

The Role of Antitrust and Pole-Attachment Oversight in TVA Broadband Deployment

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I. Introduction

As part of the Infrastructure Investment and Jobs Act (IIJA), signed by President Joe Biden in November 2021, Congress provided \$42.5 billion for broadband deployment, mapping, and adoption projects through the Broadband Equity, Access, and Deployment (BEAD) program, with the stated goal of directing the funds to close the so-called “digital divide.”¹ But actions by pole owners—such as refusing to allow broadband companies to attach their lines on reasonable and nondiscriminatory terms—threaten to slow broadband deployment significantly.

In a recent letter to Assistant Attorney General Jonathan Kanter, Sen. Mike Lee (R-Utah) put forth the argument that the U.S. Justice Department (DOJ) should take action to address abuses of the pole-attachment process by local power companies (LPCs) regulated by the Tennessee Valley Authority (TVA).² His concern is that such abuses threaten to slow broadband deployment, especially to rural areas served by the TVA and the LPCs.³ Among the abuses he details are:

- Delaying or refusing to negotiate pole-attachment agreements with competitive broadband-service providers, including when the TVA LPC provides broadband service (itself or through a joint venture agreement) or is interested in doing so;
- Initially refusing to negotiate pole-attachment agreements that would enable competitive broadband-service providers to obtain permits in sufficient time to meet federal grant deadlines;
- Refusing to review pole-attachment applications on a scale or at the pace necessary to complete broadband projects in a timeframe required by federal grant programs;
- Refusing to follow the standard industry practice of approving a contractor to process pole-access applications in a timely manner when the utility’s staff is insufficient to do the work, even when the broadband-service provider is willing to pay the entire bill for the contractor; and

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¹ 47 U.S.C. § 1702(b) (2018).

² See, *infra*, Appendix A [hereinafter “Lee Letter”].

³ *Broadband Assessment Report*, TENNESSEE VALLEY AUTHORITY (Dec. 2022), <https://www.tva.com/energy/technology-innovation/connected-communities/broadband-assessment-report>.

- Refusing to process pole-attachment applications at all, and failing to respond to provider outreach regarding the processing of applications for months on end.⁴

Section 224 of the Communications Act exempts municipal and electric-cooperative (“coop”) pole owners, such as the LPCs, from oversight by the Federal Communications Commission (FCC).⁵ At the same time, the TVA’s authority over pole attachments is not subject to oversight by state governments.⁶ This loophole means that it is the TVA, not the FCC, that sets the rates for pole attachments. The TVA’s rates are significantly higher than those of the FCC,⁷ and the TVA’s LPCs often are able to avoid the access requirements that states and the FCC typically require.⁸

But avoiding state and FCC regulatory oversight is not the only loophole that the TVA and its LPCs can exploit: the TVA and the government-owned LPCs also may not be subject to antitrust law. These entities hold a resource critical for broadband deployment, while it is essentially impossible for private providers to build competing pole infrastructure. In situations like this, government entities that participate as firms in the marketplace—known in the literature as “state-owned enterprises” (SOEs)—should be subject to antitrust law in order to ensure access by private competitors.

Sen. Lee is correct that the DOJ should examine the practices of the TVA and its LPCs under antitrust law. Antitrust clearly applies to those LPCs that are private coops, which have no immunities. But Congress should clarify that the TVA and government-owned LPCs are likewise subject to antitrust law when they act according to their “commercial functions” or as “market participants.” They should also consider bringing the TVA and all of its LPCs under the purview of the FCC’s Section 224 authority over pole attachments.

II. The Law & Economics of State-Owned LPCs and Rural Electrical Cooperatives (RECs)

A. The Competition Economics of State-Owned Enterprises

SOEs’ incentives differ from those of privately owned businesses. Most notably, while a private business must pass the profit-and-loss test, SOEs often are not subject to the same constraints. This difference may manifest through setting up legal SOE monopolies against which no other firm can compete; exempting SOEs from otherwise generally applicable laws; extending explicit subsidies to

⁴ See Lee Letter, *supra* note 2, at 1-2.

⁵ See 47 U.S.C. § 224(a)(1) (2018) (“The term ‘utility’ means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.”).

⁶ See Lee Letter, *supra* note 2, at n.2.

⁷ *Pole Attachment Fee Formulas Adopted by TVA and the FCC*, TENNESSEE ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS (Jan. 2017), available at https://www.tn.gov/content/dam/tn/tacir/commission-meetings/january-2017/2017January_BroadbandAppL.pdf.

⁸ See Lee Letter, *supra* note 2, at n.4.

SOEs, whether in the form of taxpayer-financed appropriations or government-backed bonds (which the government explicitly or implicitly promises to repay, if necessary); or cross-subsidies from other government-owned monopoly businesses.

As a result, SOEs do not need to maximize profits (with Armen Alchian's caveat that private market participants may be modeled as profit maximizers even if that isn't their true motivation⁹) and can pursue other goals. In fact, this is exactly why some supporters of SOEs like them so much: they can pursue the so-called "public interest" by providing ostensibly high-quality products and services at what are often below-market prices.¹⁰

But this freedom comes at a cost: not only can SOEs inefficiently allocate societal resources away from their highest-valued uses, but they may actually have greater incentive to abuse their positions in the marketplace than private entities. As David E.M. Sappington and J. Gregory Sidak put it:

[W]hen an SOE values an expanded scale of operation in addition to profit, it will be less concerned than its private, profit-maximizing counterpart with the extra costs associated with increased output. Consequently, even though an SOE may value the profit that its anticompetitive activities can generate less highly than does a private profit-maximizing firm, the SOE may still find it optimal to pursue aggressively anticompetitive activities that expand its own output and revenue. To illustrate, the SOE might set the price it charges for a product below its marginal cost of production, particularly if the product is one for which demand increases substantially as price declines. If prohibitions on below-cost pricing are in effect, an SOE may have a strong incentive to understate its marginal cost of production or to over-invest in fixed operating costs so as to reduce variable operating costs. A public enterprise may also often have stronger incentives than a private, profit-maximizing firm to raise its rivals' cost and to undertake activities designed to exclude competitors from the market because these activities can expand the scale and scope of the SOE's operations.¹¹

Here, entities like the TVA and many of the government-owned LPCs that sell the electricity it produces are simply not subject to the same profit-and-loss test that a private power company would be. But even more importantly for the discussion of broadband buildout, many of these government-owned LPCs also provide broadband services (or intend to), effectively using their position as a monopoly provider of electricity to cross-subsidize their entry into the broadband marketplace. Moreover, LPCs often own the electric poles and control decisions about whether and at what rates to rent them to third parties (subject to TVA rate regulations), including to private broadband providers that may compete with the LPCs' municipal-broadband offerings.

