

LATHAM & WATKINS LLP

March 16, 2011

EX PARTE VIA ECFS

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

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Re: Implementation of Section 224 of the Act, WC Docket No. 07-245

Dear Ms. Dortch:

On March 16, 2011, Michael Reed of FairPoint Communications, Inc. (“FairPoint”) and Karen Brinkmann and Alexander Maltas of Latham & Watkins LLP spoke by telephone with Angela Kronenberg, legal advisor to Commissioner Clyburn. They discussed the need for Commission action to clarify default rules regarding the terms and conditions of pole attachments, and specifically boxing and bracketing practices, in the absence of rules and regulations promulgated by a State.

Section 224 of the Act provides that a State may regulate rates, terms, and conditions of pole attachments if, and only if, “the State has issued and made effective rules and regulations implementing the State’s regulatory authority over pole attachments.” 47 U.S.C. § 224(c)(3)(A). The default position is that the FCC regulates rates, terms, and conditions of pole attachments, *id.* § 224(b), but if a State implements rules and regulations regarding rates, terms, and conditions of pole attachments, then it may assume regulatory authority over such matters. *Id.* § 224(c).

If, however, a State merely regulates rates, but has not promulgated “rules and regulations” regarding terms and conditions, then the “State shall not be considered to regulate” such matters. 47 U.S.C. § 224(c)(3). For example, the state of Maine regulates pole attachment rates, but has not issued rules and regulations regarding terms and conditions of attachments, and more specifically it has not issued rules and regulations regarding boxing and bracketing of poles. The Maine Public Utilities Commission has merely issued a single adjudicatory order, the *Oxford Order*, in connection with a single dispute.¹ Such an *ad hoc* decision based on the

¹ See *Oxford Networks f/k/a Oxford County Telephone; Request for Commission Investigation into Verizon’s Practices and Acts Regarding Access to Utility Poles*, Order, MPUC Docket No. 2005-486 (Oct. 26, 2006) (the “*Oxford Order*”).

limited facts of that dispute between two parties does not constitute comprehensive rulemaking, nor does it provide the guidance and predictability of “rules and regulations” regarding the terms and conditions of pole attachments that would be applicable to all pole owners and all pole attachers. It is important for the Commission to clarify that, in the absence of comprehensive, promulgated state “rules and regulations” on terms and conditions, the Commission’s rules on pole attachment terms and conditions continue to apply.

The issue is of great importance because of recent difficulties that FairPoint has encountered with regard to requests for, as well as the practice of, “boxing and bracketing” in Maine. This practice involves installing communications on both sides of the same pole at approximately the same height, or installing extension arms that extend from the pole.² Such practices are in most cases unnecessary and can have significant adverse effects on the safety of hundreds of FairPoint employees who must service poles and attachments. Maine’s *Oxford Order* nevertheless has been invoked in complaint proceedings as a ground to *compel* FairPoint to engage in these risky and unnecessary practices, despite the lack of Maine rules and regulations on the subject.

As FairPoint explained to Commission staff, FairPoint has facilities on and manages the telecommunications space on 1.4 million poles in its three New England states of Maine, New Hampshire, and Vermont that are either owned by FairPoint or the power company or jointly owned. When an entity wants to attach to any pole, each pole must be surveyed by all existing attachers to the pole in order to determine if any make-ready work is necessary so as to ensure proper operations and service of the pole. Make-ready work means that additional work is needed before the requesting attacher may attach to the pole. Make-ready work often involves movement of existing wires or cable to make room for the new attacher’s facilities, may involve stabilizing the pole with guy wires, and sometimes involves replacing the existing pole with a taller pole to create more room for an attacher.

FairPoint’s 1.4 million poles represent major infrastructure in the New England states. This infrastructure carries virtually all communications, including voice, data, video, and emergency service, as well power service.

