

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

In the Matter of

Accelerating Wireline Deployment by
Removing Barriers to Infrastructure
Investment

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WC Docket No. 17-84



COMMENTS

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TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	2
II.	POLE REPLACEMENT FEES ARE OFTEN UNJUST AND UNREASONABLE, HINDERING THE DEPLOYMENT OF CABLE, TELECOMMUNICATIONS, AND COMMINGLED BROADBAND NETWORKS	8
III.	THE COMMISSION SHOULD CLARIFY, WITH SPECIFICITY, THE OBLIGATIONS OF POLE OWNERS TO SHARE PROPORTIONATELY IN POLE REPLACEMENT COSTS	14
	A. The Commission Should Affirm That an Attacher Shall Not Bear the Costs of a Pole Replacement That is Unnecessary to Accommodate its Attachment.....	15
	B. The Commission Should Bar Pole Owners from Charging Attachers “Unjust and Unreasonable” Fees to Replace Defective Poles and from Unreasonably Delaying Replacement of Such Poles	15
	C. For Poles That Have Remaining Useful Life but “Insufficient Capacity,” the Commission Should Provide That an Attacher Must Bear Only the Specific Costs It Causes by Virtue of Making a Pole Access Request That Initiates Replacement of a Pole	17
	D. Where a Make-Ready Cost Estimate Includes Pole Replacement Costs, a Utility Should Be Required to Disclose Sufficient Information About the Poles at Issue to Ensure That Pole Replacement Costs Are Being Allocated Justly and Reasonably	19
	E. The Commission Should Clarify That a New Attacher is Not Responsible for the Costs of Moving an Attachment of a Communications Provider That the Utility Identifies as Having a Preexisting Violation on the Pole	20
	F. The Commission Should Enforce Made-Ready Timelines and Processes in the Context of Pole Replacements.....	20
	G. The Commission Should Ensure that a Pole Owner May Not “Double-Recover” from an Attacher in the Form of Pole Rental Fees any Capital Costs the Attacher Was Required to Bear in Replacing a Pole	21
IV.	THE COMMISSION CAN MOVE FORWARD IMMEDIATELY WITH THE ADOPTION OF FINAL RULES THAT ENSURE “JUST AND REASONABLE” ALLOCATION OF POLE REPLACEMENT COSTS	22
V.	THE COMMISSION SHOULD EXPEDITE COMPLAINTS INVOLVING DISPUTES REGARDING POLE ACCESS.....	23
VI.	CONCLUSION	25

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COMMENTS

ACA Connects – America’s Communications Association (“ACA Connects”) hereby responds to the Public Notice¹ issued by the Wireline Competition Bureau seeking comment on a Petition for Declaratory Ruling filed by NCTA – The Internet & Television Association (“NCTA”) regarding pole attachment issues.² NCTA asks the Federal Communications Commission (“Commission”) to declare that:

(1) it is unjust and unreasonable under section 224 of the Communications Act,³ section 1.1408(b) of the Commission’s rules,⁴ and Commission precedent to shift all pole replacement costs to a new attacher, at least in unserved areas;⁵

¹ *Wireline Competition Bureau Seeks Comment on a Petition for Declaratory Ruling Filed by NCTA – The Internet & Television Association*, WC Docket No. 17-84, Public Notice, DA 20-763 (July 20, 2020).

² Petition for Expedited Declaratory Ruling, NCTA – The Internet & Television Association, WC Docket No. 17-84 (July 16, 2020) (“NCTA Petition” or “Petition”).

³ 47 U.S.C. § 224.

⁴ 47 C.F.R. § 1.1408(b).

⁵ NCTA Petition at 9-27.

(2) disputes between a pole owner and an attaching entity in unserved areas will be placed on the Accelerated Docket pursuant to section 1.736 of the Commission's rules;⁶ and

(3) the Commission may, pursuant to section 1.1407(b) of the Commission's rules,⁷ order a pole owner to complete a pole replacement within a specified period of time or designate an authorized contractor to do so.⁸

I. INTRODUCTION AND SUMMARY

"It's déjà vu all over again."⁹ Prior to the filing of the NCTA Petition, the Commission developed a record on whether it should specify the basis for determining just and reasonable fees that new attachers pay utilities for make-ready, including pole replacements.¹⁰ In the Notice of Proposed Rulemaking in this very proceeding, the Commission inquired whether the fees utilities charge new attachers for make-ready, which includes pole replacement, are unjust and unreasonable and are deterring providers from deploying facilities and, if so, whether the Commission should adopt a rule to limit such fees to "the actual costs incurred to accommodate a new attachment."¹¹ In its many filings in response to this inquiry, ACA Connects answered

⁶ 47 C.F.R. § 1.736; NCTA Petition at 27-29.

⁷ 47 C.F.R. § 1.1407(b).

⁸ NCTA Petition at 29-31.

⁹ Perhaps Yogi Berra's most famous quote, which he said after Roger Maris and Mickey Mantle hit back-to-back home runs in 1961. See Yogi Berra Museum & Learning Center, "Yogi-isms," <https://yogiberramuseum.org/about-yogi/yogisms/> (last accessed Aug. 12, 2020).

¹⁰ The term "make-ready" is defined in 47 C.F.R. § 1402(o) to include pole replacement. 47 C.F.R. § 1402(o) ("The term make-ready means the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the utility pole.").

¹¹ See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, *et al.*, 32 FCC Rcd 3266, para. 35 (2017) ("NPRM") ("We seek comment on reasonable ways to limit the make-ready fees charged by utilities to new attachers. Would it provide certainty to the make-ready process if the Commission adopted a rule limiting make-ready fees imposed on new attachers to the actual costs incurred to accommodate a new attachment? As part of the pole attachment complaint process, the Commission has held that utilities are entitled to recover their costs from attachers for reasonable make-ready work necessitated by requests for attachment. Utilities are not entitled to collect money from attachers for unnecessary, duplicative, or defective make-ready work. Would codifying the holding that new attachers

these questions in the affirmative, especially as applicable to pole replacement. ACA Connects provided evidence that utilities frequently charged new attachers unjust and unreasonable fees for pole replacements. ACA Connects highlighted the need for the Commission to step up and provide guardrails to ensure that pole replacement charges are consistent with the statutory mandate that such fees be just and reasonable.¹² Pole owners also filed comments on the

are responsible only for the cost of make-ready work made necessary because of their attachments help to ensure that make-ready costs are just and reasonable?”) (internal citations and quotations omitted); see also *id.*, Appendix A (Proposed Rules) 47 C.F.R. § 1.1416(b) (“The cable television system operator or telecommunications carrier requesting attachment shall be responsible only for the actual costs of make-ready made necessary solely as a result of its new attachments.”).

