

**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)	

**COMMENTS OF THE EDISON ELECTRIC INSTITUTE, NATIONAL RURAL
ELECTRIC COOPERATIVE ASSOCIATION AND UTILITIES TECHNOLOGY
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SUMMARY

The Federal Communications Commission (“FCC” or “Commission”) should reject the Petition for Declaratory Ruling filed in this proceeding by NCTA – the Internet & Television Association (“NCTA”) as it unreasonably asks the Commission to upend its existing make-ready policies concerning pole replacements to accommodate pole attachment requests. The Commission’s current pole replacement policies ensure that utilities receive just compensation for their incremental costs and administratively shifting these incremental costs to utilities is contrary to the Commission’s policy and would have the effect of undermining the basis of the Commission’s pole attachment rate formulae by systematically denying utilities just compensation. The Commission’s current policy with respect to pole replacements acknowledges that leaving pole owners with unrecovered costs would create a disincentive for utilities to build taller poles or perform such pole replacements at all.

There are poles that must be replaced due to preexisting safety conditions, but the responsibility for correcting these conditions is and should be shared by the pole owner, existing attachers and new attachers. However, the Commission has been very clear that utilities are not responsible for sharing in the costs of pole replacements when those “but for” costs are incurred solely in order to provide capacity on the pole to accommodate a new pole attachment request. Pole owners are not responsible for pole replacement costs based on some vague, indefinite and unquantifiable benefits that may be incidental to accommodating pole access requests. To the contrary, utilities are allowed to recover from requesting attachers all of their incremental costs associated with replacing the pole, provided that these costs are just and reasonable.

The Commission should further reject NCTA’s proposal to reverse the Commission’s policy against self-help remedies for pole replacements. The rationale against self-help for pole replacements is as relevant and important today as it has been in the past and there is no basis for

changing this policy now. Pole replacements will always raise unique safety and reliability issues and present substantial risks to electric infrastructure and personnel. These real issues form the basis for the Commission's current policies that limit self-help remedies with regard to pole replacements.

In these comments, EEI, NRECA and UTC refute a number of NCTA's false premises for justifying shifting pole replacement cost to electric customers. The NCTA Petition presents itself as offering a solution to the challenges of broadband deployment in rural America, yet notably does not address the fact that, typically, the number of attaching entities on the pole in these areas is fewer than three and most of the wireless requests have been for small cell deployments in urban areas. Further, to the extent there are complaints regarding factual assessments regarding cost responsibility for pole replacements, these do not justify the relief requested and are best addressed in the context of a complaint proceeding, which might be expedited as NCTA suggests.

Electric utilities do not charge premiums for make-ready work or pole attachments; this is work performed at cost to accommodate pole attachment requests. Pole attachment revenues are accounted for as offsets to rates paid by electricity customers. Given that electric utilities are subject to rate regulation by the states, pole attachment rates and make-ready fees that do not provide for full and fair cost allocation directly affect the cost basis underlying rates. Furthermore, the heavily regulated nature of the electric industry also means that electric utilities have strong business and regulatory incentives to prudently plan, operate and invest in their distribution infrastructure.

Finally, given that the requested relief would create new rules involving complex matters regarding allocation of costs and apportionment of benefits, as well as underlying engineering,

capacity and safety considerations, the Commission cannot address this request through a declaratory ruling. A rulemaking would be the only appropriate venue for any changes to existing pole attachments regulations.

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**COMMENTS OF THE EDISON ELECTRIC INSTITUTE, NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION AND UTILITIES TECHNOLOGY COUNCIL**

The Edison Electric Institute (“EEI”), Utilities Technology Council (“UTC”) and National Rural Electric Cooperative Association (“NRECA”) hereby submit these Comments in opposition to the Petition for Declaratory Ruling (“Petition”) filed by NCTA – the Internet & Television Association (“NCTA”) as it unreasonably asks the Federal Communications Commission (“FCC” or “Commission”) to upend its existing make-ready policies concerning pole replacements to accommodate pole attachment requests¹

INTRODUCTION AND OVERVIEW

EEI is the trade organization that represents U.S. investor-owned electric companies that provide electricity for 220 million Americans and operate in all 50 states and the District of Columbia. EEI’s members own and operate vast overhead electric systems, including utility poles, as part of the electric industry’s mission to provide smarter energy infrastructure that ensures the reliable, safe, secure and efficient delivery of electric power to the public.

¹ See *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Public Notice, DA 20-763 (July 20, 2020)(Public Notice); see also *Petition for Expedited Declaratory Ruling*, WTC Docket No. 17-84 (filed July 16, 2020) (“Petition”).

UTC is the international association for the telecommunications and information technology interests of electric, gas and water utilities and other critical infrastructure industries. UTC's members own, manage and control extensive infrastructure, including pole, ducts and conduit that are used to provide pole attachments to third-party communications service providers. UTC's members include large investor-owned utilities, who are subject to FCC pole attachment regulations. As such, UTC's members would be directly affected by the relief requested by NCTA in its Petition. UTC has been an active participant in the FCC's pole attachment proceedings and it is hereby joining in opposition to the Petition, consistent with its public policy position against pole attachment regulations that would unfairly subsidize commercial communications service providers at the expense of electric consumers.

