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

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

REPLY COMMENTS OF THE UTILITIES TECHNOLOGY COUNCIL

The Utilities Technology Council ("UTC") hereby provides the following reply comments in response to the Public Notice regarding the Petition for Declaratory Ruling by the Edison Electric Institute ("EEI").[1] UTC reiterates its support for 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]

The comments on the record by UTC and numerous utilities overwhelmingly support EEI's Petition, and they explain that variable state statutes of limitation create significant uncertainty regarding potential liability from refunds in pole attachment complaint proceedings.[3]

[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] *See* Comments of the Utilities Technology Council in WC Docket No. 17-84 (filed Aug. 23, 2021). *See also* Petition for Declaratory Ruling of the Edison Electric Institute in WC Docket No. 17-84 (filed Apr. 20, 2021) (hereinafter "Petition for Declaratory Ruling").

[3] *See e.g.*, Comments of Alabama Power, Georgia Power and Mississippi Power Companies in WC Docket No. 17-84 (filed Aug. 23, 2021); Comments of American Electric Power in WC Docket No. 17-84 (filed Aug. 23, 2021); Comments of Berkshire Hathaway Energy Company in WC Docket No. 17-84 (filed Aug. 23, 2021); Comments of the Coalition of Concerned Utilities in WC Docket No. 17-84 (filed Aug. 23, 2021); Comments of El Paso Electric Company in WC Docket No. 17-84 (filed Aug. 23, 2021); Comments of Duke Energy Corporation in WC Docket No. 17-84 (filed Aug. 23, 2021); Comments of Entergy Corporation in WC Docket No. 17-84 (filed Aug. 23, 2021); Comments of the Hawaiian Electric Companies in WC Docket No. 17-84 (filed Aug. 23, 2021); Comments of Oncor Electric Delivery, LLP in WC Docket No. 17-84 (filed Aug. 23, 2021); and Comments of WEC Energy Group in WC Docket No. 17-84 (filed Aug. 23, 2021).

In addition, they explain how permitting refunds prior to good faith notice of a dispute has the practical effect of discouraging negotiations and dispute settlement prior to the filing of a complaint. These comments also agree with UTC that the EEI Petition raises issues of procedural due process and fundamental fairness, and the Commission should issue a declaratory ruling to resolve the uncertainty and controversy related to the appropriate statute of limitations in pole attachment complaint proceedings. 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.

As UTC and others explained in their comments, the Commission should adopt a uniform two-year statute of limitations for refunds in pole attachment complaint proceedings, because doing so would provide greater certainty and avoid disputes, which would in turn promote the deployment of broadband infrastructure. Conversely, the Commission should not borrow state statutes of limitation, not only because using state statutes of limitation results in discriminatory, inconsistent and arbitrary enforcement of the Commission's rules, but also because it is contrary to federal law and the Commission's own precedent.

UTC agrees with the comments on the record by numerous utilities that support clarification by the Commission that the two-year statute of limitations in section 415(b) of the Communications Act is the applicable statute of limitations for refunds awarded pursuant to section 1.1407 of the Commission's rules and that refunds should not be permitted prior to good faith notice of a dispute. As these comments explain, applying state statutes of limitations to pole attachment complaints is arbitrary and discriminatory, and it prejudices the ability of

utilities to defend themselves in complaint proceedings.[4] It subjects utilities to arbitrary differences in potential refunds depending on where the poles are located, despite the same or similar issues involved in pole attachment complaints involving poles located in other states. It also discriminates against utilities, who are subject to longer statutes of limitation under state law compared to carriers, who would be subject to the two-year statute of limitations under federal law, as provided in section 415(b) of the Communications Act of 1934. Meanwhile, allowing refunds for periods prior to good faith notice of a dispute prejudices utilities because the potential liability from refunds in pole attachment complaint proceedings is not easily discernable by utilities, owing to the inherent uncertainties involved in calculating the "just and reasonable" rate for purposes of a joint use agreement, due in part to the benefits that these joint use agreements convey to incumbent local exchange carriers ("ILECs"). As a result, utilities are unable to reserve for contingent liabilities that may result from refunds in pole attachment complaint proceedings.

