

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

In the Matter of	)	
	)	
Build America: Eliminating Barriers to Wireline	)	WC Docket No. 25-253
Deployments	)	

**COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION**

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The American Public Power Association (“APPA”), on behalf of the Nation’s publicly-owned electric utilities, submits these comments in response to the *Build America: Eliminating Barriers to Wireline Deployments Notice of Inquiry* (“NOI”), issued by the Federal Communications Commission (“Commission”).¹

I. SUMMARY OF ARGUMENTS

APPA shares the Commission’s desire to expand broadband coverage to all Americans, and particularly to the communities that its members serve. APPA is extremely concerned, however, that several of the Commission’s lines of inquiry in the *NOI*, particularly with respect to the use of public power utility poles and conduits, are based on unwarranted assumptions, exceed the Commission’s statutory authority, run counter to Congressional intent, and if implemented would have detrimental effects on utility operations. Specifically, the Commission seeks comment on whether it can use its Section 253 authority to establish rates, terms, and conditions of access for wireline telecommunications service attachments to government-owned infrastructure. To the extent that this would apply to public power utility poles,² the answer is no.

¹ *Build America: Eliminating Barriers to Wireline Deployments, Notice of Inquiry* (“NOI”), WC Docket 25-253, released September 30, 2025.

² Unless otherwise specified, APPA’s use of the term “pole” or “pole attachment” will also include access to or use of “conduits.”

First, it is not clear that there is a pressing need for the imposition of sweeping top-down regulation of public power pole attachments. As the Commission's own broadband data collection mapping shows, the vast majority of the country, particularly in metropolitan and suburban areas served by municipal utilities, there is widespread availability of wireline telecommunications services. Wireline telecommunications service providers have had ready access to public power utility poles for decades without need of federal regulation.

Second, Section 253 is only applicable to government entities acting in a regulatory capacity. Here, while public power utilities may be government owned, they operate as business-units in functionally the same way that private investor-owned utilities do. The courts have long recognized that if government entities are acting as market participants, then they are not acting in a regulatory capacity, but rather a proprietary capacity. Additionally, the Commission appears to be improperly conflating attachments to public power utility poles with state and local government franchising and right-of-way access. Pole and conduit attachment procedures are distinct in both purpose and procedure from state and municipal governments regulating and managing access to the underlying right-of-way where the poles are located.

Third, were the Commission to use Section 253 to establish rates, terms, and conditions for wireline telecommunications service attachments to public power utility poles, that would undermine the intent of Congress in its enactment and amendment of Section 224 of the federal Communications Act,³ the only statute that expressly grants the Commission the power to regulate pole attachment rates and procedures. Section 224 explicitly exempts government-owned electric utilities from the FCC's pole attachment regulatory authority. Using Section 253 to circumvent this clear Congressional intent would undermine multiple canons of statutory interpretation.

³ Section 224 was first enacted in 1978 in the federal Pole Attachment Act, and was amended in 1996, as part of the federal Telecommunications Act of 1996.

II. INTRODUCTION TO APPA

APPA represents community-owned, not-for-profit electric utilities that provide safe and reliable electricity to more than 55 million Americans and employ over 100,000 employees. Approximately 70 percent of APPA's members serve communities with less than 10,000 residents. Homes and businesses in 2,000 communities across the U.S. — large cities like Austin, Nashville, Los Angeles, and Seattle, as well as small towns and the Navajo Nation — get electricity from a public power utility. Collectively, these utilities serve 1 in 7 electricity customers across the U.S. and operate in 49 states — all except Hawaii — and the territories of American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.

III. SECTION 253 REQUIRES THE FCC TO DIFFERENTIATE BETWEEN GOVERNMENTAL ENTITIES ACTING IN A REGULATORY VERSUS PROPRIETARY CAPACITY

In Section 253, Congress specified that state and local governments may not enact or impose *regulations or statutes* that have the effect of prohibiting an entity from providing telecommunications service. By specifically limiting the FCC's enforcement power under Section 253 to regulations and statutes, Congress implicitly focused the scope of its preemptive authority on addressing actions of governmental entities acting in a sovereign or *governmental capacity*.

