Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS
OF
NTCA–THE RURAL BROADBAND ASSOCIATION

I. INTRODUCTION & SUMMARY

NTCA-The Rural Broadband Association ("NTCA")[1] hereby submits these reply comments in response to the Public Notice[2] seeking comment on a Petition for Declaratory Ruling ("Petition") filed in the above-captioned Federal Communications Commission ("Commission") proceeding. The Petition filed by NCTA — The Internet & Television Association (hereinafter "Petitioner")[3] seeks to expedite pole access complaints, in part by clarifying certain aspects of the Commission's existing pole attachment rules and making expanded use of the agency's "Accelerated Docket" procedures as set forth in 47 C.F.R. § 1.736(a).

The record supports the Petition. As noted by Petitioner and several other commenters,[4] clarification is necessary to provide all parties involved specific guidance with respect to the

[1] NTCA represents approximately 850 rural local exchange carriers ("RLECs"). All of NTCA's members are voice and broadband providers, and many of its members provide wireless, video, and other competitive services to their communities.
[2] *Wireline Competition Bureau Seeks Comment on a Petition for Declaratory Ruling Filed by NCTA — The Internet & Television Association*, Public Notice, WC Docket No. 17-84, DA 20-763 (rel. Jul. 20, 2020).
[3] NCTA — The Internet & Television Association, Petition for Expedited Declaratory Ruling, WC Docket No. 17-84 (fil. Jul. 16, 2020) ("Petition").
[4] Comments of ACA Connects, WC Docket No. 17-84 (fil. Sep. 2, 2020), pp. 14-22; Comments of Wireless Infrastructure Association, WC Docket No. 17-84 (fil. Sep. 2, 2020), pp. 2-4; Comments of INCOMPAS, WC Docket No. 17-84 (fil. Sep. 2, 2020), pp. 13-17; Comments of Crown Castle, WC Docket No. 17-84 (fil. Sep. 2,

proper allocation of costs that arise when accommodation of a new attacher's facilities necessitates replacement of a utility-owned pole. Lingering vagueness in these rules enables pole owners to demand that a would-be new attacher take responsibility for the entire cost of replacing a pole in such circumstances, even when the pole may be near or beyond its useful life and the pole owner benefits from the change, meaning that the demand for full reimbursement bestows a potential windfall on a pole owner. The Commission should also grant the request to address all pole access complaints, in areas where broadband service is presently unavailable, via the agency's Accelerated Docket, as would-be attachers often begrudgingly accept unreasonable rates, terms, and conditions from pole owners knowing that a complaint can delay deployment for an unacceptable amount of time.

II. GRANT OF THE PETITION FOR DECLARATORY RULING WILL CLARIFY EXISTING RULES, SETTING CLEAR EXPECTATIONS WITH RESPECT TO THE COSTS OF POLE REPLACEMENTS AND THEREBY EXPEDITING BROADBAND DEPLOYMENT.

NTCA members have long found that access to utility-owned poles for the purposes of broadband deployment can be a persistent barrier to expanding the quality and reach of their networks, imposing on them unnecessary costs and delays that harm consumers. While the Commission has taken several important and much-appreciated steps since early 2017 to expedite and reduce the cost of pole access,[5] additional steps such as those proposed by the Petitioner are necessary and appropriate to remove lingering barriers. Those barriers specifically

2020), pp. 3-8; Comments of Citizens Against Government Waste, WC Docket No. 17-84 (fil. Sep. 2, 2020), p. 4; Comments of Charter Communications, WC Docket No. 17-84 (fil. Sep. 2, 2020), pp. 12-17.

[5] *E.g.*, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Third Report and Order and Declaratory Ruling, FCC 18-111 (rel. Aug. 3, 2018) ("2018 Wireline Infrastructure Order"); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Declaratory Ruling, DA 20-796 (rel. Jul. 29, 2020).

raised in the Petition persist, in part, due to a lack of clarity with respect to the application of certain pole attachment rules in certain circumstances as well as the significant time that an attacher must commit to pursue a pole access complaint.

