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

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by removing barriers to infrastructure investment	)	ET Docket No. 17-84
	)	
	)	
	)	

REPLY COMMENTS OF THE NATIONAL RURAL ELECTRIC COOPERATIVES ASSOCIATION AND AMERICAN PUBLIC POWER ASSOCIATION

The National Rural Electric Cooperative Association (NRECA) and American Public Power Association (APPA) 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] NRECA and APPA support 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. Doing so will eliminate inconsistent, arbitrary and discriminatory treatment towards regulated electric utilities; encourage collaboration between pole owners and attachers; and promote the Commission's overarching policy goals to reduce disputes and advance broadband deployment.

I. Consistent with Federal Law and Commission Precedent the Commission Should Clarify That the Applicable Statute of Limitations in ILEC Pole Attachment Complaint Proceedings Is Two Years.

[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).

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 rationale for the "borrowing" doctrine, as well as the Commission's own precedent. 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, under the "borrowing" doctrine. Instead, the ILEC pole attachment complaints at question here seek relief based on the regulated rate for pole attachments instead of the rate provided under their joint use agreements. Therefore, these are not breach of contract cases. The Commission itself has declined to borrow state statute of limitations, where, as here, the claim involves an agency proceeding.[2] 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. Statute of limitations vary from state to state and can extend far beyond two years limitation that applies to attachment disputes on incumbent LEC owned poles, which would result in inconsistent refunds in pole attachment complaint proceedings. Borrowing state statutes of limitation clearly produces 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.

[2] *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").

This is unfair to electric utilities and systematically denies their rights to due process and equal protection under the law.

NRECA and APPA join 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 and as a matter of fairness.

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

Furthermore, NRECA and APPA join 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. Contrary to claims by some provider/attacher commenters, 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 prolong the process and refrain from pre-complaint negotiations. Conversely, it unnecessarily opens utilities to significant liability because the "just and reasonable" pole attachment rate for ILEC attachments is undiscernible. Limiting the refund period will eliminate the incentive for attachers to game the system and instead encourage good faith negotiations that will result in a quicker and more fair resolution of disputes.

As noted in the comments filed by the Utilities Technology Council (UTC) in support of the petition, 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 unique benefits provided to ILECs under the terms and conditions of each joint use agreement.[3] Moreover, as UTC pointed out, 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 they and other parties warned the Commission in 2011 when they proposed to revise its previous policy of permitting refunds only for periods after the filing of a pole attachment complaint. It is clear that the process is being exploited by attachers, which undermines good-faith negations and can lead to delays in broadband deployment. To prevent these unfair practices by ILECs the Commission must clarify that refunds in pole attachment complaint proceedings will not be awarded for periods prior to good-faith notice of a dispute.

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

Finally, NRECA and APPA agree 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 (APA).[4] Moreover, the Commission should issue a declaratory order 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.[5] 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

[3] Comments of UTC *In The Matter Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, available at https://ecfsapi.fcc.gov/file/10824194779925/Comments%20of%20the%20Utilities%20Technology%20Council.pdf.
[4] 5 U.S.C. §554(e).
[5] 5 U.S.C. §553(b)3

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.

IV. Conclusion

The petitioners and commenters that represent utility pole owners have made clear that providing this clarification will promote the Commission's overarching policy goals of reducing disputes and accelerating broadband infrastructure access. Comments by attachers claiming the granting the relief requested by EEI would create additional barriers to broadband deployment and would further exacerbate the digital divide are completely unfounded and contrary to experience as outlined by EEI and in comments submitted by utility pole owners. Electric utilities and telephone utilities should be subject to the same statute of limitations in pole attachment complaints.

Congress recognized that mutual negotiations would result in faster access to pole attachments, and joint-use agreements served as the model to follow. For decades, these joint-use agreements between ILECs and utilities paved the way for the deployment of telecommunications and broadband 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. This will only reduce disputes and promote broadband deployment. A two-year statute of limitations will provide 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 numerous benefits through mutual negotiation. Procedural problems with the statute of limitations threatens to upset the joint-use process that lead to further disputes and delay.

Accordingly, the Commission should grant the relief requested by EEI to 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,

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