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January 27, 2011

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: Implementation of Section 224 of the Act, WC Docket No. 07-245; 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 Federal Communications Commission's ("FCC") Rules, that on January 26, 2011, Allen Bell of Georgia Power Company (an operating company subsidiary of Southern Company), Holly Henderson and Michael Rosenthal of SouthernLINC Wireless (an affiliate of Southern Company), Sean B. Cunningham, and Meghan R. Gruebner of Hunton & Williams, LLP met separately with (1) Wireline Competition Bureau staff ("staff"): Mr. Jonathan Reel, Competition Policy Division; Mr. Jeremy Miller, Deputy Division Chief, Industry Analysis & Technology Division; Mr. Wes Platt, Competition Policy Division; Mr. Al Lewis, Division Chief, Pricing Policy Division; Mr. Marcus Maher, Associate Bureau Chief, Pricing Policy Division; Mr. Richard Kwiatkowski, Pricing Policy Division; and Mr. Marv Sacks, Pricing Policy Division; (2) Mr. Brad Gillen, Legal Advisor–Wireline Issues to Commissioner Baker; and (3) Ms. Christine Kurth, Policy Director & Wireline Counsel to Commissioner McDowell.

During these meetings, the parties[1] discussed the FCC's Further Notice of Proposed Rulemaking ("FNPRM")[2] on pole attachments. More specifically, the parties discussed pole attachment rates

[1] The parties represent "the Alliance for Fair Pole Attachment Rules," which includes American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services, Inc., Florida Power & Light Company, Progress Energy, and Southern Company (hereinafter "the Alliance").

[2] Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, 75 Fed. Reg. 41,338 (July 15, 2010) (to be codified at 47 C.F.R. pt. 1).

and access issues, consistent with their comments on the record in these proceedings. The parties also made the following points in response to questions raised by staff or in elaboration of previously filed comments:

- Although the Alliance opposes timeline mandates because they are unnecessary and the Commission lacks statutory authority to adopt them, any timeline the Commission adopts should not commence unless and until the applicant already has a master agreement in place. Although current regulations require the utility to respond to the applicant in writing within 45 days, the level of specificity required in such response is not the same as requiring a "full blown" field survey in response to an applicant with which the utility lacks an existing contract that specifies critical matters including, inter alia, insurance, indemnification, and safety procedures. Also, at a minimum, the Commission should clarify that the utility is allowed to charge the applicant up front for the entire costs of the survey and collect such amount before commencing the survey. Until the master agreement is executed and the survey charges are collected, there should be a "time out" before the attachment agreement timeline commences.

- As explained in the Alliance's previously filed comments, the Commission lacks statutory authority to regulate the rates, terms and conditions of ILEC attachments on electric poles because ILECs are expressly excluded from the definition of "telecommunications carrier" in section 224. It would also be arbitrary and capricious for the Commission to reverse its previous statements that ILECs have no rights under section 224. Additionally, the Commission's May 2010 Declaratory Ruling, by necessary implication, makes clear that the terms "telecommunications carrier" (used with respect to the right of access under section 224(f)) and "provider of telecommunications services" (used with respect to the right to just and reasonable rates, terms, and conditions under section 224(b)) are interchangeable inasmuch as the Declaratory Ruling determines that the right of access is a just and reasonable condition of access. Thus, in answer to the Commission's own question in the 2007 Notice of Proposed Rulemaking ("NPRM") in its discussion of whether ILECs, which lack access rights under 224(f), can nevertheless have a right to just and reasonable rates, terms, and conditions under section 224(b), the Declaratory Ruling makes clear that such rights are not severable — access is, according to the Commission, now merely a subset of just and reasonable rates, terms, and conditions. If section 224 rights are not severable, then ILECs — who uncontestably lack the right of access — do not have a severed subset of rights to rates, terms, and conditions under 224(b).

- In response to a staff question about what "recourse" ILECs would have if they felt that their "rates" for pole attachments under existing joint use agreements were too high, the parties responded that ILECs, who are large, sophisticated parties, are free to: (1) seek renegotiation of such agreements; (2) seek relief from their State public service commissions who typically have broad regulatory powers with respect to certain

contracts between regulated utilities; (3) request that their State "reverse pre-empt" the FCC pursuant to section 224(c) and directly regulate the rates, terms, and conditions of such agreements; or (4) seek a statutory change.

- It is an illusion to think that giving ILECs the "same" rate as cable and CLEC attachers will somehow create competitive parity or support expansion of networks. It would do neither; instead, ILECs would simply enjoy a two-fold windfall and new competitive *advantage* relative to new market entrants: (1) ILECs would get new, lower rates for many thousands of existing attachments on existing service lines, which does nothing to incent the expansion of service to new areas; and (2) ILECs, once existing joint use agreements are abrogated, would be able to charge monopoly rents for electric attachments on ILEC poles, which would simply give ILEC pole owners an additional cash windfall which new market entrants that are not utility pole owners would, of course, not enjoy.

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

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. Jonathan Reel (via electronic mail)
Mr. Jeremy Miller (via electronic mail)
Mr. Wes Platt (via electronic mail)
Mr. Al Lewis (via electronic mail)
Mr. Marcus Maher (via electronic mail)
Mr. Richard Kwiatkowski (via electronic mail)
Mr. Marv Sacks (via electronic mail)
Mr. Brad Gillen (via electronic mail)
Ms. Christine Kurth (via electronic mail)