

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

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 TW TELECOM AND COMPTTEL**

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tw telecom inc. (“TWTC”) and COMPTTEL, by their attorneys, hereby file these reply comments in response to the Further Notice of Proposed Rulemaking in the above-referenced proceedings.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

The voluminous comments filed in response to the FNPRM demonstrate that reform of pole attachment access and rate regulations is desperately needed. The evidence continues to show that utilities abuse their market power over poles and that above-cost pole attachment rates harm investment in and deployment of broadband facilities. To correct these market distortions, the FCC should adopt (1) a definition of cost which produces a telecommunications service attachment rate at or near the cable rate; (2) most of the access rules proposed in its FNPRM as modified where appropriate;

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<sup>1</sup> See *Pleading Cycle Established for Proposed Rules Implementing Section 224 of the Act*, Public Notice, 25 FCC Rcd 9226 (2010); *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, FCC 10-84 (rel. May 20, 2010) (“FNPRM”).

and (3) streamlined dispute resolution procedures as proposed by TWTC, COMPTTEL and others.<sup>2</sup>

As an initial matter, the FCC clearly has the authority to adopt a definition of cost in Section 224(e) that yields rates for telecommunications service attachments at or near the cable rate. Contrary to the arguments of the utilities, there is nothing in the statute or the legislative history that precludes the FCC from adopting this approach. Absent a clear Congressional intent to define costs in Section 224(e) in a particular manner, the FCC has ample discretion to “fill in the gaps” and adopt a definition of its choosing so long as it explains and justifies its departure from the current fully-allocated approach.

Given the FCC’s wide discretion, it can adopt its own “low-end” proposal or one of NCTA’s detailed proposals (either NCTA’s fully allocated or its incremental cost approach). As Don Wood explains in his declaration attached hereto, both the FCC’s and NCTA’s approaches more accurately capture the costs imposed on pole owners by attachers than the definition of cost that the FCC currently uses to calculate the telecommunications service rate.

Despite the many months between the release of the FNPRM and the initial comment deadline, the utilities provided almost no factual information in their comments to rebut the FCC’s proposal or demonstrate that attachers impose substantial “but for” costs on utilities. In fact, the utilities’ own behavior in planning their pole networks and replacing poles for the benefit of attachers when they believe that they are under no

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<sup>2</sup> While these reply comments do not address every proposal made by the FCC in its FNPRM or by the commenters, they focus on those issues of greatest importance to both TWTC and COMPTTEL.

current legal obligation to do so suggests that utilities profit handsomely from the presence of pole attachers and the current pole attachment rates.

The FCC must also reject the utilities' arguments that the FCC does not have the authority to adopt its proposed access rules. The utilities are incorrect that the FCC may only impose duties on pole owners related to the adjudication of disputes. The utilities' position rests upon a fundamental misreading of the statute, one that has been rejected by both the FCC and the 11<sup>th</sup> Circuit in *Southern Company*.

The utilities' many objections to the FCC's proposed access rules (e.g., use of third-party contractors to perform make-ready, payment in stages, the make-ready timeline, etc.) must also be dismissed. The utilities' numerous arguments in support of their position are all variations on the same theme: that the proposed rules are contrary to a particular utility's practices and, if adopted, would impose substantial costs and place the very existence of its pole networks in danger. But it is hard to credit these utilities' arguments when other utilities concede that they already permit the very practices which the FCC seeks to mandate for all utilities. For example, while some utilities absolutely refuse to permit third-party contractors to perform make-ready work, others allow such work as a matter of course. As the FCC found in its RBOC merger orders, evidence that one monopolist has adopted a more cooperative "best-practice" demonstrates that other monopolists can do the same.

In their comments, TWTC, COMPTTEL and other parties supported the FCC's proposal for compensatory damages back to the statute of limitations. TWTC and COMPTTEL also proposed other remedies, such as the adoption of model contracts which can be challenged in an expedited manner and a bar on utilities' refusal to include

change-of-law provisions in their contracts as a brake on the utilities' disregard for the law. The record has shown that the utilities continue to ignore the pole attachment rules, and, in particular, FCC adjudicatory precedent. This can be clearly seen in the utilities' continued enforcement of contractual unauthorized attachment penalties which the FCC has repeatedly found to be illegal. The remedies proposed by the FCC, TWTC, COMPTTEL and others are crucial to halting the utilities' lawless behavior.

In particular, the FCC should allow for the award compensatory damages for utility violations of Section 224. Contrary to utilities' arguments, the FCC's remedial authority in Section 224 is sufficiently broad to permit the FCC to authorize the award of compensatory damages. Indeed, the FCC authorized the award of compensatory damages in program access complaint proceedings pursuant to similarly broad language in Section 628.

To reduce disputes over the number of attachers per pole, the FCC should also adopt TWTC/COMPTTEL's proposal regarding the manner in which utilities are permitted to rebut the presumptions regarding the average number of attachers. As their comments show, the utilities already obtain information regarding the number of attaching entities on their poles through the make-ready process. Utilities should be required to use that information to determine the number of attachers per pole on the poles to which the attacher is or plans to attach.

As TWTC, COMPTTEL and others have proposed, the FCC should adopt changes to the pole attachment complaint process to ensure the expeditious resolution of complaints. Whatever proposals the FCC adopts should (1) assist in the resolution of disputes without FCC involvement where possible; (2) ensure that attachers can seek

relief at the FCC for a utility's refusal to negotiate a pole attachment agreement within a reasonable amount of time; and (3) provide expedited complaint procedures for, at a minimum, those disputes which require little fact-finding. TWTC/COMPTEL submitted a proposal for such an expedited procedure in its comments.

Under no circumstances, however, should the FCC adopt unauthorized attachment penalties such as those adopted by Oregon. Such penalties, which serve as automatic contractual punitive damages provisions, would be contrary to public policy, FCC precedent, and basic principles of contract law. If the FCC nevertheless decides to adopt an unauthorized attachment penalty scheme, it should ensure that safeguards are in place to prevent the utilities from gaming the system.

Finally, the FCC should reject the utilities' proposed changes to the pole attachment formula (e.g., allocating the safety space among all attachers, reducing the presumed number of attaching entities to three, etc.). The FCC has already repeatedly rejected virtually all of these proposals. The utilities provide no support for why the FCC should change course now and many of the utilities' proposals are in direct conflict with the language and purpose of Section 224.

## **II. THE FCC SHOULD ADOPT ITS OWN PROPOSAL OR ONE OF NCTA'S PROPOSALS FOR A LOW-END TELECOMMUNICATIONS SERVICE RATE**

### **A. The FCC Has The Authority To Adopt Either Its Own Proposal Or One Of The NCTA Proposals**

The utilities raise a number of arguments in their comments in support of their claim that the FCC does not have the statutory authority to adopt an incremental cost approach with respect to the "low-end" Section 224(e) rate. Among other things, the utilities assert that (1) the relevant legislative history shows that Congress intended the

Section 224(e) definition of “cost” to mean fully allocated costs; (2) if Congress had intended to provide a definition of “cost” in Section 224(e) that is different from the definition of cost under Section 224(d), it would have done so explicitly;<sup>3</sup> (3) because the FCC employed a fully allocated cost methodology for Section 224(d) at the time Congress drafted the 1996 Act, Congress must have also intended the 224(e) definition of cost to mean fully allocated costs;<sup>4</sup> (4) an incremental cost methodology is incompatible with the terms “cost of providing space” and the “cost of providing space other than the usable space” in Section 224(e);<sup>5</sup> and (5) any definition of cost in 224(e) which would

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<sup>3</sup> See Edison Electric Institute and the Utilities Telecom Council (“EEI and UTC”) Comments at 69 (“[I]f Congress had intended to give the Commission flexibility to establish rates falling between incremental and fully-allocated costs, it could have easily followed the same language it used in Section 224(d).”).

<sup>4</sup> See Florida Investor-Owned Electric Utilities (“Florida Utilities”) Comments at 63-64 (“[T]he Commission’s attempt to seize upon a perceived ambiguity in the term ‘cost’ as used in section 224(e) is a non-starter, since it presumes Congress drafted § 224(e) in ignorance of the Commission’s 15+ year history of interpreting the costs associated with poles under Section 224(d) to include administrative maintenance, depreciation, taxes and a rate of return.”).

<sup>5</sup> See *id.* at 62 (“The Commission’s [proposed] cost-causation approach also focuses on the costs associated with the attachment. To the contrary, Congress intended costs to be premised on the cost associated with the pole itself.”); *id.* (citing to sections 224(e)(2) and (e)(3) regarding the costs of “providing space on a pole” and “costs of providing space other than usable space”); Oncor Comments at 61-63 (arguing that the concepts of “full allocation” of the usable and unusable portions of the pole are inconsistent with incremental cost recovery); EEI and UTC Comments at 65 (“Congress did not need to specifically identify which costs were to be included in the telecom rate formula because the plain language of the statute calls for ‘the cost of providing space’ which was already defined by Congress in Section 224(d) as the fully allocated cost.”); *id.* at n.113 (“Section 224(e) is not directed to incremental costs because (1) Section 224(e) does not refer to these costs as the ‘additional costs’ of providing space...and it makes very little sense to ‘apportion’ the incremental costs between the amount of space occupied by an attacher or by the number of attachers.”).

produce a telecommunications service rate lower than the cable rate is contrary to Congressional intent.<sup>6</sup> None of these arguments has any merit.

