Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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

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 Proposed Rulemaking* ("*NPRM*"), issued by the Federal Communications Commission ("Commission").[1]

I. SUMMARY OF ARGUMENTS

APPA respectfully submits these comments to advocate that the Commission recognize the statutory limitations on its ability to apply the *NPRM's* proposed regulations governing wireline attachments to public power utility poles.[23] Public power utility poles occupy a unique regulatory niche due to such utilities' status as government owned entities that operate in a wholly proprietary capacity. First, as government-owned utilities, public power utilities are explicitly exempted from the Commission's Section 224 authority to govern the rates and procedures to attach to utility poles.

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[1] *Build America: Eliminating Barriers to Wireline Deployments, Notice of Proposed Rulemaking* ("NPRM"), WC Docket 25-253, released June 26, 2026.

[2] Unless otherwise specified, APPA's use of the term "pole" or "pole attachment" will also include access to or use of public power utility "conduits."

[3] APPA's comments are narrowly tailored to the application of fees and procedures proposed in the *NPRM* to public power utility pole and do not address issues related to the use the public rights-of-way or non-electric utility government-owned facilities within the public rights-of-way generally.

Second, as electric utilities whose primary function is to provide commercial electric services to residential and business customers with no policy setting power, public power utilities are not subject to the Commission's Section 253 authority because Section 253 only applies to government entities acting in a regulatory capacity. The Commission's efforts to rely upon the Ninth Circuit's decision in *City of Portland* upholding the Commission's Small Cell Order are unavailing. *City of Portland* was based on distinct factual and legal issues surrounding an anticipated surge in the installation of a novel wireless small technology that is not the subject of the current *NPRM*. In contrast, the current proceeding involves the Commission taking an expansive interpretation of its Section 253 authority with respect to the regulation of traditional wireline pole attachments to public power utility facilities that is a clear departure from decades of prior Commission interpretations and is not entitled to deference in a post-*Loper Bright* environment.

Third, attachments to electric utility poles involve myriad safety and engineering considerations and costs issues that are distinct from issues related to access to the public rights-of-way and the Commission must take care to not conflate the two.

In addition to laying out the clear lack of statutory authority to impose limitations on public power utilities' wireline attachment procedures, these comments highlight the lack of evidence presented in the underlying *NOI* that is put forward in the *NPRM* as the justification for imposing one size fits all wireline pole attachments rules on all public power utilities in direct contravention of the explicit congressional exemption of public power utilities from Commission pole attachment regulation under Section 224. Contrary to the *NPRM*'s assumptions, the actual record demonstrates that quite the opposite is true. Public power utility poles are highly leveraged by wireline telecommunications and broadband providers demonstrating that access is readily available and not a barrier to entry. Indeed, as demonstrated below, the majority of public power utilities' service areas are built out by wireline telecommunications carriers and have broadband coverage.

According to the Commission's own broadband mapping data, over 95 percent of public power utilities in the lower 48 states have 90 percent or greater broadband coverage throughout their service territories.

Taken together, the Commission lacks both the authority and any discernable reason to apply the proposed preemptive regulations over wireline attachments to public power utility poles. As such, APPA urges the Commission to explicitly affirm that public power utilities are exempted from the new regulations in any rules adopted pursuant to this proceeding.

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 employes. 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 — receive electricity from a public power utility. Collectively, these utilities serve one in seven 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. SUBJECTING PUBLIC POWER UTILITY WIRELINE POLE ATTACHMENT PROCESSESS TO COMMISSION REGULATION 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 Regulation Of Pole Attachment Rates, Terms, And Conditions

In response to a 1977 decision that the Commission did not have the authority to set rates for communications attachments to electric utility poles,[4] Congress passed the Pole Attachment Act of 1978, which was codified in Section 224 of the Communications Act.[5] In this originating act of the Commission's authority over pole attachments, Congress set forth the principles that the

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4 *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.").

5 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.*
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> ***
>
> (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.[6]

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*

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

> *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*.[7]

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.

As demonstrated below, for nearly fifty years (including the thirty years that Section 253 has been in place) the legal and policy analysis of the Commission (including the current Chairman) has repeatedly and consistently held that the Section 224 public power exemption denies the Commission authority to regulate attachments to public power utility poles. Throughout this period, rather than finding that Section 253 provided an alternate source of authority to regulate wireline attachments to public power utility poles, the Commission bemoaned its lack of authority and called upon Congress to expand its regulatory authority. Now, the Commission is seeking to execute an abrupt U-turn claiming newfound authority where none was previously found to exist. The Commission has not provided a legally sufficient basis to justify the shift in the scope of its authority.

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

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[7] Cong. Rec. S964, at S966 (Jan. 31, 1978) (*emphasis* added).

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.[8] 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."[9] 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."[10] 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.[11] No such change was made in the law.

Finally, in 2022, as part of a Commission proceeding to remove perceived barriers to broadband wireline deployment, then-Commissioner Brendan Carr, issued a Statement (with *emphasis* added) stating:

> I continue to hear concerns from broadband builders about unnecessary delays and costs when they seek to attach to poles that are owned by municipal and cooperative

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8 *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).

9 *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).

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

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

> utilities. Unlike what we are doing in today's item, *there is a strong argument that Section 224 does not give us authority to address issues specific to those types of poles.* Therefore, *I encourage states and Congress to take a closer look at these issues—and revisit the exemption that exists in Section 224—so that we can ensure deployment is streamlined, regardless of the type of pole you are attaching to.*[12]

Again, Congress did not implement this recommendation.

As shown above, since its enactment in 1978 the Commission's legal and policy analysis has repeatedly and consistently concluded that the Section 224 public power exemption denies the Commission authority to regulate wireline attachments to public power utility poles. This is the most straightforward and reasonable interpretation of the statutory language and congressional intent and nothing in the underlying record or the *NPRM* suggests anything to the contrary.

B. Public Power Utility Poles Cannot Be Commandeered Simply Because They Are Located Within The Public Rights-Of-Way And Would Be Useful For Communications Carriers

The Commission apparently assumes that all it needs to do to exercise its Section 253 authority over state and local government entities is cite some benefit to communications carriers, and its authority to regulate to achieve that benefit will follow *ipso facto.* But, as shown above, this assumption flies directly in the face of the Commission's recognition in *California Water* that the Commission did not acquire authority to regulate electric utility pole attachments simply because the utility poles were convenient or even necessary for cable deployment:

> The reading of these sections urged by petitioners [cable operators] is overbroad and would bring under the Act activities never intended by Congress to be regulated. *The fact that cable operators have found in-place facilities convenient or even necessary for their businesses is not sufficient basis for findings that the leasing of those facilities is wire or radio communications.*[13]

The Commission went on to state,

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[12] Statement of FCC Commissioner Brendan Carr, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17-84, *Second Further Notice of Proposed Rulemaking* (March 16, 2022).

[13] *California Water,* at 758 *(emphasis* added).

> If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions.[14]

In response, Congress did confer broader powers to the Commission in the form of Section 224, but those powers specifically excluded the power for the Commission to regulate access to public power utility poles.

C. 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."[15] 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

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14 *Id.* at 760 (*emphasis* added).

15 *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.'"[16] 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, if the Commission's decision were correct, it would effectively nullify the Section 224 exemption. This goes against the requirement that a court must assume that Congress intends that every provision of its laws be given effect.[17]

Fourth, the U.S. Supreme Court has held that when a statute is clear, it must be applied as written, even if the choices Congress made as embodied in the law as written run counter to the Commission's current policy objectives. "[T]he choice is not ours to make. Congress wrote the statute it wrote." *CSX Transport v. Alabama Department of Revenue*, 562 U.S. 277 at 295 (2011) (*emphasis* added). The clarity of Section 224 should settle the matter here.

