Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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

INITIAL COMMENTS OF LIGHTOWER FIBER NETWORKS

Rebecca L. Hussey
Associate General Counsel
Natasha Ernst
Vice President, Senior Assistant General Counsel
Lightower Fiber Networks
470 Schrock Road, Suite B
Columbus, Ohio 43229
Telephone: (614) 657-4294
Email: rhussey@lightower.com

Counsel for Lightower Fiber Networks

SUMMARY

As described herein, there are still many areas of law that need improvement in order to create a regulatory environment supportive of increased wireline infrastructure investment because, under today's legal framework, receiving all the necessary approvals for deployment takes too long and costs too much, which has a chilling effect on investment.

Lightower has experienced significant delays to deploying wired broadband infrastructure due to an inability to access utility poles and municipal public right-of-way ("ROW") in a timely manner. Utility pole owners and pre-existing attachers regularly fail to comply with the make-ready timeframes set out by the Commission. Similarly, many local jurisdictions fail to approve access to the ROW within reasonable periods of time. Lightower encourages the Commission to establish predictable timeframes with adequate remedies when those timeframes are exceeded.

Additionally, Lightower has experienced barriers due to a lack of cost transparency. Utility pole owners often send bulk make-ready invoices without any explanation. Without clear itemization, Lightower has no way to evaluate whether these charges are fair or accurate. Likewise, many jurisdictions demand arbitrary amounts of money or "donations" in exchange for access to the ROW with no clear relationship to ROW management costs. Lightower encourages the Commission to clarify that all fees be transparent, non-discriminatory and based on actual underlying costs borne by pole owners and local jurisdictions in relation to Lightower's network.

In order to have robust broadband access, regulatory reforms and new regulations are needed so that those who invest in broadband infrastructure will be able to predict how long it will take to obtain all necessary approvals and how much they can expect to spend on such. With better certainty, the Commission will be ensuring continued invest in broadband networks.

TABLE OF CONTENTS

I. INTRODUCTION

High-speed broadband is, and will continue to be, an extremely important tool for effective personal, business, and automated communications in this country and throughout the world. As noted in the April 21, 2017 Notice of Proposed Rulemaking initiating this docket, high-speed broadband serves as a "gateway to jobs, health care, education, information, and economic development,"[1] and will play a vital role in connection with the deployment of next-generation networks and services in the upcoming years. To that end, it is extraordinarily important that unnecessary barriers to the deployment of wireline broadband infrastructure and the investment therein be eliminated in the near term.

Lightower Fiber Networks I, LLC, Lightower Fiber Networks II, LLC, and Fiber Technologies Networks, L.L.C. (collectively, "Lightower") are competitive providers of fiber network services that serve enterprise, government, carrier and data center customers. Lightower has over 17 years of experience providing all-fiber solutions to its customers, and its network consists of approximately 30,000 route miles, providing access to over 20,000 service locations in the Northeast, Mid-Atlantic and Midwest. Lightower also extends its network by approximately 2,000 route miles per year. As part of its services, Lightower also deploys wireless infrastructure, including small cells and DAS nodes, in public rights-of-way ("ROW").

Lightower's wireline and wireless deployment efforts and its position as both an owner of utility poles and an attaching party to others' utility infrastructure allow it to present a unique perspective on the necessity of reforms to existing wireline attachment rules and the preemption of state and municipal laws and policies that inhibit the deployment of broadband infrastructure.

[1] See *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, Adopted April 20, 2017 (hereinafter, "Wireline NPRM/NOI").

Lightower appreciates the opportunity to submit the comments offered herein on the Wireline NPRM/NOI, and the Commission's initiation of both this docket and the Wireless NPRM/NOI.[2]

II. COMMENTS ON PROPOSED POLE ATTACHMENT REFORMS

A. Reforms to Current Pole Attachment Timelines are Needed to Ensure Speedy Access to Poles and Eliminate Barriers to Deployment.

For broadband deployment to proceed at the pace innovation has dictated, improvements must be made to the existing attachment rules to (1) speed access and attachment timeframes, and, at the same time, (2) meaningfully encourage both pole owners and attaching parties to comply with the adopted timeframes and processes, whatever form they may ultimately take. Accelerated deployment timeframes alone will not likely hasten the infrastructure deployment that serves as the necessary backbone for next-generation networks. As explained herein, for the rules to work most efficiently, pole owners and attaching parties should be subject to penalties for non-compliance with attachment timeframes. When paired with a meaningful downside for noncompliance, accelerated timeframes and/or attachment processes will likely produce the desired effect of accelerated deployment of telecommunications infrastructure. Unfortunately, without the existence of a real, economic impact for failure to comply with attachment timelines, Lightower and others trying to construct new broadband distribution facilities will continue experiencing delays, and the speedy infrastructure deployment envisioned will not come to fruition.