⁹ See Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211 (1950).

¹⁰ See, e.g., JONATHAN SALLET, BROADBAND FOR AMERICA'S FUTURE: A VISION FOR THE 2020S, at 50-51 (Oct. 2019), available at https://www.benton.org/sites/default/files/BBA_full_F5_10.30.pdf.

¹¹ David E.M. Sappington & J. Gregory Sidak, *Competition Law for State-Owned Enterprises*, 71 ANTITRUST L.J. 479, 499 (2003).

This raises two significant issues for competition policy:

- 1) Because government-owned municipal-broadband providers focus on speed and price, rather than profitability, they can sometimes offer greater speeds at lower prices than private providers, deterring private buildout and competition using what, in other contexts, would be referred to as “predatory pricing” (i.e., the government can use its unique monopoly advantages to indefinitely set prices too low)¹²; and
- 2) LPCs that offer municipal-broadband services can raise rivals’ costs by refusing to deal with private broadband providers that want to attach equipment to their poles (an “essential facility” or “critical input”) or by offering access only on unreasonable and discriminatory terms.

In *Verizon Communication Inc. v. Law Offices of Curtis V. Trinko LLP*,¹³ the U.S. Supreme Court explained the reasoning behind a very limited duty to deal under antitrust law:

Compelling... firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.¹⁴

In sum, a private market participant is constantly looking to acquire monopoly power by innovating and better serving customers, and temporary monopolies—acquired through a legitimate competitive process—are not unlawful. If successful, this process provides incentive for more innovation and competition, including incentives for competitors to build their own infrastructure.

But this is not so when it comes to SOEs, which can prevent competition in a way that private market participants cannot, due to their special access to legal mechanisms like eminent domain, taxes, below-market-rate loans, government grants of indefinite monopolies, and cross-subsidies from their own monopolies in adjacent markets. As a result, SOEs possess both special ability and incentive to raise rivals’ costs through refusals to deal or predatory pricing.

Ironically, the lack of a profit motive may make SOEs uniquely positioned to harm competition. Thus, it may make sense to impose on SOEs a duty to deal on reasonable and nondiscriminatory terms when it comes to pole attachments.

¹² See Ben Sperry, *Islands of Chaos: The Economic Calculation Problem Inherent in Municipal Broadband*, TRUTH ON THE MARKET (Sept. 3, 2020), <https://truthonthemarket.com/2020/09/03/islands-of-chaos-the-economic-calculation-problem-inherent-in-municipal-broadband>.

¹³ 540 U.S. 398 (2004).

¹⁴ *Id.* at 408-09.

B. The Economics of Co-Ops¹⁵

According to the National Rural Electric Cooperative Association, the trade association for rural electricity co-ops (RECs):

- Co-ops serve 56% of the U.S. landmass and 88% of the nation's counties, including 93% of the 353 persistent poverty counties.
- They account for roughly 13% of all electricity sold in the United States.
- More than 90% of electric co-ops serve territories where the average household income is below the national average. One in six co-op consumer-members live at or below the poverty line.
- Cooperatives serve an average of eight consumer-members per-mile of electric line, but this average masks the extremely low-density population of many co-ops. If the handful of large co-ops near cities were removed, the average would be lower.
- More than 100 electric cooperatives provide broadband service and more than 200 co-ops are exploring the option and conducting feasibility studies to do so.¹⁶

There are some important differences between electric co-ops and investor-owned power companies. Most importantly, co-ops are owned by their consumers. Economics helps explain why this form of organization could be pro-competitive in some situations, but the history of RECs suggests that government support and corporate rules particular to co-ops are the main reasons that we continue to rely on co-ops to distribute electricity in rural areas of the United States. As a result, RECs—especially those that distribute electricity generated and transmitted by the TVA—have incentives more like those of state-owned enterprises (SEOs) than private firms.

In other words, RECs also have the incentive and ability to act anticompetitively—e.g., by refusing to deal with private broadband providers who wish to attach to the poles they own.

I. Why Do We Have So Many RECs?

The classic law & economics examination of firms' choice of business organization comes from Henry Hansmann, in his book *The Ownership of Enterprise*.¹⁷ He explained that the choice of ownership for any firm is driven by costs. The form that is chosen by a particular firm is that which “minimizes the total costs of transactions between the firm and all of its patrons.”¹⁸ These costs include both transaction costs with those patrons who are not owners, and the costs of ownership, such as monitoring and controlling the firm.

¹⁵ This section is adapted from Ben Sperry, *Broadband Deployment, Pole Attachments, & the Competition Economics of Rural Electric Co-ops*, TRUTH ON THE MARKET (Aug. 16, 2023), <https://truthonthemarket.com/2023/08/16/broadband-deployment-pole-attachments-the-competition-economics-of-rural-electric-co-ops>.

¹⁶ See Brian O'Hara, *Rural Electrical Cooperatives: Pole Attachment Policies and Issues*, at 2, NRECA (Jun. 2019), available at https://www.cooperative.com/programs-services/government-relations/regulatory-issues/documents/2019.06.05%20nreca%20pole%20attachment%20white%20paper_final.pdf.

¹⁷ HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* (2000).

