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

In the Matter of	)	
	)	
Accelerating Wireline Broadband Infrastructure Development by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79

COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

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June 15, 2017

EXECUTIVE SUMMARY

Cable operators have a long track record of continually investing in their networks to deliver a broad range of high quality services to American consumers and businesses. With the right regulatory framework in place, cable operators will be able to continue expanding and upgrading their wireline and wireless networks. As described in these comments, the Commission can promote these continued infrastructure investments by removing needless friction and costs from the deeper deployment of broadband technologies.

A key element of the Commission's strategy for achieving increased deployment should be improvements in the pole attachment process. In particular, the Commission should expedite and reduce the cost of installing common configurations of fiber and advanced electronics in existing networks to counter recent efforts by utilities to place costly and unnecessary constraints on such deployment. It also should take steps to accommodate the rapid deployment of short "last mile" line extensions needed to connect commercial properties or installations.

In addition, the Commission should remind utilities that they may not artificially extend Commission deadlines for completing application processes and may not double charge for costs that are already covered in pole rents and make-ready charges. It should then reduce the obscurity, unpredictability and disputes over costs by requiring pole owners to publish a schedule of all charges for rents, applications, surveys, make-ready, rearrangements, pole replacements, inspections, and any other fee or assessment.

The Commission should reject extreme forms of "one touch" make ready. Instead, any new approach should be grounded in the "right touch" principle that existing attachers must be provided with adequate prior notice of *all* planned work and a meaningful opportunity to perform the required make-ready work themselves, as is required by Section 224(h). The Commission also should improve the pole complaint process by adopting a shot clock for pole attachment

complaints and by clarifying and modifying its recent *Part 32 Order* to ensure that critical pole-specific cost data remains available.

The Commission should require all pole owners to provide access to all providers at low, uniform rates. Removing capital costs from the calculation of rental rates would be an appropriate step in further reducing rates, and could help offset potential rate increases for incumbent LEC-owned poles that are likely to result from the Commission's recent *Part 32 Order*. It is especially well-suited to situations where poles already have been fully depreciated. All pole rents, including rents for municipal poles, should be required to be "fair and reasonable" and "competitively neutral and nondiscriminatory" under Section 253, and to avoid being "unduly discriminatory" under Section 622.

Although the right of franchised cable operators to share compatible easements should be settled by now, there has been some recent resistance from some utilities to sharing their easements. The Commission can counter this development with a straightforward declaration that access to easements is required under the rights granted to franchised cable providers under federal law, in addition to common-law rights to share easements. Private agreements may not restrict such rights

The Commission should use its authority under Section 253 and Title VI to halt the efforts by some local authorities to impose restrictions on franchised cable operators' deployment of advanced equipment and services. The Commission should make clear that franchising authorities may not require additional franchises, right-of-way permissions, or fees for placing communications equipment on cable system facilities already authorized to be in the rights-of-way or for cable providers to offer new services over the same facilities. Where a cable operator already pays (through its cable franchise fee) for the right to access and utilize the

public right-of-way, the addition of broadband or telecommunications services does not impose any additional maintenance or regulatory costs and should not be treated by state or local governments as a revenue-generating opportunity. A Commission declaration is essential to send a strong signal to state and local governments that the Commission does not support ordinances that materially inhibit the provision of broadband or telecommunications services by imposing excessive fees and discriminating among providers of broadband services.

In addition, the Commission should reaffirm that state and local authorities may not dictate the technologies that cable providers use to offer communications services. Cable operators have experienced state and local efforts to prohibit, condition, or restrict a cable operator's choice and use of such technologies and to limit their deployment through moratoria, discrimination against aerial equipment, or the imposition of other unreasonable burdens and obligations. The Commission should find that any such requirements would "materially inhibit" a provider from "compet[ing] in a fair and balanced legal and regulatory environment" and therefore "prohibit or have the effect of prohibiting" broadband deployment under Section 253(a). The Commission also should find that such requirements violate Section 624(a)'s preemption of any such regulation of services, facilities and equipment as inconsistent with Title VI.

TABLE OF CONTENTS

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	)	
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COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

NCTA – The Internet & Television Association (NCTA) supports the Commission's efforts to promote the deployment of all types of broadband networks, regardless of the technology used. As explained in these comments, the Commission should exercise its authority under Section 224 of the Communications Act to reduce the cost of deploying broadband infrastructure and streamline the process for doing so. The Commission also should use its authority under Section 253 and Title VI of the Communications Act to ensure that state and local governments do not undermine federal broadband policies through excessive fees and regulatory requirements on companies that deploy broadband networks.

INTRODUCTION

The Commission has a long history of recognizing that private investment in communications infrastructure depends on sound policies regarding pole attachments and access to rights-of-way. Congress adopted Section 224 almost four decades ago, and from the start the Commission and the courts recognized the significant benefits that result from requiring pole owners to provide access to their poles at reasonable rates.[1] These requirements formed the

[1] *See, e.g., Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330-31 (2002) (*Gulf Power*) ("Congress first addressed these transactions in 1978, by enacting the Pole Attachments Act, . . . which requires

foundation for the widespread deployment of cable facilities across the country and, spurred by key decisions by the Commission, the provision of broadband and VoIP services over those same cable systems.[2]

Over the coming years, cable operators will consider plans to invest billions of dollars in expanding and upgrading their wireline and wireless networks. The largest cable operators all have announced that they expect to upgrade their wireline networks to include more fiber deployment, including some operators' plans to move to a fiber-to-the-premises service.[3] Cable operators also have invested hundreds of millions of dollars to deploy some of the largest public Wi-Fi networks in the country, which support 2.5 billion active sessions and carry 169 petabytes of data per month. NCTA's operator members also are continuing to explore broadening their wireless infrastructure investment, using both licensed and unlicensed spectrum.[4] Cable operators also are major providers of backhaul services that can help with the deployment and growth of innovative wireless services.[5]

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the Federal Communications Commission (FCC) to 'regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable.'").

[2] *See, e.g., Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, 6 FCC Rcd 7099 (1991) (finding that non-cable services provided by cable operators are protected under Section 224), *recons. dismissed*, 7 FCC Rcd 4192 (1992), *petition for rev. denied, Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 933 (D.C. Cir. 1993); *see also Gulf Power*, 534 U.S. at 333 ("The addition of a service does not change the character of the attaching entity – the entity the attachment is 'by.' And this is what matters under the statute.").

[3] *See, e.g.*, FierceCable, *Cable Capex: Comcast, Charter to Ramp Up Network Spending for Combined $16B Outlay in 2017* (Mar. 23, 2017), http://www.fiercecable.com/cable/cable-capex-top-ops-comcast-and-charter-stabilize-cpe-spending-but-ramp-up-network; LightReading, *Altice Plans FTTH For Entire US Footprint* (Nov. 30, 2016), http://www.lightreading.com/gigabit/fttx/altice-plans-ftth-for-entire-us-footprint/d/d-id/728657.

[4] *See, e.g.*, Fortune, *Expect Heavy Combat Between Cable and Wireless in 2017* (Dec. 29, 2016), http://fortune.com/2016/12/29/heavy-combat-cable-wireless/; Reply Comments of Charter Communications, Inc., GN Docket No. 14-177, at 1 (filed Oct. 31, 2016) ("Charter sees wireless as a primary area for future communications growth—and plans to be a key part of that growth. Charter intends to leverage and expand its existing Wi-Fi service, work with MVNO partners, and, at the appropriate time, invest in its own licensed spectrum based wireless network" (citations omitted)).

