

July 27, 2007

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Via Electronic Filing

Ex Parte

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C., 20554

Re: In the Matter of the Petition of the United States Telecom Association for a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures, RM-11293; In the Matter of Petition for Rulemaking of Fibertech Networks, LLC, RM-11303

Dear Chairman Martin:

This letter responds to the written *ex parte* submission filed by the law firm of Keller and Heckman LLP in the above-referenced proceedings on June 1, 2007 (“June 1 *Ex Parte*”). That submission consists of a series of irrelevant, inaccurate, and intemperate assertions, all of which are intended to divert the Commission’s attention from consideration of the serious public policy and competitive issues raised by the FCC’s current pole attachment rules. The Commission should ignore these baseless claims and promptly adopt a Notice of Proposed Rulemaking as an initial step toward fundamental reform of its pole attachment regulations.

The June 1 *Ex Parte* repeatedly disparages cable operators and competitive providers of telecommunications services, claiming that they are allowed to “‘piggy back’ on electric utility poles without paying a full and fair attachment rate.”¹ The June 1 *Ex Parte* attacks the rates established under the Commission’s current rules, particularly those for cable attachments, on the ground that they are “unreasonably low” and amount to “a gross government mandated subsidy of the cable and telecom industries at the expense of the utility industry....”² These misleading characterizations ignore the 2002 *Alabama Power* decision in which the Eleventh Circuit flatly rejected utility industry claims that the Commission’s formula for setting cable attachment rates produced unlawfully low charges.³

¹ June 1 *Ex Parte*, at 4.

² *Id.*

³ See *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002); see also *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. 245, 254

The June 1 *Ex Parte* also decries the fact that in exchange for paying allegedly “miniscule” pole charges attachers are “completely relieved from the burden of incurring the far greater costs of constructing and maintaining their *own* distribution systems.”⁴ But Congress adopted section 224 in 1978 precisely because the suggestion that cable operators have the option of installing their own poles is utterly fanciful.⁵ That statutory provision is designed to prevent utilities, as “the owner[s] of these essential facilities,” from extracting monopoly rents from attachers.⁶ Moreover, the market capitalization of the companies that need access to poles is completely irrelevant. Cable television was clearly not a “nascent industry” in 1996 when Congress amended section 224 to strengthen its provisions.

Finally, the June 1 *Ex Parte* makes the outrageous allegation that Time Warner Telecom, Inc. is engaged in a “scam” to avoid paying telecommunications pole attachment fees and erroneously claims that past litigation between Time Warner Telecom and CenterPoint Energy and between Bright House Networks and Tampa Electric supports its contentions.⁷ In fact, Time Warner Telecom has paid and will continue to pay lawfully assessed pole attachment fees. CenterPoint’s complaint, which was filed against Time Warner Cable, acknowledged that Time Warner Cable had offered to pay the telecommunications service rate for the 10,119 attachments used by Time Warner Telecom to provide telecommunications service.⁸ The utility also was offered

(1987)(“Appellees have not contended, nor could it seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory.”); *see also Alabama Cable Telecommunications Ass’n v. Alabama Power Co.*, Order, 16 FCC Rcd 12209, ¶¶ 45-61 (2001)(discussing the adequacy of utility compensation provided by the statutory pole attachment rate).

⁴ June 1 *Ex Parte*, at 3 (emphasis in original).

⁵ *See Alabama Power*, 311 F.3d at 1362 (“In the view of Congress, the costs of erecting an entirely new set of poles would have created an insurmountable burden on cable companies.”); *see also* S. Rep. No. 95-580, 95th Cong. 1st Sess 1977, 1978, 1978 U.S.C.C.A.N. 109, 121 (“there is often no practical alternative to a CATV system operator except to utilize available space on existing poles. ... Sharing arrangements minimize unnecessary and costly duplication of plant for all pole users, utilities as well as cable companies.”).

⁶ *See id.* (“As the owner of these ‘essential’ facilities, the power companies had superior bargaining power, which spurred Congress to intervene in 1978.”).

⁷ June 1 *Ex Parte*, at 6.

⁸ *CenterPoint Energy Houston Electric, LLC v. Texas Cable Partners*, File No. EB-04-MD-009, Revised Complaint, ¶ 18 (July 16, 2004).

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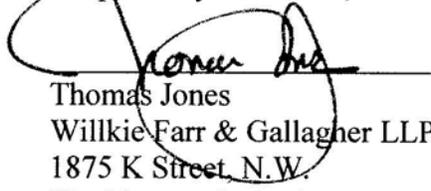
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payment at the telecommunications service rate in the Tampa Electric case. The Tampa Electric matter was actually initiated by a Bright House Networks complaint filed *against* Tampa Electric. Tampa Electric has not filed a complaint against Time Warner Telecom. Tampa Electric's response admits that Bright House offered to pay the properly calculated telecommunications service rate for 7,875 Bright House attachments on Tampa Electric's poles used by Time Warner Telecom to provide telecommunications services.⁹ The offers in both of these cases to pay the telecommunications service rate for attachments used by Time Warner Telecom to provide telecommunications services cannot credibly be characterized as a "scam" to avoid paying telecommunications pole attachment fees.

In sum, the Commission should not permit the inaccurate and irrelevant assertions advanced in the June 1 *Ex Parte* to divert its attention from the significant pole attachment policy issues that are pending in RM-11293 and RM-11303. Instead, the FCC should reject these transparent tactics by issuing a Notice of Proposed Rulemaking that will enable it to correct the competitive distortions caused by its current pole attachment rules.

Pursuant to Section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. § 1.1206(b)(1), a copy of this notice is being filed electronically in each of the above-referenced proceedings. Please contact me if you have any questions.

Respectfully submitted,



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cc: Jeremy Miller

⁹ *Bright House Networks, LLC v. Tampa Electric Co.*, File No. EB-06-003, Tampa Electric Company's Response to Pole Attachment Complaint of Bright House Networks, LLC at p. 2 and Exh. 7 (March 29, 2006).