NRECA is the national trade association representing nearly 900 local electric cooperatives operating in 48 states. America's electric cooperatives power over 20 million businesses, homes, schools and farms across 56 percent of the nation's landmass and serve one in eight (42 million) consumers. NRECA's member cooperatives include 62 generation and transmission ("G&T") cooperatives and 831 distribution cooperatives. Both distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable and affordable electric service. NRECA's member cooperatives include cooperatives that are Registered Entities with compliance obligations under Reliability Standards established by NERC to ensure the reliability of the Bulk Power System. Cooperatives own and operate substantial local distribution facilities and are responsible for the reliability and security of their local distribution systems. In addition, over 150 NRECA members are deploying broadband to their consumers in unserved and underserved rural communities.

The electric industry supports the Commission's national goals for the deployment of

broadband and Fifth Generation (“5G”) wireless networks. Our member companies not only have provided access to pole infrastructure, consistent with requirements of Section 224 of the Communications Act,² but they also have voluntarily developed innovative attachment solutions that enable communications service providers to access a broader selection of utility-owned poles at reasonable rates. Furthermore thanks to creative thinking, the formation of partnerships, state initiatives and laws, as well as the support of local communities, some electric companies are even partnering with communications providers to facilitate the provisioning of affordable and reliable broadband to underserved and unserved communities as they look to upgrade their respective networks. Many cooperatives are beginning to offer broadband and some investor owned utilities are also looking at opportunities to assist in bringing broadband to unserved and underserved communities in their service territory.³ Importantly, when poles need to be changed out to accommodate utility broadband deployment, utilities treat themselves and their partners the same as any third-party attachers.

This ultimately is for the benefit of communities served by both electric companies and telecommunications companies. Pole rental rates, especially those subject to the FCC regulated formulas, represent significant savings to attachers compared to deploying and maintaining their own pole infrastructure. Similarly, cost-based charges to replace poles, when needed for

² See 47 U.S.C. § 224.

³ For example, electric companies can partner as middle mile providers that help lower the broadband costs in historically high cost, low population density areas so that internet service providers can more cost effectively build out last mile broad band services. See e.g. EE Online, “Appalachian Power to build “middle mile” for broadband access in proposed Virginia pilot program “ (May 21, 2019), <https://electricenergyonline.com/article/energy/category/automation-it/53/768896/aep-appalachian-powerappalachian-power-to-build-middle-mile-for-broadband-access-in-proposed-virginia-pilot-program.html> and Telecompetitor, “C Spire Works with Entergy Mississippi On \$11 Million Broadband Project in the State” (Dec. 20, 2019), <https://www.telecompetitor.com/c-spire-works-with-entergy-mississippi-on-11-million-broadband-project-in-the-state/>.

legitimate safety and capacity reasons, also represent a substantial savings to attachers.

Accordingly, the Commission should focus on policies that encourage cooperation between electric companies and the communications companies to develop smarter, safer and more efficient networks that offer superior benefits and services to the public.

Over the last decade, it has become more apparent than ever, in light of the hurricanes and other catastrophic events, that electric utility infrastructure is critical to the interests of the nation, not only with respect to the provision of electric service but also because all communications providers rely upon and benefit from this infrastructure. In particular, critical electric infrastructure is important for communications, not only as a source of electric power but also as a reliable physical network of poles, ducts, conduits and rights-of-way for the deployment of communications wires and equipment. As a consequence, the Commission's policies should encourage the communications industry to collaborate and partner with electric utilities to develop smarter, safer and more technically efficient communities which benefits to the public interest. The Commission's policy should not simply favor subsidized rapid deployment of facilities over the reliability and safety of jointly-used infrastructure. The Commission's policies must account for the fact that the communications industry has little economic incentive to actually build in high-cost and low population density areas, while in contrast electric utilities, both cooperative and regulated investor owner entities, have an obligation to serve and therefore must prudently build out and maintain the electric grid to serve the public wherever people may be located, even very rural and high-cost areas.

The Commission should not only ensure that public safety is not negatively impacted by pole attachment policies, but also should take into account how its policies may impede nationwide efforts to deploy smart infrastructure and develop smart communities by

unnecessarily increasing costs to be borne by electric customers and diverting resources away from grid modernization and improved network resilience. Finally, the Commission should be aware that, if granted, NCTA's request to shift the cost of pole replacements would create a significant disincentive for utilities to voluntarily accommodate access through pole replacements.

BACKGROUND

Electric utilities face a very real challenge of building and maintaining electric distribution infrastructure. This is a very resource- and labor-intensive enterprise that has become more so as the industry has experienced an increase, not only in the number of communications pole attachment applications, but also in the number, weight and variety of the requested attachments. This means that there is an even greater need for analysis of pole strength and loading, as well as make-ready work, before adding new attachments. This is because each wire and device attached or strung along a distribution network, including overlashed wires, adds physical stress to the poles in terms of weight, wind loading, ice loading and lifespan. This results in an extra layer of complexity for pole construction for the electric distribution system operator. It also increases the risk associated with pole ownership from the standpoint of reliability, safety and maintenance.

While electric utilities and communications providers have a common need for pole infrastructure, these entities also have a common responsibility for this critical infrastructure because responsible use by both parties of utility infrastructure avoids wasteful duplication of facilities on public or private rights of way and reduces costs and other impacts on customers. Both electric and communications providers depend, not only on the existence of pole infrastructure, but also on routine pole maintenance, including tree-trimming, right-of-way clearance, safety inspections and compliance with applicable codes and standards for pole plant.

Also, when infrastructure is damaged as a result of storms, vehicle impacts, or other causes, such that one or more poles are downed, both electric and communications providers depend on prompt repair or replacement of the damaged poles to ensure the reestablishment of safe and reliable service. Both electric and communications providers also depend on prompt restoration of such pole infrastructure to ensure continuity of the respective service that they provide to their customers, protect costly wireline plant and associated capital equipment and comply with applicable ground clearance safety requirements. However, under the Commission's current policy, attachers bear a proportionately small share of the operational responsibilities and costs associated with owning and maintaining the pole plant required for all attachers. It is no accident that the telecommunications industry has been shedding pole ownership for decades.

