Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Petition for Declaratory Ruling of Mediacom Communications Corporation

WC Docket No. 14-52

COMMENTS OF PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION &
THE HETNET FORUM IN SUPPORT OF MEDIACOM’S PETITION

PCIA – The Wireless Infrastructure Association and The HetNet Forum (“PCIA”) ¹ respectfully submit these comments in response to the Federal Communications Commission (“FCC” or “Commission”) Wireline Competition Bureau’s April 8, 2014 Public Notice.² PCIA supports the petition filed by Mediacom Communications Corporation (“Mediacom”) seeking a declaratory ruling that a non-reciprocal indemnification clause in a pole attachment agreement is not a “just and reasonable” term and condition of attachment.³ Non-reciprocal indemnification clauses are counter to Section 224 of the Communications Act of 1934, as amended, which requires just and reasonable terms and conditions of attachment for pole attachment agreements.⁴

¹ PCIA is the national trade association representing the wireless infrastructure industry. PCIA’s members develop, own, manage, and operate towers, rooftop wireless sites, and other facilities for the provision of all types of wireless, telecommunications, and broadcasting services. PCIA and its members partner with communities across the nation to affect solutions for wireless infrastructure deployment that are responsive to the unique sensitivities and concerns of each community. The HetNet Forum, formerly The DAS Forum, is a membership section of PCIA dedicated to the advancement of heterogeneous wireless networks. “Heterogeneous networks” combine “macro,” or large, infrastructure such as monopoles with small cells and distributed antenna systems (“DAS”). By integrating the two types of infrastructure together, carriers are able to target geographic areas to increase network capacity.

² Wireline Competition Bureau Seeks Comment on Petition by Mediacom Communications Corp. for Declaratory Ruling Concerning Indemnification Clauses in Pole Attachment Agreements, WC Docket No. 14-52, Public Notice (“Notice”).


I. **Non-reciprocal Indemnity Clauses are Unjust and Unreasonable**

The Commission’s Enforcement Bureau recognized the unjust and unreasonable nature of non-reciprocal indemnity clauses for cable operators’ pole attachment agreements in its 2003 *Georgia Power* decision. In making its decision, the Bureau rejected a utility pole owner’s argument that mandatory access and the allegedly poor safety practices of cable operators require non-reciprocal indemnification because a reciprocal indemnification provision “simply would result in each party assuming responsibility for losses occasioned by its own misconduct.” The Bureau’s reasoning in *Georgia Power* holds true today and should apply to any pole attachment agreement.

Moreover, non-reciprocal indemnity provisions can slow or halt the deployment of communications infrastructure and needlessly increase costs for broadband infrastructure providers. Forcing an attaching party to pay for the negligence of the pole owner diverts money that an attaching party could invest in deployment of its services, thus delaying broadband deployment. Even where an attaching party successfully negotiates the removal of a non-reciprocal indemnity provision, lengthy contract negotiations drive up transaction costs and delay broadband deployment. Finally, and importantly, these conditions can limit the pool of insurers willing to provide coverage to attachers because of asymmetric risk.

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5 18 FCC Rcd 16333, 16345-46.
6 Id.
II. Pole Owners Often Require Wireless Infrastructure Providers to Enter Agreements with Non-reciprocal Indemnity Clauses

Mediacom’s petition arises out of ongoing litigation in Iowa involving the estate of a Mediacom employee who was killed after a pole on which the employee was working failed.\(^8\) The employee’s estate sued Interstate Power and Light Company/Wisconsin Power and Light (“IPL”)—the company that owned the pole—after an investigation determined the pole was rotted and in a state of disrepair.\(^9\) IPL then filed a third party petition against Mediacom’s Iowa subsidiary alleging: (1) breach of contract for failure to accept a tender of defense pursuant to an indemnification clause in the parties’ pole attachment agreement; and (2) a claim for indemnification for failure to accept the tender of defense.\(^10\) Mediacom’s petition asserts simply that an indemnification clause that requires one party to pay for another party’s negligence is not a “just and reasonable” term and condition of a pole attachment agreement.\(^11\)

Like Mediacom, PCIA members routinely encounter utility companies that demand non-reciprocal indemnity clauses in pole attachment agreements, forcing protracted negotiations between the parties to remove the non-reciprocal indemnity clause. For example, the record in the Commission’s pole attachment proceeding indicates that some wireless infrastructure providers experience pole owner demands to indemnify the pole owner for its own negligence.\(^12\)

