May 5, 2015

The Honorable Phil Berger
President Pro Tempore
North Carolina Senate
16 W. Jones Street, Room 2007
Raleigh, NC 27601-2808

Re: Senate Bill 88 and House Bill 403, Pole Attachment Compensation

Dear Senator Berger,

I am writing on behalf of the Fiber to the Home Council Americas, which has over 20 member companies that have manufacturing facilities, networks, or some other major presence in North Carolina, including Corning, OFS, Alcatel-Lucent, TE Connectivity, and numerous telecommunications providers, public and private. The Council strongly opposes Senate Bill 88, which, in an amended form, recently passed the Senate and its companion legislation, House Bill 403, now under consideration. This legislation seeks to repeal a key provision in North Carolina General Statute 62-350, which regulates access to poles, ducts, or conduits owned or controlled by a municipality or a membership corporation organized under General Statute 117. Doing so would harm consumers, competition, economic growth, and jobs.

Just six years ago, the North Carolina legislature remedied a flaw in the federal pole attachments statute, Section 224 of the Communications Act of 1934, by requiring municipalities and membership corporations organized under General Statute Chapter 117 that own or control poles, ducts, or conduits to permit access by a communications service provider at just, reasonable, and non-discriminatory rates, terms, and conditions. That law, General Statute 62-350 as amended by Session Law 2009-78, explicitly required the Business Court, in resolving disputes between attachers and these types of infrastructure owners over rates, terms, and conditions of access, to consider the regulatory framework adopted by the Federal Communications Commission (“FCC” or “Commission”) concerning pole attachment rates.

House Bill 403 effectively would remove consideration of the court-tested and economically-sound federal rules and regulations governing rates, terms, and conditions for access to poles, ducts, or conduits when there is a dispute over the rates charged for access to facilities owned or controlled by a municipality or a membership corporation. This would unravel the progress enabled by the FCC’s rules and regulations over time to facilitate

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1 The Council is a not for profit association with a mission to accelerate deployment of all-fiber access networks (including fiber to the home (“FTTH”)) by demonstrating how fiber-enabled applications and solutions create value for service providers and their customers, promote economic development, and enhance quality of life. The FTTH Council’s members represent all areas of the broadband access industry, including telecommunications, computing, networking, system integration, engineering, and content-provider companies, as well as traditional service providers, utilities, and municipalities.
attachment to these facilities by cable operators and telecommunications service providers. By eliminating the reference to the federal pole attachment rate regulation regime, the proposed legislation would enable municipalities or membership corporations to increase rates to unjust and unreasonable levels and impose more onerous terms and conditions for attachment to their facilities.

Experience in other states where, unlike North Carolina, there is no regulation of attachment rates charges by municipal utilities and cooperatives, demonstrates that harms would be immediate and substantial. Access to poles, ducts, and conduits is crucial for deployment of communications networks. Enactment of the instant legislation would slow deployment of new infrastructure, negatively affecting North Carolina consumers and economic activity in the state. It also would harm development of competition for high-performance broadband service.

Five years ago, the FCC’s National Broadband Plan explained that the cost of deploying a broadband network hinges on the “costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands. Collectively, the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20% of the cost of fiber optic deployment.”2 The Plan then recommended that the Commission foster broadband deployment by establishing rental rates for pole attachments that are as low and close to uniform as possible, lowering the cost of the pole attachment make-ready process, and establishing a comprehensive timeline for each step of the access process.3

One year later, the Commission amended its rules to, among other things, lower pole attachment rates paid by telecommunications providers to bring them closer to attachment rates paid by cable operators, and adopt strict timelines to expedite attachments.4 In doing so, the Commission reiterated basic precepts set forth by the U.S. Congress in adopting the Pole Attachment Act in 1978 to assist the then nascent cable television industry.

“Congress concluded that ‘[o]wing to a variety of factors, including environmental or zoning restrictions’ and the very significant costs of erecting a separate pole network or entrenching cable underground, ‘there is often no practical alternative [for network deployment] except to utilize space on existing poles.’ Congress recognized further that there is a ‘local monopoly in ownership or control of poles,’ observing that…’public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents…in the form of unreasonable high pole attachment rates.’”5

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3 Id. at 110-111.
Thus, the Pole Attachment Act specifically sought to allow cable operators to obtain critical fair, reasonable, and non-discriminatory access to utility and local exchange carrier infrastructure to facilitate their infrastructure deployment.

The Council recognizes that the federal pole attachments statute does not apply to a municipal utility or cooperative that owns or controls pole, ducts, or conduits. This exclusion in the federal law enabled electric membership corporations to charge excessive pole attachment rates when telecommunications carriers and cable operators sought to attach to their owned or controlled poles or conduit. The economics of a carrier’s or cable operator’s deployment in an area served by a municipal utility or a cooperative are no different than in areas where an investor owned utility or a local exchange carrier own the poles. This is a significant shortcoming of the federal law, and the Council applauds the North Carolina legislature for remediating this deficiency when it enacted Session Law 2009-78 by an overwhelming margin. Session Law 2009-78 requires that a municipality or a membership corporation organized under Chapter 117 of the General Statues that owns or controls poles, ducts, or conduits permit access by a communications service provider at just, reasonable, and non-discriminatory rates, terms, and conditions. Moreover, it recognizes that in resolving disputes between attachers and infrastructure owners over rates, terms, and conditions, the Business Court should consider and apply the rules and regulations of the FCC adopted in implementing Section 224 of the Communications Act.

