National Rural Electric
Cooperative Association
A Touchstone Energy® Cooperative

February 17, 2011

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of Ex Parte Communication: National Rural Electric Cooperative Association ("NRECA") and American Public Power Association ("APPA) Notice of Ex Parte Presentation, 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:

Pursuant to Section 1.1206 of the Commission's rules, this ex parte notice is filed on behalf of NRECA and APPA. On February 17, 2011, David Predmore, Laura Marshall Schepis and Tracey Steiner of NRECA, Gloria Tristani of Spiegel & McDiarmid LLP, Desmarie Waterhouse of APPA and Jim Baller and Sean Stokes of the Baller Herbst Law Group met with Commissioner Michael J. Copps and Ms. Margaret McCarthy, Policy Advisor to the Commissioner.

Also on February 17, 2011, David Predmore, Laura Marshall Schepis and Tracey Steiner of NRECA, Gloria Tristani of Spiegel & McDiarmid LLP, Desmarie Waterhouse of APPA and Jim Baller and Sean Stokes of the Baller Herbst Law Group met with Ms. Christine Kurth, Policy Director & Wireline Counsel to Commissioner McDowell.

During these meetings the parties discussed barriers to broadband deployment and the public policy rationale for maintaining the cooperative and municipal utility exemption from the FCC's pole attachment jurisdiction. The parties discussed information provided in the attached handouts and comments previously filed in the above referenced proceedings.

A copy of this letter and the handouts presented during the meeting are being filed via ECFS with your office. Please do not hesitate to contact me if you have any questions.

Sincerely,

Dave Predmore

David Predmore
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National Rural Electric Cooperative Association
4301 Wilson Blvd.
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Enclosure

cc: Commissioner Michael J. Copps (via electronic mail)
Ms. Margaret McCarthy (via electronic mail)
Ms. Christine Kurth (via electronic mail)

The Electric Cooperative Exemption in §224(a)(1) Remains Sound Public Policy. Why? In short, there's no problem that needs "fixing," and the "fix" would not even result in the intended benefits but would instead create collateral harm.

