

Before the
Federal Communications Commission
Washington, D.C. 20554

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

To: The Commission

COMMENTS
OF THE
COALITION OF CONCERNED UTILITIES

Arizona Public Service Company
Berkshire Hathaway Energy
Eversource Energy
Exelon Corporation
FirstEnergy
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SUMMARY OF ARGUMENT

The *Coalition of Concerned Utilities* appreciates that the Commission recognizes the important role that utility pole owners play in the advancement of broadband services, and appreciates the Commission's recognition that ensuring the safe and reliable operation of electric distribution systems is a paramount concern.

As explained in these Comments, NCTA's Petition for Declaratory Ruling is counterproductive to the Commission's goal of promoting broadband deployment. For the reasons explained herein, the Petition is also anticompetitive, misleading and ill-informed.

Over the years, electric utilities have diverted valuable, scarce resources from their own electric operations to accommodate communications attachments, and a good portion of the costs they incur to accommodate communications attachers are not recovered. Yet ever since regulation of communications company attachments began, electric utility pole owners have voluntarily replaced poles to expand pole capacity with taller or stronger poles to accommodate new attachers, despite having no legal requirement to do so.

NCTA's Petition contains proposals that would burden utilities even further, by requiring them to pay for these expansions of capacity and by ordering them to perform these capacity expansions rapidly, at the expense of safety and service reliability. Utilities are willing to work to expand capacity for new attachers because they recognize the necessity of deployment of advanced communications for the benefit of their own communities. Utilities, however, cannot continue to assist at any cost.

The Pole Attachment Act, as interpreted by the courts and the Commission, clearly allows utilities to deny access to their facilities for lack of capacity, and by anyone's measure,

the replacement of existing poles with new, stronger, and often taller poles with expanded capabilities to accommodate new attacher facilities, constitutes an expansion of capacity.

Since the Commission began regulating pole attachments following the 1978 Pole Attachment Act, the Commission has held that utilities must be reimbursed for out-of-pocket costs incurred to accommodate new attachers, including the out-of-pocket costs associated with pole replacements. The entire industry, pole owners and attachers alike, have understood that utility pole owners must be reimbursed, and for more than four decades since 1978, that process has successfully accommodated the needs of all parties.

NCTA's Petition would reverse this successful process and have these utility pole owners begin to shoulder the great majority of pole replacement costs to accommodate new attachers.

NCTA's Petition would also have utilities sacrifice the safety and reliability of their systems by accelerating pole replacements. Ordering utilities to forfeit control over pole replacements, however, is unsafe, unwarranted, and bad public policy.

The willingness of electric utility pole owners to replace poles for new attachers has been dependent on reimbursement for the pole replacements and on maintaining control over the pole replacement process. By shifting the economic burden to utility pole owners and forcing utilities to surrender control, NCTA's Petition would severely limit the ability of pole owners to replace poles to accommodate new attachers.

Because utility pole owners would be unable to expand capacity to accommodate new attachers, NCTA's requests would result in less broadband deployment. If utilities are no longer compensated for pole replacements and can no longer control the pole replacement process, many utility pole owners will decide they can no longer economically or safely replace poles on a voluntary basis for new attachers. In those areas where voluntary pole replacements do not

occur, attaching entities would be forced to install their facilities underground. NCTA's Petition, therefore, would have the perverse effect of making it more expensive and time consuming to provide broadband service to unserved areas.

Although the Petition requests to transfer pole replacement costs from new attachers to pole owners only in "unserved areas," the rationale the Petition alleges for such a ruling is not limited to "unserved areas" at all. And the Pole Attachment Act does not allow utilities to discriminate in favor of attachment requests in unserved areas in any event. NCTA's Petition, therefore, cannot be limited to "unserved areas." As such, any relief the Commission does or does not provide would end up applying equally to served and unserved areas, which would eliminate most of the rationale the Petition alleges to support its request.

Because NCTA's request would have an effect everywhere on both unserved areas and areas already served, NCTA's Petition would result not only in less broadband deployment, it would also result in less competition. Large, established cable companies like Charter and Comcast have benefited enormously from decades of voluntary pole replacements by utility pole owners and they have already largely built out their systems as far as they care to build. If pole owners were unable to replace poles for new competitors in these already served areas, the entities that would suffer are the new competitors, which need to attach to already congested poles that often need to be replaced. By forcing these would-be competitors to go underground, NCTA's Petition would make it more expensive and time-consuming for these new entrants to compete.

NCTA's Petition also misunderstands utility pole replacements. The premature replacement of serviceable utility poles is a costly, time-consuming activity that makes no sense for utilities to perform without compensation. Such premature replacements with no

compensation would result in the underfunding of important system reliability projects, and jeopardizing those projects in favor of the premature replacement of distribution poles to benefit communications attachers is not a decision the Commission should force utility pole owners to make.

The Petition also contains numerous misstatements about utility pole replacement practices. Contrary to claims made in the Petition, utilities replace poles for third parties using the same process and personnel that are used to replace poles for themselves. Utilities are not “postponing necessary repairs,” and do not “underinvest in infrastructure.” Utilities do not replace poles to increase capacity with the hope for future attachment revenues or because some day they might themselves provide broadband service. Poles do not need more frequent replacement in rural areas than in more congested areas, and the “chief beneficiary” of a pole replacement is the new attacher, not the utility pole owner. Finally, even the State of Maine, which is the sole jurisdiction the Petition cites to support its request to modify pole replacement cost allocations, presumes that utility pole owners do not benefit from pole replacements.

NCTA’s Petition also mischaracterizes Commission rulings and several pole attachment complaint cases. First, the Commission has always allowed utilities to recover the full costs of pole replacements. Second, the Petition’s new definition of company “betterment” has never been the Commission’s definition of company “betterment.” Third, the Petition’s claim that its request to pay only a small amount of new pole costs is not the “natural extension” of the Commission’s preexisting safety violation policy; it is completely at odds with it. Fourth, the *Local Competition Order* requires attachers who benefit from a pole replacement to share in the cost, but only in limited circumstances that are far different than what NCTA contends. The Petition’s creative but convoluted interpretation of the *Local Competition Order* is entirely

incorrect. Finally, the several pole attachment complaint cases cited by the Petition do not stand for what NCTA alleges. Complaint allegations are not findings of fact, and the utility pole owner answers to those complaints that tell a completely different story. NCTA's mischaracterizations of these complaint proceedings are as objectionable as they are unavailing.

NCTA's request for across-the-board application of Accelerated Docket complaint procedures is not necessary, since anyone currently can request the Accelerated Docket process for any pole attachment complaint proceeding. And imposing an unfair, expedited complaint process on utility pole owners simply because the poles are located in rural areas makes no sense in any event.

NCTA's requests are not only counterproductive, anticompetitive, misleading and ill-informed, the Commission also lacks authority to issue the declaratory ruling that the Petition requests, and instead requires a more formal notice and comment rulemaking proceeding.

The *Coalition* respectfully submits that the solution to promoting broadband expansion and to promoting competition is not to burden electric utilities and their electric customers with unjustified additional costs and to remove control over pole replacements. Instead, utility pole owners and attachers alike should be encouraged to continue to work harmoniously. Working harmoniously, after all, has gotten us as far as where we are now and at this time it continues to facilitate broadband expansion.

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**COMMENTS
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COALITION OF CONCERNED UTILITIES**

Arizona Public Service Company, Berkshire Hathaway Energy, Evergy, Eversource Energy, Exelon Corporation, FirstEnergy, Minnesota Power, and NorthWestern Energy (collectively, “the *Coalition of Concerned Utilities*” or “*Coalition*”), by their attorneys and pursuant to the Public Notice and Order Granting Extension of Time issued by the Federal Communications Commission (“FCC” or “Commission”),¹ respectfully submit these Comments in response to NCTA’s Petition for Declaratory Ruling filed on July 16, 2020 (“NCTA Petition” or “Petition”).²

¹ *Wireline Competition Bureau Seeks Comment on a Petition for Declaratory Ruling Filed by NCTA – The Internet & Television Association*, Public Notice, DA 20-763 (WCB July 20, 2020); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Order Granting Extension of Time, WC Docket No. 17-84, DA 20-881 (rel. Aug. 13, 2020).

² Petition of NCTA for Expedited Declaratory Ruling, WC Docket No. 17-84 (filed July 16, 2020) (“*NCTA Petition*”).

I. FOREWORD

The electric utility members of the *Coalition of Concerned Utilities*, like other utilities across the country, have worked hard since the *April 2011 Pole Attachment Order*³ to adjust to new pole attachment make-ready deadlines and to accommodate attachments to their electric distribution poles, all in an effort to speed the process by which communications companies attach their facilities to electric distribution poles. As this process requires the attachment of facilities to electric distribution poles carrying potentially hazardous electric currents, the *Coalition* appreciates the Commission's recognition that ensuring the safe and reliable operation of these electric distribution systems is paramount.

Over the years, electric utilities have diverted valuable, scarce resources from their own electric operations focused on providing safe and reliable service to accommodate communications attachments, by (1) processing attachment applications, (2) performing engineering and design work for proposed attachments, (3) performing make-ready construction to "make" the poles "ready" for communications company attachers, (4) monitoring, auditing and inspecting authorized and illegal attachments following installation (including installations recklessly close to energized electric facilities), and (5) incurring legal and contractor expenses they would otherwise not have to incur.

Regardless of the intent of pole attachment regulations, formula rate methodologies result in utilities not recovering a good portion of these costs, including the ancillary costs associated with planning, forecasting, training, and managing these activities. For example, some attachers choose to avoid pole replacement costs by attaching illegally, in violation of the National

³ *In re Implementation of Section 224 of the Act: A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket Nos. 07-25 *et al.*, 26 FCC Rcd 5240 (2011) ("*April 2011 Pole Attachment Order*").

