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INSTITUTE

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December 17, 2020

*Via Electronic Filing*

Marlene H. Dortch, Secretary  
Federal Communications Commission  
45 L Street, NE  
Washington, DC 20554

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

Dear Ms. Dortch:

On December 15, 2020, Aryeh Fishman, Associate General Counsel, Regulatory Affairs, for the Edison Electric Institute (“EEI”), Brian O’Hara, Senior Director Regulatory Issues, Telecommunications & Broadband for the National Rural Electric Cooperative Association (“NRECA”), Tom Breuckman, Manager, Facility Attachments and Kelly Everhart, Assistant General Counsel for Xcel Energy Services (“Xcel Energy”), David Rines of Lerman Senter, counsel to Xcel Energy, met by phone with Adam Copeland, Michael Ray, Liz Drogula, and Michael Nemchik of the Wireline Competition Bureau (“WCB”) to urge the Commission to deny the Petition for Declaratory Ruling submitted by NCTA – the Internet & Television Association (“NCTA Petition”),<sup>1</sup> as well as other proposed approaches, such as whether to proceed incrementally on the petitioner’s request<sup>2</sup> or to declare that the scope of its ruling on pole replacement costs applies to every pole over which the Commission has jurisdiction.<sup>3</sup> In addition to our objections on the merits of the NCTA Petition, we indicated agreement with comments from a cross-section of industries that the NCTA Petition is procedurally flawed.<sup>4</sup>

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<sup>1</sup> While our discussion focused on the proposals to shift the costs of poles replaced for reasons on insufficient capacity to electric customers, we also reiterated our opposition to self-help for pole replacements, reminding WCB staff that the safety and reliability rationales against self-help for pole replacements is as relevant today as in the past.

<sup>2</sup> See, e.g., Letter from Brian Hurley, Vice President of Regulatory Affairs, ACA Connects to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed Oct. 20, 2020).

<sup>3</sup> See, e.g., Comments of INCOMPAS, WC Docket No. 17-84 (filed Sept. 2, 2020).

<sup>4</sup> See Letter from Kayla Gardner, Director, Policy & Advocacy, USTelecom – the Broadband Association (“USTelecom”), to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed Nov. 18, 2020); Letter from Randy Clarke, Vice President, Federal Regulatory Affairs, Lumen, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed Oct. 26, 2020);

We explained that the electric industry supports the Commission’s national goals for the deployment of broadband and Fifth Generation (“5G”) wireless networks. Electric companies not only have provided access to pole infrastructure, consistent with requirements of Section 224 of the Communications Act,<sup>5</sup> but they also have voluntarily developed innovative attachment solutions that enable communications service providers to access a broader selection of utility-owned poles at reasonable rates. NRECA discussed how many cooperatives are beginning to offer broadband and EEI discussed how some investor owned utilities are also looking at opportunities to assist in bringing broadband to unserved and underserved communities in their service territory.<sup>6</sup>

The Commission’s rules for make-ready, including those addressing cost responsibility for pole replacements, already facilitate broadband deployment. Make-ready, including pole replacements, is not a profit center for utilities; therefore, having certainty about r cost recovery is a significant factor that utilities must consider when deciding whether to voluntarily replace poles that would otherwise not need to be replaced to facilitate a broadband provider’s deployment of additional attachments. Although utilities cannot be required to expand their systems or replace poles, and the Act clearly gives them the right to deny access to their facilities for lack of capacity, over the last number of decades, under these rules, utilities have routinely voluntarily replaced poles to accommodate new attachers.

Given that the actual service life of distribution poles is determined by the condition of the poles and not by age, we discussed how the electric industry invests in and maintains electric distribution infrastructure including distribution poles. We explained that independent of the Commission’s regulation of pole access, electric utilities are highly regulated and have significant incentives to maintain and invest in their distribution infrastructure, including distribution poles. For example, Xcel Energy described how the company has made \$1 billion dollars in capital investments in the last three years to maintain and modernize its distribution system, and plans to spend an additional \$2.7 billion dollars in the next five years.<sup>7</sup>

We also discussed that electric utilities typically have pole inspection and remediation programs in the ordinary course of business. Xcel Energy described how the utility evaluates around 1.5 million poles on a 12-year inspection cycle, where pole condition is evaluated for treatment, reinforcement or replacement. Xcel Energy also explained various treatment options and how poles may be reinforced with trusses to extend the life of the poles, minimizing the requirement for replacement. We explained that poles needing replacement are typically “red-tagged” and replaced within one year. Consequently, it is rare for there to be a need to replace a pole at the time a pole attachment request is made to the utility where the pole is either determined to have a violation or in non-compliant condition or has deteriorated physically to the

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<sup>5</sup> See 47 U.S.C § 224 (the “Act”).

<sup>6</sup> We underscored that when poles need to be changed out to accommodate utility broadband deployment, utilities treat themselves and their partners the same as any third-party attachers.