In turn, this speculative, significant, and unpredictable liability from refunds from pole attachment complaints discourages good-faith negotiations between the parties to resolve disputes, which is likely to cause delays in broadband deployment. The Commission sought to avoid such disputes when it revised its rules in 2011 to provide refunds for periods prior to the filing of a pole attachment complaint.[5] The Commission reasoned that parties would be encouraged to engage in negotiations and informal resolution of disputes, if the rules permitted recovery for periods prior to the filing of the complaint. In that context, the Commission specified that refunds would be available based upon the applicable statute of limitations. At the

[4] *Id.*
[5] *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 (Apr. 7, 2011) (the "*2011 Order*").

time, utilities warned that this policy could have the reverse effect by rewarding parties that deliberately delay filing complaints as a tactic to maximize the amount of potential pole attachment refunds. Those warnings are now reality. As the comments in support of EEI's Petition confirm, borrowing state statutes of limitation and allowing refunds prior to good faith notice of a dispute is actually discouraging negotiations and resolution of disputes, contrary to the Commission's intent when it revised its rules to allow recovery for periods prior to the filing of a complaint.

In order to avoid disputes that will delay broadband deployment, the Commission should clarify that the two-year statute of limitations in section 415(b) of the Communications Act is the applicable statute of limitations for refunds in pole attachment complaint proceedings pursuant to section 1.1407 of the rules.[6] In addition, it should prevent refunds for periods prior to good faith notice of a dispute. As some comments underscore, utilities make good faith efforts to deploy pole attachments to benefit customers, but they need business certainty to continue making significant deployments in pole attachments and make ready services.[7] And while they conduct annual rate formula reviews to ensure the costs incurred by attaching entities are fair to customers of both parties and despite their good faith efforts to maintain equipment and communications, without the requested clarification, attaching entities could wait a full 10 years relying on state breach of contract statute of limitations to file a complaint, even if concerns arise in the first or second year after the work was performed.[8] This exposes utilities and to unreasonable business risk, and it underscores the need for clarification that a uniform two-year

[6] *See also* Comments of the Pennsylvania Public Utility Commission in WC Docket No. 17-84 at 11 (filed Aug. 23, 2021)(stating "Allowing telecommunications utilities to accrue refunds without an effort to remedy an unacceptable situation actively disincentivizes telecommunications deployment and frustrates Congress' intent. The Commission should keep Congress' intent in favor of telecommunications deployment in mind while ruling on EEI's Petition, and in all pole attachment matters going forward.")
[7] Comments of Berkshire Hathaway Energy Company in WC Docket No. 17-84 at 2-4 (filed Aug. 23, 2021).
[8] *Id*. at 4.

statute of limitations applies to refunds in pole attachment complaint proceedings and that refunds are not appropriate prior to good faith notice of a dispute.

Although some comments argue that utilities can avoid disputes over the just and reasonable rate for pole attachments and make ready simply by reducing rents and make ready fees, this argument is untrue in practice and principle.[9] Joint use agreements are distinctly different from pole attachment agreements because they are based on cost-sharing between pole owners, and they grant greater access rights to ILECs than are provided to other attachers under pole attachment agreements. That is why the Commission has correctly refrained from reflexively applying the new Telecom rate to ILEC pole attachments. Similarly, make ready fees will vary significantly depending on the type of work that is involved and the geographic location of the make ready work. Utilities can not easily discern whether the joint use rate or a make ready fee is just and reasonable, nor can they guesstimate the liability from potential refunds.[10] As some comments explain, utilities are already bearing an unfair share of the costs under their joint use agreements and further reducing cost recovery would only exacerbate this problem and unfairly subsidize communications carriers at the expense of electric customers.[11]

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[9] *See* Comments of the US Telecom – The Broadband Association in WC Docket No. 17-84 at 5 (filed Aug. 23, 2021)(stating "pole owners can avoid all refund liability (and concerns about claims that reach back to the beginning of the applicable statute of limitations) simply by charging all attachers a lawful pole attachment rate.") *See also* Comments of Crown Castle Fiber LLC in WC Docket No. 17-84 at 5-6 (stating "If EEI's members have concerns about make-ready charges, they can resolve those concerns by allowing attaching parties to exercise self-help more readily when make-ready is delayed, including for pole replacements, which is a large driver of disputed costs.")