[2] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* WT Docket No. 17-79, Notice of Proposed Rulemaking and Notice of Inquiry, Adopted April 20, 2017 ("*Wireless NPRM/NOI*").

1. Many pole owners and attachers are not complying with the existing attachment timelines, as there is no significant negative outcome associated with failure to comply.

The primary impediment to construction of broadband infrastructure in the United States is the fact that many municipalities and utilities ignore federal and state statutes and regulations that establish timeframes for compliance.[3] Seemingly, they ignore these rules because to date there have been no adverse consequences for non-compliance. Until there is a risk associated with non-compliance, municipalities and utilities will continue to ignore the timeline requirements and will continue to impede the development of broadband facilities.

Utilities more often than not ignore the binding attachment timelines in 47 CFR Section 1.1420. The mere possibility that infrastructure providers might exercise the self-help remedies authorized by the rules or file a complaint alleging non-compliance with the rules has not sufficiently encouraged pole owners and pre-existing attachers to comply with the attachment timelines. While the attachment rules[4] have provided timeframes for compliance, the remedies afforded to new attachers have not been forceful enough to effectuate actual compliance by numerous pole owners and attachers. The self-help and complaint procedures in the survey, estimate, and make-ready construction phases have simply not had the desired effect of spurring pole owners and pre-existing attachers to comply with the timeframes.

[3] E.g., ORC § 4939.03(C)(2)–(6) (stating that Ohio municipalities will act on new request from public utilities in the ROW within 60 days and not withhold consent unreasonably); Michigan METRO Act (requiring approval within 45 days of application).
[4] 47 CFR 1.1401 et seq.

2. The timelines proposed by the Commission in the Wireline NPRM/NOI represent a positive step toward accelerating broadband deployment.

The Commission has proposed changes to 47 CFR 1.1420[5] that reflect positive steps toward accelerating broadband deployment and addressing current barriers thereto. As a general matter, Lightower supports the adoption of one-touch make-ready ("OTMR") rules by the Commission, as it believes OTMR (utilizing a utility-approved contractor) represents the speediest path to attachment, produces predictable delivery timelines for customers, and takes all stakeholders' attachment and safety concerns into account. Lightower also supports the Commission's proposed changes to 1.1420(c), (d), and (e), addressed in turn *infra*, as the proposed rules shorten many of the operable timeframes and eliminate the delay that is seemingly built into the current rules.

a. Proposed 1.1420(c)

Proposed 1.1420(c) provides a utility 15 days from the date of receiving a new attacher's "complete application" to complete its survey. The current survey timeline is 45 days. The shortened timeline will be beneficial in that it eliminates a significant period of delay that is unnecessary for the performance of a survey. What is concerning, however, is the discretion that remains in the rule regarding what constitutes a "complete application." The pertinent language of the rule states that "[a] complete application is an application that provides the utility with the information necessary under its procedures to begin to survey the poles." Although this language, as included in proposed 1.1420, remains unchanged from the current version of the rule, in practice, utilities have adopted different policies as to what constitutes a "complete application," as is discernible from the text. For example, some utilities require a "field survey"

[5] For purposes of these comments, hereafter, existing Commission rules, codified as 47 CFR 1.1401 et seq., will be referenced solely by their sections (e.g., 1.1403); in contrast, rules proposed in connection with the Wireline NPRM will be identified as Proposed ____ (e.g., Proposed 1.1403).

and receipt of a payment for the costs associated with the same before they deem an application to be a "complete application." After this initial field survey, another survey takes place. In essence, the "procedures" adopted by a number of utilities have been used to prevent or toll application of the attachment timelines, and thus generate additional revenue. The spirit of the rule is compromised when utilities are in receipt of all necessary information to process attachment applications, but refuse to do so until their discretionary procedures (often including receipt of preliminary payment in excess of the application fee) are complied with by Lightower. The imposition of these types of "pre-application" requirements—under the guise that they are simply utility "procedures"—constitutes a barrier to deployment. Lightower requests that the Commission clarify this issue and eliminate this loophole by defining that all applications in the "form" required by the utility constitute "complete applications." Lightower also suggests that the Commission eliminate the phrase "under its procedures" from proposed 1.1420(c) because those "procedures" are often expensive, time consuming, and in excess of the complete application itself.

