

COLE, RAYWID & BRAVERMAN, L.L.P.

ATTORNEYS AT LAW
1919 PENNSYLVANIA AVENUE, N.W., SUITE 200
WASHINGTON, D.C. 20006-3458
TELEPHONE (202) 659-9750
FAX (202) 452-0067
WWW.CRBLAW.COM

CHRISTOPHER A. FEDELI
DIRECT DIAL
(202) 828-9874
CFEDELI@CRBLAW.COM

LOS ANGELES OFFICE
2381 ROSECRANS AVENUE, SUITE 110
EL SEGUNDO, CALIFORNIA 90245-4290
TELEPHONE (310) 643-7999
FAX (310) 643-7997

August 25, 2006

VIA ELECTRONIC FILING

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

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

Dear Ms. Dortch:

On Thursday, August 24, 2006, John D. Seiver and Christopher A. Fedeli, both of Cole, Raywid & Braverman, L.L.P., met with Julie A. Veach, Deputy Chief, Wireline Competition Bureau, and Amy E. Bender, Acting Legal Counsel to the Bureau Chief, Wireline Competition Bureau, to discuss issues raised in the comments of the Joint Cable Operators¹ 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. As utilities have already begun claiming that they are not legally required to perform make ready and change outs because of the insufficient capacity exemption,² the Commission should act now to ensure that competitive facilities-based broadband providers have reasonable access to utility pole plant and thus enhance the competitive availability of broadband services for all Americans.

¹ 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.

² See Comments of Joint Cable Operators, *In the Matter of Petition of the United Power Line Council for a Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, WC Docket 06-10, pp. 5-6, fn. 17 (filed February 10, 2006).

Marlene H. Dortch
August 25, 2006
Page 2

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 necessarily requires the same treatment for cable operator attachments. Further, we noted that in *Southern Company v. FCC*, 293 F.3d 1338 (11th 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 the Commission can and should grant the Joint Cable Operators request pursuant to its Title I and Section 224 authority in this proceeding. Although pole owners’ Section 224 pole attachment obligations will not change as a direct result of Title I classification for BPL, such classification directly increases electric utilities’ anticompetitive incentives to obstruct its competitors. The requested clarification will provide the “regulatory certainty” sought by the utilities in the proper context by promoting the competition that the BPL classification order seeks to achieve. The proximity of BPL rollouts to the rise of anticompetitive pole attachment practices by electric utilities – as evidenced by the increase in formal 224 complaints filed with the FCC’s Enforcement Bureau in the past two years – is not coincidental and makes this proceeding the ideal time for the Commission to ensure that consumers are not deprived of the benefits of broadband competition by anticompetitive utility pole practices.

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: Julie A. Veach
Amy E. Bender