KELLER AND HECKMAN LLP
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1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
tel. 202.434.4100
fax 202.434.4646

Writer's Direct Access
Wesley K. Wright
(202) 434-4296
wright@khlaw.com

June 3, 2008

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

Re: *Notice of Written Ex Parte Communication – WC Docket No. 07-245*

Dear Ms. Dortch:

Please accept this letter, being filed pursuant to Section 1.1206 of the Commission's Rules, as notice that on June 3, 2008, Jack Richards, Thomas Magee and I, attorneys for the Coalition of Concerned Utilities,[1] forwarded the attached letter to Commission Chairman Martin, Commissioner Adelstein, Commissioner Copps, Commissioner McDowell and Commissioner Tate.

Please do not hesitate to contact the undersigned with any questions.

Sincerely,

Wesley K. Wright

[1] The Coalition for Concerned Utilities is comprised of Allegheny Power, Baltimore Gas and Electric Co., Dayton Power and Light Co., FirstEnergy Corp., Kansas City Power and Light, National Grid and NSTAR.

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1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
tel. 202.434.4100
fax 202.434.4646

Writer's Direct Access
Jack Richards
(202) 434-4210
richards@khlaw.com

June 3, 2008

Electronic and Hand Delivery

The Honorable Kevin J. Martin
Chairman, Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Pole Attachment Rules
WC Docket No. 07-245
Ex Parte Presentation

Dear Mr. Chairman:

Allegheny Power, Baltimore Gas and Electric, Dayton Power & Light, FirstEnergy, Kansas City Power & Light, National Grid, and NSTAR (the "*Coalition of Concerned Utilities*" or "*Coalition*") serve approximately 12,800,000 electric customers and own, in whole or in part, more than 7,200,000 electric distribution poles. The *Coalition* is extremely concerned that the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding may exacerbate an already troubling pole attachment and joint use regulatory environment and jeopardize the safe and efficient operation of the nation's electric utility distribution systems.

Although the Commission's promotion of cable, telecommunications and broadband services is a worthy goal, the *Coalition* agrees wholeheartedly with your view that it should not occur at the expense of electric utilities and their ratepayers.[1] The cable industry has been benefiting from subsidized Pole Attachment rates since 1978. At this late stage of "CATV" development -- especially in the midst of an energy crisis and deep concerns over raising electric utility rates -- there is no public policy justification for electric utility ratepayers to continue subsidizing communications giants such as Comcast, Time Warner Cable and Time Warner Telecom.

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[1] Statement of Chairman Kevin J. Martin, *Re: Implementation of Section 224 of the Act; Amendment to the Commission's Rules and Policies Governing Pole Attachments*, released Nov. 20, 2007, WC Docket No. 07-245, RM-11293, RM-11303 (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-187A2.pdf)(last visited March 3, 2008) ("It is … important that pole owners be properly compensated for the use of their infrastructure by others. I do not think electric consumers should be subsidizing any broadband companies. Establishing parity should not come at the expense of pole owners or electric consumers. … The safety and reliability of critical electric infrastructure is a paramount concern. Our work on telecommunications reliability should not come at the expense of other public safety systems.").

The *Coalition of Concerned Utilities* implores the Commission not to adopt the cavalier approach of cable companies toward electric utility ratepayers, which is best summarized by the National Cable Television Association (NCTA) when it argues that "Congress has given the Commission no role whatsoever in protecting electric ratepayers."[2] The *Coalition* is encouraged that you appear to disagree, recognizing in your Separate Statement that electric utility ratepayers should not be required to provide subsidies to unregulated, gigantic cable companies.

Poles and conduit are the backbone of electric utility systems. While the electric distribution network is a cheap and convenient vehicle for cable and other communications companies to use as a platform for deploying their own services, by far its primary function is to support the safe and efficient delivery of electric services to consumers across the country. The Commission should protect and defend that function, while ensuring that attachers pay their fair share for their use of electric utilities' pole distribution networks.

Rates

The electric utility industry has subsidized cable and telecom attachers for years. Under the Commission's pole attachment rules, attachers avoid all costs necessary to construct their own pole distribution systems and pay a disproportionately small percentage of expenses necessary for electric utilities to construct and operate one on their behalf.