[5] *See, e.g.*, CableLabs, *Cable: 5G Wireless Enabler*, at 4 (Winter 2017), http://www.cablelabs.com/wp-content/uploads/2017/02/cable-5g-wireless-enabler.pdf ("Cable operators have deployed vast broadband

As explained in the *Wireline Notice*, continued improvements in the Commission's infrastructure policies will be essential to the next wave of broadband investment.[6] NCTA supports the Commission's decision to revisit its rules governing pole attachments and determine whether there are ways to streamline the process for new attachments and reduce the cost in a manner that "balances the legitimate needs and interests of new attachers, existing attachers, utilities, and the public."[7] The Commission should work to reduce the time and expense associated with attaching facilities to poles or installing them in rights-of-way and easements, but it should reject extreme "one touch" make-ready proposals that promote speed of new deployment by trampling on the property rights of existing attachers and jeopardizing the safety and quality of existing networks and services.

Similarly, NCTA encourages the Commission to exercise its authority under Section 253 and Title VI to preempt state and local laws that inhibit broadband deployment by imposing excessive fees and regulatory obligations on providers that already have authority to deploy facilities in the public right-of-way.[8] The Commission should make clear that it is unreasonable to impose additional fees on broadband and telecommunications services offered by franchised cable operators or to require additional authorization or impose unduly burdensome regulation for the deployment of services that place no additional burden on the public rights-of-way. The Commission also should use its authority under Section 253 and Title VI to ensure that rates

networks across the globe. Since wireless services rely on fixed network connectivity, this positions cable to be a key enabler of 5G.") (CableLabs 5G Report).

6 *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, 32 FCC Rcd 3266 ¶ 2 (2017) (*Wireline Notice*).

7 *Id.* ¶ 6.

8 *Id.* ¶¶ 100-110.

charged for attaching to poles owned by municipal electric companies are subject to the same standards as investor-owned utility poles.[9]

I. THE COMMISSION SHOULD CONSIDER STEPS TO STREAMLINE THE POLE ACCESS PROCESS WITHOUT HARMING EXISTING PROVIDERS

As recognized in the *Wireline Notice*, streamlining the attachment process and facilitating the placement of new facilities on poles will promote the faster and more efficient deployment of broadband infrastructure.[10] In making such changes, the Commission must strive to balance the interests of new entrants with the rights of existing providers, pole owners, and consumers to ensure that any changes do not inadvertently lead to safety or service quality issues. The proposals we endorse herein, unlike the one-touch make-ready proposals endorsed by Google and others, accomplish the Commission's objective of streamlined access to poles without upsetting the balance the Commission has struck between stakeholders.

A. The Commission Should Consider Reasonable Reductions in Fees and Time Frames Associated with Pole Access

NCTA agrees with the Commission's suggestion that there are opportunities to streamline the attachment process and reduce associated costs to meet the goal of faster and more efficient deployment of wireline broadband facilities. NCTA proposes four recommendations that will expedite common deployments, facilitate competition, eliminate some emergent barriers to deployment, and increase transparency and predictability of make-ready and other attachment expenses, while appropriately mitigating any burdens on pole owners and existing providers.

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[9] *Id.* ¶ 108.

[10] *Id.* ¶ 3.

1. The Commission Should Streamline Requirements for Common Deployments

The Commission can help streamline the continuous expansion and improvement of cable systems by reinforcing the right of cable operators to install common configurations of fiber and advanced electronics in existing networks. While cable operators already have strand on the poles, utility practices continue to affect their ability to expand and upgrade services. The Commission wisely intervened against utility constraints in the past to ensure that cable operators could overlash to existing strand without a permit or other interference from the pole owner.[11] Cable operators have safely overlashed fiber and advanced electronics to their strand for decades, and upgraded their communications services by going from analog to digital, adding competitive voice and broadband, and upgrading associated electronics, without any untoward burden on the poles.

Nevertheless, there have been recent efforts by utilities to again place unnecessary constraints on such upgrades, including overlashing. For example, in one Northeastern state, the electric utilities are proposing to change current practice (in which cable operators provide 5 days advance notice and loading information for the cable strand alone) to a requirement that no fiber may be overlashed to existing strand without the cable operator submitting a load analysis for every attachment by all parties on every pole. Many other utilities also demand unnecessary and costly pole-by-pole load analysis for fiber overlashing (tantamount to a permitting

[11] *See Amendment of Commission's Rules and Policies Governing Pole Attachments,* CS Docket Nos. 97-98 and 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12141 ¶ 73 (2001) ("Cable companies have, through overlashing, been able for decades to replace deteriorated cables or expand capacity of existing communications facilities, by tying communications conductors to existing, supporting strands of cable on poles. The 1996 Act was designed to accelerate rapid deployment of telecommunications and other services, and to increase competition among providers of these services. Overlashing existing cables reduces construction disruption and associated expense") (*2001 Pole Order*); *id.* at 12141 ¶ 75 ("We affirm our policy that neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment").

requirement) and other common installations that have been safely installed for years without incident. Some utilities in the South are beginning to insist that cable operators enter into separate pole agreement addenda before advanced electronics may be mounted on existing strand. These types of requirements not only delay new deployment of facilities, but in many cases they also are accompanied by unwarranted engineering fees as high as $250 per pole that further serve to discourage such deployment.

These costly and unnecessary approaches to common configurations are placing a needless drag on broadband deployment. Because cable operators, like the utilities, have installed facilities on the pole, they have the same interest in maintaining safe and reliable outside plant, networks and support structures as the utilities. In addition, they are commonly required by agreement to indemnify pole owners from damages. In analog days, cable operators spaced, respaced, and upgraded their strand-mounted amplifiers without incident. In digital days, cable operators overlashed fiber and upgraded amplifiers to house optical nodes without incident. Some utilities, however, have sought to abrogate these rights by demanding costly and unnecessary loading analysis to justify such common installations and overlashed fiber and advanced electronics – effectively imposing requirements for additional approvals and consent for installations on existing support strand that have been widely and safely installed and are authorized by the Commission.

The Commission can help streamline the continuous expansion and improvement of cable systems by clarifying that pole owners may not require such unnecessary analysis or pole-by-pole engineering studies, or authorizations for such common configurations for the common practice of overlashing fiber or other common equipment to existing strand. The Commission also should remove any financial incentives for utilities to impose excessive loading analyses

(which are ostensibly designed to assign costs to the attacher that should properly be the responsibility of the pole owner), such as those proposed in the above-mentioned Northeastern state, by reminding utilities that under existing law, utilities "are entitled to recover their costs from attachers for reasonable make-ready work necessitated by requests for attachment. [But] [u]tilities are not entitled to collect money from attachers for unnecessary, duplicative, or defective make-ready work."[12]

2. The Commission Should Streamline Requirements for Short Line Extensions

The Commission also should adopt rules that accommodate rapid deployment of short line extensions such as those needed to connect commercial properties or installations. Cable operators typically have facilities very near to commercial locations and are in an excellent position to compete in the business data services (BDS) market. But current application processing and make-ready deadlines have been designed for much larger projects than the "last mile" often required for the final installation of service to a commercial property. In many cases, the slightest delay in the process can cost an operator a time-sensitive contract and cost the commercial customer its choice in providers.

The proximity of competitive BDS from cable operators helps to discipline the market and provide competitive choice. Indeed, the Commission's regulatory framework for BDS is explicitly premised on the expectation that cable operators will be able to aggressively extend new facilities to meet BDS demand, even for customers that may be located half a mile or more from the edge of the cable network.[13] By adding an abbreviated timetable for access for the short

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[12] *Wireline Notice* ¶ 35 (citing *Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 24615, 24625 ¶ 26 (2003) and *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co*., Consolidated Order, 14 FCC Rcd 11599 (Cable Serv. Bur. 1999)).

[13] *Business Data Services in an Internet Protocol Environment*, Report and Order, 32 FCC Rcd 3459, 3513 ¶ 119 (2017) (*BDS Order*).

hop needed to extend new facilities to a commercial customer, the Commission can help fulfill this vision for robust BDS competition and increase investment in broadband infrastructure deployment. Specifically, NCTA proposes that the Commission adopt a rule that access requests for 30 or fewer poles must be completely fulfilled within thirty days of a request made by the attaching entity. Where that 30-day time frame is not met, the rules should allow the requesting entity to install NESC-compliant temporary extension arms to allow for the delivery of service pending permitting for permanent installations.[14]

Rules providing for the rapid installation of these short line extensions will not only encourage competition in commercial services, but could speed backhaul support for wireless facilities and help accelerate wireless broadband deployment and the densification of small cells, as discussed in further detail in Section V.B, below.[15] Adopting rules that accommodate short line extensions in a fast and predictable manner will also decrease the opportunity for pole owners to stifle competition in the commercial market.

