

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

REPLY COMMENTS
OF THE
COALITION OF CONCERNED UTILITIES

Arizona Public Service Company
Berkshire Hathaway Energy
Eversource Energy
Exelon Corporation
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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, respectfully reply to comments filed in response to NCTA’s Petition for Declaratory Ruling (“NCTA Petition” or “Petition”) in the above-captioned proceeding.¹

I. REPLY COMMENTS

Comments filed by the relatively few entities which support NCTA’s Petition add little to what was already raised in NCTA’s Petition and addressed by the *Coalition*. These Reply Comments address what is new.

¹ Petition of NCTA for Expedited Declaratory Ruling, WC Docket No. 17-84 (filed July 16, 2020) (“*NCTA Petition*”).

A. Charter and its Economic White Paper Fail to Consider that Premature Pole Replacements do not Benefit Utility Pole Owners

Charter attached to its comments a 57-page white paper prepared by the economist Patricia Kravtin, which attempts to justify NCTA’s proposed allocation of the lion’s share of pole replacement costs to the utility pole owner.² Charter’s white paper, however suffers from the same misunderstanding of utility practices as NCTA’s Petition, and the Commission should afford it little weight for the same reasons.

As explained in the *Coalition’s* Comments, the premature replacement of serviceable utility poles is a costly, time-consuming activity that makes no sense for utilities to perform without compensation, and prematurely replacing poles without compensation would underfund important system reliability projects.³ By failing to appreciate these fundamental utility practices, the conclusions reached by Charter and its economist concerning “the actual costs caused by a pole replacement” are uninformed and incorrect.⁴ Similar to NCTA, Charter and the white paper also fail to acknowledge that the new attacher gaining access to the pole is the primary beneficiary of the pole replacement.⁵ As a result, it is Charter itself, and not electric utility pole owners, which suffers a “myopic view” of who “caused” the pole replacement.⁶ As for Charter’s alleged “pernicious chilling effect for broadband deployment in unserved rural areas”⁷ any such “chilling effect” would be caused solely by NCTA’s ill-conceived Petition to

² See Comments of Charter Communications, Inc. at Ex. 1 (filed Sept. 2, 2020) (“*Kravtin White Paper*”).

³ Comments of the Coalition of Concerned Utilities at 20 (filed Sept. 2, 2020) (“*Coalition Comments*”).

⁴ Comments of Charter Communications, Inc. at 9 (“*Charter Comments*”); *Kravtin White Paper* at 27, 29-31.

⁵ *Coalition Comments* at 27-28.

⁶ See *Charter Comments* at 9; *Kravtin White Paper* at 5-8, 12-13, 35.

⁷ *Charter Comments* at 9.

destroy the economic rationale enabling utility pole owners to replace poles to make room for new attachers.

B. Applying NCTA’s Request Nationwide Would Reduce Competition to the Benefit of Established Cable Companies

As the *Coalition* expected, several parties took this opportunity to ask the Commission to extend NCTA’s request to require pole owners to bear pole replacement costs to all parts of the country, whether those areas currently enjoy broadband service or not.⁸

As explained in the *Coalition’s* Comments, only established entities like Charter would benefit from such a nationwide extension. As explained, established entities like Charter have built out most areas about as far as they intend to build out, and if pole owners cannot replace poles to make room for new competitors in suburban, urban, and other areas, then only established, already-attached entities like Charter will benefit.⁹ NCTA’s Petition therefore creates an anticompetitive benefit that the Commission should reject.

Rather than undermine the carefully balanced pole replacement process that has worked well for decades, the *Coalition* respectfully submits that the key to promoting broadband and to furthering competition in all areas of the country is instead to continue allowing utility pole owners and attaching entities to work harmoniously.

