

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

COX COMMUNICATIONS HAMPTON
ROADS, L.L.C.,

Complainant,

v.

DOMINION VIRGINIA POWER.

Respondent.

File No.

POLE ATTACHMENT COMPLAINT

Cox Communications Hampton Roads, L.L.C. (hereinafter “Cox” or “Cox Communications”) respectfully submits this Pole Attachment Complaint for unjust and unreasonable practices against Dominion Virginia Power (hereinafter “Pole Owner” or “Dominion”) pursuant to Subpart J of the Federal Communications Commission (“Commission” or FCC”) Rules, 47 C.F.R. §§ 1.1401 *et seq.*

I. SUMMARY AND INTRODUCTION

The Pole Attachment Act is clear – an attaching entity is not required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment, sought by any other entity, including the pole owner. In this case, Dominion, the owner of two poles to which Cox is attached, seeks to modify certain of its existing attachments on those poles by

lowering its lines to within inches of Cox's facilities. In doing so, Dominion would encroach upon the separation distance required by the National Electrical Safety Code ("NESC") between its facilities and those of Cox Communications. Meanwhile, Cox's facilities on these two poles cannot be lowered to create sufficient separation without encroaching upon required NESC ground clearance. Dominion will not put in a taller pole to resolve the separation issue (in fact, it is also seeking to shorten the two poles at issue). Accordingly, Dominion is requiring Cox to remove its permitted facilities – installed over 10 years ago pursuant to Dominion's application process – and reroute its facilities underground, all at Cox's cost.

Cox is willing to re-route its facilities and has only asked that Dominion, the causing party, pay for costs of the relocation, an estimated amount of approximately \$43,000. After executive level discussions, Dominion and Cox were unable to reach agreement regarding which party is responsible for the full costs associated with moving the Cox facilities underground. Both parties agreed to appeal to the Commission for a ruling on the matter and Cox agreed to move forward with the necessary construction work in the meantime while seeking said ruling.

Accordingly, through this Complaint, Cox seeks a determination by the Commission that, consistent with Section 224(i) of the Communications Act, Dominion is to bear the full costs of its requested relocation of Cox's facilities underground. In addition, Cox seeks a Commission finding that, in the future, if Dominion places similar demands on Cox, Dominion will pay Cox's estimated costs up front and any true-up will be made at the completion of construction, as is customary in the industry. Cox also requests that the Commission order Dominion to pay Cox's attorney's fees and any other damages necessary to compensate Cox for losses incurred as a result of Dominion's unreasonable practices.

II. JURISDICTION AND PARTIES

1. The Commission has jurisdiction over this action under the provisions of the Communications Act of 1934, as amended, including, but not limited to, Section 224 thereof, 47 U.S.C. § 224 (hereinafter "Section 224").

2. Pursuant to Section 224(i), where a pole owner requires modification of an attachment for its own needs, it must bear the cost of such modification, and the attaching entity will not be required to bear the costs of rearranging its attachment if such rearrangement is required as a result of the modification of an existing attachment by another entity, including the pole owner.

3. Complainant Cox is a franchised cable operator offering competitive video, voice and data service to businesses and residences in Virginia.

4. Cox has a general office address of is 1341 Crossways Boulevard, Chesapeake, VA 23320.

5. Respondent Dominion is an electric utility in the business of providing electric transmission and distribution services. Dominion has a general business address of 2700 Cromwell Drive, Norfolk, VA, 23509 and its corporate headquarters are located at 7500 West Broad Street, Richmond, VA 23294.

6. Dominion owns or controls poles in the State of Virginia that are used for wire communication.

7. Cox and Dominion entered into a Pole Attachment Agreement dated September 1, 1984, pursuant to which Cox would attach to Dominion owned and controlled poles (“1984 Agreement”) in Virginia.¹

8. Cox engaged in good faith in executive level discussions with Dominion in an attempt to resolve the pole attachment dispute.²

9. Cox alleges, upon information and belief, that Dominion is not owned by any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

10. The Commonwealth of Virginia, including its political subdivisions, agencies and instrumentalities, does not regulate pole attachments in the manner established by Section 224, which would preempt the jurisdiction of this Commission over pole attachments in Virginia.³

11. Attached to this Complaint is a certificate of service certifying that Dominion and the Virginia State Corporation Commission were served with copies of the Complaint.

