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May 11, 2010

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

Re: In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Docket No. 07-245

Dear Ms. Dortch:

In its Notice of Proposed Rulemaking released on November 20, 2007, the Commission raised well-founded concerns regarding whether pole and conduit owners impede attachers' access to rights-of-way.¹ These issues were also addressed by numerous commenters who urged the Commission to adopt rules related to this issue.²

In the National Broadband Plan, the Commission once again expressed concerns that pole and conduit owners would erect roadblocks to attachment. The Commission directly addressed the critical role that infrastructure access plays in the deployment of broadband,³ as well as the public-

¹ See *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, WC Docket No. 07-245, at 16-17 (2007) ("We seek comment on these and any other pole attachment access concerns, such as concerns about the process for obtaining access.").

² See, e.g., Comments of Fibertech Networks, LLC and Kentucky Data Link, Inc. (filed Mar. 7, 2008); Comments of Sunesys, LLC Regarding Rates, Terms and Conditions of Access to Utility Poles (filed Mar. 7, 2008).

³ See, e.g., Fed. Commc'ns Comm'n, National Broadband Plan, at 127 (2010) (hereinafter "National Broadband Plan") ("[G]overnment should take steps to improve utilization of existing infrastructure to ensure that network providers have easier access to poles, conduits, ducts and rights-of-way.").

interest harms caused by access-based impediments.⁴ Indeed, the Commission specifically recommended the creation of a concrete timeline for each step of the attachment process, as well as the imposition of federal penalties against pole and conduit owners for unreasonable denial of access.⁵

Time Warner Cable (“TWC”) fully supports these recommendations. Like other commenters in this proceeding, TWC has also had difficulties with pole and conduit owners’ use of terms and conditions to effectively block access to their rights-of-way. TWC’s experiences have led it to conclude that current Commission rules must be more specific as to the terms and conditions and timing of actual physical access to the pole and conduit resource, and should also include a more robust Commission enforcement mechanism.

A vivid (but by no means the only) illustration of this need today relates to TWC’s on-going experiences in Hawaii. There, TWC has encountered great difficulty attaching to the poles and conduits owned by the local telephone company, Hawaiian Telcom (“HT”).⁶ Over the past several years, HT has used its pole and conduit permitting and overlashing processes to slow TWC’s upgrade and expansion of its cable system. In HT’s case, this conduct is particularly troubling because HT is concurrently preparing to launch its own video delivery system to compete directly with TWC.

HT’s conduct highlights the need for the Commission to strengthen its ability to enforce the Communications Act and related rules. In particular, HT has:

- Refused to allow HT to overlash fiber to its existing attachment upon reasonable notice, as required by FCC rules and precedent;⁷
- Imposed unjust, unreasonable and discriminatory poles and conduit application procedures and charges;⁸

⁴ See, e.g., *id.* (“Securing rights to this infrastructure is often a difficult and time-consuming process that discourages private investment.”).

⁵ See *id.* at 129-30.

⁶ See generally Letter from J. D. Thomas, Hogan & Hartson LLP, to John Komeiji, Hawaiian Telcom (Mar. 4, 2010) (attached as Ex. A); Comments in Opposition of Time Warner Cable, *In the Matter of Applications Filed for the Transfer of Control of Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Inc., Debtors-in-Possession*, WC Docket No. 10-41 (filed Mar. 24, 2010) (attached as Ex. B); Ex Parte Letter from J. D. Thomas, Hogan & Hartson LLP, to Marlene H. Dortch, Federal Communications Commission (filed Mar. 26, 2010) (attached as Ex. C); Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Inc., Reply to Comments, *In the Matter of Applications Filed for the Transfer of Control of Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Inc., Debtors-in-Possession*, WC Docket No. 10-41 (filed Apr. 7, 2010) (attached as Ex. D); Ex Parte Letter from J. D. Thomas, Hogan Lovells US LLP, to Marlene H. Dortch, Federal Communications Commission (filed May 3, 2010) (attached as Ex. E).

⁷ See *In re Amendment of Commission’s Rules and Policies Governing Poles Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶¶ 75, 82 (2001).

⁸ See, e.g., *Knology, Inc. v. Ga. Power Co.*, Memorandum Opinion & Order, 18 FCC Rcd 24615 (2003); *Cavalier Tel. v. Va. Elec. & Power Co.*, Order & Request for Information, 15 FCC Rcd 9563 (2000); *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599 (1999); *Salsgiver Commc’ns, Inc. v. N.*

- Denied TWC permit applications for reasons other than safety and generally accepted engineering purposes;⁹
- Refused to act on permit and conduit access requests within the 45-day deadline required by FCC rules;¹⁰ and
- Imposed unjust, unreasonable and discriminatory pole and conduit access engineering and construction standards and costs.¹¹

Although HT has violated the Communications Act and Commission rules, the enforcement mechanisms currently in place have not deterred HT's conduct. The Commission itself, in the National Broadband Plan, recognized the necessity for more detailed and more stringent access dispute resolution procedures and penalties and damages for unreasonable delays and denials.¹²

For instance, one of HT's clearest violations of Commission rules has been its pattern of failing to act on permit requests within the Commission-mandated 45-day time period – in some cases missing the deadline by as long as two years. Were the Commission to impose penalties from the date of a violation (*i.e.* the end of the 45-day period), it is less likely that HT would commit the violation in the first place. And even if it did, such an enforcement mechanism would create a strong incentive for HT to resolve the conflict immediately.

As another example, HT engages in the practice of denying permit requests when they would require make-ready charges, and then requiring TWC to resubmit a brand new permit request that addresses the newly imposed conditions. This process effectively doubles (or extends indefinitely) the already unlawful period of time that it takes HT to approve TWC's permit applications. Were the Commission to impose firm deadlines for each stage in the attachment process, as the National Broadband Plan suggests, pole and conduit owners such as HT would not be able use application procedures in this way to delay access to its poles and conduit.

TWC is concerned that this may be one of those cases that can only be resolved by engaging the Commission's formal complaint process. But that process would be greatly strengthened by adopting stringent support structure access deadlines, stiff penalties and fast-track complaint procedures. Indeed, the mere existence of measures such as those outlined in the National Broadband Plan would be a powerful deterrent to pole and conduit owners.

Pittsburgh Tel. Co., Memorandum Opinion and Order, 22 FCC Rcd 20,536 (2008); *Fiber Techs. Networks, LLC v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 3392 (2007); *DQE Commc'ns Network Servs., LLC v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 2112 (2007); *Salsgiver Telecom, Inc. v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 9285 (2007).

⁹ See 47 C.F.R. § 1.1403(a).

¹⁰ See *id.* § 1.403(b).

¹¹ See, e.g., *Knology, Inc. v. Ga. Power Co.*, Memorandum Opinion & Order, 18 FCC Rcd 24615, 24634 (2003); *Cavalier Tel. v. Va. Elec. & Power Co.*, Order & Request for Information, 15 FCC Rcd 9563 (2000).

¹² See National Broadband Plan at 129-30.

The Commission's tentative conclusions on these matters are correct: Better and faster broadband deployment requires these measures. The *status quo* is untenable. If, however, the Commission moves forward in adopting the access-facilitating proposals outlined in the National Broadband Plan, then the gaps between the clear legal right to prompt and reasonable access, and the ability of pole owner to stymie that access, will be closed.

Respectfully submitted,
TIME WARNER CABLE

/s/ J. D. Thomas

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Exhibit A

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March 4, 2010

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Via Electronic Mail and FEDEX

John Komeiji, Esq.
General Counsel
Hawaiian Telcom
1177 Bishop Street
Honolulu, Hawaii 96813

Re: Access to Poles, Conduits and Rights-of-Way by Time Warner Cable

Dear Mr. Komeiji:

I write on behalf of Time Warner Cable ("TWC") regarding TWC's unsuccessful efforts to secure access to the poles, conduits and rights-of-way of Hawaiian Telcom ("HT").

To fulfill a number of customer commitments, TWC must expand and enhance its cable system by adding fiber to its facilities that already occupy HT poles and conduit, and by securing access to additional poles and conduits that HT owns or controls. Applicable law fully entitles TWC to take these actions.

However, TWC's efforts, which correspond closely with a growing list of HT pole and conduit-related initiatives (and which, at best, were adopted without sufficient consideration of HT's general obligation to provide just and reasonable access to its poles) have become increasingly futile. Today, HT has created a very significant backlog of overlash requests (referred to as Work Access Requests (or "WARs")), pole attachment requests ("PARs"), and conduit occupancy requests ("CORs"). This backlog, which covers hundreds of poles and thousands of feet of conduit, is long and growing longer.

The HT's current approach to pole and conduit access ignores HT's specific obligations under (1) its express agreements with TWC and (2) FCC precedent, which requires HT to provide timely access for new attachments and to allow TWC to overlash to its existing facilities upon reasonable notice. It also is reminiscent of an earlier HT initiative to use poles and conduits for anti-competitive purposes at exactly the time that the company announced its intention to

compete with TWC by providing “video dial tone” service. *See Time Warner Cable d/b/a/ Oceanic Cable v. GTE Hawaiian Tel. Co. Inc.*, P.A. No. 95-005 (filed Nov. 30, 1994).

For example, HT has attempted to convert overlashing – which is supposed to be a notice-only procedure – into a full-permitting process. In fact, approximately 40 of TWC’s overlashing requests are currently pending and have been pending for an average of *11 months* each. The same is true for approximately 30 pole and conduit occupancy requests, which have been pending for an average of *nine (9)* and *13 months*, respectively. With deadlines for new and ongoing projects fast approaching, TWC will be submitting many more requests in the weeks ahead, and TWC must be assured that HT intends to change its ways immediately.