¹² 47 U.S.C. § 224(b). See, e.g., Comments of the American Cable Association on the Notices of Proposed Rulemaking, WC Docket No. 17-84, *et al.*, 48-49 (June 15, 2017) (“ACA Connects Comments”) (“A number of utilities...include restrictions in their Master Agreements on acceptable make-ready costs. CPS Energy prohibits charges for the replacement of failing poles and repair of existing safety code violations, while Rocky Mountain Power in its agreement with First Digital Telecom specifically precludes payment by attachers of the entire cost for poles being replaced for Rocky Mountain Power’s benefit. By expressly prohibiting these categories of charges from inclusion in make-ready, the Commission would help reduce the cost of construction and promote additional network deployment.”); Reply Comments of the American Cable Association on the Notices of Proposed Rulemaking, WC Docket No. 17-84, *et al.*, 29-33 (July 17, 2017) (“ACA Connects Reply Comments”) (“ACA further explained that multiple States prohibit make-ready charges unrelated to accommodating new attachments, and some utilities have adopted policies to exclude such charges from their estimates and invoices. ACA therefore proposed that the Commission codify its prior decision by adopting a rule prohibiting the inclusion of unrelated charges in make-ready estimates and invoices.”); *Ex Parte* Letter from Thomas Cohen, Counsel to the American Cable Association, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84, 5 (Aug. 3, 2017) (“ACA Connects Aug. 3 *Ex Parte*”) (“ACA submits the Commission should address these concerns by prohibiting utilities from charging for make-ready work that is unrelated to the new attachment, including for work to fix existing attachment violations or to replace poles determined to be inadequate for existing attachers or scheduled for replacement”); *Ex Parte* Letter from Thomas Cohen, Counsel to the American Cable Association, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84, 7 (Sep. 14, 2017) (“ACA Connects Sep. 14 *Ex Parte*”) (“ACA representatives discussed how the Commission can take action to improve transparency and reduce the charges associated with make-ready work. Mr. Lieberman stated that pole owners repeatedly charged ACA members for work unrelated to new attachments...Mr. Larsen and Mr. Jobe indicated that pole owners included costs to resolve preexisting violations and replace aging poles in their make-ready estimates, even though attachers already pay for pole maintenance through pole rental fees. Mr. McKay stated that his company was charged for the replacement of a 75-year old pole.”); *Ex Parte* Letter from Thomas Cohen, Counsel to the American Cable Association, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84, 5 (Mar. 8, 2018) (“ACA Connects Mar. 8 *Ex Parte*”) (“The Commission has refrained from adopting regulations governing make-ready work charges, instead addressing their reasonableness on a case-by-case basis. ACA members have found that utilities have exploited this regulatory gap to charge for work not directly related to the new attachment...ACA submits the Commission should address these concerns by...prohibiting utilities from charging for make-ready work that is unrelated to the new attachment, including for work to fix existing attachment violations or to replace poles determined to be inadequate for existing attachers or scheduled for replacement.”); *Ex*

issue of fees for make-ready and the Commission's proposed rule.¹³ And while the Commission has yet to address this issue, it stated in the 2018 Order in this proceeding that it will take action on outstanding issues raised in this docket where warranted.¹⁴ ACA Connects contends that, while the record and the public interest warranted the Commission addressing this issue two years ago, the NCTA Petition presents an opportunity for the Commission to act now and establish by rule the basis for just and reasonable pole replacement fees as set forth in ACA Connects' proposed framework.

The NCTA Petition confirms what the Commission already knows and ACA Connects demonstrated in this docket: utilities often charge unjust and unreasonable pole replacement fees that impede the deployment of network infrastructure through new attachments.¹⁵ As with ACA Connects, NCTA reported that its members regularly face demands by utilities that they pay the full cost of replacing poles to accommodate new attachments.¹⁶ Such costs can be

Parte Letter from Thomas Cohen, *et al.*, Counsel to the American Cable Association, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84, 3-4 (Mar. 26, 2018) ("ACA Connects Mar. 26 *Ex Parte*") ("[T]he ACA representatives recommended that the Commission...prohibit utilities from charging for make-ready work unrelated to the new attachment, including for work to fix existing violations or replace poles determined to be inadequate for existing attachers or scheduled for replacement.").

¹³ See, e.g., Initial Comments in Response to the Commission's Notice of Proposed Rulemaking on Pole Attachments, Ameren Corporation, *et al.*, WC Docket No. 17-84, 42 (June 15, 2017) ("The Commission proposes a new Rule 1.1416(b), which states: The cable television system operator or telecommunications carrier requesting attachment shall be responsible only for the actual costs of make-ready made necessary solely as a result of its new attachments. As a preliminary matter, make-ready work is not a profit center for the Electric Utilities and it never has been. Make-ready costs are calculated in the same manner as any other electric customer contribution in aid of construction. For this reason, the Electric Utilities do not oppose the concept embodied by proposed Rule 1.1416(b).") (internal quotations and emphasis omitted).

¹⁴ See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, et al.*, WC Docket No. 17-84, *et al.*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, para. 130 (2018) ("2018 Order") ("We do not at this time address all outstanding issues raised in the notices or record in this proceeding, and we will take further action as warranted in this proceeding to address outstanding issues.").

¹⁵ See NCTA Petition at 5-9.

¹⁶ *Id.* at 8.

significant, including not only the capital cost of the replacement pole, but especially the cost of make-ready to move all existing attachments on the replaced pole to the new pole.¹⁷ Where a utility has failed to maintain its poles, where poles are or will soon be scheduled for replacement, or earlier attachments involve safety violations, the replacement of a pole to accommodate a new attachment may trigger an attempt by the pole owner to impose the costs of maintaining its own infrastructure on the new attacher, contrary to longstanding Commission precedent.¹⁸ A utility receives an unlawful windfall when it does so, especially where poles are fully or largely depreciated or have deteriorated and are no longer safe.¹⁹ In all events, pole replacement fees that seek a recovery of the entire cost to replace the pole and transfer the existing attachments may cause service providers to abandon deployments or pursue attachment alternatives like undergrounding that tend to be more expensive than aerial attachments.²⁰ In short, excessive, unjust, and unreasonable pole replacement fees result in reduced network investment, fewer deployments, and more unserved households.

