

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

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

**REPLY COMMENTS OF THE UTILITIES TECHNOLOGY COUNCIL**

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## SUMMARY

The comments on the record confirm that utilities are providing pole replacements voluntarily to accommodate new third-party attaching entities, and that they do not directly benefit from pole replacements. Attaching entities benefit from pole replacements, and utilities bear the burden of conducting the work and coordinating with other attaching entities as well as local authorities. The existing process based on cost-causation principles and subject to case-by-case review works well and there is no widespread problem related to the allocation of pole replacement costs that would justify the Commission departing from its long-standing cost-causation policies and attempting to regulate pole replacement costs based on vague and uncertain allocation of benefits. In addition, pole replacements are complex and the costs vary depending on different factors, such that the Commission should not adopt cost sharing formula proposals that would systematically deny utilities cost recovery. There have been no complaints and only anecdotal evidence of disputes involving pole replacements and cost-sharing. Moreover, pole replacements represent a small percentage of pole attachment requests overall, such that pole replacements does not represent a significant barrier to broadband deployment. Therefore, the Commission should continue to follow its existing policies related to pole replacements and ensure that utilities are able to recover the cost of pole replacements that are caused by new attaching entities. This will encourage utilities to continue to provide pole replacements voluntarily, thereby reducing disputes and ultimately promoting broadband deployment.

Instead of shifting costs of pole replacements, the Commission should consider ways to reduce or avoid pole replacements by encouraging third-party overloading of existing attachments and leasing fiber optic capacity where it is available, as well as encouraging utilities to deploy stronger and taller poles that increase capacity for additional attachments. At the same time, the Commission should address continuing problems associated with unauthorized and abandoned attachments as well as attachers' failure to participate in timely make ready and timely transfers and correct safety violations, which have the practical effect of delaying broadband deployment. Finally, the Commission should grant the Petition for

Declaratory Ruling by the Edison Electric Institute and apply a federal two-year statute of limitations for refunds in pole attachment complaints, and deny refunds for periods prior to good faith notice of a dispute. All of these progressive policy approaches will provide greater certainty which will promote broadband access through pole attachments.

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The Utilities Technology Council hereby files the following reply comments in response to the FCC’s *Second Further Notice of Proposed Rulemaking* in the above-referenced proceeding.<sup>1</sup> As more fully described below, utilities promote broadband access by providing pole replacements on a voluntary basis and the Commission should ensure that utilities are able to recover their pole replacement costs. Pole replacements are complex and the costs vary, such that the Commission should review pole replacement costs on a case-by-case basis. Moreover, the data shows that pole replacements represent only a small percentage of the overall number of pole attachment requests, especially in unserved areas, and are not a significant barrier to broadband access. The pole replacement process has worked well, and the Commission should not regulate pole replacements by rule, nor should it adopt NCTA’s arbitrary and unfair proposed cost sharing formula which would systematically shift practically all of the costs of pole replacements on utilities. Similarly, the FCC should reject proposals for information sharing requirements, which are unnecessary. Instead, it should adopt policies that encourage more efficient use of pole capacity and expand capacity by encouraging utilities to use taller and stronger replacement poles. Finally, the Commission should grant the Petition for Declaratory Ruling by the Edison Electric Institute, which seeks a two-year statute of limitations for refunds in pole attachment complaint proceedings and a prohibition on refunds prior to good faith notice of a dispute.

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<sup>1</sup> Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, *Second Further Notice of Proposed Rulemaking*, WC Docket No. 17-84 (rel. Mar. 18, 2022)(hereinafter “*FNPRM*”)

**I. Utilities are supporting broadband access by voluntarily providing pole replacements to accommodate new attaching entities, and the Commission should ensure utilities are able to recover their pole replacement costs.**

The comments on the record reflect the reality that utilities are voluntarily performing pole replacements to accommodate new attachment requests. In doing so, they undertake the burden of conducting the work and coordinating the process, and they do not directly benefit from replacing the pole. The pole replacement is conducted to benefit the attaching entity, and utilities are promoting broadband access by providing pole replacements. They provide pole replacements at cost, and they provide attaching entities an estimate of the costs which the attaching entity must approve before any work is performed. The process has worked well and there have been no formal complaints involving pole replacements. To be sure, pole replacements are complex and the costs vary depending on a variety of factors, including the geographic location of the pole and the size and strength of the pole. Utilities will pick up the cost of replacing certain red-tagged poles and poles with pre-existing safety violations, but generally the new attaching entity will bear the cost of the pole replacement consistent with the Commission's longstanding cost-causation policies.<sup>2</sup>

