**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, DC 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 |
| | ) | |
| Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment | ) | WT Docket No. 17-79 |

# OPPOSITION OF THE AMERICAN CABLE ASSOCIATION TO THE PETITION FOR RECONSIDERATION OF THE COALITION OF CONCERNED UTILITIES


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## I. INTRODUCTION AND SUMMARY

The American Cable Association ("ACA")[1] hereby files in opposition to the Petition for Reconsideration ("Petition") submitted by the Coalition of Concerned Utilities ("CCU") of the Third Report and Order in the above-referenced dockets (the "Pole Attachment Order" or "Order").[2] The Federal Communications Commission's ("Commission's") Pole Attachment Order represents transparent, well-reasoned agency decisionmaking that was grounded in the statute and fact-based, even if ACA did not agree with every part of the Order. The

[1] ACA represents more than 700 smaller cable operators and other local providers of broadband Internet access, voice, and video programming services to residential and commercial customers. These providers pass approximately 18.2 million households of which 7 million are served. Many of these providers offer service in rural communities and more remote areas.

[2] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, *Accelerating Wireless Broadband by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, WT Docket No. 17-79, Third Report and Order, FCC 18-111 (rel. Aug. 3, 2018) ("Pole Attachment Order" or "Order").

Commission initiated its review of pole attachment issues well over a year before reaching a decision. It received numerous comments and replies from a great many stakeholders representing widely diverse viewpoints, including those of the CCU and other owners of regulated poles, and then engaged in many meetings and accepted many additional filings prior to crafting its decision. The Commission also considered and often implemented the policy recommendations of its Broadband Deployment Advisory Committee ("BDAC"), which spent months working on developing consensus proposals for improving pole attachment processes.[3] The eventual Pole Attachment Order explicitly discusses the concerns of the many competing interests, including the need to protect the safety and reliability of poles and electric attachments raised by the CCU and other utilities, while balancing these concerns with the interests of existing and new attachers and other interests.

In fact, in a meeting with Commission staff a week before the Order was adopted, the CCU "expressed [its] appreciation that, although the results are not ideal, several of its concerns regarding ILEC rates, overlashing and one-touch make-ready were reflected in the draft order's proposed rulings."[4] The CCU then raised concerns about only two of the many issues for which it seeks reconsideration — self-help make-ready in the electric space and per-pole make-ready estimates.[5] As such, the Commission clearly heard the concerns of the CCU, considered them along with the views of other stakeholders, and reasonably balanced all of these interests in the Pole Attachment Order. The facts and arguments made by the CCU in the Petition are not new. To the extent the Commission thinks any of them are novel, they could have been made during

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3 "Report of the Competitive Access to Broadband Infrastructure Working Group," Presented to the Broadband Deployment Advisory Committee of the Federal Communications Commission (Jan. 23-24, 2018) ("BDAC Recommendations").

4 Letter from Thomas B. Magee, Attorney for the Coalition of Concerned Utilities, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84, WT Docket No. 17-79, at 2 (July 25, 2018) ("CCU Letter").

5 *Id*. at 2-3.

the rulemaking period, and do not provide any public interest benefit in being heard for the purpose of modifying decisions in the Order that already maximize the public welfare. Further, the CCU does not show that the Commission committed a material error or omission in the Order. For all of these reasons, the CCU fails to meet the Commission standard for reconsideration.[6] Accordingly, the Commission should deny the Petition as it merely represents an attempt by the CCU to have the Commission re-hear issues that CCU wishes would have been decided differently.

## II. STANDARD OF REVIEW FOR A PETITION FOR RECONSIDERATION

Under the Commission's rules, a petition for reconsideration in a rulemaking proceeding that relies on facts or arguments not previously presented to the Commission may be granted only if it relies on facts or arguments that: (i) relate to events that have occurred or circumstances that have changed since the petitioner's last opportunity to present such matters to the Commission; (ii) were unknown to the petitioner until after the last opportunity to present them to the Commission; or (iii) the Commission or its designee determines that reconsideration of the facts or arguments relied on is required in the public interest.[7] Petitions that rely on arguments that have been fully considered and rejected by the Commission in the proceeding do not warrant consideration.[8] Commission precedent, however, establishes that reconsideration is generally appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to respond.[9]

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6 *See* 47 C.F.R. § 1.429.

7 47 C.F.R. § 1.429(b).

8 47 C.F.R. § 1.429(l).

9 *See, e.g.*, *Amendment of Section 73.3555(e) of the Commission's Rules, Nat'l Television Multiple Ownership Rules*, MB Docket No. 13-236, Order on Reconsideration, 32 FCC Rcd 3390, para. 16 (2017); *Connect Am. Fund; ETC Annual Reports and Certifications*, WC Docket Nos. 10-90, 14-

## III. THE COMMISSION SHOULD DENY THE CCU'S REQUEST TO PROHIBIT ATTACHERS FROM INVOKING THE SELF-HELP REMEDY IN THE ELECTRIC SPACE

The CCU requests that the Commission amend the Pole Attachment Order as well as the self-help survey and make-ready rule[10] so that new attachers are not permitted, when invoking the self-help remedy, to "hire utility-approved contractors to perform make-ready survey or construction work in the electric space," because such work can be unsafe, the public can be harmed, and it may cause electrical outages.[11] CCU fails to meet the Commission's standard for reconsideration pertaining to this issue.

