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March 8, 2018

Via ECFS

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Filing of the American Cable Association on Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84

Dear Ms. Dortch:

On March 6, 2018, Ross Lieberman (Senior Vice President of Government Affairs, American Cable Association (“ACA”)) and Thomas Cohen (Kelley Drye & Warren LLP, Counsel to ACA) met with Daniel Kahn, Michael Ray, and Adam Copeland of the Wireline Competition Bureau and Jiaming Shang of the Wireless Telecommunications Bureau to discuss the Notice of Proposed Rulemaking (“NPRM”) and Further Notice of Proposed Rulemaking (“FNPRM”) in the above-referenced docket¹ concerning barriers in obtaining access to poles pursuant to Section 224 of the Communications Act.²

From the outset of this proceeding, ACA has sought to propose improvements to the pole attachment process that would facilitate cooperation among utilities, existing attachers, and new attachers and provide greater certainty about the rights and responsibilities of each. In this meeting, ACA representatives discussed the following proposals with Federal Communications Commission (“Commission”) staff. All of the proposals have been vetted extensively in the

¹ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, FCC 17-154 (rel. Nov. 29, 2017).

² 47 U.S.C. § 224.

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record, and most have been approved by the Broadband Deployment Advisory Committee (“BDAC”) in full or part. As such, ACA submits they are ripe for Commission action.

- **Codify the Commission’s Overlashing Precedent** – Overlashing³ clearly expedites and lowers the cost of network deployments, and existing attachers have long engaged in overlashing (and permitted third parties to overlash) consistent with generally accepted engineering standards. Based on these benefits, the demonstrated lack of harm to pole safety and reliability, and the adequacy of measures to audit such attachments and correct issues, the Commission has ruled consistently that such overlashing can be performed without approval by or additional payment to the pole owner. Yet, despite the Commission’s longstanding precedent, some utility pole owners continue to claim the right to impose costly and unnecessary overlashing conditions based on safety claims that the Commission has repeatedly considered and rejected. These conditions are inconsistent with Commission precedent and threaten to impede the upgrading, expansion, and densification of broadband networks. As a result, the Commission should remove these barriers to broadband deployment by codifying existing precedent permitting an attacher or third party to overlash consistent with generally accepted engineering practices without requiring prior utility pole owner approval, including a pole attachment application, or pay additional charges to the utility pole owner.

In addition, although not required by Commission precedent, ACA does not oppose service providers and utility pole owners agreeing to an overlashing notice period, so long as the notice is reasonable (both in its duration and the amount of information provided). In determining what is reasonable notice, the Commission could provide guidance by making clear that providing the time and location of the overlashing work is presumptively reasonable and any requirement to provide pole loading analysis or other engineering review is conclusively not reasonable since the overlashing will be conducted consistent with generally accepted engineering practices.

- **Define a “Complete” Application** – The Commission’s pole attachment timeline is triggered by a pole owner deeming an attachment application to be complete; yet, pole owners frequently take weeks, if not longer, to respond after an application has been filed. In addition, pole owners often do not clearly indicate what information the requesting attacher should supply and, after an application is filed, they frequently demand additional information. This undermines the value of the timeline, delaying any attachment. It also engenders needless disputes

³ ACA representatives stated that the record does not support the need for the Commission to adopt at this time a definition of overlashing. Rather, it should just enable pole owners and utilities to continue to address this issue on a case-by-case basis.

between requesting attachers and utilities about when an attachment application is “complete.” ACA has recommended that the Commission should address this concern.

To that end, ACA supports the BDAC’s Competitive Access to Broadband Infrastructure Working Group’s “Defining ‘Complete’ Attachment Applications” proposal that was put forward for a vote by the BDAC on January 23-24, 2018.⁴ ACA does not support the modifications made to this proposal by the BDAC, which extended the timeframes for action by the utility from seven calendar to 10 business days after submission for an initial determination of a complete application and from three calendar to five business days for review of a resubmitted application. The Working Group adopted its timeframes after lengthy discussion over months, and the additional time is not needed to evaluate an application and would serve only to delay broadband deployment.