¹⁸ *Id.* at 21.

Hansmann argued that the form of consumer-owned co-ops predominates in the distribution of electricity in rural areas because it is a response to the threat of natural monopoly, where high barriers to entry and startup costs suggest that one firm is likely to dominate.¹⁹ This is particularly true in geographic areas with low population density, because the costs of building out infrastructure is extremely high per individual consumer. As such, consumers would likely be subject “to serious price exploitation if they were to rely on market contracting with an investor-owned firm.”²⁰ Thus, the choice is among rate regulation of an investor-owned utility, municipal ownership, or consumer ownership through a co-op.

Hansmann argued that consumer co-ops best align “the firm’s interests with those of its consumers” because they have lower overall costs than other forms of ownership in rural areas.²¹ This is because electricity is a “highly homogeneous [commodity] with few important quality variables that affect different users differently.”²² Moreover, relatively stable farm and nonfarm residential households account for the overwhelming majority of the membership and demand for electricity in rural areas, “creating a dominant group of patrons with relatively homogenous interests.”²³

As a result, the costs of monitoring and controlling these natural monopolies are relatively lower for the consumers as owners than they would be as citizens overseeing a public utility commission in charge of regulating an investor-owned utility, or a board in charge of a municipally owned utility.

On the other hand, the history of RECs suggests that their formation and persistence may be more due to government intervention than as a market response to consumer demand. As Hansmann himself recognized, RECs received significant public subsidies in the form of below-market loans from the Rural Electrification Administration (REA), though he argues that these loans were not significant subsidies for the first 15 years); exemption from federal corporate income tax; and preferential access to power generated by the TVA.²⁴ On top of that, the REA essentially organized many co-ops in their early days.²⁵

Nonetheless, Hansmann argues:

These subsidies have undoubtedly been important in encouraging the formation and growth of cooperative utilities, and therefore the great proliferation of rural electric co-operatives does not provide an unbiased test of the viability of the cooperative form. Evidently, however, the federal subsidies have not been critical to the success of cooperatives in the electric power industry. Even before the federal programs were enacted,

¹⁹ See *id.* at 169.

²⁰ *Id.*

²¹ *Id.* at 170.

²² *Id.*

²³ *Id.*

²⁴ See *id.* at 173

²⁵ See *id.*

there already existed forty-six rural electric cooperatives operating in thirteen different states. Also, as already noted, there was no net interest subsidy to the cooperatives for the first fifteen years of the REA. And in its early years, the REA also offered low-interest loans to investor-owned utilities that wished to extend service into rural areas, but found little interest in these loans among the latter firms.²⁶

In an excellent 2018 law-review article, however, Debra C. Jeter, Randall S. Thomas, & Harwell Wells systematically detail the great lengths to which the REA went to organize co-ops in rural areas.²⁷ The authors convincingly argue that the co-op model was not adopted as a market response, but primarily due to the REA's organizational efforts and the subsidies bestowed upon them.

Even if RECs were a market response to natural monopoly in rural areas at the time of their adoption, that does not mean that they would necessarily continue to be the most economically efficient model. At a given point of time, economies of scale and high costs of entry may mean that the market can only support one firm (*i.e.*, natural monopoly). But over the last 80-90 years, underlying conditions that may have made co-ops the most efficient model may have changed. As we argued in a 2021 white paper:

[I]n any given market at a given time, there is likely some optimal number of firms that maximizes social welfare. That optimal number—which is sometimes just one and is never the maximum possible—is subject to change, as technological shocks affect the dominant paradigms controlling the market. The optimal number of firms also varies with the strength of scale economies, such that consumers may benefit from an increase in concentration if economies of scale are strong enough... And it is important to remember that the market process itself is not static. When factors change—whether a change in demographics or population density, or other exogenous shocks that change the cost of deployment—there will be corresponding changes in available profit opportunities. Thus, while there is a hypothetical equilibrium for each market—the point at which the entry of a new competitor could reduce consumer welfare—it is best to leave entry determinations to the market process.²⁸

In fact, as Jeter, Thomas, & Wells go on to argue, rules particular to the co-op model make it nearly impossible to change the form of ownership through merger or acquisition.²⁹ These rules—adopted as part of the model acts promoted by the REA—prevent what the great Henry Manne called “the market for corporate control” that would otherwise discipline co-op managers.³⁰

²⁶ *Id.*

²⁷ See Debra C. Jeter, Randall S. Thomas, & Harwell Wells, *Democracy and Dysfunction: Rural Electrical Cooperatives and the Surprising Persistence of the Separation of Ownership and Control*, 70 ALA. L. REV. 316, 372-395 (2018).