First, as the CCU acknowledges in the Petition, it previously raised its safety concerns regarding the performance of make-ready work in the electric space in its prior comments to the Commission.[12] In fact, the CCU simply makes the same request and arguments it made to Commission staff a week prior to the Commission's adoption of the Pole Attachment Order.[13] Second, the Commission explicitly cited the safety claims made by the CCU and other utilities in the Order,[14] but determined that permitting self-help in the electric space "will strongly encourage utilities and existing attachers to meet their make-ready deadlines and give new

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58, Report and Order and Order on Reconsideration, 32 FCC Rcd 1642, paras. 68-70 (2017) ("*CAF Reconsideration Order*").

10 47 C.F.R. § 1.1411(i).

11 Petition at i-ii. See also *id.* at 8 ("Communications companies have no training or expertise in electric distribution system design and cannot responsibly manage the activities of outside contractors performing work on electric distribution systems.").

12 *Id.* at 8 (citing Comments of the Coalition of Concerned Utilities, WC Docket No. 17-84, at 27 (June 15, 2017) ("CCU Comments"). *See* Reply Comments of the Coalition of Concerned Utilities, WC Docket No. 17-84, at 1-8 (July 17, 2018) ("CCU Reply Comments").

13 *See* CCU Letter at 2-3. ("We explained that OSHA regulations require utility control over electric space work….We explained that contractors beholden to communications companies could be pressured to complete work faster, not safer….[E]lectric utilities would be encouraged to avoid that result by saving time on make-ready work by discontinuing the…practice of expanding capacity by replacing existing poles with taller poles.").

14 *See* Pole Attachment Order at paras. 96, nn. 336-337 (citing CCU Comments at 11), 99, n. 347 (citing CCU Comments at 28-29; CCU Letter at 2-3),

attachers the tools to deploy quickly when they do not."[15] Thus, it is clear that the CCU is not presenting any new arguments in its Petition on this matter or ones it could not have made during the rulemaking process. Further, the CCU fails to show the Commission made a material error or omission in its decision. All of the CCU's arguments were before the Commission when it adopted the Order. For purposes of whether to grant the Petition on this matter, the consideration of the issue must end there.

But even if the Commission thought some of the CCU's arguments were new, there is no public interest benefit that warrants considering them. It already adopted sufficient safeguards to protect public safety and utility pole owner rights regarding make-ready work in the electric space.[16] Moreover, as the Commission points out, utilities can control the entire process just by completing make-ready on-time.[17] Accordingly, changes to the Order's reasoned decisionmaking based on arguments that the Commission may consider new would only serve to diminish the public interest benefits already provided.

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15 *Id.* at 98.

16 For example, unlike communications attachers who have abbreviated make-ready deadlines, utilities continue to have make-ready deadlines of 90 days (and 135 days for large requests) to give them sufficient time to complete complex make-ready above the communications space. *See id.* at paras. 87, 99. Utilities also may deviate from the make-ready deadlines "for good and sufficient cause." *See id*. at para. 88. In addition, attachers invoking self-help in the electric space are required to use a qualified contractor approved by the utility. *See id*. at para. 99; 47 C.F.R. §§ 1.1411(i)(2), 1.1412. Attachers are further required to give the utility advance notice of make-ready so they can be present and halt any work where safety and reliability are jeopardized. *See id*. Attachers also must give the utility post-completion notice so that any issues can be addressed, including by having the attacher pay to correct any issues. *See id.* Importantly, the Commission maintained its rule that gives utilities the ability to have a consulting engineer oversee self-help surveys and make-ready, and "make final determinations…where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes." 47 C.F.R. § 1.1412(d).

17 *See Pole Attachment Order* at para. 99. ("Because electric utilities always will have the opportunity to complete make-ready work before self-help is triggered, have control over which contractors will be allowed to perform self-help, and will have the opportunity to be present when the self-help make-ready work is performed, we disagree with FirstEnergy [a member of the CCU] that our new rules 'risk loss of control for every expansion of capacity to accommodate new attachments.'") (internal citation omitted).

In its Petition, however, the CCU deems the Commission's safeguards "simply inadequate."[18] Instead, it just wants to say "no" — "no" to meeting any make-ready deadline and "no" to suffering any immediate consequences for that inaction. Its primary complaint – which is common throughout the Petition – is with the Commission's reasoned judgment, which alone, is not proper grounds for reconsideration. The Commission sought to expedite deployments and rejected the CCU's request to prevent new attachers from relocating electric attachments, a request which it now repeats in its Petition, because the Commission recognized that this request, if granted, could force new attachers to go through the time and expense of filing a complaint, most likely long after the make-ready deadline has passed, to complete their deployments. The Commission sought a better way to serve the public interest, and the Commission found it in the Pole Attachment Order by adopting a conservative approach that continues to give the CCU and other utilities the ability to fully prosecute their legitimate interests and statutory rights.[19]

The CCU also objects to the Commission's rule on self-help surveys[20] with a one-sentence claim that the rule will not protect safety and reliability and no further explanation.[21] As with make-ready in the electric space, the CCU presents no new facts or arguments, and does not even attempt to show that the Commission committed a material error or omission to justify reconsideration of the Order on this matter. The CCU merely wants the Commission to reach a decision different from the one it reached after considering the arguments previously

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18 Petition at 9.