TWC has attempted to resolve this situation at the operational level. It has tried to expedite requests and negotiate access solutions. TWC has even hired a number of employees whose primary responsibility is to secure access on support structures across the state. Yet TWC has very little to show for its efforts. HT has taken increasingly unreasonable positions with respect to TWC and its efforts to secure access.

In addition to converting overlashing into a full permitting event, HT has stated that TWC will not be permitted to attach to a new pole (or overlash to its existing poles) until TWC has resolved all safety violations on that pole, regardless of whether TWC caused the violation.

Similarly, with respect to overlash requests (WARs), HT has stated that unless TWC can show a paper permit signed by HT (which in many cases could date back 35 years or more when as likely as not authorizations to attach were given orally), the TWC attachment will be deemed unauthorized. But even when TWC is able to produce a paper permit for a pole (or poles) in a given run, the poles for which TWC *cannot* produce a paper permit HT now states will be deemed unauthorized. TWC, thus, has the “choice” of filing permits for the pole (and clearing all safety violations that might have developed on that pole over the years) or removing its facilities.

With respect to TWC’s conduit requests, HT has asserted that no duct capacity is available because it must reserve space for “maintenance” and because other cables in the duct are “too big” to accommodate the installation of new ones. These assertions are not credible. HT has no legal basis for its claim that it may reserve duct for “maintenance.” Further, such a position ignores the realities of modern underground communications design and construction in which (1) large quantities of duct could be made available by removing dead copper; (2) inner-duct (which HT requires others to install as a pre-condition to occupancy) is used to subdivide individual ducts into many different usable chambers; and (3) fiber-optic cables have much smaller diameters than “legacy” communications cables.

HT’s actions and positions violate not only FCC precedent but also long-standing operating terms between HT and TWC. Specifically, under the terms of the 1995 Settlement Agreement between HT and TWC, which resolved the litigation challenging HT’s efforts at the time to

John Komeiji, Esq.
March 4, 2010
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increase the burden of its pole attachments rates, terms and conditions immediately after HT announced its intention to provide video services, TWC is permitted to (a) overlash its facilities upon 10 days' notice to HT, *see* 1995 Settlement Agreement at ¶ 8; and (b) have actual physical access to poles and conduits within 30 days of submitting an application to HT, *see id.* at ¶ 7. If HT has not responded to the application within this 30-day time frame, the application is deemed granted on the 31st day. *See id.*

Moreover, under applicable FCC rules, TWC is entitled to overlash to TWC facilities on poles owned or controlled by HT on "reasonable notice." *See In re Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12144-45, ¶ 82 (2001). With respect to new pole and conduit requests, FCC rules require that HT grant or deny a permit application within 45 days of submission. *See* 47 C.F.R. § 1.1403(b). Further, HT may only deny a permit request for reasons of insufficient capacity, safety, reliability and generally accepted engineering practices. *See id.* § 1.1403(a).

The FCC has encountered situations like this in the past and has not hesitated to issue forceful rulings against pole owners seeking to block access to or force unreasonable terms and costs upon communications companies. *See, e.g., Knology, Inc. v. Ga. Power Co.*, Memorandum Opinion & Order, 18 FCC Rcd 24615 (2003); *Cavalier Tel. v. Va. Elec. & Power Co.*, Order & Request for Information, 15 FCC Rcd 9563 (2000); *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599 (1999); *Salsgiver Commc'ns, Inc. v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 20,536 (2008); *Fiber Techs. Networks, LLC v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 3392 (2007); *DQE Commc'ns Network Servs., LLC v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 2112 (2007); *Salsgiver Telecom, Inc. v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 9285 (2007). Indeed, echoing the 1995 Settlement Agreement here, the FCC in *Salsgiver Telecom, Inc. v. North Pittsburgh Telephone Company*, concluded that if the incumbent pole owner (a telephone company that was seeking to transfer ownership of its assets and licenses) did not grant access within a specified time period after the adoption of the order, the competitor's access requests would be deemed granted. *See* 22 FCC Rcd at 9298, ¶ 28.

As you are aware, HT and TWC have periodically attempted to negotiate new pole attachment agreements, but none of these attempts has been completed. Thus, in addition to the FCC's pole-attachment rules and regulations (and supporting precedent), the parties' relationship continues to be governed by the terms of the original 1974 pole attachment and conduit occupancy agreements, as modified by the 1995 Settlement Agreement.

We trust that you understand the severity and extreme time sensitivity of this situation and realize that HT's positions with respect to TWC's access requests are extremely problematic. The current situation has become untenable, and TWC has placed resolving this problem among its very highest priorities.

John Komeiji, Esq.
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While we continue to believe that it is possible for TWC and HT to work through these problems informally and would prefer to do so, please understand that if this is to occur it must happen quickly and with HT's full commitment and cooperation. I therefore request that we arrange an immediate in-person meeting between our principals to attempt to resolve these issues amicably. I will contact you within the next day to discuss those arrangements.

Please understand, however, that if we are unable to meet virtually immediately (within the next several business days), TWC will be compelled to pursue all available remedies and that TWC reserves all rights at law and equity in connection with this matter.

Thank you in advance for your consideration. I look forward to working with you.

Sincerely,

A handwritten signature in black ink, appearing to be 'J.D. Thomas', written in a cursive style.

J. D. Thomas

JDT/dg

cc: Norman Santos
Nate Smith
Julie P. Laine, Esq.

Exhibit B

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Applications Filed For The Transfer of Control of)	WC Docket No. 10-41
Hawaiian Telcom, Inc. and Hawaiian Telcom)	DA 10-409
Services Company, Inc., Debtors-in-Possession)	

COMMENTS IN OPPOSITION OF TIME WARNER CABLE

Time Warner Cable (“TWC”), by its attorneys, hereby submits these Comments In Opposition to Hawaiian Telcom Inc.’s (“HT”) Application for authority to assign its Section 214 authorizations to Hawaiian Telcom Services Company, Inc. (“HT Services”) as the former emerges from Chapter 11 bankruptcy.^{1/}

TWC respectfully submits that granting the Application would not serve the public interest because HT has consistently failed to comply with its statutory obligations under Section 224 of the Communications Act to provide access to the poles, conduits, and rights-of-way that it controls in a reasonable and nondiscriminatory basis. Specifically, over the past several years, HT has consistently engaged in tactics designed to slow the expansion and enhancement of TWC’s cable system, affecting the ability of TWC to provide broadband connectivity and advanced services in furtherance of the goals of the Communications Act.

For instance, HT has abused its ownership and control of poles and conduits by:

^{1/} See *Applications Filed for the Transfer of Control of Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Inc., Debtors-in-Possession*, Public Notice, WC Docket No. 10-41, DA 10-409 (WC Bur. rel. March 10, 2010) (the “Public Notice”); *Hawaiian Telcom Services Company, Inc., Debtor-in-Possession, Applications for Authority Pursuant to Sections 214 of the Communications Act of 1934, as Amended, for Assignment or Transfer of Control*, WC Docket No. 10-41 (submitted Jan. 25, 2010).

- Refusing to allow TWC to overlash fiber to its existing attachments upon reasonable notice as required by FCC standards and the agreement between the parties, *see In re Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12144-45, ¶ 82 (2001);
- Imposing unjust, unreasonable and discriminatory pole and conduit application procedures and charges;^{2/}
- Denying TWC permit applications for “reasons” other than safety and generally accepted engineering purposes, *see* 47 C.F.R. § 1.1403(a);
- Refusing to act on permit pole and conduit access requests within the 45-day deadline specified by Commission rules, *see id.* § 1.1403(b); and
- Imposing unjust, unreasonable and discriminatory pole and conduit access engineering and construction standards and costs, *see, e.g., Knology, Inc. v. Ga. Power Co.*, Memorandum Opinion & Order, 18 FCC Rcd 24615, 24634 (2003); *Cavalier Tel. v. Va. Elec. & Power Co.*, Order & Request for Information, 15 FCC Rcd 9563, 9578-79 (2000).

Meanwhile, while it continually ignores TWC’s reasonable access requests and gives no indication that it intends to alter this practice, HT itself appears to be proceeding with its own fiber deployment with none of the impediments that it layers upon TWC. As HT’s financial position strengthens, so, too, will its capacity to restrain competitors like TWC by denying access to essential pole and conduit resources.

Such conduct is contrary to the public interest and should not be rewarded by granting the pending Application. Section 224 of the Act clearly provides for competitors to be granted access to essential poles, conduit, and rights of way, and HT’s failure to provide such access frustrates

^{2/} *See, e.g., Knology, Inc. v. Ga. Power Co.*, Memorandum Opinion & Order, 18 FCC Rcd 24615 (2003); *Cavalier Tel. v. Va. Elec. & Power Co.*, Order & Request for Information, 15 FCC Rcd 9563 (2000); *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599 (1999); *Salsgiver Commc’ns, Inc. v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 20,536 (2008); *Fiber Techs. Networks, LLC v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 3392 (2007); *DQE Commc’ns Network Servs., LLC v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 2112 (2007); *Salsgiver Telecom, Inc. v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 9285 (2007).

both the public interest and the Act’s goal of fostering competition. Moreover, HT’s behavior is precisely the sort of deployment obstacle that the Commission has vowed to prevent in order to further the nation’s goal of universal access to broadband services, as articulated in the Commission’s National Broadband Plan. *See, e.g.*, FED. COMM’NS COMM’N, NATIONAL BROADBAND PLAN 127 (2010) (“FCC Broadband Plan”) (“[G]overnment should take steps to improve utilization of existing infrastructure to ensure that network providers have easier access to poles, conduits, ducts and rights-of-way.”).

