

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**COMMENTS OF
THE FREE STATE FOUNDATION**

I. Introduction and Summary

These comments are filed in response to the Federal Communications Commission's Second Further Notice of Proposed Rulemaking regarding reforms to provide more regulatory certainty about pole replacements. The Commission should establish an objective formula for pole replacement cost-sharing in conjunction with a rebuttable presumption that utility pole owners directly benefit from replacement poles. And the agency should place pole attachment disputes in unserved areas on its Accelerated Docket.

In the drive to expand broadband Internet services to unserved, mainly rural areas, access to utility poles is increasingly important. When it comes to further closing the digital divide and helping to ensure all Americans can reap the benefits of access to broadband Internet services, time is of the essence. Unresolved pole attachment cost-sharing disputes can pose significant barriers to timely broadband deployment. The Commission is obligated to take steps to reduce those barriers and promote timely, predictable, cost-effective access to broadband infrastructure for serving all Americans.

An objective formula for sharing the costs of pole replacements is necessary to keep utility pole owners from exercising monopolistic power to charge above-market rates for leasing access to

poles and, ultimately, driving up consumer prices for broadband access. Excess costs drain provider resources away from broadband infrastructure deployments and upgrades.

At the same time, an objective formula should ensure that the property rights of utility pole owners are respected. Application of such a formula should make cost allocation determinations more predictable and reduce dispute delays compared to a more untethered free-wheeling form of adjudication. Avoiding free-wheeling adjudications should reduce dispute-related costs for utilities and broadband providers alike.

The aim of the objective formula should be to produce a consistent calculation of the amount of direct benefits conferred on utility pole owners from pole replacements – an amount that should be subtracted from the total costs of pole replacements in order to establish the share of replacement costs to be paid by new attachers. Moreover, and consistent with the comments filed by the Free State Foundation in the *2021 Pole Attachment Declaratory Ruling* proceeding, the Commission should recognize that when utility pole owners request that new attachers furnish pole replacements that include upgrades or modifications that go beyond the equipment needed to support the new attachments, or when the owners request upgrades or modifications that are simply unrelated to new attachments, then new attachers should not be responsible for those costs. The formula also ought to factor in the remaining lifespan of the pole that is to be replaced. Replacements of relatively new poles should yield a significantly smaller benefit to owners compared to replacements of old poles.

Furthermore, the Commission should adopt in its objective formula a rebuttable presumption that utility pole owners directly benefit from replacement and should share in replacement costs. As Section 1.1408(b) of the Commission's rules provides: "The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification." Indeed, utility poles have finite lives, and even in the absence of attachers that lease space the owners eventually incur costs to replace old poles with new

ones. Also, excess capacity provides pole owners opportunities to collect additional rents through attachment leases and to deploy more of the owner's own equipment.

Importantly, a presumption of direct benefit to pole owners from pole replacements would be rebuttable. The presumption could be overcome by proffering clear and convincing evidence that: (1) a pole owner does not directly benefit from a proposed replacement in a particular instance; and/or (2) new attachers have caused or likely will cause specific and unique costs that the new attachers should be obligated to cover. The burden of producing evidence to overcome the presumption should rest upon pole owners.

Finally, in light of the importance of closing the digital divide as fast as reasonably possible, and, again, consistent with the comments the Free State Foundation filed in the 2021 *Pole Attachment Declaratory Ruling* proceeding, the Commission should place pole attachment disputes on its Accelerated Docket. The Accelerated Docket's 60-day timeframe is more appropriate for furthering the urgent policy goal of closing the digital divide than the existing 180-day shot clocks.

II. Disputes Over Pole Replacement Cost-Sharing Can Pose Barriers to Timely Deployment of Broadband

Although policy actions by the Commission have helped to boost access to broadband Internet services, many Americans still lack such access. As the *Fourteenth Broadband Deployment Report* states: "While deployment is improving in all geographic areas, we recognize that there is still significant work to do to encourage deployment to rural areas, where more than 17% of Americans lack access, and Tribal lands, where nearly 21% of Americans lack access."¹ One way to improve access is eliminating barriers to broadband deployment, which the

¹ Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 20-269, Fourteenth Broadband Deployment Report (released Jan. 19, 2021), at ¶ 108.

Commission has a responsibility to do, especially in unserved areas, which most often, but not invariably, are rural areas.²

The Commission's 2021 *Pole Attachment Declaratory Ruling* is premised on the fact that pole attachment cost-sharing disputes can impede broadband deployment.³ As the Free State Foundation's comments in that proceeding explained, "saddling service providers with the entire expense of replacing old poles results in imposing unjustifiable high-cost barriers to timely deployment of broadband Internet services to all Americans."⁴ Correctly, the *Declaratory Ruling* found that "it is unreasonable and inconsistent with section 224 of the Communications Act, the Commission's rules, and past precedent, for utilities to impose the entire cost of a pole replacement on a requesting attacher when the attacher is not the sole cause of the pole replacement."⁵ The Commission based that *Declaratory Ruling* on its authority in Section 224 of the Communications Act, which authorizes the FCC to "regulate the rates, terms, and conditions of pole attachments to provide that such rates, terms, and conditions are just and reasonable, and . . . adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions."⁶

In its Second Further Notice of Proposed Rulemaking, the Commission rightly affirmed the Wireline Bureau's findings in the *Pole Replacement Declaratory Ruling* "that it would be contrary to the Commission's rules and policies to require a new attacher to pay the entire cost of a pole

² See, e.g., Comments of Charter Communications, Inc., Accelerating Wireline Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84 (September 2, 2020), at 4-7 (describing obstacles to broadband deployment in rural areas posed by excessive pole attachment costs), available at: <https://www.fcc.gov/ecfs/search/search-filings/filing/10902736319911>.

