

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**COMMENTS OF TECHFREEDOM**

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June 27, 2022

## SUMMARY

Never before has this country seen such a large influx of public spending on broadband deployment in the quest to close the digital divide. Yet the close to \$100 billion of taxpayer dollars committed over the past few years may not be able to accomplish that goal. It is becoming apparent that the costs of deployment are skyrocketing, especially in the most rural areas where fuel costs, labor shortages, and supply chain issues are conspiring against those wishing to deploy.

While the FCC can't solve those issues, the one area where the Commission can do something is to use its statutory authority to address the cost of pole replacements. NCTA and others have submitted evidence that anywhere from 20 to 50 percent of deployment costs are going into pole attachments and pole replacements. Yet the funds appropriated under BIL (and specifically the BEAD program) are earmarked for broadband deployment, not power grid replacement, and the digital divide will never be closed if pole owners can reap all the benefits of pole replacements while passing all the cost off to broadband providers (and, in this instance, taxpayers).

The Commission should use its statutory authority under Section 224 to set pole replacement rules that fairly apportion the costs to reflect the benefit all parties receive from the pole replacement. That could take the form of the new attachers paying the remaining net book value of the pole being replaced, or some other formula that recognizes that the remaining value of the pole may exceed remaining net book value. In any event, the formula can neither be "attacher pays all" or "utility pays all."

Finally, the Commission should place on the Accelerated Docket any pole attachment dispute involving unserved areas. If the paramount goal is closing the digital divide, the FCC's resources are best used to "fast-track" disputes in unserved areas so that deployment may proceed as quickly as possible.

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**Comments of Tech Freedom**

TechFreedom hereby files these Comments in the above-referenced proceeding in response to the Commission’s Second Further Notice of Proposed Rulemaking (SFNPRM).<sup>1</sup> In these Comments, we document why it is vital that the Commission address the issue of pole replacements now, as an unprecedented amount of federal funding for broadband is about to be deployed. If a substantial part of that money goes into the ground to replace utility poles, however, the digital divide will never be closed.

**1. About TechFreedom**

TechFreedom is a non-profit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public

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<sup>1</sup> See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, Second Further Notice of Proposed Rulemaking, FC 22-20 (March 18, 2022) (“Pole Attachment SFNPRM”). The Pole Attachment SFNPRM appeared in the Federal Register on April 28, 2022, 87 Fed.Reg. 25181 (April 28, 2022), and established the comment date as June 27, 2022 and reply comment date as July 27, 2022. These Comments are timely filed.

policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. We have commented often on regulations that impact broadband deployment and adoption.<sup>2</sup> We are uniquely suited to provide commentary on the SFNPRM.

## **2. Introduction: This is a “Once in a Once” Opportunity to Close the Digital Divide**

Calls to close the digital divide are not new. The term dates back more than 20 years, and the FCC’s 2010 National Broadband Plan outlined steps the United States could take to make broadband available to everyone.<sup>3</sup> Closing the digital divide has been elusive and costly. In 2017, an FCC White Paper predicted the following:

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<sup>2</sup> See TechFreedom, Comments on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination (May 16, 2022), GN Docket No. 22-69, <https://techfreedom.org/wp-content/uploads/2022/05/TechFreedom-Digital-Discrimination-NOI-Comments.pdf>; TechFreedom, Comments on NTIA’s Funding through the Broadband Equity, Access and Deployment (BEAD) program, Docket No. NTIA-2021-0002 (Feb 4, 2021), <https://techfreedom.org/wp-content/uploads/2022/02/TechFreedom-Comments-2-4-22.pdf>; TechFreedom, Comments on Report on the Future of the Universal Service Fund, WT Docket No. 21-476 (January 18, 2022), <https://techfreedom.org/wp-content/uploads/2022/01/TF-Comments-USF-NOI-1-18-22.pdf>; Letter of TechFreedom, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment (Sep 2, 2020), <https://www.innovationeconomyalliance.org/wp-content/uploads/2020/09/FCC-Pole-Attachment-Petition-Support.pdf>; TechFreedom, Reply Comments on Restoring Internet Freedom et al., WC Docket No. 17-108 et al. (May 20, 2020), <https://techfreedom.org/wp-content/uploads/2020/05/TechFreedom-Net-Neutrality-RIFO-Reply-Comments-5-20-20.pdf>; TechFreedom, Comments on Restoring Internet Freedom et al., WC Docket No. 17-108 et al. (Apr. 20, 2020), <https://techfreedom.org/wp-content/uploads/2020/04/TechFreedom-Net-Neutrality-RIFO-Comments.pdf>; Letter of TechFreedom, Promoting Broadband Infrastructure Investment (July 22, 2015), [http://docs.techfreedom.org/techfreedom\\_letter\\_on\\_broadband\\_deployment\\_-\\_july\\_2015.pdf](http://docs.techfreedom.org/techfreedom_letter_on_broadband_deployment_-_july_2015.pdf).

<sup>3</sup> Connecting America: The National Broadband Plan, FCC (2010), <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>. Interestingly, the National Broadband Plan only used the term “digital divide” to describe efforts in other parts of the world to bring broadband to rural areas and to the poor. “The United States should continue to support policies that hasten the rollout and uptake of telecommunications technology that bridges

We estimate that the total upfront capex required to deploy FTTP to the 14% of locations lacking access would be ~\$80b but, because of the shape of the cost curve, ~98% coverage could be attained for ~\$40b.<sup>4</sup>

Yet according to former FCC Chairman Tom Wheeler, in 2020 there were still 18 million people without access to any broadband network,<sup>5</sup> and the amount of people without access to broadband had only decreased by one million between 2012 and 2020.<sup>6</sup> Clearly, the cost to deploy broadband further into rural America is far greater than previously predicted. After all, according to a Government Accountability Office report from June 2020, the telecommunication industry itself spent \$795 billion, and the federal government spent \$47.3 billion on broadband deployment between 2009 and 2017, for a total national investment of \$842.3 billion during that period.<sup>7</sup>

When we consider the \$25+ billion in taxpayer dollars committed and spent between 2017<sup>8</sup> and the current Broadband Infrastructure Legislation's (BIL's) \$65 billion,

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the international digital divide. Integrating ICT deployment and utilization into broader regional economic development strategies is as important abroad as it is at home." *Id.* at 60.

<sup>4</sup> FED. COMM'NS COMM'N, IMPROVING THE NATION'S DIGITAL INFRASTRUCTURE (2017), <https://www.fcc.gov/document/improving-nations-digital-infrastructure>.

<sup>5</sup> Tom Wheeler, *5 Steps to get the Internet to all Americans*, BROOKINGS (May 27, 2020), <https://www.brookings.edu/research/5-steps-to-get-the-internet-to-all-americans/>.

<sup>6</sup> See FED. COMM'NS COMM'N, FCC 12-90, EIGHTY BROADBAND PROGRESS REPORT (2012), <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/eighth-broadband-progress-report>.

<sup>7</sup> U.S. Gov't Accountability Off., GA-20-535, Broadband: Observations on Past and Ongoing Efforts to Expand Access and Improve Mapping Data (2020), <https://www.gao.gov/assets/gao-20-535.pdf>.

<sup>8</sup> This includes: 1) \$20.4 billion in the FCC's Rural Digital Opportunity Fund, FCC, <https://www.fcc.gov/auction/904> (last visited Feb. 3, 2022); 2) \$1.49 billion in the FCC's 2018 CAF II Auction, FCC, <https://www.fcc.gov/auction/903> (last visited Feb. 3, 2022); 3) \$1.5 billion from the Consolidated Appropriation Act of 2021, FCC, <https://broadbandusa.ntia.doc.gov/resources/grant-programs> (last visited Feb. 3, 2022).

