Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS OF ACA CONNECTS TO THE EDISON ELECTRIC INSTITUTE PETITION FOR DECLARATORY RULING

Matthew M. Polka
President and Chief Executive Officer
ACA Connects – America's Communications Association
Seven Parkway Center
Suite 755
Pittsburgh, PA 15220
(412) 922-8300

Thomas Cohen
Edward A. Yorkgitis, Jr.
Kelley Drye & Warren LLP
3050 K Street, NW
Washington, DC 20007
(202) 342-8518
Counsel to ACA Connects – America's Communications Association

Ross J. Lieberman
Senior Vice President of Government Affairs
Brian Hurley
Vice President of Regulatory Affairs
ACA Connects – America's Communications Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

September 10, 2021

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS OF ACA CONNECTS TO
THE EDISON ELECTRIC INSTITUTE PETITION FOR DECLARATORY RULING

I. INTRODUCTION AND SUMMARY

ACA Connects – America's Communications Association ("ACA Connects") hereby replies to the comments filed in response to the Petition for Declaratory Ruling filed by The Edison Electric Institute ("EEI").[1] The *EEI Petition* asks the Federal Communications Commission ("Commission") to "clarify" that (1) Section 415(b) of the Communications Act (the "Act")—rather than State law—provides the "applicable statute of limitations" for purposes of Section 1.1407(a)(3) in Commission pole attachment complaint proceedings against investor-owned electric utilities, and that (2) refunds in pole attachment complaint proceedings are not "appropriate" for any period preceding "good-faith notice of a dispute."

---

[1] Petition for Declaratory Ruling of the Edison Electric Institute, WC Docket No. 17-84 (filed April 20, 2021) ("EEI Petition" or "Petition").

As ACA Connects set forth in in its initial comments,[2] the Commission should immediately dismiss the *EEI Petition* because it presents no "controversy" or "uncertainty" for the Commission to resolve through a declaratory ruling; rather, EEI requests rulings that would overturn well-settled Commission precedent, and it offers no compelling reason for doing so. NCTA,[3] USTelecom,[4] Crown Castle,[5] and ExteNet[6] also filed comments opposing the *EEI Petition*.[7] Not only did these opponents buttress the arguments made by ACA Connects, but, as we discuss herein, they provided additional reasons for the Commission to dismiss the *EEI Petition*. Moreover, those investor-owned utilities and associations thereof that filed in support of the *EEI Petition* merely reiterate the flawed arguments advanced in the *Petition* itself. Accordingly, the Commission should promptly dismiss the *EEI Petition*.

---

2 Opposition of ACA Connects to the Edison Electric Institute Petition for Declaratory Ruling, WC Docket No. 17-84 (Aug. 23, 2021) ("ACA Connects Opposition" or "Opposition").

3 Comments of NCTA – The Internet & Television Association, WC Docket No. 17-84 (Aug. 23, 2021) ("NCTA Comments").

4 Comments of USTelecom – The Broadband Association, WC Docket No. 17-84 (Aug. 23, 2021) ("USTelecom Comments").

5 Comments of Crown Castle Fiber LLC, WC Docket No. 17-84 (Aug. 23, 2021) ("Crown Castle Comments").

6 Comments of ExteNet Systems, Inc. on the Edison Electric Institute Petition for Declaratory Ruling, WC Docket No. 17-84 (Aug. 23, 2021).

7 ACA Connects and the other opponents to the *EEI Petition* represent, in aggregate, most of the pole attachers in the United States.

II. THE COMMISSION SHOULD DISMISS THE *EEI PETITION* FOR DECLARATORY RULING BECAUSE IT DOES NOT IN FACT ASK THE COMMISSION TO RESOLVE A CONTROVERSY OR UNCERTAINTY

The *EEI Petition* contains a fatal flaw: its request for the Commission to issue a declaratory ruling fails to provide, as required by the Commission's rules,[8] a "controversy" or "uncertainty" for it to resolve. First, EEI asks the Commission to rule that Section 415(b) provides the "applicable statute of limitations" for pole attachment complaints filed against investor-owned utilities. But, as other commenters joined ACA Connects in observing, such a ruling would directly contradict Commission precedent. USTelecom, for instance, notes that the Commission ruled in 2011 – and the D.C. Circuit affirmed – "that a case-specific statute of limitations should apply to pole attachment complaint proceedings, consistent with the 'way that claims for monetary recovery are generally treated under the law.'"[9] As NCTA points out, the Commission issued an Order just last year that affirmed this approach and that "explicitly rejected the interpretation that EEI advocates here."[10]

---

8 47 C.F.R. § 1.2 of the Commission's rules provide that it, "in accordance with Section 5(d) of the Administrative Procedure Act, on motion or on its own motion [may] issue a declaratory ruling terminating a controversy or removing uncertainty."