19 The CCU also questions the Commission's authority "to dictate who can move electric facilities." *Id.* at 9, n. 24. In the Order, the Commission rejected the CCU's argument, finding that, while utilities have authority to deny new attachments due to lack of capacity or safety, reliability, and engineering concerns, that authority is not unfettered, and its actions do not "abridge a utility's ability to deny access on a non-discriminatory basis." Pole Attachment Order at para. 100, nn. 356-357.

20 47 C.F.R. § 1.1411(i)(1).

21 Petition at 10.

presented to the Commission by the CCU and other utilities.[22] As such, the Commission should summarily reject the CCU's objection to the self-help survey rule.

## IV. THE COMMISSION SHOULD REJECT THE CCU'S REQUEST TO MODIFY THE OVERLASHING RULE

The CCU alleges that the Commission's views about the safety and reliability of overlashing without pre-approval are "mistaken"[23] because the Commission concluded that "the record does not demonstrate that significant safety or reliability issues have arisen from the application of the current policy" of not requiring advance approval of overlashing.[24] Once again, the CCU supports its assertion by pointing to questionably relevant evidence already in the record of where overlashing caused safety issues.[25] It presents no new facts or arguments on this issue.

Importantly here, the CCU demonstrates no mistake – much less material error – that justifies reconsideration of the Commission's overlashing framework. The Commission explicitly considered the information submitted and the concerns expressed by the CCU and other utilities, but concluded that it was "unpersuaded" by "utility arguments that utility pre-approval for overlashing is necessary to ensure safety."[26] After reviewing the record, the Commission concluded that "an advance notice requirement has been sufficient to address safety and reliability concerns, as it provides utilities with the opportunity to conduct any engineering

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22 The CCU gives a series of proposed fixes (as opposed to just saying "no"), but the presentation of alternative means for the Commission to address the facts and arguments that were presented in the record of the Order is not grounds for reconsidering the Order. *Id.*

23 *Id*. at 11.

24 Pole Attachment Order at para. 117.

25 Petition at 11-12 (citing Reply Comments of the Utility Commission on Overlashing, WC Docket No. 17-84, at 10-11, Exhibit B (Feb 16, 2018)). The CCU fails to explain the relevance of the evidence it provided. It does not explain whether the cited safety issues caused any actual injury or harm, whether the utility had pre-approval or advance notice prior to the overlashing, and, if not, whether advance notice would have mitigated these issues.

26 Pole Attachment Order at 117, n. 433 (citing CCU Reply Comments at 29-30). *See id.* at para. 116, nn. 424, 426 (citing CCU Reply Comments at 30).

studies or inspections either prior to the overlash being completed or after completion."[27] The Commission appropriately weighed the utilities' claims against the arguments presented by ACA and other attachers,[28] and reached its reasoned conclusion to codify its existing precedent not to require pre-approval for overlashing. Thus, the CCU fails to demonstrate any material error or omission by the Commission in adopting its overlashing framework and reconsideration should be denied. The Commission fully considered the safety concerns raised by the CCU and other utilities and established safeguards, including a 15-day advance notice process, to address such issues.[29] As stated at the outset, the CCU thanked the Commission staff one

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27 Pole Attachment Order at para. 117.

28 *See, e.g.*, *Ex Parte* Letter from Thomas Cohen, Counsel for the American Cable Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84 (Mar. 8, 2018) ("Overlashing clearly expedites and lowers the cost of network deployments, and existing attachers have long engaged in overlashing (and permitted third parties to overlash) consistent with generally accepted engineering standards. Based on these benefits, the demonstrated lack of harm to pole safety and reliability, and the adequacy of measures to audit such attachments and correct issues, the Commission has ruled consistently that such overlashing can be performed without approval by or additional payment to the pole owner. Yet, despite the Commission's longstanding precedent, some utility pole owners continue to claim the right to impose costly and unnecessary overlashing conditions based on safety claims that the Commission has repeatedly considered and rejected. These conditions are inconsistent with Commission precedent and threaten to impede the upgrading, expansion, and densification of broadband networks. As a result, the Commission should remove these barriers to broadband deployment by codifying existing precedent permitting an attacher or third party to overlash consistent with generally accepted engineering practices without requiring prior utility pole owner approval, including a pole attachment application, or pay additional charges to the utility pole owner. In addition, although not required by Commission precedent, ACA does not oppose service providers and utility pole owners agreeing to an overlashing notice period, so long as the notice is reasonable (both in its duration and the amount of information provided). In determining what is reasonable notice, the Commission could provide guidance by making clear that providing the time and location of the overlashing work is presumptively reasonable and any requirement to provide pole loading analysis or other engineering review is conclusively not reasonable since the overlashing will be conducted consistent with generally accepted engineering practices.").