b. <u>Proposed 1.1420(d) and Proposed 1.1416</u>

Proposed 1.1420(d) provides utilities with a seven day period, shortened from the 14-day period in the current rule, during which it must present an estimate of charges to perform all necessary make-ready work. Like the proposed change to 1.1420(c), this proposed change also eliminates unnecessary time that is presently built into the existing rule and will be helpful in speeding wireline and wireless infrastructure deployment. Because the make-ready costs identified in the engineering survey are scenarios that pole owners very typically encounter, providing a price for the necessary make-ready engineering should not take an extended period of time. The requirement in Proposed 1.1416(d) that utilities performing make-ready make

schedules of their common make-ready charges available to parties requesting attachment also supports the shortened estimate timelines in Proposed 1.1420(d) and promotes cost transparency.

In connection with the changes in Proposed 1.1420(d) and Proposed 1.1416(d), and in the spirit of transparency, the Commission should also require that estimates presented under 1.1420(d) must be itemized and the costs of engineering reflected therein must be clearly discernible. Numerous pole owners regularly present Lightower with bulk estimates for make-ready, alleging that their systems do not permit itemization of make-ready costs. This practice makes it difficult for applicants, such as Lightower, to assess the reasonableness of the estimated costs comprising the bill. Allegations that such companies' accounting systems are "unable to itemize" costs associated with engineering make-ready for new applications to attach are dubious at best. Thus, Lightower urges the Commission to adopt regulations that require make-ready engineering costs to be itemized and clearly defined. To the extent that a utility's system currently does not support this itemization, the proposed rule change will reasonably require the system to be updated. Adoption of this requirement will also enable applicants to meaningfully challenge make-ready costs they disagree with. Applicants' attempts to challenge make-ready costs appearing in bulk make-ready estimates are largely unfruitful. The lack of success attachers have had when protesting such costs is one reason a number of utilities have not moved toward itemizing their estimates. Transparency is needed throughout the make-ready process, and Lightower's proposed rule change would assist with this goal.

c. <u>Proposed 1.1420(e)</u>

Proposed 1.1420(e), like Proposed 1.1420(c) and (d), will assist in streamlining the extended pole attachment process by shortening the timeline for completion of make-ready for standard pole attachment "orders." Proposed 1.1420(e) provides that "[u]pon receipt of payment

specified in paragraph (d)(2) of this section, a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready." Although this requirement has not changed under Proposed 1.1420(e), a number of utilities have attempted to deviate from this requirement by shifting the burden to the new attacher to inform existing attachers of their make-ready obligations and applicable timelines.

This common practice of shifting to the applicant the notification requirement under 1.1420(e) does not comport with the responsibilities clearly outlined in the pole attachment rules, and the Commission should clarify that any attempts by utilities to deviate from this requirement, by subsequent contract or otherwise, are unenforceable. This is important to the parties' relative positions with respect to the ability to attach and the knowledge of all existing (and any other pending) attachments for notice purposes.

Proposed 1.1420(e)(1)(ii) directs utilities to set a date for completion of make-ready that, for standard orders, is no later than 30 days after the notification discussed *supra* is sent. At half of the sixty days presently allocated for completion of make-ready under 1.1420(e), the thirty day timeline envisioned by Proposed 1.1420(e)(1)(ii) represents a significant improvement over the current rule's timeframe and, if adopted by the Commission, will mark an important development in speeding attachment timelines.

d. Additional Proposed Timeline: Power Delivery for Wireless Attachments

Lightower has repeatedly found that, even after completion of make-ready involving the attachment of wireless equipment to a pole, obtaining timely power delivery to the pole for the attached/appurtenant equipment is a difficult and time-consuming task. In many circumstances, Lightower (and other attachers) may have completed all make-ready and installed the equipment necessary for the deployment of small wireless technologies, but then must wait months for the

utility to deliver power to the site. The extended periods of time for which wireless deployments await power delivery constitute additional barriers to deployment.

Some may argue that power delivery is already governed by state regulations; however, there are two problems with this argument. First, if states effectively governed power delivery timeframes, then there would not be a problem receiving power connections. Second, to the extent states govern power connection at all, there is an inconsistent patchwork of requirments, often sending attachers into individual electrical utility tariffs that can be over 1000 pages in length.

As such, Lightower proposes that the Commission streamline power delivery on a nationwide level by adopting a seven-day timeline for delivery of power to a pole on which make-ready is complete and wireless equipment has been fully attached. Once power delivery has been requested by the party deploying wireless infrastructure, this timeline should be triggered by the passing of an electrical inspection conducted by the local governing entity's electrical inspector. In Lightower's experience, the period of time spent waiting for power delivery once municipal inspection is obtained has been a significant source of delay in wireless infrastructure deployment, and Commission guidance on applicable timelines for the same is necessary to eradicate this additional barrier to deployment.