In light of the barriers to network deployment posed by unjust and unreasonable utility pole replacement fees, NCTA requests that the Commission issue a declaratory ruling clarifying two key issues. First, NCTA asks the Commission to clarify that, at least in unserved areas, it is unjust and unreasonable for a utility pole owner to shift the entire cost of a pole replacement to a new attacher because, in fact, the utility is the direct primary beneficiary of the pole replacement.²¹ Second, NCTA requests that the Commission take additional steps to ensure

¹⁷ *Id.* at 9.

¹⁸ See ACA Connects Comments at 48-49; ACA Connects Reply Comments at 29.

¹⁹ See NCTA Petition at 4.

²⁰ See ACA Connects Comments at 48; ACA Connects Mar. 26 *Ex Parte* at 3.

²¹ NCTA Petition at 9-27. See *Ala. Cable Telecomms. Ass'n v. Ala. Power Co.*, File No. PA 00-003, Order, 16 FCC Rcd 12209, para. 58 (2001) (stating that shifting the cost of a pole replacement to a new attacher “increases the utility’s asset value and defers some of the costs of the physical plant the utility would otherwise be required to construct as part of its core service”). NCTA elaborates that utilities

that attachers can vindicate their pole attachment rights in a timely manner through the Commission's complaint processes.²²

ACA Connects agrees with NCTA that the Commission must take action now on its pole attachment rules to resolve utility pole replacement fee issues and spur deployment to more people, more quickly, and more efficiently. As NCTA explains, “[a] fair and economically principled allocation of pole replacement costs attributes to the attacher responsibility for the costs it actually causes the utility to incur, such that the pole owner is made whole by the new attacher, and attributes to the utility the capital costs it would have otherwise incurred in the

routinely incur pole replacement costs, whether prompted by a new attachment request or not, and derive significant benefits from replaced poles. NCTA highlights that section 224 of the Communications Act requires that all make-ready charges imposed by utilities – including those related to pole replacements – must be just and reasonable and utilities cannot recover make-ready costs from new attachers that the new attachers did not actually cause. NCTA also highlights that section 1.1408 of the Commission's rules governing the modification of network facilities through pole replacements and other work explicitly mandates that all parties directly benefitting from a modification must pay a proportionate share of the modification's costs, which includes pole replacements. NCTA therefore argues that a utility receives an unlawful windfall when it uses a new attachment request as an opportunity to try and shift in their entirety the pole replacement and upgrade costs to the new attacher, especially where poles are fully depreciated or nearly so. NCTA asserts that the requested clarification will spur network investment by fairly allocating pole replacement costs between the utility and new attacher and ensuring that the new attacher only will be responsible for the incremental costs it actually causes as a result of its attachment. NCTA submits that such incremental costs normally will entail no more than the costs of advancing in time the replacement of an existing pole – and those costs will be zero where the pole is already fully depreciated and/or scheduled for replacement at the time of the new attacher's request – unless a utility can clearly demonstrate other specific incremental costs caused by a new attachment.

²² *Id.* at 27-29. NCTA states that many service providers are subject to strict deployment timeframes and the Commission's often indeterminate complaint processes may unduly delay necessary buildouts. NCTA therefore requests that the Commission declare that it will prioritize resolving pole attachment complaints related to broadband deployment in unserved areas by including such disputes on its Accelerated Docket with expedited procedural timelines and remedies. NCTA notes that new attachers currently cannot exercise self-help and complete pole replacement work themselves when faced with utility pole access delays. Thus, NCTA further requests that the Commission clarify that it may order a utility pole owner to complete a pole replacement within a specified timeframe or designate an authorized contractor to do so as part of the relief provided in a successful pole attachment complaint. NCTA concludes its Petition by emphasizing that the Commission wields broad authority to issue the requested clarifications to remove any remaining uncertainty regarding the proper allocation of pole replacement costs and reduce the barriers to deployment posed by unjust and unreasonable utility pole replacement fees.

absence of the attachments.”²³ Based on that principle, we urge the Commission to adopt rules that codify or affirm the following policies:

- A utility may not assess fees for pole replacement if there is not “insufficient capacity” on an existing pole, as that term is used in the Commission’s rules and orders;
- Where an existing pole is deteriorated such that its structure strength is 2/3 of that required when installed (as per NESC Table 261-1) or is scheduled to be replaced by the utility as part of its regular maintenance (*i.e.*, a pole that the utility has “red tagged”), a utility that puts in a new pole to accommodate a new attachment request may not charge the new attacher to replace the pole, including to move attachments to the new pole or remove the old pole;
- For poles that have remaining useful life but “insufficient capacity,” a utility that puts in a pole to accommodate a new attachment request may charge the new attacher a make-ready fee only to recover (i) the remaining net book value, if any, of the existing (to be replaced) pole less salvage value (ii) the incremental costs of installing a pole larger than the existing pole to accommodate the new attachment; and (iii) a proportion of the costs to transfer existing electrical attachments to the new pole that is equal to the percentage of the original net book value that remains in the pole;
- Where a make-ready cost estimate includes pole replacement costs, a utility is required to disclose to the new attacher sufficient information about the condition of the poles and the attachments thereto at issue to ensure that pole replacement costs are being allocated justly and reasonably and consistent with the other rules proposes herein;

²³ NCTA Petition at 23.

- Where a pole is being replaced, a new attacher shall not be charged any portion of the cost of moving the attachment of a communications provider that has a pre-existing violation on that pole;
- Utilities shall comply with make-ready timelines and processes for pole replacements; and
- Make-ready costs paid by a new attacher in connection with a pole replacement that relates to an incremental increase in pole size may not be included in a utility's corresponding pole line capital account.²⁴

In addition, we support adoption of NCTA's request for expedited resolution of pole attachments complaints in unserved areas, but request that the Commission extend this treatment to pole attachment complaints generally.