**II. Pole replacements involve complex issues and the costs are variable depending on different factors, such that the Commission should review pole replacement costs on a case-by-case basis.**

Comments on the record also express concerns that regulating pole replacement costs by rule would be contrary to the reality that pole replacements are complex and the costs are highly variable. Instead, pole replacement costs should be reviewed on a case-by-case basis. Informal dispute resolution and adjudication of disputes ensures due process and equitable review of the various factors affecting the cost of pole replacements, as well as the surrounding circumstances. These processes can be conducted in

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<sup>2</sup> See e.g., Initial Comments in Response to the Second Further Notice of Proposed Rulemaking filed by Southern Company, Oncor Electric Delivery Company, LLC, Entergy Corporation, Duke Energy Corporation, American Electric Power Service Corporation, Ameren Services Company in WC Docket No. 17-84 at 32-37 (filed June 27, 2022) (hereinafter "Initial Comments of Electric Utilities") (explaining that electric utilities already bear the cost of replacing red-tagged poles). And see *Id.* at 37-39 (explaining that pre-existing violations do not automatically insulate attaching entities from bearing pole replacement costs, even though in general utilities bear the cost of pole replacements that are necessitated solely by pre-existing violations.)

a timely manner, and a complainant should only resort to using the Accelerated Docket for certain types of cases and only after the parties have made good faith attempts but been unable to resolve the dispute through informal resolution. Moreover, there are no widespread problems with pole replacement costs that would justify attempting to regulate pole replacements by rule.<sup>3</sup> Accordingly, the Commission should refrain from adopting rules for pole replacement cost sharing and continue to rely on case-by-case review of any disputes involving pole replacements that might arise.

**III. Pole replacements are not a barrier to broadband access, and only compose a small fraction of all pole attachment applications and an extremely small number of poles in unserved areas.**

Some comments make vague and unsubstantiated claims that the average percentage of pole replacements is significant, and they portray utilities as anti-competitive monopolists who have nothing better to do than wait for a new attacher to come along so they can make them pay for replacing their poles. Meanwhile utilities and other pole owners provide detailed information about the number of pole replacements, which represents a small percentage of the total number of pole attachment requests generally, and an even smaller percentage of pole attachments in unserved and underserved areas.<sup>4</sup> Even intuitively it is hard to believe that pole replacements are prevalent in unserved areas where poles should presumably have plenty of available capacity if there are no other service providers in the unserved area.

Similarly, the claims of attachers that pole replacements represent a barrier to broadband deployment in unserved and underserved areas and that utilities are competing against them do not withstand scrutiny.<sup>5</sup> Utilities generally do not compete with other service providers and many are

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<sup>3</sup> See Comments of AT&T in WC Docket No. 17-84 at 8 (stating that “[n]ew attachers have filed no formal complaints seeking to reallocate costs of a replacement pole that was larger than needed or due to any of the other everyday scenarios presented in the [FNPRM]”)

<sup>4</sup> See Comments of AT&T in WC Docket No. 17-84 at 7 (reporting that “Over the last three years (2019-2021), AT&T approved over 137,000 pole attachment requests for wireline facilities on those poles, of which less than one-half of 1 percent (specifically, 0.35%) required pole replacements, with all of these years well below one percent.”) See also Initial Comments of the Electric Utilities, at 16-17, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84 (filed Sept. 2, 2020)(reporting that these utilities replaced only 1.78% of poles to accommodate attachment requests (1,595 of 89,804)

<sup>5</sup> See Comments of the National Rural Electric Cooperative Association in WC Docket No. 17-84 (filed June 27, 2022)(disputing Charter’s claims that pole replacement costs are a barrier to broadband and observing that electric

deploying middle mile broadband infrastructure that they provide to third parties so they can provide last mile broadband access in unserved areas.<sup>6</sup> As comments on the record report, it is existing attaching entities who engage in anti-competitive practices that delay broadband deployment.<sup>7</sup> UTC supports these comments that urge the Commission to address continuing problems associated with unauthorized and abandoned attachments as well as attachers' failure to participate in timely make ready and timely transfers and correct safety violations, which have the practical effect of delaying broadband deployment.<sup>8</sup>