3. Economic penalties for non-compliance with pole attachment timelines are necessary in order to effectuate compliance with the timelines and produce predictable deployment schedules.

In view of the fact that pole owners and existing attachers typically bill new attachers for make-ready whether or not the make-ready is performed within the applicable attachment timelines, there seems to be no real incentive for complying with those timelines. Applicants do not have the ability to withhold payment for non-compliance with make-ready timelines as a

method of addressing non-compliance therewith, as they may face additional delays from pole owners or existing attachers when submitting subsequent applications as a result of non-payment. In order to formally (and completely) eliminate non-compliance with make-ready timelines by pole owners and pre-existing attachers, the Commission must adopt rules that have "teeth" – i.e., there need to be penalties for non-compliance. Without an economic disincentive for non-compliance, the offending pole owner/attacher has no real reason to comply with attachment timelines. Lightower and other builders of fiber communications infrastructure have timeframes for deliverables to their customers and limited resources for expensive litigation of these issues and, thus, the failure of utilities and existing attachers to observe required make-ready response time requirements penalizes the applicant and delays the build-out of telecommunications facilities.

In order to even the playing field, the Commission should impose strict penalties for non-compliance with attachment timeframes. Enforcement of these penalties would effectuate rapid deployment of broadband infrastructure and bring violating pole owners and pre-existing attachers into compliance with attachment timelines and processes. So long as the parties violating the Commission's rules incur no cost for non-compliance, the delays in building needed infrastructure will continue and the Commission's goals will be frustrated. Accordingly, Lightower respectfully requests that the Commission establish penalties for non-compliance with attachment timelines.

B. Clarification of Definition of "Necessary" Make-Ready Costs is Needed in Connection with Proposed 1.1416.

Proposed 1.1416(b) states that a "cable television system operator or telecommunications carrier requesting attachment shall be responsible only for actual costs of make-ready made necessary solely as a result of its new attachments." Lightower appreciates the incorporation of

this important concept in the proposed rules. However, further clarification is needed concerning what constitutes make-ready "made necessary solely as a result of its new attachments."

1. Costs of make-ready when utility or pre-existing attacher fails to meet timelines.

Often, in the course of the make-ready process, either the utility's or an existing attacher's non-compliance with the attachment timelines makes it necessary for an applicant to hire a utility-approved contractor to complete the survey and/or make-ready. Hiring a contractor often results in two sets of costs: those already incurred prior to hiring a contractor, and those incurred in connection with the contractor completing the designated work. Arguably, one of these categories of costs is not "made necessary solely as a result of" an applicant's new attachments.

By way of illustration, imagine that a utility has not complied with the survey timeline in 1.1420. The rules provide that an applicant for attachment may hire a utility-approved contractor in order to complete the survey in a timely manner. However, an applicant that hires a contractor to perform the survey is expected to pay the contractor for completion of the same and, additionally, the utility typically bills the applicant for any survey work the utility performed. This type of "double-dipping" means the costs to the applicant are significantly greater than what they would have been if the utility had adhered to the timelines. Hiring a contractor to complete the survey would not have been necessary if the utility had complied with the timeline for the survey. Given these circumstances, either the costs associated with survey billed by the utility or the costs of survey billed by the contractor are arguably not "made necessary *solely* as a result of the [applicant's] new attachments." The new applicant should not have to pay for both.

The Commission should clarify if the applicant pays for conducting its own survey because the utility fails to do so in a timely manner, then it should not pay the utility the costs the

utility assesses for the survey phase in this scenario regardless of whether or not the costs were driven by a pre-existing attacher's non-compliance with timelines causes the applicant to have to hire a contractor to timely complete the make-ready survey.

2. Costs of make-ready triggered by existing attachers' internal procedures and practices.

Another issue that arises under Proposed 1.1416(b) is whether the redundant costs imposed by existing attachers when an application requires relocation of existing attachments constitute "costs of make-ready made necessary solely as a result of" the new attachments. For example, certain pre-existing attachers have adopted procedures demanding that a new attacher apply directly to them for rearrangement of their facilities, even after the utility's 1.1420(e) notice has been served upon all pertinent parties. Once such application is made, and in spite of the fact that the make-ready the pre-existing attacher must do has been (1) specifically identified by the pole owner, and (2) provided along with the 1.1420(e) notice, said pre-existing attacher will typically conduct its own survey, bill the new attacher for the same, and then, only after payment is received, rearrange its attachment. This additional layer of engineering is entirely redundant, typically takes a great deal of unnecessary time, and is utilized by the existing attacher, under the guise of safety, to produce an additional stream of revenue.

