

May 10, 2006

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Ex Parte

Re: In the Matters of Petition for Rulemaking of Fibertech Networks, LLC, WC Docket No. RM-11303 and Petition of the United States Telecom Association for Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures, WC Docket No. 11293

Dear Ms. Dortch:

Time Warner Telecom Inc. (“TWTC”), by its attorneys, hereby submits this *ex parte* letter to supplement its earlier submissions in the above-captioned proceedings.¹ As evidenced by the numerous comments filed in support of the petitions for rulemaking by Fibertech and the United States Telecom Association (“USTA”), utilities’ (including incumbent local exchange carriers’ (“ILECs”)) exercise of market power over pole attachments is seriously undermining the ability of competitive local exchange carriers (“CLECs”) to provide broadband and other services. Accordingly, in addition to redressing the discriminatory rate problem discussed in the TWTC White Paper, the Commission should amend its pole attachment regulations to accomplish the following objectives:

¹ See White Paper on Pole Attachment Rates Applicable to Competitive Providers of Broadband Telecommunications Services: Time Warner Telecom Inc., *In the Matters of Petition of the United States Telecom Association for Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures and Petition for Rulemaking of Fibertech Networks, LLC*, WC Docket Nos. RM-11293 and RM-11303 (filed Jan. 16, 2007) (“TWTC White Paper”); see also Reply Comments of Time Warner Telecom, *In the Matter of Petition for Rulemaking of Fibertech Networks, LLC*, WC Docket No. RM-11303 (filed Mar. 1, 2006).

Pole Attachment Rate Inputs

- Require pole owners, upon request from an attacher, to provide complete and accurate information necessary to determine whether rates charged by the pole owner are consistent with the rate formula for attachments used to provide telecommunications services, *see* 47 C.F.R. § 1.1409(e)(2).

Make-Ready, Survey, and Inspection Costs

- Ensure that make-ready costs and other expenses charged by pole owners are reasonable and recover only actual costs—
 - For example, while pole owners should be reimbursed for actual engineering costs, they should not be permitted to charge flat fees for application processing and pre-construction surveys that bear no relationship to reasonable, actual costs. *See also* Sigecom, LLC Comments at 8; segTel, Inc. Comments at 11 (survey costs and make-ready work should not be subject to flat fees or upfront payments). Nor should pole owners be permitted to require that attachers pay an audit fee or similar charge in connection with a pole owner's defense of make-ready charges that have been challenged by an attacher as not based on reasonable, actual costs.
 - Pole owners should be prohibited from charging attachers for periodic inspections except through annual rental rate charges.
 - Pole owners should not be able to charge rent for equipment in unusable space (*e.g.*, risers).
 - Pole owners should be permitted to pass through to attachers only reasonable tree trimming costs and only on a *pro rata* basis among all attachers; no single attacher should be required to pay disproportionately for the costs associated with one or more tree trimming project.
 - Pole owners should be limited in their ability to impose financial or other penalties for unauthorized attachments; such actions are typically attempts to assess exorbitant fees.
- Ensure that a new attacher whose attachment requires that incumbent attachers rearrange or transfer their facilities only be required to reimburse incumbents for expenses the incumbents would not have incurred but for the new attachment.
 - For example, if an incumbent has an pre-existing safety violation which is discovered only when it is required to rearrange its attachment, the new attacher should not be required to pay for the expense of fixing such safety violation.

- Equalize pole replacement costs among all attachers when the pole at issue becomes overburdened—
 - Relatedly, segTel, Inc. describes “the frequent reality that previous attachers have wasted space on poles, resulting in new attaching parties having to pay for otherwise unnecessary make-ready work.” segTel Comments at 3. Accordingly, segTel suggests that new attachers should not be required to pay make-ready costs for a previous attaching party, including the pole owner itself, when the costs are necessitated by the previous attaching party’s facilities having been attached in a manner that wastes pole space. *See id.* at 4. TWTC supports this policy objective.

