

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Implementation of Section 224 of the Act	)	WC Docket No. 07-245
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	

**COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®**

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CTIA – The Wireless Association® (“CTIA”)<sup>1</sup> hereby respectfully submits these comments in the above-captioned proceeding.<sup>2</sup> CTIA agrees with and supports the great majority of the Commission’s fundamental conclusions and proposals.

**I. INTRODUCTION AND SUMMARY.**

CTIA, on behalf of its members, underscores the critical importance of timely access to electric utility poles at reasonable, cost-based rates. CTIA believes that the Federal Communications Commission’s (“FCC” or “Commission”) access timeline and enforcement proposals adequately address the vital pole-owner interests of pole and grid safety and integrity. With certain modifications, these proposals can achieve the correct balance between (1) ensuring the integrity of the poles and attachments and providing just and reasonable compensation for the use of the pole, and (2) facilitating nondiscriminatory wireless pole access at reasonable rates.

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<sup>1</sup> CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, broadband PCS, ESMR, and 700 MHz licensees, as well as providers and manufacturers of wireless data services and products.

<sup>2</sup> In the Matter of Implementation of Section 224 of the Act, *Order & Further Notice of Proposed Rulemaking*, WC Docket No. 07-245, GN Docket No. 09-51 (rel. May 20, 2010) (“FNPRM” or “Further Notice”).

As to the access timelines, CTIA believes that the basic framework the FNPRM proposes is workable:

- CTIA supports the Commission’s proposal to establish a firm make-ready work timeline;
- The Commission should implement a shorter timeline for wireless attachments including distributed antenna systems (“DAS”) because such systems often are inherently smaller-scale than wireline or cable build-outs;
- CTIA agrees with the Commission’s proposal that attachers may use pre-approved and pre-certified contractors to complete make-ready work;
- CTIA approves of the Commission’s proposal that attachers pay for make-ready in stages; and
- CTIA endorses the Commission’s laudable transparency and state-access goals, though the Commission should avoid creating too large a federal role in this regard.

An access regime is effective only when accompanied by an effective enforcement mechanism. The Commission should build on its past regulatory successes by:

- Implementing a two-tiered complaint process that fast-tracks disputes related to access issues;
- Strengthening its remedies by awarding compensatory damages, forfeitures, and attorneys fees; and
- Retaining the “sign and sue” rule.

Finally, CTIA seeks rental rates that facilitate access to electric utility poles to streamline wireless broadband deployment while fully compensating the pole owner for attachers’ use of the pole. Again, the Commission’s proposals are more than adequate to ensure that the pole owners receive fair, cost-based compensation:

- CTIA supports the development of a more uniform rate structure and one that lowers rates for attachments that fall outside the coverage of the “cable rate” established under section 224(d); and
- CTIA supports the Commission’s plan to reduce the rate applicable to telecommunications attachers (“Telecommunications rate”).

The Commission's regulation of pole attachments has been a regulatory and policy success story that has enabled the development of entire industries by efficiently utilizing the monopoly assets of regulated utilities. Moreover, the Commission correctly concludes in the FNPRM that the time has come for a revised approach to accommodate the ever-growing demand for bandwidth and innovative mobile applications. As President Obama recently declared, "Few technological developments hold as much potential to enhance America's economic competitiveness, create jobs, and improve the quality of our lives as wireless high-speed Internet."<sup>3</sup> Today it is as important as ever to facilitate the expansion of broadband through wireless facilities.

## **II. THE PRESENT AND FUTURE OF WIRELESS.**

Today's wireless providers face unprecedented demands for their services, which in turn drives the need for more efficient utilization of all network resources—from spectrum to physical infrastructure, including electric utility poles. Each year, wireless companies invest tens of billions of dollars to expand their service areas, improve service quality, increase network capacity, and develop innovative new products and services. In 2008, for example, wireless carriers invested more than \$25 billion in equipment and infrastructure, and from 2001 through 2008 wireless carriers invested a combined average of \$22.8 billion per year.<sup>4</sup> By the end of 2009, U.S. wireless carriers' cumulative capital expenditures totaled more than \$285 billion, an

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<sup>3</sup> Press Release, The White House, Presidential Memorandum: Unleashing the Wireless Broadband Revolution (June 28, 2010), *available at* <http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution>.

