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

In the Matter of	)	
	)	
Accelerating Wireline Broadband	)	WC Docket No. 17-84
Deployment by removing barriers to	)	
infrastructure investment	)	

REPLY COMMENTS OF THE EDISON ELECTRIC INSTITUTE, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AND UTILITIES TECHNOLOGY COUNCIL

EDISON ELECTRIC INSTITUTE

Aryeh B. Fishman
Associate General Counsel,
Regulatory Legal Affairs
Edison Electric Institute
701 Pennsylvania Avenue NW
Washington, D.C. 20004
202-508-5023

NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION

Brian M. O'Hara
Senior Director Regulatory Issues – Telecom & Broadband
National Rural Electric Cooperative Association
4301 Wilson Blvd.
Arlington, VA 22203
703-907-5798

UTILITIES TECHNOLOGY COUNCIL

Brett Kilbourne
Vice President, Policy, and General Counsel
Utilities Technology Council
2550 South Clark Street, Suite 960
Arlington, VA 22202
202-872-0030

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SUMMARY

The Federal Communications Commission ("FCC" or "Commission") should reject the Petition for Declaratory Ruling filed in this proceeding by NCTA – the Internet & Television Association ("NCTA") as it unreasonably asks the Commission to upend its existing make-ready policies concerning pole replacements to accommodate pole attachment requests. The Commission's current pole replacement policies ensure that utilities receive just compensation for their incremental costs, and administratively shifting these incremental costs to utilities is contrary to the Commission's policy and would have the effect of undermining the Commission's pole attachment rate formulae. Moreover, the Commission's current policy with respect to pole replacements acknowledges that leaving pole owners with unrecovered costs would raise constitutional questions regarding just compensation and create a disincentive for utilities to build taller poles or perform such pole replacements at all.

Comments on the record overwhelmingly demonstrate that NCTA's Petition is flawed and baseless. Comments demonstrate that the Commission has limited jurisdiction with respect to pole replacements. Moreover, these comments show that NCTA's requested relief is contrary to Section 224 of the Communications Act and Section 1.1408 of the Commission's rules regarding the "modification costs." Furthermore, these comments correctly observe that the Petition overreaches in its attempt to supplant the Commission's polices by shifting the incremental costs of pole replacements onto pole owners. The Commission's long-standing cost causation policies require the new attacher to pay for the costs of pole replacements. Moreover, the Commission has already clearly stated that pole owners do not share in the costs of pole modifications merely because they incidentally benefit from additional capacity on the pole. Finally, this is consistent with the Commission's rationale underlying its pole attachment rates,

as well as to encourage pole owners to voluntarily replace poles in order to accommodate new attachments.

In addition to these substantive issues, the Petition is procedurally defective because it seeks relief that may not be granted through declaratory ruling. NCTA seeks to circumvent a rulemaking proceeding and avoid factual issues which would be better addressed in the context of a complaint proceeding. There is no question or controversy here that requires clarification; instead, NCTA is fundamentally requesting a change in the Commission's policies and there is no supporting evidence upon which it bases its claims regarding pole replacement practices by utilities. Additionally, the Commission may not avoid the need to provide adequate notice and opportunity for comment on any such change in the rules, despite comments that claim that a past proposal, never adopted, fulfills the agency's administrative requirements.

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The Edison Electric Institute ("EEI"), Utilities Technology Council ("UTC") and National Rural Electric Cooperative Association ("NRECA") hereby submit these Reply Comments in opposition to the Petition for Declaratory Ruling ("Petition") filed by NCTA – the Internet & Television Association ("NCTA") that asks the Federal Communications Commission ("FCC" or "Commission") to unreasonably eviscerate its existing make-ready policies concerning pole replacements to accommodate pole attachment requests.[1]

The Commission should reject NCTA's Petition and the further proposals advanced on the record in response to the Petition, as they ask the Commission to effectively provide attachers with a blanket discount on pole replacements, thereby shifting costs to pole owners contrary to the Commission's longstanding cost allocation policies. EEI, NRECA, and UTC agree with comments demonstrating that the requested relief is contrary to the statute as well as the

[1] *See In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Public Notice, DA 20-763 (July 20, 2020)(Public Notice); *see also Petition for Expedited Declaratory Ruling*, WC Docket No. 17-84 (filed July 16, 2020) ("Petition").

Commission's own policy.[2] Moreover, the requested relief would undermine the Commission's current pole attachment rate structure by limiting recovery of one-time incremental costs that are caused by and directly and solely attributable to pole attachments. The Commission should reject NCTA's Petition and the further proposals by commenters that seek to expand the relief requested in the Petition.

