

**BEFORE THE
FEDERAL COMMUNICATIONS
COMMISSION WASHINGTON, D.C.**

In the Matter of)	
)	
The Electric Power Board of)	
Chattanooga, Tennessee)	
)	WCB Docket Nos. 14-115 and
City of Wilson, North Carolina)	14-116
)	
Petitions Pursuant to Section 706 of the)	
Telecommunications Act of 1996 for)	
Preemption of State Laws Restricting the)	
Deployment of Certain Broadband Networks)	

**COMMENTS OF NORTHERN VIRGINIA
ELECTRIC COOPERATIVE**

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I. INTRODUCTION AND SUMMARY

On July 24, 2014, the Electric Power Board of Chattanooga, Tennessee, and the City of Wilson, North Carolina (collectively, Petitioners), filed separate petitions asking that the Federal Communications Commission (“Commission”) act pursuant to section 706 of the Telecommunications Act of 1996 to preempt portions of Tennessee and North Carolina state statutes that restrict Petitioners’ ability to provide broadband services.

The Electric Power Board is an independent board of the City of Chattanooga that provides electric and broadband service in the Chattanooga area. The City of Wilson provides electric service in six counties in eastern North Carolina and broadband service in Wilson County. Both Petitioners allege that state laws restrict their ability to expand their broadband service offerings to surrounding areas where customers have expressed interest in these services, and they request that the Commission preempt such laws.

The Commission invited comments on these petitions due August 29, 2014. The Northern Virginia Electric Cooperative (“NOVEC”) offers these comments to enable the Commission to gain awareness of the business relationship that NOVEC must maintain with Comcast, and the tactics employed

by Comcast that strain that relationship. As Comcast is currently seeking regulatory approval to acquire Time Warner Cable (TWC) to form the largest cable television/internet provider in the United States, this Commission should take notice of Comcast's business practices and its legislative and litigation strategies to achieve its goals, to the detriment of smaller companies deemed by Comcast to be competitors.

NOVEC is compelled by Virginia state law, as well as practical circumstances, to accommodate Comcast's overhead communications plant on its pole infrastructure. NOVEC believes that Comcast's conduct as a part of this business relationship, including engaging NOVEC in costly litigation before the Virginia State Corporation Commission (VSCC), may be relevant and helpful to this Commission as it explores the controversy before it in the instant proceeding.

NOVEC is willing and able to produce affidavits and/or sworn testimony and subject NOVEC personnel to cross-examination in support of the facts and assertions set forth in these Comments. While NOVEC takes no position on the advisability of federal pre-emption of the state laws at issue here, the purpose of these comments is to advise the Commission of factual circumstances in Virginia, and to assert that, in general, competition in the wired broadband industry is beneficial to consumers. In litigation before the VSCC, as well as in lobbying at the Virginia General Assembly, Comcast has spared virtually no expense in employing regulatory and legislative tactics to attempt to achieve its business objectives of providing broadband service of marginal value, meaning that poor

customer service is a component part of the Comcast product. Rather than relying on superior performance in market competition to enhance its bottom line, Comcast instead does not hesitate to throw its considerable resources into non-market activities --- lobbying and litigation --- to its achieve financial goals.

Rates for pole attachment services paid by cable operators such as Comcast to rural electric utilities such as NOVEC have been very controversial in Virginia. NOVEC is currently involved in extensive and expensive litigation with Comcast before the VSCC. As set forth below in these comments, NOVEC's position in the VSCC pole attachment litigation¹ has been that NOVEC sought only reimbursement of its out-of-pocket costs expended (approximately \$400,000 per year) to accommodate Comcast's pole attachments. Comcast objected to NOVEC's quantification of NOVEC's out-of-pocket costs and sought to limit NOVEC's recovery for these expenses at nearly 25% of those incurred (approximately \$100,000 per year). NOVEC also raised issues with Comcast's conduct in the field that included more than 3,500 individual violations of the National Electrical Safety Code ("NESC"), plus nearly 3,000 unauthorized attachments to NOVEC's poles. Thus far, NOVEC has spent in excess of \$400,000 on the case currently before the VSCC.