III. BACKGROUND AND FACTS

12. Cox is a franchised cable operator offering a variety of advanced digital video, high-speed Internet and telephone services over its cable network.⁴

13. Cox requires access to utility owned and controlled poles, conduits and rights-of-way to construct and deploy its cable network plant, and to provide competitive services to its customers.⁵

¹ Attachment A, Declaration of James Ruel dated January 20, 2015 (“Ruel Decl.”) ¶ 6 & Ex.

² *See id.* ¶ 10.

³ *See Corrected List of States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, DA 10-893 (rel. May 19, 2010).

⁴ Ruel Decl. ¶ 5.

14. Cox is the only entity other than Dominion attached to the two Dominion poles in dispute. The two poles in dispute are located at 3657 Shore Drive and 3601 Shore Drive in Virginia Beach (hereinafter “Poles”).⁶

15. Dominion is mandating that Cox relocate its facilities underground as part of Dominion’s efforts to address issues with its own facilities.⁷

16. Dominion admits that relocation is for Dominion’s own needs, and not because of any violations created by Cox. For example, in an email from Kelly Mansfield (Dominion) to Greg Patterson (Cox) on July 10, 2014, Ms. Mansfield says that “[t]his work is part of our safety improvements between our distribution and transmission circuits. So it is internal Dominion required work.”⁸

17. In an email from Matt Polson (Dominion) to Greg Patterson (Cox) on July 11, 2014, Dominion reiterates this same position, stating that “Dominion will be needing Cox to underground there [sic] facilities between poles at 3657 Shore Dr. NJUNS ticket 1794636 due to new facilities Dominion will be installing which will cause Cox to not have the proper ground clearance needed to stay on the pole.”⁹

18. On the pole located at 3601 Shore Drive, Dominion proposes to “lower everything 4’ 2” to clear violation with transmission line and cut top of pole off so that only 28’ 2” of pole

⁵ *Id.*

⁶ Attachment B, Declaration of Gregory Patterson dated January 21, 2015 (“Patterson Decl.”) ¶ 4.

⁷ *Id.*

⁸ *Id.* ¶ 5 & Ex. 1.

⁹ *Id.* ¶ 6 & Ex. 2.

sticks up above ground level.”¹⁰ Similarly, on 3657 Shore Drive, Dominion intends to “cut top of new pole off so only 32’ sticks up above ground level.”¹¹

19. There has been no indication by Dominion that Cox is the cause of any violations. Yet, in September 25, 2014 email from Lola Ausby (Dominion) to Greg Patterson (Cox), Dominion is convinced that “Cox’s agreement with Dominion is rental which means that Cox does not have reserved space on our poles. At anytime [sic] Dominion needs the space that Cox is renting, we can ask Cox to remove its attachments from our poles.”¹²

20. In order to accommodate Dominion’s demands, Cox has agreed to relocate its facilities at the Poles to underground if Dominion fulfills its legal obligations and pays the full costs of moving the present facilities.¹³

21. Dominion has unilaterally sought to impose the resulting relocation costs upon Cox. The present dispute concerns which party should bear the cost of Cox’s relocation. The total amount in dispute for relocation and rearrangement of Cox’s Poles to an underground facility is \$43,251.89.¹⁴ However, this is an estimate, and the actual costs may increase or decrease once the work is complete.

Executive Level Discussions

22. Cox and Dominion have engaged in several executive level discussions and exchanged written positions regarding the issues set forth in this Complaint.¹⁵

¹⁰ *Id.* ¶ 7 & Ex. 2 at 3.

¹¹ *Id.* ¶ 7 & Ex. 2 at 4.

¹² *Id.* ¶ 8 & Ex. 3.

¹³ Ruel Decl. ¶ 9.

¹⁴ Patterson Decl. ¶ 9 & Ex. 4.

¹⁵ Ruel Decl. ¶ 10.

