**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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

# COMMENTS OF THE UTILITIES TECHNOLOGY COUNCIL

The Utilities Technology Council ("UTC") hereby provides the following comments in response to the Public Notice regarding the Petition for Declaratory Ruling by the Edison Electric Institute ("EEI").[1] UTC supports EEI's Petition and urges the Commission to clarify that (1) the applicable statute of limitations for refunds awarded pursuant to section 1.1407 of the Commission's rules is the same as the two-year period prescribed by section 415(b) of the Act; and (2) refunds in pole attachment complaint proceedings are not "appropriate" for any period preceding good-faith notice of a dispute.[2] Doing so will eliminate inconsistent, arbitrary and discriminatory treatment towards electric utilities; provide greater regulatory certainty; and promote the Commission's overarching policy goals of reducing pole attachment disputes and increasing broadband deployment.

## I. The Commission Should Clarify that the Applicable Statute of Limitations in ILEC Pole Attachment Complaint Proceedings is Two Years, Consistent with Federal Law and Commission Precedent.

As EEI explained in its Petition, the Commission should provide the requested clarification because "borrowing" the state statute of limitations is contrary to the underlying

[1] Wireline Competition Bureau Seeks Comment on a Petition for Declaratory Ruling Filed by the Edison Electric Institute, *Public Notice*, DA 21-888 (rel. Jul. 23, 2021).
[2] Petition for Declaratory Ruling of the Edison Electric Institute in WC Docket No. 17-84 (filed Apr. 20, 2021) (hereinafter "Petition for Declaratory Ruling").

rationale for the "borrowing" doctrine, as well as the Commission's own precedent.[3] That is, the Commission may not borrow state statute of limitations from a state civil action for breach of contract, because it is not the "most analogous state law cause of action" for its application to a pole attachment complaint, as required under the "borrowing" doctrine.[4] Instead, the ILEC pole attachment complaints involved here seek relief based on the regulated rate for pole attachments instead of the rate provided under their joint use agreements. These are not breach of contract cases. Moreover, the Commission itself has declined to borrow state statute of limitations, where, as here, the claim involves an agency proceeding.[5] Therefore, as a matter of law and Commission precedent, the Commission should not borrow state statute of limitations for pole attachment complaint proceedings.

As EEI also explained, borrowing the state statute of limitations for breach of contract claims will produce inconsistent and discriminatory results when applied to pole attachment complaints.[6] The statute of limitations vary from state to state and can extend far beyond two years, which would result in inconsistent refunds in pole attachment complaint proceedings if the FCC continues to borrow them.[7] Moreover, borrowing state statutes of limitation will result in discriminatory results, because electric utilities will be subject to longer statutes of limitations under state law than carriers are subject to under section 415(b) of the Communications Act, which limits recovery to two years from the date of the cause of action.[8] This is fundamentally unfair to electric utilities and systematically denies their rights to due process and equal protection under the law.

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[3] *See* Petition for Declaratory Ruling at 8.
[4] *Id.*
[5] *See* In the Matter of Sandwich Isles Communications, Inc., Order on Reconsideration, WC Docket No. 10-90, 2019 FCC LEXIS 41, at * 159-70, ¶¶ 130-37 (Jan. 3, 2019) ("Sandwich Isles").
[6]Petition for Declaratory Ruling at 6.
[7] *Id.*
[8] 47 U.S.C. §415(b). *See also* Petition for Declaratory Ruling at 12-14.

UTC joins EEI in urging the Commission to clarify that a two-year statute of limitations should apply uniformly to all pole attachment complaints, consistent with section 415(b) of the Communications Act. In support of this clarification, UTC agrees with EEI that section 415(b) provides a far more analogous statute of limitations to apply to pole attachment complaint proceedings because it 1) applies to agency proceedings, 2) would apply uniform limitations of refunds that would be consistent with Commission precedent, and 3) avoids inconsistent, discriminatory and inequitable treatment of utilities and carriers in pole attachment complaint proceedings.[9]

## II. The Commission Should Clarify That Refunds are Permitted Only for Periods After Good-Faith Notice of Dispute.

Furthermore, UTC joins EEI in urging the Commission to clarify that refunds in pole attachment complaint proceedings are not "appropriate" for any period preceding good-faith notice of a dispute.[10] As EEI explained in its Petition, this clarification is appropriate because it prevents ILECs from abusing the pole attachment complaint process, while still advancing the Commission's goal of encouraging pre-complaint negotiations between the parties and ensuring that injured attachers are made whole. Allowing refunds prior to good-faith notice only encourages attachers to sit on their rights and refrain from pre-complaint negotiations. Conversely, it blindsides utilities without warning to significant liability because the "just and reasonable" pole attachment rate for ILEC attachments is undiscernible.[11]

The Commission's decision in its *Verizon Florida Order* supports this point because it recognized that the "just and reasonable" rate for ILEC attachments was not readily discernable using the regulated pole attachment rate and could only be determined after an evaluation of the

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[9] Petition for Declaratory Ruling at 12-14.
[10] *Id.* at 15.
[11] *Id.* at 16.

unique benefits provided to ILECs under the terms and conditions of each joint use agreement. Moreover, the facts in the ILEC pole attachment complaint cases plainly show that ILECs are exploiting the process to gain unfair leverage in complaint proceedings, just as UTC and other parties warned the Commission in 2011 when it proposed to revise its previous policy of permitting refunds only for periods after the filing of a pole attachment complaint. To prevent these unfair practices by ILECs going forward, it is urgent that the Commission clarify that refunds in pole attachment complaint proceedings will not be awarded for periods prior good-faith notice of a dispute.