FairPoint explained that it employs particular practices for pole attachments to ensure the safety and security of its employees, to protect the public welfare, and to better manage and facilitate access to the poles and the cables that are connected to the poles. Boxing and bracketing can compromise pole maintenance, increase the cost of replacing a damaged pole by as much as \$1,500 *per pole*, and place dangerous obstacles in the path of utility employees who may need to climb poles, replace poles, and maintain poles, including in emergency situations. Boxing and bracketing also delays removal of fallen or broken poles as well as delays restoration of all communications services to customers who rely upon this critical infrastructure. FairPoint also made clear that it implements its policies on boxing and bracketing in competitively neutral

² *Implementation of Section 224 of the Act*, WC Docket No. 07-245, Order and Further Notice of Proposed Rulemaking, ¶ 8 (May 20, 2010) (“*Pole Attachment Order*”).

ways; in the limited instances where FairPoint permits boxing and/or bracketing, it applies strict parity and permits others to do so to the same extent.

The diagram and photographs attached as Exhibit 1 to this letter were discussed during the meetings reflected above, to demonstrate that boxing and bracketing practices create obstacles that can compromise utility employees' ability to service poles and cable attachments. When a request is made to attach to any of FairPoint's 1.4 million poles then a survey is required for each such pole to determine whether any make-ready work is required. Where a pole is already scheduled for replacement, the new attacher bears no expense for such work. However, where make-ready work is required, its cost should be borne by the new attacher, as provided in applicable agreements and tariffs. Many attachers want to avoid the make-ready costs by employing boxing and bracketing practices, which compromise FairPoint's pole administration, create safety risks for FairPoint employees, put critical infrastructure at risk, and ultimately thrust costs on the existing occupants of the pole that ought to be borne by the new attacher.

The Commission recently addressed these concerns, and issued federal rules and regulations that acknowledged that "boxing and bracketing complicates pole maintenance and replacement, can compromise safety, and may not be consistent with sound engineering practices."³ The Commission also recognized that utilities may reasonably regard such practices as "fundamentally unsafe or otherwise incompatible with proper attachment practice."⁴ For these reasons, the Commission ordered that utilities may choose not to use or allow boxing and bracketing practices, subject to a condition that any permitted use of such practices be objective and competitively neutral.⁵

The need for the Commission to clarify that its rules apply in the absence of publicly promulgated state regulations has become acute. Both the states of New Hampshire and Vermont have regulations that are consistent with Commission rules and regulations and these state rules reflect the concerns identified in the Commission's Order. However, Maine's *ad hoc* decision-making not only creates physical and operational risks, but also leaves FairPoint subject to conflicting rules within these three contiguous New England states.

The requirements of § 224(c)(3) are explicit – "a State *shall not be considered to regulate* ... terms and conditions for pole attachments ... unless the State has *issued and made effective* rules and regulations..." (emphasis added). These requirements provide important substantive and procedural safeguards. While a state may choose to implement rules and regulations that conflict with federal policy, it may only do so through public proceedings and promulgated regulations that ensure a process for policy determinations that prevents arbitrary or *ad hoc* decision-making. However, FairPoint does not encourage states to issue rules and regulations that are in conflict with federal rules and regulations, particularly when the FCC has already conducted a thorough investigation and issued a reasoned determination on boxing and

³ *Id.* ¶ 11.

⁴ *Id.*

⁵ *Id.* ¶¶ 9, 11-13.

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bracketing. On matters of safety, sound engineering, and preservation of critical infrastructure there should not be piecemeal regulation across the states.

For these reasons, FairPoint explained to Commission staff that it is important for the Commission to clarify that if a state has not promulgated rules and regulations regarding terms and conditions of pole attachments, including boxing and bracketing policies, then the Commission's rules continue to apply. In addition, FairPoint requests that the Commission advise the States that their rules and regulations on boxing and bracketing should be consistent with federal rules and regulations, and that before departing from Federal policy they should consider the Commission's findings regarding the operational and safety risks of boxing and bracketing and be prepared to explain how variations in state rules and regulations comply with the Act.

Very Truly Yours,

/s/

Karen Brinkmann
LATHAM & WATKINS LLP

Counsel for FairPoint Communications, Inc.

cc: Angela Kronenberg