A. Congress Explicitly Limited the FCC's Section 253 Authority to Govern Local Government Acting in a Regulatory Capacity

Courts, Congress, and the Commission each have long recognized the distinction between government entities acting in a regulatory versus proprietary capacity.⁴ The U.S. Supreme Court differentiated between these capacities by stating, “When the State acts as *regulator*, it performs a role that is *characteristically a governmental* rather than a private role... These distinctions are far

⁴ See for example, *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865 (F.C.C.), 30 FCC Rcd. 31, 2014 WL 5374631 at ¶ 239 (where the Commission stated, “we conclude that Section 6409(a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities.”).

less significant when the State acts *as a market participant with no interest in setting policy*.⁵ Here, Congress clearly intended for the Commission’s power in Section 253(a) to only apply to state and local governments acting in a regulatory capacity. Section 253 in pertinent part reads as follows:

SEC. 253. REMOVAL OF BARRIERS TO ENTRY.

(a) IN GENERAL. -- No State or local *statute or regulation*, or other State or local *legal requirement*, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.⁶

For the nearly thirty years since enactment of this provision, the Commission and courts consistently concluded that these provisions relate to state and local governments when they are acting in a regulatory capacity – e.g., regulating use of private property subject to zoning requirements, issuing franchises, or issuing permits for the use of the public rights-of-way – as opposed to when they are acting in a proprietary capacity, such as when they lease or rent space on building rooftops or utility facilities.⁷⁸

Further, canons of statutory construction also support this assertion. Specifically, the canon *ejusdem generis* stands for the presumption that where general words follow a list of two or more items, the general words apply only to things of the same kind of class as the listed items that are specifically mentioned.⁹ Here, by listing “statute” and “regulation” to start the list, and including the more general phrase “legal requirement” to close it, Congress intended that only legal

⁵ *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I. Inc.*, 507 U.S. 218, 231–32 (1993) (*emphasis added*).

⁶ 47 U.S.C § 253 (*emphasis added*).

⁷ See, e.g., *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only “regulatory schemes”).

⁸ APPA recognizes that in its *Small Cell Order* the FCC sought to evade this limitation by adopting a blanket and unsupported presumption that all government-owned facilities, including public power utility poles, are managed in a governmental capacity with regulatory objectives. *Declaratory Ruling and Third Report and Order, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79 (*Small Cell Order*), released September 27, 2018. While the court in *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020) upheld this presumption, a close reading of that decision reveals that the Court’s focus was only on activities that are inherently governmental. Further, it is unlikely that the degree of deference that the Court afforded the FCC on this issue of statutory interpretation would be repeated in a post *Loper Bright* environment (*Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024)).

⁹ See, e.g., *Fischer v. United States*, 606 U.S. (2024).

requirements that are similar to statutes and regulations be included in the scope of the Commission's enforcement capacity. When government is acting in a proprietary capacity, it is not issuing statutes, regulations, or legal requirements of a similar nature. As such, governmental entities undertaking actions in a proprietary capacity should not be considered as falling within the scope of Section 253's enforcement authority even if contracts, such as pole attachment agreements, contain enforceable "legal requirements." Indeed, a private telecommunications carrier would be able to rely on that very same pole attachment agreement to enforce the contract's legal requirements.

B. Public Power Utilities Do Not Act in a Regulatory Capacity

As described above, public power utilities are owned by municipalities, states, and other governmental entities, but function in the same manner as private utility companies. Much like their private utility counterparts, public power utilities provide electricity to customers for a fee, they build infrastructure to respond to customer demand, they adjust their prices based on market forces, and they conduct myriad other activities that businesses across the country engage in. They do not pass laws, they do not promulgate regulations, grant franchises, or adopt or enforce aesthetic or zoning requirements, and they do not set public policy.

To return to the U.S. Supreme Court's language above distinguishing between regulatory and proprietary functions of government entities, public power utilities act in a proprietary capacity, as "market participant[s] with no interest in setting policy," they do not perform "a role that is characteristically a governmental rather than a private role."¹⁰

Pivotaly, the purpose for which public power utilities own and manage their poles is as an electric industry market participant and not to further governmental or regulatory purposes. Public power utilities were formed to provide electric service in communities where private utilities were

¹⁰ *Bldg. & Constr. Trades Council of Metro. Dist.*, 507 U.S. 218, 231–32 (1993).

not providing service, as such they own and manage their electric facilities, including their poles like any other utility. This includes the processes by which public power utilities approve and manage access to their infrastructure by telecommunication carriers. While public power utilities have sought for decades to reasonably accommodate and facilitate access to their poles by wireline telecommunications service providers and other attaching entities, the core purpose and function of public power utility poles, like that of private investor-owned utilities and electric cooperatives, is the safe and reliable distribution and delivery of electric services to their customers.

