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June 17, 2019

VIA ELECTRONIC FILING

Molly C. Dwyer, Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: *Sprint Corp. v. FCC, Case No. 19-70123 et al.*; Letter of *Amicus Curiae* Northwest Public Power Association in Support of Petitioner American Public Power Association

Dear Ms. Dwyer:

Pursuant to Ninth Circuit Advisory Committee Note to Rule 29-1 of the Federal Rules of Appellate Procedure, the Northwest Public Power Association (“NWPPA”) respectfully submits this letter as *amicus curiae* to join in Petitioner American Public Power Association (“APPA”) in the above-referenced proceeding. Respondents’ counsel has consented to the submission of this amicus letter brief.

I. Interest of NWPPA

NWPPA is an electric utility trade association formed in 1941, representing over 150 consumer-owned utilities in the western United States, Alaska, and Canada. NWPPA is dedicated to serving the interests of its members and their millions of electric utility customers. The central mission of consumer-owned utilities is to serve their communities with safe, reliable, and low-cost power on a not-for-profit basis. NWPPA has continuously been an advocate for this mission on behalf of its member utilities.

NWPPA has an interest in this proceeding because the Order¹ of the Federal Communications Commission (“FCC”) that is under review would have significant detrimental operational and financial impacts on NWPPA’s member utilities. The Order also would negatively affect the customers of NWPPA’s member utilities, and other local residents, by creating safety and electric reliability concerns and increasing the cost of electric service to pay for costs associated with attaching broadband technology to electric power poles.

As *amicus curiae*, NWPPA joins in the arguments contained in APPA’s Opening Brief, filed in this proceeding on June 10, 2019.

II. Arguments

NWPPA’s member utilities own and manage the power poles within their service territories. Telecommunications providers and other organizations frequently seek access to attach equipment and wires to these poles. NWPPA supports the expansion of broadband or 5G service to all areas, urban and rural, including those underserved areas, provided that it is done safely and in accordance with federal state and local law governing such attachments. These laws recognize the industry standards that protect the safety, integrity, and reliability of electric facilities.

NWPPA opposes the Order because it exceeds the FCC’s authority and is arbitrary, capricious, and an abuse of discretion. Furthermore, the Order would allow telecommunications providers to bypass state and local safety requirements and rate regulation, set pursuant to state law and long-standing regulatory regimes established under state law, thereby putting utility workers and the general public at risk, while also requiring NWPPA member utilities and their customers to subsidize private third-party telecommunications providers.

Many of NWPPA’s member utilities are situated in states or localities that allow them to set market-based pole attachment fees that reflect the full costs associated with readying and attaching third-party facilities to existing poles.² The Order would allow telecommunications providers to bypass the local rate-setting

¹ *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 (Sept. 27, 2018) (“Order”).

² Additionally, electric utilities recover the electricity costs associated with powering the pole attachments.

process with respect to pole attachment fees, and would instead require public power utilities to accept the attachment rate that the FCC has prescribed for attachments to investor-owned utility poles. Put another way, the Order would force public power utility customers to subsidize the attachment of for-profit third-party companies' equipment.

A. *The Order Exceeds FCC's Authority and Is Arbitrary, Capricious, and Contrary to Law.*

In the Order under review, the FCC adopted a new, expansive interpretation of its authority under Sections 253 and 332 of the Communications Act of 1934, as amended.³ For the first time—disregarding plain statutory language and decades of controlling precedent—the Order concluded that the FCC's authority under Section 253 to remove barriers to entry for telecommunication services providers enables the FCC to regulate attachments to municipal utility poles.

Prior to the 1970s, the FCC had no authority over electric utility poles. In *In re California Water & Telephone Co.*, the FCC found that it does not have general authority to regulate access to public or private property or facilities, except where such authority is specifically granted by statute.⁴ In response to *California Water*, Congress passed The Pole Attachment Act of 1978, now codified at 47 U.S.C. § 224. Section 224 expressly provides that public power utilities, such as NWPPA's members, are exempt from federal regulations regarding pole attachments.⁵ The legislative history of that Act chronicles the FCC's recognition that it lacks jurisdiction to regulate pole attachments absent express Congressional authority.⁶ As discussed in the APPA's Opening Brief, in the 40 years between the enactment of the Pole Attachment Act and the FCC's issuance of the Order, the FCC frequently confirmed that the public power exemption in Section 224 means that the FCC does not have jurisdiction over attachments to public utility poles.⁷ In 1996, Congress amended Section 224 to ensure non-discriminatory pole attachment access, but retained the public power exemption.⁸

³ 47 U.S.C. §§ 253, 332.

