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ELECTRONIC SUBMISSION

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

EX PARTE

Re: Implementation of Section 224 of the Act (WC Docket No. 07-245); Petition for Rulemaking of Fibertech Networks (RM-11303); United States Telecom Association Petition for Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures (RM-11293)

Dear Ms. Dortch:

As AT&T has explained previously, the Commission should reform the existing pole attachment regime by creating a uniform and low broadband attachment rate or rate formula available to all categories of broadband attachers, including incumbent local exchange carriers (“ILECs”).¹ The Commission has the legal authority to do so under 47 U.S.C. § 224, and reforming the existing regime in this manner would “promote broadband deployment” by helping to “remove many of the[] distortions” resulting from current pole attachment rate disparities and by “greatly reduc[ing] complexity and risk for those deploying broadband.”²

The purpose of this letter is to provide a path forward for the Commission to ensure that all broadband attachers are able to enjoy the benefit of a uniform and low broadband pole attachment rate or rate formula. Specifically, the Commission should: (i) amend its pole attachment complaint procedures so that an ILEC can challenge an unjust and unreasonable broadband pole attachment rate charged by a utility; (ii) create a rebuttal presumption that a broadband pole attachment rate in excess of the uniform rate or formula is unjust and unreasonable; and (iii) ensure that ILECs have a meaningful remedy in the event that the Commission finds that a utility is charging an unjust and unreasonable broadband pole attachment rate.

¹ See, e.g., Comments of AT&T, Inc., WC Docket No. 07-245 (filed Aug. 16, 2010); Reply Comments of AT&T, Inc., WC Docket No. 07-245 (filed Oct. 4, 2010).

² Federal Communications Commission, National Broadband Plan: Connecting America, Recommendation 6.1 at 110-11 (rel. Mar. 16, 2010).

It is imperative that the Commission address these implementation issues in its order reforming the current pole attachment regime. As evidenced by the desire of the electric industry to deprive ILECs of the just and reasonable rate protections of section 224 and as explained in this ex parte letter, the creation of a uniform broadband pole attachment rate or formula alone will not be adequate for the Commission to achieve its broadband objectives. In this letter, AT&T also responds to assertions by various electric utilities that attempt to insulate joint use agreements from the reach of section 224 – assertions that are inaccurate and irrelevant.

A. The Commission Should Amend Its Pole Attachment Complaint Procedures.

In order for ILECs to take advantage of a uniform and low broadband pole attachment rate or rate formula, the Commission should amend its complaint procedures to allow an ILEC to bring a complaint challenging unjust and unreasonable broadband attachment rates. Currently, by virtue of the language in section 1.1402(h) of the Commission's rules, ILECs are not permitted to file a complaint challenging a utility's pole attachment rate, regardless how unjust or unreasonable that rate may be.³ Once ILECs are afforded the protection of just and reasonable pole attachment rates pursuant to section 224, AT&T expects that many disputes with electric utilities regarding broadband attachment rates can be resolved without Commission involvement. However, in the event negotiations are unsuccessful, an ILEC must have the ability to avail itself of the Commission's complaint procedures so that the Commission can enforce its pole attachment rules. Indeed, simply giving ILECs the ability to file a complaint to challenge an electric utility's pole attachment rates is likely to serve as powerful incentive for parties to mutually agree on just and reasonable rates.

Only modest amendments to the Commission's existing complaint procedures would be required to effectuate this change. Specifically, the Commission should amend its rules to distinguish, consistent with section 224, "telecommunications carriers" from "providers of telecommunications." A draft of AT&T's suggested amendments to the Commission's pole attachment complaint procedures is attached as Exhibit 1.

Notwithstanding any suggestion to the contrary, unlike an ILEC, an electric utility currently can avail itself of the Commission's pole attachment complaint procedures.⁴ The Commission's existing rules define a "complainant" to include a "utility," the definition of which encompasses "an electric, gas, water, steam, or other public utility" that "owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communication."⁵

³ 47 C.F.R. § 1.1402(h) ("For purposes of this subpart, the term telecommunications carrier means any provider of telecommunications services, except that the term does not include aggregators of telecommunications services (as defined in 47 U.S.C. 226) or incumbent local exchange carriers (as defined in 47 U.S.C. 251(h))").