REPLY COMMENTS

EEI, NRECA and UTC oppose NCTA and other commenters that request relief that exceeds the Commission's authority, departs from longstanding pole attachment policies, and is wholly unsupported by any underlying facts and contradictory to the overriding goal of promoting broadband deployment. Conversely, EEI, NRECA and UTC support the comments by numerous utilities and other parties, who correctly observe that the requested relief cannot be granted through a declaratory ruling, and that it effectively represents a solution in search of a problem that would lead to disputes instead of resolving them. [3]

I. Shifting pole replacement costs to pole owners contravenes the statute and the Commission's orders.

EEI, NRECA and UTC agree with comments that recognize that NCTA and proponents are really asking the Commission to reverse its current make-ready policies to shift the majority of the costs of pole replacements made to accommodate new attachments to pole owners that perform this work.[4]

The Commission's cost causation principles are not ambiguous and its orders clearly

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[2] *See, e.g.*, Comments of ExteNet Systems, Inc., WC Docket No. 17-84, at 5-6 (Filed September 2, 2020) ("ExteNet Systems, Inc. Comments").

[3] *See* 47 U.S.C. § 224. *See, e.g.*, Comments of the POWER Coalition, WC Docket No. 17-84, at iii (filed September 2, 2020) ("POWER Coalition Comments").

[4] *See, e.g.*, Comments of the Coalition of Concerned Utilities at 14-15 (filed September 2, 2020) ("Coalition of Concerned Utilities Comments").

demonstrate that pole owners are not responsible for pole replacement costs based on some vague, indefinite and unquantifiable benefits that may be incidental to accommodating pole access requests. USTelecom aptly states that the current rule allocating pole replacement costs "to all parties that benefit from the modification" precludes allocating costs to the pole owner.[5] Therefore, pole replacement fees are just and reasonable when the requesting entity avails itself of Section 224, including paying the regulated rental rates and the full cost of make-ready, including any poles replaced to accommodate the new attachments.[6] The Commission's existing make-ready policy with regard to pole replacements is grounded in the overall framework of Section 224 and key to its premise that utilities receive just compensation for their incremental costs under the existing rate structure.[7]

A. The statute constrains the circumstances under which pole replacement costs due to insufficient pole capacity can be allocated beyond the entity initiating the request for access to the poles.

EEI, NRECA and UTC agree with comments that demonstrate that under existing law, where a pole replacement is due to insufficient capacity, pole owners are not responsible for the cost of expansions of capacity to accommodate attachers.[8]

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[5] *See* Comments of USTelecom – The Broadband Association, WC Docket No. 17-84, at 3 (filed September 2, 2020)(" USTelecom Comments").

[6] EEI, NRECA and UTC oppose the requested relief were to be applied to unserved areas or applied more broadly. *See* e.g., ExteNet Comments at 4; *see also* ACA Connects Comments, WC Docket No. 17-84, at 4 (filed September 2, 2020).

[7] *See, e.g.*, ExteNet Systems, Inc. Comments at 2.

[8] *See, e.g.*, Comments of the Electric Utilities, Ameren Service Company, American Electric Power Service Corporation, Duke Energy Corporation, El Paso Electric Company, Entergy Corporation, Southern Company, and Tampa Electric Company, WC Docket No. 17-84 (Filed September 2, 2020)(" Electric Utilities Comments"); *see also* USTelecom Comments; *see also* Comments of AT&T, WC Docket No. 17-84, (filed Sept. 2, 2020)("AT&T Comments").

1. The Commission's jurisdiction over pole replacement costs is constrained by Section 224(h) and the Commission's Rule 1.1408(b).

The Electric Utilities correctly note that while the statute was initially silent on the specific issue of allocating the costs of make-ready and pole replacements, the Commission deferred to contractual arrangements between pole owners and attachers on this issue until adopting rules and regulations regarding the allocation of make-ready and pole replacement costs after the 1996 amendments to the Pole Attachments Act, which included a new subsection 224(h).[9] In this regard, the Commission addressed Congress' expectations on how make-ready costs should be allocated when it implemented the 1996 amendments to the Pole Attachment Act, and in particular Section 224(h) that governs modification or alteration of a pole. The POWER Coalition explained that had Section 224(h) been intended to provide a cost allocation for pole replacements as proponents argue, Congress could have expressly used the term "replacement." However, Congress did not do so, and consistent with the Court's determination in *Southern Co. v. FCC*, the statute does not, and was never intended, to provide the Commission with jurisdiction to require utilities to replace poles to accommodate pole attachments.[10]

With respect to the Commission's policy under Section 224(h), Rule 1.1408(b)'s "directly benefit" limitation with respect to the allocation of pole replacement costs is a result of Congress's intent and the narrow legal authority granted to the Commission under the 1996 amendments to the Pole Attachment Act.[11] Accordingly, the Commission's policy establishes that if an attaching entity seeks to make an attachment on a facility that has no available capacity,

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[9] *See* Electric Utilities Comments at 5-6.

