BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 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
	)	

REPLY COMMENTS OF TIME WARNER CABLE INC.

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October 4, 2010

EXECUTIVE SUMMARY

There is no dispute over the importance of the Commission's objectives in this proceeding: to increase the availability of broadband services by reducing the costs and delays inherent in deploying the facilities used to provide those services. And the record strongly supports many of the Commission's proposals to accomplish that objective. Importantly, the record evidence supports the Commission's proposal to adopt a low and uniform pole attachment rate for all providers. The Commission's proposed rate formula will speed broadband deployment by reducing the costs of accessing critical infrastructure, removing irrational regulatory distinctions that foster marketplace distortions, and reducing, if not entirely eliminating, the punitive and counterproductive litigation that the existing Telecom rate has engendered. The record further confirms that, as TWC has previously commented, the Commission's proposed rate structure will adequately (if not over) compensate utilities for the cost of providing pole attachments. There can be no serious question that the Commission has authority to adopt its rate proposal, and TWC strongly encourages it to do so.

As the Commission recognizes, expediting access to infrastructure is one of the core mandates of the Broadband Plan, and TWC generally supports the Commission's effort to reduce the time and expense associated with pole access. While there is disagreement among the commenters over the finer points of the Commission's proposed five-stage timeline, consistent with TWC's initial comments, the record amply demonstrates that pole owners can and do provide access to poles in most cases in much less time than the Commission's proposed timelines would encourage. Accordingly, the Commission should adopt a far more compressed make-ready timeline for run-of-the-mill cases It must also reject the infinite number of caveats and exceptions that utilities propose as the basis for exercising discretion to "stop the clock."

Giving utilities discretion to "stop the clock" in any variety of circumstances will inject new delays into the make-ready process and, in effect, swallow any timeline rule the Commission establishes.

The Commission should also follow through on its other proposals to reduce the time and expense of the make-ready process. Importantly, the Commission should allow increased use of outside contractors. Most utilities already use outside contractors extensively, and providing attachers with lists of approved contractors will increase efficiency and consistency in the make-ready process. The Commission should also adopt its proposal to require utilities to post a schedule of charges for typical make-ready costs. This will provide utilities incentives to become more efficient, and will provide attachers more information in the planning stages. Together, these proposals will facilitate the rapid deployment of broadband infrastructure, and the Commission has clear authority to implement them.

The record strongly supports modifying the Commission's enforcement procedures to accelerate facilities deployment and provide utilities with greater incentives to comply with Commission rules and policies. TWC agrees with other commenters that the Commission should establish clear timelines for resolving pole attachment complaints. The Commission also has authority to and should expand the relief available in a complaint proceeding to include compensatory damages, and, in some circumstances, attorneys fees and costs. The availability of these additional forms of relief will provide important incentives to utilities to respect the Commission's rules – which many currently do not – and to compensate an attacher for a utility's abuses.

The Commission should not, however, vest pole owners with unfettered discretion to impose penalties on cable operators for alleged unauthorized attachments or safety violations.

Far from supporting the massive numbers of unauthorized attachments that utilities allege, the record demonstrates that the utilities' allegations are overblown and inaccurate. Cable operators have incentives to properly permit their attachments, and the Commission's existing penalty regime is sufficient to deter them from making unauthorized attachments. The record further demonstrates that the Commission should not adopt a penalty regime modeled after the Oregon experiment, which has proven to be a failure and would undermine the goals of this proceeding and the Broadband Plan.

The Commission should additionally clarify that utilities do not have authority to impose penalties on cable operators for alleged safety violations. Cable operators have the same interest as utilities in safe outside plant, and utility allegations that cable operators create widespread safety violations are false and misleading. Allowing utilities to impose penalties for alleged safety violations would, again, undermine the core objective of reducing the time and expense associated with deploying broadband facilities.

It is also vitally important that the Commission retain its "sign and sue" rule in its current form. As the record demonstrates, the rule provides a critical check on utility abuses, and there is no need to modify it. While there is no evidence that the rule is being abused, as utilities allege, it is clear that the Commission's proposed modifications would prove counterproductive and create an even more unwieldy, protracted and expensive pole attachment agreement negotiation process.

Nor should the Commission permit utilities to impose additional charges on overlashed wires, as some utilities request. Allowing utilities to impose a surcharge on overlashed wires not only grates against the Commission's decades-old policies, but would needlessly increase the costs and delay the deployment of broadband facilities – in direct contravention of the core

mandate of the Broadband Plan. As the Commission has long recognized, overlashing allows timely and efficient deployment of facilities while using the very same space occupied by a pre-existing host attachment. Utilities should not be allowed to recover twice for use of the same pole space.

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Time Warner Cable Inc. ("TWC") respectfully submits these Reply Comments in response to the Commission's May 20, 2010, *Further Notice of Proposed Rulemaking* in WC Docket No. 07-245, GN Docket No. 09-51 ("FNPRM"), published in the Federal Register on July 15, 2010. *See* 75 Fed. Reg. 41,338 (July 15, 2010).

DISCUSSION

I. THE COMMISSION CAN AND SHOULD ADOPT A LOW AND UNIFORM RATE STRUCTURE TO FOSTER BROADBAND DEPLOYMENT.

A. A Low And Uniform Rate Structure Will Spur Broadband Deployment.

The comments submitted in response to the FNPRM reflect broad agreement among diverse interests that the Commission has set its sights on worthy objectives in this proceeding: to increase the availability of broadband services and increase competition in the provision of communications services. 1/ Electric utility commenters question, however, whether the Commission's means, including a low and uniform pole attachment rate, will accomplish those

1/ *See, e.g.*, Comments of the Coalition of Concerned Utilities ("CCU") at i; Comments of Oncor Electric Delivery Company LLC ("Oncor") at 1; Comments of the Edison Electric Institute and the Utilities Telecom Counsel ("EEI/UTC") at 63; Comments of the National Cable & Telecommunications Association ("NCTA") at 1-2; Comments of CenturyLink at 1; Comments of T-Mobile at 4; Comments of Qwest Communications International, Inc. at 1-2; Comments of the United States Telecom Association ("USTA") at 1.

recognized and important national imperatives. 2/ But the record created in this proceeding amply allays these concerns. Importantly, the record demonstrates that a low and uniform pole attachment rate for all providers will advance the core objective of promoting broadband deployment so that all Americans can enjoy the benefits of competition and advanced communications services. There is indeed broad support across the spectrum of commenters, including some pole owners, 3/ for the Commission's proposal to adopt a low and uniform pole attachment rate. 4/ Consistent with TWC's initial comments, the evidence of record demonstrates that the Commission's rate proposal would accelerate broadband deployment by reducing the costs of accessing vital infrastructure, eliminating irrational market distortions and reducing, if not eliminating, cancerous and wasteful litigation over pole attachment rates.

It is no secret that low and fair pole attachment rates are key to fostering investment in broadband deployment. 5/ As commenters point out, the Commission's existing policy of ensuring low pole attachment rates for cable, information and unclassified communications services has been an overwhelming success. 6/ That policy has spurred cable operators to invest billions to deploy two-way interactive networks capable of delivering advanced communications services and the development of real facilities-based competition to incumbent voice providers. 7/ Extending that fundamentally sound, pro-investment and pro-competition policy by implementing a low and uniform pole attachment rate for all providers would similarly encourage facilities deployment in currently unserved areas and foster greater competition in areas already served.

2/ *See, e.g.*, Comments of the Florida Investor-Owned Electric Utilities at 1-2; Oncor Comments at 3-4.
3/ *See* CenturyLink Comments at 4-5.
4/ *See* Comments of the American Public Power Association ("APPA") at 19-20.
5/ *See* Comcast Comments at 5; NCTA Comments at 3-4.
6/ *See* Comcast Comments at 5; NCTA Comments at 3-4.
7/ Comcast Comments at 5.

The record further confirms that high pole attachment rates deter investment and retard broadband deployment, especially in rural areas of the country. 8/ The record reflects that higher pole attachment rates would carry an outsized impact in rural America where there are more poles and fewer prospective customers. 9/ For example, the United States Telecommunications Association pointedly observes that "[h]igh pole attachment rates impede the delivery of broadband in sparsely populated rural areas." 10/ According to USTA, lower and more uniform pole attachment rates would therefore have "a substantial and immediate impact on the provision of broadband to rural areas." 11/

Similarly, the American Cable Association reports that low pole attachment rates have been "instrumental in the ability of smaller cable operators to deploy broadband facilities and offer advanced communications services." 12/ Cable operators in rural and smaller markets "already face significant hurdles to deploying and upgrading their broadband networks, as they generally must attach their equipment to a greater number of poles than their urban counterparts, yet have fewer subscribers per mile over which to spread the costs." 13/ As such, pole attachment rates charged to these operators impact decisions to expand their service areas and the scope of their service offerings and also affect broadband adoption by their subscribers. 14/

The record also makes clear that there is no sound justification for applying different and higher rates based on the types of communications services an attachment is used to provide. As commenters point out, the current structure, which mandates wildly divergent rates based on

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8/ ACA Comments at 3.
9/ *See* NCTA Comments at 8; *see also* NCTA Reply Comments at App. B, Decl. of Billy Jack Gregg; USTA Comments at 10.
10/ USTA Comments at 11.
11/ *Id.* at 11-12.
12/ ACA Comments at 3.
13/ *Id.*
14/ *Id.* at 4-5.

whether a service is cable, information, or unclassified service or whether it is a telecommunications service, is illogical in a world of converged services and operates inappropriately to distort markets for communications services. 15/ The comments – including those of pole *owners* – recognize that there is absolutely no cost-based reason for this disparity: No greater burden is placed on a pole based on the type communications services that travel over an attached wire. 16/ The same space is used for the attachment regardless of the type of service provided. 17/

The comments also support the Broadband Plan's recognition that the current structure of vastly different rates for cable/information and telecommunications services has fostered costly and wasteful litigation over pole attachment rates and injected needless and counterproductive uncertainty into investment decisions. 18/ In addition to bearing out the National Broadband Plan's recognition that the existing "arcane" Telecom Rate has led to "near-constant litigation,"19/ the comments demonstrate that the Telecom Rate has provided fertile ground for utilities to manipulate their pole attachment rates. 20/ A rate regime that mandates low and uniform pole attachment rates would also reduce – if not entirely eliminate – utilities' attempts to have state courts classify every new service as a telecommunications service in hopes of generating additional revenue from their pole plant.

