

Docket No. 18-72689 (L), 19-70490

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

AMERICAN ELECTRIC POWER
SERVICE CORPORATION, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

VERIZON and USTELECOM-THE
BROADBAND ASSOCIATION,

Respondents-Intervenors.

On Petition for Review of an Order of the
Federal Communications Commission

**BRIEF OF
AMICI CURIAE EDISON ELECTRIC INSTITUTE,
UTILITIES TECHNOLOGY COUNCIL, and
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
IN SUPPORT OF AMERICAN ELECTRIC POWER SERVICE
CORPORATION PETITIONERS**

Emily Fisher
Aryeh Fishman
Amanda Aspatore
Edison Electric Institute
701 Pennsylvania Avenue, NW
Washington, DC 20004-2696
(202) 508-5000

Brett Kilbourne
Vice President Policy and General
Counsel
Utilities Technology Council
2550 South Clark Street
Suite 960
Arlington, VA 22202
(202) 872-0030

Jeffrey L. Sheldon
Stephen J. Rosen
Levine, Blaszak, Block & Boothby,
LLP
2001 L Street, NW, Suite 900
Washington, DC 20036
(202) 857-2550

Brian O'Hara
Senior Director Regulatory Issues
National Rural Electric
Cooperative Association
4301 Wilson Blvd.
Arlington, VA 22203
(703) 907-5500

*Counsel for Edison Electric Institute,
Utilities Technology Council, and
National Rural Electric Cooperative
Association*

July 1, 2019

CORPORATE DISCLOSURE STATEMENT

Edison Electric Institute (“EEI”) is the national association of investor-owned electric companies. It has no parent company, subsidiaries or affiliates. EEI has no outstanding shares or debt securities in the hands of the public, and no publicly-owned company has a 10% or greater ownership interest in EEI.

Utilities Technology Council (“UTC”) is the international association for the telecommunications and information technology interests of electric, gas and water utilities and other critical infrastructure industries. It has no parent company, subsidiaries or affiliates. UTC has no outstanding shares or debt securities in the hands of the public, and no publicly-owned company has a 10% or greater ownership interest in UTC.

National Rural Electric Cooperative Association (“NRECA”) is the national association of rural electric cooperatives. It has no parent company, subsidiaries or affiliates. NRECA has no outstanding shares or debt securities in the hands of the public, and no publicly-owned company has a 10% or greater ownership interest in NRECA.

Dated: July 1, 2019

s/ Jeffrey L. Sheldon
Counsel for *Amici Curiae* Edison Electric
Institute, Utilities Technology Council, and
National Rural Electric Cooperative
Association

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INTEREST OF AMICI CURIAE¹

Edison Electric Institute (“EEI”), Utilities Technology Council (“UTC”), and National Rural Electric Cooperative Association (“NRECA”) file this *Amici Curiae* brief in support of the American Electric Power Service Corporation Petitioners (“American Electric Petitioners”) in Case No. 19-70490. EEI, UTC, and NRECA represent entities, including investor-owned electric companies, municipally-owned utilities, and rural electric cooperatives, that generate, transmit and distribute electric power to homes and businesses throughout the United States. *Amici*’s members own and operate electric distribution facilities and are affected by rules and policies governing attachments to their electric distribution facilities, including electric utility poles.

Amici submit this brief in support of the American Electric Petitioners to explain why critical issues of safety, reliability, and general engineering practices must be given priority, as required by statute, even as the FCC pursues its laudable policy goal of speeding the deployment of broadband throughout the country.

¹ In accordance with Fed. R. App. P. 29(a)(4)(E), no counsel for a party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *Amici* or their counsel has made a monetary contribution to the preparation or submission of this brief.

Pursuant to Fed. R. App. P. 29(a)(2), *Amici* submit this brief without an accompanying motion for leave to file or leave of this Court because all parties to Case No. 19-70490 have consented to its filing.

