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VIA ELECTRONIC FILING

Bernadette McGuire-Rivera

Associate Administrator, Office of Telecommunications and Information Applications

David P. Grahn

Associate General Counsel, Rural Development

Broadband Technology Opportunities Program

U.S. Department of Commerce, Room 4812

1401 Constitution Avenue, NW

Washington, DC 20230

**RE: Comments on the American Recovery and Reinvestment Act
Broadband Initiatives of the National Telecommunications and
Information Administration and the Rural Utilities Service
Docket No. 090309298-9299-01**

Dear Ms. McGuire-Rivera and Mr. Grahn:

Alliance Communications Network (“Alliance”) respectfully submits these brief comments in response to the Joint Request for Information and Notice of Public Meetings (“Joint Request”) issued March 9, 2009, by the Department of Commerce, National Telecommunications and Information Administration (“NTIA”), and the Department of Agriculture, Rural Utilities Service (“RUS”).¹ Alliance is a privately-owned broadband cable company headquartered in Greenbrier, Arkansas, serving approximately 3,800 subscribers in nine rural communities.² Although Alliance provides traditional video cable services to most of its subscribers, we also provide high-speed Internet and competitive telephone services in a few markets. Alliance is committed to the rural markets that we serve and is encouraged by the federal government’s renewed commitment to universal broadband deployment with enactment of the American Recovery and Reinvestment Act of 2009 (“ARRA”).

¹ Department of Commerce, National Telecommunications and Information Administration, Department of Agriculture, Rural Utilities Service, American Recovery and Reinvestment Act of 2009 Broadband Initiatives, Joint Request for Information and Notice of Public Meetings, 47 Fed. Reg. 10,716 (Mar. 12, 2009).

² As discussed below, Alliance is in the regrettable position of having to stop services in two rural communities (affecting 500 subscribers) because of prohibitively expensive pole attachment rates imposed by cooperatively-organized utilities in those areas.

Targeted government investment in communications technology providers holds the promise of finally making the longstanding, critical objective of universal access to broadband services a reality. But there needs to be a coherent, rational policy where broadband providers need to attach to essential poles facilities owned by unregulated electrical cooperatives Failure in this regard will frustrate NTIA's efforts to deploy broadband in rural areas of our nation. Given the enormous financial stimulus to be administered by NTIA, it is important to highlight this glaring lapse in federal coverage of pole attachment rates, terms and conditions.

Serving residents of rural communities presents special challenges for Alliance and for similar companies that must attach to poles owned by cooperative utilities to be in business. Even modest increases in pole-attachment rates and related costs (such as "safety" audits) can mean the difference between continuing to provide service to a rural subscriber, or not. Larger cost increases can severely threaten our ability to serve rural customers as we do not have hundreds of thousands of customers to absorb these cost increases. Moreover, we do not serve densely populated areas; in fact, in many of our service areas we have more pole attachments than we do subscribers. Accordingly, increases in pole attachment fees carry significant consequences for our business.

There has been at least one situation where Alliance was unable to bring high-speed Internet and competitive facilities-based telephone services to certain rural communities simply because the pole owner unilaterally imposed a pole attachment "permitting freeze"—effectively preventing us from making pole attachments necessary to reach newly-built residential areas in a timely fashion. While we ultimately were able to resolve our dispute with that pole owner, we were only able to do so because the Federal Communications Commission ("FCC") exercised its jurisdiction to resolve the dispute.

But the FCC does not have any pole attachment jurisdiction over cooperatively-organized utilities. Unlike investor-owned utilities, cooperatively-organized utilities have unfettered discretion to impose rates, terms and conditions on pole attachments that are unchecked by any federal oversight.³ And they can, and do, provide video and data services that compete with other video providers. The lack of any uniform federal (and often even state or local) regulations governing cooperatives' attachment practices has had predictable consequences: certain cooperatives have leveraged their ownership of essential pole facilities to impose monopoly pricing and abusive terms and conditions. While Congress may have thought that the nonprofit and community-based characteristics of cooperatives would shield entities like

³ Section 224(a)(1) of the Communications Act expressly excludes cooperatives and government entities from pole attachment rate regulation. Compare 47 U.S.C. § 224(b)(1) (FCC authorized to regulate attachments to "utility" poles), with *id.* § 224(a)(1) (definition of "utility" excludes "any person who is cooperatively organized"). Cooperatively-organized utilities were excluded from regulation because Congress believed that they already had a built-in mechanism to prevent the monopoly abuses of investor-owned utilities: "the pole rates charged by municipally-owned and cooperative utilities are already subject to a decision-making process based upon constituent needs and interests." S. Rep. No. 95-980, at 18 (1977). Congress also recognized that, because these utilities "are located in rural areas where often over-the-air television is poor," "the customers of these utilities have an added incentive to foster the growth of cable television in their areas." *Id.* at 18; see generally Jim Cooper, *Electric Cooperatives: From New Deal to Bad Deal?* 45 Harv. J. Leg. 335 (2008).

cable operators needing access to their poles from high-handed behavior, that has not been consistently the case, especially as alternatives to video services provided by cable operators have become available to cooperative members.⁴

Indeed, in extreme cases, Alliance has been forced to cease service to some of our rural customers and shutter our system. This occurred in Greers Ferry and Perryville, Arkansas in 2009. The Greers Ferry system had served 300 subscribers. The Perryville system had served 200 subscribers. Rather than upgrading these traditional video cable systems to provide broadband and VoIP telephony services, as many cable operators have done in the past decade, we were forced to entirely abandon the property. Not only did we lose customers and entire systems as a result of runaway pole rates and abusive attachment practices; but the incident involved aspects that raise particular concerns bearing on the administration of stimulus funds.