15/ MetroPSC Comments at 8; USTA Comments at 6-9.

16/ *See, e.g.*, APPA Comments at 4 ("The use of a single rate methodology for all attachments of the same kind, irrespective of the particular service, recognizes that all attachments of the same type are imposing essentially the same burden and cost on the poles . . . .").

17/ *See, e.g.*, APPA Comments at 4.

18/ MetroPSC Comments at 8.

19/ Broadband Plan at 110.

20/ Level 3 Comments at 8-11.

In light of all of these realities, the electric utility commenters are simply wrong that pole attachment rates are irrelevant to broadband deployment and adoption in this country. 21/ The costs to access critical infrastructure, as the Broadband Plan recognizes, emphatically do impact the cost and availability of broadband services. Accordingly, the Commission's rate proposal is imminently sound and should be promptly adopted in this proceeding. As discussed below, the Commission's low and uniform rate structure also more than adequately compensates utilities for the cost of pole attachments and is lawful.

B. The Commission's Proposed Rate Structure Would Fully Compensate Pole Owners For The Cost Of Pole Attachments.

In this comment round, various pole owing electric utilities once again mount their favorite hobbyhorse: the argument that the Commission's pole attachment rate formulas "subsidize" cable operators and other attachers. 22/ But, as before, these pole owners offer no evidence – no studies, no economic expert, no support whatsoever – to bolster that claim. The reason for the dearth of evidence that pole owners subsidize cable operators is clear: The Commission's existing pole attachment rate formulas contain no subsidies for cable operators or other communications attachers, and the Commission's proposed rate structure would continue to ensure that utilities are fully compensated for the costs of pole attachments. As the National Cable and Telecommunications Association ("NCTA") explains, pole owner claims of subsidies "have been repeatedly refuted and rejected by the Commission, the courts, public service commissions, and consumer advocates." 23/

Far from exposing subsidies to cable operators, the record developed in this proceeding instead supports TWC's comments that the Commission's proposal to implement a lower and

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21/ *See, e.g.*, Comments of the Florida Investor-Owned Electric Utilities at 1-4.
22/ *See, e.g.*, APPA Comments at 4; EEI/UTC at 74-75; Oncor Comments at 65; CCU Comments at 114.
23/ NCTA Comments at 6 & n.16

more uniform pole attachment rate structure by removing capital costs from the Telecom Rate formula is economically sound and entirely appropriate. 24/ Consistent with TWC's comments, the record makes clear that the Commission's current formulas actually *over*compensate utilities for pole attachments. 25/ For example, the expert report of Patricia D. Kravtin submitted by the NCTA with its comments on the FNPRM powerfully demonstrates that the Commission's formulas allow pole owners to over-recover for the costs of pole attachments. Ms. Kravtin shows that the Commission's current pole attachment formulas lead to over-recovery in the following ways:

- The formulas include inflated non-pole-related maintenance expenses for electric utilities. 26/
- The formulas allow utilities to recover administrative and general expenses unrelated to poles. 27/
- The current formulas allow inappropriate recovery of income taxes. 28/
- The formulas afford utilities an outdated default rate of return that does not reflect actual capital market conditions. 29/
- The formulas use stale and artificially low presumed pole heights. (Electric utility commenters indeed argue they install much taller poles.) 30/

The record also supports the Commission's proposal to remove capital costs from the lower bound Telecom Rate. The record evidence demonstrates that removing capital costs is economically justified because pole attachment rates should be set closer to the marginal costs of

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24/ *See* TWC FNPRM Comments at 5-10.

25/ *See id.* at 5-9; *see also* NCTA Comments, at Att. A (Report of Patricia D. Kravtin); Comcast Comments at Att. 1 (Declaration of Timothy S. Pecaro).

26/ *See* Kravtin Rpt. at 15-18.

27/ *See id.* at 18-19.

28/ *See id.* at 19-21.

29/ *See id.* at 21-22.

30/ *See id.* at 24. The fact that the Commission's pole height presumptions are outdated is further supported by electric utility commenters, which state that they construct taller poles than the Commission presumes. *See, e.g.,* CCU Comments at 109.

attachment. 31/ As Ms. Kravtin explains, pole attachment rates set closer to marginal costs promote more efficient allocation of resources, which in turn "maximizes the overall societal value that can be generated from those resources." 32/ Accordingly, the Commission's effort to move the Telecom Rate closer to marginal costs "better fosters the emergence of conditions that stimulate competition in the relevant communications markets and produces the desired competitive market performance attributes including lower prices, greater choices among new and innovative broadband services, enhanced productivity and economic development opportunities for national and local economies." 33/ And the evidence also shows that removing capital costs from the Telecom Rate is more consistent with sound principles of cost causation. 34/

The record is also clear that, even without the inclusion of capital costs, utilities will continue to receive more than full compensation for the cost of attachment under the lower bound Telecom Rate. 35/ For example, the declaration of Timothy S. Pecaro, submitted with the comments of Comcast Corporation, makes clear that the Commission's lower bound rate allows utilities to recover more than their marginal costs of attachment through the dual revenue streams of make-ready payments and recurring rental payments. 36/ Mr. Pecaro explains that the lower bound Telecom Rate is "fair and more than fully compensatory" because, in addition to the recovery of marginal costs through make-ready payments, the utility receives recurring rental payments "set a level that ensures that the utility recovers substantially more than the actual maintenance and administrative expenses caused by attachers," which constitutes "a significant

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31/ *See* Kravtin Rpt. at 28; Pecaro Decl. ¶ 27.
32/ Kravtin Rpt. at 28.
33/ *Id.*
34/ *See* Kravtin Rpt. at 12; Pecaro Decl. ¶¶ 14-22.
35/ *See* Kravtin Rpt. at 13-27; Pecaro Decl. ¶¶ 14-35. ¶
36/ *See* Pecaro Decl. ¶ 27.

cushion above the actual marginal cost of a pole attachment." 37/ Indeed, the record demonstrates that even the lower bound Telecom Rate reflects inappropriate costs and presumptions that lead to over recovery in light of attachers inferior rights. 38/

The utilities nevertheless contend that by removing capital costs from the Telecom Rate, they are denied recovery of costs for the taller poles they install to accommodate third-party attachers. 39/ This argument is incredible: Pole owners would not, and in fact do not, routinely build taller-than-necessary poles to accommodate third-party attachers. As Mr. Pecaro explains:

> The only rational impetus for the utility to incur these additional costs would be the expectations that they will subsequently be able to profit from installing these taller poles. If the pole is found to be of inadequate height for additional attachers, it is part of the make-ready process to replace the pole *at the expense of the attacher*. Since it is the additional attacher that bears the cost of any necessary pole replacement, it *cannot* be the case that the utility is required to invest its own capital in taller poles. In most cases, the poles needed for the utility's own purposes can accommodate the typical attachers. 40/

Indeed, as Mr. Pecaro explains, because installing a taller-than-necessary pole "is strictly speculative and contrary to efficient capital management," "it would be wholly irrational for the utility, as well as inconsistent with the utility's capital preservation obligations, to risk nonrecovery of these costs absent a direct economic benefit." 41/ The electric utilities offer no reasonable economic justification for building taller-than-necessary poles for the benefit of cable operators.

Mr. Pecaro's analysis is supported by the many utility comments emphasizing that the need for pole-change outs to accommodate third-party attachers should stall any make-ready

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37/ *See* Pecaro Decl. ¶ 27.
38/ *See* Kravtin Rpt. at 34-40; Pecaro Decl. ¶¶ 28-35.
39/ *See, e.g.*, CCU Comments at 109-110.
40/ Pecaro Decl. ¶ 16 (emphasis in original).
41/ *Id.* ¶ 17.

timelines. 42/ Routine pole change outs would not be necessary – as they often are – if utilities actually installed poles to accommodate third-party attachers.

The Commission's proposed rate structure is more than compensatory. At a minimum, utilities are guaranteed pole attachment rates calculated at the existing cable rate, which is fully compensatory. The Commission also has authority to adopt its proposed rate structure.

C. The Commission Has Authority To Adopt A Low And Uniform Pole Attachment Rate.

Electric utility commenters argue that the Commission does not have authority to adopt its rate proposal. Their arguments lack merit. As TWC and other comments have demonstrated, the Commission clearly has discretion under Section 224 to adopt a low and uniform pole attachment rate. 43/

The utilities argue that the Commission's proposal is not supported by the text of the statute and is inconsistent with legislative intent. 44/ They argue that the Commission has no discretion to interpret "cost" as used in subsection (e) because that term is defined in subsection (d) as fully allocated costs. But that argument simply misreads the statute. 45/ As TWC has previously explained, the utilities are correct that the Commission's discretion to adopt pole attachment rate formulas is constrained by the requirement that they be "just and reasonable" which, in turn, is cabined by the zone of reasonableness established by subsection (d) between

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42/ *See, e.g.*, Comments of Pole Owners Working For Equitable Regulation ("Power") Coalition Comments at 7. While TWC has previously observed that pole owners are not generally obligated to create space for cable operators, Section 224 obligates utilities to treat attachers non-discriminatorily, including with respect to pole change outs and other make-ready. *See* 47 U.S.C. § 224(f).

43/ *See* TWC FNPRM Comments at 11-14; Comments of Bright House Networks at 14-27; NCTA Comments at 14-15; Comcast Comments at 9-11; USTA Comment at 12-16.

44/ EEI/UTC Comments at 63-74.