ARGUMENT

I. THE FCC’S ORDER EXCEEDS THE AGENCY’S STATUTORY AUTHORITY OVER ELECTRIC UTILITIES

Amici file this brief in support of the American Electric Petitioners’ appeal of the Federal Communication Commission’s (“FCC” or “Commission”) recent pole attachment order—*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, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) (“Order”).² As set forth in greater detail below, because the Commission exceeded its statutory authority in promulgating the pole attachment rules set forth in the Order, the Court should set aside the portions of the Order and rules addressed in the American Electric Petitioners’ brief.

Specifically, the Pole Attachment Act of 1978 (“Pole Attachment Act”)³ provides for access to utility distribution poles, conduits, and rights-of-way by cable television systems and providers of telecommunications services. Section

² Case No. 19-70490 seeks review only of the *Third Report and Order* within the Order. Case No. 18-72689 seeks review of the *Declaratory Ruling* portion and is being briefed separately. Order of Appellate Commissioner Shaw, No. 19-70490 (Apr. 18, 2019), Dkt Entry 45 (“Briefing Order”).

³ Pub. L. 95–234 § 6 (1978), codified at 47 U.S.C. § 224.

224(f)(2) of the Pole Attachment Act requires electric utilities to be able to protect and maintain the safety and reliability of critical electric infrastructure and ensure responsible use of such infrastructure by attaching entities. In particular, a utility “providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity *and for reasons of safety, reliability and generally applicable engineering purposes.*” 47 U.S.C § 224(f)(2) (emphasis added). Against this statutory background, the Court should: (1) find that Congress unambiguously imposed limits on the FCC’s jurisdiction over the safety, reliability, and engineering standards related to our nation’s electric infrastructure; and (2) strike down the FCC regulations at issue that unlawfully override state and local laws and industry standards designed to ensure the safe and reliable provision of electric service to the public.

A. Section 224 of the Communications Act Strictly Limits the FCC’s Authority Over Electric Utilities Because of the Overriding National Interest in Safe and Reliable Provision of Electric Service to the Public

Electric companies are required by law to provide the public with safe and reliable electricity. Safety, reliability, and sound engineering practices are therefore the foundation of each electric company’s business model; indeed, it is each electric company’s mandate as a public utility under state law to provide electric power to homes and businesses safely and reliably. Importantly, the

electric industry is not opposed to accommodating communications attachments so long as such attachments do not interfere with safety and reliability and the utilities are compensated at rates that reflect a full and fair allocation of costs. It is in fact in the interest of an electric utility to accommodate communications attachments that are consistent with the utility's primary mission of providing safe and reliable power to its electric customers at reasonable rates.

In drafting Section 224(f)(2), Congress ensured that electric utilities will retain significant control over their facilities to ensure that third-party attachments will not jeopardize the power grid. Moreover, electric utilities and communications attachers alike have a responsibility to comply with the nation's homeland security requirements, especially in this era of heightened risk of cyber- and physical attack on the power grid.⁴ Any failure by communications attachers to observe the electric utilities' carefully crafted requirements of notice, safety, and sound engineering therefore represents a potential threat to our critical national infrastructure. While the FCC's policy goal of speeding up broadband deployment is laudable, it cannot come at the expense of *Amici's* public mandate—safe and reliable electric service.

⁴ For a recent overview of security risks to the nation's electric infrastructure, both physical and cyber, and the Federal policies and rules that address those risks, see Richard J. Campbell, Congressional Research Service, R45312, *Electric Grid Cybersecurity* (2018), <https://crsreports.congress.gov/product/pdf/R/R45312/2>.

Section 224(f)(2) prohibits the FCC from mandating third-party access to electric facilities if there are unresolved issues of capacity, safety, reliability, or generally applicable engineering principles. Congress imposed these restrictions on the FCC's authority *only* with respect to the facilities of utilities providing electric service, and for good reason. The distribution of electric power, and the facilities used to deliver electric power, can pose significant hazards to persons and property. Working in and around electric distribution facilities requires specialized equipment and training. Considerable expertise in electric safety is needed to make well-informed judgments concerning whether a matter of capacity, safety, reliability, or engineering standards is serious enough to warrant denial of access to electric facilities or the imposition of conditions necessary to prevent a hazard.