<sup>4</sup> *See* Comments of CTIA-The Wireless Association®, GN Docket No. 10-127, at 22 (filed July 15, 2010) ("CTIA Third Way Comments").

increase of more than \$20 billion from year-end 2008.<sup>5</sup> Indeed, wireless carriers have continued to commit billions of dollars to capital expenditures, despite the current recession.

This investment is paying off. By the end of 2009, there were an estimated 103 million unique 3G wireless subscribers and more than 122 million total 3G wireless subscriptions in the United States.<sup>6</sup> Chairman Genachowski noted recently that “[n]o area of the broadband ecosystem holds more promise for transformational innovation than mobile.”<sup>7</sup> The virtuous cycle of investment, innovation and consumer demand is in full effect. As the wireless industry has invested in its infrastructure and technological advancements, broadband speeds have grown faster, and consumer demand for wireless has increased. Just this summer, for example, Apple’s iPhone 4 sold 1.7 million handsets in its first three days on the market.<sup>8</sup> As wireless providers shift from 3G to 4G technologies in the coming months and years,<sup>9</sup> demand for wireless broadband will continue its rise.

The potential for wireless is boundless. Wireless broadband’s innovative and dynamic technologies have already revolutionized modern life in the 21<sup>st</sup> century and will continue to do so. Inroads are now being made to use wireless broadband for improving healthcare, enabling Smart Grids and other green technologies, and re-imagining students’ relationships with their classrooms. Wireless service continues to play a critical role in public safety as first responders

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<sup>5</sup> See Comments of CTIA-The Wireless Association®, WT Docket No. 10-133, at 6-7 (filed July 30, 2010).

<sup>6</sup> See *id.*

<sup>7</sup> Comments of Julius Genachowski, Chairman, Federal Communications Commission, Mobile Broadband: A 21<sup>st</sup> Century Plan for U.S. Competitiveness, Innovation and Job Creation (Feb. 24, 2010), available at [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2010/db0224/DOC-296490A1.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0224/DOC-296490A1.pdf) (last visited July 30, 2010).

<sup>8</sup> Press Release, Apple Inc., iPhone 4 sales Top 1.7 Million (June 28, 2010), available at <http://www.apple.com/pr/library/2010/06/28iphone.html> (last visited July 30, 2010).

<sup>9</sup> See generally CTIA Third Way Comments at 9-11.

rely on wireless communications, and as more and more Americans depend on their wireless devices to make E-911 calls from highways, public spaces, and even their residences. As President Obama has observed, “Expanded wireless broadband access will trigger the creation of innovative new businesses, provide cost-effective connections in rural areas, increase productivity, improve public safety, and allow for the development of mobile telemedicine, telework, distance learning, and other new applications that will transform Americans’ lives.”<sup>10</sup>

### **III. REASONABLE AND NON-DISCRIMINATORY ACCESS TO INFRASTRUCTURE CAN AND SHOULD BE IMPROVED.**

As America’s appetite for wireless broadband has produced demand for more access to more wireless spectrum in more locations across the country, wireless providers are moving as fast as they can to meet the market’s needs. Even as wireless providers work diligently to expand their networks, they continue to run up against an infrastructure logjam – time and again, wireless providers’ make-ready work is unreasonably impeded and delayed by pole owners resistant to wireless attachments on their poles.<sup>11</sup> The FNPRM indicates that the Commission has both the ability and the inclination to facilitate timely access to electric utility poles. CTIA wholly supports the Commission in its efforts to promote reliable “last mile” wireless broadband.

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<sup>10</sup> Press Release, The White House, “Presidential Memorandum: Unleashing the Wireless Broadband Revolution,” June 28, 2010, *available at* <http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution> (last visited July 30, 2010).

<sup>11</sup> Indeed, barriers to wireless broadband deployment are not strictly limited to actions by electric utility pole owners, but can include municipalities as well. For example, the City of San Francisco has before it a proposed ordinance that would discourage the use of pole attachments on aesthetic zoning grounds, higher fees, and through multiple layers of city and citizen review. The Commission should be prepared to preempt such local government ordinances that threaten wireless broadband deployment.

