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March 29, 2011

ELECTRONIC SUBMISSION

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

Re: **EX PARTE**
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:

When addressing pole attachments in its National Broadband Plan (NBP), the Commission struck all the right notes in its discussion of facilitating deployment of broadband facilities.¹ *First*, the Commission recognized that pole attachment rates should be “as low and close to uniform as possible.”² *Second*, the Commission acknowledged that its rules should be amended to lower the costs associated with the pole-attachment “make-ready” process.³ *Third*, the Commission recommended formulating a “comprehensive timeline” for Section 224 access and “reform[ing] the process for resolving disputes” over infrastructure access.⁴ Subject to certain caveats, AT&T has backed these laudable goals. To achieve them, however, the Commission can not proceed by taking half measures.

A. The Commission Needs to Set a Broadband Attachment Rate That is as Close to Uniform As Possible for All Attachers and That Can be Made Effective as Soon as Possible.

Present pole-attachment rates vary widely among the different attachers and—as acknowledged by the Commission—such differences “distort[] attachers’ deployment decisions.”⁵ Cognizant of this disparity in rates, in its *2010 Notice*, the Commission sought comments among other things as to whether “arrangements between incumbent LECs and electric companies historically provide more favorable terms and conditions to attaching incumbent LECs than competitive

¹ FEDERAL COMMUNICATIONS COMMISSION, NATIONAL BROADBAND PLAN: CONNECTING AMERICA, INFRASTRUCTURE (rel. Mar. 16, 2010) (*NBP*).

² *Id.* at INFRASTRUCTURE: RECOMMENDATIONS, p. 109.

³ *Id.*

⁴ *Id.*

⁵ *NBP*, RECOMMENDATION 6.1, p. 110.

LECs and cable operators receive from electric companies under license agreements.”⁶ While the comments filed in response to this notice differed greatly depending upon their source, AT&T does not believe the record evidence justifies the widely disparate pole-attachment rates about which the Commission has expressed justifiable concern. Nor do such comments affect the Commission’s authority under Section 224(b) to ensure just and reasonable pole-attachment rates—authority the Commission should exercise by establishing a uniform broadband attachment rate that applies to all attachers.

In assessing the terms and conditions of existing joint-use agreements, it is important for the Commission to note that most of these agreements were negotiated before—some many decades before—the introduction of competition in the telecommunications market brought about by the Telecommunications Act of 1996 and before the advent of price-cap regulation. The rates, terms and conditions to which an incumbent LEC may have agreed in the absence of competitors—especially competitors who enjoy legally prescribed lower rates—and under a rate-of-return regulatory regime would be vastly different than the rates, terms and conditions negotiated in today’s environment.

The Commission will, of course, evaluate recent claims by some electric companies that establishment of a low and uniform pole attachment rate for all broadband attachments that includes ILEC attachments would somehow be tantamount to granting either a windfall or a competitive advantage to ILECs over other pole attachers. For this reason, AT&T proposed that the Commission amend its Section 224 pole-attachment complaint procedures (47 C.F.R. §§ 1.1401 *et seq.*) to allow an ILEC to bring a complaint challenging any alleged unjust and unreasonable broadband attachment rates in excess of the uniform rate.⁷ This process would allow the Commission to conduct a detailed and real-world examination of the monetary value of any benefits such agreements allegedly provide ILECs. In resolving such a complaint, the Commission could determine that an attachment rate that is higher than the uniform broadband attachment rate would nonetheless be just and reasonable based on the value conferred by or costs avoided under a joint-use agreement.

Another way of reaching the same goal is by establishing a “safe harbor” for utilities. For example, the Commission could find that a utility could assess an ILEC up to 110% of any uniform broadband attachment rate to compensate the utility for the alleged “more favorable terms and conditions” provided ILECs under joint-use and joint-ownership agreements. Rates in excess of the 110% safe harbor would be subject to challenge in a complaint proceeding before the Commission under modified pole-attachment complaint rules. “Safe harbor” remedies have been used in other circumstances.⁸

⁶ *Implementation of Section 224 of the Act*, WC Docket No. 07-245, et al., Order and Further Notice of Proposed Rulemaking, FCC 10-84, at para. 145 (rel. May 20, 2010) (*2010 Notice*).

⁷ Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from William A. Brown, General Attorney, AT&T Services, Inc., WC Docket 07-245, (Mar. 18, 2011). AT&T notes that, if the Commission acknowledges as it should its authority to regulate the rates charged ILECs for their attachments to electric utility poles, the pole-attachment complaint procedures should be amended regardless.