3. The Commission Should Reaffirm That Cable Operators Have the Right to Share Utility Easements

Although the right of franchised cable operators to share compatible easements should be settled by now, cable operators are again experiencing resistance from some utilities to sharing their easements. Section 621(a)(2) of the Communications Act provides that "[a]ny franchise *shall be construed* to authorize the construction of a cable system over public rights-of-way, and *through easements*, which is within the area to be served by the cable system and which have been dedicated for *compatible uses*."[16] Section 224(f) of the Communications Act requires that

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[14] Rule 014B of the National Electrical Safety Code specifically permits temporary overhead installations.

[15] *See Accelerating Wireless Broadband Deployment*, WT Docket No. 17-79, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330 (2017) (*Wireless Notice*).

[16] 47 U.S.C. § 541(a)(2) (emphasis added).

"[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[17] Yet today, utilities in South Carolina (along with the state's Highway Department) are starting to insist that the easements underlying poles and rights of way may not be used unless the cable operator is specifically named in the easement. The Commission can and should put a stop to any revival of this archaic approach with a straightforward declaration.

In the early days of cable deployment, the right of a cable operator to use existing utility easements had to be adjudicated state by state through common law. But in 1984 Congress made clear that cable operators have access to, and a right to share, compatible easements as a national policy and statutory right that is not subject to the patchwork of sometimes conflicting or abstruse state property laws. As the legislative history of the Communications Act explains:

> Subsection 621(a)(2) specifies that any franchise issued to a cable system authorizes the construction of a cable system over public rights-of-way, and through easements, which have been dedicated to compatible uses. This would include, for example, an easement or right-of-way dedicated for electric, gas or other utility transmission . . . . Any private arrangements which seek to restrict a cable system's use of such easements or rights-of-way which have been granted to other utilities are in violation of this section and not enforceable.[18]

Key cases – which the Commission should explicitly endorse – have held that this right cannot be restricted by private agreements.[19] As it has previously done in interpreting Section 621 to promote deployment and competition,[20] the Commission should reaffirm that

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17 47 U.S.C. § 224(f).

18 H.R. Rep. No. 934, 98th Cong., 2d Sess. 59, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4696.

19 *See Centel Cable Television Co. of Fla. v. Thos. J. White Dev. Corp.*, 902 F.2d 905, 908-09 (11th Cir. 1990) (finding a private agreement prohibiting a cable provider from using utility easements across private roads violated the Act); *Centel Cable Television Co. of Fla. v. Burg & DiVosta Corp.*, 712 F. Supp. 176, 177-78 (S.D. Fla. 1988) (recognizing a cable operator's federal right to access utility easements in a new development and rejecting a requirement to enter into a separate "right-of-entry" agreement).

20 *See, e.g., Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and

cable operators have the right under Section 621 to access any compatible easement within their franchise areas, including those used by a utility.[21] Thus, a utility may not prevent or delay a cable operator's access to and use of its rights of way or easement, and may not attempt to contract around such use by cable operators.

Such a ruling would not adversely affect the owner of the underlying property. Section 621 requires that cable operators are responsible for "any damages caused by the installation, construction, operation, or removal of such facilities,"[22] and the shared use of utility easements does not in itself adversely affect the owner of the underlying property. It is well established that an additional strand attached to an existing utility pole causes no harm to the landowner and places no greater burden on the property.[23] Indeed, far from imposing any additional burdens, the installation of additional communications capacity enhances the value of underlying property

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Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007) (*2007 Cable Order*), *aff'd, All. for Cmty. Media v. FCC*, 529 F.3d 763, 783 (6th Cir. 2008).

[21] *Implementation of the Provisions of the Cable Communications Policy Act of 1984*, 58 RR2d 1 ¶¶ 78-80 (1985). The Commission should also make clear that these federal rights do not depend on whether the easement is public or private or whether it is formally dedicated, filed, registered, or whatever other technical procedure may be called for by state property law. The fact that a utility "easement" may not be recorded as such, "dedicated," or even be an "easement" at all does not mean that it is not divisible for shared use. Utility land use rights might be held in fee, or as easements, or with no paperwork at all, and be equally subject to shared use. *See, e.g. Gilpin v. Blake*, 712 P.2d 1051, 1055 (Colo. Ct. App. 1985) (finding an "implied easement of necessity" based on an interest in real property that arose from investment-backed usage).

[22] 47 U.S.C. § 541(a)(2)(C).

[23] *See C/R TV Cable, Inc. v. Shannondale, Inc.*, 27 F.3d 104, 110 (4th Cir. 1994) (addition of an additional wire to provide cable service did "not impose an unnecessary or even an increased burden on the servient estate"); *Salvaty v. Falcon Cable Television*, 165 Cal. App. 3d 798, 803 (Cal. Ct. App. 1985) ("We fail to see how the addition of cable equipment to a preexisting utility pole materially increased the burden on appellants' property"); *Hoffman v. Capitol Cablevision Sys. Inc.*, 383 N.Y.S.2d 674, 677 (App. Div. 3d Dep't 1976) (adding cable equipment on existing poles imposed "no burden on plaintiffs greater than that contemplated by the original easements"); *Joliff v. Hardin Cable Television Co.*, 26 Ohio St. 2d 103, 108 (1971) (recognizing that attachments to provide cable service are "a use similar to that granted in the easements to Ohio Power. In fact, such use constitutes no more of a burden than would the installation of telegraph and telephone wires"); *American Tel. & Tel. Co. v. McDonald*, 273 Mass. 324, 326, 173 N.E. 502 (1930) (noting that the party sharing the utility easement to install cables and cross arms imposed no additional burden because it did nothing that the initial easement holder could not have done).

by increasing the availability of services in the area.[24] By reaffirming cable operators' rights to share utility easements, the Commission will further promote the deployment of broadband services to all Americans and advance its Congressional directive to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" and to "remove barriers to infrastructure investment."[25]

4. The Commission Should Require Utilities to Make Available Schedules of Common Charges

NCTA encourages the Commission to adopt its proposal to require pole owners to publish a schedule of costs and fees associated with the application and make-ready process, but it should not establish a standard per-pole fee for make-ready activity.[26] The Commission should start by reminding pole owners of their responsibility to eliminate double steps and double charges. Pole owners today sometimes require a two-step application process in order to determine and charge survey fees before they will even treat an application as submitted for purposes of starting the 45-day clock for processing. This pre-application process is not a contemplated step on the timeline adopted by the Commission. Some pole owners also charge for back office processing of applications, assessing fees for the pole owner's administrative costs that are already included in the pole rental rate or in actual costs for make-ready. The Commission has had to periodically remind utilities that such double charges are not permitted, and it should do so again.[27]

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[24] "Metcalfe's law tells us that the addition of each single user to a network creates more than one unit of additional value to the network as a whole. Not just to new users, but to everyone that uses the network." Remarks of Jonathan Sallett, Acting FCC General Counsel, at Georgetown Center for Business and Public Policy (Mar. 12, 2014).

[25] 47 U.S.C. § 1302(a).

[26] *Wireline Notice* ¶¶ 33, 34, 36.

