

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

In the Matters of)	
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Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment)	WT Docket No. 17-84
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Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment)	WT Docket No. 17-79
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**COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION**

The American Public Power Association (“APPA”), on behalf of the Nation’s publicly-owned electric utilities, submits these consolidated comments in response to the *Wireline Notice of Proposed Rulemaking and Notice of Inquiry* (“*Wireline NPRM/NOI*”)¹, and the associated *Wireless Notice of Proposed Rulemaking and Notice of Inquiry* (“*Wireless NPRM/NOI*”)², issued by the Federal Communications Commission (“Commission”). In these two interrelated

¹ *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking (“Wireline NPRM”), Notice of Inquiry (“Wireline NOI”), and Request for Comment*, WT Docket 17-84, released April 21, 2017. Notably, as published by the Federal Register in the Code of Federal Regulations, the abovementioned issuance did not include the “Request for Comment,” so these comments do not directly address inquires in that portion of the document.

² *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking (“Wireless NPRM”), and Notice of Inquiry (“Wireless NOI”),* WT Docket 17-79, released April 21, 2017.

proceedings, the Commission seeks comment on numerous far-reaching proposals that are intended to “reduce pole attachment costs and speed access to utility poles” for broadband service providers,³ and to “remove or reduce” existing “regulatory impediments to wireless network infrastructure investment and deployment.”⁴ The Commission suggests that these proposals will remove barriers to wireline and wireless broadband deployment, and will thereby encourage broadband service providers to accelerate deployment of facilities and introduce more advanced services, such as 5G wireless broadband services.

APPA shares the Commission’s desire to expand broadband deployment, adoption, and use throughout the United States. In fact, as the Commission is aware, some members of APPA have been at the forefront of spurring broadband deployment, adoption, and use in their communities, particularly in rural and underserved areas. APPA submits, however, that several of the Commission’s proposals and lines of inquiry in the *Wireline NPRM/NOI* and *Wireless NPRM/NOI* may exceed the Commission’s statutory authority and would have significant detrimental operational and financial impacts on utility operations.

Access to utility poles involves a balancing of myriad competing interests and considerations. With respect to municipal utility poles,⁵ Congress has repeatedly concluded that

³ *Wireline NPRM/NOI*, at ¶ 3.

⁴ *Wireless NPRM/NOI*, at ¶ 2.

⁵ Many public power utilities are municipal utilities (a utility owned by a municipality). The ones that are not owned by a municipality are still governmentally owned. Examples include public utility districts, irrigation districts, and state-created entities that serve areas larger than a municipality. Given that the *Wireline NPRM/NOI* and *Wireless NPRM/NOI* utilize the phrase “municipal” or “municipally-owned” generally with respect to all government-owned utilities we use it throughout the document, but our comments are applicable to all public power utilities.

decisions regarding pole attachment rates and regulations are best made at the local level by the consumer-owners of the poles. The Commission should therefore not attempt to circumvent congressional will and the express provisions of Section 224⁶ in order to impose top-down, one-size-fits-all attachment practices and procedures that, in the name of expediency, could compromise the safety and reliability of critical electric facilities, and which would further subsidize private industry at the expense of consumer electric ratepayers.

As determined by Congress when it passed Section 224 of the Communications Act in 1978, and reinforced by the Commission for many years thereafter, collocation of communications services infrastructure on electric utility poles is efficient and may ultimately provide communications services to otherwise unconnected communities. As such, public power utilities seek to accommodate and facilitate access to their poles by a wide variety of communications providers and other duly authorized attaching entities. However, the core purpose and function of public power utility poles is for the safe and reliable distribution and delivery of electric services to their customers. The use of public power utility poles must always ensure the continued operational integrity, safety, and reliability of such electric facilities and electric services for both personnel and the public.

In addition, collocation only provides benefits to communities if each user of the pole pays its proportional share of all associated costs of the infrastructure. As owners of the utility poles, public power utilities must bear the burden of residual costs that are not fairly allocated to attaching entities. Electric ratepaying customers served by public power utility owners of electric utility poles will ultimately bear costs not fairly allocated to attaching entities, effectively subsidizing the operations of these attachers. Thus, it is through the lens of safety and fairness that APPA offers these comments.

⁶ 47 U.S.C. § 224.

I. INTRODUCTION AND INTEREST OF APPA

APPA is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ. Approximately 70 percent of APPA’s members serve communities with less than 10,000 residents.

In the *Wireline NPRM/NOI*, the Commission recognizes that its authority to regulate electric utility pole attachments in Section 224 of the Communications Act of 1934 does not apply to municipally-owned utilities (hereinafter, the “municipal exemption”).⁷ Despite this statutory exemption, APPA members have a significant interest in this proceeding for the following reasons. First, despite its recognition of the municipal exemption from Section 224 federal pole attachment regulations, the Commission has nevertheless raised questions in both the *Wireline NPRM/NOI* and the *Wireless NPRM/NOI* as to the scope of its authority to utilize other statutory or regulatory means to regulate access to municipal utility poles.⁸ If the Commission does attempt to exercise authority over municipal pole attachments, using sections of the Communications Act that are wholly unrelated to pole attachments and thus circumventing the Section 224 municipal exemption, each of the proposals in the *Wireline NPRM/NOI* and *Wireless NPRM/NOI* may have a direct impact on municipal utilities.