*First*, the discussion of pole attachments in the House bill that was a precursor to the 1998 Act does not foreclose use of an incremental cost approach. It is true that the House bill indicated that the definition of “cost” for the purpose of the telecommunications service rate should mean “fully allocated” costs, but the House version of the pole attachment provision was not adopted in the 1996 amendments to Section 224.<sup>7</sup> Rather, the Senate version, along with several House amendments unrelated to the definition of cost, comprised the Section 224 amendments that were ultimately adopted.<sup>8</sup> The Florida Utilities wrongly state that “Commenting on the

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<sup>6</sup> See Florida Utilities Comments at 58-59 (“Notwithstanding multiple rulemakings and other opportunities to raise the issue, the FCC has never postulated that the costs “allocated” in the telecom rate formula might be different than the costs allocated in the cable rate formula.”); American Electric Power *et al.*, Comments at 83-86.

<sup>7</sup> See H. Conf. Rep. 104-458, at 92 (1996); see also Bright House Networks Comments at 18 (“The House version of the of the changes to the pole attachment provisions would have instructed the FCC to regulate telecommunications service attachment rates based on a ‘fully allocated cost’ formula.”); *id.* at n.25 (“The Conference report did not adopt that instruction.”).

<sup>8</sup> See H. Conf. Rep. 104-458, at 207 (1996) (“The conference agreement adopts the Senate provision with modifications. ... The Conferees also agree to three additional provisions from the House amendment. First, subsection (g) requires utilities that engage in the provision of telecommunications services or cable services to impute to its costs of providing such service an equal amount to the pole attachment rate for which such company would be liable under section 224. Second, new subsection 224(h) requires utilities to provide written notification to attaching entities of any plans to modify or alter its poles, ducts, conduit, or rights-of-way. New subsection 224(h) also requires any attaching entity that takes advantage of such opportunity to modify its own attachments shall bear a proportionate share of the costs of such alterations. Third, new subsection 224(i) prevents a utility from imposing the cost of rearrangements to other attaching entities if done solely for the benefit of the utility.”); Bright House Networks Comments at 19; *id.* at 18 (“While the legislation does not dictate how the word ‘costs’ should be applied in the carrying charge factor, the House Senate Conference did not adopt the House’s formulation.”).

language ultimately included as Section 224(e), the Conference Report states: ‘The new provision directs the Commission to regulate pole attachment rates based on a ‘fully allocated cost’ formula.’”<sup>9</sup> Rather, the Conference Report was describing the House bill<sup>10</sup> which, as explained, was not adopted.

*Second*, as several commenters noted, the absence of any guidance from Congress as to the meaning of cost in the Section 224(e) formula, especially when compared to the detailed guidance as to the meaning of cost in the Section 224(d) formula, demonstrates that Congress intended to provide the FCC with substantial discretion to define cost for purposes of Section 224(e). As Comcast argues, courts have repeatedly found that “where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”<sup>11</sup> Moreover, courts have granted the FCC substantial leeway in defining the term “cost” in other contexts.<sup>12</sup> In the face of statutory ambiguity, the FCC must “fill in the gaps” with its own interpretation of the meaning of “cost” in Section 224(e).

*Third*, the FCC is not “stuck” with a fully allocated cost approach for the telecommunications service rate simply because the FCC selected a fully allocated cost approach for the cable rate in 1978 and that approach was in place at the time the 1996 Act was adopted. Such a reading of Congressional intent, which the utilities advocate,

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<sup>9</sup> Florida Utilities Comments at 61.

<sup>10</sup> See H. Conf. Rep. 104-458 at 206 (1996).

<sup>11</sup> Comcast Comments at 10 (internal cites omitted).

<sup>12</sup> *Id.* at 14.

would yield absurd results. Under this interpretation, the FCC would be free to choose between the two definitions of cost provided under Section 224(d) and could, with sufficient justification, change that definition of any time, but the FCC could *never* change the definition of “cost” in the 224(e) formula. This cannot be the case. Moreover, under the utilities’ logic, if the FCC had been utilizing an incremental cost approach for Section 224(d) at the time the 1996 Act was passed, the FCC would have had no choice but to adopt the same incremental cost approach for Section 224(e).

Nor is the utilities’ argument consistent with their past advocacy. When it served their interest in the past, the utilities have argued that the FCC has substantial flexibility to choose an interpretation of cost in Section 224(e). For example, in the late 1990s and early 2000s, the utilities repeatedly argued that the FCC should abandon its decades old<sup>13</sup> historical cost approach in favor of a forward-looking cost approach.<sup>14</sup> The utilities were of course correct.

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<sup>13</sup> See *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, ¶ 3 (2000) (“*2000 Pole Attachment Order*”) (“Beginning in 1978, the Commission developed a methodology to determine the maximum allowable pole attachment rate under Section 224(d)(1)...implementing a cost methodology premised on historical or embedded costs.”).

<sup>14</sup> See *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, ¶ 101 (1998) (“*1998 Pole Attachment Order*”) (“American Electric, et al., advocate that when applied the formula should use forward looking/replacement costs.”); *id.* ¶ 123 (“a number of parties advocate that the Commission adopt a forward-looking economic cost pricing (‘FLEC’) methodology for pole attachments.”); *2000 Pole Attachment Order* ¶ 8 (“[I]n response to the *Notice*, American Electric submitted comments supporting a methodology...which employs forward looking economic cost pricing.”); *Commission’s Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of The Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶ 16 (2001) (“*2001 Reconsideration Order*”) (“Electric utilities continue to urge that we abandon our use of regulatory accounts based on historical costs.”).

*Fourth*, it is not the case that the apportionment among multiple entities of the cost of usable and unusable space in Section 224(e) conflicts with an incremental cost approach. Such a conflict would only arise if an incremental cost approach required allocation of the marginal costs of *each* attacher. But no party is suggesting such an approach. Rather, under both the FCC and NCTA proposals, the telecommunications service formula would be revised so that the marginal cost of attachment for all third-party entities (i.e., the costs that the utility incurs but for the presence of attachers *in general*) would be apportioned according to the telecommunications service formula. For example, NCTA proposes that, under its incremental cost approach, the administrative and general costs of pole attachments would be calculated based on the cost of “the number of full-time equivalent (FTE) employees assigned to administer and manage the third-party attachment process....”<sup>15</sup> These costs, along with other incremental costs imposed by third-party attachers *in general*, would be allocated according to the telecommunications formula. Assuming four attaching entities, NCTA proposes a 12.50% space allocation factor through which the incremental costs of attachment would be allocated among attachers.<sup>16</sup> Similarly, the approach proposed by the FCC would employ a 13.33% space allocation factor assuming four attaching entities.<sup>17</sup> In sum, there is nothing inconsistent with an incremental cost methodology and the allocation of the costs of providing space pursuant to the 224(e) formula.

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<sup>15</sup> NCTA Comments, Attach. A: Report of Patricia D. Kravtin, ¶ 72 (Aug. 16, 2010) (“Kravtin Report”).

<sup>16</sup> Kravtin Report at Table 6.

<sup>17</sup> *Id.*

*Fifth*, there is no evidence that Congress intended telecommunications carriers to pay more than cable companies for access to utilities' poles. The utilities are fond of citing to the passage of the 1996 House Report stating that the cable formula "provided a more favorable rate for attachment than other telecommunications service providers" and "was established to spur the growth of the cable industry, which in 1978 was in its infancy" to show that Congress intended the cable rate to be lower than the telecom rate.<sup>18</sup> But statements regarding the purpose of the 1978 Act do not prove that Congress intended that the 1996 Act amendments should yield lower rates for cable attachers than for telecommunications carrier attachers. In 1978, there was of course no telecommunications service rate, nor any competitive telecommunications industry to speak of. The 1978 Act provided lower, regulated rates to cable companies than to incumbent LECs (i.e., the "other telecommunications providers" mentioned in the Conference Report) to provide a relative advantage to cable companies. In contrast, the legislative history indicates that Congress in 1996 wanted all attachers that have the benefit of a regulated rate under the Act (cable companies and CLECs) to pay the *same rate*. As Senator Hollings stated, "[t]he purpose of the [pole attachment] provisions is to ensure that all [pole] users pay the same amount."<sup>19</sup>

Additionally, it cannot be that Congress intended telecommunications carriers to pay a higher rate than cable companies in all instances because, even under the current Section 224(e) definition of "cost," telecommunications carriers pay less per attachment than cable companies if there are a substantial number of attachers per pole. As Comcast

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<sup>18</sup> American Electric Power Comments at 86 (citing H. Conf. Rep. 104-458, at 92 (1996)).

<sup>19</sup> See S. Rep. No. 104-23, at 69 (1996).

argued, both Congress and the FCC anticipated that there would be many more attachers per pole than turned out to be the case.<sup>20</sup> The fact that that fewer telecommunications attachers deployed facilities than anticipated and, as a result, the telecommunications service rate today is usually higher than the cable rate, does not mean that Congress intended such an outcome.

