BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

COMMENTS OF
ACA CONNECTS – AMERICA'S COMMUNICATIONS ASSOCIATION
ON CTIA PETITION FOR DECLARATORY RULING

I. INTRODUCTION AND SUMMARY

ACA Connects – America's Communications Association ("ACA Connects") hereby submits comments in response to the Public Notice issued by the Federal Communications Commission's ("Commission's") Wireless Telecommunications Bureau and Wireline Competition Bureau seeking comment on the CTIA Petition for Declaratory Ruling.[1] ACA Connects' comments focus solely on CTIA's requests for the Commission to issue declaratory rulings on the following three matters related to pole attachments and Section 224 of the Communications Act, as amended (the "Act"):[2]

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1 *Wireless Telecomms. Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling, and CTIA Petition for Declaratory Ruling*, WC Docket No. 17-84, *et al.*, Public Notice, DA 19-913 (Sep. 13, 2019) ("Public Notice"). In accordance with the Commission's instructions, ACA Connects files these comments only in WC Docket No. 17-84, as they focus solely on CTIA's Petition for Declaratory Ruling. *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Inv.*, *et al.*, WC Docket No. 17-84, *et al.*, Order Granting Extension of Time, para. 4 (Sep. 30, 2019); *see also* CTIA, Petition for Declaratory Ruling, WC Docket No. 17-84, *et al.* (Sep. 6, 2019) ("CTIA Petition").

2 47 U.S.C § 224.

- Defining the statutory term “pole” to include utility-owned light poles;
- Affirming that utilities may not impose blanket prohibitions on access to any portions of their poles; and
- Clarifying that utilities cannot seek to impose terms on attachers that conflict with the pole attachment rules.

ACA Connects agrees that each of these matters are of significant concern not just to wireless providers but to wireline providers as well. For instance, a wireline provider may deploy fiber to a small cell of a wireless provider located on a light pole or may deploy fiber to its own Wi-Fi transceiver installed on a light pole. Further, a blanket prohibition on attachments imposed by a utility could harm wireline providers that want access, and wireline providers would be harmed if utilities are permitted to use their bargaining leverage to effectively nullify the Commission’s rules. As such, ACA Connects submits that the Commission should issue the three declaratory rulings proposed by CTIA, so long as they apply to all providers. By doing so, the Commission will ensure that attachers, especially smaller attachers, can fully exercise their rights under the statute and the implementing regulations. In addition, by providing this relief, the Commission will not jeopardize the safety and reliability of the utilities’ infrastructure, as the statute and rules enable utilities to account for and address such concerns.

II. THE COMMISSION SHOULD DEFINE THE STATUTORY TERM “POLE” TO INCLUDE UTILITY-OWNED LIGHT POLES

In its petition, CTIA requests that the Commission declare the term “poles” in Section 224 includes light poles.[3] CTIA supports its request by highlighting that as wireless providers deploy advanced telecommunications networks, which the Commission wants to encourage, they need to be able to attach to light poles owned by utilities subject to Section 224, especially

[3] CTIA Petition at 21-25.

because these may be the only poles they can access in areas.[4] CTIA also provides a series of examples of utilities acting inconsistent with the statute and regulations in addressing requests by telecommunications providers to attach to their light poles.[5] Further, CTIA shows its request is well within the statutory framework of Section 224 because the statute always uses the generic term "pole" without qualification and the term should be given its ordinary meaning.[6]

ACA Connects' members increasingly access (or seek access to) utilities' light poles, including to provide fiber connectivity to wireless providers' small cell attachments or to attach their own Wi-Fi transceivers. ACA Connects thus believes, to facilitate such attachments and avoid disputes between utilities and attachers, it is important for the Commission to clarify that light poles are "poles" subject to Section 224. ACA Connects submits that such a clarification follows from a straightforward reading of the statute. Section 224 only uses the generic term "poles" without qualification or modifier – provided that the pole is "used, in whole or in part, for any wire communications."[7] Further, the Commission, which has broad authority to regulate utility-owned pole attachments,[8] has adopted rules implementing the statute that also do not distinguish among types of utility-owned poles.[9] Moreover, the Commission has found its rules "take into account the many purposes of utility poles," including to provide "electric power, telephone, cable, wireline broadband, and wireless," and that such an approach "benefits the

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4 *Id.* at 22.