For nearly fifty years, the Commission has recognized that the public power exemption in Section 224 excludes public power utilities from the scope of the Commission's wireline pole attachment authority, a fact that is evidenced by prior Commission statements and repeated calls by previous Commission administrations, including Chairman Carr, to remove the exemption. Congress has not done so and therefore the Commission must accept that it has no such authority.

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16 *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).

17 *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).

D. The Ninth Circuit's *City Of Portland* Decision Is Limited To The Specific Agency Actions At Issue – Small Cell Installations -- And Does Not Insulate The Commission's Current Efforts To Improperly Expand Its Authority With Respect To Wireline Attachments To Public Power Utility Poles

APPA recognizes that the Commission seeks to rely on its prior determination in its *Small Cell Order,*[18] which was upheld by the Ninth Circuit's *City of Portland* decision, that Section 253 was an independent source of authority for the Commission to regulate access to governmental infrastructure, including public power utility poles.[19] Reliance on the *Small Cell Order* in the context of this proceeding would be misplaced, particularly in a post-*Loper Bright*[20] environment. While the U.S. Supreme Court in *Loper Bright* indicated that *pre-Loper Bright* holdings, such as *City of Portland*, that were adopted under a *Chevron* deference standard remain lawful, the Court made clear that such decisions are limited to the "specific agency actions" on which the decisions were made. There are many factors distinguishing the proposals in the *NPRM* from the *Small Cell Order*.

First, in affirming the Commission's *Small Cell Order*, the Ninth Circuit did not address the statutory interpretation issues presented here in its decision. In *City of Portland*, the court's decision was made with respect to "local jurisdictions," "cities," or other similar government entities. Here APPA's comments are narrowly applicable to public power utilities. Public power utilities are owned by government entities but are distinct from other local government entities, such as municipalities, because of both their underlying interest and the methods available to them for advancing those interests.

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18 *NPRM* at 28.
19 *City of Portland v. United States*, 969 F.3d 1020, at 1046 (9th Cir. 2020).
20 *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

Local municipal jurisdictions, such as cities and counties, exist to advance the public good and welfare, and they do so with a full suite of state police powers including regulations, criminal statutes, and the backing of enforcement authority. Public power utilities, on the other hand, exist to achieve the narrow purpose of providing reliable electricity to customers. They do so without the benefit of state governmental police powers, instead they advance this interest by charging a fee for their services and choosing to invest in infrastructure, personnel, and technology to advance the economics of their electric services. This is the same limited authority that all other utilities use to advance their interests.

Whether attachment procedures constitute regulatory or proprietary action under Section 253, with regards to public power utilities' use of market-based tools, is a fundamentally different analysis than the Ninth Circuit's analysis of whether local jurisdictions regulation of the rights-of-way with the tools of state governmental police power constitutes regulatory or proprietary action.

The court in *Portland* made its decision regarding the regulation of access to "public rights-of-way." APPA's challenge to the *NPRM* is limited to the Commission's proposals to regulate the way public power utilities manage access to their utility poles by wireline carriers. Whereas the public rights-of-way exist for the general public's benefit, public power utilities' poles are constructed for the sole purpose of providing electricity to the utility's customers.

Further, the service area of most public power utilities extends beyond the jurisdiction of a single municipal jurisdiction. There are many situations where a public power utility pole is located in the rights-of-way of several municipal jurisdictions. Thus, the assumption that public power utility attachment procedures are always an extension of the regulatory power of a local government jurisdiction is objectively false. Public power utility poles are fundamentally distinct from the public rights-of-way where they are located and thus raise considerations that were not considered in the *City of Portland*.

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 rights-of-way. The Commission indicated that small cell facilities represented a new and unique use of the rights-of-way. The Commission argued that the urgent need to accommodate these novel facilities could only be met by a regulatory overhaul of traditional state and local government management of the public rights-of-way and justified the Commission asserting authority over government owned facilities that could accommodate such small cell wireless installations.[21]

Here, there is nothing novel about wireline communications technology or wireline attachments to utility poles. Indeed, while there were relatively few small cell wireless installations on government-owned utility poles and streetlight poles at the time of the *Small Cell Order*, the same cannot be said about wireline telecommunications pole attachments which are readily found on nearly every public power electric distribution pole and have enjoyed such access for well over seventy years without need of federal regulation. Thus, there is no compelling justification for the Commission to try and use Section 253 to circumvent the clear and long understood intent of Congress in enacting the Section 224 public power exemption to exclude public power utilities from the scope of the Commission's pole attachment authority with respect to wireline attachments. In fact, the triggering obligation of investor-owned 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

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[21] *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).

communication." This same statutory provision exempts public power utilities from its scope. In enacting Section 224 and later amending it, there can be no doubt that Congress well understood that it was exempting public power utilities from Commission regulation of rates, terms, and conditions related to wireline telecommunications attachments.

Third, courts have already indicated that the scope of any precedent under the Ninth Circuit's *City of Portland* decision is limited to issues involving small cell wireless installations. For example, as discussed below, in *NMSurf vs Santa Fe*, the Tenth Circuit found that the Ninth Circuit's decision upholding the Commission's interpretation of Section 253 under the *Small Cell Order* is not applicable to wireline facilities.[22] This is consistent with Chairman Carr's 2022 public Statement, two years after the Ninth Circuit's decision, expressing his opinion that there is a strong argument that the Commission lacks the authority to regulate wireline attachments to public power utility poles.

Fourth, as is demonstrated below, 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[23] that would justify an expansive interpretation of the Commission's Section 253 authority with respect to public power utility poles in direct contravention of Congress's explicit denial of such authority under Section 224.

Finally, in issuing the *NPRM*, the Commission itself has opened the door to questions on the scope of the Commission's authority under Section 253 and its relation to Section 224, particularly with respect to wireline attachments to public power utility poles that were not the

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22 *NMSurf, Inc. v. Webber, et al.*, No. 22-2131 (10th Cir. Aug. 15, 2023).

23 See Exhibit A, demonstrating that the service areas of over 95 percent of the nation's nearly 2,000 public power utilities have greater than 90 percent broadband availability according to the Commission's Broadband Availability Map data (https://broadbandmap.fcc.gov/home).

subject of the specific agency actions under review in *City of Portland*. It is doubtful that the Commission's proposed overly broad interpretation of Section 253 authority as an independent source of authority to govern wireline attachments to public power utility poles that overrides the explicit Section 224 denial of such authority would be upheld under a post-*Loper Bright* review.

IV. SECTION 253 DOES NOT GRANT THE COMMISSION AUTHORITY TO REGULATE GOVERNMENT-OWNED UTILITIES ACTING IN A PROPRIETARY CAPACITY

Assuming, without conceding, that Section 224 does not exempt public power utilities from the Commission's Section 253 authority, the Commission is incorrect when it assumes without evidence that public power utilities manage access to their utility poles in an inherently regulatory capacity. Public power utilities manage access to their poles in a proprietary capacity as market participants in support of their underlying electric utility activities in a similar manner as all other utilities. As such, public power utility pole attachment practices are outside of the scope of the Commission's Section 253 authority.

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.[24] Crucially, the U.S. Supreme Court differentiates between a governmental entity performing governmental functions and a governmental entity acting as a *market participant with no interest in setting policy*.[25]

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[24] 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.").