**B. The FCC’s And NCTA’s Proposals Fully Account For The But-For Costs Of Third-Party Attachments**

**1. The FCC Could Adopt Either Its Proposal Or NCTA’s Proposal**

Commenters provided widespread support for the FCC’s approach to defining cost for the purpose of section 224(e).<sup>21</sup> Moreover, the FCC should closely examine the two approaches put forth by NCTA, a fully allocated cost approach which exclude those costs which are not related to the costs imposed by attachers<sup>22</sup> and an incremental cost approach.<sup>23</sup> As Mr. Don Wood explains in the declaration attached hereto, the FCC’s and

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<sup>20</sup> Comcast Comments at i.

<sup>21</sup> *See, e.g.*, Comcast Comments at 11-13; Level 3 Comments at 12; NCTA Comments at 14-15; Time Warner Cable Comments at 9-11.

<sup>22</sup> *See* Kravtin Decl. ¶ 13 (“The upper bound rate analysis presented in this report is based on a fully allocated cost approach, similar to the Commission’s existing cable and telecom rate methodologies. This analysis refines the existing telecom formula methodology to achieve a more direct linkage of the individual components of and inputs to the formula (or both capital and operating costs) to the fundamental economic principles of cost causation.”).

<sup>23</sup> *See id.* ¶ 12 (“The lower bound telecom rate analysis presented in this report is based on a direct proxy for the economically efficient marginal cost of pole attachment – the cost standard most conducive to achieving the goals set forth in the NBP.”).

NCTA's approaches would fully compensate the utilities for the cost of attachment while promoting broadband deployment.<sup>24</sup>

Contrary to the concerns of the FCC, setting the Section 224(e) definition of cost equal to incremental costs will not result in confiscatory rates. As Mr. Wood and NCTA show, if the FCC sets the definition of cost in Section 224(e) equal to the incremental costs of attachment, the 224(e) formula will produce a rate at or above the pole owner's incremental costs. As Mr. Wood argues, because the "allocation formula in § 224(e) is a hybrid formula that allocates costs on both a relative use and per-capita basis...the 224(e) 'hybrid allocation' results in a cost allocation to the utility that exceeds the utility's incremental cost to provide the attachment."<sup>25</sup> Therefore, if the FCC adopted either approach, the FCC need not permit utilities to charge the cable rate in those instances where the revised telecommunications formula produces a telecommunications rate below the cable rate.<sup>26</sup>

The FCC invited commenters to present studies and data which would "isolate and quantify the effect" of third-party attachments on the utilities' capital costs and

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<sup>24</sup> See Declaration of Don J. Wood, attached hereto as Appendix A ("Wood Declaration").

<sup>25</sup> See Wood Declaration ¶ 15; see also Kravtin Decl. ¶ 57 ("Under the hybrid cost methodology described in Section 224(e), usable costs are allocated in a cost causative proportion based on relative occupancy on the pole, but unusable costs are allocated based on the number of attaching entities. This hybrid approach gives much more in excess cost recovery to the pole owner (vis-à-vis economically appropriate marginal costs) than is taken away by the statutory two-thirds adjustment factor.").

<sup>26</sup> However, as Mr. Wood explains, to the extent that a revised definition of cost produces a rate below the utility's incremental costs "a 'plus factor' can be calculated and applied to the cost to be allocated" to ensure that the utility receives compensation equal to its incremental costs. Wood Declaration ¶ 15.

operating expenses.<sup>27</sup> While NCTA and others filed detailed information in response, the utilities filed virtually no relevant information at all. Rather, as Mr. Wood explains, the utilities presented largely anecdotal information regarding the impact of attachers on their costs. Such limited information does not provide a basis for concluding that attachers impose more than de minimis costs on pole owners.

*First*, the Concerned Utilities argued that they install poles five feet higher than necessary for their own purposes in order to meet the needs of attachers.<sup>28</sup> However, as explained below, such behavior is contrary to the utilities' own economic interests, thereby casting doubt on the utilities' claims. Moreover, as Mr. Wood explains, to the extent utilities install taller poles for attachers that are not compensated for through make-ready charges, it is likely that they are only doing so in greenfield areas or in those instances where a pole is worn out and would need to be replaced anyway.<sup>29</sup> Therefore to determine the "but for" costs of pole replacement due to attachers, the utilities would have to present data demonstrating (1) the extent to which utilities' pole stock has been replaced to serve the needs of attachers; (2) that five feet represents a reasonable response to the anticipated need to provide space to third-party attachers; (3) the incremental cost of the taller pole compared to the cost of the pole that would have been installed 'but for' the utility's desire to accommodate communications attachers; and (4) the useful life of a taller pole (likely to be longer than shorter poles or the pole stock in general because they

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<sup>27</sup> *FNPRM* ¶¶ 136-137.

<sup>28</sup> *See* Concerned Utilities Comments at 108.

<sup>29</sup> Wood Declaration ¶ 39.

were installed to accommodate attachers).<sup>30</sup> The utilities have not provided this information.

*Second*, the Concerned Utilities argue that their poles must be replaced more often than would be the case in the absence of attachers because of the additional load caused by attachers.<sup>31</sup> But the utilities do not attempt to “isolate and quantify” the extent to which this is the case. Moreover, as the FCC has found, the purpose of make-ready is to strengthen the pole to accommodate additional attachers.<sup>32</sup> It is possible that the presence of attachments causes damage to poles because make-ready work performed by or at the direction of the utility was not done properly and the pole was not adequately strengthened. To the extent that is the case, the cost of pole replacement should not be borne by attachers.

*Third*, the Concerned Utilities argue that “unlike many electric wires, communications cables do not break when a tree falls on them, so it is the communications attachments – not the electric lines – that bring down poles in stores.”<sup>33</sup> As an initial matter, as Mr. Wood explains, it is simply not the case that communications cables never break and the power lines always break. Even if the utilities’ theory was correct, to determine the cost imposed by the presence of attachers, the utilities would need to calculate, “the present value, calculated over the number of years of depreciable life (if any) remaining for the old pole, of the difference between the capital carrying cost

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<sup>30</sup> *Id.* ¶¶ 40-42.

<sup>31</sup> *See* Concerned Utilities Comments at 111.

<sup>32</sup> *See infra* note n.137.

<sup>33</sup> Concerned Utilities Comments at 111.

of the old pole and the capital carrying cost of an equivalent new pole, multiplied by the percentage of poles in the utility's network that must be replaced in a given period of time because the pole is brought down by a falling tree that breaks the power cables but does not break the communications cables."<sup>34</sup> The utilities, of course, do not even attempt to make such a calculation.

*Fourth*, the Concerned Utilities assert that "Garbage trucks or other vehicles pull down the communications lines, not the electric lines, and in the process pull down the poles with them." But the Concerned Utilities do not attempt to "isolate and quantify" how often garbage trucks bring down poles and what subset of those events are attributable to the presence of third party attachments. Therefore, there is no way to determine the impact on the utilities' capital costs.

*Fifth*, the Concerned Utilities argue that "[w]hen poles are changed out that already have many communications companies attached, the pole change out takes longer, and increases capital costs."<sup>35</sup> As an initial matter, the Concerned Utilities do not "isolate and quantify" what these costs are or how often they are incurred. Moreover, as Mr. Woods explains, there are likely a substantial number of pole change-outs which are paid for by attachers when the pole owner replaces a shorter pole for a taller pole at the request of the attacher. The utility incurs no net capital costs in such a situation.<sup>36</sup> The Concerned Utilities do not take these attacher subsidies into account.

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Wood Declaration ¶ 48.

*Sixth*, the Concerned Utilities argue that when an electrical utility must install certain additional equipment like transformers and risers on an existing pole, the pole often must be changed out because there is insufficient space on the pole due to the presence of attachers.<sup>37</sup> To measure the impact, the utilities would have to calculate: “the present value, calculated over the number of years of depreciable life (if any) remaining for the old pole, of the difference between the capital carrying cost of the pole and the capital carrying cost of an equivalent new pole, multiplied times the percentage of poles in the utility’s network that must be replaced in a given period of time because the presence of a communications attacher in the Communications Space makes it impossible for the utility to install needed equipment in the Electric Supply Space.”<sup>38</sup> Again, the utilities do not provide any of this information.

**2. The Utilities’ Own Assertions Show That They Incur Few Capital Costs As A Result Of The Presence Of Attachers And In Fact Profit From The Presence Of Attachers**

The available evidence indicates that, far from imposing substantial “but for” capital costs on utilities, third-party pole attachments are a profit center for utilities. The FCC must therefore conclude that the “but for” costs of attachment are minimal, and the current attachment rates provide compensation well in excess of the costs actually incurred by the utility.

Utilities argue that attachers “add significantly to utility capital expenditures [because] electric utilities must install taller poles than they need for their own purposes

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<sup>37</sup> Concerned Utilities Comments at 111.

<sup>38</sup> Wood Declaration ¶ 50.

in order to accommodate communications attachers.”<sup>39</sup> The utilities assert that they do not benefit or profit from the installation of taller poles than are necessary for their own use or from the replacement of full poles with taller poles at the request of attachers. If this were the case, and if the cable rate did not provide sufficient compensation to attachers as the utilities argue,<sup>40</sup> the utilities’ losses would escalate as the number of attachers on their poles increases. Utilities would presumably seek to avoid such escalating costs by refusing to replace existing poles with taller poles in order to accommodate third-party attachers.

In fact, the utilities themselves state that they install taller poles to accommodate the needs of the attachers on a regular basis. They do so even though they are under no obligation to plan their pole networks with attachers in mind. Moreover, utilities regularly replace poles at attachers’ request and cost even though the utilities believe that they have no obligation to do so.<sup>41</sup> TWTC is unaware of any instance where a pole owner has refused to replace an existing pole with a taller pole at TWTC’s expense.