⁸ See Comments of ExteNet Systems, Inc. at 2 (filed Sept. 2, 2020) (“*ExteNet Comments*”); See Comments of Crown Castle Fiber LLC at 10-12 (filed Sept. 2, 2020) (“*Crown Castle Comments*”); See Comments of The Wireless Infrastructure Association at 4 (filed Sept. 2, 2020) (“*WIA Comments*”); See Comments of INCOMPAS at 17-19 (filed Sept. 2, 2020) (“*INCOMPAS Comments*”).

⁹ *Coalition Comments* at 17-18.

C. Unsubstantiated Allegations About Utility Misconduct Are Improper

Several parties contend that NCTA’s Petition should be granted because of unsupported allegations that utilities somehow unfairly require new attachers to pay pole replacement costs in violation of Commission rules.¹⁰

These unsubstantiated allegations do not belong in a proceeding seeking to modify Commission regulations. They belong in a pole attachment complaint proceeding where they can be properly vetted for accuracy, where existing Commission regulations that are relevant to the dispute can be applied, and where the Commission can provide a remedy that any proven allegations actually warrant.

D. Utilities Already Maintain Their Pole Plant and Make Necessary Pole Replacements

Crown Castle suggests NCTA’s Petition must be granted because “NESC standards and state commission rules are examples that clearly demonstrate that the pole owner—not a new attacher—is responsible for the maintenance of poles, including necessary repairs, upgrades and replacements.”¹¹

No party disputes that utility pole owners are responsible for maintaining poles, and for making necessary repairs, upgrades and pole replacements. Pole owners accept the burden of pole ownership, which attaching entities like Crown Castle avoid by simply attaching to existing poles rather than undertaking to install and maintain their own poles. But utility pole owners

¹⁰ See *ExteNet Comments* at 4-5; See also *Crown Castle Comments* at 5-6, 9; See also *Charter Comments* at 6-7; Comments of ACA Connects – America’s Communications Association at 10-11, 14 (Filed Sept. 2, 2020) (“*ACA Comments*”); See also *INCOMPAS Comments* at 7-12. ExteNet, for its part, repeats its claim from the CTIA proceeding that some utility in Missouri is requiring ExteNet to pay market-based pole attachment rental rates to attach to poles that have been replaced. *ExteNet Comments* at 7-9; Comments of ExteNet Systems, Inc., WC Docket 17-84 at 18 (Filed Oct. 29, 2019). ExteNet’s allegations also appear to be sanctionable in that they appear to violate confidentiality provisions of its agreement with the “other investor-owned utility” in the state. Such allegations should be kept confidential using the Commission’s confidentiality rules that apply in Complaint cases.

¹¹ *Crown Castle Comments* at 8.

already do “maintain” their pole plant, and already do make “necessary repairs, upgrades and pole replacements.” The key word in Crown Castle’s observation about NESC standards and state commission rules is the word “necessary.” Instead of calling for “necessary” pole replacements in accordance with the NESC and these state commission rules, the NCTA Petition is asking utility pole owners to pay for “unnecessary” pole replacements of poles that are already properly maintained.

E. Utility Pole Plant Has Not Reached the End of Its Useful Life

Charter claims NCTA’s Petition is timely because much of the nation’s pole infrastructure has reached or is nearing the end of its useful life.¹² That assertion is unfounded and incorrect, like other comments of both NCTA and Charter which the *Coalition* already has addressed. Since poles have been replaced at regular intervals and on a rolling basis for decades, there is no reason to believe that pole infrastructure today is any more near the end of its useful life than it was decades ago.¹³

F. The 2002 Southern Decision Has Been Misconstrued

The Wireless Infrastructure Association (“WIA) claims the Commission may define what “proportionate” pole sharing costs should be because the Eleventh Circuit’s *Southern* decision in 2002 said it could, and WIA erroneously concludes that NCTA’s request that utilities bear the lion’s share of pole replacement costs is reasonable under this precedent.¹⁴

¹² *Charter Comments* at 3.