<sup>7</sup> During this meeting, Xcel Energy provided WCB staff with slides, which are attached with this letter.

point it is determined to be unfit for continued use.<sup>8</sup> Thus, as a result of these investments and efforts, there are rarely issues with the condition of poles or availability of capacity, which directly benefits attaching entities. This is particularly the situation with regard to congestion on the poles in rural areas. For example, Xcel Energy reports that the average number of attachers in the rural parts of its service territory is less than two attachers per pole and most poles can accommodate another attacher without replacement. Furthermore, last year, Xcel Energy reports having approved 12,000 new attachments with less than 100 poles needing replacement due to clearance requirements.

During the meeting, WCB staff asked a question regarding how to assign cost responsibility for poles that are at full-capacity but have deteriorated physically to a point that they are determined to be unfit for continued use and are scheduled for replacement in the ordinary course of business, yet then subject to a request for replacement by a new attacher for reasons of insufficient capacity. We explained that in this infrequent scenario, under the Commission's rules, while the utility may not charge the new attacher to bring the poles into compliance, the practical implication is that the attacher may have to wait for the electric utility to replace the pole according to its particular schedule. This may serve to encourage attachers to negotiate and collaborate with utilities to find a different route or try an engineering alternative to expedite their deployment. To the extent there are disputes over what poles should be red-tagged and/or the cost responsibility for the replacement of these poles, these are highly complex issues that are dependent on the specifics of the deployment and of the individual poles, and thus are appropriately handled in an enforcement proceeding.

In response to an additional question from WCB staff, we clarified that consistent with our comments in this proceeding, the Commission should reject variations on the NCTA proposals such as to declare that the cost of a pole replaced for insufficient capacity must be allocated "proportionately to distinguish between true economic costs with the attachment and the costs associated with "betterment of the utility facilities."<sup>9</sup> In cases of insufficient capacity, where a pole owner requires replacement of a pole with a larger, stronger, or higher class of a pole, such work is performed solely to create capacity for the new attachment. This is not an exclusive modification or an "upgrade" that is unnecessary or unreasonably required to accommodate the new attachment. When there is a need for a pole to be replaced because of lack of capacity, the new pole still must ensure safety, reliability and resiliency. Therefore, to accommodate the new load, the new pole must meet all applicable standards and requirements at the time of installation and the attaching entity is the cost-causer of this work. Under the Commission's policy, in this scenario, because the replacement of the pole is triggered by insufficient capacity, the attacher is the direct beneficiary and may incur up to the full cost of the work that would otherwise not be performed but for its request. Unless the pole owner uses the opportunity to add to or modify its own facility for its own exclusive use, it does not directly benefit from the pole replacement and does not bear any share of the pole replacement costs. In this regard, Congress expected a pole owner only to incur cost if it modified the pole (for

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<sup>8</sup> See Comments of the Edison Electric Institute, National Rural Electric Cooperative Association and Utilities Technology Council, WC Docket No. 17-84 (filed Sept. 2, 2020) at 21.

<sup>9</sup> See Letter of Christopher L. Shipley, Attorney & Public Policy Advisor, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed Dec. 14, 2020).

example, increased height or new class of pole) in a way that was unnecessary to accommodate the attachment and otherwise not required by applicable codes or standards,<sup>10</sup> and the Commission has recognized that if an attacher seeks access to poles without the capacity to accommodate the attachment request, then the cable television company (or any other prospective attacher) would incur the cost of the taller pole.<sup>11</sup>

Finally, we urged the Commission to deny the NCTA petition because the impact of such a policy would impermissibly leave electric utilities with unrecovered capital costs for pole replacement, which is ultimately counter-productive to the Commission's interest in facilitating broadband deployments. As mentioned, currently, electric utilities are typically willing to collaborate with attaching entities to identify alternatives to pole replacements such as rerouting or other make-ready engineering approaches. However, by limiting cost recovery to only the remaining book value of the bare pole, instead of expediting deployments, the Commission will erect a significant financial barrier that a utility – as a regulated entity – would have to carefully evaluate in its approval process, and thus would likely compel a utility to closely analyze the cost feasibility of each pole replacement request, perhaps even on a pole-by-pole basis. The concern is that the NCTA proposal and variations thereto would force an electric utility to divert scarce capital from its own business needs to support the demands of a new attacher, which would raise significant regulatory concerns over the prudence of the investment of utility capital. If a company were to be limited to cost recovery under the NCTA Petition, the very likely result would be that it would no longer be feasible for that company to agree to voluntarily replace poles to expand capacity.

In sum, the Commission should not provide the requested relief in this proceeding as it rests on flawed premises and would not substantially promote broadband. As discussed, the requested relief contradicts the Commission's long-standing policies regarding cost recovery based on cost-causation, including cost recovery of pole modification costs. Furthermore, the requested relief involves complex and specific matters that cannot be summarily addressed through a declaratory order.

Please feel free to contact the undersigned if you have any questions.

Respectfully submitted,

/s/ Aryeh Fishman

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<sup>10</sup> See S. Rep. No. 580, 95<sup>th</sup> Congress 1<sup>st</sup> Sess. 1977, 1978 U.S.C.C.A.N. 109, 110.

<sup>11</sup> See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, at ¶¶ 1211-13 (1996).

/s/ Brian M. O'Hara

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