Collectively, electric utilities own sixty-five to seventy percent of all poles nationally according to FCC data.⁴

Under Section 224, attachers have a right to attach their equipment to utility poles and pay just and reasonable rates for their attachments. Sometimes in the course of deploying facilities, when attachers request access to a pole that has no immediately available space or capacity to accommodate the new attachments, existing facilities must be rearranged or the pole needs to be replaced. This process is known as "make-ready." The Commission generally defines "make-ready" as the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities,⁵ and has specifically stated that a "pole change-out is the

⁴ *Report and Order and Order on Reconsideration, In the matter of Implementation of Section 224 of the Act*, WC Docket No. 07-245, and *A National Broadband Plan for our Future*, GN Docket No. 09-51, FCC 11-50, at ¶ 206 (Adopted Apr. 7, 2011) ("National Broadband Plan").

⁵ *See 2011 Pole Attachment Order*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5296 (2011) ("2011 Pole Attachment Order"); *see also* 1977 Senate Report at 19, reprinted in 1978 U.S.C.C.A.N. at 127 ("1977 Senate Report").

replacement of a pole to accommodate additional users.”⁶ In cases of pole replacements, as discussed further below, the Commission’s long standing policy is that the attacher requesting or needing access may pay the utility to make space available by covering up to 100% of the costs of a new, taller pole and paying for installation. Similarly, it is the Commission’s policy that the same would apply when instead of a pole replacement, the utility must rearrange existing facilities on the pole to make existing space available consistent with pole engineering and safety requirements. In short, the attacher directly reimburses the utility for make-ready and for the cost of any modifications to utility poles necessitated by the new attachments, including pole rearrangements, inspection, pole replacements and other direct costs of making space available to the attacher.⁷

No study has conclusively determined that pole attachment rental rates or pole replacement charges have an impact on rural broadband deployment decisions.⁸ On the contrary, numerous agencies have determined that other factors, primarily low population density, are more significant factors, as discussed further below.

COMMENTS

NCTA’s request for the Commission to administratively exact steep discounts for pole

⁶ “Make-ready” generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. *See* 1977 Senate Report at 19. A pole “change-out” is the replacement of a pole to accommodate additional users. *See Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CC Docket No. 86-212, 2 FCC Rcd 4387, 4405 n.3 (1987).

⁷ *See In re Alabama Cable Telecomm’s Ass’n., et al. v. Alabama Power Company*, 16 FCC Rcd 12209 at ¶ 47 -48(2001).

⁸ The National Broadband Plan stated that easing permit and zoning rules, as well as reducing fees for access to easements, rights-of-way and pole attachments “could have the added effect of generating an increase in rural broadband” but did not make a conclusive finding, p. 110, <https://www.fcc.gov/general/nationalbroadband-plan>.

replacements at the expense of electric customers is contrary to the Commission's established pole attachment policy and case precedents. Moreover, it would undermine the Commission's basis for its current pole attachment rate structure by limiting recovery of one-time incremental costs that are caused by and directly and solely attributable to pole attachments. The Commission should reject this proposal. The Commission also should reject NCTA's proposal to reverse the Commission's policy against self-help remedies for pole replacements because the substantial risks presented by self-help installation of distribution poles by communications providers threaten safety and reliability. The rationales against self-help, which are recognized by the Commission, are as relevant and important today as they have always been.⁹

I. Expanding the application of Section 1.1408(b) of the Commission's Rules to include pole owners as direct beneficiaries of pole replacements made to accommodate new attachers contravenes Congress expectation for attachers to bear the costs associate with new attachments.

As premise for discounting the cost of pole replacements, NCTA argues that 47 C.F.R. § 1.1408 (b) of the Commission's Rules has "generated confusion" over the scope of parties benefiting from a pole replacement necessary to accommodate pole attachment access for new broadband construction.¹⁰ NCTA suggests a discount on pole replacements is warranted because Section § 1.1408(b) of the Commission's Rules states, in part, that the costs of modifying a facility shall be borne by all parties that directly benefit from the modification.¹¹ NCTA argues this should now be read to include pole owners and that the Commission should provide the new

⁹ See Petition at 9-27 and 29-31.

¹⁰ See *id.* at 9.

¹¹ NCTA's request can be read to mean that all attachers, including other broadband providers, would benefit and should therefore help pay for the pole replacement. Not only would the requested relief impact electric rate payers but it would also increase the cost of competing broadband providers attached to the pole raising anti-competitive concerns.

attacher with administratively set apportionment that will be far less than the full cost of a replacement to accommodate its attachment request. NCTA is not asking for a clarification of the Commission's existing make-ready policies under Section 224, which already address issues of cost responsibility and sharing for pole modifications to accommodate requests to install new attachments on utility poles. Rather NCTA is asking for a wholesale change in its policies to provide NCTA members with discounted pole replacement costs at the expense of electric customers and other communications attachers in direct competition to the new attacher.

A. Utilities are not direct beneficiaries of pole replacements to meet demand for access to poles.

NCTA's argument hinges on the notion that pole owners are direct beneficiaries of pole replacements under 47 C.F.R. § 1.1408 (b) of the Commission's Rules; however, this is contrary to the Commission's long-standing policies under Section 224 that allow utilities to recover all of the costs of a modification that are attributable to new pole attachments. The Commission has long recognized that these costs are solely caused by the new attaching entity, which is solely responsible for reimbursing utilities for these costs. Moreover, a pole replacement is distinctly different from other modifications because it is voluntarily provided by the utility in order to accommodate a request for pole attachments and the cost of the pole replacement would not have been incurred but for the need to accommodate the request for pole attachments.