23. On October 1, 2014, Ms. Maria Browne (attorney for Cox) sent a letter to Dominion reaffirming that Cox is willing to move its facilities underground provided that Dominion reimburse Cox in advance of such work, as federal law provides that Dominion, not Cox, is responsible for the cost of such relocation.¹⁶

24. On October 27, 2014, Mr. Horace P. Payne (Senior Counsel for Dominion) replied to Ms. Browne's letter stating that Dominion is willing to reimburse Cox for removal of its facilities from the poles, but not for any costs associated with relocating the facilities underground.¹⁷

25. On November 17, 2014, Ms. Browne responded to Mr. Payne's letter and reiterated Cox's position that, under federal law, and more specifically Section 224(i), Dominion is obligated to reimburse Cox for the full amount of replacing and rearranging its facilities, which would include the amount incurred for Cox to move its facilities underground.¹⁸

26. On November 20, 2014, Ms. Brett Heather Freedson (Attorney for Dominion) sent a letter to Ms. Browne restating Dominion's position and requesting an executive-level discussion under 47 C.F.R. § 1.404(k).¹⁹

27. On December 16, 2014, an executive meeting was held at Dominion headquarters to discuss who should bear the cost of Cox's relocation of its facilities for Dominion's own improvements. Kathryn Falk (Vice President of Public and Government Affairs), Jim Ruel (Vice President of Network Operations and Construction), and Barrett Stork (Manager of Government Affairs), on behalf of Cox, and Mike Roberts (Customer Solutions Supervisor), Mike Graf (Joint

¹⁶ *Id.* ¶ 11 & Ex. 2.

¹⁷ *Id.* ¶ 12 & Ex. 3.

¹⁸ *Id.* ¶ 13 & Ex. 4.

¹⁹ *Id.* ¶ 14 & Ex. 5.

Use Administrator), Brandon Sites (Director Electric Distribution Design), and Anthony Barni (Manager Electric Distribution Design) on behalf of Dominion, attended the meeting.²⁰

28. As a result of the executive meeting held at Dominion headquarters on December 16, 2014, Dominion has agreed to reimburse Cox for the actual cost of the work *after* Cox completes the work on the poles before March 1, 2015, and *only if* the FCC issues an order determining that Dominion is liable for the costs incurred by Cox.²¹

29. As of the date of this Complaint, the parties have been unable to resolve the dispute detailed herein.²²

IV. DISCUSSION

A. The Pole Attachment Act

30. The Pole Attachment Act requires Dominion to pay the cost of rearrangement and replacement of the attaching entity's facilities where, as here, modification of an attachment is required for Dominion's own needs. *See* 47 U.S.C. § 224(i).

31. Dominion's practice of shifting costs of its compliance obligations is unjust and unreasonable, and thus violates federal laws and regulations.

B. Dominion is in Violation of Federal Laws and Regulations Requiring That Pole Owners Bear the Cost of Rearrangement and Replacement of the Attaching Entity's Facilities

32. *First*, Section 224(i) of the federal Pole Attachment Act determines who shall bear the costs of relocation or modification of facilities if the pole owner modifies the attachment for its own needs. Section 224(i) states that an attaching entity "shall not be required to bear any cost of rearranging or replacing its attachment, if such rearrangement or replacement is required as a

²⁰ *Id.* ¶ 15 & Ex. 6.

²¹ *Id.* ¶ 16 & Ex. 6.

²² *Id.* ¶ 17.

result of . . . modification of existing attachments sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way)”.²³

33. Dominion acknowledges that the relocation is for Dominion’s own needs and safety improvements.²⁴ As a result, Dominion has urged Cox to relocate its facilities underground. Cox has agreed to relocate its facilities if Dominion reimburses Cox the full cost of relocating the present facilities underground.

34. Dominion has refused to reimburse Cox for relocation of Cox’s existing facilities and has thus failed to fulfill its legal obligations under Section 224(i).

35. *Second*, the FCC has stated in its guidelines implementing Section 224(h) of the Communications Act that “attaching entities will not be responsible for sharing in the cost of governmentally mandated pole or other facility modification.”²⁵ Instead, it instructed that “[t]he reasonably projected incremental costs associated with the movement of attaching entities’ facilities should be factored into the standard rent that attaching entities pay a utility, rather than be treated as a separate cost to be recovered.”²⁶

²³ 47 U.S.C. § 224(i). *See also Central Lincoln People’s Util. Dist. v. Verizon Northwest*, 2005 WL 2365897 (Or. PUC 2005) at 2 (interpreting Section 224(i) as “the Commission agreed with the federal policy that an attaching utility should not have to pay to rearrange its facilities, for which it has already submitted an application and received approval, due to a change in plan by the pole owner.”); *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement on Pole Attachments, 2004 WL 1764132 (N.Y. PSC 2004) (finding that, if an attachment is legal when made, subsequent rearrangements should be paid for by the entity that requires the rearrangement and not previous attachers); *Central Maine Power Co.*, Order on Reconsideration, 1997 WL 151134 (Me. PUC 1996) (interpreting Section 224(i) to preclude Central Maine Power from assessing relocation/transfer charges to existing attacher that did not cause the need for pole replacement).

