KENTUCKY POWER
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DELIVERED VIA EMAIL

October 19, 2020

Kentucky Public Service Commission
Administrative Regulations Working Group
P.O. Box 615
Frankfurt, Kentucky 40602-0615
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RE: Kentucky Power Company's Reply Comments regarding Proposed Chapter 807 KAR 5:0XX, Access and Attachments to Utility Poles and Facilities

Dear Sir or Madam:

Kentucky Power Company ("Kentucky Power" or the "Company") hereby respectfully submits the following reply comments regarding proposed Chapter 807 KAR 5:0XX, Access and Attachments to Utility Poles and Facilities. Kentucky Power appreciates the Public Service Commission of Kentucky's ("Commission") consideration of Kentucky Power's suggestions below as the Commission finalizes utility pole attachment rules for the Commonwealth.

807 KAR 5:0XX – Section 1. Definitions.

Section 1(9)

The Commission's proposed Section 1(9) definition of a "new attacher" expressly (and correctly) excludes "a utility with an applicable joint use agreement with the utility that owns or controls the pole to which it is seeking to attach." AT&T proposes to delete this important exclusion and, more broadly, to "expressly mandate non-discriminatory pricing, even for entities that have or had joint use agreements…" AT&T Comments at 1. In other words, AT&T is proposing that the Commission replace the long-standing cost sharing arrangements between telephone and electric utilities (joint use agreements) with the tariffed rate. The Commission should reject AT&T's proposal because it is anti-competitive, because it would be operationally disruptive, and because it would shift significant costs to electric utilities' customers.

As set forth in Kentucky Power's initial comments, the vast majority of ILEC networks have already been deployed through joint use agreements. In those joint use agreements, ILECs and electric utilities agreed to share their infrastructure for the distribution of their respective services, thus saving costs through a single, shared pole network in their overlapping service areas, as opposed to building separate, redundant networks. Under joint use agreements, and because ILECs were viewed as infrastructure "partners," ILECs deployed their networks with numerous

advantages over CATVs and CLECs, which make attachments pursuant to tariffs and/or pole license agreements. The competitive advantages of a joint use agreement include, but are not limited to, the following: (1) paying significantly lower make-ready costs; (2) avoidance of application and preapproval requirements; (3) avoidance of post-attachment inspection costs; (4) avoidance of obtaining rights-of-way from private landowners; (5) avoidance of relocation and rearrangement costs; (6) guaranteed space on a network of built-to-suit poles; and (7) paying drastically lower labor and material costs for things like installation of new poles. *See* Kentucky Power Comments at 2-3.

The FCC has consistently acknowledged that ILECs enjoy benefits under joint use agreements that are not available to their CATV and CLEC competitors under standard pole license agreements. *See, e.g., In the Matter of 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, 7768 at ¶ 124 (Aug. 3, 2018) (the "2018 Order") ("[J]oint use agreements may provide benefits to incumbent LECs that are not typically found in pole attachment agreements between utilities and other telecommunications attachers…"); *In the Matter of Verizon Florida, LLC v. Florida Power and Light Company*, Memorandum Opinion and Order, Docket No. 14-216, 30 FCC Rcd 1140, 1150 at ¶ 26 (Feb. 11, 2015) (noting that ILEC "received benefits under the [joint use agreement] that were not available to other attachers"); *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, 5336 at ¶ 217 (Apr. 7, 2011) (the "2011 Order") (acknowledging that "joint use agreements…implicate rights and responsibilities that differ from those in typical pole lease agreements"); *In the Matter of BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Memorandum Opinion and Order, Docket No. 19-187, 35 FCC Rcd 5321, 5329 at ¶ 14 (May 20, 2020) (finding that ILEC "receives significant benefits under the [joint use agreement] not afforded competitive LECs and cable attachers").

If the Commission accepts AT&T's proposal and allows ILECs to avoid their cost sharing obligations under joint use agreements, while at the same time allowing ILECs to continue enjoying the superior rights and benefits under those joint use agreements, ILECs like AT&T will have an enormous competitive advantage over CATVs and CLECs. Further, it will place electric utilities' customers in the position of paying for taller and stronger networks of poles than necessary to supply electric service that were specifically constructed to accommodate ILECs like AT&T. If, alternatively, ILECs are suddenly converted into "just another attaching entity," it will have dramatic consequences on the operational relationship between the parties. For example, under the existing relationship, if Kentucky Power needs to use an ILEC-owned pole to serve an electric customer, but the ILEC-owned pole requires replacement (due to insufficient capacity or deterioration), then the existing processes allow Kentucky Power to change-out the pole without delay and bill the ILEC for the scheduled cost (which is lower than actual cost). This process

eliminates delay, facilitates timely electric service, and provides the ILEC with cost-effective pole replacement. All of this would unravel if the ILEC becomes "just another attaching entity."

Rather than taking steps to undermine these important agreements, the Commission should instead **preserve** existing joint use agreements, as the Commission's proposed rules correctly suggest. These agreements have always been subject to the Commission's jurisdiction and, therefore, are presumptively reasonable. Moreover, there is no risk that ILECs will be disadvantaged or subjected to unfair terms under such agreements, because both parties to joint use agreements are regulated utilities and can seek recourse at the Commission.

807 KAR 5:0XX – Section 2. Duty to provide access to utility poles.

Section 2(2)(a)

Section 2(2)(a), as proposed by the Commission, would allow a utility to deny access on a non-discriminatory basis for reasons of insufficient capacity, safety, reliability, or generally applicable engineering purposes. This proposed rule is appropriate as a matter of policy. It is also entirely consistent with both the federal Pole Attachments Act and the FCC rules implementing the federal Pole Attachments Act. *See* 47 U.S.C. § 224(f)(2) ("a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles…on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes"); 47 C.F.R. § 1.1403(a) ("a utility may deny a cable television system or any telecommunications carrier access to its poles…on a nondiscriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes"). KBCA, though, argues for a revision to the proposed rule that would restrict the right to deny access only to situations where capacity, safety, reliability and engineering limitations "cannot be remedied by make-ready." KBCA Comments at Exhibit 3, Section 2(2)(a). The definition of "make-ready" in the Commission's proposed rules, importantly, includes "replacement of a utility pole." KBCA's proposal would, in essence, require a utility to expand capacity (*i.e.*, replace a pole) on demand for attaching entities. KBCA's proposal would gut the purpose of Section 2(2) as proposed by the Commission.

KBCA incorrectly claims that its proposed addition would be consistent with federal law. The Eleventh Circuit, interpreting section 224(f)(2) of the federal Pole Attachments Act (which is nearly identical to the Commission's proposed rule), has expressly held that utilities are not required to expand capacity at the request of attaching entities. *Southern Co. v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002). KBCA's proposed revisions to Section 2(2) are especially harmful when viewed in tandem with KBCA's proposal that utilities bear the vast majority of make-ready pole replacement costs. *See* discussion of Section 4(6)(b) *infra*. If KBCA has its way, Kentucky Power not only will be required to replace poles at the request of a communications attacher, but Kentucky Power's customers also will be required to bear the cost.

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KBCA's proposal would also compromise electric reliability. Though Kentucky Power routinely replaces poles to accommodate communications attachments, there are circumstances where Kentucky Power denies access because a required pole replacement would cause an extended electric customer outage. Kentucky Power needs the ability (as electric utilities have under federal law) to deny access on a non-discriminatory basis for reasons of reliability, safety, insufficient capacity and generally applicable engineering purposes.

New Section 2(3)

KBCA argues in favor of a new Section 2(3) that would prohibit a utility from denying access "to any pole (including overlashing), duct, conduit, or right-of way based on a pre-existing violation not caused by any pre-existing attachments of the requesting attacher." KBCA Comments at Exhibit 3, Section 2(3). This proposed revision would conflict with the Section 2(2) right to deny access for reasons of existing safety, reliability, engineering, or capacity violations. Though KBCA's proposed rule is similar in substance to rules recently adopted by the FCC, those rules were challenged in court, and the court placed important limitations on the scope of the applicability of those rules. The court noted:

> The FCC confirmed at oral argument that the preexisting violation rule would not prevent utilities from rejecting proposed attachments that increase safety risks on a utility pole. The rule thus operates to prevent utilities from relying on preexisting violations pretextually to deny pole access to attachments that pose no greater safety risk than existing attachments.

City of Portland v. United States, 969 F.3d 1020, 1051 (9th Cir. 2020). The Commission can avoid this conflict entirely by rejecting KBCA's proposal. If the Commission believes it is appropriate to address the cost allocation for correction of pre-existing violations, it can do so through separate rules.

807 KAR 5:0XX – Section 3. Pole attachment tariff required.

New Section 3(4)

KBCA proposes a new Section 3(4) that would prejudge any electric utility distribution construction standard that limited the use of certain attachment techniques, such as boxing and extension arms. "Boxing" is a technique whereby communications messenger strand is attached to both sides of a pole (*i.e.*, the pole is "boxed-in" by communications lines). Extension arms are horizontal brackets that extend outward from the communications space. Both techniques can complicate pole climbing, pole replacement, and other operational necessities. Though there are certain circumstances where these techniques are allowed, a utility's right to restrict the use of these practices through non-discriminatory distribution construction standards should not be predetermined through a rule of general applicability. If an attaching entity believes a particular

utility's standard is unreasonable, the attaching entity can seek recourse through the Commission on the particular facts, and the Commission can determine whether the utility's limitation is reasonable.

In a similar vein, KBCA argues, "[t]he Commission should require that any construction standards that exceed the NESC are demonstrably necessary for specific safety reasons that cannot otherwise be achieved by following the NESC or other generally applicable standards and applied on a nondiscriminatory, prospective basis only." KBCA Comments at 24. KBCA, in essence, seeks a presumption that any standards that exceed the National Electrical Safety Code ("NESC") are unreasonable. The NESC, though, is not a ceiling for distribution construction practices. Under Kentucky law, the NESC is either a normative standard or a minimum standard. *See* Ky. Rev. Stat. Ann. § 278.042; 807 Ky. Admin. Regs. 5:04, Section 3; *see also In the Matter of: Jackson County Rural Electric Cooperative Corporation, Inc.; Alleged Failure to Comply with Commission Regulation 807 KAR 5:041, Section 3*, Order, Case No. 10094, 1988 Ky. PUC LEXIS 961, at *5 (Jul. 11, 1988) ("We believe a failure to comply with the NESC is a violation of Commission Regulation 807 KAR 5:041, Section 3, which requires all electric utilities to use the NESC as the standard of accepted good engineering practice for the construction and maintenance of plant and facilities. This regulation prescribes the minimum level of conduct necessary for the protection of human life.") (emphasis added)). In Kentucky Power's current pole attachment tariff, the NESC is clearly identified as a **minimum** standard:

> All such attachments and equipment shall be installed and at all times maintained by Operator so as to comply at least with the minimum requirements of the National Electrical Safety Code and any other applicable regulations or codes promulgated by state, local or other governmental authority having jurisdiction there over.

Kentucky Power Company Cable Television Pole Attachment Tariff, P.S.C. KY. No. 11, Original Sheet No. 16-2 (effective Jan. 19, 2018).

Moreover, the NESC is not a design code. Different requirements may be necessary for and applicable to various reliability or engineering purposes. The NESC itself states: "This Code is not intended as a design specification or as an instruction manual." NESC, IEEE Standards Association, Rule 010.C (2017). The FCC, for its part, has repeatedly rejected the request by attaching entities to convert the NESC into a ceiling for distribution construction standards. Most recently, the FCC stated:

> We decline the requests of certain commenters to establish limits on the construction standards and requirements that utilities adopt for their poles. We agree with those utility commenters who argue that one-size-fits-all national pole construction standards (even if they were based on the NESC or similar codes) are not a good idea, and the better policy is to defer to reasonable and targeted construction standards established by states, localities, and the utilities themselves where appropriate.

2018 Order, 33 FCC Rcd at 7772, ¶ 133 (internal citations omitted).

New Section 3(7)

AT&T proposes a new Section 3(7) that would require utilities to provide "at least 60 days advance notice of the intent to make changes to its tariff." AT&T Comments at 3 (proposing a new Section 3(7)). This proposal is contrary Kentucky Revised Statutes Section 278.180, which requires utilities to provide thirty days' notice prior to a change in rates. The Commission has discretion under that statute to shorten the notice period to 20 days, but it lacks discretion to extend the statutory notice period as AT&T proposes. Thus, to the extent a tariff change involves a change in pole attachment rates, AT&T's proposal is contrary to statute. AT&T's proposal also is inconsistent with the customer notice provisions of 807 KAR 5:011, Section 7, which permit a utility to provide customer notice of a proposed tariff change on or before a tariff change is filed. The Commission's existing tariff regulations contained in 807 KAR 5:011 already provide ample time for affected or interested parties to intervene, object, and submit comments after a proposed tariff revision is filed. There is no reason for the Commission's regulations to treat pole attachment tariffs differently than any other utility tariff, and AT&T has not offered one.

807 KAR 5:0XX – Section 4. Procedure for new attachers to request utility pole attachments.

Section 4(6)(b)

In its initial comments, KBCA argues that the Commission "should ensure that utilities do not use pole replacements to shift their own infrastructure betterment and upgrade costs onto new attachers." KBCA Comments at 13. KBCA then provides two "common scenarios" in which utilities allegedly shift the cost of pole upgrades onto attachers: (1) when utilities discover "existing issues" with a pole or a third-party attachment while they are performing surveys in conjunction with attachment requests; and (2) when additional capacity is required to host a new attachment, and utilities require the new attacher to replace the existing pole with a taller, stronger pole that is capable of hosting the additional attachment. *Id*. at 14.

To mitigate against the first "scenario," KBCA proposes revisions to proposed Section 4(6)(b) that would clarify that new attachers are not required to bear the cost of pre-existing violations caused by either third-party attachers or utilities. Kentucky Power does not oppose KBCA's proposed revisions. In fact, in its initial comments, Kentucky Power stated that it "agrees that the cost of correcting pre-existing violations should be paid by the entity that caused the violation." Kentucky Power Comments at 13. However, Kentucky Power stresses that under no circumstances should an electric utility be forced to bear the cost of correcting pre-existing violations caused by another party. As explained in Kentucky Power's initial comments, "it makes the least sense for the electric utility to bear this cost given that the electric utility was neither the cause of the violation nor stands to gain access as a result of correcting the violation." *Id*. at 13. Therefore, Kentucky Power reiterates that the following sentence should be added to the end of Section 4(6)(b): "In no

event shall a utility be required to bear such cost unless the utility was the cause of such non-compliance."

To mitigate against the second "scenario"—*i.e.*, that pole owners are shifting the cost of upgrades and betterment onto new attachers, KBCA proposes that the Commission adopt a rule requiring pole owners to share in the cost of make-ready pole replacements. Specifically, KBCA proposes the adoption of a new Section 4(6)(b)(2) that provides:

> With respect to make-ready consisting of a pole replacement, an attacher that causes the need for such replacement is responsible only for (i) the difference, if any, between the cost for the replacement pole and the cost for a new utility pole of the type and height the utility would have installed in the same location in the absence of such attachment, plus (ii) a reasonable estimate of the net book value of the pole and supporting equipment, if any, which has been replaced.

KBCA Comments at Exhibit 3, Section 4(6)(b)(2). Kentucky Power strongly opposes KBCA's cost allocation proposal, as it would shift the vast majority of make-ready pole replacement costs to electric utility customers, and away from the entities whose attachments to electric utility poles causes those costs.

KBCA borrowed its proposed cost allocation rule from Maine. KBCA Comments at 16-17 (citing 65-407-880 Me. Code R. § 5.C). Maine is an outlier jurisdiction on this issue. The vast majority of other state public service commissions have reached the opposite conclusion. *See, e.g.*, Arkansas**:** 126-03 Ark. Code R. § 028, Rule 4.03(b)(1) (requiring attacher to "pay for the replacement cost of [the new] pole, including the cost of removing the old pole, less any salvage value plus the costs of transferring the facilities of all other attachers"); Ohio**:** Ohio Admin. Code 4901:1-3-04(E) (only requiring pole owners to share in the cost of a pole replacement if the pole owner either "adds to" or "modifies" its existing attachments after receiving notice of the proposed pole replacement); Utah**:** *In the Matter of an Investigation into Pole Attachments; In the Matter of the Consolidated Applications of Rocky Mountain Power for Approval of Standard Reciprocal and Non-Reciprocal Pole Attachment Agreements*, Report Recirculating "Safe Harbor" Pole Attachment Agreement, Docket No. 04-999-03, Docket No. 10-035-97, 2010 Utah PUC LEXIS 264, at *23-24 (Oct. 7, 2010) (requiring the attacher to "reimburse the [p]ole [o]wner for all costs, including, but not limited to the cost in (sic) replacing the new pole, the remaining life value of the existing pole, lower and haul of the existing pole…and topping of the existing pole when performed as either an accommodation to [the attacher] or as required by NESC").

Recently adopted small cell legislation by numerous states also requires the attaching entity, and not the pole owner (ordinarily the municipality), to bear the costs of make-ready pole replacements. *See, e.g.*, Arkansas**:** Ark. Code Ann. § 23-17-509(f)(3) (allowing pole owner to recover the actual costs of make-ready pole replacements); Florida**:** Fla. Stat. Ann. § 337.401(7)(f)(5)(c)-(d) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); Georgia**:**

Ga. Code Ann. § 36-66C-7(n) (requiring wireless provider to bear the costs of "any make-ready work necessary to enable the authority pole to support the proposed facility, including replacement of the pole if necessary"); Hawaii**:** Haw. Rev. Stat. § 206N-7(f) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); Illinois**:** 50 Ill. Comp. Stat. Ann. 840/15(i)(4)(D) (noting that make-ready pole replacements shall be completed at the wireless provider's "sole cost and expense"); Indiana**:** Ind. Code § 8-1-32.3-26(d)(4)(A)-(B) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); Iowa**:** Iowa Code § 8C.7A(3)(c)(3)(a)(iv)(B) (noting that wireless provider "shall pay or advance…the costs of modifying or replacing the utility pole…with a utility pole…that would safely support the small wireless facility"); Michigan**:** Mich. Comp. Laws Serv. § 460.1319(4)(d) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); Missouri**:** Mo. Rev. Stat. § 67.5115(5)(3) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); North Carolina**:** N.C. Gen. Stat. § 160D-937(f)-(g) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); Ohio**:** Ohio Rev. Code Ann. § 4939.0322(A) (noting that pole owner may "condition approval of the collocation on replacement or modification of the wireless support structure at the operator's cost"); Oklahoma**:** Okla. Stat. tit. 11, § 36-505(D) (allowing pole owner to recover the "actual costs" of make-ready pole replacements, including the cost of having a professional engineer "review the wireless provider's make-ready work plans"); Nebraska**:** Neb. Rev. Stat. § 86-1238(5)(a)&(c) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); Virginia**:** Va. Code Ann. § 56-484.31(E) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); Wisconsin**:** Wis. Stat. Ann. § 66.0414(4)(h) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); West Virginia**:** W. Va. Code § 31H-2-3(a)(6) (allowing pole owner to recover the "actual costs" of make-ready pole replacements).