Moreover, Charter's economic studies claiming that pole replacements are a barrier to broadband lack merit, and falsely accuse utilities of exercising market power (i.e., hold-up leverage) and acting on adverse incentives without any substantial evidence, and they repeat claims from Charter about pole replacements and costs without any independent or secondary sources of data.<sup>9</sup> They also claim that pole replacements are a barrier to broadband based on recycled data from Charter and hypothetical benefits to utilities that have no basis in practice, and making inflated conclusions about the economic impact of pole replacements that are completely hypothetical and aggregated across an unreasonably wide variety of socio-economic factors. Moreover, they improperly assume that utilities benefit from pole replacements and the study largely ignores the lost economic value of the pole that was replaced prematurely. Like their earlier flawed studies, the basis for their conclusion is that any additional input costs constitute a

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cooperatives are offering broadband in unserved areas on a cost effective economically sustainable basis).

<sup>6</sup> Initial Comments of Electric Utilities at 14 (stating that "Like AEP, most electric utilities providing middle mile facilities and/or services are not seeking to compete with traditional communications companies providing fiber to the home; instead, they are offering to provide middle mile solutions to the extent the electric utility has additional fiber that is not being used for its electric service needs and to the extent that fiber can assist in solving the problem of broadband deployment to unserved Americans.")

<sup>7</sup> See e.g., Comments of Dominion Energy and Xcel Energy in WC Docket No. 17-84 at 22-24 (filed June 27, 2022)(reporting that "[e]xisting attachers lack incentives to proactively take measures that would assist their competitors with gaining access to poles in a timely and cost-effective manner and often engage in actions or fail to take steps that then lead to delays and increased costs imposed on competitors and new market entrants seeking to attach to utility poles.")

<sup>8</sup> *Id.* at 24-31.

<sup>9</sup> Patricia D. Kravtin and Edward J. Lopez, "An Economic Study of the Barriers Erected by Current Utility Pole Replacement Practices and of Policy Prescriptions to Better Align Incentives and Promote Broadband Expansion" Submitted in The Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Federal Communications Commission, WC Docket No. 17-84 (filed June 27, 2022).



barrier to broadband, and this contrived economic theory is purely designed to justify attachers avoiding pole replacement costs and shifting them entirely to utilities and their rate payers who are not deriving any benefit.<sup>10</sup>

**IV. The pole replacement process has worked well and there have been no formal complaints, such that there is no need nor should the Commission adopt one-size fits all rules.**

In as much as regulation of pole replacements is a solution in search of a problem, there is a very real likelihood that such regulation would actually cause more disputes over the allocation of cost and the purported benefits involved, which in turn would delay broadband deployment. While utilities do currently replace poles to accommodate pole access requests to promote broadband deployment, utilities may become discouraged from doing so if they are unable to recover their costs and/or are forced to incur the costs that should be borne by the new attaching entity. This may cause more utilities to deny access for pole attachments for lack of capacity.<sup>11</sup>

UTC reiterates and echoes the comments on the record that utilities should not be required to share in the cost of pole replacements simply because the pole was scheduled to be replaced sometime in the future or the replacement pole happens to be taller or stronger than the original pole.<sup>12</sup> Similarly, UTC urges the Commission not to adopt a definition of “red-tagged” poles that is overbroad and would

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<sup>10</sup> See e.g. Edward Lopez and Patricia Kravtin, Advancing Pole Attachment Policies to Accelerate National Broadband, Connect the Future, available at <https://connectthefuture.com/wp-content/uploads/2021/11/Advancing-Pole-Attachment-Policies-To-Accelerate-National-Broadband-Buildout-National-Report.pdf>. See also Patricia D. Kravtin, The Economic Case for a More Cost Causative Approach to Make-Ready Charges Associated with Pole Replacement in Unserved/Rural Areas: Long Overdue, But Particularly Critical Now in Light of the Pressing Need to Close the Digital Divide (September 2, 2020).