²⁴ Patterson Decl. ¶ 5 & Ex. 1.

²⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration, 14 FCC Rcd. 18049 ¶ 106 (1999).

²⁶ *Id.*

36. The Eleventh Circuit, in *Southern Co. v. Federal Communications Commission*, upheld the FCC in this regard, holding that utilities must “bear the cost of modifying their facilities in response to local government mandates” and that “[a]ttaching entities are not given a free ride, as incremental costs associated with moving the attachment can be factored into the standard rent utilities charge to attachers.”²⁷ By the same token, the FCC consistently has ruled that attaching entities may not be charged the cost of correcting pre-existing non-compliance.²⁸

37. Here, Dominion permitted Cox’s attachments many years ago using Dominion’s application process. The application process requires Cox to pay to make any changes to the pole Dominion deems necessary to accommodate the attachment at the time and provides Dominion with an opportunity to inspect the attachment.²⁹ Given that Dominion had the opportunity to vet Cox’s attachments for compliance, it cannot be said that the attachments that were previously deemed compliant, caused Dominion’s need to add or rearrange electrical facilities on the poles.

38. Dominion has admitted that its own needs have given rise to the need to rearrange its facilities and for the need to relocate Cox’s facilities underground. As such, Dominion is responsible for the full amount of relocation of Cox’s facilities.

²⁷ *Southern Co. v. FCC*, 293 F.3d 1338, 1352 (11th Cir. 2002).

²⁸ *Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 24615 ¶ 37 (2003) (“[I]t is an unjust and unreasonable term and condition of attachment, in violation of section 224 of the Act, for a utility pole owner to hold an attacher responsible for costs arising from the correction of other attachers’ safety violations.”); *Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, Order and Request for Information, 15 FCC Rcd 9563 ¶ 16 (2000) (holding that attaching entity “is only responsible for make-ready costs generated by its own attachments [and that a pole owner] is prohibited from holding [an attacher] responsible for costs arising from the correction of safety violations.”).

²⁹ Ruel Decl. Ex. 1..

V. COUNTS

Count I: Unjust and Unreasonable Terms and Conditions of Attachment

39. Cox incorporates by reference as if fully set forth herein paragraphs 1 through 40 of this Complaint.

40. The Commission has the authority and the duty to “regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions.” 47 U.S.C. § 224(b)(1).

41. Dominion’s refusal to compensate Cox in advance for Dominion’s requested relocation of Cox’s facilities for Dominion’s own safety improvements is unjust and unreasonable in contravention of 47 U.S.C. § 224 and 47 C.F.R. § 1.1401 *et seq.*

VI. RELIEF REQUESTED

Cox respectfully requests an order from the Commission:

- a. Requiring that Dominion immediately pay Cox for the actual direct and indirect costs of relocation of its facilities underground, plus interest on such amounts due and owing.
- b. Directing Dominion to pay all estimated relocation amounts in advance, provided that such estimates may be tried up after the work is completed to reflect cost savings or cost overruns.
- c. Awarding Cox such other relief as the Commission deems just, reasonable and proper, including attorneys’ fees.

Respectfully submitted,

Cox Communications, Hampton Roads, LLC

A handwritten signature in blue ink that reads "Maria Browne". The signature is written in a cursive style and is positioned above a horizontal line.

By its Attorneys

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Date submitted: January 22, 2015

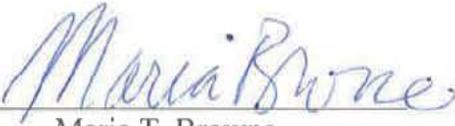
CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2015, I caused a copy of the foregoing Complaint, exhibits and declarations in support thereof, to be served on the following (service method indicated):

Marlene J. Dortch, Secretary
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