2 September 2020

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84

Dear Ms. Dortch:

We, the undersigned organizations, respectfully submit these comments in support of NCTA's Petition for Declaratory Ruling in the above-captioned proceeding.[1]

The widespread availability of broadband in rural areas can spur economic growth, extend educational opportunities, and provide new healthcare options. The best way to promote broadband deployment is through policies that enable investment with private capital so that market forces can propel growth in these areas. NCTA's Petition identifies one instance in which a market failure is currently preventing the flow of private investment in rural broadband: the high cost of attaching broadband facilities to monopoly-owned poles in rural markets.

NCTA's proposed clarifications offer economically sound solutions to overcome this distortion in the marketplace which is preventing more private investment from flowing to areas where it is needed and could otherwise be profitably deployed. Pole owners should not be able to exploit their government-issued monopolies to force other parties to bear their costs of replacing aging pole infrastructure and make it more difficult for competitors to enter the market.[2] And, when disputes over these issues do arise, parties should be able to obtain quick resolution without a slow regulatory process becoming a bottleneck. We therefore urge the Commission to grant both NCTA's requested clarification of the pole attachment rules and its request to expedite its resolution of complaints under those rules that inhibit pole access in unserved areas.

The reality of our digital divide is hard to ignore. According to the FCC's own studies, while 97% of Americans in urban areas have access to high-speed fixed Internet service, that number plummets to

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[1] Petition for Expedited Declaratory Ruling, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (filed July 16, 2020) ("DR" or "Petition").

[2] *Accord FCC v. Florida Power Corp*., 480 U.S. 245, 249 (1987) (explaining that Congress enacted the 1978 Pole Attachment Act to prevent pole owners from "exploiting their monopoly position by engaging in widespread overcharging.").

65% in rural communities.[3] All in, nearly 30 million Americans are effectively shut out of the digital era.[4] The ramifications of this disparity are far reaching. Without reliable access to high-speed Internet, unserved rural communities are left at a distinct disadvantage in recruiting high paying jobs, providing 21st century educational opportunities, and attracting the most talented workers. Addressing this challenge has only grown more urgent due to our present pandemic. This crisis has shown that reliably fast Internet is critical for services like distance learning and telemedicine—both of which are severely strained in rural locations around the country.

However, deploying high-speed broadband in unserved rural areas will not be achieved through expensive government subsidies. Solving this problem will require creating the right market conditions for a significant increase in private sector investment, due in no small part to the complicated logistics of providing infrastructure to sparsely populated communities. Government should not increase these costs through mandates, but instead immediately pursue removing artificial barriers to such investment.

One such persistent barrier to rural broadband buildouts has been the cost of pole replacements. Without any market-driven need to upgrade these poles, many are nearly fifty years old and in need of replacement before additional attachments can be accommodated. According to some broadband providers, the expense of upgrading or replacing aging poles can commonly constitute as much as 25% of a rural buildout's cost.[5] Those staggering numbers often limit the reach of buildout projects leaving too many households on the wrong side of what is becoming a digital chasm.

Replacement of these aging facilities is ultimately a necessity for the heavily regulated utilities that own and operate them, yet they often leverage their monopoly position to seek to shift the entirety of these replacement costs to the attaching entities. In an efficient and competitive market, pole owners would not be able to shift all of these costs in this manner, as they would be limited by competitive pressures to charging fees much closer to their actual costs of allowing the attachment. Although local utilities' monopoly control over poles forecloses a competitive market for pole attachments,[6] Congress

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[3] *Bridging The Digital Divide For All Americans*, Federal Communications Commission, https://www.fcc.gov/about-fcc/fcc-initiatives/bridging-digital-divide-all-americans (last visited Aug. 12, 2020).

[4] *Id.*

[5] Petition at 6.