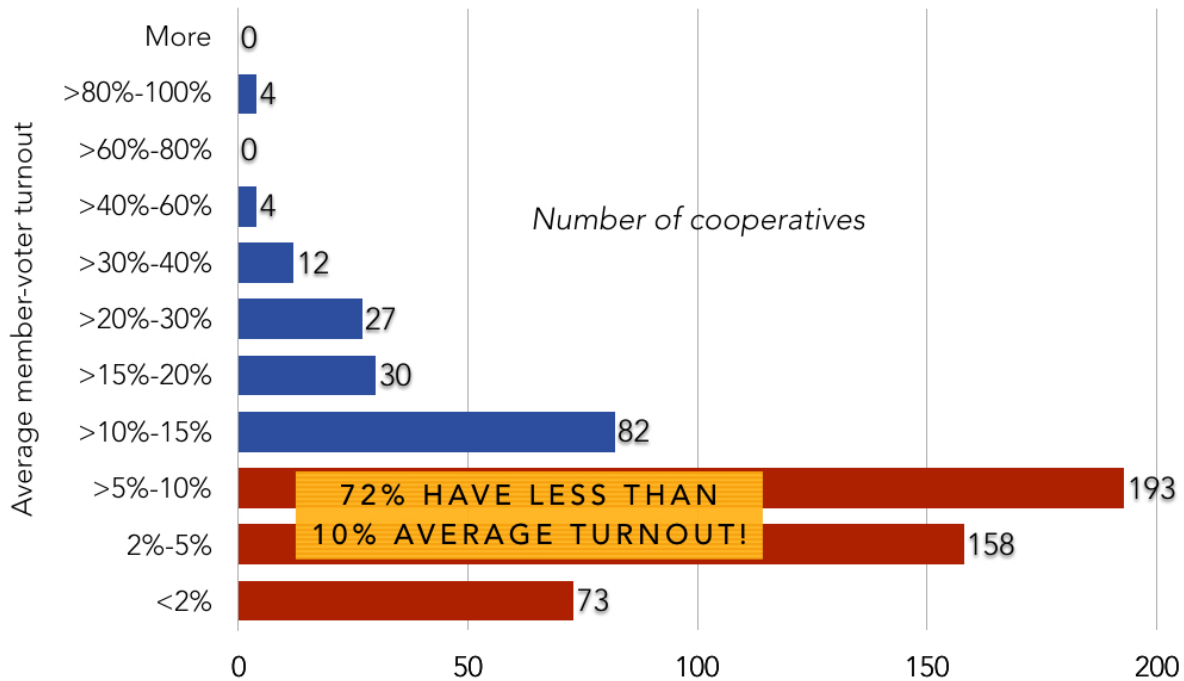
²⁸ Geoffrey A. Manne, Kristian Stout, & Ben Sperry, *A Dynamic Analysis of Broadband Competition: What Concentration Numbers Fail to Capture*, at 28, 32 (ICLE White Paper – June 2021), available at <https://laweconcenter.org/wp-content/uploads/2021/06/A-Dynamic-Analysis-of-Broadband-Competition.pdf>.

²⁹ Jeter *et al.*, *supra* note 27, at 419-39.

³⁰ See Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

As has been noted by even the strongest supporters of the co-op model³¹—and seemingly undermining Hansmann’s assessment that consumer-ownership is the most effective form of organization for these entities—RECs suffer from a lack of oversight by consumer-owners, with very few ever showing up to even vote for their board of directors:

FIGURE I: Low Turnout for Electric Cooperative Boards



SOURCE: *Institute for Local Self-Reliance*³²

This lack of oversight from the ownership means that the board of directors can engage in all kinds of abuses, as detailed extensively by Jeter, Thomas, & Wells.³³

Without sufficient incentives for oversight by consumer-owners or a functioning market for corporate control, there is no basis to conclude that RECs remain the best business model for distributing electricity. Their ubiquity is more due to the REA’s organizational efforts and ongoing government benefits—in the form of subsidies, tax exemptions, and preferences from the TVA—than market demand.

³¹ See John Farrell, Matt Grimley, & Nick Stumo-Langer, *Report: Re-Member-ing the Electric Cooperative*, INST. FOR LOCAL SELF-RELIANCE (Mar. 29, 2016), <https://ilsr.org/report-remembering-the-electric-cooperative/#Missing%20Members> (“More than 70 percent of cooperatives have voter turnouts of less than 10 percent [] including Wilson’s Jackson Energy Cooperatives, which averages just under 3 percent turnout.”).

³² *Id.*

³³ Jeter *et al.*, *supra* note 27, at 397-400.

2. *The Competition Economics of RECs and Pole Attachments*

Due to the privileged position enjoyed by RECs, particularly those that distribute electricity from the TVA, they have a unique ability and incentive to act anticompetitively toward broadband providers that want to attach to the poles they own.

Much like municipally owned electricity distributors, RECs are not motivated solely by profit maximization. RECs also have similar advantages, like access to eminent domain, below-market loans, tax exemptions, and the ability to cross-subsidize entry into a new market (like broadband) from its dominant position in electricity distribution.

On the other hand, unlike municipally owned electricity distributors, RECs can go out of business, and thus must earn sufficient revenues to remain a going concern. This means that the incentives for RECs to act anticompetitively are at least as strong as those of investor-owned firms, and may be even as strong as those of state-owned enterprises. This is especially notable, when so many RECs either have entered or are planning to enter the broadband market.

In such cases, there are strong incentives for RECs to refuse to deal with private broadband providers that are trying to deploy in—and introduce competition to—their rural areas, as Sen. Lee’s (R-Utah) recent letter to the U.S. Justice Department suggests, many of these co-ops have done exactly that.³⁴

FIGURE 2I: Runaway Pole Costs

REGULATED:	CO-OP OWNED:	MUNI OWNED:
\$6.84 per pole X 18 poles per mile	\$15.39 per pole X 18 poles per mile	\$14.86 per pole X 18 poles per mile
\$123.12 poles per mile	\$277.02 poles per mile	\$267.48 poles per mile

SOURCE: NCTA

The economic logic that drives a limited duty to deal under antitrust law is that enforced sharing rarely makes sense because it reduces the incentives to build infrastructure.³⁵ But creating new rural infrastructure (like poles) is cost-prohibitive—at least, without the same subsidies, eminent-domain power, and other advantages that RECs have historically enjoyed. Thus, RECs may rightfully have a duty to deal with broadband providers on a reasonable and nondiscriminatory basis.

Moreover, many RECs receive little oversight from rate regulators when it comes to pole attachments. And when they do, like those RECs that distribute electricity from the TVA, the formula

³⁴ See Lee Letter, *supra* note 2, at 1-2.

