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June 1, 2007

Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 Twelfth Street, S.W.
Washington, D.C. 20554

Ex Parte Submission

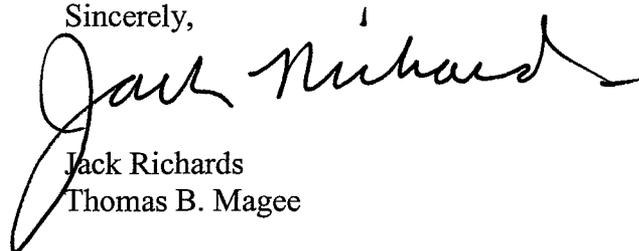
Re: *In the Matter of the Petition of The United States Telecom Ass'n for a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures, RM-11293 (filed Oct. 11, 2005); and In the Matter of Petition for Rulemaking or Fibertech Networks, LLC, RM-11303 (filed Dec. 7, 2005).*

Dear Ms. Dortch:

Attached is an *ex parte* letter to Chairman Martin from the law firm Keller and Heckman LLP. Please associate this letter with the records in the two above-referenced proceedings.

Please contact the undersigned if you have any questions regarding this submission.

Sincerely,



Jack Richards
Thomas B. Magee

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Kevin J. Martin
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
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Ex Parte Submission

Re: *In the Matter of the Petition of The United States Telecom Ass'n for a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures, RM-11293 (filed Oct. 11, 2005); and In the Matter of Petition for Rulemaking or Fibertech Networks, LLC, RM-11303 (filed Dec. 7, 2005).*

The Honorable Chairman Martin:

Our firm represents a number of electric utility clients before the Federal Communications Commission and elsewhere. The purpose of this letter is to protest the continuing efforts of the cable and telephone industries to portray electric utilities as irresponsible abusers of the Commission's pole attachment regulations.

Building on the shaky premises of the USTA and Fibertech Petitions,¹ Time Warner Telecom, Inc. ("TWTC") has filed the latest series of complaints. On the heels of its recent "*White Paper*," in which TWTC argues that telecom attachment rates are too high,² TWTC now

¹ Among other things, USTA claims (despite specific statutory language and a decade of practice and precedent to the contrary), that attachments by Incumbent Local Exchange Carriers ("ILECs") are *not* exempted from the provisions of the Pole Attachment Act. See United States Telecom Association ("USTA"), Petition for Rulemaking, *In the Matter of the Petition of The United States Telecom Ass'n for a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures*, RM-11293 (filed Oct. 11, 2005). The gist of Fibertech's Petition is that Fibertech, not the electric utilities, knows best how to operate and maintain an electric distribution system that is used to support communications attachments. See Fibertech Networks, LLC, Petition for Rulemaking of Fibertech Networks, *In the Matter of Petition for Rulemaking or Fibertech Networks, LLC*, RM-11303 (filed Dec. 7, 2005).

² Time Warner Telecom, Inc., White Paper on Pole Attachment Rates Applicable to Competitive Providers of Broadband Telecommunications Services, *In the Matter of the Petition of The United States Telecom Ass'n for a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures, et al.* RM-11293 and RM-11303 (filed Jan. 16, 2007) ("*White Paper*").

The Honorable Kevin J. Martin

June 1, 2007

Page 2

claims that utilities' market power over pole attachments "is seriously undermining the ability of competitive local exchange carriers ('CLECs') to provide broadband and other services."³

In fact, as described below, the electric utility industry and its ratepayers *subsidize* the cable and telephone industries under the Commission's current pole attachment rules. Attachers need not pay to construct their own distribution systems. Rather, they are allowed to "piggy back" on utility systems by paying only a small percentage of the utilities' annual ownership and operating expenses (akin, by analogy, to the utility paying full price for a car while the attachers chip in for gas and other expenses). We are aware of no other example where the government so blatantly favors one industry (communications) over another (electric utility distribution).

We also take issue below with the source of the attachers' most recent complaints. Based on our experience, as well as several cases reported to date, we believe that TWTC's motives in recommending reduced penalties for unauthorized attachments and "clarification" of the notice requirements for the provision of telecom services are highly suspect.⁴ TWTC apparently has been involved in a widespread, longstanding scheme to use cable attachments for telecom purposes without notification to the affected utility and without payment of the required telecom rate. This apparent scheme may be an attempt to defraud utilities of the limited payments rightfully due to them under the Commission's current pole attachment rules.