Electrical Safety Code and utility standards, forcing the utility pole owner who later discovers the violation to prove they caused the violation and force them to pay for it. And pressure is increasing from state consumer advocates that are concerned about the effect of electric ratepayers subsidizing telecom companies.

This diversion of utility resources and lack of cost recovery imposes a negative impact on utility operations and maintenance. Yet ever since regulation of communications company attachments began, electric utility pole owners have voluntarily replaced poles to expand pole capacity with taller or stronger poles to accommodate new attachers, despite having no legal requirement to do so.⁴

NCTA's Petition contains proposals that would burden utilities even further, by requiring them to pay for these expansions of capacity and by ordering them to perform these capacity expansions rapidly, at the expense of safety and service reliability. NCTA's proposals are not only prohibitively burdensome; they also are counterproductive. Utilities are willing to work to expand capacity for new attachers because they recognize the necessity of deployment of advanced communications for the benefit of their own communities. Utilities, however, cannot continue to assist at *any* cost.⁵

The *Coalition* respectfully suggests that the best public policy is one that encourages all affected parties to collaboratively resolve their attachment issues based on local operating and regulatory conditions, to ensure that pole owners have incentives to continue to replace poles, and to ensure that utility operating and design standards be respected and followed.

⁴ *Southern Co. v. FCC*, 293 F.3d 1338, at 1346-48 (11th Cir. 2002).

⁵ As mentioned, pressure already exists from state consumer advocates that are concerned about the effect of electric ratepayers subsidizing telecom companies.

II. INTRODUCTION

A. *The Coalition of Concerned Utilities*

The *Coalition of Concerned Utilities* is composed of a diverse group of electric utility companies in terms of size, attachment relationships and operational characteristics. The following is a brief description of *Coalition* members.

Arizona Public Service - provides electric service to 1.2 million customers in 11 counties in Arizona. Arizona Public Service owns, in whole or in part, approximately 525,000 electric distribution poles.

Berkshire Hathaway Energy - provides electric service to approximately 3.9 million customers in Iowa, Illinois, South Dakota, Nevada, Oregon, Washington, California, Utah, Idaho and Wyoming. Berkshire Hathaway Energy provides service to its customers through three electric utility operating companies.⁶ Berkshire Hathaway Energy owns and maintains, in whole or in part, approximately 2,087,000 electric distribution poles.⁷

Evergy – has two electric distribution operating companies; Kansas City Power & Light and Westar Energy, Inc., which collectively provide electric service to 1.6 million customers in Kansas and Missouri. Evergy owns approximately 1.8 million electric distribution poles.

Eversource Energy - has three electric distribution operating companies and provides electric and natural gas service to approximately 3.6 million people in New Hampshire,

⁶ Berkshire Hathaway Energy's operating companies are MidAmerican Energy, NVEnergy and PacifiCorp.

⁷ MidAmerican Energy owns and maintains approximately 750,000 poles; NVEnergy owns and maintains approximately 217,000 poles; and PacifiCorp owns and maintains approximately 1,120,000 poles.

Massachusetts, and Connecticut, and owns approximately 1.6 million electric distribution poles.

- Connecticut Light & Power Company serves approximately 1.25 million customers in Connecticut, and owns approximately 674,000 electric distribution poles.
- Public Service of New Hampshire serves approximately 517,000 customers in New Hampshire, and owns approximately 436,000 electric distribution poles.
- NSTAR Electric Company serves 1.43 million customers in Massachusetts, and owns approximately 529,000 electric distribution poles.

Exelon Corporation- has six electric distribution operating companies, provides electric and natural gas service to approximately 10 million customers and owns, in whole or in part, approximately 3,075,000 electric distribution poles.

- Atlantic City Electric serves approximately 547,000 customers in New Jersey and owns, in whole or in part, approximately 392,000 electric distribution poles.
- Baltimore Gas and Electric provides electric service to more than 1.25 million customers and natural gas to over 675,000 customers in Maryland. BGE owns, in whole or in part, approximately 360,000 electric distribution poles.
- ComEd provides electric service to more than 4 million customers in Illinois and owns, in whole or in part, approximately 1.4 million electric distribution poles.
- Delmarva Power provides electric service to over 500,000 customers in Delaware and Maryland and natural gas service to approximately 129,000 customers in northern Delaware. Delmarva Power owns, in whole or in part, approximately 297,000 electric distribution poles.
- PECO provides electric service to more than 1.6 million customers and natural gas service to over 500,000 customers in Pennsylvania. PECO owns, in whole or in part, approximately 415,000 electric distribution poles.
- Pepco provides electric service to more than 842,000 customers in the District of Columbia and Maryland and owns, in whole or in part, approximately 211,000 electric distribution poles.

FirstEnergy- has ten electric distribution operating companies and provides electric service to six million customers. FirstEnergy owns, in whole or in part, approximately 3.9 million electric distribution poles.

- Jersey Central Power & Light serves approximately 1.13 million customers in New Jersey and owns, in whole or in part, approximately 348,895 electric distribution poles.
- Metropolitan Edison serves approximately 569,000 customers in Pennsylvania and owns, in whole or in part, approximately 343,785 electric distribution poles.
- Penelec serves approximately 587,000 customers in Pennsylvania and owns, in whole or in part, approximately 498,932 electric distribution poles.
- Penn Power serves approximately 166,000 customers in Pennsylvania and owns, in whole or in part, approximately 130,219 electric distribution poles.
- West Penn Power serves approximately 726,000 customers in Pennsylvania and owns, in whole or in part, approximately 504,681 electric distribution poles.
- Monongahela Power serves approximately 392,000 customers in West Virginia and owns, in whole or in part, approximately 445,124 electric distribution poles.
- Potomac Edison serves approximately 409,000 customers in West Virginia and Maryland and owns, in whole or in part, approximately 431,558 electric distribution poles.
- Toledo Edison serves approximately 311,000 customers in Ohio and owns, in whole or in part, approximately 242,155 electric distribution poles.
- Ohio Edison serves approximately 1,050,000 customers in Ohio and owns, in whole or in part, approximately 601,381 electric distribution poles.
- The Cleveland Electric Illuminating Company serves approximately 751,000 customers in Ohio and owns, in whole or in part, approximately 385,973 electric distribution poles.

Minnesota Power – provides electric service to approximately 144,647 customers throughout a 26,000 square-mile service area in northeastern Minnesota. Minnesota Power owns 163,430 electric distribution poles.

NorthWestern Energy- provides electric service to approximately 427,000 customers in South Dakota, Nebraska, and Montana. NorthWestern Energy owns, in whole or in part, approximately 332,775 electric distribution poles.

Altogether, the *Coalition of Concerned Utilities* serves approximately 27 million electric customers in 26 states and the District of Columbia, and owns, in whole or in part, approximately 13.5 million electric distribution poles.

B. Electric Utilities and Communications Company Pole Attachments

Electric utilities construct, operate and maintain millions of distribution poles that are used to deliver safe and reliable electric service to hundreds of millions of people throughout the country. For many years, communications companies have found these distribution poles to be a convenient alternative to constructing their own support structures for the installation of equipment for cable television and telecommunications services, including wireless telecommunications services.

Electric utilities and communications companies represent two different industries with different missions and visions who increasingly share the same physical plant to distribute their services. In most cases electric utilities constructed, own, operate and maintain the distribution pole system while communications companies simply use it. While electric utilities are rate-based companies focused on the safe and reliable distribution of their essential services, communications companies are motivated to deliver their services as quickly and competitively as possible, and are no longer traditionally cost-of-service rate-base regulated. Both electric utilities and communications companies strive to serve customers and improve communities, but there is a limit to how much utilities can subsidize communications deployments to their own detriment.

Electricity drives virtually all of the key components of modern life, and the safe and efficient delivery of electric utility services is dependent upon a highly complex, interrelated series of processes. The *Coalition* urges the Commission to give great deference to electric utilities and to the time-tested, longstanding practices they employ before imposing new regulations at the behest of attaching entities.

The *Coalition* supports broadband deployment, and actively works to promote broadband deployment, but utilities cannot participate at the expense of what they consider to be the safe, reliable and efficient operation of utility distribution systems. The *Coalition* therefore submits these comments to address its concerns.

III. COMMENTS

A. The Federal Pole Attachment Act Entitles Utility Pole Owners to Deny Access for Reasons of Lack of Capacity

The Pole Attachment Act clearly allows utilities to deny access to their facilities for lack of capacity:

Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.⁸

By anyone's measure, the replacement of existing poles with new, stronger, and often taller poles with expanded capabilities to accommodate new attacher facilities, constitutes an expansion of capacity.

⁸ 47 U.S.C. §224(f)(2).

The Eleventh Circuit has repeatedly held that utilities need not expand capacity to accommodate attaching entities. In *Southern Company v. FCC*, utility petitioners objected to the Commission’s 1999 decision that “utilities must expand pole capacity to accommodate requests for attachment in situations where it is agreed that there is insufficient capacity on a given pole to permit third-party pole attachments.”⁹ The Eleventh Circuit held that the plain language of Section 224(f)(2) of the Communications Act explicitly prevents the Commission from mandating pole replacements: “When it is agreed that capacity is insufficient, there is no obligation to provide third parties with access to that particular ‘pole, duct, conduit, or right-of-way.’”¹⁰ The court further noted that “the FCC’s attempt to mandate capacity expansion is outside of its purview under the plain language of the statute.”¹¹

The *Southern Company* decision was repeated by the Eleventh Circuit in *Alabama Power v. FCC*:

A panel of this court recently used this statutory exception as the basis for vacating an FCC rule which forced power companies to enlarge pole capacity at the request (and expense) of attaching cable and telecommunications companies. See *Southern Company v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002). The panel could not reconcile the no-capacity excuse allowed under the statute with the forced build-out rules required under the FCC’s regulations, and thus held the regulations to be *ultra vires*.¹²

Alabama Power also cited Congressional intent: “Congress contemplated a scenario in which poles would reach full capacity when it created a statutory exception to the forced-attachment

⁹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996), *aff’d*, Order on Reconsideration, 14 FCC Rcd 18049 (1999), *rev’d in part*, *Southern Co. v. FCC*, 292 F.3d 1338, 1347 (11th Cir. 2002).