⁷ *Wireline NPRM/NOI*, ¶ 30.

⁸ *Id.* (requesting comment on “actions that the Commission might be able to undertake to speed deployment of next generation networks by facilitating access to infrastructure owned by entities not subject to Section 224.”).

Second, some states incorporate the federal pole attachment requirements by reference into state law. For example, Section 38-5.5-108 of the Colorado Revised Statutes incorporates by reference the pole attachment rates under Section 224 as the highest rate that municipal utilities can charge communications providers seeking to make communications attachments.⁹

Even where the federal pole attachment requirements are not binding, formally or otherwise, cable and telecommunications providers often point to the Commission rules as *de facto* benchmarks of reasonableness.

Finally, in seeking comments on its proposals, the Commission cites pole attachment make-ready policies set forth by an APPA member public power utility and a City with a public power utility.¹⁰ The fact that these two public power communities adopted materially distinct, but effective OTMR pole attachment processes, highlights the fact that a one-size-fits-all approach will not work, and is not needed for public power utilities.

For each of these reasons, the Commission's actions in these proceedings could have a significant impact on APPA's members. Thus, APPA is an appropriate entity to represent the interests of municipal utilities in this proceeding.

⁹ State laws in Indiana, Florida, Missouri, and Texas similarly incorporate by reference the FCC's attachment rate formulas to municipal utilities.

¹⁰ *Id* at ¶¶ 24-25 (citing unique "one-touch make-ready" ("OTMR") policies adopted by CPS Energy, which is an APPA municipal utility member located in San Antonio, TX, and in Nashville, TN, which is served by APPA municipal utility member Nashville Electric Service).

II. SECTION 253 CANNOT BE USED TO REGULATE MUNICIPAL UTILITY POLES THAT ARE EXEMPT FROM FEDERAL REGULATIONS UNDER SECTION 224

A. The Commission Does Not Have Regulatory Authority Over Attachments to Municipal Utility Poles

In adopting the *Wireline NPRM/NOI*, the Commission invites public input on several potential Commission actions aimed at expediting the deployment of broadband infrastructure, including streamlining and accelerating pole attachment processes, and lowering pole attachment make-ready costs and pole attachment fees under the Commission’s Section 224 pole attachment regulations. Despite the Commission’s acknowledgment in the *NPRM* portion of the *Wireline NPRM/NOI* that municipal utilities “are not subject to Section 224 of the Communications Act,”¹¹ the Commission nevertheless inquires in the *NOI* portion of the *Wireline NPRM/NOI* whether it could utilize its Section 253¹² authority to regulate access to municipally-owned utility poles.¹³

Other Prohibitive State and Local Laws. Finally, we seek comment regarding any other instances where the Commission could adopt rules to preempt state or local legal requirements or practices that prohibit the provision of telecommunications service. For instance, should the Commission adopt rules regarding the transparency of local and state application processes? *Could the Commission use its authority under Section 253 to regulate access to municipally-owned poles when the actions of the municipality are deemed to be prohibiting or effectively prohibiting the provisions of telecommunications service?* If so, could the Commission use its Section 253 authority in states that regulate pole attachment under Section 224(c)?¹⁴

For several reasons set forth below, the answer is simply “No.”

¹¹ *Wireline NPRM/NOI*, ¶ 30.

¹² 47 U.S.C. § 253.

¹³ The Commission raises a similar question in the *Wireless NPRM/NOI*.

¹⁴ *Wireline NPRM/NOI*, at ¶ 108 (*emphasis added*).

1. Municipal utilities are explicitly exempt under Section 224

The Commission lacks the statutory authority to regulate attachments to public power utility poles. As the Commission has consistently recognized, the FCC “does not have authority to regulate attachments to poles that are municipally or cooperatively owned.”¹⁵ The clear statutory exemption, set forth in 47 U.S.C. § 224, imposes federal pole attachment requirements only upon entities that meet the definition of “utility” in Section 224(a)(1). The term “utility” is defined to exclude local governments, cooperatives, and railroads:

The term “utility” means any person whose rates or charges are regulated by the Federal Government or State and who owns or controls poles, ducts, conduits or rights of way used, in whole or in part, for any wire communications. *Such term does not include* any railroad, any person who is cooperatively organized, or *any person owned by* the federal government or *any State*.¹⁶

Section 224(a)(3), in turn, defines “State” as “any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.” Public power utilities are, as described above in Footnote 5, governmentally owned, and include entities such as municipal utilities, public utility districts, irrigation districts, and state-created entities. Thus, public power utilities are explicitly excluded from FCC pole attachment regulations.

In excluding public power utilities from the scope of the Commission’s Section 224 authority, Congress concluded that this “municipal and cooperative exemption” was necessary “because the pole attachment rate charged by municipally owned and cooperative utilities [were]

¹⁵ See, e.g., *Report and Order, In the Matter of Implementation of Section 224 of the Act*, WC Docket No. 07-245, Appendix B, ¶ 46, released April 7, 2011.

¹⁶ 47 U.S.C. § 224(a)(1) (*emphasis added*).

already subject to a decision-making process based upon constituent needs and interests.”¹⁷ This rationale still holds true today.