Electric Utilities Subsidize Attachers

TWTC complains that there should be one rate for all types of attachments, rather than a cable/telecom differential as currently required under the Commission's rules. Instead of suggesting that the Commission raise the cable attachment rate because it is too low (which it is), TWTC argues that the Commission should "level the competitive playing field" by dropping the telecom rate.⁵ For TWTC to portray itself as some kind of "victim" under these circumstances is a regulatory slight-of-hand of remarkable proportions.

Under the FCC's existing rules, electric utilities must bear the enormous cost of constructing their electric distribution systems. Once these systems have been constructed at electric utility expense, cable operators and others get to hop on board and exploit them for communications purposes at a small fraction of the annual operating costs.

³ Letter from Thomas Jones to Marlene H. Dortch, Secretary, FCC, May 10, 2006 [sic: 2007], regarding Petition for Rulemaking of Fibertech Networks, LLC, RM-11303 and Petition of the United States Telecom Association for Rulemaking to Amend Pole Attachment Rate Regulations and Complaint Procedures, RM-11293, at 1 ("TWTC May 10, 2007 Letter").

⁴ TWTC May 10, 2007 Letter at 2, 5.

⁵ TWTC *White Paper* at 2.

KELLER AND HECKMAN LLP

The Honorable Kevin J. Martin

June 1, 2007

Page 3

Cable operators (and, now, TWTC) argue that they should be required to pay only 7.41% of the utility's annual cost of pole ownership, since cable attachments occupy only that percentage of the pole's "usable space."⁶ In their view, attachers are entitled to "piggy back" on electric utility distribution systems for this miniscule fee, even though the attachers are completely relieved from the burden of incurring the far greater costs of constructing and maintaining their *own* distribution systems. The result, in essence, is a gross government mandated subsidy of the cable and telecom industries at the expense of the utility industry (analogous to the utility paying full price for a car while the attachers chip in 7.41% for gas and other expenses).

Not all regulatory bodies buy into attacher arguments that electric utilities and their rate payers should subsidize attachers with unreasonably low pole attachment rates. Some states recognize the huge windfall that attachers receive when they avoid the costs of building and maintaining their *own* distribution systems. These jurisdictions factor the value of the respective distribution systems (electric, cable, telco) into the rate equation and require attachers to pay their fair share.

The State of Maine, for example, allocates annual pole attachment costs in a much more equitable manner than the FCC. After calculating annual costs using an approach similar to the Commission's, Maine allocates the lion's share of those costs based upon a ratio of what it would have cost each attacher to build its *own* distribution system.⁷

The Maine PUC recognized that not all distribution systems are created equally, because electric utilities need poles that are taller, stronger and more closely spaced than poles used by telephone and cable companies. With that in mind, the Maine PUC determined that construction of a pole line covering a certain distance would cost \$24,000 for an electric utility, \$20,000 for a

⁶ Commission rules presume that an average pole is 37.5 feet in height, that usable space on that pole is 13.5 feet, and that cable operators use one foot of that usable space. The fraction $1/13.5$ equals 7.41%.

⁷ See CMR 65-407-880-5 (2007). In the Maine regulations, different allocations apply to two different portions of the pole. The first portion, called the "assigned space," is the small portion of the pole on which attachments by electric, cable, and other entities are actually made. The costs associated with this "assigned space" are allocated among the attachers based on the percentage of the assigned space that each attacher uses. Since electric companies use a large portion of this assigned space, electric companies are required to pay more of the costs associated with this assigned space than other attachers. The remainder of the pole is considered to be "common space." Thus, if a 37.5-foot average pole is used by an electric utility, a telephone utility and a cable company, these rules would consider 7.5 feet of the pole to be "assigned space" (4.5 feet for the electric utility; 2 feet for the telephone utility; and 1 foot for the cable company). The rest of the pole, or 30 feet, would be considered "common space," with costs allocated based on the ratio.

The Honorable Kevin J. Martin

June 1, 2007

Page 4

telephone utility, and \$15,000 for a cable operator. As a result, Maine allocates the costs of constructing a single pole line used by all three in the ratio 24:20:15.⁸

Under the Maine cost allocation methodology, no one industry is “preferred” over the other. There is no 7.41% “free ride.” Attachers are required to pay fair rates that reflect the full benefits that they receive from the host distribution system -- nothing more, and nothing less.