³⁵ See *Trinko*, 540 U.S. at 408-09.

allows for much higher rates than the FCC would allow.³⁶ As a result, pole costs are much higher for broadband companies dealing with poles owned by co-ops and municipalities that are not subject to the FCC's authority (see Figure II).³⁷

III. The Complicated Nature of Antitrust Immunities

There is, however, a complication. In his letter to the DOJ, Sen. Lee rightly complains that:

TVA's regulatory practices enable such behavior: there is no reason why TVA's regulation of the pole rental rates charged by its LPCs requires TVA to somehow exempt those LPCs from generally-applicable rules that protect competition by requiring pole owners to provide pole access to third parties on reasonable terms. TVA should be using its authority over LPC distribution contracts to require LPCs to offer reasonable, non-discriminatory, and prompt pole access to third-party broadband providers (particularly recipients of taxpayer-funded broadband grants) in unserved areas, rather than giving its LPCs a free pass from those requirements.³⁸

Unfortunately, while Lee's letter is addressed to the DOJ's antitrust chief, it isn't clear whether antitrust laws even apply to the behavior he observes. This is primarily because of two legal doctrines: federal sovereign immunity from lawsuit and state-action immunity from antitrust.

A. Federal Sovereign Immunity and the TVA

Normally, the federal government is immune from lawsuit under the ancient (and deeply flawed³⁹) doctrine of sovereign immunity, except where explicitly waived by statute. The TVA is a wholly owned corporate agency and instrumentality of the federal government. Thus, federal courts have typically found that the TVA and other federal entities operating in the marketplace are exempt from antitrust.⁴⁰ This is despite the fact that the TVA's enabling statute states:

Except as otherwise specifically provided in this chapter, the Corporation... may sue and be sued in its corporate name.⁴¹

There is, needless to say, nothing in the chapter that actually says the agency can't be sued for antitrust violations. The older cases finding the TVA to be exempt from antitrust are likely to be found wrongly decided under the logic of the U.S. Supreme Court's most recent case dealing with TVA's

³⁶ See *Pole Attachment Fee Formulas Adopted by TVA and the FCC*, *supra* note 7.

³⁷ See NCTA, *Pole Attachments*, <https://www.ncta.com/positions/rural-broadband/pole-attachments> (last accessed Sept. 4, 2023).

³⁸ Lee Letter, *supra* note 2, at 2.

³⁹ See Ben Sperry, *When Violations of the Law Have No Remedy: The Case of Warrantless Wiretapping*, COMPETITIVE ENTERPRISE INSTITUTE (Aug. 8, 2012), <https://cei.org/blog/when-violations-of-the-law-have-no-remedy-the-case-of-warrantless-wiretapping>.

⁴⁰ See, e.g., *Webster Cty. Coal v. Tennessee Valley Authority*, 476 F.Supp. 529 (W.D. Ky. 1979) (finding the TVA is exempt from antitrust law); *Sea-Land Serv. Inc. v. Alaska R.R.*, 659 F.2d 243 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982) (finding the Alaska Railroad exempt from antitrust law).

⁴¹ 16 U.S.C. §831c(b) (2018).

immunity from suit. In 2019, the Court took up *Thacker v. TVA*,⁴² which asked whether the TVA was immune from lawsuits for negligence. The Court rejected the lower court's reasoning that the TVA was immune for torts arising from its "discretionary functions," substituting a new test as to whether the TVA was acting pursuant to its governmental function or a commercial function. As the Court stated:

Under the clause—and consistent with our precedents construing similar ones—the TVA is subject to suits challenging any of its commercial activities. The law thus places the TVA in the same position as a private corporation supplying electricity. But the TVA might have immunity from suits contesting one of its governmental activities, of a kind not typically carried out by private parties.⁴³

The Court also gave examples to help distinguish the two:

When the TVA exercises the power of eminent domain, taking landowners' property for public purposes, no one would confuse it for a private company. So too when the TVA exercises its law enforcement powers to arrest individuals. But in other operations—and over the years, a growing number—the TVA acts like any other company producing and supplying electric power. It is an accident of history, not a difference in function, that explains why most Tennesseans get their electricity from a public enterprise and most Virginians get theirs from a private one. Whatever their ownership structures, the two companies do basically the same things to deliver power to customers.⁴⁴

The test to be applied, therefore, is "whether the conduct alleged to be negligent is governmental or commercial in nature... if the conduct is commercial—the kind of thing any power company might do—the TVA cannot invoke sovereign immunity."⁴⁵ Here, that arguably means that, when the TVA is acting pursuant to its commercial function, it should not receive immunity from antitrust suit.

On the other hand, Congress gave the TVA broad ratemaking authority and contractual powers. One federal court (previous to *Thacker*) rejected an antitrust challenge to the TVA's ratemaking formula because it was a "valid governmental action and [therefore] exempt from the antitrust laws of the United States."⁴⁶

As noted above, some LPCs have entered into the municipal-broadband market and act as competitors to private broadband companies who want to attach to poles owned by LPCs. Thus, even though competition economics would suggest that LPCs would have a greater incentive to raise rivals' costs by charging a monopoly price, the TVA would likely argue that it is acting in its

⁴² 139 S. Ct. 1435 (2019).

⁴³ *Id.* at 1439.

⁴⁴ *Id.* at 1443-44.

⁴⁵ *Id.* at 1444.

⁴⁶ *City of Loudon v. TVA*, 585 F.Supp. 83, 87 (E.D. Tenn. Jan. 30, 1984).

government function when it sets those rates.⁴⁷ If courts agree, then antitrust law would not be able to reach that problem.

Consistent with the Court's reasoning in *Thacker*, however, courts could find that antitrust law reaches agreements between wholesalers (like the TVA) and retailers (like the LPCs) to charge certain rates for pole attachments to competitors in an adjacent market. This would arguably be an example of the TVA acting as any other power generator would, pursuant to its commercial function, through some type of price-maintenance agreement. As it stands, it isn't clear which way the courts would go.

Congress should strongly consider clarifying that the TVA is not exempt from antitrust scrutiny when it acts pursuant to a commercial function, including when it sets anticompetitive rates for pole attachments that would slow broadband buildout. This clearly affects the market for access to LPC-owned utility poles.

B. State Action Immunity and the LPCs

Even if the commercial versus government distinction is clarified with respect to the TVA, there is a further wrinkle as it relates to antitrust scrutiny of LPCs. This concerns how the TVA's actions interact with state-action immunity in antitrust law.