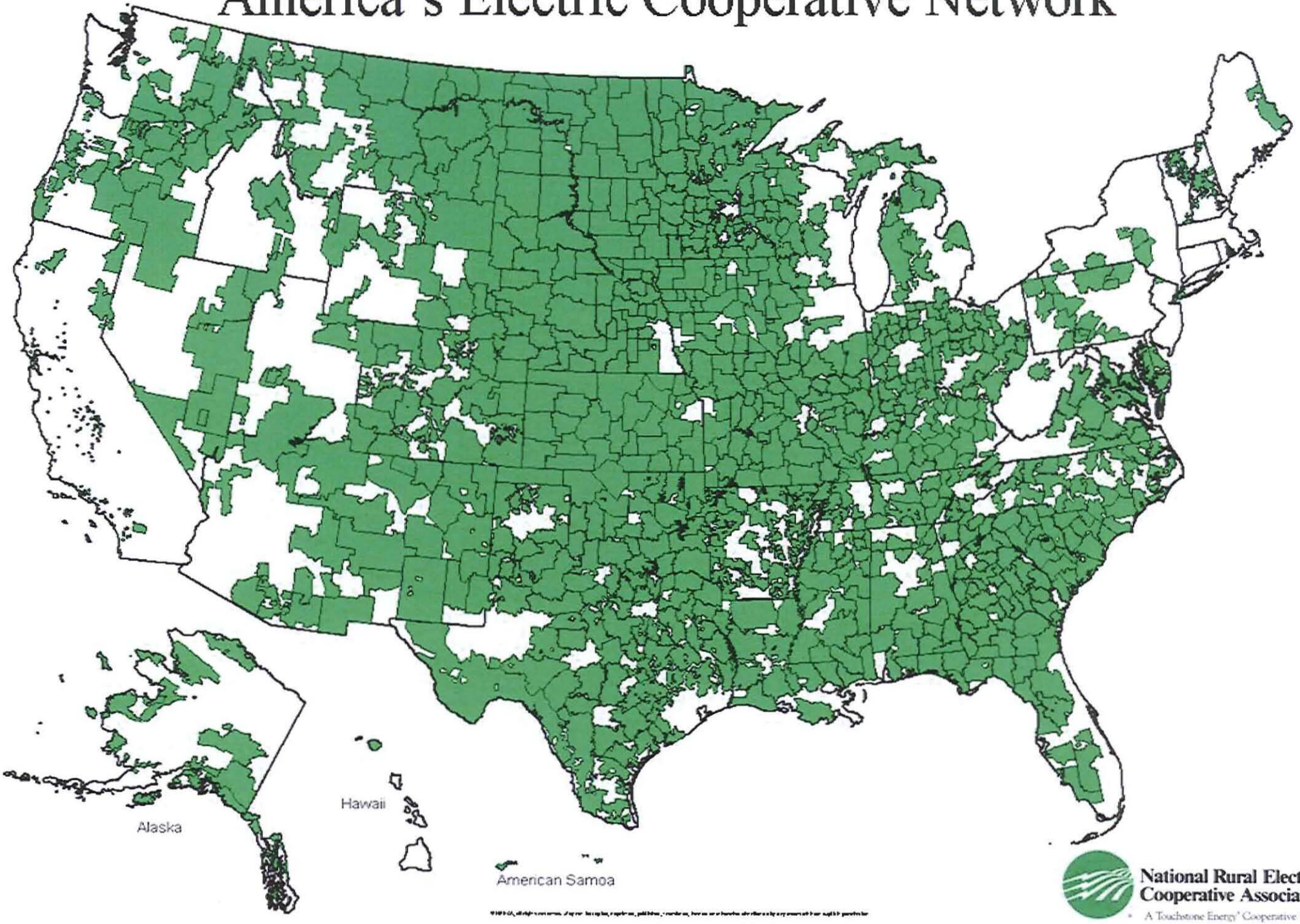
- **Co-op attachment rates are cost-based and fairly negotiated.**
  - **According to an NRECA Survey conducted in 2010, the average annual fee charged was $10.38 *per pole.***
  - Many co-ops still fall short of full cost recovery, especially costs associated with attachment inventories and inspections (47%); attachment moves to a relocated/replaced pole (37%); and removal of unsafe, unauthorized or abandoned attachments (28%).
  - To maintain their "cooperative" status under state law and exempt status under federal income tax law – non-profit and tax-exempt cooperatives must operate on a nonprofit basis. If a cooperative cannot recover the actual costs associated with pole attachments from the attachers themselves, then electric consumers will wind up paying those costs, regardless of whether they receive any services from the attacher.
  - A handful of such unsupported allegations in the entire record in this proceeding (WC Docket No. 07-245) do not justify any regulation of cooperative pole attachments.
- Cooperative board members must still answer to the consumers in their communities that elect them, and they do not want to be seen as responsible for their community not getting broadband.

Economics, Not Cooperative Pole Attachment Rates or Practices, Impede Broadband Deployment.

- Low pole attachment rates do not and will <u>not</u> incentivize deployments to areas with too few potential subscribers.
  - NRECA's survey compared consumer density – the number of consumers per mile of electric distribution line – to the average annual rates charged per pole to test the NPRM's assumption.
  - ***The <u>lowest</u> pole attachment rates charged were for those electric cooperatives that average <u>fewer than 4 consumers per mile</u> of line.*** The average per pole rates for these cooperatives serving in very sparsely populated areas were $5.50 (median) and $6.33 (mean), yet broadband providers are not flocking there.
- 25% of cooperative poles have at least one attachment. The most frequent reason cited for why the percentage is not higher is the cooperative has received no attachment requests for the its other poles.
  - 51% of cooperatives responding to NRECA's 2010 survey reported that the poles without any attachments were *those located in sparsely populated areas*, and
  - 36% responded that the poles without attachments were on *lines that did not serve a residence or business likely to need broadband or other communications services.*
- As the latest 706 Report notes, "[M]arket forces alone are unlikely to ensure that the unserved minority of Americans will be able to obtain the benefits of broadband anytime in the near future."
- Further, there is no guarantee that broadband providers will channel their windfall from more heavily subsidized attachment rates into broadband deployments in underserved areas.

NRECA opposes federal pole attachment regulation of cooperatives, particularly when such regulation would establish rates that do not afford adequate cost recovery and would compel cooperatives' electric ratepayers to subsidize broadband providers and their shareholders. NRECA believes that Congress got it right when it left decisions related to cooperative and public power pole attachments at the local level.