Congress has allocated well more than the \$80 billion that the FCC predicted in 2017 would totally close the Digital Divide, and that doesn't include the \$79.4 billion invested by private companies in broadband in 2020 alone.<sup>9</sup> Clearly the shape of the cost curve must differ significantly from what the FCC thought just five years ago.

### **3. Costs to Deploy Broadband are Going Up, Up, Up**

NTIA has promised numerous times,<sup>10</sup> and to numerous Senators, that the \$48.2 billion allocated by Congress in the BIL will make it possible to deliver broadband to every resident of the United States.<sup>11</sup> But before NTIA has sent a dollar to the states to spend, there are clear signs that the costs of broadband deployment are skyrocketing. First, there is general inflation. As a rough proxy for cost, if inflation remains at current levels during the majority of the five-year period of the BEAD program, the \$42.5 billion allocated will

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<sup>9</sup> Mike Saperstein, *2020: Broadband Providers Pump Another \$79.4 Billion Into America's Connectivity Infrastructure*, USTELECOM (Sept. 22, 2021), <https://ustelecom.org/2020-broadband-providers-pump-another-79-4-billion-into-americas-connectivity-infrastructure/>.

<sup>10</sup> See Megan Boswell, *Infrastructure Investment and Jobs Act Will Close Digital Divide if States Are Prepared, Says Alan Davidson*, BROADBAND BREAKFAST (Apr. 14, 2022), <https://broadbandbreakfast.com/2022/04/infrastructure-investment-and-jobs-act-will-close-digital-divide-if-states-are-prepared-says-alan-davidson/>; Grace Dille, *NTIA has 'Once in a Generation Opportunity' to Close Digital Divide*, MERITALK (Mar. 1, 2022), <https://www.meritalk.com/articles/ntia-has-once-in-a-generation-opportunity-to-close-digital-divide/>; Testimony of Assistant Secretary Davidson on Connecting America: Oversight of the NTIA, submitted February 16, 2022 to the House Committee on Energy and Commerce, Subcommittee on Communications and Technology, at <https://www.ntia.doc.gov/speechtestimony/2022/testimony-assistant-secretary-davidson-connecting-america-oversight-ntia> ("Thanks to the leadership and work of this Subcommittee, the Bipartisan Infrastructure Law provided \$65 billion to help deliver affordable, reliable, high-speed Internet to every American and help close the digital divide.").

<sup>11</sup> See U.S. Senate Committee on Commerce, Science, & Transportation: Oversight of the National Telecommunications and Information Administration, testimony of Alan Davidson, Administrator of the National Telecommunications and Information Administration, June 9, 2022, at <https://www.commerce.senate.gov/2022/6/oversight-of-the-national-telecommunications-and-information-administration>.

have the buying power of barely \$31 billion by the end of the program.<sup>12</sup> Given that most unserved and underserved are rural, the cost of diesel fuel to transport materials to remote locations and to fuel generators for construction will be a key factor, and diesel fuel has increased more than \$2.00 a gallon just since the BIL was signed into law.

Many industry experts are also warning of severe supply chain and labor shortages that could increase the cost of deployment significantly over the next few years. The cost of both raw materials, such as fiber, and networking equipment is increasing rapidly.<sup>13</sup> Then there are labor force issues, again exacerbated by the fact that companies have to deploy and support the labor force in rural areas:

“There is no labor force,” [Charter CEO Tom] Rutledge said at the MoffettNathanson Media and Communications Summit in New York, when

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<sup>12</sup> See *Inflation Calculator*, SMARTASSET, <https://smartasset.com/investing/inflation-calculator#D6TmrwUAfw> (\$42.5 billion as of the end of 2021 will have the buying power of \$31.2 billion at the end of 2026).