## III. The Commission Has the Authority to Issue a Declaratory Ruling, and Doing So Will Reduce Disputes and Promote Broadband Deployment.

Finally, UTC agrees with EEI that the Commission has the authority to issue the declaratory relief requested in its Petition, because it will remove uncertainty and settle disputes about the appropriate statute of limitations for ILEC pole attachment complaints, consistent with the Administrative Procedure Act.[12] Moreover, the Commission should issue a declaratory ruling in this instance, because the APA provides that the Commission may do so without a notice and comment rulemaking for matters involving "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" such as those here in ILEC pole attachment complaints.[13] The same rationale applies to both forms of requested declaratory relief with respect to the two-year statute of limitations and the good-faith notice requirement for refunds. Accordingly, the Commission should issue clarification that the applicable statute of limitations in an ILEC pole attachment complaint proceeding is two years, and refunds are not appropriate for periods prior to good-faith notice of a dispute.

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[12] 5 U.S.C. §554(e).
[13] 5 U.S.C. §553(b)3.

Providing this clarification will promote the Commission's overarching policy goals of reducing disputes and accelerating broadband infrastructure access. Congress intended for the parties to negotiate the rates, terms and conditions for pole attachments, rather than to resort to regulatory relief. It recognized that mutual negotiations would result in faster access to pole attachments, and joint use agreements served as the model to follow.[14] For decades, these joint use agreements between ILECs and utilities paved the way for the deployment of telecommunications services. The Commission should support policies to promote parties to engage in good faith negotiation for pole attachments.

By issuing the declaratory ruling, the Commission will encourage good-faith negotiations for pole attachments, which will in turn reduce disputes and promote broadband deployment. A two-year statute of limitations will provide regulatory certainty and reduce disputes. Moreover, it will encourage ILECs to negotiate in good faith, rather than to abuse the process and maximize liability in complaint proceedings. Joint use agreements provide ILECs with various benefits through mutual negotiation. Regulatory uncertainty and procedural problems with the statute of limitations threatens to upset the joint use process. In turn, that will discourage negotiations and result in further disputes which will delay pole attachments and broadband infrastructure deployment.

To promote pole attachment negotiations and to encourage timely filing of complaints, the Commission's original policy was to prevent recovery of damages prior to the filing of a pole

[14] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, Report and Order, 11 FCC Rcd 15499, at 16068, para. 1143 ("We will not enumerate a comprehensive regime of specific rules, but instead establish a few rules supplemented by certain guidelines and presumptions that we believe will facilitate the negotiation and mutual performance of fair, pro-competitive access agreements. We will monitor the effect of this approach and propose more specific rules at a later date if reasonably necessary to facilitate access and the development of competition in telecommunications and cable services.")

attachment complaint.[15] While the Commission revised this policy in order to encourage pre-complaint negotiations, the underlying purpose was to promote informal dispute resolution and avoid protracted pole attachment complaint proceedings.[16] Unfortunately, borrowing state statutes of limitation will have the opposite effect. It will encourage ILECs to file pole attachment complaints and remove incentives for ILECs to provide advance notice of disputes and engage in informal resolution. At the same time, it will undermine joint use agreements and remove incentives for utilities to negotiate with and provide benefits to ILECs, if the ILECs are able to abuse the pole attachment complaint process. Accordingly, the Commission should establish a uniform two-year statute of limitations for ILEC pole attachment complaints, and it should clarify that refunds will not be permitted for periods prior to good-faith notice of a dispute.

Respectfully,

**Utilities Technology Council**

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[15] *See* 47 C.F.R. § 1.1410(c) (1979) (stating that the "refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission *from the date that the complaint, as acceptable, was filed*, plus interest") (emphasis added) and 47 C.F.R. § 1.1410(c) (2010) (stating that the "refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or ondition and the amount that would have been paid under the rate, term, or condition established by the commission *from the date that the complaint, as acceptable, was filed*, plus interest") (emphasis added).

[16] *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, Report and Order and Order on Reconsideration*, WC Docket 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240 at ¶¶097-103 (Apr. 7, 2011) (requiring parties to engage in informal dispute resolution prior to filing a pole attachment complaint, which was intended to "have the effect of expediting the pole access process.")