The utilities claim that they deploy taller poles simply as a matter of charity.<sup>42</sup> But this is implausible.<sup>43</sup> Utility rate-payers and state regulators would be rightfully upset

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<sup>39</sup> Concerned Utilities Comments at 109.

<sup>40</sup> *Id.* at 113-14.

<sup>41</sup> *Id.* at 18 (“Although not required to do so by FCC rules or the Pole Attachment Act, utilities often replace poles for communications attachers in instances where insufficient capacity exists on the existing poles.”).

<sup>42</sup> *See id.* at 110 (“The installation by electric utilities of taller poles than they need for themselves is simply one more way in which utilities with no fanfare have helped communications attachers reach their customers with as little inconvenience and expense as possible.”). For example, while the FCC assumes that the average pole height is 37.5 feet, the Coalition of Concerned Utilities stated two utilities install poles 40 foot poles

if electric utilities installed taller pole networks and/or replaced shorter poles as a give-away to attachers and included the costs of taller poles in its electrical rate base.<sup>44</sup>

The unavoidable conclusion is that utilities accommodate third-party attachers because it is profitable for them to do so. Specifically, the utilities' behavior demonstrates that they benefit from the installation of taller poles in the form of above-cost make-ready charges (obtained from charging the attacher for pole replacement),<sup>45</sup> above-cost pole attachment rates (the utilities' profit from above-cost rates increases as

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(instead of 35 foot poles) and two utilities install 45 foot poles (instead of 40 foot poles) allegedly for the sole purpose of accommodating additional attachers. *See id.* at 109.

<sup>43</sup> The utilities' attempt to justify this argument is internally incoherent. For example, the Coalition of Concerned utilities contradicts itself in the same paragraph where it argues that (1) its members install taller poles than they would use for their own purposes because "it makes no sense to install shorter poles with the knowledge that those poles may need to be replaced with a taller pole upon request for attachment by a third party" and (2) "utilities are not legally required to replace poles to accommodate attachers." *Id.* at 110.

<sup>44</sup> *See* Alliance For Fair Pole Attachment Rules Comments at 21 ("Under state laws, utilities are permitted to recover only 'prudently incurred' costs in rates."); Bright House Networks Comments at 16 ("Utilities invest capital into poles for the benefit of the utility's customers, not for possible future attachers. Indeed, it would be passing strange for a utility to insist that it routinely seeks recovery of capital costs in its rate-setting process with state commissions to be reimbursed to meet the future needs of unaffiliated and unidentified attachers.").

<sup>45</sup> For example, even if pole owners charge the attachers what they deem to be the "actual cost" of the labor necessary to perform pole replacement, the utilities' calculation of "actual cost" is well in excess of the costs incurred by the utility to make the labor available. According to Mr. Woods, "[u]tilities generally do not take into account the needs of attachers in determining the number of work-crews that they must keep on hand." Moreover, "utilities generally hire substantially more work crews than need to be in the field a typical day in order to meet peak demand in an emergency. These crews, which are often idle, are funded through the utility rate base. As a result, there is little or no incremental cost for the utility (beyond fuel for the truck) to send a work crew to perform pole replacement, or indeed any make-ready work." The utilities therefore "earn a substantial profit from make-ready work even at 'actual cost.'" Wood Declaration ¶ 21.

the number of attachers increases) and through an enrichment of their capital base (through pole replacement funded by attachers).<sup>46</sup>

### **III. THE FCC SHOULD ADOPT COMPREHENSIVE NEW RULES TO LIMIT UTILITIES' INCENTIVE AND OPPORTUNITY TO SLOW-ROLL AND OVERPRICE ATTACHMENTS BY THIRD-PARTIES**

#### **A. The FCC Has Statutory Authority To Adopt Its Access Proposals**

Many electrical utilities argue that the FCC does not have the jurisdiction to adopt any of its access proposals (e.g., the make-ready timeline, establishment of a pole database, publication of make-ready costs, etc.)<sup>47</sup> because the FCC only has the authority to subject electrical utilities to rules of general applicability that govern adjudications.<sup>48</sup>

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<sup>46</sup> Concerned Utilities Comments at 110; *see also* Comcast Comments, Attach. 1: Declaration of Timothy S. Pecaro ¶ 16 (“The only rational impetus for the utility to incur these additional costs would be the expectation that they will subsequently be able to profit from installing these taller poles. ... 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 utility’s own purposes can accommodate the typical additional attachers.”).

<sup>47</sup> *See* EEI and UTC Comments at 13 (“The FCC lacks statutory authority to impose specific make-ready deadlines on all electrical utilities. ... [T]he FCC’s jurisdiction pursuant to Section 224 is extremely limited and extends only so far as necessary to resolve a dispute or controversy over rates, term and conditions of access.”); *id.* at 27 (“The FCC’s proposal to require utilities to establish, maintain and update an extensive database of their assets goes well beyond the FCC’s statutory authority to regulate the rates, terms and conditions of access.”); Oncor Comments at 18 (arguing that the FCC does not have the jurisdiction to “tell electric utilities (1) when to perform make-ready; (2) how quickly to perform it; (3) who can do it; (4) how and when to get paid for it; and (5) to accept a new coordinating role in the make-ready process.”); Alliance for Fair Pole Attachment Rules Comments at 57 (“[T]he Commission’s regulatory authority under 224(b)(1) and its rulemaking authority under 224(b)(2) are purely ancillary to its specific mandate to hear and resolve complaints in specific disputes between jurisdictional utilities and jurisdictional attaching entities over pole attachment rates, terms and conditions.”).

<sup>48</sup> *See, e.g.*, EEI and UTC Comments at 2-3 (“Congress only granted the FCC limited jurisdiction to ensure that the rates, terms and conditions of pole attachments are just and reasonable; it did not authorize the FCC to regulate electric utilities. ... Section 224 makes clear that the FCC’s authority to regulate the rates, terms and conditions of access

The utilities' argument rests on a fundamental misreading of the statute which has been rejected by both the FCC and the 11<sup>th</sup> Circuit in *Southern Company*.

As an initial matter, the FCC has *already imposed* many duties on pole owners that are not limited to the adjudication of disputes.<sup>49</sup> For example, Section 1.1403(b) states that, if a utility does not provide access to its poles within 45 days of application, “the utility must confirm the denial in writing by the 45<sup>th</sup> day” and the denial must “include all relevant evidence and information supporting its denial.”<sup>50</sup> Section 1.1403(c) states that a utility must provide an attaché “no less than 60 days written notice prior to [r]emoval of facilities or termination of any service to those facilities;” “[a]ny increase in pole attachment rates;” or “[a]ny modification of facilities other than routine maintenance or modification in response to emergencies.”<sup>51</sup> The FCC’s rules require that utilities permit access to overlashers and prohibit utilities from requiring “the host attaching entity

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is invoked at such time as an attaching entity files a complaint with the FCC alleging a denial of access or an allegedly unreasonable rate, term or condition. ... The enforcement process in Section 224(b)...is based solely on hearing and resolving complaints.”).

<sup>49</sup> Thus far, the FCC has only adopted a limited number of such rules because it did not believe that it had sufficient knowledge to fashion more detailed rules. *See 1998 Pole Attachment Order* ¶ 121 (“The information submitted in this proceeding is not sufficient to enable us to adopt detailed standards that would govern all right-of-way situations. We thus believe it prudent for the Commission to gain experience through case-by case adjudication to determine whether additional ‘guiding principles’ or presumptions are necessary or appropriate.”); *2001 Reconsideration Order* ¶¶ 43, 45 (“Teligent urges us to adopt more specific rules regarding pole attachments in rights-of-way...rather than consider those complaints on a case by case basis. ... We have not been persuaded that our current rules are not satisfactory to provide all parties a process by which they may seek appropriate remedies when negotiations for attachments fail.”). But the FCC’s decision not to adopt more detailed rules in the past has no bearing on its authority to do so.

<sup>50</sup> 47 C.F.R. § 1.4103(b).

<sup>51</sup> *Id.* § 1.4103(c).

[or] the overlasher [to] obtain additional approval from or consent of the utility for overlying other than the approval obtained for the host attachment.”<sup>52</sup> The FCC also held in the *Local Competition Order*, and again reiterated in its *Recon Order*, that the utility must permit attachers to use workers who meet the “same qualifications, in terms of training, as the utility’s own workers” in performing post-make ready work (i.e., the “contract worker rule”).<sup>53</sup>

Nor is there any doubt that Section 224(b)(1) provides ample authority for the FCC to adopt rules that apply outside of the dispute resolution process. That section states that “the Commission shall regulate the rates, terms and conditions for pole attachments to provide that such rates, terms and conditions are just and reasonable, *and* shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms and conditions.”<sup>54</sup> Congress granted the FCC authority *both* to regulate the rates, terms and conditions of pole attachments *and* to establish procedures to hear and resolve complaints concerning those rates, terms and conditions. These two clauses operate independently, and the authority of the FCC to hear and resolve complaints in no way limits the FCC’s authority to regulate the rates, terms and conditions of pole attachments outside of the complaint process. Moreover, Section 224(b)(2) specifically provides that the FCC may regulate such rates, terms and

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<sup>52</sup> *2001 Reconsideration Order* ¶ 75.