\(^8\) Petition at 1.
\(^9\) Id. at 1-2.
\(^10\) Id. at 2. Mediacom reproduced the relevant indemnification clause in its Petition. The clause requires Mediacom to indemnify IPL against damages or injury “arising out of or in connection with” Mediacom’s use of IPL’s pole, but it does not require IPL to indemnify Mediacom.
\(^11\) Id. at 4-6 (citing Cable Television Association of Georgia v. Georgia Power Co., Order, 18 FCC Rcd 16333, 16345-46 (2003) (“Georgia Power”), recon. denied, 18 FCC Rcd 22287 (2003)).
\(^12\) See NextG Comments at 6 (“[W]orking through this one issue often adds months to the contract negotiation process even though the Commission has clearly directed utilities to bargain in good faith and extend ‘just and reasonable terms’ to attachers.”); Opposition of NextG Networks, Inc. to Petition for Reconsideration of the Coalition of Concerned Utilities, WC Docket No. 07-245, GN 09-51, at 20 (filed Aug. 10, 2011) (“[A] pole owner should not be excluded from liability for harm caused by its own negligence. NextG must regularly remind utilities...”)
Additionally, PCIA members have experienced difficulty in negotiating pole attachments with a Florida-based utility company that requires full indemnification of up to $2 million for fiber and node attachments in the communications space, without any limitations on negligence for regular pole attachment agreements, and $3 million for pole top attachments. Similarly, a Wisconsin-based utility company would require indemnification of potential attachers seemingly without limits. The core of this specific utility’s argument suggests that because all other attachers had agreed to non-reciprocal indemnification clauses, a change of policy or terms would be discriminatory.

The issue of non-reciprocal indemnity clauses is not limited to states governed by federal pole attachment regulations. For example, Utah, a state that has exercised reverse preemption with respect to the management and regulation of poles and attachments, requires that pole attachment agreements be filed with the Public Service Commission (“PSC”). The PSC has adopted a safe harbor for parties unable to agree to terms.\(^\text{13}\) The safe harbor indemnifies a pole owner for liability except that which is “caused by gross negligence or intentional misconduct of the [p]ole [o]wner.”\(^\text{14}\) This provision is not mutual and requires attaching entities to indemnify the pole owner for its own negligence.

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\(^{14}\) Safe Harbor, Article IX, Section 9.01.
III. Consumer Demand for Mobile Connectivity Necessitates Action

Consumer demand for mobile connectivity necessitates FCC action. Last year, mobile data usage grew eighty-one percent,15 and now more than half of Americans own bandwidth-hungry smartphones.16 Approximately 70 seventy percent of all emergency calls are placed with a wireless device.17 The National Broadband Plan emphasized the need to remove obstacles to broadband buildout,18 recognizing that mobile broadband in particular is “driving innovation and playing an increasingly important role in our lives and our economy.”19 Likewise, President Obama has stressed the ability of wireless high-speed Internet access to “enhance America’s economic competitiveness, create jobs, and improve the quality of our lives.”20 And Chairman Tom Wheeler has acknowledged that “wireless voice and data services are increasingly prevalent, empowering consumers to connect at the place and time of their choosing.”21

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19 Id. at 9-10; see Alan Pearce et al., WIRELESS BROADBAND INFRASTRUCTURE: A CATALYST FOR GDP AND JOB GROWTH 2013-2017 (Sept. 2013), available at http://www.pcia.com/images/IAE_Infrastructure_and_Economy2.PDF (projected wireless infrastructure investment of $34 to 36 billion per year over the next five years would unleash in $1.2 trillion in economic development and create 1.3 million net new jobs.).
These benefits cannot be achieved without the deployment of robust communications infrastructure. Distributed Antenna Systems (“DAS”) and small cells play an increasingly important role, as communications providers seek to target broadband capacity to the locations where customers use it most. For example, by 2015, AT&T alone plans to deploy over 40,000 small cells and over 1,000 DAS networks, in addition to 10,000 macrocells. A large number of these facilities could be deployed on existing utility distribution structures like utility poles. However, without an equal footing with respect to liability, these projects may be unnecessarily limited in scope, delayed, or outright abandoned.

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23 Id. at 20.
Conclusion

For the forgoing reasons, PCIA supports the petition of Mediacom and urges the FCC grant it expeditiously.

Respectfully submitted,

/s/ D. Zachary Champ

D. Zachary Champ
Government Affairs Counsel

Jonathan M. Campbell
Director, Government Affairs

D. Van Fleet Bloys
Government Affairs Counsel

PCIA – The Wireless Infrastructure Association
500 Montgomery Street, Suite 500
Alexandria, VA 22314
(703) 739-0300

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