This is distinct from a modification in which the utility directly benefits and participates in the modification and, therefore, bears a proportionate share of the costs. In the *Local Competition Order*, the Commission concluded that, to the extent the cost of a modification is incurred for the specific benefit of any particular party, the benefiting party is obligated to assume the cost of the modification, or to bear its proportionate share of cost with all other

attaching entities participating in the modification.¹² However, the Commission also explained that if an attacher's modification affects the attachments of others who do not initiate or request the modification, such as the movement of other attachments as part of a primary modification, the modification cost will be covered by the initiating or requesting party.¹³ While the Commission does require utilities to contribute to the extent that they participate in the modification of a pole, they are not responsible for costs that are caused solely in order to accommodate a new attachment.

The Commission was also clear that if an entity uses a proposed modification as an opportunity to adjust its preexisting attachment, the "piggybacking" entity should share in the overall cost of the modification to reflect its contribution to the resulting structural change. It is in the context of modifications initiated by attachers that the Commission stated that "[t]his will discourage parties from postponing necessary repairs in an effort to avoid the associated costs."¹⁴ The Commission recognized the concern that limiting cost burdens to entities that initiate a modification, or piggyback on another's modification, may confer incidental benefits on other parties with preexisting attachments on the newly modified facility.¹⁵ Nevertheless, the Commission reasoned that 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 to modify their own facilities.

¹² See *In the matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, FCC 96-325, 11 FCC Rcd 15499, at ¶ 1211 (Aug. 1, 1996) ("*Local Competition Order*").

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.* at ¶ 1213.

The Commission relied upon the Conference Report accompanying the passage of the 1996 Telecommunications Act to confirm that Congress intended to impose cost sharing obligations on an entity “that takes advantage of such opportunity to modify its own attachments.”¹⁶ The Commission therefore found that the 1996 Telecommunications Act suggests that “an attaching party, incidentally benefiting from a modification, but not initiating or affirmatively participating in one, should not be responsible for the resulting cost.”¹⁷ Moreover, the Commission distinguished pole owners from attachers stating that “[a]s 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.”¹⁸ That is, if they were not able to offset those costs borne by their customers via appropriate charges for other attachments. Thus, neither Congress nor the Commission intended to sweep pole owners – and their electricity customers – in under this rule as financially responsible parties.

Section 1.1408(b) of the Commission’s Rules was promulgated in the *Local Competition Order* with concerns about safety violations in mind¹⁹ and to address the situation where “the entity initiating and paying for the modification might pay the entire cost of expanding a facility’s capacity only to see a new competitor take advantage of the additional capacity without

¹⁶ See *Local Competition Order*, 11 FCC Rcd 15499, at ¶ 1213.

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *id.* at ¶1212 (“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. This will discourage parties from postponing necessary repairs in an effort to avoid the associated costs.”); see also *id.* at ¶1201.

sharing in the cost.”²⁰ To prevent this, the rule allows “the modifying party or parties to recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification.”²¹ These provisions are intended to ensure that new entrants, especially small entities with limited resources, bear only their proportionate costs and are not forced to subsidize their later-entering competitors.

With respect to pole owners, in the *Local Competition Order*, the Commission addressed the issue that “in some cases a facility modification will create excess 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.”²² The Commission explained that this does not require the owner to use those revenues to compensate the parties that did pay for the modification because 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 Commission found that 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.²³ This reasoning applies to NCTA’s erroneous assertion that pole owners are direct beneficiaries of pole changes-outs and that they gain a direct benefit from pole replacements such as to justify having the Commission administratively provide communications providers with an upfront offset of pole replacement costs.

²⁰ *See id.* at ¶1214.

²¹ *See id.*

²² *See id.*

²³ *See id.*

B. The requested relief would undermine the Commissions current Section 224 rate structure.

The Commission should not only reject NCTA’s proposal as it would shift pole replacement costs to utilities and electric customers but also because it would wholly undermine the Commission’s own basis for the adopting the 2011 Telecom Rate that is predicated on the understanding that utilities would install poles based on an assessment of their own needs and, to the extent that future attachments could not be accommodated on such poles, leave it to the new attacher to pay the cost of the new pole. In adopting the 2011 Telecom Rate, the Commission identified a lower-bound rate that is consistent with the statutory framework and enables costs to be allocated based on the prescribed cost-apportionment formulas. However, in doing so the Commission relied on the basic principles of cost causation that would underlie a marginal cost rate without defining “cost” as equivalent to marginal or incremental cost per se.²⁴ The Commission explained that under these principles, if a customer is causally responsible for the incurrence of a cost, then that customer – the cost causer – pays a rate that covers this cost. The Commission further explained that this is consistent with the Commission’s existing approach in the make-ready context, where a pole owner recovers the entire associated capital costs through make-ready fees. The Commission acknowledged that Congress expected a pole attachment rate based on incremental costs to be minimal since most of those costs would have been fully recovered in the make-ready charges already paid by an attacher.²⁵

In deciding to lower the Telecom Rate in 2011, the Commission stated that while it

²⁴, See *Implementation of Section 224 of the Act*, WC Docket No. 07-245, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, 26 FCC Rcd 5240, at ¶ 143 (Apr. 7, 2011) (“*2011 Pole Attachment Order*”).