TWC is Hawaii’s principal cable operator, providing a host of residential and commercial voice, video and Internet access services across the state—both on Oahu and on the neighboring islands. TWC’s service area ranges from the dense, concrete-hardened urban areas, such as the residential dwellings and hotels in Waikiki in Honolulu (Oahu), to the predominantly agricultural areas of the neighboring islands.

For its part, HT is the “incumbent local exchange carrier in Hawaii and provides service to 470,024 access lines on all of Hawaii’s major islands.”^{3/} As an incumbent LEC, HT is “a ‘utility’ within the meaning of section 224(a)(1) of the Act” and is obligated to “provide ‘a cable television system or any telecommunications carrier’ with ‘nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.’”^{4/} Absent this obligation, HT could abuse its “control of the enumerated facilities and property to impede . . . the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields.”^{5/}

^{3/} Public Notice at 1.

^{4/} *Salsgiver Telecom, Inc. v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, File No. EB-06-MD-002, DA 07-2150, ¶ 3 (Enforcement Bur. rel. May 24, 2007) (“*Salsgiver Telecom Order*”) (citing and quoting 47 U.S.C. § 224(f)(1)).

^{5/} *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1123 (1996), *subsequent history omitted*.

Accordingly, HT owns and controls access to the overwhelming majority of poles and underground conduit facilities across Hawaii. Today TWC's facilities are attached to more than 100,000 of these poles and located within hundreds of miles of this conduit plant across the state. For the past several years and, in particular, within the past several months, TWC has focused on expanding both the reach of its network and the breadth of the services it offers by accessing additional poles and conduit and supplementing the existing facilities that are already installed in HT support structures. HT's failure to provide TWC with reasonable access to these facilities under both FCC rules and the terms of its long-standing operating agreements has prevented TWC from completing its planned expansions. Moreover, despite repeated efforts by TWC to resolve these problems amicably,^{6/} this conduct has only worsened since HT received federal bankruptcy court approval of its reorganization plan in December 2009.^{7/} This is no coincidence.

Under the terms of HT's bankruptcy plan, HT's primary if not sole business objective is to provide fiber-based communications services, including video services.^{8/} While this in itself advances the cause of competition, any benefit of having any additional competitor clearly would be undermined where, as here, that competitor stifles competition by abusing the pole, conduit and

^{6/} After months of progressively restrictive and unreasonable denials and numerous informal efforts at the operational level to resolve this dispute, this matter was escalated to counsel on March 4, 2010. See Letter from J. D. Thomas, Hogan & Hartson LLP, to John Komeiji, Hawaiian Telcom (Mar. 4, 2010) (attached as Ex. 1). To date, TWC has received neither a written response to its letter or even an invitation to meet.

^{7/} See Order Confirming the Joint Chapter 11 Plan of Reorganization of Hawaiian Telcom Communications, Inc. and Its Debtor Affiliates, *In re Hawaiian Telcom Commc'ns, Inc., et al., Debtors and Debtors in Possession*, Ch. 11 Case No. 08-02005 (Bankr. D. Haw., Dec. 30, 2009), available at <http://www.kccllc.net/documents/0802005/080200509123100000000002.pdf>.

^{8/} See, e.g., Jay Fidell, *Revamped Hawaiian Tel Betting on BAI0 to Survive*, Honolulu Advertiser, Feb. 21, 2010, <http://www.honoluluadvertiser.com/apps/pbcs.dll/article?AID=20102210331>; see also Letter from John T. Komeiji, Hawaiian Telcom, to Clyde Sonobe, Cable Television Administrator, Hawaii Dep't of Commerce & Consumer Affairs (Dec. 7, 2009) (attached as Ex. 2) (“[W]e are proceeding with expending significant operating and capital funds for our next generation television service.”).

right-of-way resources that it controls. Indeed, HT's actions here are reminiscent of an earlier chapter in the company's history when, in 1994, HT announced its plan to begin competing directly with TWC by providing video services, and within days, imposed dramatic pole and conduit rental increases.^{9/} Since the 1995 settlement of that proceeding, however, the Commission time and again has been confronted with pole owners that have attempted to leverage their ownership and control of poles and conduits to hinder competition by slowing or preventing the deployment of fiber. And time and again the Commission has responded resoundingly against this type of anticompetitive conduct by pole owners.^{10/}

At a time when the Commission has placed broadband deployment as a top national priority and recognized the critical role that expeditious access to essential infrastructure such as poles, conduits, and rights of way plays in achieving that goal, HT's conduct should not be sanctioned.^{11/} Accordingly, TWC opposes approval of the proposed transaction and Application unless and until HT demonstrates that its unreasonable practices have been remedied. Specifically,

^{9/} See *Time Warner Cable d/b/a/ Oceanic Cable v. GTE Hawaiian Tel. Co. Inc.*, P.A. No. 95-005 (filed Nov. 30, 1994).

^{10/} See *In the Matter of Heritage Cablevision Associates of Dallas, L.P., & Tex. Cable TV Ass'n, Inc. v. Tex. Utilities Elec. Co.*, Memorandum Opinion & Order, 6 FCC Rcd 7099 (1991); *Multimedia Cablevision, Inc. v. Southwestern Bell Tel. Co.*, 11 FCC Rcd. 11202 (1996); *Cavalier Tel. v. Va. Elec. & Power Co.*, Order & Request for Information, 15 FCC Rcd 9563 (2000); *DQE Commc'ns Network Servs., LLC v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 2112 (2007); *Salsgiver Telecom, Inc. v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 9285 (2007); See *Salsgiver Commc'ns, Inc. v. North Pittsburgh Tel.*, Memorandum Opinion and Order, 22 FCC Rcd. 20536 (2007) (Complaint filed Mar. 20, 2006); *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599 (1999).

^{11/} See FCC Broadband Plan at ix ("It's now time to act and invest in our nation's future by bringing the power and promise of broadband to us *all*.") (emphasis added); *id.* at 127 ("Securing rights to this infrastructure is often a difficult and time-consuming process that discourages private investment."); *id.* at 129 ("The FCC should establish a comprehensive timeline for each step of the Section 224 access process . . ."); *id.* at 130 ("[A]warding compensation that dates from the denial of access could stimulate swifter resolution of disputes.").

TWC seeks enforceable commitments that HT grant TWC reasonable access to the poles, conduit, and rights of way that HT controls and that:

1. HT notify TWC within 15 days of any new pole or duct / conduit occupancy request. HT must specifically and in writing state what (if anything) TWC must do to perfect its application and to attach to the pole or conduit (*e.g.*, engineering and make-ready work that would be required);
2. Grant actual physical access to the support structure within 30 days of written application;
3. In the event of failure to affirmatively respond within the time periods specified in Conditions 1 and 2, above, pending applications will be deemed granted;^{12/}
4. HT allow TWC to overlash fiber to existing facilities upon reasonable notice as required by Commission standards;^{13/} and
5. Certify that all charges of any kind associated with TWC's access requests are just, reasonable and nondiscriminatory, reflect only HT's actual, direct costs in performing the function, and are no different in any respect that HT charges itself or an affiliate for the same or similar functions.

Absent such assurances, grant of the application will embolden HT to deny competitors like TWC the ability to upgrade their networks to meet the surging demand for fiber-based services that HT seeks to reserve for itself. Reels of fiber are sitting today in TWC yards (with more ready to be shipped to Hawaii from the mainland) waiting to be deployed but for HT's refusal to grant

^{12/} See *Salsgiver Telecom, Inc. v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 9285, 9298, ¶ 28 (2007).

^{13/} See *In re Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12144-45, ¶ 82 (2001).

pole and conduit access to TWC. This is fiber that will be used to support not only video services, but also advanced broadband voice and data services and applications. HT states in its Application that the transfer “will make [HT and HT Services] stronger competitors and able to offer new products and services.”^{14/} Yet it is entirely unclear how improving HT’s own financial position and ability to offer service will foster competition if HT remains in a position to use its ownership and control of poles, conduit, and rights of way to thwart its competitors’ ability to offer service. Rather, grant of the present application will simply permit HT to continue in its ways; it will allow it to continue to prevent its competitors such as TWC from expanding their networks and offering consumers with the competitive broadband and advanced services envisaged by the Act.

Conclusion

For these reasons, the Commission should deny HT’s application unless and until HT comes into compliance with applicable law and the Commission’s long-practiced commitment to ensure just, reasonable and non-discriminatory access to poles, conduits and rights-of-way. To grant the application in the face of access conditions that persistently have violated Commission precedent, and that have continued to deteriorate over the past several months, is not in the public interest. That the Commission has made universal broadband a top priority, and, that TWC stands ready, willing and able to deploy the fiber necessary to make that priority a reality, further compels Commission action on HT’s application consistent with these comments.

Respectfully submitted,
TIME WARNER CABLE

/s/ J. D. Thomas

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555 Thirteenth Street, NW

^{14/} See Application for Consent to Transfer of Control, at 12.

Washington, DC 20004
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Its Attorney

March 24, 2010

Exhibit 1

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March 4, 2010

J. D. Thomas
Partner
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Via Electronic Mail and FEDEX

John Komeiji, Esq.
General Counsel
Hawaiian Telcom
1177 Bishop Street
Honolulu, Hawaii 96813

Re: Access to Poles, Conduits and Rights-of-Way by Time Warner Cable

Dear Mr. Komeiji:

I write on behalf of Time Warner Cable ("TWC") regarding TWC's unsuccessful efforts to secure access to the poles, conduits and rights-of-way of Hawaiian Telcom ("HT").

