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May 5, 2010

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

Ex Parte

Re: Notice of Ex Parte Communication: In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Docket No. 07-245; Petition for Declaratory Ruling of American Electric Power Service Corporation et al. Regarding the Rate for Cable System Pole Attachments Used to Provide Voice Over Internet Protocol Service, WC Docket No. 09-154; and In the Matter of a National Broadband Plan for Our Future, GN Docket No. 09-51

Dear Ms. Dortch:

Please accept this letter as notification, pursuant to Section 1.1206 of the Commission's Rules, that on May 4, 2010, Sean Cunningham and Scott Stone of Hunton & Williams LLP and Eric Langley of Balch & Bingham LLP met with Ms. Julie Veach, Mr. Christopher Killion, and Ms. Diane Griffin of the Office of the General Counsel.

During the meeting, the parties discussed the development of pole attachment regulations through the above-referenced proceedings, consistent with their written comments on the record. The parties also discussed the legal issues surrounding the Broadband Plan recommendations regarding pole attachments. The parties specifically addressed the limitations on the FCC's legal authority under section 224, namely:

- The Commission lacks authority to extend the cable rate or its equivalent to telecommunications carriers because section 224(e) expressly establishes the Telecommunications Formula as the applicable formula for telecommunications carriers.

- The Commission has no statutory basis for asserting jurisdiction over ILEC attachments on electric poles, because ILECs are not telecommunication carriers within the meaning of section 224.
- Presumptions used in calculating pole attachment rates using the statutory Telecommunications Formula must be supported by substantial evidence. For example, where the record shows that the average number of attaching entities (including the utility) is fewer than three in both rural and urban areas, the Commission would not have discretion to establish a presumption of a higher number of such attaching entities.
- The Commission lacks authority to mandate the use of boxing and extension arms, or related practices, if the purpose of these practices is to increase capacity or if such practices would affect safety, reliability, or sound engineering purposes. Under section 224(f)(2), electric utilities have no obligation to increase capacity — or compromise safety, reliability, and sound engineering — to accommodate new attachments.
- The Commission lacks authority to mandate collection and public disclosure of information regarding pole location and associated attachments because the Commission’s authority over electric utilities is limited to review of rates, terms and conditions of pole attachment agreements.
- The Commission lacks authority to require electric utilities to transfer communications facilities or otherwise function as the “traffic cop” in cases where communications attachers competing with each other fail to make room for each other’s facilities on an electric utility’s poles; here again, such requirement would exceed the Commission’s authority to review rates, terms, and conditions. The Commission may have authority under other provisions of the Communications Act to allow a communications attacher to file a complaint against another communications attacher to resolve such a dispute.
- Finally, the Commission has no authority to “forebear” from applying the Telecommunications Formula to attachments by telecommunication carriers and thereby allow the Cable Formula to apply instead. The Commission’s forbearance authority is an authority to forebear from enforcing a regulation against a regulated entity, which in this case would be the electric utility, not the communications attacher. It is not to re-regulate by other means (i.e., not to disregard one statutory provision in order to allow another statutory provision to take its place by default).

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This notice has been filed in accordance with Section 1.1206(b) of the Commission's Rules, and one electronic copy of this notice is being filed in the above-referenced docket.

Please do not hesitate to contact the undersigned if you have any questions.

Respectfully submitted,

/s/Sean B. Cunningham
Sean B. Cunningham

Enclosure

cc: Mr. Ajit Pai (via electronic mail)
Ms. Julie Veach (via electronic mail)
Mr. Christopher Killion (via electronic mail)
Ms. Diane Griffin (via electronic mail)