²⁵ See 1977 Senate Report at 19; see also *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CC Docket No. 86-212, Report and Order, 2 FCC Rcd at 4387, 4388 (1987).

sought to ensure that its policies promote the availability of broadband services and efficient competition for those services, it also recognized that pole rental rates historically have helped support the investment utilities make in their pole infrastructure and acknowledged utilities' policy concerns about shifting that burden to utility ratepayers.²⁶ In the *2011 Pole Attachment Order*, the Commission heavily justified its decision to lower the Telecom Rate based on the observation "that pole owners have the opportunity to recover through make-ready fees all of the capital costs actually caused by third-party attachers." As a result, the FCC rationalized that under its policy the pole owner need not bear any significant risk of unrecovered pole investment undertaken to accommodate a third-party attacher.

The Commission also acknowledged in the *2011 Pole Attachment Order* that, with respect to impact on investment in infrastructure, it typically would not be economically rational for utilities to build taller poles solely for the possibility of accommodating attachers and therefore incur unreimbursed capital costs: "[I]ninstalling a pole that is taller than necessary is strictly speculative and contrary to efficient capital management. . . Therefore, it would be wholly irrational for the utility, as well as inconsistent with a utility's capital preservation obligations, to risk non-recovery of these costs absent a direct economic benefit."²⁷ Further, in the comparatively few instances where a pole is replaced to accommodate a new attachment, the Commission has contemplated that the attacher's make-ready fees are designed to recover those costs even though the utility will own the pole.

In the *2011 Pole Attachment Order*, the Commission emphasized that the rules it was adopting would impose no unrecoverable cost on the utility and would even provide an

²⁶ See *2011 Pole Attachment Order*, 26 FCC Rcd, at ¶ 146.

²⁷ See *2011 Pole Attachment Order*, 26 FCC Rcd, at ¶ 146.

incidental benefit (as opposed to direct benefit) to the utility, insofar as a utility that has not considered third-party demand is able to install a new pole at the new attacher's expense.²⁸ The Commission again recognized that utilities typically would not install such extra capacity in advance purely to accommodate possible telecommunications carrier or cable attachers. Moreover, the Commission concluded that utilities would install poles based on an assessment of their own needs and, to the extent that future attachments could not be accommodated on such poles, leave it to the new attacher to pay the cost of the new pole. Although lowering the Telecom Rate, it did so on the basis that utilities at least had the certainty of recovering the full cost of make-ready work performed on behalf of communications providers. In this manner, utilities are certain to recover the full cost of the additional capacity through make-ready charges.

Despite the clear and long-standing policy, NCTA now proposes a cost shift that would fully undermine the intent of the 2011 rules by leaving a utility with an unrecoverable cost for a pole replacement made because of the new attacher's pole attachment request. The Commission's longstanding policy has thus been that the pole owner recovers the entire associated capital costs through make-ready fees, thus the additional costs that form the basis for the statutory minimum are the costs of access to the pole that would not have been incurred by the utility "but for" the pole attachment request. These costs include pre-construction survey, engineering, make-ready and replacement costs incurred in preparing the pole for attachments. The Commission has clarified that "these capital costs would not have been incurred but for the pole attachment demand and, the attacher—the cost causer—pays for these costs."²⁹ Similarly if rearrangement or bracketing is performed to accommodate a new attachment, the new attacher is

²⁸ *Id.* at ¶ 188.

²⁹ *See 2011 Pole Attachment Order*, 26 FCC Rcd at ¶ 143, fn 426.

responsible for those costs, but the Commission has been clear that a pole owner recovers the entire capital cost of a new pole through make-ready charges from the new attacher when a new pole is installed to enable the attachment. The Commission has noted that “if capital costs arise from the make-ready process, our existing rules are designed to require attachers to bear the full amount of those costs.”³⁰

C. The Commission has already addressed cost responsibility for bringing pole and associated attachments into compliance to meet safety and reliability requirements.

The Commission’s rules are likewise clear that a “utility may not charge a new attacher to bring poles, attachments, or third-party equipment into compliance with current published safety, reliability and pole owner construction standards guidelines if such poles, attachments, or third-party equipment were out of compliance because of work performed by a party other than the new attacher prior to the new attachment.”³¹ 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 standard to the extent there were pre-existing violations.³² Thus, read together, 47 C.F.R. § 1.1408(b) and 47 C.F.R. § 1.1411(d)(4) of the Commission’s Rules prohibit utilities from charging a new attacher to correct preexisting violations, but at the same time state that a pole owner that pays for a pole replacement must be able to recover a proportionate share “from all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification including the new attacher. Accordingly, while the utility is prevented from charging a new attachers under 47 C.F.R. § 1.1411(d)(4) of the Commission’s Rules for costs to replace a pole with a preexisting

³⁰ See *id.*, at ¶ 144 (noting that make-ready, or non-recurring costs, could include capital costs).

³¹ See 47 C.F.R. § 1.1411(d)(4).

³² See *2011 Pole Attachment Order*, 26 FCC Rcd at ¶ 121.

condition, the new attacher retains a reimbursement obligation to existing attachers or the pole owners under 47 C.F.R. § 1.1408(b) of the Commission's Rules to cover the cost of its access to the replaced pole.

