new arrangement."[14] It is time for the Commission to take meaningful action to recognize that this disparity, which IOUs exacerbate and enjoy, requires adopting a presumptive just and reasonable rate of attachment for ILECs.

III. Higher ILEC Rates are Not Justified by Purported Benefits of Joint Use

Unable to refute the fact that rates have not dropped as the Commission intended and that IOUs continue to extend their leverage of pole ownership, the Electric Utilities Filing attempts as a final retort to claim that the benefits of joint use are so great that it justifies the inflated rates they demand from ILECs. This argument also fails.

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[10] *Electric Utilities Filing*, p. 4.

[11] For example, IOUs may enter new communities first due to the need for power to new construction; and also restore poles (including some ILEC poles) during storms and related events. In all of these instances, however, IOUs also have increasingly refused to sell poles to ILECs to retain parity—including even when poles owned by ILECs are replaced by IOUs. None of these events, notably, are the result of any intent by ILECs to seek to own fewer poles.

[12] *2011 Pole Attachment Order*, ¶ 206.

[13] *See Electric Utilities Filing*, pp. 6-7 (provisions stating that after termination "all such attachments shall continue thereafter to be maintained, pursuant to and in accordance with the terms of this agreement").

[14] *2011 Pole Attachment Order*, ¶ 216; *see also* Memorandum Opinion and Order, *Verizon Florida LLC v. Florida Power and Light Co.*, EB-14-MD-003, No. 14-216, DA 15-187, ¶25 (Feb. 11, 2015) ("Because the Bureau has not previously applied the 2011 Pole Attachment Order, and dismissal with prejudice could force Verizon to pay the relatively high Agreement Rates for as long as its attachments remain on Florida Power's poles pursuant to the evergreen clause, we dismiss Verizon's Complaint without prejudice.").

1. Operational Benefits of Joint Use Are Scant

Despite claims of the "many differences"[15] between joint use agreements and standard pole attachment agreements, the Electric Utilities Filing points to a mere two purported benefits that hardly confer any cognizable advantage to ILECs. The alleged benefits cited include the fact that ILECs do not pay make-ready costs when a new pole line is first constructed and the fact that ILEC make-ready costs may be based on less volatile scheduled costs rather than the more volatile actual costs that provide the basis for non-ILECs' rates.

The different approaches to make-ready costs between ILECs and non-ILECs hardly constitute the "huge"[16] benefit to ILECs asserted by the Electric Utilities. It is unsurprising that ILECs do not pay make-ready fees when the electric IOUs first construct a new pole line since there are no "make-ready" costs at that time. ILECs and IOUs each assume the costs of their "built-to-suit" poles under the typical agreement. As the Electric Utilities note, ILECs pay separately for upgrade and replacement costs they cause when a joint use pole is replaced for the benefit of the ILEC. Cable and non-ILECs, never having owned poles, pay up front fees for "make-ready" to ILECs and IOUs to make suitable space available when necessary. This difference is merely one of historical circumstance. For ILECs, pole ownership conveys both benefits and costs. Yet, the Electric Utilities Filing does not quantify the totality of costs and benefits and offers no evidence that ILECs somehow enjoy significant benefits relating to make-ready costs.

The Electric Utilities' claim about the advantages of scheduled versus actual costs for ILEC make ready or pole replacement charges is similarly empty. Replacement price schedules can be and have been renegotiated. In any case, replacement cost schedules have little bearing on the reasonableness of excessive recurring annual attachment rates charged by the IOUs, which impede efficient investment and deployment in a competitive broadband marketplace.

There is ample record evidence in this proceeding that belies any purported "unique benefits" that accrue to ILECs as a result of joint use agreements.[17] USTelecom and others have previously explained that these purported benefits generally do not provide any advantage to ILECs that would justify charging ILECs rates that are multiples of the new telecom rate. In addition to the record evidence in this proceeding, the Commission's Enforcement Bureau also concluded last year that an IOU's claims regarding benefits to an ILEC from joint use were "overstated," that the IOU failed to "quantify the purported material advantages" received by

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[15] *Electric Utilities Filing*, p. 3.

[16] *Id.*, p. 5.

[17] *See e.g.*, Comments of Verizon, WC Docket No. 17-84, pp. 12, n. 30 (submitted July 17, 2017); Reply Comments of AT&T Services, Inc., WC Docket No. 17-84, p. 12 (submitted July 17, 2017); Reply Comments of Verizon, WC Docket No. 17-84, pp. 11 – 12 (submitted July 17, 2017); Ex Parte Notice, from Kevin G. Rupy, USTelecom, to Marlene Dortch, Federal Communications Commission, WC Docket No. 17-84, p. 2 (submitted December 8, 2017).

the ILEC, and that the ILEC "adduced substantial evidence . . . that any advantages it obtains under the Joint Use Agreements do not remotely justify the difference between the rate it pays and the rate that competitive LECs pay."[18]

2. Financial Benefits of Joint Use Are Virtually Non-Existent

Perhaps the most convoluted part of the Electric Utilities Filing is its economic analysis purportedly implying that when the balance of pole ownership shifts from an ILEC to an IOU, the ILEC generates windfall savings of $14 per pole per year while imposing a $68 annual per pole cost burden on the IOU.[19] As an initial matter, such a disparity cannot be reconciled with the unrefuted fact that IOUs continue to seek to own more poles, not fewer. Moreover, as noted below, the Electric Utilities' methodology for calculating the alleged ILEC windfall savings and the alleged additional IOU burdens is both conceptually flawed and incomplete.[20]