The FCC has long acknowledged its lack of expertise in matters of safety and engineering,⁵ and has generally therefore deferred to state, local and industry

⁵ Prior to the enactment of the Pole Attachment Act, a representative of the Commission testified that the Commission lacks expertise in "utility regulation" and argued that such matters would be better handled by the states. *See* H.R. Rep. No. 95-721, pt.1 (Oct. 19, 1977) at pp. 5-6. As recounted in the Report submitted by the House Committee on Interstate and Foreign Commerce:

The FCC witness testified further that the Commission believes that if the creation of a regulatory forum is necessary for the resolution of pole attachment disputes, such a forum would be most appropriately lodged with the states. The Commission bases its position on the belief that the resolution of such matters involves the need for expertise with respect to not only telephone company regulation but also power company regulation. The FCC does not have such expertise and if one adds the necessity to understand local problems, it would be preferable,

standards.⁶ Such laws include state laws codifying the National Electric Safety Code (“NESC”) (or variants thereof),⁷ as well as state regulations governing safe

according to the Commission, to decentralize such regulation rather than to centralize it within a Federal agency. *Id.*

At the same time, President Carter’s Office of Telecommunications Policy commented:

We do not believe the FCC should be delegated general jurisdiction over the facilities of electric companies and other noncommunications utilities. Jurisdiction over cable television companies and telephone companies does not necessarily imply the FCC needs or has the expertise required for specific jurisdiction over all suppliers of pole and conduit space, including electric utility companies. *Id.* at 11.

⁶ See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, Order on Reconsideration, 14 FCC Rcd 18049 (1999) (“Local Competition Reconsideration Order”) at ¶ 87 (declining to adopt minimum skills and performance requirements for technicians, because “utilities’ requirements with respect to qualifications and training of individuals working in proximity to utility facilities flow from such codes and requirements as the NESC and OSHA ...” and because some utilities have stricter requirements than NESC or OSHA); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, First Report and Order, 11 FCC Rcd 15499 (1996) at ¶ 1145 (“[o]ur determination not to prescribe numerous specific rules is supported by acknowledgements in the relevant national industry codes that no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment”). This observation is even more relevant today because of the wide variety of equipment and pole-top antennas that were not even presented in 1996.

⁷ See the Institute of Electrical and Electronics Engineers’ (“IEEE’s”) survey of state codes noting that Alabama, Arkansas, Connecticut, Kentucky, Maine, Maryland, Minnesota, Mississippi, Montana, New Mexico, New York, North Carolina, Rhode Island, South Carolina, Vermont, West Virginia, and Wyoming

working practices in the vicinity of high voltage lines.⁸

In fact, the text of Section 224(f)(2) demands FCC deference to state jurisdiction on these issues of safety, reliability, and good engineering practices.

As previously noted, while Section 224 provides for third-party access to utility

automatically adopt each new edition of the NESC. IEEE, *National Electrical Safety Code (NESC) Adoption/Reference of 2012 Edition*, available at <https://standards.ieee.org/content/dam/ieee-standards/standards/web/documents/other/2012-nesc-state-adoption-reference-survey.pdf> (last visited Jun. 28, 2019).

