BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Petition for Rulemaking of Fibertech Networks LLC	)	RM-11303
	)	

REPLY COMMENTS OF TIME WARNER TELECOM

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ATTORNEYS FOR TIME WARNER TELECOM INC.

March 1, 2006

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Time Warner Telecom Inc. ("TWTC"), by its attorneys, hereby submits its reply comments in support of the Petition for Rulemaking filed by Fibertech Networks, LLC ("Fibertech") requesting that the Commission initiate a rulemaking and adopt rules establishing "best practices" for providing access to poles, ducts, and conduits.

I. Discussion

In its Petition, Fibertech enumerates various discriminatory practices employed by pole owners to delay and constrain competitors' access to poles, ducts, and conduit. Utilities currently justify this harmful conduct as an exercise of discretionary privilege due to the pole owner to protect the integrity and safety of its network. But these tactics run directly counter to the purposes of Section 224 and should fall outside the limits of pole owner discretion. For the reasons set forth below, TWTC supports the initiation of a rulemaking to articulate a set of reasonable and nondiscriminatory procedures for providing access to poles, ducts, and conduits.

TWTC agrees with Fibertech's description of current practices in the pole attachment application and implementation processes. In fact, TWTC has experienced similar obstacles in the application and implementation processes, which were described

by various commenters and are also described in the attached Declaration of Jeff Jarvis ("Jarvis Dec.")

As with most other commenters,[1] TWTC has encountered significant resistance to the use of extension arms. As explained in the attached declaration, use of extension arms can extend the life of a pole and reduce facilities-deployment costs without undue risk. However, resisting utilities often defend the decision not to use extension arms by arguing that extension arms block climbing spaces. But as Mr. Jarvis explains, transmission line personnel rarely climb poles, opting instead to use bucket trucks and similar equipment. *Id.* ¶ 6. In any event, if properly constructed, extension arms and similar equipment comply with applicable safety codes and generally do not pose obstacles to transmission line personnel. *Id.* Some utilities therefore permit and regularly install extension arms. Jarvis Dec. ¶¶ 6-8. Given the current practices of most transmission line personnel and the inconsistent stance of the pole owners on extension arms, it is clear that safety concerns do not warrant a blanket denial of the use of extensions in all situations. Accordingly, TWTC recommends that the Commission consider adopting rules requiring pole owners to permit the use of extension arms whenever the pole is of sufficient grade to handle the vertical load and bending moment stresses associated with an extension arm.

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[1] *See* Sunesys Comments at 5-6; segTEL Comments at 2-3; SigeCom Comments at 3. *See also* Fibertech Petition at 6-7.

TWTC has also encountered unnecessary delays in all phases of the application and implementation process.[2] While some pole owners resolve applications and complete make-ready work efficiently, most pole attachment preparation is not complete until months or even years after submission of an application for access. Jarvis Dec. ¶¶ 4-5. While TWTC recognizes that projects may vary in scope and requirements, TWTC agrees with Fibertech that a 75-day timeframe for resolution of an application and completion of make-ready work is reasonable for a project covering at least 100 poles. Fibertech at 17. Furthermore, to the extent that delays are caused by utilities' failure to identify flaws in an prospective attacher's application, the Commission should consider in its rulemaking the adoption of a deadline, for example 48 hours from submission of an application, by which a utility must identify deficiencies in an attachment application.

Moreover, much of the delay experienced in obtaining pole access is due to utilities' refusal to permit the attacher's contractor (approved by the utility) to implement or engineer make-ready work. Where utilities insist that their own staff engineers schedule and implement make-ready work, the result is slower, more expensive make-ready work. Jarvis Dec. ¶ 9. At best, a pole owner may offer the attacher the option of paying the utility's engineers and outside plan personnel overtime in order to complete a project within a reasonable timeframe. This of course increases the cost of the project significantly. Jarvis Dec. ¶ 5. At worst, the attacher has no choice but to accede to the pole owner's schedule, risking the loss of a customer whose service depends on the

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[2] *See* Comptel Comments at 9; segTEL Comments at 5-7; SigeCom Comments at 4; NextG Comments at 5-6; Sunesys Comments at 9-12; Indiana Fiber Works Comments at 3-4.

timely deployment of attachments.[3] If TWTC were permitted to hire its own utility-approved engineering contractor, TWTC could reduce make-ready costs substantially and ensure the consistency and reliability of its network across multiple deployments. Accordingly, as Fibertech proposed, pole owners should permit approved contractors to perform make-ready without pole owner supervision. Fibertech at 19. This is clearly a worthy subject for a rulemaking proceeding.