KBCA's pole replacement proposal also conflicts with Kentucky law. *See In the Matter of: The CATV Pole Attachment Tariff of Mountain Rural Telephone Cooperative Corporation, Inc.*, Order, Case No. 251-14, 1983 Ky. PUC LEXIS, at *3 (Mar. 31, 1983) (finding that pole owners "may charge a CATV operator the entire cost of transferring or rearranging facilities to accommodate a CATV pole attachment; including the cost of pole replacement, less salvage value"). Moreover, because it would require pole owners to share in the cost of pole replacements that are necessitated solely by an attacher's need for additional capacity, KBCA's proposal also runs afoul of the Commission's "bedrock" cost causation principles—*i.e.*, requiring the party who causes the cost to bear the cost. *See, e.g., In the Matter of: The Application of Kentucky Power Company d/b/a American Electric Power for Approval of Amendment Compliance Plan for Purposes of Recovering the Costs of New and Additional Pollution Control Facilities and to Amend its Environmental Cost Recovery Surcharge Tariff*, Order, Case No. 2002-00169, 2003 Ky. PUC LEXIS 230, at * 56 (Mar. 3, 2003) (rejecting electric utility's cost allocation proposal because it would "require the Commission to abandon the bedrock principle of basing rates on cost causation"). For the same reasons, the FCC also does not require a pole owner to share in the cost of make-ready pole replacements unless the pole owner either "adds to" or "modifies" its existing attachments after receiving notice of the proposed pole replacements. *See* 47 C.F.R. § 1.1408(b);

see also 2011 Order, 26 FCC Rcd at 5301, ¶ 143 (noting that under cost causation principles, pole owners are entitled to "recover[] the entire capital cost of a new pole through make-ready charges from the new attacher when a new pole is installed to enable the attachment").

KBCA's proposal is also inconsistent with Kentucky Power's current pole attachment tariff, which provides:

> Where in Company's judgment a new pole must be erected to replace an existing pole solely to adequately provide for Operator's proposed attachments, Operator agrees to pay Company for the entire cost of the new pole necessary to accommodate the existing facilities on the pole and Operator's proposed attachments, plus the removal of the in-place pole, minus the salvage value, if any, of the removed pole.

Kentucky Power Company Cable Television Pole Attachment Tariff, P.S.C. KY. No. 11, Original Sheet No. 16-2 (effective Jan. 19, 2018) (emphasis added).

KBCA's proposal is also premised upon mistaken facts. Specifically, KBCA argues that:

> The pole owner practice of demanding that new attachers pay the entire cost of pole replacements is unreasonable because it results in a windfall to the utility and is not reflective of the costs caused by the new attachment. Utilities regularly replace poles as part of cyclical investment schedules and to upgrade their facilities to meet new construction, engineering, and resiliency requirements. When a pole replacement is needed to accommodate a new attachment, therefore, the new attacher is not changing *whether* the pole is replaced, it is only advancing the schedule for *when* the pole is replaced.

KBCA Comments at 15 (emphasis in original). There are at least two things wrong with KBCA's premise. First, not all poles are eventually replaced. Some poles will never be replaced in the ordinary course because they will be removed from service as part of an undergrounding project prior to the end of their useful lives. Second, though it is true that many poles will eventually be replaced (due to deterioration, operational needs, etc.), it is impossible to know at the time of a make-ready pole replacement what type of pole will be required by the electric utility for such eventual replacement at some then-unknown point in the future. When a pole is replaced as part of make-ready, the new pole is only of sufficient height and strength to accommodate the new attachment. For example, if the existing pole is a 40-foot Class 5 pole, and the new attachment requires only two feet of vertical space and slightly more pole strength, then an electric utility would set a 45-foot Class 4 pole (in other words, the next size up). If, at the time the pole would have otherwise been replaced, the electric utility actually needs a 50-foot Class 2 pole, then the 45-foot Class 4 pole is of no use or benefit to the electric utility. This is true regardless of whether the pole would have been eventually replaced due to deterioration (where, for example, standards

might require a conversion from 3-phase cross arm construction to vertical 3-phase construction) or the electric utility's own service needs (like the installation of a transformer or an additional phase).

Finally, KBCA's proposal is remarkably similar to a recent petition for declaratory ruling filed by the National Cable & Telecommunications Association ("NCTA") at the FCC. *See In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Petition of NCTA for Expedited Declaratory Ruling, WC Docket 17-84 (July 16, 2020) (requesting that the Commission declare, *inter alia*, that pole owners must share in the cost of pole replacements in unserved areas). Numerous electric utilities, including an affiliate of Kentucky Power (American Electric Power Service Corp.), have filed comments opposing NCTA's petition. Notably, as discussed in the electric utilities' initial comments in that proceeding, NCTA's cost allocation proposal—which, again, is very similar to KBCA's—would effectively shift more than 90% of the cost of make-ready pole replacements onto electric ratepayers. *See In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Initial Comments of the Electric Utilities in Opposition to NCTA's Petition for Expedited Declaratory Ruling at pp. 20-21, WC Docket 17-84 (Sep. 2, 2020). Copies of the initial and reply comments submitted by Kentucky Power's affiliate are attached hereto as Exhibits "A" and "B."

New Section 4(11): Overlashing

KBCA and Open Fiber request new rules relating specifically to overlashing. Kentucky Power does not object, generally, to rules that allow overlashing with advance notice and an opportunity (on the part of the utility pole owner) to ensure that the proposed overlash will not (1) compromise the safety, reliability, engineering or capacity of the pole or (2) exacerbate an existing safety, reliability, engineering or capacity issue. Thus, Kentucky Power could accept KBCA's proposed Section 4(11), with two important revisions:

- The second sentence of KBCA's proposed Section (4)(11)(b) should be deleted. The second sentence states: "Such notice requirements may not include any quasi-application or quasi-approval requirements such as requiring engineering studies or requiring attachers to pay for a utility's review of the planned overlash." Aside from being vague, this sentence imposes unreasonable restrictions onto the overlash process. An electric utility needs the ability to determine whether the proposed overlash will impact the safety and reliability of the distribution network, and if this requires an engineering study (as is sometimes the case), then this is a cost the overlasher (the cost causer) should bear.

- KBCA's proposed Section 4(11) should explicitly include a utility's right to deny overlashing for reasons of safety, reliability, insufficient capacity or generally applicable engineering purposes. This addition would mitigate future disputes and bring the proposed rule in-line with federal overlashing policy. *See Southern Co. Servs., Inc. v. FCC*, 313 F.3d

574, 582 (D.C. Cir. 2002) ("And a utility can also deny access to overlashers for reasons of insufficient capacity, safety or reliability as described in the Act.").

807 KAR 5:0XX – Section 6. Notice of changes to existing attachers.

New Section 6(1)(c)

KBCA proposes a new Section 6(1)(c) that would require 60 days' notice of a change in construction standards and guidelines, and limit any such changes as follows:

> Any such changes permitted by a pole agreement or tariff must be nondiscriminatory, made on a prospective basis, may not be made in an arbitrary manner, and may not impose materially greater burdens on or materially decrease the benefits available to attachers under previous versions of the standards or guidelines.

KBCA Comments at Exhibit 3, Section 6(1)(c). Kentucky Power does not object to a 60-day notification requirement or to the requirement that such changes be non-discriminatory, prospective and not arbitrary. Kentucky Power objects, though, to the language that would serve to undermine revised standards that impose different burdens or requirements as compared to "previous versions of the standards or guidelines." Any revisions to the standards and guidelines are made to address specific distribution construction issues and practices. These revisions may, or may not, alter what is expected of an attaching entity on a going forward basis. Though it may be appropriate to ensure that any such revisions do not materially conflict with an existing tariff or agreement, this is not what KBCA is seeking. KBCA is seeking, in essence, to "lock" utilities into their current electric distribution construction standards. The Commission should reject this proposal, as it would undermine Kentucky Power's ability to address changing needs within its distribution system. Moreover, the requirement that revisions to standards "not be made in an arbitrary manner" serves as sufficient protection against KBCA's alleged concerns.

807 KAR 5:0XX – Section 7. Complaints.

Section 7(2)

Section 7(2) of the proposed rules would require the Commission to "take final action" on a pole attachment complaint "within 360 days [of] the complaint being filed." Kentucky Power supports the adoption of an objective dispute resolution timeframe (often referred to as a "shot clock") and further supports the Commission's proposed 360-day shot clock because it would afford the Commission sufficient time to carefully evaluate the particular facts of each pole attachment complaint and weigh the unique policy considerations generally attending the joint use of electric utility infrastructure.

CTIA opposes the 360-day shot clock and proposes that it be reduced to a mere 7 days. CTIA Comments 6-8. Seven days is not sufficient time for a utility pole owner to prepare a response to a pole attachment complaint, especially if it raises complex engineering or regulatory accounting issues, to say nothing of the time period necessary for the Commission to weigh the merits of the case. Moreover, a 7-day shot clock would provide attachers with an enormous tactical advantage—*i.e.*, it would allow an attacher to spend months formulating an expansive and detailed pole attachment complaint and require an electric utility to respond in kind in less than 7 days. Justice cannot be served under such a framework.

If the Commission is inclined to constrict the complaint resolution shot clock at all, it should go no further than the corresponding FCC rule, 47 C.F.R. § 1.740, which imposes a 270-day shot clock on pole attachment complaints not alleging a "denial of access." Further, if the Commission adopts the FCC's 270-day shot clock, it should also adopt some additional safeguards, including:

- **Pre-Complaint Obligations**: A rule requiring the complainant to notify the defendant—in writing—of the allegations forming the basis of its complaint and affording the defendant adequate time to respond before the complaint is filed with the Commission. This rule should also require the parties to engage in executive-level discussions concerning the possibility of settlement prior to the filing of a pole attachment complaint. The FCC has imposed similar pre-complaint obligations on pole attachment proceedings. *See* 47 C.F.R. § 1.722(g).

- **Pausing the Shot Clock**: A rule allowing the Commission to "pause" the shot clock under certain circumstances, including where: (a) the parties engage in significant discovery or briefing of the disputed issues that prolongs the complaint process; (b) the complaint involves large pole access requests of a complex nature that necessitate the Commission's requests for additional information from the parties in order to resolve the complaint; or (c) the parties decide to pursue informal dispute resolution or request a delay to pursue settlement discussions after a complaint has been filed. The FCC has adopted a rule allowing it to "pause" the shot clock under similar circumstances. *See In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, WC Docket No. 17-84, 32 FCC Rcd 11128, 11133-34 at ¶ 12 (Nov. 29, 2017).

KBCA, for its part, proposes that the Commission adopt an alternative 90-day shot clock for pole attachment complaints involving a denial of access ("pole access complaints"). KBCA Comments at 26-27. So long as it is strictly limited to true pole access complaints, Kentucky Power does not oppose KBCA's alternative 90-day shot clock. In its order adopting an accelerated shot clock for denials of access, the FCC defined "pole access complaint" as follows:

> A "pole access complaint" is a complaint filed by a cable television system or a provider of telecommunications service that alleges a complete denial of access to

> a utility pole…. This term does not encompass a complaint alleging that a utility is imposing unreasonable rates, terms, or conditions that amount to a denial of pole access.

In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, WC Docket No. 17-84, 32 FCC Rcd 11128, 11132 at ¶ 9 n.21 (Nov. 29, 2017) (emphasis added). If the Commission decides to adopt an accelerated shot clock for pole access complaints, the Commission should also adopt the foregoing definition of "pole access complaint" to ensure that the accelerated shot clock is not abused.

KBCA's Proposed New Section 7

KBCA proposes a new Section 7 addressing the minutia of pole attachment inventories. As an initial matter, the timing, process and cost allocation for pole attachment inventories should be addressed in an individual utility's tariff—not in a rule of general applicability. But even if the Commission opts to include any portion of KBCA's proposed new Section 7, the Commission should reject Section 7(4), which would give attaching entities, among other things, the right to meddle in the "design and planning" of the inventory and the right to "approve the cost to be incurred" in conducting the inventory. This is an invitation for disputes, would derail the planning and implementation process, and would prevent an inventory from ever taking place, which is probably what KBCA is really seeking because these inventories often discover unauthorized attachments and carry financial consequences to the attaching entity beyond its pro rata share of the inventory costs.

Kentucky Power currently performs pole attachment inventories on a 5-year cycle, such that approximately one-fifth of its service area is inventoried each year. Kentucky Power's attaching entities are given advance notice (usually 60 days) of when and where the inventory will be taking place. Attaching entities are also invited to ride along with the inventory contractor so that they can provide input, in real time, to help ensure the accuracy of the inventory. Some attaching entities participate, but many do not. After the inventory of a particular area is completed and Kentucky Power reviews the data for accuracy, the results are transmitted to the attaching entities. Attaching entities are then given 60 days to review the data and raise disputes. Most of the post-inventory disputes are by attaching entities who have declined to ride-along with the inventory contractor.

AT&T's Proposed New Section 7

AT&T's proposed new Section 7, which would require compliance with current and future FCC pole attachment rules and policy, would essentially render moot Kentucky's reverse preemption of FCC pole attachment jurisdiction. *See* AT&T Comments at 14; *see also* CTIA Comments at 3 arguing that the Commission's pole attachment rules "should mirror the FCC's current pole

attachment regime…as closely as possible.").[1] The Commission is perfectly competent—and in fact better positioned than the FCC—to develop and implement pole attachment policy that balances the concerns of stakeholders and serves the interests of Kentuckians.

CTIA (perhaps recognizing the logical disconnect in reverse preempting the FCC's pole attachment jurisdiction but nonetheless adopting the FCC rules) argues, "the Commission would still benefit from the advantages of reverse preemption - in particular, from the ability to settle disputes at the Commission and apply the rules more broadly to all pole owners under its jurisdiction…." CTIA Comments at 4. This argument ignores the fact that the rules themselves would serve as a constraint on the Commission's exercise of authority and would limit the Commission's ability to craft solutions in the best interest of the stakeholders and Kentuckians.

Further, a proposal that not only cedes to the existing rules of the FCC but also to future rules of the FCC would violate Kentucky's Administrative Procedure Act, Kentucky Revised Statutes Sections 13A.010, *et* seq. Specifically, the Commission must comply with the Act's provisions governing rulemaking. *See, e.g.,* Ky. Rev. Stat. § 13A.350(1) ("The provisions of this chapter [*i.e.*, Kentucky's Administrative Procedures Act] shall apply to all grants of authority to promulgate administrative regulations and no administrative regulation shall be promulgated or adopted unless in conformity with the provisions of this chapter."); Ky. Rev. Stat. § 13A.010(2) (defining "administrative regulation" to include amendments of existing administrative regulations); Ky. Rev. Stat. § 13A.270 (imposing notice and comment requirements on the promulgation of administrative regulations). By providing for the automatic adoption of future FCC rules and substantive amendments into the Commission's pole attachment rules, AT&T's and CTIA's request would violate Kentucky's Administrative Procedures Act. Moreover, the mechanism proposed by AT&T—*i.e.*, incorporating the FCC's existing and future pole attachment rules by reference—is explicitly prohibited under the Act. *See* Ky. Rev. Stat. § 13A.2261 ("Federal statutes and regulations shall not be incorporated by reference."). Accordingly, incorporating AT&T's proposed new Section 7 would not only be inadvisable; it would be unlawful.

807 KAR 5:0XX – New Section 8. Unauthorized Attachments.

KBCA Proposed New Section 8

KBCA's proposes a new Section 8 regarding unauthorized attachments that would defeat the purpose of permitting processes. Specifically, proposed Section 8(2) would limit the financial

[1] CTIA contends that the FCC rules have "proven fair and effective in balancing the needs of pole owners and pole attachers..." CTIA Comments at 3. Kentucky Power respectfully disagrees. The FCC's rules, on the whole, are decidedly tilted in favor of communications attachers. Kentucky Power's affiliate, AEP Service Corp., regularly participates in FCC pole attachment rulemaking proceedings in an effort to promote more balanced solutions, and often participates in challenges to rules that adversely affect its operating companies. Though these efforts have yielded some fruits, there is still **significant** opportunity for striking a better balance for the benefit of stakeholders and Kentuckians.

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consequences of unauthorized attachments to "a one-time Unauthorized Attachment fee the amount of which shall be no more than the annual pole attachment fee for the number of years since the most recent inventory or five years, whichever is less, plus interest." KBCA Comments at Exhibit 3, Section 8(2). This, in essence, reimburses the electric utility for the back rent the attaching entity should have already paid. It does nothing to deter violation of the permitting process which is the "gatekeeper" for ensuring that third-party attachments do not compromise the safety and reliability of the electric distribution system. Even the FCC has recognized the impotence of limiting unauthorized attachment fees to back rent: "[T]here appears to be a well-founded concern that an unauthorized attachment payment amounting to no more than back rent provides little incentive for attachers to follow authorization processes, and that competitive pressure to bring services to market overwhelms any deterrent effect." 2011 Order, 26 FCC Rcd at 5290-91 at ¶ 114 (emphasis added). Moreover, the *Mile Hi* decisions, which KBCA erroneously describes as "the FCC's standard" (KBCA Comments at 25), were expressly abandoned by the FCC in 2011 because that standard served no deterrent effect. The FCC stated: "To address the concerns implicated by unauthorized attachments, we explicitly abandon the *Mile Hi* limitation on penalties and instead create a safe harbor for more substantial penalties." 2011 Order, 26 FCC Rcd at 5291, ¶ 115.

KBCA's proposal would also be inconsistent with Kentucky Power's existing, approved pole attachment tariff, which provides: "Should such unauthorized attachment or use be made, Operator shall pay to the Company on demand two times the charges and fees…that would have been payable had such attachment been made on the date following the date of the last previous inspection required to be made under applicable regulations of the Kentucky Public Service Commission." Kentucky Power Company Cable Television Pole Attachment Tariff, P.S.C. KY. No. 11, Original Sheet No. 16-3 (effective Jan. 19, 2018).

***

Kentucky Power appreciates the opportunity to provide the foregoing comments regarding the proposed pole attachment rules.

Respectfully submitted.

Brian West
Director, Regulatory Services

Kentucky Power Company

EXHIBIT A

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WIRELINE COMPETITION BUREAU

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

INITIAL COMMENTS OF THE ELECTRIC UTILITIES IN OPPOSITION TO NCTA'S PETITION FOR EXPEDITED DECLARATORY RULING

Filed by:

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Duke Energy Corporation
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Date: September 2, 2020

EXECUTIVE SUMMARY

- NCTA's proposal would shift more than 90% of make-ready pole replacement costs to electric utility pole owners. This proposal is not only legally flawed, but also premised upon mistaken facts.

- Though NCTA claims, based on the legislative history of the 1978 Pole Attachments Act, that the Commission has authority to shift these costs to electric utilities, NCTA ignores Section 224(h) of the Act (adopted as part of the 1996 amendments). Section 224(h) expressly confines the circumstances under which pole replacement costs can be allocated to anyone other than the entity at whose request the pole was replaced. The Commission's implementation of this statutory provision (through what is now denominated as Rule 1.1408(b)) recognizes this limitation.

- Since its initial enactment and implementation, the Pole Attachments Act has always embodied the principle of "cost causer pays." NCTA's request to undermine this long-standing rule is not, as NCTA suggests, a "clarification" of the Commission's existing rules—it is a request to turn the law on its head.

- NCTA's proposal to shift more than 90% of make-ready pole replacement costs to electric utility pole owners is premised on the flawed theory that electric utilities would need to replace these poles eventually, anyway. First, not all poles will be replaced. Some poles, due to line relocation or undergrounding projects, will never be replaced. Second, even those poles that will eventually be replaced due to deterioration or damage are replaced only when necessary as determined through cyclical plant inspections. The fact that a wood distribution pole might have an average service life of 44 years does not mean that every pole is replaced after 44 years. Many poles can and do serve their intended purpose well beyond the average useful life.