**A. CTIA Supports the Establishment of a Make-Ready Timeline and Suggests a Shorter Timeline for Wireless Attachments.**

CTIA supports the Commission’s proposal for a federal make-ready timeline to expedite access to electric utility poles.<sup>12</sup> Indeed, wireless providers confront many of the same access barriers as wireline attachers.<sup>13</sup> While there may be some differences<sup>14</sup> in the physical characteristics of wireline and wireless communications facilities, these variances do not require materially different treatment. Make-ready involves many of the same processes and is similarly vital to the deployment timeframe in both wireline and wireless build-outs. Because wireless providers operate in a fast-moving, intensely competitive industry, speedy access to poles is just as important to wireless attachers as it is to wireline attachers, if not more so. It is for these reasons that the Commission and courts have repeatedly affirmed that wireless attachments receive the same statutory protections as wireline attachments.<sup>15</sup>

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<sup>12</sup> See FNPRM at ¶¶ 31-45.

<sup>13</sup> See FNPRM at ¶ 25; *id.* at ¶ 29 (“The record before the Commission includes many examples of delay in make-ready work in states without make-ready timelines, in contrast to evidence of more expedited deployment in those states that have adopted timelines.”); Federal Communications Commission, *Connecting America: The National Broadband Plan 127* (2010), available at <http://www.broadband.gov/plan> (“National Broadband Plan”) (“[W]ireless and wired networks rely on cables and conduits attached to public roads, bridges, poles and tunnels. Securing rights to this infrastructure is often a difficult and time-consuming process that discourages private investment.”); *id.* at 129 (“Rearranging existing pole attachments or installing new poles – a process referred to as ‘make-ready’ work – can be a significant source of cost and delay in building broadband networks.”).

<sup>14</sup> See FNPRM at ¶ 31 n.110.

<sup>15</sup> See, e.g., 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, CS Docket No. 97-151, 13 FCC Rcd 6777, at ¶¶ 39-40 (1998) (“1998 Implementation Order”); *Nat’l Telecommc’ns Assoc. v. Gulf Power Co.*, 534 U.S. 327, 342 (2002) (“[A]ttachments at issue in this suit – . . . ones which provide wireless telecommunications – fall within the heartland of the [Pole Attachments] Act.”).

Although one party advocates that the Commission exclude pole tops from regulation under Section 224,<sup>16</sup> such a legal distinction is unwarranted. An attachment at the top of a pole is as necessary as, and is not functionally dissimilar to, an attachment at any other portion of that pole's usable space. If anything, wireless pole-top attachments are more flexible than standard wireline attachments because wireless attachers do not need to attach to every pole. In those instances where a given pole has been proven to lack capacity<sup>17</sup> for a pole top, the wireless provider often can just as easily attach on a nearby pole down the run.

In addition to supporting adoption of the proposed timeline, CTIA further suggests that the Commission implement an even shorter timeline for wireless attachers.<sup>18</sup> Accelerating the timeline for wireless attachments is consistent with the Commission's well-founded suggestion that the size of a build-out request impact the make-ready timeline.<sup>19</sup> Indeed, systemwide DAS build-out is inherently a smaller-scale project than wireline build-out; unlike wireline build-outs, wireless build-outs do not require attachments on each and every pole. This means that whereas the average wireline networks can include hundreds of thousands of poles, DAS networks only include dozens of poles – or hundreds at the high end of the scale.<sup>20</sup> As a result, quantifiably less

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<sup>16</sup> See Ex Parte Notice of Oncor Electric Delivery Co., Florida Power & Light Co., Tampa Electric Co. & Progress Energy Florida, Inc., GN Docket No. 09-51, WC Docket No. 07-245, WC Docket No. 09-154, at 10 (filed Dec. 3, 2009).

<sup>17</sup> Nevertheless, when considering the “insufficient capacity” issue, the Commission should be wary of broad interpretations of Section 224(f)(2) that effectively lead to the exception swallowing the rule. It would be counterintuitive for the drafters of the Act to have crafted a “blank check” or “catchall” excuse for pole owners to deny attachment at their whim.

<sup>18</sup> Cf. *id.* at ¶ 52 (“We seek comment on whether the wired pole attachment timeline is appropriate for wireless equipment.”).

<sup>19</sup> See *id.* at ¶¶ 47-50.

<sup>20</sup> See, e.g., NextG Networks, Philadelphia Pennsylvania Case Study, <http://www.nextgnetworks.net/communities/philadelphia.html> (last visited July 30, 2010) (describing the deployment of a 400-plus node system that covers more than 100 square miles in Philadelphia, PA).

engineering and make-ready work is required for building out a wireless system. For this reason alone, it is simply not necessary to allot as much time for wireless make-ready as for wireline make-ready.