9 USTelecom Comments at 3-4, *citing Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183, 190-191 (D.C. Cir. 2013). The Commission's decision and the court's affirmance decisively dispenses with the disingenuousness of the electric utilities' claims that there is need for "clarification" on this issue, as some electric utilities suggest. *See, e.g.*, BHE Comments at 3 (while acknowledging implicitly the applicability of the Illinois ten-year statute of limitations, it bemoaned "the absence of the Commission's clarification of the applicable statute of limitations.")

10 NCTA Comments at 3 ("The Commission found [in *Verizon v. PEPCO*] that Section 415(b) was inapplicable in the context of a complaint against an electric utility under Section 224 and that the state statute of limitations for breach of contract actions was "more closely analogous" to the fact pattern in a pole

Second, EEI asks the Commission to rule that refunds in pole attachment complaints, at least against electric utilities, are not appropriate for any period preceding good faith notice of a complaint. Here again, the Commission has already definitively ruled that a pole attacher may seek refunds going back to the time the harm was incurred, consistent with the applicable statute of limitations. Indeed, as USTelecom explains, the Commission, in the *2011 Order,* "specifically rejected EEI's proposal that refunds should be available only from the date of good-faith notice of a dispute, because '[s]uch a rule modification runs counter to the very idea of a statute of limitations, which permits complaints to be filed up until the last day of the limitations period' and such a proposal would 'discourage[] pre-complaint negotiations between the parties to resolve disputes about rates, terms and conditions of attachment.'"[11]

The *EEI Petition* also advances the narrower argument that there is "uncertainty" that merits resolution through declaratory ruling about the rates that investor-owned electric utilities can charge attachers in the context of complaints from incumbent LECs regarding pole attachment charges and complaints related to make-ready charges. But this is not so. Assessing whether charges are "just and reasonable" in a specific pole attachment complaint proceeding is not an uncertainty, to the extent it exists,[12] that can

---

attachment complaint."); *see also Verizon Maryland v. Potomac Edison Co.*, Memorandum Opinion and Order, 35 FCC Rcd. 13607 (2020) ("*Verizon v. PEPCO"*).

11 USTelecom Comments at 4.

12 *See* NCTA Comments at 5-6, where NCTA explains that in addressing incumbent LEC complaints in particular "the case-by-case approach adopted by the Commission means the outcome of any particular rate case may be difficult to predict, [but] that difficulty is attributable to the variety of fact patterns that

or should be resolved in response to the *EEI Petition*, but rather in the specific context of individual complaints in light of the statute and Commission's rules. Importantly, under the *2011 Order*[13] and Section 1.1410(c) of the rules as interpreted by the Commission, there is no remaining controversy or uncertainty about whether an

might arise in the context of an incumbent LEC's complaint against an electric utility, not any fundamental uncertainty about what the term 'appropriate' means in the context of the Commission's rule or what the Commission's intent in applying that rule might be." NCTA's point is equally true in the case of complaints concerning allegedly unjust and unreasonable make-ready charges, and in fact, as ACA Connects explained, electric utilities have only themselves to blame for any lack of predictability surrounding make-ready charges. (*See* ACA Connects Opposition at 17 ("EEI and other electric utility stakeholders are largely responsible for any perceived ambiguity regarding make-ready charges, having consistently opposed requirements that make-ready charges be more predictable."). *See also* USTelecom Comments at 7-8 ("[T]here is no ambiguity about the "just and reasonable" rates required by law that would warrant a shorter statute of limitations period. The just and reasonable rates that electric companies may charge competitive LEC ("CLECs") and cable providers are set by regulation. The just and reasonable rate they may charge an ILEC attacher is presumptively the new telecom rate, with the old telecom rate setting a hard cap on the lawful rate if the presumption is rebutted. There is no plausible argument that the electric utilities do not know how to calculate these rates.").