A. Clarity is needed with respect to the proper allocation of the costs of pole replacements.

The Commission should clarify its rules for the allocation of the costs of pole replacements. Those seeking to expand the reach of networks can find themselves in disputes with pole owners on this issue, and this will likely arise even more as operators complete buildout obligations and deploy networks and services pursuant to various federal and state programs adopted in recent years. Even as the Commission's existing rules and various orders indicate that attachers are generally responsible only for the specific costs they impose on pole owners, as Petitioner notes, the lack of clarity in the rules/orders enables pole owners to demand that new attachers cover the entire cost of replacing a pole. Perhaps worse than this lack of clarity – as discussed further below – is the time and expense associated with pursuing a pole access complaint in the event of disputes. NTCA members report that even if secure in the knowledge that they are "in the right" (based on their review of Commission precedent), the time and expense associated with a complaint may outweigh what can be gained via an eventual victory – and thus they simply concede to the demands of the pole owner. In other words, the relief requested by Petitioner would prevent pole owners from taking advantage of the lack of clarity in the rule, both by making it abundantly clear where the responsibility for the costs of replacing a pole lie and by ensuring that pole owners cannot leverage any asserted ambiguity in the rules to force would-be new attachers to yield as an alternative to a long and deployment-delaying fight. And, of course, because the proposed use of the Accelerated Docket would apply

to all pole access complaints in unserved areas, it should prevent pole owners from unnecessarily delaying needed deployment for reasons beyond disputes over pole replacement costs.

As Petitioner notes, a review of the Commission's rules and orders adopted over the last decade, when put together, indicates that a pole owner cannot foist upon a new attacher the entire cost of replacing a pole even if it is done to accommodate that new attachment. Specifically, in the 2011 Pole Attachment Order, the Commission stated that attachers are "responsible only for [the] cost of work made necessary because of its attachments."[6] The Commission's pole attachment rules also support grant of the Petition, already stating in Section 1.1408(b) that all "parties that directly benefit from" a modification to a utility-owned pole made to accommodate an attachment must "share proportionately" in that cost.[7] Despite this precedent, as the Petition notes and NTCA members confirm, pole owners finding that a new attacher's request necessitates the replacement of a pole often demand the latter cover the entire cost of doing so. This demand is issued even when the utility would have had to replace that pole soon in the absence of any request for access. As Petitioner correctly states, "[a]llowing pole owners to assign the full costs of pole replacements to attaching parties is not 'just and reasonable' because it allows them unfairly to externalize the cost of upgrading their aging infrastructure…while reaping most of the benefit."[8] A "just and reasonable" approach – and one that arguably already exists in Commission rules but must be made clear – is one that grants to the pole owner the

[6] *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, FCC 11-50 (rel. Apr. 7, 2011), ¶ 185 n. 572 (2011) (emphasis added) (internal citations omitted).
[7] 47 C.F.R. 1.1408(b).
[8] Petition, p. 14.

incremental costs caused by the attacher, that is, "capital costs [that] would not have been incurred 'but for' the pole attachment demand."[9]

With respect to the calculation of those costs, the Petition proposes an administratively simple methodology for the allocation of pole replacement costs that fits into the principles set forth above. Specifically, Petitioners propose that the Commission use "the remaining net book value of the pole being replaced" as measured by "the average depreciated bare pole investment derived using the Commission's pole attachment rate formula."[10] As the Petition notes, this rate is already set in the Commission's rules and therefore one with which attachers and owners should be familiar, "relies primarily upon publicly available cost data."[11] As the Commission and all parties involved have experience with this method of measuring costs, this approach is administratively simple and one the agency can use immediately. It can also be applied in cases where the pole is at the end of its life and in need of replacement or must be retired early to accommodate a new attachment. Petitioner notes, and NTCA members confirm, that this latter circumstance often causes disputes between pole owners and attachers, and this the clarification requested herein as well as the use of this administratively simple formula "across the board" would set clear expectations for all parties going forward.