The Commission should recognize this practice for what it is and clarify that the costs imposed by pre-existing attachers pursuant to these types of internal procedures are not "costs of make-ready made necessary solely as a result of" new attachments in order to eliminate additional economic barriers to broadband deployment. The additional costs to applicants from these types of unnecessary requirements from existing attachers can be significant, especially given that multiple pre-existing attaching parties are often present on poles when a new attacher applies to attach. Use of these practices should be eliminated, and clarification by the

Commission that make-ready costs resulting from such practices are not authorized would eliminate this practice.

3. Costs associated with pre-existing NESC or engineering standard violations.

Another scenario under Proposed 1.1416(b) for which Lightower requests Commission clarification occurs when an applicant applies to attach to a pole that has pre-existing National Electric Safety Code ("NESC") or utility engineering standard violations. For a significant percentage of these poles, the non-compliant condition is not the result of "grandfathered" attachments; thus, at least one or more of the existing attachers caused the non-compliant condition when they attached and should have previously paid for the costs of bringing the pole into compliance. Given this situation, not all of the costs of make-ready triggered by the new attachment application are "made necessary solely as a result of" the new attachment. Although the pole must be brought into a compliant condition prior to attachment, the costs associated with resolving the violation should not be borne by the new attacher, which is a common practice wherein Lightower will have all progress on its applications stalled until it relents and agrees to pay for pre-existing violations.

The pole owner, as the party ultimately responsible for policing attachments, should be the party responsible for resolving the non-compliant conditions and seeking remuneration from the pre-existing attacher(s) that caused the violation. Lightower has experienced a number of situations, however, in which the pole owner either (1) expects the new attacher to pay <u>all</u> of the costs of make-ready, including remedying the violation, and then seek remuneration from the party or parties that caused the pre-existing violation, or (2) simply denies access to the pole based on safety concerns arising from the existing violation. Lightower requests that the Commission clarify that pole owners may not adopt either of the aforementioned policies under

the rules, and that the applicant is responsible only for the costs of make-ready that is still necessary after the non-compliant condition has been remedied.

The Commission's adoption of the requirement in Proposed 1.1416(d), discussed above, that utilities performing make-ready must make schedules of common make-ready charges available to new attachers upon request would represent an important step toward eliminating barriers to deployment associated with make-ready costs. This requirement, along with the additional clarifications to Proposed 1.1416 would allow Lightower to understand if a utility is attempting to charge Lightower for pre-existing violations, and thus assist in lifting the veil on make-ready costs and eliminating this longstanding deployment roadblock.

C. The Commission Should Clarify that the Self-Help Rights for New Attachers Apply Regardless of Policies Against the Same Adopted by Utilities or Existing Attachers.

Lightower applauds the Commission's inclusion, in Proposed 1.1422(a), of a requirement for a utility to identify, on its list of approved contractors, the contractors it authorizes to perform make-ready above the communications space on its utility poles. Lightower requests, however, that the Commission clarify that the space "above the communications space" includes both the power space and the pole top. This clarification will eliminate doubt that work in the power space by a utility-approved contractor is permitted and will provide an important and meaningful self-help remedy for attachers whose make-ready necessarily requires work in the power space.

Lightower also seeks explicit clarification from the Commission that when, due to non-compliance with attachment timelines, an applicant utilizes the self-help remedies authorized by the rules, and has provided the utility and any existing attachers with a reasonable opportunity to accompany and consult with the authorized contractor and the applicant pursuant to Proposed 1.1422(c), the applicant may lawfully use the selected utility-approved contractor to complete make-ready in spite of any utility/existing attacher's internal procedures or policies preventing

the use of a contractor to carry out the utility/existing attacher's own make-ready in question. Specifically, Lightower urges the Commission to explain that the self-help rights afforded to applicants may be exercised in spite of any collective bargaining or other internal utility/existing attacher's policies or contracts prohibiting the same. Clarification on this issue is sought due to contentions previously expressed to Lightower that its self-help rights are limited by other attachers' collective bargaining agreements, in spite of missed attachment timelines.

D. Commission Clarification of Duty to Provide Access is Necessary in Connection with Proposed 1.1403.

Proposed 1.1403 shortens utility timelines for responding to requests for access to a utility's poles, ducts, conduits, or rights of way from 45 days to 15 days. This timeframe modification is a positive step toward eliminating barriers to wireline deployment, and Lightower strongly supports it. Certain clarifications are necessary from the Commission, however, surrounding practices that have arisen in the context of the current rules and whether they constitute permissible utility practices under 1.1403(a) and (b).