Public power utilities acquire and maintain their utility poles in the service of providing electric power. The poles, while owned by governmental entities, are not “public property” or “public goods” that are generally available for public use in the same way that the public right-of-way is available. The fact that these same poles can also accommodate communications attachments does not change the fundamental nature of the poles or the proprietary capacity in which public power utilities own and manage their use.

The FCC does not have the authority under Section 253 to regulate public power utility attachment rates, terms, or conditions, because such utilities operate in a proprietary capacity that is beyond the scope contemplated by the language of Section 253. Congress explicitly set out and expressly limited the scope of the Commission’s sole authority to regulate pole attachments and that was in Section 224 not Section 253.

IV. REGULATING PUBLIC POWER UTILITIES UNDER SECTION 253 WOULD CIRCUMVENT THE WILL OF CONGRESS

In first enacting Section 224 in 1978 Congress established the Commission’s sole explicit authority to regulate pole attachments by giving the Commission authority to regulate utility attachment rates for cable television providers. In enacting Section 224 Congress specifically, exempted poles owned by government entities, cooperatives, and railroads from the Commission’s authority.

In the 1996 Telecommunications Act, Congress created Section 253 and amended Section 224 to its current form. In enacting this law, Congress amended Section 224 to broaden the Commission’s pole attachment authority and extended pole attachment rights to telecommunications service providers. Tellingly in the same legislation, Congress saw fit to both retain the exemption of utility poles owned by government entities, cooperatives, and railroads from the Commission’s Section 224 authority; and to *separately* grant the Commission and the federal courts the power to ensure neither state nor local statutes and regulations prohibited any entity’s ability to provide telecommunications services. By doing so, in the same legislation, Congress communicated its intent that these sections are designed to govern different activities. Section 224 tasks the Commission with regulating the rates, terms, and conditions of private investor-owned utilities. In explicitly excluding public power utilities from the scope of the Commission’s authority, Congress clearly evidenced a belief and preference that access to public power utility poles could best be achieved by the local governmental and consumer owners. Regulating rates, terms, and conditions of public power pole attachments via Section 253 would circumvent Congressional intent and be beyond the scope of the Commission’s statutory authority.

A. Section 224 Exempts Public Power Utilities from FCC Pole Attachment Rate Regulation

In response to a 1977 decision that the Commission did not have the authority to set rates for communications attachments to electric utility poles¹¹ Congress passed the Pole Attachment Act of 1978, which was codified in Section 224 of the Communications Act.¹² In this originating act of the Commission’s authority over pole attachments, Congress set forth the principles that the

¹¹ *In Re: California Water and Telephone Co.*, 64 F.C.C.2d 753, 1977 WL 38620 (1977) (“[We] have concluded that this activity does not constitute ‘communication by wire or radio,’ and is thus beyond the scope of our authority.”).

¹² 47 U.S.C. § 224.

Commission should apply in developing rules for rates, terms, and conditions for attachment agreements.

At the same time, Congress made clear that it did not want the Commission to regulate rates, terms, and conditions for attachments to consumer-owned utility poles – i.e., poles owned by public power utilities and electric cooperatives. Congress expressly exempted such poles from regulation by the Commission by excluding such entities from Section 224(a)(1)’s definition of “utility.”

Sec. 224. (a) As used in this section:

(1) The term 'utility' means any person whose rates or charges are regulated by the Federal Government or a State and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication. *Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.*

(3) The term 'State' means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.¹³

Public power utilities are government owned. Thus, public power utilities are explicitly excluded from the Commission’s pole attachment regulations and authority. The legislative history of the public power exemption demonstrates that Congress intended that rates, terms, and conditions of access to public power utility poles could be best set not by the Commission, but by the consumer owners of the utility. During deliberations on the Pole Attachment Act, Congress explained its rationale as follows:

S. 1547 as amended in committee exempts telephone and electric cooperatives and municipally owned utilities from FCC regulation. *It is believed that these utilities are of a different type than investor-owned utilities in that they are closer to the grassroots level of government whose discretion in this matter the bill seeks to protect.*

¹³ *Id* (a)(1) and (3) as enacted in the 1978 Pole Attachment Act (*emphasis added*). 47 U.S.C. § 224(a)(1) (*emphasis added*).