**Attachers Are No Longer Entitled
To Receive Pole Attachment Subsidies**

At this late date, it is inappropriate to allow the cable industry to “piggy back” on electric utility poles without paying a full and fair attachment rate. Cable is no longer the nascent industry that it was in 1978, when the Pole Attachment Act was enacted. “CATV” companies have transformed themselves into communications giants, offering not only cable television service, but also video on demand, broadband Internet access and telephone services.

Comcast, the largest cable company in the country, boasted a market capitalization of some \$66 billion at the beginning of 2006.⁹ The company reported \$2.6 billion in free cash flow for 2005,¹⁰ based on an increase in monthly revenues per subscriber from \$77 to \$84.¹¹ Most customers subscribing to Comcast’s video, Internet and telephone services pay \$120 per month,¹² and the number of those customers is growing rapidly.¹³ Meanwhile, the company pays attachment rates of just a few dollars per pole *per year*. That’s an unjustified gift, and it comes at the expense of the electric utility industry and its ratepayers.

Many telecom providers, such as TWTC, also are huge companies that are fully capable of paying their own way. TWTC operates in 75 metropolitan markets throughout the country,

⁸ *Id.*

⁹ Comcast Corporation Form 10-K for fiscal year ended December 31, 2005, cover page (“Comcast Form 10-K”) (“As of June 30, 2005, the aggregate market value of the Class A Common Stock and Class A Special Common Stock held by non-affiliates of the Registrant was \$41.761 billion and \$24.493 billion, respectively.”).

¹⁰ Comcast Corporation 2005 Annual Report at 6.

¹¹ *Id.* at 2.

¹² CNBC US Interview with Brian Roberts, Chairman and CEO of Comcast Corporation, April 27, 2006, at 2 (visited May 16, 2006), <<http://www.axisto.com/webcasting/tv/us/comcast/270406-2-cnbc/index.htm#>> (“So, for \$99 new customers can get all three products. It’s a fabulous value. Most customers then use their savings to buy other digital products and spend around a hundred and twenty a month.”).

¹³ See Comcast Corporation 2005 Annual Report at 12-14 (reporting 1.5 million new Internet customers in 2005; 1 million new telephone customers projected for 2006; marketing push for bundled services underway).

The Honorable Kevin J. Martin

June 1, 2007

Page 5

with a fiber network some 24,670 miles long. Its annual revenues for 2006 exceeded \$800,000,000.¹⁴ TWTC, like other attachers, is hardly in need (or deserving) of continued government hand outs.

Even if some kind of subsidies were appropriate in the early days of pole attachments, those days are long gone. Yet these media giants continue to get access to the most basic and essential component of “their” distribution systems for a song.

TWTC’s Reported Use Of “Cable” Attachments To Provide Telecom Services

Of all the self-serving and unsound recommendations contained in TWTC’s May 10, 2007 Letter, particularly galling from the electric utility perspective are TWTC’s requests for the Commission to reduce penalties for unauthorized attachments and to clarify the meaning of the term “notice” in the context of overlashing.¹⁵ Based on several cases reported to date, as well as our own experience, we believe that TWTC’s motives in recommending reduced penalties for unauthorized attachments and “clarification” of the notice requirements are highly suspect.

In its *White Paper* complaining that telecom attachment rates are too high, TWTC correctly notes that “an existing pole attachment [that is] subject to the lower [cable] rate becomes subject to the higher telecommunications carrier rate when a carrier simply leases fiber within an existing attachment to provide a telecommunications service.”¹⁶ As TWTC concedes, “where TWTC leases a strand of fiber to provide telecommunications services, the rate applicable to the pole attachment increases up to two-to-three times to the Telecom Service Rate.”¹⁷ According to its *White Paper*, TWTC is responsible for paying this rate differential when it provides telecom services via someone else’s cable attachment.¹⁸

Instead of paying the higher rate, however, TWTC apparently has come up with a more cost-effective alternative of its own: don’t tell the utility pole owner about the use of the cable attachments for telecom services, and let the cable company continue to pay the lower cable rate. That way, as a practical matter, the “rate differential” that TWTC says it is responsible for paying quickly drops to zero.

¹⁴ See Time Warner Telecom Inc., 2006 Form 10-K (on file with the Securities and Exchange Commission), at 2, 29.

¹⁵ TWTC May 10, 2007 Letter at 2, 5.