[27] A "utility may not recover the same expenses twice, once as a make-ready charge and again as an allocated portion of an expense account included in the calculation of the annual pole attachment rental fee." *Texas Cable and Telecomms. Ass'n v. GTE Southwest, Inc*., Order, 14 F.C.C.R. 2975, 2984-85 ¶ 32 (CSB 1999), *aff'd*, 17

The Commission also should take steps to assure that such non-recurring fees are just and reasonable. Cable operators appreciate that labor rates and make-ready costs may vary regionally, making a national standard charge difficult to develop. But there are steps that the Commission can take to reduce the obscurity, unpredictability and disputes that create needless friction in deployment. Too often, providers are embroiled in disputes over the appropriate charges for tasks, the amount of time necessary for tasks, the unpredictability of charges assessed by a utility for any particular project, and very wide differences in costs from one utility to the next, even after acknowledging differences in regional labor rates.

The Commission should assure that such costs are just and reasonable by requiring each utility to publicly post its individual charges for rents, surveys, make-ready, including rearrangements and pole replacements, post-construction inspections, and any other fee or assessment. To the extent such fees appear to be for a type of cost that should be recovered through the pole rent (such as application processing fees), the public posting should include a demonstration that there is no double recovery of costs. By injecting transparency into pole owners' make-ready costs and fees, all current and prospective attachers will be better able to plan their upgrades and extensions, and the Commission, attaching parties, and other stakeholders will be able to compare the costs across utilities. Such transparency will enhance accountability, reduce disputes, and help create market forces that will pressure charges down to "just and reasonable" levels for the type of work performed.

F.C.C.R. 6261, 6265 ¶ 11 (2002); *Texas Cable & Telecomms. Ass'n v. Entergy Servs.*, Order, 14 F.C.C.R. 9138, 9140, 9143 ¶¶ 5, 14 (CSB 1999).

B. The Commission Should Reject Extreme Forms of One Touch Make-Ready

The *Wireline Notice* solicits comment on whether the Commission should adopt some form of "one touch" or "right touch" make-ready to facilitate new construction.[28] As NCTA explains in this section, the one touch policies implemented by state and local governments to date raise some very significant concerns. To the extent that the Commission moves forward with any reforms of the make-ready process, it should strike a balance that better protects the rights of all interested stakeholders, including existing attachers.

1. Introduction of one touch make-ready policies

The Commission last reformed its make-ready rules in the *2011 Pole Attachment Order*.[29] The 2011 reforms specifically were intended to facilitate pole attachments by new providers of broadband and telecommunications services. Proponents of one touch make-ready, primarily Google Fiber, have argued that these reforms are insufficient, but they proffer scant evidence of a problem – and none is included in the *Wireline Notice* – to justify the extreme steps they argue are needed to facilitate entry.[30]

The common element of most one touch proposals is that any new attacher is granted the right, under defined circumstances, to move the facilities of existing attachers with little or no prior notice to that party. Such an approach ignores the make-ready procedures required by

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28 *Wireline Notice* ¶¶ 21-29.

29 *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (*2011 Pole Attachment Order*). As described in the *Wireline Notice*, the current rules generally provide 45 days for the pole owner to do an initial application and engineering review, 14 days to prepare a cost estimate, 14 days for the attacher to accept the cost estimate, and 60-75 days for existing attachers to perform any necessary make-ready work. *Wireline Notice* ¶¶ 7-11. The rules provide additional time for make-ready work in the case of large orders (more than 300 poles) and wireless attachments. *Id*. ¶ 12.

30 *See, e.g.*, Letter from Austin Schlick, Google, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-245 (filed July 19, 2016).

statute[31] and represents a radical change from the Commission's policies, which always have been premised on the commonsense notion that each party maintains complete control over its own facilities. According to proponents, this radical change in philosophy is necessary because waiting for each entity to move its facilities under the timelines established by the Commission would result in excessive delays in the deployment of new networks.

One touch policies have been adopted in a number of locations across the country. Two of the most extreme one touch ordinances (Louisville, Kentucky, and Nashville, Tennessee) have triggered litigation that is still pending.[32] In San Antonio, the municipally-owned electric utility has adopted one touch practices that are quite problematic from the perspective of existing providers.[33] In addition to these municipal efforts, state legislation imposing one touch requirements recently was adopted in West Virginia.[34]

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[31] 47 U.S.C. §224(h) requires that an attaching party be provided with advance notice and a reasonable opportunity to add to or modify its existing attachment.

[32] Louisville Ordinance No. 21, Series 2016 (approved Feb. 25, 2016), codified at Louisville Metro Code of Ordinances, § 116.72 (D) (Louisville Code); Nashville Ordinance No. BL 2016-343 (approved Sept. 21, 2016), codified at Nashville Code of Ordinances, § 13.18.020 (Nashville Code). In connection with the pending litigation regarding the Louisville Ordinance, the Commission's former general counsel submitted a letter suggesting that "in general" the Louisville ordinance was "consonant" with federal pole attachment policy. *See BellSouth Telecomms., LLC v. Louisville/Jefferson Cty. Metro Gov't, et al.*, Case No. 3:16-cv-00124-DJH (W.D. Ky.) Dkt. Entry #68 (Statement of Interest on behalf of the Federal Communications Commission). The Commission's federal pole attachment make-ready policy is reflected in the specific regulations it has developed after extensive notice and comment processes. That policy does not – and for the reasons set forth in these Comments, should not – permit attachers to perform work on the facilities of an existing communications provider without giving the provider both notice and an adequate opportunity to perform any needed work. Indeed, although proposals with some of the aspects of "one-touch" (specifically the use of utility approved contractors to evaluate and perform the necessary make-ready work) were proposed in the 2010 *National Broadband Plan*, the Commission in the *2011 Pole Attachment Order* reiterated the need for providing existing attachers with at least 60 days to perform their own make-ready work. 26 FCC Rcd at 5257 ¶ 31. Thus, to say that an ordinance allowing new attachers to move existing attachments without the knowledge or consent of the existing attacher is "consonant" with federal pole attachment policy is simply erroneous. Accordingly, the Commission should explicitly repudiate the letter filed by the General Counsel in the Louisville litigation.

[33] CPS Energy, Pole Attachment Standards, Version 1.0 (effective Aug. 1, 2016) (San Antonio Standards).

[34] West Va. H.B. 3093, to be codified at West Va. Code § 31G-4-2 (West Virginia Code).

2. Concerns regarding one touch make-ready policies

As demonstrated by the pending litigation in Louisville and Nashville, the adoption of one touch ordinances has generated significant concerns for existing providers and their customers. These concerns arise from the fact that one touch is premised on diminishing or eliminating an existing attacher's control over its own network facilities. Specifically, these ordinances generally provide little or no advance notice to an existing provider that its facilities will be moved,[35] little or no opportunity to perform the work even when notice is provided,[36] no ability to select the contractor that performs the work on behalf of the new entrant,[37] and limited ability to inspect and remediate (and no indemnification requirement) if the work is done poorly.[38]

The effect of these provisions is to jeopardize the safety and quality of service of existing providers. The primary concern is that work on an existing provider's facilities is being performed by a contractor with whom there is no privity of contract. Rather, the work is being performed at the direction of the new entrant, which has no experience with the cable operator's equipment and derives obvious competitive benefits from any disruption in the service being provided by an existing provider to its customers. These concerns are not hypothetical. In one city, a cable operator found that a new entrant had moved as many as 300 of the cable operator's

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35 *See, e.g.*, West Virginia Code, § 31G-4-2(a) (prior notice required only if customer outage is expected); Louisville Code, § 116.72(D)(2) (prior notice required only if customer outage is expected); San Antonio Standards, § IV(A)(5)(f) (72-hour advance notice for "simple" transfers).

36 *See, e.g.*, Nashville Code, § 13.18.020(B) (30 days from notice to perform work); Louisville Code, § 116.72(D)(2) (30 days from notice to perform work).

37 Typically, one touch rules permit the new entrant to use any contractor approved by the pole owner, with no opportunity for the owner of the existing attachment to approve or veto the selection. *See, e.g.*, West Virginia Code, § 31G-4-2(a); Louisville Code, § 116.72(D)(2); Nashville Code, § 13.18.020(A); San Antonio Standards, § IV(A)(5)(b).