B. The Commission should also use its accelerated docket for resolving pole access complaints in unserved areas to ensure that such disputes do not impede, or unnecessarily drive up, the costs of much-needed broadband deployment.

Petitioners also seek to improve the pole attachment complaint process, specifically asking the Commission to direct the Enforcement Bureau to prioritize all pole access complaints

[9] *Id*., p. 13.
[10] *Id*., pp. 10-11.
[11] *Id*., p. 11.

in "unserved"[12] areas by using the agency's "Accelerated Docket"[13] for the resolution of such disputes.[14] NTCA supports this approach, as it will "give teeth" to the newly clarified rules as discussed above, as well as more generally provide small operators a timely and accessible remedy for resolving disputes with pole owners and getting on with the business of serving rural communities.

The time and expense associated with the pursuit of a pole access complaint can be significant and daunting. This in fact serves as an effective barrier to any operator's use of this avenue for pursuing a remedy under Section 224 – in fact, the burdens of this process create an incentive to "give in" to unreasonable rates, terms and conditions for access to utility-owned poles in order to avoid the delays in construction that will come to pass from pursing a complaint. NTCA members make this "Hobson's choice" for several reasons. For one, some of these providers operate in portions of the nation where weather renders construction seasons short – a small operator attempting to complete a project to begin serving customers cannot afford to await the results of a complaint proceeding as doing so could bring construction to a halt only to be resumed on the precipice of winter. Moreover, many NTCA members are at present focused, on a daily basis, on working hard to complete buildout obligations associated with various federal and state programs. Every day counts, and meeting these obligations presents numerous challenges of distance, terrain, supply chain delays exacerbated by a global pandemic, contractor and other skilled worker shortages and other barriers such as environmental and historic preservation

[12] While the Petition does not specifically define the term "unserved," use of the Commission's Broadband Internet Access benchmark as established in the context of Section 706 proceeding would seem to offer an objective threshold for the purpose of prioritizing pole access complaints and using the Accelerated Docket to ensure that consumers lacking service today are not forced to wait longer due to disputes between pole owners and new attachers.
[13] 47 C.F.R. § 1.736(a).
[14] Petition, pp. 29-31.

reviews. To say that "pressing pause" on buildout to litigate a pole access complaint is often a less attractive option would be an understatement – it is, rather, a choice many providers seeking to expand broadband access cannot afford to make.

With respect to the need for a more expedient (and therefore more useful to would-be complainants) process, as Petitioners correctly state, the Commission's Accelerated Docket for pole access complaints is meant for circumstances that warrant expedited resolution of a dispute.[15] It would be hard to conceive of a circumstance more worthy of an expedited agency review process than one in which a broadband provider seeking to deploy facilities in areas of the nation that have already waited too long for service seeks to ensure that existing provisions meant to make that possible are enforced. In fact, the Commission has already recognized that "[n]ow, more than ever, access to [utility-owned poles] must be swift, predictable, safe, and affordable, so that broadband providers can continue to enter new markets and deploy facilities that support high-speed broadband."[16] But it would be hard to argue that such access is "swift…predictable, and affordable" when a pole owner can take advantage of the fact that the complaint process is so time-consuming as to be of little use. Moreover, no consumer should have to wait longer – or even perhaps be denied service – if a would-be provider chooses to direct resources elsewhere and to where poles are not needed or are available at more reasonable rates because a process meant to enforce the rules is not usable.

In addition, pole owners are likely aware that the time-consuming nature of the complaint process works in their favor. Put another way, pole owners in unserved areas would, should the Commission grant the Petition, lose the incentive to offer "take it or leave it" rates, terms, and

[15] Petition, p. 29.
[16] 2018 Wireline Infrastructure Order, ¶ 2.

conditions knowing that a complainant can now invest 60 days, via the timeline set in the Accelerated Docketed, in pursuing its rights under Section 224. As NTCA members (and providers all across the nation) work to eliminate the "Digital Divide" and bring the benefits of a robust and reliable Internet connection to those in need, disputes between pole owners and attachers will continue to arise, and their rapid resolution will be a benefit to those consumers not forced to wait any longer than necessary. Yet the current complaint process is often one that "functions in name only," as noted above, because pole owners and attachers alike know that the time involved is often more difficult to absorb than unreasonable rates for access. The Commission can remedy this flaw via the action requested by Petitioner.