To fulfill a number of customer commitments, TWC must expand and enhance its cable system by adding fiber to its facilities that already occupy HT poles and conduit, and by securing access to additional poles and conduits that HT owns or controls. Applicable law fully entitles TWC to take these actions.

However, TWC's efforts, which correspond closely with a growing list of HT pole and conduit-related initiatives (and which, at best, were adopted without sufficient consideration of HT's general obligation to provide just and reasonable access to its poles) have become increasingly futile. Today, HT has created a very significant backlog of overlash requests (referred to as Work Access Requests (or "WARs")), pole attachment requests ("PARs"), and conduit occupancy requests ("CORs"). This backlog, which covers hundreds of poles and thousands of feet of conduit, is long and growing longer.

The HT's current approach to pole and conduit access ignores HT's specific obligations under (1) its express agreements with TWC and (2) FCC precedent, which requires HT to provide timely access for new attachments and to allow TWC to overlash to its existing facilities upon reasonable notice. It also is reminiscent of an earlier HT initiative to use poles and conduits for anti-competitive purposes at exactly the time that the company announced its intention to

compete with TWC by providing “video dial tone” service. *See Time Warner Cable d/b/a/ Oceanic Cable v. GTE Hawaiian Tel. Co. Inc.*, P.A. No. 95-005 (filed Nov. 30, 1994).

For example, HT has attempted to convert overlashing – which is supposed to be a notice-only procedure – into a full-permitting process. In fact, approximately 40 of TWC’s overlashing requests are currently pending and have been pending for an average of *11 months* each. The same is true for approximately 30 pole and conduit occupancy requests, which have been pending for an average of *nine (9)* and *13 months*, respectively. With deadlines for new and ongoing projects fast approaching, TWC will be submitting many more requests in the weeks ahead, and TWC must be assured that HT intends to change its ways immediately.

TWC has attempted to resolve this situation at the operational level. It has tried to expedite requests and negotiate access solutions. TWC has even hired a number of employees whose primary responsibility is to secure access on support structures across the state. Yet TWC has very little to show for its efforts. HT has taken increasingly unreasonable positions with respect to TWC and its efforts to secure access.

In addition to converting overlashing into a full permitting event, HT has stated that TWC will not be permitted to attach to a new pole (or overlash to its existing poles) until TWC has resolved all safety violations on that pole, regardless of whether TWC caused the violation.

Similarly, with respect to overlash requests (WARs), HT has stated that unless TWC can show a paper permit signed by HT (which in many cases could date back 35 years or more when as likely as not authorizations to attach were given orally), the TWC attachment will be deemed unauthorized. But even when TWC is able to produce a paper permit for a pole (or poles) in a given run, the poles for which TWC *cannot* produce a paper permit HT now states will be deemed unauthorized. TWC, thus, has the “choice” of filing permits for the pole (and clearing all safety violations that might have developed on that pole over the years) or removing its facilities.

With respect to TWC’s conduit requests, HT has asserted that no duct capacity is available because it must reserve space for “maintenance” and because other cables in the duct are “too big” to accommodate the installation of new ones. These assertions are not credible. HT has no legal basis for its claim that it may reserve duct for “maintenance.” Further, such a position ignores the realities of modern underground communications design and construction in which (1) large quantities of duct could be made available by removing dead copper; (2) inner-duct (which HT requires others to install as a pre-condition to occupancy) is used to subdivide individual ducts into many different usable chambers; and (3) fiber-optic cables have much smaller diameters than “legacy” communications cables.

HT’s actions and positions violate not only FCC precedent but also long-standing operating terms between HT and TWC. Specifically, under the terms of the 1995 Settlement Agreement between HT and TWC, which resolved the litigation challenging HT’s efforts at the time to

John Komeiji, Esq.
March 4, 2010
Page 3

increase the burden of its pole attachments rates, terms and conditions immediately after HT announced its intention to provide video services, TWC is permitted to (a) overlash its facilities upon 10 days' notice to HT, *see* 1995 Settlement Agreement at ¶ 8; and (b) have actual physical access to poles and conduits within 30 days of submitting an application to HT, *see id.* at ¶ 7. If HT has not responded to the application within this 30-day time frame, the application is deemed granted on the 31st day. *See id.*

Moreover, under applicable FCC rules, TWC is entitled to overlash to TWC facilities on poles owned or controlled by HT on "reasonable notice." *See In re Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12144-45, ¶ 82 (2001). With respect to new pole and conduit requests, FCC rules require that HT grant or deny a permit application within 45 days of submission. *See* 47 C.F.R. § 1.1403(b). Further, HT may only deny a permit request for reasons of insufficient capacity, safety, reliability and generally accepted engineering practices. *See id.* § 1.1403(a).

The FCC has encountered situations like this in the past and has not hesitated to issue forceful rulings against pole owners seeking to block access to or force unreasonable terms and costs upon communications companies. *See, e.g., Knology, Inc. v. Ga. Power Co.*, Memorandum Opinion & Order, 18 FCC Rcd 24615 (2003); *Cavalier Tel. v. Va. Elec. & Power Co.*, Order & Request for Information, 15 FCC Rcd 9563 (2000); *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599 (1999); *Salsgiver Commc'ns, Inc. v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 20,536 (2008); *Fiber Techs. Networks, LLC v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 3392 (2007); *DQE Commc'ns Network Servs., LLC v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 2112 (2007); *Salsgiver Telecom, Inc. v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 9285 (2007). Indeed, echoing the 1995 Settlement Agreement here, the FCC in *Salsgiver Telecom, Inc. v. North Pittsburgh Telephone Company*, concluded that if the incumbent pole owner (a telephone company that was seeking to transfer ownership of its assets and licenses) did not grant access within a specified time period after the adoption of the order, the competitor's access requests would be deemed granted. *See* 22 FCC Rcd at 9298, ¶ 28.

As you are aware, HT and TWC have periodically attempted to negotiate new pole attachment agreements, but none of these attempts has been completed. Thus, in addition to the FCC's pole-attachment rules and regulations (and supporting precedent), the parties' relationship continues to be governed by the terms of the original 1974 pole attachment and conduit occupancy agreements, as modified by the 1995 Settlement Agreement.

We trust that you understand the severity and extreme time sensitivity of this situation and realize that HT's positions with respect to TWC's access requests are extremely problematic. The current situation has become untenable, and TWC has placed resolving this problem among its very highest priorities.

John Komeiji, Esq.
March 4, 2010
Page 4

While we continue to believe that it is possible for TWC and HT to work through these problems informally and would prefer to do so, please understand that if this is to occur it must happen quickly and with HT's full commitment and cooperation. I therefore request that we arrange an immediate in-person meeting between our principals to attempt to resolve these issues amicably. I will contact you within the next day to discuss those arrangements.

Please understand, however, that if we are unable to meet virtually immediately (within the next several business days), TWC will be compelled to pursue all available remedies and that TWC reserves all rights at law and equity in connection with this matter.

Thank you in advance for your consideration. I look forward to working with you.

Sincerely,

A handwritten signature in black ink, appearing to be 'J.D. Thomas', with a long horizontal flourish extending to the right.

J. D. Thomas

JDT/dg

cc: Norman Santos
Nate Smith
Julie P. Laine, Esq.

Exhibit 2

Hawaiian Telecom

CABLE DIVISION
COMMERCE AND
CONSUMER AFFAIRS

2009 DEC 7 A 11:03

A E P S

FILE

December 7, 2009

Via Facsimile Transmission (586-2625)

Mr. Clyde Sonobe, Administrator
Cable Television Division
Department of Commerce and Consumer Affairs
335 Merchant Street, 1st Floor
Honolulu, Hawaii 96813

Re: In re Application of Hawaiian Telcom Services
Company, Inc. (HTSC) for a Cable Franchise

Dear Mr. Sonobe:

HTSC appreciates the willingness of the Cable Television Division of the Department of Commerce and Consumer Affairs to continue discussions with HTSC with a view to completing the process.

As you are aware, HTSC and certain of its affiliates (the "Debtors") had filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code on December 1, 2008. The Debtors subsequently filed a Plan of Reorganization (the "Plan"), which included HT's next generation television services. On November 13, 2009, at the conclusion of a hearing on the confirmation of the Plan, the Bankruptcy Court orally confirmed the Plan. The Bankruptcy Court has not yet issued its written order confirming the Plan. The Plan, as confirmed, also includes a restructuring of the existing financing arrangements that will significantly reduce the level of debt to which the Debtors are subject and foster the long-term financial health of the Debtors. Now that the Plan has been confirmed by the Bankruptcy Court, HTSC and its sister company, Hawaiian Telcom, Inc., will seek approvals from the Hawaii Public Utilities Commission and Federal Communications Commission that are required as conditions precedent to the Plan becoming effective.

In light of our current situation and our recent discussions regarding our application, we request agreement to an extension of the time limit for final action, from December 31, 2009 to June 30, 2010. As discussed, notwithstanding HTSC's chapter 11 status, we are proceeding with expending significant operating and capital funds for our next generation television service. We look forward to completing this process.

Very truly yours,

Hawaiian Telcom Services Company, Inc.



John T. Komeiji
Senior Vice President and General Counsel

Exhibit C

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March 26, 2010

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

**Re: In the Matter of Applications Filed for the Transfer of Control of
Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Inc.,
Debtors-in-Possession, WC Docket No. 10-41, DA 10-409**

Dear Ms. Dortch:

The last sentence in footnote 6 of the Comments of Time Warner Cable filed on March 24, 2010 should be replaced with: "To date, TWC has received neither a written response to its letter, nor a date—or even a week—for a possible meeting."