5 *Id.*

6 *Id*. at 23.

7 47 U.S.C § 224(a)(1).

8 *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Inv.*, *et al.*, WC Docket No. 17-84, *et al.*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, para. 5 (2018) ("*Wireline Infrastructure Order*").

9 47 C.F.R. § 1401, *et seq.*

public by minimizing unnecessary and costly duplication of plant for all pole users."[10] Further, the Commission has explained that its interpretation of Section 224 is underpinned by Congress' directive to the Commission to "accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[11] In sum, the Commission should give the term "poles" its ordinary meaning – any pole used by a utility or that can be used by a utility for telecommunications and cable services.

III. THE COMMISSION SHOULD AFFIRM THAT UTILITIES MAY NOT IMPOSE BLANKET PROHIBITIONS ON ACCESS TO ANY POLES OR PORTIONS OF THEIR POLES

Based on utilities denying access to wireless providers to install antennas on their poles, CTIA requests the Commission affirm that Section 224 does not permit a utility to impose a blanket prohibition on installing wireless equipment on a pole or part thereof.[12] It argues that, under the statute and the Commission's interpretations thereof, a utility is required to consider whether a proposed individual attachment will harm safety and reliability and, if it finds that it will, the utility then may deny the proposed attachment.[13] ACA supports the Commission adopting a ruling finding that utilities cannot impose blanket prohibitions on attachments by both wireless and wireline providers.

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10 *Wireline Infrastructure Order* at para. 6 (internal quotation omitted). *See Wikipedia*, "Utility pole" (noting that "[u]tility poles may also carry other equipment such as street lights, supports for traffic lights and overhead electric trolley wires, and cellular network antennas," available at https://en.wikipedia.org/wiki/Utility_pole (last visited Oct. 29, 2019).

11 *Implementation of Section 703(e) of the Telecomms. Act of 1996*, *et al*., CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777, para. 61 (1998) ("*1998 Pole Attachment Order*").

12 CTIA Petition at 25-27.

13 *Id*. at 25.

In Section 1.1403 of its rules, the Commission sets forth the duties of a utility to address a pole attachment request.[14] Subsection (a) provides the general duty of a utility to provide non-discriminatory access to "any pole…owned or controlled by it," except that a utility may deny access on a non-discriminatory basis where there is insufficient capacity or where it finds it would harm safety or reliability or be contrary to generally applicable engineering standards.[15] Subsection (b) then gives the utility the right to reject an individual attachment application, but to do so, the utility must provide "all relevant evidence and information supporting its denial" and must explain how such evidence and information relate to a denial of access for reasons of insufficient capacity or of safety, reliability, or engineering standards.[16] In other words, blanket denials, which by definition do not address the specific attachment request and reasons for denial, are inconsistent with the rule.

In the *Wireline Infrastructure Order*, the Commission found that no two attachment requests are likely to be similar.[17] For instance, one might require existing attachers to move and another might require installation of a new pole. It, therefore, concluded "[w]hen a new attacher seeks access to a pole, it is necessary to evaluate whether adding the attachment will be safe and whether there is room for it."[18] In other words, the utility is obligated under the Commission's rules to evaluate the specifics of each and every request for attachment to a pole and cannot assume in advance that all requests are to be denied.

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14 47 C.F.R. § 1.1403.

15 47 C.F.R. § 1.1403(a).

16 47 C.F.R. § 1.1403(b). Section 1.1411, in providing the timeline for attachments and the duties of attachers and utilities, buttresses ACA Connects' reading of the Commission's rules that denials of pole attachment requests must provide specific information explaining why the request was denied. 47 C.F.R. § 1.1411.

17 *Wireline Infrastructure Order* at para. 7.

18 *Id*.