- Even if an electric utility could anticipate the exact date in the future on which a particular pole would need to be replaced, it makes no sense to force an electric utility and its ratepayers to bear that cost now. This would be no different than an electric utility building new generation capacity (and including it in rate base) decades before the anticipated need for the new generation capacity arises.

- The Electric Utilities are nonetheless willing to bear (and many already bear) the cost of pole replacement when a pole has been identified through inspection (or through the make-ready survey) as in need of immediate replacement due to deterioration. Even further, some of the Electric Utilities are actively considering programs to absorb certain make-ready costs in an effort to incentivize broadband deployment in unserved areas, but these decisions should not be force-placed by federal regulation. These decisions should be made by individual utilities in consultation with, or in consideration of, their state regulators.

- NCTA's petition also seeks, albeit in ambiguous terms, an expression of policy preference that favors the Accelerated Docket for access complaints in unserved areas. So long as the policy preference is truly limited to access complaints in unserved areas, the Electric Utilities would support this statement of policy by the Commission. The Electric Utilities take broadband deployment seriously, exercise their right to deny access sparingly, and recognize the need for rapid adjudication when denials of access occur in unserved areas.

- Finally, NCTA's request to end-run the Commission's express (and recent) exclusion of pole replacements from the self-help remedy would run afoul of the right to deny access under Section 224(f)(2) and, in any event, fails to present any new information upon which the Commission might revisit its recent decision.

- NCTA's petition for declaratory ruling is more of the same—another request to shift costs to electric utility ratepayers based on the illusory promise of delivering broadband.

- Instead of continuing to shift costs in a way that distorts competition and burdens electric ratepayers, the Commission should encourage innovative and mutually beneficial solutions. The first generation of communications infrastructure was ubiquitously deployed under innovative and mutually beneficial agreements (joint use agreements), free from Commission regulation, that virtually eliminated make-ready and significantly reduced construction costs. Instead of viewing agreements like this as arcane vestiges of the past, the Commission should see them as a model for the future.

- The Commission should deny and dismiss NCTA's petition for declaratory ruling.

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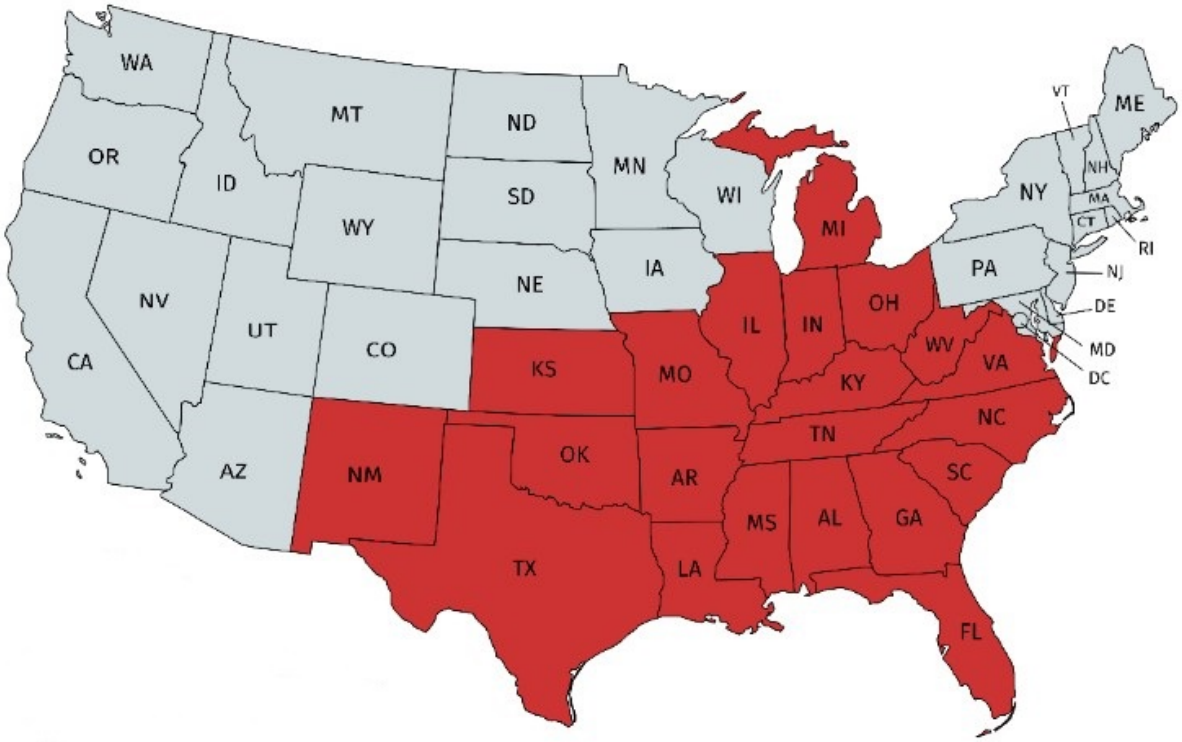
INITIAL COMMENTS OF THE ELECTRIC UTILITIES
IN OPPOSITION TO NCTA'S PETITION
FOR EXPEDITED DECLARATORY RULING

Ameren Service Company, American Electric Power Service Corporation, Duke Energy Corporation, El Paso Electric Company, The Empire District Electric Company, Entergy Corporation, Southern Company and Tampa Electric Company (collectively the "Electric Utilities") respectfully submit the following comments in opposition to NCTA's Petition for Expedited Declaratory Ruling in the above-referenced docket.[1] For the reasons set forth below, the Commission should deny NCTA's requested declaratory rulings.

INTRODUCTION

The Electric Utilities, either directly or through their operating company subsidiaries and affiliates, provide electric service to customers in 21 states across the Southeast, Midwest and Southwest. These service areas include densely populated major cities, as well as sparsely populated rural areas. The Electric Utilities collectively own and maintain more than 18 million distribution poles, many of which host third-party attachments and some of which have been changed-out solely to accommodate communications attachments.

[1] *Wireline Competition Bureau Seeks Comment on a Petition for Declaratory Ruling Filed by NCTA*, Public Notice, WC Docket No. 17-84, DA 20-763 (released July 20, 2020).



Fourteen of the states served by the Electric Utilities are among the 27 states in which pole attachments are currently regulated by the Commission. *See States that Have Certified that They Regulate Pole Attachments*, Public Notice, WC Docket No. 10-101, 35 FCC Rcd 2784, 2784-85 (Mar. 19, 2020).[2]

Ameren Service Company is a wholly owned subsidiary of Ameren Corporation ("Ameren"). Ameren Service Company provides administrative and technical services to Ameren and its subsidiaries, including its operating company subsidiaries—Ameren Illinois Company d/b/a Ameren Illinois and Union Electric Company d/b/a Ameren Missouri. Ameren Illinois and Ameren Missouri own electric distribution infrastructure, including a substantial number of utility

[2] The 14 states referenced do not include Illinois, a reverse preempted state with respect to which the FCC currently exercises jurisdiction over telecommunications attachments to electric utility poles. *See In the Matter of Crown Castle Fiber LLC, Complainant v. Commonwealth Edison Company, Defendant*, Order, Docket No. 19-169, Docket No. 19-170, 34 FCC Rcd 5959, 5960-61 at ¶ 5 (Jul. 15, 2019).

poles, in Illinois and Missouri. Ameren's operating companies provide electric power service to more than 2.3 million customers throughout a 64,000 square mile service territory in Missouri and Illinois.

American Electric Power Service Corporation ("AEP Service Corp.") is a wholly owned subsidiary of American Electric Power Company, Inc. ("AEP"). AEP Service Corp. supplies administrative and technical support services to AEP and its subsidiaries. AEP is one of the largest investor-owned electric utilities in the United States with more than 5 million customers linked to its electricity transmission and distribution grid covering 197,500 square miles. AEP, through its operating company subsidiaries, owns and operates electric distribution infrastructure in eleven states across the Midwest and Southeast: Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia, and West Virginia.

Duke Energy Corporation ("Duke Energy") is an electric power holding company. Through its operating company subsidiaries—Duke Energy Carolinas, LLC, Duke Energy Progress, LLC, Duke Energy Florida, LLC, Duke Energy Kentucky, Inc., Duke Energy Indiana, LLC and Duke Energy Ohio, Inc.—Duke Energy owns electric distribution infrastructure, including a substantial number of utility poles. Duke Energy provides electric service to 7.45 million customers across a 95,000 square mile footprint in Florida, Indiana, Kentucky, North Carolina, Ohio, and South Carolina.

El Paso Electric Company ("EPE") is an investor-owned electric utility providing electric generation, transmission and distribution services to approximately 424,000 retail and wholesale customers in a 10,000 square mile area of the Rio Grande valley in west Texas and southern New Mexico. EPE owns approximately 190,000 distribution poles within its service territory, which

extends from Hatch, New Mexico to Van Horn, Texas, and includes the El Paso, Texas metropolitan area.

Entergy Corporation ("Entergy") is an electric utility holding company. Through its operating company subsidiaries—Entergy Arkansas, Inc., Entergy Louisiana, LLC, Entergy Mississippi, Inc., Entergy New Orleans, Inc., and Entergy Texas, Inc.—Entergy owns electric distribution infrastructure, including a substantial number of utility poles. Entergy's operating companies provide electric service to 2.9 million customers over a 94,000 square mile service area in Arkansas, Louisiana, Mississippi and Texas.

The Empire District Electric Company ("Empire") is an investor-owned electric utility that provides electric service to approximately 172,000 customers in Missouri, Kansas, Oklahoma, and Arkansas. Empire owns 205,086 distribution poles and approximately 6,345 linear miles of primary distribution lines, and has a service territory of approximately 7,940 square miles.

Southern Company ("Southern") is one of the largest generators of electricity in the nation, serving both regulated and competitive markets across the southeastern United States. Southern, through three retail operating companies—Alabama Power Company, Georgia Power Company and Mississippi Power Company—supplies energy to more than 4.68 million customers with 172,000 miles of power lines and a service territory spanning most of Georgia and Alabama and southeastern Mississippi.

Tampa Electric Company ("Tampa Electric"), headquartered in Tampa, Florida, has supplied the Tampa Bay area with electricity since 1899. Tampa Electric's service area covers 2,000 square miles, including all of Hillsborough County and parts of Polk, Pasco and Pinellas Counties. Tampa Electric serves nearly 765,000 residential, commercial, and industrial customers. Tampa Electric owns approximately 300,000 electric distribution poles.

COMMENTS

I. THE COMMISSION SHOULD REJECT NCTA'S REQUEST TO SHIFT MAKE-READY POLE REPLACEMENT COSTS TO ELECTRIC UTILITIES AND THEIR RATEPAYERS.

a. Under Existing Law, where a New Attachment Requires a Pole Change-Out to Expand Capacity, the New Attacher is Responsible for the Cost.

Section 224 and longstanding Commission precedent make clear that pole owners are not responsible for the cost of expansions of capacity to accommodate communications attachments. Attaching entities have always been responsible for the "additional costs of providing pole attachments." *See* Pole Attachments Act, P. L. No. 95-234, § 224(d)(1), 92 Stat. 33, 36 (1978) (codified as 47 U.S.C. § 224(d)(1)). And the "additional costs of providing pole attachments" have always included pole replacements necessitated by the need for additional capacity. *See* S. Rep. No. 95-580 at 19 (1977) ("The term 'additional costs' means those costs which would not be incurred by the pole owner…'but for' the CATV attachment. Within this category would fall such items as preconstruction survey costs and engineering, make-ready, and change-out costs incurred in preparing the utility pole for the CATV attachment.").[3]

The Commission has historically relied upon "cost causation" principles in determining whether certain costs fall within the "additional costs of providing pole replacements."[4] As

[3] *See also In the Matter of Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Order and Request for Information, No. PA-99-005, 15 FCC Rcd 9563, 9572 at ¶ 19 (Jun. 7, 2000) (the "Cavalier Telephone Order") (holding that complainant, a communications attacher, "is responsible for the costs of the change-out."); *In the Matter of Alabama Cable Telecommunications Assoc., et al. v. Alabama Power Company; Application for Review*, Order, No. PA 00-003, 16 FCC Rcd 12209, 12240 at ¶ 69 (May 25, 2001) (the "Alabama Cable Telecommunications Association Order") (noting that "if a utility is required to replace a pole in order to provide space for an attacher, the attacher pays the full cost of the replacement pole").

[4] *See, e.g., In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Service Providers*, Order on Reconsideration, CC Docket No. 96-98, CC Docket No. 95-185, 14 FCC Rcd 18049, 18086-87 at ¶ 106 (Oct. 26, 1999) (the "1999 Order on

recently as 2011, the Commission expressly applied its "cost causation" principles within the context of make-ready pole replacements:

> Under cost causation principles, if a customer is causally responsible for the incurrence of a cost, then that customer—the cost causer—pays a rate that covers this cost. This is consistent with the Commission's existing approach in the make-ready context, where a pole owner recovers the entire associated capital costs through make-ready fees. For example, if rearrangement or bracketing is performed to accommodate a new attachment, the new attacher is responsible for those costs. **Likewise, a pole owner recovers the entire capital cost of a new pole through make-ready charges from the new attacher when a new pole is installed to enable the attachment**.

2011 Order at 5301, ¶ 143 (emphasis added).

i. Congress and the Commission Both Have Made Clear that Electric Utilities Should Not Share in the Cost of Make-Ready Pole Replacements Unless Electric Utilities Take Advantage of the Pole Replacement by Either Adding to or Modifying their Existing Electric Facilities.

While attaching entities have always been required to bear the "additional costs" of their attachments, the Pole Attachments Act was initially silent on the specific issue of allocating the costs of make-ready and pole replacements. S*ee* Pole Attachment Act, P. L. No. 95-234, § 224, 92 Stat. 33, 35-36 (1978). Therefore, the Commission did not issue any regulations governing cost allocation and, instead, largely deferred to the contractual arrangements between pole owners and

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Reconsideration") (refusing to require third party attachers to share in cost of governmentally mandated pole modification because "such expenses are not **caused** by the attaching party and would occur in any event") (emphasis added); *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, 5322 at ¶ 185 (Apr. 7, 2011) (the "2011 Order") (noting that "[p]ole owners have the opportunity to recover through make-ready fees all of the capital costs **caused** by third party attachers") (emphasis added); *In the Matter of 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, 7766 at ¶ 121 (Aug. 3, 2018) (the "2018 Order") (clarifying that new attachers cannot be held responsible for the costs of correcting preexisting violations because new attacher did not **cause** the preexisting violations).

attaching entities on this issue.[5] In fact, the Commission did not adopt rules regarding the allocation of make-ready and pole replacement costs until after the 1996 amendments to the Pole Attachments Act, when Congress first addressed how make-ready costs should be apportioned:

> Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. **Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible**.

Telecommunications Act of 1996, P. L. No. 104-104, § 224(h), 110 Stat. 56, 151 (1996) (codified as amended at 47 U.S.C. § 224(h)) (emphasis added); *see also* S. Rep. No. 104-230, at 207 (1996) (Conf. Rep.) ("New subsection 224(h) also requires any attaching entity that takes advantage of such opportunity [i.e., proposed make-ready or pole replacements] to modify its own attachments shall bear a proportionate share of the costs of such alterations."). Section 224(h) contains express guidance on how and when make-ready costs should be apportioned: **only parties that either "add to or modify" their existing attachments after receiving notice of proposed make-ready or pole replacements can be required to share in the costs of the make-ready or pole replacements.**

In implementing Section 224(h), the Commission followed the clear limitations imposed by Congress:

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[5] *See, e.g., In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Second Report and Order, Docket No. 78-144, 72 F.C.C.2d 59, 70-71 at ¶ 24 (May 23, 1979) ("1979 Order") (acknowledging that attaching entities are generally contractually obligated to bear the costs of pole replacements); *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Order, CC Docket 78-144, 77 F.C.C.2d 187, 191 at ¶ 11 n.7 (Mar. 10, 1980) ("1980 Order") (noting the administrative record establishes that attaching entities generally assume the costs of pole replacements).

> 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. **A party with preexisting attachments to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in subpart J of this part, it adds to or modifies its attachment**.

Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, CC Docket No. 96-98, CC Docket No. 95-185, 11 FCC Rcd 15499, App'x B at § 1.1416(b) (Aug. 8, 1996) (the "1996 Order") (originally codified at 47 C.F.R. § 1.1416(b) (1996)) (emphasis added). The Commission's cost allocation rule defines the phrase "directly benefits" as follows: "A party with preexisting attachments to the modified facility shall be deemed to directly benefit from a modification **if, after receiving notification of such modification…, it adds to or modifies its attachment**." 47 C.F.R. § 1.1408(b) (emphasis added).[6] The "directly benefits" language directly correlates with the clear limitations of Section 224(h).

In its order implementing Section 224(h), the Commission specifically attributed the "directly benefits" limitation in Rule 1.1408(b) to Section 224(h):

> We recognize that in some cases a facility modification will create excess capacity that eventually becomes a source of revenue for the facility owner, even though the owner did not share in the costs of the modification. We do not believe that this requires the owner to use those revenues to compensate the parties that did pay for the modification. **Section 224(h) limits responsibility for modification costs to any party that "adds to or modifies its existing attachment after receiving notice" of a proposed modification.** The statute does not give that party any interest in the pole or conduit other than access. Creating a right for that party to share in future revenues from the modification would be tantamount to bestowing an interest that the statute withholds. **Requiring an owner to offset modification costs by the amount of future revenues emanating from the modification expands the category of responsible parties based on factors that Congress did**

[6] 47 C.F.R. § 1.1416 was redesignated as 47 C.F.R. § 1.1408 effective September 4, 2018. *See* Formal Complaint Proceedings to the Enforcement Bureau, 83 Fed. Reg. 44,831, 44,841 (Sept. 4, 2018).

> **not identify as relevant. Since Congress did not provide for an offset, we will not impose it ourselves.**

1996 Order at 16098, ¶ 1216 (emphasis added); *see also id*. at 16077, ¶ 1166 ("[S]ection 224(h) imposes the cost of modifying attachments on those parties that benefit from the modification. If, for example, a cable operator seeks to make an attachment on a facility that has no available capacity, the operator would bear the full cost of modifying the facility to create new capacity, such as by replacing an existing pole with a taller pole."). In the same order, and for the same reasons, the Commission also rejected requests that pole owners be required to share in the costs of make-ready and pole replacements even if the pole owners derived incidental benefits from such work:

> We recognize that limiting cost burdens to entities that initiate a modification, or piggyback on another's modification, may confer incidental benefits on other parties with preexisting attachments on the newly modified facility. Nevertheless, if a modification would not have occurred absent the action of the initiating party, the cost should not be borne by those that did not take advantage of the opportunity by modifying their own facilities. **Indeed, the Conference Report accompanying the passage of the 1996 Act imposes cost sharing obligations on an entity "that takes advantage of such opportunity to modify its own attachments."** This suggests that an attaching party, incidentally benefitting from a modification, but not initiating or affirmatively participating in one, should not be responsible for the resulting cost.

1996 Order at 16097, ¶ 1213 (emphasis added). The foregoing makes clear that Rule 1.1408(b)'s "directly benefits" limitation is not the product of Commission discretion; it is the product of the Commission's narrowly defined legal authority under the 1996 amendments to the Pole Attachments Act.

ii. The Commission Has Consistently Relied Upon the Fact that Attaching Entities Bear the Entire Cost of Make-Ready and Pole Replacements to Justify its Pole Attachment Rate Formulas.