⁸ See, e.g., Arizona Revised Statutes, Ariz. Rev. Stat. §§ 40-360.41 to 40-360.45 (2019) (high voltage line safety); CPUC General Order No. 95 (rev. 05/31/2018), available at <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M217/K418/217418779.pdf> (overhead electric line construction); Delaware Code, Del. Code tit. 16 §§ 7401B to 7408B (2019) (overhead high voltage line safety); Florida Administrative Code, Fla. Admin. Code r. 25-6.0342 (2019) (storm hardening rules); Idaho Administrative Code, Idaho Admin. Code r. 31.11.01.101(2018) (safety and accident reporting rules); Illinois Administrative Code, Ill. Admin. Code tit. 83 §§ 305.10-305.130 (2019) (construction of electric power and communications lines); Maine Revised Statutes, Me. Rev. Stat. tit. 35-A §§ 751-761 (2019) (high voltage line safety); Maryland Code, Md. Code, Lab. & Empl. §§ 6-101 to 6-110 (2019) (high voltage line safety); Missouri Revised Statutes, Mo. Rev. Stat. §§ 319.075-319.090 (2019) (high voltage line safety) and Missouri Regulations, Mo. Code Regs. tit. 4 §240-18.010 (2019) (safety standards for electric utilities); North Carolina General Statutes, N.C. Gen. Stat. §§ 95-229.5 to 95-229.13 (2019) (high voltage line safety) and North Carolina Administrative Code, 04 N.C. Admin Code 11 R08-26 (2019) (safety rules and regulations); Oregon Administrative Rules, Or. Admin. R. 860-024-000 to 860-024-0050 (2019) (safety standards); South Dakota Codified Laws, S.D. Codified Laws §§ 49-32-10 to 49-32-17 (2019) (high voltage line safety); Texas Statutes, Tex. Health & Safety Code §§ 752.001-752.008 (2019) (high voltage line safety); Utah Administrative Rules, Utah Admin. Code § 746-310-5 (2019) (design, construction, and operation); Code of Virginia, Va. Code §§ 59-1-406 to 59-1-414 (2019) (high voltage line safety); Wyoming Statutes, Wyo. Stat. §§ 37-3-301 to 37-3-306 (2019) (high voltage line safety).

infrastructure and authorizes the Commission to provide that the rates, terms, and conditions for access are just and reasonable, this authority applies *only* where a utility grants access to an attaching entity. The statute clearly permits an electric utility to deny access for reasons of capacity, safety, reliability, or generally applicable engineering standards. It is well settled that such safety issues have traditionally been subject to the police power of the states and are regulated by the states, including states that have not reverse-preempted the Commission by filing a certification under Section 224(c).⁹

Nor does the Pole Attachment Act preempt state and local regulations pertaining to capacity, safety, reliability, and engineering. Instead, the Act was intended to fill gaps only with respect to matters that were not directly regulated by some states; namely, pole attachment rates, terms and conditions.¹⁰ A fair reading

⁹ *Local Competition Reconsideration Order* at ¶ 6 (The “Commission will presume state and local requirements affecting pole attachments to be reasonable, and are entitled deference even if the state has not sought to preempt federal regulations under section 224(c)”).

¹⁰ Communications Act Amendments of 1978, S. Rep. No. 95-580, at 15 (1977), reprinted in 1978 U.S.C.C.A.N. 109, 123 (stating that FCC’s regulatory authority over pole attachments is “strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems”). The Senate Commerce, Science, and Transportation Committee Report on the amendments described the local nature of pole attachment regulation:

The Committee considers the matter of CATV pole attachments to be essentially local in nature, and that the various state and local regulatory bodies which regulate other practices of telephone and electric utilities

of the statute demonstrates that the Commission's jurisdiction is therefore limited to adjudication of disputes over whether a utility has applied its safety, reliability, and engineering standards in a non-discriminatory manner as between jurisdictional communications attachers. Because the FCC's jurisdiction does not encompass the content of such standards, the FCC has no authority to ignore or preempt applicable state or local safety requirements.¹¹ In addition, as a matter of

are better equipped to regulate CATV pole attachments. Regulation should be vested with those persons or agencies most familiar with the local environment within which utilities and cable television systems operate. It is only because such state or local regulation currently does not widely exist that Federal supplemental regulation is justified. S. Rep. No. 95-580 at 16, 1978 U.S.C.C.A.N. at 124.