<sup>11</sup> See Initial Comments of Electric Utilities at 28-32 (emphasizing that “The Cost Allocation Proposals Discussed in the Second FNPRM Will Result in More Access Denials Due to Insufficient Capacity.”) See also Comments of Coalition of Concerned Utilities in WC Docket No. 17-84 at 34 (filed June 27, 2022)(emphasizing that “Allocating pole replacement costs to utility pole owners could result in less broadband deployment and less competition.”)

<sup>12</sup> See Comments of the Utilities Technology Council in WC Docket No. 17-84 at 6 and 12-15 (filed June 27, 2022)(hereinafter “Comments of UTC”)(emphasizing that “Utilities should not share in the cost of pole replacements when the pole was already planned to be replaced one or two years in the future, unless the pole is red tagged,” and “Utilities should not share in the cost of pole upgrades and modifications unrelated to new attachments.”) See also Initial Comments of Electric Utilities at 39 (emphasizing that “Unless a Pole Is Scheduled for Immediate Replacement, Electric Utilities Should Not Bear the Cost of Prematurely Replacing a Pole to Accommodate a New Communications Attachment.”) And see *Id.* at 41 (emphasizing that “Where a Proposed Attachment is the But-For Cause of a Make-Ready Pole Replacement, the New Attacher Should Bear the Cost of the Replacement Pole that Meets the Utility’s Current Standards.”)

as a practical matter require utilities to bear the entire costs of replacing any pole that is at full capacity or that was grandfathered (and thus in compliance) under the current standard but must be replaced to accommodate a new attaching entity.<sup>13</sup> Instead, UTC supports comments by utilities that would define red-tagged poles to include poles that were scheduled to be replaced within 12 months or that the utility would have needed to replace at the time of the request for attachment was made, and UTC underscores that this definition is similar to the one that was recently adopted by the Kentucky Public Service Commission.<sup>14</sup> Finally, UTC reiterates its opposition to the proposed cost-sharing formula proposed by NCTA because it would systematically deprive utilities from recovering their costs and would shift an estimated 93 percent of the pole replacement costs to the utilities.<sup>15</sup> Instead of shifting costs onto utilities and discouraging voluntary pole replacements, the Commission should be considering other ways to promote broadband deployment.

#### **V. Cost sharing of pole replacements involving preexisting violations**

Utility comments on the record have sought clarification concerning one issue that would help to avoid disputes over the sharing of costs when pole replacements involve pre-existing violations. Several comments have reported that the Commission's 2018 Order<sup>16</sup> has created an expectation among attachers

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<sup>13</sup> See Initial Comments of Electric Utilities at 36 (explaining that Crown Castle's definition of "red-tagged" pole would include "any pole where, based on an existing condition, the utility contends the pole must be replaced before any new attachment, or change to an existing attachment, may be made," adding that "[a]ny pole that is at full capacity (i.e., incapable of hosting another attachment) would qualify as a 'red-tagged' pole under Crown Castle's proposed definition.") And see *Id.* ("Furthermore, under Crown Castle's proposed definition, if an existing attacher seeks to make an additional attachment to a pole that is grandfathered under (and thus in compliance with) the current standard, the pole owner would be forced to bear the make-ready pole replacement costs even though the pole would not have required replacement but for the additional attachment.")

<sup>14</sup> Initial Comments of Electric Utilities at 37, citing 807 KAR 5:015, Section 1(10) (defining "red tagged pole," in part, as any pole "[d]esignated for replacement within two (2) years of the date of its actual replacement for any reason unrelated to a new attacher's request for attachment").

<sup>15</sup> See Comments of UTC at 17 (emphasizing that "The NCTA proposed cost sharing formula is completely unfair and would systematically deny just compensation by ignoring the value to the utility of the useful life of the pole.") See also Initial Comments of Electric Utilities at 45 (emphasizing that "NCTA's Cost Allocation Proposal Would Shift the Vast Majority of MakeReady Pole Replacement Costs to Electric Utilities and Their Ratepayers.") And see *Id.* at 46 (estimating that "NCTA's proposal would shift approximately 93% of the cost to perform a make-ready pole replacement to the Electric Utilities and their ratepayers.")

<sup>16</sup> Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd 7705 (Aug. 3, 2018) (the "2018 Order")

that they do not bear any share of the costs when there is a pre-existing violation involved in a pole replacement.