NCTA's requested clarification would raise serious issues under the Fifth Amendment's "takings" clause because the Commission has consistently relied upon the fact that attaching

entities bear the entire cost of make-ready and pole replacements to justify its pole attachment rate formulas.[7] Federal appellate courts have also relied upon the ability of pole owners to recover all make-ready and pole replacement costs attributable to communications attachments in upholding the Commission's pole attachment rate formulas:

> While we might ordinarily be sympathetic to [the utility's "takings"] argument, [the utility's] case is complicated by one known fact, one unknown fact, and one legal principle….The known fact is that the Cable Rate requires the attaching cable company to pay for any "make-ready" cost and all other marginal costs (such as maintenance cost and the opportunity cost of capital devoted to make-ready and maintenance costs), in addition to some portion of the fully embedded cost.

Ala. Power Co. v. FCC, 311 F.3d 1357, 1368-69 (11th Cir. 2002). NCTA's requested "clarification," if granted, would prevent pole owners from recovering the full amount of pole replacement costs attributable to new communications attachments, thereby rekindling the issue of whether the Commission's pole attachment rate formulas actually afford pole owners "just compensation."

b. NCTA's Requested Declaratory Ruling Would Require a Significant *Change* in Law, not a Mere a "Clarification."

NCTA argues that "[t]he declaration sought by the Petition is fully consistent with the language and purposes of the Communications Act and the Commission's rules and orders."

[7] *See, e.g.,* 1979 Order at 70-71, ¶ 24 (justifying its decision to not allocate any portion of the safety space to CATV operators because CATV operators "would normally be solely responsible for all pole replacement costs to insure the maintenance of the full 40-inch safety space"); 1980 Order at 191, ¶ 11 (rejecting argument that its "treatment of the safety space results in too low a rate or a subsidization of cable television service by utility consumers" because "all expenses directly related to the preparation of the poles for cable attachments are reimbursable independently of the rate formula"); Alabama Cable Telecommunications Association Order at 12231, ¶ 48 ("The Commission's pole attachment formula ensures that a utility receives full compensation for any loss incurred as a result of an attachment. The attacher directly compensates the utility through make-ready and change-out charges for the cost of any modifications to utility poles necessitated by the attachments, including pole rearrangements, inspections, pole replacements, and other direct incremental costs of making space available to the cable operator.").

(Petition, 13). However, as set forth above, both Congress (through adoption of § 224(h)) and the Commission (through adoption of Rule 1.1408) have spoken directly to this issue and made clear that utilities are not responsible for pole replacement costs necessitated by expansions of capacity. Despite this directly applicable governing law, NCTA attempts to leverage various inapplicable statutory provisions and rules in support of its proposal. None of those provisions can trump the plain language of § 224(h) and Rule 1.1408. And in any event, the statues and regulations cited by NCTA do not, in fact, support its proposal that electric utilities pay for make-ready pole replacements to accommodate a proposed attachment.

i. Section 224(b)(1) and the Commission's Related Cost Causation Principles Require that an Attaching Entity Pay for Pole Replacements Necessary to Accommodate Their Attachments.

NCTA argues that § 224(b)(1)'s general grant of jurisdiction ("the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable") requires that the Commission grant NCTA's requested declaration. (Petition, 13). NCTA further argues that the Commission's cost causation principles limit make-ready charges to those for which "an attacher 'is causally responsible.'" *Id.* (citing 2011 Order at 5301 & 5322, ¶¶ 143 & 185 n.572). Though it is certainly true that the Commission's cost-causation principles require an attaching entity to pay make-ready costs for which it is causally responsible, where a pole must be changed out to expand capacity to accommodate a proposed attachment, the new attachment is the cause of the cost of the new pole. As the Commission recently observed:

> The additional, or incremental, costs that form the basis for the statutory minimum are the **costs that would not be incurred by the utility "but for" the pole attachments**. These costs include preconstruction survey, engineering, make-ready, and **change-out costs** incurred in preparing the pole for attachments.

2011 Order at 5296, ¶ 128 (emphasis added). NCTA fails to recognize that, in order to perform the Commission's cost causation analysis, it is essential to identify the reason for the pole replacement.

There are three primary reasons why a pole would need to be replaced prior to construction of a proposed attachment or overlash: (1) the pole is unable to accommodate the attachment because it has deteriorated due to age or conditions; (2) the pole is unable to accommodate the attachment because of a pre-existing violation caused by a third-party attachment; or (3) the pole is unable to accommodate the proposed attachment due to insufficient capacity (in terms of vertical space, loading capacity, or both). In scenario (1) above, where an electric utility determines that the pole is due for immediate replacement due to deterioration or damage, the Electric Utilities agree that the pole owner should bear the cost of replacement. This is true whether the electric utility identifies the deteriorated condition of the pole: (a) at the time of the survey for the proposed attachment; or (b) shortly prior to the filing of the application for the proposed attachment.[8] Of course, to the extent the replacement pole must be taller or stronger than the existing pole due to the proposed attachment, the applicant should pay for the incremental increase in the cost of the new pole. In scenario (2) above involving pre-existing violations, the party that caused the violation should pay for a pole replacement (assuming pole replacement is the only means of remediating the violation and assuming the actual "cost causer" can be identified). The Electric

[8] Each of the Electric Utilities has a unique program for identifying poles within its system that need to be replaced. While some pole owners refer to poles that are to be replaced within a relatively short period of time as "red tagged" poles, many utilities do not use this nomenclature, and thus the Electric Utilities do not use that term here. Instead, in order to bring uniformity and clarity to the issue for purposes of this proceeding, the Electric Utilities are willing to stipulate that where a pole has been identified by the utility as requiring replacement within a six month period, and where an attacher subsequently applies to attach to that pole, the pole owner should pay for the replacement pole.

Utilities agree that a new attaching entity should not be required to bear the cost of the replacement pole under those circumstances. But in scenario (3), where the pole is in safe and serviceable condition, and must be replaced *solely* to expand capacity to accommodate the new attachment, the new attachment is the proximate cause of the change-out, and the party responsible for the new attachment should bear the replacement cost.

ii. Section 224(f)(1)'s Non-Discriminatory Access Requirement Prohibits NCTA's Proposal Regarding Pole Replacement Costs.

NCTA also argues that its requested ruling would implement § 224(f)(1)'s nondiscriminatory access obligation because "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." (Petition, 15). Since the advent of cable television and through the present, whenever a pole change-out was needed to expand capacity, it has been the new attacher that paid for the pole replacement—not the pole owner.[9] Thus, all existing attachers—those in urban areas, those in rural areas, those in areas currently served by broadband and those in areas unserved by broadband—have been required to pay for pole replacements where their proposed attachments necessitated an expansion of capacity. Changing the rules now and shifting the cost of make-ready pole replacements to pole owners, as proposed by NCTA, would

[9] *See, e.g.*, 1979 Order at 70-71, ¶ 24 (acknowledging that attaching entities are generally contractually obligated to bear the costs of pole replacements); *In the Matter of Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Company*, Consolidated Order, No. PA 99-001, No. PA 99-002, 14 FCC Rcd 11599, 11607 at ¶¶ 20-21 (Jul. 15, 1999) (enforcing a contractual provision that required attacher to bear the actual cost of pole replacements necessitated by its new attachments); Cavalier Telephone Order at 9568-69 & 9572, ¶¶ 12 & 19 (finding contractual provision that requires attacher to bear the actual cost of pole replacements necessitated by its attachments to be reasonable and holding attacher "responsible for the costs of the change-out").

actually discriminate against existing attachers that have already paid the actual cost of make-ready necessary to accommodate their attachments.[10]

NCTA's proposal would also discriminate against existing attachers by requiring those attachers to pay for a portion of all buildouts to unserved areas through potential increases in the pole attachment rental rate. If electric utilities are bearing the vast majority of make-ready pole replacement costs, then those costs will be booked to the appropriate capital and O&M accounts (principally FERC Accounts 364 and 593), which will, in turn, lead to an increase in pole attachment rates paid by all attaching entities subject to the Commission's formulas. For example, if an electric utility absorbs $1,000,000 of unreimbursed make-ready pole replacement those costs would go into rate base (primarily Accounts 364 and 593). This would have the effect of increasing the pole attachment rates paid by existing telecom carriers and cable television providers (many of whom will receive no "benefit" from the pole replacement and some of whom may already have paid for a make-ready pole replacement).[11]

iii. NCTA's Proposal to Require Electric Utilities to Pay for Make-Ready Pole Change-Outs is not a "Natural Extension" of the Pre-Existing Violations Rule.

NCTA argues that its proposal is a "natural extension" of the Commission's recently-adopted pre-existing violations rule. (Petition, 18). NCTA has it exactly backwards, though, because the pre-existing violations rule is rooted in cost-causation principles—*i.e.* a new attacher should not have to pay to correct code violations it did not cause. *See* 2018 Order at 7766, ¶ 121

[10] This would be akin to the discriminatory effect of favoring an incumbent local exchange carriers ("ILEC"), which paid $0 in make-ready costs to access an electric utility's pole network, with the same recurring rate paid by CATVs and CLECs, which have paid significant amounts for make-ready throughout the years.

[11] In addition to being discriminatory, this also raises concerns under Rule 1.1408(b), because existing attachers would be held responsible for a portion of the cost of pole replacements from which they do not "directly benefit."

(finding that the "new attachment may precipitate correction of the preexisting violation, but it is the violation itself that *causes the costs*, not the new attacher") (emphasis added). So, to the extent the pre-existing violations rule is relevant at all to the allocation of make-ready pole replacement costs, it speaks life into (rather than undermines) the Commission's long-standing cost-causation principles.

c. NCTA's Proposal Would Not Advance the Deployment of Rural Broadband.

NCTA attempts to justify its proposal by arguing that it would "best advance the federal priority of 'removing unnecessary impediments to broadband.'" (Petition, 16 (citing *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, WC Docket No. 17-84, 32 FCC Rcd 11128, 11129 at ¶ 3 (Nov. 29, 2017)). To the contrary, NCTA's proposal would (1) be ineffective in spurring broadband deployment because pole replacements are less frequent in rural areas, and because the service territories of investor owned electric utilities are less likely than those of electric cooperatives to overlap with areas unserved by broadband; and (2) actually impede broadband deployment by creating disincentives for pole owners to perform make-ready pole change-outs.

1. Make-Ready Pole Replacements Are Far Less Frequent in Rural and Unserved Areas.

NCTA alleges (without citation or data) that "the heightened frequency with which [pole replacements] are required in sparsely populated areas" serves as an impediment to broadband deployment. (Petition, 16). In the experience of the Electric Utilities, though, poles in rural areas are *less* likely to require replacement than poles in urban areas.

First, in rural areas, and particularly in unserved areas, change-outs to expand capacity are less likely than in urban areas because there are generally fewer attaching entities on rural poles than urban poles. This notion is, in fact, embedded within the Commission's telecom rate formula presumptions. *See* 47 C.F.R. § 1.1409(c) (presuming three attaching entities within non-urbanized areas versus five attaching entities within urbanized areas). And in many of the Electric Utilities' service territories, the actual average number of attaching entities is actually *less* than the Commission's presumptions for non-urbanized areas. For example:

Company	Average Number of Attaching Entities
AEP Tennessee	2.73 (urban)
AEP Virginia	2.51 (urban)
AEP Indiana	2.48 (urban)
AEP Oklahoma	2.45 (urban)
AEP SWEPCO Texas	2.62 (urban)
AEP Texas	2.48 (urban)
Georgia Power Company	2.77 (entire service territory)
Mississippi Power Company	2.62 (entire service territory)
Tampa Electric Company	2.44 (entire service territory)

And in any event, make-ready pole replacements are not as frequent as NCTA seems to suggest even when including an electric utility's entire service area, as illustrated by the following chart:

	Make-Ready Pole Change-Outs in 2019 for Attachers with Mandatory Access	Total Number of Poles for which Applications Were Filed in 2019	Percentage of 2019 Applications that Required Pole Change-Outs	Total Number of Distribution Poles Owned by Operating Company (YE 2019)	Percentage of Total Distribution Poles Changed-Out for Make-Ready in 2019
AEP Indiana	29	3,710	0.78%	355,952	0.008%
AEP Oklahoma	151	4,631	3.26%	420,230	0.040%

AEP Tennessee	34	377	9.01%	31,167	0.109%
AEP Texas	369	37,864	0.97%	1,105,787	0.033%
AEP SWEPCo-Tx	2	849	0.24%	223,614	0.001%
AEP Virginia	139	7,440	1.87%	531,833	0.026%
Alabama Power Company	129	7,456	1.73%	1,447,416	0.009%
Ameren Missouri	190	4,465	4.26%	898,487	0.02%
Georgia Power Company	389	18,769*	2.07%	1,391,766	0.028%
Tampa Electric Company	163	4,243**	3.84%	307,266	0.053%
TOTAL:	1,595	89,804	1.78%	6,713,518	0.024%

*This figure represents attachments permitted in 2019, rather than poles applied for in 2019.
**This figure represents attachments applied for in 2018-2019.

Second, the quality of poles in rural areas is equal to those in urban areas. Electric utilities are required to meet stringent standard of service requirements, and those requirements do not differ based on where the service area is located—*i.e.*, urban versus rural service areas. Electric utilities have regular maintenance programs that evaluate the condition of poles and replace them as needed regardless of their location within the utility's service territory. For example, each of AEP's operating companies have numerous inspection programs where the condition of the pole is inspected. If any of these inspection programs find a defective or poor-conditioned pole, that pole will be included in the pole replacement program for replacement. There is no difference between the inspection process for urban poles versus rural poles in AEP's system. Similarly, in order to mitigate the significant risk associated with distribution poles that are in poor condition, Duke Energy has systematic pole inspection programs in all of its jurisdictions. Some jurisdictions

have inspection cycles mandated by state commissions. Both urban and rural areas are inspected on the same cycles.[12]

2. Areas Unserved by Broadband Often Do Not Overlap with Investor Owned Electric Utility Service Territories.

To a large extent, NCTA's proposal is barking up the wrong tree. Though the service areas of some of the Electric Utilities include some rural and unserved areas, rural and unserved areas are far more likely to overlap with the service territories of electric cooperatives (over which the Commission lacks jurisdiction under the Pole Attachments Act). For example, the maps below illustrate that most of the areas unserved by broadband in Georgia (shown in light yellow on the

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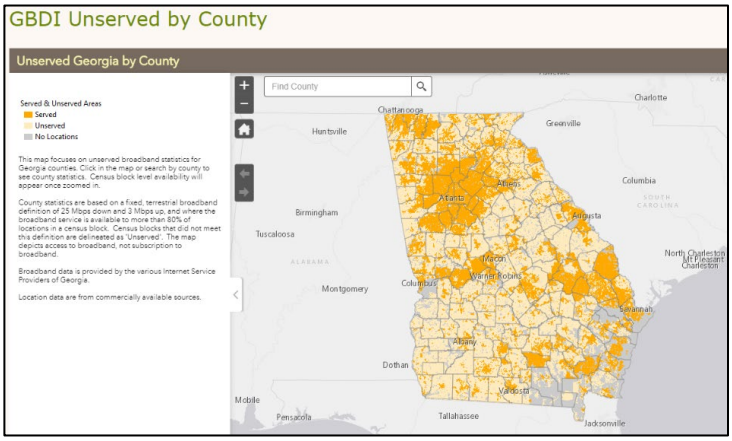
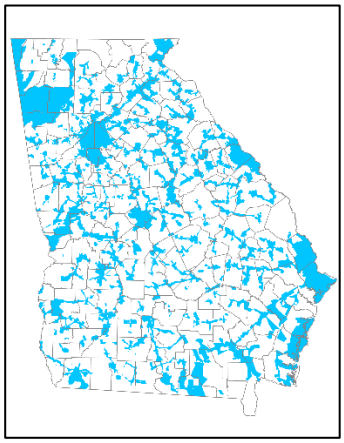
[12] Further, regardless of the location of the pole within its service territory, all of the Electric Utilities comply with NESC Rule 214 regarding maintenance of poles, which provide as follows:

> 214. Inspection and tests of lines and equipment
> A. When in service
> 1. Initial compliance with rules
> Lines and equipment shall comply with these safety rules when placed in service.
> 2. Inspection
> Lines and equipment shall be inspected at such intervals as experience has shown to be necessary.
> NOTE: It is recognized that inspections may be performed in a separate operation or while performing other duties, as desired.
> 3. Tests
> When considered necessary, lines and equipment shall be subjected to practical tests to determine required maintenance.
> 4. Inspection records
> Any conditions or defects affecting compliance with this Code revealed by inspection or tests, if not promptly corrected, shall be recorded; such records shall be maintained until the conditions or defects are corrected.
> 5. Corrections
> a. Lines and equipment with recorded conditions or defects that would reasonably be expected to endanger human life or property shall be promptly corrected, disconnected, or isolated….

National Electrical Safety Code (NESC), IEEE Standards Association, Rule 214A (2017).

map on the left) do not overlap with Georgia Power Company's service territory (shown in blue on the map on the right).[13]





The disconnect between the service territories of investor owned electric utilities and areas unserved by broadband is also one reason why the Electric Utilities believe NCTA's proposal is meant to be a first step down a slippery slope towards NCTA's ultimate goal of obtaining the same relief in dense urban areas, where pole change-outs are more expensive and returns on investment are higher for broadband providers.

3. Electric Utilities Currently Rarely Decline to Perform Pole Replacements pursuant to § 224(f)(2); however, NCTA's Petition, if Granted, Would Disincentivize Make-Ready Pole Replacements.

Despite electric utilities' § 224(f)(2) right to decline to perform make-ready pole replacements, electric utilities are generally supportive of capacity expansion because electric utilities, at present, are reimbursed for their actual cost to replace the pole. However, NCTA's proposed rule, if granted, would put electric utilities in the undesirable position of either absorbing

[13] Georgia Power Company is the only investor-owned electric utility in Georgia.

the vast majority of make-ready pole replacement costs or denying access altogether. In this way, NCTA's proposal would stymie, rather than promote, broadband deployment.

d. NCTA's Proposal Would Shift More Than 90% of Make-Ready Pole Replacement Costs to Electric Utilities and Their Customers.

NCTA proposes that an attaching entity, at whose request a pole is changed-out to accommodate a new attachment, should be responsible only for the "average depreciated bare pole investment derived using the Commission's pole attachment rate formula." (Petition, 11). The chart below identifies the average depreciated bare pole investment for each of the Electric Utilities (or their operating companies in non-reverse preempted states) based on year ending 12/31/19 data, as well as the average cost of make-ready pole replacements in 2019:

	Average Net Bare Pole Investment (YE 2019 Data)	Average Make-Ready Pole Replacement Cost (2019 Replacements)	Amount NCTA's Proposal Would Shift to Electric Utilities	Percentage of Costs NCTA Proposes to Shift to Electric Utilities
Alabama Power	$565	$5,859	$5,294	90.36%
Georgia Power	$386	$9,472	$9,086	95.92%
Mississippi Power	$400	$5,788*	$5,388	93.09%
Duke Energy Florida	$265	$7,500*	$7,235	96.47%
Duke Energy Carolinas	$376	$7,500*	$7,124	94.99%
Duke Energy Indiana	$451	$7,500*	$7,049	93.99%
Duke Energy Progress	$396	$7,500*	$7,104	94.72%
Tampa Electric	$360	$2,650	$2,290	86.42%
Entergy Mississippi	$426**	$3,000*	$2,574	85.80%
Entergy Texas	$253**	$3,000*	$2,747	91.57%

AEP-Texas	$361	$3,500*	$3,139	89.69%
AEP-Virginia	$350	$3,500*	$3,150	90%
AEP-Indiana	$304	$3,500*	$3,196	91.31%
AEP-Oklahoma	$492	$3,500*	$3,008	85.94%
AEP-Tennessee	$402	$3,500*	$3,098	88.51%
AEP-SWEPCo-TX	$340	$3,500*	$3,160	90.29%
Ameren Missouri	$485	$17,483[14]	$16,998	97.20%
El Paso Electric	$442	$4,292	$3,850	89.70%
Empire District Electric	$397	$11,943	$11,546	96.68%
AVERAGE	**$392**	**$6,026**	**$5,634**	**93.49%**

* Indicates estimated average.