¹⁰ *Southern Co. v. FCC*, 292 F.3d 1338, 1347 (11th Cir. 2002).

¹¹ *Id.*

¹² *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1364 n. 8 (11th Cir. 2002).

regime.”¹³ Neither case needed to proceed past the first prong of the *Chevron* test¹⁴ for reviewing the FCC’s interpretation of the statute as both times the court determined Congressional intent was unambiguous in Section 224(f).

Applying this judicial precedent, the Commission has indicated repeatedly that utilities need not expand capacity to accommodate attachers. In its *April 2011 Pole Attachment Order*, the Commission explained: “[A]s the court noted in *Southern Company*, mandating the construction of new capacity is beyond the Commission’s authority . . . The ‘terms and conditions’ of pole attachment encompass the process by which new attachers gain access to a pole, and setting deadlines and remedies for that process in no way constitutes a mandate to expand capacity.”¹⁵

The *Southern* decision specifies that utility pole owners need not replace poles for attachers at all, including in situations where they would replace poles for themselves. This “nondiscrimination” argument is precisely the argument that the FCC used in the 11th Circuit and that the court struck down.¹⁶

¹³ *Id.* at 1370.

¹⁴ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

¹⁵ *April 2011 Pole Attachment Order*, 26 FCC Rcd 5240, 5284 at ¶95 (2011).

¹⁶ *Southern Co. v. FCC*, 293 F.3d 1338, 1346 (11th Cir. 2002) (“The FCC counters this argument by noting that many utilities now use their poles to support thriving telecommunications businesses of their own . . . and suggests that the nondiscrimination principle that motivated the 1996 Telecommunications Act mandates that the FCC prohibit a utility from ‘favoring itself over other parties with respect to the provision of telecommunication or video programming services.’ *First Report and Order*, 11 FCC Rcd 15499, ¶1157 (Aug. 1, 1996). . . . The FCC’s position is contrary to the plain language of § 224(f)(2). While the FCC is correct that the principle of nondiscrimination is the primary purpose of the 1996 Telecommunications Act, we must construe statutes in such a way to ‘give effect, if possible, to every clause and word of a statute.’ . . . Section 224(f)(2) carves out a plain exception to the general rule that a utility must make its plant available to third-party attachers.”

B. Utilities Nevertheless Have Routinely Expanded Capacity to Accommodate New Attachers Because They Are Not Forced to Pay for the Pole Replacements and The Pole Replacements Are Done Safely

Despite having no requirement to replace poles to make room for new attachers, utilities have been routinely willing to do so in the absence of Commission regulation. Electric utilities understand that communications companies provide valuable services to the communities they serve and therefore replace existing poles with taller or stronger poles when poles with greater capacity are needed to accommodate new attachers.

Since the Commission began regulating pole attachments following the 1978 Pole Attachment Act, the Commission has held that utilities must be reimbursed for out-of-pocket costs incurred to accommodate new attachers. Referring to these reimbursable costs as “non-recurring costs,” the Commission explained this reimbursement requirement as follows:

Non-recurring costs. Such costs, defined in a general functional fashion, are those that are expended by the utility to prepare utility poles for CATV attachments. As indicated in the legislative history, pre-construction, survey, engineering, make-ready, and change-out (non-betterment) costs are included in additional costs but only to the extent they are out-of-pocket expenses specifically attributable to CATV attachments or facilities. Preparatory costs incurred by a utility that benefit more than one pole user must be allocated among the beneficiaries so that, for example, the hourly wages of a utility company engineer would only be assignable to the non-recurring pole attachment category if those hours had been devoted in part to CATV attachment projects. Tools, including vehicles, are not includible unless purchased specially and exclusively for CATV installation. In short, costs which are incurred to prepare pole plant for CATV attachments are includible, but repairs or upgrading of the plant of other users are not. Therefore, we believe these non-recurring costs, which are of a one-time only nature, are directly reimbursable by the CATV operator and should not constitute any component of "additional costs" for purposes of Section 1.1409(c).¹⁷

¹⁷ *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Second Report and Order, 72 F.C.C.2d 59, 79 at ¶29 (1979).

The “change-out” costs referenced above are pole replacement costs. The term “pole change-out” is an industry term for pole replacements, and the Commission’s early definition of “make-ready,” included pole change-outs: “Such make-ready costs include modifications to poles or lines, installation of guy wires and anchors, or replacement of poles (change-out) where necessary due to additional loading factors caused by CATV facilities. The CATV user may be responsible for all or part of these costs.”¹⁸

Since the Commission began regulating pole attachments in 1978, the entire industry, pole owners and attachers alike, have understood that utility pole owners must be reimbursed for pole replacements. And for more than four decades since 1978, that process has successfully accommodated the needs of all parties.

Over these four decades, the voluntary expansion of capacity by utility pole owners has enabled nascent “CATV” companies to become the communications giants they are today. For example, the market capitalization of Charter Communications, Inc. is more than \$125 billion,¹⁹ with annual revenues exceeding \$45 billion.²⁰ Charter has 15,620,000 video customers, 24,908,000 Internet customers, 9,443,000 voice customers, and 1,082,000 wireless customers,

¹⁸ *Id.* at n.5. The Commission further recognized such reimbursable expenses included pole plant when it held: “[W]here a utility has been directly reimbursed by a CATV operator for non-recurring costs, including plant, such costs must be subtracted from the utility’s corresponding pole line capital account to insure that CATV operators are not charged twice for the same costs.” *Id.* at ¶27.

¹⁹ Charter Communications, Inc. (CHTR), Profile, Business Summary. *Yahoo! Finance*, available at: <https://finance.yahoo.com/quote/CHTR/>.

²⁰ Charter Communications, Inc., Form 10-K For the Fiscal Year Ended Dec. 31, 2019 at p, 26 available at: <https://ir.charter.com/static-files/b453964b-6b96-4fb8-aebc-91cec0fda968>.

and its average yearly revenue per residential customer is \$1,351.56.²¹ Comcast Corporation is even larger.²²

This voluntary expansion of capacity has been made possible only because utilities can perform pole replacements safely and economically. Voluntary pole replacements are possible because utility pole owners have not been required to make unnecessary, premature capital expenditures at unnecessary expense to accommodate new attachers, and have not had to sacrifice the safety and reliability of the system in order to accommodate new attachers.

Now that Charter, Comcast and other cable companies have benefited from decades of voluntary pole replacements by utility pole owners, new competitors to these cable companies should also be allowed to benefit from voluntary pole replacements. Continuing to encourage voluntary pole replacements in this way increases “competitive neutrality” and “improves the ability of different providers to compete with each other on an equal footing, better enabling efficient competition.”²³ Discouraging voluntary pole replacements and requiring new entrants to go underground, on the other hand, does not.

²¹ Charter Communications, Inc., Form 10-K For the Fiscal Year Ended Dec. 31, 2019 at p, 3 available at: <https://ir.charter.com/static-files/b453964b-6b96-4fb8-aebc-91cec0fda968>.

²² The market capitalization of Comcast Corporation is \$196,657,000,000 with annual revenues of \$45,764,000,000. Comcast Corporation (CMCSA), Profile, Business Summary. *Yahoo! Finance*, available at: <https://finance.yahoo.com/quote/CMCSA/> (Aug. 21, 2020) and Comcast Corporation, Form 10-K For the Fiscal Year Ended Dec. 31, 2019 at p, 31 available at: <https://www.cmcsa.com/static-files/d3de7993-a16b-42bf-bebd-a45b938dcbfc>. Comcast has 26,414,000 high-speed Internet customers, 20,288,000 video customers, 9,934,000 voice customers and 2,052,000 wireless customers, and its average yearly revenue per residential customer is \$1,874.88. Comcast Corporation, Form 10-K For the Fiscal Year Ended Dec. 31, 2019 at p, 40 available at: <https://www.cmcsa.com/static-files/d3de7993-a16b-42bf-bebd-a45b938dcbfc>.

²³ *In the Matter of Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5295 at ¶126 (2011).

C. NCTA is Asking the Commission to Reverse This Longstanding Arrangement Which Has Enabled Utilities to Voluntarily Expand Capacity by Replacing Poles

NCTA's Petition would have utilities begin to shoulder the costs to accommodate new attachers, and would have utilities sacrifice the safety and reliability of their systems by accelerating pole replacements. The willingness of electric utility pole owners to replace poles for new attachers has been dependent on reimbursement for the pole replacements and on maintaining control over the pole replacement process. By shifting the economic burden and forcing utilities to surrender control, NCTA's Petition would serve to limit the ability of pole owners to replace poles to accommodate new attachers.

1. The Petition requests that the great majority of pole replacement costs be transferred to utility pole owners

In its Petition, NCTA asks for the following "clarification" of Commission regulations for "unserved areas":

NCTA requests a ruling clarifying that, in unserved areas, where existing utility infrastructure is often near the end of its useful life, it is unjust and unreasonable for pole owners to shift the entire cost of a pole replacement to a new attacher when the pole owner itself derives the predominant financial gain, including in the form of betterment, from replacing and upgrading a pole.²⁴

The Petition proposes that the entire material cost of the new pole, along with the entire labor cost to install the new pole, the entire labor cost to replace the old pole, and the entire labor cost to transfer existing attachments to the new pole, should all be borne by the utility pole owner, except for the limited "remaining net book value of the pole being replaced."²⁵

²⁴ NCTA Petition at 4.