1. Access when pre-existing NESC or other violations are present.

Proposed 1.1403(a) provides (as does current 1.1403), in pertinent part, that a utility may deny "access to its poles, ducts, conduit, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes." Many utilities over the years have utilized pre-existing violations of NESC standards or their internal engineering standards at the time of a new attachment application submission to deny the applicant access on safety and reliability grounds. Lightower contends that this practice violates the spirit of the rules and a utility's obligation to maintain its pole plant in a safe, compliant manner. Lapse by a utility to maintain its pole plant in an NESC-compliant manner is not a reasonable rationale for denial of an attachment application.

Accordingly, the Commission should clarify that utilities may not deny access to prospective attachers by citing pre-existing violations on poles as grounds for denial.

2. Access when capacity is at issue.

The Commission should additionally clarify that if, in the ordinary course of business, a utility allows for the replacement of its poles when capacity issues prevent a proposed new attachment from being approved, that it may not deny a new attacher's application on the grounds of insufficient capacity. This change is critical to America having robust wired and wireless broadband infrastructure because many utility pole lines have already hit capacity. Being able to deny for reason of "capacity" would have a chilling effect on new investment.

Moreover, to the extent that pole replacement is permitted as a make-ready solution for new attachers in circumstances of insufficient capacity on existing infrastructure, the make-ready timelines in 1.1420 continue to apply. Clarification that standard make-ready timelines still apply in instances where pole replacement is a necessary make-ready remedy will eliminate a significant barrier to deployment, in that it will keep the clock ticking to facilitate attachment across utility territories, whether they have aging or new pole infrastructure.

3. Conduit availability

Although conduit access is subject to the same timeline for access under Proposed 1.1403 as poles, obtaining important information from utilities pertaining to conduit capacity and infrastructure can prove extremely difficult. Physical inspection of conduit infrastructure and availability is typically not an option, given its underground location. Utilities are also often reticent to provide access to their conduit records or produce drawings demonstrating whether conduit is available. Because of the importance of conduit as a means through which broadband infrastructure may be deployed and the ever-increasing preference by municipalities to utilize

underground versus aerial deployment paths, the Commission should clarify the responsibilities of utilities in providing conduit availability, stressing the need for transparency. Such clarification will assist in ensuring that necessary information is accessible to those who are actively seeking to advance broadband deployment by underground means.

E. The Commission Should Adopt a Ninety-Day "Shot Clock" for Resolution of Pole Attachment Complaints.

Proposed 1.1425 provides that except in extraordinary circumstances, in which the Commission is permitted to pause the review period, final action on a complaint for denial of access "to a pole, duct, conduit, or right-of-way owned or controlled by a utility should be expected no later than 180 days from the date the complaint is filed with the Commission." Lightower appreciates the Commission's attempt to expedite the complaint process for access denials by means of Proposed 1.1425; however, it asks the Commission to go further and apply a 90-day shot clock to access complaints. In many situations surrounding the filing of a complaint for denial of access, the party seeking access has expended a significant amount of time and resources attempting to gain access before filing its complaint. The expiration of an additional six months for resolution of the issue is unlikely to effectively promote broadband deployment; however, resolution of the issue within three months would promote more timely deployment in situations where access is determined to be lawful and is a reasonable amount of time for thorough review of the complaint and application of all necessary administrative procedures thereto. Lightower therefore requests that the Commission shorten the 180-day review period in Proposed 1.1425 to 90 days.

III. COMMENTS ON NOTICE OF INQUIRY PERTAINING TO PROHIBITING STATE AND LOCAL LAWS INHIBITING BROADBAND DEPLOYMENT

The Commission has requested comment on whether, consistent with its authority under 47 USC 253 ("Section 253"), it should adopt rules to promote the deployment of broadband infrastructure by preempting state and local laws that inhibit broadband deployment. As an initial matter, Lightower posits that the Commission has the requisite authority to adopt such rules pursuant to the language of Section 253 and its authority under 47 USC 201(b) to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Telecommunications Act of 1934. Likewise, the adoption of general rules pertaining to Section 253(a) is not inconsistent with the provisions of Section 253(d) directing the Commission to preempt the enforcement of particular state or local statutes, regulations, or requirements "to the extent necessary to correct such violation or inconsistency," in that rules implementing and interpreting Section 253(a) will provide clarification on what constitutes a state or local regulation or practice that may prohibit or have the effect of prohibiting the provision of telecommunications service.