** Indicates that figure is based on YE 2018 data because calculations based on YE 2019 data are not available at this time.

Though a couple of poles per year might not be a meaningful financial burden for any of the Electric Utilities, the cost shift becomes impactful when multiplied by the potential for change-outs in large scale deployments. By way of example, during the course of a major fiber build-out in the Atlanta area within the past few years, Georgia Power replaced 300 electric distribution poles. If the cost of pole change-outs is no longer an economic consideration for broadband companies in their route planning, then it stands to reason that the number of change-outs will increase significantly. A hypothetical deployment involving 3,000 poles (10% of which require change-outs) over a 12-month period would result in approximately $1.69 million in unbudgeted expense for an electric utility's distribution operations based on the averages set forth above. Broadband companies, unlike electric utility pole owners, know when and where they intend to

[14] Ameren Missouri's average cost of pole replacements in 2019 helps to illustrate the fundamental unfairness of NCTA's proposal. The relatively high average pole replacement cost of $17,483 for 2019 was attributable to the need for pole change-outs to expand capacity on a large volume of sub-transmission poles in association with various projects in the St. Louis metropolitan area.

deploy well in advance of the deployment and can budget accordingly. Electric utilities are often first informed of a deployment plan when they receive an application subject to a ticking regulatory clock. Making matters worse, this unbudgeted expense would be on top of the reduced revenue to electric utility distribution operations resulting from the downward pressure on cost recovery applied by the Commission since 2011.

In addition to the actual costs, NCTA's proposal would shift opportunity costs to the electric utilities and their ratepayers. Even NCTA concedes that any "benefit" to electric utilities arising from a make-ready pole replacement is the benefit of avoiding the future replacement cost of that pole. (Petition, 22). As set forth above, this presumes a pole replacement will be necessary at all. The decision whether and when to replace a pole is not based simply on the age of a pole—it is based on cyclical inspections that evaluate the remaining strength of a pole. Depending on the condition of the pole, as revealed through the inspection process, a pole can last much longer than the average useful life. The financial utility of a pole to the electric utility and its ratepayers can far exceed its depreciable life or its average useful life. There are many poles across the Electric Utilities distribution networks that are well beyond average service life but have many years of useful life remaining.

But even assuming, hypothetically, it was possible to determine in advance the actual age at which a particular pole would need to be replaced, allocating any of the cost of the accelerated replacement to the electric utility would deprive the electric utility of its ability to use that capital over the actual remaining useful life of the replaced pole. For example, based on the average set forth in the chart above, and assuming a weighted average cost of capital of 7% and 20 years of "known" remaining life in a pole, the actual opportunity cost to the electric utility and/or its ratepayers would be $7,888 over the course of the accelerated replacement period.

Even if the Commission determines that it can and should shift a portion of make-ready pole replacement costs to electric utilities and their ratepayers, the Commission should not attempt to determine the presumptive portion of costs to be shifted through an expedited declaratory ruling. If the Commission is inclined to do this at all, it should only be through a thoughtful, deliberative, careful rulemaking proceeding. As it currently stands, none of the presumptions within the Commission's pole attachment rules were adopted via declaratory ruling. All of them were adopted through rulemaking proceedings and on full evidentiary records. This is no coincidence, either: "unlike a legislative body, which is free to adopt presumptions for policy reasons…an agency may only establish a presumption if there is a sound and rational connection between the proved and inferred facts." *Chem. Mfrs. Ass'n v. DOT*, 105 F.3d 702, 705 (D.C. Cir. 1997) (citing *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 787 (1979)).

Some of the issues the Commission would need to carefully consider in a rulemaking proceeding regarding any economic presumption include:

- Whether the difference between average net bare pole cost and actual replacement cost is a legitimate economic measure of any alleged benefit to the electric utility;
- The precise circumstances under which the presumption would apply, and the manner in which the utility could rebut presumptions;[15] and

[15] NCTA frames each of its three requests for declaratory rulings as being confined to pole replacements "in unserved areas." However, in order to have an informed conversation regarding NCTA's request, NCTA needs to provide greater clarity regarding what it means when it refers to an "unserved area." Does it mean an area completely unserved by broadband, including satellite broadband? If so, the areas in question are few and far between. For example, in Alabama Power Company's service territory, the FCC's current broadband map does not show any census block as being unserved by broadband. However, if satellite broadband is removed from the criteria of the services that constitute broadband, then large swaths of the state of Alabama show as unserved. Further, the Electric Utilities assume that when NCTA refers to "unserved areas" it means areas without fixed wireline or wireless broadband, as mobile broadband is now ubiquitous. Further, when NCTA refers to an "unserved area" does it mean a county or a census block that is 0% served, or does it have in mind some other percentage of population unserved by broadband? In order to understand the scope of NCTA's request, and to understand the impact that request would have on

- Whether, if electric utilities are required to share in the cost of make-ready pole replacements on the premise that they "benefit" from an unsolicited accelerated replacement, broadband companies should be required to make an up-front capital contribution toward those poles that do **not** require replacement given the "benefit" they receive from the unsolicited prior investment (and if so, in what amount).

e. Pole Owners Do Not "Directly Benefit" from Make-Ready Pole Replacements.

To provide a legal foundation for its requested clarification, NCTA relies primarily on a reference to "non-betterment" costs in the 1978 Pole Attachments Act's legislative history, (*see* Petition, 10), and the requirement in Rule 1.1408(b) for all parties that "directly benefit" from pole replacements to share in the costs thereof. (*See* Petition, 20). As set forth above, these legal arguments contradict the black letter of Section 224(h) and Rule 1.1408(b), as well as longstanding Commission precedent. *See* Section I(a), *supra.* In addition to its legal deficiencies, the overarching premise of NCTA's Petition—that pole owners are the "chief beneficiaries" of make-ready pole replacements—is also factually incorrect.

i. The Legislative History of the Pole Attachment Act Cited by NCTA in Support of its Argument that Pole Owners Should Bear the "Betterment" Costs of Pole Replacements Was Expressly Superseded by the 1996 Amendments to the Act.

NCTA cites the following legislative history as supporting its proposal that make-ready pole replacement costs necessitated by lack of capacity can be allocated to the pole owner:

> The term "additional costs" means those costs which would not be incurred by the pole owner or controller "but for" the CATV attachment. Within this category would fall such items as preconstruction survey costs and engineering, make-ready, and change-out costs incurred in preparing the utility pole for the CATV attachment….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" replacement costs, sometimes referred**

electric ratepayers, it is critical that the electric utilities understand what NCTA means when it refers to "unserved areas."

> **to as the "nonbetterment costs."** All of these costs arise solely by virtue of the CATV occupation of space within the communications space on the pole.

S. Rep. No. 95-580 at 19 (1977) (emphasis added). In relying on this passing reference to "non-betterment" costs in the legislative history for the 1978 Pole Attachments Act, NCTA ignores Congress' subsequent and explicit treatment of cost allocation in the 1996 amendments to the Pole Attachments Act, which specifically address the issue of allocating make-ready and pole replacement costs:

> Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. **Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible**.

Telecommunications Act of 1996, P. L. No. 104-104, § 224(h), 110 Stat. 56, 151 (1996) (codified as amended at 47 U.S.C. § 224(h)) (emphasis added). As discussed above, Section 224(h) narrowly defines which parties are required to share in make-ready and pole replacement costs: only those parties that either "add to or modify" their existing attachments after receiving notice of a proposed pole replacement. *See also* S. Rep. No. 104-230, at 207 (1996) (Conf. Rep.) ("New subsection 224(h) also requires any attaching entity that takes advantage of such opportunity [i.e., proposed make-ready or pole replacements] to modify its own attachments shall bear a proportionate share of the costs of such alterations.").

To the extent the "non-betterment" language in the legislative history of the 1978 Act ever authorized the Commission to allocate the cost of make-ready pole replacements to pole owners, that legal authority expired with the 1996 amendments and Section 224(h). The Commission made this point crystal clear in its order implementing Section 224(h), which rejected a request for pole

owners to share in the cost of make-ready pole replacements to the extent the additional capacity afforded pole owners an opportunity to earn additional revenue:

> Requiring an owner to offset modification costs by the amount of future revenues emanating from the modification **expands the category of responsible parties based on factors that Congress did not identify as relevant**. Since Congress did not provide for an offset, we will not impose it ourselves. Indeed, a requirement that utilities pass additional attachment fees back to parties with preexisting attachments may be a disincentive to add new competitors to modified facilities, in direct contravention of the general intent of Congress.

1996 Order at 16098, ¶ 1216 (emphasis added).

ii. NCTA's Claim that Pole Owners Are the "Chief Beneficiaries" of Make-Ready Pole Replacements Is Factually Incorrect.

Perhaps recognizing the constraints imposed by Section 224(h), NCTA claims that make-ready pole replacements "directly benefit" pole owners by, among other things: (1) increasing their underlying rate base and, as a consequence, their overall return; (2) allowing them to "externalize the cost of upgrading their aging infrastructure"; and (3) creating excess capacity on the pole, which they can use to either earn additional pole attachment revenue or deploy their own communications facilities. (*See* Petition, 14, 14 n.28 & 22). These arguments ignore the regulatory framework within which electric utilities are required to operate.

Electric utilities are only entitled to earn a rate of return on *prudently invested* capital. The determination of whether capital has been prudently invested is a matter of state regulatory concern. Second, the fact that an electric utility might be required to replace a pole anyway in 15 to 20 years is of no financial solace to the electric utility or its current ratepayers. The timing of infrastructure investment is a critical component in regulatory ratemaking. For example, if an electric utility reasonably projects a need for additional generation capacity in year 2040, but it will only take five years to obtain permits and construct the new generation facilities, it does not make financial sense for the electric utility or its ratepayers to begin the project now. The proper

time for the electric utility to incur the costs is closer in time to the actual need. There are numerous reasons for timing the investment to match the need, including but not limited to:

- pairing the increase in revenue requirement with the group of ratepayers who will benefit from the investment (so today's ratepayers are not unnecessarily bearing the cost of infrastructure needed tomorrow); and

- the fact that changed circumstances might obviate the need for the investment at all (the ability to determine a future need becomes more precise as the point in the future draws nigh); for example, a pole replacement "accelerated" by 20 years is worthless when, five years from now, the replaced pole is removed entirely as part of a targeted undergrounding project.

In addition, NCTA claims that electric utilities benefit from the excess capacity created by make-ready pole replacements via the prospect of additional streams of pole attachment rental. However, creating excess capacity on utility poles does not necessarily mean that new attachers will flock to attach to them. This seems, as a matter of logic, especially true in unserved areas—the focus of NCTA's Petition—which generally have low population densities or other characteristics that have failed to attract private (or even government subsidized) capital thus far. In any event, even if there was logical merit to NCTA's assertion (and there is not), the Commission has previously dispensed with this idea:

> Requiring an owner to offset modification costs by the amount of future revenues emanating from the modification **expands the category of responsible parties based on factors that Congress did not identify as relevant**. Since Congress did not provide for an offset, we will not impose it ourselves.

1996 Order at 16098, ¶ 1216 (emphasis added).[16]

[16] NCTA also claims that "[w]here the utility itself shares in the cost of a pole replacement that it directs…it will be incentivized to perform the replacement in a more cost-effective and efficient manner." (Petition, 19). This claim is based on a massive misunderstanding, which electric utilities have previously debunked. *See* Initial Comments in Response to the Commission's Notice of Proposed Rulemaking on Pole Attachments at 42, filed by Ameren Corporation *et al*., WC Docket No. 17-84 (Jun. 15, 2017). Make-ready work orders are generated by the same systems that generate work orders (and costs) for any other customer and for the electric utility itself. The cost is the same whether the pole replacement is at the request of a developer, as part of CATV

f. The Vast Majority of States that Regulate Pole Attachments Require the New Attacher to Pay for Pole Replacements Necessitated by An Expansion of Capacity to Accommodate the New Attachment.

NCTA claims that its proposed cost allocation method—*i.e.*, requiring pole owners to bear the lion's share of make-ready pole replacement costs—is not "unique." (Petition, 26). However, NCTA cites solely to one rule adopted by the state of Maine in support of its proposal. (Petition, 26 (citing 65-407-880 Me. Code R. § 5(C))). Maine's approach is not only distinguishable from Section 224(h) and the Commission's cost allocation rule—it is at odds with the approach taken by the vast majority of other state public service commissions that have addressed this issue. For example:

Arkansas. The Arkansas Public Service Commission explicitly allows pole owners to recover the entire cost of pole replacements necessitated by an attaching entity's need for additional capacity:

> Pole Owners shall charge Attaching Entities separately for the following:
>
> Solely Assigned; Excess Height. When an Attaching Entity, including the Pole Owner, except as provided for under Rule 2.02(d), requires additional space which is not available on that pole, and the pole must be replaced by a taller pole, the entity causing the need for replacement shall pay for the replacement cost of such pole, including the cost of removing the old pole, less any salvage value plus the costs of transferring the facilities of all other attachers.

126-03 Ark. Code R. § 028, Rule 4.03(b)(1). In its order adopting the foregoing rule, the Arkansas Public Service Commission explained that its cost allocation rule "properly allocates the cost of replacing a pole, including the transfer of other attachers' facilities, **to the cost causer**." *In the Matter of a Rulemaking Proceeding to Consider Changes to the Arkansas Public Service*

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make-ready work, or as part of the electric utility's core business. There is not a "shadow" work order system that electric utilities use when preparing work orders for make-ready (pole replacements or otherwise).

Commission's Pole Attachment Rules, Order, Docket No. 15-019-R, Order No. 5, 2016 Ark. PUC LEXIS 202, at *220 (Jun. 24, 2016) (emphasis added).

Kentucky. Because Kentucky largely regulates pole attachments through tariffs, recently approved tariffs provide the best insight into the Kentucky PSC's current stance on pole replacement costs. For example, in 2018, the Kentucky PSC approved a pole attachment tariff submitted by Kentucky Power Company containing the following language:

> Where in Company's judgment a new pole must be erected to replace an existing pole solely to adequately provide for Operator's proposed attachments, Operator agrees to pay Company for the entire cost of the new pole necessary to accommodate the existing facilities on the pole and Operator's proposed attachments, plus the cost of removal of the in-place pole, minus the salvage value, if any, of the removed pole…

Kentucky Power Company Cable Television Pole Attachment Tariff, P.S.C. KY. No. 11, Original Sheet No. 16-2 (effective Jan. 19, 2018).[17] Even more recently, the Kentucky PSC approved a pole attachment tariff submitted by Duke Energy Kentucky, Inc. containing the following language:

> In any case where it is necessary for the Company to replace a pole because of the necessity of providing adequate space or strength to accommodate the attachments of attachee thereon, either at the request of attachee or to comply with the above codes and regulations, the attachee shall pay the Company the total cost of the new pole including material, labor, and applicable overheads, plus the cost of transferring existing electric facilities to the new pole, plus the cost of removal of the existing pole and any other incremental cost required to provide for the attachments of the attachee, including any applicable taxes the Company may be required to pay because of this change in plant, minus salvage value of any poles removed.

Duke Energy Kentucky Distribution Pole Attachments Tariff, KY.P.S.C. Electric No. 2, Third Revised Sheet No. 92 at pp. 2-3, ¶ 4 (effective May 1, 2020).[18] *See also In the Matter of: The*

[17] Available at: rb.gy/gldhyv.
[18] Available at: rb.gy/vick10.

CATV Pole Attachment Tariff of Mountain Rural Telephone Cooperative Corporation, Inc., Order, Case No. 251-14, 1983 Ky. PUC LEXIS 2727, at *3 (Mar. 31, 1983) (finding that pole owners "may charge a CATV operator the entire cost of transferring or rearranging facilities to accommodate a CATV pole attachment; including the cost of pole replacement, less salvage value").

Ohio. The Public Utilities Commission of Ohio ("PUCO") has adopted a rule nearly identical to Commission Rule 1.1408(b). *See* Ohio Admin. Code 4901:1-3-04(E). Like Commission Rule 1.1408(b), the PUCO rule only requires those parties that "directly benefit" from the pole replacement to share in the costs thereof. And like Commission Rule 1.1408(b), the PUCO defines "directly benefits" as meaning any party that either "adds to" or modifies" its existing attachments after receiving notice of the proposed pole replacement.

The pole attachment tariffs approved by the PUCO reveal that attaching entities are required to bear the full cost of make-ready pole replacements. For example, the PUCO recently approved a Duke Energy Ohio pole attachment tariff containing the following language:

> In any case where it is necessary for the Company to replace a pole or conduit because of the necessity of providing adequate space or strength to accommodate the wireline attachments or occupancies of Licensee thereon, either at the request of Licensee or to comply with the above codes and regulations, the Licensee shall pay the Company the total cost of this replacement. Such cost shall be the total estimated cost of the new pole/conduit, including material, labor, and applicable overheads, plus the cost of transferring existing electric facilities to the new pole or conduit, plus the cost of removal of the existing pole or conduit and any other incremental cost required to provide for the attachments or occupancy of the Licensee, including any applicable taxes the Company may be required to pay because of this change in plant, minus salvage value of any facilities removed.

Duke Energy Ohio Pole Attachment/Conduit Occupancy Tariff, P.U.C.O No. 1, Sheet No. 1.7 at p. 3, § 4 (effective Apr. 12, 2017).[19]

[19] Available at: rb.gy/runyxg.

Utah. The Utah Pole Attachment Agreement, or "Safe Harbor" agreement, allows pole owners to recover "the total cost of the pole replacement," as well as the costs incurred in disposing of the pole that has been replaced:

> Section 3.14 Pole Replacement for Licensee's Benefit
>
> Where an existing pole is prematurely replaced (for reasons other than normal or abnormal decay) by a new pole for the sole benefit of the Licensee, the Licensee shall reimburse the Pole Owner for all costs, including, but not limited to the cost in [sic] replacing the new pole, the remaining life value of the existing pole, lower and haul of the existing pole (to the extent that this is performed by the Pole Owner), and topping of the existing pole when performed either as an accommodation to Licensee or as required by NESC. Pole Owner shall credit the Licensee for salvage value of the existing pole if it is not topped and it is less than ten years old….If pole replacement under this Section 3.14 benefits both Licensee and other pole attachers, the costs shall be pro-rated among all benefiting attachers.

In the Matter of an Investigation into Pole Attachments; In the Matter of the Consolidated Applications of Rocky Mountain Power for Approval of Standard Reciprocal and Non-Reciprocal Pole Attachment Agreements, Report Recirculating "Safe Harbor" Pole Attachment Agreement, Docket No. 04-999-03, Docket No. 10-035-97, 2010 Utah PUC LEXIS 264, at *23-24 (Oct. 7, 2010).

