Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

PETITION FOR EXPEDITED DECLARATORY RULING

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SUMMARY

NCTA — The Internet & Television Association ("NCTA") requests that the Commission issue an expedited declaratory ruling clarifying that, in areas with no access to broadband, pole owners are required to engage in proportionate and equitable allocation of pole replacement costs, and that it is unjust and unreasonable to require attaching entities to bear those costs in their entirety. Pole owners routinely incur pole replacement and upgrade costs, whether prompted by an attachment request or not, and derive significant economic gain, including in the form of "betterment," even when a pole is replaced ahead of schedule. The Commission should ensure that the cost of replacing a pole in unserved areas is not shifted entirely to the attaching entity, as it often is today, but is instead allocated in a manner that recognizes the limited role the attaching entity plays in causing (as opposed to merely advancing) the costs of the replacement, as well as the significant benefits the replacement conveys to the pole owner. This result is both mandated by the just and reasonable requirements of section 224(b) of the Communications Act and consistent with the Commission's orders limiting make-ready costs to those actually caused by the attaching entity as well as with section 1.1408(b) of the Commission's rules, which requires proportionate sharing of costs among the entities that directly benefit from a modification to pole owner facilities, including the pole owner.

In interpreting its rules and orders in this context, NCTA urges the Commission to consider the costs the utility would incur in the regular course as compared to the incremental costs caused by advancing the replacement to an earlier date. Attachers should be presumed to be responsible only for the undepreciated cost of the old pole. The most efficient and economically principled way to measure this cost is to use the average net book investment per bare pole derived using the Commission's pole attachment rate formula, which can be easily administered by utilities and attachers relying primarily upon publicly available data with

minimal need to escalate disputes to the Commission. Under NCTA's proposal, the pole owner would also be provided the opportunity to prove that certain additional costs associated with the new pole would not have been incurred "but for" the new attachment and specific costs found to have met that economic criteria could also be allocated to the attacher.

NCTA also requests that the Commission clarify that complaints regarding pole access disputes that arise in unserved areas will receive expedited consideration under the Accelerated Docket. The Commission's Accelerated Docket procedures provide a mechanism for addressing pole attachment complaints more expeditiously when circumstances warrant; the Commission should emphasize that disagreements about pole access that inhibit deployment in unserved areas are a priority and therefore should be placed on the Accelerated Docket, with expedited procedural timelines and effective remedies, whenever possible.

The clarifications requested by this Petition are consistent with the goals of the Communications Act in removing barriers to broadband deployment; with Commission and Congressional policy prioritizing the expansion of broadband service to unserved areas (where pole replacement costs operate as a significant barrier); and with sound policy and economic principles. Accordingly, the Commission should grant the requested declaratory ruling on an expedited basis.

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Pursuant to section 1.2 of the Commission's rules[1] and section 5(e) of the Administrative Procedure Act,[2] NCTA — The Internet & Television Association ("NCTA") hereby requests that the Commission issue an expedited declaratory ruling clarifying the application of its orders and cost allocation rules to pole replacements in areas that do not have access to broadband to ensure an equitable allocation of those costs between pole owners and attaching entities. The time and expense required to replace aging poles is a significant obstacle to broadband deployment in unserved areas. Clarification of the Commission's orders and pole replacement cost allocation rules will facilitate investment and result in expanded broadband access for more people, more quickly, and at more affordable prices. To ensure that the Commission's decision on this issue is meaningfully implemented by pole owners, NCTA also requests that the Commission declare its intention to: (1) prioritize the resolution of pole access disputes when they arise in unserved areas; and (2) empower the Enforcement Bureau resolving pole attachment complaints to require a utility to replace poles within prescribed time periods.

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1 47 C.F.R. § 1.2.

2 5 U.S.C. § 554(e).

INTRODUCTION

The gap between those who have internet access and those who do not is one of the many inequities further exposed by the COVID-19 pandemic. In particular, the crisis has demonstrated that reliably fast internet is essential for critical applications like distance learning, remote working, and telemedicine. For example, a recent McKinsey & Company report showed that if in-class instruction does not resume until January 2021, students who remain enrolled but receive no instruction at all—as would be the case for many in unserved areas—could lose the equivalent of 12 to 14 months of learning, at least *four times* more learning lost than students who receive even just average remote instruction.[3] Similarly, Blue Cross BlueShield of Tennessee ("BCBST"), the state's largest insurer, reported 50 times more telemedicine claims from mid-March to mid-May 2020 than during the same period the previous year.[4]

Long before the COVID-19 crisis, NCTA's members have been committed to helping to close the digital divide through their own privately funded deployment efforts and through their participation in federal and state broadband support programs. For example, in 2018-19 alone, Charter Communications extended its network to provide broadband to more than 1.5 million additional homes and businesses across its footprint, about 30 percent of which were in rural

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[3] Emma Dorn et al., *COVID-19 and Student Learning in the United States: The hurt could last a lifetime*, McKinsey & Company (June 1, 2020), https://www.mckinsey.com/industries/public-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosam&stream=top.

[4] *Testimony of Dr. Andrea Willis, BlueCross BlueShield of Tennessee Senior Vice-President and Chief Medical Officer, Before the Senate Committee on Health, Education, Labor and Pension (HELP) "Telehealth: Lessons from the COVID-19 Pandemic"* (June 17, 2020), https://protect-us.mimecast.com/s/_P_NCgJQJlc413N4I2_cld?domain=help.senate.gov.

areas,[5] and the company plans continued investment, including expansion into lower-density rural communities, ideally—with these regulatory clarifications—on an expedited timeline. Likewise, Comcast has increased homes and businesses passed by more than 1.6 million between the first quarters of 2018 and 2020, including unserved locations in the Northeast, mid-Atlantic, and Southeast. Comcast also has plans for continued investment in unserved areas during 2020 and 2021.

NCTA's other members also have a strong track record of performance extending plant to unserved areas and plans for continuing such expansion. For example, in 2017, Iowa became the first fully gigabit state in the country when Mediacom deployed one gigabit service to its 309 communities. Since then, Mediacom has deployed gigabit service to 98 percent of its footprint across 22 states. Midco has expanded its high-speed broadband offerings across the Plains states and is using $40 million from the Connect America Fund to bring fixed wireless service to more unserved areas where it is too costly to deploy fiber. And Sjoberg's has been expanding its footprint throughout Minnesota to towns with as few as 50 residents.

Though government officials and agencies at both the state and federal levels have already shown great commitment to and progress toward connecting unserved Americans, more can be done. In particular, as the Commission has recognized repeatedly, helping to address the steep costs of deploying infrastructure could kick-start a new surge in building to the hardest-to-reach places. The cost of deploying broadband facilities to more sparsely populated areas is among the biggest hurdles to extending broadband networks to unserved areas and, for some

[5] Charter Communications National Fact Sheet, 1/1/18-12/31/19, Charter Communications, https://policy.charter.com/wp-content/uploads/2020/04/Charter-2020-National-Fact-Sheet-4.21.20-FINAL.pdf (using the Commission's definition of "rural area").

NCTA members, make-ready costs alone (including pole replacements) comprise as much as one third of the total buildout expense in these areas.

