

**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 )

**DECLARATORY RULING**

**Adopted: January 19, 2020**

**Released: January 19, 2021**

By the Chief, Wireline Competition Bureau

**I. INTRODUCTION**

1. Closing the digital divide and delivering the benefits of broadband to all Americans remains the Commission's top priority. The COVID-19 pandemic has served to highlight the essential nature of a robust communications infrastructure in promoting access to healthcare, employment, education opportunities, and social connectivity, including civic and religious institutions, as well as family and friends. As part of its efforts to close the digital divide and further broadband deployment, the Commission has undertaken a series of reforms of its pole attachment rules with the aim of making access to this critical infrastructure faster, easier, safer, more predictable, and more affordable.<sup>1</sup> Most notably, in August 2018, the Commission adopted the *2018 Wireline Infrastructure Order*, which eliminated barriers to broadband deployment by streamlining the process for attaching new communications facilities to utility poles and reducing associated costs.<sup>2</sup>

2. In July 2020, NCTA — The Internet & Television Association filed a Petition for Expedited Declaratory Ruling (NCTA Petition) seeking clarification of certain issues related to pole replacements.<sup>3</sup> In particular, NCTA requested that the Commission clarify that in unserved areas, it is unjust and unreasonable for pole owners to shift all pole replacement costs to new attachers.<sup>4</sup> We decline to act on NCTA's Petition at this time. We believe it is more appropriate to address questions concerning the allocation of pole replacement costs within the context of a rulemaking, which provides the Commission with greater flexibility to tailor regulatory solutions.

<sup>1</sup> See, e.g., *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC Rcd 11128 (2017) (*2017 Wireline Infrastructure Order*); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, WT Docket No. 17-79, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) (*2018 Wireline Infrastructure Order*); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Declaratory Ruling, 35 FCC Rcd 7936 (WCB 2020) (*2020 Declaratory Ruling*).

<sup>2</sup> *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7706-07, paras. 2-3.

<sup>3</sup> NCTA, Petition for Expedited Declaratory Ruling, WC Docket No. 17-84 (filed July 16, 2020), <https://www.fcc.gov/ecfs/filing/107161552527661> (NCTA Petition). Unless otherwise noted, the citations herein to comments, replies, and *ex parte* presentations are to such documents filed in response to the NCTA Petition in WC Docket No. 17-84.

<sup>4</sup> NCTA Petition at 4.

3. The record developed in response to the NCTA Petition revealed, however, that utilities throughout the country have disparate and inconsistent practices with regard to cost responsibility for pole replacements. Specifically, comments in the record indicate that some utilities may delay needed pole replacements until they receive a request for a new attachment, at which point they allocate the entire cost of the replacement to the new attachers.<sup>5</sup> Thus, in an effort to provide clarity and promote consistency, today we issue a Declaratory Ruling to clarify 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.

## II. BACKGROUND

4. In the Telecommunications Act of 1996, Congress amended section 224 of the Communications Act to, among other things, establish: (1) a cost causation principle in section 224(i) that protects pole attachers from costs associated with rearranging or replacing their preexisting attachments due to circumstances that they did not cause;<sup>6</sup> and (2) a cost sharing requirement in section 224(h) for situations where an attacher uses a modification as an opportunity to add to or modify its existing attachment.<sup>7</sup> In the subsequent 1996 *Local Competition Order*, the Commission adopted rules implementing these new statutory requirements and offered guidance on how pole attachment modification costs are to be allocated.<sup>8</sup> The Commission determined that when a modification, such as a pole replacement, is undertaken for the benefit of a particular party, under cost causation principles, the benefiting party is obligated to assume the cost of the modification.<sup>9</sup> Even when the modification affects the attachments of others who did not initiate or request the modification, the requesting party must pay the costs of the modification.<sup>10</sup> When a utility decides to modify a pole for its own benefit, and no other

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<sup>5</sup> See, e.g., Crown Castle Reply at 2 (arguing that “pole owners regularly fail to replace or repair deteriorated poles in a timely manner, and then foist the associated costs onto a company seeking a new attachment”); NCTA Petition at 8 (“NCTA members regularly encounter demands by pole owners that they pay the *full cost* of replacing aging poles as a condition of access—even though (in the absence of the new attachment or overlash) the utility would have had to replace the same pole at its own cost in the near future, or (in many cases) should already have done so. Utilities frequently treat deployment projects by broadband providers as opportunities to shift the utilities’ own inevitable infrastructure upgrade costs onto third parties.” (emphasis in original)).