Unfortunately, House Bill 403 seeks to turn back the clock and let municipalities and membership corporations inflate attachment fees far above reasonable levels. Just one year ago, the Business Court found that the pole attachment rates charged by the Rutherford Electric Membership Corporation (“Rutherford EMC”), which provides service in ten counties, greatly exceeded the maximum just and reasonable pole attachment rate calculated under the FCC’s cable rate formula. Primarily on this basis, the Business Court concluded that the Rutherford EMC rates were not just and reasonable under the North Carolina statute. Importantly, the court determined that the FCC’s formula was economically justified because it “calculates the maximum just and reasonable rate that a pole owner may charge based on an appropriately allocated share of the actual, documented costs of owning and maintaining a pole.” In addition, the Business Court concluded that the FCC’s formula “actually leaves the utility and its customers better off than they would be if no attachments were made to their poles.”

The Business Court’s decision recently was upheld in a unanimous decision of the Court of Appeals of North Carolina, which concluded that the Business Court “did not err in concluding that Rutherford’s rates…were neither just nor reasonable” and that Rutherford’s expert testimony as to the appropriate rate was “not supported by credible evidence.” Of real relevance for the North Carolina legislature, the Court of Appeals found there was substantial merit in using the FCC’s formula as prescribed by General Statute 62-350 because it is “well-understood, widely used, and judicially sanctioned.” Furthermore, the Business Court found that “reliance on established FCC precedent will, as the General Assembly intended, provide helpful guidance to parties involved in future negotiations over just and reasonable pole attachment, rates, terms, and conditions.”

The Business Court’s reliance on the FCC’s pole attachment rate formula should not have come as a surprise. The FCC’s pole attachment formula is durable, just, and widely accepted.
The Commission’s rate formula for cable operators has been in place for more than three decades.\textsuperscript{6} The rate for telecommunications carriers was added by Congress as part of the Telecommunications Act of 1996, and has been in place for nearly twenty years. Significantly, the U.S. Supreme Court and the U.S. Court of Appeals for the 11th Circuit have found that the FCC’s pole attachment formula for cable operators is justly compensatory and not confiscatory.\textsuperscript{7} Finally, the formula is used not only by the FCC, but also by most of the states that have certified to the FCC that they regulate pole attachments themselves and reverse preempted the FCC’s jurisdiction over pole access and attachment rates. As the National Rural Electric Cooperative Association, has acknowledged, the FCC’s rate formulas are not only “sanctioned by Congress,” they “have been adopted by most of the states that regulate pole attachments and are the most widely accepted methodologies for calculating pole attachment rates.”\textsuperscript{8}

The Rutherford EMC case is a major victory for North Carolina consumers who want more and better broadband. Rutherford wanted to charge rates ranging from $15.50 to $19.65 per pole; the rates calculated by the FCC’s compensatory formula were approximately $3 per pole. That enormous difference in price would impose major additional expense in a network build. Enabling communications service providers to attach at lower yet still compensatory rates will facilitate deployment of more gigabit, all-fiber networks in North Carolina by improving the economics of a network build.

All-fiber networks count. They foster local economic growth, facilitate social interaction, and promote increased community engagement. Just since the beginning of this year, there has been an overwhelmingly positive reaction to builds announced by AT&T, Frontier, Google and others in the state. For instance, North Carolina State’s vice chancellor for information technology and chief information officer explained, “A key issue in choosing a business location is the availability of fiber for both the business and its employees. Businesses will come to the region because they can now allow more telecommuting and bring IT services to a distributed workforce.”\textsuperscript{9}

More all-fiber builds also mean more jobs for North Carolina. As noted in the introduction, the Council has many members, including equipment vendors, construction companies, and communications service providers with a major presence in North Carolina. All would benefit from greater fiber investment and deployment.

\textsuperscript{6} National Broadband Plan at 110 (“[The cable rate] has been in place for 31 years and is ‘just and reasonable’ and fully compensatory to utilities.”).


\textsuperscript{8} See Rutherford EMC Business Court decision at 16, quoting NRECA.

\textsuperscript{9} See https://news.ncsu.edu/2015/01/what-google-fiber-may-mean/.
In conclusion, enactment of House Bill 403 would be bad for North Carolina consumers and businesses. The changes to the 2009 law are unnecessary to ensure that municipalities and membership organizations will be compensated adequately for attachment to their poles. By allowing municipalities and membership organizations that own or control poles to charge excessive fees and other unwarranted costs on attachers, the legislation would permit narrow interests to reap a windfall at the expense of community economic development and the public interest. That simply cannot be justified.

Should you have any questions about my letter or would like to discuss this issue further, you can contact me at heather.b.gold@ftthcouncil.org.

Sincerely,

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