Thank you in advance for your attention to this matter.

Sincerely,



J. D. Thomas

JDT:msk

Exhibit D

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

HAWAIIAN TELCOM, INC. and
HAWAIIAN TELCOM SERVICES
COMPANY, INC. (Debtors-in-Possession)

Application for Consent to Transfer
Control of Domestic Authorizations Under
Section 214 of the Communications Act, as
Amended

WC Docket No. 10-41

File Nos. ITC-ASG-20100122-00038

ISP-PDR-20100122-00002

0004095753

**HAWAIIAN TELCOM, INC. AND
HAWAIIAN TELCOM SERVICES COMPANY, INC.
REPLY TO COMMENTS**

Hawaiian Telcom, Inc. (“HTI”) and Hawaiian Telcom Services Company, Inc. (“HT Services,” and together with HTI, the “Applicants”) hereby reply to the lone comment filed in opposition to the Applicants’ request to transfer control of their Section 214 authorizations. As explained in their Application, grant of these requests to transfer control will allow Applicants to complete their post-bankruptcy reorganization and give them a sound financial structure so that they can continue serving customers and investing in new facilities and services.¹ The only opposition to this transfer comes from a competitor that raises spurious claims totally unrelated to the pending Applications and that stands to benefit the longer Applicants remain under the jurisdiction of the bankruptcy court. Therefore, Applicants urge the Commission to approve the request to transfer control promptly so the Applicants can emerge from bankruptcy and become stronger and better service providers.

¹ Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Application for Consent to Transfer Control of Domestic Authorizations Under Section 214 of the Communications Act, as Amended, WC Docket No. 10-41 (filed Jan. 22, 2010) (“Application”). This Reply is associated with DA 10-409.

I. THE STANDARD OF REVIEW FOR TRANSFER APPLICATIONS PRECLUDES CONSIDERATION OF TIME WARNER CABLE’S CLAIMS.

Pursuant to Sections 214(a) and 310(b) of the Communications Act (“the Act”),² the FCC must consider whether the proposed transaction will serve the public interest, convenience, and necessity.³ Because no party contends that this transaction would result in a violation of the Act or any Commission rule, the Commission’s public interest assessment reduces to “a balancing test weighing any potential public interest harms of a proposed transaction against any potential public interest benefits to ensure that, on balance, the proposed transaction will serve the public interest.”⁴ This balancing test weighs any potential public interest harms of the proposed transaction against the public benefits expected to be gained.⁵ A primary goal of evaluating the public interest benefits is whether the transaction will promote competition or promote the

² 47 U.S.C. §§ 214(a), 310(b).

³ See, e.g., *Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and Its Subsidiaries to FairPoint Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 514, 519 (2008).

⁴ *Applications of Midwest Wireless Holdings, LLC and ALLTEL Communications, Inc., for Consent to Transfer of Control of Licenses and Authorizations, File Nos. 0002391997, et al. and Application of Great Western Cellular Partners, LLC and ALLTEL Communications, Inc., For Consent to Transfer Control of License*, Memorandum Opinion and Order, 21 FCC Rcd 11526, 11535 (2006) (footnote omitted). See also *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18300-01 (2005) (“SBC/AT&T Order”); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18442-43 (2005) (“Verizon/MCI Order”); *Applications of Nextel Communications, Inc. and Sprint Corporation; For Consent to Transfer Control of Licenses and Authorizations; File Nos. 0002031766, et al.*, Memorandum Opinion and Order, 20 FCC Rcd 13967, 13976-77 (2005) (“Sprint/Nextel Order”).

⁵ See, e.g., *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21543 (2004) (“Cingular/AT&T Wireless Order”); *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 483 (2004).

availability of advanced services.⁶ The Commission will also consider whether the merger will accelerate competition in the future.⁷

Moreover, the Commission has made clear that it will not consider all harms asserted by opponents of the transaction. Most relevant here, the Commission has repeatedly stated that it will not consider alleged harms unless they directly “arise from the transaction”⁸ and that it will not “impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.”⁹ Further, allegations of Act or Commission rule violations “are more appropriately addressed via the Commission’s complaint process,”¹⁰ and are ill-suited for resolution in a transfer-of-control proceeding.

Applicants have made a strong case that grant of these Applications would allow HTI and HTSC to complete their reorganization and emerge from bankruptcy with a more sound financial structure so they can continue to provide high quality service. In response, only one party – Time Warner Cable (“TWC”) – opposes the transfer.¹¹ TWC’s sole claim is that HTI has

⁶ See, e.g., Cingular/AT&T Wireless Order at 21544; Verizon/MCI Order at 18444 (2005); 47 U.S.C. § 706.

⁷ Cingular/AT&T Wireless Order at 21545; *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23246, 23256 (2002).

⁸ See, e.g., Verizon/MCI Order at 18446; *IT&E Overseas, Inc., Transferor, and PTI Pacifica Inc., Transferee*, Memorandum Opinion and Order and Declaratory Ruling, 24 FCC Red 5466, 5474 (2009); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Time Warner Inc. and its subsidiaries, Assignor/Transferor, to Time Warner Cable Inc., and its subsidiaries, Assignee/Transferee*, Memorandum Opinion and Order, 24 FCC Rcd 879, 887 (2009); SBC/AT&T Order at 18303.

⁹ See, e.g., Verizon/MCI Order at 18445; SBC/AT&T Order at 18302-03.

¹⁰ See, e.g., *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5727 n.342 (2007); Verizon/MCI Order at 18529 n.517 (declining to address issues that were the subject of pending complaint proceedings).

¹¹ Comments in Opposition of Time Warner Cable, WC Docket No. 10-41 (filed Mar. 24, 2010) (“TWC Comments”).

violated the Commission's pole attachment, conduit, and rights-of-way rules.¹² Even if TWC's allegations were accurate, which as shown below they are not, they are wholly unrelated to the proposed transfer. TWC admits that grant of the transfer applications will do nothing more than allow HTI to continue its current policies¹³ – the grant will not affect HTI's actions or capabilities regarding pole attachments at all.

Further, TWC's opposition is a prime example of why the Commission has affirmed that alleged past and future rule violations are more appropriately addressed via the Commission's complaint process.¹⁴ Complaint proceedings require “[a] complete statement of facts which, if proven true, would constitute such a violation. All material facts must be supported, pursuant to the requirements of §1.720(c) and paragraph (a)(11) of this section, by relevant affidavits and documentation.”¹⁵ In contrast, TWC broadly claims that HTI has failed to comply with the Commission's rules but provides no evidence to support its claims. Indeed, TWC cites not one specific instance in which HTI has violated the rules nor does it even provide a sworn statement supporting its allegations. The Commission has made clear that:

We continue to believe it prudent to gain experience through case by case adjudication to determine whether additional guiding principles or presumptions are necessary or appropriate, and this will be accomplished through our existing complaint procedures. We will continue to address complaints about just and reasonable

¹² TWC Comments at 1-2.

¹³ TWC Comments at 7.

¹⁴ *See, e.g., AT&T/BellSouth Order at 5727 n.342; Verizon/MCI Order at 18529 n.517; Applications of CRAIG O. MCCAWE, Transferor, and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Transferee, For Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, Memorandum Opinion and Order, 9 FCC Rcd 5836 at 5880-81 (1994); Applications of CONTEL CORPORATION, Transferor, and GTE CORPORATION, Transferee, For Consent to the Transfer of Control of Authorizations Held by Contel Subsidiaries, Memorandum Opinion and Order, 6 FCC Rcd 1003, 1005 (1991).*

¹⁵ 47 C.F.R. § 1.721(a)(5).

rates, terms and conditions, and nondiscriminatory access for nontraditional attachments on a case-by-case basis.¹⁶

The Commission should not allow TWC to circumvent the complaint process by introducing unsupported vague allegations in this proceeding.¹⁷ Rather, the Commission should urge TWC to meet with HTI and attempt to negotiate a resolution to any problems TWC may have. HTI recently responded to the letter TWC sent to HTI on March 4th and suggested that the parties meet to discuss any issues TWC has regarding access to poles and conduits.¹⁸ To facilitate resolution of any outstanding disagreements, HTI has asked TWC to provide the specific circumstances of each incident as well as the associated documentation at least one week in advance of a proposed meeting date so that HTI can be prepared to respond TWC's specific concerns.¹⁹

II. TWC'S VAGUE ALLEGATIONS ARE UNSUPPORTED AND INACCURATE.

TWC claims that HTI has violated the Commission's pole and conduit access rules in a number of ways. However, as explained above, TWC provides no specific instances or documentation to support its allegations, which makes it difficult for HTI to respond in detail. Nonetheless, HTI has reviewed both its procedures generally and their application to TWC and believes that HTI's policies are consistent with the Commission's rules and requirements. HTI responds to each of TWC's claims as follows.

¹⁶ *Amendment of Commission's Rules and Policies Governing Pole Attachments Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12128 (2001) ("Pole Attachment Reconsideration Order").

¹⁷ In addition to lacking any specificity or supporting evidence, TWC's claims are also suspect because, as TWC recognizes, HTI is preparing to enter the video services market in direct competition with TWC, the current monopoly wireline cable provider. TWC Comments at 4.

¹⁸ Letter from Gregory J. Vogt, Counsel for HTI, to J.D. Thomas, Counsel for TWC (Apr. 7, 2010), attached hereto as Exhibit 1.