29 Indeed, the Commission cited the overlashing safety concerns expressed by the CCU when permitting utilities to require overlashers to file pre-overlashing notifications. Pole Attachment Order at para. 116, n. 426 (citing CCU Reply Comments at 30). *See* Letter from Brett Kilbourne, Vice President, Policy and General Counsel, Utilities Technology Council, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84, at 5 (July 26, 2018) ("UTC supports the provisions in the Draft Order that require third-party attachers to provide utilities with 15-days advance notice of overlashing….As utilities explained on the record, it would be better if the 15-day advance notice period were extended, but requiring attachers to provide 15-day advance notice of overlashing gives utilities an opportunity (albeit short) to address potential engineering and safety issues.").

week before the Order was issued for responding to utility concerns about overlashing — and it did not raise at that time the overlashing proposals that it set forth in its Petition.[30]

In sum, the CCU once again is merely objecting to the Commission's balanced and reasonable decision, which in reality took into account the facts and arguments the CCU raises in the Petition. As mentioned before, arguing that the Commission reached the wrong policy outcome, without more, is not sufficient to justify reconsideration, and the time for proposing alternative remedies has passed. Accordingly, the proper treatment of the CCU's reconsideration request on this matter is rejection.

The CCU also requests that the Commission "eliminate or modify its footnote ruling that pole owners may not deny overlashing because there are preexisting violations on the pole."[31] It suggests that the Commission's decision is not based on reasoned decisionmaking because it fails to recognize that some violations are far more dangerous than others. Moreover, it argues that the ruling violates the Pole Attachment Act's provision allowing utilities to deny access for safety reasons.[32]

These arguments have been made before. The Commission directly considered and rejected allowing utilities to deny overlashers access to poles due to a pre-existing violation.[33] To the extent the Commission believes these arguments to be new, there is no reason why the CCU was unaware or unable to raise this claim with the Commission in its submissions prior to the adoption of the Order. Further, there is no public interest benefit in considering these arguments, given that the Commission's decision in the Order already took into account issues of public safety. First, the Commission highlighted that a party that chooses to overlash on a

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30 *Supra* note 4.

31 Petition at 12.

32 *Id.* at 12-13.

33 *See* Pole Attachment Order at para. 116, n. 429.

pole with a pre-existing violation and causes damage to the pole or other equipment would be held responsible for any necessary repairs.[34] The overlasher therefore would possess strong incentives to overlash in a way that does not exacerbate the preexisting violation or cause further damage, undercutting the need to deny access. Second, the Commission indicated that any utility concerns with overlashing to poles with pre-existing violations should be resolved through the 15-day advance notice process, not by barring pole access.[35] The Commission found that advance notice process is "sufficient to address safety and reliability concerns" by providing utilities with adequate time to conduct any necessary engineering studies and inspections, and correct any outstanding violations not caused by the proposed overlashing, before the overlashing begins.[36] Third, the Commission emphasized that a utility's authority under the Pole Attachment Act to deny access is not "unfettered" and the Commission possesses considerable authority to prescribe rules to facilitate timely access to poles by balancing the competing interests of pole owners and new attachers.[37] Given that the CCU fails to meet the criteria for reconsideration in its Petition, the Commission should reject the CCU's request and not disturb its well-reasoned decision regarding overlashing.

## V. THE COMMISSION SHOULD REJECT THE CCU'S REQUEST TO MODIFY THE PRE-EXISTING VIOLATION RULINGS IN THE ORDER

In the Pole Attachment Order, the Commission clarified that "new attachers are not responsible for the costs associated with bringing poles or third-party equipment into compliance with current safety and pole owner construction standards" to the extent there were

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34 *Id.* at para. 116, n. 429.

35 *See id.* at para. 116.

36 *Id.* at para. 117.

37 *Id.* at para. 100. *See AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000) (holding that the Commission possesses "wide discretion to determine where to draw administrative lines").

pre-existing violations.[38] The Commission also clarified that "utilities may not deny new attachers access to the pole solely based on safety concerns arising from a pre-existing violation."[39] In doing so, the Commission dismissed utility arguments, including arguments raised by CCU, that new attachers should bear the costs of correcting pre-existing violations, finding "this practice is inconsistent with our long-standing principle that a new attacher is responsible only for the actual costs incurred to accommodate the attachment."[40] The Petition does not present any new facts or arguments to the Commission, and certainly none that could not have been made during the rulemaking process or that would benefit the public interest to consider. Moreover, it also does not demonstrate that the Commission committed a material error or omission that would require reconsideration. Rather the Petition seeks to reconcile these rulings with other rules and asks the Commission to address issues in the CCU's comments that it did not address in the Order.[41]

First, the CCU asks the Commission to reconcile the new rule, section 1.1411(d)(4), which prohibits a utility from charging a new attacher for pre-existing violations, with section 1.1408(b), which permits the cost of modifying a facility to be shared by all parties that obtain access.[42] The CCU argues that a modification may be made to correct a pre-existing violation encountered by a new attacher.[43] Once again, the CCU raises no new facts or arguments, or any that could not have been presented to the Commission prior to the adoption of the Order on this issue. Further, given the Commission's decision was well-reasoned, balanced, and in the

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38 Pole Attachment Order at para. 121.

39 *Id.* at para. 122.

40 *Id.* at para. 121, n. 450 (citing CCU Comments at 19-20).

41 Petition at 13-17. The CCU also seeks reconsideration on the "red tagged" pole issue. *Id.* at 14. ACA does not comment on that issue herein.

42 *Id.* at 15-16.