Similarly, the small cell legislation recently adopted by numerous states also requires the attaching entity, and not the pole owner (ordinarily the municipality), to bear the costs of make-ready pole replacements. *See, e.g.*, **Arkansas:** Ark. Code Ann. § 23-17-509(f)(3) (allowing pole owner to recover the actual costs of make-ready pole replacements); **Florida:** Fla. Stat. Ann. § 337.401(7)(f)(5)(c)-(d) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); **Georgia:** Ga. Code Ann. § 36-66C-7(n) (requiring wireless provider to bear the costs of "any make-ready work necessary to enable the authority pole to support the proposed facility, including replacement of the pole if necessary"); **Hawaii:** Haw. Rev. Stat. Ann. § 206N-7(f) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); **Illinois:**

50 Ill. Comp. Stat. Ann. 840/15(i)(4)(D) (noting that make-ready pole replacements shall be completed at the wireless provider's "sole cost and expense"); **Indiana:** Ind. Code § 8-1-32.3-26(d)(4)(A)-(B) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); **Iowa:** Iowa Code § 8C.7A(3)(c)(3)(a)(iv)(B) (noting that wireless provider "shall pay or advance…the costs of modifying or replacing the utility pole…with a utility pole…that would safely support the small wireless facility"); **Michigan:** Mich. Comp. Laws Serv. § 460.1319(4)(d) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); **Missouri:** Mo. Rev. Stat. § 67.5115(5)(3) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); **Nebraska:** Neb. Rev. Stat. Ann. § 86-1238(5)(a)&(c) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); **North Carolina:** N.C. Gen. Stat. § 160D-937(f)-(g) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); **Ohio:** Ohio Rev. Code Ann. § 4939.0322(A) (noting that pole owner may "condition approval of the collocation on replacement or modification of the wireless support structure at the operator's cost"); **Oklahoma:** Okla. Stat. tit. 11, § 36-505(D) (allowing pole owner to recover the "actual costs" of make-ready pole replacements, including the cost of having a professional engineer "review the wireless provider's make-ready work plans"); **Virginia:** Va. Code Ann. § 56-484.31(E) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); **Wisconsin:** Wis. Stat. § 66.0414(4)(h) (allowing pole owner to recover the "actual costs" of make-ready pole replacements); **West Virginia:** W. Va. Code Ann. § 31H-2-3(a)(6) (allowing pole owner to recover the "actual costs" of make-ready pole replacements).

g. The Commission Should Promote Innovative and Mutually Beneficial Solutions Rather than Continuing to Shift Costs from Broadband Providers to Electric Utilities and Their Ratepayers.

After the Commission implemented the Section 224(e) telecom pole attachment rate following the 1996 amendments to the Pole Attachments Act, NCTA and its members strenuously argued against its application to anything other than traditional telephony, and the Commission largely obliged. When NCTA's members became more fully engaged in the provision of telecom services, NCTA argued for a reduction in the telecom rate,[20] and the Commission obliged. *See* 2011 Order at 5244, ¶ 8 (adopting new telecom rate formula that reduces "the disparity between [the old telecom rate] and cable rates"). When broadband internet access service was classified as a telecom service, thus subjecting virtually all cable television attachments to the telecom rate, NCTA argued for an even further reduction of the telecom rate, and the Commission obliged. *See In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 30 FCC Rcd 13731, 13738 at ¶ 16 (Nov. 24, 2015) (broadening the use of cost allocators in the telecom rate formula "to bring cable and telecom rates for pole attachments into parity at the cable-rate level").

If rates were the barrier 10 years ago, and at every turn NCTA has received what it sought in terms of rate relief, why are there still unserved areas 10 years later? Why hasn't there been more measurable deployment in areas of need? None of the Commission's rate reductions have done anything to promote broadband deployment, especially to rural and unserved areas. Nor have the rate reductions resulted in any reduced pricing for cable, telephone, or broadband customers.

[20] *See* Comments of the National Cable & Telecommunications Association at 21, WC Docket No. 07-245 (Mar. 7, 2008) ("The best way for the Commission to make progress on all of its goals…is to reduce the rate for attachments by telecommunications carriers.").

Those rate reductions have, instead, inured to the benefit of big telecom shareholders at the expense of electric ratepayers (many of whom are fixed income).

There is no evidence—and certainly no history—to suggest that NCTA's members would be any more inclined to serve areas of need even if their pole attachment costs were $0. But there *is* evidence to suggest that they would *not* be so inclined:

> In 2014, during pole attachment negotiations with a Tennessee cooperative, a vice-president of one of the world's largest telecommunications companies requested a lower pole attachment rate at the cooperative's board meeting. A board member asked about the company's plans to expand their services to more of the cooperative's membership, inquiring what pole attachment rate would support an extension of the company's rural service territory. The vice president answered that the company "would not extend its services further into the cooperative's rural areas even if the pole attachment rate were zero."

Brian O'Hara, *Rural Electric Cooperatives: Pole Attachment Policies and Issues, Broadband Deployment in Rural America Not Impeded by Pole Attachment Rates* at 12, National Rural Electric Cooperative Association (Jan. 6 2020) (emphasis in original), available at https://rb.gy/ovyzna. Moreover, at least one electric cooperative has offered pole attachments at $0 for any entity that would bring broadband to an unserved area, and there were no takers. *See id.* at 14-15 (explaining how previous offers of free or heavily discounted pole attachments did not encourage communications companies to serve rural areas).

Further, the Electric Utilities permit application data makes clear that CATVs and telecom providers are not even attempting to bring broadband to many unserved areas:

	Number of poles for which applications were filed by CATVs or CLECs in 2019	Number of poles for which applications were filed by CATVs or CLECs in unserved counties in 2019[21]	Percentage of poles for which CLECs or CATVs filed applications in unserved areas in 2019
Alabama Power	7,456	632	8.5%
Georgia Power	18,769	262	1.4%
Mississippi Power	109	3	2.8%
AEP-Texas	30,473	8,367	27.5%
AEP-Virginia	7,406	0	0%
AEP-Indiana	2,275	0	0%
AEP-Oklahoma	4,623	739	15.99%
AEP-Tennessee	149	0	0%
AEP-SWEPCo-TX	0	0	0%
Ameren Missouri	4,465	317	7.10%
El Paso Electric	5961	0	0%
Empire District Electric	938	0	0%

But even if NCTA's syllogism were true (that lower pole attachment costs = more broadband deployment), NCTA's proposal does nothing to actually lower the costs. NCTA's proposal would merely shift the costs to someone else. The Commission can do better than this. The Commission has long expressed a preference for "innovative and mutually beneficial

[21] For purposes of this chart, the Electric Utilities adopted a conservative definition of an "unserved" county, and considered a county to be "unserved" if the percentage of population served by fixed terrestrial broadband in that county was less than 50% according to the FCC's 2020 broadband report. *See Inquiry Concerning Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion*, 2020 Broadband Deployment Report, GN Docket No. 19-285, Release No. FCC 20-50, Appendix 1 (April 24, 2020).

solutions."[22] It is neither innovative nor mutually beneficial to simply wield the power of government to force one entity to pay the costs of another entity. If the prospect for return on investment were adequate, electric utilities would be able to justify building pole networks that included capacity beyond the capacity necessary for its own electric service needs. If electric utilities had the appropriate economic incentives to build new pole lines (or replace aging pole lines) with 5G and broadband ready infrastructure, there wouldn't be repeated discussions about make-ready timelines and make-ready costs because there wouldn't be a significant need for make-ready.

This isn't a pipe dream, either. This is **actually what happened** between electric utilities and telephone companies through joint use agreements. Joint use agreements—free from Commission regulation—virtually eliminated make-ready in the ubiquitous deployment of the first generation of communications infrastructure. Electric utilities could justify the costs within their rate bases because telephone companies provided something valuable in return (either poles the electric utility could use without make-ready or, alternatively, negotiated cost-sharing commitments). It is no small irony that, as make-ready challenges for the next generation of communications infrastructure mount, the Commission is taking steps to dismantle the very "innovative and mutually beneficial solutions" that brought ubiquitous (and low cost) deployment of the first generation of communications infrastructure. The Commission should reverse course

[22] 2011 Order at 5295, ¶ 124; *see also In the Matter of Amendment of Commissions Rules and Policies Governing Pole Attachments, In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, CS Docket No. 97-98, CS Docket No. 97-151, 16 FCC Rcd 12103, 12113 at ¶ 14 (May 25, 2001) ("We encourage, support and fully expect that mutually beneficial exchanges will take place between the utility and the attaching entity. When utilities and attaching entities are innovative and provide mutually beneficial negotiated alternatives to the maximum rates, competition and the deployment of services to all communities will be fostered…").

on its efforts to regulate broadband deployment into prosperity and instead voice support for the type of mutually beneficial solutions that can only be attained when all stakeholders are motivated by opportunity.

II. THE ELECTRIC UTILITIES SUPPORT "FAVORING THE PLACEMENT" OF TRUE ACCESS COMPLAINTS ARISING IN UNSERVED AREAS ON AN ACCELERATED DOCKET.

NCTA argues that the Commission should "announce priorities, to guide Commission staff's discretion under sections 1736(d) [sic] and 1736(f) [sic], favoring the placement of pole attachment complaints onto the Accelerated Docket with expedited procedural schedules when they arise in unserved areas." (Petition, 27). So long as this concept is limited to true access disputes in unserved areas, the Electric Utilities would support this statement of policy.

The Commission adopted new procedural rules governing pole attachments complaints in 2017 and 2018. *See* 47 C.F.R. § 1.1414(a); 47 C.F.R. § 1.740. Under those recently-adopted rules, all pole attachment complaints are governed by the period of review set forth in 47 C.F.R. § 1.740, which provides a 270-day shot-clock for resolution of a complaint, *except* "where a cable television system operator or provider of telecommunications service claims that it has been denied access to a pole…," in which case the Commission must take final action on the complaint within 180 days. *See* 47 C.F.R. § 1.1414(a), (b); *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, WC Docket No. 17-84, 32 FCC Rcd 11128, 11132 at ¶ 9 (Nov. 29, 2017) (the "2017 Order and FNPRM").

In its Order adopting Rule 1.1414(a) and the 180-day shot-clock for pole access complaints, the FCC stated:

> A "pole access complaint" is a complaint filed by a cable television system or a provider of telecommunications service that alleges **a complete denial of access** to a utility pole. See infra Appx. A, new 47 CFR § 1.1425. This term **does not**

> **encompass a complaint alleging** that a utility is imposing **unreasonable rates, terms, or conditions** that amount to a denial of pole access.

2017 Order and FNPRM at 11132, ¶ 9 n.21 (emphasis added). The Commission further reasoned:

> [T]he record before us today includes broad support for establishing a shot clock for resolving pole access complaints, and we agree with commenters that establishment of such a shot clock will expedite broadband deployment by resolving pole attachment access disputes in a quicker fashion. As the POWER Coalition explains, pole access complaints "are more urgent than complaints alleging unreasonable rates, terms and conditions," and because the only meaningful remedy for lack of pole access "is the grant of immediate access to the requested poles," it is crucial for the Enforcement Bureau to complete its review of pole access complaints in a timely manner.

Id. at 11132, ¶ 9. In the Commission's July 18, 2018 Report and Order on the Complaint Procedures NPRM, the Commission declined to extend the 180-day shot clock for disputes other than pure access disputes—*i.e.*, disputes regarding the rates, terms, and conditions of attachment—and instead adopted a 270-day deadline for resolution of such complaints. *See In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, Report and Order, EB Docket No. 17-245, 33 FCC Rcd 7178, 7185-86 at ¶¶ 21-23 (Jul. 18, 2018) ("2018 Complaint Rules Order"); *see also* 47 C.F.R. § 1.740(a). The Commission reasoned:

> We anticipate that the Commission will be able to complete review of many complaints in less than 270 days. Complaints filed pursuant to Sections 224 . . . raise an extensive range of issues, however, often requiring the Commission to determine for the first time and in an era of rapidly-changing technology whether specific conduct is lawful under existing rules and orders. A 180-day shot clock would restrict the agency's ability to analyze and adjudicate all cases effectively. For example, a determination of a rate, term, or condition's reasonableness may have a precedential impact on an entire industry, and the Commission may need more time to establish a full record and resolve a complicated matter.

2018 Complaint Rules Order at 7185-86, ¶ 22.

NCTA now seeks to unwind the Commission's very recent and careful consideration of this issue by including *all* pole attachment disputes regarding areas unserved by broadband in its

accelerated 60-day docket pursuant to 47 C.F.R. § 1.736(a). As set forth above, the Electric Utilities do not oppose a 60-day accelerated shot-clock for true access disputes, as defined in the 2017 Order and FNPRM, in areas that are actually unserved by broadband. *See* 2017 Order and FNPRM at 11132, ¶ 9 n.21. Given the infrequency of the need for pole replacements in unserved areas and given the historical willingness to replace poles to accommodate communications attachments, the Electric Utilities anticipate that such disputes will be few and far between.

Should the Commission declare such disputes subject to the accelerated docket, the Electric Utilities urge the Commission to include guidance to the Enforcement Bureau regarding a limitation on the number of poles that can be included in a complaint subject to the 60-day shot clock. In the context of building out hundreds of miles of fiber to provide broadband to an unserved area, the expedited process would not be long enough to address complaints involving denial of access to dozens of poles, especially in light of the requirement that the basis for denial be specifically articulated on a pole-by-pole basis. *See, e.g.,* 2011 Order at 5275, ¶ 76 (noting that a utility must explain a denial of access "in a way that is specific with regard to both the particular attachment(s) and the particular pole(s) at issue"); *In the In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling, WC Docket No. 17-84, Release No. DA 20-796, 2020 FCC LEXIS 2827, at *4 (Jul. 29, 2020) (noting that "utilities are required under section 1.1403(b) of the Commission's rules to provide a written explanation for denying pole access that is specific to the particular attachment and particular pole").

However, where a complaint involves the rates, terms, and conditions of access, rather than a flat denial of access, the concerns voiced by the Commission in the 2017 Order and FNPRM and in the 2018 Complaint Rules Order regarding an accelerated docket continue to apply. Disputes

over the rates, terms, and conditions of access do not "impede deployment" because in such circumstances, the attacher can proceed with attachment and, thereafter, file a complaint under the normal 270-day process challenging whatever rates, terms, or conditions of access that the attacher views as unjust or unreasonable. In this situation, unlike with a denial of access, an attaching entity has a complete remedy that is not altered by the passage of time.

III. THE COMMISSION CANNOT IMPOSE DEADLINES ON POLE REPLACEMENTS BECAUSE IT CANNOT REQUIRE POLE REPLACEMENTS IN THE FIRST INSTANCE.

NCTA writes that "[t]he 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." (Petition, 29). NCTA's proposal, however, would not be a "clarification" of existing remedies—it would be an unlawful expansion of those remedies. As the Eleventh Circuit has held, and as the Commission has acknowledged, utilities are not required to expand capacity under § 224.[23]

In *Southern Company*, the Eleventh Circuit Court of Appeals reviewed a Commission order that stated: "[T]he principle of nondiscrimination established by section 224(f)(1) requires a utility to take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs." [24] In overturning this portion of the 1999 Order, the Eleventh Circuit reasoned:

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[23] *See Southern Company v. FCC*, 293 F.3d 1338, 1346 (11th Cir. 2002); *see also* 2018 Order at 7754, ¶ 100 (citing *Southern Company v. FCC* and acknowledging "a utility's ability to deny access on a non-discriminatory basis as provided for by Section 224(f)(2)"); 2011 Order at 5284, ¶ 95 ("As the court noted in *Southern Company*, mandating the construction of new capacity is beyond the Commission's authority.").

[24] 1999 Order on Reconsideration at 18067, ¶ 51; *see also id.* at 18067, ¶ 53 ("[U]tilities subject to pole attachment regulation have been expected, since the beginning of pole attachment regulation to take steps to rearrange or change out existing facilities at the expense of attaching parties in order to facilitate access.").

> Section 224(f)(2) carves out a plain exception to the general rule that a utility must make its plant available to third-party attachers. When it is agreed that capacity is insufficient, there is no obligation to provide third parties with access to that particular "pole, duct, conduit, or right-of-way." 47 U.S.C. § 224(f)(2). As Commissioner Michael Powell noted, it is hard to see how this provision could have any independent meaning if utilities were required to expand capacity at the request of third parties. The entire purpose of the section is to specify the conditions under which the general rules mandating access for third parties do not apply. By attempting to extend those generally applicable rules into an area where the statutory text clearly directs that they not apply, the FCC is subverting the plain meaning of the Act.

Southern Company, 293 F.3d at 1346-47.

If a utility cannot be required to expand capacity **at all**, then a utility cannot be required to expand capacity within a specified period of time. *See* 47 U.S.C. § 224(f)(2); *see also Southern Company*, 293 F.3d at 1346-47. Consider the following hypothetical: a utility agrees to change out a pole to expand capacity in order to accommodate a proposed attachment, but the utility subsequently encounters a resource (labor or material) shortage, which leads to missing the deadline; the attacher then threatens to file a pole attachment complaint, at which point the utility revokes its earlier conditional grant of access and denies access due to insufficient capacity. The preceding hypothetical reveals why the rule proposed by NCTA would be meaningless. Further, if an electric utility is held to the standard of an "irrevocable conditional grant of access" then it stands to reason that conditional grants of access will be supplanted by denials of access due to insufficient capacity. In this sense, NCTA's proposals would, yet again, thwart rather than promote broadband deployment.

Neither can the Commission order an electric utility "to designate a qualified contractor" to perform a pole change-out, as secondarily urged by NCTA. (Petition, 31). If the Commission cannot order an electric utility to expand capacity under § 224(f)(2), then it cannot end run this legal barrier by simply ordering the electric utility to order someone else to expand capacity.

Even assuming *arguendo* that NCTA's proposal is legally valid, the Commission has already expressed its viewpoint on the underlying *policy* issue of "someone else" performing a pole replacement without the utility's consent:

> Pole Replacements. We agree with parties that argue that the self-help remedy should not be available when pole replacements are required as part of make-ready. **The record shows that pole replacements can be complicated to execute and are more likely to cause service outages or facilities damage. Given the particularly disruptive nature of this type of work, we make clear that pole replacements are not eligible for self-help**.