TWTC has also experienced substantial delays in accessing conduit. It can take from 120 to 180 days from the submission of a conduit access application to conclusively determine the existence and availability of conduit space.[4] As described by Fibertech, investigating the availability of conduit involves a two-step process. Fibertech at 8. The first step requires the pole owner to review its records to determine if the records show that a conduit exists along a particular route. The second step requires a physical inspection of the route to determine whether the conduit actually exists (*i.e.*, that the records are correct) and whether the necessary space is available. Moreover, utilities

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[3] Where a prospective attacher must rely on a pole owner's staff or affiliate to perform make-ready work for an attachment used to provide service in competition with the pole owner, the pole owner has an obvious incentive to raise its rival's costs. TWTC has encountered this problem most recently with power companies, like Idaho Power & Light ("IPL"), that have entered the telecommunications service market. IPL raises TWTC's costs by insisting that make-ready work for TWTC's attachments be performed by IPL's own affiliated engineers. This is a problem that will only become more acute as more power companies enter the telecommunications service business.

[4] While, under Section 224, attachers possess the right to access to all ILEC conduit, TWTC has encountered resistance from ILECs to permitting access to conduit near a manhole. Consequently, TWTC must install conduit and facilities between the manhole and the customer premises in order to access the ILEC conduit inside the customer premises. This practice creates unnecessary duplication of facilities between the street and the customer premises, entailing additional deployment costs as well as unnecessary inconvenience to the customer.

generally insist on using their own engineering staff to conduct the inspection, which creates yet another delay. *Id.* This is such a slow process that TWTC generally does not even seek access to utility-owned conduit. Thus, conduit access is another subject that the Commission should address in a rulemaking. In fact, the most appropriate means of addressing conduit access would be for the Commission to consider in its rulemaking requiring that utilities (1) check their records to determine the availability of conduit within a set time period, seven days would seem eminently reasonable, and (2) give attachers the right to use utility-approved contractors to perform a facilities-check to verify the existence of conduit and determine the availability of space in the conduit.

Finally, the Commission should address the inconsistent and often incorrect billing practices of pole owners. The Commission's rules require an attacher to pay a proportionate share of make-ready costs incurred by a preceding attacher if the subsequent attacher avails itself of pole capacity created by the preceding attacher's make-ready.[5] 47 C.F.R. § 1.1416(b). However, pole owners often do not comply with this requirement, and the attachers themselves lack the information and legal rights necessary to recover contributions from subsequent attachers. Jarvis Dec. ¶ 10. Pole owners are in the best position to monitor this process but have not done so without positive regulation. Pole owners have also failed to bill correctly for safety violation corrections, resulting in the newest attacher bearing the entire cost of correcting the safety

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[5] *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Order, 11 FCC Rcd 15499 ¶ 1214 (1996) ("To protect the initiators of modifications from absorbing costs that should be shared by others, we will allow the modifying party or parties to recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification.") ("*Local Competition Order*").

violations of previous attachers.[6] Jarvis Dec. ¶ 11. This practice is clearly contrary to existing Commission policy, as evidenced by the Commission's resolutions of past disputes.[7] The utilities' recalcitrance with regard to this requirement clearly indicates that adjudication alone does not suffice to produce adequate deterrence. Both of these billing issues, as well as the issues raised in the preceding paragraphs, should be addressed by specific federal rules.

II. Conclusion

For the reasons explained above, TWTC respectfully urges the Commission to grant Fibertech's Petition, and promptly issue a Notice of Proposed Rulemaking, in which it considers the practices proposed by Fibertech for reasonable and nondiscriminatory access to utility-controlled poles, ducts, and conduit.

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[6] *See also Local Competition Order* ¶ 1212 (1996) ("A utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost. This will discourage parties from postponing necessary repairs in an effort to avoid the associated costs.")

[7] This practice is clearly contrary to existing Commission policy. *See Knology, Inc. v. Georgia Power Company,* Memorandum Opinion and Order, 18 FCC Rcd 24615 ¶ 37 (2003) ("[I]t is an unjust and unreasonable term and condition of attachment, in violation of section 224 of the Act, for a utility pole owner to hold an attacher responsible for costs arising from the correction of other attachers' safety violations."); *Kansas City Cable Partners v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599 ¶ 19 (1999) ("Correction of the pre-existing code violation is reasonably the responsibility of KCPL and only additional expenses incurred to accommodate Time Warner's attachment to keep the pole within NESC standards should be borne by Time Warner.").