45/ *See id.* at 65.

marginal and fully allocated costs. 46/ But subsection (d) does not, as the utilities suggest, expressly define the "cost of providing space" as used in subsection (e); that term does not appear anywhere in subsection (d). 47/ The statute is far from the paragon of unambiguousness that the utilities see. Thus, because the statute does not speak directly to the critical issue – *i.e.*, what are the costs of providing pole space – the Commission is vested with discretion to interpret "costs" consistent with the bounds of reasonableness set forth in subsection (d). 48/ And, as TWC and other commenters have explained, the Commission's proposed rate structure is faithful to that requirement. 49/

The utilities' related argument that Congress intended the Telecom Rate to be greater than the Cable Rate is similarly misguided. While it is true that the statute provides that if the Telecom Rate adopted by the Commission yields a rate above the Cable Rate, "[a]ny increase" is to be phased in over five years, there is no requirement contained anywhere in the statute that the Telecom Rate must yield a rate higher than the Cable Rate. 50/ Subsection (e) only sets forth a method for apportioning usable and unusable space; it does not command the Commission to adopt a rate formula that yields a rate higher than the Cable Rate. To the contrary, by vesting the Commission with discretion to adopt a "just and reasonable" Telecom Rate within the zone of reasonableness established by subsection (d), the statute allows the Commission to adopt a Telecom Rate that yields a rate lower than the Cable Rate. This has not been lost on the

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46/ *See* 47 U.S.C. § 224(b) & (d); *see also* TWC FNPRM Comments at 11-14; Comments of Bright House Networks at 14 -23.

47/ *Compare* 47 U.S.C. § 224(e), *with id.* § 224(d).

48/ *See* TWC FNPRM Comments at 11-14. EEI/UTC indeed notes that, had Congress intended to give the Commission "flexibility to establish rates falling between incremental and fully-allocated costs, it could have easily followed the same language that it used in Section 224(d)." EEI/UTC Comments at 69. Of course, that is precisely what Congress did in expressly providing that all pole attachment rates must be "just and reasonable" as defined under subsection (d). *See* 47 U.S.C. § 224(b) & (d).

49/ *See* TWC FNPRM Comments at 11-14; Bright House Networks Comments at 14 -23.

50/ *See* 47 U.S.C. § 224(e)(4).

Commission. When the Commission implemented subsection (e), it anticipated that the new Telecom Rate could produce a lower rate, and required that any rate reduction take effect immediately. 51/

Nor does the legislative history support the utilities' position that the Commission's proposal is inconsistent with legislative intent behind subsection (e). While the utilities invoke various snippets of the legislative history, none of these snippets support the proposition that Congress intended to require the Commission to implement a Telecom Rate that produced rates higher than the Telecom Rate. 52/ The best that the utilities apparently can come up with is a quotation allegedly drawn from the Conference Report on S. 652, containing the 1996 Communications Act amendments including Section 224(e), that suggests that the Telecom Rate is to be based on "fully allocated costs." 53/ But, on inspection, this quotation comes from the *House Report* on a House Bill amending Section 224 that was rejected at Conference. The adopted language was from the Senate Bill, which did not require any fully allocated cost formula. 54/ Accordingly, the utilities' assertion that Congress intended the Telecom Rate to be based on fully allocated costs – an instruction found nowhere in the statutory text itself, of course – is simply based on a patent misrepresentation of the relevant legislative history. Such dubious interpretations of legislative history provide no insight into Congressional intent. If anything, the actual legislative history suggests that Congress did *not* intend for the Telecom Rate to be based on fully allocated costs. In any event, the Commission should look to the text of the statute to interpret its authority – and the statute itself manifestly vests it with discretion to adopt a Telecom Rate that yields a rate closer to the Cable Rate.

51/ *See* 47 C.F.R. § 1.1409(f).
52/ *See, e.g.*, Florida Utilities at 61-63; Oncor Comments at 60-62.
53/ *See* Florida Investor-Owned Utilities Comments at 61.
54/ *See* Conference Report No. 104-458, 104th Cong., 2d Sess. p. 206 (1996).

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In sum, the Commission should adopt its proposed low and uniform rate structure. The Commission's proposal is thoroughly sound and will promote the core objective of accelerating broadband deployment by eliminating inappropriate marketplace distortions, lowering costs to access critical infrastructure and provide innovating services, and reducing, if not eliminating, punitive litigation over pole attachment rates. The Commission's proposed rate structure also will fully compensate – indeed will likely continue to *over*compensate – utilities for the cost of third-party pole attachments. And the Commission's proposal is lawful.

II. THE COMMISSION CAN AND SHOULD ADOPT PERMITTING AND MAKE-READY PROCESSES TO EXPEDITE ACCESS TO CRITICAL INFRASTRUCTURE.

The Commission cannot fulfill the objectives set forth in the Broadband Plan unless it adopts policies governing the permitting and make-ready processes that will increase the transparency and predictability of those processes and accelerate cable operators' access to poles. To do so, the Commission must make the construction timelines shorter than proposed and improve efficiencies in the make-ready process. 55/ As part of this effort, the Commission should adopt proposed rules that will encourage expanded use of outside contractors and should mandate price transparency. Arguments against the use of outside contractors in make-ready construction fail to acknowledge that the use of outside contractors on pole plant is already widespread and will not impose undue burdens on utilities. The utilities also will be able to retain authority to approve outside contractors based on objective criteria in any event. The Commission should also reject arguments against implementing a schedule of charges for typical

55/ TWC FNPRM Comments at 15-23.

make-ready costs. 56/ A schedule of charges will be an extremely useful tool for attachers in the planning stages, and increased transparency in make-ready costs will give utilities incentives to become more efficient.

The proposed rules expanding the use of outside contractors and requiring a schedule of charges for standard make-ready work will ensure accountability, transparency and predictability in the make-ready process. Combined with the abbreviated time limits on make-ready construction proposed by TWC, these rules will facilitate the rapid deployment of the broadband infrastructure consistent with the Commission's goals in this proceeding.

A. The Record Demonstrates That Most Broadband Facilities Can Be Deployed More Rapidly than the Commission's Proposal Contemplates.

While TWC generally supports the Commission's effort to curb utility delays and abuses of permit and make-ready processes, 57/ the record makes clear that the timeline proposals outlined in the FNPRM will be unworkable both from the standpoint of the pole owners as well as that of the attaching parties. Indeed, there is scant support in the record for adoption of the timeline as currently drafted. Attachers recognize that the new deadlines are too lengthy, and are likely to become the minimum term of any make-ready project. 58/ Most commenters propose significant modifications to the proposed timeline. 59/ Utilities seek to extend the timeline even further than the Commission has proposed, and request endless opportunities to "stop the clock" on make-ready construction, which, if permitted, would surely

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56/ *See, e.g.,* Alliant Comments at 5; CCU Comments at 78-79; CPS Energy Comments at 13.
57/ TWC FNPRM Comments at 15 (citing Broadband Plan at 111 "The FCC should establish a federal timeline that covers each step of the pole attachment process, from application to issuance of the final permit.").
58/ TWC FNPRM Comments at 18; NTELOS Comments at 6-7.
59/ Florida Investor-Owned Utilities' Comments at 13; AT&T Comments at 28-30; Alliance Comments at 15-29; Sunesys Comments at 5-11.

prove an exception that swallows the rule. 60/ One commenter even proposes that any make-ready clock be started anew anytime an attacher provides incomplete information or otherwise delays the process. 61/ It will be exceedingly difficult to incorporate the parties' widely divergent views into the framework in the FNPRM. TWC therefore supports the implementation of a simpler process – a much shorter timeline that would govern most attachment applications, that is consistent with current practices in the field, and is readily achievable in the majority of make-ready situations. 62/

As TWC argued in its comments, the proposed 105/149-day timeline actually extends the process far beyond the time necessary for completion of make-ready construction. 63/ In TWC's experience, pole owners are able to approve attachment applications and make poles ready for installation in far less than 105 days, which would be the shortest approval period mandated under the proposed rules. 64/ But this fact is best illustrated by data submitted by pole owners themselves. AEP's statistics are in line with TWC's experience – that poles generally are made ready for attachment within an average timeframe of 52 days. 65/ Indeed, AEP reports that "for the year 2010 to date the seven of its operating company subsidiaries that have received the most attachment applications have completed surveys in an average of under 33 days and have *completed the make-ready process in an average of approximately 48 days*." 66/ Utilities should be encouraged to operate more efficiently to improve access to infrastructure, rather than

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60/ CCU Comments at 30-35; Florida Investor-Owned Utilities' Comments at 16-17; POWER Coalition Comments at 4.

61/ CCU Comments at 35.

62/ TWC FNPRM Comments at 17; *see also* NTELOS Comments at 2 ("...[B]y creating, in effect, an inflexible fixed schedule for all make ready projects, the Commission's timeline also threatens to delay smaller projects for which the entire length of the FCC's proposed timeline is not necessary...").

63/ *Id.*

64/ *Id.* (noting that a five-stage 105/149-day schedule would be a significant step backwards and would jeopardize TWC's current 60-day installation commitment for business class services).

65/ *Id.*

66/ Alliance comments at 41 (emphasis added).

be given baselines based on outlier cases and sweeping authority to "stop the clock" in their discretion.

Despite the fact that the proposed five-stage make-ready process actually appears to lengthen completion times beyond what utilities currently achieve, utilities still seek a broad array of exceptions to the process. They seek the ability to "stop the clock" at every stage in the process and propose to leave critical determinations throughout the process to their own broad discretion. 67/ These exceptions would provide no incentive for quicker action or increased responsiveness, and if implemented, would inject new and profound delays that would undermine the objectives identified in the Broadband Plan.

Instead of a detailed five-stage, 105/149-day schedule for make-ready completion, the Commission should adopt a less complex framework that provides for some exceptions but limits the potential for delay and abuse inherent in the utilities' proposals. TWC's abbreviated process would address the routine applications received by pole owners, with the goal of actually improving upon the current rate of construction for the bulk of attachments. 68/ TWC's proposal would apply a 45-day make-ready timeline to applications involving 20-200 poles and a 30-day timeline to applications involving fewer than 20 poles. 69/ These timelines should be applied in routine cases. 70/ The Commission can provide flexibility to negotiate more appropriate timeframes that take into account extra time utilities claim they need for pole replacement,

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67/ CCU Comments at 30-35; Florida Investor-Owned Utilities' Comments at 16-17; POWER Coalition Comments at 4.

68/ TWC FNPRM Comments at 18.