2018 Order at 7754, ¶ 101 (emphasis added). In addition to rejecting the inclusion of pole-replacements in the self-help remedy, the Commission also declined the inclusion of pole replacements within the one-touch make-ready rule, reasoning: "We agree with commenters that pole replacements are usually not simple or routine and are more likely to cause service outages or facilities damage…" *Id*. at 7715, ¶ 18. NCTA has provided no evidence in its Petition that would counter the record evidence underlying the 2018 Order.[25]

In arguing that the Commission should allow attachers to perform self-help pole replacements, NCTA states that "Some certified states already follow this approach," citing solely to Vermont's pole attachment rules. (Petition, 31 (citing Vermont Public Utility Commission, Case No. 19-0252-RULE, *Rule 3.700 Pole Attachment Rulemaking*, Responsiveness Summary at 5 (Nov. 26, 2019) (amending pole attachment rules to allow attachers to use self-help for pole

[25] NCTA claims, without support, that "In some instances, utilities have delayed action on pole attachment applications and used the time to deploy their own broadband facilities instead." (Petition, 30). If NCTA has actual evidence of this vague innuendo, NCTA should file that evidence into the record. Otherwise, NCTA should refrain from lobbing such baseless allegations into an important conversation. The Commission has previously recognized that "electric power companies…are typically disinterested parties with only the best interest of the infrastructure at heart." *In the Matter of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, WC Docket No. 07-245, GN Docket No. 09-51, 25 FCC Rcd 11864, 11894 at ¶ 68 (May 20, 2010).

replacements); 30-3700 Vt. Code R. § 3.708(L))). However, as in the rest of the Petition, NCTA relies upon the outlier, rather than the approach adopted by the majority of states. *See, e.g.*, **Arkansas:** 126-03 Ark. Code R. § 028, Rule 2.03(e) (limiting self-help remedy to include only work within the communications space"); **Kentucky:** Kentucky Public Service Commission, Proposed Rules, *Access and Attachments to Utility Poles and Facilities 807 KAR 5:0XX* at Section 4(9)(d) ("Self-help shall not be available for pole replacements.");[26] **New Hampshire:** N.H. Code R. Ann. PUC 1303.12(h) (limiting self-help remedy to include only work within the communications space); **Ohio:** Ohio Admin Code 4901:1-3-03(B)(4)-(5) (limiting self-help remedy to include only work within the communications space); **Pennsylvania:** 52 Pa. Code § 77.4 (adopting all of the Commission's pole attachment regulations, including 47 C.F.R. § 1.1411(i)(3)'s prohibition on self-help pole replacements); **Washington:** Wash. Admin. Code § 480-54-030 (limiting self-help remedy to only work within the communications space); **West Virginia:** W. Va. Code R § 150-38-10.9.3 ("Self-help shall not be available for pole replacements."). In addition to being an outlier on this issue, the Vermont PUC was not subject to the restrictions of § 224(f)(2) in adopting its pole replacement self-help rule. To the contrary, the Vermont PUC rules expressly state that "[i]nsufficient capacity shall not be legitimate grounds for denial of access where Make-Ready work can be used to increase or create capacity." 30-3700 Vt. Code R. § 3.707(A)(2).

CONCLUSION

The Electric Utilities respectfully request that the Commission deny NCTA's petition for declaratory ruling. The Electric Utilities share in the goal of bringing broadband to unserved areas.

[26] The Kentucky Public Service Commission's proposed pole attachment rules can be found here: https://psc.ky.gov/home/pscregulations.

However, the solutions proposed by NCTA are not only contrary to precedent, but would also undermine, rather than promote, broadband deployment.

The Electric Utilities urge the Commission to work with the various stakeholders on strategies to incentivize "innovative and mutually beneficial solutions" to the deployment of broadband to unserved areas, rather than serving-up additional heaps of heavy-handed regulation that yield no results.

Electric utilities are not "barriers" to broadband deployment—they are a critical part of the solution to broadband deployment. The sooner electric utilities are treated as such, the better for broadband deployment. The Electric Utilities appreciate the opportunity to submit these comments and look forward to further dialogue with the Commission on these important issues.

Respectfully submitted this 2nd day of September, 2020.

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EXHIBIT B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WIRELINE COMPETITION BUREAU

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

REPLY COMMENTS OF THE ELECTRIC UTILITIES
REGARDING NCTA'S PETITION
FOR EXPEDITED DECLARATORY RULING

Filed by:

Ameren Service Company
American Electric Power Service Corporation
Duke Energy Corporation
El Paso Electric Company
The Empire District Electric Company
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Date: September 17, 2020

EXECUTIVE SUMMARY

- While NCTA cloaks its Petition in benevolent purpose—*i.e.*, reducing deployment costs in "unserved" areas—the comments filed by almost every non-ILEC attacher reveal the true character of the Petition: it is a bait and switch scheme designed to further offload the up-front capital costs of urban deployments onto pole owners under the guise of closing the digital divide.

- NCTA's Petition has created the oddest of coalitions. Over the past decade, ILECs and electric utilities have agreed on very little when it comes to pole attachment issues. However, the initial comments submitted by these distinct classes of pole owners universally oppose NCTA's Petition. Stranger still, ILECs and electric utilities share many of the same substantive concerns regarding the Petition.

- Relying on the "directly benefit" language in Rule 1.1408(b), the attaching entities allege that the Petition is merely seeking a "clarification" of existing law. Their arguments ignore the fact that Rule 1.1408(b) explicitly defines "directly benefit" to mean either "adding to or modifying an existing attachment" after receiving notice of a proposed pole replacement. NCTA's Petition is, in fact, seeking to substantively amend Rule 1.1408(b), which requires notice and comment under the APA.

- While proposing sweeping reforms to the allocation of make-ready pole replacements costs, NCTA's Petition is conspicuously light on details. To fill this void, Charter submitted a white paper that attempts to justify and illustrate NCTA's cost allocation proposal. However, in "justifying" why pole owners should bear the lion's share of pole replacement costs, the white paper relies on a handful of foundational assumptions that are either myopic or simply incorrect. In illustrating how NCTA's cost allocation proposal would work, the white paper also confirms the Electric Utilities' initial suspicion: the proposal would shift more than 90% of make-ready pole replacement costs onto electric utilities and their ratepayers.

- Several attaching entities filed comments in support of NCTA's proposal for the Commission to regulate the timing of make-ready pole replacements. But these commenters are just whistling past the graveyard. The Eleventh Circuit has already addressed this issue and determined that Section 224(f)(2) precludes the Commission from mandating expansions of capacity—much less the timing of such expansions. Even the ILECs agree with this point.

- The Electric Utilities do not oppose NCTA's proposal that "denial of access" complaints involving truly unserved areas be placed on the Commission's accelerated docket. However, several attaching entities submitted comments requesting that NCTA's "accelerated docket" proposal be extended to disputes outside of "unserved areas" and to include complaints regarding the rates, terms, and condition of attachment, rather than true "denials of access." The Commission already considered and rejected this proposal just two years ago.

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REPLY COMMENTS OF THE ELECTRIC UTILITIES REGARDING NCTA'S PETITION FOR EXPEDITED DECLARATORY RULING

Ameren Service Company, American Electric Power Service Corporation, Duke Energy Corporation, El Paso Electric Company, The Empire District Electric Company, Entergy Corporation, Southern Company and Tampa Electric Company (collectively the "Electric Utilities") respectfully submit the following reply comments regarding NCTA's Petition for Expedited Declaratory Ruling in the above-referenced docket.[1]

REPLY COMMENTS

I. Reducing Make-Ready Pole Replacement Costs for Broadband Providers Will Not Result in Deployment to Unserved Areas.

The initial comments of several attaching entities filed in response to NCTA's petition confirm the Electric Utilities' concerns that NCTA's petition is not truly aimed at providing broadband to underserved areas; instead, it is meant to shift pole replacement costs to pole owners in dense urban areas where broadband services are most profitable. *See* Electric Utilities Comments at 19. Crown Castle, INCOMPAS, and WIA all argue that NCTA's proposed

[1] *Wireline Competition Bureau Seeks Comment on a Petition for Declaratory Ruling Filed by NCTA*, Public Notice, WC Docket No. 17-84, DA 20-763 (released July 20, 2020).

declaratory ruling should be applicable to areas already served by broadband, and not just to unserved areas. *See* Crown Castle Comments at 10 ("[T]he Commission should not limit—geographically or otherwise—any clarifying declaratory ruling"); INCOMPAS Comments at 13 (arguing that the declaratory ruling "should apply to all poles under the Commission's jurisdiction—not just in rural, unserved areas"); WIA Comments at 4. These comments make clear that NCTA's proposal is not really about providing broadband to unserved areas—it is about increasing profits for big telecom on the backs of electric rate payers.

The Electric Utilities agree with Next Century Cities, which states in its initial comments that: "another cost-cutting win for providers would not necessarily entice them to service the unserved and underserved areas that they have already made economic decisions to avoid." Next Century Cities Comments at 4-5. The "solution" of shifting costs to electric utilities and their ratepayers does nothing to address the fact that broadband providers will never recover their investment in heretofore avoided areas due to lack of population density, and the correlation between unserved areas and lower median income.[2] And as set forth in the Electric Utilities' initial comments, the FCC has been dramatically shifting costs from broadband providers to electric utilities and their ratepayers since 2011, yet vast swaths of rural America remain unserved by any source of broadband other than satellite. *See* Electric Utilities Comments at 33-34. The problem is the underlying economics; the problem is **not** pole attachments.

[2] *See Inquiry Concerning Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion,* 2020 Broadband Deployment Report, GN Docket No. 19-285, Release No. FCC 20-50, ¶ 43 (April 24, 2020) ("Americans living in areas where these services are deployed typically live in census block groups where there is a lower percentage of households living in poverty, and where there are higher average populations, population densities, per capita incomes, and median household incomes.").

II. NCTA's Petition Is Opposed by *All* Pole Owners, Not Just Electric Utilities.

Over the past decade, ILECs and electric utilities have agreed on very little when it comes to pole attachment issues at the Commission. NCTA's petition for declaratory ruling is the exception. Many of the concerns raised by the ILEC commenters overlap with the concerns raised in the Electric Utilities' initial comments. For example, CenturyLink devoted a significant portion of its initial comments to highlighting the impact NCTA's cost allocation proposal would have on the Commission's rate formulas. Like the Electric Utilities, CenturyLink points to the Commission's historic reliance on the ability of pole owners to recover the incremental costs of pole attachments through make-ready charges to justify its rate formulas. *See* CenturyLink Comments at 7-8; Electric Utilities Comments at 9-10; *see also* Edison Electric Institute, et al. Comments at 18-21 (explaining that NCTA's cost allocation proposal would "undermine the Commission['s] current Section 224 rate structure). And like the Electric Utilities, CenturyLink concludes that, if adopted, NCTA's cost allocation proposal would rekindle the issue of whether the Commission's rate formulas afford just compensation under the Fifth Amendment's "takings" clause. CenturyLink Comments at 7-8.

USTelecom's initial comments also overlap with the Electric Utilities' in arguing that NCTA's cost allocation proposal directly contradicts Rule 1.1408(b) and longstanding Commission precedent on cost allocation. *See* USTelecom Comments at 3-4. Noting the clear limitations Rule 1.1408(b) imposes on the allocation of make-ready pole replacement costs, USTelecom concludes that: "What the Petition terms a request for clarification is in fact a request to revise the Commission's existing rules in a manner that would shift costs from attachers to pole owners, including incumbent service providers." *Id.* at 3; *see also* AT&T Comments at 2-3 (citing recent Commission precedent allowing pole owners to recover "the full cost of additional capacity

through make-ready charges" and concluding that NCTA's cost allocation proposal would require a change in existing law).

Furthermore, like the Electric Utilities, CenturyLink and USTelecom both assert that Section 224(f)(2) bars NCTA's Petition. Both CenturyLink and USTelecom argue, citing the Eleventh Circuit's decision in *Southern Company v. FCC*, 293 F.3d 1338 (11th Cir. 2002), that the Commission does not have the authority to require pole owners to perform make-ready pole replacements, much less the authority to require that such work to be performed within a certain timeframe. *See* CenturyLink Comments at 5-6; USTelecom Comments at 5. AT&T's initial comments also raise this issue by asking: "Would preventing pole owners, which are not required to replace poles with insufficient capacity, from recovering all of their pole replacement costs from the new attachers be discouraged from replacing poles, creating an opportunity cost relative to enhanced pole capacity?" AT&T's Comments at 3. The answer to this question is "yes."

Pole owners universally oppose NCTA's Petition. And significantly, pole owners are not just raising esoteric legal objections to NCTA's Petition. As perfectly encapsulated by AT&T's rhetorical question, pole owners are also concerned about the second order effects that NCTA's Petition would have on broadband deployment. If NCTA's Petition is granted, pole owners would be left with two bad options—either deny requests for pole replacements outright or be forced to subsidize a new attacher's bottom line. Like the Electric Utilities, the ILEC commenters have concluded that NCTA's Petition would serve only to disincentivize broadband deployment. That AT&T, CenturyLink and USTelecom reached this conclusion is significant. These entities are not just pole owning ILECs. They also operate as CLECs and wireless providers outside of their ILEC service territories and, thus, incur make-ready costs outside their ILEC service territories like any other attaching entity.

III. The Argument that NCTA's Proposed Relief Is Merely a "Clarification" of Existing Law Ignores the Plain Language of Section 224(h) and Rule 1.1408(b), as well as the Commission's Precedent on this Issue.

Seizing upon the phrase "directly benefit" in Rule 1.1408(b), several attaching entities submitted comments in support of NCTA's argument that pole owners are already required to share in the cost of make-ready pole replacements. *See* Charter Comments at 14; Crown Castle Comments at 4; ExteNet Comments at 5-6; INCOMPAS Comments at 7; WIA Comments at 3. These attaching entities claim that make-ready pole replacements "directly benefit" pole owners because, *inter alia*, they shift the cost of upgrading or replacing the pole owners' infrastructure onto new attachers. *See* Charter Comments at 3; Crown Castle Comments at 8-9; ExteNet Comments at 4-5; INCOMPAS Comments at 16; WIA Comments at 3. Charter also points to some other tangential "benefits" allegedly arising out of make-ready pole replacements, such as creating excess capacity that pole owners can either use or monetize,[3] lowering maintenance costs and operating expenses, and creating potential tax savings through accelerated depreciation of new capital assets. *See* Charter Comments at 19 n.60 (referencing alleged benefits cited within the white paper[4] that Charter filed with its initial comments); *but see infra* Section V (disputing assertion in Kravtin White Paper that pole owners benefit from make-ready pole replacements). These arguments completely ignore the black letter of Section 224(h) and Rule 1.1408(b).

[3] Charter argues that pole owners "directly benefit" from make-ready pole replacements because the resulting excess capacity allows pole owners to earn additional pole attachment revenue. However, this is not the "Field of Dreams." As discussed in the Electric Utilities initial comments, pole owners are not going to attract more attachers to their poles, especially in "unserved areas," by simply creating more capacity on their poles. *See* Electric Utilities Comments at 27. By Charter's logic, broadband providers can address the root cause of "unserved" areas— the lack of population density—by merely increasing the supply of broadband to those areas—*i.e.*, "if you build it, they will come."

[4] 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) (hereinafter, the "Kravtin White Paper").

As discussed in the Electric Utilities' initial comments, the Commission's authority to allocate pole replacement costs is strictly proscribed by Section 224(h):

> Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. **Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible**.

47 U.S.C. § 224(h) (emphasis added). In recognition of Section 224(h)'s clear limitations, Rule 1.1408(b) is narrowly tailored to only require those parties that "directly benefit" from make-ready pole replacements to share in their cost. "Directly benefit" is explicitly defined under Rule 1.1408(b) and means either "adding to or modifying" existing attachments after receiving notice of proposed pole replacements. Significantly, the "directly benefit" limitation in Rule 1.1408 explicitly mirrors the limiting language in Section 224(h). *See Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket No. 96-98, CC Docket No. 95-185, 11 FCC Rcd 15499, 10698 at ¶ 1216 (Aug. 8, 1996) (the "1996 Order") ("Section 224(h) limits responsibility for modification costs to any party that 'adds to or modifies its existing attachment after receiving notice' of a proposed modification."). Against this backdrop, the alleged benefits cited by NCTA and the other attaching entities clearly fall outside of Section 224(h) and Rule 1.1408(b). If they exist at all, the cited benefits constitute, at most, "incidental benefits," and the Commission has already made clear that incidental beneficiaries of pole replacements **are not** required to share in the costs thereof. *See* 1996 Order at 16097, ¶ 1213.

Charter attempts to end-run the black letter of Section 224(h) and Rule 1.1408(b) by citing the following language from the legislative history for the Pole Attachments Act: "[i]n enacting

Section 224, Congress recognized that where a change-out was necessary 'in order to accommodate the CATV user…it would be appropriate to charge the CATV user' only '***a certain percentage*** of these pole 'change-out' replacement costs." Charter Comments at 2 (citing S. Rep. No. 95-580 at 19 (1977)). However, the Senate Report is internally inconsistent in that it also states that "make-ready charges" "should be fully recovered" by the utility, and that "costs which would not be incurred by the pole owner…'but for' the CATV attachment" include "change-out costs." S. Rep. No. 95-580 at 19 (1977). Charter also cites to Commission precedent interpreting the foregoing legislative history and argues that "the Commission has specifically acknowledged that Congress 'did not contemplate that cable would pay the entire cost of replacing the pole even when the change was necessitated to accommodate cable facilities'…" Charter Comments at 2 (citing *In re Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, Report and Order, CC Docket No. 86-212, 2 FCC Rcd 4387, 4297 at ¶76 & n.44 (Jul. 23, 1987)). This argument, which relies on a Senate report from 1977 and Commission precedent from 1987, misses the forest for the trees. Whatever the Senate Report language referenced by Charter might have meant in 1977, Congress subsequently and explicitly addressed the allocation of make-ready pole replacement costs in its 1996 amendments to the Pole Attachments Act. *See* Telecommunications Act of 1996, P. L. No. 104-104, § 224(h), 110 Stat. 56, 151 (1996) (codified as amended at 47 U.S.C. § 224(h)); *see also* Electric Utilities Comments at 24-26.

IV. A Declaratory Ruling Is Not the Proper Vehicle for Addressing the Allocation of Make-Ready Pole Replacement Costs Because NCTA's Proposal Seeks a Change in Existing Law, Not the Resolution of "Controversy" or "Uncertainty."

As noted in the Electric Utilities' initial comments and Section III (above), Rule 1.1408(b) only requires those parties that "directly benefit" from make-ready pole replacements to share in the costs thereof, and Rule 1.1408(b) explicitly defines the phrase "directly benefit" to mean parties

that either "add to or modify" their existing attachments after receiving notice of the pole replacements. 47 C.F.R. § 1.1408(b). Pursuant to the black letter of Rule 1.1408(b), the Commission has never required pole owners to share in the cost of pole replacements that are necessitated solely by a new attacher's need for additional capacity. *See, e.g.*, 1996 Order at 16077, ¶ 1166 ("[S]ection 224(h) imposes the cost of modifying attachments on those parties that benefit from the modification. If, for example, a cable operator seeks to make an attachment on a facility that has no available capacity, the operator would bear **the full cost of modifying the facility to create new capacity, such as by replacing an existing pole with a taller pole**.") (emphasis added); *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, 5301 at ¶ 143 (Apr. 7, 2011) (noting that under cost causation principles, pole owners are entitled to "recover[] the entire capital cost of a new pole through make-ready charges from the new attacher when a new pole is installed to enable the attachment").

Notwithstanding this clear authority, NCTA is seeking a declaratory ruling that would require pole owners to bear the vast majority of make-ready pole replacement costs from which they do not "directly benefit." What's more, NCTA is characterizing its request as one for "clarification" of existing law, and several cable and broadband companies have filed comments supporting NCTA's characterization. *See* NCTA Petition at 9; Charter Comments at 14 ("Charter emphasizes that the NCTA Petition is not asking and does not require the Commission to make new rules; it is merely asking it to clarify the application of existing precedents and statutory provisions…"); WIA Comments at 6 (noting that the "Commission has the authority to prevent the IOU's misinterpretation of the costs regarding pole modification and attachments"). This mischaracterization—*i.e.*, framing NCTA's cost allocation proposal as an "interpretive rule"—is

nothing more than a brazen attempt to bypass the APA's notice and comment rulemaking requirements.

