

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Accelerating Wireline Deployment by) WC Docket No. 17-84
Removing Barriers to Infrastructure)
Investment)



REPLY COMMENTS

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ACA Connects – America’s Communications Association (“ACA Connects”) hereby responds to comments filed on the Public Notice¹ issued by the Wireline Competition Bureau seeking comment on a Petition for Declaratory Ruling filed by NCTA – The Internet & Television Association (“NCTA”) regarding pole attachment issues.²

¹ *Wireline Competition Bureau Seeks Comment on a Petition for Declaratory Ruling Filed by NCTA – The Internet & Television Association*, WC Docket No. 17-84, Public Notice, DA 20-763 (July 20, 2020).

² Petition for Expedited Declaratory Ruling, NCTA – The Internet & Television Association, WC Docket No. 17-84 (July 16, 2020) (“NCTA Petition” or “Petition”). NCTA asks the Federal Communications Commission (“Commission”) to declare that:

- (1) it is unjust and unreasonable under section 224 of the Communications Act, section 1.1408(b) of the Commission’s rules, and Commission precedent to shift all pole replacement costs to a new attacher, at least in unserved areas;
- (2) disputes between a pole owner and an attaching entity in unserved areas will be placed on the Accelerated Docket pursuant to section 1.736 of the Commission’s rules; and
- (3) the Commission may, pursuant to section 1.1407(b) of the Commission’s rules, order a pole owner to complete a pole replacement within a specified period of time or designate an authorized contractor to do so.

I. INTRODUCTION AND SUMMARY

As ACA Connects and others have documented in this proceeding, it is standard practice for many utilities to require parties requesting a new attachment to bear the entire cost of pole replacements that are necessary to accommodate the request — even though utilities are typically direct beneficiaries from these upgrades to their pole infrastructure. The NCTA Petition asks the Commission to find that this inequitable allocation of costs for pole replacements is contrary to the mandate of Section 224 of Communications Act of 1934, as amended, as expressed in Commission rules and precedent, that access be just and reasonable.³ The Petition also proposes a methodology to establish a rebuttable presumption to allocate the costs of pole replacements among the benefitting parties – including the pole owners – consistent with the statute and Commission rules, and it requests that the Commission accelerate the consideration of complaints about pole replacement disputes. In their comments, ACA Connects and various cable and telecommunications providers expressed support for the Petition based on their experience with excessive pole replacement charges. Utility companies opposed the Petition, but, as discussed herein, failed to present a convincing defense of the status quo.

ACA Connects thus asserts that the Commission has more than ample justification and authority to act promptly to find that current pole replacement cost-recovery practices, which shift the entire cost of pole replacements to the new attacher when the replacement occurs in response to an attachment request, are not just and

³ 47 U.S.C. §224.

reasonable and that, because utilities directly benefit from pole replacements, they should bear an equitable portion of the pole replacement costs.⁴ As ACA Connects explains in this filing, such action by the Commission will alleviate the significant problem that unjust and unreasonable pole replacement fees and timelines are slowing communications network deployment, especially in rural areas. Moreover, such action is consistent with the statute and is procedurally ripe for decision because the issue was raised in the NPRM in the above-referenced docket and a full record has been developed.⁵

In addition, in tandem with ruling that the current practices of many utilities imposing full pole replacement costs on new attachers are unlawful in all geographic areas, the Commission should adopt rules ensuring that pole replacement fees and practices are just and reasonable, including by requiring a fair and equitable allocation