¹³ See W.M. Warwick, *Electricity Distribution System Baseline Report*, Pacific Northwest National Laboratory (prepared for the Department of Energy) (July 2016) at 11 (available at <https://www.energy.gov/sites/prod/files/2017/01/f34/Electricity%20Distribution%20System%20Baseline%20Report.pdf>) (“The constant repair and replacement of components of the distribution system makes “age” a rolling average.”)

¹⁴ *WIA Comments* at 6, quoting *Southern Co. v. Fed. Comm’n’s Comm’n*, 293 F.3d 1338, 1352 (11th Cir. 2002) (“The second guideline, requiring that utilities bear a proportionate share of the costs associated with modernizing their plants pursuant to an attacher’s request for a modification, is also reasonable. As the utilities will be the

This interpretation of the *Southern* decision is misleading and incorrect. The *Southern* decision affirmed the Commission's *Local Competition Order*¹⁵ decision to require utilities to pay a proportionate share of costs only in the following circumstance: "a utility that uses a request for modification from an attaching entity to bring facilities into compliance with applicable safety or other regulatory guidelines will be responsible for its share of the modification costs."¹⁶ As explained in the *Coalition's* Comments, prematurely replacing poles does not bring them into compliance with applicable safety or other regulatory guidelines because they were not out of compliance to begin with.¹⁷ Accordingly, this *Local Competition Order* ruling affirmed by the Eleventh Circuit *Southern* decision simply does not apply and cannot be used as legal support for NCTA's Petition.

G. NCTA's Request is Not a "Clarification" of Existing Rules but Instead a Substantial Modification of a Rule that Requires a Rulemaking Proceeding

Several parties mistakenly insist that the NCTA Petition is merely requesting some "clarification" of existing rules, so that a notice and comment rulemaking proceeding is unnecessary.¹⁸

These assertions ignore that NCTA's Petition is asking the Commission: (i) to modify four decades of precedent; (ii) to develop an entirely new rule inconsistent with this precedent; (iii) to upset a carefully balanced and successful system established by the Commission to enable

primary beneficiaries of efforts to modernize their facilities, it is logical for the FCC to mandate that they bear some share of the costs of the transition.").

¹⁵ *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).

¹⁶ *Southern*, 293 F.3d at 1352.

¹⁷ *Coalition Comments* at 32-34.

¹⁸ See *WIA Comments* at 5; See also *Charter Comments* at 13-15.

pole owners to accommodate communications attachers and deploy facilities nationwide; and (iv) to make these ill-advised rulings despite the inevitable result of less broadband deployment and less competition.

The Commission should reject NCTA’s ill-conceived Petition because the relief it seeks would be counterproductive and anticompetitive. But if any analysis of such rule changes were even warranted, it should be done in a notice and comment rulemaking proceeding. In this respect, USTelecom – the Broadband Association correctly concludes that the “shift” in Commission rules requested by NCTA would require a rulemaking:

“If a ‘second rule repudiates or is irreconcilable with a prior legislative rule, the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.’” It cannot be achieved by “interpreting” or “clarifying” an existing rule that today leaves no room for the outcome the Petition seeks.”¹⁹

The Coalition agrees that the changes requested by the NCTA Petition is irreconcilable with and would repudiate four decades of precedent and so would require a rulemaking proceeding.

H. The Pole Replacement Cost Allocation Proposed by NCTA Was Not Raised in the 2017 Notice of Proposed Rulemaking

Charter and ACA claim that NCTA’s issue of pole replacement costs was already subject to an FCC rulemaking notice and comment process in the 2017 Notice of Proposed Rulemaking (“2017 NPRM”) that led to the 2018 *Third Report and Order*.²⁰ In their view, the necessary

¹⁹ Comments of USTelecom – The Broadband Association at 4 (Filed Sept. 2, 2020) (citing *Cent. Tex. Tel. Co-op. v. FCC*, 402 F.3d 205, 211 (D.C. Cir. 2005) and *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993); *See also* Comments of AT&T Services, Inc. at 2-5 (Filed Sept. 2, 2020).