[10] *See* POWER Coalition Comments at 15, citing to *Southern Co. v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002).

[11] The Commission has specifically attributed the "direct benefits" limitation in Rule 1.1408(b) to Section 224(h). *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16098, ¶ 1216 (1996)(the "*Local Competition Order*").

the attaching entity bears the full costs of modifying the facility to create new capacity such as by replacing an existing pole with a taller pole.[12]

The Commission should reject erroneous attempts to characterize pole replacements as the functional equivalent of a modification within the meaning of Rule 1.1408(b), which was promulgated under Section 224(h) to address situations where a utility or an existing attacher uses a modification as an opportunity to bring its respective facilities into compliance with applicable safety or other requirements. While the utility and existing attachers arguably obtain an incidental benefit resulting from such pole modifications, they do not share in the costs because the costs would not have been incurred but for the need to accommodate the new attachment. Moreover, a pole replacement is distinctly different from a typical pole modification, because it is voluntarily provided by the utility in order to accommodate a request for pole attachments and the cost of the pole replacement would not have been incurred but for the need to accommodate the request for pole attachments.

The Commission in implementing Section 224(h) has therefore not treated pole replacements the same as "modifications."[13] The POWER Coalition explained that the plain text of the statue and the Commission's rule speak narrowly and precisely to an "alteration" or "modification of a facility." This limiting language distinguishes modifications of poles from wholesale pole replacements or change-outs, which are more complex and involve moving power lines and other pole owners' infrastructure.[14] The POWER Coalition therefore correctly concludes, consistent with the statute, the rule applies specifically to cases where a facility or

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[12] *See id* at 16077, ¶ 1166.

[13] EEI, NRECA and UTC and other comments have demonstrated that the Commission's policy rightly addresses modifications separately from pole replacements. *See* EEI, NRECA and UTC Comments at 14.

[14] *See* POWER Coalition Comments at 14.

attachment is modified, but not to cases where a pole is entirely replaced.

2. Utilities are not "direct beneficiaries" of poles replaced to meet a request for access to poles under Section 224.

EEI, NRECA, and UTC agree with comments that demonstrate the Commission's orders already make clear that where a pole is replaced to expand capacity to accommodate a proposed attachment it is the new attacher that is the direct beneficiary.[15] The Commission should dismiss comments that characterize pole owners as the direct or "chief beneficiary of the pole replacement."[16] The legislative history of the Pole Attachment Act as amended by the 1996 Telecommunications Act guides the Commission's present jurisdiction under Section 224(h) and its determination that pole owners do not share in the costs of a pole replaced to expand capacity to accommodate new pole attachments.[17] Moreover, in implementing Section 224(h), the Commission already rejected a request for pole owners to share in the cost of make-ready pole replacements performed to add additional capacity based on the attachers' argument that it afforded pole owners the opportunity to earn additional revenue.[18] Thus, there is no question or controversy in the Commission's rules or orders with respect to the fact that utilities are not direct beneficiaries of pole replacements that are made to accommodate new attachers. Moreover, any incidental benefits conferred on utilities are within the intent of Congress as provided within Section 224(h), and they are consistent with the Commission's overall Section 224 rate structure and pole attachment policies in order to avoid depriving utilities of just compensation for providing access and discouraging them from voluntarily replacing poles to

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[15] *See* EEI, NRECA and UTC Comments at 14-17; *see also* Electric Utilities Comments at 11, and 24-27.

[16] *See, e.g.*, ExteNet Systems, Inc. Comments at 6.

[17] *See* Electric Utilities Comments at 25.

[18] *See id.* citing to *Local Competition Order* at ¶¶ 1214-1216.

provide additional capacity for attachments.

B. Discounting costs for a pole replaced to accommodate new attachments because of insufficient capacity cannot be squared with the broader principles of the FCC's section 224 policy.