⁸ *See for example: Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001); *Presubscribed Interexchange Carrier Charges*, Order and Further Notice of Proposed Rulemaking, 17 FCC Rcd 5568 (2002); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order,

AT&T's proposed common-sense remedies address the concerns raised by the Commission and by some commenters about the alleged added value of the joint-use/ownership agreements. More important, however, they would facilitate negotiations between ILECs and electric utilities and would in all likelihood accelerate the application of the Commission's uniform broadband attachment rate. After all, to be effective, any resolution of this issue adopted by the Commission must be susceptible to implementation within a reasonable amount of time—otherwise the benefits of any uniform broadband attachment rate would be further delayed.

B. The Commission Should Adopt Pole-Attachment Access Rules That Are Flexible and That Are Not Unduly Burdensome.

AT&T generally supports the Commission's efforts to develop rules to accelerate access to poles.⁹ As we cautioned in our comments, however, “[t]here is simply no way anyone—the Commission, utilities, and potential attachers—can anticipate the variety of field conditions, local laws, and limitations on performance that can arise naturally and without unlawful intent in the pole-access process [and that t]he required flexibility to address these potential delays in the pole-access process must be built into the Commission's application and enforcement of any comprehensive timeline.”¹⁰ Instinctively, the Commission recognized this common-sense approach and referred to the pole-attachment regulations of five states: Connecticut, New Hampshire, New York, Utah, and Vermont.¹¹ While the regulations of these five states vary, they do incorporate flexibility.

For example, the Utah state pole-attachment regulations provide flexibility to systematically extend the time period over which the process unfolds as the number of poles included in an application increases. Small applications—those with 20 or fewer poles—are to be fulfilled over a 165-day period. As the number of poles in the applications increases, there is a corresponding increase in the time to perform the work. Plus, larger applications are subject to caps—*e.g.*, column (2) in the chart below applies to applications covering more than 20 poles but not greater than the lower of .5% of the pole owner's poles *or 300 poles* or column (3) in the chart below applies to applications covering more than 20 poles but not greater than the lower of 5% of the pole owner's poles *or 3,000 poles*. Above 3,000 poles (column (4)), the application is subject to good faith negotiation, subject to state commission review.

18 FCC Rcd 14014 (2003); *Universal Service Contribution Methodology; etc.*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006).

⁹ See Comments of AT&T, pp. 28-32.

¹⁰ *Id.* at p. 28.

¹¹ 2010 Notice, at para. 28.

UTAH ADMIN. R. 746-345-3(C)

Activity	(1) Requests for 20 or fewer poles	(2) Requests for more than 20 poles, but not more than the lower of .5% pole owner's poles or 300 poles	(3) Requests for more than 20 poles but not greater than the lower of 5% pole owner's poles or 3,000 poles	(4) Requests for more than the number of poles covered by (3)
Estimate ¹²	45 days	60 days	90 days	Negotiated
Perform Work ¹³	120 days	120 days	180 days	Negotiated
Total	165 days	180 days	270 days	Negotiated

More flexibility is injected into the process by allowing the pole owner to provide alternative time periods than those set out in the regulations along with an explanation for the anticipated delay.¹⁴ This would help address unanticipated events, such as Force Majeure events, that might impact the pole owner's ability to otherwise meet standard time periods.¹⁵ Presumably, any alternative time period provided by the pole owner would be subject to state commission review.

AT&T continues to endorse the incorporation of this sort of flexibility in any new regulations the Commission is considering in this proceeding. What's more, AT&T reiterates its support for the Commission to encourage local, commercially available, professional mediation of timeline disputes. Having access to disinterested, third-party technical professionals to judge the validity of exceptions to the norm in the timeline would, in AT&T's estimation, greatly enhance the pole access process.¹⁶

¹² The pole owner must either approve or deny the application within this time period and, if approved, provide simultaneously a completed make-ready estimate that includes an explanation of the work to be done, the cost of doing that work, and a time for completing the work, which cannot exceed the applicable perform-work period. UTAH ADMIN. R. 746-345-3(C)(1) (*Utah Rules*).

¹³ This perform-work time period starts with the pole owner's receipt of an initial deposit payment for the make-ready work. *Id.*

¹⁴ *Id.*

¹⁵ The ability of ILEC pole owners to process applications for pole attachments can be impacted not only by Force Majeure events (e.g., large storms—electrical storms, ice storms, tornadoes, hurricanes—labor unrest, earthquakes) in the pole owner's own territory, but also by such events in other areas if the pole owner's employees are committed to assist other ILECs to recover from them.

¹⁶ See AT&T Comments, pp. 20-23. Unless a state "reverse preempts" the Commission, the only avenue disputing parties have under existing Commission rules is to file a complaint in Washington, D.C. This is both expensive and time-consuming. Moving the dispute resolution process for pole access back out to the local communities or state will accelerate that process and reduce costs—both of which are stated goals of the NBP and the 2010 Notice.

Marlene H. Dortch

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Sincerely,

A handwritten signature in black ink, appearing to read "Willie Brown". The signature is written in a cursive style with a long horizontal flourish extending to the right.