II. The FCC should not reverse its current policy against self-help for pole replacements.

NCTA asks the Commission to divest utilities of their ownership and control of their infrastructure by requiring utilities to allow third-party communications providers to replace poles themselves through self-help. As justification, NCTA asks the Commission to erroneously apply 47 C.F.R. § 1.1407(b) of its so that an attacher may order a pole owner to either complete a replacement within a designated amount of time or designate a qualified contractor authorized to do so.³³

The Commission has already decided that self-help is not available for pole replacements and the rationale for that decision remains valid today. In the *Third Report and Order and Declaratory Order*, the Commission considered exactly this issue and correctly acknowledged that utilities have a legitimate concern from a safety/reliability standpoint with regard to who performs changeouts given the complexity and the need for coordination with regard to things such as power shutoffs. The Commission found the record showed that pole replacements can be complicated to execute and are more likely to cause service outages or facilities damage if not done properly. For example, pole replacements require utilities to manage an outage in order transfer the lines – for both the utility and the existing attachers. Given the particularly disruptive nature of this type of work, the Commission has made “clear that pole replacements are not eligible for self-help.”³⁴ The facts and the Commission's reasoning for the *Third Report*

³³ See Petition at 29.

³⁴ See 47 C.F.R. § 1.1411(i)(3).

and Order and Declaratory Order have not changed. Safety of workers and the public should be paramount and the Commission should absolutely reject NCTA's proposal to revise its rules to apply self-help remedies to pole replacements.

III. The Commission should reject NCTA's premises for discounting the cost of pole replacements.

NCTA's arguments in favor of discounting the costs of a pole replacements made to accommodate pole attachment requests are premised on unsupported and factually inaccurate assertions about broadband deployment and should be rejected by the Commission.

A. The requested relief have limit impact given the Commission's limited jurisdiction and cost-based pole replacement fees are not impediments to rural broadband deployments.

While the goal of promoting broadband in unserved areas is laudable, rules promulgated under a legislative enactment must reasonably advance the purposes of the enactment.³⁵ An agency may have broad rulemaking powers under legislative enactments, but a substantive relationship must be demonstrated between purpose and means. Although the Commission's mission may be to promote broadband deployment and competition, the rule changes proposed in the Petition will not achieve the stated goal.

Given the Commission's limited jurisdiction, no matter what regulations may be considered in this proceeding, they will have limited impact on broadband access in large areas of the country where consumers are "unserved" by broadband.³⁶ The Commission still lacks jurisdiction to regulate the rates, terms and conditions for pole attachments in states that adopt

³⁵ *National Tire Dealers & Retreaders Ass'n v. Brinegar*, 491 F.2d 31 (D.C. Cir. 1974).

³⁶ It also bears noting that utilities do not operate or plan their systems according whether an area is "unserved" or not with respect to broadband. Utilities have service territories in which they have an obligation to serve customers and they plan and operate their infrastructure to ensure the safe, reliable, secure, resilient and efficient delivery of power to the public.

their own system of pole attachment regulation (i.e., “reverse preemption states”) or for attachments to poles owned by cooperatives, municipalities and non-utilities that are exempt from FCC regulation under Section 224.³⁷

Further, no study has conclusively determined that pole attachment rental rates or pole replacement charges have an impact on rural broadband deployment decisions.³⁸ On the contrary, numerous agencies have determined that other factors, primarily low population density, are more significant factors. This fact has been supported by analyses by the Virginia State Corporation Commission,³⁹ a Virginia Hearing Examiner,⁴⁰ the Tennessee Broadband

³⁷ Twenty three states, including the District of Columbia, have certified that they have issued and made effective rules and regulations implementing their regulatory authority of pole attachments. *See States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice. DA-302 (rel. Mar. 19, 2020).

³⁸ The National Broadband Plan stated that easing permit and zoning rules, as well as reducing fees for access to easements, rights-of-way and pole attachments “could have the added effect of generating an increase in rural broadband” but did not make a conclusive finding. See p. 110, <https://www.fcc.gov/general/nationalbroadband-plan>.

³⁹ “Report on Electric Cooperative Pole Attachment Issues.” Commonwealth of Virginia State Corporation Commission, November 1, 2011. <http://www.scc.virginia.gov/docketsearch/DOCS/2h%40m01!.PDF>

⁴⁰ Virginia State Corporation Commission, *Application of Northern Virginia Electric Cooperative*, Case No. PUE-2013-00055, “Report of Howard P. Anderson, Jr., Hearing Examiner” (June 12, 2014) (“Virginia Hearing Examiner Report”), at 43-44, <http://www.scc.virginia.gov/docketsearch/DOCS/2xzq01!.PDF>. The Hearing Examiner’s report was affirmed by the full Virginia State Corporation Commission.

Report,⁴¹ the U.S. GAO,⁴² the U.S. Small Business Administration,⁴³ the Congressional Research Service⁴⁴ and recognized by the FCC's own Intergovernmental Advisory Committee.⁴⁵ All demonstrate that cost-based pole attachment rental and replacement rates have little, if any, influence on decisions by for-profit communications companies to invest in advanced broadband infrastructure in rural America.

Contrary to NCTA's assertions, rural areas do not typically present problems with respect to adequate capacity on poles for new attachments. Make-ready work of all types depends heavily on the number of existing attachers on the pole due both to incremental costs associated with moving the current existing attachers, as well as potential costs associated with pole replacements and in-line builds when no space is available to accommodate the new attacher. Overall, the number, variety and weight and surface area of attachments are all increasing, but the number of attaching "entities" has remained relatively stable and in most cases and the entities that are deploying advanced equipment are the same entities that already have attachments on poles. Rural areas continue to typically average fewer than three attaching

⁴¹ Report of the Tennessee Advisory Commission on Intergovernmental Relations, *Broadband Internet Deployment, Availability and Adoption in Tennessee*, January 2017 ("Tennessee Broadband Report"), at 74, https://www.tn.gov/content/dam/tn/tacir/documents/2017_Broadband.pdf.