NCTA therefore requests that the Commission issue an expedited declaratory ruling clarifying two matters that are critical to facilitating broadband deployment in unserved areas. *First*, NCTA requests a ruling clarifying that, in unserved areas, where existing utility infrastructure is often near the end of its useful life, it is unjust and unreasonable for pole owners to shift the entire cost of a pole replacement to a new attacher when the pole owner itself derives the predominant financial gain, including in the form of betterment, from replacing and upgrading a pole. The Commission has long made clear that make-ready charges must be just and reasonable and should not recover from new attachers costs the new attacher did not cause. In addition, under Commission rule 1.1408(b), which governs the modification of facilities,[6] when replacement of an existing utility pole is necessary to accommodate a new attachment, all parties that "directly benefit from the modification" must share "proportionately in the cost" of the modification. Pole owners often obtain a windfall by requiring new attachers to pay all costs associated with replacing and upgrading an old pole. Using its declaratory ruling authority, the Commission should make clear that, at least in unserved areas where substantial uncertainty about the lawfulness of this practice is inhibiting broadband deployment, shifting all pole replacement costs to the new attacher is unjust and unreasonable under 47 U.S.C. § 224 and the Commission's rules and orders.

Second, to better achieve the goal of providing all Americans with access to broadband services, NCTA requests that the Commission declare that it will prioritize resolution of pole attachment disputes that arise in unserved areas. Under the Commission's 2017 reforms in this

[6] 47 C.F.R. § 1.1408(b).

docket, pole attachment complaints are now eligible for the Commission's Accelerated Docket procedures. A statement by the Commission that accelerated procedures should be invoked in cases where a dispute between a pole owner and an attaching entity impedes the deployment of broadband in unserved areas will help clarify the Commission's enforcement priorities and guide Commission staff's discretion under section 1.736(d) of the Commission's rules. Making it clear that the Commission will prioritize pole attachment complaints in unserved areas by placing them on the expedited docket will help ensure that broadband is deployed as expeditiously as possible.

I. WITHOUT EXPEDITIOUS COMMISSION ACTION, THE COSTS AND OPERATIONAL CHALLENGES OF POLE REPLACEMENTS WILL IMPEDE THE DEPLOYMENT OF BROADBAND TO UNSERVED AMERICANS.

Expanding broadband access to all Americans is a critical national priority.[7] The COVID-19 crisis has underscored the economic and social importance of reliable and fast internet access so that all Americans can work and learn remotely. Narrowing the digital divide and expanding broadband access to the country's unserved areas has accordingly been a high priority for the Commission, Congress, and numerous other federal and state agencies.[8]

As NCTA members expand their networks into increasingly remote areas, they have experienced first-hand the challenges that face broadband providers that build new wireline facilities in areas that currently lack broadband access. In particular, they have confronted the reality that existing utility infrastructure in many areas is at or near the end of its useful life and

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[7] *Implementation of Section 224 of the Act*, Order on Reconsideration, 30 FCC Rcd 13731, 13773 ¶ 4 (2015) (emphasizing the importance of broadband deployment to unserved areas).

[8] Cong. Research Serv., RL30719, *Broadband Internet Access and the Digital Divide: Federal Assistance Programs* at Summary (Oct. 25, 2019), https://fas.org/sgp/crs/misc/RL30719.pdf (describing the various government programs aimed at closing the digital divide between urban and rural areas).

incapable of supporting new facilities without a significant investment in new poles. For instance, in one major broadband construction project that has included (to date) over five thousand miles of new rural plant, Charter has encountered situations in which as many as one out of every twelve poles needs to be replaced, with the average replaced pole already several decades into its service life.[9] In a major expansion to over 57,000 rural homes and small businesses, pole replacement costs *alone* have accounted for approximately *25 percent of the total cost* of construction (including applications, surveys, permitting, labor, and material).

Charter's experience is not unique. In response to its Notice of Proposed Rulemaking in this docket, the Commission received a number of similar complaints about pole owner demands arising during the make-ready process.[10] These comments echo concerns that have been brought

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[9] Much of the data regarding the aging of existing pole infrastructure is held confidential by pole owners and is not available for public inspection. However, a partial review of depreciation information publicly available in electric utility Federal Energy Regulatory Commission Form 1 filings shows average service lives for poles of 44-50 years. Duke Energy Ohio, Inc., FERC Financial Report FERC Form No. 1: Annual Report of Major Electric Utilities, Licensees and Others and Supplemental, 337 (Quarter 4, 2016) (showing an average service lifespan for poles of 50 years); Pacific Gas and Electric Company, FERC Financial Report FERC Form No. 1: Annual Report of Major Electric Utilities, Licensees and Others and Supplemental, 337.1 (Quarter 4, 2019) (showing an average service lifespan for poles of 44 years). Indeed, in the context of utility pole resiliency programs, state agencies have found significant aging even in urban areas. *See* Ron Galperin, L.A. Controller, *It Only Takes a Spark: Enhancing DWP's Wildfire Prevention Strategy*, at 2, 16 (Nov. 20, 2019), https://lacontroller.org/wp-content/uploads/It-Only-Takes-A-Spark-Enhancing-DWPs-Wildfire-Prevention-Strategy_11.20.19.pdf (finding that 30 percent of poles already beyond their 65-year service life and in need of replacement); *see also* H. Lee Willis & Randall R. Schrieber, AGING POWER DELIVERY INFRASTRUCTURE 1 (2d ed. 2013) ("America's electric utility systems are growing older. In many systems, significant portions of the equipment and facilities in service date from the economic boom following WWII, or from the sustained growth period of the 1950s and 1960s that many American cities and towns experienced. A lot of equipment installed then, and still in service today, is between 50 and almost 70 years old.").

[10] *See, e.g.*, Comments of Lumos Networks Inc., Lumos Networks of West Virginia Inc., and Lumos Networks LLC at 15, WC Docket No. 17-84 (filed June 15, 2017) (averring that it regularly "encountered situations in which it has been made to absorb the entire cost of survey and make-ready work merely because it happened to be the first attacher requesting

to the Commission in past complaint proceedings.[11] For example, in a Commission pole attachment complaint proceeding initiated by Cox Communications in 2014, Cox identified unreasonable pole attachment replacement policies being employed by Nevada Energy that would have required Cox to pay to replace numerous poles in connection with an overlashing project despite their compliance with NESC construction requirements.[12] Just last year, Crown Castle filed a pole attachment denial of access complaint with the Commission seeking to address Commonwealth Edison Company's ("ComEd") refusal to permit Crown Castle to attach to poles that had been previously identified by ComEd as needing replacement, unless and until

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access to a certain route or to certain pole lines"); Initial Comments of Lightower Fiber Networks at 12, WC Docket No. 17-84 (filed June 15, 2017) (explaining that, in its experience, pole owners typically "expect[] the new attacher to pay all of the costs of make-ready" and will then often seek *additional* remuneration from existing attachers for costs they already recouped).

[11] *See, e.g.*, *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) ("*Crown Castle Complaint*") (alleging improper shifting of pole replacement costs involving poles scheduled for replacement onto new attacher); *Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd. 24615, 24629-32 ¶¶ 36-40 (2003) (complainant Knology showed that it was charged the full cost of Georgia Power's pole replacements, despite ample evidence that Knology was not alone in creating the need for those replacements); *Fiber Technologies Networks, L.L.C. v. Baltimore Gas & Electric Co.*, Complaint, File No. EB-14-MD-006 (filed Apr. 10, 2014) (seeking relief from Baltimore Gas & Electric Co.'s unreasonable practice of shifting pole replacement costs, ranging from $15,000 to $25,000 per pole, to attachers); *Zito Media v. Pennsylvania Electric Co.*, Complaint, FCC Proceeding No. 17-316, Bureau ID No. EB-17-MD-006 (filed Nov. 13, 2017) (exposing alleged utility error in shifting pole replacement betterment costs to attachers).

