

FISH & RICHARDSON P.C.

1425 K STREET, NW
11TH FLOOR
WASHINGTON, DC
20005

Telephone
202 783-5070

Facsimile
202 783-2331

Web Site
www.fr.com
Shirley S. Fujimoto
202 626-7754

Email
fujimoto@fr.com

Frederick P. Fish
1855-1930

W.K. Richardson
1859-1951

March 16, 2011

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554



ATLANTA

BOSTON

DALLAS

DELAWARE

HOUSTON

MUNICH

NEW YORK

SILICON VALLEY

SOUTHERN CALIFORNIA

TWIN CITIES

WASHINGTON, DC

Re: Implementation of Section 224 of the Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Docket No. 07-245; A National Broadband Plan for Our Future, GN Docket No. 09-51; Notice of Ex Parte Presentation

Dear Ms. Dortch:

On March 15, 2011, Aryeh Fishman of the Edison Electric Institute ("EEI") and Shirley Fujimoto and Kevin Cookler of Fish & Richardson P.C. met with Christine Kurth, Policy Director and Wireline Counsel to Commissioner Robert McDowell to discuss issues regarding pole attachments that are currently under consideration by the Commission in the above-referenced proceeding.

In this meeting, EEI discussed the need for flexibility in any timelines that the Commission may be considering for the make-ready process, including situations where "stopping the clock" or "safe harbors" would be warranted. As EEI discussed in its comments, certain situations, including but not limited to the following, should stop any make-ready clock: (1) severe weather conditions, outages and other force majeure type events that require utilities to engage in extensive restoration efforts; (2) state and local regulatory proceedings, such as a state public utility commission rulemaking that affects pole attachments; (3) a deficient application that must be returned by the electric utility to the applicant; (4) failure of an attaching entity to respond timely to a utility's request for additional information; (5) failure of an existing attacher to cooperate in moving its facilities to accommodate a new attacher; or (6) the need for a utility to modify a facility to bring it up to

Marlene H. Dortch
March 16, 2011
Page 2

code when a new attachment is added to a pole or where a utility may have been unaware of a safety violation until make-ready is performed.¹

EI discussed why third party contractors under the direction of attaching entities should not be permitted to perform electric make-ready or otherwise work in the electric space. To the extent that the Commission may be considering allowing third-party contractors to do so, EI discussed the need for the pole owner to have supervisory and contractual control over contractors working in the electric space.

EI urged the Commission to adopt strong incentives to ensure that the safety and reliability of the electric utility infrastructure is protected, such as by requiring the attaching entity to provide a surety through either a bond or letter of credit to cover any potential damages caused by the contractor so that the pole owner has assurances that it will actually be able to recover payment. EI also discussed that attaching entities should be required to indemnify, protect and hold harmless the pole owner from any claims which arise out of the actions of the third-party contractor or that the pole owner should be allowed to recover liquidated damages from the attaching entity for any harm that may occur due to actions by a contractor.

EI also discussed the problem of unauthorized attachments and the need for the Commission to provide the proper incentives to ensure that attachments to utility infrastructure are appropriately authorized. EI pointed to the model adopted by the Oregon Public Utilities Commission as an example of liquidated damages that should be considered just and reasonable. As EI discussed in its comments filed in this proceeding, the Oregon Commission's system includes:²

- An unauthorized attachment fee of \$500 per pole for licensees without a contract.
- An unauthorized attachment fee of five times the current annual rental fee if the licensee does not have a permit and the violation is self-reported by the attaching entity or found through a joint inspection process, with an additional sanction of \$100 per pole if the violation is found by the pole owner.
- A fee of \$200 per pole for safety violations, plus the actual costs of correcting all violations for which the attacher is responsible.
- The FCC should also establish a rebuttable presumption that if an unauthorized attachment is in violation of an applicable safety requirement, the attacher caused the safety violation.

¹ See Comments of EI and UTC at 22-25 (filed Aug. 16, 2010).

² See Comments of EI and UTC at 56-57.

Marlene H. Dortch

March 16, 2011

Page 3

- A utility is allowed to impose an enforceable time limit for attaching entities to correct safety violations, with additional fees for failing to correct violations by the deadline.
- In the case of safety violations that create an imminently hazardous condition on the pole, the pole owner may fix the violation and recover the costs incurred if the licensee does not respond promptly.
- All liquidated damages should be adjusted for inflation.

EI discussed that electric utilities have a statutory right under Section 224(f)(2) to deny pole-top access for wireless attachments for reasons of safety, reliability and generally applicable engineering purposes. To the extent that some pole owners may allow pole-top access, EI emphasized that this is a case-by-case, pole-by-pole analysis consistent with the nondiscriminatory access requirement in Section 224(f)(1).

EI also explained that the FCC's "shot-clock" order for wireless tower siting and collocation does not serve as a model for adopting a make-ready timeline for wireless attachments.³ EI discussed that the type of review conducted by a local or state government is very different from the field survey and engineering analysis conducted by an electric utility to determine whether an attachment can be safely installed on critical utility infrastructure. Unlike electric utilities, a state or local government is not tasked with evaluating how a collocation request would affect electric utility service and reliability. The state or local government does not have to schedule and oversee any make-ready work to electric utility infrastructure that is needed to accommodate the collocation, including the relocation or rearrangement of existing attachers.

EI explained that under the FCC's shot-clock order, the FCC defined the time period after which the applicant can seek judicial redress for a state or local government's failure to act on a wireless facility siting application. The state or local government still has an opportunity to rebut the presumption of reasonableness regarding the timeframe for review of the application. Thus, the deadlines in the shot-clock order are only used as a rebuttable presumption and the wireless applicant still has petition a court before it has authority to begin construction. This is in contrast to the FCC's proposal to allow an attacher to use a third-party contractor to perform make-ready work if the proposed deadlines are not met.

In addition, EI discussed issues the Commission has raised in this proceeding regarding the appropriate treatment of incumbent local exchange carriers (ILECs) for

³ See EI and UTC Reply Comments at 20-21 (filed Oct. 4, 2010).

FISH & RICHARDSON P.C.

Marlene H. Dortch
March 16, 2011
Page 4

pole attachment purposes. Finally, EEI discussed how the proposed telecom rate formula is inconsistent with Section 224(e).

The positions and views expressed by EEI were consistent with its written filings in the docket of this proceeding.

In accordance with the Commission's rules, one copy of this *ex parte* notice is being filed electronically for inclusion in the records of the above-captioned proceedings.

Very truly yours,

/s/ Shirley S. Fujimoto

Shirley S. Fujimoto

Counsel for the Edison Electric Institute

cc: Christine Kurth