2. Section 253 does not apply to municipal utility poles

Recognizing that municipal utilities are not subject to Section 224 federal pole attachment regulations, the Commission suggests that it might nevertheless have jurisdiction over municipal utility poles by arguing that municipal pole attachments are part of the Commission’s Section 253 authority. Reinforcing its own mischaracterization of its authority under Section 253, the Commission raises similar questions in the *Wireless NPRM/NOI*. In doing so, the Commission appears to conflate its authority to place reasonable limits on state and local authority to manage the use of public rights-of-way (“ROW”) and prohibit barriers to entry, with a heretofore never-recognized authority to regulate access to municipally-owned electric utility poles. Any proposal that broadens the well-established statutory authority granted to the Commission under Section 253 should be rejected.

Section 253 provides:

SEC. 253. REMOVAL OF BARRIERS TO ENTRY.

- (a) **IN GENERAL.** -- *No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.*
- (b) **STATE REGULATORY AUTHORITY.** -- *Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.*
- (c) **STATE AND LOCAL GOVERNMENT AUTHORITY.** -- *Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from*

¹⁷ S. Rep. No. 95-580, 95th Cong., 1st Sess. 17-18 (1977).

telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

- (d) *If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.*¹⁸

Section 253 pertains to state and local governments acting in a regulatory capacity. It has no bearing on when a local government is acting in a proprietary capacity, such as when it leases access to a municipally-owned electric utility pole.

a. Statutory Construction

Given the unique ability for telecommunications services and electric utility services to collocate infrastructure to share and reduce costs, Congress explicitly and specifically provided the Commission with limited jurisdiction over electric utility pole attachments in a separate section of the Communications Act, Section 224. The argument that Section 253 implicitly applies to access to municipally-owned poles within the ROW completely ignores the fact that the same piece of legislation includes more specific language pertaining to utility pole attachments, which explicitly excludes municipally-owned utility poles. The comparison of the language in Sections 224 and 253 is significant for two reasons, both central tenants of statutory construction.

First, as the Supreme Court noted in *United States v. Gonzales*, 520 U.S. 1 (1997), ““Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the

¹⁸ 47 U.S.C. § 253 (*emphasis added*).

disparate inclusion or exclusion,” 520 U.S. at 5, quoting *Russello v. United States*, 464 U.S. 16, 23 (1983).¹⁹ Congress clearly understood the distinction between ROWs and poles, as is evidenced by the fact that Section 224, which was amended in the 1996 Telecommunications Act at the same time as Section 253 was enacted, explicitly applies to “poles, ducts, conduits and *rights-of-way*,” whereas Section 253 only mentions “right-of-way.” According to the principle set forth in *Russello*, it may be presumed that Congress acted “intentionally and purposely” in excluding pole attachments from the scope of Commission’s jurisdiction allowed under Section 253 of the Communications Act.

Second, in *Morton v. Mancari*, 417 U.S. 535, 550-551, 94 S.Ct. 2474, 2482-2483, 41 L.Ed.2d 290 (1974), the Supreme Court developed the oft-cited tenant of construction when it said “[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.” As described in more detail below, Congress did not signal its intention to allow the Commission to regulate pole attachments under a broad and sweeping grant of jurisdiction like that found in Section 253. In fact, the Congressional record indicates Congress’s desire to ensure that the Commission does not implement burdensome pole attachment regulations of municipal utilities, which already have pole attachment regulatory processes at the local or state level which better fits the needs of the particular jurisdiction. Since Congress very clearly laid forth specific, limited jurisdiction for the Commission over electric

¹⁹ The FCC has similarly held that “[w]hen Congress uses explicit language in one part of a statute . . . and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing.” *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, *Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 98-27, ¶ 32 n.113 (rel. February 26, 1998), quoting *Cabell Huntington Hospital, Inc. v. Shalala*, 101 F.3d 984, 988 (4th Cir. 1996).

utility pole attachments, it would be nonsensical for Congress to then grant broad authority to the Commission to regulate the very thing it limited in Section 224. Accordingly, the specific section of the Communications Act related to pole attachments is not controlled by the broader, more general grant of authority under Section 253.

b. Legislative Intent

The legislative history of the municipal pole attachment exemption demonstrates that Congress intended for access to municipal utility poles to be addressed at the local level by their consumer-owners. During deliberations on the Pole Attachment Act (Section 224 of the Communications Act), Congress explained its rationale as follows:

Because the pole rates charged by municipally owned and cooperative utilities are already subject to a decision making process based upon constituent needs and interests, § 1547, as reported, exempts these utilities from FCC regulation. Presently cooperative utilities charge the lowest pole rates to CATV pole users. CATV industry representatives indicate only a few instances where municipally owned utilities are charging unsatisfactorily high pole rental fees. *These rates presumably reflect what local authorities and managers of customer-owned cooperatives regard as equitable distribution of pole costs between utilities and cable television systems.*²⁰

Significantly, when Congress amended and expanded the federal pole attachment regulations under Sections 224 and adopted Section 253 as part of the Telecommunications Act of 1996, it chose to keep the municipal exemption in place as set forth in the original Communications Act.