<sup>6</sup> Section 224(i) states that “[a]n entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).” 47 U.S.C. § 224(i).

<sup>7</sup> Section 224(h) states that “[w]henver the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.” 47 U.S.C. § 224(h).

<sup>8</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Report and Order, 11 FCC Rcd 15499 (1996) (*Local Competition Order*). Following the Commission's adoption of the *Local Competition Order*, the cost allocation and cost causation pole requirements were codified at 47 CFR § 1.1416(b). In 2018, the Commission redesignated section 1.1416(b) to section 1.1408(b) of its rules. 47 CFR § 1.1408(b).

<sup>9</sup> *Local Competition Order*, 11 FCC Rcd at 16077, 16096, paras. 1166, 1211 (“If, for example, a cable operator seeks to make an attachment on a facility that has no available capacity, the operator would bear the full cost of modifying the facility to create new capacity, such as by replacing an existing pole with a taller pole.”).

<sup>10</sup> 47 CFR § 1.1408(b) (“Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an

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attachers derive a benefit from the modification, the Commission found that the utility would bear the full cost of the new pole in that situation.<sup>11</sup> The Commission also adopted a cost sharing principle for when an existing attacher uses a modification by another party as an opportunity to add to or modify its own attachments.<sup>12</sup> It then extended this principle to utilities and other attachers seeking to use modifications as an opportunity to bring their own facilities into compliance with safety or other requirements.<sup>13</sup>

5. On July 16, 2020, NCTA filed its Petition asking the Commission to clarify its rules in the context of pole replacements. Specifically, the Petition asks the Commission to declare that: (1) pole owners must share in the cost of pole replacements in unserved areas pursuant to section 224 of the Communications Act, section 1.1408(b) of the Commission's rules, and Commission precedent;<sup>14</sup> (2) pole attachment complaints arising in unserved areas should be prioritized through placement on the Accelerated Docket under section 1.736 of the Commission's rules;<sup>15</sup> and (3) section 1.1407(b) of the Commission's rules authorizes the Commission to order a pole owner to complete a pole replacement within a specified time frame or designate an authorized contractor to do so.<sup>16</sup> NCTA argues that without Commission action, the costs and operational challenges associated with pole replacements will inhibit attachers from deploying broadband services to Americans in unserved areas.<sup>17</sup> On July 20, 2020, the Wireline Competition Bureau (Bureau) issued a *Public Notice* seeking comment on the NCTA Petition.<sup>18</sup> In response to the *Public Notice*, the Bureau received 20 comments and 11 reply comments from a variety

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existing attachment sought by another party."); *Local Competition Order*, 11 FCC Rcd at 16096, para. 1211 ("If a user's modification affects the attachments of others who do not initiate or request the modification, such as the movement of other attachments as part of a primary modification, the modification cost will be covered by the initiating or requesting party.").

<sup>11</sup> *Local Competition Order*, 11 FCC Rcd at 16077, para. 1166.

<sup>12</sup> *Local Competition Order*, 11 FCC Rcd at 16077, para. 1166 ("Other parties with attachments would not share in the cost [of a modification], unless they expanded their own use of the facilities at the same time."). Section 1.1408(b) states in pertinent part that "[t]he 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. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in subpart J of this part, it adds to or modifies its attachment." 47 CFR § 1.1408(b).

<sup>13</sup> *Local Competition Order*, 11 FCC Rcd at 16096-97, para. 1212 ("A utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost."). In 2018, the Commission reaffirmed this interpretation when it clarified 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 standards to the extent such poles or third-party equipment were out of compliance prior to the new attachment." *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7766, para. 121.