[12] *Cox Communications Las Vegas, Inc. v. NV Energy, Inc.*, Complaint, FCC Proceeding No. 14-267, File No. EB-14-MD-017 (filed Dec. 18, 2014) (addressing NVE's attempt to shift pole replacement costs to Cox in connection with overlash project despite fact that overlash did not cause pole to become non-compliant and numerous poles failed NVE newly adopted heightened constructions standard); *see* Cox Reply to Response to Pole Attachment Complaint at 1 ("Yet NVE has adopted a new Grade B policy, which it seeks to apply on as 'as encountered' basis in a manner that would delay Cox's deployment of competitive broadband services until after poles are replaced.") (filed Feb. 20, 2015).

Crown Castle first paid to replace or reinforce those poles.[13] And, in a complaint filed earlier this month, AT&T, a pole owner itself, sought Commission relief from utility efforts to shift pole replacement costs to third parties, including for poles that have "no useful future."[14]

The aging state of America's pole infrastructure has created significant cost and logistical barriers as NCTA members have expanded their networks, particularly in unserved areas. NCTA members regularly encounter demands by pole owners that they pay the *full cost* of replacing aging poles as a condition of access—even though (in the absence of the new attachment or overlash) the utility would have had to replace the same pole at its own cost in the near future, or (in many cases) should already have done so. Utilities frequently treat deployment projects by broadband providers as opportunities to shift the utilities' own inevitable infrastructure upgrade costs onto third parties. Moreover, although the Commission's make-ready rules now expressly include pole replacements within the definition of "make-ready," they exclude pole replacements from both "One-Touch Make-Ready" ("OTMR") and from self-help under the regular make-ready process, affording pole owners significant practical leverage to hold up the pole replacement process, and thereby prevent the attacher from deploying its network, unless the attacher agrees to shoulder these costs in full.

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[13] *See, e.g.*, *Crown Castle Complaint* ¶ 2 ("ComEd refuses to permit Crown Castle to attach to poles that have been 'red tagged' by ComEd unless and until Crown Castle first pays to replace or reinforce those red tagged poles, even though the conditions that caused the red tag status existed prior to and are unrelated to Crown Castle's proposed attachment.").

[14] *See BellSouth Telecommunications, LLC, d/b/a AT&T Florida v. Florida Power & Light*, Complaint ¶ 26, FCC Proceeding No. 20-214, Bureau ID No. EB-20-MD-002 (filed July 6, 2020) (asking the FCC to address Florida Power & Light practices that "would allow FPL to charge AT&T for poles with no useful future *and* stealthily transfer millions of dollars of its own pole removal and disposal costs to AT&T"); *see also id.* Exhibit B, Affidavit of Mark Peters in Support of Pole Attachment Complaint, ¶ 21 ("FPL's reliance on the 60-day deadline was thus a transparent ploy to foist its pole removal and disposal costs on AT&T.").

Any national strategy to expand broadband access by encouraging investment in unserved areas will need to address these issues. Otherwise, a significant amount of capital that broadband providers devote towards broadband buildout to unserved areas risks instead being diverted into upgrading the existing utility pole infrastructure—and benefitting utility investors at the expense of unserved Americans. The delays and high costs associated with pole replacements are inconsistent with the Commission's past efforts to reduce regulatory barriers to getting broadband to unserved areas. Accordingly, NCTA respectfully requests that the Commission take further action to remove these barriers to broadband deployment.

II. THE COMMISSION SHOULD CLARIFY THAT ITS EXISTING COST ALLOCATION RULES AND ORDERS REQUIRE POLE OWNERS TO SHARE IN THE COST OF POLE REPLACEMENT IN UNSERVED AREAS.

Under the Commission's orders, attaching entities "can seek Commission review of make-ready charges to the extent that they believe such charges are unjust or unreasonable," and an "attacher [is] responsible only for [the] cost of work made necessary because of its attachments."[15] In addition, section 1.1408(b) specifies that all "parties that directly benefit from" a modification to a facility to accommodate an attachment must "share proportionately" in that cost.[16] However, the application of these principles has generated confusion in unserved areas where the existing utility pole stock often is at the end of its useful life. In such cases, new broadband construction frequently triggers the need for replacement poles, with pole owners nearly always insisting that a new attacher pay the full cost to replace an old pole with a new, upgraded one, including the transfer of the pole owner facilities to the new pole.

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[15] *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240, 5322 ¶ 185 n.572 (2011) (emphasis added) ("*2011 Pole Attachment Order*").

[16] 47 C.F.R. § 1.1408(b).

To resolve recurring disagreements that have the potential to impede broadband deployment and deplete funds and resources that could otherwise be used to reach more unserved homes and businesses, the Commission should clarify that in cases where a pole owner performs a pole replacement to accommodate an attachment in an unserved area, it is unjust and unreasonable for the pole owner to use the new attachment as an opportunity to upgrade the utility's own facilities and shift the entire cost to the new attacher. In such circumstances, the cost should be allocated fairly and proportionately between the pole owner and the new attacher to distinguish between the true economic costs associated with the attachment and the costs associated with "betterment," *i.e.*, improving the utility's facilities.[17] Specifically, the Commission should declare that because the utility is the chief beneficiary of the pole replacement, it is unjust and unreasonable for the pole owner to capture the windfall benefits of obtaining a new, upgraded pole when that benefit comes at the expense of broadband availability. Rather, the new attacher is responsible only for the *incremental* costs it *actually*

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[17] *See, e.g.*, S. Rep. No. 95-580 at 19 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 127 ("In a few limited instances it may be necessary for the utility to replace an existing pole with a larger facility in order to accommodate the CATV user. In those cases it would be appropriate to charge the CATV user a certain percentage of these pole 'change-out' replacements costs, sometimes referred to as the 'non-betterment costs.'"); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Second Report and Order, 72 F.C.C.2d 59, 79 ¶ 29 (1979) ("*Non-recurring costs*. Such costs, defined in a general functional fashion, are those that are expended by the utility to prepare utility poles for CATV attachments. As indicated in the legislative history, pre-construction, survey, engineering, make-ready, and change-out (non-betterment) costs are included in additional costs but only to the extent they are out-of-pocket expenses specifically attributable to CATV attachments or facilities.… In short, costs which are incurred to prepare pole plant for CATV attachments are includible, but repairs or upgrading of the plant of other users are not."); Response of Pennsylvania Electric Company to Pole Attachment Complaint Filed by Zito Media, L.P., FCC Proceeding No. 17-316, File No. EB-17-MD-006 (dated Dec. 13, 2017), at 26-27 and Att. H (acknowledging that the cost of pole replacements for a company's betterment legally may not be imposed on attachers and that Penelec had imposed such charges by mistake during the pole attachment process until such pole replacements were identified by Zito Media as requiring replacement prior to attachment).

causes—*i.e.*, the cost of advancing the retirement of the existing pole that would have been retired by the utility in the normal and routine course, unless the pole owner can demonstrate any other specific incremental costs caused by the attacher.

The cost allocated to the new attacher in such circumstances would not include the full cost of purchasing and installing the new pole or transferring the utility's facilities to the new pole, as utilities frequently insist. Instead, the appropriate cost is the remaining net book value of the pole being replaced. NCTA proposes that the most efficient and economically appropriate way to measure this cost is to use the average depreciated bare pole investment derived using the Commission's pole attachment rate formula, which relies primarily upon publicly available cost data[18] and a presumed appurtenance deduction to remove non-pole related investment, such as cross-arms, booked to a utility's pole account in cases where actual appurtenance data is not available.[19] Providing this clarity is consistent with the congressional goal that the pole

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[18] Electric utility pole owners report the amount of investment booked to FERC Account 364, poles and fixtures. Incumbent local exchange carriers report the amount of pole investment and pole plant depreciation to the FCC in CC Docket No. 86-182. *See Revision of ARMIS Annual Summary Report*, Order, 29 FCC Rcd. 11436, 11437-38 ¶¶ 4, 5 n.8 (2014) (requiring carriers to file pole attachment ARMIS data in a single docket in order to "facilitate public access to the data"). The Commission has likewise assured the availability of this data even as it transitioned from Form M, from Part 31 to Part 32, to ARMIS 43-01 Table III, and to electronic submission of Pole Attachment Data required as a condition of forbearance from the full ARMIS Report 43-01 filing requirement using the Commission's Electronic Comment Filing System.