<sup>13</sup> See, e.g., Mike Dano, *Price increases, supply chain problems weigh on US equipment vendors*, LIGHTREADING (Apr. 14, 2022), <https://www.lightreading.com/open-ran/price-increases-supply-chain-problems-weigh-on-us-equipment-vendors/d/d-id/776807> (“Airspan CEO Eric Stonestrom said the company has raised its prices on new orders by an average of 7% to 10%. “However, we have negotiated new orders from two of our bigger customers with price increases, in one case, in excess of 15%. And in the other case, a substantial amount at that level,” he said, without naming the customers.”); Mike Farrell, *Equipment, Worker Shortage Could Delay Fiber Buildout*, MULTICHANNEL NEWS (Apr. 12, 2022), <https://www.nexttv.com/news/fiber-deficiency> (““There is still a lot of backlog of projects and it’s not like they’re slowing down any strategic initiatives they have,’ [Dell’Oro Group VP Jeff] Heyner said. ‘The projects just keep coming and they’re gated by supplies. It’s really difficult to get ahold of fiber itself, conduit, and once everything is installed, the CPE necessary to connect the subscriber.’”); Diana Goovaerts, *AT&T expects to miss fiber target by 500k due to supply chain issues*, FIERCE TELECOM (Aug. 10, 2021, 10:53 AM), <https://www.fiercetelecom.com/operators/at-t-expects-to-miss-fiber-target-by-500k-due-to-supply-chain-issues> (“[AT&T CFO Pascal] Desroches said that up through the second quarter AT&T ‘hadn’t really experienced any impact’ from global supply chain disruptions, thanks in part to its status as a ‘preferred’ customer. But he noted ‘since the start of the third quarter we are seeing dislocation across the board, including in fiber supply.’”).

asked about the worker shortage. “For all the construction that hasn’t been done, there is no skilled labor force that is currently out there.”

Adding to the dilemma is that many of the areas where the build outs are taking place have small populations, meaning that workers have to be brought in, which creates logistic and transportation issues. Rutledge added that the problem is greater for smaller operators.

“We are a big operator and we can manage through these big projects,” he said. “We’ve already invested a lot of money in new construction equipment and hired a couple of thousand people just to manage the contract process of building out these new assets.” Still, it hasn’t been entirely smooth sailing, even a company the size of Charter. “We have thousands of unfilled positions,” Rutledge said.<sup>14</sup>

Recently, Commissioner Carr noted that broadband providers tell him that “their costs to construct Internet infrastructure are up nearly 30% in light of inflation, rising fuel costs, supply chain challenges, and workforce shortages.”<sup>15</sup> Given all of these rising costs, is it realistic to expect digital divide can be closed with this round of taxpayer funding?

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<sup>14</sup> Mike Farrell, *Charter Chief Tom Rutledge: No Labor Force for Fed-Funded Fiber Builds*, MULTICHANNEL NEWS (May 18, 2022), <https://www.nexttv.com/news/charter-chief-tom-rutledge-no-labor-force-for-fed-funded-fiber-builds>. See also Mike Farrell, *Equipment, Worker Shortage Could Delay Fiber Buildout*, MULTICHANNEL NEWS (Apr. 12, 2022), <https://www.nexttv.com/news/fiber-deficiency> (“‘Everyone is building at once,’ [AmeriCrew founder Kelley] Dunne said. ‘In the process, the skill sets are converging as well. You need skilled labor out in the workforce, not to mention electricians and higher skilled laborers. I think we’re heading into the largest workforce shortage our nation has ever seen.’”).