In addition, the Committee explained that the Federal role was to fill any gap over rate-setting in the absence of state and local government regulation. The Committee Report stated:

[I]n the absence of regulation by these state and local authorities of CATV pole attachments, the Federal Communications Commission should fill the regulatory vacuum to assure that rates, terms, and conditions otherwise free of governmental scrutiny are assessed on a just and reasonable basis. *Id.*

¹¹ Section 224 does not expressly grant the FCC authority to regulate utility safety practices or to preempt state and local laws on safety. Even where Congress gave the FCC explicit authority in Section 253(a) of the Communications Act of 1934, as amended, to preempt state and local laws that prohibit or have the effect of prohibiting anyone from providing telecommunications service, Congress also made clear that this preemption authority "shall not affect the ability of a State to impose, on a competitively neutral basis ... requirements necessary ... to *protect the public safety and welfare* ... and safeguard the rights of consumers." 47 U.S.C. § 253(a) and (b) (emphasis added). In addition, there is no suggestion that Congress intended the FCC's authority under Section 224 to occupy the field of utility safety, or that state laws on safety stand as an impermissible obstacle to the development of broadband. To the contrary, the language and structure of Section

public policy, given the local nature of electric distribution and consumption and the wide variation in climate and geography in the United States, states and localities are far better situated to ensure the safety of their citizens and utility workers while allowing for the reliable distribution of electricity in their areas. And states have developed a considerable field of regulations to ensure the safe and reliable use of utility infrastructure, including states that have not reverse-preempted the FCC. These statutory provisions include state occupational safety and health laws, high voltage line acts, and storm-hardening regulations.¹² The Commission likewise lacks authority to preempt applicable Federal standards and regulations that affect the installation and maintenance of pole attachments,¹³ or supersede safety regulations promulgated by other Federal agencies.

224(f)(2) demonstrate that the “reasons of safety, reliability and generally applicable purposes” are standards external to the FCC and may be applied by an electric utility to deny pole access so that it may remain compliant with federal, state or local laws and standards on utility safety.

¹² *See supra* note 8.

¹³ For example, electric utilities are subject to workplace safety rules of the Occupational Safety and Health Administration, including a number of requirements applicable to power generation, transmission, and distribution companies. *See* 29 C.F.R. § 1910.269. In addition, the Federal Energy Regulatory Commission has approved, as mandatory and enforceable, a number of electric reliability standards, several of which affect the physical configuration of utility equipment. Electric utilities are also subject to numerous other Federal regulations, including those promulgated by the Environmental Protection Agency under various environmental statutes, and the United States Department of Transportation. All of these Federal requirements directly or indirectly impact the installation and maintenance of pole attachments.

This Court should give effect to the statutory command of Section 224(f)(2) by striking down the FCC’s regulations here, which eliminate the ability of electric utilities to “deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity *and for reasons of safety, reliability and generally applicable engineering purposes.*”¹⁴

B. Contrary to the Statute, the Order Improperly Prioritizes Broadband Deployment Over Safety, Reliability, and Sound Engineering of Electric Utility Facilities

In the Order at issue, the FCC stated that, while it only relied on Section 224 for its legal authority to adopt rules governing pole attachments, it balanced the issue of broadband deployment against other issues:

[O]ur prioritization of broadband deployment throughout today’s *Report and Order* finds support in section 706(a) of the Telecommunications Act of 1996, which exhorts us to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” by “remov[ing] barriers to infrastructure investment.” 47 U.S.C. § 1302(a). *While section 706(a) does not provide a grant of regulatory authority, we look*

¹⁴ 47 U.S.C. § 224 (f)(2) (emphasis added). *Amici* note that issues of safety are already being posed in other cases. For example, a formal complaint was just filed with the FCC in which the attaching entity is relying on the revised rules to seek attachment to poles with pre-existing safety issues. *Crown Castle Fiber LLC v. Commonwealth Edison Company*, Pole Attachment Complaint for Denial of Access, filed June 19, 2019, in EB Docket No. 19-169.