III. THE COMMISSION SHOULD TAKE ADDITIONAL STEPS TO STREAMLINE AND REDUCE THE COST OF ACCESS TO RIGHTS-OF-WAY AND ANY OTHER FACILITIES NECESSARY FOR BROADBAND NETWORK DEPLOYMENT.

As noted above, since 2017, the Commission has taken several important steps to reform its pole attachment rules, and further action as proposed by Petitioner and supported herein by NTCA would be an important next step. Additional streamlining/removal of barriers efforts are also necessary to ensure that both wireline and wireless facilities can expeditiously be made available for the benefit of consumers.

Moving beyond pole attachments for the moment, NTCA once again asks the Commission to view infrastructure deployment with a more holistic view of the barriers providers face in terms of rolling out new and upgraded service. As has often been said "wireless needs wires," but that phrasing should more directly play into the Commission's view of the barriers to infrastructure deployment. NTCA members working to push fiber deeper into their networks to meet buildout obligations and/or to support wireless services would benefit

greatly from the same kind of streamlining measures that the Commission has enacted with respect to the deployment of facilities necessary to support spectrum-based services.

More specifically, deployment on federal lands is often cited by NTCA members as a top barrier, with permitting timelines far exceeding those experienced on a local level. NTCA, of course, understands that the Commission's jurisdiction is limited with respect to removing wireline carriers' barriers to deployment (such as environmental and historic preservation reviews that fall under the purview of other federal agencies). Yet, the Commission can and should lend its expertise to other federal agencies and urge them to use the former's infrastructure streamlining efforts as a model for similar measures that can facilitate deployment of fiber and other facilities necessary for wireline and wireless services alike while also protecting the environment and historic properties.

Where the Commission can take more direct action is addressing railroad crossing issues – NTCA members report frequent clashes with railroads that seemingly have unconstrained "gatekeeper" status with respect to railroad crossings that intersect with public rights-of-way ("RoWs"). While various parties have brought this to the Commission's attention,[17] state or local laws that enable and empower railroads to stop broadband deployment when it would otherwise proceed in public RoWs continue to act as barriers to efficient deployment of telecommunications infrastructure. NTCA urges the Commission to "tee this up" further in

[17] *Ex Parte* Letter from Michael Romano, Senior Vice President – Industry Affairs & Business Development, NTCA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84 and WT Docket No. 17-79 (fil. Sep. 6, 2018); *Ex Parte* Letter from Robert Millar, Associate General Counsel, Crown Castle, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84 and WT Docket No. 17-79 (fil. Jun. 1, 2018).

future proceedings, as existing practices that are inconsistent with the provisions of Section 253 of the Communications Act.

Finally, turning back to pole attachments, NTCA also supports the proposal pending in another proceeding to include utility-owned light poles within the definition of "pole," thus ensuring that these are available to would-be attachers on non-discriminatory and just and reasonable rates, terms, and conditions. CTIA's Petition[18] on that issue correctly notes that utilities continue to deny, outright, access to such poles or charge rates far exceeding those charged for similar facilities. Indeed, to promote a competitive environment for the delivery of broadband that will benefit consumers most, all poles should ultimately be subject to a comparable regulatory regime regardless of intended use, owner, or other factors.

IV. CONCLUSION

For the reasons set forth above, the Commission should grant the Petition for Declaratory Ruling in order to expedite and reduce the cost of broadband deployment.

Respectfully submitted,

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[18] CTIA, Petition for Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79 (fil. Sep. 6, 2019), pp. 17-21.