Evidenced by the legislative record, Congress clearly understood and intended that municipal utilities could adopt different rates, terms, and conditions of access than those that would be allowed under the Commission's Section 224 regulations, based on a balancing of the needs of

²⁰ S. Rep. No. 95-580, 95th Cong., 1st Sess. 17-18 (1977) (*emphasis added*).

the local consumer-owners. The rationale provided by Congress during the original development of Section 224, and later confirmed by the fact that Congress preserved the exemption in the 1996 Telecommunications Act, still holds true today.

Public power utilities are the representatives of the consumers who both own the poles and benefit from the services provided over the facilities attached to these poles. As a result, municipal utilities are inherently incentivized to provide reasonable access and apportion the costs of constructing and maintaining their poles in an equitable manner among all attaching entities. This apportionment balances the interests of public power communities as electric consumer-owners and consumers of communications services, and ensures that public power customers do not unfairly subsidize deployment of infrastructure for an unrelated service that they may or may not choose to use. Moreover, public power utilities are often prohibited from subsidizing private, for-profit entities by state laws, bond documents, utility accounting standards, and other requirements.²¹

c. Access to municipal utility poles is a proprietary activity

Section 253 only applies to local and state governments acting in a governmental, regulatory capacity, so the FCC has no authority to regulate municipal utilities, which operate in a proprietary capacity, under Section 253.

As evident from the excerpted language of Section 253 set forth above, the substantive requirement of Section 253(a) applies to state or local “statutes,” “regulations,” or “legal

²¹ For example, the Tennessee Valley Authority (“TVA”) has established pole attachment pricing requirements for the public power distribution utilities that acquire wholesale power from TVA, in order to ensure that such distribution utilities do not subsidize non-electric activities. <http://tinyurl.com/y7mt8nnf>

requirements.” The Commission and courts have previously concluded that these provisions relate to state and local governments when they are acting in their regulatory capacity – e.g., issuing permits for the use of the public ROWs – as opposed to when they are acting in a proprietary capacity, such as when they lease or rent utility facilities or property.²² Indeed, citing these decisions, the Commission affirmed this distinction in its *Wireless Siting Order*, in which it imposed various limitations on the ability of State and local governments to regulate the siting of wireless facilities:

As proposed in the Infrastructure NPRM and supported by the record, we conclude that Section 6409(a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities. As discussed in the record, courts have consistently recognized that in “determining whether government contracts are subject to preemption, the case law distinguishes between actions a State entity takes in a proprietary capacity—actions similar to those a private entity might take—and its attempts to regulate.” As the Supreme Court has explained, “[i]n the absence of any express or implied implication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and when analogous private conduct would be permitted, this Court will not infer such a restriction.” Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances. We find that this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt “non-regulatory decisions of a state or locality acting in its proprietary capacity.”²³

²² *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only “regulatory schemes”); *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002) (finding that Section 332(c)(7) “does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity”).

²³ *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865 (F.C.C.), 30 FCC Rcd. 31, 2014 WL 5374631, at ¶ 239 October 21, 2014 (“*Wireless Siting Order*”) (internal citations omitted).

In the *Wireless NPRM/NOI*, however, the Commission asks whether management of access to municipally-owned structures should at times be considered regulatory rather than proprietary in nature.

We seek comment on whether we should reaffirm or modify the *2014 Infrastructure Order*'s characterization of the distinction between State and local governments' regulatory roles versus their proprietary roles as "owners" of public resources. How should the line be drawn in the context of properties such as public rights of way (e.g., highways and city streets), municipally-owned lampposts or water towers, or utility conduits? Should a distinction between regulatory and proprietary be drawn on the basis of whether State or local actions advance those government entities' interests as participants in a particular sphere of economic activity (proprietary), by contrast with their interests in overseeing the use of public resources (regulatory)?²⁴

APPA submits that the Commission was correct in its prior determinations that management of access to municipal facilities, namely electric utility poles, is proprietary in nature and is outside the scope of Section 253. There can be no real suggestion that the provision of electric service by a municipal electric utility is not a proprietary activity. Indeed, public power utilities do not have regulatory authority over public ROW to be used by private communications providers. Further, in many instances, public power utilities are separate corporate entities from the local governments that may own the public ROWs. For example, the electric service territory of many municipal electric utilities extends well beyond the corporate territorial boundaries of the municipality that created them. In such cases, the municipal utility typically must obtain access to the public ROWs from the local jurisdiction in a similar manner as other users of the ROWs. Similarly, many public power utilities were created as independent agencies or districts, are not part of any particular local governmental entity, and do not exercise any control over the use of the public ROWs.

²⁴ *Wireless NPRM/NOI*, at ¶ 96.

B. There Is No Compelling Evidence That Municipal Utilities Are Unreasonably Denying Access

Not only does the Commission lack statutory authority to regulate access to municipal utility poles, but the Commission has not cited any compelling need for such regulation, or any existing state or local pole attachment laws that currently create barriers to entry for communications providers. Given the unique physical and safety concerns that must be considered when placing wireless facilities on existing utility poles, existing pole attachment processes have been effective at ensuring safety and electric reliability, while still encouraging deployment.