²⁵ NCTA Petition at 9-11.

The actual expected life cycle of a wood pole is more than the book value depreciation schedule. This fact, combined with the labor costs identified above, mean that this request by NCTA would result in the great majority of pole replacement costs being transferred to utility pole owners. These are the same utility pole owners that are not required to replace poles at all, but who have voluntarily been doing so for four decades.²⁶

2. The “clarification” the Petition seeks regarding pole replacement costs would affect all areas, not just “unserved” areas

Although the Petition requests to transfer pole replacement costs from new attachers to pole owners only in “unserved areas,” the rationale the Petition alleges for such a ruling is not limited to “unserved areas” at all. The Petition’s allegations that pole owners benefit from pole replacements and therefore must bear most of the replacement cost expense are allegations that could be made anywhere that poles are located. A pole replacement has the same effect in a rural area or other unserved area as it has in a suburban or other served area.

The Pole Attachment Act does not allow the Commission to “clarify” that different rules apply to “unserved” areas and “served” areas. The Act instead requires utilities to provide nondiscriminatory access to their poles, and does not allow discrimination in favor of companies seeking access to unserved areas. As mandated by Section 224(f)(1): “A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any

²⁶ For the many reasons explained in these Comments, the *Coalition* believes this attempt to shift pole replacement costs is ill-considered. It is also ill-timed. The COVID-19 crisis has made this a time of financial uncertainty for many electric utilities. Utility rates are calculated based on normal customer operations and customer revenues. The pandemic, however, has resulted in significantly reduced electricity load and revenues. In addition, while utilities normally are permitted to disconnect service for non-payment and thereby manage bad debt expense and collection expenses for the collective benefit of all customers, this normal operating condition has been temporarily eliminated in many jurisdictions. A lot of utility rate payers are having trouble paying their bills during this crisis, and the resulting bad debt and other collection expenses have put utilities in a financial bind. Utilities certainly do not need to incur additional unreimbursed expenses.

pole, duct, conduit or right-of-way owned or controlled by it.”²⁷ The Act simply does not allow preferential treatment for unserved areas.

NCTA’s Petition, therefore, cannot be limited to “unserved areas.” As such, any relief the Commission does or does not provide would end up applying equally to served and unserved areas, which would eliminate most of the rationale the Petition alleges to support its request.²⁸

3. NCTA’s request to expedite pole replacements is not limited to “unserved” areas at all

Underscoring that the requested relief would apply everywhere, the Petition asks the Commission to “clarify” that “the remedies available in pole attachment complaint proceedings include directing a utility to complete a pole replacement within a specified period of time or to designate an authorized contractor to do so.”²⁹ This requested “clarification,” however, is not limited to “unserved” areas at all.

²⁷ 47 U.S.C. §224(f)(1).

²⁸ The Petition’s analysis of “unserved” areas is problematic in any event. The Petition tries to convey some urgency by citing the effect of the COVID-19 crisis on “unserved” areas, but that message makes no sense. Many rural areas have a low incidence of coronavirus and their schools will continue in-person learning. And the McKinsey & Company report cited by the Petition is about income gaps and racial inequality; it is not about rural “unserved” areas, and the problems it cites are problems of affordability, not lack of availability. See Emma Dorn et al., *COVID-19 and Student Learning in the United States: The hurt could last a lifetime*, McKinsey & Company (June 1, 2020), https://www.mckinsey.com/industries/public-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosam&stream=top. Finally, the COVID-19 crisis will be over by the time any requested relief could be granted, and while the Coalition hopes the cable industry will make strong efforts to connect to unserved areas, the areas they can possibly reach before this crisis is over will be only a tiny fraction of the vast areas currently unserved.

²⁹ *NCTA Petition* at 29.

D. Because Utility Pole Owners Will Be Unable to Expand Capacity to Accommodate New Attachers, NCTA's Requests Will Result in Less Broadband Deployment and Less Competition

If utilities are no longer compensated for pole replacements and can no longer control the pole replacement process, many utility pole owners will decide they can no longer economically or safely replace poles on a voluntary basis for new attachers. The “clarification” would deny new attachers access to poles that require replacement to accommodate them. In those areas where pole replacements do not occur, attaching entities would be forced to install their facilities underground.

It is generally understood that installing cables underground is more expensive and time consuming than attaching them to poles. The cost of going underground, in fact, is sometimes cited as one of the reasons the federal Pole Attachment Act was enacted,³⁰ and the Petition itself recognizes that undergrounding cable is a “costly alternative.”³¹

NCTA's Petition, therefore, would have the perverse effect of making it more expensive and time consuming to provide broadband service to unserved areas, which of course is contrary to the stated goal of NCTA's Petition.

In areas that are currently being served, however, the cable industry would benefit from such a development. The large, established cable companies have already largely built out their systems about as far as they care to build. If pole owners were unable to replace poles for new attachers in these already served areas, the entities that would suffer are competitors to these established attachers, which currently need to attach to more congested poles that need to be

³⁰ See S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977) (1977 Senate Report), *reprinted in* 1978 U.S.C.C.A.N. 109 (“Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles.”).

³¹ *NCTA Petition* at 19.

replaced. By forcing these would-be competitors to go underground, NCTA's Petition would make it more expensive and time-consuming for these entities to compete. NCTA's Petition therefore would not only result in less broadband deployment, it would also result in less competition.

The solution to promoting broadband expansion and to promoting competition is not to burden electric utilities and their electric customers with unjustified additional costs and to remove control over pole replacements. Instead, utility pole owners and attachers alike should be encouraged to continue to work harmoniously. Working harmoniously, after all, has gotten us as far as where we are now and at this time it continues to allow broadband expansion. As the NCTA Petition itself explains:

[I]n 2018-19 alone, Charter Communications extended its network to provide broadband to more than 1.5 million additional homes and businesses across its footprint, about 30 percent of which were in rural areas Likewise, Comcast has increased homes and businesses passed by more than 1.6 million between the first quarters of 2018 and 2020, including unserved locations in the Northeast, mid-Atlantic, and Southeast. ... NCTA's other members also have a strong track record of performance extending plant to unserved areas and plans for continuing such expansion. ... Mediacom has deployed gigabit service to 98 percent of its footprint across 22 states. Midco has expanded its high-speed broadband offerings across the Plains states and is using \$40 million from the Connect America Fund to bring fixed wireless service to more unserved areas where it is too costly to deploy fiber. And Sjoberg's has been expanding its footprint throughout Minnesota to towns with as few as 50 residents.³²

³² *NCTA Petition* at 2-3.

E. The “Clarifications” the Petition Seeks are Rule Changes That Require a More Formal Notice and Comment Rulemaking Proceeding

NCTA’s requests are not only counterproductive and anticompetitive, the Commission also lacks authority to issue the declaratory ruling that the Petition requests.

The Administrative Procedures Act (“APA”) requires that agencies provide sufficient notice and an opportunity for comment before promulgating any new substantive rule. What NCTA’s Petition requests goes beyond seeking “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,” which are exceptions to the APA notice and comment requirement.³³

NCTA instead is asking the Commission on an expedited basis to modify four decades of precedent to develop an entirely new rule that would discriminate in favor of attachments by providers to unserved areas in a way that would upset a carefully balanced system encouraging voluntary cooperation between pole owners and attaching entities. Thus, what NCTA seeks are substantive rules that will amend earlier rules and which therefore warrant notice and comment procedures.³⁴

³³ 5 U.S.C.A §553(a)(3).

³⁴ See, e.g., *American Min. Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106 at 1109-1112 (DC. Cir. 1993)(holding that an Agency’s rule is a “legislative rule,” and thus subject to the APA’s notice-and-comment requirements, if the court can answer affirmatively to any of these questions: (1) whether in absence of rule there would not be adequate legislative basis for enforcement action or other agency action to confer benefits or ensure performance of duties; (2) whether agency has published the rule in Code of Federal Regulations; (3) whether agency has explicitly invoked its general legislative power; and (4) whether the rule effectively amends a prior legislative rule).

F. NCTA's Petition Misunderstands Utility Pole Replacements

1. The premature replacement of serviceable utility poles is a costly, time-consuming activity that makes no sense for utilities to perform without compensation

Electric utilities have programs in place with limited capital and labor resources that are designed to maintain and improve the reliability of electric service. Much of the focus for electric distribution capital expenditures is to increase system reliability and resiliency, in addition to modernizing the grid. And every year utilities determine the best use of capital to improve system reliability, developing budgets for this activity a year in advance. For example, a utility might need to decommission an aging distribution substation, which requires the construction of miles of new feeder lines. Or the utility might need capital to deploy smart devices to monitor and control the electric distribution grid. The replacement of aging infrastructure is another common capital expenditure that must be budgeted for in advance using limited capital resources. In addition to these known project needs, utilities must also accommodate the capital requirements for emergent projects, major storm damage, and unexpected equipment failure needed to provide electric service to customers.

For four decades, the replacement of poles to expand capacity for third party attachers has not affected these system reliability capital budgets because new attachers, for which the pole replacements are done, pay for the replacement. NCTA's Petition seeks to deny such reimbursement, so that unplanned replacements of poles by highly-regulated electric utilities to expand capacity for third parties would not only divert limited skilled resources to this task, but would also divert limited capital dollars away from carefully budgeted system reliability activities and require them to be spent instead on unnecessary premature pole replacements for unregulated third party communications companies.

