WC Docket # 14-52

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20544

ACCEPTED/FILED

FEB 19 2014

Federal Communications Commission
Office of the Secretary

Petition for Declaratory Ruling	)
Pursuant to Section 1.2(a) of	)
The Commission's Rules	)

PETITION FOR DECLARATORY RULING

Mediacom Communications Corporation ("Mediacom"), pursuant to Section 1.2(a) of the Commission's Rules,[1] hereby requests the Commission issue a declaratory ruling clarifying that an indemnification clause in a pole attachment agreement between a cable operator attacher and an utility pole owner, to the extent the clause imposes asymmetric and non-reciprocal indemnification liability for negligence on the attaching party, is not a "just and reasonable" term and condition of attachment and is therefore contrary to Section 224(b)(1) of the Communications Act.[2]

BACKGROUND

The question for which Mediacom seeks clarification arises in the context of Iowa state court tort litigation.[3] In 2011, a Mediacom employee working on pole owned by Interstate Power and Light Company / Wisconsin Power and Light ("IPL") was injured and later died due to the structural failure of the utility pole. An investigation conducted by counsel for the deceased employee of the pole post-accident indicated that the pole broke where it was flush to the ground, and that the pole was rotted and in a state of disrepair. The conservator of the employee and subsequently his estate brought a personal injury and then wrongful death action

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[1] 47 C.F.R. § 1.2(a).

[2] 47 U.S.C. § 224(b)(1).

[3] *Maribel Romero v. Interstate Power and Light, Interstate Power and Light v. MCC Iowa LLC*, Iowa District Court for Johnson County, Case No. LACV 075505.

in Iowa state court against IPL asserting negligence due to the condition of the pole.[4] IPL then filed a third party petition against MCC Iowa, LLC, a subsidiary of Mediacom, alleging two counts. IPL's count one alleges breach of contract for failure to accept a tender of defense pursuant to an indemnification clause in the parties' pole attachment agreement. Count two alleges a claim for indemnification for failure to accept the tender of defense.

It is Mediacom's position that there is no breach of contract, nor is there a duty to indemnify IPL, because if there is negligence it is the fault of the pole owner and not that of Mediacom. However, IPL contends that the indemnification clause requires Mediacom to defend and indemnify without regard to fault. By seeking to assert the indemnification clause, IPL is taking the position that even if the court finds it to be wholly responsible for the wrongful death claim, it is entitled to shift responsibility entirely to Mediacom.[5]

The specific indemnification clause contained in the IPL attachment agreement reads as follows:

> MCC Iowa, LLC agrees to take all necessary precautions to safeguard the public against damages or injury and to save IPL and/or WPL harmless from any and all damages, expense, cost and reasonable attorney fees on account of injury to person, life or property or injury resulting in the death of any person or persons in any manner arising out of or in connection with attachment, removal, relocation, rearrangement, reconstruction, repair or over-lashings of MCC Iowa, LLC's facilities to IPL and/or WPL's poles. If IPL and/or WPL is made a party to any suit or litigation on account of injury or damage or alleged injury or damage to person, life or property or on account of an injury or damage or alleged injury resulting in the death of any person or persons, arising out of or in connection with the attachment, removal, relocation, rearrangement, reconstruction, repair or over-lashings of MCC Iowa, LLC's facilities to IPL and/or WPL's poles, MMC Iowa, LLC will defend such actions on behalf of IPL and/or WPL, including claims or causative action at

[4] The underlying tort case is set for trial in July of 2015. Written discovery is ongoing but no depositions have taken place at this time. Expert disclosures are in December 2014 for the estate and in 2015 for the defendants.

[5] The employee/estate has filed a workers' compensation case against MCC Iowa, its employer. Under Iowa law the sole and exclusive remedy against the employer is workers' compensation benefits. Therefore, in order for the estate to successfully prosecute its claim there must be a finding of negligence against IPL as the defendant in this case. Absent negligence by IPL, the employee/estate has no claim.

> common law arising under any statute. If judgment shall be obtained or claim allowed against IPL and/or WPL, MCC Iowa, LLC will pay and satisfy such judgment or claim in full. IPL and/or WPL shall be indemnified except to the extent that such claim is the direct result [their] own gross negligence or willful misconduct.

Under this clause, in addition to being responsible for its own negligence and gross negligence/willful misconduct in connection with its use of the pole, Mediacom is additionally responsible for IPL's own negligence in connection with the poles, including IPL's own negligent maintenance of the poles. Thus, should the clause be enforced as written, Mediacom is potentially required to fully indemnify IPL for any liability to the deceased's estate if IPL's own negligence is determined to be the cause of the injury.