Focusing solely on *potential* harms, the Commission has failed to cite any evidence that municipal utilities are unreasonably denying access to utility poles, for either wireline or wireless attachments. There is no evidence that municipal utilities are unreasonably denying access to their electric utility poles. In most instances, utilities are fully cooperating with wireline and wireless providers, and the traditional negotiation processes are working. In fact, public power utilities have been at the forefront of encouraging broadband deployment and adoption in their respective communities, including the adoption of innovative bulk deployment and streamlined make-ready procedures.²⁵

Importantly, placement of wireless devices on electric utility poles above the industry-recognized electric safety space²⁶ raises unique operational and safety issues that are utility-specific and need to be addressed based on operational requirements and capabilities. No empirical

²⁵ For example, as noted in the Wireline NPRM/NOI, CPS Energy of San Antonio, Texas, has adopted an innovative one touch make ready pole attachment process.

²⁶ National Electrical Safety Code, Section 235C4.

evidence has been put forward to suggest that careful pole attachment application review and processing is not taking place at a reasonable pace on a widespread, pervasive basis.

Relatedly, it should be recognized that while the wireless industry euphemistically characterizes their wireless facilities as “small,” and no larger than a “pizza box,” the reality is that these devices are only small *when compared to* traditional macrocell facilities, which are, in fact, very large. Simply calling this equipment “small” doesn’t make it so. Indeed, one only need look at the descriptions of “small wireless facilities” introduced by wireless companies in bills submitted to state legislatures around the country to see that these are, by no means, “small” or “unobtrusive.” For example, many of these bills would define a “small wireless facility” as having “(1) an antenna with an enclosure exterior displacement volume of no more than six cubic feet;” and “(2) associated equipment with a cumulative enclosure exterior displacement volume no larger than 28 cubic feet.”²⁷ Also, these same bills often exclude many associated facilities, such as power and grounding facilities, from the calculation of the size of the small wireless facilities.

Safely accommodating these attachments on utility poles is much more complex than what is involved in accommodating a traditional horizontal wireline attachment in the communications space. Not only do wireless attachments take up significantly greater vertical space on the pole, but applicants often request that such attachments be situated in or above the electric space, raising significant safety and operational issues. Further, such attachments create issues related to radio frequency (“RF”) exposure to linemen working on and around such facilities and create potential

²⁷ See, for example, the definition of “small wireless facility” in pending Missouri House Bill H.B.656, “The Uniform Wireless Communication Infrastructure Deployment Act,” <http://www.house.mo.gov/billtracking/bills171/hlrbillspdf/1391H.02C.pdf>

RF interference to utility systems.²⁸ Given the complexity of these myriad issues, suggestions that such wireless attachments can be easily accommodated by cookie cutter, one-size-fits-all solutions by regulatory fiat are, at best, disingenuous. Again, considering the challenges inherent in deployment of wireless devices on existing electric municipal utility poles, the FCC has cited no specific state or local laws or regulations that unreasonably or arbitrarily create barriers to entry for telecommunications companies to deploy broadband technology.

Further, while the Commission and wireless carriers point to an anticipated surge in the need for wireless small cell deployments and “densification” to meet 5G and other emerging wireless and wireline needs, these are, at best, unsubstantiated projections as to what may be needed in the future. As was recently noted in the on-going *Mobilitie* proceeding,²⁹ the reality is that, in large parts of the country, there has only been “a moderate demand for permits” to allow the siting of small cell facilities within the public ROWs, and in other parts of the country there has been no such demand.³⁰ Similarly, as NATOA observed in its comments,

The coverage data provided by the wireless industry does not seem to indicate that local government practices hinder the provision of wireless service to the residents or business across the country. Instead, the greatest barrier to the provision of service is the population density of a given local community (urban versus rural), and the relative profitability of the market in that location.³¹

²⁸ Electric utility linemen working in the vicinity of wireless antennas raise the potential for RF exposure at levels that exceed the Commission’s guidelines as set out in FCC OET Bulletin 65, *Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields*.

²⁹ *Mobilitie, LLC Petition for Declaratory Ruling, Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way, (“Mobilitie Petition”)*, filed Nov. 15, 2016.

³⁰ *Mobilitie Petition*, comments of Colorado Municipal League, et al, 6.

³¹ *Mobilitie Petition*, comments of NATOA, et al, at 7.

Contrary to the unsubstantiated assertions by industry commenters,³² the traditional pole attachment negotiation process between public power utilities and the private sector is working, and there is simply no legal or credible factual basis for the Commission to impose a federal solution to solve a problem that does not exist.

III. THE COMMISSION SHOULD NOT REVISE APPLICATION REVIEW AND MAKE READY TIMELINES

Not only has the Commission failed to provide evidence of widespread delays in approving pole attachment applications under currently-effective state and local laws that are attributable to public power utilities, the Commission also proposes an unrealistic timeline that would divert the attention of utility workers, may risk electric reliability in public power communities, and may limit the ability of states and localities to implement helpful pole attachment policies.

In its *2011 Report and Order*,³³ the Commission adopted a four-stage application review and make-ready process that consists of the following time periods: (1) 45-days for review of an application; (2) 14-days to provide an estimate of required make-ready; (3) 14-days to accept make-ready-estimate; and (4) 60-days to complete make-ready. The FCC provides for longer time periods for applications involving a large number of poles, and for attachments above the communications space. If these deadlines are not met, the FCC's rules provide for self-help remedies under which the attaching entity, using a utility-authorized contractor, may perform the work itself (this is not available for attachments above the communications space). In its *Wireline NPRM/NOI*, the Commission states that these time periods, when taken together, total up to a five-

³² *Wireline NPRM/NOI* at ¶ 30, citing an *ex parte* letter from the American Cable Association.