Underfunding and jeopardizing important system reliability projects in favor of the premature replacement of distribution poles to benefit communications attachers is not a decision the Commission should force utility pole owners to make. Depleting funds and diverting resources from a capital budget designed to meet carefully planned, vital electric infrastructure investments does not benefit electric utility pole owners or their electric utility customers. Allowing system reliability to suffer by voluntarily taking limited resources and spending them on premature pole replacements would simply be unwise and a waste of money.

Such unwise expenditures would likely be unrecoverable in utility rate cases. Public service commissions require electric utility ratepayers to pay only for prudent expenditures. Diverting funds that are necessary for system reliability and using them to replace assets that continue to be used and useful with years of remaining life is not a prudent expenditure, as commission staff and consumer advocates are quick to point out. Imprudent expenditures cannot be added to rate base, including imprudent expenditures voluntarily made by utilities to prematurely replace poles.

2. The Petition contains numerous misstatements about utility pole replacement practices

- a) *Utilities replace poles for third parties using the same process and personnel that are used to replace poles for themselves*

The Petition claims that if utilities begin share the cost of pole replacements, then somehow pole replacements will become less expensive and more efficient: “Where the utility itself shares in the cost of a pole replacement that it directs, however, it will be incentivized to perform the replacement in a more cost-effective and efficient manner.”³⁵ This speculation is nonsense. Utilities already routinely incur the same costs to replace poles for themselves as they

³⁵ *NCTA Petition* at 19.

charge third party attachers to replace poles. No additional “incentive” would result from a requirement that pole owners also pay to replace poles for the benefit of new attachers.

b) *Utilities are not “postponing necessary repairs.”*

The Petition cites the *Local Competition Order* to suggest that utility pole owners are “postponing necessary repairs” by not replacing poles sooner: “The order expressly tied this allocation to ensuring that utilities not shift the costs of maintaining their own infrastructure onto third parties, noting that its rule ‘will discourage parties from postponing necessary repairs in an effort to avoid the associated costs.’”³⁶

The obvious problem with this suggestion that utilities are postponing necessary repairs, however, is that the poles NCTA expects utilities to pay to replace do not need repairs at all. Instead, NCTA is asking the Commission to require pole owners to incur the costs to prematurely replace poles that continue to be used and useful and might have decades of remaining life.³⁷

c) *Utilities do not “underinvest in infrastructure”*

The Petition makes another unfounded, malignant suggestion that utilities “underinvest in infrastructure” because they can “offload” facility upgrades on new attachers.³⁸ NCTA,

³⁶ NCTA Petition at 21, quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Implementation of Sections 3(n) and 332 of the Communications Act*, 11 FCC Rcd. 15499, 16096-97 ¶1212 (1996) (“*Local Competition Order*”), *aff’d in part and vacated in part sub nom. Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff’d in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff’d in part, rev’d in part, and remanded sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

³⁷ Indeed, the Commission expressed concern for utilities in this situation: “As for pole owners themselves, the imposition of cost burdens for modifications they do not initiate could be particularly cumbersome if excess space created by modifications remained unused for extended periods.” *Local Competition Order*, 11 FCC Rcd. 15499 at ¶1213.

³⁸ NCTA Petition at 18-19 (“Unserved areas, which are overwhelmingly rural areas with low population density in which a large number of poles is necessary to serve each household, present an especially

however, somehow does not understand that electric utilities have service reliability oversight by state commissions, often with reliability standards and penalties associated with failing to meet them. And unlike cable companies, who invest solely based on a profit motive, electric utilities invest in infrastructure in compliance with safety needs, reliability standards, and statutory obligations to serve.

Based on regular inspections and in compliance with industry standards and state regulatory requirements, utilities each year replace a percentage of their aging pole plant. The National Electrical Safety Code (“NESC”), for its part, specifies when poles must be replaced.³⁹

The only “offloading” that is happening here is the request in NCTA’s Petition to “offload” the cable industry’s own premature pole replacement costs onto utility pole owners and their electric customers.

d) Requiring utilities to prematurely replace poles is a financial burden

The Petition claims that utility pole owners benefit from premature pole replacements because “[r]eplacing an older pole with a new one necessarily allows the utility to defer the next

strong risk that utilities will underinvest in infrastructure if they believe that they will have an opportunity to offload the cost of facilities upgrades onto a new attacher who seeks to serve the area.”)

³⁹ The 2017 edition of the NESC, Rule 214.A.5. states:

214. Inspection and tests of lines and equipment

. . . .

5. Corrections

a. Lines and equipment with recorded conditions or defects that would reasonably be expected to endanger human life or property shall be promptly corrected, disconnected, or isolated.

b. Other conditions or defects shall be designated for correction.

2017 NATIONAL ELECTRICAL SAFETY CODE, Rule 214.A.5.a-b. (Apr. 26, 2016).

scheduled replacement, including transfer of its facilities to the new pole, and reduces maintenance costs.”⁴⁰

As explained above, depleting funds and diverting resources from a capital budget that is designed to meet carefully planned, vital electric system reliability infrastructure investments, in favor of the premature replacement of distribution poles, would be unwise, a waste of money, and potentially unrecoverable in utility rate cases. And accelerating the date by which a pole is replaced and facilities are transferred would deprive utilities of the time value of money by requiring them to spend money now on an unnecessary pole replacement that they otherwise would not have to spend until 10, 20, 30 or more years from now.⁴¹ As for “reduce[d] maintenance costs,” the *Coalition* has no idea what those might be, and suspects that neither does NCTA.

Utilities currently replace aging pole plant on a regular maintenance schedule that is subject to the utility’s control. This control over scheduling is much preferable to pole replacements conducted randomly at the behest of third-party communications companies with make-ready deadlines in mind. And accelerating the replacement of poles by several decades prior to the end of their useful life is an incremental burden on electric utilities and their electric customers because they still have to replace all the other poles that actually have reached the end of their useful life.

The Petition also alleges that some benefit exists from expending capital to prematurely replace poles “insofar as the utility can include those investments in its rate base as appropriate

⁴⁰ *NCTA Petition* at 22.

⁴¹ It also would create unwelcome generational subsidies since today’s electric utility customers might not be customers of the utility at the later date when the pole should be replaced.

for prudent capital expenditures made by a utility in the regular course to maintain its plant.”⁴²

The primary problem with this claim is that the premature replacement of pole plant when that capital has a greater need elsewhere is not a “prudent” capital expenditure and so likely could not be included in a utility’s rate base at all. But even if it were includable, the Petition has it backwards from an electric utility customer perspective, because it would increase the cost burden on those customers.⁴³

e) *Utilities do not replace poles to increase capacity with the hope for future attachment revenues or because some day they might themselves provide broadband service*

The Petition claims that if a pole is prematurely replaced with a taller or stronger pole, “the utility further benefits from the opportunity to earn additional rents from later attachers, or to use the additional capacity for its own purposes, whether (in the case of an electric utility) in providing its core electric services or in facilitating the utility’s own future entry into broadband markets.”⁴⁴

This claim suggests that utility pole owners should want to bear the lion’s share of expenses to replace poles prematurely so that they can later reap economic rewards. But utilities do not prematurely replace poles now because, as explained above, such an unnecessary expenditure is unwise, imprudent, and likely unrecoverable in a rate case. And the economic

⁴² *NCTA Petition* at 23, n.53.

⁴³ This problem of an increased cost burden also pertains to the Petition’s claim that utilities will enjoy “tax savings from the accelerated depreciation of a new capital asset which reverse as the asset ages.” *NCTA Petition* at 15, n.28. Electric utilities cannot aggressively accelerate the depreciation of their pole plant like incumbent local exchange carriers do, which is why electric utility depreciation rates for pole plant are often only a fraction of the ILEC depreciation rates. And regardless of whether depreciation is accelerated or not, depreciation is still an expense. Moreover, the depreciation expense on a more expensive new pole is greater than the depreciation expense on a less expensive pole purchased decades ago.

⁴⁴ *NCTA Petition* at 22.

rewards to which the Petition alludes are speculative, not likely to occur, and in the case of having to accommodate new communications attachers, of highly questionable benefit to utility pole owners. As for broadband services, very few utilities have shown any interest in providing broadband and so this NCTA claim is again simply unfounded.⁴⁵

In short, the speculative, questionable, and/or nonexistent “rewards” NCTA alleges certainly do not outweigh the very real costs associated with wasting money to prematurely replace a perfectly good asset.

f) *Poles do not need more frequent replacement in rural areas than in more congested areas*

The Petition supports its extraordinary request to transfer pole replacement costs to utility pole owners in rural unserved areas by suggesting, without proof, that pole replacements occur more often in rural areas than elsewhere. The Petition vaguely claims that Charter “has encountered situations” where “as many as” one in 12 poles needed to be replaced in rural areas.⁴⁶ The Petition reports another Charter claim without proof that utility infrastructure “in many areas” is somehow “at or near the end of its useful life and incapable of supporting new facilities.”

No real facts support the Petition’s conclusion that rural poles get replaced more frequently, and it is instead possible that suburban and urban poles are more frequently replaced than rural ones, considering those poles are more congested. Indeed, after explaining that “Charter’s experience is not unique,” the Petition itself cites Cox allegations regarding Cox

⁴⁵ It is improper for NCTA to make inflammatory claims like the following without any evidence or support: “In some instances, utilities have delayed action on pole attachment applications and used the time to deploy their own broadband facilities instead.” *NCTA Petition* at 30. Even if something like that ever happened, the remedy for such behavior is available in the FCC’s pole attachment complaint process, where such allegations can be answered and judged accordingly.

⁴⁶ *NCTA Petition* at 6.

overlapping on Nevada Energy poles, Crown Castle allegations regarding ComEd poles in the Chicago area, and a joint use complaint by AT&T against Florida Power & Light. None of these allegations, however, even if true,⁴⁷ seem to support the Petition's request for relief in rural, unserved parts of the country, because the poles at issue do not appear to be located in such areas.