38 *See, e.g.*, Louisville Code, § 116.72(D)(2) (14 days for existing attacher to conduct inspection); San Antonio Standards, § IV(A)(5)(h) (15 days for existing attacher to conduct inspection).

attachments even before the city's one touch policies took effect, requiring the operator to divert significant resources from other matters to ensure that no damage was done by the entrant. Similar problems have occurred with this company's entry in other cities, even without one touch policies.

3. The Commission should establish clear limits on one touch make-ready

The adoption of various forms of one touch make-ready requirements at the state and local level, and the intense controversy that most of those requirements have generated, suggests that Commission action on these issues could be quite helpful to all parties. Notwithstanding the limited evidence to suggest that the Commission's current rules are ineffective, NCTA does not oppose additional streamlining of the pole attachment process provided that any rule changes respect the rights of existing providers. For example, any new approach should be grounded in the "right touch" principle that existing attachers must be provided with adequate prior notice of *all* planned work (not just "complex" projects or those that the entrant unilaterally decides would cause outages) and a meaningful opportunity to perform the required make-ready work, as is required by Section 224(h). In order to assure that compensable work can proceed without interruption, the new entrant should provide funding for such work in advance, to be drawn down to pay for the work as it progresses, a model that is most likely to expedite cooperative efforts. In addition, any ability of new entrants to move existing facilities must be conditioned on the use of a contractor approved by the party that owns the facilities. The mere fact that the pole owner approves of the contractor is insufficient to protect the rights of an attaching party. Finally, a new entrant that performs work on facilities owned by another party should be required to accept full liability for improperly performed work and indemnify the existing attacher.

Developing a regulatory regime that appropriately balances all of these considerations will require a process that includes a wide variety of participants. The Broadband Deployment Advisory Committee (BDAC) process that the Commission has initiated is an excellent starting point for consideration of these issues. Accordingly, before adopting any new rules based on one touch or right touch principles, the Commission should solicit comment on any recommendations made by the BDAC.

II. ALL POLE OWNERS SHOULD BE REQUIRED TO PROVIDE ACCESS TO ALL PROVIDERS AT LOW, UNIFORM RATES

Section 224(b) requires the Commission to adopt regulations to ensure that pole attachment rates are just and reasonable.[39] In adopting rules to implement the rate parameters established in Section 224(d) for cable attachments and in Section 224(e) for telecommunications attachments, the Commission consistently has recognized that there is a "zone of reasonableness" within which rates should fall, with fully allocated costs at the high end of the zone and marginal costs at the low end of the zone.[40] Both of the Commission's current rate formulas tend to produce rates toward the high end of the zone of reasonableness because they require all attaching parties to pay rental rates that contribute to the capital cost of the pole, above and beyond any capital costs they must pay in make-ready charges.[41]

The Commission consistently has recognized that low, uniform pole attachment rates are critical to continued deployment of broadband services, particularly in rural areas where there are

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39 47 U.S.C. § 224(b).

40 *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987) ("The minimum measure is thus equivalent to the marginal cost of attachments, while the statutory maximum measure is determined by the fully allocated cost of the construction and operation of the pole to which the cable is attached."); *2011 Pole Attachment Order*, 26 FCC Rcd at 5295-96 ¶ 127.

41 *2011 Pole Attachment Order*, 26 FCC Rcd at 5304 ¶ 149.

more poles and fewer customers, *i.e.*, higher pole cost per customer.[42] The Commission's 2011 reforms to the telecommunications rate formula were designed to achieve this objective by ensuring that the rates produced by that formula generally are similar to the rates produced by the cable rate formula.[43]

The proposal in the *Wireline Notice* to modify the rate formulas by removing capital costs would be an appropriate step in further reducing rates for all types of attaching parties. Removing capital costs from the rate formulas, while continuing to allow pole owners to recover such costs through make-ready charges, ensures that attaching parties are only contributing to capital costs that are directly attributable to their attachments. Where there are no capital costs attributable to an attachment (*e.g.*, where there is ample room on the pole for a new attachment), the capital costs of the pole are borne by the pole owner and recovered from the pole owner's customers.

Adopting the proposal to eliminate capital costs from the pole attachment formulas would have the benefit of offsetting potential rate increases for incumbent LEC-owned poles that are likely to result from the Commission's recent *Part 32 Order*, which allows these carriers to transition from regulated Part 32 accounting mechanisms to Generally Accepted Accounting Principles (GAAP).[44] As explained in NCTA's petition for reconsideration of that order, eliminating the accounting rules that for decades have governed the development of rates for attaching to incumbent LEC poles creates a substantial risk of significant increases in pole

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42 *Connecting America: The National Broadband Plan*, GN Docket No. 09-51, at 110 (Omnibus Broadband Initiative 2010) (*National Broadband Plan*), https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf.

43 *2011 Pole Attachment Order*, 26 FCC Rcd at 5305 ¶ 151; *Implementation of Section 224 of the Act*, Order on Reconsideration, 30 FCC Rcd 13731, 13732 ¶ 3 (2015) (*2015 Pole Attachment Reconsideration*).

44 *Comprehensive Review of the Part 32 Uniform System of Accounts*, Report and Order, 32 FCC Rcd 1735, 1744 ¶ 31 (2017) (*Part 32 Order*).

attachment rates.[45] Because such a result would completely undermine the Commission's otherwise sound pole attachment policies, the Commission should move expeditiously – in the instant proceeding and/or the Part 32 proceeding – to guard against such an outcome.

An approach that removes capital costs from the rate formulas is especially well-suited to situations where poles already have been fully depreciated. As NCTA has explained in its pending petition for reconsideration of the *Part 32 Order*, many incumbent LECs have fully depreciated their poles but continue to charge rates that include a contribution to the capital cost of the pole.[46] Revising the rate formulas as proposed in the *Wireline Notice* would put a long-overdue end to this windfall.

Finally, the *Wireline Notice* solicits comment on the treatment of "commingled" services.[47] A key virtue of the Commission's current rate formulas is that the two formulas produce equivalent rates, thereby eliminating artificial rate differences based solely on the types of services running through the attachment.[48] To the extent the Commission adopts any changes to its pole attachment rate regime, it should strive to preserve this feature of the rules. Given that objective, there appears no need to change the treatment of commingled services and certainly no need for a third rate formula. As is the case today, and consistent with the Supreme Court's decision in *Gulf Power*, the cable rate formula should apply when a provider offers cable and information services or unclassified services, while the telecommunications rate formula should

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45 *Comprehensive Review of the Part 32 Uniform System of Accounts*, WC Docket No. 14-130, Petition for Reconsideration of NCTA – The Internet & Television Association at 11-20 (filed June 5, 2017) (NCTA Part 32 Petition).

46 *Id.* at 17.

47 *Wireline Notice* ¶ 42.

48 *2015 Pole Attachment Reconsideration*, 30 FCC Rcd at 13739-40 ¶ 19.

apply when a company offers telecommunications service.[49] In either case, the rates should be similar.

III. THE COMMISSION SHOULD TAKE STEPS TO IMPROVE THE POLE ATTACHMENT COMPLAINT PROCESS

NCTA strongly agrees with the Commission's statement in the *Wireline Notice* that "increasing transparency of cost information could lead to more efficient pole attachment negotiations."[50] Currently the biggest threat to the transparency and the proper functioning of the pole attachment process is the Commission's recent decision in the *Part 32 Order*.[51] As explained in detail in NCTA's pending petition for reconsideration of that order, for decades "the critical pole specific data has been available even to the smallest rural attacher and all parties thus know how a particular pole attachment rate was derived."[52] The *Part 32 Order* jeopardizes this situation unless the Commission adopts a number of clarifications and changes recommended by NCTA to ensure that attaching parties are able to access the information necessary to confirm that pole attachment rates are being developed in a manner consistent with the Commission's rules.

Specifically, NCTA has requested that "the Commission should first reaffirm that attachers still enjoy the same pre-complaint discovery rights that exist under the current pole attachment rules."[53] In addition, NCTA's petition proposes that the Commission "preserve the efficacy of its pole attachment procedures still further by requiring the automatic posting of pole

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49 *Gulf Power*, 534 U.S. at 333.