³³ *Report and Order, In the Matter of Implementation of Section 224 of the Act*, WC Docket No. 07-245 (“*2011 Report and Order*”), released April 7, 2011.

month construction period from application to installation. In response, the Commission proposes to dramatically shorten these time periods, including reducing the application review period to 15 days, and the make-ready period to 30 days, for routine applications.

As an initial matter, it should be noted that the five-month application review and make-ready time period is the maximum time period and does not necessarily reflect the average time period, which is often far less for routine installation work. APPA questions the Commission's assumption that the existing processes are not working. Again, while the Commission provides anecdotal evidence of delays experienced by some cable and telecommunications providers, it has not cited any evidence of widespread, unreasonable delays in the pole attachment process. It has been the experience of public power utilities that the existing localized processes work relatively smoothly, and there is no need to shorten these time periods. Of even greater importance, as alluded to above, doing so would adversely affect the safety, security, and reliability of both utility facilities and the existing attachments on the utility poles.

Second, the Commission should recognize that the adoption of more stringent and compressed timeframes for the completion of pole attachment-related work would divert utility resources from core utility activities. This is particularly problematic for smaller utilities such as many municipal utilities. At a minimum, a condition precedent for utilities to complete the engineering review within shorter time frames is that the applicant be required to take on a greater role in the process upfront. For example, an attaching entity seeking a shorter time period for review should be responsible for including make-ready engineering design documents as part of the application. This is an important requirement that would allow the utility to move forward in its review of applications on the accelerated schedule that the Commission is seeking. Utilities should also be able to fully recover the additional costs of utilizing qualified contractors to review

such documents. Such a requirement properly aligns the burden of pole attachment make-ready engineering design work with the entity responsible for causing the burden.

Third, any efforts to “reform” and expedite the make-ready process must recognize that, in many instances, the *raison d'être* for much of the delay in completing make-ready is not caused by the electric utility pole owner, but rather, is attributable to the failure of the incumbent telephone and cable operators to move their facilities in a timely manner. While electric utility pole owners are generally willing to accommodate any attachments that can safely and securely made consistent with all applicable engineering standards, and that do not impair their electric facilities, existing providers are often resistant to new practices or efforts to more efficiently accommodate attachments.³⁴ Indeed, the ongoing litigation to the one-touch-make-ready (“OTMR”) programs in Louisville, KY, and Nashville, TN, reflect the reluctance of incumbent telephone and cable companies to resist changes that would speed up the make-ready process. This is evident from the fact that, in both instances, the legal challenges to the OTMR ordinances were brought by the incumbent telephone and cable companies, and not the electric utilities that actually owned the majority of the poles at issue.

As a result, any efforts at reform must give the pole owner utility the tools to require existing attaching entities to move or rearrange their facilities in a timely manner, including the ability for the utility to perform such work itself or with a qualified contractor if the incumbent

³⁴ For example, incumbent local exchange telephone companies (“ILECs”) will often insist that they, and they alone, are entitled to occupy the lowest portion on a pole, even if there is sufficient space below their existing attachments to safely accommodate a new attachment consistent with the National Electrical Safety Code and required separations and clearances. Instead, the ILEC will often require that the new entrant undertake the costs and time of moving the ILEC facilities down on the pole.

fails to meet the prescribed time frames. The utility pole owner must also be fully insulated from legal liabilities arising from the exercise of these rights.

Finally, efforts at adopting shorter time frames for application review and make-ready work must recognize that the installation of wireless facilities, and associated equipment that occupies significant vertical space on the pole, is going to dramatically increase the complexity of accommodating all new pole attachments, as well as implementing programs such as OTMR. While traditional wireline attachments generally only occupy a relatively small space on the pole located within the “communications space,” wireless attachments occupy much larger amounts of vertical space on the pole, and therefore have a correspondingly larger impact on the available space on the pole for other purpose, as well as impacting pole loading calculations and climbing space considerations. Additionally, many existing poles may not be loadbearing or rated to withstand the weight of many new devices, and utilities may need to study the extent which additional make-ready is necessary to prepare the poles for pole-top attachments. This added complexity suggests the need for the Commission to hold-off on any wholesale changes to the application review and make-ready process until there is greater familiarity and experience of accommodating these wireless attachments on a routine basis.

IV. THE FCC SHOULD NOT REVISE ITS RULES WITH RESPECT TO THE TREATMENT OF CAPITAL COSTS

A. Capital Expenses Recovered via Make-Ready Fees

In the *Wireline NPRM/NOI* the Commission proposes to codify a rule that excludes capital costs that utilities have already recovered via make-ready fees from pole attachment rates. The Commission notes that, under its existing rulings, if a utility is required to replace a pole in order to provide space for an attacher and the attacher pays the full cost of the replacement pole, the

capital expenses associated with the installation of those poles should be excluded from pole attachment rates for all attachers. The Commission also inquires whether all attachers benefit from lower rates in circumstances where a third-party has paid capital expenses as part of the make-ready process.