Grounded in the 10th Amendment, the Supreme Court has found there is immunity from antitrust laws for conduct that is the result of "state action."⁴⁸ This doctrine has been interpreted to immunize anticompetitive conduct pursuant to state and local government action from antitrust claims, so long as "the State has articulated a clear ... policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct."⁴⁹ When it comes to municipalities, however, the Court has found that "[o]nce it is clear that state authorization exists, there is

⁴⁷ The TVA could also argue that the rate formula for pole attachments that it sets is subject to the filed rate doctrine and thus exempted from antitrust scrutiny. The filed rate doctrine does not allow courts to second-guess agency determinations of rates. See *Keogh v. Chicago & Northwest Railway Co.*, 260 U.S. 156 (1922). While the original case on the filed rate doctrine dealt with the literal situation of regulated entities filing rates which were approved by a regulator, courts have extended the doctrine to other situations where a regulator uses its authority to set rates. Cf. *Wortman v. All Nippon Airways*, 854 F.3d 606, 611 (9th Cir. 2017) ("While the filed rate doctrine initially grew out of circumstances in which common carriers filed rates that a federal agency then directly approved, we have applied the doctrine in contexts beyond this paradigmatic scheme.") The unique situation with the TVA is that there is no clear statutory ratemaking authority over pole attachments, but they have asserted the ability to do so under their contract powers, raising the same issue of whether this is a governmental function or market function. See TVA DETERMINATION OF REGULATION ON POLE ATTACHMENTS 2 (Jan. 22, 2016), available at <https://tva-azr-eastus-cdn-ep-tvawcm-prd.azureedge.net/cdn-tvawcma/docs/default-source/about-tva/guidelines-reports/determination-on-regulation-of-pole-attachments-7-12-2023.pdf>. Even if the filed rate doctrine applies, though, it would not stop an enforcement action aimed at an injunction or declaratory relief by the DOJ, just treble damages sought by a private litigant. See *Keogh*, 260 U.S. at 162 ("[T]he fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government.").

⁴⁸ See, e.g., *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny.

⁴⁹ *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. 494, 506 (2015) (internal citations omitted).

no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.”⁵⁰

The Supreme Court has also left open the possibility of an exception to state-action immunity when government entities themselves are acting as market participants.⁵¹ In one case dealing with a local municipally owned power plant in Louisiana, the Supreme Court did *not* grant broad immunity from antitrust laws, in part because:

Every business enterprise, public or private, operates its business in furtherance of its own goals. In the case of a municipally owned utility, that goal is likely to be, broadly speaking, the benefit of its citizens. But the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interest of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders.⁵²

While there are a few cases applying this distinction in lower federal courts,⁵³ there is no Supreme Court caselaw determining how to differentiate when, for the purposes of state-action immunity, municipal corporations act as market participants versus when they act as government entities. Jarod Bona and Luke Wake have proposed applying a test similar to the one the courts use in dormant Commerce Clause cases.⁵⁴ The distinction made by the Supreme Court in *Thacker* and discussed above may also be applicable.

Government-owned LPCs are creatures of states or municipalities. As such, they would certainly argue they are immune from antitrust scrutiny, even when they refuse to deal with private broadband providers with whom they compete while withholding a critical input (*i.e.*, the ability to attach to their poles). But there are two problems with this argument.

First, it seems unlikely that the LPCs could argue that they are acting pursuant to a clearly articulated policy of displacing competition when they refuse to deal with broadband providers. As Sen. Lee

⁵⁰ *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985).

⁵¹ See, e.g., *City of Columbia v. Omni Outdoor Advertising Inc.*, 499 U.S. 365, 379 (1991) (“We reiterate that, with the possible market participant exception, any action that qualifies as state action is ‘*ipso facto*... exempt from the operation of the antitrust laws...”); *FTC v. Phoebe Putney Health Systems Inc.*, 568 U.S. 216, 226 n.4 (“An amicus curiae contends that we should recognize and apply a ‘market participant’ exception to state-action immunity because Georgia’s hospital authorities engage in proprietary activities... Because this argument was not raised by the parties or passed on by the lower courts, we do not consider it.”).

⁵² *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 403 (1978).

⁵³ See, e.g., *Edinboro Coll. Park Apartments v. Edinboro Univ. Found.*, 850 F.3d 567 (3d Cir. 2017); *VIBO Corp. v. Conway*, 669 F.3d 675 (6th Cir. 2012); *Freedom Holdings Inc. v. Cuomo*, 624 F.3d 38 (2d Cir. 2010); *Hedgecock v. Blackwell Land Co.*, 52 F.3d 333 (9th Cir. 1995).

⁵⁴ See Jarod M. Bona & Luke A. Wake, *The Market-Participant Exception to State-Action Immunity from Antitrust Liability*, 23 J. ANTITRUST & UNFAIR COMP. L. SECTION OF THE STATE BAR OF CA., VOL. 1 (Spring 2014), available at <https://www.theantitrustattorney.com/files/2014/05/Market-Participant-Exception-Article.pdf>.

pointed out in his letter, there are state laws that would impose a duty to deal on reasonable and nondiscriminatory terms, but for any exemptions to that authority due to the TVA.⁵⁵ For instance, North Carolina and Kentucky require all pole owners not subject to FCC Section 224 authority to offer nondiscriminatory pole access.⁵⁶

On the other hand, they could appeal to the TVA's contract authority,⁵⁷ in addition to the TVA's stated policy that its purpose is "to provide for the ... industrial development" of the Tennessee Valley.⁵⁸ But even if this grants the TVA authority to regulate rates for pole attachments, it doesn't mean the TVA has enunciated an articulable policy of displacing competition in refusing to deal with broadband providers. It also would appear to be contrary to the purpose of promoting industrial development to forestall broadband deployment in the Tennessee Valley because LPCs that also have municipal-broadband systems don't want that competition. In other words, their refusal to deal is not protected by an appeal to any articulable policy to displace competition, either by a state or the TVA.