43 *Id.* at 16, n. 54.

public interest when adopted, there is no benefit to the public of considering the CCU's arguments now if such consideration may result in changing the decision.[44]

In any event, ACA sees no ambiguity in the rule sections cited by the CCU. ACA submits that the Commission's new rule on pre-existing violations already can be read consistent with the "modification" language – that is, the new section controls, and the new attacher does not have to pay to fix a pre-existing violation, including one that results in a modification of a facility. ACA's reading is based on the Commission's statement in the Order that making new attachers pay to correct pre-existing violations is inconsistent with its longstanding principles recognizing that "it is the violation itself that causes the costs, not the new attacher."[45] Accordingly, the Commission should deny the CCU's request because it did not present any new facts or arguments that have not been considered or could not have been made prior to the Order's adoption, and there is no material error or omission. Even the reconciliation it seeks is unnecessary.

Second, the CCU asks the Commission to address three issues raised in its comments that the Commission did not address in the Order:

- "Unauthorized attachers should be presumed to have caused the violation and pay to correct it."[46]

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44 The Commission noted generally that further actions may be necessary, and said it would "take further action as warranted in this proceeding to address outstanding issues." Pole Attachment Order at para. 130. Thus, there is no Commission action on this issue to reconsider at this time. If the CCU believes that this alleged ambiguity in the Order warrants further action, the appropriate vehicle is a petition for a declaratory ruling, where the Commission can assess, based on a fully developed record, whether the changes made in the Order warrant clarification. *See* 47 C.F.R. § 1.2.

45 Pole Attachment Order at para. 121 ("Holding the new attacher liable for preexisting violations unfairly penalizes the new attacher for problems it did not cause, thereby deterring deployment, and provides incentives for attachers to complete make-ready irresponsibly and count on later attachers to fix the problem.").

46 Petition at 16.

- "If it cannot be determined who caused the violation, then the costs should be shared by any communications company entity which reasonably might have caused the violation."[47]
- "The new attacher should pay to correct the violation and seek reimbursement from existing violators."[48]

ACA submits the Commission has no obligation to address any of these requests on reconsideration. The CCU provides no new facts or arguments supporting these proposals beyond stating that the Commission should "reconsider" them.[49] Thus, there is no Commission action on this issue to reconsider at this time. The CCU admits that the proposals represent a rehash of requests it made in its prior comments and there is no reason to assume that the Commission did not consider its input in its decisionmaking.[50] The Commission is not required to explicitly address every recommendation made in a rulemaking proceeding and it is afforded substantial deference when engaging in the regulatory "line-drawing" contained in its framework for pre-existing violations.[51] The Coalition therefore fails to show that the Commission committed a material error or omission regarding these issues and reconsideration should be denied. The CCU's request for reconsideration of this matter must be denied.

## VI. THE COMMISSION SHOULD REJECT THE CCU'S REQUEST TO MODIFY THE REQUIREMENT THAT UTILITIES PROVIDE DETAILED ESTIMATES AT NO COST TO THE NEW ATTACHER

The CCU asks the Commission to give utilities the right to charge new attachers for the additional accounting and personnel costs needed to generate a pole-by-pole estimate of make-

47 *Id.* at 17.

48 *Id.*

49 *Id.* at 16-17.

50 Petition at 16-17 (citing CCU Comments at 19-20).

51 *CAF Reconsideration Order* at para. 27, n. 57.

ready and not penalize utilities for taking additional time to prepare detailed estimates.[52] The CCU claims that many utilities will need to purchase new or modified accounting systems to perform this task.[53] This is the same request and contention that the CCU made to the Commission staff one week prior to the adoption of the Order.[54] So, again, the CCU had presented the facts and arguments contained in its current Petition to the Commission already. The CCU believes that the Commission should not have rejected them in adopting the Order and rule,[55] but that is not sufficient grounds for the Commission to reconsider them. The CCU also fails to demonstrate that the Commission committed a material error or omission in barring utilities from shifting the burden of providing detailed make-ready costs to new attachers.

Even if the Commission believes the CCU's arguments to be novel, they could have been made before, and considering them for purposes of change the Order's rule would not serve the public interest given that such interest is already so well served by the Order. As the Commission noted in the Order, "[t]he record reflects frustration over the lack of transparency of current estimates of make-ready work charges," and the fact that numerous attachers experience "bill shock" when the final invoice far exceeds the estimate.[56] ACA members were among those expressing this frustration. They explained to the Commission that all they wanted from utilities is what they expect from any vendor: (1) clear and detailed estimates so they can compare the work and rates to alternative means of deployment and (2) clear and detailed final invoices so they can ensure they received the work they paid for and at the rates reflected in

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52 Petition at 18.

53 *Id*.

54 CCU Letter at 2.

55 47 C.F.R. § 1.1411(d).

56 Pole Attachment Order at para. 110.

their agreement with the utility.[57] They further explained that they were hampered in planning network expansions without having access to make-ready estimated costs on a pole-by-pole basis.[58] ACA also noted that New York and Oregon pole attachment regulations require detailed make-ready estimates and that the utility MidAmerican "consistently provides itemized cost estimates prior to make-ready."[59]

The Commission agreed with the arguments of ACA and other attachers, finding that, while more burdensome for utilities, requiring utilities to provide a per-pole estimate would enable attachers "to make informed decisions about altering their deployment plans" and would, both for estimates and final invoices, save attachers "the unnecessary time and cost they currently devote to such a task."[60] The Commission specifically considered claims by utilities, including the CCU, regarding the difficulties in providing detailed make-ready costs, but concluded that "utilities are best positioned to compile and submit these make-ready estimates…due to their pre-existing and ongoing relationships with the existing attachers on their poles."[61] The CCU Petition regarding this matter does not meet the standard for reconsideration, and thus the Commission should deny the CCU's requested modification.