The Commission suggests that the reason that third parties do not see a decline in their rates is because the Commission's rules do not explicitly require utilities to exclude reimbursed capital costs from their pole attachment rates. As such, the Commission seeks comment on how utilities recalculate rates when make-ready pays for a new pole, as well as what rate reductions pole attachers have experienced when poles are replaced through the make-ready process, and whether attachers have experienced the inclusion of already-reimbursed capital costs in their pole attachment rates.

The Commission's concerns with respect to costs associated with make-ready is misplaced. The reason that attaching entities tend not to see a reduction in their pole attachment rates when poles are replaced through the make-ready process is because pole attachment rates are based on the average costs throughout the system. The costs are not recalculated on a per pole basis. Thus, absent the replacement of an unusually large number of poles, it is unlikely that pole replacements attributable to make-ready would be sufficient to change the average poles costs when spread through the system. APPA notes that it is the Commission and attaching entities that have repeatedly called for the use of averages in order to provide for administrative simplicity and efficiency.³⁵

³⁵ See, for example, the Commission's endorsement of the use of averages as the most effective and efficient means to calculate pole attachments rates. *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments, Order on Reconsideration*, CS Docket No. 97-98, released May 25, 2001.

APPA is further concerned that the proposed rule changes may lead to an unjustified expectation on the part of attaching entities that they will see a material change in their attachment rates, but, as explained, this is unlikely to occur given the large number of utility poles that would have to be replaced in any given public power community or utility footprint to affect the average net cost of the poles system wide.

B. Capital Expenses Not Recovered Via Make-Ready Fees

The Commission's suggestion in the *Wireline NPRM/NOI* that utilities should exclude virtually all of their own capital costs in constructing or replacing poles from the calculation of pole attachment rates is even more troubling.³⁶ Such a change is unwarranted and would simply extend an additional subsidy to cable and telecommunications companies at the expense of electric ratepayers. Eliminating the ability of utilities to recover capital costs would also run counter to the cardinal principle of utility law that it is inappropriate to subsidize competitive services through revenues extracted from captive ratepayers.³⁷ Furthermore, the Commission's proposed measures are unlikely to have any appreciable impact on broadband deployment, adoption, or use.

In its *2011 Report and Order*, the Commission dramatically revised the way pole attachment rates are calculated under its Section 224(e) pole attachment rate formula by reducing the amount of capital costs that utility pole owners can recover. Specifically, the Commission

³⁶ *Wireline NPRM/NOI*, at ¶40.

³⁷ For example, the National Association of Regulatory Utility Commissioners' Guidelines for Cost Allocations and Affiliate Transactions at 1, states that, in general, the "prevailing premise of these Guidelines is that allocation methods should not result in subsidization of non-regulated services or products" NARUC Guidelines, at 1, <http://pubs.naruc.org/pub/539BF2CD-2354-D714-51C4-0D70A5A95C65>.

amended the pole attachment rate formula to reduce the percentage of the fully allocated costs that utilities may recover based on the average number of attaching entities.³⁸

The Commission took this step over the protests of pole owners, and in the face of evidence that pole owners in fact do take the needs of attaching entities into account when making their pole investment decisions. The Commission based its decision almost entirely on the theory that “utilities typically would not install such extra capacity in advance purely to accommodate possible telecommunications carrier or cable attachers.”³⁹ This theory is at odds with over thirty years of operational practice by most electric utilities.

Now, the Commission proposes to further reduce or eliminate the ability of utilities to recover a portion of their capital costs in pole attachment rates. The Commission provides no evidence to support the need for such a drastic rule change other than the mathematical certainty that such a formula change would reduce pole attachment rates. APPA urges the Commission to reconsider this proposal as unwarranted and contrary to the public interest.

As a threshold matter, the *Wireline NPRM/NOI* is ostensibly aimed at streamlining and reducing “barriers” to broadband deployment. The Commission’s action in the *2011 Report and Order* effectively reverse-engineered the telecommunications rate formula so that it would yield an attachment rate that is essentially the same as the Commission’s cable rate formula, which has been in effect virtually unchanged since the enactment of the 1978 Pole Attachment Act.

³⁸ In 2015 the Commission further revised these rules to address the applicable percentage of fully allocated costs for poles with 2, 3, 4, or 5 average attaching entities. *Order on Reconsideration, In the Matter of Implementation of Section 224 of the Act*, WC Docket No. 07-245, released November 24, 2015.

³⁹ *2011 Report and Order* at ¶ 188.

Undoubtedly, many communications providers would prefer lower pole attachment rates, but that is not a sufficient reason to revise the pole attachment rate formula at the expense of electric utilities and their consumers. These same providers would also presumably prefer to pay lower prices for other inputs to their businesses, but the Commission has no justification or authority to lower the cost of equipment, labor, or other inputs. In this case, the Commission may have authority to act, but no evidentiary justification to support such action. Moreover, there is no reason to believe that lowering costs would lead to more deployment or that lower costs would be passed through to consumers. Indeed, it is more likely that providers will simply keep the savings.

More fundamentally, the Commission is simply mistaken in its assumption that utilities do not take the need to accommodate third-party attachments into consideration when they undertake capital expenditures. This is simply not true.