Additionally, the notice and comment opportunities presented in a Commission proceeding to take enforcement action following a violation of Section 253(a), as detailed in rules implementing the same, would be sufficient to satisfy the requirements of Section 253(d). Thus, as explained in comments and reply comments submitted in other Commission dockets[6] and herein, the Commission should adopt rules interpreting and implementing the pronouncement of Section 253(a) against state and local regulations that prohibit or have the

[6] See *In the Matter of Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition For Declaratory Ruling*, WT Docket No. 16-421, Initial and Reply Comments of Lightower Fiber Networks, submitted, respectively, March 8, 2017 and April 7, 2017; see also *Wireless NPRM/NOI*, WT Docket No. 17-79, Initial Comments of Lightower Fiber Networks, submitted June 15, 2017.

effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service in order to assist parties in identifying and eradicating these significant barriers to deployment.

As suggested in the Notice of Inquiry in this docket, there are a number of specific categories of actions/items for which Commission rules are needed to prevent states and localities from enforcing laws and/or engaging in practices that may prohibit or have the effect of prohibiting the ability of entities to provide telecommunications service. The need for rules in each of these categories is discussed in turn below.

A. The Commission Should Adopt Rules Prohibiting State and Local Deployment Moratoria, whether Actual or Effective.

The Commission should adopt rules under Section 253(a) to prohibit the imposition, by state and local governments, of deployment moratoria in circumstances where such moratoria are unrelated to safety. It is important that the Commission clearly states in any such rules that deployment moratoria, whether actual/pronounced, or effective, constitute regulations that may prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services.

Over the years, Lightower has encountered situations in which local governments have explicitly imposed moratoria on processing applications necessary for the deployment of broadband infrastructure; it has also been involved in a number of scenarios in which, in spite of no pronunciation by local government that a moratorium has been imposed, the governmental entity is simply not moving forward in such a way as to process applications related to the deployment of broadband infrastructure. The latter scenario may be characterized as an effective prohibition. In Lightower's experience, moratoria have most often not been tied to safety or driven by events requiring construction stoppages; rather, moratoria often appear to have been

put into place in order to arbitrarily exempt governmental entities from processing applications, etc. These types of moratoria, when imposed, amount to delay tactics without correlation to safety or specific events that would warrant delay.

The Commission should adopt rules prohibiting the imposition of both explicit and effective deployment moratoria in circumstances where safety concerns are not the operative consideration. It seems evident that periods of time, whether limited or otherwise, that permit state and local authorities to hold pending applications related to deployment in abeyance, represent real barriers to entry. Although the Commission has previously clarified that the shot clock timeframe for wireless siting applications runs regardless of any moratorium, the Commission has not made the same pronouncement in association with wireline deployment applications. Adopting a rule prohibiting state and local moratoria on the deployment of broadband infrastructure, with very narrow exceptions, would formalize the existing Commission holding for wireless siting applications, and would extend the same protections to wireline deployment applications, thereby eliminating an obvious barrier to broadband infrastructure deployment.

B. The Commission Should Adopt Rules to Eliminate Excessive Delays in Negotiations and Approvals for Rights-of-Way Agreements and Permitting for Telecommunications Services.

Often, the timelines applicants face when seeking state and/or local approval of the various applications necessary for deployment of broadband infrastructure are extremely prolonged and unpredictable. The adoption of rules by the Commission setting forth binding timeframes for consideration of the same would assist telecommunications providers in achieving deployment within a reasonable, predictable amount of time.

In Lightower's experience, securing a local franchise for the deployment of telecommunications infrastructure often takes in excess of six months from the date of tendering an application for the same to the applicable governmental entity. Given that broadband infrastructure is extraordinarily important to the vitality of local governments in relation to public safety, consumers and the businesses located therein and the ability to attract and retain new customers, and that such customers expect connectivity within a finite (and sometimes quite a short) period of time, the delay associated with granting telecommunications providers franchise agreements and approving deployment applications represents a significant deployment barrier. In order to combat this issue, the Commission should adopt rules placing time limits on local consideration of applications for telecommunications franchises, much as those recently adopted in the context of cable franchises. Lightower recommends a review period of 90 days for typical telecommunications deployment proposals.

Further, Lightower often encounters unwillingness by localities to concurrently process franchise applications and other applications necessary for deployment. In order to facilitate the timely deployment of telecommunications infrastructure, the Commission should issue a rule directing that state and local governments must process an applicant's application to occupy the ROW and any other necessary applications during the same timeframe in which an applicant's franchise application is being considered.