Because the pole rates charged by municipally owned and cooperative utilities are already subject to a decision-making process based upon constituent needs and interests, S. 1547 *precludes substitution of the Commission's judgment for that of locally elected managers of municipal utilities and the managers of customer-owned cooperatives.*¹⁴

In order for the Commission to regulate the rates charged by government-owned utilities, it would require Congress overturning this language. Instead of doing so, in the Telecommunications Act of 1996, Congress reaffirmed and extended the exemption to utility poles owned by governmental entities, cooperatives, and railroads. Notably, Congress did so in the same legislation that established Section 253.

Since the passage of the 1996 Act, the Commission has many times acknowledged that the municipal pole exemption in Section 224 prevents it from exercising jurisdiction over attachments to public power utility poles. In the 2010 *National Broadband Plan*, the Commission undertook an exhaustive analysis of existing laws, regulations, and policies impacting broadband deployment, and it made recommendations to Congress for changes in the law where the Commission lacked authority to carry out its policy objectives. Recommendation 6.5 urged Congress to consider removing the municipal pole exemption.¹⁵ Congress did not implement this recommendation.

Then in the *2011 Pole Order*, the Commission further acknowledged that it “does not have authority to regulate attachments to poles that are municipally or cooperatively owned.”¹⁶ In 2016 then Commissioner Ajit Pai acknowledged, “Right now, we don’t have jurisdiction over poles owned by government authorities, whether federal, state, or local, nor poles owned by railroads.”¹⁷

¹⁴ Cong. Rec. S964, at S966 (Jan. 31, 1978) (*emphasis added*).

¹⁵ *Connecting America: The National Broadband Plan*, at 112 (adopted Mar. 15, 2010) (“As previously discussed, without statutory change, the convoluted rate structure for cable and telecommunications providers will persist. Moreover, due to exemptions written into Section 224, a reformed regime would apply to only 49 million of the nation’s 134 million poles. *In particular, the statute does not apply in states that adopt their own system of regulation and exempts poles owned by co-operatives, municipalities and non-utilities.*”) (*emphasis added*).

¹⁶ *Report and Order, In the Matter of Implementation of Section 224 of the Act*, WC Docket No. 07-245, Appendix B, ¶ 46, released April 7, 2011 (2011 Pole Order).

¹⁷ Remarks of FCC Commissioner Ajit Pai, At the Brandery, “A Digital Empowerment Agenda,” Cincinnati, Ohio, September 13, 2016.

There has been no statutory change since this statement. Again, in 2017 the Commission’s Office of Strategic planning and policy analysis released a paper that acknowledged the lack of Commission authority over public power utility poles and recommended that Congress eliminate the exemption.¹⁸ Again, Congress did not implement this recommendation. The Commission has not provided a legally sufficient basis to justify the shift in the scope of its authority.

B. Using Section 253 to Circumvent the Public Power Exemption in Section 224 Would Undermine the Will of Congress

In proposing to utilize Section 253 to regulate attachments to public power utility poles, the Commission would violate several canons of statutory construction that each confirm the Commission lacks the authority to do so.

First, the U.S. Supreme Court has observed that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts *intentionally and purposely* in the disparate inclusion or exclusion.”¹⁹ Here, Sections 253 and 224 are within Title II of the federal Communications Act and were enacted in their current form at the same time. Congress explicitly applies Section 224 to “poles, ducts, conduits and rights-of-way owned or controlled by a utility,” whereas Section 253 only mentions “public rights-of-way.” Thus, it should be presumed that Congress acted “intentionally and purposely” in excluding pole attachments from the scope of the Commission’s jurisdiction allowed under Section 253.