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

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.[26]

On its face, Section 253(a) applies to state or local "statutes," "regulations," and "legal requirements." For thirty years, the Commission and courts have consistently held that Section 253 applies to state and local governments when acting in a regulatory capacity – e.g., when issuing permits or zoning authorizations for the use of the public rights-of-way – and not when acting in a proprietary capacity – e.g., when leasing or renting out access to utility facilities. *See, e.g., Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) finding that Section 253(a) only preempts "regulatory schemes." The Second Circuit reached the same conclusion in *Mills,* holding that the "language and structure of the [Telecommunications Act] implicitly recognize that some governmental decisions are not regulatory" and that the "Telecommunications Act does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity."[27] Indeed, citing these and other decisions, the Commission affirmed this distinction in its *Wireless Siting Order* in 2014, in which it imposed various limitations on the ability of State and local governments to regulate the siting of wireless facilities:

> As proposed in the Infrastructure NPRM and supported by the record, 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

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[26] 47 U.S.C § 253 (*emphasis* added).

[27] *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002), Section 332(c)(7) which contains similar language to Section 253.

> capacities. *As discussed in the record, courts have consistently recognized that in "determining whether government contracts are subject to preemption, the case law distinguishes between actions a State entity takes in a proprietary capacity—actions similar to those a private entity might take—and its attempts to regulate*."[644] As the Supreme Court has explained, "[i]n the absence of any express or implied implication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and when analogous private conduct would be permitted, this Court will not infer such a restriction."[645] Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances. We find that this conclusion is consistent with judicial decisions holding that *Sections 253 and 332(c)(7) of the Communications Act do not preempt "non-regulatory decisions of a state or locality acting in its proprietary capacity.*"[646]
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> [644] *See, e.g.,* Alexandria *et al.* Comments at 49 (citing *American Airlines v. Dept. of Transp.,* 202 F.3d 788, 810 (5th Cir. 2000)).
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> [645] *Building & Construction Trades Council of Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island Inc.,* 507 U.S. 218, 231-32 (1993).
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> [646] *Qwest Corp. v. City of Portland,* 385 F.3d 1236, 1240 (9th Cir. 2004) (*recognizing that Section 253(a) preempts only "regulatory schemes"); Sprint Spectrum v. Mills,* 283 F.3d 404, 421 (2d Cir. 2002) (*finding that Section 332(c)(7)* "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity").[28]

As the Supreme Court explained in *Boston Harbor,* "in the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction."[29] In reviewing a statute such as Section 253, the question is not whether the statute contains an express statement of preemption but, rather, whether there is an "express or implied indication" by Congress that the proprietary conduct is itself preempted. If not, then the governmental entity may engage in the proprietary conduct if a private entity would be allowed to engage in such activity.

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[28] *Wireless Siting Order,* at ¶ 239 (*emphasis* added).
[29] *Boston Harbor, at 232.*

Under this application of the standard, it is clear that Section 253 does not apply to government entities engaged in proprietary activities. First, there is no express statement in Section 253 that the statute is intended to preempt proprietary activities. Second, neither the language nor the structure of Section 253 indicate that Congress intended that these provisions should prohibit proprietary activities. Third, private investor-owned utilities and electric cooperative utilities engage in the exact same pole attachment leasing activities as public power utilities.

As indicated, the operative language of Section 253(a) preempts "state [and] local statute[s] [and] regulation[s]" and "other State [and] local legal requirement[s]" that prohibit or have the effect of prohibiting entities from providing telecommunications service. Taken together, these terms and phrases can best be understood as being aimed at governmental regulatory activities or as the Ninth Circuit held in *Qwest* "regulatory schemes."

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.[30] 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 requirements that are similar to statutes and regulations be included in the scope of the Commission's enforcement authority. When a public power utility is managing access to its poles, it is acting in a proprietary capacity in precisely the same manner as all other utilities. Public power utilities are not issuing, and, indeed, have no authority to issue statutes, regulations, or legal requirements of a similar nature. As such, public power utilities undertaking electric utility pole

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

management practices 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, private telecommunications carriers are able to rely on those very same pole attachment agreements to enforce their contracts' "legal requirements."

B. The Commission Cannot Rely On The Ninth Circuit's Decision As A Basis To Assume That Public Power Utilities Manage Wireline Access To Their Poles In A Regulatory Capacity

Having established that Section 253 is statutorily limited to preempting *regulatory* action, the question becomes whether public power utilities are acting in a regulatory or proprietary capacity when they manage access to their utility poles for wireline attachments. The Supreme Court's *Boston* decision is the controlling decision setting out that distinction. The *Boston Court* sets out a three-prong analysis (discussed below in Section IV.C) to determine whether a government entity is acting in a proprietary or regulatory capacity.

In the *NPRM*, the Commission has not undertaken any such analysis with respect to wireline attachments to public power utility poles. Instead, the Commission has simply adopted a blanket presumption that all government entities are acting in a "regulatory capacity" when they manage access to "government-owned structures." The Commission based this conclusion solely on a recitation of the Ninth Circuit's upholding of the Commission's conclusion in the *Small Cell Order* that local governments "act in a regulatory capacity when they restrict access to the public rights-of-way because they are acting to fulfill regulatory objectives."[31] The Commission's reliance on *City of Portland* is misplaced.

[31] *NPRM*, at ¶ 28, citing *City of Portlan*d, at 1045.

First, the *City of Portland's* blanket determination is at odds with the Ninth Circuit's finding in *Qwest* and in other federal circuits that Section 253 recognizes the distinction between regulatory and proprietary actions of state and local governments and preempts only the former.

Second, while the Commission maintains that the Ninth's Circuit's decision in *City of Portland* found that local governments operate government-owned structures in a regulatory rather than a proprietary capacity, a close reading of the decision reveals that the Ninth Circuit did not actually provide any sort of analysis as to how exactly local government entities are acting in a regulatory capacity when they manage the use of government-owned facilities within the public rights-of-way. Instead, the Ninth Circuit panel, without foundation, appears to have simply equated control over access to public rights-of-way with control over access to government-owned facilities located within the public rights-of-way. The key paragraph in City of Portland that the Commission relies upon states (with *emphasis* added).

> The FCC's regulations in the *Small Cell Order* were premised on the agency's determination that municipalities, *in controlling access to rights-of-way*, are not acting as owners of the property; *their actions are regulatory, not propriety,* and therefore subject to preemption. *Small Cell Order* ¶ 96. *This is a reasonable conclusion based on the record. The rights-of-way, and manner in which the municipalities exercise control over them, serve a public purpose, and they are regulated in the public interest, not in the financial interests of the cities*. As the FCC explained, the *cities act in a regulatory capacity when they restrict access to the public rights-of-way because they are acting to fulfill regulatory objectives, such as maintaining aesthetic standards*.[32]

As can be seen, while purporting to address access to government-owned facilities, this paragraph solely speaks in terms of governmental entities controlling access to public rights-of-way and does not reference access to government-owned facilities, let alone wireline attachments to public power utility poles. The *City of Portland* court accepted without scrutiny the

[32] *City of Portlan*d, at 1045 (*emphasis* added).

Commission's determination in the *Small Cell Order* that local governments regulate access to the public rights-of-way to further public interest regulatory objectives, and as a result pronounced the rather unremarkable tautology that "municipalities do not regulate rights-of-way in a proprietary capacity."[33] But even if that is true, neither the *Small Cell Order* nor the *City of Portland* decision explain or demonstrate how local government regulation of access to rights-of-way necessarily means that access to public power utility poles within the rights-of-way is also a governmental activity.[34] Public power utilities do not regulate access to the public rights-of-way, and in managing their poles, they do so in a proprietary capacity in the same manner as all other utilities -- not to seek to "*fulfill regulatory objectives, such as maintaining aesthetic standards*."