⁴ See, e.g., *Baltimore Gas & Electric Co. v. Cable Telecommunications Ass'n of Maryland, Delaware & The District of Columbia; Adelphia Prestige Cablevision LCC; Millennium Digital Media; and Comcast Cable Communications, Inc.*, File No. EB-02-MD-031 (filed May 14, 2002).

⁵ 47 C.F.R. §§ 1.1402(a), (e); see also 47 C.F.R. § 1.1402(m) (defining "attaching entity" to include "utilities").

Nonetheless, to the extent the Commission believes its rules are ambiguous on this point, AT&T has no objection to the Commission amending its pole attachment complaint procedures to make clear that an electric utility can avail itself of those procedures to vindicate its section 224 rights as well.

B. The Commission Should Establish a Rebuttable Presumption That A Broadband Pole Attachment Rate In Excess of the Uniform Rate or Formula Is Unjust and Unreasonable.

The Commission should establish a rebuttable presumption that any broadband pole attachment rate in excess of the uniform rate or rate formula is unjust and unreasonable. This approach is consistent with the Commission's current pole attachment regime, which uses rebuttable presumptions "to reduce reporting requirements and recordkeeping" and to provide "a level of predictability and efficiency in calculating the appropriate rate."⁶ According to the Commission, rebuttable presumptions preserve fairness "because the presumptions may be overcome through contrary evidence."⁷

Under this rebuttable presumption approach, any attaching party that believes it is being charged an unjust and unreasonable broadband attachment rate could file a complaint with the Commission. Consistent with section 1.1409(b) of the Commission's rules, the attaching party would have "the burden of establishing a prima facie case that the rate ... is not just and reasonable" – a burden that could be met by demonstrating that the broadband attachment rate exceeds the uniform rate or rate formula. Upon such a demonstration, the burden would shift to the utility to justify its pole attachment rate by establishing that the rate is just and reasonable.⁸

Electric utilities have complained that the Commission should not intervene with respect to ILEC pole attachment rates because they are subject to joint use agreements. However, there is nothing magical about a joint use agreement that prevents the Commission from assessing whether a pole attachment rate in that agreement is just and reasonable within the meaning of section 224 and the Commission's rules. Furthermore, under a rebuttable presumption approach, to the extent an electric utility believes that it incurs costs in connection with a joint use agreement that should be reflected in the rate for a broadband pole attachment, it would have the

⁶ *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, ¶ 74 (1998).

⁷ *Id.* The Commission also has used a safe harbor approach, establishing a benchmark level at which rates are conclusively presumed to be just and reasonable. See, *Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC 01-146, ¶ 3 (establishing regime by which CLEC access rates that are at or below a specified benchmark are presumed to be just and reasonable and may be subject to tariff; for rates above the benchmark, CLEC access services are mandatorily detariffed and subject to negotiation); *Presubscribed Interexchange Carrier Charges*, Report and Order, 20 FCC Rcd 3855, ¶ 7 (2005) (establishing safe harbor approach for tariffed PIC change charges by which rates that are equal to or less than the safe harbor can be tariffed without having to provide detailed cost filings in support of those rates).

⁸ See, e.g., *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, Order, 16 FCC Rcd 12209, 12237 ¶ 62 (2001) (upholding Bureau's determination that pole attachment rate was unreasonable when utility "made no attempt to justify the \$38.81 rate using the Commission's rules ...").

ability to present evidence regarding such costs when attempting to establish that a rate in excess of the uniform broadband rate or rate formula is nonetheless just and reasonable.

C. The Commission Should Ensure That ILECs Have A Meaningful Remedy In The Event That An Electric Utility Is Charging An Unjust And Unreasonable Broadband Pole Attachment Rate.

Under the Commission's existing pole attachment rules, if it determines that a pole attachment rate is unjust and unreasonable, the Commission "may prescribe a just and reasonable rate" and may: (i) "[t]erminate the unjust and unreasonable rate"; (ii) "[s]ubstitute in the pole attachment agreement the just and reasonable rate ... established by the Commission"; and (iii) "[o]rder a refund, or payment, if appropriate."⁹ The Commission should ensure that these remedies are available to ILECs in the event that an electric utility is charging an unjust and unreasonable broadband pole attachment rate.