<sup>15</sup> FCC, CARR CALLS FOR NATIONAL BROADBAND STRATEGY (June 10, 2022), <https://www.fcc.gov/document/carr-calls-national-broadband-strategy>. Commissioner Carr’s statement related to the release of a new report from the Government Accountability Office, entitled “Broadband: National Strategy Needed to Guide Federal Efforts to Reduce the Digital Divide, May 2022, at <https://www.gao.gov/assets/gao-22-104611.pdf>. That report is highly critical of the way various agencies are implementing the “more than 100 programs administered by 15 agencies.” In the summary, the Report concludes:

The U.S. broadband efforts are not guided by a national strategy with clear roles, goals, objectives, and performance measures. In 2021, the Executive Office of the President, through the National Economic Council and in collaboration with other White House offices, took the lead for coordinating broadband programs. The Executive Office of the President has not decided if a national strategy is needed,

#### 4. The Importance of This Proceeding

There is little the Commission can do to combat some of the external factors driving up the cost of broadband deployment. What the Commission *can* do is continue the work of this proceeding, critically named “Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment.” Started March 30, 2017,<sup>16</sup> the Commission has attempted to tackle the issues over which it has authority to break down barriers to deploying broadband. Its decisions in this proceeding include The *2018 Wireline Infrastructure Order*,<sup>17</sup> which eliminated barriers to broadband deployment by streamlining the process for attaching new communications facilities to utility poles, the *2020 Declaratory Ruling*,<sup>18</sup> and the *Pole Replacement Declaratory Ruling*,<sup>19</sup> clarifying that “it is unreasonable and inconsistent with section 224 of the Communications Act, the Commission’s rules, and past Commission precedent, for utilities to impose the entire cost

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but it is well positioned to develop and implement one. A strategy to help better align programs could also include legislative proposals for Congress. Without such a strategy, federal broadband efforts will not be fully coordinated, and thereby continue to risk overlap and duplication of effort.

<sup>16</sup> See Public Notice DA 17-300, “Wireline Competition Bureau Opens WC Docket No, 17-84,” at [https://www.fcc.gov/ecfs/file/download/DOC-56c7f52b61000000-X.pdf?file\\_name=DA-17-300A1.pdf](https://www.fcc.gov/ecfs/file/download/DOC-56c7f52b61000000-X.pdf?file_name=DA-17-300A1.pdf).

<sup>17</sup> Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless 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).

<sup>18</sup> 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>19</sup> Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, Declaratory Ruling, 36 FCC Rcd 776, 777, ¶ 3 (WCB 2021) (Pole Replacement Declaratory Ruling).

of a pole replacement on a requesting attacher when the attacher is not the sole cause of a pole replacement.”<sup>20</sup>

On July 16, 2020, NCTA—the Internet & Television Association filed a Petition asking the Commission to clarify its rules in the context of pole replacements.<sup>21</sup> NCTA and others in this proceeding have amply demonstrated that broadband deployment into highly rural unserved areas is being hamstrung by the cost of pole replacements and the delays caused when pole attachment disputes arise:

For instance, in one major broadband construction project that has included (to date) over five thousand miles of new rural plant, Charter has encountered situations in which as many as one out of every twelve poles needs to be replaced, with the average replaced pole already several decades into its service life. In a major expansion to over 57,000 rural homes and small businesses, pole replacement costs alone have accounted for approximately **25 percent of the total cost of construction** (including applications, surveys, permitting, labor, and material).<sup>22</sup>

In an *ex parte* letter, filed January 31, 2022, the Schools, Health & Libraries Broadband (SHLB) Coalition reported numerous instances where broadband deployment plans have had to be significantly modified, or the project abandoned because of high pole replacement costs or the time necessary to negotiate with the pole owner.

Our members have experienced unpredictable pole attachment, make-ready, and permit costs that can range from **20% to 50% of the cost of some broadband deployment projects**. In some cases, as shown below, the unpredictability and costs of pole replacements can lead to the cancellation of broadband deployment plans altogether. In other cases, broadband

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<sup>20</sup> SFNPRM ¶ 2.

<sup>21</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).

<sup>22</sup> NCTA Petition at 6 (emphasis original).

deployment plans are significantly delayed or must be curtailed in order to make the project economically viable.<sup>23</sup>

Clearly, we have an aging power infrastructure and delivery system in desperate need of upgrading.<sup>24</sup> But the funds appropriated under BIL (and specifically the BEAD program) are earmarked for broadband deployment, not power grid replacement. If even 20 percent of the \$42.5 billion in BEAD funding went into pole replacements, this would not close the digital divide. This is especially true in the most rural areas, where those wishing to deploy broadband need far more poles per household, and thus higher costs.