<sup>14</sup> NCTA Petition at 9-27.

<sup>15</sup> NCTA Petition at 27-29.

<sup>16</sup> NCTA Petition at 29-31.

<sup>17</sup> NCTA Petition at 5-9.

<sup>18</sup> *Wireline Competition Bureau Seeks Comment on a Petition for Declaratory Ruling Filed by NCTA — The Internet & Television Association*, WC Docket No. 17-84, Public Notice, 35 FCC Rcd 7196 (2020). Initially, comments on the NCTA Petition were due on August 19, 2020 and reply comments on September 3, 2020. The Bureau then extended the comment deadline to September 2, 2020 and the reply comment deadline to September 17, 2020. *Order Granting Extension of Comment Period in Docket 17-84*, WC Docket No. 17-84, Order, 35 FCC Rcd 8761 (2020).

of commenters, including telecommunications companies, internet service providers, trade associations, public interest organizations, electric utilities, and utility coalitions.

### III. DECLARATORY RULING

6. In this Declaratory Ruling, we issue a narrow clarification that, based on the Commission's rules and prior precedent, utilities may not require requesting attachers to pay the entire cost of pole replacements that are not necessitated solely by the new attacher and, thus, may not avoid responsibility for pole replacement costs by postponing replacements until new attachment requests are submitted. This clarification is necessary to address comments submitted to the Commission indicating inconsistent utility practices with respect to the allocation of pole replacement costs.<sup>19</sup>

7. Our clarification today is based on the cost causation and cost sharing principles codified in section 1.1408(b) of our rules. The first two sentences of section 1.1408(b) set out the principle of cost sharing, stating that “[t]he cost 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. Each party described in the preceding sentence shall share proportionately in the cost of the modification.”<sup>20</sup> This cost sharing language must be read in tandem with the cost causation language of the fourth sentence of 1.1408(b), which states, “[n]otwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party.”<sup>21</sup> As the Commission has previously made clear, when these principles of cost causation and sharing are read together, section 1.1408(b) stands for the proposition that parties benefitting from a

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<sup>19</sup> See NTCA Reply at 3 (arguing that “the lack of clarity in the rules/orders enables pole owners to demand that new attachers cover the entire cost of replacing a pole”); Crown Castle Reply at 2, 6 (arguing that “the pole owners’ apparent willingness to recognize their liability for the cost of replacing a deteriorated pole is undermined by their attempts to qualify the conditions under which they must absorb the costs”); NCTA Reply at i, 8 (providing the example that “certain pole owners agree that they benefit from the extra capacity created by pole replacements, even those prompted by a new attachment, while others argue there is no benefit to the pole owner when a pole is retired early” (footnote omitted)); Charter Reply at 21 (“[T]he Coalition of Concerned Utilities asserts that the ruling requested by NCTA will not yield benefits from better aligning utility incentives because utilities do not engage today in inefficient practices that the declaratory ruling would deter, such as inflating the cost of pole replacements, deferring replacements until they receive a pole replacement request, or underinvesting in pole infrastructure. As Charter has itself encountered problematic demands by pole owners in its own rural construction projects, it has doubts that the Coalition’s statements—even if true for the Coalition’s own members—are universally followed among pole owners.” (footnote omitted)).

<sup>20</sup> 47 CFR § 1.1408(b). We disagree with the argument of USTelecom and Edison Electric Institute et al. that a utility cannot be considered a party that directly benefits from a modification and, as such, cannot be required to share in the costs of a pole replacement. USTelecom Comments at 3; Edison Electric Institute Reply at 7. Rather, we agree with NCTA that the *Local Competition Order* recognized the general principle that a utility may be among the parties and beneficiaries of a pole replacement required to share in its costs. NCTA Petition at 20. In the *Local Competition Order*, the Commission directed that “[a] utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost.” *Local Competition Order*, 11 FCC Rcd at 16096-97, para. 1212 (emphasis added); see also NCTA Reply at 10-12 (“Commission decisions construing Section 224 require that certain pole replacement costs be shared, and in some cases borne exclusively, by pole owners, including in the case of pole owner betterment (as was first recognized by Congress in 1978).”).