NCTA therefore provides no proof at all that the relief it seeks for its large established cable company members seeking attachments in unserved areas is any more justified than relief for entities that might seek to compete with the large established cable operators in more congested urban and suburban areas.

g) *The "chief beneficiary" of a pole replacement is the new attacher, not the utility pole owner*

The Petition claims that the utility pole owner should bear the lion's share of the costs associated with a pole replacement because the utility pole owner is the "chief beneficiary" of the pole replacement.⁴⁸ That statement is incorrect for a number of reasons.

First, the "chief beneficiary" of the pole replacement is the new attacher, because the new attacher gains access to the pole. The electric utility pole owner and other attachers are already on the pole and receiving revenues for services rendered via the existing attachment.⁴⁹

Second, as explained above, requiring a utility pole owner to pay for a premature pole replacement is no benefit to the utility at all. It is instead unwise and imprudent to waste limited

⁴⁷ The allegations in those complaint proceedings were contested and no decisions were rendered by the Commission to accept or reject any of those allegations.

⁴⁸ *NCTA Petition* at 10 ("Specifically, the Commission should declare that because the utility is the chief beneficiary of the pole replacement, it is unjust and unreasonable for the pole owner to capture the windfall benefits of obtaining a new, upgraded pole when that benefit comes at the expense of broadband availability.")

⁴⁹ Moreover, absent a request to attach, any pole replacements caused by pole deterioration would most likely be like for like, in other words there would be no need to set a taller pole.

capital resources to prematurely replace poles when the result is the diversion of funds from system reliability capital improvement projects, and an inability to recover those expenditures in a rate case. And the speculative, questionable and/or nonexistent “benefits” the Petition alleges do not outweigh the very real costs associated with wasting money to prematurely replace a perfectly good asset.

h) Even the State of Maine, which is the sole jurisdiction the Petition cites to support its request to modify pole replacement cost allocations, presumes that the utility pole owner does not benefit from pole replacements

The Petition cites only one jurisdiction in support of its extraordinary cost allocation proposal, claiming the State of Maine “allocates the costs of replacement poles using a similar formula to the proposal here consisting of the remaining net book value of the existing (to be replaced) pole and some potential incremental costs related to the new pole.”⁵⁰ But contrary to claims made by NCTA in its Petition, Maine recognizes utility pole owners do not benefit from pole replacements.⁵¹ Whatever was the motivation of the State of Maine for its new cost allocation system, it certainly was not based on a conclusion that pole owners benefit from the pole replacement, as NCTA claims in this proceeding. It is improper in any event to cherry-pick non-jurisdictional pole attachment regulations without considering the full gamut of other regulations that might be applicable in Maine and elsewhere, and without considering the views of, and impacts on, the relatively few entities that are subject to those regulations in Maine.

⁵⁰ NCTA Petition at 26.

⁵¹ NCTA itself points this out: “The statutory framework governing pole replacements in Maine presumes that the utility, in the absence of an attachment, (1) does not benefit from pole replacement in the form of betterment.” NCTA Petition at 26, n.59.

G. NCTA’s Petition Mischaracterizes Commission Rulings and Several Pole Attachment Complaint Cases

In addition to not understanding utility pole replacements, NCTA’s Petition also mischaracterizes a number of Commission rulings and several pole attachment complaint cases.

1. The Commission has always allowed utilities to recover the full costs of pole replacements

The Petition is requesting that the Commission “clarify” that its existing rules pole owners to share in the cost of pole replacement in unserved areas.⁵² No such “clarification” can be made, however. As explained above, the Petition’s “clarification” request runs contrary to 40-year-old Commission precedent and four decades of industry practice, pursuant to which pole owners have been reimbursed in full for pole replacements by communications attachers.⁵³

2. The Petition’s analysis of company “betterment” is incorrect

Recognizing that Commission rules prohibit utility pole owners from charging new attachers for make-ready work associated with company “betterment,” the Petition requests the

⁵² *NCTA Petition* at 9.

⁵³ As explained above, the Commission’s 1979 “Memorandum Opinion and Second Report and Order” ruled that certain “non-recurring costs” are reimbursable and they include pole change-out (*i.e.*, pole replacement) costs:

Non-recurring costs. Such costs, defined in a general functional fashion, are those that are expended by the utility to prepare utility poles for CATV attachments. As indicated in the legislative history, pre-construction, survey, engineering, make-ready, and change-out (non-betterment) costs are included in additional costs but only to the extent they are out-of-pocket expenses specifically attributable to CATV attachments or facilities. Preparatory costs incurred by a utility that benefit more than one pole user must be allocated among the beneficiaries so that, for example, the hourly wages of a utility company engineer would only be assignable to the non-recurring pole attachment category if those hours had been devoted in part to CATV attachment projects. Tools, including vehicles, are not includible unless purchased specially and exclusively for CATV installation. In short, costs which are incurred to prepare pole plant for CATV attachments are includible, but repairs or upgrading of the plant of other users are not. Therefore, we believe these non-recurring costs, which are of a one-time only nature, are directly reimbursable by the CATV operator and should not constitute any component of "additional costs" for purposes of Section 1.1409(c).

72 F.C.C.2d 59, 79 at ¶29.

Commission to grossly expand the definition of company “betterment” to encompass the entire cost of the new pole, the labor cost to install the new pole, the labor cost to remove the old pole, and the labor cost to transfer existing attachments to the new pole, except for the limited “remaining net book value of the pole being replaced.”⁵⁴

NCTA’s requested interpretation, however, has never been the definition of company “betterment.” As NCTA points out, even the State of Maine, the jurisdiction the Petition cites to support its argument, recognizes that utility pole owners do not benefit from pole replacements via betterment: “The statutory framework governing pole replacements in Maine presumes that the utility, in the absence of an attachment, (1) does not benefit from pole replacement in the form of betterment.”⁵⁵ Utilities do not charge pole attachers for betterment in any event, which is clear from the pole attachment complaint proceeding cited by the Petition. In that complaint proceeding, both parties understood what utility “betterment” is, both sides understood it did not include the expansive definition NCTA now claims it includes, and both parties in any event understood utilities cannot charge new attachers for any company “betterment.”⁵⁶

⁵⁴ *NCTA Petition* at 10-11. The Petition claims this is the cost “of advancing the retirement of the existing pole that would have been retired by the utility in the normal and routine course.” *Id.* Inexplicably, it is only the pole owner’s transfer costs that NCTA requests be considered unreimbursable betterment—the new attacher would still be required to pay for all other communications attacher transfers.

⁵⁵ *NCTA Petition* at 26, n.59.

⁵⁶ The Petition cites the Complaint filed in *Zito Media v. Pennsylvania Electric Co.*, FCC Proceeding No. 17-316, Bureau ID No. EB-17-MD-006 (Complaint filed Nov. 13, 2017), as “exposing alleged utility error in shifting pole replacement betterment costs to attachers.” *NCTA Petition* at 7, n.11. But both parties understood that utilities are not allowed to charge new attachers for company “betterment.” As Pennsylvania Electric Co. (a/k/a Penelec, which is a FirstEnergy utility) explained:

As for “company betterment,” in the course of surveying the poles in Zito’s application, Penelec instructs Sigma to note any Penelec equipment that is out of compliance with current standards. One example is when an old porcelain-type piece of equipment must be replaced with polyurethane-type material. Another is when a transformer is too small or is overloaded. In such cases, Sigma’s design will include replacing the equipment. However, if any of this work generates more than an insubstantial, incidental cost, the

3. Pole replacement costs are “but-for” costs that new attachers pay

The Petition seeks to require pole owners to pay the great majority of the expense to replace poles and to transfer existing attachments to the new pole, but such a requirement is at odds with the Commission’s longstanding requirement that pole owners be reimbursed for their out-of-pocket expenses to accommodate new attachers.

The entire make-ready process is predicated on new attachers paying the out-of-pocket expenses of pole owners to accommodate their facilities. Pole replacements are no exception. The Commission’s 1979 “Memorandum Opinion and Second Report and Order” ruled that certain “non-recurring costs” are reimbursable and they include pole change-out (i.e., pole replacement) costs:

Non-recurring costs. Such costs, defined in a general functional fashion, are those that are expended by the utility to prepare utility poles for CATV attachments. As indicated in the legislative history, pre-construction, survey, engineering, make-ready, and change-out (non-betterment) costs are included in additional costs but only to the extent they are out-of-pocket expenses specifically attributable to CATV attachments or facilities. Preparatory costs

cost for that work is removed from Sigma’s engineering survey charge. *Zito is therefore not charged for any of this “company betterment.”*

See Penelec Response at 23, Zito Media v. Pennsylvania Electric Co., FCC Proceeding No. 17-316, Bureau ID No. EB-17-MD-006 (Response filed Dec. 13, 2017) (emphasis added). As for NCTA’s claim that this proceeding “expos[ed] an alleged error in shifting pole replacement betterment costs to attachers,” Penelec did no such shifting of costs at all. As Penelec explained to Zito, 10 poles that had only electric facilities on them were mistakenly included in a list of poles to be replaced for Zito, but Penelec never charged Zito for pole replacements because the poles were being replaced only for Penelec:

I have reviewed the 10 poles that you sent photos of; thanks for putting them in SPANS notes. I did find that those replacements were classified during engineering as Company betterment to Penelec, those costs were removed at that time and therefore were not included in the estimates you received. Below is a summary of the impact of those removals. . . .Removal of these Company betterment replacement poles also included a reduction of the engineering cost associated with the projects; therefore, you also were not charged for corresponding engineering costs associated with construction classified as Company betterment.