Contrary to the Court's sweeping conclusion, public power utilities do in fact operate as businesses with an eye to the "financial interests" of the utility. While state and local governments may obtain and maintain public rights-of-way as a public benefit for the community, public power utilities – like all utilities – install and maintain utility poles in furtherance of their electric business operations, not for a broader public good.

All electric utilities require attaching entities to enter into pole attachment agreements and obtain permits for individual attachments. This is not a regulatory activity. The fact that communications providers that attach to public power utility poles may also be required to obtain an authorization to occupy the underlying rights-of-way where the poles are located does not somehow render the pole attachment process a regulatory activity. Surely, the Commission and the

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33 *Id.*, at 1046.

34 The Commission notes that in *City of Portland* the Ninth Circuit references *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 881 (9th Cir. 2006), as a prior determination that cities manage access to public rights-of-way and property thereon in a regulatory capacity. This argument is equally unavailing, *Olympic Pipeline* purely dealt with the City regulating access to City rights-of-way and easements and had nothing to do with access to government-owned facilities.

City of Portland Court would not find that investor-owned electric utilities or electric cooperatives are acting in a regulatory capacity when managing access to their poles by wireline telecommunications providers. Such a decision would be non-sensical, it is equally non-sensical with respect to attachments to public power utilities. This is precisely the point of *Boston Harbor* in distinguishing between activities undertaken by government entities in a governmental regulatory capacity versus in a proprietary capacity when acting in exactly the same manner as other market participants.

As referenced in the introduction, APPA is not arguing that governments do not govern access to the public rights-of-way in a regulatory capacity. Rather, APPA maintains that public power utilities establish pole attachment fees and procedures in a proprietary capacity. As explained herein, this distinction rests on the fact that public power utilities' reason for implementing attachment procedures and fees is not based on a desire to promote or effectuate a particular public policy, but rather are based on advancing the utility's interest in the effective, safe, and reliable provision of electric service to utility customers.

The Commission must avoid conflating access to public rights-of-way with access to government-owned utility poles. Even when part of the same municipal government, which is often not the case, public power utilities are a separate governmental department or division, akin to a corporate affiliate, and do not have policy making regulatory authority, let alone control over the public rights-of-way or the use of such rights-of-way by private communications providers. Further, in many instances, public power utilities are separate corporate entities from the local government entities that own the public rights-of-way. For example, public utility districts are typically not owned by a municipality and must themselves obtain authorization from the local government to occupy the public rights-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. CPS Energy operates and manages access to its utility poles in the same manner throughout its service territory. Similarly, the municipal electric utility based in Wilson, NC, serves a territory that includes six of the state's counties.

In cases such as this, the public power utility typically must obtain access to the public rights-of-way from each local jurisdiction in which it provides service in a similar manner as other users of the rights-of-way, and it certainly has no regulatory control over access to the public rights-of-way by telecommunications carriers. 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 rights-of-way in which they own poles, the *Small Cell Order* does not purport to reach that circumstance."[35] APPA urges the Commission to adopt this same determination in the current proceeding.

Third, as indicated in the above excerpt, the court's determination in *City of Portland* that government entities manage access to government-owned infrastructure in a regulatory capacity relied on the record compiled in the *Small Cell Order*. As such, the record relied upon in *City of Portland* addressed considerations related to the installation of novel small cell wireless facilities to all manner of government owned structures ranging from utility poles, and streetlight poles, to traffic signal poles and bus shelters, as well as other "street furniture." Some of these facilities, such

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[35] *City of Portland*, FCC Brief, at 136.

as traffic signal poles and bus shelters, may well be imbued with governmental purposes, but that is not the case with the installation of public power utility poles. Therefore, the record in the *Small Cell Order*, and the conclusions drawn by the court in *City of Portland* based on that record, is largely irrelevant to the questions in the current *NPRM* with respect to the installation of wireline attachments to public power utility poles.

Fourth, the Commission's reasoning in the *Small Cell Order* upheld by the Ninth Circuit in *City of Portland* was limited to the context of small cell deployments. In *NMSurf vs. Santa Fe,* a case brought in the Tenth Circuit after *City of Portland*, a wireline provider argued that Santa Fe's application of non-cost-based fees for the use of the public rights-of-way was a violation of Section 253. As evidence, NMSurf cited to the *Small Cell Order* to justify its argument that "fees are only permitted to the extent that they are nondiscriminatory and represent a reasonable approximation of the locality's reasonable costs." The Tenth Circuit dismissed this argument, holding:

> That order, however, addresses small-scale wireless infrastructure, not the wired internet infrastructure at issue in this case. Although NMSurf argues the FCC's reasoning is broad enough to apply to this case, we decline to adopt the reasoning of the order under the circumstances presented here.[36]

Here, as in *NMSurf*, the Commission proposes to expand reasoning that the Commission previously justified in the limited circumstance of small cell deployments. The mere reference to a wholly dissimilar set of regulations is insufficient justification for the rules the Commission proposes here.

The Tenth Circuit's decision is bolstered by the Commission's own language in the *Small Cell Order* where the Commission justified the new rules with an exhaustive description of how the unique and novel nature of small cell 5G deployments required the Commission to adopt the *Order*.

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[36] *NMSurf vs Santa Fe*, at 7.

The *Order* was further justified as an emergency action that was necessary due to the perceived impact that delayed adoption would have on the global competitiveness of the U.S. economy. The Commission went so far as arguing that increasing the speed of small cell deployments by one year would "unleash an additional $100 billion to the U.S. economy." The validity of these predictions set aside, no such grandiose claims justify the Commissions application of this emergency measure's logic to wireline service attachments to public power utility poles. Access to public power utility poles is readily available and the vast majority of public power utility poles already have multiple wireline attachments. While there continue to be areas of the country in need of broadband deployments, as demonstrated below, the majority of these areas are outside of the communities served by public power.

Further, in the *Small Cell Order,* the Commission argued that the physical impact of the equipment also raised novel issues that required the new rules.

> The challenge for policymakers is that the deployment of these new networks will look different than the 3G and 4G deployments of the past. Over the last few years, providers have been increasingly looking to densify their networks with new small cell deployments that have antennas often no larger than a small backpack. From a regulatory perspective, these raise different issues than the construction of large, 200-foot towers that marked the 3G and 4G deployments of the past.[37]

Wireline connectivity infrastructure has not undergone a similar metamorphosis, and the Commission does not claim that it has. Again, the justifications for the FCC's *Small Cell Order* and the Ninth Circuit's decision to uphold it are inapplicable to the current wireline *NPRM.*

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[37] *Small Cell Order* at 3.

C. Public Power Utilities Operate In A Proprietary Capacity And Manage Their Poles In A Proprietary Capacity

Government entities are found to act in a proprietary rather than a governmental capacity when they engage in commercial activities in the same manner as other private sector market participants rather than to advance regulatory objectives or public policies. "A public entity acts in a proprietary rather than a governmental capacity when it engages in businesslike activities that are normally performed by private enterprise; whereas, governmental functions are those generally performed exclusively by governmental entities."[38]

The U.S. Supreme Court's *Boston* decision is the controlling authority on determining whether a governmental entity is acting in a proprietary or governmental capacity. In that decision, the U.S. Supreme Court states "When the State acts as regulator, it performs a role that is *characteristically a governmental* rather than a private role… Moreover, as regulator of private conduct, the *State is more powerful than private parties*. These distinctions are far less significant when the State acts as a market participant with *no interest in setting policy*."