¹⁹ *Id.*

1. Overlapping

TWC argues that HTI is “[r]efusing to allow TWC to overlap fiber to its existing attachments upon reasonable notice as required by FCC standards and the agreement between the parties.”²⁰ This is incorrect. Consistent with the Commission’s rules,²¹ HTI notes that any overlapping must comply with the pole loading standards in the National Electric Safety Code (“NESC”).²² HTI applies this standard to itself and all third parties. HTI is aware of several instances in which it has informed TWC that proposed overlaps would not meet NESC standards.²³ However, HTI is not aware of any circumstances in which it has refused to undertake the make-ready work required to permit an overlap when the attaching entity has agreed to pay the costs.²⁴

Further, TWC complains that HTI will not permit overlapping until “TWC has resolved all safety violations on that pole, regardless of whether TWC caused the violation.”²⁵ TWC is correct; HTI requires that all safety violations be remedied before new attachments can be made on a pole.²⁶ From a safety perspective, it is irrelevant which entity with a pole attachment has

²⁰ TWC Comments at 2 (citations omitted).

²¹ The FCC has stated that overlapping must comply “with generally accepted engineering practices.” *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, 6807-08 (1998); Pole Attachment Reconsideration Order at 12141.

²² Declaration of Derrick Uyeda, ¶ 3, attached hereto as Exhibit 2 (“Uyeda Declaration”).

²³ Uyeda Declaration, ¶ 4.

²⁴ *Id.*, ¶ 6. Attaching entities are required to pay any costs of make-ready work. *See, e.g.*, Pole Attachment Reconsideration Order at 12142-43 (stating “if the addition of overlapped wires to an existing attachment causes an excessive weight to be added to the pole requiring additional support or causes the cable sag to increase to a point below safety standards, then the attacher must pay the make-ready charges to increase the height or strength of the pole.”).

²⁵ TWC Comments, Ex. 1 at 2.

²⁶ Uyeda Declaration, ¶ 7.

caused an unsafe condition; increasing the load on a pole which already has safety violations only exacerbates the problem and increases the likelihood of accident and injury. HTI requires that unsafe conditions be remedied prior to installation of new pole attachments for all entities, including itself.

TWC then argues that HTI is unjustified in asking for proof of overlash authorizations.²⁷ This assertion misses the point: HTI is allowed to determine which attaching entity is responsible for causing an overload on a pole so that HTI can properly determine which party must either pay for any make-ready work or remove its attachment. If TWC cannot aid in determining whether its overlashing will exacerbate any load problems on the pole, HTI has the right to have the unsafe condition corrected prior to TWC's attachment.

2. Procedures and Charges

TWC claims that HTI “[i]mpos[es] unjust, unreasonable and discriminatory pole and conduit application procedures and charges.”²⁸ Although it is difficult to respond to such a vague allegation, HTI believes that its application procedures and charges are consistent with the Commission's rules. HTI's application procedures and charges (which are periodically updated) are clearly delineated in the Pole Attachment and Conduit Occupancy Agreement negotiated by HTI and Time Warner.²⁹ If the requesting party wants to proceed with an attachment requiring make-ready work, the requesting party must submit a request for HTI to perform the “make ready” work required so the pole/conduit will meet NESC standards.³⁰ These standards are

²⁷ TWC Comments, Ex. 1 at 2.

²⁸ TWC Comments at 2 (footnote omitted).

²⁹ Uyeda Declaration, ¶ 8.

³⁰ *Id.*, ¶ 5.

consistently applied to all companies requesting to occupy HTI poles or conduits, including HTI.³¹

3. Permit Application Denials

TWC asserts that HTI “[d]en[ies] TWC permit applications for ‘reasons’ other than safety and generally accepted engineering purposes.”³² This is not accurate. HTI applies industry-standard safety and engineering standards to itself and third parties.³³ It is possible that TWC is referring to HTI rejections of applications for the use of maintenance ducts.

Maintenance ducts are used for service restoration purposes when an in-service cable needs replacement.³⁴ For example, when a cable needs service, HTI uses the following procedure: a temporary cable is placed in the maintenance duct, the service is transferred from the defective cable to the new cable, the defective cable is removed, another cable is installed, and the service is then transferred from the temporary cable to the newly placed cable.³⁵ The temporary cable is then removed from the maintenance duct. HTI does not permit any party, including its own operations, to use the maintenance duct for any purpose other than maintenance.³⁶

TWC argues that HTI “has no legal basis for its claim that it may reserve a duct for ‘maintenance’” and that “such a position ignores the realities of modern underground communications design and construction.”³⁷ Both of these assertions are wrong. The

³¹ Uyeda Declaration, ¶ 9.

³² TWC Comments at 2 (citations omitted).

³³ Uyeda Declaration, ¶ 9.

³⁴ *Id.*, ¶ 10.

³⁵ *Id.*, ¶ 10.

³⁶ *Id.*, ¶ 10.

³⁷ TWC Comments, Ex. 1 at 2.

Commission reaffirmed as recently as 2002 that “a utility may designate capacity in a duct for maintenance or emergency use” and has adopted specific rules regarding how such capacity should be treated when determining access fees.³⁸

Fourth, TWC argues that HTI “[r]efus[es] to act on permit pole and conduit access requests within the 45-day deadline specified by Commission rules.”³⁹ Because TWC fails to cite any specific examples, HTI is unable to verify if it has exceeded the 45-day deadline for any particular TWC request. However, HTI is aware that it has failed to meet the 45-day deadline in some cases due to circumstances beyond its control.⁴⁰ Most of the poles in Hawaii are jointly owned by HTI with the electric utility.⁴¹ All proposed pole attachments to a jointly owned pole must be approved by the electric utility as well as HTI.⁴² Hawaiian Telcom has no control over the timeliness of the electric utility’s responses to a pole attachment request.⁴³ In addition, if there are other entities that have installed attachments on a particular pole, HTI needs to contact these other entities to confirm the weight of their cables to determine if an attachment request meets NESC standards.⁴⁴ In some cases, delayed responses from the electric utility or other attaching entities delay HTI’s response to attachment requests.⁴⁵

³⁸ Pole Attachment Reconsideration Order at 12148-49; *see also Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, 6496-97 (2000).

³⁹ TWC Comments at 2 (citation omitted).

⁴⁰ Uyeda Declaration, ¶ 11.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

Finally, TWC argues that HTI “[i]mpos[es] unjust, unreasonable and discriminatory pole and conduit access engineering and construction standards and costs.”⁴⁶ This is not the case. HTI complies with generally-accepted engineering and construction standards and applies these standards to all entities, including itself.⁴⁷

HTI’s procedures and practices comply with the Commission’s rules and requirements. As noted above, HTI would welcome the opportunity to discuss any specific problems TWC has encountered and attempt a mutually-acceptable resolution. However, in order for such a discussion to be productive, HTI requests that TWC provide HTI with the specific requests, including relevant documentation, about which it has questions, prior to a meeting so that HTI can be prepared.

III. CONCLUSION

Applicants have demonstrated that the Plan for Reorganization will allow them to provide the same high quality local exchange, long distance, and other services that they do today with the same qualified employees but with a more sound financial structure. No party has even questioned these showings. The only opponent to this transfer makes unsupported assertions of alleged harms which it admits are wholly unrelated to the proposed transfer of control and therefore are not eligible for consideration under the Commission’s standard of review. Therefore, Applicants urge the Commission promptly to approve the Applications.

⁴⁶ TWC Comments at 2 (citations omitted).

⁴⁷ Uyeda Declaration, ¶ 9.

Respectfully submitted,

By: /s/ Gregory J. Vogt

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April 7, 2010

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April 7, 2010

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gvogt@vogtlawfirm.com

VIA Electronic Mail and FEDEX

Re: Access to Poles, Conduits, and Rights-of-Way

Dear Mr. Thomas:

I am responding in writing to your letter dated March 4, 2010 regarding your client Time Warner Cable's ("TWC") complaints regarding access to Hawaiian Telcom's ("HTI") poles, conduits, and rights-of-way, as a follow-up to your discussions with John Komeiji, HTI's General Counsel. Unfortunately, although HTI has made considerable effort to research the issues you have raised, the lack of specificity in your letter makes it impossible to resolve any of TWC's concerns. Although HTI cannot respond in detail to the broad assertions in your letter, HTI can provide some general responses.

First, HTI notes that all overlashing, whether by HTI or other entities, must comply with the pole loading standards in the National Electric Safety Code ("NESC"). Because this is a safety issue, there cannot be any exceptions regardless of which entity may have caused the problem. When attaching entities, including TWC, cannot provide proof that their attachments are authorized, this makes it difficult for HTI to determine which attaching party has caused the pole to exceed loading standards and therefore which party must either pay to remedy the problem or remove its attachment.

Second, HTI imposes the same procedures and charges on all attaching entities, including itself. If a proposed attachment requires make-ready work in order to meet NESC standards, the entity requesting the attachment must pay the costs of that work.

Third, the Federal Communications Commission has clearly stated that "a utility may designate capacity in a duct for maintenance or emergency use." *Amendment of Commission's Rules and Policies Governing Pole Attachments Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶ 91 (2001) ("Attachment Order"). Further, HTI believes that ensuring the availability of a maintenance duct is sound

Marlene H. Dortch
April 6, 2010
Page 2

engineering practice which allows HTI to minimize network downtime and facilitate repairs.

Fourth, HTI imposes the same engineering and construction standards on all entities, including itself. The standards to which HTI adheres are generally-accepted engineering and construction practices commonly practiced throughout the communications industry.