<sup>21</sup> *Id.* We note that when the Commission adopted the language of now-section 1.1408(b) and considered the application of the rule, utilities were considered parties “with preexisting attachment[s] to a pole.” See, e.g., *Local Competition Order*, 11 FCC Rcd at 16077, para. 1166 (“If the electric utility decides to change a pole for its own benefit, and no other parties derive a benefit from the modification, then the electric company would bear the full cost of the new pole.” (emphasis added)).

modification share proportionately in the costs of that modification, unless such a modification is necessitated solely as a result of an additional or modified attachment of another party, in which case that party bears the costs of the modification.<sup>22</sup>

8. Therefore, we make clear that when section 1.1408(b) is applied to pole replacements,<sup>23</sup> it would be contrary to the Commission's rules and policies to require a new attacher to pay the entire cost of a pole replacement when a pole already requires replacement (e.g., because the pole is out of compliance with current safety and utility construction standards<sup>24</sup> or it has been red-tagged<sup>25</sup>) at the time a request for a new or modified attachment is made.<sup>26</sup> Even if the new attacher might "benefit" from that pole replacement, the pole replacement is not "necessitated solely as a result" of the new attachment, and therefore the utility may not use the cost causation language of section 1.1408(b) to impose all make

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<sup>22</sup> See *Local Competition Order*, 11 FCC Rcd at 16077, 16096, paras. 1166, 1211 ("[I]f . . . a cable operator seeks to make an attachment on a facility that has no available capacity, the operator would bear the full cost of modifying the facility to create new capacity, such as by replacing an existing pole with a taller pole. Other parties with attachments would not share in the cost, unless they expanded their own use of the facilities at the same time."); *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, 5302, para. 143 (2011) (*2011 Pole Attachment Order*) ("Under cost causation principles, if a customer is causally responsible for the incurrence of a cost, then that customer—the cost causer—pays a rate that covers this cost. This is consistent with the Commission's existing approach in the make-ready context, where a pole owner recovers the entire associated capital costs through make-ready fees. For example, if rearrangement or bracketing is performed to accommodate a new attachment, the new attacher is responsible for those costs. Likewise, a pole owner recovers the entire capital cost of a new pole through make-ready charges from the new attacher when a new pole is installed to enable the attachment." (footnotes omitted)).

<sup>23</sup> We disagree with the POWER Coalition and Edison Electric Institute et al. arguments that a pole replacement does not constitute a "modification" within the meaning of section 1.1408(b). Edison Electric Institute et al. Reply at 9; POWER Coalition Comments at 14. In the *Local Competition Order*, which implemented the requirements of now-section 1.1408(b), the Commission specifically recognized a pole replacement as an example of a modification that falls within the context of the rule. *Local Competition Order*, 11 FCC Rcd at 16075-77, 16091, paras. 1161, 1163, 1166, 1200 ("When a utility cannot accommodate a request for access because the facility in question has no available space, it often must modify the facility to increase its capacity . . . . A utility pole filled to capacity often can be replaced with a taller pole."); see also Charter Reply at 30-31 ("If pole replacements were not 'modifications,' for instance, the notice obligations under Section 1.1403(c) (which apply only to 'modifications') would be inapplicable to pole replacements, and utilities would be allowed to replace poles without notifying existing attachers, a reading that would defeat the purpose of the rule."); NCTA Reply at 13 ("The term 'modification' cannot be interpreted, as pole owners claim, to refer only to the modification of attached facilities. After all, government-mandated modifications such as road-widening projects for which the pole owners are undeniably responsible require the relocation (in most cases, replacement) of the utility's pole lines. Moreover, the Commission's rules now define make-ready—indisputably a modification—to include pole replacements.").

<sup>24</sup> See *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7766, para. 121 ("[N]ew attachers are not responsible for the costs associated with bringing poles or third-party equipment into compliance with current safety and pole owner construction standards to the extent such poles or third-party equipment were out of compliance prior to the new attachment.").