While public power utilities are governmental entities, they are generally deemed to be acting in a proprietary capacity in their provision of electric service and operation of electric utility facilities. See *San Antonio Indep. Sch. Dist. v. City of San Antonio,* 550 S.W.2d 262, 264 (Tex. 1976) ("[a] city which owns and operates its own public utility does so in its proprietary capacity."); *Washington Pub. Power Supply Sys. v. General Elec. Co.,* 113 Wash. 2d 288, 301 (1989) ("In the production and sale of electricity, a municipal corporation acts in its proprietary capacity."); *Memphis Power & Light Co. v. City of Memphis,* 172 Tenn. 346, 112 S.W.2d 817 (TN. 1937) ("The texts and cases hereinabove referred to cite innumerable authorities supporting our conclusion that

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[38] *City of Wenatchee v. Chelan County Public Utility Dist. No. 1, 325 P.3d 419, 432 (Wash. Ct. App. 2014).*

the city of Memphis, in constructing and operating an electric plant, functions as a private or business corporation.”).

This is equally true with respect to public power utility management of their utility poles and access to them by wireline attaching entities. In *Boston Harbor*, the U.S. Supreme Court laid out a three part test for determining whether a government-owned entity is acting in a governmental or proprietary capacity: (1) whether the governmental entity adopts procedures with an interest in setting policy; (2) whether the role the government entity is performing is characteristically a governmental rather than a private role, and (3) whether the government entity is more powerful than a private party (by virtue of its governmental authority). When applying this test to public power utilities, it is clear that public power utilities manage attachments to their poles in a proprietary capacity.

1. Public Power Utilities Do Not Attempt To Set Public Policy Through Their Pole Attachment Practices

First, and most importantly according to the *Boston Harbor* Court, public power utilities establish and manage pole attachment procedures and practices with *no interest in setting policy*. Though they are owned by government entities, public power utilities do not have the power to pass laws, nor promulgate regulations, grant franchises, adopt or enforce aesthetic or zoning requirements, or impose criminal penalties, and they certainly do not set public policy. Rather, their decisions are made with a focus on what is necessary to ensure the secure, safe, reliable, and efficient provision of electricity to their customers. 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 the costs of delivering services, and they conduct myriad other activities that similar utility businesses across the country engage in.

When public power utilities adopt pole attachment procedures and assess requests to attach wireline facilities to their poles, they do so with the same focus on how such attachments may impact their poles and their electric service. Said another way, public power utilities implement attachment procedures to ensure that attachments to their property do not negatively impact the operation or safety of their electric system or their ability to conduct their business. These are the same interests that drive investor-owned utilities and cooperatives to implement attachment procedures to protect their property and ability to provide services to paying customers.

Here again, it must be emphasized that APPA's comments make no claims about whether local governments' regulations of property generally or access to the rights-of-way fall under the Commission's Section 253 authority. But it is clear that public power utilities apply pole attachment procedures and practices as market participants with no interest or authority to set public policy.

2 In Managing Their Utility Poles Public Power Utilities Are Performing A Function That Is More Characteristically Undertaken By A Private Entity

The second question under the *Boston Harbor* test is whether the activity in question is traditionally performed by a government entity rather than a private entity. There is nothing inherently governmental about the management of electric utility poles. Quite the opposite, the vast majority of electric utility poles are owned by private investor-owned electric utilities and cooperatives. Public power utilities own and manage their electric utility poles, including wireline pole attachment practices, in the same manner as these private utilities. For example, the touchstone for determining the safety and engineering requirements of attachments to electric utility poles is the National Electrical Safety Code ("NESC"). The NESC is used by all types of electric utilities and there are no distinctions based on the nature of the utility's ownership.

3. Public Power Utilities Have No Greater Power Than Other Market Participants

The third prong of the *Boston Harbor* market participant test is whether the governmental entity is able to leverage or wield governmental authority over third parties that would not be available to private entity participants in the market. The U.S. Supreme Court clarified the meaning of this test in *American Trucking Associations, Inc. v. City of L.A.*[39] where it found that a city that statutorily required private entities to agree to "[c]ontractual commitments resulting not from ordinary bargaining, but instead from the threat of *criminal sanctions* manifest the government *qua* government, performing its prototypical regulatory role." (*Emphasis added*). The Court continued "the [city] here has not acted as a private party, contracting in a way that the owner of an ordinary commercial enterprise could mimic."

No such governmental authority exists for public power utilities. Public power utilities enter into pole attachment agreements in the same manner as other types of utilities. Indeed, unlike investor-owned utilities, public power utilities are typically dwarfed in size and available resources (including lobbying and legislative clout) as compared to the large nationwide carriers that seek pole attachments.

As can be seen, under all three prongs of the *Boston Harbor* analysis, it is clear the public power utilities operate and manage their electric facilities and access to their poles in a proprietary capacity that is no different than other utilities. As such, the Commission does not have the authority under Section 253 to regulate rates, terms, or conditions, of wireline attachments to public power utility poles 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

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39 *Am. Trucking Ass'ns, Inc. v. City of L. A.*, 569 U.S. 641, 133 S.Ct. 2096, 186 L.Ed.2d 177 (2013).

scope of the Commission's sole authority to regulate pole attachments and is found in Section 224 not Section 253.

V. THE UNDERLYING PREMISE OF THE *NPRM* IS FLAWED AND UNSUPORTED WITH RESPECT TO ATTACHMENTS TO PUBLIC POWER UTILITY POLES

The premise of the *NPRM* is that the "record developed" in response to the Commission's 2025 *Notice of Inquiry* ("NOI") supports the Commission's conclusion "that additional action by the Commission is needed to prevent excessive delays, fees, and other conditions imposed by state and local requirements from creating barriers to wireline telecommunications deployments."[40] The Commission is therefore proposing to "codify" sweeping rules that would

> (1) "establish a rebuttable presumption that state and local governments have effectively prohibited the provision of wireline telecommunications services if they fail to process all authorizations for use of public rights-of-way to provide wireline telecommunications services or to deploy wireline telecommunications infrastructure within 120 days; (2) limit the fees that state and local governments may charge for a wireline telecommunications authorization to a reasonable approximation of the government's actual, direct costs of managing the rights-of-way with respect to that authorization.[41]

Despite the primary focus of the *NOI* and the record developed being on access to public rights-of-way, the Commission also seeks to apply these same timing and fee limitation requirements to "wireline requests to access and use government-owned infrastructure located in public rights-of-way, *including, but not limited to, government-owned poles.*"[42] With respect to wireline attachments to public power utility poles, the Commission's entire premise is deeply flawed and the "record" absolutely does not support the conclusion that any such sweeping requirements are required for

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40 *NPRM*, at ¶ 3.
41 *NPRM*, at ¶ 4.
42 *NPRM*, at ¶¶ 28; and 59 (*emphasis* added).

wireline attachments to public power utility poles – or that such changes would appreciably impact the pace of deployment in unserved or underserved areas.

A. Section 253 Limits The Commission's Authority To Case By Case Enforcement Actions It Does Not Have The Authority To Adopt Rules

As an initial matter, the Commission's proposals to "codify" sweeping requirements applicable to wireline attachments to public power utility poles would exceed its statutory authority under Section 253.

At its core, Section 253 exists to ensure that individual state and local government entities do not use their governmental authority to impose laws, regulations, or legal requirements that "prohibit or have the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service."[43] Section 253(d) specifically circumscribes the Commission's authority in enforcing the prohibition, stating (with *emphasis* added):

> "If, after notice and an opportunity for public comment, the Commission determines that *a* State or local government has permitted or imposed *any statute, regulation, or legal requirement* that violates subsection (a) or (b), the Commission shall preempt the enforcement of *such statute, regulation, or legal requirement* to the extent necessary to correct such violation or inconsistency.