II. POLE REPLACEMENT FEES ARE OFTEN UNJUST AND UNREASONABLE, HINDERING THE DEPLOYMENT OF CABLE, TELECOMMUNICATIONS, AND COMMINGLED BROADBAND NETWORKS

The NCTA Petition demonstrates that utility pole owners often impose unjust and unreasonable pole replacement fees on new attachers, hindering the deployment of cable, telecommunications, and comingled broadband networks. NCTA states that its members

²⁴ This outcome would be consistent with the Report and Order issued in this docket, in which the Commission amended its rules to "exclude capital expenses already recovered via non-recurring make-ready fees from recurring pole attachment rates." See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, FCC 17-154 at ¶ 7; see also 47 C.F.R. § 1.1409(c). Addressing the matter of double recovery, the FCC "reiterate[d] and emphasize[d] longstanding FCC precedent . . . that 'where a utility has been directly reimbursed by an operator for non-recurring costs, including plant, such costs must be subtracted from the utility's corresponding pole line capital account to insure that...operators are not charged twice for the same cost. Since that time, the FCC has made clear that 'make-ready costs are non-recurring costs for which the utility is directly compensated and as such are excluded from expenses in rate calculation. Nonetheless, the record demonstrates that not all attachers benefit from lower rates in these circumstances, in part because the rules do not explicitly require utilities to exclude already-reimbursed capital costs from their pole attachment rates.'" *Id.*, quoting *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Second Report and Order, 72 FCC 2d 59, 72, ¶ 27 (1979) and *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, 6471, ¶ 28 (2000).

regularly face demands by utilities that they pay the full cost of replacing poles before they are allowed to deploy new attachments.²⁵ NCTA asserts that utilities make such demands even though they would have to replace the poles in the near future in the absence of the new attachment or should have replaced the poles already to make necessary upgrades or correct existing violations.²⁶ NCTA notes that such unwarranted pole replacement fees only add to the hurdles faced by service providers in deploying networks to reach unserved Americans.²⁷

As NCTA explains, the pole replacement fees imposed by utilities can be significant, especially in unserved areas where available infrastructure frequently is nearing the end of its useful life.²⁸ As examples, NCTA cites one member's broadband deployment project where one out of every twelve poles required replacement as well as another project where pole replacement charges alone accounted for approximately 25 percent of the total deployment costs.²⁹ Critically, NCTA submits that the pole replacement fees imposed by utilities frequently include not only the cost of a new pole but also the cost of transferring all existing facilities on the old pole to the new pole, which can be substantial.³⁰ NCTA also submits that the outsized leverage held by utilities over pole access, combined with the time and expense necessary to bring a Commission pole attachment complaint, often results in new attachers casting aside legitimate complaints and agreeing to bear the full cost of pole replacements to ensure buildouts stay on schedule and meet required deployment milestones.³¹ Accordingly, NCTA asserts that

²⁵ *Id.* at 8.

²⁶ *Id.*

²⁷ *Id.* at 3-4.

²⁸ *Id.* at 5. See ACA Connects Comments at 49 (noting that the costs of pole replacement often far exceed the costs of a new attachment on an existing pole).

²⁹ NCTA Comments at 6.

³⁰ *Id.* at 9.

³¹ *Id.* at 30-31.

unjust and unreasonable utility pole replacement fees divert resources better spent on new buildouts, undermining the Commission’s goal of facilitating the deployment of cable, telecommunications, and commingled broadband networks to all Americans.³²

NCTA’s concerns echo those raised in the docket by ACA Connects and others. As ACA Connects explained, the Commission’s current case-by-case approach for determining valid make-ready charges has created a “regulatory gap” exploited by utilities when assessing fees on new attachers.³³ Like NCTA, ACA Connects members and other service providers reported that some utilities inflate their make-ready charges by including costs for work unrelated to their attachments, including for pole replacement work.³⁴ For example, one ACA Connects member stated that utilities have tried to charge it to replace half or more of the poles affected by a new attachment request, totaling tens of thousands of dollars in make-ready fees per project. These fees alone regularly exceeded the ACA Connects member’s estimated return on investment, resulting in the member forgoing buildouts entirely or engaging in more expensive underground deployments to avoid unjust and unreasonable make-ready charges.³⁵ To add insult to injury, ACA Connects and others noted, the need for utility pole replacements, and the resulting make-ready fees imposed on new attachers, often result from long-deferred pole maintenance or even safety violations on “red-tagged” poles caused by existing attachers

³² *Id.* at 9.

³³ ACA Connects Aug. 3 *Ex Parte* at 5; *see also* ACA Connects Mar. 8 *Ex Parte* at 5.

³⁴ ACA Connects Comments at 22-23; ACA Connects Reply Comments at 28-33; ACA Connects Aug. 3 *Ex Parte* at 5; ACA Connects Sep. 14 *Ex Parte* at 7; ACA Connects Mar. 8 *Ex Parte* at 5; ACA Connects Mar. 26 *Ex Parte* at 3-4. *See, e.g.*, Initial Comments of Lightower Fiber Networks, WC Docket No. 17-84, 12-13 (June 15, 2017) (“Lightower Comments”); Comments of Lumos Networks Inc., *et al.*, WC Docket No. 17-84, 15-16 (June 15, 2017) (“Lumos Comments”); Comments of NCTA –The Internet & Television Association, WC Docket No. 17-84, *et al.*, 11 (June 15, 2017) (“NCTA Comments”).