The Commission's current pole attachment rate methodology is akin to the utility paying full price for a car while attachers remain free to climb on board and chip in a small percentage annually for gas and other expenses. Not only that, but the car itself (which must be bigger, faster and stronger to accommodate the added passengers) is considerably more expensive than the car that the utility would have bought for its own purposes.

Under the Commission's pole attachment rules, cable companies are required to pay only 7.4% of the costs associated with the common space on a pole (inappropriately termed "unusable" space) that is necessary to stabilize the pole, elevate cable's attachments, and provide 40 inches for the "communications worker safety zone" that would not be needed at all but for the presence of communications workers near energized utility lines. Cable's aerial attachments clearly benefit from all of this common space, but electric utilities are required to bear almost all (92.6%) of these costs. The cable industry gets a virtual "free ride."

[2] NCTA Comments at 12.

The Telecom attachment rate is an improvement (since it allocates 2/3 of most common space costs equally), but similarly fails to reflect the value of the pole distribution system to telecom attachers or the significant costs that they avoid by not being required to build their own pole distribution systems. They, too, are permitted to climb on board utility pole distribution systems for a fraction of the fair cost. Additionally, the FCC's "presumed number of attachers" of 3 or 5 (based on whether a system is "rural" or "urban") falsely inflates the number of attachers used for rate calculation purposes and thereby reduces the applicable Telecom rate, all to the detriment of electric utilities and their rate payers.

To the extent that government mandated subsidies were appropriate to jump-start the cable and telecom industries in the early days of pole attachments, those days are long gone. Yet Comcast, Time Warner Telecom and other media giants continue to get access to the most basic component of "their" pole distribution systems for an artificially low, government-mandated fee that unfairly discriminates against electric utilities and their consumers.

The *Coalition* supports the Commission's efforts to create a single, broadband rate, but, as noted in your Separate Statement, electric consumers should not be subsidizing broadband companies. The *Coalition's* proposed rate for broadband attachers (adopted by the City of Seattle and affirmed by the Washington State courts) eliminates the historic subsidy of cable and telecom companies by requiring that costs associated with 100% of the common space on poles (including the "communications worker safety zone" space) be shared equally by and among all attachers. Anything less than an equal sharing of costs related to the common space on the poles will result in an unjustified subsidy to whichever industry is favored by the Commission.

Joint Use

Unlike third party pole attachments, Joint Use involves arrangements between two pole-owning entities -- electric utilities and Incumbent Local Exchange Carriers ("ILECs"). For almost 100 years, electric utilities and ILECs have worked together to construct a mutually beneficial, multi-million mile aerial pole distribution system throughout the country that is both safe and efficient. The Commission should not upset this longstanding balance between pole owners by misconstruing its statutory authority as requested by USTelecom, the national trade association representing ILEC interests.

US Telecom argues that ILECs have become the "victims" of abuse by electric utilities under Joint Use. Far from being victimized, however, ILECs in fact have exploited the Joint Use process. Within the last few years, as the number of their wireline subscribers has dwindled, ILECs have abandoned their traditional joint use responsibilities and required electric utilities to install the vast majority of new poles, obtain necessary permits, provide emergency responses, police the system and ensure safe operations. The ILECs' relatively recent disassociation from

Joint Use, not any "abuse of market power" by electric utilities, is the reason why utilities have come to own a higher percentage of Joint Use poles.

USTelecom's claim that the Pole Attachment Act mandates regulated rates for ILECs attaching to electric utility poles fails the laugh test. It ignores explicit statutory language, as well as 10 years of history at the FCC and in the courts. The ILECs themselves only recently "discovered" their claimed loophole.

While USTelecom would guarantee regulated rates for ILECs on electric utility poles, it would offer no parallel rights for electric utilities that remain dependent on access to ILEC-owned poles. Stripped of similar leverage, electric utilities would be left to fend for themselves and likely would find themselves paying exorbitant rates to ILECs for parallel attachment rights.

Penalties

Speed to market and cutting costs are driving the rollout of new communications services as cable companies, CLECs and ILECs compete for customers. Unfortunately, electric system safety and reliability often has taken a back seat.