<sup>25</sup> For our purposes here, a "red tagged" pole is one found to be non-complaint with safety standards and placed on a utility's replacement schedule. *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7766, n.450.

<sup>26</sup> See *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7766, para. 121 ("The new attachment may precipitate correction of the preexisting violation, but it is the violation itself that causes the costs, not the new attacher. Holding the new attacher liable for preexisting violations unfairly penalizes the new attacher for problems it did not cause, thereby deterring deployment, and provides incentives for attachers to complete make-ready work irresponsibly and count on later attachers to fix the problem."); Crown Castle Comments at 2 (asking the Commission to "reaffirm that the costs of replacing or upgrading a pole, including correcting pre-existing conditions, may not be shifted entirely to the newest entity to attach to a utility pole").

ready costs of that pole replacement on the new attacher.<sup>27</sup> Yet, according to the record in response to the NCTA Petition, some utilities have sought to do exactly that,<sup>28</sup> although the record also shows that other utilities do not follow this practice and either pay for the costs or impose only incremental costs on the new attacher.<sup>29</sup> In this situation, the requesting attacher is not the sole cause of the pole replacement under section 1.1408(b) of the Commission's rules and should not pay the entire cost of a new pole.<sup>30</sup>

9. Our clarification today is narrower than that requested in the NCTA Petition and by commenters supporting the NCTA Petition.<sup>31</sup> NCTA argues that "it is unjust and unreasonable for pole owners to shift the entire cost of a pole replacement to a new attacher when the pole owner itself derives the predominant financial gain, including in the form of betterment, from replacing and upgrading a pole."<sup>32</sup> Crown Castle asks the Commission to declare that "if the pole owner asserts that a pole must be

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<sup>27</sup> This clarification should not be read to prevent the utility from recovering any allowable costs of the new pole through its pole attachment rates, to the extent such cost recovery is consistent with our rules regarding pole attachment rates.

<sup>28</sup> See Crown Castle Comments at 9 (stating that "a large investor-owned utility is requiring Crown Castle to pay the full cost of correction and pole replacement even when the utility recognizes that the existing conditions were caused by one or more of the existing attaching parties"); ACA Connects Comments at 10-11 (arguing that "the need for utility pole replacements, and the resulting make-ready fees imposed on new attachers, often result from long-deferred pole maintenance or even safety violations on 'red-tagged' poles caused by existing attachers or the utility itself"); Charter Reply at 7.

<sup>29</sup> See POWER Coalition Comments at 4 (stating that "if a pole replacement must be performed to cure a violation, or because the pole's physical condition has deteriorated to the point that a safety or reliability concern exists, the costs associated with the pole replacement are instead borne by the utility pole owner"); Xcel Energy Comments at 2, 9 (stating that "if a communications provider requests access for a new attachment to a pole that has been 'red tagged' for replacement (*i.e.*, is scheduled to be replaced within one year), Xcel Energy will coordinate the replacement of that pole with the communications provider's construction schedule and perform the replacement at Xcel Energy's own expense. In such cases, the new attacher would be responsible only for the incremental cost difference if accommodating the new attachment requires a pole that is taller and/or stronger than a pole sufficient to meet Xcel Energy's own needs."); Electric Utilities Comments at 12 (stating that "where an electric utility determines that the pole is due for immediate replacement due to deterioration or damage, the Electric Utilities agree that the pole owner should bear the cost of replacement").

<sup>30</sup> See 47 CFR § 1.1408(b); 47 U.S.C. § 224(i); see also ACA Connects Reply at 8 (arguing that "the mere fact that an attachment request immediately precedes a pole replacement does not mean the attacher is the sole beneficiary or that its request was a 'but-for' cause [of] the replacement. Rather, a more comprehensive analysis is required to determine the causal contributions of different parties and a fair allocation of costs.").

<sup>31</sup> See, e.g., POWER Coalition Reply at 7-10 ("At bottom, NCTA's proposal to shift the bulk of pole replacement costs to the utility pole owner in **all** cases (even where insufficient capacity would cause a pole access request to be denied) is a near complete turnabout of law and policy that the Commission has applied, and has repeatedly espoused for two decades." (emphasis in original)).