Second, under the caselaw that does exist, government-owned LPCs are market participants that should not receive antitrust immunity. For instance, in one case, a private arena owner challenged under antitrust law an exclusive contract between a municipal-arena owner and LiveNation.⁵⁹ The court held that state-action immunity was "less justified" because the municipality's "entertainment contracts" reflected "commercial market activity," not "regulatory activity."⁶⁰ Here, the LPCs' actions as both power companies and municipal-broadband providers reflect commercial-market activity more than regulatory activity. They shouldn't be able to claim immunity from antitrust for this refusal to deal, any more than a private broadband provider could.

In sum, the LPCs' anticompetitive refusal to deal appears to be separate from the rates set by the TVA pursuant to its ratemaking authority or contractual powers. They should be subject to antitrust law. But due to uncertainty in this area, Congress should clarify that LPCs are not immune from antitrust scrutiny, and consider codifying the market-participant exception to state-action immunity in antitrust statutes.

⁵⁵ See Lee Letter, *supra* note 2, at 2.

⁵⁶ *Id.* at n.4; N.C. Gen. Stat. § 62-350(a) (requiring all pole owners to offer non-discriminatory pole access); 807 Ky. Admin. Regs. 5:015 § 2(1) (same).

⁵⁷ 16 U.S.C. § 831i (2018) ("Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act").

⁵⁸ 16 U.S.C. § 831 (2018).

⁵⁹ See *Delta Turner Ltd. v. Grand Rapids-Kent County Convention/Arena Authority*, 600 F.Supp.2d 920 (W.D. Mich. 2009).

⁶⁰ *Id.* at 929.

IV. Section 224 of the FCC Act

In his letter, Sen. Lee noted that, under Section 224 of the Communications Act, “Congress determined that poles and conduits are essential facilities that lack a viable market-based alternative, which led it to require utilities to extend nondiscriminatory access to utility poles to cable operators and competitive telecommunications providers.”⁶¹ While acknowledging that TVA distributors are not subject to Section 224, Lee argued that “the congressional conclusion that poles are essential facilities that lack a viable market-based alternative holds for all poles.”⁶² Lee further noted that the “TVA’s regulation of its LPCs’ pole attachment rates also impedes competition by setting rates well above the rates set by the FCC and deemed compensatory by the U.S. Supreme Court, inflating the cost for competitive broadband providers unaffiliated with TVA LPCs to offer service.”⁶³

Theoretically, government-owned LPCs and cooperative LPCs are subject to *some* oversight when they run services like municipal broadband, either from voters or member-owners. But it is implausible that such oversight can be truly effective, given that these pole owners are not subject to normal market incentives and have their own conflicts of interest that encourage hold-up problems. Combined with their ability to cross-subsidize operations in broadband from their electricity customers, it should be clear that these entities pose a host of potential public-choice problems.⁶⁴

Indeed, as FCC Commissioner Brendan Carr has noted:

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 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.⁶⁵

We echo both Sen. Lee’s and Commissioner Carr’s sentiments here. The FCC’s important work on this matter stands to benefit millions of Americans trapped on the wrong side of the digital divide. The co-op and municipal loophole poses a major obstacle to achieving these ends. Insofar as Congress prioritizes quick and efficient broadband buildout, the TVA and its LPCs should not be able

⁶¹ Lee Letter, *supra* note 2, at n.5.

⁶² *Id.*

⁶³ *Id.* at n.3.

⁶⁴ See Vincent Ostrom & Elinor Ostrom, *Public Goods and Public Choices*, in ALTERNATIVES FOR DELIVERING PUBLIC SERVICES: TOWARD IMPROVED PERFORMANCE (1979) (“[I]nstitutions designed to overcome problems of market failure often manifest serious deficiencies of their own. Market failures are not necessarily corrected by recourse to public sector solutions.”).

⁶⁵ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Second Further Notice of Proposed Rulemaking (March 16, 2022) (Statement of Commissioner Brendan Carr), available at <https://docs.fcc.gov/public/attachments/FCC-22-20A3.pdf>.

to thwart these goals through anticompetitive rates and refusals to deal. Congress should revisit this issue and grant the FCC jurisdiction over these types of pole owners.

V. Conclusion

Sen. Lee's letter to the DOJ highlights issues that are extremely important to closing the digital divide. Broadband deployment could be harmed as a result of the practices by the TVA and the LPCs. If DOJ Antitrust Division chief Jonathan Kanter is serious about taking on gatekeeper power,⁶⁶ he should start here: with public entities granted a truly unassailable gatekeeper position over private markets. But even more importantly, Sen. Lee's letter highlights the need to reform antitrust immunities that apply to SOEs. Economics suggests government monopolies are a greater harm to competition than private ones. Antitrust law should reflect that reality.

⁶⁶ See, *Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at the Second Annual Spring Enforcers Summit*, U.S. JUSTICE DEPARTMENT (Mar. 27, 2023), <https://www.justice.gov/opa/pr/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-second-annual-spring> ("Gatekeeper power has become the most pressing competitive problem of our generation at a time when many of the previous generations' tools to assess and address gatekeeper power have become outmoded.").