This issue has resulted in a growing number of disputes and saddled utilities with unreimbursed expenses to correct preexisting safety violations resulting from communications attachments, much of which are unreimbursed expenses that come from pole replacements. This unfairly shifts all of the costs to the utility, when the preexisting violation has been caused by a communications attaching entity and often is incurred to accommodate a new attaching entity through replacement of the pole. Utility comments note there are situations where, even if a make-ready pole replacement relates to a pole with a pre-existing violation, the new attacher should still be responsible for the cost of the pole replacement, including for example, if removal of the pre-existing attachment would result in a violation-free pole that still needs to be replaced to expand capacity to accommodate the new attacher.<sup>17</sup>

To address this issue, UTC supports the comments of utilities requesting that section 1.1408(b) of the Commission's rules be interpreted to fairly distribute the cost of pole replacements caused by preexisting violation recovery in the event that a pole to be replaced to accommodate a new attacher has a pre-existing violation.<sup>18</sup>

#### **VI. UTC supports proposals by utilities to promote efficient use of pole capacity through third-party overloading.**

Utility comments have proposed innovative solutions to promote broadband deployment, such as encouraging/requiring existing attachers to use existing fiber and messenger wires on poles, including

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<sup>17</sup> See Initial Comments of Electric Utilities at 38. See also *Id.* at 39 (explaining that the suggestion in the FNPRM that correction (through pole replacement) of preexisting violations "directly benefits" an electric utility incorrectly implies that utilities are responsible for pole change outs to correct third-party attachments and that utilities directly benefit from continuing to accommodate an attachment in violation).

<sup>18</sup> Comments of the Coalition of Concerned Utilities at 35 (Section 1.1408(b) should require that the attaching entity that caused the violation should bear the costs of correcting the violation, and if it cannot be determined which attaching entity caused the violation and there is an unauthorized attachment on the pole, the unauthorized attacher should be presumed to bear the cost of the pole replacement. If there is not an unauthorized attacher on the pole, then all attachers should share in the cost to correct the violation; and in all cases, the new attaching entity should share in the cost of the pole replacement because the new attaching entity "obtained access to the facility" in accordance with section 1.1408(b). Costs should be shared proportionally with the new space used on the pole by attachers.)

permitting third-party overloading, subject to notice and approval by the utility.<sup>19</sup> As these comments note, the Commission has previously promoted overloading as a way to make efficient use of space on a pole and reduce the cost of deployment.<sup>20</sup> UTC agrees that such a policy would avoid the need to replace poles to accommodate new attachments in many cases, and it would reduce the cost of pole attachments significantly by avoiding the incremental cost of replacing the pole and reducing or eliminating altogether the annual rental rate that they would otherwise pay for attaching to the pole. This policy would be consistent with the Commission’s policies supporting one-touch make ready, which is designed to accelerate deployment by allowing the new attacher to perform all the make ready on the pole at the same time instead of having to wait incrementally for each attaching entity to move its attachments.<sup>21</sup> The same principle would apply here, such that third-party overlashers would be allowed to conduct the overloading themselves, subject to safety and engineering review by the utility.

**VII. The Commission should adopt policies that encourage utilities to replace poles with taller and stronger poles.**

Similarly, and consistent with UTC’s initial comments as well as other comments on the record, the FCC should adopt a policy that encourages utilities to replace poles with taller and stronger poles, and fully reimburses a utility for the costs associated with any capacity beyond what the utility needs at the time of the pole replacement<sup>22</sup> This policy would promote broadband access by creating more capacity on poles, which then in turn would avoid pole replacements in the future, thereby reducing costs and accelerating pole attachment access.<sup>23</sup> By relying on economic incentives rather than regulatory

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<sup>19</sup> Initial Comments of Electric Utilities at i and 18-19.

<sup>20</sup> *Id.* at 18, citing *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-151, 13 FCC Rcd 6777, 6809, ¶ 68 (Feb. 6, 1998) (“1998 Report and Order”)

<sup>21</sup> See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7711-75, paras. 13-139 (2018) (“Third Wireline Infrastructure Order”).

<sup>22</sup> See Comments of UTC at 12; and Initial Comments of Electric Utilities in WC Docket No. 17-84 at i, 6-11 (emphasizing that the Commission should embrace policies that encourage, rather than discourage the speculative construction of excess pole capacity).