See Penelec Response at Attachment H, email exchange between R. Chumrik, Penelec and K. Ragosta, Zito Media, dated September 22 and October 27, 2017 (emphasis added).

incurred by a utility that benefit more than one pole user must be allocated among the beneficiaries so that, for example, the hourly wages of a utility company engineer would only be assignable to the non-recurring pole attachment category if those hours had been devoted in part to CATV attachment projects. Tools, including vehicles, are not includible unless purchased specially and exclusively for CATV installation. In short, costs which are incurred to prepare pole plant for CATV attachments are includible, but repairs or up-grading of the plant of other users are not. Therefore, we believe these non-recurring costs, which are of a one-time only nature, are directly reimbursable by the CATV operator and should not constitute any component of "additional costs" for purposes of Section 1.1409(c).⁵⁷

4. NCTA's request to have the pole owner pay replacement costs is inconsistent with the Commission's rule regarding the correction of pre-existing safety violations -- it is not "the natural extension" of it

The Petition claims "the interpretation urged by NCTA is the natural extension of the same policy underlying the Commission's repeated decisions emphasizing that a new attacher is not responsible for the costs of remedying existing safety violations."⁵⁸

NCTA's "interpretation" is not a "natural extension" of this rule at all; it is instead completely at odds with this rule. In the 2018 *Third Report and Order*, the Commission clarified that "new attachers are not responsible for the costs associated with bringing poles or third-party equipment into compliance with current safety and pole owner construction standards to the extent such poles or third-party equipment were out of compliance prior to the new attachment."⁵⁹ Completely inconsistent with this ruling, NCTA proposes to hold utilities responsible for the costs to replace poles that are not out of compliance at all. The Commission held that utilities charging new attachers for correcting preexisting violations "is inconsistent

⁵⁷ 72 FCC 2d 59 at ¶29.

⁵⁸ *NCTA Petition* at 17.

⁵⁹ 2018 *Third Report and Order* at ¶121.

with our long-standing principle that a new attacher is responsible only for actual costs incurred to accommodate its attachment.”⁶⁰ But NCTA’s proposal is completely at odds with this ruling too because it would “relieve” the new attacher from paying, not make the new attacher “responsible” for paying, the “actual costs incurred to accommodate its attachment.”

5. The *Local Competition Order* requires attachers who benefit from a pole replacement to share in the cost, but only in limited circumstances far different than what NCTA contends

The bizarre nature of the Petition’s request that pole owners pay the lion’s share of pole replacement costs is perhaps most apparent from the Petition’s bizarre interpretation of the *Local Competition Order*.⁶¹ The Petition correctly quotes the Order’s recognition that a utility may be among the beneficiaries of a pole modification: “[a] utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost.”⁶² But after tacitly acknowledging the premature replacement of a pole does not correct any “safety” requirements, the Petition claims the premature replacement of a pole brings the pole into compliance with “other requirements,” which the

⁶⁰ *Id.*, citing *Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 24615, 24625, ¶26 (2003); *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, File Nos. PA 99-001, PA 99-002, Consolidated Order, 14 FCC Rcd 11599, 11606-07, ¶19 (CSB 1999).

⁶¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Implementation of Sections 3(n) and 332 of the Communications Act*, 11 FCC Rcd. 15499 (1996) (“*Local Competition Order*”), *aff’d in part and vacated in part sub nom. Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff’d in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff’d in part, rev’d in part, and remanded sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

⁶² *NCTA Petition* at 20-21, quoting *Local Competition Order*, 11 FCC Rcd. 15499 at ¶1212.

Petition suggests include the requirement to “maintain” the poles and not to “postpon[e] necessary repairs.”⁶³

This creative but convoluted interpretation of the *Local Competition Order* is entirely incorrect. First, the premature replacement of a pole does not correct any failure to “maintain” the pole, nor does it “repair” the pole, because the pole is already being properly maintained and does not need repair. The fact that it is being properly maintained and does not need repair is the reason why the pole replacement is premature – the pole still has many years of useful life remaining because it is properly maintained and in good repair.

Second, both the Pole Attachment Act and the *Local Competition Order* impose a reimbursement obligation only on attaching entities which modify their attachments. The Pole Attachment Act limits this responsibility for modification costs to “any entity that adds to or modifies its existing attachment.”⁶⁴ The *Local Competition Order* similarly limits responsibility for modification costs to entities that modify their attachments:

Nevertheless, if a modification would not have occurred absent the action of the initiating party, the cost should not be borne by those that did not take advantage of the opportunity by modifying their own facilities. Indeed, the Conference Report accompanying the passage of the 1996 Act imposes cost sharing obligations on an entity “that takes advantage of such opportunity to modify its own attachments.”⁶⁵

Third, the *Local Competition Order* recognizes that circumstances exist where pole owners will replace a pole with taller poles but not have to pay anything for the pole replacement: “We recognize that in some cases a facility modification will create excess

⁶³ *NCTA Petition* at 20-21.

⁶⁴ 47 U.S.C. §224(h).

⁶⁵ *Local Competition Order*, 11 FCC Rcd. 15499 at ¶1213.

capacity that eventually becomes a source of revenue for the facility owner, even though the owner did not share in the costs of the modification.”⁶⁶ This circumstance, where the pole owner replaces a pole but does not pay for the pole replacement, is of course the opposite of NCTA’s requested interpretation that pole owners should always pay for pole replacements, and in fact should always pay the great majority of those costs.

Fourth, the quote above from the *Local Competition Order* mentions a potential benefit to pole owners of new attachment revenues from a taller pole, and that is the sole pole owner “benefit” that is alleged in the NCTA Petition that is even mentioned by the *Local Competition Order*. Regardless, the Commission recognized that it was not allowed to require pole owners to compensate those who paid to replace the pole for this potential “benefit” of new attachment revenues:

We do not believe that this requires the owner to use those revenues to compensate the parties that did pay for the modification. Section 224(h) limits responsibility for modification costs to any party that "adds to or modifies its existing attachment after receiving notice" of a proposed modification. The statute does not give that party any interest in the pole or conduit other than access. Creating a right for that party to share in future revenues from the modification would be tantamount to bestowing an interest that the statute withholds. Requiring an owner to offset modification costs by the amount of future revenues emanating from the modification expands the category of responsible parties based on factors that Congress did not identify as relevant. Since Congress did not provide for an offset, we will not impose it ourselves.⁶⁷

Finally, the Petition takes issue with the *Coalition’s* currently-pending Petition for Reconsideration of the 2018 *Third Report and Order*,⁶⁸ in which the *Coalition* is asking the

⁶⁶ *Local Competition Order*, 11 FCC Rcd. 15499 at ¶1216.

⁶⁷ *Id.* (footnotes omitted)

⁶⁸ *NCTA Petition* at 17-18, n.37.

Commission to clarify that even while section 1.1411(d)(4) of the rules⁶⁹ prevents the new attacher from being charged by the utility for the costs to replace a pole with a preexisting violation, the new attacher retains a reimbursement obligation to existing attachers or the pole owner under section 1.1408(b)⁷⁰ to cover the new attacher's access to the replaced pole.⁷¹ The Petition takes issues with this reimbursement obligation but ignores that section 1.1408(b) of the rules, which was first promulgated by the *Local Competition Order*, requires new attachers to pay for the pole access they were able to obtain because of the pole replacement: "The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification." Read together, section 1.1411(d)(4) prohibits utilities from charging a new attacher (Attacher 2) to correct preexisting violations, while section 1.1408(b) allows any existing attacher (Attacher 1) or pole owner that pays for a modification to be able to recover a proportionate share from Attacher 2.

The practical effect of the latter issue was discussed in the *Local Competition Order*: a new entrant who pays for a modification to enable attachment should not watch as a subsequent new competitor attaches for free in the space made possible by the new entrant's investment. Correction of a preexisting violation which makes possible a subsequent attachment is indistinguishable in effect from the thirty-year old provision just described. The Commission's rules require utilities to comply with both rules—NCTA argues they should only comply with one of them.

⁶⁹ 47 C.F.R. §1.1411(d)(1).

⁷⁰ 47 C.F.R. §1.1408(b).

⁷¹ See Petition for Reconsideration of the *Coalition of Concerned Utilities*, WC Docket Nos. 17-84 and 17-79, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment, at 15-16 (filed Oct. 15, 2018).

6. The requirement to provide detailed, itemized make-ready estimates applies to all make-ready work

To support its proposal to transfer pole replacement costs to pole owners, the Petition makes a nonsensical and confusing contention about make-ready estimates. The Petition correctly notes that the Commission requires utilities to provide detailed make-ready estimates upon request, and then oddly concludes that make-ready estimates do attachers no good when pole replacements are required. According to the Petition, the reason that make-ready estimates do attachers no good when pole replacements are required is because attaching entities have no self-help remedy for pole replacements.⁷²

This contention makes no sense. The purpose of a make-ready estimate is to allow the new attacher to decide whether to pay certain make-ready charges or to find an alternative. The purpose of the self-help remedy is to give the attaching entity the ability to perform make-ready work that is not performed within the make-ready deadlines. Make-ready estimates have nothing to do with self-help remedies which are invoked solely when deadlines are missed. Further, detailed itemized make-ready estimates for pole replacements would become a moot point if utilities rationally conclude to discontinue voluntarily increasing capacity.

7. The several pole attachment complaint cases cited by the Petition do not stand for what NCTA alleges

In an effort to denigrate electric utility pole owners, the Petition cites several allegations filed by communications attachers against electric utility pole owners (including several *Coalition* members) in recent pole attachment complaint proceedings.⁷³

⁷² *NCTA Petition* at 19.

⁷³ *NCTA Petition* at 6-8 and nn.11-14.