- **Facilitate “Joint Surveys”** – To facilitate cooperation and agreement between a requesting attacher and a utility about the need to undertake make-ready work and the extent of such work on specific poles, the Commission should require a utility to give a requesting attacher the option of accompanying it on its field inspection conducted as part of the survey. The utility also should invite any existing attachers on affected poles, which would further facilitate the work. The utility should use commercially reasonable efforts to provide advance notice of the survey and field inspection of not less than three days to a requesting attacher and existing attachers. ACA supports “Joint Field Survey to Examine and Analyze Proposed Pole Attachments” proposal the BDAC adopted on January 23-24, 2018.⁵
- **Enhance the Self-Help Remedy** – The Commission’s timeline provides a self-help remedy that a new attacher can invoke when an existing attacher does not perform make-ready within the 60-day timeline.⁶ However, it has proven difficult to use for a variety of reasons, including because the utility rather than the new

⁴ See <https://www.fcc.gov/sites/default/files/bdac-competitiveaccess-report-012018.pdf> and the Appendix to this Letter. ACA notes that NCTA – The Internet & Television Association recently submitted a similar “Complete” application proposal (“NCTA Accelerated and Safe Access to Poles (ASAP) Proposal,” § 1.1403(b) (“NCTA ASAP Proposal”). See *Ex Parte* Letter from Steven F. Morris, NCTA – The Internet & Television Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84 (Mar. 5, 2018).

⁵ See <https://www.fcc.gov/sites/default/files/bdac-competitiveaccess-report-012018.pdf> and the Appendix to this Letter. ACA notes that the NCTA ASAP Proposal includes a similar “Joint Survey” approach in §1.1420(c).

⁶ 47 C.F.R. §§ 1.1420(e), 1.1422.

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attacher is responsible for overseeing the work of existing attachers and because the new attacher has to select a contractor approved by the utility, which the utility often does not supply or is not acceptable to the new attacher. Yet, ACA believes the self-help remedy remains a sound approach to expediting attachments, especially because, if properly structured, it would avoid disputes and a potential complaint process, enabling a new attacher to attach rapidly.⁷ Accordingly, the Commission should address the flaws in the current rule and amend it to:

Require the utility to notify existing attachers about the need for and nature of make-ready and to provide that information to the new attacher, who then will be responsible for following-up with existing attachers on that work;

Allow the new attacher to use its own contractor to perform the work in accordance with applicable government laws and regulations and engineering and safety standards; and

Require the new attacher to give utilities and existing attachers an opportunity to consult on the make-ready work and be present when it undertakes work.

To that end, ACA supports the proposal submitted by the BDAC's Competitive Access to Broadband Infrastructure Working Group, "Improving the Requesting

⁷ See *Ex Parte* Letter from Thomas Cohen, Counsel to American Cable Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84 at 6-7 (Sept. 14, 2017).

An improved, workable self-help remedy also is consistent with any effort to adopt a one-touch make-ready regulation because a requesting attacher may decide not to use one-touch make-ready for a variety of reasons. For instance, a requesting attacher may want to avoid or limit being liable for moving existing attachments. There are also certain circumstances where one-touch make-ready would not be available, such as when the work involves complex make-ready. For that reason, to provide a requesting attacher with an alternative, complementary approach, the Commission should seek to improve the existing self-help remedy as discussed herein.

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Attachers' Self-Help Remedy,"⁸ that was put forward for a vote by the BDAC on January 23-24, 2018.⁹

- **Ensure Make-Ready Charges are Just and Reasonable** -- The Commission has refrained from adopting regulations governing make-ready work charges, instead addressing their reasonableness on a case-by-case basis. ACA members have found that utilities have exploited this regulatory gap to charge for work not directly related to the new attachment and to send attachers vague, un-itemized estimates of make-ready costs as well as final make-ready invoices that not only were un-itemized, but far exceeded these estimates. As a result, ACA members and other commenters often lack the information necessary to challenge – or otherwise need to challenge – unreasonable make-ready charges. ACA submits the Commission should address these concerns by (1) prohibiting utilities from charging for make-ready work that is unrelated to the new attachment, including for work to fix existing attachment violations or to replace poles determined to be inadequate for existing attachers or scheduled for replacement; and (2) require utilities to provide attachers with make-ready cost estimates and final invoices with itemized details for work on a per-pole basis and with regular updates on whether the costs of ongoing make-ready work are consistent with estimates.¹⁰

⁸ The proposal by the BDAC's Working Group was approved by the BDAC with certain modifications. First, the proposal was modified to require the new attacher to either use a utility-approved contractor or a contractor to which the utility did not reasonably object, and to require a new attacher either have adequate insurance or post an adequate performance bond. ACA opposes these two proposals, which are onerous and not necessary. However, ACA is willing to support the other modifications that added a requirement that the new attacher notify the utility and existing attacher post-attachment to give them an opportunity to inspect the work and a requirement that the new attacher cease work immediately if the utility or existing attachers notify it that the work has damaged the pole or their attachments such that an outage occurred.