69/ *Id.*

70/ Although the utilities propose even longer time frames for all make-ready, they recognize that there should be a distinction between "non-complex" make-ready and construction that involves greater challenges. CCU at 33. For example, the Coalition defines as "non-complex" any make-ready that does not involve: (i) a wireless antenna attachment; (ii) electric outages for commercial or industrial customers; (iii) any wireline attachment when the make-ready work (if approved) involves 250 or more poles or requires a change out of any poles. *Id.*

difficult engineering issues or circumstances beyond a pole owner's control that can affect timing, such as weather and service interruptions. 71/

TWC advocates a 60 to 90 day schedule for completion of applications involving more than 200 poles. As TWC noted in its Comments, a 90-day period generally is sufficient in more complex cases involving multi-party coordination or pole replacement. 72/ Also, TWC would not object to greater up-front requirements in the application process if such requirements would allow utilities to process applications more rapidly. 73/ This could include an obligation to organize planning meetings or other coordination measures to ensure that the utility can allocate time and resources necessary to facilitate build-out. 74/

In proposing a 45-day deadline for routine make-ready construction, TWC notes that the cases batted about as examples of egregious delay will not be cured by any make-ready deadline, whether 45 days or 149 days. These outlier cases are examples of intractable problems between pole owners and attachers in isolated instances and should not serve as the "common denominator" for purposes of implementing national make-ready timelines. The Commission should instead focus its efforts on achievable goals and address the types of cases that make up the bulk of make-ready construction throughout the United States.

B. The Commission Should Reject Unreasonable And Anticompetitive Restrictions On The Use Of Outside Contractors.

The record in this proceeding strongly supports the expanded use of outside contractors in make-ready construction. Although pole owners raise a variety of objections to the use of outside contractors, the record clearly demonstrates that utilities themselves use outside

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71/ CCU Comments at 18-24; POWER Coalition Comments at 9.
72/ TWC FNPRM Comments at 17.
73/ *Id.* at 19-20.
74/ CCU Comments at 30-32.

contractors quite frequently. 75/ In fact, utilities' use of outside contractors is so widespread that one commenter anticipates that increased use of contractors by communications service providers might affect that labor pool and make contractors less available for utility needs. 76/ For the same reasons, requiring utilities to allow attachers to use outside contractors in performing make-ready work also places very little burden on pole owners. The use of outside contractors by utilities and ILECs is already so common, most are likely to have approval processes already in place. 77/

Commenters that oppose expanded use of outside contractors in make-ready construction fail to provide adequate justification for their opposition. One commenter goes so far as to equate the expanded use of contractors with a proposal to "transfer control over electric distribution systems" to outside contractors. 78/ There has been no suggestion, however, that pole owners should be required to permit any contractor, regardless of qualification, to perform construction work on their plant. Safety and reliability issues are easily addressed by allowing pole owners to establish objective approval criteria for such contractors. The rules should require utilities to make such criteria available to contractors who seek to perform make-ready work, and that they make lists of qualified, approved contractors available to attachers. 79/ Control over the contractor-approval process should also address pole owners' fears that outside

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75/ CCU Comments at 52; CPS Energy Comments at 11-12; Alliant Energy at 3 ("Alliant carefully selects its outside contractors.").

76/ CCU Comments at 52.

77/ For example, Level 3 notes that "[t]here are many cases in which pole owners maintain reasonable lists of approved contractors to perform surveys and make-ready work, usually listing nearly all of the reputable vendors who provide services in the utility's territory." Level 3 Comments at 12. CPS Energy also uses outside contractors and provided its "Contract for the Construction of Overhead Electric Distribution Facilities bid requirements" as an exhibit to its comments. CPS Energy Comments, Exhibit A.

78/ CCU Comments at 48.

79/ Level 3 notes that where utilities provide lists of approved contractors, it has "never known of a case in which it desired to have different contractors perform its work than the ones approved by the utility." Level 3 Comments at 12.

contractors being paid by an attacher will be unresponsive to the safety and reliability concerns of pole owners. 80/ An outside contractor would not likely be willing to risk losing approval from a pole owner for the sake of being responsive to the attaching party, regardless whether the attaching party is paying for the contractor's services. In addition, the Commission should reject the utilities' proposals to impose burdensome and extensive reporting and coordination requirements on outside contractors. 81/ These proposals are contrary to the Broadband Plan's mandate to remove unnecessary delay and expense in the make-ready process. 82/

The Commission also should adopt additional measures presented in TWC's Comments to ensure that the objectives of the Broadband Plan are not undermined by unnecessary restrictions on the use of outside contractors. TWC believes that increased reliance on outside contractors approved by utilities will improve consistency and facilitate rapid deployment, especially when used early on in the process. 83/ TWC also supports allowing attachers and their contractors to rely on the standards in the NESC Work Rules, which permit communications workers to perform work on a limited basis outside the communications space and safety space on a pole. 84/ These measures, if adopted, will reduce the cost and time to deploy facilities.

C. Increased Availability Of Pricing Information Will Provide Much-Needed Transparency and Will Increase Efficiency in the Make-Ready Process.

The Broadband Plan recognized that there is too little transparency in the process by which utilities assess charges for make-ready work. To instill some accountability in this

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80/ CCU Comments at 48.

81/ *Id.* at 54-55.

82/ *See* Broadband Plan at 111 (recognizing make-ready process is a "significant source of cost and delay in building broadband networks").

83/ TWC FNPRM Comments at 20.

84/ *Id.* at 22-23. *See* FNPRM ¶ 69. The Commission proposes to limit communications attachers and their contractors "to the communications space and safety space below the electric space on a pole." *Id.*

process, the Broadband Plan recommended that the Commission require utilities to provide a schedule of charges for such work. 85/ TWC supports the Commission's proposal to implement this recommendation. Cable operators are continually frustrated by unpredictable make-ready charges that appear grossly disproportionate to the utilities' actual work performed and similar cost-related issues. 86/ Cost inefficiencies will frustrate broadband deployment if utilities are permitted unbounded discretion in setting ever-fluctuating charges for routine items and services.

Predictably, the utilities oppose the adoption of a rule requiring a schedule of charges for make-ready work. They claim that their systems are continually updated with the latest cost and resource information and it would be impossible to implement a schedule of charges due to frequent variations in their own input costs. 87/ In addition, they suggest that each attachment is so unique that make-ready costs could not possibly be predicted without a thorough examination of each individual attachment and each site. 88/ Finally, despite the fact that most utilities routinely provide detailed estimates of make-ready costs pursuant to their contracts with attachers, they appear to argue that there is no portion of these estimates that can be predicted closely enough to be used in a schedule of charges upon which attachers can rely. 89/

The Commission should reject these baseless claims and adopt its proposed requirement. First, there is no need for the rule to cover every conceivable type of charge, as the utilities suggest. 90/ The requirement should apply to routine costs and charges — the type that are provided in portions of any estimate prepared by a utility for make-ready work. The

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85/ FNPRM ¶ 71.

86/ TWC noted in its comments that the Commission should consider requiring utilities to retain inspection and survey information so that attachers are not charged repeatedly for collecting the same information on any given pole. TWC FNPRM Comments at 22.

87/ CCU Comments at 78-79.

88/ CCU Comments at 78; Florida Investor-Owned Utilities' Comments at 33; POWER Coalition Comments at 21.

89/ Alliant Comments at 5; CCU Comments at 78-79; CPS Energy Comments at 13.

90/ One Commenter equates the proposal with a tariff regime and argues that the Commission lacks authority to implement the schedule of charges based on its lack of tariff authority. EEI/UTC Comments at 40-41.

Commission should also reject utilities' arguments that the schedule of charges should be issued in the form of non-binding guidelines. 91/ An enforceable schedule of charges for routine make-ready costs will increase transparency, decrease disputes between attachers and utilities, and will aid attachers in the decision-making process so that their design plans are more efficient at the outset. These effects are consistent with the Commission's goals in this proceeding and will facilitate more rapid deployment of broadband infrastructure.

D. The Commission Has Ample Authority To Adopt Rules Governing the Make-Ready Process.

Some utilities commenting in this proceeding argue that the Commission's authority under the Pole Attachment Act is extremely limited and does not authorize it to adopt many of the proposals in the FNPRM concerning the make-ready process. 92/ The crux of the argument is that Section 224 limits the FCC's authority to regulate the rates, terms and conditions of access to utility poles only on a remedial basis – that is, that the statute applies only at such time as an attaching entity files a complaint with the Commission concerning a utility's rates, terms and conditions. 93/ In effect, they argue that the Commission cannot adopt rules to govern such access prospectively, but must rely on after-the-fact adjudication to address harms that have already occurred.

These arguments are based on a flawed reading of the text of Section 224. They focus solely on the Commission's authority to hear complaints under Section 224(b)(1), and ignore the Commission's general authority to "prescribe by rule regulations to carry out the provisions of" the statute. 94/ Among the provisions that the Commission is charged with enforcing through

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91/ POWER Coalition Comments at 21-22.
92/ EEI/UTC Comments at 13-14; Florida Investor-Owned Utilities' Comments at 10-11.
93/ EEI/UTC Comments at 41; Florida Investor-Owned Utilities' Comments at 12-13.
94/ 47 U.S.C. § 224(b)(2).

regulations is the requirement that utilities "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." 95/ Accordingly, Section 224 clearly provides the Commission with authority to implement regulations governing the make-ready process.

Read together, Section 224(b) and 224(f)(1) support the conclusion that Congress instructed the Commission to ensure that terms and conditions of access to utility poles are just and reasonable, and that its actions need not wait until a complaint is filed. The Commission thus, appropriately concludes that "access to poles, including the preparation of poles for attachment, commonly termed 'make-ready,' must be timely in order to constitute just and reasonable access," and seeks to ensure timely access in this proceeding. 96/ TWC likewise agrees with the Commission that "the duty to proceed in a timely manner applies to the entirety of the pole attachment process" 97/ and urges the Commission to adopt rules to facilitate the make-ready process consistent with TWC's proposals.

III. THE COMMISSION SHOULD MODIFY ITS ENFORCEMENT PROCEDURES TO PROMOTE FACILITIES DEPLOYMENT AND COMPENSATE ATTACHERS FOR UTILITY ABUSES.

Consistent with TWC' initial comments, there is strong support in the record for the Commission to take proactive steps to revise its enforcement procedures to accelerate deployment and incentivize utilities to act reasonably. The Commission should pursue the National Broadband Plan's recommendation to "institute a better process for resolving access disputes" by establishing a clear and certain timeframe for resolving formal pole attachment complaint proceedings. And the Commission should also encourage utilities to act reasonably

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95/ *Id.* at § 224(f)(1).
96/ FNPRM at ¶ 17.
97/ *Id.* at ¶ 17.

before a formal complaint is filed by allowing attachers to recover compensatory damages for unlawful conduct that are not tied to the date a complaint is filed and, in appropriate circumstances, attorneys fees and costs.