Unserved areas, which are overwhelmingly rural areas with low population density in which a large number of poles is necessary to serve each household, present an especially strong risk that utilities will underinvest in infrastructure if they believe that they will have an opportunity to offload the cost of facilities upgrades onto a new attacher who seeks to serve the area.<sup>25</sup>

The Commission fully understands the underlying problem. “We recognize that our current cost sharing rules have been interpreted to shift the financial responsibility of

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<sup>23</sup> The Schools, Health & Libraries Broadband (SHLB) Coalition *ex parte* letter, filed January 31, 2022 (emphasis added). The letter also highlighted an upstate New York broadband project that was cancelled due to “excessive rights-of-way fees and pole attachment fees that made it uneconomic to serve the Adirondack region.” *Id.* p. 2, n.3, *citing* <https://www.adirondackexplorer.org/stories/a-nest-of-north-country-broadband-issues>. *See also* SFNPRM, separate statement of Chairwoman Rosenworcel (“Some of the companies that are in the process of building broadband to unserved and underserved areas have told us that the cost of these pole attachments can make up as much as one-third of the cost of rural deployment.”).

<sup>24</sup> *See* Tim McLaughlin, *Creaky U.S. Power Grid Threatens Progress on Renewables, EVs*, REUTERS (May 12, 2022), <https://www.reuters.com/investigates/special-report/usa-renewables-electric-grid/> (“The nation’s transmission network, plagued by outages and increasingly severe weather, needs a trillion-dollar overhaul to handle the Biden administration’s promised clean-energy revolution. No one is taking charge of that problem.”).

<sup>25</sup> NCTA Petition, p. 19.

utilities for maintaining and replacing their capital assets to attachers, and that this shift inflates attachers' pole attachment costs."<sup>26</sup> It is imperative that the FCC move quickly to resolve the issues presented in the SFNPRM.

## **5. The Commission Has the Legal Authority to Set Pole Replacement Rules**

A number of utility commentators argue that the FCC lacks the requisite legal authority to establish pole replacement rules.<sup>27</sup> The statutory power of the FCC in this area is set forth in Section 224 of the Communications Act, enacted as part of the 1978 Pole Attachment Act,<sup>28</sup> and could not be clearer:

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.<sup>29</sup>

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<sup>26</sup> SFNPRM ¶ 29 (footnotes omitted), *quoting* Charter Comments, at 4-5 ("Charter can confirm from its own experience that the cost of pole replacements factors significantly into its expenditures in bringing broadband to unserved, rural areas, and operates as a barrier towards further network expansion in those areas.").

<sup>27</sup> *See* SFNPRM ¶ 8 n.21 ("We note some commentators argue that the Commission lacks the legal authority to 'shift the cost of pole replacements caused solely by attachers to pole owners.'").

<sup>28</sup> Pub. L. No. 95-234, 92 Stat. 33 (1978).

<sup>29</sup> 47 U.S.C. § 224.

Courts have upheld this authority,<sup>30</sup> including rejecting claims that regulations setting maximum pole attachment rates constitute an unconstitutional Fifth Amendment taking.<sup>31</sup> Indeed, we can find no cases where FCC pole attachment decisions were ultimately overturned by the courts. The same analysis would apply to regulations which allocate pole replacement costs between the owner and the attacher. As noted above, the Commission has already concluded that “it is unreasonable and inconsistent with section 224 of the Communications Act, the Commission’s rules, and past Commission 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 a pole replacement.”<sup>32</sup> That decision was not appealed. The *Pole Attachment Declaratory Ruling* further concluded that utilities “may not avoid responsibility for pole replacement costs by postponing replacements until new attachment requests are submitted.”<sup>33</sup> The question in this proceeding thus becomes not *whether* the FCC can apportion the costs of pole attachments between owners and attachers, but rather *how* those costs should be apportioned.