Second, in *Morton v. Mancari*, the U.S. Supreme Court developed the oft-cited tenet of statutory construction that “[w]here there is no clear intention otherwise, a specific statute will not

¹⁸ *Improving the Nation’s Digital Infrastructure*, Paul de Sai, Chief, FCC Office of Strategic Planning and Policy Analysis, January 19, 2017.

¹⁹ *United States v. Gonzales*, 520 U.S. 1 at 5 (1997) (*emphasis added*).

be controlled or nullified by a general one, regardless of the priority of enactment.”²⁰ Here, Congress set forth very specific limitations in Section 224 on the Commission’s jurisdiction over public power utility poles and there is no clear statement to the contrary in Section 253. Accordingly, the specific exemption for public power utilities in Section 224 is not overridden by the broad general grant of authority under Section 253.

Third, stands the canon that a court must assume Congress intends that every provision in a law be given effect.²¹ Here, were the Commission to use Section 253 to set rates for wireline attachments to public power poles, the municipal exemption in Section 224 would be rendered ineffectual.

APPA recognizes that the Commission may seek to rely on its prior determination in its *Small Cell Order*, which was upheld by the Ninth Circuit, that Section 253 was an independent source of authority for the Commission to regulate access to governmental infrastructure, including public power utility poles.²² Reliance on the *Small Cell Order* in the context of this proceeding would be misplaced. First, in affirming the Commission’s *Small Cell Order* the Ninth Circuit did not address the statutory interpretation issues presented here in its decision. Second, the Commission’s *Small Cell Order* and arguments to the Ninth Circuit were entirely couched in terms of the urgent need to accommodate what the Commission anticipated to be a nationwide tsunami of new “5G” small cell wireless facilities within the public right-of-way. The Commission argued that this urgent need could only be met by a regulatory overhaul of traditional state and local government management of the public right-of-way, and justified the Commission asserting

²⁰ *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974), *See also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, (1992) (“[...]it is a commonplace of statutory construction that the specific governs the general,”); *Westlands Water Dist. v. Nat. Res. Def. Council*, 43 F.3d 457, 461 (9th Cir. 1994); and *Cuero v. Cate*, 850 F.3d 1019, 1034 (9th Cir. 2017).

²¹ *United States v. Menasche*, 348 U.S. 528, 538 (1955); *Wilshire Westwood Assocs. v. Atl. Richfield Corp.*, 881 F.2d 801, 804 (9th Cir. 1989); *United States v. LKAV*, 712 F.3d 436, 440 (9th Cir.2013).

²² *City of Portland v. United States*, at 1046.

authority over government owned facilities that could accommodate such small cell wireless installations.²³ Here, there is nothing novel about wireline communications technology. Overturning the long-held interpretation that the Commission cannot regulate public power pole attachments is thus unjustified. Indeed, the triggering obligation of utilities to provide access to attaching entities under Section 224 is that the utility has poles that are used “in whole or in part, for wire communication.” This same, statutory provision exempted public power utilities from its scope.

Moreover, while there is clearly a pressing and important need to deploy broadband networks facilities in the most rural areas of the country, there is no such need in the majority of the country where APPA’s members operate, as can be readily determined by the relatively small amount of areas served by public power communities that were eligible for BEAD²⁴ funding or by simply looking at the large number of wireline communications attachments on public power utility poles. Finally, the Ninth Circuit’s decision was made while *Chevron* deference was still the governing principle of statutory interpretation. Following the U.S. Supreme Court’s decision in *Loper Bright*, courts have been instructed to afford far less deference to agency decision making, particularly with respect to the interpretation of statutory language.²⁵ It is doubtful that the Commission’s interpretation of its Section 253 authority over public power utility poles would be similarly upheld today, particularly in the context of wireline attachments.

Lacking statutory authority to do so, the Commission cannot use Section 253 to regulate the rates, terms, and conditions of attachments to public power utility poles.

²³ *Declaratory Ruling and Third Report and Order, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79 and WC Docket No. 17-84, FCC 18-133 (2020).

²⁴ *Broadband Equity and Digital Access* funding being made available under the *Infrastructure and Investment Jobs Act*.

²⁵ *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

V. QUESTIONS RAISED IN THE NOTICE OF INQUIRY

APPA now turns to a review and response to some of the myriad questions that the Commission raises in the *NOI*, focusing on those questions that pertain to regulation of public power utility poles.