³⁵ *See* ACA Connects Mar. 26 *Ex Parte* at 3 (providing examples of service provider buildouts abandoned or undergrounded due to unexpectedly high make-ready estimates for work unrelated to new attachments); ACA Connects Comments at 48 (“These extra make-ready charges add significantly to attacher construction costs and may even cause attachers to build expensive underground routes instead.”).

or the utility itself.³⁶ For instance, an ACA Connects member stated it was charged for the replacement of a failing 75-year old pole,³⁷ while another member received a make-ready estimate that included costs to replace poles that were already failing, such that the member's new attachments were a mere pretext to replace the poles at the new attacher's expense.³⁸

The record is clear that such fees violate the Commission's longstanding prohibition on charging new attachers for the correction of violations unrelated to the new attachment.³⁹ Over 16 years ago, the Commission found that the charges Georgia Power Company billed Knology for the correction of safety violations caused by existing pole attachers prior to the make-ready work on Knology's attachments represented an unjust and unreasonable practice.⁴⁰ More recently, in the 2018 Order in this docket, the Commission stated that "new attachers are not responsible for preexisting violations"⁴¹ and that "[w]hen a pole has been red tagged, new attachers are not responsible for the cost of pole replacement."⁴² Such fees also may result in a

³⁶ ACA Connects Comments at 48-49; ACA Connects Reply Comments at 29; ACA Connects Aug. 3 *Ex Parte* at 5; ACA Connects Sep. 14 *Ex Parte* at 7; ACA Connects Mar. 26 *Ex Parte* at 3. See Lightower Comments at 12-13 (stating that utilities often will prohibit new attachments until Lightower agrees to pay for the correction of preexisting violations on poles); Lumos Comments at 15 ("[R]ather than charge the existing attacher for remediation of this safety violation, the pole owner takes the path of least resistance and simply charges the new attacher.").

³⁷ ACA Connects Sep. 14 *Ex Parte* at 7.

³⁸ ACA Connects Comments at 22.

³⁹ See 2018 Order at para. 121 (stating that while a new attachment "may precipitate correction of the preexisting violation....[h]olding the new attacher liable for preexisting violations unfairly penalizes the new attacher for problems it did not cause, thereby deterring deployment."); *Kansas City Cable Partners v. Kansas City Power & Light Co.*, File No. PA 99-001, *et al.*, Consolidated Order, 14 FCC Rcd 11599, para. 19 (1999) (finding pole owner responsible for costs associated with correction of preexisting safety code violation); see also 47 C.F.R. § 1.1411(c)(2) ("A utility may not deny the new attacher pole access based on a preexisting violation not caused by any prior attachments of the new attacher.").

⁴⁰ *Knology, Inc. v. Ga. Power Co.*, File No. PA 01-006, 18 FCC Rcd 24615, paras. 36-41 (2003) ("*Knology*").

⁴¹ See 2018 Order at para. 121 (internal formatting omitted).

⁴² 2018 Report and Order at para. 121, n.450.

double-collection by utilities, as they already charge for regular pole maintenance as part of their rental fees.⁴³

The Commission's previous efforts to address unjust and unreasonable pole replacement charges in complaint proceedings and in the 2018 Order have made some difference, but problems persist. Indeed, Crown Castle filed a complaint just last year stating that a utility refused to allow it to attach to "red tagged" poles until Crown Castle first paid to replace or reinforce those poles.⁴⁴ Like the examples cited by NCTA, ACA Connects, and other service providers, the conditions that caused the utility to tag the poles for replacement existed prior to and were unrelated to the new attachment request.⁴⁵ Further, AT&T filed a complaint just two months ago challenging utility efforts to assess replacement costs for poles the utility itself abandoned to avoid paying pole disposal costs.⁴⁶ These complaints show that utilities will continue to demand pole replacement fees from new attachers unrelated to the actual incremental costs the new attachers cause unless the Commission takes action to address this unjust and unreasonable practice.

⁴³ ACA Connects Comments at 23; ACA Connects Reply Comments at 33; ACA Connects Sep. 14 *Ex Parte* at 7. See NCTA Comments at 11 (stating some utilities assess fees "for the pole owner's administrative costs that are already included in the pole rental rate").

⁴⁴ *Crown Castle Fiber LLC v. Commonwealth Edison Co.*, FCC Proceeding No. 19-169, *et al.*, Pole Attachment Complaint for Denial of Access, paras. 121-34 (June 19, 2019) ("Crown Castle Complaint"). The Commission subsequently dismissed the Crown Castle Complaint at the request of the parties, who reached a settlement. See *Crown Castle Fiber LLC v. Commonwealth Edison Co.*, FCC Proceeding No. 19-169, *et al.*, Order of Dismissal, 35 FCC Rcd 2733 (2020).

⁴⁵ Crown Castle Complaint at para. 127.

⁴⁶ *Bellsouth Telecomms., LLC d/b/a AT&T Fla. v. Fla. Power & Light Co.*, FCC Proceeding No. 20-214, Pole Attachment Complaint, para. 26 (July 6, 2020). See *Zito Media, L.P. v. Pa. Elec. Co.*, FCC Proceeding No. 17-316, Pole Attachment Complaint, 4 (Nov. 13, 2017) (alleging utility attempted to shift pole replacement "betterment" costs to new attacher unrelated to the new attachment). The Commission subsequently dismissed the Zito Media complaint at the request of the parties, who reached a settlement. See *Zito Media, L.P. v. Pa. Elec. Co.*, FCC Proceeding No. 17-316, Order of Dismissal, 34 FCC Rcd 2817 (2019).

As NCTA and ACA Connects note, it does not have to be – and should not be – this way. NCTA points out that some States require utility pole owners to allocate pole replacement costs proportionately between pole owners and new attachers, ensuring new attachers are charged only for the incremental costs they actually cause as a result of their attachments.⁴⁷ Such cost allocation rules axiomatically improve make-ready cost transparency, allowing service providers to better plan and implement buildouts.⁴⁸ NCTA also observes that some States allow attachers to use self-help to complete pole replacements, thereby avoiding pole replacement fee disputes altogether in some cases.⁴⁹ ACA Connects similarly demonstrated that multiple States already prohibit utility make-ready charges unrelated to accommodating new attachments.⁵⁰

Underscoring the justness and reasonableness of the relief ACA Connects seeks, some utilities years ago adopted policies excluding make-ready charges unrelated to a new attachment from their make-ready estimates and fees.⁵¹ In fact, some utilities asserted that pole replacement and maintenance costs unrelated to new attachments should never be included in the make-ready charges assessed on new attachers.⁵² Thus, the record is replete with potential solutions utilities have found acceptable to address unjust and unreasonable utility pole

⁴⁷ NCTA Petition at 26-27.

⁴⁸ ACA Connects Sep. 14 *Ex Parte* at 7. See ACA Connects Mar. 26 *Ex Parte* at 3 (“Predictability in deployment costs is critical to ACA members when determining the size, location, and timing of buildouts.”).

⁴⁹ NCTA Petition at 31.