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<sup>30</sup> See *Nat’l Cable Telecomm. Ass’n v. Gulf Power Co.*, 122 S.Ct. 782 (2002); *Gulf Power Co. v. U.S.*, 187 F.3d 1324 (11<sup>th</sup> Cir. 1999) (“Gulf Power I”) (rejecting facial challenge to Section 224); *Southern Company v. FCC*, 293 F.3d 1138 (11<sup>th</sup> Cir. 2002) (upholding 47 U.S.C. § 224(f)).

<sup>31</sup> See *FCC v. Florida Power Corp.*, 107 S.Ct. 1107, 1111-12 (1987) (“So long as the rates set are not confiscatory, the Fifth Amendment does not bar their imposition.”); see also *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11<sup>th</sup> Cir. 2002).

<sup>32</sup> SFNPRM ¶ 2, *citing* Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, Declaratory Ruling, 36 FCC Rcd 776, 777, ¶ 3 (WCB 2021) (Pole Replacement Declaratory Ruling).

<sup>33</sup> *Id.* ¶ 6, *citing* Pole Replacement Declaratory Ruling, 36 FCC Rcd at 779, ¶ 6.

## 6. The Commission Should Allocate the Cost of Pole Replacement to Best Reflect the Benefits to All Parties

The Commission recognizes both the importance and the difficulty in getting the equation right, especially given the fact that, if pushed too far, utilities will simply deny attachment requests, as is their right under the statute.<sup>34</sup>

Our concern is rooted in the potential impact on the deployment of broadband networks if the financial resources available for deployments are depleted by these costs. That said, we are keenly aware of the need to carefully examine the impact that any changes to our cost allocation rules may have on the ability of utilities to fully recover the costs of expanding capacity to accommodate new attachments to avoid the unintended consequence of increased attachment denials.<sup>35</sup>

TechFreedom recognizes that this is a difficult issue to resolve. But the solution is neither “attacher pays” nor “utility pays.” Both parties benefit from the pole replacement. The attacher gets access to a pole that has already gone through the right-of-way, environmental, and zoning gauntlet that would take months or years to navigate were they to put up wholly new poles. As such, the attacher should pay for a portion of the new pole. For example, at the least, the attacher should be responsible for the differential cost of the

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<sup>34</sup> *Id.* ¶ 17, n.49 (“Section 224 does not provide the Commission with authority to require utilities to replace poles when additional capacity is needed to accommodate a new attachment.”). We would echo the Commission’s concern, nonetheless, that utilities can abuse this right by arguing that their poles need replacement because of lack of capacity for additional attachments, when that is not the case. *Id.*, ¶ 18, n. 50 (“We are aware of allegations by attachers that some utilities erroneously or disingenuously claim that an existing pole lacks capacity to accommodate a new attachment and insist that the pole must be replaced at the attacher’s cost.”).

<sup>35</sup> *Id.* ¶ 17 (footnotes omitted).

pole in terms of either increased height or girth necessary to support the new attachment.<sup>36</sup>

At the same time, pole owners get a brand-new pole that can support one or more attachers, from which they derive future monthly revenue.<sup>37</sup> In the case of poles that are at or near the end of life, those new poles go to the end of the line for future replacement, pushing out the cost and time when the utility would have to schedule a pole replacement. We therefore agree that there should be a presumption that the utility benefits from the new pole.<sup>38</sup> But we also recognize that if a utility is forced to replace a pole before the end of its useful life because the existing pole cannot support the new attachment, then the utility loses value of the remaining life of the replaced pole.<sup>39</sup>

NCTA's resolution would have the new attachers pay the remaining net book value of the pole being replaced, measured by the average depreciated bare pole investment

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<sup>36</sup> See FCC, Second Notice of Proposed Rulemaking on Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84 ¶ 24, (Mar. 18, 2022), <https://docs.fcc.gov/public/attachments/FCC-22-20A1.pdf> (discussing the allocation of the costs of pole replacements and pole adjustments).