50 *Wireline Notice* ¶ 27.

51 NCTA Part 32 Petition at 8-11.

52 *Id*. at 5.

53 *Id*. at 9.

attachment rate data by carriers."[54] Adopting these changes would ensure that attaching parties have the same access to information regarding incumbent LEC-owned poles that they do when poles are owned by electric utilities.

In addition to the clarifications and changes recommended by NCTA in its petition for reconsideration of the *Part 32 Order*, the Commission also should adopt the proposal in the *Wireline Notice* to establish a shot clock for pole attachment complaints.[55] The Commission's rules include a variety of mechanisms that historically have helped to limit the need for formal complaints (*e.g.*, clear rate formulas combined with publicly available cost information), but complaints still are an inevitable part of a regime in which the pole owner generally is an unwilling participant. While the Commission's "sign and sue" rule reduces some of the urgency around pole attachment complaints by enabling parties to attach facilities pursuant to disputed agreements,[56] the pendency of a complaint still produces uncertainty that may not be conducive to the swift deployment of facilities. Adding a shot clock to the complaint process would ensure a timely resolution of any disputed issues, which generally should be beneficial to all parties.

IV. THERE IS NO REASON TO PROVIDE INCUMBENT LECS WITH ADDITIONAL RIGHTS TO USE COMPETITIVE LEC CONDUIT

As explained in the *Wireline Notice*, the Commission has interpreted Section 224 in a manner that treats incumbent LECs differently than other telecommunications carriers. In particular, while all LECs are subject to a statutory obligation to provide access to poles, ducts, and conduit pursuant to Sections 251(b) and 224, the Commission has found that incumbent LECs are not within the class of telecommunications carriers that possess rights under Section

54 *Id.* at 10.

55 *Wireline Notice* ¶¶ 47-51.

56 47 C.F.R. § 1.1404(d).

224(a) and therefore have no right of access under Section 251(b).[57] The *Wireline Notice* solicits comment on whether to change its interpretation of these provisions so as to provide incumbent LECs and competitive LECs with "reciprocal access" to each other's infrastructure.[58]

As the Commission long has recognized, differences between incumbent and competitive LECs exist and often justify disparate regulatory treatment between the two categories of providers.[59] In the context of broadband deployment, imposing new obligations on competitive LECs would be of limited relevance because the only infrastructure owned by competitive LECs that conceivably would be useful to an incumbent LEC is conduit. While local governments generally will not approve more than one set of poles on a street, it is rare that a local government would preclude the incumbent LEC from building its own conduit. Accordingly, there is no demonstrated need for imposing any type of sharing requirement on competitive providers.[60] Given this history and the absence of any new facts or policy arguments that would warrant a change in policy, the proposal should be rejected.

V. THE COMMISSION SHOULD USE ITS AUTHORITY UNDER SECTION 253 AND TITLE VI TO PROHIBIT EXCESSIVE FEES OR AUTHORIZATIONS FOR WIRELINE AND WIRELESS ACCESS TO PUBLIC RIGHTS-OF-WAY AND INFRASTRUCTURE

The *Wireline Notice* recognizes that pole attachments are not the only area where the Commission can reform its policies to better promote broadband deployment. The Commission

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57 *Wireline Notice* ¶¶ 52-53.

58 *Id.* ¶ 54.

59 *Id.* ¶ 52; *see also Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations*, Memorandum Opinion and Order, 30 FCC Rcd 6157, 6203 ¶ 82 (2015) ("[T]he asymmetrical nature of the access requirements in Sections 251(b)(4) and 224 is not an unintended consequence, as evidenced by the fact that the Commission has consistently declined to extend this incumbent LEC obligation to competitors."); *BDS Order*, 32 FCC Rcd at 3539 ¶ 182.

60 Contrary to the suggestion that current policy "dampens the incentives for all local exchange carriers to build and deploy the infrastructure necessary for advanced services," *Wireline Notice* ¶ 53, current policy promotes investment by ensuring that competitors can reap the benefits of their investments in conduit.

appropriately raises questions in both the *Wireline Notice* and the *Wireless Notice* regarding what steps it should take pursuant to its authority under Section 253 to preempt state and local regulations that inhibit broadband deployment.[61]

In addressing these issues, the Commission should take a holistic view of the marketplace that does not favor any class of providers or technologies over any other. The cable industry's broadband deployments highlight the trend toward technological convergence and the importance of technology neutral policies. Not only does wireline cable broadband pass 93 percent of U.S. homes,[62] but cable operators offer wireless broadband to their customers through in-home and public Wi-Fi hotspots, which alleviate the burden on mobile providers' congested licensed networks. As some of NCTA's members continue to explore technologies that could enable them to operate their own licensed wireless networks, they also see their wireline deployments as a key enabler of 5G small cell deployments. In an environment where wireline and wireless technologies converge and become ever more interdependent, the Commission should strive to adopt policies that promote investment by all types of companies using all types of technologies. Below we identify a few situations where Commission intervention may be warranted.

A. Imposing Broadband or Telecommunications Right-of-Way Fees on a Franchised Cable Operator is Unreasonable

The Commission should exercise its authority under Section 253 to prohibit local governments from imposing fees for broadband or telecommunications services offered by cable operators that place no additional burden on the public right-of-way. Where a cable operator already pays (through its cable franchise fee) for the right to access and utilize the public right-

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61 *Wireline Notice* ¶¶ 100-110; *see also Wireless Notice* ¶¶ 15, 87-91.

62 CableLabs 5G Report at 4.

of-way, the addition of broadband or telecommunications services does not impose any additional maintenance or regulatory costs and should not be treated by state or local governments as a revenue-generating opportunity, as such measures needlessly drive up consumer costs, discourage broadband adoption, and burden deployment.

The Commission also has authority under Title VI to restrict the imposition of such fees. Section 621(a)(2) makes clear that a cable system may be used to provide services other than cable service and Section 624(a) permits a franchising authority to regulate "services, facilities, and equipment" only to the extent consistent with Title VI.[63] The combination of these provisions strongly suggests that the imposition of fees in excess of the five percent franchise fee provided for in Section 622(b) are not permitted.[64]

Declaring such additional fees unreasonable when applied to providers with existing cable franchises also is fully consistent with Commission statements that regardless of regulatory classification, franchised cable operators are not required to obtain additional franchises or pay additional fees to provide services other than cable service. In the *Open Internet Order*, the Commission held that reclassification of broadband Internet access service (BIAS) should not serve as justification to require a franchised cable operator to "obtain an additional or modified franchise in connection with the provision of [BIAS], or to pay any new franchising fees in connection with provision of such services."[65] Similarly, in the *Cable Modem Order*, the Commission tentatively concluded that "Title VI does not provide a basis for a local franchising

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63 47 U.S.C. §§ 541(a)(2), 544(a).

64 47 U.S.C. § 542(b). As discussed below, the Commission should explicitly reject the contrary conclusion reached by the Oregon Supreme Court in *City of Eugene v. Comcast of Or. II Inc.*, 359 Or. 528 (2015).

65 *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5804 ¶ 433 n.1285 (2015).

authority to impose an additional franchise on a cable operator that provides cable modem service."[66]

Prohibiting excessive fees is also good policy. Cable franchises generally contain construction provisions, fees, and other protections for the franchisor, and thus already protect legitimate state and local government interests in regulating access to the public rights-of-way and recovering their costs of such regulation. The deployment of new services over franchised cable systems serves the Commission's goal of furthering broadband deployment, while presenting no threat to the existing ability of state and local governments to protect their interests through the operators' franchise agreements. Indeed, the public rights of way are a public good held by local authorities in the public trust.[67] As the managers of the rights of way, local authorities are not entitled to treat them as profit centers.[68] Local governments should not be raising costs for communications consumers at the very time when the federal government is trying to promote deployment and affordability.[69]

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66 *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, 4849-50 ¶ 102 (2002), *aff'd, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967 (2005).