[10] *See* Comments of American Electric Power in WC Docket No. 17-84 at 3-4 (filed Aug. 23, 2021)(explaining that "it is impossible to quantify the amount in dispute [in an ILEC complaint]" because among other things, the Commission "did not establish a new 'rate' or rate formula applicable to ILEC attachments on poles owned by AEP," adding that "[e]ven if we could have guesstimated the correct amount for ILECs to pay, this would only have been half of the equation.")

[11] Comments of American Electric Power in WC Docket No. 17-84 at 3 (stating "To be clear, from AEP's perspective, these agreements are much better for the ILECs than they are for us. For this reason, it makes sense to us that an ILEC would leave well enough alone.") *See also* Comments of WEC Energy Group in WC Docket No. 17-84 at 1 (filed Aug. 23, 2021)(explaining that joint use agreements were "based on the premise that both the utility and the ILEC would be responsible for the operation and maintenance of their pole stock and partner in order to limit the number of poles needed to operate both a phone and electric system,' but that "ILECs … did not maintain their share of the required pole facilities [which] caused WEC to increase its share of pole stock, thus increasing its operation and maintenance costs.")

Therefore as a matter of practice and principle, the Commission should reject the arguments in some comments that utilities could or should simply reduce rates or make ready fees to avoid uncertainty surrounding potential liability from pole attachment refunds based upon state statutes of limitation.

In conclusion, UTC reiterates its support for the EEI Petition and echoes the comments on the record urging the Commission to clarify that a uniform two-year statute of limitations applies to refunds in pole attachment complaint proceedings under section 1.1407 and that refunds are not permitted prior to good faith notice of a dispute. This clarification would be consistent with its authority under section 415(b) of the Communications Act of 1934, and it would be consistent with the Commission's own precedent.[12]

As UTC and others explained in comments on the record, borrowing from state statutes of limitations based on breach of contract claims in civil actions is not the "most analogous state law cause of action" for its application to a pole attachment complaint, as required under the "borrowing" doctrine.[13] Instead, the ILEC pole attachment complaints at issue here seek relief based on the regulated rate for pole attachments instead of the rate provided under their joint use agreements. Moreover, borrowing the state statutes of limitations results in discriminatory treatment of utilities as pole owners and arbitrarily imposes greater and varying extents of liability from pole attachment refunds, depending on the location of the poles in the complaint.

The recent decision in *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*[14] only underscores the need for the Commission to provide the requested

[12] *See In re Sandwich Isles Communications., Inc.*, 2019 FCC LEXIS 41, *170, 34 FCC Rcd 577 (F.C.C. January 3, 2019).
[13] *Id.*
[14] *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*, Proceeding No. 20-276, EB-20-MD-003, Memorandum Opinion and Order, DA 21-1008, (rel. Aug. 27, 2021).

clarification to prevent further discriminatory treatment and arbitrary liability towards utilities, resulting from using state statutes of limitation in pole attachment complaint proceedings. Moreover, the Commission should provide the requested declaratory relief to remove uncertainty and settle disputes about the appropriate statute of limitations for ILEC pole attachment complaints, consistent with the Administrative Procedure Act.[15] The comments by utilities on the record substantiate the uncertainty that exists and the disputes that will be caused due to the application of state statutes of limitation in pole attachment complaint proceedings. Furthermore, granting the requested clarification will settle disputes, which in turn will promote broadband deployment, consistent with the Commission's intent when it revised its rules in 2011. Therefore, UTC supports the EEI Petition and urges the Commission to provide the requested clarification that the uniform two-year statute of limitations in section 415(b) of the Communications Act of 1934 applies to refunds in pole attachment complaint proceedings, and that refunds are not permitted for any period prior to good faith notice of a dispute.

Respectfully,

Utilities Technology Council

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[15] 5 U.S.C. §554(e).