A. The Commission Should Provide Clear And Certain Timeframes For Resolving Formal Pole Attachment Complaints.

TWC agrees with the commenters that propose that, rather than adopt best practices for informal dispute resolution, the Commission should move to institute clear and certain timeframes for resolving formal pole attachment complaints. 98/ While the Commission's pole attachment complaint process is intended to be efficient, the Commission's rules currently do not provide for the resolution of complaints within any particular timeframe. 99/ As commenters point out, the lack of any timeframe for resolving pole attachment disputes has in some instances produced undesirable outcomes. 100/ This uncertainly encourages attachers to pursue other, often less favorable, solutions while complaints linger at the Commission, slows or prevents deployment in some cases, and causes market uncertainty. 101/ The lack of any clear timeframe for resolving disputes, and the delays in resolving some disputes, has also encouraged some utilities to pursue litigation in state courts, even though the very same issues are pending before the Commission. 102/

98/ Charter Comments at 22-23; Level 3 Comments at 17; Comcast Comments at 31; NCTA Comments at 51.

99/ *See Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, 17 F.C.C.R. 19,859, 19,867, ¶ 22 (2002) ("The pole attachment process is designed to be efficient."); S. Rep. No. 95-580, 95th Cong., 1st Sess., at 21 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109. (Congress intended "the Commission [to] institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation"); *see also* 47 C.F.R. § 1.1407.

100/ Charter Comments at 23.

101/ *Id.*

102/ *Id.*

In light of these issues, TWC encourages the Commission to adopt a 90- to 120-day timeframe for resolving all pole attachment complaint proceedings. 103/ Establishing a clear timeframe for resolving pole attachment disputes will remedy the problems inherent in the currently open-ended dispute process noted above. A clear timetable is consistent with the intent of the Commission's current procedures and also fully consistent with the National Broadband Plan's instruction to the Commission to "expedite dispute resolution." 104 / And the Commission has found the timetables proposed by commenters reasonable in other contexts. 105/

By the same token, the Commission should ensure that any informal efforts to resolve pole attachment disputes occur within the same timeframe for resolving formal complaint proceedings. 106/ As NCTA points out, pre-complaint mediation without any time limits has "created delays that are antithetical to prompt deployment and to the prompt resolution of rate issues that can have profound impact on deployment decisions." 107/ By contrast, putting mediation on the same track as formal complaint resolution will likely increase the success of informal dispute resolution efforts. 108/ Providing greater certainty in the process for resolving formal complaints will provide the parties additional incentives to resolve their dispute informally. 109/

103/ Charter Comments at 22-23; Comcast Comments at 31; NCTA Comments at 51.
104/ *See* Broadband Plan at 112.
105/ NCTA Comments at 52.
106/ *See* NCTA Comments at 51.
107/ *See id.*
108/ *See id.*
109/ *See id.* at 52.

B. The Commission Should Authorize Additional And More Expansive Remedies In Formal Pole Attachment Complaint Proceedings.

Sound policy reasons support the Commission's proposal to expand its arsenal of remedies in pole attachment complaint proceedings to expressly include compensatory damages not tied to the date when a complaint is filed. 110/ Despite assertions by utility commenters that they have no incentives to interfere with cable operators' and other attachers' exercise of their Section 224 rights, the reality is that, whatever their claimed incentives, they can and often do inappropriately thwart access and impose unreasonable, rates, terms and conditions on cable operators. 111/ As TWC explained in its initial comments, it continually confronts utilities that attempt to impose known unjust and unreasonable terms and conditions on it. 112/

The comments make clear that the Commission's current enforcement regime does not deter this sort of utility behavior, but that the prospect of compensatory damages would provide utilities with the incentive to comply with Commission rules before a complaint is filed and deter abuses. 113/ As Comcast explains, "by providing compensatory relief, the Commission will create a powerful incentive for utilities to promptly comply with their pole attachment obligations."114/ The threat of damages for unlawful actions would also likely eliminate many disputes before they arise. 115/ And the comments support the Commission's recognition that its current enforcement regime does not make attachers whole for utility pole attachment abuses. 116/ For example, as Sunesys, LLC, explains, the Commission's current remedies do

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110/ *See* MetroPSC Comments at 22-23; Level 3 Comments at 16; Comments of T-Mobile USA, Inc. at 15.

111/ *See, e.g.*, EEI/UTC Comments at 49. Notably, utility commenters do not assert a lack of incentive to charge excessive pole attachment rates.

112/ *See* TWC FNPRM Comments at 26-27 & 29.

113/ *See, e.g.*, Comcast Comments at 32; MetroPSC Comments at 22; Level 3 Comments at 16; Charter Comments at 25.

114/ Comcast Comments at 32

115/ *See, e.g.*, TWC FNPRM Comments at 26-27.

116/ *See, e.g.*, MetroPSC Comments at 22-23.

not compensate attachers for many of the harms caused by utility abuses. 117/ Compensatory damages would fix this situation by allowing attachers to recover for the harms caused by utilities' unlawful conduct.

The Commission should adopt its proposal to award prevailing complainants compensatory damages for unlawful denials of access and rates, terms and conditions not tied to the particular date a complaint is filed. As discussed below, the Commission also has ample statutory authority to do so.

C. The Commission Has Authority To Award Compensatory Damages In Complaint Proceedings.

Various utility commenters assert that the Commission lacks statutory authority to award compensatory damages, but this view is clearly mistaken. 118/ As TWC pointed out in its initial comments, Congress vested the Commission with broad discretion to adopt appropriate remedies in pole attachment complaint proceedings. 119/ Section 224 could not be clearer about the Commission's mandate to enforce its orders in complaint proceedings: The statute *requires* it to take "such action as it deems appropriate and necessary" to "enforce[e] any determinations resulting from complaint procedures." 120/ While the statute provides that such actions "*includ[e]* . . cease and desist orders," the reference to that one remedy is clearly intended as illustrative not exhaustive of the "appropriate and necessary" remedies the Commission has authority to use to enforce its rulings in pole attachment complaint proceedings. 121/ The word "including" preceding the reference to "cease and desist orders" makes clear that the

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117/ Sunesys Comments at 23.
118/ *See, e.g.*, EEI/UTC Comments at 42-44.
119/ *See* TWC FNPRM Comments at 26.
120/ 47 U.S.C. § 224(b)(1) ("[T]he Commission *shall* take such actions as it deems necessary and appropriate . . . ."). (emphasis added).
121/ 47 U.S.C. § 224(b)(1).

Commission's authority is not limited to that sole remedy. Indeed, "it is a well-established canon of statutory construction that when the word 'including' is followed by a list of examples, those examples are generally considered illustrative rather than exhaustive."122/

There is nothing remarkable or inappropriate about including compensatory damages within the sweep of "appropriate and necessary" remedies the Commission may invoke. The Commission itself has long recognized that its remedial powers extend beyond mere equitable remedies. It has explained that, "as we read the legislative history, the references to authority to order negotiations or to exercise the cease and desist power are intended simply as examples of two tools in our remedial arsenal which would be well suited to the task at hand." 123/ In fact, under its current rules, the Commission already awards compensatory damages to prevailing attachers, typically in the form of refund payments. 124/ And recognizing that it has "broad authority to fashion remedies in pole attachment complaint proceedings," the Commission has, on occasion, ordered even "more expansive remedies" beyond refund payments. 125/ Consistent with such "expansive" awards, the FNPRM proposes only to expand the scope of damages already awarded to prevailing attaching parties.

Despite the language of the statute and the Commission's precedents and existing rules, utility commenters nevertheless contend that the Commission cannot award damages because

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122/ *In re APA Trans. Corp. Consol. Litig.*, 541 F.3d 233, 241 (3rd Cir. 2008).

123/ *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 1980 WL 121714, *7, ¶ 22 (1980).

124/ *See* 47 C.F.R. § 1.1410(c) ("The refund or payment will *normally* be the difference between the amount paid . . . and the amount that would have been paid . . . ." (emphasis added)); *see also id.* § 1.145 ("Commission may issue such other orders . . . as will best conduce to . . . the ends of justice."). Although utilities seek to overlook it, the Commission also allows utilities to recover compensatory damages for unauthorized attachments.

125/ *Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion & Order, 18 F.C.C.R. 24,615, 24,640, ¶¶ 54-57 (2003); *see also Cavalier Telephone, LLC v. Virginia Elec. & Power Co.*, Order & Request for Information, 15 F.C.C.R. 9563, 9579, ¶ 42 (Cable Serv. Bur. 2000) *vacated by settlement* 2002 FCC LEXIS 6385 (Dec. 3, 2002) (stating the vacatur did "not reflect any disagreement with or reconsideration of any of the findings or conclusions contained" in the original order issued in 2000); *Cable Tex., Inc. v. Entergy Serv., Inc.*, Order, 14 F.C.C.R. 6647, 6653, ¶¶ 18-19 (Cable Serv. Bur. 1999).

Section 224 does not specifically refer to damages, while other grants of remedial authority to the Commission do. As noted above, the statute confers on the Commission broad discretion to adopt "appropriate and necessary" remedies to enforce its determinations. Thus, Congress surely did not expressly *forbid* the award of compensatory damages, 126/ and thus the notion that *Chevron* forecloses the Commission from awarding such damages is wrong. 127/

The utilities' related assertion that, because Congress expressly permitted the Commission to award damages under Section 573, Congress intended to preclude damages under Section 224 is an inappropriate stretch. In Section 573, Congress set forth specific remedies available in a "damages proceeding," while in Section 224 Congress gave the Commission broader discretion to invoke any "necessary and appropriate" remedy. 128/ It simply makes no sense to attempt to read Congress's limited remedies under one statutory provision for damages proceedings (Section 573), as imposing limitations on the remedies available under a very different provision (Section 224) – especially where Congress used far more expansive language in the latter provision to describe the available remedies. By attempting to read the clear limitations of one provision into another provision that contains no such limitations, the electric utilities turn a canon of statutory construction into a " 'cannon[ ]' of statutory destruction." 129/

The utilities' additional argument that "appropriate and necessary" is actually a "limiting" term and affirmatively excludes compensatory damages is nonsense. 130/ On the face of it, the statutory term is one of extraordinary breadth, affording the Commission wide latitude

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126/ *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984); *see also Barnhart v. Walton*, 535 U.S. 212, 218 (2002); *Northpoint Technology, Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005).