Fifth, HTI notes that certain outstanding TWC pole, conduit, and rights-of-way requests appear to be for the provision of telecommunication, rather than cable, services, such as those that are connected to wireless service cell sites. HTI reminds TWC that the Commission has stated that “if the third party overloading a cable operator’s pole attachment is a telecommunications carrier, then the pole attachment will be considered to be used to provide telecommunications services for purposes of calculating the pole attachment rate.” Attachment Order, ¶ 76.

Although HTI hopes the information above is helpful, such general statements are unlikely to address TWC’s specific issues. HTI agrees with your suggestion that an in-person meeting with both legal counsel and subject matter experts would be useful. However, in order for such a session to be productive, HTI needs to review the specific applications and attachments with which TWC has concerns so HTI is prepared to respond. Without a list of the specific requests that TWC believes have not been addressed, HTI cannot determine what if any problem has occurred and cannot work with TWC to come to a mutually acceptable solution. To expedite this process, please provide me with a list of the application numbers with which TWC has a dispute, in addition to any relevant documentation. HTI subject matter experts Lynette Yoshida and Rae Correia, in addition to HTI legal counsel, will research each of the application numbers TWC provides and will be prepared to meet two weeks after receiving the information requested. Please include several potential dates when TWC subject matter experts will be available to meet when you provide me with the material requested.

I look forward to working with you to resolve any outstanding issues.

Sincerely,



Gregory J. Vogt
Counsel for Hawaiian Telcom, Inc.

cc: John Komeiji, Esq.

Exhibit 2

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

HAWAIIAN TELCOM, INC. and
HAWAIIAN TELCOM SERVICES
COMPANY, INC. (Debtors-in-Possession)

WC Docket No. 10-41

Application for Consent to Transfer
Control of Domestic Authorizations Under
Section 214 of the Communications Act, as
Amended

Declaration of Derrick Uyeda

1. My name is Derrick Uyeda. I serve as Executive Director – Network Engineering of Hawaiian Telcom Inc. (“HTI”). As such, I am responsible for HTI’s policies regarding poles, conduits, and rights-of-way. My business address is 1177 Bishop Street, Honolulu Hawaii 96813.
2. I have prepared this Declaration in support of the Hawaiian Telcom, Inc. (“HTI”) and Hawaiian Telcom Services Company, Inc. (“HT Services,” and together with HTI, the “Applicants”) Reply to the Comments in Opposition of Time Warner Cable (“TWC”).
3. HTI requires that all overloading on HTI poles, including that by third parties and HTI itself, conform to National Electric Safety Code (“NESC”) standards.
4. HTI has informed TWC on several occasions that its proposed overloads would result in pole loading that does not meet NESC standards.
5. If a proposed attachment by HTI or a third party would result a violation of NESC standards, HTI requires that the requesting party (including HTI) submit a request for the

performance of any make-ready work required (if the requesting party wants to pursue the attachment) so that the pole/conduit will meet NESC standards.

6. HTI is prepared to perform any make-ready work required to make a pole or conduit available to a third party, as long as that party commits to paying the costs of the work required. I am not aware of any circumstances in which HTI has refused to undertake make-ready work.
7. HTI requires that all safety violations on a pole be remedied prior to new attachments being added, regardless of whether the attachment belongs to a third-party or HTI. If a pole is already in an unsafe condition, further attachments increase the chances of an accident to both HTI and third-party employees as well as the general public.
8. Pole attachment application procedures and charges are contained in the HTI/TWC Pole Attachment and Conduit Occupancy Agreement, which has been updated periodically by HTI and TWC.
9. HTI applies the same industry-standard safety, construction, and engineering standards to itself and third parties.
10. Consistent with industry practice, HTI reserves maintenance ducts for service restoration purposes. HTI does not permit any party, including HTI, to use maintenance ducts for any purpose other than to repair and maintain network infrastructure. An example of HTI's process to repair a cable is as follows. First, HTI places a temporary cable in the maintenance duct. Second, the service is transferred from the defective cable to the new cable. Third, the defective cable is removed, and another cable is installed. Fourth, the service is then transferred from the temporary cable to the newly placed cable. Finally, the temporary cable is then removed from the maintenance duct.

11. In some cases, HTI has been unable to respond within 45 days to a pole or conduit request by a third party because of circumstances beyond HTI's control. Most poles in the State of Hawaii are jointly owned by HTI and the electric utility. Pole attachment requests must be approved by both HTI and the electric utility. HTI has no control over the length of time it takes for the electric utility to respond to a request. In addition, if there are other third-party attachments on a particular pole, HTI must contact those entities to verify the weight of their cables to determine if the new attachment request complies with NESC standards. Delays by the electric utility and by third-party attachers have in some cases delayed HTI's responses to attachment requests.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on April 6, 2010.

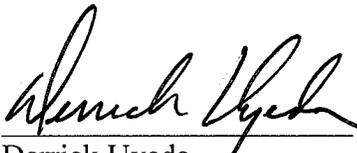

Derrick Uyeda

Exhibit E

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
T +1 202 637 5600
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www.hoganlovells.com

May 4, 2010

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

Re: In the Matter of Applications Filed for the Transfer of Control of Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Inc., Debtors-in-Possession, WC Docket No. 10-41, DA 10-409

Dear Ms. Dortch:

This responds to Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Inc.'s ("HT") April 7, 2010 Reply to the Comments in Opposition of Time Warner Cable ("TWC"), filed March 24, 2010 in the above-referenced matter.

Contrary to HT's allegations that TWC's comments are "spurious" and "totally unrelated to the pending Applications,"¹ HT's actions lie at the heart of the Commission's public interest assessment. The Commission has said repeatedly that as part of its analysis it "considers whether [the transaction] could result in public interest harms by *substantially impairing the objectives or implementation of the Communications Act* or related statutes."² This is precisely the point: approval of HT's 214 applications would both enable and reward HT's violations of the Communications Act. Even though HT asserts that the Section 214 process is the incorrect place to raise these issues,³

¹ Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Inc. Reply to Comments, WC Docket No. 10-41 (filed Apr. 7, 2010) at 1 (hereinafter "Reply Comments").

² See, e.g., *Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and Its Subsidiaries to FairPoint Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 514, 519 (2008) (emphasis added).

³ Reply Comments at 5.

this is precisely the sort of input on which the Commission relies in ensuring that the Communications Act is honored; this proceeding is the most efficient means for quickly resolving these questions.⁴ And unlike a prior section 214 proceeding⁵ in which the Commission declined to impose conditions on the grant of a transfer of control because of allegations of pole-attachment abuse, there is no open and on-going pole-attachment enforcement proceeding here.

In fact, TWC's goal in submitting comments here was to facilitate a prompt and efficient resolution of this dispute which affects not only TWC, but its customers and other facilities-based competitors who must rely on access to the poles and conduits that HT owns and controls. Given the burdens and time delay that a formal pole-attachment complaint proceeding would impose on Commission staff, TWC and other interested parties,⁶ TWC continues to believe that *this proceeding* could most immediately and efficiently facilitate a more robust broadband market in Hawaii. These factors, in addition to the Commission's focused if not urgent commitment to broadband, would seem to warrant the Commission's intervention here.

In addition to these compelling reasons for taking action here, HT's Reply Comments contain a number of errors that require correction. For example, on the question of overlashing, HT appears to try to justify its actions by saying they are required for safety purposes. Safety, of course, is a critical factor in pole attachments, but the law is clear that overlashing must not be subject to a full-blown permit process and that only "reasonable notice" is required.⁷ HT has freely admitted that it does not allow TWC to overlash fiber to existing plant unless the poles are free of all safety violations.⁸ This effectively puts the entire burden of making those corrections on TWC – whether or not TWC caused the violations or had anything to do with them whatsoever. At a minimum it is more than fair to ask if HT holds itself to this same standard. Does HT, in fact, *not* overlash unless and until the pole is 100% clear? Does it delay its own deployment – for months or indefinitely – until this occurs? These are critical questions that run to the core of the transaction at issue here.⁹

⁴ See, e.g., *In re Application of GTE Corporation and Bell Atlantic Corporation*, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14036 (2000) (“[W]e find in this Order that, absent conditions, the merger of Bell Atlantic and GTE will harm consumers of telecommunications services by . . . increasing the merged entity's incentives and ability to discriminate against entrants into local markets of the merging firms.”).

⁵ See *North Pittsburgh Systems, Inc. to Consolidated Communications Holdings, Inc.*, WC Docket No. 07-151, DA 07-4520 (released November 5, 2007)

⁶ As examples, from the date the complaint was filed in *Salsgiver Telecom, Inc. v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 9285 (2007), it took nearly 16 months for the Commission to release its final order; and in *Salsgiver Commc'ns, Inc. v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 20,536 (2007), it took more than 21 months.

⁷ See *In re Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12144-45, ¶¶ 75, 82 (2001).

⁸ See Reply Comments at 6.

⁹ See, e.g., *Knology, Inc. v. Ga. Power Co.*, Memorandum Opinion & Order, 18 FCC Rcd 24615, 24629 (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 attachor responsible for costs arising from the correction of other attachers' safety violations.”); *Cavalier Tel. v. Va. Elec. & Power Co.*, Order &

HT has taken the position that TWC cannot overlash unless it has, in hand, a paper permit showing that it is authorized to attach to each pole where its attachments are located (and in many cases have been for 30 years).¹⁰ In its Reply, HT says that its paper-permit overlash prerequisite is merely a means of assessing responsibility for safety violations. This is nonsense. The most that a paper permit can do, standing alone, is provide one small piece of the puzzle and show when and under what terms the permit was granted. After all, an attachment installed in a manner consistent with the permit instructions at installation may have “changed” over the years. Poles are located outside in an extremely dynamic environment, not inside in a static one. Outside plant is exposed and subject to weather, vehicle accidents, workers, and change in character in the surrounding environment (i.e. yesterday’s farms are today’s subdivisions and strip malls).