⁹ See <https://www.fcc.gov/sites/default/files/bdac-competitiveaccess-report-012018.pdf> and the Appendix to this letter.

¹⁰ ACA notes that the NCTA's ASAP Proposal includes an "Estimate" approach in §1.1420(d).

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This letter is being filed electronically pursuant to Section 1.1206 of the Commission's rules.¹¹

Sincerely,



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¹¹ 47 C.F.R. § 1.1206.

APPENDIX

PROPOSED LANGUAGE TO CODIFY THE COMMISSION'S OVERLASHING PRECEDENT

At the end of 47 C.F.R. §1.1403 the following provision should be added:

“(f) Overlashing to existing facilities on utility poles consistent with generally accepted engineering practices does not require prior utility pole owner approval, including a pole attachment application, or additional payment to the utility pole owner.”

PROPOSED LANGUAGE TO DEFINE A “COMPLETE” APPLICATION

At the end of 47 C.F.R. §1.1420(c) the following underlined text should be added:

“(c) Survey. A utility shall respond as described in 1.1403(b) to a cable operator or telecommunications carrier within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days, in the case of larger orders as described in paragraph (g) of this section). This response may be a notification that the utility has completed a survey of poles for which access has been requested. A complete application is an application that provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-released requirements at the time of submission of the application, to begin to survey the poles. An application shall be deemed complete seven days after its submission unless the utility notifies the applicant that the application is incomplete and enumerates all reasons for finding it incomplete. Any resubmitted application need only address the utility's enumerated reasons for the application being incomplete and shall be deemed complete within three days after its resubmission unless the utility specifies which enumerated reasons were not addressed.”

PROPOSED LANGUAGE TO FACILITATE JOINT SURVEYS

To be added to the end of 47 C.F.R. §1.1420(c), the following underlined text is recommended:

“(c) Survey. A utility shall respond as described in § 1.1403(b) to a cable operator or telecommunications carrier within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days, in the case of larger orders as described in paragraph (g) of this section). This response may be a notification that the utility has completed a survey of poles for which access has been requested, consistent with its obligation to offer the opportunity for joint surveys as set forth below. A complete application is an application that provides the utility with the information necessary under its procedures to begin to survey the poles. A utility shall permit a cable operator or telecommunications carrier requesting attachment and any entities with existing attachments on the affected poles to be present for a field inspection conducted as part of a survey. A utility shall use commercially reasonable efforts to provide a cable operator

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or telecommunications carrier requesting attachment and any entities with existing attachments on the affected poles with advance notice of not less than three days of a field inspection as part of a survey.”

PROPOSED LANGUAGE TO ENHANCE THE SELF-HELP REMEDY

Amend 47 CFR §1.1420 and §1.1422 as follows –

§ 1.1420 Timeline for access to utility poles.

(a) The term “attachment” means any attachment by a cable television system or provider of telecommunications service to a pole owned or controlled by a utility.

(b) All time limits in this subsection are to be calculated according to § 1.4.

(c) Survey. A utility shall respond as described in § 1.1403(b) to a cable operator or telecommunications carrier within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days, in the case of larger orders as described in paragraph (gf) of this section). This response may be a notification that the utility has completed a survey of poles for which access has been requested. A complete application is an application that provides the utility with the information necessary under its procedures to begin to survey the poles.

(d) Estimate. Where a request for access is not denied, a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work within 14 days of providing the response required by § 1.1420(c), or in the case where a prospective attacher’s contractor has performed a survey, within 14 days of receipt by the utility of such survey.

(1) A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented.

(2) A cable operator or telecommunications carrier may accept a valid estimate and make payment any time after receipt of an estimate but before the estimate is withdrawn.