<sup>53</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, ¶ 1182 (1996).

<sup>54</sup> 47 U.S.C. § 224(b)(1) (emphasis added).

conditions through rules of general applicability, not solely through adjudicatory decisions.<sup>55</sup>

The courts have found that the FCC's imposition of duties and restrictions on pole owners outside of the complaint process is well within its authority. In *Southern Company*, the utilities argued that “the [contract worker rule] goes beyond the statutory authority the FCC enjoys to regulate the ‘rates, terms and conditions’ of pole attachments” and that the FCC does not have the authority to regulate the employment practices of utilities.<sup>56</sup> Then, as now, the utilities argued that the grant of authority in Section 224(b)(1) is extremely narrow.<sup>57</sup> While acknowledging that the statute does not provide *explicit* authority for the FCC to regulate the utilities’ labor practices, the court held that FCC has the *implicit* authority to do so because the qualifications of workers that attachers may employ is a “condition” of attachment. The court explained that Section 224(b)(1) “gives the FCC the power to regulate the ‘rates, terms and conditions’ of pole attachments.”<sup>58</sup> The FCC has wide discretion under that section because

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<sup>55</sup> See *id.* § 224(b)(2) (“The Commission shall prescribe by rule regulations to carry out the provisions of [Section 224(b)].”).

<sup>56</sup> See *Southern Co. v. FCC*, 293 F.3d 1338, 1350 (11<sup>th</sup> Cir. 2002).

<sup>57</sup> Brief of Petitioners at 16, *Southern Co. v. FCC*, 2000 WL 33981935 at \* 34-35 (11<sup>th</sup> Cir. 2000) (Nos. 99-15160-GG *et al.*) (“The analysis of this issue must be guided by the first narrowing principle for interpreting the Pole Attachments Act, to wit, that Congress intended to grant the FCC limited authority to regulate electric utilities. As noted *supra*, during the mid-1970’s, when the original pole attachment legislation was considered, both Congress and the Administration were concerned about delegating jurisdiction over electric companies to the FCC....This same concern was echoed by Senator Ernest Hollings (D-SC) on the floor of the Senate when he introduced the legislation.”).

<sup>58</sup> *Southern Co.*, 293 F.3d at 1335-51; see also Brief for Respondents at 17-18, *Southern Co. v. FCC*, 2000 WL 33980217 at \*45 (11<sup>th</sup> Cir. 2000) (No. 99-15160-GG) (“Petitioners contend that the FCC has no authority to make pronouncements concerning who may install or modify a pole attachment....On the contrary, the Pole Attachment Act

“[a]bsent some clear indication on the face [of Section 224] that [the FCC] lacks the authority” to impose the regulation at issue, the FCC has the “authority to fill gaps” where Section 224 is silent.<sup>59</sup> The Act, the court found, “does not specify what sorts of concerns constitute the ‘conditions’ of a pole attachment, and there is no statutory language suggesting that regulation of the physical process of attaching wires (by workers) is outside of the scope of the ‘conditions’ of a pole attachment.”<sup>60</sup> Under the precedent of *Southern Company*, the FCC has ample authority to adopt the access rules that it has proposed.

**B. There Is Substantial Support Among Both Attachers And Utilities For The FCC’s Make-Ready Timeline**

There is widespread support among the commenters, even among some pole owners, for the FCC’s proposed make-ready timeline.<sup>61</sup> In fact, as several parties argued, the pole attachment timeline proposed by the FCC is too conservative. The FCC should

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specifically provides that the FCC ‘shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, *terms, and conditions* are just and reasonable.’ 47 U.S.C. § 224(b)(1) (emphasis added). Establishing a guideline concerning who may install or modify a pole attachment - a guideline intended to prevent the imposition of an unreasonable condition of attachment - is comfortably within the FCC’s jurisdiction to regulate the terms and conditions for pole attachments.”).

<sup>59</sup> *Southern Co.*, 293 F.3d at 1351.

<sup>60</sup> *Id.*

<sup>61</sup> *See, e.g.*, Qwest Comments at 3 (“Qwest generally supports the Commission’s proposal to establish timelines for different stages of the make-ready work process, which would commence once a signed agreement is in place between the pole owner and the prospective attacher.”); National Telecommunications Cooperative Association (“NTCA”) *et al.* Comments at 10-11 (“The Associations agree that, for requests of fewer than 100 poles, the Commission’s proposed make-ready time-line is fair, reasonable and adequate....The Associations report difficulties in working with the larger utilities in reaching agreement on prompt pole access, especially due to the absence of a federal make-ready timeline”).

shorten the timeline where appropriate and adopt other reasonable proposals to speed up the make-ready process.

There are many components of the FCC's proposed timeline that can be shortened.<sup>62</sup> As TWC explained, in its experience, make-ready work is typically completed for poles within 52 days of commencing work, and, even if coordination among other attachers is necessary, "poles are typically ready to accommodate a new attachment well within 90 days."<sup>63</sup> Several commenters presented viable approaches for shortening and speeding up the FCC's proposed timeline. The FCC should closely consider the following proposals:

- Under Fibertech's proposal, "[f]or applications of up to 35 poles, no more than five of which require make-ready work, with no pole replacements, the initial survey, make-ready determination, and make-ready estimate should be completed in 30 days" and the period for make-ready performance should be 15 days.<sup>64</sup>
- TWC proposed that make-ready work should be completed within 45 days for applications of between 20 and 200 poles. For applications of fewer than 20 poles, TWC proposed that make-ready work be completed within 30 days and for applications of more than 200 poles that make-ready work be completed within 60 to 90 days.<sup>65</sup>
- Both Verizon and Fibertech argued that there is no need for a 14 day period for the preparation of a make-ready estimate, as the FCC has proposed.<sup>66</sup> Fibertech

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<sup>62</sup> See Time Warner Cable Comments at 16 ("Instead of adopting its proposed five-stage timeline and exceptions thereto, the Commission should provide for a more abbreviated timeline for the typical cases that comprise the bulk of the applications that cable operators submit and are routinely processed each year.").

<sup>63</sup> Time Warner Cable Comments at 17.

<sup>64</sup> Fiber Technologies ("Fibertech") Comments at 8.

<sup>65</sup> Time Warner Cable Comments at 18.

<sup>66</sup> See Fibertech Comments at 5-6 ("The estimate for make-ready work should be prepared contemporaneously with the make-ready determination. Experience in Connecticut, which has no such two-week estimate period, shows that no additional period if necessary."); Verizon Comments at 25-26 ("In Verizon's experience, there is no

also argued that, if (as TWTC/COMPTEL proposed) contractors are permitted to perform make-ready work from the beginning of the timeline instead of waiting for the utility to fail to do its job, there is also no need for an extra 30 day period for multi-party coordination. As in Connecticut, “that 30 day timeline should run contemporaneously with the 45-day time period required of pole owners.”<sup>67</sup>

Utility objections to the proposed timeline should be rejected. *First*, there is no justification for the utilities’ proposal to exclude from the proposed timeline any jobs that require a pole change-out. As TWC argued, an “installation timetable is not generally upset by make-ready that requires a pole change-out. Pole change-outs are generally not time consuming. At most, installing a new pole requires a few additional days.”<sup>68</sup> This has been TWTC’s experience as well.

*Second*, the FCC should reject utilities’ arguments concerning the purported liability to which such utilities would become subject under the make-ready timeline. For example, some utilities argued that the obligation to move attachments in order to meet the timeline will subject them to unreasonable liability.<sup>69</sup> Other pole owners argued that pole owners should be indemnified and held harmless for any damages arising from their obligation to move third-party attachments.<sup>70</sup> These concerns are a red herring. Most

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need for an additional fourteen days to prepare make ready invoices. Verizon already generally provides make ready estimates at the same time it provides responses to pole or conduit access applications.”).

<sup>67</sup> See Fibertech Comments at 7.

<sup>68</sup> Time Warner Cable Comments, Declaration of Robert Shugarman ¶ 10.

<sup>69</sup> See, e.g., Coalition of Concerned Utilities Comments at 70 (“Requiring electric utilities and ILECs to move each others’ facilities and other attachers’ facilities creates additional liability if the work is not performed properly.”).

<sup>70</sup> See AT&T Comments at 31 (“If this proposal is adopted, the utility should be indemnified and held harmless by the uncooperative attacher in the event that the activities of the utility in moving or removing the facilities or the resulting configuration cause any damages, losses, or injuries to persons or property.”).

pole attachment agreements provide that the utility will be held harmless and indemnified for any damage that the utility causes to attachers during the attachment process.

*Third*, while it is no doubt reasonable to “stop the clock” under certain circumstances (e.g., where extreme weather conditions prevent make-ready work), some of the utilities’ proposed reasons for stopping the clock should clearly be rejected. In general, if the proffered reason has nothing to do with the utility’s ability to actually perform the work, the clock should not be stopped. For example, several utilities argued that a utility should be permitted to stop the clock if the utility determines that the attacher requesting access has unauthorized attachments.<sup>71</sup> But the presence of unauthorized attachments has nothing to do with the utility’s ability to complete make-ready work on time. Moreover, as explained *infra*, utilities’ assertions as to the presence of unauthorized attachments have often been based on faulty records. The FCC should not permit a utility to refuse to perform make-ready if, *in its sole discretion*, it believes that the attacher has a single unauthorized attachment on the utility’s poles.

