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August 22, 2006

*VIA ELECTRONIC FILING*

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

**Re: Notice of Ex Parte Meeting - WC Docket 06-10**

Dear Ms. Dortch:

On Monday, August 21, 2006, John D. Seiver and Christopher A. Fedeli, both of Cole, Raywid & Braverman, L.L.P., met with Michelle M. Carey, Senior Legal Advisor to Chairman Kevin J. Martin, to discuss issues raised in the comments of the Joint Cable Operators<sup>1</sup> in the above-referenced proceeding concerning the impact of BPL classification on pole attachment practices.

The discussion included a summary of the Joint Cable Operators' request, namely that the Commission clarify that denial of access to poles by electric utilities based upon "insufficient capacity" does not mean that utilities can refuse to do routine make ready and pole change outs, which have been standard industry practice for decades and are clearly contemplated by Sections 224(h) and (i) of the Communications Act. Such clarification is necessary and appropriate in connection with the Commission's classification of BPL as a Title I service in order to ensure that anticompetitive incentives of electric utilities to block or otherwise burden continued deployment of competitive broadband services by the cable industry are minimized.

In addition, we discussed the fact that Section 224(f)(2) allows electric utilities to use the "insufficient capacity" defense to deny access only on a non-discriminatory basis, and since utilities routinely change-out poles and rearrange wires wherever necessary to accommodate their own facilities the Commission should observe that the principle of non-discrimination

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<sup>1</sup> The Florida Cable & Telecommunications Association, the Cable Television Association of Georgia, the South Carolina Cable Association, the California Cable & Telecommunications Association, the Alabama Cable Telecommunications Association, and the Cable Telecommunications Association of Maryland, Delaware, and the District of Columbia.

Marlene H. Dortch  
August 22, 2006  
Page 2

necessarily requires the same treatment for cable operator attachments. Further, we noted that in *Southern Company v. FCC*, 293 F.3d 1338 (11<sup>th</sup> Cir. 2002) the court found that the term “insufficient capacity” was not defined by statute and was ambiguous, and that court specifically found that utilities do not “enjoy the unfettered discretion to determine when capacity is insufficient.” Facilities on utility poles, and utility poles themselves, may reasonably be subject to modification to accommodate attachers. The ease of such modifications along with cost reimbursement should make denials of access rare as confirmed by general experience.

Finally, we pointed out that Section 224(i) makes clear that the last attacher in time pays make-ready, if necessary, either to accommodate a new attachment or to modify an existing attachment. That section applies by its express terms to pole owners as well so changes or modifications to any pole to accommodate an electric utility’s BPL service facilities would be at the expense of the utility pole owner.

Pursuant to 47 C.F.R. § 1.1206, this notice is being filed electronically with the Commission. Please contact the undersigned with any questions.

Sincerely,

s / Chris Fedeli

Christopher A. Fedeli

cc: Michelle M. Carey