Once the Commission determines that a broadband pole attachment rate is unjust and unreasonable, that rate is unlawful and thus unenforceable.¹⁰ That an unjust and unreasonable rate may appear in a joint use agreement is irrelevant. According to the Commission, utilities simply "may not charge more than the maximum amount permitted by the formulas developed by the Commission."¹¹ The Commission's authority to invalidate unjust and unreasonable pole attachment rates extends to all pole attachments, even those made pursuant to joint use agreements executed years ago.¹²

Pole attachment rates in joint use agreements are not sacrosanct or somehow shielded from the law. Any attempt by an electric utility to charge an unjust and unreasonable pole attachment rate, even if contained in an existing joint use agreement, would run afoul of section 224, and the Commission enjoys long-established regulatory jurisdiction to preclude enforcement of that rate. Consistent with its existing rules, the Commission should "terminate" a pole attachment rate in an existing joint use agreement that it finds is unjust and unreasonable and "substitute" in that agreement a just and reasonable rate.

⁹ 47 C.F.R. § 1.1410.

¹⁰ *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 4 FCC Rcd 468, ¶ 25 (1989) (noting that the Pole Attachment Act directs the Commission to "ensure that terms and conditions are just and reasonable," and that "[i]f a term or condition of a pole attachment agreement is found to be unjust or unreasonable, it is unlawful"); *see also Implementation of Section 224 of the Act*, 25 FCC Rcd 11864, ¶ 83 (2010); *Mile Hi Cable Partners v. Public Serv. Co. of Colo.*, Order, 17 FCC Rcd 6268, 6269 (2002) ("A utility must charge a pole attachment rate that does not exceed the maximum amount permitted by the formula developed by the Commission"), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.2d 675 (D.C. Cir. 2003).

¹¹ *Nevada State Cable Television Association v. Nevada Bell*, 17 FCC Rcd 15534, ¶ 2 (2002).

¹² *See, e.g., Monongahela Power Co. v. FCC*, 655 F.2d 1254, 1257 (D.C. Cir. 1981) (per curiam) (holding that the Commission has jurisdiction to resolve disputes between cable television operators and pole owners, "including those involving preexisting contracts, using the methods for calculating and apportioning costs that it has prescribed"); *Alabama Power Co.*, Order, 16 FCC Rcd at 12209, ¶ 21 (declining to find that agreements voluntarily negotiated "are 'grandfathered' under the Pole Attachment Act as perpetual voluntary relationships").

By the same token, the Commission should not endorse or condone any attempt by an electric utility to use its failure to charge a just and reasonable pole attachment as a pretext to modify other terms of an existing joint use agreement. The Commission's existing rules would not sanction such an outcome.

Furthermore, the *Mobile-Sierra* doctrine authorizes the Commission to "prescribe a change in contract rates when it finds them to be unlawful," without abrogating or otherwise affecting other terms in that contract.¹³ Under the *Mobile-Sierra* doctrine, "[b]efore changing rates, the Commission must make a finding that [the rates] are 'unlawful' according to the term of the governing statute, which typically requires a finding that existing rates are unjust, unreasonable, unduly discriminatory, or preferential."¹⁴ Additionally, it must be shown that the rates in question are contrary to the public interest.¹⁵

When an electric utility charges an unjust and unreasonable pole attachment rate under an existing joint use agreement with an ILEC, it is acting contrary to law and to the public interest. Excessive rates for an ILEC's broadband pole attachments, particularly in relation to rates paid by other broadband providers, stand as an obstacle to lowering the costs of broadband investment and encouraging the deployment of new facilities. Thus, the *Mobile-Sierra* doctrine authorizes the Commission to require a change in the pole attachment rate in an existing joint use agreements when it finds that rate to be unlawful, without disturbing the other provisions of such agreements.

D. ILECs Do Not Currently Have Meaningful Recourse When An Electric Utility Charges An Unjust and Unreasonable Broadband Pole Attachment Rate.

Electric utilities claim that no need exists for the Commission to afford ILECs the protection of just and reasonable pole attachment rates pursuant to section 224 because they have other means of "recourse" if pole attachment rates under existing joint use agreements are "too high."¹⁶ However, these methods of "recourse" identified by the electric utilities provide no meaningful means of relief from unjust and unreasonable broadband pole attachment rates.¹⁷

¹³ *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987); *see also BellSouth Telecomm'ns, Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 969-70 (11th Cir. 2005).

¹⁴ *Western Union*, 815 F.2d at 1501 n.2 (citing 47 U.S.C. §§ 202 and 205); *see generally United Gas Pipe Line Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1956) (recognizing that the terms and conditions of utility contracts can be rendered unjust and unreasonable by intervening circumstances).