### **C. The FCC Should Permit Attachers To Use Third-Party Contractors During Make-Ready**

TWTC, COMPTTEL and other commenters strongly support the FCC’s proposal to permit the use of third-party contractors to perform make-ready work. However, as TWTC and COMPTTEL explained in their initial comments, the FCC should strengthen its proposal by permitting attachers to use contractors (1) from the beginning of the make-ready process (rather than delaying use of outside contractors until a utility has failed to meet make-ready deadlines, as suggested in the FNPRM) and (2) on both non-

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<sup>71</sup> Alliance for Fair Pole Attachment Rules Comments at 22; *see also* Coalition of Concerned Utilities Comments at 24.

incumbent LEC utility and incumbent LEC utility poles so long as the contractor has the “same qualifications, in terms of training, as the utilities’ own workers.”

The utilities raise a number of objections to the FCC’s proposals. They argue that permitting attachers to use third-party contractors from a list that is pre-approved by the utility would, among other things, (1) “undermine utility control of its own infrastructure”<sup>72</sup> and (2) threaten utility assets because “the contractor would still be working for the attaching entity and would have an inherent conflict of interest...”<sup>73</sup> These arguments should be rejected.

To begin with, many utilities already permit the use of third-party contractors, again justifying a presumption that all utilities are able to do so. There appears to be no rhyme or reason as to why certain utilities refuse to allow attachers to utilize third-party contractors while other utilities allow this practice and even allow the attachers’ own employees to perform make-ready work. Simply because many utilities insist upon retaining absolute control over all conditions of attachment does not make such absolute control just or reasonable.

The utilities’ comments are full of examples of pole owners granting third-party contractors and even attachers themselves wide access to pole infrastructure to perform make-ready work. For example “NRECA’s survey found that 58% of Electric Cooperatives reported that cooperative employees complete all make-ready work.

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<sup>72</sup> EEI and UTC Comments at 35.

<sup>73</sup> *Id.* at 36; *see also* Ameren *et al.* Comments at 14 (“Because the make-ready process involves work that directly impacts the safety, reliability, and engineering of electric distribution facilities, the POWER coalition members select contractors based not only on objective qualifications, but also on subjective criteria and performance evaluations that are not public record.”).

Another 23% reported that some combination Electrical Cooperative employees and attaching entity employees or contractors perform make-ready work.”<sup>74</sup> Similarly, the 2007 UTC survey found that 34% of utilities permit licensees to hire third parties for field surveys and 22% allow licenses to hire third parties for make-ready work.<sup>75</sup> Oncor states that it never performs make-ready work and that “this process is left to the attaching entities.”<sup>76</sup> Permitting third parties to perform make-ready work has been “Oncor’s long-standing practice.” Therefore, “Oncor does not oppose approved contractors working in the communications space.”<sup>77</sup> The Florida Utilities believe that the 45-day make-ready performance deadline is reasonable because “most of the work at issue would be performed by either the existing attachers or the prospective attacher’s contractor.”<sup>78</sup> The Florida Utilities request changes to the FCC’s proposed Rule 1.1420(e) regarding rearrangements to “acknowledge the reality that most make-ready within the communications space is handled without significant involvement by the electric utility pole owner.”<sup>79</sup> Indeed, as long as the use of contractors is restricted to the telecommunications space, the Florida Utilities argue that “the proposed rules [regarding the use of contractors] strikes the appropriate balance between the interests of communications attachers and utilities’ concerns regarding safety, reliability and

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<sup>74</sup> National Rural Electric Cooperative Association (“NRECA”) Comments at 11.

<sup>75</sup> *The Problem with ... Pole Attachments*, A Survey Report by The Utilities Telecom Council, at 16 (2008) (“2007 UTC Survey”).

<sup>76</sup> *See* Oncor Comments at 24.

<sup>77</sup> *Id.*, Ex. A: Declaration of Karen Flewharty ¶ 27 (“Flewharty Decl.”).

<sup>78</sup> Florida Utilities Comments at 20.

<sup>79</sup> *Id.* at 22.

engineering.”<sup>80</sup> Qwest asserted that “[u]pon notice and approval, [it] has no objection to attachers’ use of Qwest-approved contractors.”<sup>81</sup> These statements by pole owners should foreclose any further debate: use of third-party contractors to perform make-ready work for attachers must become a presumptive requirement for all pole owners.

**D. The FCC Should Permit Payment Of Make-Ready Work In Stages**

The utilities argue that they should continue to be permitted to charge for all make-ready fees up front because (1) it has been the industry practice to impose such conditions on attachers and (2) pole owners have no security if the attacher fails to pay.<sup>82</sup> Neither assertion, even if true, would justify a failure to accept payment in stages. Moreover, it is not the case that pole owners lack security because most attachers must post a bond as a condition of the attachment agreement.

*First*, it is unsurprising that pole owners have mandated up-front payment since up-front payment is advantageous to the utility and the attacher has no leverage to bargain for payment in stages. The common imposition of a particular payment term by a seller with monopoly power does not, by itself, make the term reasonable.

*Second*, many utilities do in fact permit payment in stages, thereby presumptively demonstrating that such a practice does not place the utilities’ assets at risk. In fact, the

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<sup>80</sup> *Id.* at 30.

<sup>81</sup> Qwest Comments at 4.

<sup>82</sup> *See, e.g.*, Flewharty Decl. ¶ 23 (“Oncor’s procedures require up-front payment of make-ready charges....In my experience, Oncor’s requirement of up-front make-ready is consistent with industry custom and practice.”); Idaho Power Company at 9 (“From a financial perspective, allowing attachers to withhold payment would require the utility to finance the up-front cost of attachment without any security from the attacher.”).

NRECA survey “revealed a fairly even split among its members in those requiring upfront payments (59%) and those that did not require any upfront payment (41%).”<sup>83</sup>

In any event, utilities will rarely ever realize actual losses from the failure of attachers to pay up front for make-ready work. This is because attachers (unlike the utilities’ own rate payers), including TWTC, are often required by the utility to post a bond as a condition of entering into a pole attachment agreement. The bond will make the utility whole in case the attacher fails to pay its make-ready costs or its annual pole rental fees as a result of bankruptcy or for any other reason.<sup>84</sup>

#### **IV. THE FCC SHOULD ADOPT RULES THAT DIMINISH POLE OWNERS’ INCENTIVE AND OPPORTUNITY TO IGNORE THE POLE ATTACHMENT RULES.**

As the Commission itself explained in the *FNPRM*, “fully adjudicated pole attachment complaints establish precedent,” and attachers and pole owners that were not parties to the case “are bound by the result.”<sup>85</sup> The utilities appear to disagree. Confirming the experience of attachers,<sup>86</sup> the utilities explain in their comments that they simply choose to ignore unfavorable decisions. The utilities’ lawless behavior demonstrates that the FCC must adopt additional mechanisms suggested by both the FCC

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<sup>83</sup> NRECA Comments at 16.

<sup>84</sup> See Charter Comments at vi (“In addition to the five-year back rent penalty, Charter is also subject to strict default, bond and insurance requirements in pole attachment agreements and at the state and local level.”).

<sup>85</sup> *FNPRM* ¶ 23.

<sup>86</sup> See Sunesys Comments at 25 (“[M]any utilities in the past have generally ignored pole attachment decisions and precedent, claiming that every individual case is different. While every case may have different facts, there has been considerable precedent that is applicable to many cases, which some utilities have flatly ignored...”).

and TWTC/COMPTEL that would reduce the utilities' incentive and opportunity to flout the pole attachment laws.

The utilities' dismissive attitude toward the Commission's authority in general and its adjudicatory precedent in particular can be most clearly seen in their imposition of illegal unauthorized attachment penalties. The FCC first determined *over ten years ago* (and reiterated in several subsequent rulings) that utilities may recover an unauthorized attachment penalty equal to back rent for five years or from the date of the last audit, whichever is less, plus interest at the IRS rate.<sup>87</sup> Incredibly, the utilities admitted in their comments that they routinely insist that attachers agree to unlawful unauthorized attachment penalty contract provisions. When utilities attempt to collect the illegal unauthorized attachment fees and the attacher objects by citing to FCC precedent, the utilities complain that they are often "forced" to accept less than is allowed under the contractual provision but more than the utility is allowed to recover under the law. It appears that some attachers do not challenge the illegal unauthorized attachment fees (likely because doing so would be more expensive than paying the illegal fees) and pay the full fee as stipulated in the contract. The utilities' comments include the following descriptions of their conduct:

- The Coalition of Concerned Utilities states that "many [but apparently not all] utilities follow the FCC's guidance in the Mile Hi Cable order, which permits the utility to recover only unpaid rentals on unauthorized attachments for five years of from the data of the last audit, whichever is less."<sup>88</sup>
- Oncor states that "[its] pole attachment agreements provide for a \$25 per unauthorized attachment fee, in addition to back rent, with interest. Because of the Commission's prior precedent of awarding only back-rent plus interest, Oncor

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<sup>87</sup> *Mile Hi Cable Partners*, Order, 15 FCC Rcd 11450 ¶ 14 (2000); *see also infra* n. 145.