Moreover, Commission precedent already exists for establishing a significantly shorter timeline for building out wireless infrastructure: in the 2009 “Shot Clock” *Declaratory Ruling*, the Commission determined that 90 and 150 days were presumptively reasonable timeframes for processing collocation and non-collocation applications, respectively.<sup>21</sup> Surely, if 90 days is a presumptively reasonable time period for a wireless siting collocation application, then a make-ready timeline for wireless attachments can be shorter than the 148-day timeline proposed by the Commission. Given the Commission’s premise that “access to poles, including [make-ready], must be timely in order to constitute just and reasonable access,”<sup>22</sup> wireless attachers should be given access on as short a timeline as is reasonably practicable.

As the Commission determines a proper timeline for wireless attachment make-ready, it would be useful for the Commission to discuss with utilities the process they use for their own wireless attachments. After all, “utilities must allow attachers to use the same attachment techniques that the electric utility itself uses in similar circumstances.”<sup>23</sup> National Grid, for

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<sup>21</sup> See In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Declaratory Ruling*, WT Docket No. 08-165, at ¶ 45 (rel. Nov. 18, 2009) (“We find 90 days to be a generally reasonable timeframe for processing collocation applications and 150 days to be a generally reasonable timeframe for processing applications other than collocations. Thus, a lack of a decision within these timeframes presumptively constitutes a failure to act under Section 332(c)(7)(B)(v).”).

<sup>22</sup> See FNPRM at ¶ 17.

<sup>23</sup> FNPRM at ¶ 9.

example, built a flourishing DAS system in Nantucket, MA, which included 26 DAS nodes.<sup>24</sup> The successful practices of utilities such as National Grid could serve as a useful model for developing a timeline for other attachers.

**B. CTIA Generally Agrees with the Commission’s Recommendations Concerning Outside Contractors.**

CTIA also supports the Commission’s proposal that attachers may use contractors that have been approved or certified by the utility to perform surveys and make-ready work.<sup>25</sup> This approach serves as a common-sense compromise that addresses attachers’ need to access poles quickly, and also alleviates electric utilities’ safety and engineering concerns. Likewise, the Commission’s suggestions that each utility share a list of approved- and certified- contractors, including those that the utility itself uses, and that each utility also share its evaluation standards, serve as strong checks on electric utilities’ discretion without subjecting them to an overly burdensome requirement.

Nevertheless, CTIA does object to the Commission’s statement that “communications attachers . . . do not have the same incentives to maintain the safety and reliability of the infrastructure as utilities themselves would.”<sup>26</sup> Despite some utilities’ assertions to the contrary, CTIA and its members have every incentive for poles to remain safe and reliable. Indeed, if a pole to which a wireless provider attaches fails, then the attacher’s communication fails as well – that is precisely the outcome that wireless attachers do *not* want. It is in both utilities *and* wireless attachers’ interest to maintain safe and reliable poles. To that end, wireless attachers

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<sup>24</sup> See Nelson Sigelman, *Up-Island Officials Look to Nantucket for Cell Phone Tips*, THE MARTHA’S VINEYARD TIMES, Aug. 24, 2006, available at [http://www.mvtimes.com/news/2006/08/24/up\\_island\\_cell\\_phones.php](http://www.mvtimes.com/news/2006/08/24/up_island_cell_phones.php).

<sup>25</sup> See FNPRM at ¶¶ 61-64.

<sup>26</sup> *Id.* at ¶ 67.

closely follow Commission regulations, the National Electrical Safety Code (“NESC”), Occupational Safety and Health Administration (“OSHA”), Environmental Protection Agency (“EPA”), state building code standards, and other regulations that adequately address utilities’ concerns regarding safety and RF emissions. In fact, wireless attachments are specifically designed to be placed on a pole in compliance with safety standards and other requirements. Any claim that CTIA and its members do not care about public safety and the integrity of poles is incorrect and unfounded.