127/ *See* EEI/UTC Comments at 43;

128/ EEI/UTC also invoke various snippets of legislative history to suggest that Congress did not intend for the Commission to award compensatory damages. *See* EEI/UTC Comments at 45-49. None of the cited references support any such proposition, which is inconsistent with the plain language of Section 224, and the Commission's longstanding practice.

129/ *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 503 (D.C. Cir. 2004) (Garland, J., dissenting).

130/ *See* EEI/UTC Comments at 44 n.72

to choose appropriate remedies. Furthermore, when interpreting the scope of "appropriate remedies" in a different statute, the United States Supreme Court recognized that "the language of the statute is consistent with a grant of ... authority" to award "compensatory damages." 131/ The same clearly goes here. 132/ Section 224 does not "limit" the Commission from awarding compensatory damages in complaint proceedings – as it already does.

The utilities' assertions that allowing attachers to recover compensatory damages will lead to unduly complex and inefficient complaint proceedings are mistaken. 133/ There is no reason that claims for broader compensatory damages cannot be accommodated into the current complaint pleading cycle. The Commission can require complainants to support their damages claims just as they must also support their claims for liability. And the Commission can resolve claims for damages in the same way that it resolves substantive claims.

D. The Commission Should Allow Complainants To Recover Fees And Costs In Appropriate Circumstances.

In addition to permitting an attacher to recover compensatory damages for utility abuses, the Commission should also revisit its conclusion that an attacher may not recover attorneys fees and costs in pole attachment proceedings. 134/ For the same reasons that the Commission has

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131/ *West v. Gibson*, 527 U.S. 212, 217 (1999).

132/ Some utilities assert that the Seventh Amendment to the U.S. Constitution prohibits the Commission from awarding compensatory damages in pole attachment complaint proceedings. *See* Comments of POWER Coalition at 22-24. There is nothing to this argument. "Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989). For "Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field." *Atlas Roofing Co., Inc. v. OSHA*, 430 U.S. 442, 455 (1977) (footnote omitted).

133/ *See* EEI/UTC at 48-49.

134/ The Commission's basis for concluding that it lacks authority to award fees and costs is unclear, and worth reconsidering in this proceeding. *See, e.g., Multimedia Cablevision, Inc. v. Southwestern Bell Tel. Co.*, 11 F.C.C.R. 11,202, 11,208, ¶ 16 (1996); *Comark Cable Fund III v. Northwestern Indiana Telephone Co.*, 100 FCC 2d 1244, 1257, n.51 (1985); *Newport News Cablevision, Ltd. v. Virginia Electric & Power Co.*, 7 F.C.C.R. 2610, 2613 (Com. Car. Bur., Apr. 27, 1992).

authority to award compensatory damages and other relief, the Commission also has the authority to award attorneys' fees and costs: The statute authorizes the Commission to "take such action as it deems appropriate and necessary" to enforce its determinations in complaint proceedings. 135/ That necessarily includes fees and costs.

There are clearly circumstance where an award of attorneys' fees and costs in a pole attachment complaint proceeding is "appropriate and necessary." 136/ For example, as TWC explained in its initial comments, it continually confronts utilities that simply refuse to acknowledge long-standing Commission precedents, such as its rule on overlashing. 137/ If a cable operator is forced to formally litigate a settled issue before the Commission, it should be entitled to recover not only its damages caused by the utilities' unlawful condition, but also the fees and costs incurred to put it to an end. The prospect of such additional relief would further encourage utilities to respect this Commission's authority and to act reasonably before a formal dispute arises. The availability of such relief would also help conserve this Commission's limited resources by eliminating redundant litigation. Accordingly, in addition to allowing an award of compensatory damages, the Commission should also provide for recovery of fees and costs under appropriate circumstances.

IV. THE COMMISSION SHOULD NOT GIVE UTILITIES UNFETTERED DISCRETION TO IMPOSE SEVERE PENALTIES FOR "UNAUTHORIZED ATTACHMENTS" AND SAFETY VIOLATIONS.

A. The Record Does Not Support Allowing Utilities To Impose More Severe "Unauthorized Attachment" Penalties.

Notwithstanding the superheated rhetoric of certain utility commenters, the record in this proceeding does not support giving utilities a freer hand to impose more serious financial

135/ 47 U.S.C. § 224(b)(1).
136/ *See id.*
137/ *See* TWC FNPRM Comments at 29; *see also* Sunesys Comments at 23.

penalties on attachers for alleged "unauthorized attachments." As they have before, various utilities invoke assorted data (much of which has been cited before in this proceeding) to support massive numbers of "unauthorized attachments." 138/ But as TWC and others commenters demonstrated in earlier rounds of this proceeding, 139/ and have done once again in response to the Commission's FNPRM, their claims do not withstand scrutiny. The reality is that the numbers of unauthorized attachments that utilities claim to have "discovered" during inspections of cable operators' plant are misleading and overblown and typically result from inaccurate and faulty audits that are not even designed to determine which attachments have been made without permits in the first place. 140/

The comments demonstrate that, based on the real-world experience of cable operators and other attachers, claims of large numbers of unauthorized attachments are attributable largely to flaws in how an audit is designed and carried out by a utility's outside contractors. As the comments make clear, the "discovery" of large numbers of unauthorized attachments is therefore attributable to any or all of the following problems:

- Poor record-keeping by pole owners. Despite utility assertions that questions about their record-keeping are "insulting," they concede that it "is not 100%." 141/

- Shoddy work by outside contractors hired to perform audits. In some cases, "phantom" attachments are deemed unauthorized or attachments are attributed to the wrong party then deemed "unauthorized."

- Changes in pole ownership. Authorized attachments become unauthorized when the ownership of a pole once owned by a telephone company is transferred to an electric utility that has no permit for the attachment.

138/ *See, e.g.*, Oncor Comments at 48 & n.207.
139/ *See, e.g.*, TWC Comments at 54-56; TWC Reply Comments at 47-49.
140/ *See* TWC FNPRM Comments at 30-33; Charter Comments at 27; NCTA Comments at 43-44.
141/ Concerned Utilities Comments at 98.

- Additions of new, midspan poles without notice to existing attachers. During an audit, attachments to these new poles are deemed "unauthorized."142/

- Shifting standards for determining how attachments are defined and counted for billing purposes. For example, drop poles are counted for the first time, then deemed "unauthorized."

- Financial incentives offered to outside contractors to find unauthorized attachments. The Commission must recognize utilities' profit motive to find unauthorized attachments.

- Failures to notify attachers of, or allow them to participate in audits and verify the results. 143/

As TWC pointed out in its comments, utility audits are not even generally designed to determine attachments for which there is no permit, even though utilities recognize that only an attachment that has not been permitted may be deemed unauthorized. 144/ Instead, utilities usually determine "unauthorized attachments" simply by comparing the number of attachments counted in the field against current billing records. 145/ Against these explanations for the numbers of unauthorized attachments that utilities claim exist in the field, there is simply no verifiable data of record to support utility claims that unauthorized attachments are a widespread problem threatening system reliability and integrity.

Furthermore, as NCTA points out, in addition to all of the problems noted above, the supposed data that utilities have offered to support their allegations of unauthorized attachments is not reliable for another important reason. 146/ The claims made by utilities in this proceeding

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142/ *See* NCTA Comments at 46; TWC FNPRM Comments at 31-32.
143/ *See* TWC FNPRM Comments at 30-33; Charter Comments at 27; NCTA Comment at 46.
144/ *See* EEI/UTC Comments at 58.
145/ *See* TWC FNPRM Comments at 31.
146/ *See* NCTA Comments at 45.

are contradicted by representations that they have made to state regulatory bodies in other contexts. 147/

Nor does the record support the utilities' assertion that unauthorized attachments are simply "irresistible" to cable operators and the current level of penalty does not deter unauthorized attachments. The fact is that cable operators share electric utilities' interest in the integrity and reliability of their infrastructure: Without a safe and reliable electric grid, TWC would not be able to serve its own customers. 148/ After all, cable operators depend on the same pole infrastructure to provide their communications services, and they must also have electricity to do so. Cable operators also care about the safety of their workers, and the public generally. 149/

The comments also make clear that cable operators are subject to legal obligations that provide incentives for complying with permitting processes. 150/ As Charter explains, for example, cable operators are subject to default, indemnity, bond, and insurance requirements under pole attachment agreements – all of which provide ample incentive for cable operators to comply with utilities' permit processes. 151/

Beyond these mechanisms, there are also Commission-approved penalties for unauthorized attachments. The Commission's existing penalties are serious and effectively deter cable operators from making unauthorized attachments, even if cable operators did not have sufficient incentive to do so otherwise, which they do. 152/ The utilities' mantra that requiring

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147/ *See* NCTA Comments at 45.
148/ *See* Charter Comments at 26; NCTA Comments at 43.
149/ *See* NCTA Comments at 43.
150/ *See id.* at 43-44.
151/ Charter Comments at 26.
152/ *See* FNPRM ¶ 94; *Mile Hi Cable Partners L.P. v. Public Serv. Co. of Colo.*, 15 F.C.C.R. 11,450, 11,458, ¶ 14 (Cable Serv. Bur. 2000), *aff'd on review*, 17 F.C.C.R. 6268 (2002), *review denied sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

cable operators to pay five years' back rent, plus interest, for unauthorized attachments is not a sufficient incentive to deter unauthorized attachments because it only obligates the attacher to pay rent that it owed anyway is mistaken. 153/ Under the Commission's rules, a utility is entitled to collect up to a maximum of 5-years back rental for unauthorized attachments, even if the "unauthorized attachment" existed for far less than 5 years. Paying five years of back rent for an attachment that did not exist for five years obligates a cable operator to pay more than what it simply owed. Such a penalty is significant and operates to deter unauthorized attachments. While utility commenters have larded the record with inflammatory accusations, they have failed to back up their bombastic rhetoric with any real evidence that the Commission's current policy on unauthorized attachments is not working.