<sup>37</sup> *Id.* ¶ 18.

<sup>38</sup> *Id.* ¶ 23.

<sup>39</sup> *Id.* ¶ 16 (In particular, the white paper submitted by Charter's economist, Dr. Patricia Kravtin, states that 'since the future replacement of the pole from the utility's perspective is 'an inevitable event' that it would eventually have to pay for itself, the practice of transferring the full cost of that replacement onto new attachers (who must either pay to obtain access or choose to abandon their investment plans) results in burdens to the attaching entity far exceeding the costs they actually cause the pole owner to incur over a more meaningful time horizon.' Utilities counter that the early retirement of their poles precipitated by a new attachment comes at a cost—the value they lose in a capital asset that has not yet reached the end of its useful life—and that under the Commission's cost causation policy, they are entitled to compensation for the unrealized value of a pole that would otherwise remain in service.") (footnotes omitted).

derived using the Commission's pole attachment rate formula.<sup>40</sup> This may be a workable solution. Yet we note the countervailing argument that the remaining value of the pole is based on its current condition when replaced, not strictly on its age or depreciated value.<sup>41</sup> We look forward to reviewing all of the comments to see where compromise might be reached.

## **7. Disputes Arising in Unserved Areas Should be Resolved via the Accelerated Docket**

The *SFNPRM* asks whether the current 180-day shot clock is sufficient to resolve pole replacement disputes, or whether the Commission should adopt NTCA's request that disputes arising over pole replacements in unserved areas should be moved to the Accelerated Docket, which requires a decision within 60 days under Section 1.736(a).<sup>42</sup> TechFreedom believes that pole complaints which demonstrate that the area in question is unserved should automatically be placed on the Accelerated Docket. As noted above and elsewhere, the challenges faced in reaching the most rural areas are large, and providers faced with a six-month delay before receiving a decision (after taking the time necessary to first go through negotiations and then prepare the complaint) may derail that project, ultimately resulting in no broadband service being deployed to close the digital divide. Given the clear congressional mandate to bring broadband to all Americans, disputes over

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<sup>40</sup> *Id.* ¶ 30, n.94 citing NCTA Petition at 11.

<sup>41</sup> *Id.* ¶ 28, n.78, citing Xcel Energy Comments at 5. If the Commission adopts a rule which includes an assessment of the remaining value of a replaced pole, then utilities must be open and transparent with their valuation metrics and provide such information to attachers on a timely basis, so they can plan their deployment accordingly. *See Id.*, ¶ 35.

<sup>42</sup> *Id.* ¶ 36.

poles in unserved areas should be fast-tracked and placed in front of disputes over pole attachments in areas that are already served, sometimes by multiple carriers. Commission resources should be deployed first and foremost to resolving disputes that will lead to first service to Americans without broadband.<sup>43</sup>

## CONCLUSION

As we noted above, there is little the Commission can do to combat the rising costs of deploying broadband, driven by inflation, fuel costs, supply chain problems and labor force issues. The one thing the Commission can do is to ensure that broadband dollars are spent on broadband, not replacing aging poles owned by other industries. The Commission should exercise its statutory powers to promulgate fair regulations that have all benefitting parties pay their share of the cost of pole replacements and provide accelerated review of pole attachment disputes in unserved areas.

Respectfully submitted,  
\_\_\_\_\_/s/\_\_\_\_\_  
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Dated: June 27, 2022

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<sup>43</sup> For example, is the digital divide being closed if the Commission expends resources to resolve a pole attachment complaint involving a company seeking to overbuild existing areas and being denied pole attachments because the utility argues that the pole can't support additional attachments? While such disputes should be heard and decided, that decision likely will not lead to first service and a narrowing of the digital divide.