[19] The FCC formula is intended to assign a share of the annual carrying costs attributable to net investment of the *bare pole* (and to exclude "appurtenances" that are not used by or useful to attachers.) Appurtenances include, *inter alia*, cross arms, pole top pins, secondary racks, transformer mounts, and ground equipment. Both electric utilities and carriers book appurtenances to the same investment accounts that include bare pole investment and that comprise the rate base used to derive pole attachment rents. In adopting the pole attachment rate formulas, based upon information available to it at the time, the Commission established rebuttable presumptions that 15 percent and 5 percent of electric utility and carrier investment accounts respectively are comprised of appurtenances. In fact, in many cases today, particularly in the case of electric utilities, the percentages are much higher.

attachment regime be administratively efficient and it will free up significant resources and ultimately enable NCTA members and others to reach more customers in unserved areas.[20]

Providing the declaratory ruling sought by this Petition would not require the Commission to resolve, comprehensively, the application of its pole attachment orders and rules to pole replacement costs in all instances. Current controversies regarding pole replacements and the proper application of the Commission's rules are arising largely in the particular context of new broadband deployment in unserved areas, and thus have the effect of frustrating the national objective of extending broadband services to these areas. A comprehensive examination of pole replacement issues in all cases is beyond the limited scope of this Petition, whose predicate facts illustrate the problems and uncertainty that clouds broadband deployment in unserved areas. The Commission can and should provide the clarity necessary to resolve the proper application of its rules as necessary to address the immediate need to expand broadband facilities to unserved areas.

Amendment of Rules and Policies Governing Pole Attachments, Report and Order, 15 FCC Rcd. 6453, 6472-73 ¶ 31 (2000) (FCC "promulgated a methodology to arrive at the net cost of a bare pole for use in the *Cable Formula*, from a calculation of the total investment in poles less accumulated depreciation for poles, and less accumulated deferred income taxes" and further adjusting "to eliminate the investment in crossarms and other non-pole related items") (internal footnotes omitted).

[20] Although the areas at issue do not have broadband service, there may be existing attachers that provide cable or telecommunications services. The Commission should reiterate that these existing attachers do not benefit directly from its replacement and are not responsible for any of the replacement costs consistent with section 224(i) ("An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).").

A. Requiring Pole Owners to Share in the Cost of Pole Replacements in Unserved Areas Is Sound Policy Consistent with the Purposes of the Act and the Commission's Precedents.

The declaration sought by the Petition is fully consistent with the language and purposes of the Communications Act and the Commission's rules and orders.

First, the requested declaration is required by the command of section 224(b)(1), and the Commission's regulations thereunder, of ensuring that "the rates, terms, and conditions for pole attachments … are just and reasonable."[21] The "just and reasonable" standard governs not only pole rents, but also the terms and conditions of access to the poles.[22] Pole replacements are expressly defined as a form of make-ready encompassed by the Commission's make-ready rules.[23] And as the Commission noted in its *2011 Pole Attachment Order*, the Commission's "approach in the make-ready context" is that just and reasonable rates should look to the incremental costs caused by the attacher, where "capital costs [that] would not have been incurred '*but for*' the pole attachment demand" should be paid by "the attacher–the cost causer."[24] And "[u]nder cost causation principles," only to the extent an attacher "is causally responsible for the incurrence of a cost," will "that customer – the cost causer – pay[] a rate that covers this cost."[25]

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[21] 47 U.S.C. § 224(b)(1).

[22] *2011 Pole Attachment Order*, 26 FCC Rcd. at 5283-84 ¶ 93.

[23] *See* 47 C.F.R. § 1.1402(o) ("The term *make-ready* means the modification or replacement of a utility pole . . . to accommodate additional facilities on the utility pole.").

[24] *2011 Pole Attachment Order*, 26 FCC Rcd. at 5301 ¶ 143 & n.426 (emphasis added).

[25] *Id.* at 5322 ¶ 185 n.572 (providing that parties "can seek Commission review of make-ready charges to the extent that they believe such charges are unjust or unreasonable," and an "attacher [is] responsible only for [the] cost of work *made necessary because of* its attachments.").

In the context of pole rents, this principle has guided the Commission's decision to exclude a utility's capital costs from its lower bound telecom rental rate and limit the ultimate recovery of such costs in the telecom rental formula. The Commission has stressed that because "[p]ast investment in an existing pole would have been incurred *regardless* of the demand for attachments," under the lower bound formula, "where there is space available on a pole, an attacher would be required to pay for none of the capital costs of that pole."[26]

Although cost-causation alone does not govern the Commission's approach to pole rents (which also allocate to attachers a share of the costs of pole maintenance, administration and capital costs that the pole owner would incur whether or not the attachment is made), the Commission's approach to make-ready costs looks to the incremental costs actually caused by the attacher. And as set forth above, pole replacements are a form of make-ready and should likewise be guided by the principle that a utility is made whole when it is able to recover the incremental cost burden caused by the attachment.

Moreover, under section 224(b) and the Commission's rules, pole owners may not assign to an attacher pole upgrade costs resulting in betterment to the owner simply because it was performed in connection with make-ready.[27] Allowing pole owners to assign the full costs of pole replacements to attaching parties is not "just and reasonable" because it allows them unfairly to externalize the cost of upgrading their aging infrastructure (and transferring their facilities) while reaping most of the benefit.[28] The Commission itself has long recognized that

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[26] *Id.* at 5302 ¶ 144 (emphasis added).

[27] *See supra* note 17.

[28] 47 C.F.R. § 1.1411(i)(3). Congress and the Commission have, in contrast, clearly directed that, at a minimum, utilities may not recover directly from attachers for betterment, for which the pole owner is the sole party to gain financially. Specifically, the utility gains: the operational benefits of the replacement pole (*i.e.*, additional height, strength and resiliency)

shifting the full costs of facilities modifications onto attaching entities often "exceeds just compensation" since "the attacher actually *increases* the utility's asset value and defers some of the costs of the physical plant the utility would otherwise be required to construct as part of its core service."[29]

The ruling requested also implements the requirement in section 224(f) that a utility provide "nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it,"[30] as it would preclude utilities from discriminating against new attachers seeking to bring broadband to an unserved area by imposing unjust and unreasonable conditions upon access. Utilities that seek to transfer the entire costs of a replacement pole to a new attacher may seek to attribute this position to section 224(f)(2), which permits electric utilities to deny attachments "where there is insufficient capacity," and the Eleventh Circuit's decision in *Southern Co.*,[31] which held that that provision barred the Commission from requiring utilities to "take all reasonable steps to expand capacity to accommodate requests for attachment."[32]

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and the ability to meet its own regulatory mandates; the ability to offer additional service offerings and enhancements of its own (*e.g.*, smart grid) as well as broadband in competition with the attacher; the sole benefit of enhanced rental opportunities from the increased capacity on the new replacement pole; the cost savings of any future planned upgrade for its own use and purposes, as it no longer has to incur the expense associated with any future scheduled cyclical replacement of the pole in the normal and routine course of providing for its own electric distribution service; lower maintenance expenses associated with the new replacement pole; and the ability to earn its authorized return on the enhanced rate base assets, and enjoy tax savings from the accelerated depreciation of a new capital asset which reverse as the asset ages.