¹⁶ TWTC *White Paper* at 2.

¹⁷ *Id.* at 11.

¹⁸ *Id.*

KELLER AND HECKMAN LLP

The Honorable Kevin J. Martin

June 1, 2007

Page 6

This apparent scam is nothing new. Several years ago, CenterPoint, an electric utility serving Houston and other areas of Texas, filed a Complaint with the Commission regarding TWTC's use of a cable company's attachments to CenterPoint's poles.¹⁹ The central issue was TWTC's use of cable attachments for telecom purposes with no notice to the utility and no payment of the telecom rate.

CenterPoint and TWTC had not entered into a pole attachment agreement. TWTC instead had entered into a "Master License Agreement" with the local cable operator, pursuant to which TWTC was authorized to use cable attachments to provide telecom services in 19 specific cities across the country.²⁰

As it pointed out in its *White Paper*, TWTC was responsible under the Master License Agreement for paying the differential between the cable and telecom rates.²¹ Apparently, however, (and here's where the real cost savings for TWTC comes into play), no one advised CenterPoint that thousands of "cable" attachments to CenterPoint's poles were being used for telecom -- not cable -- purposes. As a result, conveniently for TWTC, the "rate differential" for all of these attachments was zero.

Tampa Electric raised a strikingly similar complaint with the Commission regarding TWTC's use of cable attachments for telecom purposes in Florida. Tampa Electric complained that TWTC overlashed or leased fiber on thousands of cable attachments for the provision of circuit switched telephone service. As in *CenterPoint*, TWTC and the cable company neglected to mention that fact to Tampa Electric -- or to pay the higher telecom rate (for which, apparently, TWTC was "responsible").²²

Based on our experience with other utilities, the TWTC situation in Texas and in Florida is not unique. TWTC appears to have routinely used "cable" attachments for telecom purposes without notification to the utility from the cable company or TWTC and without payment of the telecom rate differential. Regardless of whether the cable company or TWTC should notify the utility (which may explain TWTC's apparent confusion regarding the Commission's "notice" requirements), the electric utility clearly is entitled to be told about the use of its poles for

¹⁹ CenterPoint Energy Houston Electric, LLC, Revised Complaint, *In the Matter of CenterPoint Energy Houston Electric, LLC v. Texas Cable Partners, L.P., d/b/a Time Warner Cable*, EB-04-MD-009 (filed July 16, 2004) (hereinafter cited as "CenterPoint Revised Complaint").

²⁰ See Master Terms and Conditions Capacity License Agreement, dated July 1, 1998, attached to CenterPoint Revised Complaint at Exh. 19.

²¹ *Id.* at Sec. 6.

²² See Tampa Electric Company, Tampa Electric Company's Response to Pole Attachment Complaint of Bright House Networks, LLC, *In the Matter of Bright House Networks, LLC v. Tampa Electric Co.*, EB-06-MD-003 (filed March 29, 2006), at 1-2.

KELLER AND HECKMAN LLP

The Honorable Kevin J. Martin

June 1, 2007

Page 7

telecom purposes and to be paid the telecom rate. Any scheme to avoid this fundamental obligation is contrary to the FCC's requirements and public policy.

* * *

The Commission's pole attachments rules already unduly favor attachers. Some of them routinely ignore their obligations. Some use attachments for telecom purposes without paying the telecom rate. Some place attachments on utility poles without even seeking permission in advance. In some cases, *thousands* of attachments have been placed on poles *for years*, without any advance permitting or approvals and without payment of any attachment fees whatsoever. Many of these and other attachments are in violation of applicable electric safety codes, thereby endangering the public as well as electric utility personnel.

The Commission should reject the attachers' transparent attempts to convert an already favorable government mandated pole attachment subsidy into an outright give-away. Further overburdening the owners and operators of the nation's electric utility distribution system – who are dedicated to the safe, reliable and efficient distribution of electric utility services – would be a seriously misplaced public policy in this day and age.

Sincerely,



Jack Richards
Thomas B. Magee

cc:

The Honorable Michael J. Copps
The Honorable Jonathan S. Adelstein
The Honorable Deborah Taylor Tate
The Honorable Robert M. McDowell
Marcus Maher
Jeremy Miller
Renee Crittendon
Heather Hendrickson
Melissa Kinkel
Jennifer McKee
Jonathan Reel
Marvin Sacks
Tom Navin
Thomas Jones
Richard Metzger