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57 *See, e.g.*, Comments of the American Cable Association on the Notices of Proposed Rulemaking, WC Docket No. 17-84, WT Docket No. 17-79, at 49-50 (June 15, 2017) ("Itemized cost estimates allow attachers to quickly evaluate the reasonableness of the estimates provided by utilities and decide whether individual 'problem' poles should be bypassed and removed from an application. In many cases, the costs of pole replacement are greater than the costs of short runs of conduit. In these situations, pole-level cost estimates allow the attacher to make the most cost-effective decision for deploying plant.").

58 *Id*. at 24-25 ("[B]y having detailed estimates of make-ready costs, LISCO and ImOn found they are able to evaluate the reasonableness of the works more quickly, enter into negotiations with utilities where there are issues in dispute, and make economic decisions about whether to attach their wires or bury them.").

59 *Id*. at 49.

60 Pole Attachment Order at para. 112.

61 *Id.* at para. 111, nn. 397, 399 (citing CCU Letter at 2). Although it rejected utility arguments for shifting the obligation to provide detailed make-ready estimates to new attachers, the Commission's rule reflects utilities' concerns. First, the Commission decided not to mandate that utilities provide detailed estimates and invoices in all instances, but only upon a request by the attacher. 47 C.F.R. § 1.1411(d). Second, the Commission enabled utilities, where fixed costs

## VII. THE COMMISSION SHOULD REJECT THE CCU'S REQUEST TO MODIFY THE JOINT SURVEY RULE

The CCU requests that the Commission modify the Joint Survey rule[62] by making it optional because "many new attachers do not want joint ride-outs," requiring a new attacher to submit with its application information about existing attachers because utilities "may not know which attachers are on any given pole," and shortening the notice period to no more than at least 24 hours because "the personnel qualified to do a ride out schedule their work as flexibly as possible."[63]

The Commission already explicitly considered and rejected utility claims that the joint survey notice requirement provided "no practical benefit."[64] After reviewing the record, the Commission concluded that the joint survey rule "strikes the right balance" between the needs of new attachers and utilities.[65] The CCU fails to present any new facts or arguments warranting reconsideration of this issue. Even if the CCU's claims did represent new information, there is no reason why the CCU was unaware of or unable to present such information in its prior comments to the Commission, especially considering that the CCU had access to draft language for the Order in advance. Moreover, the CCU has not made the case that considering its arguments is in the public interest. Indeed, it cannot because considering new arguments for the purpose of modifying a reasoned and balanced decision that already maximizes the benefits to the public interest could only lead to a result that would undermine

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are not reasonably calculable on per-pole basis to "present the charges on a per-job basis." *Id.* Third, the Commission decided that utilities do not need to provide a final invoice "where the final cost of the work does not differ from the estimate." Pole Attachment Order at para. 113. Finally, the Commission rejected the proposal of some attachers that utilities should provide a publicly-available schedule of common make-ready charges. *Id*. at para. 114.

62 47 C.F.R. § 1.1411(c)(3)(ii).

63 Petition at 19.

64 Pole Attachment Order at para. 82, n. 301.

65 *Id.* at para. 82.

such benefits.[66] The CCU's asserts that its so-called "operational issues" will make compliance with the rule more convenient, but that would impact the benefit of the rule to others, such as new attachers.[67]

## VIII. THE COMMISSION SHOULD REJECT THE CCU'S CALL TO MODIFY THE CONTRACT LIST RULE

Prior to the Pole Attachment Order, the Commission required a utility to "make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready…on its utility poles in cases where the utility failed to meet deadlines."[68] However, as ACA commented to the Commission, utilities frequently have not provided any list of contractors or provided a list of contractors that were available but that charged unreasonable

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66 The Commission should reject each of the CCU's proposed changes to the joint survey rule. First, the CCU makes the conclusory statement that many attachers do not want joint ride-outs. Petition at 19. But evidence in the record in fact demonstrates that new attachers want this right and will exercise it. *See, e.g.*, Reply Comments of the American Cable Association on the Notices of Proposed Rulemaking, WC Docket No. 17-84, WT Docket No. 17-79, at 18-19 (July 17, 2017) ("ACA Reply Comments"). Moreover, the BDAC recommended joint surveys as a way to facilitate cooperation and agreement among utilities and attachers. BDAC Recommendations at 37-41. Second, the Commission should reject the CCU's request that new attachers submit with their applications per-pole information identifying existing attachers. The Commission rightly placed this obligation on utilities and not new attachers because utilities are expected to collect this per-pole information as they review and approve the applications of attachers. Moreover, they have good reason to maintain these records. By contrast, while new attachers can see what attachments are on a pole, they are unlikely to know the identity of each existing attacher – and thus they will have to undertake substantial work to find this information. Thus, the utility should have the burden of producing the existing attacher information. *See* Pole Attachment Order at para. 82, n. 299 ("The failure of a utility to maintain adequate records to enable the utility to identify the attachers on its poles…is not a sufficient reason for us to eliminate the notification requirement."). Third, while the CCU claims utility personnel need to have flexibility and thus should only have to give 24 hours' notice of a joint ride-out, the CCU personnel are not the only parties involved in that process – and nowhere does the CCU discuss or seek to balance attachers' interests. It is axiomatic that personnel of the new and existing attachers also are essential participants in joint ride-outs, and it is likely to take time (more than 24 hours) to coordinate the schedules of all personnel that need to be engaged in any ride-out. The BDAC sought to balance the interests of utilities and attachers by providing a "three business day" notice requirement, which it deemed to be "reasonable." BDAC Recommendations at 39. Moreover, the BDAC noted that, other than for this minimum notice requirement, the pole owner alone controlled the joint survey process. *Id.*