[29] *Alabama Cable Telecomms. Ass'n v. Alabama Power Co.*, Order, 16 FCC Rcd. 12209, 12235 ¶ 58 (2001).

[30] 47 U.S.C. § 224(f)(1).

[31] *Southern Co. v. FCC*, 293 F.3d 1338, 1346 (11th Cir. 2002) (quoting 47 U.S.C. § 224(f)(2)).

[32] *Id*. (citation omitted).

But that position is mistaken because section 224(f)(2) does not take pole replacements outside of the requirement in section 224(b)(1) that pole attachment rates, terms, and conditions must be "just and reasonable." As the Commission determined in 2011, "section 224(b)(1) applies the 'just and reasonable' standard to *all* rates, terms, and conditions of pole attachments, including the conditional access regime set up under section 224(f)."[33] Whether an electric utility *could have* declined an attachment on a non-discriminatory basis under section 224(f)(2) because it is agreed that there is insufficient capacity has no bearing on whether the rates, terms and conditions it *actually* imposes in connection with a pole replacement are just and reasonable. An electric utility that allows conditional access to its facilities by requiring an attaching entity to contribute to the cost of improving the utility's facilities in exchange for allowing an attachment has, by definition, *not* exercised any available right under section 224(f)(2) to decline the attachment. Rather, it is setting the "rates, terms, and conditions" for a "pole attachment" subject to section 224(b)(1), and is therefore subject to the Commission's jurisdiction to determine whether such rates, terms, and conditions are just and reasonable.

Second, explicitly adopting the interpretation with respect to pole replacements in unserved areas above would best advance the federal priority of "removing unnecessary impediments to broadband deployment."[34] Demands by pole owners that attachers bear the entire cost of pole replacements have the potential to impair the expansion of broadband into unserved areas due to the high cost of pole replacements and the heightened frequency with which they are required in sparsely populated areas. When broadband deployment costs are

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[33] *2011 Pole Attachment Order*, 26 FCC Rcd. at 5283 ¶ 93.

[34] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC Rcd. 11128, 11129 ¶ 3 (2017).

artificially inflated by implicit subsidies to pole owners, those increased costs will both deplete and limit the reach of finite sources of funding and deter private investment.

Third, the interpretation urged by NCTA is the natural extension of the same policy underlying the Commission's repeated decisions emphasizing that a new attacher is not responsible for the costs of remedying existing safety violations. Although this rule is longstanding,[35] the Commission recently reiterated it in its 2018 *Wireline Infrastructure Third Order*, where it clarified that "new attachers are not responsible for the costs associated with bringing poles . . . into compliance with current safety [standards]," including cases where complex make-ready, such as replacing a noncompliant pole, must be performed due to a new attachment.[36] The Commission stressed that while the "new attachment may precipitate correction of the preexisting violation . . . [h]olding the new attacher liable for preexisting violations unfairly penalizes the new attacher for problems it did not cause, thereby deterring deployment[.]"[37]

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

[36] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd. 7705, 7766 ¶ 121 ("*Wireline Infrastructure Third Order*") ("This is true whether the make-ready work that corrects these preexisting violations is simple or complex.").

[37] *Id.* Some pole owners have requested that the Commission interpret section 1.1408(b) to provide an even greater windfall to utilities than already exists. *See* Petition for Reconsideration of the Coalition for Concerned Utilities, WC Docket Nos. 17-84 and 17-79, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment (filed Oct. 15, 2018) ("*Coalition Recon. Petition*") (requesting the

That logic applies with equal force to the poles that are the subject of this Petition: poles that may still comply with existing safety standards today, but which have deteriorated over time and will require future replacement as part of the utility's regular maintenance schedule. The costs associated with replacing such poles—such as the cost of purchasing the replacement pole itself, removing the existing pole, installing the replacement pole, and transferring existing attachments to the new pole—would still be incurred by the utility in due course when it replaces the pole, independent of the attachment.[38] The new attacher is only precipitating the earlier incurrence of these costs, not causing them, and should therefore not bear them in full.

The policies that originally animated this rule when the Commission first announced it in the 1996 *Local Competition Order* are particularly pertinent in unserved areas today. The reasoning behind the *Local Competition Order*'s decision that any utility 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 costs" was intended to "discourage" pole owners "from postponing necessary repairs in an effort to avoid the associated costs."[39] Unserved areas, which are overwhelmingly rural areas with low population density in which a large number of poles is

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Commission to "clarify that even while section 1.1411(d)(4) prevents the new attacher from being charged to replace a pole with a preexisting violation, the new attacher retains a reimbursement obligation under section 1.1408(b) to cover the new attacher's access to the replaced pole"). However, the Coalition's argument, which would have third parties pay to replace poles that already require replacement, completely ignores Congress' and the Commission's clearly articulated positions that attaching entities are not responsible for the costs of utility betterment (*see supra* notes 17 and 28), consistent with established economic principles underlying cost-causation.

[38] *2011 Pole Attachment Order*, 26 FCC Rcd. at 5323 ¶ 187 (recognizing that "periodic pole replacement [is] needed to provide [the utility's] own service").

[39] *Local Competition Order*, 11 FCC Rcd. at 16096-97 ¶ 1212.

necessary to serve each household, present an especially strong risk that utilities will underinvest in infrastructure if they believe that they will have an opportunity to offload the cost of facilities upgrades onto a new attacher who seeks to serve the area.

Fourth, the interpretation sought by NCTA would better align incentives for more efficient and cost-effective pole replacement work in unserved areas. In its 2018 *Wireline Infrastructure Third Order*, the Commission acknowledged attachers' "frustration over the lack of transparency of current estimates of make-ready work charges" and their concern that pole owners included in these charges "costs that are unnecessary, inappropriately inflated, or that attaching entities could easily avoid."[40] Although the Commission took initial steps towards addressing this concern by requiring more detailed, itemized estimates of make-ready costs,[41] this remedy has limited utility in the pole replacement context because—unlike other forms of make-ready work—an attaching entity does not have the right to exercise self-help and perform the replacement itself if the utility's estimate is unsatisfactory.[42] Indeed, many pole owners now seek to charge a premium for providing the level of detail necessary to verify make-ready charges.[43] Moreover, pole owners hold significant leverage due to the costliness of alternatives, such as undergrounding, in some areas of the country. Where the utility itself shares in the cost of a pole replacement that it directs, however, it will be incentivized to perform the replacement in a more cost-effective and efficient manner.

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[40] *Wireline Infrastructure Third Order*, 33 FCC Rcd. at 7758-59 ¶ 110 (citation omitted).

[41] 47 C.F.R. § 1.1411(d).

[42] 47 C.F.R. § 1.1411(i)(3).

[43] *See Coalition Recon. Petition* at iv and 18 (arguing that, "[a]s for pole-by-pole estimates, which require more time and expense to prepare, any attacher requesting such detailed pole-by-pole estimates should bear the extra time and expense to prepare them").

B. Pole Owners Are "Parties that Directly Benefit from" Pole Replacements and Should "Share Proportionately in the Cost."