[6] Congress, the courts, and the FCC have long recognized this monopoly. *See Communications Act Amendments—Penalties and Forfeitures Authority and Regulation of Cable Television Pole Attachments by the Federal Communications Commission*, S. Rep. No. 95-580 at 13 (Nov. 2, 1977) ("Public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates.") (citation omitted), *reprinted in* 1978 U.S.C.C.A.N. 109, 121; *NCTA v. Gulf Power*, 534 U.S. 327, 330 (2002) ("Since the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents."); *Alabama Cable Telecommunications Ass'n*, 16 FCC Rcd 12209, 12234 (2001) (noting "the bottleneck monopoly status of the utilities' poles").

and the FCC have historically sought—through the regulation of pole attachment rates—to create a framework that is at least closer to a market outcome than monopoly pricing.

Under the FCC's pole attachment orders, pole owners are supposed to impose make-ready charges only for the reasonable expenses actually caused by a new attachment. Pole owners may not use make-ready as an excuse to generate additional monopoly profits or to pay to fix unrelated issues that preceded the new attachment.[7] This principle results in greater economic efficiency by ensuring that the cost of deploying new communications networks is not inflated by undue subsidization of incumbent pole owners, and by ensuring that pole owners are not incentivized to engage in rent-seeking behavior by requiring unnecessary and wasteful make-ready work. Without adherence to these basic economic principles, the result is higher costs for broadband service, or—as is too often the case in rural America—underinvestment that leads to no internet access at all. Neither of these results is an economically efficient outcome.

NCTA has asked that the FCC facilitate the expansion of broadband into rural America by clarifying that pole owners in unserved areas may not shift their own pole upgrade and maintenance costs onto new attachers by demanding the full cost of a pole replacement. Instead, in rural communities that lack reliable broadband access, broadband providers should be required to reimburse the pole owner only for the incremental costs they *actually cause* the pole owner to incur, which does not include the cost of upgrading the pole owner's facilities for the pole owner's future use and benefit. By properly allocating the cost of the replacement, this clarification ensures that the party best-suited to keep costs low is properly incentivized to do so. Such a clarification within the current system considers both pole owners and attachers in a way that furthers broadband expansion, innovation and property interests.

But requiring pole owners to share in the cost of pole replacement is, by itself, insufficient if pole owners can delay implementation of this principle. Disputes, which are generally adjudicated by the FCC, can drag on for months if not years before resolution. These delays can limit the viability of private investment projects with already tight margins. While broadband providers might be able to weather these delays in profitable urban areas, these delays can cause underinvestment in rural areas. NCTA's Petition addresses this problem by proposing that the FCC use its accelerated docket procedures to prioritize disputes that arise between attaching entities and pole owners in rural areas so that parties can reach a resolution quickly and complete their projects in a timely manner. Rather than proposing new rules, the FCC could utilize an existing dispute resolution mechanism to address this unnecessary barrier to new rural broadband.

At bottom, we believe government should stand firmly on the side of free markets and open communication. But on occasion this requires the government to identify and address a persistent bottleneck to the operation of the marketplace. Such a bottleneck is present when pole owners erect

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[7] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266, 3277 ¶ 35 (2017) (Commission has held that "new attachers are responsible *only* for the cost of make-ready work *made necessary because of* their attachments").

unnecessary barriers to the deployment of broadband to rural communities. And unreasonable delays in resolving disputes over these matters exacerbates the problem. NCTA's proposed clarifications address both of these issues.

We therefore strongly support NCTA's Petition and urge speedy adoption of its proposed declaratory rulings.

Respectfully submitted,

Bartlett D. Cleland
Executive Director
Innovation Economy Institute

Tom Giovanetti
President
Institute for Policy Innovation

David Williams
President
Taxpayers Protection Alliance

Seton Motley
President
Less Government

TechFreedom

Jeffrey Mazzella
President
Center for Individual Freedom

Matthew Kandrach
President
Consumer Action for a Strong Economy

Katie McAuliffe
Executive Director
Digital Liberty