

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

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JUL - 7 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Inquiry Regarding Carrier Current Systems, ) ET Docket No. 03-104  
including Broadband over Power Line Systems )

**COMMENTS OF KNOLOGY, INC.**

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July 7, 2003

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The Commission rightly seeks to facilitate the development and deployment of various competing platforms for the distribution of broadband services. However, if such development is to foster innovation, promote ubiquity, increase competition and drive down prices, market forces must be permitted to operate. The Commission must take actions to prevent exertion of monopoly control over essential facilities. Broadband over Power Line (“BPL”) currently is permitted on an unlicensed basis under Part 15 of the Commission’s rules.<sup>1</sup> However, its growth as a viable option requires the Commission to examine electric utility current participation in the broadband marketplace to encourage such participation without detriment to the proper operation of market forces.

Historically, some electric utilities have used their control of essential facilities to extract unreasonable payments or to impose unreasonable conditions for cable operator and

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<sup>1</sup> Inquiry Regarding Carrier Current Systems, including Broadband over Power Lines, ET Docket No. 03-104, *Notice of Inquiry*, FCC 03-100, ¶ 1 (rel. April 28, 2003).

telecommunications carrier attachment to their poles and other facilities.<sup>2</sup> These electric utilities' exploitation of their control over such facilities occurred notwithstanding the fact that they largely avoided entry into the product markets of their attachers (*i.e.*, telecommunications, cable television, and Internet services).

The Telecommunications Act of 1996 was predicated, in part, on the assumption that marketplace forces provided optimal outcomes, but only insofar as market imperfections could be corrected or controlled. Where an incumbent controlled essential inputs for the provision of telecommunications services, the statute sought to regulate that control in order to allow for competitive entry. Notably, before incumbent local exchange carriers could enter the competitive long distance market in-region, they had to demonstrate that they had opened their incumbent networks to use by competitors so as to allow for the growth of competition in an historically monopolized market. Section 271 restricts BOC entry into the competitive in-region long distance market until it can demonstrate compliance with a competitive checklist that includes the provision of nondiscriminatory access to the poles, ducts, conduits, and rights of way that it owns or controls in a manner consistent with Section 224.<sup>3</sup> This requirement not only seeks to open the local market to competition, but it also seeks to lessen the ability of the incumbent to leverage its control of essential facilities in a manner that would extend its market power from its core local exchange market into a separate but competitive long distance market.

Electric utilities control facilities essential to the facilities-based provision of Internet services. Some electric utilities have notoriously rendered telecommunications and cable

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<sup>2</sup> See National Cable & Telecommunications Ass'n v. Gulf Power Co., 534 U.S. 327, 330 (2002) (“Since the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents.”).

<sup>3</sup> 47 U.S.C. § 271(c)(2)(B)(iii).

network construction slow, difficult, and expensive through their make-ready processes.<sup>4</sup> The incentives to engage in such practices only increases as the electric utilities seek to compete with the attachers to their poles in the provision of broadband services. In short, the electric utilities will be in a position similar to the position of ILECs that warranted the section 271 checklist.

The entry of another competitor in the provision of broadband services is likely to involve consumer benefits, but not if it involves the elimination of existing competitors through anti-competitive practices. If electric utilities are permitted to exploit their control of essential facilities, they could irreparably damage the competitive market for broadband services. Although heightened enforcement of section 224 requirements through the pole attachment complaint process is necessary, it is insufficient. Already, electric utilities lack any incentive to comply with the requirements under that provision, as the penalties for noncompliance are little or non-existent. Instead, if an electric utility loses a pole attachment complaint filed against it, it must only comply thereafter with the statutory requirements; it has suffered nothing for imposing tremendous financial costs and delay on the attachers as a result of its unreasonable practices. This obviously creates an incentive to ignore the pole attachment rules.