67 Petition at 19.

68 47 C.F.R. § 1.1422 (2017).

fees.[69] The Commission agreed with this concern, finding "that inconsistent updating of approved contractor lists by utilities, as well as a lack of uniform contractor qualification and selection standards, leads to delays when new attachers seek to exercise their self-help remedy and perform make-ready work on the pole."[70] At the same time, the Commission noted that utilities "are understandably apprehensive about having unfamiliar contractors work on and potentially damage their facilities."[71] The Commission, therefore, amended the "contractor list" rule[72] to "strongly encourage utilities to publicly maintain a list of approved contractors" and "establish[] clear minimum qualifications."[73] The new rule includes numerous protections for utilities when attachers undertake self-help make-ready.[74] Importantly, to be deemed "qualified," a contractor must meet a series of industry-standard and utility-related safety and reliability criteria.[75]

The Petition requests that the Commission modify its rule in two respects. First, the CCU does not want utilities to maintain lists of qualified contractors to perform make-ready in the communications space, but it wants to retain the authority to disqualify any contractor based on safety and reliability concerns.[76] Second, the CCU wants to revise the standards under which communications providers propose a new contractor in several ways: require that the contractor "have on staff licensed Professional Engineers who understand" industry standards

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69 *See* ACA Reply Comments at 25.

70 Pole Attachment Order at para. 36.

71 *Id.* The Commission specifically accounted for concerns of utilities in numerous respects in adopting its rule. *See, e.g.*, *id*. at paras. 37, 41-42, 46, 106, nn. 146-148, 160, 164, 176, 373, 376, 377.

72 47 C.F.R. § 1.1412.

73 Pole Attachment Order at para 37. See generally *id.* at paras. 36-50, 104-108.

74 *See id.* at paras. 104-107.

75 *See id.* at para. 39.

76 Petition at 20-21.

and utility rules; enable a utility to demand a "ramp-up" period to evaluate the contractor; and require any attacher hiring non-union personnel to "reimburse the pole owner for union contract costs incurred by the utility pole owner because union workers were not used."[77]

ACA submits that the Commission should deny the CCU's requests. As an initial matter, the CCU does not make any claim that the Commission made an error or omission in its Order regarding this matter. Indeed, the Commission did not. It was a reasoned decisionmaking based on the evidence presented in the record, including comments submitted by the CCU.[78] The CCU also fails to present any new facts or arguments that have not or could not have been made prior to the Order's adoption. The CCU had an opportunity to present its proposals to the Commission staff just prior to the Commission adopting the Order. Yet, it apparently did not, even though it had the draft of the decision in hand.[79] Even if the Commission believes the CCU arguments in the Petition are new, the CCU makes no claim that the public interest requires the Commission to take into account these arguments. In fact, it would be against the public interest to consider them for purposes of granting the CCU's request because it would forestall attachments and add to their cost, for several reasons.

First, in considering the CCU's modifications, it is important to understand that the utility can control any make-ready work it is obligated to perform simply by completing work itself within the timeframe established by the Commission. The utility can even extend that timeframe in certain instances.[80] Thus, the issues of whether a new attacher can use a contractor to perform make-ready and how to ensure the contractor is qualified only come into play when the utility fails to meet the Commission's mandated deadline and the new attacher invokes the self-

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77 *Id.*

78 *See* Pole Attachment Order at paras. 37, nn. 146-147 (citing CCU Comments at 17), 41, n. 160 (citing CCU comments at 10, 24).

79 *Supra* note 4.

80 Pole Attachment Order at para. 91.

help remedy. In other words, at this point, the utility has had more than sufficient opportunity to protect its interest, and the Commission has good reason to find reasonable ways to facilitate self-help make-ready to achieve its goal of expediting infrastructure deployment.

Second, as discussed above, the Commission accounted for the varied interests of the utilities and many other stakeholders in this proceeding in crafting its new rule. Moreover, the Commission had the benefit of seeing how its 2011 "contractor" rule did and did not work and could draft the new rule to preserve the beneficial parts of the prior rule while correcting its flaws. The Commission, thus, for instance, encouraged the utility to maintain a list for simple make-ready work in the communications space, but maintained the 2011 rule requiring such a list for complex work and work above the communications space.[81] The Commission also added a series of robust and well-recognized standards a contractor must meet to be deemed "qualified."[82] In sum, in adopting the "contractor" rule, the Commission has provided the CCU and other utilities with more than sufficient safeguards to protect their safety and reliability interests and minimize their burdens of developing a list of contractors while it seeks to achieve its goal of facilitating network deployments.