For instance, Lightower recently submitted franchise applications and applications to occupy public rights-of way in two municipalities of roughly the same size that are located geographically close to one another. One of the municipalities reviewed and considered Lightower's franchise application at the same time it considered its right-of-way occupancy application; the other municipality indicated that it was unwilling to process the right-of-way

occupancy application until the franchise process was complete. The former municipality approved Lightower's franchise and issued its permit to occupy rights-of-way within days of one another; in the latter municipality, however, several months elapsed from the time the franchise was approved until the ROW occupancy permit was issued. From this example, it is clear that concurrent consideration of all necessary permit applications will shorten resulting timeframes for deployment of telecommunications infrastructure. Lightower respectfully requests that the Commission direct state and local governments to consider any applications submitted by the same applicant related to the deployment of telecommunications infrastructure on a concurrent basis.

C. The Commission Should Adopt Rules Prohibiting Excessive Fees and Costs, the Imposition of Unreasonable Permit Conditions, and Bad Faith Negotiation Conduct, as Each of these Practices by State and Local Jurisdictions May Prohibit or Have the Effect of Prohibiting the Provision of Telecommunications Service.

Lightower has encountered a number of scenarios in which local jurisdictions have imposed unreasonable conditions for approval of deployment applications and, by means of those unreasonable conditions, have imposed excessive costs for deploying telecommunications infrastructure in their jurisdictions. In connection with these scenarios, in situations where Lightower has contested the conditions or costs, jurisdictions have often refused to continue processing or grant pending deployment applications. The Commission should prohibit these practices.

1. Importance of cost transparency.

As Lightower has previously noted in other dockets, many jurisdictions demand arbitrary fees for use of public rights-of-way for telecommunications infrastructure with no clear relationship to the jurisdiction's costs of management of the rights-of-way. Lightower strongly

suggests that any forthcoming Commission rules interpreting Section 253(a) specify that all jurisdictional fees associated with telecommunications infrastructure in public rights-of-way be based on or otherwise verifiably connected to actual costs incurred by the jurisdiction to regulate telecommunications providers' use of the same. Additionally, there is often no available evidence that all telecommunications providers are being charged in an equitable manner, so it is important that any rules implementing Section 253(a) call for full cost transparency so that providers can ascertain that they are being treated fairly and in the same manner as other such providers.

2. Requirement for "donations" and other excessive costs.

Lightower has also encountered local jurisdictions that have requested significant "donations" before they will agree to approve a telecommunications franchise or equivalent agreement. Other times, such jurisdictions will simply refuse to process an application or grant a franchise until payment of some sort of arbitrary fee has been received. Regardless of the form these arbitrary fees or donations take, they significantly delay deployment of telecommunications facilities, and the Commission should adopt rules proscribing these practices.

D. The Commission Should Adopt a Residual Rule Preempting any State or Local Legal Requirement or Practice that May Prohibit or Have the Effect of Prohibiting the Provision of Telecommunications Service.

To the extent that the Commission determines that it should adopt rules interpreting and implementing Section 253(a), Lightower strongly recommends incorporation of a residual section that proscribes practices that, while not fitting squarely within any enumerated category of prohibited regulations, practices, or requirements, may prohibit or have the effect of prohibiting the ability of an entity to provide telecommunications service. Clearly, the practices discussed above, which should be prohibited by the Commission, do not represent an exhaustive

list. New practices, regulations, and other procedures resulting in extensive deployment delays and prohibitions seem to be implemented every month. In order to ensure against a workaround, any rules interpreting and implementing Section 253(a) should include a residual section proscribing practices that may prohibit or have the effect of prohibiting the ability of entities to provide telecommunications service.

IV. CONCLUSION

As discussed *supra*, Lightower recommends adoption of the Commission's proposed pole attachment rule revisions, with minor changes to a number of the same. Lightower further recommends the assessment of penalties upon parties who have not complied with attachment timelines. Lightower additionally requests Commission clarification of a number of items, and recommends that the Commission adopt rules interpreting and implementing Section 253(a). Lightower thanks the Commission for the opportunity to submit comments in this important proceeding.

Respectfully submitted,

/s/ *Rebecca L. Hussey*
Rebecca L. Hussey
Associate General Counsel
Natasha Ernst
Vice President, Senior Assistant General Counsel
Lightower Fiber Networks
470 Schrock Road, Suite B
Columbus, Ohio 43229
Telephone: (614) 657-4294
Email: rhussey@lightower.com

Counsel for Lightower Fiber Networks