America's Electric Cooperative Network



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Ex Parte Presentations

Pole Attachments

February 17, 2010

I. INTRODUCTION

A. The American Public Power Association represents America's approximately 2,000 publicly-owned power utilities. More than 75% of APPA's members are in communities of 10,000 residents or less. APPA's members also include some large cities. All own and operate poles, ducts, conduits, and ROW.

B. Most of APPA's members are exempt from federal pole attachment regulation and are thus outside the direct scope of this rulemaking. APPA is participating in this proceeding, however, because it is concerned that the Commission may ask Congress to remove the exemption for publicly-owned and cooperatively-owned entities ("the Exemption") and to apply to its members the rules that the Commission adopts in this proceeding. The Commission's rules may also affect public power utilities indirectly, e.g., when applied by state law to municipal utilities or when cited as benchmarks of reasonableness.

C. APPA's goals in this proceeding:

1. To help the Commission understand the reasons for the Exemption and the continuing benefits that it provides.

2. To persuade the Commission to underscore the benefits of the Exemption in the order that it adopts and in its communications with Congress, or, at a minimum, to say nothing that would undermine the Exemption.

3. To provide the Commission the benefit of APPA members' decades of experience with pole attachments, particularly in areas unserved or underserved by broadband providers.

II. THE EXEMPTION SHOULD BE RETAINED

A. In 1978 and again in 1996, Congress exempted consumer-owned poles from federal pole attachment regulation for two reasons: (a) decisions about how pole costs for consumer-owned poles should be allocated among the electric utility and communications provider should be handled locally; and (b) prices being charged by municipalities and cooperatives were reasonable

B. Public power utilities have been at the forefront of providing or fostering the provision of high-capacity broadband and other communications services to their communities.

C. As representatives of their consumer-owners, members of APPA have long employed pole attachment practices that encourage entry by communications service providers while at the same time protecting electric ratepayers from being forced to subsidize communications attachments. For example, APPA's pole attachment manual encourages members to provide attachments not only to telecom carriers and cable systems, but also to purely broadband or dark-fiber providers, and to spread the full costs of poles equitably among all attaching entities, including the pole owner.

D. Members of APPA have many millions of poles subject to thousands of pole attachment agreements. In the last three decades, only a small handful of problems have arisen, and these have almost always been resolved effectively at the local level.

III. THE COMMISSION SHOULD NOT ADOPT ITS PROPOSAL TO LOWER POLE ATTACHMENT RATES TO LEVELS AT OR NEAR THE CABLE RATE

A. The Proposal Runs Counter to Congressional Intent and Expectations

B. The Record Does Not Support the Conclusion That Lowering Pole Attachment Rates Will Increase Broadband Deployment

1. The cable industry claims that it has made, or will soon make, broadband available to 92-95% of US households, and the wireless industry claims that it has made, or will soon make, 3G wireless available to 98% of US households. Thus, lowering pole attachment rates cannot significantly expand broadband deployment

2. The record shows that pole attachments are a relatively small component of the cost of deploying broadband facilities and that the other costs are far more significant to a provider's decision whether to deploy broadband facilities

3. The proposed lower rates will apply to all attachments, not just to new attachments in areas where broadband deployment has not yet occurred. As a result the proposal would result in a huge windfall to current attachers, at the expense of electric ratepayers

C. The Record Does Not Support the Conclusion That Lowering Pole Attachment Rates Will Increase Broadband Adoption and Use

1. The Commission has not proposed a mechanism to ensure that lower pole attachment costs are passed through to potential new broadband adopters.

2. There is no reasonable basis for believing that, in the absence of such a mechanism, pole attachers will pass any of the cost savings through to their customers

3. Even if such a mechanism existed, the amounts passed through are likely to be too small to have any significant impact

   a. Studies show that price is only one of the factors that deter adoption and use of broadband – others include lack of perceived relevance, computers, digital literacy, etc.

   b. In urban areas, the cost-savings-per-subscriber are likely to be negligible.

   c. In more sparsely-populated areas, cost reductions per household due to lower pole attachment rates would be offset by higher electricity rates, leaving target households less capable of paying for broadband than before.

D. The Commission Cannot and Should Not Remove Capital Costs from the Telecom Rate Formula

1. Having previously proposed to establish uniform pole rates at or near the rates calculated by the Telecommunications Rate Formula, the Commission has now proposed to establish uniform rates at or near the rates calculated by the Cable Rate Formula.