It is not NOVEC's intention to re-litigate its Virginia state jurisdictional dispute with Comcast before this Commission --- although NOVEC would like the Commission to know that NOVEC has proven beyond any reasonable doubt

¹ The record in the case, thus far, is available at the VA SCC website under Case No. PUE-2013-00055

that the FCC's formula-based pole attachment rate, if applied to NOVEC, would fail to cover NOVEC's costs of providing pole attachment services (the accommodation of pole attachments) to Comcast and, as such, would require NOVEC's member-owners to subsidize Comcast shareholders without even so much as enhancing the penetration of wired broadband service in NOVEC's electric service territory. Rather, the point of these comments is to advise this Commission that NOVEC's experience with Comcast appears to be very much like that of Petitioners' experience with Comcast and other cable operators. Frankly – NOVEC's service reliability is detrimentally affected by Comcast's violations of the NESC and its practice of attaching to NOVEC's poles without advising NOVEC, resulting in an absence of the requisite engineering studies to determine whether the attachments impose strain upon the poles beyond their design capabilities. As a result, NOVEC's members are not well served by Comcast's tactics. In fact, NOVEC would be better off financially and operationally if there were no telecommunications attachments on its overhead pole infrastructure.

The remainder of these comments provides a description of NOVEC and then a recap of the pole attachment controversy before the VSCC. The concluding section states the relevance of these comments to this proceeding.

II. DESCRIPTION OF NOVEC

NOVEC is a locally-based, and locally-owned, supply and distribution electric cooperative headquartered in Manassas, Virginia. NOVEC is a not-for-profit corporation, and, as a cooperative, it is owned by its member-owners, the customers who purchase energy from NOVEC. NOVEC is governed by a nine-member board of directors elected by the customers. NOVEC's members share in any margins (profits) the Cooperative earns. All such, margins are allocated and credited annually back to the members; periodically, the board of directors approves a "retirement of patronage capital," which is returned to the active members in the form of reductions in the power bill, and to former members in the form of cash. The return of this patronage capital is referred to as "CashBack." In 2008, customers received CashBack distributions totaling more than \$26.5 million. In 2009, CashBack distributions were in excess of \$15 million, and since 1999 NOVEC has returned more than \$280 Million to its members.

NOVEC's service territory encompasses 651 square miles with 6,800 miles of power lines. NOVEC serves more than 156,000 homes and businesses located in Clarke, Fairfax, Fauquier, Loudoun, Prince William and Stafford counties, the City of Manassas Park and the Town of Clifton. NOVEC is one of the country's largest electric cooperatives, in terms of number of customers served. The majority of NOVEC's customers are residential and small

commercial; there are also a number of large commercial customers such as AOL, Potomac Mills Outlet Mall, NOAA's Mount Weather Facility, Vulcan Materials Company, Verizon, AT&T, Doane Food Products, and several Luck Stone Corporation quarry locations. NOVEC's service reliability has been the best in the DC Metro region for fourteen (14) consecutive years. In 2013, the system reliability was 99.99%; SAIDI² of 42 minutes; this translates to an average outage time of just over 2/3 of an hour per customer last year. This reliability record largely results from our well-trained staff of 307 highly productive employees and a well-designed, well-constructed, and well-maintained delivery infrastructure.

As independent and objective confirmation of NOVEC's overall excellence in meeting its members' needs, in 2012 JD Power & Associates ranked NOVEC first in the United States among the 126 largest electric utility systems in (a) Overall Customer Satisfaction, (b) Reliability and Power Quality, (c) Price-Value Proposition (Value for the Price Paid) and (d) Corporate Communications. NOVEC's excellent standing in the JD Power & Associates customer satisfaction survey has continued in 2013 and 2014.

III. THE VIRGINIA POLE ATTACHMENT CASE

On May 16, 2013, NOVEC filed with the VSCC its Application pursuant to § 56-466.1 F of the Code of Virginia for approval of pole attachment rates and

² System Average Interruption Duration Index.

terms and conditions related to attachments by Comcast, requesting that the VSCC determine just and reasonable rates for such attachments by Comcast to NOVEC's distribution poles. The case was docketed as VSCC Case No. PUE-2013-00055.

