

March 23, 2011

EX PARTE

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

Re: *In the Matter of 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:

On March 22, 2011, Patrick Webre of Charter Communications, Paul Glist and Jill Valenstein of Davis Wright Tremaine, LLP (“DWT”) on behalf of Charter Communications, and John Seiver of DWT on behalf of the State Cable Associations and Operators, met separately with Margaret McCarthy, policy advisor to Commissioner Copps, Bradley Gillen, legal advisor to Commissioner Baker and Angela Kronenberg, legal advisor to Commissioner Clyburn, to discuss the Commission’s Further Notice of Proposed Rulemaking in WC Docket No. 07-245 (“FNPRM”).

At the meetings, Charter expressed strong support for the proposal in the FNPRM to promote broadband deployment by ensuring that pole attachment rates for all attachers are as low and close to uniform as possible. Charter explained that the current telecommunications formula, along with regulatory uncertainty over its applicability, has resulted in excessive rates, protracted disputes and created barriers to broadband deployment. In contrast, Charter noted that the cable rate formula has facilitated billions of dollars in investment by cable operators. Charter also commented that no utility has refuted the National Broadband Plan’s conclusion that removing the risk of higher rents for cable companies and lowering rents for CLECs will promote broadband deployment. The parties also discussed that the courts, other public utility commissions and the National Association of State Utility Consumer Advocates have all concluded that the cable rate formula justly compensates utilities.

The parties also discussed that the additional penalties for unauthorized attachments proposed in the FNPRM would increase the cost of and slow broadband deployment, contrary to the Commission’s goals. Charter explained that, based on its experience in Oregon, allowing utilities to charge attachers large, non-compensatory penalties will only create a cottage industry

DWT 16771565v1 0108500-000001

March 23, 2011

Page 2

focused on collecting the penalties, rather than achieving permitted and safe plant. The parties discussed that when the Oregon penalty regime was first adopted in Oregon, abuse of the system was so rampant that the Oregon Public Utility Commission (“PUC”) was inundated with complaint cases and eventually was forced to limit the penalty regime. Despite these limitations, Charter explained that abuses still exist and attachers must spend significant resources monitoring the program and disputing penalty notices, rather than deploying plant. Charter further explained that without the constant oversight of the Oregon Joint Use Association, which is a unique, stake-holder organization created by the Oregon State Legislature to oversee these issues, as well as extensive Oregon PUC electric staff participation in the field (neither of which the Commission has available), utility abuse of the program would continue unchecked but now on a national scale.

The parties also asked the Commission to reconsider its conclusion not to require pole replacements as part of traditional make-ready procedures. This request for reconsideration is the subject of a pending petition for reconsideration filed by the State Associations and Operators¹ and a recent ex parte letter that was also supplied to the legal advisors.² We explained that pole replacements have been a routine part of pole ownership and pole make-ready for decades. When utilities (or joint owners) need additional height, and the pole location can accommodate it, they replace existing poles with taller poles. When a joint user or attacher asks for a change-out, the party requesting the change-out pays for the new pole, as well as reimburses other attachers (including the utility) to move to the new pole. Change-outs are sought only when measures like boxing, bracketing, or rearrangement will not allow further access to a given pole. Accordingly, we explained that the Commission should revisit its *Pole Order* and require utilities that perform pole changeouts for themselves, joint owners, or other joint users to also change-out poles on a nondiscriminatory, cost-justified basis for other existing or new attachers, unless external factors physically preclude installing taller poles.

Finally, Charter expressed its strong support for retaining the so-called “sign and sue” rule. Charter explained that the rule was established more than 30 years ago to ameliorate pole owners’ superior bargaining position, which remains unchanged, and to assure the Commission’s

¹ See Petition for Reconsideration or Clarification of Alabama Cable Telecommunications Association, *et al.*, WC Docket No. 07-245, GN Docket No. 09-51, Sept. 2, 2010 (seeking review of pole change-out conclusions in *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 25 FCC Rcd. 11864 (2010) (“*Pole Order*”)); Reply to Oppositions to Petition for Reconsideration of Alabama Cable Telecommunications Association, *et al.*, WC Docket No. 07-245, GN Docket No. 09-51, Nov. 12, 2010. CTIA and Time Warner Cable supported the Petition. Comments of Time Warner Cable Inc. Regarding Petitions for Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, Nov. 1, 2010, at § II; Comments of CTIA – the Wireless Association, WC Docket No. 07-245, GN Docket No. 09-51, Nov. 1, 2010, at 6-9.

² Letter from John D. Seiver to Ms. Marlene Dortch, dated March 16, 2011, submitted in Dockets 07-245 and 09-51.

March 23, 2011

Page 3

authority to enforce its pole attachment rules. Charter explained that the “sign and sue” rule, and the assurance that the Commission can apply its rules to agreements, provides a critical check on utilities when they are negotiating pole attachment agreements. Because utilities continue to have monopoly control of the pole, the rule serves the same important function today as when it was first established. For these reasons, the rule has repeatedly been upheld (as recently as 2002) by the courts as a reasonable exercise of the Commission’s duty to guarantee effective pole attachment regulation. The parties also discussed that under the “sign and sue” rule, pole owners have the ability to demonstrate that an attacher bargained away the rate, term or condition that it subsequently challenges and that a pole owner can never be “blind-sided” by a complaint because the current pre-complaint procedures require the parties to attempt resolution.

Please do not hesitate to contact me if you have any questions regarding these matters.

Very truly yours,

Davis Wright Tremaine LLP

/s/

Paul Glist