⁵⁰ ACA Connects Comments at 48. See ACA Connects Reply Comments at 30.

⁵¹ ACA Connects Comments at 48-49; ACA Connects Reply Comments at 32-33. See, e.g., Joint Comments of Centerpoint Energy Houston Electric, LLC, Dominion Energy Virginia, and Florida Power & Light Company, WC Docket No. 17-84, 21 (June 15, 2017) (“POWER Coalition Comments”); Joint Comments of Alliant Energy Corporation, WEC Energy Group, Inc., and XCEL Energy Services Inc., WC Docket No. 17-84, 41 (June 15, 2017); Comments of the Utilities Technology Council, WC Docket No. 17-84, 18 (June 15, 2017).

⁵² See POWER Coalition Comments at 20; Comments of Puget Sound Energy, WC Docket No. 17-84, 7 (June 15, 2017); Comments of CPS Energy, WT Docket No. 17-84, 9 (June 15, 2017).

replacement fees some utilities continue to charge, and the Commission should use such models as a guide when taking action on the NCTA Petition. Such action is urgently needed.

ACA Connects and others have also observed that utilities regularly suspend all work on pole attachment requests until the new attacher accedes to unjust and unreasonable pole replacement fees.⁵³ ACA Connects demonstrated that this practice allows utilities to unlawfully externalize their own pole replacement and maintenance expenses and increases make-ready costs for new attachers, reducing providers' resources for additional deployments.⁵⁴ ACA Connects and others concurred with NCTA that the Commission's complex pole attachment complaint procedures only exacerbate the situation and frequently force service providers to accept unjust and unreasonable pole attachment fees to avoid costly and protracted litigation.⁵⁵

As NCTA highlights, the ongoing COVID-19 pandemic has underscored the need for reliable, high-performance networks to support telemedicine, telelearning, and teleworking applications.⁵⁶ Consequently, the Commission should act now to adopt rules to eliminate utility pole replacement fee issues to ensure all Americans can access essential services in this unprecedented time and in the future.

III. THE COMMISSION SHOULD CLARIFY, WITH SPECIFICITY, THE OBLIGATIONS OF POLE OWNERS TO SHARE PROPORTIONATELY IN POLE REPLACEMENT COSTS

The record in this proceeding makes clear that communications providers are often forced to bear unjust and unreasonable make-ready charges associated with pole

⁵³ ACA Connects Reply Comments at 31; Lighttower Comments at 12.

⁵⁴ ACA Connects Reply Comments at 31-32. See ACA Connects Aug. 3 *Ex Parte* at 5; ACA Connects Mar. 8 *Ex Parte* at 5.

⁵⁵ ACA Connects Comments at 51-53; ACA Connects Reply Comments at 42-43. See, e.g., Comments of the USTelecom Association, WC Docket No. 17-84, 19 (June 15, 2017); Comments of CenturyLink, WC Docket No. 17-84, 22 (June 15, 2017); NCTA Comments at 9.

⁵⁶ NCTA Petition at 2.

replacements, including, but not only, when expanding their networks into unserved areas. ACA Connects and others demonstrated the urgency of this problem in earlier stages of this proceeding. NCTA's petition underscores that the need for Commission action remains. Accordingly, the Commission should dispel the uncertainty and unfair practices that persist in the marketplace by establishing clear requirements for pole owners on setting just and reasonable pole replacement fees and processes, as explained below.

A. The Commission Should Affirm That an Attacher Shall Not Bear the Costs of a Pole Replacement That is Unnecessary to Accommodate its Attachment

As an initial matter, the Commission should make clear that an attacher does not bear any of the costs of a pole replacement where sufficient capacity exists on a pole and the pole is in good enough condition to accommodate its attachment. This clarification flows directly from Commission precedent⁵⁷ and finds support in the Section 1.102(o) definition of "make ready," which includes only work that is performed "to accommodate additional facilities on a utility pole."⁵⁸ Where a pole replacement does not qualify as "make ready," at least with respect to an attacher, it would be unjust and unreasonable for the attacher to bear any "make-ready charges" in connection with that pole replacement.

B. The Commission Should Bar Pole Owners from Charging Attachers "Unjust and Unreasonable" Fees to Replace Defective Poles and from Unreasonably Delaying Replacement of Such Poles

As discussed earlier, ACA Connects members and others have found that pole owners often require prospective attachers to pay for replacement of poles that have been (or should

⁵⁷ See, e.g., 2011 Order, para. 231 ("[A] pole does not have insufficient capacity where a request for attachment could be accommodated using traditional methods of attachment. Rearrangement of facilities on a pole is one of these methods, and nothing in the statute suggests that, for purposes of gauging capacity, rearrangement of facilities in the electric space should be treated differently from rearrangement of facilities in the communications space. Thus, where rearrangement of a pole's facilities—whether in the communications space or the electric space—can accommodate an attachment, there is not 'insufficient capacity' under section 224(f)(2).").

⁵⁸ 47 CFR § 1.402(o).

have been) marked for replacement for their failure to meet safety or reliability standards. In effect, this practice enables a pole owner to transfer to another party—the new attacher—the financial responsibility for maintenance and improvement of its own assets. Moreover, the prospect of billing a future attacher for replacement of a deficient pole creates an incentive for the pole owner to defer this necessary maintenance work, to the detriment of public safety. For these reasons, the practice is inherently unjust and unreasonable. Indeed, the Commission clarified in the 2018 Order that new attachers “are not responsible for the costs associated with bringing poles . . . into compliance with current safety and pole owner construction standards” and that “[w]hen a pole has been red tagged, new attachers are not responsible for the cost of replacement.”⁵⁹

The Commission should reaffirm this ruling and clarify that it applies not only to poles that have been “red tagged” *per se*, but to any pole that fails to meet applicable safety and reliability standards. Consistent with NESC guidelines, the Commission should adopt the presumption that a pole falls in this category if its structural strength is less than 2/3 of that required by applicable codes or the utility’s own standards when the pole was installed.⁶⁰ When applied to this broader class of poles, the logic of the Commission’s prior ruling remains the same: the party that caused the pole to be noncompliant must bear the costs to fix the violation.⁶¹

⁵⁹ 2018 Order, para 121, n.450.