These shutdowns occurred because the pole rates of the cooperative, First Electric, already high, were raised beyond what Alliance could pay and continue to operate a viable system. Larger cable operators who bordered on First Electric's territory might be able to absorb these skyrocketing rates because they could be averaged in across a broad number of poles, the majority of which were under federal or state regulated rates. Alliance could not; the pole rate demands essentially had reduced the value of the systems to zero.

Alliance attempted to give the system away, at no cost, making offers to the cities and others to take them over. But with the uncertainty of the pole rates across so few subscribers, Alliance had no takers, even at no cost. Worse, and with policy significance in the stimulus context, after making an unreasonable demand for exorbitant pole fees, the cooperative pole owner in Greers Ferry and Perryville *itself* considered taking possession of our cable system, a system that its unilateral behavior forced into darkness.

Mr. Dennis Krumblis, Buford's then-VP of engineering, reported a conversation with First Electric's VP of engineering, Mr. Jon Joyce. While discussing how Buford (which managed the system for Alliance) would disconnect its cable facilities from the poles as part of the shutdown, Mr. Joyce learned that Alliance was trying to give the system away. Mr. Joyce indicated to Mr. Krumblis that, at that price, First Electric might be interested and referred the opportunity to the First Electric board of directors. After a meeting of its board of directors, the cooperative ultimately decided not to take over our cable system.

The anticompetitive concerns inherent in the ability of an unregulated and potential competitor to force the sale of a cable system—and at a fire-sale, or zero price—are obvious. Without any meaningful legal or regulatory remedy, an unregulated pole owner (like a cooperative) can dramatically increase rates charged for the use of these essential facilities, force rural operators to discontinue operations, and then take possession of the networks as the only viable acquirer of the system. These concerns are heightened where, as here, the system is

⁴ Telephone companies that might also need access to poles owned by cooperatives have the ability to counteract unreasonable rate increases because poles in rural areas may be jointly owned, or the cooperative may need access to the telephone companies' poles for their own transmission facilities.

located entirely in the cooperative's footprint and the system is small and low density – hallmarks of the rural communities the ARRA was meant to address.

An unregulated pole owner does not have to actually engage in such behavior either. It need only threaten to do so in order to chill investment for potential competition to a cooperative's services, and reserve markets—served, under served or unserved—to itself. These effects are the antithesis of competitive broadband deployment and, if allowed to thrive unchecked, will ultimately hinder universal deployment.

The prospect of hundreds of millions of dollars of subsidies now available to cooperative pole owners to provide broadband services will only enhance their incentives to abuse their rural cable operator tenants. It is therefore essential that any funds distributed to electric or telephone cooperatives that are pole owners be conditioned in two ways:

1. NTIA should require that cooperatives receiving funds set maximum pole-attachment rates for cable operators at a level not to exceed that produced under the FCC's formula set forth at 47 U.S.C. § 224(d).
2. A cooperative's eligibility for these funds should be conditioned on providing just, reasonable and non-discriminatory access on its poles to cable operators and other competitors in the broadband market. Any cooperative recipient should be required to certify compliance with these conditions at the time it applies for the funds. If a cooperative pole owner is later determined not to be in compliance with these conditions, it should be subject to the repayment of the stimulus funds and other penalties.

There may be other rural cable operators who have suffered injuries similar to Alliance's. Alliance offers these comments and proposed conditions to ensure that no party seeking stimulus funds is able to use its essential pole facilities anticompetitively—to the detriment of broadband deployment—because the rates, terms and conditions of attachments to its poles are not yet regulated.

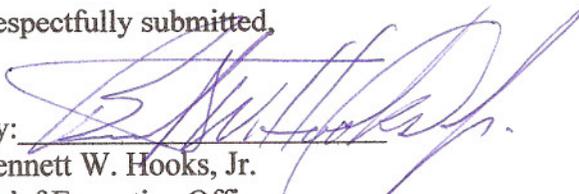
CONCLUSION

The ARRA is a once-in-a-lifetime opportunity to bring the benefits of broadband to rural America. Most areas of the United States have pole rates governed by the FCC or state utility commissions. The glaring exception are cooperatives. Whatever the rationale for excluding them from following the rate rules with which every other pole owner must comply, the grant of stimulus funds changes the incentives for cooperatives to discriminate against other providers of communications services, including cable operators.

While only Congress can fix the cooperative loophole in the pole attachment statute, NTIA can, and should, implement Congress's wish to fully achieve broadband ubiquity by conditioning cooperatives in the manner described here. Indeed, to accomplish Congress's intentions here, cooperatives who seek stimulus funds must be brought under the same law to

which every other pole owner is subject. That move is entirely consistent with Congress's superseding and prioritized judgment that broadband must be universally deployed – and now.

Respectfully submitted,

By: 

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