As Commissioner Gomez notes, a "plain reading of the text seems to suggest that the Commission has the authority to preempt on a case-by-case basis as it identifies individual State or local initiatives that violate Sections 253(a) or (b), rather than using rulemaking authority to issue a blanket preemption under Section 253(d)."[44] Thus, Section 253(d) limits the Commission's role to reviewing specific actions taken by specific state or local governments via the notice and comment process and then to determine whether the specific action in question has the effect of

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[43] 47 U.S.C. 253(a)(*emphasis* added).

[44] *Statement of FCC Commissioner Anna Gomez, Build America: Eliminating Barriers to Wireline Deployments*, WC Docket No. 25-253, *Notice of Proposed Rulemaking* (June 26, 2026).

prohibiting the provision of telecommunications service. Section 253(d) does not provide the Commission with the authority to adopt the broad preemptive rules of general applicability that it proposes in the *NPRM*. As Commissioner Gomez suggests, the proposed rules are unlikely to survive judicial scrutiny under *Loper Bright* as the "best" interpretation of Section 253(d).[45]

B. The Record In The *NOI* Does Not Support The Commission's Proposed Actions With Respect To Wireline Attachments To Public Power Utility Poles

Not only is the Commission improperly proposing the wholesale preemption of broad categories of proprietary pole attachment practices instead of specific governmental regulatory actions, but the comments in the underlying *NOI* have also failed to reveal evidence that there are widespread, if any, statutes, regulations, or legal requirements related to attachments to public power utility infrastructure, that are actually prohibiting the provision of telecommunications services. Even in the few comments that reference attachments to government-owned poles generally, the comments failed to demonstrate the existence of a widespread or pervasive pattern of pole attachment practices by public power utilities that would warrant the imposition of sweeping regulations. Instead, the few comments that discuss pole attachments speak in broad generalities about perceived excessive costs or delays without providing context or specifics. Undoubtedly, most communications providers would prefer to have lower pole attachment rates, but that is not a sufficient reason to apply rate regulations at the expense of public power utilities and their customers. These same providers would also presumably prefer to pay lower prices for other cost inputs than they incur as part of their business, and, if given the chance, would argue that the high costs of the Commission's universal service program are an unreasonable barrier to entry.

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45 *Id.*

In contrast, there is broad evidence that public power attachment fees, practices, and procedures are not prohibitive. In fact, the vast majority of poles owned by public power utilities have multiple wireline communications attachments and have supported such attachments for years. While the *NOI* and industry commenters focus on the perceived need to remove state and local government regulatory barriers to the deployment of wireline networks for the provision of telecommunication service and/or broadband capabilities, the available record does not support the argument that public power utility pole attachment practices present such barriers.

For example, the Commission recently celebrated the pace of broadband deployment in its 2026 Section 706 Report, proudly proclaiming, "FCC Broadband Report Shows Rapid Expansion of High-Speed Internet."[46] The Section 706 Report states (with *emphasis* added):

> 2. The data presented in this Report *reveal that market forces, industry developments, and our regulatory reforms are succeeding in delivering broadband to more Americans than ever before. Both fixed and mobile broadband providers have made great strides in bringing broadband service to the previously unserved or underserved.*
>
> - *High-speed residential broadband—whether cable, fiber,* or fixed wireless*—has become more widely available since our last Section 706 inquiry. From June 2024 to June 2025, the number of Americans lacking access to 100/20 Mbps fixed terrestrial broadband service decreased by approximately 23%. Over a two-year period, this reduction was approximately 43%.* With the inclusion of satellite, deployment of broadband to the home or business appears to be virtually universally available to all Americans.
> - Consumers are also benefitting from the rapid increase in the availability of high-speed mobile broadband. The number of Americans lacking access to mobile 5G-NR broadband with a minimum speed of 35/3 Mbps declined by almost 16% from June 2024 to June 2025, and by over 30% from June 2023 to June 2025.
> - *The number of competitive options available to Americans also continues to grow. From June 2023 to June 2025, the percentage of*

[46] *2026 Section 706 Report*, GN Docket No. 25-223, released August 14, 2026.

households with three or more fixed terrestrial broadband service options at 100/20 Mbps increased by approximately 56%. In addition, from June 2023 to June 2025, the percentage of Americans with access to fixed wireline service at a speed threshold of 100/20 for rural areas has increased at an even faster rate than in urban areas. Further, in June 2025, the inclusion of Fixed Wireless service in our analysis increases the percentage of the rural population with access to broadband at speeds of at least 100/20 Mbps by over 10%.

- *Rural Americans also continue to experience major gains in the availability of high-speed broadband. From June 2023 to June 2025, the percentage of rural Americans lacking access to 100/20 Mbps fixed terrestrial broadband service decreased by over 44%.* Further, with the inclusion of satellite, 100/20 Mbps broadband deployment is available in most rural areas.

3. *Today, we conclude our annual inquiry by finding that deployment of advanced telecommunications capability to all Americans meets the statutory standard of being reasonable and timely.*[47]

The empirical and data driven conclusions of the Section 706 Report's "that high-speed residential broadband whether cable, fiber, or fixed wireless" — "has become more widely available" and "competitive" are at odds with the anecdotal and conclusory pronouncements in the *NPRM* that practices by state and local governments are collectively imposing unreasonable requirements with respect to wireline access to the rights-of-way or government owned facilities, such as utility poles, that would justify the Commission adopting sweeping preemptive requirements.

More specifically, with respect to wireline attachments to public power utility poles, the majority of public power utilities operate in cities and towns that typically have two or more wireline telecommunications carrier attachments on their poles. Many of these networks are fully deployed (and have been for years) with the carriers only seeking new attachments as new developments are built. The Commission's own broadband availability maps developed to identify

[47] *2026 Section 706 Report, Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 25-223, ¶¶ 2-3, released August 14, 2026 (*emphasis* added).

the state of deployment of broadband and advanced telecommunications services, demonstrate that most of the unserved and underserved portions of the country are not within areas served by public power utilities. As shown in the attached map of broadband availability in public power communities,[48] the vast majority of public power utilities located in the lower 48 states have relatively few areas within their respective service territories that are eligible for BEAD funding due to the high degree of qualifying broadband coverage as determined by the Commission's own data.[49] If public power wireline attachment procedures actually had a prohibitive effect on telecommunications service, then this map would be expected to show some correlation between public power utilities and a lack of broadband availability. It does not, in fact it shows quite the opposite. The maps show a high degree of broadband availability, with 1,846 out of 1,936 public power utilities in the lower 48 states of the country having between 90 percent and 100 percent broadband availability throughout their service territories. This means that over 95 percent of public power utilities have 90 percent or greater broadband coverage. Further, only 1.2 percent of public power utilities' service areas have 50 percent or lower broadband availability. This represents a higher rate of broadband deployment than any other type of electric utility, including private, investor-owned utilities subject to the Commission's Section 224 pole attachment regulations.

Further, in making their purchasing decisions for new poles, public power utilities have long included poles of a larger size and class than they would otherwise require in accommodating their own needs. Utilities specifically consider and purchase larger poles based on the anticipated and potential uses of the poles by multiple third-party communications providers. This typically includes maintaining a warehoused inventory of such poles for new installations and replacing poles

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48 Exhibit A, Map of Broadband Availability in Public Power Communities.

49 *Broadband Equity and Digital Access* (BEAD") funding under the *Infrastructure and Investment Jobs Act* is only available to areas that are "unserved" or "underserved" as reported on the Commission's BDC maps.

damaged in storms and accidents. Indeed, many of APPA's members order their poles with pre-drilled bolt holes in the communications space to accommodate third-party wireline communications attachments. Business decision such as these would be nonsensical if public power utilities sought to prohibit or inhibit third party communications attachments to their poles.