This incentive will only be increased as electric utilities begin to provide broadband services. They will realize substantial benefits by increasing their competitors' network construction costs (*i.e.*, through excessive make-ready charges) or by slowing their competitors' time-to-market (by slowing make-ready work) so that the utility can approach and/or serve the customer first. The Commission's resolution of pole attachment complaints has not resulted in

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<sup>4</sup> Knology's dispute with Georgia Power, described in the pole attachment complaint proceeding between the two parties, provides a classic example of a utility's exercise of essential facility control in a manner that renders it difficult to construct a competitive facilities-based network in a timely and cost-effective manner. See generally Knology, Inc. v. Georgia Power Company, PA 01-006, *Complaint* (filed Nov. 21, 2001).

quick settlement of differences. Rather, since enactment of the Telecommunications Act of 1996, the average time between the filing of a pole attachment complaint and the release of a decision has been 22 months (for those complaints resolved by a Commission order as distinct from those resolved through settlement). An electric utility's 22-month head start in the marketplace (while a complaint is being processed at the Commission) can impose real harm on its competitor's position. The Commission's resolution of the complaint will do little to remedy this damage after the fact. Instead, the Commission should impose up-front requirements for electric utility provision of BPL to ensure that providers of broadband service are able to build out their networks without anti-competitive interference by the electric utility pole owners.

Knology respectfully suggests that the Commission include in a Notice of Proposed Rulemaking rules that would establish conditions precedent to electric utility entry into the broadband marketplace. The Enforcement Bureau has developed a good deal of experience with pole attachment issues and representatives from the Bureau should assist in the effort to craft appropriate rules in this regard. Knology does not suggest that enormous barriers be imposed on electric utilities; rather, it merely recommends putting systems in place to ensure that the spirit and letter of section 224 will be honored without the constant need for attachers to seek redress through the expensive and time-consuming pole attachment complaint process.<sup>5</sup>

In order to do so, Knology recommends the Commission's imposition of the following requirements that electric utilities must satisfy *prior to* entry into the broadband marketplace in-

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<sup>5</sup> Section 224 provides the Commission with sweeping authority that allows it to proceed in this manner. See 47 U.S.C. § 224 (b)(1) ("For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including cease and desist orders, as authorized by section 312(b) of title III of the Communications Act of 1934, as amended.").

region (that is, where the electric utility provides electric service and/or controls distribution facilities):

1. **Make-ready timing**: Time is of the essence in constructing facilities-based networks.<sup>6</sup> The electric utility should be able to demonstrate that it has effective procedures to ensure that it can complete attachers' make-ready requests within a reasonably short period of time. While make-ready procedures can and do vary considerably, certain standards can be established. First, the utility should respond to a make-ready request within 10 business days. In addition, the utility should be required to demonstrate that in the two years prior to broadband market entry, it has achieved an average completed make-ready rate of 40 miles per month.
2. **Compliance with section 224**: Prior to an electric utility's entry into the broadband market, entities that are attached to its poles or who seek to attach to its poles should be afforded the opportunity to comment on the utility's pole attachment-related practices. Parties can comment on make-ready procedures, attachment rates charged, and other matters related to the electric utility's exercise of its control over the facilities essential for providing facilities-based broadband services. Based on the record, the Commission would be afforded the ability to identify problems and could craft solutions as a condition precedent to an electric utility's provision of broadband services necessary to the preservation of a competitive broadband market.
3. **Penalties for non-compliance**: Once the electric utility is able to enter the broadband services market, the actual effects of section 224 violations could devastate competitive markets, slow broadband availability, and eliminate choices and/or increase broadband prices for consumers. In short, the stakes will be higher. Consequently, the electric utilities must be given greater disincentives to unreasonable practices than currently exist. The Commission should establish a practice of imposing forfeiture penalties for non-compliance with pole attachment requirements, and should increase forfeiture amounts if the electric utility has exhibited a pattern of violations or other egregious behavior.
4. **Audits**: Upon legitimate inquiry, the electric utility should be required to maintain its books in such a manner that it can readily demonstrate that it does not discriminate in favor of itself or its affiliates in the provision of make-ready services or pole attachment rates. These books and the utility's

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<sup>6</sup> See Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd 6777, ¶ 17 (1998) ("Prolonged negotiations can deter competition because they can force a new entrant to choose between unfavorable and inefficient terms on the one hand or delayed entry and, thus, a weaker position in the market on the other.").

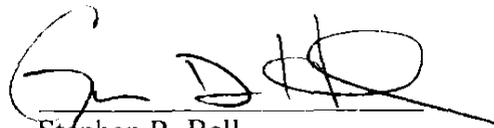
practices should be subject to periodic audits to ensure that the electric utility is not engaging in anti-competitive use of its essential facilities.

The entry of electric utilities into the broadband market could benefit consumers, but only if it is accompanied by responsible and vigilant regulatory oversight to ensure proper operation of market forces. The foregoing, along with any other recommendations, should be considered and discussed in the context of a rulemaking prior to the widespread deployment of broadband over power lines.

Respectfully submitted,

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