³ See Accelerating Wireline Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, Declaratory Ruling ("*Pole Attachment Declaratory Ruling*"), (released Jan. 19, 2021).

⁴ See Comments of the Free State Foundation, Accelerating Wireline Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84 (September 1, 2020), at ¶ 2, available at: <https://www.fcc.gov/ecfs/search/search-filings/filing/10901141120613>.

⁵ *Id.* at ¶ 3.

⁶ 47 U.S.C. 224(b)(1).

replacement when a pole already requires replacement (e.g., because the pole is out of compliance with current safety and utility construction standards or it has been red-tagged) at the time a request for a new or modified attachment is made" and that in such instances "the utility may not impose all make-ready costs of that pole replacement on the new attacher."⁷

The Commission should take further action in this proceeding to remove pole replacement cost dispute barriers to timely broadband deployment.

III. The Commission Should Adopt an Objective Formula for Pole Replacement Cost-Sharing That Presumes Pole Owners Benefit From Replacements

These comments recommend a two-fold approach to removing barriers to broadband deployment that was initially set forth in the Free State Foundation's September 2020 comments in this proceeding:⁸ The Commission should establish an objective formula for determining how pole replacement costs should be shared between utility pole owners and new attachers, and the agency should adopt a presumption that, absent clear and convincing evidence to the contrary, utility pole owners benefit from pole replacements.

An objective formula for sharing the costs of pole replacements is necessary to keep utility pole owners from exercising monopolistic power to charge above-market rates for leasing access to poles and, therefore, driving up consumer prices for services that depend on such access. When new attachers pay disproportionate shares of pole replacement costs – for example, by paying rates that ignore benefits conferred to utilities – the excess costs reduce provider resources for broadband deployment, slowing the pace at which consumers access new or upgraded broadband infrastructure.

⁷ Accelerating Wireline Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, Second Further Notice of Proposed Rulemaking ("*Notice*") (released March 18, 2022), at ¶ 7.

⁸ See Comments of the Free State Foundation, WC Docket No. 17-84, at 4.

Importantly, an objective formula also should serve to ensure that the property rights of utility pole owners are respected. And application of such a formula should make determinations about the appropriate costs assessed to both pole owners and new attachers more predictable. It also should make the dispute resolution process less costly and time-consuming for the parties as well as less resource-intensive for the Commission, as compared to a more free-wheeling form of adjudication.

The aim of the objective formula should be to produce a consistent calculation of the amount of direct benefits conferred on utility pole owners from pole replacements – an amount that should be subtracted from the total costs of pole replacements in order to establish the share of replacement costs to be paid by new attachers. Moreover, the Commission should recognize that when utility pole owners request that new attachers furnish pole replacements that include upgrades or modifications that go beyond the equipment needed to support the new attachments, or when the owners request upgrades or modifications that are simply unrelated to new attachments, then new attachers should not be responsible for those excess costs.⁹ For purposes of calculating the direct benefit of pole replacements to owners and the incremental cost imposed by new attachers in hastening replacements, the formula also ought to factor in the remaining lifespan of the pole that is to be replaced. New attachments that would cause replacements of poles that are 12 months old or less, for instance, should yield a significantly smaller or potentially de minimis direct benefit to owners compared to poles that are 20 or more years old.

The Commission should apply an objective formula for pole replacement cost allocation in conjunction with a rebuttable presumption that utility pole owners directly benefit from replacements.¹⁰ Indeed, there are good reasons why owners of utility poles should be presumed to

⁹ See Notice, at ¶ 20.

¹⁰ See Notice, at ¶ 23.

directly benefit from replacements and therefore bear responsibility for an objective share of the costs. Recognition that owners ought to share in the costs of replacing their poles is consistent with §1.1408(b) of the Commission's rules, which provides: "The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification."¹¹

Utility poles have finite lives, and even in the absence of renters the owners eventually incur costs to replace old poles with new ones. Also, owners receive the benefit of increased revenues through replacement poles that have excess capacity. Such excess capacity provides utilities with the opportunities to collect additional rents through attachment leases and to deploy more of the utility pole owner's own equipment. Those options would not exist but-for the replacements prompted by new attachers. If excess capacity is treated as a mere "incidental benefit," pole owners would have the incentive to demand pole replacements with more excess capacity than is needed, increasing the costs of pole replacements for broadband providers.

A presumption of direct benefit to pole owners from pole replacements would be rebuttable, not absolute. The presumption could be overcome by a proffering of clear and convincing evidence that: (1) a pole owner does not directly benefit from a proposed replacement in a particular instance; and/or (2) new attachers have caused or likely will cause specific and unique costs that the new attachers should be obligated to cover. The burden of producing evidence to overcome the presumption should rest upon pole owners.

IV. The Commission Should Place Pole Attachment Disputes on Its Accelerated Docket

The Commission also should accelerate broadband deployment by expediting pole attachment disputes through its complaint procedures. As recommended in the Free State

¹¹ 47 C.F.R. §1.1408(b).

Foundation's September 2020 comments,¹² the agency should put pole attachment complaints involving unserved areas on the agency's Accelerated Docket.¹³ According to Section 1.736 of the Commission's rules, the Accelerated Docket includes a 60-day timeframe for resolving disputes more quickly. Under the rules, the Commission's staff has discretion in accepting complaints for inclusion on the Accelerated Docket. The Commission should direct the staff's exercise of that discretion to accept pole attachment disputes in unserved areas for that docket. Given the importance of further closing the digital divide in a timely fashion, the faster 60-day timeframe of the Accelerated Docket is more appropriate than the Commission's existing 180-day shot clock period.

V. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

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¹² See Comments of the Free State Foundation, WC Docket No. 17-84, at 4-5.

¹³ See Notice, at ¶ 36.