"Interpretive rules" merely "advise the public of the agency's construction of the statutes and rules which it administers" and, therefore, do not require notice and comment. *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995); *see also* 5 U.S.C. § 553(b)(A). In contrast, rules that "work substantive changes" or "major substantive legal additions" to prior regulations are deemed "legislative rules" and require notice and comment under the APA. *United States Telecom Ass'n v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005) (quoting *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) and *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000)). Because NCTA is effectively seeking to substantively amend Rule 1.1408(b), NCTA's cost allocation proposal constitutes a "legislative rule" and requires notice and comment. *See id.*; *see also NRDC v. Wheeler*, 955 F.3d 68, 84 (D.C. Cir. 2020) (holding that because an agency's rule "had the effect of amending…a legislative rule…it too is a legislative rule subject to notice-and-comment obligations"). But even if it were truly an "interpretive rule," the Commission could not adopt NCTA's cost allocation proposal via declaratory ruling because it cannot be reconciled with the black letter of Rule 1.1408(b). *See Shalala*, 514 U.S. at 100 (noting that notice and comment rulemaking would be required if an interpretive rule "adopted a new position inconsistent with any…existing regulations"); *see also Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (rejecting an agency's interpretation of its own regulation because it conflicted with the text of the regulation).

Perhaps acknowledging the futility of pursuing an "interpretive rule" that would directly contradict the regulation it was purporting to interpret, some commenters have taken a different tack and argue that the Commission should modify Rule 1.1408(b) to require pole owners to share

in make-ready pole replacement costs. *See* Charter Comments at 15-17; ACA Connects Comments at 22-23. Even though this approach clearly involves the adoption of a legislative rule, these commenters argue that notice and comment rulemaking would not be necessary because the 2017 Notice of Proposed Rulemaking has already laid the requisite procedural foundation. *See* Charter Comments at 15-16 (citing *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, WC Docket No. 17-84, 32 FCC Rcd 3266, 3277-78, 3310-11 at ¶¶ 35, 36 & App'x A (Apr. 21, 2017) (the "2017 NPRM")); ACA Connects Comments at 22 (citing 2017 NPRM at 3277, ¶ 35).

However, the 2017 NPRM **did not** seek comment on whether pole owners should be forced to bear the cost of make-ready pole replacements necessitated solely by a new attacher's need for additional capacity. Instead, the 2017 NPRM sought comment on whether pole owners should be required to "**reimburse** new attachers for make-ready costs for improvements that **subsequently benefit**" pole owners. 2017 NPRM at 3277, ¶ 36. In other words, the question raised in the 2017 NPRM related to whether pole owners should share in the cost of make-ready or pole replacements **if and when** the pole owners actually derive a tangible benefit from the make-ready or pole replacements (*i.e.,* by either using or earning additional pole attachment rental from the resulting excess capacity). In contrast, NCTA's cost allocation proposal would require pole owners to share in the **upfront** cost of make-ready pole replacements, regardless of whether pole owners ever actually derive any benefit from such pole replacements.

Therefore, the Commission cannot fall back on the 2017 NPRM to satisfy the APA's procedural requirements. This is especially true since NCTA's cost allocation proposal is ambiguous and fails to address important questions like:

- What is an unserved area?

- How does shifting pole replacement costs to pole owners affect broadband deployment overall—*e.g.*, would pole owners be less inclined to engage in pole replacements if NCTA's petition is granted?

- How does the proposed shift in make-ready costs affect the Commission's rate formulas—*e.g.*, would they still be fully compensatory under the Fifth Amendment's "takings" clause?

- Does the Commission have authority to determine the share of make-ready pole replacement costs that should be borne by electric ratepayers?

And due to the expedited nature of these proceedings, there is simply not enough time to fully address these important questions. Accordingly, the Electric Utilities agree with AT&T, CenturyLink and USTelecom that a "declaratory ruling is not the proper vehicle" to address the issues raised in the Petition because "NCTA seeks changes to existing rules, not resolution of controversies or uncertainties under [the Commission's] existing rules." AT&T Comments at 1; *see also* CenturyLink Comments at 3-4; USTelecom Comments at 3-4.

V. The Report Submitted by Charter is Premised Upon an Incomplete Assumption, Employs an Improper "Economic Calculus" and Illustrates Why Any Reallocation of Make-Ready Replacement Costs is Poorly Suited for a Declaratory Ruling.

a. Ms. Kravtin's Position is Premised Upon the Incomplete Assumption that All Poles Will Eventually Be Replaced in a Utility's Ordinary Course of Business.

Ms. Kravtin claims that the assignment of make-ready pole replacement costs to the entity at whose request the pole is replaced overlooks that:

> [T]he pole would be replaced by the utility over the normal course of operations to meet the utility's own operational needs to meet growth, in response to damage or other exogenous events, as part of the utility's normal and routine cyclical capital asset replacement program tied to the average service life of the asset, or on an even more accelerated basis in conjunction with the increasing number of pole resiliency and hardening programs nationwide…

Kravtin White Paper at 29. There are at least three things wrong with this foundational assumption. First, as explained in the Electric Utilities' initial comments, not all poles are eventually replaced. *See* Electric Utilities Comments at i & 27. Some poles will **never** be replaced in the ordinary

course because they will be removed from service as part of an undergrounding project prior to the end of their useful life.

Second, though it is true that many poles will eventually be replaced (due to deterioration, operational needs or storm hardening initiatives), it is impossible to know at the time of a make-ready pole replacement what type of pole will be required for such eventual replacement at some then-unknown point in the future. When a pole is replaced as part of make-ready, the new pole is only of sufficient height and strength to accommodate the new attachment. For example, if the existing pole is a 40-foot Class 5 pole, and the new attachment requires only two feet of vertical space and slightly more pole strength, then an electric utility would set a 45-foot Class 4 pole (in other words, the next size up).[5] If, at the time the pole would have otherwise been replaced, the electric utility actually needs a 50-foot Class 2 pole, then the 45 foot Class 4 pole is of no use or benefit to the electric utility. This is true regardless of whether the pole would have been eventually replaced due to (1) deterioration (where, for example, standards might require a conversion from 3-phases cross arm construction to vertical 3-phase construction), (2) the electric utility's own service needs (like the installation of a transformer or an additional phase), or (3) as part of a storm hardening initiative. During make-ready pole replacements, electric utilities typically do not build additional height and strength into the pole in order to accommodate future potential needs. And if they do, Rule 1.1408(b) steps in to ensure the costs of the additional capacity is not passed-along to the entity at whose request the pole is being changed-out.

Third, the potential for future damage to a pole illustrates the importance of assigning the cost of a make-ready pole replacement to the entity at whose request the pole is replaced. Past

[5] Wood distribution poles come in 5-foot increments. A lower "Class" number means a stronger pole.

damage is obviously irrelevant (except to the extent that past damage, and subsequent replacement, might be indicative of a newer pole further removed from eventual replacement). The only damage that matters is future damage. If a 40-foot Class 5 pole is replaced with a 45-foot Class 4 pole in September 2020 to accommodate a new attachment, but the pole requires replacement in September 2021 due to storm damage or a vehicle collision, the electric utility bears the cost to replace the 45-foot Class 4 pole. In this scenario, the 45-foot Class 4 pole installed in September 2020 as part of a broadband make-ready project is of no value to the electric utility. The September 2020 make-ready pole replacement has not lowered the electric utility's cost in any way. If anything, it has added to the electric utility's cost in September 2021 because of (a) the additional expense associated with replacing a taller and stronger pole and (b) the additional cost of working with and around an additional attachment.

b. Ms. Kravtin's "Economic Calculus" Fails to Consider How the Diversion of Cash into Unplanned Projects Impacts the Operations of a Rational Firm.

The economic theory of Ms. Kravtin's proposal to shift make-ready pole replacement costs to electric utilities and their ratepayers is best summarized by the following excerpt from her report:

> In the parlance of social welfare economics, economists define efficiency as an optimal state where it is impossible to improve the economic situation of one party without making another worse off. This is not the same as saying that the utility's cash position and account balances should be restored to their pre-request levels by the attacher. Rather, what it means in an economic sense is that the utility should be indifferent between its overall economic position before the request (with its existing facilities) and its overall economic position after the request (with the new facilities), because the attacher has compensated it for all of the replacement costs that did not provide the utility with corresponding economic betterment value. The proper economic calculus, that is, one designed to achieve maximum allocative and productive efficiencies, takes into account the totality of all economic costs and benefits (including cost savings) to the respective parties.

Kravtin White Paper at 5. This theory, of course, presumes the replacement pole brings at least some value to the electric utility. As set forth above, that is not the case. But even assuming there is some value to the electric utility, Ms. Kravtin's economic analysis draws no distinction between cash and property. If an electric utility diverts cash to fund make-ready pole replacements, then it has less cash to fund other projects that are aligned with its core service needs and priorities. This is especially true if the expenses (whether capital or O&M) are unbudgeted. The fact that an electric utility might have a more "valuable" pole in the ground as a result of a make-ready pole replacement does not help it pay a crew to harden a critical feeder or to pay a contractor for cyclical ground line inspections.

Further, if the "proper economic calculus" requires that "all economic costs and benefits (including cost savings) to the respective parties" be taken into account, then this same economic calculus should apply to other aspects of the relationship between the respective parties—namely, the recurring rate. Attaching entities enjoy immense benefits and cost savings by utilizing existing pole networks. Those cost savings are in no way reflected in the Commission's current rate formulas. As Ms. Kravtin notes, "The ultimate economic picture is necessarily and properly informed by the amount of total cost recovery the utility receives in connection with the third-party attachment." Kravtin White Paper at 53. The situation Ms. Kravtin describes is, for example, reflected in many joint use agreements between electric utilities and incumbent local exchange carriers ("ILECs"). Under those agreements, all of the economic costs and benefits to both parties are balanced. Whereas electric utilities and ILECs typically pay far less in make-ready costs to access each other's poles because each party is required to build its pole networks in a way that will accommodate the needs of the other party, each party is also required to bear other offsetting costs either through pole ownership or annual rates.

VI. The Financial Models in Ms. Kravtin's Report Illustrate why the Re-allocation of Make-Ready Pole Replacement Costs is Poorly Suited for a Declaratory Ruling or Even a Rule of General Applicability.

Tables 2 and 3 of Ms. Kravtin's report illustrate the costs attaching entities would bear in the event the Commission grants NCTA's request for declaratory ruling. *See* Kravtin White Paper at 51-52. Though these are hypothetical and for illustrative purposes, they also inform the scope and scale of the costs NCTA's requested declaratory ruling would shift to electric utilities and their ratepayers. In their initial comments, the Electric Utilities included a chart that identified, among other things, the average net bare per pole cost for each member of the group, as well as each member's average make-ready pole replacement cost in 2019. *See* Electric Utilities Comments at 20-21. The combined average net bare per pole cost was $392, and the average make-ready pole replacement cost for 2019 was $6,026. *See id*. at 21. Ms. Kravtin's hypotheticals confirm that the Electric Utilities have properly understood NCTA's proposal—to shift in excess of 90% of make-ready pole replacement costs to electric ratepayers.

Table 2 in Ms. Kravtin's report also contains a handful of adjustments to the net bare per pole cost, depending on the circumstances of a particular pole replacement, including a $250 "adder" for a replaced pole that is newer than the average pole vintage. *See* Kravtin White Paper at 51.[6] Though this adjustment seems to recognize the inequity of using net bare per pole cost as the basis for an attaching entity's cost responsibility when a pole is changed-out to accommodate a new attachment, it is woefully insufficient. By way of example, Georgia Power's net bare per pole cost based on year ending 2019 data was $386; its average make-ready pole replacement cost in 2019 was $9,472. *See* Electric Utilities Comments at 20. Even using the $250 adder, this would

[6] Ms. Kravtin claims that Table 2 is an illustration of NCTA's proposal, *see* Kravtin White Paper at 50, but neither the chart nor any text that might explain the chart is within NCTA's petition for declaratory ruling.

still mean that the attaching entity at whose request the pole was changed out would pay only $636 of the $9,472 of the replacement cost (less than 7%). This is not a credible proposal.

If there are circumstances that warrant shifting the cost of make-ready pole replacements to an electric utility, there is already a process that accommodates this: the Commission's pole attachment complaint process. If an attaching entity believes it has unfairly been required to pay the full cost of pole replacements for poles that were already damaged beyond repair, already at the end of their useful life or already identified for replacement for operational purposes, then these are circumstances that can be brought to the Commission's attention on an *ad hoc* basis and adjudicated on the specific facts. But attempting to determine an equitable allocation of make-ready pole replacement costs (if any) cannot be accomplished equitably through a declaratory ruling or a rule of general applicability. It would require the level of precision and fact-specific adjudication that can only be achieved through the complaint process.

VII. The Commission Lacks Authority to Set a Deadline for Electric Utilities to Perform Pole Replacements Either in the Form of a Make-Ready Timeline Rule, as Proposed by ACA Connects and the Free State Foundation, or in the Context of a Complaint Proceeding, as Proposed by NCTA.

ACA Connects argues that:

> [T]he Commission should clarify the applicability of the make-ready timelines and processes adopted in the 2018 Order in the context of pole replacements. In particular, Section 1.[1]411(f) provides that a utility shall complete its make-ready no later than 15 days after the deadline by which existing attachers must complete theirs. The Commission should affirm that pole replacements, when required as part of make-ready, must be completed within this established timeline. As a further safeguard, the Commission should grant NCTA's request for clarification that directing utilities to complete pole replacements within a specified timeframe is an available remedy in pole attachment complaint proceedings.

ACA Connects Comments at 20-21. However, Rule 1.1411(f) states that:

> A utility shall complete its make-ready **in the communications space** by the same dates set for existing attachers in paragraph (e)(1)(ii) of this section **or its make-ready above the communications space** by the same dates for existing attachers in paragraph (e)(2)(ii) of this section (or if the utility has asserted its 15-day right of control, 15 days later).

47 C.F.R. § 1.1411(f). A pole change-out does not fall within the aforementioned rule because it is neither make-ready in the communications space nor make-ready above the communications space. While the Commission has adopted the timeline in Rule 1.1411(f) for electric utility work in the communications space, and a 90-day deadline for make-ready in the electric supply space (*see* 47 C.F.R. § 1.1411(e)(2)(ii)), the FCC has not set a deadline for pole replacements. This is consistent with the fact that the Commission cannot require an electric utility to replace a pole in the first instance. *See* Electric Utilities Comments at 40-42. And even if the Commission did have such authority (which it does not), rules setting deadlines for pole replacements would only discourage pole owners from agreeing to replace poles to expand capacity in the first place. *See* Electric Utilities' Comments at 19-20 & 41.

Similarly, The Free State Foundation argues that:

> Under §[1.1407(b)] of the Commission's rules for pole attachment complaints, "[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." …Aside from putting pole attachment disputes in unserved areas on the Accelerated Docket, the Commission should curb delays by declaring that §[1.1407(b)] authorizes the agency to order utility pole owners to complete pole replacements within a specific timeframe or – if necessary – to designate a qualified and authorized contractor to make such replacements.

The Free State Foundation Comments at 5. However, Rule 1.1407(b) merely authorizes the Commission to order that "**access** be permitted within a specified time frame." 47 C.F.R. § 1.1407(b) (emphasis added). Though the Commission has authority to impose timelines for access to existing utility poles, it is well settled that the Commission lacks authority to require capacity

expansion (pole replacement) for the reasons set forth herein and in the Electric Utilities' initial comments. *See* Electric Utilities Comments at 40-42; *see also* CenturyLink Comments at 4-6; USTelecom Comments at 5.

VIII. The Commission Should Reject Proposals to Adopt an Expansive View of the Types of Pole Attachment Complaints Appropriate for the Accelerated Docket and Should Declare that Only Complaints Based on True Denials of Access in Unserved Areas Should Be Placed on the Accelerated Docket.

It is clear from the comments that attachers would seek to expand the Accelerated Docket rule proposed by NCTA to include more than just complaints regarding denials of access in unserved areas. For example, ACA Connects states in its initial comments that:

> …[w]hile NCTA seeks a ruling that expedited '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,' the ruling should be clear that this applies **wherever** there is an allegation that the dispute impedes deployment."[7]

ACA Connects Comments at 24 (emphasis added). Charter argues for a similarly expansive definition of the types of disputes that should be included in the accelerated docket, which it argues should include not just pure access denials, but also:

> …(2) functional denials of access (e.g., disputes where the pole owner and attaching entity disagree about whether the conditions for an attachment have been met, such as the completeness of an application, or where a utility fails to comply with deadlines to perform tasks for which self-help is unavailable);
>
> (3) disputes about conditional access (i.e., disagreements arising out of utility demands that an attacher satisfy certain conditions or requirements external to the Commission's make-ready and pole attachment timelines before the utility will permit an attachment); and
>
> (4) categorical disagreements about make-ready costs that rise to the level of preventing an attaching entity from moving forward with a construction project.

[7] ACA Connects goes on to state in a footnote that "[c]ertain types of disputes need not be accelerated, such as disputes over annual attachments rates or billing for them." ACA Connects Comments at 24 n.79.

Charter Comments at 17-18. The above three categories of complaints are not disputes regarding denials of access; rather, they are disputes regarding the rates, terms and conditions of attachment, which the Commission, as recently as 2018, stated were not appropriate for expedited resolution.[8] Contrary to Charter's argument, these types of disputes are more likely to raise complex questions of law and fact that are not appropriate for the Accelerated Docket. Charter's proposed expansive definition of "access disputes" would unwind the rules recently adopted by the Commission on a full record in two different rulemaking proceedings. *See* 2017 Order and FNPRM at 11132, ¶ 9; 2018 Complaint Rules Order at 7185-86; 47 C.F.R. §§ 1.736(a), 1.740(a). The Commission's accelerated docket rules already grant Commission staff "discretion to decide whether a complaint, or portion of a complaint, is suitable for inclusion on the Accelerated Docket." 47 C.F.R. § 1.736.

CONCLUSION

The Electric Utilities request that the Commission deny and dismiss NCTA's proposal to shift the vast majority of make-ready pole replacement costs to electric utilities. NCTA's proposal would undermine the Commission's broadband deployment goals, conflict with longstanding precedent, and contradict the black letter of Section 224(h) and Rule 1.1408(b).

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[8] *See In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, WC Docket No. 17-84, 32 FCC Rcd 11128, 11132 at ¶ 9 n.21 (Nov. 29, 2017) (the "2017 Order and FNPRM") (explaining that the term "pole access complaint," for which the 180-day shot clock is applicable, "does not encompass a complaint alleging that a utility is imposing unreasonable rates, terms, or conditions that amount to a denial of pole access"); *see also id.* at ¶ 9 ("As the POWER Coalition explains, pole access complaints 'are more urgent than complaints alleging unreasonable rates, terms and conditions,'… because the only meaningful remedy for lack of pole access 'is the grant of immediate access to the requested poles'…."); *see also In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau,* Report and Order, EB Docket No. 17-245, 33 FCC Rcd 7178, 7186 at ¶ 22 (Jul. 18, 2018) ("2018 Complaint Rules Order") ("A 180-day shot clock would restrict the agency's ability to analyze and adjudicate all cases effectively. For example, a determination of a rate, term, or condition's reasonableness may have a precedential impact on an entire industry, and the Commission may need more time to establish a full record and resolve a complicated matter.").

The Commission should also deny NCTA's request and the proposals of some commenters to set deadlines for pole replacements, because the Commission lacks authority under Section 224 and controlling precedent to require expansions of capacity in the first place. The Electric Utilities do not oppose NCTA's proposal to place true "denial of access" complaints arising out of "unserved" areas on the Commission's accelerated docket, but the Commission should reject proposals by commenters seeking to expand the categories of complaints appropriate for the accelerated docket to complaints involving areas already served by broadband, or complaints regarding the rates, terms, and conditions of attachment.

The Electric Utilities look forward to further dialogue with the Commission regarding these important issues.

Respectfully submitted this 17th day of September, 2020.

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