VI. THE COMMISSION MUST AVOID CONFLATING ACCESS TO PUBLIC RIGHTS-OF-WAY WITH WIRELINE ATTACHMENTS TO PUBLIC POWER UTILITY POLES AND SHOULD NOT SEEK TO REGULATE ACCESS OR RATES FOR WIRELINE ATTACHMENTS TO PUBLIC POWER UTILITY POLES

A. The Issuance Of Attachment Permits For Wireline Access To Utility Poles Are Separate And Different Processes Than Obtaining Rights-Of-Way Permits

Without citing any evidence of widespread practices by public power utilities unreasonably denying or delaying wireline pole attachment requests, the Commission proposes to adopt a 120-day deadline for state and local governments to act on applications "to access and use government-owned property located in public rights-of-way, including, but not limited to, government-owned poles." In raising this proposal, the Commission inquires whether there are "any factual or practical distinctions between requests to access public roadways, highways, streets, sidewalks, or similar property and requests to attach to different types of government-owned poles or structures that warrant taking a different approach." The Commission asks whether the "Commission should consider a separate deadline that applies solely to applications to access and use government-owned structures" or whether it should "consider a longer deadline that is inclusive of any type of authorization that a provider may seek from a jurisdiction." Finally, the Commission inquires as to the impact of not applying the proposed deadline to government-owned structures.[50]

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[50] *NPRM*, at ¶ 28.

For all of the above discussed reasons, APPA urges the Commission not to adopt any such deadlines with respect to access requests for wireline attachments to public power utility poles. Any such action would be both unnecessary and outside of the Commission's authority. In answer to the Commission's question, the impact of not applying the proposed deadline to public power utility poles is that there would be no harm to wireline carriers. As is evidenced by the existing number of wireline pole attachments on public power utility poles throughout the country, wireline telecommunications already enjoy readily available access to public power utility poles on a timely basis.

The Commission must also recognize that public power utilities function as separate entities from the local government bodies that regulate and control access to the public rights-of-way.[51] As with investor owned utilities and electric cooperatives, 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 rights-of-way where the poles are located.

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 agreements are negotiated between the parties and therefore the timeframe to negotiate an agreement is as much in the control of the attaching entity as it is the control of the utility. It is not unusual for an attaching entity to initiate a pole attachment agreement process and disappear for months at a time while they

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[51] Indeed, as discussed above, 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 rights-of-way.

turn to focus on other matters. To place the blame for that delay on the pole owner would be a mistake.

Pole attachment permits issued pursuant to a pole attachment agreement are entirely different than permits to occupy the public rights-of-way, with wholly different considerations and timeframes. The timing for the issuance of a pole attachment permit cannot be tied to the date that a carrier seeks authorization from the local government to utilize the rights-of-way. In most instances, the utility had no reason or way of knowing that a wireline carrier has met with a city public works, zoning board, or franchising authority to initiate a rights-of-way authorization. This is particularly true when the public power utility is a separate entity from the state or local government entity that controls access to the rights-of-way.

Moreover, public power utilities, like all utilities, review requested pole attachment permits and determine whether the specific poles have sufficient capacity to safely accommodate the requested attachments in conformance with applicable safety and engineering standards. If the requested attachments can be accommodated but require make-ready work to address necessary rearrangement of the existing facilities or replacements of poles, the attaching entity is required to review, accept, and pay the estimated make-ready costs in advance of the utility and other attaching entities performing the required work. Thus, in many instances the time periods between review and completion of make-ready work are as much in the hands of the attaching entity and third-party attaching entities as with the utility. The *NPRM* neither acknowledges nor addresses how these processes would work within the proposed 120-day timeframe.

The Commission requests comment on whether there are " any factual or practical distinctions between requests to access public roadways, highways, streets, sidewalks, or similar property and requests to attach to different types of government-owned poles or structures that warrant taking a different approach?" The answer is yes. The necessary considerations included in approval of requests to access electric utility poles differs starkly from those made regarding access to the public rights-of-way. While local permitting decisions regarding access to the public rights-of-way certainly involve engineering and safety considerations, they generally do not involve the same degree of granular analysis and review as access to electric utility poles which are inherently dangerous.

To account for that inherent danger, access to utility poles requires intensive pole by pole and cumulative engineering assessments of pole conditions, the proposed attachments' impact on structural loading, the impacts on existing and planned future electric facilities, the impacts on existing third-party attachments for communications and other purposes, compliance with the National Electrical Safety Code, Occupational Safety and Health Administration requirements, make-ready requirements, and a variety of other utility-specific engineering considerations.

Each of these considerations assess whether the proposed attachment could have a negative impact on the actual purpose of the poles, the delivery of electricity to homes and businesses. These vital, and yes, often time-consuming operational assessments protect not only the electric business interests of the utility, but also must take into account the potential danger new attachments may create for both utility and telecommunications professionals who need to work on and near the poles. This is not a barrier to deployment – it is the longstanding process through which public utilities ensure the continued safe operation and maintenance of critically important electric utility infrastructure.

For all these reasons the Commission must not seek to tie or impose timing restrictions on rights-of-way access with the wholly separate and distinct process of obtaining access to utility poles.

B. The Commission Should Not Seek To Regulate Rates For Wireline Attachments To Public Power Utility Poles

The Commission is proposing to limit the rates and fees that public power utilities may charge for wireline attachments to their utility poles to cost recovery based on the actual and direct cost incurred by the utility in making the poles available. In support of this proposal, the Commission makes the sweeping and conclusory statement that "[t]he record developed in response to the 2025 Notice of Inquiry suggests that providers of wireline telecommunications services pay excessively high fees when they seek to attach facilities to government-owned poles and conduit."[52] The sole justification for this statement and thus for the imposition of the proposed fee standard for wireline attachments on public power utilities is the Commission's reference to the comments of Crown Castle Fiber LLC, NCTA, and WorldNet Telecommunications, LLC ("WorldNet") in response to the *NOI*.[53] These comments alone simply do not justify the sweeping proposal the FCC puts forward in contravention of the specific congressional directive in Section 224 to exclude public power utilities from Commission pole attachment rate regulation.

Two of the commentors cited, Crown Castle and WorldNet, raise highly fact specific issues they have had with individual government-owned utilities, detailing what they argue are unreasonable terms.[54] NCTA, without naming attachers or utilities, vaguely references one off issues, such as a pole owner increasing attachment rates and charging an attachment fee that NCTA considers to be unreasonable. These comments, even if taken at face value, represent a very small percentage of the overall number of public power utilities. The Commission should not attempt to broadly expand the reach of its Section 253 regulatory authority to adopt sweeping one-size-fits-all

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52 *NPRM* at 59.

53 NPRM at Footnote 178.

54 For example, WorldNet's comments relate to highly fact specific claims related to the practices of LUMA Energy, LLC a private utility company that operates and maintains the electric system owned by the Puerto Rico Electric Power Authority after Hurricane Maria.

pole attachment rate regulations for public power utilities without clear empirical evidence in the record that there is a genuine problem for such new regulations to address.

As discussed above, Congress has explicitly stated that 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, the legislative history to the exemption clearly indicates Congress intended that the exemption was intended to "*protect*" the "*discretion*" of public power utilities and cooperatives, "[b]cause 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*."[55]

The Commission (including the current Chairman) has many times over confirmed that it lacks the statutory authority to regulate rates for 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 especially in a post-*Loper Bright* environment.