## IX. THE COMMISSION SHOULD REJECT THE CCU'S REQUEST TO MODIFY THE COMPLETE APPLICATION RULE

In the Order, "[t]o prevent unnecessary delays in starting the pole attachment process,"[83] the Commission adopted a rule, consistent with the BDAC's recommendation,[84] setting forth a process[85] for determining when an application is complete, which would then become the

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81 *Id.* at paras. 104, 107.

82 *Id.* at para. 104.

83 *Id.* at para. 62.

84 BDAC Recommendation at 32.

85 47 C.F.R. § 1.1411(c)(1)(i)-(ii). The Commission also set forth a substantive standard for "Application Completeness." 47 C.F.R. § 1.1411(c)(1).

starting date for the Commission's attachment timeline. The new rule gives the utility 10 business days to review an application and either accept it or provide specific reasons to the applicant why it is not complete.[86] If the utility does not meet this deadline, the application is deemed complete.[87] If the utility determines the application is not complete and provides specific reasons, the applicant can cure those issues, and the utility then has five business days after resubmission to review the application – and the process for the review by the utility is the same as described above.[88] The Commission determined this approach "balances the interests of new attachers in the speedy processing of applications and of utilities in needing sufficient time to review applications."[89]

The CCU claims that the time allotted in the rule for reviewing whether an application is complete, which it asserts provides for a "deemed granted" application, is "grossly unfair to utility pole owners and risks harming both the public and the electric distribution system."[90] It therefore requests that the Commission provide five additional days – from 10 to 15 business days – to review an application for completeness and permit it to add time for any *force majeure* and other events beyond the pole owner's control.[91] As discussed below, the Commission should deny the CCU's request for multiple reasons.

First, the CCU makes no claim that the Commission made a material error or omission in its Order on this matter. Indeed, it is the CCU that is in error when it states that the process provides for a "deemed granted" application; it only provides for an application to be "deemed

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86 47 C.F.R. § 1.1411(c)(1)(i).

87 *Id.*

88 *See* Pole Attachment Order at para. 62 (providing a complete description of the process).

89 *Id*. at para. 63. *See also id.* at para. 79 ("We agree with ACA that providing a specific timeline for determining completeness offers all parties predictability about the start of the OTMR process and avoids unnecessary delays.").

90 Petition at 24.

91 *Id.*

complete" and then the utility has 45 days to review the merits of the application.[92] Second, the CCU never mentioned needing additional time to review an application for completeness when it met with Commission staff a week prior to the adoption of the Order, despite it having the proposed text and rule.[93] It thus either did not have any concern with the timing for review of an application for completeness or did not deem it of sufficient import to raise it. Thus, while the arguments presented by the CCU may be considered new, it had the opportunity to make these claims before and such claims are not particular to events or circumstances that have changed since the Order was adopted. Moreover, consideration of these arguments would not be in the public interest if the purpose is to disrupt the reasoned and balanced rule adopted by the Commission that already maximizes public welfare. The claims by the CCU that this rule "risks harming both the public and the electric distribution system" are without merit.[94] Because the Commission explicitly rejected a "deemed granted" application remedy if the utility fails to complete its review on time,[95] an applicant's only recourse is to go through the time and expense of filing a complaint, which occurs rarely. Thus, even where an application is deemed complete, the utility has almost total control over granting it, and thus it is virtually impossible for the CCU's "parade of horrible outcomes" to occur when the utility must act within 10, instead of 15, business days in reviewing an application for completeness. Moreover, the 10-day timeframe strikes a reasonable balance among many stakeholders. The BDAC Working Group, which first proposed this policy, after much debate, unanimously adopted a recommendation

92 47 C.F.R. § 1.1411(c)(1).

93 *Supra* note 4.

94 Petition at 24.

95 *See* Pole Attachment Order at para. 81 ("We also declined to adopt ACA's proposal that a pole attachment application be deemed granted if the utility fails to act on an application within the 45-day timeframe.").

with an even shorter review period – seven calendar days.[96] The BDAC, after further discussion, then increased the time to 10 business days.[97] As discussed above, the Commission then found the BDAC's recommendation to be reasonable and adopted it. Because it is not in the public interest to take account of the CCU's arguments in the Petition, and the CCU has not met the Commission's other criteria for reconsideration, the Commission should deny the CCU's request to extend the timeframe for reviewing an application for completeness.

## X. CONCLUSION

The Commission proceeded transparently and reasonably in adopting the Pole Attachment Order. It received lengthy submissions from a wide variety of stakeholders and held numerous meetings with them. Throughout the Order, the Commission demonstrated that it considered the entire record and adopted rules that balanced competing claims. The Petition fails to demonstrate that the Commission made a material error or omission when adopting the Pole Attachment Order. Moreover, the arguments and facts presented by the CCU in its Petition are not new, but the same ones put forth during the rulemaking process. To the extent the Commission may believe some of CCU's arguments to be new, CCU was capable of making them all in prior submissions to the Commission, and there is no public interest benefit in taking account of them for the purpose of replacing rules that increase the public welfare with those that do not do so at all or as effectively. In its Petition, the CCU only seeks to have the

96 BDAC Recommendations at 29-33.

97 *Id.* at 35.

Commission re-litigate matters it has already decided, which is not grounds for reconsideration.

As such, the Commission should deny the reconsideration request as a whole.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that, on November 9, 2018, a true and correct copy of the foregoing Opposition of the American Cable Association to the Petition for Reconsideration of the Coalition of Concerned Utilities was provided via first class U.S. mail to:

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