⁴ As discussed herein, numerous other commenters supported ACA Connects' assertion. See e.g., Comments of Charter Communications, Inc. on Petition for Declaratory Ruling, WC Docket No. 17-84 at 3 (Sept. 2, 2020) ("As a practical matter, the common utility practice of charging the full replacement cost of a pole to the attacher means that the utility recovers far more than the costs that the attachment actually causes—the pole owner also obtains the additional windfall from advancing the upgrade of its facilities and shifting the entire cost of that upgrade onto the attacher.") ("Charter Comments"); Comments of Altice USA, Inc., WC Docket No. 17-84, at 3 (Sept. 2, 2020) ("The pole owner not only benefits in the form of a brand new, stronger and often taller pole for its own core electric utility purposes, but it also then has added capacity for future income producing attachments.") ("Altice Comments"); Comments of ExteNet Systems Inc. on Petition for Expedited Declaratory Ruling Filed by NCTA – The Internet & Television Association, WC Docket No. 17-84, at 5 (Sept. 2, 2020) ("Clearly the utility benefits from the pole replacement and should be required to pay its fair share of the pole replacement cos.") ("ExteNet Comments").

⁵ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, *et al.*, 32 FCC Rcd 3266, para. 35 (2017) ("NPRM") ("We seek comment on reasonable ways to limit the make-ready fees charged by utilities to new attachers. Would it provide certainty to the make-ready process if the Commission adopted a rule limiting make-ready fees imposed on new attachers to the actual costs incurred to accommodate a new attachment? . . . Would codifying the holding that new attachers are responsible only for the cost of make-ready work made necessary because of their attachments help to ensure that make-ready costs are just and reasonable?").

of costs among those that benefit from replacement. Here, ACA Connects submits that the proposal it set forth in its comments achieves this objective, which among other things, provides that: a pole owner may not charge a new attacher to replace a defective pole, and the costs to replace non-defective poles should be allocated fairly and proportionately, based on cost-causation principles.⁶ In addition, the Commission should provide for expedited resolution of pole attachments disputes in all areas, both those that involve pole replacement and in general.

II. UNJUST AND UNREASONABLE POLE REPLACEMENT CHARGES AND PROCESSES DELAY, IF NOT THWART, THE DEPLOYMENT OF CABLE, TELECOMMUNICATIONS, AND COMMINGLED BROADBAND NETWORKS

In its Petition, NCTA described the problems its members have experienced in deploying communications facilities because of unreasonable pole replacement charges and delays in replacing poles.⁷ ACA Connects confirmed that these types of unreasonable pole replacement fees and processes are also faced by its members and

⁶ See ACA Connects Comments, WC Docket No. 17-84 at 7-8 (Sept. 2, 2020) (“ACA Connects Comments”). ACA Connects also proposed that:

- A utility may not assess fees for pole replacement if there is not “insufficient capacity” on an existing pole, as that term is used in the Commission’s rules and orders;
- Where a make-ready cost estimate includes pole replacement costs, a utility is required to disclose to the new attacher sufficient information about the condition of the poles and the attachments thereto at issue to ensure that pole replacement costs are being allocated justly and reasonably and consistent with the other rules proposes herein;
- Where a pole is being replaced, a new attacher shall not be charged any portion of the cost of moving the attachment of a communications provider that has a pre-existing violation on that pole;
- Utilities shall comply with make-ready timelines and processes for pole replacements; and
- Make-ready costs paid by a new attacher in connection with a pole replacement that relates to an incremental increase in pole size may not be included in a utility’s corresponding pole line capital account.

⁷ See NCTA Petition at 5, 6, 9, and 20-21. As examples, NCTA cited a member’s broadband deployment project where one out of every twelve poles required replacement and another project where pole replacement charges alone accounted for approximately 25 percent of the total deployment costs.

explained they undermine network deployments in unserved as well as other areas.⁸ Many other communications providers, in their comments, detailed the unreasonable pole replacement fees they often encounter and how such fees deter their network deployments.