Appendix A: Sen Mike Lee Letter to DOJ

MICHAEL S. LEE
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United States Senate

WASHINGTON, DC 20510-4404

COMMITTEES:

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ENERGY AND
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JOINT ECONOMIC
COMMITTEE

BUDGET

June 22, 2023

Jonathan Kanter
Assistant Attorney General, Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Re: Tennessee Valley Authority (TVA) - Supporting Broadband Deployment

Dear Mr. Kanter:

I write with concern regarding potentially anticompetitive behavior by certain electric distributors that purchase power from the Tennessee Valley Authority (TVA), and whose relationship to TVA places them beyond the reach of state laws that might otherwise regulate their pole access practices as monopolies. Through its rules and regulations for Local Power Companies ("LPCs") that distribute TVA power, TVA has assumed the role of regulator for those LPCs' pole access charges,¹ displacing state regulators that would otherwise exercise jurisdiction.² Unfortunately, I have received troubling reports that certain LPCs regulated by TVA have been impeding federal broadband investments by:

- Delaying or refusing to negotiate pole attachment agreements with competitive broadband service providers, including when the TVA LPC itself provides broadband service (itself or through a joint venture agreement) or is interested in doing so;
- Initially refusing to negotiate pole attachment agreements that would enable competitive broadband service providers to obtain permits in sufficient time to meet federal grant deadlines;
- Refusing to review pole attachment applications on a scale or at the pace necessary to complete broadband projects in a timeframe required by federal grant programs;

¹ TVA has the power to include rules, terms and conditions in its contracts with electric distributors. *See* 16 U.S.C. § 831i. TVA interprets this power as giving it the authority to set rental rates for third-party pole access, while declining to take any other action to supervise its distributors' pole access practices. *See* TVA Board Resolution on Pole Attachments (approved Feb. 11, 2016), <https://bit.ly/31C5WoS>.

² *See* Order, *In re* *Petition of Kentucky Cable Telecommunications Association*, Case No. 2012-00544, Ky. Pub. Serv. Comm'n (Oct. 30, 2015) (concluding that, due to TVA regulation, state public utilities commission lacks "jurisdiction over the pole attachment rates, terms, or conditions of the TVA Cooperatives."), *available at* https://psc.ky.gov/pscscf/2012%20Cases/2012-00544//20151030_PSC_ORDER.pdf; *see also* Ga. Code § 46-3-200.4(b) (exempting TVA distributors from otherwise-applicable pole attachment regulation by Georgia Public Service Commission).

- Refusing to follow the standard industry practice of approving a contractor to process pole access applications in a timely manner when the utility's staff is insufficient to do the work, even when the broadband service provider is willing to pay the entire bill for the contractor; and
- Refusing to process pole attachment applications at all, and failing to respond to provider outreach regarding the processing of applications for months on end.

These practices not only frustrate federal broadband deployment policies, they raise serious competition questions regarding prohibited anticompetitive conduct. Moreover, TVA's regulatory practices enable such behavior: there is no reason why TVA's regulation of the pole rental rates charged by its LPCs³ requires TVA to somehow exempt those LPCs from generally-applicable rules that protect competition by requiring pole owners to provide pole access to third parties on reasonable terms.⁴ TVA should be using its authority over LPC distribution contracts to require LPCs to offer reasonable, non-discriminatory, and prompt pole access to third-party broadband providers (particularly recipients of taxpayer-funded broadband grants) in unserved areas, rather than giving its LPCs a free pass from those requirements.

Over the past several years, the Federal government has appropriated billions of taxpayer dollars to build out broadband networks in unserved rural America. While I have questioned whether this is an appropriate use of taxpayer funds, now that it is law I want to ensure that those taxpayers' money is not wasted. To that end, recipients of federal broadband funding should be able to access utility poles without unreasonable delays or excessive charges to deploy their networks and compete on a level playing field.⁵ It is therefore important to ensure that pole owners, such as electric distributors, not leverage their position or manipulate regulatory schemes to impede broadband deployment by competitors or extract unreasonable prices. Such anticompetitive behavior frustrates successful execution of federal programs, denies subscribers the benefits of free and fair competition, and hurts unserved Americans by delaying their access to the economic, healthcare, and education benefits of high-speed connectivity.

You recently acknowledged to me that "pole attachments are especially critical to the deployment of next-generation broadband services" and that to the extent a "pole owners'

³ TVA's regulation of its LPCs' pole attachment rates also impedes competition by setting rates well above the rates set by the FCC and deemed compensatory by the U.S. Supreme Court, inflating the cost for competitive broadband providers unaffiliated with TVA LPCs to offer service. *See* n.2, *supra*.

⁴ *See, e.g.*, Tenn. Code Ann. § 65-25-134(a)(3) (requiring electric cooperatives that offer broadband to offer nondiscriminatory pole access); N.C. Gen. Stat. § 62-350(a) (requiring all pole owners to offer non-discriminatory pole access); 807 Ky. Admin. Regs. 5:015 § 2(1) (same); Georgia Public Service Comm'n, Pole Attachment Regulations at 10, 17 (Dec. 30, 2020), *available at* <https://services.psc.ga.gov/api/v1/External/Public/Get/Document/DownloadFile/183713/65552> (setting pole access rules for electric cooperatives).

⁵ Congress determined that poles and conduits are essential facilities that lack a viable market-based alternative, which led it to require utilities to extend nondiscriminatory access to utility poles to cable operators and competitive telecommunications providers. *See* Pub. L. 95-234, § 6 (1978) (enacting Section 224 of the Communications Act); Pub. L. 104-104, § 703, (1996) (extending Section 224 to cover attachments by telecommunications carriers and enacting non-discriminatory access requirement). While TVA distributors are not subject to Section 224, the congressional conclusion that poles are essential facilities that lack a viable market-based alternative holds for all poles.

actions raise competition issues,” the Department “will review them” in order to “create and protect economic opportunity in the marketplace for broadband Internet access services. . . .”⁶ With that in mind, I urge the Department to investigate this problematic behavior, and, where and if appropriate, to take steps to ensure that (1) TVA LPCs are providing fair and timely access to poles at reasonable costs; and (2) federal entities with authority over pole access, including the TVA, are utilizing the powers provided to them by Congress to promote rather than impede fair competition.

I appreciate your attention to these important issues.

Sincerely,



Sen. Michael S. Lee
Ranking Member
Senate Judiciary Subcommittee on
Competition Policy, Antitrust, and Consumer Rights

cc: Mr. Jeffrey J. Lyash
Mr. William Kilbride
TVA Board of Directors

⁶ Responses from the Department of Justice to Written Questions for the Record from the U.S. Senate Committee on the Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights Following a Hearing on September 20, 2022, entitled “Oversight of Federal Enforcement of the Antitrust Laws,” at 21.