The Commission's regulations also are consistent with the relief requested here. Its make-ready rules clearly address the timing of and responsibility for pole replacements, but not who bears the responsibility for paying for them or to what extent. However, the position commonly asserted by pole owners—that attachers are responsible for the entire cost of replacing poles—does not comport with the text of section 1.1408(b), which governs cost allocation for modifications to poles and other facilities.[44]

The Commission's pole attachment regulation regarding the cost of "modifying a facility" to accommodate an attachment makes clear that such costs are to be shared among all beneficiaries:

> The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification *and by all parties that directly benefit from the modification*. Each party described in the preceding sentence shall share proportionately in the cost of the modification.[45]

The Commission's 1996 *Local Competition Order* expressly recognized the general principle that a utility may be among the beneficiaries of a modification required to share in its costs. There, the Commission directed that "[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

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[44] The Commission's regulations regarding recurring pole *rental* rates are silent on the issue. 47 C.F.R. § 1.1406(b) directs that any "reimbursements received by the utility from cable operators and telecommunications carriers for non-recurring costs" are to be excluded from the utility's capital costs for purposes of determining pole rent, but does not address which non-recurring costs should be "received . . . from cable operators and telecommunications carriers" in the first instance.

[45] 47 C.F.R. § 1.1408(b) (emphasis added).

modification cost."[46] Moreover, the order did not limit this principle to maintaining compliance with safety requirements, but broadly referenced any "other requirements" observed by the utility. The order expressly tied this allocation to ensuring that utilities not shift the costs of maintaining their own infrastructure onto third parties, noting that its rule "will discourage parties from postponing necessary repairs in an effort to avoid the associated costs."[47]

Replacement of an existing pole with a new pole is a quintessential example of "modifying a facility" and thus, falls within the situations covered by the text of the rule.[48] NCTA's requested clarification – that a utility is among the entities that should share "proportionately" in those costs – is entirely consistent with the broad language of the rule as well.[49] The rule refers both to parties that "obtain access to the facility as a result of the modification" and those that otherwise "benefit from the modification" in identifying the entities

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[46] *Local Competition Order*, 11 FCC Rcd. at 16096-97 ¶ 1212.

[47] *Id.*

[48] *Id.*, 11 FCC Rcd. at 16096 ¶ 1211 (describing the "installation of a new pole" as a type of modification contemplated by this rule). Although the Eleventh Circuit subsequently held that the Commission may not compel an electric utility to expand capacity to accommodate an attachment, nothing in this subsequent history alters the application of the rule to allocate costs when the electric utility, in lieu of exercising its ability to deny the attachment, grants access conditioned upon cost-sharing by the attaching entity. Moreover, as Judge Sippel noted in *Florida Cable Telecommunications Ass'n v. Gulf Power Co.*, 26 FCC Rcd. 6452 ¶ 22 (2011), "[t]he Commission acknowledged the Eleventh Circuit's ruling in *Southern Company* that utilities are not obligated to provide access to a pole when it is agreed that the pole's capacity is insufficient to accommodate a proposed attachment, but concluded that a pole does not have 'insufficient capacity' for purposes of section 224(f)(2) if a utility could accommodate another attachment using conventional methods that it employs in its own operations," *i.e.*, on a non-discriminatory basis.

[49] As explained in Part I.D *infra*, application of this rule to electric utilities is not inconsistent with section 224(f)(2) of the Act. To the contrary, nothing in that section exempts electric utilities from the Commission's pole attachment rate requirements when they replace a pole in response to a request from an attaching entity.

that should bear a share of the replacement costs.[50] The rule therefore necessarily contemplates that there will be parties who "benefit from the modification" in ways other than through attachments to the facility. In contrast, the text of section 1.1408(b) cannot be squared with the efforts of many pole owners to attribute pole replacements costs exclusively to the new attacher that "obtain[s] access" from the replacement, as it would render superfluous the phrase "and by all parties that directly benefit from the modification."[51]

There can be no doubt that pole owners "directly benefit" from replacement of a utility pole in an unserved area.[52] Poles, like other utility infrastructure, have a finite life and require maintenance and intermittent replacement. Replacing an older pole with a new one necessarily allows the utility to defer the next scheduled replacement, including transfer of its facilities to the new pole, and reduces maintenance costs. In addition, if the new pole has greater capacity than the existing one, the utility further benefits from the opportunity to earn additional rents from later attachers, or to use the additional capacity for its own purposes, whether (in the case of an electric utility) in providing its core electric services or in facilitating the utility's own future entry into broadband markets.

C. To "Share Proportionately in the Cost of the Modification" Means Paying Only for the Costs the New Attacher Causes.

Insofar as the Commission grants the clarification requested in this Petition, NCTA requests that it also provide guidance about how the allocation of pole replacement costs in

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[50] 47 C.F.R. § 1.1408(b).

[51] 47 C.F.R. § 1.1408(b); *cf. Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (regulatory provisions should be read "so as not to render one part inoperative"); *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 668-69 (2007) (invoking the canon against surplusage in interpretation of regulation).

[52] *See supra*. note 28.

unserved areas between a new attacher and a pole owner should be applied in particular cases. NCTA proposes that the Commission clarify that cost causation principles be used in determining how to allocate costs both in a "just and reasonable" manner and to ensure that the parties "share proportionately in the cost" of a pole replacement. A fair and economically principled allocation of pole replacement costs attributes to the attacher responsibility for the costs it actually causes the utility to incur, such that the pole owner is made whole by the new attacher, and attributes to the utility the capital costs it would have otherwise incurred in the absence of the attachments.[53] Specifically, the costs a new attacher actually causes when a pole is replaced at the request of the new attacher consist of those costs associated with the earlier retirement of the existing pole, which in most cases is limited to the remaining net book value of the pole being replaced (*i.e.*, the original bare pole cost not yet depreciated).

NCTA proposes that the average per pole net book investment calculated using the Commission's pole attachment rate formulas should be used as a proxy for the value of the removed pole. Although generally higher than the cost of a pole near the end of its useful life, use of the Commission's pole attachment formula provides many advantages and would help to ensure that pole owners do not over-recover for the remaining pole while still facilitating a relatively straight-forward calculation. The formula, which has been upheld by the Supreme

[53] For clarity, the Petition does not seek the exclusion of these capital costs from consideration in the determination of the utility's pole rents, but rather that the utility's portion of the capital costs associated with replacement poles be treated the same as the capital costs associated with any other pole installation by the utility for the area in question, with recognition of possible timing adjustments associated with the new attachment request. To the extent this results in additional capital expenditures for the utility, it would also redound to the utility's benefit insofar as the utility can include those investments in its rate base as appropriate for prudent capital expenditures made by a utility in the regular course to maintain its plant.

Court[54] and is widely accepted and used throughout the country, calculates net investment relying primarily upon publicly available utility cost information. Thus, this methodology can be easily administered by utilities and attachers with minimal need to escalate disputes to the Commission, consistent with congressional direction.[55] The ability of the parties to rely on such public information and the agency and judicial precedent that has accumulated over the years regarding various issues that have arisen is invaluable in providing substantial guidance to pole owners and attaching parties alike without the need to resort to expensive and time-consuming administrative challenges.

In a process analogous to that used in the Commission's recurring rate formula, parties would have the opportunity to rely on actual cost data for the specific poles where such data can be substantiated and subject to verification. For example, the attacher would have the opportunity to establish that a pole is near or past its average service life or identified as soon to be replaced by the pole owner, and therefore would have a very small to negligible remaining value. Conversely, the pole owner would have the opportunity to establish that a pole is younger vintage (i.e., was only recently replaced) and that the remaining value is greater than the average net book investment (and not otherwise scheduled to be replaced by the utility). The exact evidence appropriate to calculate these factors likely may vary in individual cases and from utility to utility, but still may be derived primarily using either publicly available or routinely

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54 *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987).