Altice, which serves many rural areas, explained that high pole replacement charges can delay a project or even undermine the return on investment for a build, which is a concern in rural areas where there are fewer homes over which to allocate these charges.⁹ Charter noted that it is seeking to accelerate its builds in rural areas but is finding that “pole replacements are very commonly required . . . and represent an inordinate portion of the costs of broadband deployment.”¹⁰ Charter added that, like Altice, it found this to be an even greater problem in rural areas because it can only spread construction costs over a limited number of less dense locations.¹¹ And, Crown Castle, which set forth a number of examples of unreasonable pole replacement

⁸ See ACA Connects Comments at 8-14 (“For example, one ACA Connects member stated that utilities have tried to charge it to replace half or more of the poles affected by a new attachment request, totaling tens of thousands of dollars in make-ready fees per project. These fees alone regularly exceeded the ACA Connects member’s estimated return on investment, resulting in the member forgoing buildouts entirely or engaging in more expensive underground deployments to avoid unjust and unreasonable make-ready charges. To add insult to injury, ACA Connects and others noted, the need for utility pole replacements, and the resulting make-ready fees imposed on new attachers, often result from long-deferred pole maintenance or even safety violations on ‘red-tagged’ poles caused by existing attachers or the utility itself. For instance, an ACA Connects member stated it was charged for the replacement of a failing 75-year old pole, while another member received a make-ready estimate that included costs to replace poles that were already failing, such that the member’s new attachments were a mere pretext to replace the poles at the new attacher’s expense.”).

⁹ See Altice Comments at 2-3.

¹⁰ See Charter Comments at 6.

¹¹ See *id.*

practices, explained that it often is confronted with pole replacement fees that dwarf other make-ready charges, making aerial attachments cost-prohibitive.¹²

Overall, the record makes clear that unjust and unreasonable fees and processes for pole replacements are a widespread problem that is harming deployment of communications networks. Of particular concern, these charges and related practices can inhibit providers from expanding out into unserved areas and have the potential to undermine government initiatives, such as the Rural Digital Opportunity Fund, to bring broadband to such areas to help close the digital divide.

¹² See Comments of Crown Castle Fiber LLC, WC Docket No. 17-84, at 9-10 (Sept. 2, 2020) (“The full cost of such pole replacements can range from approximately \$8,000 to \$15,000 per pole, and in some unique cases significantly more. As a result, in multiple situations in the last few years, deployment aerially on existing utility poles has been cost prohibitive. In one example, the cost of replacing poles to deploy approximately one-half mile of fiber would have cost more than \$150,000 and in another similar case, the cost to replace poles for one-half mile of fiber would have been approximately \$75,000. To put that in perspective, the average cost for communications space make-ready in the same area is approximately \$6,000 for a half mile of aerial fiber.”). See *also* ExteNet Comments at 4-5 (“ExteNet often encounters a third reason: the utility simply wants the pole replaced, even though ExteNet’s engineers have determined that the pole’s condition and capacity is sufficient to support ExteNet’s attachment.”).

Edison Electric Institute *et al.* argue that no study has conclusively determined that high pole attachment or pole replacement rates inhibit rural broadband deployments, and they contend that other factors, such as low density, are more important. See Comments of Edison Electric Institute *et al.*, WC Docket No. 17-84, at 24-25 (Sept. 2, 2020). This argument, however, is at best specious. Every provider knows that the economics of serving rural areas are more challenging, and therefore, any material factor, including pole fees, may make the return on investment insufficient for a project to go forward. Just because density may be more determinative does not mean that unreasonable pole attachment or replacement fees are not consequential, and no study presented by Edison Electric Institute *et al.* demonstrates this point. See *also* Letter from Steven Morris, Vice President and Deputy General Counsel, NCTA – The Internet & Television Association to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 17-83, WC Docket No. 17-84, and WT Docket No. 17-79 (July 22, 2019) (“NRECA suggests that there is no need for the Commission to be concerned about excessive pole attachment rates charged by municipal and cooperative electric companies because there are other, more significant, obstacles to broadband deployment in rural areas. But as Dr. Connolly explains, ‘any fact which negatively impacts expected profits in one geographic area will, at the margin, lead to an increased likelihood that investments will be made elsewhere.’ Moreover, she explains that it is not just the certainty of currently excessive pole attachment rates that deters deployment, but also the prospect of unregulated increases in those rates once broadband facilities have been deployed.”).