Respectfully submitted,

/s/

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March 1, 2006

*Admitted to practice in New York only.

APPENDIX

Declaration of Jeff Jarvis on behalf of Time Warner Telecom Inc. (Jarvis Dec.)

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DECLARATION OF JEFF JARVIS

1. My name is Jeff Jarvis. I am the Regional Operations Director of Long Haul for Time Warner Telecom Inc. ("TWTC"). My business address is 520 SW 6th Avenue, Suite 300, Portland, Oregon.

2. As Regional Operations Director of TWTC's Longhaul Networks, I am responsible for network operations, systems engineering, network planning, and outside plant engineering and operation. I have been employed at TWTC for four and a half years. I have a Bachelor of Science Degree in Business Management (BSBM). I have 18 years of combined experience in the CLEC and cable industries. Prior to joining TWTC, I was employed by Enron Broadband Systems. In that capacity, my my main area of expertise was in Outside Plant Engineering and Construction as well as System Operations.

3. The purpose of my Declaration is to describe some of the unreasonable and discriminatory practices adopted by utility pole andc conduit owners, including power companies and incumbent local exchange carriers ("ILECs"), in the areas served by TWTC in the western United States. These practices constrain TWTC's ability to access poles, ducts, and conduits,

often unnecessarily inflating costs and negatively affecting TWTC's time and cost to deploy facilities needed to serve customers.

4. In my experience, the pole access application process and associated field surveys as well as make-ready work are often unnecessarily slow and costly. For example, in the territory where Sacramento Utility District ("SMUD") is the pole owner, an attacher can reasonably expect that its application will be processed, and the associated field survey, engineering review and review by the pole owner's Joint Use Administrator completed, within 30 days of submitting the application. Moreover, SMUD generally performs any make-ready work within 90 days after the approval of the application. SMUD meets these timeframes in significant part because it allows an attacher to work directly with other commnications grade attachers to complete the make-ready as soon as the application is approved.

5. Unfortunately, many utilities are nowhere near as efficient as SMUD. For example, Seattle City Light ("SCL") often approves applications within 30 days, but it does not schedule or perform make-ready work with the same expedience. Scheduling the make-ready alone can take months or even years. Sometimes, attachers can avoid such delays only by paying extra charges. In one case, TWTC submitted an application on May 15, 2005, and the application was approved on June 15, 2005. However, the SCL scheduler informed TWTC that the make-ready would not be completed until 2006. SCL told TWTC that it could complete the make-ready work before 2006 only if TWTC paid additional overtime charges. TWTC paid the extra amount (approximately $13,000 in addition to the $29,0000 initially requested for the make-ready work) and received the final permit to attach (with make-ready work completed) on September 7, 2005.

6. TWTC has also encountered unfounded resistance from some pole owners to the use of extension arms as a make-ready alternative to a pole replacement. Some of these pole owners

argue that extension arms create obstacles in the climbing space on poles. The pole owners assert that such climbing space is required for transmission line personnel to reach the top of the pole. However, most pole owners deploy bucket trucks in order to access pole attachments. In any event, extension arms are designed to meet standard safety requirements for climbing space and do not actually present obstacles. Where extension arms meet such requirements, the pole owners' reliance on safety concerns as the basis for refusing to use extension arms lacks credibility.

7. Moreover, TWTC has worked with utilities that do permit extension arms to the benefit of pole attachers and pole owners alike. For example, the Los Angeles Department of Water and Power ("LADWP") regularly adds ten-foot extension arms or alley arms, which are essentially longer and heavier extension arms, when vertical attachment space has been exhausted. The LADWP also permits use of so-called "F arms," which are 56-inch cross arms.

8. The addition of either type of arm creates several new attachment points for communications attachments. Moreover, the installation of an arm is relatively inexpensive. Extension arms cost approximately $300 plus rearrangement costs. In contrast, it costs between $4,500 to $10,000 plus rearrangement costs to replace a pole . Extension arms also provide additional benefits by reducing the "pull" or horizontal tension on the pole. When those loads are slight, installation of an extension arm offsets the stress, which eliminates the need to reduce the stress by placing an anchor and attaching a downguy, *i.e.* a strand, to the new attachment. Where extension arms are prohibited and guying the pole is impossible, the only alternative is to bury the cable. Buried cable plant construction costs are roughly ten times more expensive than aerial plant construction costs.