The method advocated by NOVEC to calculate pole attachment rates was simple in concept; in fact, much simpler and much more objective than the FCC pole attachment formula imposed upon investor-owned electric utilities. Accommodating communications and cable attaching entities on NOVEC's poles imposes costs on NOVEC that NOVEC would not incur in the absence of these attachments. To calculate these costs NOVEC recognized two alternative states: one where communications and cable attaching entities attach to NOVEC's poles; and one where they do not. The monetary difference between these two states were referred to in NOVEC's testimony before the VSCC as NOVEC's "out-of pocket" or "incremental" or "but for" costs of accommodating communications and cable attaching entities on NOVEC's poles.

The current state, of course, is that communications pole attachments certainly do exist; there are thousands of communications pole attachments on thousands of NOVEC's poles. Through careful and exhaustive analyses, NOVEC determined how much less its total annual costs would be if there were zero communications pole attachments on its poles. This cost difference was the annual amount of additional costs incurred by NOVEC attributable to having to accommodate communications pole attachments. In other words, this difference

is the incremental cost borne by NOVEC's member-owners from having communications attachments on NOVEC's poles. NOVEC sought to recover just that level of costs --- without any type of financial return or "profit" --- in pole attachment rental revenues, ensuring that NOVEC members do not wind up subsidizing the business of communications attaching entities, such as Comcast.

When economists look at the issue of subsidy, it is relatively simple --- at least in concept --- to determine the existence of a subsidy. When an economist probes the existence of a subsidy, the issue boils down to whether a rate or revenue stream is compensatory relative to incremental costs that a particular user activity caused. If the rate or revenue stream is demonstrated to be compensatory relative to incremental costs, no subsidy would exist. In the matter before the VSCC, NOVEC maintained that if NOVEC collected its incremental costs associated with communications pole attachments from the attaching entities, there would be no subsidy flowing from NOVEC members to pole attaching entities. From an economic or substantive standpoint, one could certainly argue that a return on capital (or profit) would also be required to entice an entity to provide pole attachment services. Notwithstanding this basic economic reality, NOVEC did not request a return on capital in the Virginia proceeding. Nevertheless, Comcast strenuously objected to NOVEC's proposed rate, forcing costly litigation by bombarding NOVEC with more than 400 interrogatories during the discovery phase, an obviously deliberate tactic intended to severely tax NOVEC's internal resources.

For the purposes of the VSCC proceeding, NOVEC defined “incremental costs” as any cost that NOVEC must incur in order to accommodate communications cables and facilities being attached to its poles. In order to determine the magnitude of these incremental costs, all additional effort, work and obligations undertaken by NOVEC solely to accommodate communications attachments were identified and quantified in annual dollar outlays. These costs were in addition to non-recurring make-ready charges that were collected outside of the pole rental fee, pursuant to Virginia law.

In its testimony before the VSCC, NOVEC witnesses fully described the operational activities and quantified associated costs that NOVEC undertook solely to accommodate communications attachments. The key point was that “but for” the presence of communication attachments on NOVEC poles, such work would not be necessary and would not otherwise be undertaken.

These areas of extra work and extra costs included:

- 1) Performing periodic third-party attachment surveys to determine whether any non-NOVEC facilities had been attached, and by whom;
- 2) Performing work to accommodate third party attachment transfers when replacing joint use poles;
- 3) Performing additional work in close proximity of communications lines attached to and hanging between NOVEC poles while trimming and cutting down trees and tree limbs (overhead right-of-way maintenance);

4) Performing additional work to clear and isolate cable or communications facilities from damaged electric lines and to clear downed trees and tree limbs across communication cables attached to NOVEC poles that posed a risk for damaging or taking down poles that also supported electric lines and equipment during electric service operations, particularly during significant weather events;

5) Performing additional work to field investigate reports received from customers and state and local emergency personnel of “wires down” that were found to be telecommunication cables;

6) Performing work to prepare for, and to undertake, joint use agreement negotiations;

7) Performing work associated with the administration of joint use agreements; and

8) The additional annual (not capital) costs associated with an extra 5 ft. of pole height on all joint use poles.

IV. COMCAST’S REACTION TO NOVEC’S PROPOSAL

NOVEC asserts in these comments that Comcast’s conduct in the case at the VSCC was extraordinary and served to greatly and unnecessarily increase NOVEC’s litigation costs far beyond a reasonable amount. Moreover, Comcast’s unwillingness to act in a reasonable manner even before the Virginia matter was filed at the VSCC left NOVEC no choice but to proceed with

litigation, costly as it was to NOVEC's members.