Eliminating Unnecessary Delays

- Consolidate the time period in which pole owners must complete survey work, application approvals, and make-ready work—
 - While Section 1.1403 of the Commission’s rules requires that access to a pole be granted within 45 days of the date that the request is made, there is no such limit on the amount of time in which the pole owner must complete make-ready work, resulting in frequent and excessive delays that can last from several months to several *years*. This problem is most acute with jointly owned poles (addressed below). Accordingly, TWTC agrees with Fibertech and other commenters that have urged the Commission to consolidate the time period for completing surveying, application approval, and make-ready work. Specifically, TWTC supports Fibertech’s proposal of a 75-day timeframe for resolution of an application and completion of make-ready work for a project involving at least 100 poles. *See* TWTC Reply Comments at 3; *see also* Indiana Fiber Works, LLC Comments at 4; Sunesys, Inc. Comments at 2; McLeodUSA Telecommunications Services, Inc. Comments at 4; Sigecom, LLC Comments at 4; segTel, Inc. Comments at 6-7.
 - TWTC urges the Commission to require imposition of special penalties on pole owners or incumbent attachers who unnecessarily delay completion of surveying, application approvals, or make-ready work; such penalties could take the form of steep discounts for the harmed attacher (either absorbed by the offending pole owner or paid for by an incumbent attacher guilty of unreasonable delay).
 - Require that tree trimming work be completed within the time frame required for completion of make-ready work. Where tree trimming is required before any additional attachments to a pole are made, tree trimmers are often months behind in their workload.

- Permit attachers to use independent contractors approved by the utility pole owner to complete make-ready work—
 - Such a proposal would prevent utilities from claiming that delays are the result of a labor shortage. *See, e.g.,* Fibertech Petition at 11; Sunesys, Inc. Comments at 8.
- Reduce delays and costs associated with seeking access to jointly-owned poles—
 - TWTC experiences significant delays and faces excessive costs when a given pole is jointly owned by two or more utilities. *See also* segTel, Inc. Comments at 7 (in order to avoid forfeiting its licenses from one utility that had issued segTel the licenses months earlier, segTel must begin paying license fees to the other utility owning the poles, but it cannot begin attaching to any poles until its licenses are granted by both joint owners of the poles); Indiana Fiber Works, LLC at 5 (Indiana Fiber Works sometimes pays double survey costs because it is forced to pay two utilities for survey work for one jointly-owned pole). These problems could be addressed by prohibiting joint owners from utilizing separate and redundant processes and procedures and conducting separate and redundant make-ready work. The process for accommodating attachers for jointly owned poles should be identical to the process followed where there is a single owner.

Improving the Contracting Process

- Require parties to negotiate pole attachment agreements in good faith.
- Standardize pole attachment agreements; terms and conditions should be standard nationwide or across a particular region, so that attachers are not forced to negotiate with each pole owner.
- Pole owners should be prohibited from requiring that attachers obtain approval for the assignment or transfer of pole attachment agreements between affiliated companies, as defined in Section 153(1) of the Communications Act.
- Permit pole owners to unilaterally terminate a contract only where an attacher has repeatedly failed to make timely payments required by the contract.
- If pole owners are permitted to require prior consent for assigning agreements to the attacher's affiliate, parent, or subsidiary, such prior consent rights must be reciprocal; that is, the attacher must be permitted to require prior consent for assigning agreements to the pole owner's affiliate, parent or subsidiary..

Other Issues

- Prohibit unreasonable pole owner requirements regarding the terms and conditions, including location, applicable to brackets on poles.
- Clarify applicability of pole attachment rules to rural utilities.
- Clarify the meaning of the “notice” required for overlashing.

The record in the above-captioned proceedings is replete with evidence of serious and widespread discrimination against competitive providers in access to utilities’ and ILECs’ poles. TWTC urges the Commission to address the aforementioned issues, many of which have been raised by other CLECs in the record, in a notice of proposed rulemaking relating to the Commission’s rules and policies governing pole attachments. Absent such a rulemaking, the current pole attachment regime will continue to undermine competition between incumbents and CLECs in the provision of broadband services.

Respectfully submitted,

_____/s/_____
Thomas Jones

cc: Marcus Maher
Jeremy Miller