

March 30, 2011

**EX PARTE**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> 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 29, 2011, Patrick Webre of Charter Communications, and Paul Glist and Jill Valenstein of Davis Wright Tremaine, LLP (DWT), on behalf of Charter Communications; Mary McManus of Comcast Corporation and Wes Heppler of DWT, on behalf of Comcast; and John Seiver of DWT, on behalf of the State Cable Associations and Operators, met with Zac Katz, Legal Advisor to Chairman Genachowski, Sharon Gillet, Chief of the Wireline Competition Bureau, and William Dever, Christi Shewman, Marcus Maher, and Jennifer Prime, all of the Wireline Competition Bureau, to discuss the Commission's Further Notice of Proposed Rulemaking in WC Docket No. 07-245 ("FNPRM").

At the meetings, the parties 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. We specifically discussed the appropriate pole attachment formula for cable-provided Voice over Internet Protocol service.

The parties also discussed how 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, Comcast and the State Associations (which includes the Oregon Cable Telecommunications Association) explained that, based on their experience in Oregon, allowing utilities to charge attachers large, non-compensatory penalties will only create a cottage industry 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 forced to limit the penalty regime. Despite these limitations, the parties explained that abuses still exist and attachers must spend significant resources monitoring the program and disputing penalty notices, rather than deploying plant. The parties 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 in Oregon, and if adopted here, on a national scale.

In order to ameliorate some of the adverse effects that additional penalties for unauthorized/no contract attachments will likely promote if adopted, the Commission should adopt guidelines to ensure any new penalty system is not abused, as it was in Oregon.

First, in order to assess any unauthorized attachment or no contract penalties, the utility must provide specific verifiable information on which poles are contacted with an unauthorized attachment (*i.e.*, the pole number and location of the alleged unauthorized attachment, including pole owner maps and GPS coordinates, if available) to allow the attacher to verify that the alleged unauthorized attachment belongs to that attacher and is an actual unauthorized attachment.<sup>1</sup> Without that information, no penalty may be assessed.<sup>2</sup> In addition, the utility must ensure the accuracy of any information prior to transmitting it to the attacher.<sup>3</sup>

Second, the utility may not apply penalties for unauthorized attachments in certain circumstances, including:

- It would not be reasonable for a utility to apply the no contract penalty where contract negotiations are in progress to replace an expired or terminated contract (including any dispute resolution over the contract), or when the parties are operating under an expired contract and both carry on business relations as if the contract terms are mutually agreeable and still applicable.<sup>4</sup>
- It would not be reasonable for a utility to apply unauthorized attachment penalties for immaterial pole count discrepancies, which often result during field counts for reasons other than an attacher installing unpermitted attachments. A reasonable approach is one currently used by Alabama Power to exclude the first 2% of any variance identified in a field count as measured against existing records.<sup>5</sup>
- It would not be reasonable for a utility to apply the additional penalty on top of the five year back rent penalty if the unauthorized attachment is reported by the attacher to the utility or is discovered through a joint field count.<sup>6</sup> A utility may apply the

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<sup>1</sup> See OAR 860-028-0190. [http://arcweb.sos.state.or.us/rules/OARS\\_800/OAR\\_860/860\\_028.html](http://arcweb.sos.state.or.us/rules/OARS_800/OAR_860/860_028.html)

<sup>2</sup> *Id.*

<sup>3</sup> See OAR 860-028-0115(6). [http://arcweb.sos.state.or.us/rules/OARS\\_800/OAR\\_860/860\\_028.html](http://arcweb.sos.state.or.us/rules/OARS_800/OAR_860/860_028.html)

<sup>4</sup> See OAR 860-028-0130(1)(b) and (c). See also 860-028-0060(4) (stating that “the last effective contract between the parties will continue in effect until a new contract goes into effect”).

[http://arcweb.sos.state.or.us/rules/OARS\\_800/OAR\\_860/860\\_028.html](http://arcweb.sos.state.or.us/rules/OARS_800/OAR_860/860_028.html)

<sup>5</sup> The 2007 Alabama Power pole attachment contract now in effect provides: “Notwithstanding the above, the parties agree that no unauthorized attachment penalties shall apply for the first 2% of any variance identified in a field count as measured against existing records.” Section 23.