**C. CTIA Generally Supports the Commission’s Other Ideas for Facilitating Expedited Access and Data Availability.**

CTIA commends the Commission for its other proposals related to pole access. For instance, CTIA supports the Commission’s suggestion that applicants pay for make-ready work in stages and may withhold a portion of the payment until the work is complete.<sup>27</sup> The Commission’s proposal – to pay one-half the cost up-front, one quarter at the mid-way point, and one quarter upon completion – both properly and reasonably aligns incentives to complete make-ready work on time. The “Utah rule,” as suggested by the Commission, is both an appropriate and a common-sense solution.

CTIA also supports the Commission’s suggestion that utilities make available to attaching entities a schedule of common make-ready charges.<sup>28</sup> CTIA likewise agrees with the Commission’s general objective of improving availability of data.<sup>29</sup> Enhancing transparency is a laudable goal that would likely help attachers achieve access to poles at the lowest compensable level.

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<sup>27</sup> *Id.* at ¶ 70.

<sup>28</sup> *Id.* at ¶ 71.

<sup>29</sup> *Id.* at ¶¶ 75-76.

Nevertheless, it is important that the Commission strike a balance between encouraging transparency and creating overly burdensome regulations. For instance, rather than creating whole new systems for collecting and coordinating data, CTIA suggests that the Commission instead focus on plugging the gaps that already exist in data that is publicly available. To illustrate: today, most inputs used to calculate electric utilities' pole rates can be found in an electric utility's FERC Form-1 filings. Two key inputs, however – the electric utility's depreciation rate and its pole count – are only sometimes, if ever, publicly available. Rather than building a brand-new, all-inclusive database for all pole-rate inputs, the Commission need only require the submission of those two data points. Such a requirement would achieve the Commission's transparency goals, but would create a lighter government footprint than other options, such as mandating participation in the National Joint Utilities Notification System ("NJUNS"). The Commission should follow a similar approach with respect to make-ready schedules; it should encourage transparency while avoiding too large a federal role in management of the schedule.

#### **IV. THE CURRENT ENFORCEMENT PROCESS CAN BE IMPROVED.**

The current set of pole attachment dispute resolution procedures has served an important purpose. It has facilitated the creation of entire industries, and has survived appellate scrutiny time and again.<sup>30</sup> While staff's notable expertise in pole attachment issues assists in the resolution of formal complaints, their mediation skills also facilitate resolution of many complaints informally.

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<sup>30</sup> See, e.g., Nat'l Cable & Telecomm'ns Ass'n v. Gulf Power Co., 534 U.S. 327 (2002); Southern Co. Svcs. v. FCC, 313 F.3d 574 (D.C. Cir. 2002); Texas Util. Elec. Co. v. FCC, 997 F.2d 925 (D.C. Cir. 1993).

Nevertheless, certain adjustments can be made to achieve a more efficient and more effective enforcement regime. Though useful, the current system does move slowly. This can be problematic when disputes involve speed-to-market issues that require prompt resolution, as is often the case for wireless attachers. As the Commission has recognized, the peculiar pressures of access disputes can place attachers into the impossible dilemma of having to “choose between unfavorable and inefficient terms on the one hand or delayed entry, and thus, a weaker position in the market on the other.”<sup>31</sup> In addition – market issues aside – the sheer expense of pole attachment disputes, coupled with limited potential for damages, can deter attachers from initiating the process in the first place. There is no question that the Commission needs more tools to facilitate a regime that is both swift and effective, including the ability to expedite complaint procedures.

**A. CTIA Suggests Adoption of a Two-Tiered Complaint Process that “Fast-Tracks” Access-Related Disputes.**

The simplest way to accelerate the enforcement regime where necessary is to recognize that not all pole attachment disputes are created equal. Whereas some disputes entail after-the-fact conflicts over rates, refunds, and similar non-time-sensitive issues, others involve critical access-related conflicts that severely exacerbate speed-to-market problems. Under the current regime, both categories of conflicts are treated the same, irrespective of their urgency or lack thereof. Not only is the current one-size-fits-all approach unnecessary, but it delays resolution of those disputes that require immediate action.