55 S. Rep. No. 95-580 at 21, *reprinted in* 1978 U.S.C.C.A.N at 129; *see* also *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Notice of Proposed Rulemaking, 68 F.C.C.2d 3 ¶ 4 (1978) ("The supplemental regulation envisioned by the [Senate Committee] Report is to be simple and expeditious, necessitating a minimum of staff, paperwork and procedures consistent with fair and efficient regulation…. Tariff filings and other aspects of the full panoply of Title II common carrier regulation need not apply, and the [FCC] is afforded discretion to select regulatory tools.").

reported and verifiable information. For instance, the utility's fixed asset accounting records pertaining to FERC Account 364 (poles, towers, fixtures) detailing depreciation for tax and ratemaking purposes may provide a more specific measurement of a pole's remaining net book value on either an average vintage or mass asset basis.[56]

While in most cases the only relevant pole replacement costs associated with a new attachment request will be the remaining net book value of the replaced pole, in certain limited circumstances, the pole owner may be able to prove that there are additional incremental costs appropriately attributed to an attacher. To this end, where a utility can substantiate for a specific pole(s) in question using verifiable cost data that (1) the existing pole is not near the end of its useful life as measured by the utility's current depreciation rate; and (2) the replacement pole is more costly than the pole the utility otherwise would have installed upon retirement of the existing pole but for the new attachment, then the difference in cost between the two poles may also be appropriately considered "but for" costs attributable to the new attacher. Given the age of most poles today and the pole resiliency and hardening programs being implemented nationwide, however, NCTA expects that such circumstances would not be frequent. Accordingly, as the Commission has done for the recurring rate formulas, the Commission should establish a presumption that the attachment does not cause incremental costs with respect to the new pole and that the pole owner receives the sole economic gain from the replacement, including the transfer of its facilities to the new pole. The utility could rebut the presumption

[56] Another alternative for deriving the remaining value of the existing pole where historic records cannot be relied upon is to identify the average cost of a standard new joint use pole being installed by the utility in the same geographic area, and to adjust that value to account for the average age and accumulated depreciation of the utility's embedded cost base of poles. The adjustments to cost of the pole to account for the age of the pole can be made using a published cost index such as the Handy Whitman Index for Utility Construction for the relevant geographic area.

with substantiated and verifiable cost data (*e.g.*, from published construction guidelines, or specific pole replacement plans including any current or future pole resiliency and hardening programs).[57]

The method for allocating pole replacement costs proposed by NCTA in this Petition is not unique. The State of Maine, which regulates pole attachments through a certification pursuant to section 224(c), already allocates the costs of replacement poles using a similar formula to the proposal here consisting of the remaining net book value of the existing (to be replaced) pole and some potential incremental costs related to the new pole.[58] The Maine approach would require adaptations for nationwide applicability. For example, a national approach would need to avoid any unrepresentative presumptions regarding the beneficiary of the pole replacement and the types of poles any given utility would have installed in the regular course independent of the attachment.[59] Subject to those caveats, however, NCTA respectfully submits that the Maine approach provides a generally sensible model that better comports with an equitable and proportionate allocation of costs than does than the common practice of

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[57] Such documents likely would include standard construction specifications such as the height and strength of poles that are necessary to support a utility's needs in cases where the utility claims it must install a taller and/or stronger pole to accommodate one or more third-party attachments. Utility work orders for various pole heights and classes installed in similar geographic areas would likely include relevant cost data.

[58] 65-407-880 Me. Code R. § 5(C) ("Excess Height") (requiring that "pole owners shall charge attaching entities separately" for "expenses and investments" arising out of situations in which a "utility pole must be replaced by a taller joint-use utility pole" to accommodate an attachment).

[59] The statutory framework governing pole replacements in Maine presumes that the utility, in the absence of an attachment, (1) does not benefit from pole replacement in the form of betterment, and (2) would have installed a "35-foot" pole, which does not reflect current nationwide trends for utility pole replacements, where newly installed poles are generally much taller than (even) the FCC's outdated presumptive 37.5-foot tall pole. 65-407-880 Me. Code R. § 1(C).

indiscriminately transferring them to new attachers in their entirety, and is consistent with the goals of prompting continued broadband deployment to unserved areas as advanced by NCTA in this petition.

III. THE COMMISSION SHOULD PRIORITIZE AND EXPEDITE POLE ATTACHMENT COMPLAINTS ARISING IN UNSERVED AREAS.

The Commission can also help address the operational challenges and delays of extending broadband to unserved areas by interpreting its pole attachment rules to require prioritizing and expediting the resolution of pole attachment complaints that impede deployment in unserved areas. The Commission's 2017 decision to "further support … efforts to expedite resolution" of pole access disputes by making them eligible for inclusion in its Accelerated Docket provides a framework to do so.[60] NCTA respectfully requests that the Commission: (1) announce priorities, to guide Commission staff's discretion under sections 1736(d) and 1736(f), favoring the placement of pole attachment complaints onto the Accelerated Docket with expedited procedural schedules when they arise in unserved areas; and (2) further make clear its authority to order expedited pole replacements within this framework.

A. Expediting Resolution of Disputes that Impede Broadband Deployment in Unserved Areas.

The Commission's Accelerated Docket Proceedings provide an avenue to expedite pole attachment complaints.[61] Section 1.736 provides Commission staff with discretion to decide which complaints to include on the Accelerated Docket.[62] To accommodate the 60-day

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[60] *Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, Report and Order, 33 FCC Rcd. 7178, 7184 ¶ 18 (2018) ("*Amendment of Procedural Rules*").

[61] 47 C.F.R. § 1.736(a).

[62] *Id.* § 1.736(d). Either party may also request inclusion on the Accelerated Docket within a designated timeframe. *See id.* § 1.736(b)-(c).

timeframe within which resolution must be reached, Accelerated Docket Proceedings are then subject to "shorter pleading deadlines and other modifications to the procedural rules,"[63] which can be set in individual cases "to provide greater flexibility to staff while preserving the basic structure of the rules."[64]

The flexibility of the Accelerated Docket procedure provides a framework within which the Commission can readily prioritize pole attachment complaints in unserved areas by providing guidance to the Commission staff on the policies it should consider in exercising its discretion with respect to which complaints are included. The deployment of broadband access to unserved areas is a pressing priority, and time is of the essence in enabling broadband providers to expand their networks to close the digital divide. In addition, many broadband providers seeking to deploy their networks into unserved areas are subject to schedule commitments under the terms of federal or state broadband programs that require construction to be completed and service activated within specified timeframes.[65]

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[63] *Id.* § 1.736(a).

[64] *Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, Notice of Proposed Rulemaking, 32 FCC Rcd. 7155, 7159-60 ¶ 18 (2017).

[65] For example, awardees under the Rural Utilities Service's ReConnect program must complete their projects within five years. Broadband Pilot Program, 83 Fed. Reg. 64315, 64322 (Dec. 14, 2018). Recipients of the California Advanced Services Fund ("CASF") infrastructure grant must complete projects within 12-24 months, depending on the type of project. *See Order Instituting Rulemaking to Consider Modifications to the California Advanced Services Fund*, R.12-10-012, Appendix 1 - Broadband Infrastructure Account Requirements, Guidelines and Application Materials to Decision Implementing the California Advanced Services Fund Infrastructure Account Revised Rules, D.18-12-018, at 12, 17 (Cal. Pub. Utils. Comm'n Dec. 20, 2018), https://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Utilities_and_Industries/Communications_-_Telecommunications_and_Broadband/CASF%20InfrastructurePublished%20Rules%20Revised.pdf.

For these reasons, disputes between broadband providers and pole owners should not be allowed to stand in the way of prompt deployment. An expectation by all parties that the Commission will address disputes expeditiously will also encourage prompt resolution of disagreements before they are escalated. Pole attachment disputes that impede broadband deployment to unserved areas, therefore, merit prioritization, and the Commission should declare that the Commission staff should be guided by these priorities in deciding[66] which disputes eligible for the Accelerated Docket (and which have otherwise satisfied the conditions for placement on the docket)[67] should be included on it.