¹⁵ *See Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527 (U.S. 2008).

¹⁶ *See Ex Parte Letter from Sean Cunningham, Counsel, Georgia Power Company and SoutherLINC Wireless, to Marlene Dortch, Secretary, FCC, at 2-3 (Jan. 27, 2011) ("Georgia Power Ex Parte").*

¹⁷ Several of the electric industry's suggested means of "recourse" represent nothing more than a transparent attempt to perpetuate the status quo. For example, while suggesting that ILECs should "request that their State 'reverse pre-empt' the FCC pursuant to section 224(c)," the electric industry does not explain why there exists any reason to believe such a request would be granted in a state that has declined to reverse-preempt the FCC for the past 15 years. Furthermore, while ILECs could seek a "change" in section 224, no statutory change is required in order to ensure just and reasonable broadband pole attachment rates, and, in any event, the electric

While it is theoretically possible that an ILEC could “seek renegotiation” of an existing joint use agreement, the record is clear that such renegotiations are by and large unproductive. With electric utilities owning 75 to 80 percent of utility poles across the country, and ILECs owning only 20 to 25 percent of such poles, ILECs enjoy little bargaining power when it comes to renegotiating joint use agreements.¹⁸ The electric industry also has powerful economic incentives to increase, or at the very least maintain, pole attachment rates because high rates benefit them financially – a benefit that an electric utility is unlikely to forego voluntarily when renegotiating an existing joint use agreement.¹⁹ The absence of bargaining power on the part of the ILECs and the incentives of the electric utilities to try to maximize their pole attachment revenues explain why electric utilities routinely refuse to amend joint use agreements negotiated decades ago to reflect the practical realities of pole usage today. Their refusal to do so is the reason AT&T and the other ILECs were forced to seek the intervention of the Commission in the first place.

Although the electric industry claims that state public service commissions are a forum to resolve disputes regarding joint use agreements,²⁰ the enabling statutes of state commissions are considerably more circumscribed than the electric utilities represent, particularly as compared to the broad authority granted to the FCC under section 224.²¹ In the 30 states that have declined to certify and regulate pole attachments,²² state commissions routinely decline or otherwise have no authority to resolve pole attachment disputes.²³ Indeed, many state commissions flatly refuse to get involved in private contractual disputes, even those involving a utility.²⁴

industry likely would oppose such a change in Congress, as evidenced by its efforts to insulate joint use agreements from Commission oversight in this proceeding.

¹⁸ See Reply Declaration of Veronica Mahanger MacPhee, WC Docket 07-245, ¶¶ 3-4 (filed April 22, 2008).

¹⁹ See Declaration of Phillip Gauntt, WC Docket 07-245, ¶¶ 5-10 (filed March 8, 2008) (noting electric utility demands to increase pole attachment rates by 120 to 2000 percent).

²⁰ See Georgia Power Ex Parte, at 3; Ex Parte Letter from Jeffrey Sheldon, Counsel, Edison Electric Institute, to Marlene Dortch, Secretary, FCC, at 2 (March 4, 2011) (claiming that joint use agreements “are already subject to state regulation even in those states that have not reverse-preempted FCC regulation of pole attachments”).

²¹ In fact, the complaint procedures of many state commissions do not encompass disputes involving “contracts between regulated utilities.” See, e.g., S.C. Code Ann. § 58-27-1940 (limiting commission’s jurisdiction to claims that an electric utility has violated “any law which the commission has jurisdiction to administer or of any order or rule of the commission”); Tex. Utilities Code § 15.051 (limiting commission complaints to those involving a “violation or claimed violation of a law that the regulatory authority has jurisdiction to administer or of an order, ordinance, or rule of the regulatory authority”).

²² *States That Have Certified That They Regulate Pole Attachments*, Public Notice, DA 10-183 (rel. May 19, 2010).

²³ See, e.g., *Competitive Access to Commercial Real Estate Developments*, Order on Reconsideration, 2005 N.C. PUC Lexis 487 (2005) (declining to require preferred provider to provide its competitors with access to its poles, conduits, and right-of-way because a decision not to regulate pole attachments “means not regulating, including not regulating access”); *Pub. Serv. Co. of Colo. v. Mile Hi Cable Partners*, 995 P.2d 210 (Colo. 1999) (upholding determination that when a state public service commission declined to regulate

E. Conclusion

Now is the time for the Commission to reform the existing pole attachment regime. Creating a uniform and low broadband attachment rate or rate formula and ensuring that all categories of broadband attachers, including ILECs, are able to take advantage of that rate or formula would help achieve the Commission's objectives of reducing the cost of broadband and promoting broadband deployment, particularly in rural areas.