<sup>32</sup> NCTA Petition at 4; see also Charter Comments at 9 (arguing that "when a pole attachment precipitates a replacement of a pole, the immediate expense incurred to replace the pole will almost always *overstate* the cost that the attachment actually causes, since poles are inevitably replaced as part of cyclical replacement programs or state-ordered hardening requirements and the attachment merely moves this replacement forward in time. The utility practice of charging the full, immediate expense of a pole replacement, therefore, results in significant over-recovery, well above the costs actually caused by the attacher and well above the just and reasonable recovery permitted by Section 224 and the Commission's regulations and orders." (emphasis in original) (footnote omitted)); Altice USA Comments at 3 (arguing that "attachers should be responsible, at most, for a proportionate share of the cost of replacing a pole that reflects the depreciated value of the pole"); ExteNet Comments at 4-5 ("When a pole is replaced at ExteNet's request, the pole owner looks upon it as an opportunity to shift the utility's own inevitable infrastructure upgrade costs onto ExteNet."); Free State Foundation Comments at 1 ("Cable operators and wireline telco providers should be obligated to pay only the incremental costs that they cause in hastening the replacement of old utility poles with new ones."); INCOMPAS Comments at 13-14; Wireless Infrastructure Association Comments (continued....)

replaced for any reason other than lack of vertical clearance/space or loading, the new attacher should not be liable for the costs associated with replacing the pole.”<sup>33</sup> Some of these arguments appear to be in tension with the cost causation principle of section 1.1408(b), which contemplates that the utility is authorized to impose make-ready costs on new attachers if such costs are “necessitated solely” by the new attachment, notwithstanding the fact that the modification sought by the new attachment may “benefit” the utility.<sup>34</sup> We therefore limit this Declaratory Ruling to our narrow clarification that when a utility replaces a pole in response to an attachment request, it cannot require the new attacher to pay the entire cost of the pole replacement if it is not solely caused by the new attacher.<sup>35</sup>

10. Our clarification also should not be understood to adopt the positions advocated by some utilities, which tend to overstate the cost causation requirement set forth in section 1.1408(b).<sup>36</sup> For instance, the Coalition of Concerned Utilities argues that the NCTA Petition’s clarification request<sup>37</sup> “runs contrary to 40-year-old Commission precedent and four decades of industry practice, pursuant to which pole owners have been reimbursed in full for pole replacements by communications attachers.”<sup>38</sup> This is not the case, however, when the attacher is not the sole cause of the pole replacement;<sup>39</sup> hence, the need

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at 3-4; Taxpayers Protection Alliance Comments at 2; International Center for Law & Economics Comments at 2-3, 5; Center Against Government Waste Comments at 4; NTCA Reply at 4-5.

<sup>33</sup> Crown Castle Reply at 9 (arguing that “if a pole owner declares in response to a pole attachment application that a pole must be replaced, and the reason for that replacement is anything other than insufficient vertical space or clearance or that the attachment will exceed loading (unrelated to remaining pole strength), then the pole owner should be liable for the full cost of replacement”); *see also* ACA Connects Comments at 7 (arguing that “[a] utility may not assess fees for pole replacement if there is not ‘insufficient capacity’ on an existing pole.”).

<sup>34</sup> *See* 47 CFR § 1.1408(b); *Local Competition Order*, 11 FCC Rcd at 16097-98, paras. 1213, 1216 (“We recognize that limiting cost burdens to entities that initiate a modification, or piggyback on another’s modification, may confer incidental benefits on other parties with preexisting attachments on the newly modified facility. Nevertheless, if a modification would not have occurred absent the action of the initiating party, the cost should not be borne by those that did not take advantage of the opportunity by modifying their own facilities.”).

<sup>35</sup> *See, e.g., 2011 Pole Attachment Order*, 26 FCC Rcd at 5302, para. 144 (“Past investment in an existing pole would have been incurred regardless of the demand for attachments other than the owner’s attachments. As a result, under a cost causation theory, where there is space available on a pole, an attacher would be required to pay for none of the capital costs of that pole.”); *Local Competition Order*, 11 FCC Rcd at 16077, para. 1166 (“If the electric utility decides to change a pole for its own benefit, and no other parties derive a benefit from the modification, then the electric company would bear the full cost of the new pole.”).