11. “We start by seeking comment on the specific authorizations that providers are required to obtain from state and local governments to deploy wireline telecommunications infrastructure and provide service, the forms that the authorizations take (e.g., franchises, licenses, permits), the specific steps providers are required to take to obtain each type of authorization, and how long each step takes”

If the Commission decides to take further actions under Section 253 to place requirements on state and local government authorizations, it should ensure that it clearly delineates between authorizations that are regulatory in nature and those that are proprietary in nature. As established above, public power utility pole attachment agreements, and pole attachment permitting, and related procedures, are implemented for entirely proprietary purposes. Compared with regulatory requirements to access the right-of-way, which local governments implement for public policy reasons, such as ensuring and facilitating the free flow of pedestrian, automobile traffic, protecting common public resources and ensuring public safety, public power utility attachment requirements are implemented to protect and maintain the security, reliability and safety of the electric service and the business interests of the utility and the customers they serve. For example, public power utilities, like all utilities, construct poles in particular locations based on their specific electric needs.

16. Are there different or additional permits needed if the provider seeks to attach facilities to government-owned property in the public rights-of-way (e.g., poles owned or controlled by municipalities)?

Public power utilities function as separate entities from the local government and access to public power utility poles requires that the parties enter into a pole attachment agreement that is wholly separate from any necessary authority that the attaching entity may require from the state or local government to occupy the public right-of-way where the poles are located. Indeed, as

discussed below, in many instances public power utilities are wholly independent and separate corporate governmental entities from the state or local government entity that owns or controls the relevant public right-of-way.

The Commission must avoid conflating access to public right-of-way with access to government-owned utility poles. Even when part of the same municipal government, public power utilities are a separate governmental department or division, akin to a corporate affiliate, and do not have control over the public right-of-way or the use of such right-of-way by private communications providers. Further, in many instances, public power utilities are separate corporate entities from the local governments that may own the public right-of-way. For example, public utility districts are typically not owned by a municipality and must themselves obtain an authorization from the local government to occupy the public right-of-way to provide electric service. In addition, the electric service territory of many public municipal electric utilities extends well beyond the corporate territorial boundaries of the municipality that created them. For example, CPS Energy, the public power utility owned by San Antonio, Texas, has a service area that spans the City of San Antonio, and thirty (30) other municipal jurisdictions in and around the greater San Antonio metropolitan area, as well as unincorporated portions of Bexar and surrounding counties.

This is functionally no different than a cable operator being required to get a cable franchise from a municipal jurisdiction and also obtaining a pole attachment agreement to access the poles of the local investor-owned or cooperatively owned utility. The utility simply has no bearing on access to the local right-of-way and does not act in a regulatory capacity in managing access to its poles.

The pole attachment agreement serves as a master agreement under which the attaching entity can seek individual pole attachment permits for the use of specific poles as needed to construct and maintain its system as new customers request service. Pole attachment permits are

entirely different than permits to occupy the public right-of-way, with wholly different considerations and time frames.

For all the above reasons the Commission must not seek to tie or impose shot clock timing considerations for right-of-way access to the consideration or issuance of pole attachment permits.

39. What fees are charged for wireline attachments to poles and other structures in public rights-of-way that are government-owned? How are the fees measured? Are they typically higher or lower than rates charged by utilities regulated under section 224? What kinds of fees are state and local governments charging for wireline infrastructure not located in public rights-of-way? Do these fees effectively prohibit wireline telecommunications service under section 253(a)?

As an initial response APPA reiterates, that as with the regulation of public power attachments generally, the Commission does not have the authority to regulate rates for public power pole attachments.

