

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

Jeffrey L. Sheldon
202 626-7761

Email
jsheldon@fr.com

Frederick P. Fish
1855-1930

W.K. Richardson
1859-1951

March 22, 2011

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



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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 21, 2011, Aryeh Fishman of the Edison Electric Institute (EEI) and Jeffrey Sheldon and Kevin Cookler, counsel to EEI, met with Margaret McCarthy, Wireline Policy Advisor to Commissioner Michael Copps, to discuss issues regarding pole attachments that are currently under consideration by the Commission in the above-referenced proceeding.

In this meeting, EEI discussed issues the Commission has raised in this proceeding regarding the appropriate treatment of incumbent local exchange carriers (ILECs) for pole attachment purposes. As EEI discussed, the FCC does not have authority to regulate attachments by ILECs because Section 224(a)(5) explicitly excludes ILECs from the definition of "telecommunications carrier" for purposes of pole attachments.¹ Attached is a copy of an *ex parte* filing submitted by EEI in the above-referenced proceeding on March 18, 2011, which discusses in greater detail the legal analysis of the statutory prohibitions against Commission regulation of the rates, terms, and conditions for ILEC pole attachments.

EEI also discussed how the proposed telecom rate formula is inconsistent with Section 224(e). In particular, EEI explained that the proposals in the Further Notice of

¹ See EEI and UTC Comments at 78-83 (filed Aug. 16, 2010).

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Proposed Rulemaking (FNPRM) ignore key provisions of Section 224 as well as Congressional intent in adopting the 1996 amendments to Section 224, in an effort to drive rates under Section 224(e) to levels that are at or below the rates calculated under Section 224(d), a grandfathering provision for “cable-only” pole attachments.

EEI 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. EEI 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 EEI 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.
- 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.

EEI 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, EEI emphasized that this is a case-by-case, pole-by-pole

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

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analysis consistent with the nondiscriminatory access requirement in Section 224(f)(1).

EEI also 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 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.³

EEI 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, EEI discussed the need for the pole owner to have direct supervisory and contractual control over contractors working in the electric space.

EEI urged the Commission to adopt strong measures 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. EEI 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.

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

We are also providing you with the attached letter from Joseph M. Rigby, President, Chairman and CEO of Pepco Holdings, Inc. (PHI), one of the largest energy delivery

³ See Comments of EEI and UTC at 22-25 (filed Aug. 16, 2010).

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companies in the Mid-Atlantic region, serving approximately 1.9 million customers in Delaware, the District of Columbia, Maryland and New Jersey.⁴ As discussed in the letter from Mr. Rigby, it is important that any changes to rules governing pole attachment access and rates do not negatively affect the safety and reliability of electric utility systems. EEI joins PHI in urging the Commission to ensure that protections are in place to guarantee that critical electric infrastructure is not compromised just for the sake of speed and lower cost in telecommunications attachments.

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/ Jeffrey L. Sheldon

Jeffrey L. Sheldon

Counsel for the Edison Electric Institute

Enclosures

cc: Margaret McCarthy

⁴PHI's regulated utility subsidiaries include Pepco, Delmarva Power, and Atlantic City Electric.