B. Mechanism for Directing Pole Replacement.

The Commission should also clarify that the remedies available in pole attachment complaint proceedings include directing a utility to complete a pole replacement within a specified period of time or to designate an authorized contractor to do so. At present, the Commission's pole attachment rules place pole replacements within the complex make-ready timeframes.[68] Accordingly, replacements are excluded from the One Touch Make-Ready regime and have also been excluded from the self-help remedy available to attachers under the regular pole attachment process.[69] The Commission explained that it exempted pole replacements from these regimes because "pole replacements can be complicated to execute and are more likely to

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66 *See* 47 C.F.R. § 1.736(d) (empowering Commission staff to decide which eligible cases to include).

67 *See, e.g.*, 47 C.F.R. § 1.722(g) (requiring parties to attempt "executive-level" discussions to reach a pre-filing settlement); *see also Amendment of Procedural Rules*, Report and Order, 33 FCC Rcd. at 7184 ¶ 16.

68 *See* 47 C.F.R. § 1.1402(o), (p) (defining pole replacements as complex make-ready); 47 C.F.R. § 1.1411(e) (setting timelines for completion of make-ready work).

69 *See* 47 C.F.R. § 1.1411(i)(3), (j).

cause service outages or facilities damage," which make them potentially disruptive when performed improperly.[70]

NCTA members have confronted challenges arising out of pole owners' being unprepared to address the operational requirements of large broadband deployment projects by new attachers in their service areas, including extreme delays by utilities in processing pole attachment applications, conducting pre-attachment surveys and engineering, and performing make-ready work. In many cases, applications languish for months, substantially impacting network deployment efforts. In some instances, utilities have delayed action on pole attachment applications and used the time to deploy their own broadband facilities instead. While the Commission's 2018 reforms in this docket provide attaching entities with additional options to overcome some situations in which pole owners are unwilling or simply unable to timely process applications, conduct surveys, and perform certain make-ready work,[71] the new rules nevertheless leave attachers entirely reliant upon the pole owner for pole replacements.[72]

As a result, an attacher confronted with a pole owner who is unnecessarily stalling pole replacements has no recourse other than to initiate a pole attachment complaint with the Commission. Due to the time required to resolve such complaints once initiated, however, the result is even further delay that prevents broadband access from being delivered to unserved Americans. Because attachers in unserved areas often are subject to strict government-mandated buildout schedules, they are often compelled to agree to inequitable cost allocations demanded

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70 *Wireline Infrastructure Third Order*, 33 FCC Rcd. at 7754, ¶ 101.

71 *Id.* at 7711-15 ¶¶ 13-17, 7717-22 ¶¶ 22-24, ¶¶ 27-31, 7725-28 ¶¶ 36-42 (describing the Commission's OTMR and self-help modifications).

72 *Id.* at 7714-16 ¶¶ 17-19 (excluding "complex make-ready" procedures, like pole replacements, from the Order's OTMR rules).

by the pole owner irrespective of how the Commission might resolve such a dispute if there were time to bring one.

The Commission can help address this challenge, as set forth above, by prioritizing pole attachment disputes in unserved areas on its Accelerated Docket. It can also specify that its authority under section 1.1407(b)—which provides that, "[i]f the Commission determines that access to a pole . . . has been unlawfully denied or delayed, it may order that access be permitted within a specified time frame and in accordance with specified rates, terms, and conditions"[73]—includes the authority to order any pole owner either to complete a pole replacement within a designated amount of time, or designate a qualified contractor authorized to do so. Some certified states already follow this approach.[74]

IV. THE COMMISSION HAS AUTHORITY TO ISSUE THE DECLARATORY RULING REQUESTED.

"Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication."[75] That general authority includes broad discretion to issue declaratory rulings "to terminate a controversy or remove uncertainty" about the interpretation and application of the Communications Act and implementing rules.[76] In

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[73] 47 C.F.R. § 1.1407(b).

[74] *See e.g*. Vermont Public Utility Commission, Case No. 19-0252-RULE, *Rule 3.700 Pole Attachment Rulemaking*, Responsiveness Summary at 5 (Nov. 26, 2019) (amending its rules to allow attachers to use self-help for pole replacements); Vermont PUC rules 3.708(L).

[75] *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013).

[76] 5 U.S.C. § 554(e) ("The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."); 47 C.F.R. § 1.2(a) ("The Commission may . . . on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."); *see also City of Arlington*, 569 U.S. at 307 (holding that *Chevron* deference applied to the Commission's declaratory ruling because "Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and

the Commission's own words, "as the agency charged with administering the Communications Act, the Commission has the authority, responsibility, and expert judgment to issue interpretations of the statutory language and to adopt implementing regulations that clarify and specify the scope and effect of the Act. Such interpretations are particularly appropriate where the statutory language is ambiguous, or the subject matter is 'technical, complex, and dynamic,' as it is in the Communications Act."[77]

There is no reason to doubt that the Commission has authority to interpret the Communications Act and its own regulations to remove barriers to broadband deployment, and it has done so on numerous occasions in the past. For instance, the Commission proceeded by declaratory ruling to clarify the meaning of a "facilities request" and its associated shot clock, explaining that its interpretations would "provide greater certainty" and "should accelerate the deployment of advanced wireless networks,"[78] and further noting that it would not delay issuing those clarifications "[i]n light of [their] significant benefits to wireless infrastructure

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adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority"); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81, 986 (2005) (applying *Chevron* deference and deferring to the Commission's declaratory ruling classifying broadband Internet access services provided by cable providers as "information services," noting that "no one questions that the order is within the Commission's jurisdiction"); *Conference Grp., LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013) ("In interpreting and administering its statutory obligations under the Act, the Commission has very broad discretion to decide whether to proceed by adjudication or rulemaking."); *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007) ("there is no question that a declaratory ruling can be a form of adjudication").

[77] *Wireline Infrastructure Third Order*, 33 FCC Rcd. at 9095 ¶ 21 (quoting *Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 328 (2002)).

[78] *Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, Declaratory Ruling and Notice of Proposed Rulemaking, WT Docket No. 19-250, FCC 20-75 ¶ 11 (rel. June 10, 2020).

deployment."[79] It has also issued a declaratory ruling to interpret section 253 so as to preempt certain state and local licensing restrictions that were inhibiting broadband deployment.[80] Nor is there any doubt that the Commission has authority to provide notice of its enforcement priorities to guide Staff in the exercise of functions within their discretion.[81]

The Commission should exercise its authority here to provide guidance on the allocation of pole attachment costs and to accelerate pole access disputes in unserved areas. By doing so, the Commission will give broadband providers the certainty they need to proceed with efficient and timely network deployment to unserved areas.

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79 *Id.* ¶ 11 n.34.

80 *Wireline Infrastructure Third Order*, 33 FCC Rcd. 9088.

81 *See, e.g.*, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14027 ¶ 15 (2003) (setting forth Commission's intent to prioritize enforcement of telemarketing rules); *Advanced Methods to Target & Eliminate Unlawful Robocalls*, Declaratory Ruling and Third Further Notice of Proposed Rulemaking, 34 FCC Rcd. 4876, 4877 ¶ 1 (2019) (stating that the Commission had taken "aggressive enforcement action against illegal callers" because stopping robocalls was its "top consumer protection priority").

CONCLUSION

NCTA respectfully requests that the Commission issue the declaratory ruling as set forth in this Petition to enable providers to more expeditiously deploy broadband networks in unserved areas of the country.

Respectfully submitted,

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