67 *See, e.g., Am. Tel. & Tel. Co. v. Village of Arlington Heights*, 620 N.E.2d 1040, 1044 (Ill. 1993) (recognizing the general principle that the "public streets are held in trust for use of the public" and the local regulatory authority does "not grant any authority to rent or lease parts, or all, of a public street"); *People v. Kerr*, 27 N.Y. 188, 211-12 (N.Y. 1863) (articulating that public streets are held by the city "in trust for the public use").

68 *See, e.g., Mackay Tel. & Cable Co. v. City of Little Rock*, 250 U.S. 94, 99 (1919) (local government right of way fees may be "for the special cost of supervising and regulating the poles, wires and other fixtures and of issuing the necessary permits"); *Postal Tel.-Cable Co. v. City of Richmond*, 249 U.S. 252, 260 (1919) (right of way charges by the city must be "reasonably proportionate to the service to be rendered [by the city] and the liabilities involved"); *Western Union Tel. Co. v. Borough of New Hope*, 187 U.S. 419, 426 (1903) (holding that the reasonableness of a local right of way fee "is *not* to be measured *by the value of the poles and wires or of the land occupied, nor by the profits of the business*" (emphasis added)); *Village of Arlington Heights*, 620 N.E.2d at 1042 (holding that local regulatory authority does "not grant any authority to rent or lease parts, or all, of a public street"); s*ee also NextG Networks of N.Y., Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063, at *18 (S.D.N.Y. 2004) (holding that the city's franchising and fee scheme for use of city-owned poles in the rights of way "are not of a purely proprietary nature, but rather, were taken pursuant to regulatory objectives or policy").

69 The Commission asks whether Section 622(i) of the Act constrains the Commission's ability to "address 'excessive' cable franchise fees." *Wireline Notice* ¶ 104. This provision is no barrier to action. The Commission has been given "*ultimate responsibility* for enforcing the franchise fee provision," *ACLU v. FCC*,

NCTA is particularly concerned about the implications of a 2016 decision by the Oregon Supreme Court rejecting a challenge to the broadband license fee imposed by the City of Eugene.[70] On top of the five percent franchise fee on video revenue, the City of Eugene has imposed a broadband license fee of seven percent of telecommunications (including broadband) revenues,[71] even though adding broadband services to the traditional cable video plant imposes no new burden on the rights-of-way. The city reasons that neither the existing cable franchise nor the franchise provisions in Title VI provided Comcast with a preexisting right to use the public rights-of-way for telecommunications services using facilities it has already deployed.[72] The court agreed and found that this broadband license fee was paid in return for a specific privilege granted to Comcast and therefore not considered a tax that would be barred by the Internet Tax Freedom Act.[73] Of particular relevance here, as part of that analysis the court found that the *Open Internet Order* language cited above was somehow inapplicable because the use of the term "franchising fees" meant the Commission only intended to preclude additional fees on cable service.[74] The court separately found that the application of the seven percent broadband license fee did not violate the five percent cap on franchise fees in Title VI of the Communications Act.[75]

The Commission should send a strong signal that the Oregon Supreme Court misinterpreted the language in the *Open Internet Order* and Title VI and that the Commission

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823 F.2d 1554, 1574 (D.C. Cir. 1987), as it did recently in comprehensively reviewing and capping municipal franchise fees on incumbent and new operators. *All. for Cmty. Media*, 529 F.3d at 783.

70 *City of Eugene*, 359 Or. 528.

71 *Id.* at 534.

72 *Id.* at 536.

73 *See id.* at 539-55.

74 *Id.* at 554-55.

75 *Id.* at 555-58.

does not support ordinances that materially inhibit the provision of broadband or telecommunications services by imposing excessive fees and discriminating among providers of broadband services.[76] The Eugene ordinance's imposition of a license fee of seven percent of telecommunications (including broadband) revenues – on top of the franchise fee equal to five percent of cable revenues – needlessly adds to the retail cost of broadband service, impeding deployment and adoption, and is not justified by any additional cost or material burden incurred by the city.[77] Absent a clear statement from the Commission that such an approach would be presumed to materially inhibit deployment and be neither "fair and reasonable" nor "competitively neutral and nondiscriminatory" under Section 253, we are concerned that other jurisdictions could follow this path and impose new fees on broadband services.[78]

B. State and Local Governments Should Be Prohibited From Dictating the Technologies that Cable Operators Use to Offer Their Services

In addition to the fee issues discussed above, the *Wireline Notice* also asks whether the Commission should adopt rules prohibiting unreasonable conditions or requirements in the context of granting access to public rights-of-way for the deployment of broadband facilities.[79] The *Wireless Notice* also inquires how the Commission should interpret the language in Section 253(a) that proscribes state and local conduct that would "prohibit or have the effect of prohibiting" a business from providing telecommunications services.[80] In response to these questions, NCTA encourages the Commission to make clear that franchised cable operators may

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[76] The Oregon court expressly stated that its decision did not reach the question of whether the Eugene ordinance was valid under Section 253, so that question remains open for resolution by the Commission. *Id.* at 553 n.14.

[77] In addition to the 7% broadband license fee, Eugene imposes a 7% license fee and 2% registration fee on Comcast's VoIP and Ethernet transport services, as well as its cellular backhaul services. Further deployment of the latter will be a crucial element in supporting the deployment of 5G.

[78] A number of Oregon communities already are assessing other non-cable services, such as VoIP and Ethernet.

[79] *Wireline Notice* ¶ 106.

[80] *Wireless Notice* ¶¶ 90-91.

not be required to obtain an additional local franchise or state certification to deploy facilities necessary for the provision of additional services, nor may cities impose other obligations that restrict the technology or equipment that may be deployed. The Commission should determine that such restrictions or additional obligations would "prohibit or have the effect of prohibiting" broadband deployment under Section 253(a).

For example, cable operators have encountered this road block in the State of California, where the California Public Utilities Commission has determined that a cable operator must obtain certification as a facilities-based CMRS carrier before it may install wireless equipment on poles.[81] Cable operators have experienced similar problems with local governments that have suggested that the deployment of fiber to a cell site is not authorized under the operator's cable franchise. These policies are at odds with Section 253(a) because they materially inhibit the ability of cable operators to deliver new and innovative wireless broadband services directly to the public in competition with existing wireless carriers, as well as offer competitive options for small cell and other infrastructure solutions to CMRS providers.[82] Nor are such state policies consistent with the Commission's precedent interpreting the savings clause in Section 253(b).[83] The Commission should make clear that once a duly franchised cable operator has permission to deploy facilities in the public right-of-way, a state or local government may not require separate

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81 *Decision Denying the Petition to Open a Rulemaking Proceeding to Extend the Right-Of Way Rules Adopted by Decision 16-01-046 to Cable Television Corporations*, Decision 17-02-006 at 17-18 (Feb. 10, 2017).

82 NCTA notes that to curb this type of broadband-impeding overreach by state and local actors and ensure uniformity across the country, the Commission should clarify that it agrees with the First, Second, and Tenth Circuits that under Section 253(a) it is sufficient that a state or local legal requirement "*may* have the effect of prohibiting the ability of an entity to provide telecommunications services" in order for the Commission to preempt it. *Wireless Notice* ¶ 91. The higher burden of establishing "actual or effective" prohibition imposed by the Eighth and Ninth Circuits could leave requirements like the California CMRS certification requirement above in place and would therefore undermine the Commission's broadband deployment goals.

83 *See, e.g., New England Public Communications Council Petition for Preemption Pursuant to Section 253*, CCB Pol. 96-11, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19722 ¶ 21 (1996).

permission for facilities necessary to provide telecommunications or broadband services, where the proposed facilities impose no additional material burden on the right of way.