<sup>88</sup> Concerned Utilities Comments at 99.

must *constantly defend its contractual entitlement* to the [unlawful] unauthorized attachment fee. In fact, Oncor often [but apparently not always] must accept less than it is contractually entitled in order to avoid litigation.”<sup>89</sup>

- The Florida Utilities argue that attachers are aware of *Mile Hi* and similar decisions “and stand ready to string cite them any time an electric utility sends a bill for unauthorized attachments. This often [but apparently not always] results in the electric utility (a) abandoning its rights (surmising Commission resolution of the issue is a *fait accompli* in favor of the attacher), or (b) negotiating a reduced amount...(attachers also regularly cite Mile Hi for the proposition that contractual interest rates above the IRS underpayment rate are unenforceable).”<sup>90</sup>
- Progress Energy’s and Gulf Power’s contracts require “payments of back rent, plus interest and “a \$25 fee for each unauthorized attachment in excess of 2% of the last verified total number of attachments (whichever is greater).”<sup>91</sup> Progress Energy’s declarant Scott Freeburn stated that Progress sent invoices to a number of attachers to collect its contractual \$25 unauthorized attachment fee plus interest. Mr. Freeburn implies that all but one of the attachers agreed to pay. However, one of Progress Energy’s attachers had the gall to “object[] to paying the invoice on grounds (among others) that the unauthorized attachment provision in the pole attachment agreement was unenforceable under the Commission’s precedent. This attacher also contended that the contractual interest rate provision (applicable to back rent) was unenforceable based on Commission precedent. In order to avoid litigation in competing forums (state court and the FCC), PEF settled for an amount less than the full invoice.”<sup>92</sup>
- Gulf Power’s declarant Ben Bowen stated that when a cable attacher was invoiced a \$25 per unauthorized attachment fee based on a 2006 pole audit, “the attacher objected on grounds that the contractual provision would be held ‘unjust and unreasonable’ by the Commission. For this reason, along with other economic reasons, Gulf ultimately settled the matter for an amount less than the actual invoice [but apparently for more than is permitted by FCC precedent].”<sup>93</sup>

Unfortunately, illegal unauthorized attachment penalties are only one of several ways in which utilities simply ignore prior FCC rulings. For example, TWC explained

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<sup>89</sup> Oncor Comments at 50-51 (emphasis added).

<sup>90</sup> Florida Utilities Comments at 51.

<sup>91</sup> *Id.*, Ex. A: Declaration of Scott Freeburn ¶ 14.

<sup>92</sup> *Id.*.

<sup>93</sup> *Id.*, Ex. E: Declaration of Ben A. Bowen ¶ 12.

that a utility “recently refused to allow TWC to overlash its own facilities without complying with the permitting process, notwithstanding the Commission’s clear precedent that overlashing is not subject to advance permitting requirements...This is just one of many instances where TWC has had significant construction projects held up by utilities insisting on procedures that clearly violate established precedent and Commission rules.”<sup>94</sup>

The utilities’ dismissive behavior toward FCC precedent and rules provides a clear basis for the FCC to adopt the reforms advocated by TWTC, COMPTTEL and others that would diminish the utilities’ incentive and opportunity to flout the law. Most importantly, the FCC should adopt regulations (1) ensuring the availability of compensatory damages; (2) adopting TWTC/COMPTTEL’s proposed framework to govern utility attempts to rebut the average number of attacher presumptions; (3) adopting TWTC/COMPTTEL’s proposal for the adjudication of unauthorized attachment disputes; (4) mandating that pole owners post “model” contracts which attachers can opt-into at any time; (5) publishing a list of utility contract terms and utility practices which the FCC has already found to be illegal; and (6) holding that it is unjust and unreasonable for utilities to refuse to include a change-of-law provision in pole attachment agreements. While all of these are important, only the first three have thus far been discussed in the record and are therefore addressed further below.

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<sup>94</sup> Time Warner Cable Comments at 27. As TWC argued, the FCC should again reiterate that attachers “are not required to provide advance notice prior to overlashing.” *Id.* at 30

**A. The FCC Should Award Compensatory Damages To Attachers Where Pole Owners Violate The Act Or The FCC's Rules**

Of all of the reforms proposed by the FCC and commenters to ensure utility compliance with the law, the availability of compensatory damages is one of the most important. The threat of damages back to the applicable statute of limitations may well cause utilities to think twice before insisting upon and enforcing unjust and unreasonable contract terms. Contrary to the utilities' arguments, the availability of compensatory damages is both good policy and well within the FCC's authority.

**1. The FCC Has The Authority To Award Compensatory Damages**

The utilities argue that the FCC lacks the jurisdiction to impose compensatory damages in the pole attachment context because (1) "Congress did not explicitly or implicitly provide the FCC with such authority," even though it has done so elsewhere in the Communications Act,<sup>95</sup> and (2) the "only specifically enumerated remedy [in Section 224(b)(1)] is 'issuing cease and desist orders.'"<sup>96</sup> Neither of these arguments has any merit.

*First*, the absence of an express statutory grant to award damages does not foreclose the FCC from doing so where the requisite power can be found in a more general grant of authority in the statute. For example, the FCC concluded that it has the authority to award compensatory damages under Section 628, a provision that contains language very similar to the language of Section 224. Section 628(e)(1) grants the FCC "the power to order *appropriate remedies*, including...the power to establish prices,

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<sup>95</sup> EEI and UTC Comments at 42.

<sup>96</sup> Florida Utilities Comments at 46.

terms and conditions” to an aggrieved party in a program access adjudication.<sup>97</sup>

Similarly, Section 224 states that, in ruling on a pole attachment complaint, the FCC may “take such action as it deems appropriate and necessary, including issuing cease and desist orders.”<sup>98</sup> Given the similarity of the relevant statutory language, the conclusion that the “appropriate remedies” clause in Section 628 grants the FCC the authority to award damages in program access cases strongly supports the conclusion that the “appropriate and necessary” clause of Section 224(b)(1) grants the FCC the authority to award damages in pole attachment cases.

Moreover, those opposed to the authorization of damages in the program access context raised the same arguments now raised by the utilities. The opponents argued that the FCC may not impose damages because “Section 628 contains no explicit reference to damages [and] if Congress intended to authorize the Commission to award damages in program access cases, Congress could have, but did not, expressly incorporate by reference the remedies available under Title II.”<sup>99</sup> The FCC rejected this argument, and it held that, “[b]ecause the statute does not limit the Commission’s authority to determine what is an appropriate remedy, and damages are clearly a form of remedy ... Section 628(e) is consistent with a finding that the Commission has authority to afford relief in

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<sup>97</sup> 47 U.S.C. § 548 (e)(1) (emphasis added).

<sup>98</sup> *Id.* § 224 (b)(1) (emphasis added).

<sup>99</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity of Video Programming Distribution and Carriage*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 1902, ¶ 12 (1994).

the form of damages.”<sup>100</sup> A similar conclusion is warranted with regard to Section 224(b).

*Second*, the FCC has already rejected the utilities’ argument that its authority is limited to ordering “cease and desist orders” under Section 224. In response to this very argument proffered by GTE in the 1980 pole attachment rulemaking, the FCC held that GTE’s claim “misperceives the overall statutory scheme.”<sup>101</sup> The FCC explained further that “the references to authority to order negotiations or exercise the cease and desist power are intended simply *as examples of two tools in our remedial arsenal*.”<sup>102</sup> Furthermore, the FCC observed that the utilities, like GTE, do not question the authority to “order a utility company to file a rate which is within a zone of reasonableness” even though “no authority to do so is precisely conferred by the statute.”<sup>103</sup> Rather, such a remedy “may be reasonably inferred from the authority to take steps ‘appropriate and

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<sup>100</sup> *Id.* ¶ 17. While the FCC did not actually authorize the imposition of damages in its 1994 program access order, it did so in its subsequent 1997 Order. In the 1997 Order, the FCC reiterated its statutory authority to impose damages and found that, with “six years of experience...[i]t is appropriate to take a logical next step -- the compensation of victims of clear-cut anticompetitive conduct which violates the program access rules. Restitution in the form of damages is an appropriate remedy to return improper gains obtained by vertically-integrated programmers to unjustly injured MVPDs.” *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, 13 FCC Rcd 15822 ¶ 17 (1998).

<sup>101</sup> *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Order, 77 F.C.C. 2d 187 ¶ 22 (1980).

<sup>102</sup> *Id.* (emphasis added).

<sup>103</sup> *Id.* at n.13.

necessary.’”<sup>104</sup> As explained, the authority to impose compensatory damages can be “reasonably inferred” from the same Congressional grant of authority.

## **2. The Availability Of Compensatory Damages Is In The Public Interest**

The utilities argue that, even if the FCC has the authority to award compensatory damages back to the applicable statute of limitations, it would be poor policy to do so. They assert that, in order to determine the level of compensatory damages, the FCC would be required “to engage in an additional level of analysis to assess potential compensatory damages” and that such a process would be “cumbersome.”<sup>105</sup> But such an “additional level of analysis” is inherent in any award of compensatory damages, either by a court or by the FCC. Indeed, the FCC has engaged in such an analysis on numerous occasions, and there is no reason that it would be too “cumbersome” for the FCC to do so here.<sup>106</sup>

The utilities also argue that an attacher could game the system by refusing to sign an agreement that it believes is unreasonable, bypass the utilities’ poles (e.g., by deploying redundant poles) and, just before the statute of limitations expires, file suit against the utility for compensatory damages equal to the cost of bypass.<sup>107</sup> This is an implausible scenario. No rational attacher would incur the substantial expense and waste the weeks or months (and thereby put its customer commitments at risk) needed to bypass

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<sup>104</sup> *Id.*

<sup>105</sup> EEI and UTC Comments at 49.