<sup>23</sup> See Initial Comments of Electric Utilities at 6 (stating that “[t]he best way to reduce costs associated with make-ready pole replacements is to reduce the incidence of make-ready pole replacements,” explaining that “[t]he fewer poles that require replacement along a particular route, the lower the deployment cost on that route.”). See also Comments of UTC at 12 (explaining that the practice of replacing poles with stronger or taller poles benefits pole

requirements, the Commission can achieve its policy goals more easily, effectively and equitably.<sup>24</sup> This approach has a proven record of success and is not mere hypothesis or speculation, because it formed the basis for joint use agreements between electric utilities and telephone companies and these joint use agreements actually included provisions for low-cost pole replacements. Economic studies submitted on the record support this approach as well.<sup>25</sup> Therefore, UTC reiterates that the Commission should not require utilities to share in the cost of replacing poles with taller or stronger poles and UTC echoes the comments that recommend incentives the Commission can provide to encourage utilities to replace poles with stronger or taller poles for the benefit of attaching entities and to promote broadband deployment.

### **VIII. The Commission should encourage attachers to use existing fiber optic capacity.**

UTC also supports comments on the record recommending that the Commission encourage broadband providers to leverage existing fiber. As these comments point out and as UTC has commented as well, utilities are deploying fiber for middle mile fiber and are providing capacity on that fiber to promote broadband access in unserved areas. Moreover, these middle mile networks are the result of policies that support the deployment of this infrastructure by utilities, and various different federal and state programs are funding deployment of middle mile infrastructure to promote broadband access. Legislation has been recently introduced that would specifically fund utility middle mile fiber deployments that support broadband access to unserved areas.

UTC supports the comments on the record that urge the Commission to adopt policies that

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attachers in various ways, and makes good economic sense because it is cost-effective.)

<sup>24</sup> See *FNPRM* at ¶¶ 29, 30 (inviting comment on whether the Commission’s current rules align the economic incentives of pole owners and attachers in a way that spurs broadband deployment). See also Initial Comments of Electric Utilities at 8 (arguing that the Commission should send economic signals that encourage electric utilities—when building new pole lines and when replacing existing poles for core electric service purposes—to include additional capacity for potential use by a broadband attacher.)

<sup>25</sup> Report of Kenneth P. Metcalfe, Christopher F. Tierney and Tyler S. Blum of HKA Global Inc., “Addressing Flawed Proposals Referenced within the Second *FNPRM* and Consideration of Alternative Approaches for the Efficient Allocation of Make-Ready Pole Replacement Costs,” submitted as Appendix 1 to the Initial Comments of Electric Utilities (Jun. 27, 2022) (the “HKA Report”). See *Id.* at 11 (stating that “To properly incentivize utilities, going forward, to build excess capacity into their pole infrastructure to accommodate possible future users of that capacity, the utilities must be allowed to earn a return on that investment. As cost and rate of return regulated businesses, the amount of that return should at least equal the utilities’ state commission-approved weighted average cost of capital (i.e., WACC)...”)

encourage broadband providers to use these middle mile networks and the funding that has been provided for them. This would make efficient and effective use of infrastructure and federal and state middle mile broadband funding programs, including programs that Congress is considering as bi-partisan legislation designed specifically to fund the deployment of utility middle mile broadband infrastructure.<sup>26</sup> Not only is this consistent with congressional intent, but it also would work together with federal and state broadband policies, rather than independently and apart from each other. The Commission could encourage broadband providers to use middle mile fiber networks by creating a database where companies could voluntarily indicate whether/where they have additional fiber for lease, and it could prioritize grant funding to companies that intend to use existing aerial or underground fiber, as comments on the record have suggested.<sup>27</sup> The Commission could also adopt policies to encourage attaching entities to use fiber available through federal or state funded deployments in unserved and underserved areas.<sup>28</sup>

**IX. The Commission should not require utilities to provide information about pole replacements.**

UTC reiterates and echoes other comments that oppose requiring utilities to provide information about the condition of poles because utilities already provide attachers with information concerning pole replacements.<sup>29</sup> As UTC explained in its comments and as other comments agree, such a reporting requirement would be largely redundant and any marginal benefits would be outweighed by the substantial burden on utilities of complying with such information reporting requirements. This information is available via surveys and inspections, which help to identify which poles need to be replaced. Utilities cannot accurately predict when poles will need to be replaced.<sup>30</sup>

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<sup>26</sup> The GRID Broadband Act, S.4763, 117<sup>th</sup> Cong. (2022).