III. THE RECORD SUPPORTS A FAIR AND EQUITABLE ALLOCATION OF POLE REPLACEMENT COSTS AS ACA CONNECTS HAS PROPOSED

In its initial comments, ACA Connects proposed a framework for allocation of pole replacement costs that is rooted in the cost-causation principles that NCTA outlined in its Petition.¹³ A key premise of the framework is that utilities “directly benefit” from pole replacements (i.e., upgrades and improvements of their pole infrastructure), and therefore should bear a proportionate share of the costs. In its comments, Charter submitted an economic analysis that provides compelling support for this principle. As set forth in that analysis:

The NCTA petition correctly recognizes the appropriate economic frame of reference for determining whether the costs associated with a pole replacement are properly considered avoidable by the utility (and hence an incremental or “but for” cost to the utility attributable to the attacher) must be informed by a dynamic time frame sufficiently long enough to factor in the utility’s own replacement program and also the economic gains or utility “betterment” bestowed upon the utility as a consequence of pole replacements.¹⁴

¹³ See ACA Connects Comments at 7-8.

¹⁴ See *e.g.*, Charter Comments attachment, “The Economic Case for a More Cost Causative Approach to Make-Ready Charges Associated with Pole Replacement in Unserved/Rural Areas: Long Overdue, But Particularly Critical Now in Light of the Pressing Need to Close the Digital Divide,” Patricia D. Kravtin (“Consistent with economic theory, then, pole replacements are a long-term fact of life for utilities, and the inevitable need for the replacement of any given pole is a ‘but for’ consequence of the pole owner’s core utility service and not of a new attacher’s request. Those requests merely change the timing of the pole’s eventual replacement. Thus, the NCTA approach sensibly assigns the costs of that temporal shift to the attacher. These are mainly in the form of the remaining (yet to be depreciated) net book value of the retired pole, plus any proven additional unique incremental costs traceable to the attacher and not the utility’s normal course of operations . . . The NCTA approach can also be easily administered. In general, the economic standard for achieving an optimal, economically efficient market outcome—one governed by cost causation principles and the absence of cross-subsidy—is that the utility will be no worse off in real terms after hosting a pole attachment than it was prior to the attachment request. The NCTA petition’s approach would achieve that outcome by ensuring that pole owners are compensated for the marginal costs of the pole replacement associated with the new attachment request, net of the betterment that the pole owner receives.”).

In other words, the mere fact that an attachment request immediately precedes a pole replacement does not mean the attacher is the sole beneficiary or that its request was a “but-for” cause the replacement.¹⁵ Rather, a more comprehensive analysis is required to determine the causal contributions of different parties and a fair allocation of costs.

The Coalition of Concerned Utilities is thus mistaken that “the ‘chief beneficiary’ of the pole replacement is the new attacher, because the new attacher gains access to the pole” and that “requiring a utility pole owner to pay for a premature pole replacement is no benefit to the utility at all.”¹⁶ Whether the utility or the new attacher is the “chief beneficiary” depends on, among other factors, the condition of the pole, including whether it has been or is about to be red tagged. A utility would be the “chief beneficiary” if a provider seeks to connect to a pole that will be red tagged the next day, while an attacher may be the “chief beneficiary” of replacing a pole that was installed the day before—which again highlights the need to allocate replacement costs equitably among all beneficiaries so they are just and reasonable.

¹⁵ Xcel Energy explains that it regularly inspects its poles and will replace at its own expense poles that are “red-tagged”, i.e., that it has marked for replacement. See Comments of Xcel Energy Services Inc., WC Docket No. 17-84, at 2 (Sept. 2, 2020). However, Xcel Energy shifts the entire cost burden to the new attacher of a replacing a pole that has not been red-tagged. See *id.* That is, Xcel Energy’s practice of shifting all costs to the new attacher applies to poles that need to be replaced because of their physical condition but have not been subject to the administrative task of red-tagging, as well as to any pole regardless of how much it has deteriorated. ACA Connects does not believe this practice is tenable under the statute, or even supportable as a matter of logic. If a utility bears the full cost of replacing a red-tagged pole, it is unclear why it should not pay *any* of the cost to replace a pole that is partially deteriorated and would need to be red-tagged within the near term.