Several investor-owned electric utilities, *see e.g.,* AEP Comments in Support of EEI's Petition for Declaratory Ruling, WC Docket No. 17-84 at 4 (Aug. 23, 2021) ("AEP Comments") and Ameren Support for EEI's Petition for Declaratory Ruling, WC Docket No. 17-84 at 3 (Aug. 23, 2021), aver that they charge the actual cost incurred in performing make-ready or pole replacements. Assuming this is the case—and that would be welcome provided the costs are objectively reasonable—then they likely should have little worry that their charges are just and reasonable, as long as the make-ready work or replacement is necessary and justified. But this contention that make-ready charges are cost-limited overlooks, in the experience of ACA Connects members, that make-ready-charge disputes are just as or more often about whether the make-ready work is required in the first place. As ACA Connects explained in its *Opposition*, the Commission has already provided pole owners significant guidance on when assessing make-ready charges against a new attacher are permissible, removing most uncertainty on this score. *See ACA Connects Opposition* at 17-20.

13 *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, ¶ 112 (Apr. 7, 2011) ("2011 Order").

attacher can, based on the applicable State breach of contract statute of limitations and when the complaint is filed, request relief covering the period prior to the date of notifying the investor-owned electric utility of a dispute over charges.[14]

Because the *Petition* for declaratory relief fails to present a valid "uncertainty" or "controversy" for the Commission to resolve, the Commission should dismiss it without further consideration.

[14] The only commenter that addressed this issue in support of the *EEI Petition* was the Utilities Technology Council ("UTC"), but UTC's comments were conclusory and merely echoed the arguments in the *Petition*. *See* Utilities Technology Council Comments, WC Docket No. 17-84 at 4 (Aug. 23, 2021) ("UTC Comments asserting that the Commission has the authority to issue the declaratory relief requested in the *EEI Petition* 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 the question of what statute of limitations applies and how far back prior to the filing of a complaint overcharges may be recovered .).

We also note that USTelecom also rebutted other arguments included in the *EEI Petition*, including that somehow the Commission is supposed to "strive" to achieve consistent statutes of limitations (USTelecom Comments at 5 ("neither section 224 of the Communications Act nor the Commission's pole attachment remedy rule requires or encourages a one-size-fits-all limitations period, let alone the two-year limitations period the Petition seeks.")) and that there is a conflict between the *Sandwich Isles* decision and application of the "borrowing doctrine" (USTelecom Comments at 7 ("*Sandwich Isles* bears no relation to the Commission's pole attachment complaint and remedies rules. *Sandwich Isles* involved the Commission interpreting its rules in the context of a universal service fund recipient that embezzled money from the federal government.")). *See also* ACA Connects Opposition at n.19 (explaining why *Sandwich Isles* does not support the *EEI Petitio*n).

III. THE RECORD MAKES CLEAR THAT THERE IS NO BASIS FOR REVISITING THE ESTABLISHED COMMISSION POLICIES THAT THE *EEI PETITION* SEEKS TO OVERTURN

A. Commenters Affirm ACA Connects' Position That the Commission's Application of the State Breach of Contract Statute of Limitations in Pole Attachment Complaint Proceedings Is Sound Policy

ACA Connects, as well as Crown Castle, NCTA, and USTelecom, demonstrated in their initial comments that it would be contrary to law to apply the Section 415(b) statute of limitations in pole attachment complaint proceedings against investor-owned electric utilities, as the *EEI Petition* requests.[15] In addition to raising dubious arguments to the contrary, investor-owned electric utility commenters further contend that the Commission's existing policy is untethered from traditional contract law; discriminatory; and harmful to broadband deployment.[16] These contentions are mistaken.

---

15 *See ACA Connects Opposition* at 3-4; Crown Castle Comments at 3-4; NCTA Comments at 6 ("With respect to the statute of limitations, the Commission fully considered the arguments EEI makes here last year in *Verizon v. PEPCO* and rejected them. The Commission fully explained its decision to apply the relevant state statute of limitations in lieu of alternative approaches" despite the potentially "greater variability in results for pole owners." "Nothing has changed in the interim to warrant a different result now."); USTelecom Comments at 6 ("The Commission has also previously rejected EEI's argument that Section 415(b) of the Act, rather than the "borrowing doctrine," should dictate the "applicable statute of limitations." The Commission explained that pole owners are "utilities" under Section 224(a)(1), so Section 415(b)—which applies to complaints against "carriers"—is not applicable.").