<sup>36</sup> 47 CFR § 1.1408(b).

<sup>37</sup> *See* NCTA Petition at 4 (“NCTA requests a ruling clarifying that, in unserved areas, where existing utility infrastructure is often near the end of its useful life, it is unjust and unreasonable for pole owners to shift the entire cost of a pole replacement to a new attacher when the pole owner itself derives the predominant financial gain, including in the form of betterment, from replacing and upgrading a pole.”).

<sup>38</sup> Coalition of Concerned Utilities Comments at 29; *see also* Xcel Energy Comments at 2-3 (“It is clearly established through the Commission’s rules, policies, and precedent—as well as the legislative history of Section 224—that attachers are expected and required to bear the entire amount of those capital costs that arise from the make-ready process, including pole replacements, in order to accommodate new attachments regardless of whether there is a benefit to the utility.”).

<sup>39</sup> *See* 47 CFR § 1.1408(b); *see also* Letter from Aryeh Fishman, Ass. General Counsel, Edison Electric Institute, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Nov. 4, 2020) (“Rule § 1.1411(d)(4) and Commission’s orders 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 new attacher prior to the new attachment.”); Letter from Christopher L. Shipley, Atty. and Policy Advisor, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Dec. 14, 2020) (“Pole owners often argue that pole replacement conditions relating to pole strength are not safety

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for this clarification.<sup>40</sup> ACA Connects asks the Commission to “at least make clear that pole owners may not require new attachers to bear pole replacement costs in their entirety.”<sup>41</sup> In situations where the pole replacement is not “necessitated solely” by the new attachment, we agree that new attachers are not required to bear pole replacement costs in their entirety.<sup>42</sup>

11. We find that a rulemaking is a more appropriate forum to more fully address questions concerning the universe of situations where the requesting attacher should not be required to pay for the full cost of a pole replacement and the proper allocation of costs among utilities and attachers in those situations.<sup>43</sup>

#### IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that, pursuant to sections 1-4 and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 224, sections 0.91(b), 0.291, and 1.2 of the Commission’s rules, 47 CFR §§ 0.91(b), 0.291, 1.2, and section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e), this Declaratory Ruling IS ADOPTED.

13. IT IS FURTHER ORDERED that the Declaratory Ruling and the obligations set forth therein ARE EFFECTIVE upon release of this document.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith  
Chief  
Wireline Competition Bureau

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‘violations’—and therefore contend that the language of the Commission’s 2018 *Third Wireline Infrastructure Order* clarifying 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 standards to the extent such poles or third-party equipment were out of compliance prior to the new attachment’ does not apply.”).

<sup>40</sup> See Charter Reply at 7 (“Practices of the sort raised by [utility] commenters are already prohibited under the Commission’s existing rules and orders; however, the continued disputes in this area reflect the need for clearer Commission guidance and enforcement.”).

<sup>41</sup> See Letter from Brian Hurley, V.P. Regulatory Affairs, ACA Connects, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Oct. 29, 2020).

<sup>42</sup> While the NCTA Petition sought clarifications of our rules with respect to only “unserved areas” (see NCTA Petition at 4, 9-10, 12, 16), a term not defined by NCTA, the clarification made by this Declaratory Ruling applies in all situations in which section 1.1408(b) may be applicable.

<sup>43</sup> See POWER Coalition Comments at i (“The primary relief that NCTA requests is a blanket declaration by the Commission that nearly all costs associated with pole replacement work requested by a third party, solely to accommodate a new attachment in an ‘unserved’ area, be shifted from the third party attacher to the utility pole owner that voluntarily performs the pole replacement work at the third party’s request. This relief would dramatically reverse the Commission’s decades’ old cost apportionment principles.”); AT&T Comments at 1; USTelecom Reply at 1-2; Verizon Reply at 2.