Sincerely,

/s/
William A. Brown

Attachment

pole attachments the FCC had primary jurisdiction over claim that cable operators had placed unauthorized attachments on utility's poles and thus were subject to \$301,250 in penalties).

²⁴ See, e.g., *Jim and Louise Hall v. Mountaineer Gas Co.*, Opinion, 2007 W. Va. PUC LEXIS 1211, 1-2 (W. Va. PUC 2007) (“[T]he Commission does not have jurisdiction to resolve private contract disputes”); *Investigation into Electric Service Market Competition and Regulatory Practices*, Order, 2001 D.C. PUC Lexis 102 (2001) (“The Commission does not have jurisdiction to resolve private contract disputes”); *Application of Mather Field Utilities, Inc., for a Certificate of Public Convenience and Necessity for its Gas Utility Distribution System at Mather Field, CA*, Interim Opinion, 72 CPUC 2d 333, 36 (1997) (“As a general rule, this Commission has no jurisdiction to adjudicate contract disputes merely because one party is a public utility”) (citation omitted); *Designer Homes v. Penn. Power & Light Co.*, Initial Decision, 1993 Pa. PUC LEXIS 30 (1993) (“While the Commission has jurisdiction over any complaints filed by a person or corporation alleging a violation of the Public Utility Code or any of the Commission's regulations or orders, it does not have jurisdiction over private contract disputes between a utility and another person”) (citations omitted).

TITLE 47--TELECOMMUNICATION

CHAPTER I -- FEDERAL COMMUNICATIONS COMMISSION

SUBPART J - POLE ATTACHMENT COMPLAINT PROCEDURES

Sec. 1.1401 Purpose.

The rules and regulations contained in subpart J of this part provide complaint and enforcement procedures to ensure ~~that telecommunications carriers and cable system operators have the~~ nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way ~~and to ensure that the rates, terms, and conditions that for pole attachments~~ are just and reasonable.

Sec. 1.1402 Definitions.

(a) The term utility means any person that is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person that is cooperatively organized, or any person owned by the Federal Government or any State.

(b) The term pole attachment means any attachment by a cable television system ~~or~~ provider of telecommunications service, or broadband service provider to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(c) With respect to poles, the term usable space means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility. With respect to conduit, the term usable space means capacity within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable and associated equipment for broadband telecommunications, or cable services, and which includes capacity occupied by the utility.

(d) The term complaint means a filing by a cable television system operator, a ~~cable television system association, a utility, an association~~ provider of utilities, a telecommunications carrier, a broadband service provider, or any association of ~~telecommunications carriers thereof~~ alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable.

(e) The term complainant means a cable television system operator, a ~~cable television system association, a utility, an association~~ provider of utilities, a telecommunications carrier, a broadband service provider, or any association of ~~telecommunications carriers thereof~~ who files a complaint.

(f) The term respondent means a cable television system operator, a utility, or a provider of telecommunications-carrier against whom a complaint is filed.

(g) The term State means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(h) For purposes of this subpart, the term telecommunications carrier means any provider of telecommunications services, except that the term does not include aggregators of telecommunications services (as defined in 47 U.S.C. 226) or incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)).

(i) For purposes of this subpart, the term broadband service provider means any person or entity that provides wired lines or wireless channels that enable the end user to receive information from and/or send information to the Internet at information transfer rates exceeding 200 kbps in at least one direction.

(j) The term conduit means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.

(k) The term conduit system means a collection of one or more conduits together with their supporting infrastructure.

(l) The term duct means a single enclosed raceway for conductors, cable and/or wire.

(m) With respect to poles, the term unusable space means the space on a utility pole below the usable space, including the amount required to set the depth of the pole.

(n) The term attaching entity includes cable system operators, providers of telecommunications-carriers, incumbent and other local exchange carriers, broadband service providers, utilities, governmental entities and other entities with a physical attachment to the pole, duct, conduit or right of way. It does not include governmental entities with only seasonal attachments to the pole.

(o) The term inner-duct means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.