EEI, NRECA, and UTC also agree that while Section 224(b)(1) provides the Commission with a general grant of jurisdiction, this general authority that does not control the more specific terms within Section 224(h). Thus, the Commission's orders make clear that where a pole must be changed-out to expand capacity to accommodate a proposed attachment, the new attachment is the "but for" cause of the cost of the new pole.[19]

EEI, NRECA, and UTC further agree with comments that point out that NCTA's requested relief would violate Section 224(f)'s prohibition against discriminatory access.[20] NCTA's requested relief would discriminate against existing attachers that have already paid the actual cost of make-ready work to accommodate their attachments. Existing attachers will be harmed by this rule because by shifting the costs of a pole replacement to pole owners those costs will then lead to an increase in pole attachment rates paid by all attachers, but this would also mean that existing attachers are paying for a benefit to the new attacher that they themselves do not enjoy.

EEI, NRECA and UTC maintain that Commission should not only reject NCTA's proposal as it would shift pole replacement costs to utilities and electric customers but also because it would wholly undermine the Commission's own rationale for adopting the 2011 Telecom Rate. There, the Commission explained that the rate was reasonable because utilities were able to recover their incremental costs of pole replacements. NCTA's petition would effectively deny utilities cost recovery of their incremental costs of pole replacements, thereby

[19] *See* Electric Utilities Comments at 11-12.

[20] *See* Coalition of Concerned Utilities at 15-16.

negating the Commission's underlying rationale for the 2011 Telecom Rate. Importantly, the Commission recognized that pole owners would be encouraged to provide pole replacements because they would not bear any significant risk of unrecovered pole investment undertaken to accommodate a third-party attacher. This also recognizes the fact that the utility is not under any legal or regulatory obligation to replace a pole due to insufficient capacity to accommodate additional pole attachments nor without full recovery of its costs to perform the work.[21]

II. There is no need to clarify the Commission's rules and policy concerning cost responsibility for modifications to bring poles and existing attachments into compliance with applicable safety and other requirements.

Contrary to some comments that complain that there are poles that must be replaced due to preexisting safety conditions and contend that this justifies declaratory relief, the Commission should address these issues – if at all – in an enforcement setting where the evidence and the specific facts of the case can be determined. While individual disputes may arise over the presence of pre-existing safety violations, there is no widespread controversy with respect to the Commission's policy and rules that puts responsibility for correcting these safety issues and compliance with other requirements on the pole owner and existing attachers.

The Commission's rules are clear that a "utility may not charge a new attacher to bring poles, attachments, or third-party equipment into compliance with current published safety, reliability and pole owner construction standards guidelines if such poles, attachments, or third-party equipment were out of compliance because of work performed by a party other than the

[21] Per the Commission's policy an attacher is not simply causally responsible for some aspects of the pole replacement, e.g., timing, but not for the replacement itself. *See* ACA Connects Comments at 17. Nor is the only cost actually caused by the attacher the cost of prematurely retiring an old pole. *See* Comments of Altice USA, Inc., WC Docket No. 17-84, at 3 (filed Sept. 2, 2020).

new attacher prior to the new attachment.[22] In the *Third Wireline Infrastructure Order*, the Commission held that new attachers are not responsible for the costs associated with bringing poles or third-party equipment into compliance with current safety and pole owner construction standard to the extent there were pre-existing violations.[23] The Commission further clarified this point in 2018 observing the new attachment may precipitate correction of the preexisting violation, but it is the violation itself that causes the costs, not the new attacher.[24] Hence, there is no question or controversy for the Commission to clarify with respect to its rules and polices concerning the responsibility for remediation costs.

III. The Commission should dismiss the Petition as the issues raised cannot be addressed summarily and outside of a rulemaking.

The Commission should not use a Petition for Declaratory Ruling to summarily reverse its long standing policies regarding cost recovery for pole modification and pole replacement costs. USTelecom, AT&T and other comments correctly point out that what NCTA and proponents characterize as a request for clarification is in fact a request to extensively revise the Commission's rules in a manner that would shift costs from attachers to pole owners.[25] USTelecom is correct that NCTA's Petition is not the right procedural vehicle and that NCTA and proponents ask the Commission to do far more than terminate a controversy or remove

[22] *See* 47 C.F.R. § 1.1411(d)(4).

[23] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-29, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, at ¶¶ 121-122 (2018) ("*Third Wireline Infrastructure Order*").

[24] *See* Comments of INCOMPAS Comments, WC Docket No. 17-84, at 5 (filed September 2, 2020).