16 Further, contrary to the arguments of some investor-owned electric utilities, *see, e.g.,* Coalition of the Concerned Utilities Comments, WC Docket No. 17-84 at 17-18 (Aug. 23, 2021) ("CCU Comments"), applying a State statute of limitations does not expose them to excessive and unfair refund liability exposure or penalty. What statute of limitations applies is irrelevant to any question whether any refunds that are ordered are excessive or unfair. Whether refunds are ordered is based solely on whether the charges are unjust and unreasonable under the statute or the Commission's implementing rules and policies and according to Commission precedent. It is not a penalty to have one's charges be determined to be excessive or unfair.

First, investor-owned electric utility commenters rehash the *EEI Petition's* flawed argument that State statutes of limitations should not apply to pole attachment actions because, "[u]nlike breach of contract actions in state or federal court, in pole attachment complaint proceedings the rates, terms and conditions of pole attachments [are subject] to Commission regulatory review to determine whether they are 'just and reasonable.'"[17] However, the Commission has long ruled to the contrary, finding that "pole attachment complaints under pole attachment agreements, which contain the rates, terms, and conditions governing pole attachments, are analogous to breach of contract actions and, thus, the statute of limitations should apply from the State in which the poles are located."[18] In fact, as ACA Connects discussed in its *Opposition*, EEI even noted in another context that pole attachment disputes are primarily contractual matters.[19] Crown Castle in its comments agreed, explaining that "[m]onetary recoveries under contracts are generally governed by statute of limitations for actions on written contract. Requests for refunds are based on the examination of that pole attachment agreement and the relationship between the parties to that agreement."[20] As such, the Commission was well-grounded in concluding that application of State statutes of limitation, where there is no express provision in the Act, flow from the underlying

17 CCU Comments at 9.

18 *ACA Connects Opposition* at 6.

19 *See id.* at 6-7, explaining in full EEI's prior comments.

20 Crown Castle Comments at 4-5. Crown Castle went on to observe that "the Commission has adopted state statutes of limitations for contract actions pursuant to the borrowing rule because contract actions are closely analogous to pole attachment complaint proceedings."

contractual nature of the dispute. And neither the *EEI Petition* nor the commenters that support it offer any persuasive reasons to disturb that finding now.

Second, UTC supported EEI's assertion that application of State statutes of limitations to investor-owned electric utilities will produce "inconsistent and discriminatory results," and thus "is fundamentally unfair to electric utilities and systematically denies their rights to due process and equal protection under the law."[21] This argument materially overstates the extent to which outcomes in pole attachment proceedings are truly discriminatory, but more to the point, it ignores the fact that the federal pole attachment statute is rife with provisions that produce disparate outcomes—all legally. The most relevant of these, explained by USTelecom, is that "even if the Commission adopted the statute of limitations the Petition champions, it would not apply in the 22 States that have reverse preempted the Communications Act. Thus, under existing Congressional authority, the Commission would apply a shorter statute of limitations to violations governed by federal law as compared to violations

---

21 UTC Comments at 2 ("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. 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."). Numerous other investor-owned electric utilities offer identical comments. *See e.g.*, Entergy Letter in Support of EEI's Petition for Declaratory Ruling, WC Docket No. 17-84, at 2 (Aug. 23, 2021). *See also* CCU Comments at 8 ("ILEC pole owners and electric utility pole owners are identically situated; therefore, there is no justifiable reason that ILEC pole owners are treated more favorably than electric utility pole owners are.").

subject to state law statutes of limitation."[22] In its *Opposition*, ACA Connects pointed out other "legally discriminatory" provisions in the Act, including that investor-owned electric utilities are subject only to Section 224, while carriers are subject to a broad range of Title II obligations.[23] Accordingly, the Commission should give no weight to the allegation that application of State statutes of limitations in pole attachment complaints against investor-owned electric utilities produces discriminatory results that run counter to the Act.