During the Virginia proceeding, Comcast served NOVEC with 16 separate sets of discovery consisting of more than 400 interrogatories (questions). Many of the questions were repetitive; however, those had to be answered or otherwise addressed by NOVEC. In a break with conventional practice before the SCC, Comcast went so far as to serve its first set of discovery questions consisting of 14 multi-part queries *before* NOVEC filed its initial direct testimony in the case. NOVEC's belief is that in propounding discovery before NOVEC filed its direct VSCC case, Comcast was employing yet another tactic that sought to advantage itself versus opponents with far, far fewer financial resources. In short, NOVEC now asserts that Comcast, a \$65 Billion/year corporation with vast resources, sought to "bully" NOVEC, a much, much smaller non-profit enterprise (less than \$500 Million/year) that sought only to protect the interests of its member consumers. These Comcast tactics were designed to, and certainly did, stretch NOVEC's limited internal resources and drive up NOVEC's litigation costs.

In the Virginia case, NOVEC repeatedly stated its belief that Comcast's numerous obfuscations and associated introduction of schools of red herring issues contained in its VSCC testimony were intended by Comcast to mask NOVEC's "but for" pole attachment rate proposal in the matter before the VSCC. As but one example, in the VSCC proceeding Comcast alleged that

NOVEC and Comcast were direct competitors in the provision of broadband services. Comcast claimed that NOVEC's proposed pole attachment rate was an attempt to "bottle-up" "bottleneck" facilities and thus somehow inappropriately advantage NOVEC, and disadvantage Comcast. This claim was absurd.

NOVEC offers a satellite-based, high-speed internet service branded as "NOVECnet" to provide internet access (no video or voice service) as a 'niche' service to rural customers throughout Virginia in areas where wireline broadband service providers have been unwilling to serve. NOVECnet presently has 306 subscribers in Virginia. Comcast testified that it has 647,043 video and (about the same number of) internet customers in Virginia according to the pre-filed testimony of a Comcast witness. A Comcast employee with an officer's title testified that NOVECnet even competed with Comcast for attachment space on NOVEC's poles, despite the obvious fact that a satellite-based wireless system couldn't possibly have any pole attachments at all. Comcast's claim that NOVEC and Comcast were direct competitors demonstrated the absurdity of the arguments that Comcast made in a regulatory proceeding to achieve its business objectives. It was unnecessarily costly and burdensome for NOVEC to even have to rebut this argument, and so many other equally outrageous Comcast arguments, during the course of the proceeding before the VSCC.

V. RELEVANCE TO THE EPB AND CITY OF WILSON, NC, FILINGS

Although a large electric cooperative, NOVEC is a relatively small enterprise (revenues of less than \$500 Million/year), especially when compared to an organization of Comcast's size. NOVEC has limited financial resources, something that Comcast attempted to exploit. As such, just as it was costly for NOVEC's members to fund NOVEC's participation in the pole attachment litigation before the VSCC, NOVEC simply cannot devote extensive resources to participate by way of special legal counsel in the instant proceeding. We are able to assist this Commission in this matter by providing insight into what occurred in the NOVEC-Comcast pole attachment proceeding before the VSCC. NOVEC has first-hand experience that Comcast uses its size and abundant financial resources to "bully" smaller, resource-constrained competitors/opponents.

Although this Commission has recognized that municipally-financed broadband service has risks and may discourage private investment, this Commission should also consider the immense size and asymmetrical resource advantage held by entities such as Comcast. If cable operators seek to gain or maintain advantage via intimidation, non-cooperation, or increasing the litigation costs of smaller, resource-constrained competitors/opponents, NOVEC holds that Comcast and other cable providers promote their business objectives in a manner that is not in the public interest.

Comcast may dispute every alleged fact, assertion, or opinion expressed by NOVEC in this pleading. Based on years of experience, NOVEC finds it a very rare circumstance when NOVEC and Comcast agree on anything related to pole attachment rates, terms of service, or conditions of pole attachment service, such as compliance with the NESC. NOVEC is comfortable relying on its business reputation as held by its members, business partners, and market research firms such as JD Power and Associates or Consumers Union as compared to that of Comcast. Regarding Petitioners' pleading in this proceeding, to the extent that Comcast or other cable providers employ similar tactics as employed by Comcast in the litigation before the VSCC, the relief sought by Petitioners is very likely in the public interest.