<sup>27</sup> Initial Comments of Electric Utilities at 17-18.

<sup>28</sup> The Commission could provide references to information about these programs, where broadband providers could go to determine if there is fiber deployed in these areas they could use as an alternative to deploying their own fiber and potentially having to replace poles.

<sup>29</sup> See Comments of UTC at 20 (emphasizing that “[u]tilities should be allowed to continue to voluntarily provide information concerning the condition of, and replacement of poles to help potential attachers deploy broadband facilities.”) See also Initial Comments of Electric Utilities at 55 (explaining that utilities conduct cyclical surveys and identify poles that need to be replaced, and this information is readily apparent to attaching entities to the extent they participate in inspections and it is also provided by utilities in their make ready estimates.)

<sup>30</sup> See Comments of the Coalition of Concerned Utilities at 42 (stating that “utilities can only know [a pole requiring replacement] when they see it.”)

**X. The Commission should not routinely place pole replacement complaints on the Accelerated Docket.**

UTC also reiterates and echoes other comments that oppose routinely placing pole replacement complaints on the Accelerated Docket. UTC agrees with comments by the Pennsylvania Public Utility Commission (Pennsylvania PUC) that requests that the FCC (1) refrain from adopting a policy encouraging or requiring placement of pole attachment complaints on the Accelerated Docket; and (2) modify its existing regulations to provide a reasonable and transparent limitation on the length of the refund period available to attachers in pole attachment dispute proceedings.<sup>31</sup> In its comments, the Pennsylvania PUC described how long it took to conduct three different pole attachment complaints, and in each of the cases it took 270 days, 240 days and approximately 120 days for each of those complaint cases to be decided respectively.<sup>32</sup> Importantly, the Pennsylvania PUC described the process it went through including pre-hearing conferences, hearings and written testimony, and it concluded that “it would be extremely difficult to provide due process in less time than the 180 days, and for good cause up to 270 days, presently allowed under existing FCC and Pennsylvania PUC regulations for the resolution of pole attachment cases,” and it concluded that it does not believe that due process can generally be provided in 60 days.<sup>33</sup> UTC agrees with the Pennsylvania PUC and urges the Commission to refrain from routinely placing pole replacement complaints on the Accelerated Document, given the complexity of the issues and the need to ensure that utilities are not denied due process.

**XI. The Commission should grant EEI’s Petition for Declaratory Ruling and apply a two-year statute of limitations for refunds in pole attachment complaints and deny refunds prior to good faith notice of a dispute.**

As the Commission is considering changes to its pole attachment policies, it should take this opportunity to grant the Petition for Declaratory Ruling that requests the Commission 1) establish that the federal two-year statute of limitations under section 415(b) of the Communications Act applies to refunds

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<sup>31</sup> See Comments of the Pennsylvania Public Utility Commission in WC Docket No. 17-84 at 18 (filed June 27, 2022).

<sup>32</sup> *Id.* at 7-13.

<sup>33</sup> *Id.* at 14.

in pole attachment complaint proceedings and 2) refunds may not be provided prior to the time that good faith notice of a dispute was provided. UTC reiterates that this would provide a consistent standard for refunds, rather than the variable liability that exists with using state statutes of limitation. Moreover, it is consistent with federal precedent generally and Commission precedent specifically. Finally, granting the relief requested in the Petition would serve the public interest as a matter of policy by encouraging parties to provide good faith notice of a dispute, which would potentially lead to informal resolution of these disputes as well as prevent gamesmanship of the process by attachers delaying the filing of a complaint in order to maximize the potential liability in pole attachment complaint cases.