Third, numerous investor-owned electric utility commenters supported the *Petition's* assertion that its requested relief "should be adopted because it will help promote broadband deployment."[24] These commenters alleged that the existing regulatory regime produces uncertainty and dissuades investor-owned utilities from investing in new pole capacity, thus harming broadband deployment. But the contrary is true: the rule changes the investor-owned electric utilities advance would actually undermine broadband deployment by emboldening pole owners to charge attachers seeking to deliver broadband higher prices than the pole owners otherwise would, and

---

22 USTelecom Comments at 8. *Accord* ACA Connects Opposition at 12.

23 ACA Connects Opposition at 9.

24 *EEI Petition* at i-ii. *See e.g.*, UTC Comments at 5 ("Providing this clarification will promote the Commission's overarching policy goals of reducing disputes and accelerating broadband infrastructure access."); CCU Comments at 17 ("Utility pole owners should not be discouraged from voluntary investment, including installing new poles, to expand capacity to accommodate broadband deployments. However, rules that allow excessive, unpredictable, unreasonable and unfair potential refund liability create a disincentive to make such investments.").

legally can, because they would not need to refund any charges above just and reasonable levels until such time that they receive notice of a dispute or a complaint is filed (and refunds would go back no more than two years from the Commission's decision). Moreover, as ACA Connects members have informed the Commission on numerous occasions, investor-owned electric utilities already, even without the rule change the *EEI Petition* seeks, hold the stronger bargaining position in pole attachment negotiations and disputes.[25] Thus, as NCTA commented, "[t]he primary effect of changing the applicable statute of limitations as EEI has requested would be to reduce the negative consequences for any pole owner that imposes unreasonably high attachment rates. Such a result would have no positive effects on broadband deployment, only negative ones."[26] USTelecom further explained, "the Petition's proposals would reward violations of the law to the detriment of broadband deployment.

---

25 *See e.g.*, Comments of the American Cable Association, WC Docket No. 17-84 and WT Docket No. 17-79, at 3 (June 15, 2017) ("In these comments, ACA describes a series of significant problems that occur throughout the pole attachment process – from negotiating agreements to filing applications to completing make-ready – all of which warrant immediate action by the Commission. These problems arise – and unless the Commission acts, will continue to exist and arise – for two primary reasons. First, many utilities oppose mandated access and have little, if any, incentive to provide access on a reasonable basis. Second, as discussed herein, the Commission's complaint process has proven to be of little value to attachers, especially smaller entities, in addressing all but the most major attachment problems."); *Ex Parte* Letter from Brian Hurley, Vice President of Regulatory Affairs, ACA Connects to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84, at 3 (Apr. 9, 2020) ("As ACA Connects Representatives discussed in the meeting, some investor-owned utilities have used their leverage in negotiations with ACA Connects members to insert provisions in pole attachment agreements requiring that the member notify the utility in advance, or even file a new application, when making customer drops.").

26 NCTA Comments at 7.

Utility pole owners are required by law to charge 'just and reasonable rates,' and the Commission's regulations ensure that a just and reasonable rate fully compensates the pole owner. If a pole owner chooses to charge a higher rate in violation of federal law, the risk should be on the pole owner—not the broadband provider attached or seeking to attach to the utility's pole."[27] For these reasons, the Commission should give no credence to the contention of EEI and its supporters that its requested relief will enhance broadband deployment.[28]

B. Commenters Affirm That the Commission Was Correct in the *2011 Order* to Permit Attachers to Seek Relief in Pole Attachment Complaints from the Time Harm Occurs, Consistent with the Applicable Statute of Limitations, and It Should Reject the *EEI Petition's* Request to Limit Claims for Refunds from the Date Notice Is Given to the Investor-Owned Electric Utility Pole Owners

In 2011, EEI and other investor-owned electric utilities failed to convince the Commission that all sorts of harms would befall them and the public interest if attachers could seek relief in pole attachment complaints from the time harm is suffered consistent with the applicable statute of limitations. The Commission found to the contrary that an attacher believing it is being charged unjustly and unreasonably "has no more incentive than any other plaintiff to delay filing a complaint in order to make additional over-payments that will later need to be refunded."[29] Consequently, the

---

27 USTelecom Comments at 9.

28 *See also* Crown Castle Comments at 7 ("Many large projects may go on for long periods of time, complicating the timing of make-ready work and make-ready payments. Limiting make-ready costs to two years would cause attaching entities to have even less bargaining power than they have to begin with.").