As a result, *Coalition* members are faced with huge numbers of unauthorized attachments, countless NESC clearance violations, improper pole guying, ungrounded messenger wires, excessive overlashing, improper use of boxing and extension arms, improper installation of equipment, improper hole drilling, the displacement and damage of utility equipment, customer outages, and a host of additional safety violations and poor construction practices by attachers.

The cable industry characterizes these serious, systemic problems, which are well known throughout the electric utility industry, as "trumped up charges."[3] This, of course, comes from the same industry that argues "Congress has given the Commission no role whatsoever in protecting electric ratepayers."[4]

The FCC's existing rules do little to assist utilities in addressing these problems. The Commission's unauthorized attachment rulings actually *encourage* unauthorized attachments, since the worst that can happen is that unauthorized attachers will be required to pay rentals that they should have been paying all along – if they get caught.

[3] Time Warner Cable Comments at iv.
[4] NCTA Comments at 12.

The *Coalition* recommends that the Commission authorize real penalties to combat the epidemic of unauthorized attachments, adjusted to encourage attachers to comply with pole owner audits:

- $100 per unauthorized attachment plus 5 years annual rental if an unauthorized attachment is found and the attacher has not participated in a required audit;

- $50 per unauthorized attachment plus 5 years annual rental if the attacher does participate in the audit or identifies the unauthorized attachment on its own.

To combat safety violations, the Commission should require attachers to comply with industry standard safety codes as well as the utilities' own safety and operational requirements. To promote compliance, the Commission should clarify that pole owners may impose penalties for safety violations in the amount of $200 per violation.

The Commission also should make clear that utility pole owners should not be "stuck" doing work that the attachers should have done themselves (as is too often the case). Pole owners should be free to charge "Imposition Costs" that reflect the cost of materials and equipment, fully loaded direct and indirect labor, engineering, supervision and overhead, plus an additional 50%, when they are required to perform work that attachers have failed to do in the first place.

Fibertech

Fibertech's proposed rules are based on the concept that attachers -- not utilities -- know best how to construct, operate, manage and maintain electric distribution systems. This notion is as dangerous as it is far fetched. Decisions regarding the safe construction and reliable operation of electric utility systems must be made by individual utilities based on their experience and best judgment, not by attachers motivated by profit and an expanding subscriber base.

For example, Fibertech's proposals regarding boxing, extension arms and drop poles raise significant operational concerns, and its proposal for unfettered access to manholes and conduit fails to make the very important distinction between relatively safe non-energized ILEC underground facilities and highly energized electric underground facilities that require significant safeguards.

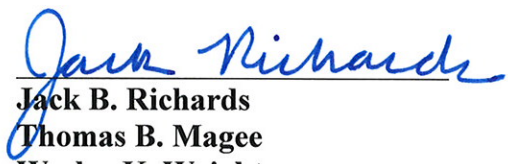
The deadlines proposed by Fibertech for field surveys and make ready work would force utility personnel to perform communications attacher work before the utility's own electric work. Allowing attachers to hire outside contractors is no solution and would raise a host of additional concerns regarding work priorities, quality of work, safety and labor relations.

* * *

The *Coalition of Concerned Utilities* agrees completely with your view that the safety and reliability of critical electric infrastructure is of paramount concern in this proceeding. Pole attachments are a deadly serious, critically important matter, with broad implications for the reliability of the nation's electric grid and the personal safety of those who work on or near poles, attachments and energized lines.

The Commission's regulations should reflect these concerns.

We appreciate your efforts and those of other Commissioners to protect electric utilities and their ratepayers during the course of this proceeding, and would be pleased to meet with you or your staff at your convenience to discuss these important issues further.



Jack B. Richards
Thomas B. Magee
Wesley K. Wright

Keller and Heckman LLP
1001 G Street, NW
Washington, D.C. 20001

Attorneys for the
Coalition of Concerned Utilities

The Honorable Michael J. Copps
The Honorable Jonathan S. Adelstein
The Honorable Deborah Taylor Tate
The Honorable Robert M. McDowell
Ms. Marlene H. Dortch, Secretary

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