October 16, 2020

VIA ECFS

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

Re: Ex Parte Presentation of ACA Connects—America’s Communications Association; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84

Dear Ms. Dortch:

On October 14, 2020, Ross Lieberman of ACA Connects—America’s Communications Association (“ACA Connects”); Tom Cohen and Edward A. Yorkgitis, Jr., of Kelley Drye & Warren LLP, outside counsel to ACA Connects; and the undersigned (collectively, “ACA Connects Representatives”) met with Adam Copeland, Elizabeth Drogula, and Michael Ray of the Wireline Competition Bureau. On October 16, ACA Connects Representatives met with Allison Baker, Economic Advisor to Chairman Ajit Pai. Both meetings were by teleconference and were in reference to the above-captioned proceeding.

In the meetings, ACA Connects Representatives explained, consistent with ACA Connects’ previous filings in this docket, that many investor-owned utilities routinely require ACA Connects member companies seeking pole access to bear the full cost to replace a pole when necessary to accommodate a new attachment. This practice is in violation of the Commission’s Rules and unjust and unreasonable in violation of Section 224 of the Communications Act of 1934, as amended (the “Act”), ACA Connects Representatives noted, because pole owners derive a direct benefit from replacement of their poles and must therefore

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share proportionately in the costs.² Excessive pole replacement charges not only transfer to attaching entities the pole owner’s financial responsibility to maintain its own capital assets, they also inhibit broadband deployment by driving up the costs of network builds and expansions. These costs may become so excessive in some cases that they undermine the business case for a new deployment.³ ACA Connects Representatives thus renewed ACA Connects’ request that the Commission move forward with the adoption of final rules that clarify the obligations of pole owners to share fairly and proportionately in pole replacement costs and to refrain from unjust and unreasonable practices in this area.⁴

Throughout the course of this proceeding, ACA Connects has cited numerous examples of its members incurring unjust and unreasonable charges in connection with pole replacements, and these practices persist.⁵ NCTA’s Petition cites additional evidence of a systemic problem,⁶ and comments filed in response to the petition further bear out this conclusion.⁷ In its Third Report and Order adopting significant reforms to its pole attachment rules, the Commission

² First and foremost, the pole owner would eventually replace the pole, and so can defer the full replacement costs as the new attacher shares in the costs of replacement. Second, any unused space on a new, larger pole can be potentially used by the pole owner for its own facilities or used to accommodate other attachments for which the pole owner will receive annual pole attachment fees (which will contribute to recovery of the pole owner’s capital costs). In short, to the extent the pole owner does not recover the replacement costs solely from the new attacher, it has lost nothing – it owns 100% of the pole, and, as is the case with all poles it owns, it can recover annual fees from the existing attachers, the new attacher, and any subsequent attachers. (Notably, when a pole that was installed as a replacement to accommodate a new attacher because of insufficient capacity is itself replaced, and there have been no new attachments in the interim, no one would suggest that the last attacher needs to share in the capital costs of the subsequent replacement. Instead, the cost of the later pole replacement in such a case is borne solely by the owner, and that pole’s costs are included in the owner’s total pole plant costs for purposes of the Commission’s pole attachment fee formula. These factors surrounding the later replacement underscore the propriety of proportionate sharing when a pole is first replaced to create new capacity.)

³ See, e.g., Comments of ACA Connects on Notice of Proposed Rulemaking, WC Docket No. 17-84 at 24-25 (filed June 15, 2017) (“For example, one of the utilities in LISCO’s footprint in Iowa provides estimates that are not itemized by pole or task, and the only useful information included is whether the poles need to be replaced. LISCO’s investment decision has become binary based upon this limited information: if a pole replacement is allegedly required, LISCO drops the project; if a pole replacement is not required, the project continues.”) (internal citations omitted).

⁴ See ACA Connects Comments at 7-8.

⁵ See id. at 3-4, n.12.

⁶ See NCTA Petition at 5-8.

vowed to “take further action as warranted in this proceeding to address outstanding issues.”\(^8\) The time has come for the Commission to adopt rules to ensure that pole replacement charges and practices are just and reasonable.

In particular, ACA Connects has urged the Commission to adopt a regulatory framework for pole replacement charges and related practices that codifies the following policies:

- A pole owner cannot charge a new attacher for any portion of a pole replacement that is unnecessary to accommodate the attachment, \textit{i.e.}, there must be insufficient capacity on the existing pole as set out in the Rules;
- A pole owner is required to disclose to a new attacher relevant information about the state of its poles;
- Where a pole owner will grant a request for a new attachment through a pole replacement, the pole replacement must occur consistent with the make-ready timelines;
- Where there is insufficient capacity, and a pole is replaced to accommodate a new request, the new attacher will not pay to correct preexisting violations of other attachers (\textit{i.e.}, pay to move the attachments of such existing attachers to the new pole); and
- Where an existing pole has insufficient capacity and the pole owner chooses to replace it and accommodate a new attachment on the new pole, the new attacher shall bear only the portion of pole replacement fees that it causes and not pay for any benefit to the pole owner.\(^9\) Specifically, the new attacher should pay (1) the incremental cost of the larger pole, compared to a replacement of the same sized pole, and (2) a portion of the remaining cost of the new pole, and the costs to transfer the existing attachments (that are not in violation), based on the extent to which the existing pole is not yet fully depreciated.\(^10\)

\(^8\) See \textit{Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment}, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7771-72 ¶ 130 (2018).