29 *See 2011 Order*, ¶ 111; *see also id.* ("[W]e reject the contention that the proposed rule change [to Section 1.1410(c)] creates an incentive for attaching

Commission adopted a change to Section 1.1410(c) of its rules that allows an attacher to seek compensation for an unjust or unreasonable rate, term, or condition for a period extending as far back as the applicable statute of limitations.[30]

The *EEI Petition* effectively asks the Commission to reconsider its well-settled decision, and in their comments, investor-owned electric utilities supported this request. CCU, for instance, averred, "[i]t is not fair to allow broadband providers or other communications attachers to stand silently by while utility pole owners incur considerable out-of-pocket expenses for make-ready survey, engineering and construction work to accommodate new attachments, only to have those attaching entities claim many years later (three to ten years pursuant to state statutes of limitation) that such expenses have been excessive."[31] AEP commented, because "there is minimal Commission guidance on what constitutes "just and reasonable" make-ready charges…an attaching entity could file a complaint against AEP and seek refunds of make-ready charges as far back as the "applicable statute of limitations"

entities to attempt to maximize their monetary recovery by waiting until shortly before the statute of limitations has expired to bring a dispute over rates to the Commission.").

30 Prior to its revision in the *2011 Order*, Section 1.1410(c) permitted a monetary award in a pole attachment proceeding disputing charges as unjust and unreasonable in the form of a "refund or payment" measured forward "from the date that the complaint, as acceptable, was filed, plus interest." *See 2011 Order*, ¶ 110. *See also* 47 C.F.R. § 1.1410(c).

31 CCU Comments at 16-17.

would allow…AEP's potential refund liability could be enormous and entirely unpredictable."[32]

But none of the investor-owned electric utility commenters provided proof of any harm to investor-owned electric utilities or the public interest—or even "unfairness"—that has occurred over the past decade due to the current rule and policy, especially in regard to cable and competitive telecommunications providers, or otherwise rebutted the Commission's findings in the *2011 Order*. Instead, all they offer is unsubstantiated speculation.

Moreover, as NCTA observed, "[t]he injury from an unreasonably high attachment rate starts at the time that the rate is first imposed, not when a notice is provided to the pole owner or when a complaint is filed with the Commission."[33] NCTA also explained that EEI's proposal "provides added incentive for pole owners to impose unreasonably high attachment rates or forces attaching parties to rush to file complaints to correct such rates."[34] And, because attachers, especially smaller providers, are already reluctant to file complaints due to the high cost and extended time for resolution, it is clear that EEI's proposal would significantly increase the already substantial leverage of investor-owned electric utilities in pole attachment negotiations and thereby diminish the likelihood that these utilities would come to the table and engage in

---

32 AEP Comments at 4.

33 NCTA Comments at 8. *See also* ACA Connects Opposition at 14 ("In adopting the change to Section 1.1410 in the *2011 Order*, the Commission explained that the new rule would 'make injured attachers whole' and be consistent 'with the way that claims for monetary recovery are generally treated under the law.').

34 NCTA Comments at 8.

productive negotiations to settle disputes. In sum, adopting EEI's request to limit recovery from the date an attacher provides notice would only serve to benefit the investor-owned electric utility and not the public interest, nor the attachers that are being charged unjustly and unreasonably, nor the end user customers that bear the indirect burden of such unlawful charges.[35]

Further, EEI and its supporting commenters' request is based on two false premises. First, investor-owned electric utilities assert that make-ready charges are not discernable and thus utilities should not be liable for harm they cannot possibly determine; yet, as ACA Connects pointed out in its *Opposition*, "the Commission has in fact provided utilities significant guidance on the justness and reasonableness of make ready charges."[36] Further, if there is ambiguity in make-ready charges, investor-owned utilities have the power to address it by providing in advance information about the