The *Coalition* reminds NCTA that complaint allegations are not findings of fact, and that utility pole owners filed answers to those complaints that tell a completely different story. Mere allegations in pole attachment complaint proceedings do nothing to support NCTA’s Petition.

To cite just one example where these complaint allegations are untrustworthy, the Petition cites the complaint filed in *Zito Media v. Pennsylvania Electric Co.*, FCC Proceeding No. 17-316, Bureau ID No. EB-17-MD-006 (Complaint filed Nov. 13, 2017), as “exposing alleged utility error in shifting pole replacement betterment costs to attachers.”⁷⁴ But Penelec (Pennsylvania Electric Company) did no such shifting of costs at all. As Penelec explained to Zito, 10 poles that had only electric facilities on them were mistakenly included in a list of poles to be replaced for Zito, but Penelec never charged Zito for those pole replacements because the poles were being replaced only for Penelec:

I have reviewed the 10 poles that you sent photos of; thanks for putting them in SPANS notes. I did find that those replacements were classified during engineering as Company betterment to Penelec, *those costs were removed at that time and therefore were not included in the estimates you received.* Below is a summary of the impact of those removals. ...Removal of these Company betterment replacement poles also included a reduction of the engineering cost associated with the projects; therefore, you also were not charged for corresponding engineering costs associated with construction classified as Company betterment.⁷⁵

Further compounding NCTA’s unfair mischaracterization of this complaint proceeding, Penelec did not “acknowledge” that it had mistakenly charged Zito for Company betterment; rather, it informed Zito that while the pole identifications were mistakenly included in the list of make-

⁷⁴ *NCTA Petition* at 7, n.11.

⁷⁵ See Penelec Response at Attachment H, email exchange between R. Chumrik, Penelec and K. Ragosta, Zito Media, dated September 22 and October 27, 2017, *Zito Media v. Pennsylvania Electric Co.*, FCC Proceeding No. 17-316, Bureau ID No. EB-17-MD-006 (Response filed Dec. 13, 2017) (emphasis added).

ready construction, the associated costs had already been excluded from the estimate. Thus, contrary to NCTA's claim of malfeasance, Penelec fully complied with the Commission's regulations and fully explained these facts to Zito.

H. Imposing an Unfair, Expedited Complaint Process on Utility Pole Owners Simply Because the Poles Are Located in Rural Areas Makes No Sense

The Petition argues that an expedited pole attachment complaint process using the Commission's Accelerated Docket is required for any complaints pertaining to poles located in unserved areas, claiming such routine expedited action is required: (1) to "help address the operational challenges and delays of extending broadband to unserved areas;" (2) because "time is of the essence in enabling broadband providers to expand their networks to close the digital divide;" and (3) because of "schedule commitments under the terms of federal or state broadband programs."⁷⁶

The Commission's normal pole attachment complaint process, however, was modified recently to establish deadlines for Enforcement Bureau resolutions of complaints, and now requires the Commission to rule on denial of access complaints within six months, and on all other complaints within nine months.⁷⁷ The Petition makes no attempt to explain why or how these new deadlines for formal complaints are somehow insufficient.

The cable industry's desire to provide broadband to unserved areas is laudable, but the goal of expanding broadband has been a Commission goal for many years and nothing has changed over that time. As for scheduling commitments under government broadband programs,

⁷⁶ NCTA Petition at 27-28.

⁷⁷ 47 C.F.R. §1.1414(a) requires an Enforcement Bureau order on pole access complaints "no later than 180 days" after filing "[e]xcept in extraordinary circumstances," and 47 C.F.R. Sections 1.1414(b) and 1.740(a) require final action on other pole attachment complaints "no later than 270 days" after filing "[e]xcept in extraordinary circumstances."

such schedule commitments have always been in place for both government and private projects, including for those receiving federal government funding to extend service under the American Recovery and Reinvestment Act of 2009. The Petition has not reported that any recipient's funding has been eliminated because of any failure to meet deadlines.

The Commission's Accelerated Docket requires decisions to be rendered within 60 days, and is subject to shorter pleading deadlines or no pleadings at all if a "minitrial" is conducted instead.⁷⁸ This process is far too short to resolve most pole attachment disputes, which often require an analysis of utility make-ready operations and charges and a history of activity associated with a large number of utility poles. Utility pole owners are already disadvantaged by the normal pole attachment complaint process, since attaching entities can take months or even years to prepare their case and file their complaint, but utilities must answer that complaint within 30 days.⁷⁹

In addition, NCTA's request for across-the-board application of Accelerated Docket procedures is not necessary, since NCTA's members currently can request the Accelerated Docket process for any pole attachment complaint proceeding, and the Commission has discretion whether to apply that process to any complaint.⁸⁰ However, to date the Enforcement Bureau has not found the Accelerated Docket process to be an inappropriate dispute resolution process, and those decisions strongly suggest that a blanket imposition of that process instead of a case-by-case determination is not a reasonable request. Instead, the *Coalition* respectfully contends that widespread imposition of the Accelerated Docket rules would raise due process

⁷⁸ 47 C.F.R. §1.736(a), (h).

⁷⁹ 47 C.F.R. §1.726(a).

⁸⁰ 47 C.F.R. §1.736(a)-(d).

concerns, grossly favor communications attachers over utility pole owners, increase the number of complaints filed by communications attachers, and disrupt the working relationship between the parties that facilitates rural broadband deployments.

I. Ordering Utilities to Forfeit Control Over Pole Replacements is Unsafe, Unwarranted, and Bad Public Policy

The Petition includes another misguided proposal that again would make utilities unable to voluntarily agree to replace poles for new attachers. The Petition suggests, in instances where access to a pole has been “unlawfully denied or delayed,” that the Commission either require the utility pole owner to replace a pole within a certain amount of time, or order a contractor to replace the pole within a certain amount of time.⁸¹

There are numerous problems with this proposal. From a legal standpoint, access to a new pole cannot be “unlawfully denied or delayed” if the decision whether to expand capacity by replacing the pole is entirely within the pole owner’s discretion.⁸² More importantly, NCTA’s request would require utility pole owners to lose control over the pole replacement process and raises very significant safety and service reliability concerns.

The Commission itself recently recognized that pole replacements are “particularly disruptive,” and excluded them from self-help remedies because “pole replacements can be

⁸¹ *NCTA Petition* at 31.

⁸² The Pole Attachment Act allows utilities to deny access for lack of capacity:

Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

47 U.S.C. §224(f)(2). *See also Southern Co. v. FCC.*, 292 F.3d 1338, 1347 (11th Cir. 2002) (“When it is agreed that capacity is insufficient, there is no obligation to provide third parties with access to that particular ‘pole, duct, conduit, or right-of-way;’” and “the FCC’s attempt to mandate capacity expansion is outside of its purview under the plain language of the statute.”)

complicated to execute and are more likely to cause service outages or facilities damage.”⁸³

Nothing has changed since that determination was made in 2018, and pole replacements continue to be “particularly disruptive,” “complicated,” and “more likely to cause service outages or facilities damage.”

Rather than address the disruptive and complicated nature of pole replacements, the Petition instead asks the Commission to ignore those concerns and require pole owners or their contractors to hurry up and perform the pole replacements. But the disruptive and complicated nature of pole replacements was not changed by COVID-19 and cannot be ignored.

Utility field operations resources are staffed to support a good number of activities associated with providing safe and reliable electric service, including capital projects, system reliability improvements, corrective maintenance, mitigating safety risks and meeting the electric customer service guarantees outlined in state tariffs, all while actively working to keep electric rates low. Attaching entity pole replacement requests are unplanned and unbudgeted, and therefore under the best of circumstances pose a challenge for electric utilities to comply with the federal, state and contractual requirements imposed on them. It is considerably more challenging when attachers make attachment requests for hundreds if not thousands of poles.

The unpredictable nature of pole attachment activity puts an unrelenting strain on local workforces that now must absorb swings in their workload, and even moderate swings cause a strain. While local contract labor are being utilized to meet core business objectives, contract resources, to the extent they are available, can be redirected to try and relieve areas unexpectedly inundated with attachment-driven work but ultimately, local utility in-house and contractor resources are finite.

⁸³ 2018 Third Report and Order at ¶101.

In the face of these resource constraints, shortening the time pole owners are given to complete pole replacements will not improve turnaround times. It will only force utilities to choose between providing safe, reliable and affordable power to electric customers (which is mandated by the states), and performing requested pole replacements in an unreasonable amount of time.

A far better system is the one that knowledgeable communications companies currently employ for large projects, which is to plan well in advance, and coordinate well in advance with utility pole owners, to develop a process whereby sufficient time is allotted for pole inventory to be increased, sufficient time is allotted for engineering and construction crews to become mobilized and committed, sufficient time is allotted to receive all necessary local permits, sufficient time is allotted to plan and conduct necessary service outages affecting electricity customers, sufficient time is allotted to address electric utility safety and reliability concerns, and sufficient time is allotted in anticipation of seasonal and other weather events.

In short, for large projects to provide broadband to unserved parts of the country, a cooperative process that is carefully developed and managed by a healthy relationship between pole owners and attachers has worked well in the past and will work well in the future. The ill-conceived mandatory labor approach proposed by the NCTA Petition will not.

IV. CONCLUSION

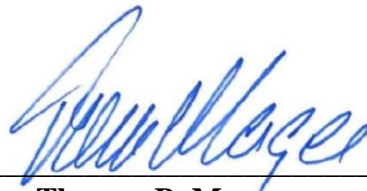
WHEREFORE, THE PREMISES CONSIDERED, the *Coalition of Concerned Utilities* urges the Commission to act in a manner consistent with the views expressed herein.

Respectfully submitted,

COALITION OF CONCERNED UTILITIES

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Eversource Energy
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