to it as guidance from Congress on how to implement our statutorily assigned duties.¹⁵

However, the FCC cannot use an expression of “guidance from Congress” to supersede or ignore specific statutory direction. Congress enacted Section 224(f)(2) to expressly allow electric utilities to protect their infrastructure from damage or disruption due to third-party attachments. It is well-settled that a specific statutory provision controls one of more general application. *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991). Yet, contrary to this canon of statutory interpretation, the FCC alleges that the general language of Section 706(a) addressing the promotion of broadband service supersedes the specific language of Section 224(f)(2) providing a statutory right to electric utilities to deny access based on capacity, safety, reliability, or engineering purposes. The FCC’s decision to prioritize broadband deployment over safety and reliability of electric infrastructure simply cannot be reconciled with the plain language of Section 224(f)(2) and is beyond the FCC’s authority.¹⁶ The Court should reject the FCC’s novel and

¹⁵ Order, n. 500 (citation omitted) (emphasis added).

¹⁶ Other courts have been unpersuaded by the FCC’s reliance on Section 706 as a specific grant of authority. *See Tennessee v. FCC*, 832 F.3d 597, 603 (6th Cir. 2016) (the FCC cannot rely on Section 706 to promote broadband competition by preempting state regulation of municipal utilities); *Direct Commc'ns Cedar Valley, LLC v. FCC*, 753 F.3d 1015, 1053 (10th Cir. 2014) (“[T]he FCC has concluded that section 706(a) is ‘not . . . an independent grant of authority, but rather, . . . a direction to the [FCC] to use the forbearance [and other] authority granted elsewhere in the Act.’”) (quoting *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,012, ¶ 76 (1998)); *Comcast*

unsupported theory of statutory interpretation.¹⁷

II. RULES ADOPTED IN THIS ORDER EXCEED THE FCC'S AUTHORITY OVER ELECTRIC UTILITIES

Amici agree with the Petitioners that the rules adopted in the Order on preexisting violations, overlashing, and a “self-help” remedy to perform make-ready in the electric supply space also conflict with the express language of Section 224(f)(2).

The agency’s revised Section 1.1411(c)(2) provides that “[a] utility may not deny the new attacher pole access based on a preexisting violation not caused by any prior attachments of the new attacher.” 47 C.F.R. § 1.1411(c)(2). The FCC explained that “utilities may not deny new attachers access to the pole solely based on safety concerns arising from a preexisting violation...”¹⁸ This rule conflicts

Corp. v. FCC, 600 F.3d 642, 659 (D.C. Cir. 2010) (“Because the Commission has never questioned, let alone overruled, that understanding of section 706 [that it is not an independent grant of authority], and because agencies ‘may not . . . depart from a prior policy sub silentio,’ the Commission remains bound by its earlier conclusion that section 706 grants no regulatory authority.”) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

¹⁷ Municipally-owned utilities have also raised concerns with this Court with respect to the FCC’s extension of authority over municipally-owned utility poles for wireless attachments despite the fact that Section 224 specifically excludes municipally-owned utilities from FCC jurisdiction over pole attachments. *See* Docket No. 19-70123 and petitions consolidated in that case.

¹⁸ Order at ¶ 122.

with the express language of Section 224(f)(2) because on its face it denies an electric utility its statutory right to deny access for reasons of safety, reliability and engineering concerns. Moreover, as a policy matter it defies reason to allow an attacher to exacerbate an unsafe condition simply because it did not create the original safety hazard. *See* Petitioners Brief at 24-28.