[25] *See* Coalition of Concerned Utilities Comments at 14-15 (arguing that the "clarifications" the Petition seeks are rule changes that require more a more formal notice and rulemaking).

uncertainty.[26] In addition to NCTA's Petition, comments such as ACA Connects include proposals for entirely new rules, even things like the creation of databases that are far beyond a clarification of the Commission's rules. ExteNet also goes far afield from NCTA's pretextual request for a clarification, not only proposing to shift costs to pole owners but also to "require pole owners to provide the age and planned replacement date for their poles."[27]

USTelecom is entirely correct that the Commission cannot achieve these requests by "interpreting" or clarifying an existing rule that leaves no room for the outcome the Petition and comments seek.[28] A rulemaking is the only appropriate venue for any changes to existing pole attachment regulations, and AT&T is correct that reconsideration of the Commission's "cost causer rule and of the Commission's priorities that led to its enactment would have to be considered in a rulemaking."[29] The Commission could consider revoking or revising its current cost-allocation rule, but must do so consistent with applicable process, procedure and precedent. CenturyLink is also correct that the Petition actually presents no uncertainty or controversy in the Commission's rules, and the Commission should not allow NCTA to circumvent the process for requesting a rulemaking.[30] Moreover, the Electric Utilities are correct to emphasize that Congress (through adoption of Section 224(h) and the Commission (through Rule 1.408) have spoken directly to the issues and made clear utilities are not responsible for pole replacement

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[26] ACA Connects does not merely ask for clarification, it asks the Commission to adopt a number of entirely new policies to effectuate shifting costs to pole owners. *See* ACA Connects Comments at 7-8.

[27] ExteNet Systems, Inc Comments. at 6.

[28] *See* USTelecom Comments at 4.

[29] *See* AT&T Comments at 3.

[30] *See* Comments of CenturyLink Comments, WC Docket No. 17-84, at 4 (filed Sept. 2, 2020).

costs necessitated by expansions of capacity.[31]

NCTA and proponents have advanced proposals based on flawed premises, and USTelecom and AT&T are correct that that the Petition and other proposals in the docket will only raise more uncertainty than clarity.[32] Both AT&T and USTelecom and other comments in the proceeding raise valid questions including whether the requested relief would substantially promote broadband access in unserved areas or other areas. In this regard, EEI, NRECA, and UTC agree with the Electric Utilities that the Commission should instead seek to promote innovative and mutually beneficial solutions as opposed to entertaining justifications for using the government to effect cross-industry subsidies to support broadband deployments.[33]

IV. Previous rulemakings do not provide a legal foundation for NCTA's Petition.

The Commission should also dismiss arguments that the Commission may proceed on NCTA's Petition for Declaratory Ruling on the basis of its 2017 Notice of Proposed Rulemaking ("NPRM").[34] The notion that the Commission's 2017 NPRM provides perpetual notice of potential rule changes is absurd, particularly considering the fact that the Commission itself did not ultimately adopt any of these potential rule changes in its 2018 Report and Order. Not only is it irrational to suggest that notice exists when the Commission declined to adopt these proposals, but this theory seems to call into question the finality of the Commission's 2018 Report and Order altogether.[35]

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[31] *See* Electric Utilities Comments at 11.

[32] *See* USTelecom Comments at 4 (describing numerous questions raised by the Petition).

[33] *See* Electric Utilities Comments at 33.

[34] *See, e.g.*, ACA Connects Comments; *see also* Comments of Charter Communications, WC Docket No. 17-84, at 13 (filed Sept. 2, 2020).

[35] *See* ACA Connects Comments at 23.

CONCLUSION

For the reasons set forth herein, EEI, NRECA and UTC oppose the NCTA's Petition and urge the Commission not to provide the requested relief through a declaratory ruling. NCTA's requested relief is based on flawed premises and would not substantially promote broadband access in unserved areas. 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. Administratively shifting costs for pole replacements onto electric customers would have the unintended consequence of undermining the Commission's very rationale for its current pole attachment rate structure. Furthermore, the requested relief involves complex and complicated matters regarding allocation of costs and apportionment of benefits, as well as underlying engineering, capacity and safety considerations that cannot be summarily addressed through a declaratory ruling.

Respectfully submitted,

EDISON ELECTRIC INSTITUTE

/s/ Aryeh B. Fishman
Aryeh B. Fishman
Associate General Counsel,
Regulatory Legal Affairs
701 Pennsylvania Avenue NW
Washington, D.C. 2000
202-508-5023wmb

UTILITIES TECHNOLOGY COUNCIL

/s/ Brett Kilbourne
Brett Kilbourne
Vice President Policy and General Counsel
Utilities Technology Council
2550 South Clark Street, Suite 960
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Brian M. O'Hara
Senior Director Regulatory Issues – Telecom & Broadband
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