Thus, at the heart of IPL's tender of defense claim is a fundamental disagreement over the enforceability of the indemnification clause and whether the scope of the clause conflicts with the requirements of Section 224(b)(1) of the Communications Act. Mediacom believes that such a clause as written is contrary to Commission's pronouncements about the reasonableness of pole attachment indemnification clauses. The Commission's resolution of this enforceability issue would likely truncate the tender of defense litigation and expedite resolution of the deceased's estate underlying tort claim. Mediacom thus hereby seeks further Commission clarification and guidance as to permissible indemnification clauses.

ARGUMENT

Under Section 224(b)(1) and related Commission rules and orders, terms and conditions contained pole attachment agreements between cable operators and electric utilities must be "just and reasonable." The Commission has addressed "just and reasonable" indemnification clauses just once. In the Enforcement Bureau's 2003 *Georgia Power* order, the Bureau explained:

> **8. Indemnities/Limits of Liability**
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> 30. The Cable Operators object to several aspects of the New Contract's provisions concerning indemnities/limits of liability, namely sections 8.1 (requiring the Cable Operators to indemnify Georgia Power from and against liability, but not vice versa), 8.2 (placing a six-month limitation on claims against Georgia Power), and 8.4 (allowing Georgia Power to control the defense of claims against the Cable Operators). Georgia Power's arguments in defense of these provisions miss the mark, and we find the provisions to be unreasonable.
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> 31. As an initial matter, Georgia Power relies generally on the Cable Operators' allegedly poor safety practices as a justification for the challenged provisions, claiming that it should not be required to pay for damages it did not cause. As explained above, however, the record in this case does not support the safety defense. In any event, the Cable Operators do not contend that indemnification provisions generally are unreasonable; instead, they claim that these particular provisions are unreasonable. Second, Georgia Power argues that, because of mandatory access, a non-reciprocal indemnification provision is warranted given that the Cable Operators allegedly pose a "far greater, and unwanted, risk" to Georgia Power in the pole attachment process. A reciprocal indemnification provision, however, simply would result in each party assuming responsibility for losses occasioned by its own misconduct. Consequently, if Georgia Power is correct that the Cable Operators more frequently are the "bad actors," then the Cable Operators more frequently would be called upon to indemnify. Finally, Georgia Power offers no response to the Cable Operators' argument that they should not be forced to bring claims in a shorter period than required by law or to relinquish their right to defend claims against them. We cannot discern any rational basis to support those contractual provisions.[7]

[7] *Cable Television Association of Georgia v. Georgia Power Co.*, Order, 18 FCC Rcd 16333, ¶¶ 30-31 (Enf. Bur. 2003), *recon. denied* 18 FCC Rcd 222871 (Enf. Bur. 2003).

From this explanation, three principles can be deduced to judge the reasonableness of pole attachment agreement indemnification clauses and their compliance with the requirements of Section 224(b)(1) – such indemnification clauses (1) are generally permissible, (2) must be reciprocal in nature, and (3) must provide that each party be held liable for any losses caused by its own misconduct. Notwithstanding the Commission's pronouncement, utility pole owners continue to steadfastly insist on non-reciprocal indemnification clauses akin to IPL's, often claiming that the Bureau's holding was less than clear, especially in the context of ordinary negligence.

Based on the *Georgia Power* principles, the Commission should clarify that an indemnification clause such as IPL's that imposes asymmetric indemnification responsibility for negligence solely on the attaching party, and indeed holds the attaching party responsible for negligence by the utility owner, should be deemed not to be a "just and reasonable" term and condition of attachment. First, any indemnification clause that purports to impose liability for negligence of the pole owner solely on the attacher, and not vice versa, is by no means reciprocal. The attacher is left liable for not only its own negligence and gross negligence/willful misconduct, but also for the pole owner's negligence. Second, any such clause plainly violates the principle that each party should be liable for their own misconduct, but not the misconduct of the other party.

In addition to a proper resolution of the litigation, such a clarification would provide helpful clarity in future pole attachment negotiations over the scope of permissible indemnification provisions. Pole owners often misstate the holding of *Georgia Power* in regard to such clauses, resulting in unnecessary haggling over what really should be a settled issue. In this vein, we ask that the Commission clearly reiterate that negligence, gross negligence and

willful misconduct are all forms of misconduct for which each party to a pole attachment agreement should be held wholly responsible for its own conduct. To hold otherwise would allow pole owners to unjustly shift the cost of their own misconduct onto attachers, and create disincentives for pole owners to maximize the safety of their distribution plant.

CONCLUSION

For the foregoing reasons, Mediacom respectfully requests that the Commission issue a declaratory ruling clarifying that an indemnification clause in a pole attachment agreement between a cable operator attacher and an utility pole owner, to the extent the clause imposes asymmetric and non-reciprocal indemnification liability for negligence on the attaching party, is not a "just and reasonable" term and condition of attachment and is therefore contrary to Section 224(b)(1) of the Communications Act.

Respectfully submitted,

MEDIACOM COMMUNICATIONS CORPORATION

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