CTIA recommends that the Commission adopt a two-tiered approach where conflicts are resolved on different timeframes depending on their exigency. Complainants should be able to

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<sup>31</sup> 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, at ¶ 17 (1998).

request resolution of access-related disputes on a timeline and under procedures such as those already established in the Enforcement Bureau’s accelerated docket.<sup>32</sup> The Commission could then “fast-track” those disputes that are time-sensitive, and would continue the current process for those disputes that are not. Because it may “conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice,” the Commission has ample authority to adopt a “Rocket Docket” for access-related complaints.<sup>33</sup>

This is a simple approach that would reflect the disparate urgency between different kinds of pole attachment disputes. Moving away from the current one-size-fits-all system would expedite resolution in those situations where time is of the essence. And it would have the added benefit of enabling the Commission to continue the current process in important but less time-critical conflicts, thus avoiding the need to re-envision its entire approach to pole attachment disputes.

**B. CTIA Supports More Robust Remedies.**

CTIA agrees with the Commission’s proposals to bolster current remedy options. In order to deter pole owners from unreasonably denying access to their poles, it is imperative that the Commission invoke remedies that actually deter malfeasance in the first place. And yet, as the Commission stated in the FNPRM, “[u]nder the current rule, the only consequence a utility engaging in such conduct is likely to face in a proceeding is a Commission order requiring the utility to provide the access it was obligated to grant in the first place.”<sup>34</sup> This cannot continue. Under today’s regime, a pole owner can deliberately deny access to its poles, all the while

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<sup>32</sup> See 47 C.F.R. § 1.730.

<sup>33</sup> See 47 C.F.R. § 1.1415; see also 47 U.S.C. § 154(j) (“The Commission may conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice.”).

<sup>34</sup> FNPRM at ¶ 86.

treating the Commission's complaint process as a tool for delay and a cost of doing business. In this regard, some owners actually have more to gain from instigating a pole dispute than they do to lose. The FNPRM takes important steps to recalibrate incentives so that Communications Act violations are deterred, not encouraged.

First and foremost, where an electric utility unlawfully denies or delays access or charges unreasonable rates, the Commission should grant the attacher compensatory damages and impose other measures such as forfeitures and attorneys fees. Strengthening remedies in this way will realign incentives so that the benefits of delay no longer outweigh the costs of violating the Commission's rules. This will deter pole owners from deliberately violating the Communications Act, and it will make attachers whole when pole owners force them to file complaints to defend their statutory rights. And all of these remedies – awarding attorneys fees, in particular – will encourage pole owners to expedite dispute resolution so as to avoid increasing the given conflict's overall costs.

Likewise, as the Commission suggests, damages should be awarded prior to the complaint date.<sup>35</sup> The current rule creates perverse incentives for both parties: it is in the pole owner's best interest to delay negotiations prior to the complainant's filing, and it is in the attacher's best interest to file a complaint quickly to start the clock for damages. The Commission's proposal would realign these incentives so that it is in *both* parties' best interests to resolve disputes as quickly as possible, and possibly without involving the Commission at all. Furthermore, in those situations where the parties cannot resolve the dispute on their own, expanding the damages timeline would take a strong step towards recouping to injured attachers the actual harm caused to them.

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<sup>35</sup> See *id.* at ¶ 88.

Of course, although the Commission should be authorized to award greater amounts in damages, it should only invoke these powers sparingly. These proposals should be used primarily to calibrate incentives and to make injured parties whole. Indeed, it would be unjust and inequitable were the Commission to swing the pendulum too far, creating unchecked incentives for attachers to file spurious complaints. For that reason, the remedies should cut both ways, and complainants that file frivolous complaints should be liable for pole owners' costs as well.

**C. The Commission Should Retain the “Sign and Sue” Rule.**

CTIA supports the Commission's decision to retain the so-called “sign and sue” rule, which enables attachers to challenge a pole attachment agreement's lawfulness after signing it.<sup>36</sup> Because electric utilities typically hold a monopoly over poles in their region, attachers often have inherently inferior bargaining positions. As the FNPRM notes, the “sign and sue” rule was initially enacted to address this bargaining disparity, to prevent electric utilities from abusing their monopoly powers by presenting to attachers “take it or leave it” unjust and unreasonable demands.<sup>37</sup> Wireless providers are particularly sensitive to the bargaining disparity because their build-outs so often involve time-sensitive, speed-to-market issues. Because the rule sufficiently addresses the owner-attacher bargaining disparity and the owner-attacher dynamic has remained essentially unchanged, the rule is as necessary today as it was when the Commission first enacted it.

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<sup>36</sup> FNPRM at ¶ 104; *see also* 47 C.F.R. § 1.1410(a)-(b).