The Commission also should establish that state and local franchising authorities may not prohibit, condition, or restrict a cable operator's choice and use of technologies or limit deployment through moratoria, discriminatory policies against aerial equipment, or other unreasonable burdens.[84] For example, a number of Western communities place strict limits on the use of new aerial facilities, some even going so far as to prohibit new aerial plant in areas where aerial facilities already exist. In many cases, the problems caused by these provisions are compounded by requirements that severely limit the ability of providers to perform the street cuts necessary to deploy facilities underground. The deployment of broadband and telecommunications equipment, including fiber and small cells, advances the Commission's broadband policies and consequently the Commission should make clear that state and local governments may not attempt to burden such deployment through unnecessary regulatory obligations.

Restraining local government practices such as those identified above is fully consistent with the Commission's authority under Section 253 of the Act. As the Commission has recognized previously, a regulatory obligation need not completely preclude the provision of a telecommunications service to run afoul of Section 253(a). Rather, state or local laws that "materially inhibit" a provider from "compet[ing] in a fair and balanced legal and regulatory environment" violate that provision.[85]

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[84] *See, e.g., Wireless Notice* ¶ 22 (seeking comment on state and local moratoria on processing wireless siting applications), ¶ 98 (seeking comment on localities' efforts to relocate utility and telecommunications facilities underground).

[85] *Wireline Notice* ¶ 108 n.153 (quoting *Cal. Payphone Ass'n Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Cal.*, CCB Pol. 96-26, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14209 ¶ 38 (1997)); *see also TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002).

As the Commission considers the scope of Section 253 and in what circumstances federal preemption of state and local activity is necessary in order to promote broadband deployment, the Commission itself should adopt a technology neutral approach. As noted earlier in these comments, dense networks of 5G small cells will rely heavily on wireline deployments for backhaul, a need that the cable industry is well-placed to meet. Federal remedies designed to ensure that state and local requirements do not unduly burden the deployment of wireless infrastructure may not be meaningful if states and municipalities have also erected barriers to deployment of the wired backhaul necessary to support those small cells. Consequently, NCTA urges the Wireline Competition Bureau and Wireless Telecommunications Bureau to coordinate closely on the policies they adopt to ensure a holistic approach that streamlines both wireline and wireless broadband deployment.

The Commission also has authority to prohibit unnecessary regulation of cable operators under Title VI of the Act. Section 621(a)(2) authorizes a franchised cable system to operate in public rights-of-way. Congress and the Commission both provide that a "facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service."[86] Section 621(b) denies the local franchising authority the right to exclude such services from cable systems, and Section 624(a) preempts any other regulation of services, facilities and equipment as inconsistent with Title VI.

The Commission should draw on its long and successful history of arresting such barriers to service, which includes preempting local zoning to advance the deployment of satellite

[86] *Heritage Cablevision*, 6 FCC Rcd at 7104 ¶ 24 (quoting H.R. Rep No 98-934, 98th Cong., 2d Sess. at 44 (1984)).

dishes,[87] declaring that cable systems could carry data and other non-cable services and retain their rights as cable systems,[88] warning localities that sought to "impose a redundant 'third tier' of telecommunications regulation" on data over cable that such "provisions will be difficult to justify under Section 253(c),"[89] and placing limits on franchising authorities to facilitate telephone company entry into cable.[90] In this docket, it should likewise construe Section 621 to prevent franchising authorities from imposing additional restrictions or requirements on already-franchised cable systems that seek to offer additional services through their cable systems.

C. Cable Franchise Obligations Should Be a Relevant Consideration in Assessing Whether State or Local Right-of-Way Obligations are Reasonable

The *Wireline Notice* asks whether cable franchise fees should "be taken into account when determining whether other types of fees are excessive" for purposes of Section 253.[91] The Commission should answer this question in the affirmative. As NCTA has explained,[92] the difficulty in considering whether any particular obligation has been imposed in a nondiscriminatory manner for purposes of Section 253(c) is that different types of entities may have different rights and obligations in connection with their use of the rights-of-way. For

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87 *Preemption of Local Zoning and Other Regulation of Receive Only Satellite Earth Stations*, 51 Fed. Reg. 5519 (1986).

88 *Heritage Cablevision*, 6 FCC Rcd at 7105 ¶ 28.

89 *TCI Cablevision of Oakland County, Inc*, 12 FCC Rcd 21396 ¶ 105 (1997) *aff'd*, FCC 98-216, 1998 FCC LEXIS 4562 (Sept. 4, 1998); *see also Bell Atlantic-Maryland, Inc. v. Prince George's Cty.*, 49 F. Supp. 2d 805, 813 (D. Md. 1999) ("It was Congress's intention that market competition, rather than state or local regulations, would primarily determine which companies would provide the telecommunications services demanded by consumers. To carry out this goal, Congress adopted sweeping restrictions on the authority of state and local governments to limit the ability of telecommunications companies to do business in local markets." (internal citation omitted)).

90 *2007 Cable Order*, 22 FCC Rcd 5101; *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Second Report and Order, 22 FCC Rcd 19633 (2007); *All. for Cmty. Media*, 529 F.3d at 783.

91 *Wireline Notice* ¶ 104.

92 *See* Reply Comments of NCTA – The Internet & Television Association, WT Docket No. 16-421 (filed Apr. 7, 2017).

example, cable operators and wireless providers historically have used different technology and been subject to different regulatory regimes. But increasingly all companies will be competing for the same customers by offering the same services using similar networks that incorporate wireless and wireline technology. Accordingly, any assessment of whether fees imposed on one set of providers are "competitively neutral and nondiscriminatory" for purposes of Section 253(c) should consider the full scope of rights and obligations faced by other providers, including the fact that cable operators are subject to revenue-based franchise fees that are paid as a condition of using the public rights-of-way.

D. The Commission Should Exercise Its Section 253 and Title VI Authority to Ensure That Municipal Pole Attachment Rates are Reasonable

The Commission has long recognized that Section 224 contains exceptions that limit its effectiveness. In particular, as explained in the National Broadband Plan, pole attachment rates of municipally-owned utilities are not subject to regulation under Section 224.[93] Not coincidentally, cable operators often find that such unregulated rates tend to be arbitrarily determined and much higher than rates charges by utilities that are regulated under Section 224.

Given this history, NCTA supports the Commission's proposal to use its authority under Section 253 to bring municipal pole attachment rates into line with rates that are subject to federal or state regulation.[94] Section 253 requires that fees assessed for use of the public right-of-way must be "fair and reasonable" and "competitively neutral and nondiscriminatory."[95] As the Commission has found repeatedly in its application of Section 224, a pole attachment rate

93 National Broadband Plan at 112.

94 *Wireline Notice* ¶ 108.

95 47 U.S.C. § 253(c).

must be cost-based to be considered reasonable.[96] All pole rents, including rents for municipal poles, should be reduced to the Commission's cost formula to be "fair and reasonable" and "competitively neutral and nondiscriminatory" under Section 253, and to avoid being "unduly discriminatory" under Section 622.

CONCLUSION

For all the reasons explained above, NCTA encourages the Commission to take a holistic approach to right-of-way management that encourages deployment by all providers and all technologies. Specifically, the Commission should streamline the application and make-ready process in a manner that balances the interests of all parties and it should take steps to reduce pole rental rates and other costs associated with pole attachments, including make-ready costs. The Commission also should prevent state and local governments from imposing excessive fees or unnecessary regulatory obligations on companies that deploy broadband or telecommunications facilities in the public rights-of-way.

Respectfully submitted,

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June 15, 2017

[96] *See, e.g., 2011 Pole Attachment Order*, 26 FCC Rcd at 5296 ¶ 127 ("[S]ection 224(d)(1) defines a just and reasonable rate as ranging from a statutory minimum based on the additional costs of providing pole attachments to a statutory maximum based on fully allocated costs."); *id*. at 5300 ¶ 140 ("Identifying reasonable, albeit different interpretations of the ambiguous term 'cost' that are consistent with the statute thus provides an upper and lower limit on the possible telecom rates that would be consistent with Section 224(e)").