¹⁶ See Comments of the Coalition of Concerned Utilities, WC Docket No. 17-84 at 27-28 (Sept. 2, 2020).

IV. THE COMMISSION HAS LAID THE PROCEDURAL GROUNDWORK TO ADOPT RULES NOW THAT ENSURE POLE REPLACEMENT CHARGES ARE JUST AND REASONABLE

As ACA Connects explained in its initial comments, NCTA’s petition raises issues that are ripe for resolution within the Commission’s open rulemaking proceeding in this docket. The NPRM sought comment whether the Commission should discharge its duty to keep make-ready charges just and reasonable by codifying as a rule the principle that “new attachers are responsible only for the costs of make-ready work made necessary because of their attachments.”¹⁷ The record is clear: pole replacement charges are frequently unjust and unreasonable for the precise reason that these charges exceed the costs that an attachment makes necessary, and deployment is severely impaired as a result. We therefore urge the Commission to rule that the it is unjust and unreasonable for pole owners to charge entities seeking attachment all the costs of replacing a pole to accommodate the new attachment and that pole owners directly benefit from pole replacement. In addition, the Commission should adopt a rule that requires pole owners to cover a fair share of pole replacement make-ready charges. The rule should incorporate the specific proposals ACA Connects has outlined for ensuring that such costs are allocated justly and reasonably.¹⁸

¹⁷ See NPRM, para. 35.

¹⁸ The Commission has the statutory authority to adopt ACA Connects’ proposed framework for pole replacements. Section 224(b)(1) of the Communications Act directs the Commission to “regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable.” As the NPRM acknowledges, make-ready charges—including for pole replacements—fall within this statutory mandate. The Commission therefore has a duty to intervene when and where necessary to ensure that pole replacement charges are just and reasonable.

By taking this procedural route, the Commission can avoid the concern raised by USTelecom that NCTA’s proposed relief is not fit for a declaratory ruling.¹⁹ Though ACA Connects does not concede USTelecom’s point, our approach renders it moot. The Commission may adopt ACA Connects’ proposed framework for allocation of pole replacement costs in the form of a final rule—arising from the NPRM, and based on the extensive record gathered in response—without addressing the precise extent to which the Commission is forging new ground or merely codifying existing law. Contrary to USTelecom’s suggestion, a further rulemaking is unnecessary to achieve this result. The NPRM provided clear notice that the Commission was considering adoption of a rule that would codify that attachers pay only the make-ready costs “made necessary by their attachments”, and the record bears out the need for this proposed rule in the context of pole replacements.²⁰ ACA Connects’ proposed framework fleshes out the details of such a rule.

V. CONCLUSION

As ACA Connects, NCTA, and others have documented, pole owners routinely require new attachers to pay the entire cost of a pole replacement as a condition of access to a pole.²¹ Through this practice, pole owners externalize the costs of maintaining their own infrastructure and reap a windfall. Meanwhile, broadband

¹⁹ See Comments of USTelecom – The Broadband Association, WC Docket No. 17-84, at 4-6 (Sept. 2, 2020).

²⁰ See NPRM, para. 35.

²¹ As NCTA explains, notwithstanding section 224(f)(2), a utility that places conditions on pole access—including requiring payment of costs to replace a pole—is subject to regulation under section 224(b)(1) of such “rates, terms [and/or] conditions” it imposes on pole access. See NCTA Petition at 15-6.

providers are faced with excessive, unreasonable costs that impede network buildouts, including in unserved areas. This status quo, if left unchecked, not only undermines broadband deployment, it is inconsistent with the plain terms of Section 224(b)(1). The Commission should intervene to rectify this situation and should do so by adopting the framework for pole replacements that ACA Connects has proposed.

Respectfully submitted,

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