<sup>37</sup> *See id.*; *see also* *Southern Co. Svcs. v. FCC*, 313 F.3d 574, 583 (D.C. Cir. 2002) (“Of course the Pole Attachment Act was designed to prevent such an exercise of monopoly power that would nullify the statutory rights of cable systems or telecommunications carriers to obtain both immediate access and timely regulatory relief to the extent access is unreasonable or discriminatory.”) (quoting the Commission's brief).

In addition, CTIA observes that open communication, including noting where there are objections and impasse, is an important part of negotiation. CTIA agrees with incorporating into the Commission's rules the ability to challenge without notice the lawfulness of an electric utility's application of a rate, term or condition that is not "unreasonable on its face," and where the attachers "could not reasonably have anticipated" that the electric utility would apply the rate, term or condition in such a manner.<sup>38</sup>

#### **IV. POLE RENTAL RATES SHOULD REMAIN UNIFORM AND AS LOW AS POSSIBLE.**

Finally, CTIA desires a rate structure that encourages broadband deployment while fully compensating pole owners for use of their infrastructure. In particular, CTIA applauds the development of a uniform rate that incorporates more efficient marginal costs principles. Such measures should apply to investor-owned utilities, cooperatives, and government-owned utilities alike. In addition, as the Commission has recognized, pole attachment rates should be as low as possible to facilitate the expansion of broadband.<sup>39</sup> CTIA approves of the Commission's plan to reduce the Telecommunications rate. Not only would lowering the rate spur investment and accelerate broadband deployment, but the Commission's proposals are more than adequate to ensure that the pole owners receive fair, cost-based compensation. Indeed, the Supreme Court has already held that the current cable rate is fully compensatory to pole owners.<sup>40</sup>

To the extent that the Commission contemplates adjusting the Telecommunications rate, it should make clear that the adjustments apply to both wireline *and* wireless attachments – both

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<sup>38</sup> FNPRM at ¶ 108.

<sup>39</sup> *See id.* at ¶ 115 ("The National Broadband Plan recommends that the Commission 'establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with [s]ection 224 of the [Act], to promote broadband deployment.'") (quoting National Broadband Plan at 110).

<sup>40</sup> *See FCC v. Florida Power Corp.*, 480 U.S. 245 (1987).

Commission and Supreme Court precedents dictate that wireless attachments receive the statutory prescriptions accorded to telecommunications carriers under Section 224.<sup>41</sup> As with make-ready access issues,<sup>42</sup> wireless attachment rates should be treated no differently than wireline attachment rates.

Likewise, the same basic usable space principle should apply to wireless attachments as it does to wire-based attachments: if a wireless attachment uses (and prevents others from using) one foot of pole space, that is the amount of space for which it should pay. In particular, CTIA suggests that the Commission follow the lead of the Utah Administrative Code and clarify that the usable space charged to wireless attachers “may not include any of the length of a vertically placed cable, wire, conduit, antenna, or other facility unless the vertically placed cable, wire, conduit, antenna, or other facility prevents another attaching entity from placing a pole attachment in the usable space of the pole.”<sup>43</sup>

CTIA hopes that the Commission will use this opportunity to promote broadband deployment by promulgating a rate structure that is uniform, low and fair.

## **V. CONCLUSION.**

For the foregoing reasons, CTIA largely supports the Commission’s proposals to promote broadband deployment. We encourage the Commission to facilitate access to poles, establish

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<sup>41</sup> 1998 Implementation Order, at ¶ 39 (“Wireless Carriers are entitled to the benefits and protections of Section 224. Section 224(e)(1) plainly states: ‘The Commission shall . . . prescribe regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services.’ This language encompasses wireless attachments.”); Nat’l Cable & Telecommc’ns Ass’n v. Gulf Power Co., 534 U.S. 327, 342 (2002) (“[A]ttachments at issue in this suit – . . . ones which provide wireless telecommunications – fall within the heartland of the [Pole Attachments] Act.”).

<sup>42</sup> See *supra* Part III.A.

<sup>43</sup> See Utah Admin. Code r. 746-345-5; see also Comments of CTIA – The Wireless Association, GN Docket No. 09-51, at 22 (filed June 8, 2009).

robust and effective enforcement mechanisms, and adopt a pole attachment rate that is both uniform and low.

Respectfully submitted,

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