Not only is there no demonstrated need for increased "unauthorized attachment" penalties, it is clear that the prospect of recovering even greater financial rewards for unauthorized attachments would ill serve the Commission's objective to accelerate broadband deployment. As the comments make clear, allowing severe penalties for unauthorized attachments would provide utilities with perverse incentives to seek out windfall profits. 154/ This would lead to more – and more serious – disputes over unauthorized attachments, which, in turn, would necessarily increase the costs of and delay facilities deployment. These consequences are not theoretical: As discussed below, they are the real upshot of allowing utilities to collect greater penalties for unauthorized attachments.

153/ *See, e.g.*, EEI/UTC at 54; CCU Comments at 99.
154/ Charter Comments at 26.

B. An "Unauthorized Attachment" Penalty Regime Modeled On the Oregon Approach Is Unwise, Unworkable And Would Subvert The Commission's Objectives To Foster Broadband Deployment.

The record demonstrates that it would be a serious mistake for the Commission to attempt to engraft the penalty regime implemented by the Oregon Public Utility Commission ("PUC") onto the national scene. 155/ The Oregon PUC has adopted a broad safety compliance inspection regime far more extensive and involved than what the Commission has proposed to undertake, and that would likely prove unworkable on a national scale. 156/ As the comments explain, this regime is complex, costly, and burdensome on attachers and pole owners alike. 157/

As part of its comprehensive regulatory structure, the Oregon PUC initially allowed utilities to impose severe penalties for attachments made without permits – $250 per pole or 30 times back rental, whichever was higher. 158/ Once this policy was put to practice, however, utilities promptly abused their monopoly control of pole infrastructure. Finding unauthorized attachments immediately became a profit center for utilities and led to costly disputes between pole owners and attachers. 159/ As one of the largest cable operators in Oregon, Charter Communications, explains, "pole owners were eager to 'find' unauthorized attachments in order to generate revenue." 160/ In order to curb rampant abuses, the Oregon PUC was ultimately forced to drastically reduce its penalties for unauthorized attachments to match those currently approved by the Commission. 161/

155/ *See* Comcast Comments 37-40; Charter Comments at 28-32; NCTA Comments at 47-48.
156/ *See* Comcast Comments 37-38.
157/ Charter Comments at 29.
158/ Oregon Public Utility Commission, *Adoption of Rules to Implement House Bill 2271, Sanction and Rental Reduction Provisions Related to Utility Pole Attachments*, AR-386, Order No. 00-467, Slip Op. App. A (Aug. 23, 2003); Charter Comments at 29.
159/ *See* NCTA Comments at 48.
160/ Charter Comments at 29.
161/ *See* Or. Admin. Rule § 860-028-0140; *see also* Charter Comments at 30; NCTA Comments at 48-49; Comcast Comments at 38.

Repeating Oregon's failed experiment with severe penalties for unauthorized attachments on the national level will not produce any better results. Allowing utilities to collect penalties that bear no correlation to reasonable compensatory damages will, as it did in Oregon, give utilities a powerful incentive to pursue windfall profits at attachers' expense. This will lead to intense, counterproductive, and costly disputes between pole owners and attachers that will stymie the deployment of facilities and new and advanced communications services. Without question, such consequences would subvert the goals of the National Broadband Plan and the Commission's stated objectives in this proceeding. 162/

If the Commission is nevertheless determined to revisit the penalties that it allows utilities to impose for unauthorized attachments, it should adopt a more balanced approach modeled on the one implemented by the New York Public Service Commission, as TWC recommended in its initial comments. 163/

C. The Commission Should Not Permit Utilities To Impose Penalties For Safety Violations.

Electric utility commenters once again insist that they should be allowed to impose penalties not only for "unauthorized attachments," but also for alleged safety violations, in order to ensure the safety and reliability of the electric distribution system. 164/ Specifically, EEI/UTC ask the Commission to "clarify" that "pole owners may impose penalties for safety violations in the amount of $200 per violation, again consistent with Oregon's rules," and to adopt a presumption that, where there is an unauthorized attachment on a pole out of compliance, the unauthorized attachment caused the violation. 165/ Despite electric utilities invocation of

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162/ *See generally* Broadband Plan at 109-112; *see also, e.g.*, FNPRM ¶¶ 1 & 19.
163/ *See* TWC FNPRM Comments at 34-36.
164/ *See* EEI/UTC Comments at 102.
165/ *Id.* at 102-103.

grave concepts like safety, reliability, and national security, giving utilities unfettered discretion to punish cable operators for alleged safety violations is unnecessary, would be disastrous public policy, and should be emphatically rejected once and for all in this proceeding.

Accusations made by some utility commenters that cable operators cavalierly ignore safety in favor of speed to market are offensive, irresponsible and untrue. 166/ Cable operators, no less than electric utilities, share an interest in safe outside plant conditions to protect their employees, the general public, and the reliability of their networks, and do not believe any party should knowingly create safety violations. Maintaining safe pole plant is the responsibility of all attachers, and with that in mind, TWC appreciates and accepts its role in avoiding the creation of unsafe pole conditions and correcting code violations attributable to it whenever they are found.

Nor is it true that cable operators cause widespread safety violations. The reality is that pole attachments exist in an organic environment, in which conditions are affected by a variety of conditions, including weather, actions by third-parties, and changes in the built environment. As such, attachments may fall out of specification for a host of reasons. For this reason, rather than casting blame and asserting unfettered discretion to levy massive, non-cost-based fines on cable operators, all parties on the poles should work jointly and cooperatively to ensure the safety of outside plant through routine inspection, maintenance and correction of violations when they are found.

The electric utility allegations that cable operators create safety violations are also seriously misleading and inaccurate. As TWC has pointed out, utilities themselves are often responsible for unsafe pole conditions and for failing to maintain the safety and integrity of their own plant. 167/ In TWC's experience, for example, utilities frequently build cable operators

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166/ *See, e.g.*, CCU Comments at 94-96.
167/ TWC Reply Comments at 38-42.

into code violation by adding additional facilities to a pole long after a cable operator's attachment was made, then attempt to blame the violation on the cable operator to have it shoulder the cost of fixing the problem. 168/ TWC's experience is shared by other commenters in this proceeding. 169/ And, despite electric utilities' ominous warning of grave safety and reliability problems caused by cable operator attachments, the record of this proceeding is entirely bereft of any evidence of any link between cable operator "safety violations" and pole failures.

Like their overblown claims of "unauthorized attachments," utilities' claims of sweeping safety violations caused by cable operators are inaccurate and grossly inflated. 170/ Such "violations" frequently come to light during the course of flawed audits performed by outside contractors. 171/ These audits often focus on cable plant, rather than the attachments of other parties, including the electric utility, in order to foist the cost of the audit on the cable operator. Thus, when a violation is found, it is presumed that the cable operator caused it. 172/ During the course of such audits, the outside contractors are also instructed to identify violations based on new "compliance" standards adopted by the utility for the purpose of conducting the audit, and long after the cable operator's attachments were installed in compliance with different operative standards. 173/ Routine maintenance issues, like broken guy guards, are also frequently labeled "safety" violations. 174/

168/ *See* TWC Reply Comments at 38-39; *see also Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, 14 F.C.C.R. 11,599 (Cable Serv. Bur. 1999).
169/ Comcast Reply Comments at 25-26; Charter Comments at 27-28.
170/ TWC Reply Comments at 38-47.
171/ *Id.* at 38-41.
172/ *Id.* at 43-44.
173/ *Id.* at 43.
174/ *Id.* at 40.

In many cases, utility claims of safety violations are also not based on any recognized code requirement. Instead, some violations are the product of new and unreasonable interpretations of code requirements or blatant refusals to acknowledge applicable exceptions of grandfathering principles. 175/ In other cases, asserted violations are the result of applying newly-minted standards that are above and beyond the requirements of the National Electric Safety Code to pre-existing cable plant constructed in accordance with then-accepted practices and standards. 176/ Furthermore, utilities and their contractors often cannot or will not provide information to support allegations of safety violations so that the cable operator can understand, correct, or contest an alleged violation. 177/

As TWC has stressed before, the Commission must appreciate that utility efforts to pin safety violations on cable operators, including through safety inspections and audits, are not accidental. Utilities have a strong financial incentive to force cable operators to fund system maintenance and pay to upgrade their own facilities and cure existing violations that they have created. 178/ As Charter Communications explains, for example, "[t]he fact is that electric utilities have historically used attacher safety as a pretext to shift inspection and repair responsibilities (and correction costs) to attachers." 179/ Utilities also have an incentive in shifting blame to cable operators to avoid liability for their unsafe plant.

Based on the foregoing, it is clear that allowing utilities to impose Oregon-style penalties for safety violations is unnecessary to provide cable operators an incentive to construct their facilities in compliance with applicable safety requirements. Making utilities the sole arbiter of safety with the unilateral and unchecked power to fine attachers for safety violations would,

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175/ TWC Reply Comments at 43.
176/ *Id.* at 40 & 43.
177/ *Id.* at 40.
178/ *See Kansas City Cable Partners*, 14 F.C.C.R. at ¶¶ 19-20; *see also* Charter Comments at 28.
179/ Charter Communications at 28.

again, encourage utilities to treat their pole plant as a profit center. This would, in turn, lead to acrimonious relationships between pole owners and attachers and costly and time-consuming disputes that would divert resources away from broadband deployment. The Commission should make clear that utilities do not have unfettered discretion to impose financial penalties for alleged "safety" violations.

V. RETAINING THE "SIGN AND SUE" RULE IN ITS CURRENT FORM WOULD BEST ADVANCE THE COMMISSION'S POLICY OBJECTIVES.

While various utility commenters continue to push for the Commission to eliminate the "sign and sue" rule entirely, 180/ the record in this proceeding supports retaining the rule in its current form, 181/ as TWC recommended in its initial comments. 182/ The comments demonstrate that the rule operates as an important check on utility abuses of their superior bargaining power at the negotiating table – just as it was intended to do. 183/ As one pole *owner* explains, the Commission's rule "reflects the reality that an attacher may have no choice but to accept an unreasonable or discriminatory contract term in order to gain access." 184/ In light of this reality, attachers have no ability to secure – and utilities have no incentive to offer – concessions during negotiations that are not required by law. 185/ As such, utilities – not attachers – fail to engage in meaningful negotiation of their boilerplate agreements,186/ and the "sign and sue" rule represents attachers' only leverage during negotiations. 187/

180/ *See* Comments of the Edison Electric Institute and the Utilities Telecom Council ("EEI/UTC") at 62.
181/ *See, e.g.*, NCTA Comments at 37; Comments of American Cable Association ("ACA") at 11; Comments of CenturyLink at 35; Comments of Charter Communications Inc. at 16; Comments of Comcast Corporation at 26.
182/ *See* TWC Comments at 23-26.
183/ *See, e.g.*, ACA Comments at 10; Comments of MetroPCS at 23; Charter Comments at 16-17.
184/ Comments of CenturyLink at 35.
185/ NCTA Comments at 41.
186/ Level 3 Comments at 14.
187/ Charter Comments at 18.