⁴² Telecommunications: Projects and Policies Related to Deploying Broadband in Unserved and Underserved Areas (GAO-14-409), at 7, <http://www.gao.gov/assets/670/662711.pdf>.

⁴³ Issue Brief: Accessing the Internet in Rural America, Daniel Wilmoth, Research Economist, Office of Advocacy, U.S. Small Business Administration, November 15, 2019, at 11, <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/11/07105617/Rural-Internet-Accesss.pdf>

⁴⁴ Cong. Research Serv., RL 30719, *Broadband Internet Access and the Digital Divide: Federal Assistance Programs*, at 7 (2019).

⁴⁵ Intergovernmental Advisory Committee to the FCC, Advisory Recommendation No. 2018-1, *In the Matter of Accelerating Wireless Broadband Deployment by removing Barriers to Infrastructure Investment*, WT Docket No. 17-79. at 4-5, <https://ecfsapi.fcc.gov/file/103210132711616/IAC%20Filing%20with%20FCC.pdf>.

entities, and to date, most of the new wireless requests have been for small cell deployments in urban areas. EEI, NRECA and UTC are not aware that there have been any substantial problems related to pole attachments in rural areas, which is evident from the low number of attachers on poles in those areas. Therefore, to the extent that the Commission is considering adopting NCTA's proposal, such action would not be likely to actually accelerate rural wireless broadband deployment and could be counterproductive because of the costs that will be imposed on rural electric customers – harming the very people NCTA claims its proposal would help.

B. Factual disputes over a limited number of complaints about allocations of pole replacement costs are best addressed in Commission enforcement proceedings.

NCTA essentially argues that over the decades that the Commission has implemented its make-ready policies, the Commission has received some complaints regarding the cost allocation responsibility.⁴⁶ However, that alone is not justification for the requested cost shift that is requested to be applied on a blanket basis and absent a rulemaking. The factual issues raised in such complaints are best addressed in the contexts of any complaint proceedings as the Commission's rule provide for. The Commission should not entertain an attempt to bypass the complaint process through a declaratory ruling that could prejudice the interests of all pole owners.

Nevertheless, it bears noting that NCTA's reference to the Comments of Lumos Networks Inc., Lumos Networks of West Virginia Inc. and Lumos Networks LLC actually involves a complaint about the assessment of make-ready costs and focuses on the fact that “providers coming after Lumos requesting similar access are not subject to the same level of

⁴⁶ See Petition at 6.

survey and make-ready costs.”⁴⁷ Their concerns, therefore, are not about the pole owners, but the potential competitive disadvantage of being a first mover with respect to new attachments and granting NCTA’s Petition would not address Lumos’s concerns.

Moreover, with respect to the issue of assessing the cost responsibility for fixing preexisting safety violations, Lumos actually complains that the problem is that the existing attachers – not the pole owners – were not properly charged for remediation of safety violations. And, unlike NCTA, Lumos’s requested relief was for the Commission to mandate that pole owners notify “existing attachers” when improperly placed attachments prevent a new attacher from attaching on a pole. Lumos did not ask the Commission for a discount on make-ready costs at the expense of the pole owner as requested by NCTA.⁴⁸

NCTA also cites to *Knology, Inc. vs. Georgia Power Co.* as justification for discounting pole replacements at the expense of pole owners, yet this complaint was also focused on a problem with improperly billing for correction of safety violations that were “caused by other attachers that existed prior to commencement of Knology’s make-ready work.”⁴⁹ In this case, the Commission ordered a refund of “the cost of pole change-outs necessitated by the safety violations of other attachers,” but did not suggest the pole owner was improperly charging Knology for the cost of new poles needed to provide additional pole capacity to accommodate Knology’s demand for access, nor did Knology suggest that the Commission provide it with a discount on such pole replacements.⁵⁰ To the extent that NCTA is able to point to other isolated

⁴⁷ See Comments of Lumos Networks Inc., Lumos Networks of West Virginia Inc. and Lumos Networks LLC at 14-15, WC Docket No. 17-84 (filed June 15, 2017).

⁴⁸ See *id.* at 15.

⁴⁹ See *Knology Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd. 24615, 24629 (2003)

⁵⁰ See *id.*

examples of complaints like *Crown Castle Fiber LLC v. Commonwealth Edison Co.*⁵¹ to show improper shifting of pole replacement costs involving poles that were red tagged or scheduled for replacement onto a new attacher, such complaints are properly subject to enforcement at the FCC and best addressed by NCTA’s proposal that the Commission expedite these proceeding but not for administratively establishing a blanket discount on pole replacements to accommodate new attachers.

C. Costs of pole replacements are recovered on a non-profit basis and utilities do not charge premiums.

The Commission should recognize utilities are not being benefited by the current Commission policy for the allocation of pole replacements made to accommodate new attachers “at the expense of unserved Americans” such as to justify shifting the cost of broadband deployments to electric customers.⁵² Consistent with discussion above, make-ready, including pole replacements, is performed at cost to the attachers. Pole owners do not charge premiums or otherwise profit from this work as NCTA incorrectly claims. NCTA’s Petition demonstrates a fundamental misunderstanding of utility ratemaking because pole attachment revenues are accounted for as offsets to rates paid by customers. Retail electricity rates for the use of distribution facilities (including poles, ducts, conduits and rights-of-way) are generally determined on the basis of capital costs, operation and maintenance costs and return on equity. Retail rates for investor owned utilities are heavily regulated by state public utility commissions and co-ops are governed by their democratically elected board of directors. Even in states that have adopted rate cap, rate freezes, or retail competition, a utility’s costs and revenues are all

⁵¹ See *Crown Castle Fiber LLC v. Commonwealth Edison Co.*, Pole Attachment Complaint for Denial of Access, ¶¶ 121-134, FCC Proceeding No. 19-169, Bureau ID No. EB-19-MD-004 (filed June 19, 2019).