In an apparent effort to support the argument that the Commission has authority under Section 253 to regulate rates for wireline telecommunications service attachments to government owned utility poles because it is a governmental activity, the Commission cites the *City of Portland*²⁶ case for its holding that “[C]ities act in a regulatory capacity when they restrict access to the public rights-of-way because they are acting to fulfill regulatory objectives . . . Municipalities do not regulate rights-of-way in a proprietary capacity.” This argument is misplaced. While APPA does not disagree with the tautology that municipal regulation of the public right-of-way is a regulatory activity, that does not support the conclusion that managing access to public power utility poles is a regulatory activity. APPA again urges the Commission not to conflate access to the right-of-way with the separate action of making attachments to utility poles located within the rights of way. Public power utilities do not have regulatory authority, let alone regulatory authority over the use of the public right-of-way. In its briefings to the Ninth Circuit in the *City of Portland* decision the Commission stated to the Court “if public utilities have no regulatory authority over the public

²⁶ *City of Portland* 969 F.3d 1020.

rights-of-way in which they own poles, the *Small Cell Order* does not purport to reach that circumstance.”²⁷

With respect to rates, as explained above, Congress explicitly stated that government-owned entities, such as public power utilities, are exempted from the Commission’s attachment rate setting authority by Section 224. This exemption is not an accident or a subsequently discovered loophole. Rather, Congress explicitly included this language because it:

[B]elieved that these utilities are of a different type than investor-owned utilities in that they are closer to the grassroots level of government whose discretion in this matter the bill seeks to protect...Because the pole rates charged by municipally owned and cooperative utilities are already subject to a decision-making process based upon constituent needs and interests, S. 1547 precludes substitution of the Commission's judgment for that of locally elected managers of municipal utilities and the managers of customer-owned cooperatives.²⁸

The Commission has many times over confirmed that it lacks the statutory authority to regulate wireline attachments to public power utility poles. Unless and until Congress sees fit to amend the statute, that fact remains unchanged. As explained above, employing Section 253 to do an end run of Congressional intent would undermine clear precedents of statutory interpretation and would not withstand judicial scrutiny in a post-*Chevron* environment.

Consistent with Congressional intent, public power utilities establish rates based on their specific requirements for reasonable cost recovery. The fact that these rate methodologies may be different than the Commission’s Section 224 rate formulae and yield different rates is not only permissible but was specifically anticipated by Congress. There is nothing talismanic about the Commission’s Section 224 rate formulae that makes them the sole or only reasonable pole attachment rate methodology. Indeed, as has long been recognized, the Section 224 formula does not provide for fully allocated cost recovery and is the product of political calculations rather than

²⁷ *City of Portland*, FCC Brief, at 136.

²⁸ Cong. Rec. S964, at S966 (Jan. 31, 1978) (*emphasis added*).

a true sharing of costs. For example, shortly after the passage of the 1996 Telecommunications Act, a Washington state court decision held not only that the Commission's pole attachment rate methodologies were inapplicable to public power utilities, but also that they were not cost-based or reasonable. In *TCI Cablevision of Washington v. City of Seattle*, No. 97-2-02395-5SEA, Superior Court (May 20, 1998) (appeal dismissed), the court found that a number of the assumptions and calculations contained in the federal pole rate methodologies are based solely on arbitrary political determinations aimed at ensuring a low rate for attaching entities. The court in *City of Seattle* concluded that a municipal utility is not obligated to follow the presumptions built into the federal pole attachment rate formulae but may instead adopt rates and methodologies that more accurately reflect the true value and cost of the use of its infrastructure. Several other courts and public utility commissions have similarly rejected the rigid adoption of the Commission's Section 224 pole attachment rate methodologies as the sole standard of reasonableness. If the Section 224 public power exemption means anything, it means that public power entities should be given deference in establishing reasonable cost-based rate methodologies.

It is not clear what the intent or scope of the Commission's inquiry is with respect to the fees state and local governments are "charging for wireline infrastructure not located in public rights-of-way." To the extent that the Commission is seeking information on the costs of pole attachment fees or the use of other public power utility infrastructure located outside of the public right-of-way, that is well beyond the scope of the Commission's regulatory authority. A fact that the Commission itself appears to acknowledge in the *Small Cell Order* where the Commission was careful to only assert oversight of fees for wireless attachments on government facilities located within the public right-of-way.

VI. CONCLUSION

Based on the foregoing, APPA, on behalf of the nation's public power utilities, urges the Commission to ensure that any use of Section 253 reflects the statutory reality that the Commission does not have the authority to regulate rates, terms, and conditions of pole attachment to public power utility poles. Congress limited the Commission's Section 253 authority to govern state and local governments acting in a regulatory capacity. The Commission must ensure it does not stray into regulation of the proprietary actions of public power utilities.

Respectfully Submitted,

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