<sup>6</sup> *Id.* at 860-028-0140(2)(a). [http://arcweb.sos.state.or.us/rules/OARS\\_800/OAR\\_860/860\\_028.htm](http://arcweb.sos.state.or.us/rules/OARS_800/OAR_860/860_028.htm)

additional penalty if the unauthorized attachment is discovered by the utility in a field count in which the attacher declined to participate, as long as the attacher had a reasonable opportunity to participate.<sup>7</sup>

- It would not be reasonable for a utility to retroactively reclassify categories of attachments as “unauthorized.”<sup>8</sup>
- If there has not been a baseline field count in ten years, it would not be reasonable for a utility to assess any unauthorized attachment penalties until an initial baseline field count has been performed and the parties have agreed to a pole count. Unauthorized attachments discovered in future pole counts are subject to unauthorized attachment penalties.<sup>9</sup>
- It would not be reasonable for a utility to apply the unauthorized attachment penalty and the no contract penalty to the same attachment.<sup>10</sup>

Third, no additional penalties are needed to incent attaching entities to install and maintain attachments in compliance with existing clearance and related requirements or to address similar claims of non-compliance. Penalties for alleged safety violations were not the focus of the NPRM or the FNPRM and there is no evidence that there is a systemic problem requiring a new penalty regime. Rather, utilities themselves, such as Progress Energy, have admitted that “[m]ost licensees either construct their facilities in compliance with the NESC and Progress Energy specifications in the first instance or timely correct any violations found during post-attachment inspection.”<sup>11</sup> There is also much evidence in the record demonstrating how application of penalties to disputes over clearances (*i.e.*, which party caused a particular violation—the utility or the attacher?) can create major controversies and delays, rather than focus the parties on making necessary corrections and carrying on with broadband operations and deployment.<sup>12</sup>

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<sup>7</sup> *Id.* at 860-028-0140(2)(b). [http://arcweb.sos.state.or.us/rules/OARS\\_800/OAR\\_860/860\\_028.htm](http://arcweb.sos.state.or.us/rules/OARS_800/OAR_860/860_028.htm)

<sup>8</sup> *See, e.g., Mile Hi Cable Partners, L.P., v. Public Serv. Co. of Colorado*, Order, FCC 02-95, 17 FCC Rcd 6268, ¶12 (2002), *aff'd*, *Public Serv. Co. of Colorado v. FCC*, 328 F.3d 675 (DC. Cir 2003) (“We agree that it would be unjust and unreasonable to allow [the utility] to collect unauthorized attachment fees for drop poles when [the utility] has provided no evidence to contradict [the cable company’s] evidence that prior to 1998, [the cable company] was not required to apply for, or pay for, attachments to drop poles.”)

<sup>9</sup> *See e.g., Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Case 03-M-0432, Order Adopting Policy Statement on Pole Attachments, at 7, Aug. 6, 2004 (requiring a baseline pole audit to be performed prior to the assessment of back rent penalties in future audits).

<sup>10</sup> *Id.* at 860-028-0160(1). [http://arcweb.sos.state.or.us/rules/OARS\\_800/OAR\\_860/860\\_028.htm](http://arcweb.sos.state.or.us/rules/OARS_800/OAR_860/860_028.htm)

<sup>11</sup> *See Ex parte* filing of Progress Energy (March 7, 2011).

<sup>12</sup> *See* Comments of Charter, at 26-32 (August 16, 2010)(recounting major delays and disputes arising in Oregon over assessments of penalties); Comments of NCTA at 42-50 (August 16, 2010). *See also* Reply Comments of Comcast, Ex. 3 (April 22, 2008) (showing that Oncor’s claim of massive violations were later shown to be virtually 100% the fault of the utility, not the attaching party); Reply Comments of Time Warner Reply, Ex. 3 (April 22, 2008) (demonstrating a similar situation with Entergy).

Ms. Marlene Dortch

March 30, 2011

Page 4

The parties also asked the Commission to reconsider its conclusion not to require pole replacements (or change-outs) as part of traditional make-ready procedures, and to clearly provide that any denial for insufficient capacity be on a non-discriminatory basis. This request for reconsideration is the subject of a pending petition for reconsideration filed by the State Associations and Operators<sup>13</sup> and a recent *ex parte* letter.<sup>14</sup> 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 and reimburses the utility and other attachers to move to the new pole. Accordingly, we support the request that the Commission require that if utilities perform pole change-outs for themselves, joint owners, or other joint users, then they also offer change-outs on a nondiscriminatory basis for existing and new attachers, unless external factors physically preclude installing taller poles. A change-out requirement would also advance the country's broadband policies. In seeking to "revis[e] ... pole attachment rules to lower the costs of telecommunications, cable, and broadband deployment and to promote competition, as recommended in the National Broadband Plan," the *Pole Order* underscored that "communications providers have a statutory right to use space- and cost-saving techniques ... consistent with pole owners' use of those techniques."<sup>15</sup>

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

Paul Glist

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<sup>13</sup> 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.

<sup>14</sup> Letter from John D. Seiver to Ms. Marlene Dortch, dated March 16, 2011, submitted in Dockets 07-245 and 09-51.

<sup>15</sup> *Pole Order* ¶ 1 (invoking *Omnibus Broadband Initiative*, Federal Communications Commission, "Connecting America: The National Broadband Plan," at 109 (2010) ("*National Broadband Plan*")) and ¶ 8.

Ms. Marlene Dortch  
March 30, 2011  
Page 5

cc: Zac Katz  
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