For example, by simply netting the average pole cost avoided or assumed against the new ILEC rental fee, the Electric Utilities focus too narrowly on the ILEC-IOU relationship and ignore many additional benefits of pole ownership that accrue to the IOUs. Most notably, the methodology used in the Electric Utilities Filing ignores rental fees from any other attachers, such as CLECs, cable and wireless companies.[21]

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[18] *See*, Order, *Verizon Virginia, LLC and Verizon South, Inc. v. Virginia Electric Power Co. d/b/a/ Dominion Virginia Power*, EB-15-MD-006, No. 15-190; DA 17-395, ¶¶ 18, 20, 22 (May 1, 2017) (holding that Verizon pays unjust and unreasonable pole attachment rates and finding that the record suggests that "Dominion has overstated the value of a number of such alleged benefits" and "with only a few exceptions, Dominion does not quantify the purported material advantages that Verizon receives").

[19] Reported costs for ILECs and IOUs are based on different accounting systems and depreciation rates, therefore they may not be directly comparable.

[20] *Electric Utilities Filing*, p. 4.

[21] As an aside, the Electric Utilities criticize the USTelecom Analysis for comparing rates that ILECs pay to IOUs and rates that non-ILECs pay to ILECs. *Electric Utilities Filing*, p. 3. USTelecom acknowledged that the USTelecom Survey reflects the rates non-ILECs pay to ILECs at least twice on the record in this proceeding. *USTelecom Analysis*, Appendix Page 2; *See*, Ex Parte Notice, from Kevin G. Rupy, USTelecom, to Marlene Dortch, Federal Communications Commission, WC Docket No. 17-84, p. 2, n. 6 (submitted December 8, 2017). Further, USTelecom noted that it does not have access to the rates that IOUs charge cable and CLEC attachers, but that both ILECs and IOUs are subject to the same rate formulas. The Electric Utilities did not offer any data on the rates they charge cable and CLEC attachers. Even assuming for the sake of argument that the Electric Utilities' estimate of relative pole costs is accurate ($94.54 for IOUs vs. $40.49 for ILECs), the IOU cost ratio would be 2.33. Applying this 2.33 cost ratio to the $3.75 ILEC average rate for CLEC attachers would result in the IOUs imposing an average rate of $8.74 on CLECs. Thus, the average rate of $26.12 imposed on ILECs

Further, the IOUs ignore the fact that their regulated status ensures their cost of pole infrastructure will be recouped in their rate base and prescribed rate of return. Put simply, IOUs are made whole in installing poles necessary for their distribution lines, which would have been deployed with or without the ILEC attachers. This is not the case, of course, for ILECs that would otherwise install shorter poles for their needs, and generally are not afforded any mandated rate of return on pole investment.

Finally, the Electric Utilities Filing acknowledges the inherent weakness in its financial analysis by conceding that there is great variation in cost allocations between IOUs and ILECs across a wide range of joint use agreements. The windfall savings the Electric Utilities claim ILECs enjoy, therefore, are entirely theoretical. Indeed, with our members reporting annual joint use rates exceeding $100 in some instances,[22] it is abundantly clear that some IOUs are taking greater advantage than are others. These discrepancies are the reason USTelecom seeks generally applicable rules, which have become necessary in a competitive telecommunications environment where private agreements do not necessarily yield just and reasonable rates. To reiterate, under USTelecom's proposal, the IOUs have the opportunity to rebut the presumptive just and reasonable ILEC rate where "benefits to the [ILEC] far outstrip the benefits accorded to other pole attachers."[23]

IV. Conclusion

The Electric Utilities Filing concedes that ILECs have not benefited from any real pole attachment rate reductions, as the Commission intended. The Electric Utilities do not refute that ILECs continue to own fewer poles and have less bargaining power as compared to IOUs and they do not suggest efforts to correct this imbalance. This is because Electric Utilities enjoy their leverage, which includes charging ILECs rates that are many multiples greater than the rates of other attaching entities.

Broadband deployment has been – and remains – a federal policy priority for Congress, the Commission, the Executive Branch and the American people. Favorable action by the Commission in the current proceeding is a means to achieve increased deployment of high speed broadband communications networks to all Americans. The Commission should seek additional market-oriented reforms that further this federal policy goal. We urge the Commission to expeditiously adopt its proposal for a presumptive just and reasonable rate formula for ILEC attachers.

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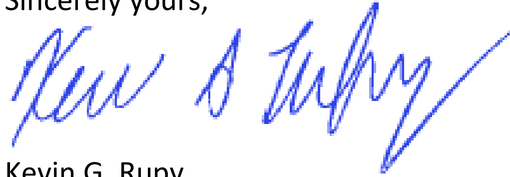
by the IOUs would be three times the estimated $8.74 rate for non-ILEC telecommunications carriers.

[22] *USTelecom Analysis*, Appendix C.

[23] *Notice*, ¶ 45.

USTelecom greatly appreciates and supports the Commission's continuing efforts to spur additional broadband deployment and establish regulatory parity among broadband competitors. Please contact the undersigned with any questions.

Sincerely yours,



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