⁶⁰ See National Electrical Safety Code at 235, Tbl 261-1, “Strength factors for structure, crossarms, braces, support hardware, guys, foundations and anchors” (2016).

⁶¹ As explained below, we believe it would be reasonable for an attacher to be assessed the incremental costs of installing a pole that is larger than the pole being replaced. See *infra* page 18.

C. For Poles That Have Remaining Useful Life but “Insufficient Capacity,” the Commission Should Provide That an Attacher Must Bear Only the Specific Costs It Causes by Virtue of Making a Pole Access Request That Initiates Replacement of a Pole

Utility poles are assets with finite lifespans and must be replaced periodically in the normal course of business. For this reason, the mere fact that a pole must be replaced to make way for an attachment does not mean that the attaching party *caused* the replacement. Rather, as explained in NCTA’s Petition, an attacher’s request for pole access may expedite the timeline on which a pole owner replaces a pole, but the owner would have needed to replace the pole in due course. The pole owner would therefore have borne costs to replace the pole even in the absence of the attachment; in other words, it bears costs to replace the pole that an attacher cannot reasonably be deemed to have “caused,” even if the replacement was initiated by the attacher’s request. The attacher may be causally responsible for some aspects of the pole replacement, e.g., its timing, but not for the replacement itself.

We thus agree with NCTA that a “just and reasonable” allocation of pole replacement costs cannot allocate these costs in their entirety (if at all) to an attaching party whose request for pole access initiates replacement of a pole. Rather, the attaching party should bear only any incremental costs it “causes” in replacing the pole, which are limited and detailed below.

Building on NCTA’s analysis, we encourage the Commission to specify that the incremental pole replacement costs that an attacher causes, and for which it is financially responsible, are limited to the following:

- *Timing Costs.* As NCTA observes in its Petition, the timing of a pole replacement can have an effect on the costs of that replacement. If a pole is replaced before it has fully depreciated, the owner will lose the value that remained in the pole. We thus agree with NCTA that an attacher whose request for pole access initiates replacement of a pole before the pole has fully depreciated should compensate the pole owner for that lost

value. The proper basis for assessing that value is the remaining net book value of the pole.

- *Additional Capacity Costs.* When a pole is replaced to accommodate a new attachment, it may be necessary for the new pole to have more capacity than the pole being replaced. In such cases, it is reasonable for the attacher to bear the incremental costs of installing a larger pole, but only to the extent the incurrence of such costs is actually necessary to accommodate the attachment, i.e., there is “insufficient capacity” as the Commission defines that term on the current pole.⁶²
- *Transfer of Existing Attachments.* In the interest of implementing a fair and administrable rule, the Commission should provide that an attacher must bear a portion of the costs of transferring existing facilities to the new pole that is the same as the fraction of the original net book value that remains in the pole being replaced. The new attacher also should cover its proportionate share of removing the existing pole less salvage value.

This breakdown of costs reflects the underlying fact that owning and maintaining poles, including periodic pole replacements, are a standard part of utilities’ businesses. Because pole access requests do not cause replacements, but at most may accelerate the schedule on which they occur in given situations, the pole owner should bear the associated costs other than those specific costs that the attaching party causes. This is a fair outcome because, as NCTA explains, exchanging older poles for newer ones confers benefits on the pole owner.⁶³ Because all poles have finite lives, the replacement of a pole enables a utility to defer — for many

⁶² If a pole owner installs a larger pole for its own purposes, e.g., to provide room for its future attachments, it should bear the incremental costs.

⁶³ In that regard, a pole owner is among the parties that “directly benefit” from a pole replacement. See 47 CFR § 1.1408(b); see also NCTA Petition at 20-22.

decades — another replacement of that asset. With that benefit comes the lower maintenance costs of a newer pole, and a variety of opportunities to bring in additional revenues.⁶⁴

D. Where a Make-Ready Cost Estimate Includes Pole Replacement Costs, a Utility Should Be Required to Disclose Sufficient Information About the Poles at Issue to Ensure That Pole Replacement Costs Are Being Allocated Justly and Reasonably

Under the pole attachment framework that governs attachments involving pole replacements,⁶⁵ a utility “shall present to a new attacher a detailed, itemized estimate, on a pole-by-pole basis where requested, of charges to perform all necessary make-ready. . . .”⁶⁶ When such charges include costs to replace poles, the Commission should require a utility to disclose sufficient information about the condition of such poles and the attachments thereto to enable the attacher to verify that the charges it is being assessed are just and reasonable and consistent with the other rules proposes herein. Among other things, a utility should disclose whether any such poles have been red-tagged or if they are otherwise, to the best of the utility’s knowledge, noncompliant with applicable safety standards. Where a utility contends that there is undepreciated value in a pole being replaced, the utility should disclose its estimate of the remaining net book value of the pole and the basis for that estimate. Requiring utilities to be transparent about the state of their poles will help ensure that attachers are not improperly charged for the pole replacement costs that should be borne by the utility.⁶⁷

⁶⁴ See NCTA Petition at 22.

⁶⁵ Because pole replacements are “complex make-ready,” they are not eligible for “one-touch make ready.” See 2018 Order, para. 18; § 1.1411(j).

⁶⁶ See 47 CFR § 1.1411(d).

⁶⁷ The Commission also should require utilities to provide such information whether or not there is existing capacity on the pole being replaced to accommodate the new attachment. As explained below, the mere fact that a pole must be replaced to make room for a new attachment does not mean the attacher *caused* that replacement such that the attacher should bear the costs of the replacement in their entirety.

E. The Commission Should Clarify That a New Attacher is Not Responsible for the Costs of Moving an Attachment of a Communications Provider That the Utility Identifies as Having a Preexisting Violation on the Pole

The 2018 Order reaffirms the long-standing principle that a new attacher is not responsible for correcting the preexisting violations of other attachers on a pole.⁶⁸ The Commission should articulate how this policy applies in the context of pole replacements. In particular, it should affirm that an incoming attacher shall not bear the costs to transfer to a new pole the facilities of any communications provider that has a preexisting violation on the pole being replaced, including where that violation could have been corrected through rearrangement. Rather, the noncompliant attacher should bear these costs.⁶⁹ Moreover, where a new attachment could have been accommodated on a pole but for a preexisting violation, the noncompliant attacher should be deemed to have caused the pole to be replaced and should “stand in the shoes of the new attacher” and bear the costs the new attacher would have incurred in their entirety.