(e) Make-ready. Upon receipt of payment specified in paragraph (d)(2) of this section, a utility shall notify ~~immediately and~~ in writing ^{all known} entities with existing attachments that may be affected by the make-ready of the need for and nature of make-ready work. For attachments in the communications space, the notice shall-

~~—————(1) For attachments in the communications space, the notice shall:~~

~~—————(i) Specify where and what make-ready will be performed.~~

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~~(ii) Set~~ set a date for completion of make-ready by such entities that is no later than 60 days after notification is sent (or 105 days in the case of larger orders, as described in paragraph (gf) of this section). For wireless attachments above the communications space, the notice shall set a date for completion for make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in paragraph (f) of this section). A utility shall provide a cable operator or telecommunications carrier requesting attachment with a copy of such notification and the contact information of entities with existing attachments that may be affected by make-ready, and thereafter a cable operator or telecommunications carrier requesting attachment shall be responsible for all further notifications to, and coordination with, such entities except as may be otherwise directed by the utility.

~~(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make ready before the date set for completion.~~

~~(iv) State that the utility may assert its right to 15 additional days to complete make-ready.~~

~~(v) State that if make-ready is not completed by the completion date set by the utility (or, if the utility has asserted its 15-day right of control, 15 days later), the cable operator or telecommunications carrier requesting access may complete the specified make-ready.~~

~~(vi) State the name, telephone number, and e-mail address of a person to contact for more information about the make ready procedure.~~

~~(2) For wireless attachments above the communications space, the notice shall:~~

~~(i) Specify where and what make-ready will be performed~~

~~(ii) Set a date for completion of make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in paragraph (g) of this section).~~

~~(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.~~

~~(iv) State that the utility may assert its right to 15 additional days to complete make-ready.~~

~~(v) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.~~

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~~(f) For wireless attachments above the communications space, a utility shall ensure that make-ready is completed by the date set by the utility in paragraph (e)(2)(ii) of this section (or, if the utility has asserted its 15-day right of control, 15 days later).~~

(gf) For the purposes of compliance with the time periods in this section:

(1) A utility shall apply the timeline described in paragraphs (c) through (e) of this section to all requests for pole attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in a state.

(2) A utility may add 15 days to the survey period described in paragraph (c) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(3) A utility may add 45 days to the make-ready periods described in paragraph (e) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(4) A utility shall negotiate in good faith the timing of all requests for pole attachment larger than the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(5) A utility may treat multiple requests from a single cable operator or telecommunications carrier as one request when the requests are filed within 30 days of one another.

(hg) A utility may deviate from the time limits specified in this section:

(1) Before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

(2) During performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete the make-ready work within the prescribed time frame. A utility that so deviates shall immediately notify, in writing, the cable operator or telecommunications carrier requesting attachment and other affected entities with existing attachments, and shall include the reason for and date and duration of the deviation. The utility shall deviate from the time limits specified in this section for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations.

(ih) If a utility fails to respond as specified in paragraph (c) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space may, ~~as specified in~~ consistent with § 1.1422, ~~hire a contractor to~~ complete a survey. If make-ready is not complete by the date specified in paragraph ~~(e)(1)(ii)~~ of this section, a cable operator or

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telecommunications carrier requesting attachment in the communications space may, consistent with § 1.1422, ~~hire a contractor to~~ complete the specified make-ready.

~~(1) Immediately, if the utility has failed to assert its right to perform remaining make-ready work by notifying the requesting attacher that it will do so; or~~

~~(2) After 15 days if the utility has asserted its right to perform make-ready by the date specified in paragraph (e)(1)(ii) of this section and has failed to complete make-ready.~~

§ 1.1422 Contractors for survey and make-ready.

~~(a) A utility shall make available and keep up to date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its utility poles in cases where the utility has failed to meet deadlines specified in § 1.1420.~~

~~(b) If a cable operator or telecommunications carrier hires a contractor for purposes specified in § 1.1420, it shall choose from among a utility's list of authorized contractors.~~

~~(ea) A cable operator or telecommunications carrier that undertakes a ~~hires a contractor for~~ survey or make-ready work pursuant to § 1.1420(h) shall provide a utility with a reasonable opportunity for a utility representative to accompany and consult with ~~the authorized contractor~~ and the cable operator or telecommunications carrier during either of those activities.~~

(b) A cable operator or telecommunications carrier that undertakes make-ready work pursuant to § 1.1420(h) shall:

(1) Provide entities with existing attachments that may be affected by the make-ready with a reasonable opportunity to accompany and consult with the cable operator or telecommunications carrier during that work;

(2) Ensure that any work it performs on existing attachments are in accordance with applicable federal, state, and local laws and regulations and applicable engineering and safety standards.

~~(dc) The consulting representative of an electric utility may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.~~