Public power utilities all operate on a non-profit basis and in setting fees and charges seek to recover costs. Consistent with congressional intent, public power utilities already establish rates based on their specific requirements for reasonable cost recovery. The Commission should not seek to substitute its judgment as to the best manner to provide public power utilities with attachment fees that ensure fully allocated cost recovery. The *NPRM* provides no empirical evidence that the

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[55] Cong. Rec. S964, at S966 (Jan. 31, 1978) (*emphasis* added).

fees and charges that public power utilities have adopted are acting as a barrier to entry for the deployment of wireline telecommunications services. As discussed above, the majority of poles owned by public power utilities have multiple wireline telecommunications attachments and the associated fees and charges for the use of these poles has clearly not been a deterrence to deployment, as is evidenced by the fact that many of these networks have bene fully deployed throughout the utility's service territory for years.

Further, there is no evidence that public power utility wireline pole attachments costs appreciably impact network deployments. For example, there is no evidence that there are any greater number of wireline networks deployed in areas of the country served by investor-owned utilities subject to the Commission's Section 224 rate regulations. In fact, available evidence strongly suggest that pole attachment fees are not a significant factor in deployment costs. For example, for the past five years, the Georgia Public Service Commission has enabled wireline carriers to attach to electric cooperative poles at a $1.00 annual attachment fee to serve unserved areas for a period of five years. To date, the Georgia cooperatives have had very few carriers seek to build to unserved areas under the $1.00 rate. This reflects the fact that other deployment costs and business considerations far outweigh a carriers' decision to construct facilities in unserved areas.[56]

Moreover, the Commission must again be careful to not conflate its treatment of access to public rights-of-way with wireline attachments to public power poles. As with all other utilities, the cost recovery for make-ready and on-going use of poles by wireline attachments is wholly separate from cost recovery requirements of the state and local government entities that may own the rights-

[56] *See*, Georgia Public Service Commission, *Order Implementing House Bill 244*, Docket No. 43453, Dec. 30, 2020.

of-way where the poles are located. Further, the Commission must recognize that the fees and costs associated with attachments to public power utility poles, as with attachments to all other electric utility poles, involves both the one-time costs associated with reviewing and performing the necessary make-ready to accommodate the requested attachment and the on-going annual fees for the use of the poles.

Finally, the Commission's proposal for the adoption of federal rate regulation of public power wireline attachment rates rests upon the assumption that telecommunications companies will pass through any savings in pole attachment costs to their customers, deploy more facilities, and/or offer additional services, but there is no requirement compelling such action. Indeed, while the *NPRM* purports to focus on facilitating the expansion and deployment of new advanced wireline telecommunications and broadband services, the application of new rate regulations to wireline attachments to public power utility poles would have a sweeping effect on millions of poles with existing fully deployed networks and would apply to all wireline attachments utilized for telecommunications services, including both new and existing analog phone lines attached purely for the provision of plain old telephone service. In other words, it would convey a massive windfall for private for profit-companies that is neither justified nor permissible under applicable law.

Rather than seeking to adopt unjustified, ill-suited, and illegal, top-down regulations of wireline attachments to public power utility poles to address a problem that does not exist, the Commission should instead adopt targeted and measured approaches that focus on actual barriers to entry and facilitating network deployments in parts of the country that are unserved.

VII. CONCLUSION

Based on the foregoing, APPA urges the Commission to recognize that this *NPRM* and any order based on it is inapplicable to public power utility poles. The Commission must not conflate access to public rights-of-way with wireline access to public power utility poles, whatever authority Section 253 conveys with respect to rights-of-way it clearly does not apply to public power utilities operating in a proprietary capacity. Further, there is no demonstrable evidence that public power wireline attachment procedures prohibit the deployment of telecommunications facilities that would justify the adoption of sweeping preemptive rules in direct contradiction of Congresses explicit exclusion of public power utilities from the Commission's Section 224 pole attachment regulations.

Respectfully Submitted,

_/S/ *Sean A. Stokes*

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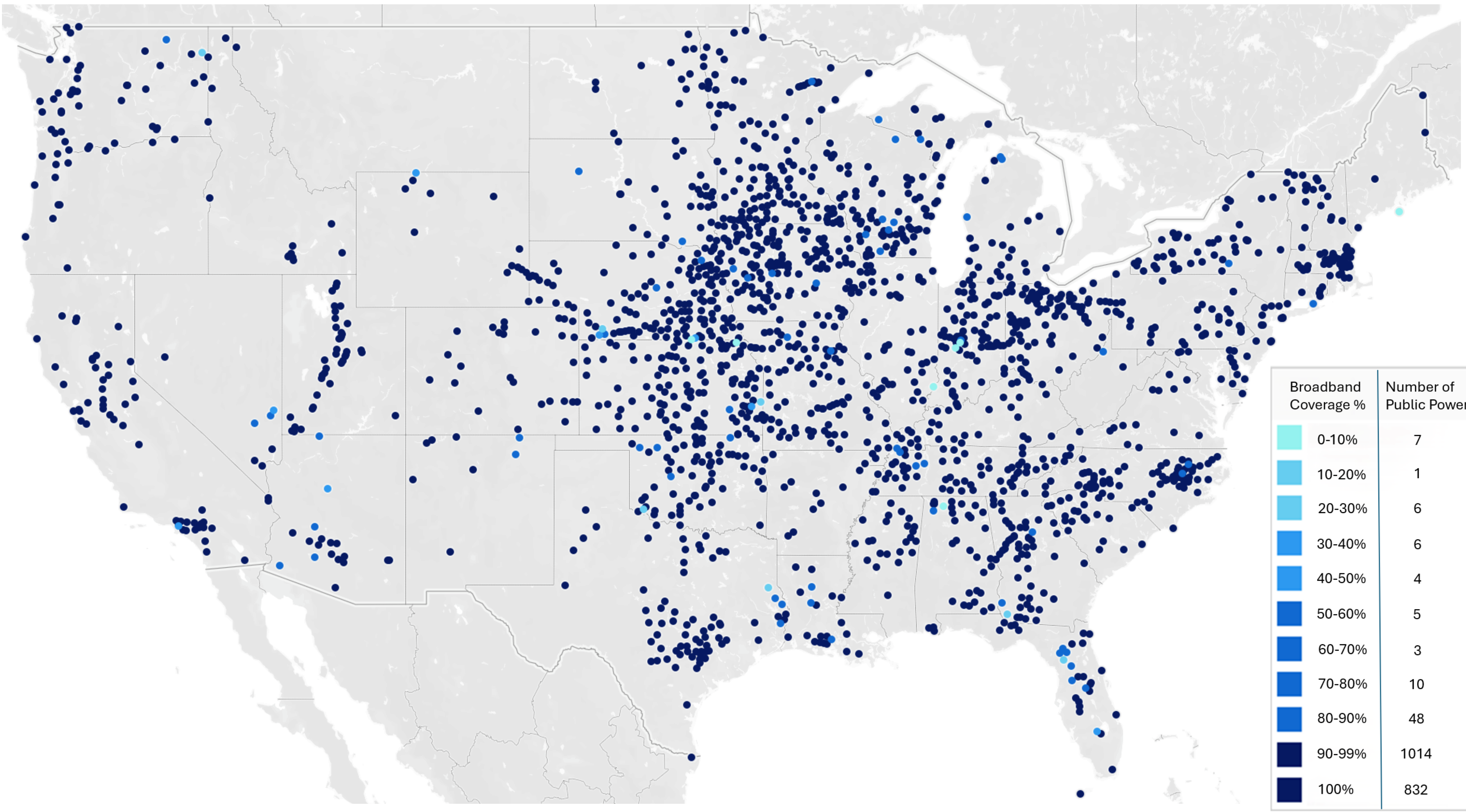
Exhibit A:

Broadband Available in Public Power Service Areas


Broadband Coverage %
Number of Public Power
0-10% 7
10-20% 1
20-30% 6
30-40% 6
40-50% 4
50-60% 5
60-70% 3
70-80% 10
80-90% 48
90-99% 1014
100% 832