⁵² See Petition at 9.

taken into account in subsequent rate proceedings to determine how future rates are determined. Over time, therefore, pole attachment rates and make-ready that does not provide for full and fair cost allocation directly affect the cost basis underlying regulated and unregulated rates. Accordingly, to the extent that NCTA asks for the Commission to discount the cost of pole replacements this windfall to new attachers will be borne by electric ratepayers.

D. Utilities have strong business and regulatory incentives to prudently plan, operate and invest in distribution system infrastructure.

Discounting the cost of pole replacements is not justified by claiming that utility infrastructure is aging. NCTA incorrectly premises its request to discount the cost of pole change on the idea that existing utility infrastructure “in many areas is at or end of its useful life and incapable of supporting new facilities without new investment in new poles,”⁵³ such that the “aging of America’s pole infrastructure has created significant cost and logistical barriers.”⁵⁴

Pole replacements are not a significant barrier to broadband access in unserved areas where there is generally sufficient capacity and a significant number of the poles not subject to the Commission’s regulation. Whether new or at or near end of useful life, the issue for pole change outs is whether a pole may safely and reliably accommodate a pole attachment request. Utilities have very strong incentives not to risk the wrath of customers and regulators by underinvesting in distribution facilities to the detriment of safety, reliability and resiliency. Utilities have an obligation provide electric service to customers within their services territories which means that they need to fulfill certain regulatory standards for customer satisfaction, which provides a very significant incentives for utilities to maintain the reliability, safety, security and resiliency of the distribution system as their top priority. Yet, NCTA expects the

⁵³ See Petition at 5-6.

⁵⁴ See *id.* at 8.

Commission to provide a discount to communication providers based on the unrealistic notion that utilities maintain and plan their systems based on speculation that new attachers in rural areas will make timely pole attachment requests that allow the utilities to opportunistically pass off pole replacement costs.⁵⁵ In any event, this premise for NCTA's request to discount pole replacement costs is unsupported and factually incorrect.

To the contrary, as part of their responsibilities, utilities often must replace their existing poles with new poles for a variety of reasons, including relocating the poles due to road-widening projects, replacing damaged poles and, in some cases, increasing pole capacity to accommodate new communications attachments. The Commission should recognize that the electric power industry invests more than \$110 billion a year to modernize the electric grid, including significant resiliency investments to harden the system and to deploy advance grid technologies. For example, Georgia Power just had more than a billion dollars in grid investment approved by the Georgia Public Service Commission. Smart Grid technology relies upon communications systems and networks to help expedite real-time system monitoring and controls thereby aiding the restoration efforts by improving situational awareness and damage assessments. Electric companies have also taken on major hardening efforts including strengthening towers and poles to withstand powerful winds. For example, FirstEnergy reports in recent years having “invested billions of dollars for infrastructure improvements to improve resiliency and reliability of their electric systems.”⁵⁶ Furthermore, FirstEnergy described how commensurate upgrades and improvements in engineering and construction standards were also developed and implemented in large part to reduce customer interruption of service.

⁵⁵ See Petition at 18-19.

⁵⁶ See Comment of FirstEnergy Electric Utilities, at 3 in PS Docket No. 11-60 (filed Feb. 8, 2018).

It bears emphasis that over the last decade it has become more apparent than ever, in light of the hurricanes and other catastrophic events, that electric utility infrastructure is critical to the interests of the nation not only with respect to the provision of electric service but also because all communications providers rely upon and benefit from this infrastructure.⁵⁷ The safety and reliability of critical electric infrastructure is therefore a top concern. However, pole owners must be properly compensated for the use of their infrastructure by others and it is not appropriate for electric consumers to shoulder the costs of communications providers using electric distribution infrastructure to expand their communications networks. It is simply inherently expensive to serve rural households and all users of the infrastructure need to pay their fair share of the costs. For example, in scenarios where a rural telecommunications provider needs 30 poles to provide broadband service to 10 rural households, the pole owner has still had to install 30 poles to serve the same 10 rural households. That broadband service providers are able to take advantage of expensive infrastructure that has been put into place by pole owners is a great value and therefore NCTA's proposal to discount the cost of a pole replacement for a new attacher may actually harm broadband deployment because it may lead to the unintended consequence of discouraging the installation of taller poles with room for attachments because of the reduction in expected compensation.

CONCLUSION

For the reasons set forth herein, EEI, NRECA and UTC oppose the NCTA's Petition and urge the Commission not to provide the requested relief through a declaratory ruling. NCTA's requested relief if based on flawed premises and would not substantially promote broadband

⁵⁷ In particular, critical electric infrastructure is important for communications not only as a source of electric power but also as a reliable physical network of poles, ducts, conduits and rights-of-way for the deployment of communications wires and equipment.

access in unserved areas. As discussed, the requested relief contradicts the Commission's long standing policies regarding cost recovery based on cost-causation including cost recovery of pole modification costs. Administratively shifting costs for pole replacements onto electric customers would have the unintended consequence of undermining the Commission's very rationale for its current pole attachment rate structure. Furthermore, the requested relief involves complex and complicated matters regarding allocation of costs and apportionment of benefits, as well as underlying engineering, capacity and safety considerations that cannot be summarily addressed through a declaratory ruling.

Respectfully submitted,

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