²⁰ *In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017) (“2017 NPRM”).

notice and comment period has already occurred, so that what NCTA proposes could easily be codified into the rules.²¹

The NCTA Petition proposes that utility pole owners pay the lion's share of pole replacement costs, seeking to overturn decades of Commission precedent and standard industry practice. But no portion of the 2017 NPRM proposes any such thing. Charter and ACA also fail to identify any party which even mentioned such a proposal in comments filed in that proceeding. And simply because ACA "advocated for rules that prohibit pole owners from charging prospective attachers excessive fees for pole replacements," does not mean that the specific requests in NCTA's Petition ever crossed the mind of any party, much less received any meaningful comment.

What Charter's and ACA's incorrect allegations make clear, however, is that a proper notice and comment period has not yet occurred and that one would need to occur before any Commission ruling affirming NCTA's proposals could properly be reached.

I. The New Rulings Proposed by ACA Connects are Inappropriate and Should be Rejected

ACA Connects asks the Commission to "adopt rules that codify or affirm" a number of new "policies,"²² and proposes a number of "clear requirements" the Commission should establish in order to "dispel the uncertainly and unfair practices that persist in the marketplace."²³

None of these proposals belongs in a petition for declaratory ruling proceeding which was established to evaluate other specific proposals, and so it is improper to insert them here.

²¹ See *Charter Comments* at 15-17; See also *ACA Comments* at 22-23.

²² *ACA Comments* at 7-8.

²³ *ACA Comments* at 15-21.

J. Charter’s Existing Rural Broadband Deployment Does Not Support NCTA’s Ill-considered Petition

Charter commends itself for its significant 2018 and 2019 deployments in rural areas, noting that it historically has served rural areas and continues to expand into such areas.²⁴

These significant deployments are noteworthy, but they do not help to justify Charter’s support for NCTA’s ill-considered Petition. Instead, Charter’s significant deployment demonstrates that utility poles are not an impediment to the deployment of rural broadband. The status quo enables pole owners to partner with Charter and other rural broadband providers to continue to deploy service and to extend broadband’s reach, but the ill-considered proposals in the NCTA Petition would destroy the capability of utility pole owners to replace poles to accommodate new attachers.

K. The Pole Replacement Costs Communications Attachers Incur are Small Compared to the Much Larger Costs Utilities Incur to Construct and Maintain Entire Pole Distribution Systems

Most if not all the non-pole owning communications company commenters in this proceeding point out the costs associated with pole replacement. These costs are real, and these costs are significant. But the overreach of NCTA’s Petition compels the *Coalition* to mention those costs are small compared to the much greater costs incurred by electric utility pole owners to construct and maintain entire pole distribution systems from which all attaching entities benefit. The ability of attaching entities to utilize these existing pole distribution systems they

²⁴ *Charter Comments* at 5:

In 2018 and 2019 alone, Charter increased the reach of its 41-state network to more than 1.5 million additional homes and businesses—approximately a third of which are in rural areas. In one state, Charter is currently engaged in one of the largest rural broadband construction projects undertaken by a single operator with private capital since the initial deployment of cable networks several decades ago, building over ten thousand miles of new plant in the past few years, with plans to complete over thirteen thousand miles by the end of 2021. For Charter, expansion of its rural network is not just a sound business decision, it is an investment in the economies and futures of the communities it serves.

did not need to construct themselves, with no pole ownership and maintenance responsibilities, itself provides a very real and quite enormous cost savings to all communications attachers, both existing and new.

II. CONCLUSION

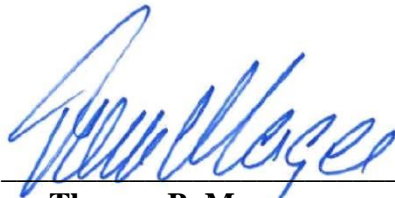
The *Coalition of Concerned Utilities* urges the Commission to act in a manner consistent with the views expressed herein.

Respectfully submitted,

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