2. In proposing to drive pole attachment rates down to the cable rate level, the Commission would remove capital costs from the Telecommunications Rate Formula, on the assumption that utilities do not take attaching entities into account when making investment decisions but expect attachers to pay for the additional space they need. In its Notice of Proposed Rulemaking, the Commission cited no evidence to support this assumption.

3. APPA and other representatives of utilities of all kinds have provided substantial evidence that utilities *do* take the needs of other entities into account in making investment decisions. In fact, as APPA indicated in its comments, some of its members purchase poles with pre-drilled holes in the communications space for this very reason.

4. The Commission's assumption is also inconsistent with the fact that Section 224 has *required* covered utilities to provide access to all eligible entities since 1996.

5. Removing capital costs from the Telecommunications Rate Formula would be counterproductive, as it would discourage, rather than encourage, broadband deployment. If attaching entities had to pay for all capacity in excess of the needs of pole owners, the costs of new attachments would be much higher than they are today. As a result, potential broadband providers would either forgo attachments or raise their broadband rates substantially to recover the increased costs.

E. If high pole attachment costs are truly a problem in low-density rural areas, where there are relatively few households per pole, then the Commission should target this issue and address it through universal service mechanisms; it should not try to solve it through rules

of general applicability that have no relevance to other circumstances and will merely result in significant unintended consequences.

IV. THE COMMISSION SHOULD NOT ADOPT ITS PROPOSED PROCEDURAL CHANGES

A. Mandatory Comprehensive Timeline for Pole Attachment Application Review and Make-Ready is Not Warranted and Would Be Problematic for Many Utilities

1. The Commission is proposing to adopt a mandatory comprehensive timeline for utilities to complete the pole attachment application and review and make-ready process.

2. APPA questions the Commission's assumption that the existing processes are not working. The Commission provides only anecdotal evidence of delays experienced by some cable and telecommunications providers; it has not presented any evidence of widespread, unreasonable delays in the pole attachment process.

3. It has been the experience of APPA's member utilities that the existing localized processes work relatively smoothly, and that many of the delays that occur are caused by the attaching party or existing attaching entities that are slow in transferring their existing facilities.

4. The adoption of a mandatory timeline for the completion of pole attachment related work would divert utility resources from core utility activities. This is particularly problematic for smaller utilities such as many municipal utilities.

5. At most, any mandatory time periods for the completion of a review and make ready-work, should only apply to routine requests for a limited number of attachments, as determined by the local utility. Attachments involving a large number of poles, relative to the utilities size, or a substantial portion of the system, should be given additional time to review and perform make-ready.

6. The Commission's rules also need to allow for seasonal variations that may significantly delay or slow down the review and make-ready processes. For example, in some areas of the country severe winters or hurricane season make the proposed 45-day time periods for the completion of make-ready impractical.

B. Mandatory One-Size-Fits-All Timelines Requirements Are Particularly Inappropriate For Access to Ducts and Conduits and Wireless Attachments

1. APPA firmly believes that it would be inappropriate to adopt any mandatory timeframes concerning access to ducts and conduits. Make-ready work for ducts and conduits tends to require significant time and resources in order to ensure the safety, security, and protection of the utility system that should be left to the individual utility's judgment and not a one-size-fits-all rule.

2. The Commission should not apply a mandatory timeline for utilities to complete the pole attachment application review and make-ready process for wireless

attachments. As with ducts and conduits, wireless attachments located above electric facilities, involve unique safety, security and operational considerations that are not amenable to pre-determined, one-size-fits-all timeframes.

C. The Decision Whether to Allow the Use of Outside Contractors and for What Purposes, Should First and Foremost be a Decision of the Individual Utility.

1. As the pole owner, the utility is ultimately accountable for what happens on and around its poles, and it therefore needs to be involved in the authorization and approval of all work performed on its poles, including the authorization of a contractor to perform make-ready work.

2. A utility should be able to specify the exact standards and qualifications of any contractors that can perform work on the pole. These qualifications may include familiarity with the specific local system requirements.

3. Further, the utility must be able to have its own representative on site, at the expense of the attaching entity, during any work by an approved contractor. In all instances the utility or its representative must be able to exercise final authority on all decisions that relate to a pole's capacity, safety, or reliability.