In sum, ACA Connects urges the Commission to affirm that utilities are prohibited from imposing blanket prohibitions on attachments by any provider covered under Section 224. Instead, a utility should address attachment requests on a case-by-case basis and, should it reject any request, it needs to provide specific reasons for its action.

IV. THE COMMISSION SHOULD CLARIFY THAT UTILITIES CANNOT SEEK TO NEGOTIATE AGREEMENTS WITH ATTACHERS THAT CONTAIN TERMS THAT CONFLICT WITH THE POLE ATTACHMENT RULES

CTIA asks the Commission to clarify that utilities may not seek terms that are in conflict with the Commission's pole attachment rules.[19] The reason is straightforward: the purpose of Section 224 and the rules is to address the leverage (unequal bargaining power) utilities have to impose unreasonable terms on attachers. That is, there is no reason for the Commission to have rules if utilities are permitted to throw their weight around and demand an attacher sign onto terms that are more advantageous to the utility and inconsistent with the public interest as set forth in the Commission's rules. ACA Connects, therefore, supports CTIA's request for clarification.

The Commission has recognized that utilities have significant leverage over attachers. As CTIA explained, the Commission has found that "a utility's demand for a clause waiving the [attacher's] right to…regulatory relief would be per se unreasonable and an act of bad faith in negotiation."[20] It also explained in the *2011 Pole Attachment Order* that Congress understood that there is no practical alternative to using a utility's existing poles, *i.e.* utilities have a local monopoly in ownership or control of poles.[21] Yet, even with these actions, utilities often seek to

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19 CTIA Petition at 28-31.

20 *Id*. at 29 (citing *1998 Pole Attachment Order* at para. 21).

21 *Id*. (citing *Implementation of Section 224 of the Act; A Nat'l Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5242, para. 4 (2011) ("*2011 Pole Attachment Order*")).

impose their will on attachers, particularly smaller providers that are so resource-limited that they cannot afford to stand up to the power of the utilities.[22]

ACA Connects had expected that the pole attachment rules adopted in the *Wireline Infrastructure Order* would have alleviated, or at least lessened, concerns about utilities exercising their leverage in negotiating attachment agreements. However, it appears the *Wireline Infrastructure Order* may in fact have encouraged utilities to assert they can ignore the rules by highlighting that "parties are welcome to reach bargained solutions that differ from our rules" to account for distinct situations and reach superior solutions.[23] Accordingly, the Commission needs to step in and address this problem, which can effectively nullify the many beneficial actions in the *Wireline Infrastructure Order*.[24] ACA Connects urges the Commission to clarify that its "bargaining" language only permits such agreements where they do not conflict with – and thereby undermine – the Commission's rules.

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22 In prior filings, ACA Connects documented with declarations from members examples of utilities seeking to act on their incentive and demanding that smaller providers enter into agreements inconsistent with the statute and rules. *See, e.g.*, Comments of the American Cable Association on the Notices of Proposed Rulemaking, WC Docket No. 17-84, WT Docket No. 17-79, 4-6 (June 15, 2017).

23 *Wireline Infrastructure Order* at para. 13.

24 The Commission has recognized in other instances that it should limit the exercise of leverage by entities that possess a significant degree of bargaining power. *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, *et al.*, WT Docket No. 17-79, *et al.*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088, para. 74 (2018) (where the Commission expresses a similar concern with regard to state or local governments and Section 253 of the Act, stating "we find it unlikely that Congress would have left providers entirely at the mercy of effectively unconstrained requirements of state or local governments"); *Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Third Report and Order, 34 FCC Rcd 6844, para. 62 (2019) (where the Commission seeks to encourage negotiations between cable operators and local franchising authorities, but enables a cable operator to file a petition for preemption should the negotiation not result in an agreement).

V. CONCLUSION

Implementing and ensuring compliance with Section 224 and the Commission's rules has always been a work in progress where new problems are identified and the Commission addresses them. CTIA, in its petition, has identified three such problems that are undermining the letter and spirit of Section 224. ACA Connects requests that the Commission address them promptly for the reasons set forth in these comments.

Respectfully submitted,

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