It appears, moreover, that HT conflates a proper permit with causation: whatever evidentiary value a piece of paper may have to prove that a particular attachment was “authorized,” its existence does not prove which, if any, entity is responsible for a safety violation. As HT correctly, but contradictorily, points out in the preceding paragraph of its Reply Comments, “[f]rom a safety perspective, it is irrelevant which entity with a pole attachment has caused an unsafe condition.”¹¹ What is not irrelevant, and indeed, what is at the heart of the Commission’s public interest analysis here, is that it is manifestly unjust, unreasonable and discriminatory to saddle TWC with the burden of cleaning up HT’s plant as a pre-condition to overlash.

HT also argues that it has never rejected a TWC permit for reasons other than safety and generally accepted engineering purposes. This is simply untrue. For example, on March 22, 2010 – just two days before the Comments in this proceeding were due – HT rejected an overlash request (a “Work Access Request,” or “WAR”) on the basis of “insufficient space . . . due to Hawaiian Telcom’s pending project for that route.”¹² A more blatant violation of the Communications Act is hard to imagine. While electric utilities under certain narrow circumstances may reserve space (only for core electric service and under a *bona fide* development plan that reasonably and specifically projects the utility’s need for the space reserved),¹³ Section 224 does not extend the same power, or deference, to telephone companies like HT.¹⁴

Request for Information, 15 FCC Rcd 9563, 9571 (2000) (“Complainant is only responsible for make-ready costs generated by its own attachments. Respondent is prohibited from holding Complainant responsible for costs arising from the correction of safety violations of attachers other than Complainant.”); *In re Amendment of Commission’s Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12144-45, ¶ 82 (2001).

¹⁰ See, e.g., Email from Donna Rae Lum, Hawaiian Telcom, to Dwight Kaneshiro, Oceanic Time Warner Cable, Re: OTWC – WAR 884 (Feb. 19, 2010) (attached as Ex. 1).

¹¹ Reply Comments 6-7.

¹² See Letter from Donna Rae Lum, Hawaiian Telcom, to Lance Uno, Oceanic Time Warner Cable (Mar. 22, 2010) (attached as Ex. 2).

¹³ See 11 FCC Rcd 15499, 16078 ¶ 1169 (1996).

¹⁴ 47 U.S.C. § 224(f)(2) (emphasis added) (“a utility providing *electric service* may deny a cable television system . . . access to its poles . . . where there is insufficient capacity.”).

Likewise, HT admits to missing the 45-day deadline for approving or rejecting permit applications,¹⁵ but blames this delay on its joint pole owner, Hawaiian Electric Company, Inc. The reality is that HT administers and controls access to the communications space on all poles to which it attaches. That HT has no control whatsoever over missing the 45-day deadline by, in some cases, as long as two years ignores that it – and not Hawaiian Electric – is the communications space gatekeeper on the poles to which it attaches.

Finally, HT's assertion that its application procedures and charges are consistent with Commission rules is not credible. As discussed above, HT's unlawful overlashing requirements, unreasonable permit denials and persistent failure to respond to permit requests all constitute unjust, unreasonable and discriminatory pole and conduit application procedures in violation of the Communications Act and Commission rules.

Likewise, HT's outlandish engineering and make-ready fees defy Commission requirements that they be cost-based. Despite TWC's requests, HT has not explained the basis for these charges in any form approaching that required by Commission precedent.¹⁶ There have been numerous instances where HT has denied applications outright without adequate – or any – explanation. But exorbitant, prohibitive costs (such as \$2500 to perform an engineering study on a single pole)¹⁷ is tantamount to a red-stamped "permit denied."

HT's behavior here presents a compelling textbook case as to why the Commission's National Broadband Plan recommendation to require hard deadlines for physical access – and penalties and damages if the deadlines are not met – are well-founded. It presents an equally compelling case for the imposition of Section 214 transfer conditions on this transaction to ensure that these abuses stop immediately and do not re-appear pending adoption of specific Commission rules in this area.

Sincerely,



J. D. Thomas
Partner
dave.thomas@hoganlovells.com
D (202) 637-5675

JDT/dg

cc: Gregory J. Vogt, Esq.

¹⁵ See 47 C.F.R. § 1.1403(b).

¹⁶ See, e.g., *Knology*, 18 FCC Rcd at 24641-42 ¶¶ 59-62.

¹⁷ Letter from Donna Rae Lum, Hawaiian Telcom, to Lance Uno, Oceanic Time Warner Cable (Apr. 22, 2009) (attached as Ex. 3).

Exhibit 1

Kaneshiro, Dwight

From: Donna Rae Lum [DonnaRae.Lum@hawaiiantel.com]
Sent: Friday, February 19, 2010 3:25 PM
To: Kaneshiro, Dwight
Subject: RE: OTWC - WAR 884

Dwight,

The original cable placement related to the new WAR 884 may be the result of one or more COR(s) and maps. If Oceanic is only able to locate COR(s) for a portion of the route, then the remainder of the route would be considered an unauthorized occupancy, subject to penalties. At that point, Oceanic can either remove its 'unauthorized' facilities or submit a COR for the existing facilities. Hawaiian Telcom will then review the COR and determine if the existing facilities can remain or make ready costs are required in order for Oceanic's facilities to remain.

Donna Rae

Donna Rae Lum
Specialist - Network Engineering
Network Engineering Support
Hawaiian Telcom
Phone: 808-546-7666
Fax: 808-546-6938

From: Kaneshiro, Dwight [mailto:dwight.kaneshiro@twcable.com]
Sent: Friday, February 19, 2010 2:27 PM
To: Donna Rae Lum
Subject: RE: OTWC - WAR 884

Thanks Donna for the quick response. I have that COR as well but it refers to a different map (3806). COR 499 has the same map as the WAR that I'm submitting. Will that suffice?

Mahalo, Dwight

From: Donna Rae Lum [mailto:DonnaRae.Lum@hawaiiantel.com]
Sent: Friday, February 19, 2010 11:57 AM
To: Kaneshiro, Dwight
Subject: RE: OTWC - WAR 884

Dwight,

I was only able to locate COR 484 which is on part of your route.

Donna Rae

Donna Rae Lum
Specialist - Network Engineering
Network Engineering Support
Hawaiian Telcom
Phone: 808-546-7666
Fax: 808-546-6938

DIA

From: Kaneshiro, Dwight [mailto:dwight.kaneshiro@twcable.com]
Sent: Friday, February 19, 2010 8:52 AM
To: Donna Rae Lum
Subject: OTWC - WAR 884

Hi Donna,

Respectfully submit WAR 884. As discussed yesterday, the attached original COR is from my research. I'm not sure if it's correct, nor if there is another one to address my request. I'm trying not to submit incomplete applications and avoid penalties as well. If it is acceptable let me know and I'll send the hard copies. If it's incorrect, could you send me the right number?

I really appreciate your valuable time. Feel free to contact me at anytime with questions.

Mahalo, Dwight

Dwight Kaneshiro
Project Manager
808-625-9739
808-349-6388
dwight.kaneshiro@twcable.com



"Few things help an individual more than to place responsibility upon him, and to let him know you trust him." ~ Booker T. Washington

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D20

Exhibit 2

March 22, 2010

Mr. Lance Uno
Oceanic Time Warner Cable
200 Akamainui Street
Mililani, HI 96789

Dear Lance,

SUBJECT: OCEANIC TIME WARNER CABLE'S WAR 896 – 98-1468 HOOMAHIE LP, PEARL CITY

Hawaiian Telcom rejects Oceanic Time Warner Cable's WAR 896 due to insufficient space for the proposed placement of a 1" subduct with 0.50" fiber cable from MH 2425 (MH1) on Hoohiki Street to HH 21720 (HH2) at Hoohiki Street and Hoomahie Loop, due to Hawaiian Telcom's pending project for that route.

According to our records, the 3-4" conduits noted on the drawing from HH 21720 (HH2) Hoohiki Street and Hoomahie Loop to PB 21731 (PB3) Hoomahie Loop does not exist. The 3-4" conduits go further up Hoohiki Street and does not traverse off to Hoomahie St.

Oceanic Time Warner Cable will be billed for the engineering fee to review this request. The estimated review fee is \$500.00.

If there are any questions, please give me a call at 546-7666.

Sincerely,



Donna Rae Lum
Specialist – Network Engineering

Attachment

cc: L. Yoshida – HIA10

Exhibit 3

W
APR 27 2009 MK

Hawaiian Telcom ●

April 22, 2009

Mr. Lance Uno
Oceanic Time Warner Cable
200 Akamainui Street
Mililani, HI 96789

Dear Lance,

Subject: Oceanic Time Warner Cable's WAR 808(Overlash) School Street, Lusitana Street and Puowaina Street, Alakea

Hawaiian Telcom (HT) rejects Oceanic Time Warner Cable's WAR 808. Pole 4 on School Street is not adequately sized for Oceanic's proposed attachment. Should Oceanic decide to pursue make ready work for this pole, please submit a request in writing.

Oceanic will receive a bill for the engineering fee to review this request. The estimated review cost is \$2,500.00.

If there are any questions, please give me a call at 546-7666.

Sincerely,



Donna Rae Lum
Specialist – Joint Use

CC: G. Hayashi / L. Yoshida – A-10

C31