The comments demonstrate that there is no need to modify the rule based on unsupported (and unsupportable) utility allegations that the rule has been abused and has created a "one-sided" environment. As the commenters explain, utilities are sophisticated, repeat players very familiar with the Commission's rules and policies and are unlikely to be surprised by challenges to unreasonable terms in pole attachment agreements. 188/ And, even though utilities typically present attachers with draft pole attachment agreements riddled with unlawful terms and conditions, the relative dearth of pole attachment complaints filed with the Commission totally contradicts utilities' claims that the "sign and sue" rule is being abused by attachers that "lie" and commit "fraud" 189/ rather than engage in good faith negotiations over pole attachment agreement terms and conditions. 190/ The reality is that cable operators do attempt to engage in good faith negotiations with utilities and, consequently, rarely invoke the "sign and sue" rule. 191/

Furthermore, as commenters point out, the current rule does not allow attachers simply to "cherry pick" terms and conditions they like, while disavowing ones they do not – the rule only relieves an attacher of a term the Commission concludes is *unlawful*. 192/ Moreover, the Commission's rules currently afford protections to utilities designed to prevent any abuses of the rule and to ensure that attachers must accept true "bargained-for exchanges." 193/ There is no record evidence that these existing protections are inadequate to the task, even were the utilities' fears of abuse real rather than imagined.

188/ NCTA Comments at 37.
189/ *See* Comments of the Edison Electric Institute and the Utilities Telecom Council at 59-60. EEI and UTC offer no concrete examples to support their outrageous allegations.
190/ NCTA Comments at 41; CenturyLink Comments at 37.
191/ *See* Charter Comments at 17; Comcast Comment at 28
192/ MetroPSC Comments at 23-24.
193/ *See* NCTA Comments at 42; CenturyLink at 37; Level 3 Comments at 15; Charter Comments at 20-21.

Instead of supporting the Commission's proposed modifications, the record demonstrates why they would eviscerate the rule and should be abandoned. The comments make clear that the Commission's proposed modifications would undermine the overarching objective of the National Broadband Plan to speed "the entire process for obtaining access to poles, duct, conduit, and rights-of-way." 194/ While the current rule fosters deployment by expediting access to poles despite utility abuses, 195/ the Commission's proposed modifications to the rule would operate to create an even more costly and protracted pole attachment agreement negotiation process and give rise to new disputes. 196/ The comments point out that, when presented with a list of unreasonable terms, a utility would likely further delay negotiations over those terms and may even refuse to enter any agreement. 197/ In addition to creating an unwieldy, time-consuming, and expensive new obligation to catalogue pole attachment terms and conditions that are unjust and unreasonable on their face, the Commission's modifications would also undermine its ability to police unreasonable and unjust pole attachment rates, terms and conditions, and impair attachers' abilities to protect their rights. 198/

Given that the "sign and sue" rule is necessary and works, and that the Commission's proposed modifications would prove counterproductive, the Commission should decline to adopt any changes to it. Indeed, there is little support in the comments for the Commission's proposed modifications to the "sign and sue" rule. While some utilities offer lukewarm support for the modifications as "a step in the right direction," 199/ others argue that the Commission's proposed modifications are merely a "fig-leaf solution" that would prove ineffectual in

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194/ Broadband Plan at 111.
195/ *See, e.g.*, CenturyLink Comments at 36-37.
196/ *See, e.g.*, NCTA Comments at 40-41; Charter Comments at 19-20; Comcast Comment at 27.
197/ *See* MetroPSC Comments at 24-25; Level 3 Comments at 15.
198/ *See* ACA Comments at 11; Level 3 Comments at 14; NCTA at 39-40; Comcast Comment at 29.
199/ *See, e.g.*, Comments of the Florida Investor-Owned Electric Utilities at 53.

practice. 200/ In view of all of the reasons counseling against modifying the "sign and sue" rule, the fact that many of the intended beneficiaries of the proposed rule change do not support it only further confirms that the Commission should leave the rule as it is.

VI. THE COMMISSION SHOULD NOT PERMIT UTILITIES TO IMPOSE ADDITIONAL CHARGES FOR OVERLASHED WIRES.

Certain utilities request the Commission to allow them to impose additional rental charges for overlashed wires. 201/ This proposal should be summarily rejected. Imposing a surcharge on overlashed wires would reverse the decades-old pro-competitive policies of this Commission, would increase the costs and therefore delay the progress of broadband deployment, and would confer a needless and unwarranted subsidy on utility rate-payers at the expense of communications providers. Needless to say, all of this would also be directly contrary to the central mandate of the National Broadband Plan to reduce the costs of accessing critical infrastructure. 202/

Even though some utilities continually attempt to impede cable operators' ability to overlash their facilities, 203/ the vital importance of overlashing to the timely deployment of broadband facilities and the Commission's approval of it should be beyond question. As the Commission has explained, the practice of overlashing allows cable operators to deploy new facilities and services efficiently and cost-effectively by affixing additional fiber optic cable to a pre-existing host attachment. 204/ Recognizing that overlashing promotes the delivery of

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200/ *See, e.g.*, EEI/UTC Comments at 61; Comments of Oncor Elec. Delivery Co., LLC at 52-54; Comments of Exelon Elec. Distribution Cos. at 1 (supporting EEI/UTC comments); Comments of Alliant Energy at 7-8; Comments of We Energies at 1 (supporting EEI/UTC comments).

201/ *See* EEI/UTC Comments at 78.

202/ *See* Broadband Plan at 110-111.

203/ *See* TWC FNPRM Comments at 29.

204/ *See 1998 Report & Order*, 13 F.C.C.R. at 6807, ¶ 62 ("We believe overlashing is important to implementing the 1996 Act as it facilitates and expedites installing infrastructure essential to providing cable and

advanced communications services and the pro-competitive objectives of the 1996 Telecommunications Act, this Commission has held that attachers need not obtain advance permission from a utility before overlashing its own host attachment. 205/ And, for the same reasons, the Commission has also held that utilities cannot recover additional charges for overlashed wires. 206/

There is no reason for the Commission to reconsider its sound policy on overlashing now. At a time when the Commission is taking important strides to spur broadband deployment by reducing costs on providers, allowing utilities to collect additional charges for overlashed wires is clearly counter-productive. A surcharge for overlashed wires is manifestly inconsistent with the Commission's effort to adopt a low and uniform pole attachment rental rate for all providers. 207/ Increasing the costs of service though overlashing surcharges would retard – not promote – promote facilities deployment.

Nor is there any basis for permitting utilities to recover additional charges for overlashed wires. As the Commission has recognized, an overlashed wire does not constitute a separate attachment because it occupies the very same pole space as the pre-existing host

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telecommunications services to American communities. Overlashing promotes competition by accommodating additional telecommunications providers and minimizes installing and financing infrastructure facilities.").

205/ *See Amendment of Commission's Rules Governing Pole Attachments*, 16 F.C.C.R. at 12,141, ¶ 75 ("We affirm our policy that neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment."); *see also Common Carrier Bureau Cautions Owners of Util. Poles*, Public Notice, DA 95-35 (Jan. 11, 1995) (warning pole owners against imposing restrictions of cable operators seeking to overlash their own attachments).

206/ *See 1998 Report & Order*, 13 F.C.C.R. at 6777, ¶ 64 ("We have been presented with no persuasive reason to change the Commission's policy that encourages overlashing, and we agree with representatives of the cable and telecommunications industries that, to the extent that it does not significantly increase the burden on the pole, overlashing one's own pole attachment should be permitted without additional charge.").

207/ *See, e.g.*, FNPRM ¶ 20 ("We also seek to establish rental rates for pole attachments that are as low and close to uniform as possible . . . .").

attachment. 208/ As such, permitting a utility to impose a charge for a host attachment and an overlashed wire would permit it to double recover for the use of the same one-foot of pole space.

Utility commenters assert that overlashed attachments impose wind and ice loading burden on poles.209/ But, to the extent that an overlashed wire imposes any additional physical burden on a pole, the utility is permitted to recover the non-recurring incremental cost of that burden directly through make-ready charges. 210/ Accordingly, allowing utilities to recover separate rental charges for overlashed wires would require cable operators to subsidize utility rate payers.

For all of these reasons, the Commission should decline to reverse its sound policy on overlashing by allowing utilities to impose surcharges on overlashed wires.

CONCLUSION

TWC supports the Commission's efforts in this proceeding to reduce the time and expense of facilities deployment. Based on the record in this proceeding, it is clear that the Commission should adopt its proposed uniform pole attachment rate structure, which will promote deployment, will adequately compensate pole owners for the cost of attachment, and which the Commission has authority to implement. Consistent with TWC's comments, the Commission should expedite access to pole infrastructure through rules that reduce the time and expense of the make-ready process. The Commission should also adjust its enforcement procedures to ensure that utilities are incentivized to comply with Commission rules and to properly compensate attachers for utility abuses. At the same time, however, the Commission

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208/ *Amendment of Commission's Rules & Policies Governing Pole Attachments*, 16 F.C.C.R. at 12,133, ¶58 (noting "conclusion that an overlashing entity does not occupy additional space on a pole. An overlashed cable is still only attached to the pole by the original single attachment.").

209/ *See* EEI/UTC Comments at 78.

210/ *Amendment of Commission's Rules & Policies Governing Pole Attachments*, 16 F.C.C.R. at 12,141, ¶¶ 77-78.

should not undercut its enforcement authority by watering down the sign and sue rule, or allow utilities to impose severe penalties for alleged "unauthorized attachments" or safety violations or additional charges on overlashing.

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October 4, 2010