⁴ 64 F.C.C.2d 753, 1997 WL 38620 (1977); *see also* APPA Opening Brief at 12-14.

⁵ 47 U.S.C. § 224(a).

⁶ S. Rep. No. 95-580, at 14 (1977); *see also* APPA Opening Brief at 14-21.

⁷ *See* APPA Opening Brief at 14-16, 26-37.

⁸ *See id.* at 16-17.

Also in 1996, Congress created Section 253 and Section 332(c)(7) to address state and local government barriers to entry for communications providers.⁹ As explained in the APPA Opening Brief, for over 20 years since enactment of these sections, the FCC and courts have consistently held that the requirements of Section 253¹⁰ and Section 332(c)(7)¹¹ apply only to regulatory functions performed by state and local governments (e.g., issuing zoning approvals), but do not apply to their proprietary activities such as owning, leasing, or operating electric facilities. It is well-established that public power utilities have authority to manage all issues (including rates, safety, and reliability) that are related to attachments to their power poles.

Not only does the FCC lack statutory authority to regulate access to municipal utility poles, but the Record in this proceeding does not demonstrate a need for it to do so. Section 253 allows the FCC to preempt certain state or local government actions that actually create a barrier to entry for telecommunications providers—not those that merely have a potential for creating a barrier to entry.¹² The Record does not support the FCC’s assertion that state or local pole attachment laws are actually creating barriers to entry for telecommunications providers, or that municipal utilities are unreasonably denying access for telecommunications providers. As such, the FCC’s decision to regulate access to public power utility poles is arbitrary, capricious, and an abuse of discretion.

B. The Order Would Cause Electric Operational and Safety Concerns.

In issuing the Order, the FCC also acted in an arbitrary and capricious manner by compressing the application review and make-ready timelines applicable to public power utilities. Placing additional attachments on electric facilities adds weight and bulk, which can exceed original facility design and existing safety factors, and can result in electric facility failure when combined with wind, rain, ice, or snow. In order to maintain electric system integrity,

⁹ 47 U.S.C. § 253; *see also* APPA Opening Brief at 21-23.

¹⁰ *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 ¶ 239 (“Wireless Citing Order”); *see also* APPA Opening Brief at 22-23, 37-53.

¹¹ Wireless Citing Order ¶ 239; *see also* APPA Opening Brief at 23-24.

¹² *See Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 578 (9th Cir. 2011) (“a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.”); *see also* APPA Opening Brief at 53-55.

properly qualified and certified utility personnel must evaluate each pole for electrical and structural suitability before an attachment is installed. NWPPA's member utilities have at times experienced that existing poles are too old and cannot safely support the large equipment attachments required for broadband or 5G service, and therefore pole replacement is needed in order to accommodate a pole attachment request.

The unrealistic timeline set forth in the Order Shot Clock Rules—which provides only days for a public utility to review a pole attachment application and determine whether it is complete and accurate, and for the automatic acceptance of an application if the deadline is not met—would significantly undermine electric reliability, worker safety, and safety of the general public. Further, it may divert utility worker attention from other critical matters.

III. Conclusion

For the reasons stated above, NWPPA joins in Petitioner APPA's argument in this proceeding, and respectfully requests that this Court find that the Order exceeds the FCC's authority, is contrary to law, and is arbitrary, capricious, and an abuse of discretion.

Respectfully submitted,



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CORPORATE DISCLOSURE STATEMENT

Pursuant to the United States Court of Appeals for the Ninth Circuit Rule 26.1 and the Federal Rules of Appellate Procedure Rule 26.1, the Northwest Public Power Association (“NWPPA”) hereby submits this Corporate Disclosure Statement. NWPPA is a not for profit association. NWPPA issues no stock, has no parent corporation, and is not owned in whole or in part by any publicly held corporation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. A. Love', with a long horizontal flourish extending to the right.

Matthew A. Love

*Counsel for Northwest Public
Power Association*

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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Description of Document(s) (*required for all documents*):

Letter of *Amicus Curiae* Northwest Public Power Association in Support of Petitioner American Public Power Association; Corporate Disclosure Statement

Signature s/ Matthew A. Love **Date** 06/17/2019
(*use "s/[typed name]" to sign electronically-filed documents*)