\(^9\) See ACA Connects Comments at 7-8.

\(^10\) Contrary to the assertions of utility commenters, the relief ACA Connects seeks does not require quantifying “vague, indefinite and unquantifiable benefits.” See Ex Parte Filing of Edison Electric Institute et al., WC Docket No. 17-84 at 2 (filed Oct. 15, 2020). Rather, the allocation of pole replacement costs that ACA Connects proposes is based on the incremental cost of the larger pole and the amount of depreciation (as a percentage) left on the existing pole. Both cost elements are readily quantifiable, and the Commission has previously recognized depreciation as a means of allocating costs among responsible parties. See \textit{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, n. 51 (2017) (“2017 NPRM”) (stating, in reference to section 1.1416(b) of the Rules (now section 1.1408(b)) that “[t]he proportionate share of the costs attributable to the subsequent attacher are reduced to take into account depreciation to the pole that occurs after the modification”).
Moreover, as part of the regulatory framework discussed above, ACA Connects has urged the Commission to provide additional clarity and certainty to the marketplace by reaffirming, and codifying in its rules, the following prior rulings:

- A pole owner may not “double recover” in the form of pole rental fees by including the capital costs a new attacher is required to bear as a make ready charge in replacing a pole, consistent with the Third Report and Order; and
- A pole owner may not charge an attacher for replacement of “red-tagged” poles or other poles that do not meet applicable safety and reliability standards, even where the pole has insufficient capacity.\(^\text{11}\)

ACA Connects has also explained in its previous filings that the Commission has substantive authority to grant the relief ACA Connects seeks and that ACA Connects’ request is procedurally ripe due to the scope of the 2017 NPRM in Docket No. 17-84 and the record developed in response.\(^\text{12}\) ACA Connects’ Representatives reiterated these points in the meetings.\(^\text{13}\)

\(^{11}\) See id. ¶ 121, n.450 (“When a pole has been red tagged, new attachers are not responsible for the cost of pole replacement.”).

\(^{12}\) See id. at 22-23; see also 2017 NPRM, ¶ 35.

\(^{13}\) During the October 14 meeting, the question was asked by FCC staff how the relief ACA Connects seeks is consistent with Section 224(i) of the Act and the entirety of Rule Section 1.1408(b). ACA Connects Representatives explained that Section 224(i) specifically addresses the situation of rearrangement or replacement of an existing attachment and provides that the existing attacher does not bear any of the costs of such rearrangement or replacement if it is required as a result of a new attachment or the modification of an existing attachment sought by another entity. ACA Connects’ requested relief ensures this result, providing that, except in the case of existing attachments in violation, the costs of transferring existing attachments (including those of the pole owner) would be borne proportionately by the pole owner and the new attacher based on the principles stated above. Section 224(i) does not say that the new attacher (third party) alone must pay for the costs of rearrangement or replacement nor does it say that the pole owner does not share in the costs of the modification. ACA Connects’ request is also consistent with Section 1.1408(b). Indeed, it is a direct outgrowth of the first two sentences of that subsection which provide that the “costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification” and that parties in either group “shall share proportionately in the cost of the modification.” That is the heart of what ACA Connects seeks in the case of pole replacements, that the new attacher and the pole owner, which directly benefits, share proportionately. The remainder of the subsection makes clear that an existing attacher is a direct beneficiary of a replacement if, “after receiving notification” of the replacement “it adds to or modifies its attachment,” whether to correct a violation or otherwise, but otherwise (consistent with Section 224(i)) has no obligation to bear any of the costs of transferring its attachment to the new pole. A final sentence of the Rule addresses the case, subsequent to the replacement, where another party makes an attachment, which is not at issue here. But see supra n.10. Consequently, as ACA Connects’ Representatives explained, there is no tension with Section 224(i) of the Act or Rule Section 1.1408(b). Rather, Section 1.1408(b) directly supports the outcome ACA Connects’ seeks, whether in the form of new rules or, in the alternative, a declaratory ruling.
Finally, ACA Connects Representatives affirmed ACA Connects’ support for the Commission giving expedited treatment to any pole attachment complaint that pertains to pole access, whether or not the dispute arises in an unserved area.\textsuperscript{14}

This letter is being filed electronically pursuant to Section 1.1206 of the Commission’s rules. Please address to the undersigned any questions regarding this filing.

Sincerely,

Brian Hurley

Cc:  Allison Baker  
     Adam Copeland  
     Elizabeth Drogula  
     Michael Ray

\textsuperscript{14} See ACA Connects Comments at 23-24.