## **XII. Procedural issues with the record in the FNPRM.**

Process does matter, and in this regard unfortunately the process in this proceeding has been irreparably damaged by the actions of Charter Communications, which redacted information in its originally-filed comments on June 27, 2022, failed to provide its Request for Confidentiality to explain the reasons for redacting the material from its comments, then subsequently filed its Request for Confidentiality on the record over a month later and finally “resubmitted” its comments in unredacted form on August 5, 2022 but withdrew Appendix A from it without providing any notice that it was withdrawing it let alone a request for permission to do so, as ordinarily required under the Commission’s rules.<sup>34</sup> UTC, and others, have objected on the record and hereby restates and incorporates by reference its objection in these reply comments.<sup>35</sup> UTC and other parties to the record were denied an equal and effective opportunity to respond to the unredacted material in Charter’s comments. By the time the unredacted material was disclosed, there was less time to file reply comments than the 30 days the Commission initially provided in the FNPRM. Although Charter claims there was no prejudice to the other parties,<sup>36</sup> there is no doubt that it gained an advantage, and its deliberate actions to drag this process

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<sup>34</sup> See 47 C.F.R. §0.459 (providing the procedure for requests that materials or information submitted to the Commission be withheld from public inspection.)

<sup>35</sup> See Letter from Brett Kilbourne, Senior Vice President & General Counsel, Utilities Technology Council to Marlene H. Dortch, Secretary, Federal Communications Commission in WC Docket No. 17-84 (filed Aug. 18, 2022).

<sup>36</sup> Letter from Maureen O’Connell, Vice President, Regulatory Affairs, Charter Communications to Marlene H.



out as long as possible raise serious questions about the fairness of the process in this proceeding. Moreover, Charter's failure to publicly disclose material that, ultimately, the Commission determined did not merit confidential treatment, and its withdrawal of Appendix A from its original comments without notice or permission casts serious doubts on its claims that this material was commercially sensitive and public disclosure posed imminent competitive harm.

## **CONCLUSION**

UTC thanks the Commission for the opportunity to provide its reply comments in this proceeding. As the Commission considers adoption of rules for the allocation of pole replacement costs and the circumstances under which pole replacement costs should be shared, UTC urges the Commission to ensure that utilities are able to recover all of the costs that they incur through pole replacements. As the comments on the record reflect, utilities do provide pole replacements voluntarily in order to accommodate access to poles by new attaching entities. Utilities fully support the goal of promoting broadband access, and pole replacements is one way in which they are helping to close the digital divide. This process has worked well and continues to do so. Any disputes have been resolved informally and there have been no complaints involving pole replacements filed with the Commission.

The Commission should ensure that utilities recover their cost of providing pole replacements for third-party attachers, which will encourage utilities to continue to provide pole replacements voluntarily. It should not regulate pole replacements by rule, and it should continue to review disputes on a case-by-case basis through the complaint process, as well as informal dispute resolution. Utilities do not directly benefit from pole replacements, and the Commission should not require them to share in pole replacement costs based on vague and unsubstantiated claims about purported benefits or anti-competitive or adverse intent against attaching entities. Regulating pole replacements by rule and cost sharing formulas will only lead to more disputes and delay broadband deployment.

Instead of shifting costs to utilities and their rate payers, the Commission should adopt policies

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Dortch, Secretary, Federal Communications Commission in WC Docket No. 17-84 (filed Aug. 24, 2022).

that reduce or avoid the need for pole replacements by encouraging attachers to make more efficient use of space on the pole (e.g., overlashing existing attachments and using existing fiber optic capacity available via middle mile broadband networks) and creating more pole capacity by encouraging utilities to use taller or stronger pole replacements, and reimbursing them for the additional capacity that they provide. It should also address anticompetitive and harmful actions by existing attachers that delay access by new attaching entities, such as unauthorized attachments, safety violations and failure to timely participate in modifications and transfers. The Commission does not need to impose reporting requirements related to pole replacements, nor should it routinely place complaints involving pole replacements on the Accelerated Docket.

Finally, the Commission should grant the Petition for Declaratory Ruling by EEI to provide a consistent two-year statute of limitations for refunds in pole replacement complaint proceedings and to prohibit refunds prior to good faith notice of a dispute. This will promote the public interest and protect utilities from uncertain liability depending on different state statutes of limitation. It will also prevent parties from gaming the process by waiting to file complaints in an attempt to obtain the maximum refund available under the state statute of limitation.

Respectfully submitted,

**UTILITIES TECHNOLOGY COUNCIL**

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