F. The Commission Should Enforce Made-Ready Timelines and Processes in the Context of Pole Replacements

As NCTA explains in its Petition, pole replacements are a form of complex make-ready for which “one touch make ready” is unavailable, and the Commission concluded in the 2018 Order that the self-help remedy is inappropriate because of “the particularly disruptive nature” of pole replacement work.⁷⁰ Hence, the pole owner is the party that must assume responsibility for replacing a pole when necessary to accommodate an attachment request. However, the

⁶⁸ See 2018 Order, para. 121. See also *Kansas City Cable Partners*.

⁶⁹ A noncompliant attacher that takes advantage of a pole replacement as an opportunity to fix a preexisting violation should bear a proportionate share of the costs to replace the pole. See 47 CFR 1.1408(b) (“A party with a preexisting attachment 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.”).

⁷⁰ 2018 Order, para. 101. ACA Connects notes that its members frequently install poles, and pole owners should be encouraged to work with attachers if they could facilitate pole replacement.

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 1.411(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.⁷¹ The Commission should affirm that pole replacements, when required as part of make-ready, must be completed within this established timeline.⁷² 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.

G. The Commission Should Ensure that a Pole Owner May Not “Double-Recover” from an Attacher in the Form of Pole Rental Fees any Capital Costs the Attacher Was Required to Bear in Replacing a Pole

In the first Report and Order in this proceeding, the Commission codified as a rule the long-established principle that pole rental rates must exclude any charges the utility has already recovered from an attacher in the form of make-ready charges. We urge the Commission to clarify that this ruling applies in the context of pole replacement make-ready charges, namely that any incremental costs the attacher bears to install a pole that is larger than the pole being replaced are excluded from the basis by which pole rental rates are established. Specifically, the Commission should make explicit that such charges must be excluded from a pole owner's pole line capital account.

⁷¹ 47 CFR § 1.1411(f).

⁷² Section 1.1411(h) confers on a utility the right to deviate from the applicable make-ready timelines for “good and sufficient cause,” but only under certain conditions specified in the rule. These conditions should apply in the context of pole replacements to the same extent they apply in other make-ready contexts.

IV. THE COMMISSION CAN MOVE FORWARD IMMEDIATELY WITH THE ADOPTION OF FINAL RULES THAT ENSURE “JUST AND REASONABLE” ALLOCATION OF POLE REPLACEMENT COSTS

In the NPRM, the Commission sought comment on comprehensive reform of its pole attachment rules, including, specifically, on the rates that pole owners are permitted to charge for various types of make-ready work. In a line of questions soliciting input “on reasonable ways to limit the make-ready fees charged by utilities to new attachers,” the Commission asked, in particular, whether “codifying the holding that new attachers are responsible only for the cost of make-ready work made necessary because of their attachments [would] help to ensure that make-ready costs are just and reasonable.”⁷³

This series of questions prompted responses from parties addressing whether the Commission should adopt rules placing limits on make-ready charges and the appropriate contents of such rules. ACA Connects, among others, advocated for rules that prohibit pole owners from charging prospective attachers excessive fees for pole replacements. Utilities submitted comments in response defending their existing practices with regard to make-ready charges and dismissing the need for Commission intervention. Since the issuance of the 2018 Order, ACA Connects has continued to document the unjust and unreasonable fees its members are charged for pole replacements in a series of *ex parte* filings.⁷⁴ NCTA’s petition presents yet more evidence that this problem remains both widespread and severe.

In adopting the 2018 Order, the Commission made clear that the Order left open “outstanding issues” that the Commission resolved to take up in the future if and when circumstances warrant. This is by no means an unusual way of proceeding; there is ample precedent for the adoption of rules in multiple stages that arise from a common notice of

⁷³ See NPRM, para. 35.

⁷⁴ See *supra* note 12.

proposed rulemaking. Indeed, the 2018 Order was itself the *Third* Report and Order in this proceeding. Because the Commission provided adequate notice in the NPRM it was considering the adoption to rules to prevent unjust and unreasonable charges for pole replacements (among other forms of make ready), the Commission has laid the necessary foundation to move directly to the adoption of final rules based on the record that has developed in response.⁷⁵

V. THE COMMISSION SHOULD EXPEDITE COMPLAINTS INVOLVING DISPUTES REGARDING POLE ACCESS

In its Petition, NCTA proposes that complaints regarding pole access disputes that arise in unserved areas should receive expedited consideration under the Accelerated Docket. As NCTA notes, clarification of utilities' obligations to share in pole replacement fees will mean nothing if new attachers cannot vindicate their pole attachment rights in a timely manner through the Commission's complaint processes.⁷⁶ NCTA states that many service providers are subject to strict deployment timeframes and the Commission's often indeterminate complaint processes may unduly delay necessary buildouts.⁷⁷ NCTA therefore requests that the Commission declare that it will prioritize resolving pole attachment complaints related to broadband deployment in unserved areas by including such disputes on its Accelerated Docket with its expedited procedural timelines and remedies.⁷⁸

We agree with NCTA's analysis and in fact urge the Commission to extend Accelerated Docket treatment broadly to all pole access disputes. Unwarranted delays in accessing poles

⁷⁵ To be clear, NCTA's request for declaratory ruling has merit, although any Commission action to address the methodology for determining pole replacement fees should not be limited to unserved areas. However the Commission proceeds, it is amply justified in taking immediate action to ensure that communications providers seeking to deploy advanced services are not unfairly saddled with the costs of maintaining and upgrading investor-owned utilities' pole infrastructure.

⁷⁶ NCTA Petition at 27-29.

⁷⁷ *Id.*

⁷⁸ *Id.*

continue to be a problem in a diverse array of deployment circumstances, despite the important strides made in the Commission’s rules to expedite these timelines. While 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.⁷⁹

⁷⁹ Certain types of disputes need not be accelerated, such as disputes over annual attachments rates or billing for them.

VI. CONCLUSION

ACA Connects appreciates the opportunity to participate in this proceeding, and it encourages the Commission to take its comments into consideration and adopt its proposed framework for addressing problems confronted by new attachers when utilities replace poles.

Respectfully submitted,

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