First, for at least the past thirty years most electric utility distribution poles have had a minimum of three users – the electric utility, a telephone provider and a cable company. Indeed, the Commission’s own rules assume that, in non-urbanized areas, the average number of attaching entities is three, and in urbanized areas, the average number is five.⁴⁰ As sound practice, utilities anticipate the need to accommodate attachments by third-parties. To do anything but anticipate the use of poles by communications providers is to invite otherwise unnecessary pole replacement and other work. Further, the Commission’s assumption that all of these additional costs are somehow captured during the make-ready process ignores the fact that the make-ready process only imposes a cost if it is necessary to make a change-out to accommodate the new attachment. For example, an attaching entity is often able to accommodate a proposed new attachment on an

⁴⁰ 47 C.F.R. § 1.1417(c)

existing pole with no make-ready work. In such case, if the existing pole purchased by the utility was of sufficient size to include the 40-inch safety space necessary to accommodate communications attachments, no additional cost would be reflected in make-ready costs to the attaching party.

At bottom, in determining the sizes of new poles to be purchased or installed by an electric utility, the majority of poles are installed with sufficient capacity to accommodate at least two (2) communications attachments, and often three, in addition to the utility's own electric attachments. Additionally, APPA's member utilities report that their specifications for poles often include the requirement for two or three pre-drilled holes to accommodate communications attachments. These utilities operate under an internal accounting policy that anticipates the uses of their poles by multiple third-party communications providers.⁴¹ It would be inefficient and nonsensical to do otherwise, given the prevalence of communications attachments on most utility poles.

The Commission's assumption that utilities would install poles only tall enough to meet their own needs and leave it to new attaching entities to pay for replacement poles if their attachments could not be accommodated, suggests that utilities use no foresight in their operations about pole replacement and utility infrastructure. APPA's member utilities plan and construct their electric distribution networks to ensure long term reliability, and cost issues aside, the preference of these utilities is not to expend time and resources constantly replacing and rearranging poles when those activities can be economically avoided.

⁴¹ To the limited extent that municipal utilities install distribution poles that do not contain any third-party attachments, they are almost always of a smaller size and class than the poles that are routinely purchases for majority of their systems.

Moreover, utilities do not seek to impose unnecessary costs on communications providers by making them constantly install new larger poles. Public power utilities are highly supportive of the widespread availability of affordable cable, broadband and telecommunications services, and work with providers to ensure that the necessary infrastructure is available to meet their needs. Contrary to the Commission’s assumption, it is precisely because utilities design and deploy their distribution systems taking into account the existence of third-party attachments, that the true costs of the pole need to be fully-allocated among all attaching entities, and this necessarily includes the capital costs of the pole.

Finally, as a practical matter, the Commission’s proposal to preclude pole owners from recovering their capital costs would also be counterproductive. Under such a rule, utilities would indeed have the incentive to purchase the smallest poles that would serve their own purposes, leaving it to attaching entities to pay for larger poles. Of course, few potential attaching entities would be willing or able to incur such costs, and in the end, if taken to its logical conclusion, the Commission’s proposal would result in fewer and more expensive pole attachments than would occur in the absence of its proposal. Indeed, this goes directly against the Commission’s objective of finding “ways that the Commission can eliminate or significantly reduce the need for make-ready work,”⁴² as well as the Commission’s proposal that utilities “reserve[e] space on new poles for new attachers.”⁴³

⁴² *NPRM/NOI*, at ¶ 11.

⁴³ *Id.*

For these reasons, the Commission should not further limit a utility's recovery of capital costs in the telecommunications pole attachment rate formula, particularly if such costs have not been paid by a third-party attaching entity through the make-ready process.

V. INFORMATION ON PUBLIC POWER PRICING AND FACILITIES

While recognizing that it does not have Section 224 authority over public power utility poles, the Commission nevertheless inquires as to what steps it can take to make sure that information about the availability of municipal utility poles and conduits is available to potential attaching entities.⁴⁴ There is no need for the Commission to take any action. Municipal utilities provide information on utility poles to potential attaching entities that enter into a non-disclosure agreement as part of entering into a pole attachment/conduit lease agreement. This is a straightforward process and should not create any difficulties for attaching entities that have a bona fide interest in making attachments. These facilities and the existing attachments constitute critical infrastructure with public safety and national security implications, and APPA has concerns about any requirements that would create a publicly available registry or database of such facilities. Moreover, the costs and burden of maintaining and updating such a database of infrastructure, particularly for small public power utilities, would far exceed the value.

VI. CONCLUSION

Based on the foregoing, APPA, on behalf of the nation's publicly-owned electric utilities, urges the Commission to refrain from further pursuing legal theories or other means to regulate attachments to public power utility poles. Such actions are not only unwarranted, but they are outside the scope of the Commission's statutory authority. APPA further urges the Commission

⁴⁴ *Wireline NPRM/NOI*, ¶ 31.

not to revise or reduce established application review and make-ready time frames in a manner that would compromise the safety, security and reliability of utility operations, or that would place additional financial or operational burdens on utility pole owners. Any review or revisions to the make-ready process must recognize the increasing complexity of managing access for multiple types of pole attachments by various competing providers.

Finally, the Commission should refrain from further reducing the capital costs that utilities can properly recover under its Section 224(e) telecommunications pole attachment rate formula, which would only result in requiring many municipal electric ratepayers to subsidize deployment of for-profit ventures through their electric charges.

Respectfully Submitted,

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