9. I have also experienced particular instances in which utility pole owners impose make-ready fees that far exceed the charges for comparable projects that other utilities charge for similar work. TWTC has experienced particular difficulties in this regard with Idaho Power and Light ("IPL"). In my experience, IPL engineers replace poles before ordering other attachers to rearrange their facilities, even when rearrangement of these attachments would suffice to provide the needed space. When IPL does order rearrangement of existing attachments, IPL insists on performing the make-ready work and will not allow attachers to employ contract engineers to perform their own make-ready work. In most cases, Idaho Power Solutions ("IPS"), a division of IPL, performs the make-ready work on IPL-owned poles. The IPL Joint Use Administrator has informed me that IPL rarely even considers rearranging existing communications attachments when assessing attachment grades, preferring instead to perform make-ready work on power lines. As Fibertech stated in its petition, make-ready work performed on power attachments is generally more expensive than make-ready work performed on other attachments. Accordingly, IPL's make-ready charges are often twice as high as make-ready costs for comparable projects performed by other utilities, such as Pacific Gas & Electric ("PG&E") or SMUD. Of course, if TWTC were permitted to hire its own IPL-approved engineering contractor, TWTC could reduce make-ready costs substantially. However, IPL has been unwilling to even discuss vetting contract engineers for their approval.

10. Additionally, it is my experience that pole owners fail to accurately bill for pole attachment services. Utilities have almost uniformly failed to establish a process to enable the recovery of costs from subsequent attachers who benefit from modifications initiated and paid for by TWTC. Although the pole owner is in the best position to identify any subsequent attachers, in my experience only one utility has assisted TWTC in identifying any subsequent

attachers. In that case, Washington Water & Power ("WWP") launched an experimental initiative which required that TWTC be notified if another entity applied for attachment to a pole that had increased in capacity due to make-ready work previously initiated and paid for by TWTC. Although WWP would provide notification, TWTC would still bear the burden of collecting a proportionate share of the incurred make-ready costs from the subsequent attacher. This is an extremely difficult process to administer, as the pole owner has the ultimate authority to collect these fees. I am aware of instances in which new attachers have benefited from increased capacity made possible by modifications initiated by TWTC. However, because TWTC, as an attacher, lacks the requisite monitoring and administration resources and legal rights of a pole owner, it has been unable to recover a proportionate share of the cost of the modifications.

11. Additionally, in some cases in Washington and Idaho, the pole owner charges a new attacher for fixing the safety violations of pre-existing attachments. For example, a cable company may have strung its strand too tightly to follow the sag of the other attachments on the pole creating a mid-span violation. Fixing this safety violation may be required in order to create the necessary capacity for the new attacher, *e.g.*, the over-taut line may necessitate a pole replacement to create space at the mid-span. Rather than charge the cable company in this example for fixing this problem, WWP charges the new attacher. In contrast, it is common practice in the SMUD and PG&E regions of California to require the attacher to fix its own safety violation so that a new attachment can be installed.

12. Finally, in my experience, access to conduit is also neither timely nor reasonable. This problem is so acute that TWTC rarely requests utilites for access to conduit space. The process is simply too time-consuming and costly to allow TWTC to respond to customer requests to

deploy transmission facilities. Generally, in rare cases where TWTC does request access to records in order to determine whether a conduit has been deployed along a particular route, pole owners charge a fee that TWTC must pay upfront regardless of whether the pole owner actually locates a conduit. The records search alone may take up to 30 days. Even if a viable conduit is found in the records search, TWTC must then pay the pole owner to visually inspect the conduit to verify that the space in the conduit is actually available. Scheduling and conducting the inspection causes the greatest delay, because the pole owner's staff must find the resources and time to conduct the inspection in addition to their regular responsibilities. The entire process is neither transparent nor timely. Indeed, it generally takes between 120 to 180 days to complete the process of applying for and obtaining access to pull fiber through a conduit.

13. This concludes my Declaration.

14. *Pursuant to 47 C.F.R. § 1.16, I declare under penalty of perjury that the foregoing is true and correct. Executed on: March 1, 2006.*

3/01/06

Jeff Jarvis