---

35 Further, AEP's complaint that allowing recovery over the full limitations period will impose a documentary burden on electric utilities is without merit. *See* Ameren Comments at 5. The relevance of records concerning work performed earlier places no greater a burden on investor-owned electric utilities than applies to all companies that are subject to a State's statute of limitations for breach of contract. While ACA Connects is not suggesting the Commission make it a requirement that records be kept for the full statutory period, each pole owner needs to make a decision regarding the prudence of doing so in light of the potential for litigation. In addition, the argument of Ameren and others that investor-owned electric utilities may not be able to take a reserve for contingent liability prior to a notice of a dispute is not a reason to reconsider Section 1.1410(c). *See, e.g.,* Ameren Comments at 4. Again, the prerequisites to taking a reserve is no different than what companies generally face, and as ACA Connects notes later in this reply, the contentions of EEI and its supporters that there is an incentive for attachers to delay informing pole owners of their disputes mischaracterizes the incentives of attachers to establish certainty rather than continue to pay out perceived unnecessary or excessive charges and seek refunds later. *See* pp. 16-17, *infra.*

36 ACA Connects Opposition at 17.

range of such charges, rather than consistently opposing efforts to make these charges more predictable.[37] In addition, as Crown Castle commented, "[i]f 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."[38]

Second, investor-owned utilities assert that the current rule encourages attachers to put off negotiations while damages pileup. Not only does this unsupported statement contradict the Commission's 2011 finding,[39] but it misunderstands and misrepresents the incentives of attachers. Attachers are in the business of providing cable and telecommunications services, and they want access to poles as quickly as possible at just and reasonable rates, terms, and conditions to provide those services. Delay in challenging rates they are charged and are paying that are believed to be not just and reasonable does not serve their business interest because it makes unavailable funds that could be used to expand their network and improve service offerings to their

---

37 As for recurring charges for pole attachments, NTCA explained (at 7-8), "it is important for the Commission to understand that the concerns regarding predictability identified by EEI arise only in the context of complaints from incumbent LECs related to the rates in joint use agreements. The rates charged by electric utilities to cable operators and telecommunications carriers that do not attach pursuant to joint use agreements are subject to the rate formulas in the Commission's pricing rules, which, where appropriately applied, provide both pole owners and pole attachers a substantial level of predictability as to what the rates should be."

38 Crown Castle Comments at 6-7.

39 *See 2011 Order*, ¶ 111 ("an injured pole attacher has no more incentive than any other plaintiff to delay filing a complaint in order to make additional overpayments that will later need to be refunded.").

customers. On the other hand, investor-owned electric utilities are unlikely to suffer harm from delaying conclusion of negotiations[40]—and, in fact, for those utilities that provide communications services, they would benefit from delaying entry by a competitor. If anything, permitting attachers to seek relief from the time harm is incurred consistent with the applicable statute of limitations gives an incentive for investor-owned utilities to ensure rates are just and reasonable from the outset and to come to the table to work out differences when they are not; attachers have every reason to be there already.

* * *

[40] In fact, some investor-owned utilities have claimed that pole attachment rates and other recoverable costs under Commission rules and policies are set too low to avoid a taking, and the benefits of providing attachments is outweighed by the cost, or is not enough to be worthwhile. *See, e.g.,* Reply Comments of the Utilities Technology Council, WC Docket No. 17-84, at 6 (July 17, 2017) (asserting that "pole attachments effect a per se taking, the government must ensure that the pole owners receive compensation that reflects the earning potential of the property taken" and that the Commission's attachment rates should be modified because "pole owners are entitled to pole attachment rates that are based on market value, and such value properly includes opportunity cost—the value of the services made possible by that access").

IV. CONCLUSION

For the foregoing reasons, the *EEI Petition* should promptly be dismissed.

Respectfully submitted,

By: 

Thomas Cohen
Edward A. Yorkgitis, Jr.
Kelley Drye & Warren LLP
3050 K Street, NW
Washington, DC 20007
(202) 342-8518
Counsel to ACA Connects – America's Communications Association

Matthew M. Polka
President and Chief Executive Officer
ACA Connects – America's Communications Association
Seven Parkway Center
Suite 755
Pittsburgh, PA 15220
(412) 922-8300

Ross J. Lieberman
Senior Vice President of Government Affairs
Brian Hurley
Vice President of Regulatory Affairs
ACA Connects – America's Communications Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

September 10, 2021