The revisions to Section 1.1415 on overlashing likewise will unlawfully prevent an electric utility from (a) denying the proposed overlashing for the reasons stated in Section 224(f)(2); (b) requiring the overlasher to provide the technical and engineering specifications of the materials it intends to overlash; and (c) recovering the cost of performing an engineering evaluation of the overlashing. These new rules therefore also violate Section 224(f)(2) by effectively prohibiting a utility from denying access for reasons of capacity, safety, reliability, or general engineering purposes, and denying a utility the right to recover costs that the utility would not have incurred otherwise. Notably, although the new rules allow a utility to require notice of overlashing, Section 1.1415(c) unlawfully gives the new attaching entity an opportunity to modify its proposal or to explain why the overlashing would not be a problem without providing for the electric utility to ultimately deny access if it disagrees with the attaching entity's proposed modifications or explanations.

Finally, Sections 1.1411(i)(2) and 1.1411(e)(2) grant attachers a self-help remedy to employ contractors to perform make-ready work on the utility's own facilities located in the electric supply space if the utility has failed to perform its obligations within the timelines proposed by the FCC. *See* 47 C.F.R. § 1.1411(i)(2) and 47 C.F.R. § 1.1411(e)(2). In granting this attachment right, however, the FCC did not provide a mechanism for the utility to have requisite visibility into all work being performed on its system at any given time, which undermines the safety and reliability of the nation's power supply. The rule will therefore threaten electric reliability through unplanned outages that will inevitably be caused by make-ready work in the electric space.

The FCC does not have jurisdiction to mandate that electric utilities allow third-party contractors in the electric supply space. To the extent an attaching entity desires to install communications equipment in or near the electric supply space, it should be permitted only with the voluntary agreement of the electric utility. Given the self-evident hazardous nature of performing work in the electric supply space, the FCC should not invite the potential for serious injury or death by removing the electric utilities' statutory right under Section 224(f)(2) to impose reasonable safety requirements on anyone proposing to enter the power space. This Court should uphold the statutory right of electric utilities to deny access to third party contractors and broadband providers for reasons of safety and reliability.

III. CONCLUSION

For the reasons set forth above, the Court should grant the relief requested by the American Electric Petitioners and vacate the FCC's new rules regarding preexisting violations, overloading, and electric supply space self-help as exceeding the Commission's statutory authority under 47 U.S.C. § 224.

Respectfully submitted this 1st day of July, 2019.

s/ Emily Fisher

Emily Fisher
Aryeh Fishman
Amanda Aspatore
Edison Electric Institute
701 Pennsylvania Avenue, NW
Washington, DC 20004-2696
(202) 508-5000

s/ Jeffrey L. Sheldon

Jeffrey L. Sheldon
Stephen J. Rosen
Levine, Blaszak, Block & Boothby,
LLP
2001 L Street, NW, Suite 900
Washington, DC 20036
(202) 857-2550

*Counsel for Edison Electric Institute,
Utilities Technology Council, and
National Rural Electric Cooperative
Association*

s/ Brett Kilbourne

Brett Kilbourne
Vice President Policy and General
Counsel
Utilities Technology Council
2550 South Clark Street
Suite 960
Arlington, VA 22202
(202) 872-0030

s/ Brian O'Hara

Brian O'Hara
Senior Director Regulatory Issues
National Rural Electric
Cooperative Association
4301 Wilson Blvd.
Arlington, VA 22203
(703) 907-5500

Certificate of Compliance

Pursuant to Fed. R. App. P. 29(a)(5), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because the brief contains 4,160 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

Dated: July 1, 2019

By: **s/ Jeffrey L. Sheldon**

Jeffrey L. Sheldon
Stephen J. Rosen
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, NW, Suite 900
Washington, DC 20036
(202) 857-2550

*Counsel for Edison Electric Institute,
Utilities Technology Council, and
National Rural Electric Cooperative
Association*

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I hereby certify that on July 1, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Dated: July 1, 2019

By: **s/ Jeffrey L. Sheldon**

Jeffrey L. Sheldon
Stephen J. Rosen
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, NW, Suite 900
Washington, DC 20036
(202) 857-2550

*Counsel for Edison Electric Institute,
Utilities Technology Council, and
National Rural Electric Cooperative
Association*