<sup>106</sup> *See* 47 C.F.R. § 1.722(d) (permitting complainant to seek a separate proceeding for the adjudication of damages once liability is determined).

<sup>107</sup> *See* EEI and UTC Comments at 51.

the utilities' poles<sup>108</sup> on the *mere hope* that it would be able to collect compensatory damages in a suit against the utility.<sup>109</sup> As TWTC, COMPTTEL and others have explained, attachers often choose not to challenge what the attacher believes are unreasonable terms and conditions because of the substantial costs involved and the risk that the case will either be lost or settled in an unsatisfactory "split the baby" solution which does not make the attacher whole.<sup>110</sup> The ability to obtain compensatory damages back to the applicable statute of limitations will not encourage gaming or frivolous suits as the utilities claim. Rather, it will provide a necessary incentive for attachers to raise

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<sup>108</sup> The Alliance for Fair Pole Attachment Rules argues, without basis, that attachers can easily re-route around poles to which they cannot obtain access because "re-rerouting or burial of their cable is less costly and more expeditious than undertaking make ready." Alliance for Fair Pole Attachment Rules Comments at 11. This is simply not the case. As Level 3 explains: "underground infrastructure is costly, and the expense of installing underground cabling and conduit for 'last mile' and 'middle mile' facilities in areas of low population sometimes cannot be justified." Level 3 Comments at 2. Moreover, to bypass utility pole and conduit, attachers would have to obtain access to rights-of-way from the relevant governing agency. As the FCC has repeatedly found, the need to obtain such permission can result in the substantial delay or complete cancellation of a carriers' deployment plans. *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 151 (2005).

<sup>109</sup> *See* Charter Comments at 17 ("Notwithstanding the utilities' unsupported allegations in this proceeding that attachers 'blind-side' utilities with pole attachment complaints, attachers do not lie in wait to 'cherry pick' contractual terms that wish to disavow. The complaint process is too expensive, lengthy and unpredictable for such a strategy to be effective.").

<sup>110</sup> *See id.* at v; Level 3 Comments at 5 ("[M]ediation almost always results in compromise, so an aggrieved attaching party cannot expect to prevail in all aspects of its challenges to a pole owner's rates, terms and conditions. Therefore, unless the pole owner's practices are especially egregious or costly to the attaching party, most attachers are unwilling to undertake the costs that mediation entails. Moreover, the costs of mediation may end up being wasted if the pole owner refuses to accept the mediator's findings, because mediation is not a final adjudication.").

objections against the utilities' imposition of unreasonable terms and conditions where the attachers might not otherwise have done so.

**B. The FCC Should Adopt TWTC/COMPTEL'S Proposal Regarding Utility Rebuttals Of The Presumptive Average Number of Attachers Per Pole**

To reduce disputes, FCC should adopt TWTC/COMPTEL's proposal for rebutting the FCC's presumptions regarding the average number of attachers per pole.<sup>111</sup> Under the proposal, utilities could rebut the FCC's presumptive averages by counting the attachers only on those poles to which the attacher is attached or plans to attach.<sup>112</sup> Adoption of this approach is necessary because, as TWTC, COMPTEL and others commenters have explained, pole owners take advantage of ambiguities in the current rules to low-ball the average number of attachers per pole. As Charter and MetroPCS explain, the pole owners' tactics include (1) miscalculating the average number of attaching entities;<sup>113</sup> (2) classifying urbanized service areas as rural; (3) "diluting" urbanized areas with rural areas; (4) failing or refusing to count the pole owner or governmental attachments; and (5) performing inaccurate or distorted surveys when rebutting the FCC's presumptions.<sup>114</sup>

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<sup>111</sup> TWTC and COMPTEL Comments at 21-26.

<sup>112</sup> *Id.* at 23-24.

<sup>113</sup> *See* MetroPCS Comments at 10 ("Some utilities with large numbers of poles in rural areas have adopted the tactic of conducting their own count of attaching entities over their entire service territory. This has the effect of lowering the average number of attaching parties in urban areas and forcing on attaching parties a larger share of the unusable space costs.").

<sup>114</sup> *See* Charter Comments at 9.

Utilities typically already have the information necessary to determine the average number of attachers per pole on the poles to which the attacher is attached or to which it plans to attach. *First*, utilities asserted as far back as 1996 that they collect and retain data regarding the average number of attachers on every pole with third-party attachers.<sup>115</sup> *Second*, the additional evidence presented in the utilities' comments indicates that they calculate the number of attaching entities on the prospective attacher's poles when the make-ready survey is performed (even in those cases where actual make-ready work is not performed). These calculations can and should be used to implement TWTC/COMPTEL's proposal. For example, the Florida Utilities argue that, even for those utilities that have recently performed a pole survey, "a field check is still required before processing an application to verify field conditions...."<sup>116</sup> CenturyLink argues that, prior to make-ready work, it must "inventory poles on the route, determine space availability [and] identify and confirm unauthorized attachments."<sup>117</sup>

The utilities may argue that, although they calculate the number of attachers per pole during the make-ready survey, they discard or do not keep track of the information once the survey is complete. But as TWC argues, the FCC should require utilities to

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<sup>115</sup> American Electric Power Service *et al.*, *Just and Reasonable Rates and Charges for Pole Attachments: A Utility Perspective*, CC Dkt. No. 97-98, at 8 (filed Aug. 28, 1996) ("The Infrastructure Owner's proposed calculation of the average number of attaching entities per pole utilizes information that is presently collected and maintained by utilities. Most utilities collect and maintain information -- through the pole permitting process and through the billing and collection process -- on the total number of pole attachments on their poles and the identity or status of the attaching entity... Thus, they have readily available information that will yield the total number of pole attachments that are subject to the Pole Attachments Act.").

<sup>116</sup> Florida Utilities Comments at 38.

<sup>117</sup> CenturyLink Comments at 31.

“retain inspection information on each pole and make such information available to attachers” as a matter of course.<sup>118</sup> Utilities should be required to use that information if they attempt to rebut the average number of attachers per pole.<sup>119</sup>

**C. The FCC Should Revise The Pole Attachment Complaint Process**

TWTC, COMPTTEL and other commenters have shown that it is necessary to reform the complaint process and many parties have put forth their own proposals. Appropriate changes to the complaint process would reduce the costs of dispute resolution and provide additional certainty that the FCC will resolve complaints in time to provide attachers with a meaningful remedy.

Whatever reforms the FCC chooses to adopt, it should follow three key principles. *First*, it should establish regulations to expedite the resolution of disputes without Commission involvement by increasing the transparency and communication between the pole owner and attacher. As TWTC/COMPTTEL explained, many disputes are not resolved expeditiously because the attacher is unable to reach the appropriate utility employee. Therefore, the FCC should mandate that pole owners publish an “escalation list” containing the contact information “of utility employees with decision-making authority regarding all matters concerning pole attachments.”<sup>120</sup>

*Second*, the FCC should adopt rules to ensure that utilities do not drag out the pole attachment agreement negotiation process. As TWTC/COMPTTEL explained, the FCC

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<sup>118</sup> Time Warner Cable Comments at 22.

<sup>119</sup> The pole owner need not examine all of the poles to which the attacher is attaching or plans to attach. As the FCC has held that when presenting information rebutting the FCC’s presumptions the pole owner may submit a statistically valid sample of such poles. *See 2001 Reconsideration Order* ¶ 63.

<sup>120</sup> TWTC and COMPTTEL Comments at 35.

should adopt the Oregon rule which allows for commission arbitration of a request for a pole attachment agreement within 90 days of a request for an agreement.<sup>121</sup> Level 3 and MetroPCS offered similar proposals.<sup>122</sup>

*Third*, the FCC should establish a timeline for the resolution of disputes brought before the FCC. Charter argued that the Commission should “adopt a timeframe for resolving disputes promptly, i.e., in no more than 90-120 days...”<sup>123</sup> NCTA argues that the FCC should resolve pole attachment complaints “within 90 days from submission of the complaint to the Commission, without requiring pre-complaint mediation.”<sup>124</sup>

At a minimum, the FCC should establish an accelerated process for disputes that are amenable to expedited resolution. Such disputes should include, but are not limited to, “those concerning whether (1) attachments are unauthorized; (2) a pole owner’s ‘model’ agreement contains any terms or conditions which the FCC has previously found to be unlawful; and (3) the utility employed a valid methodology to calculate the average number of attachers.”<sup>125</sup>

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<sup>121</sup> *Id.* at 17.

<sup>122</sup> See Level 3 Comments at 17 (“Whenever a pole attachment application, including the negotiation of a master pole attachment agreement has been pending for 90 days or more without resolution, the applicant should be allowed to file a complaint and request for arbitration to resolve all open issues.”); MetroPCS Comments at iii (“Ninety (90) days after a pole owner receives a request for negotiations of a pole attachment agreement, the requesting party may file a complaint in which open issues associated with negotiations could be resolved through the complaint process.”).

<sup>123</sup> Charter Comments at 24.

<sup>124</sup> NCTA Comments at 51.

<sup>125</sup> TWTC and COMPTTEL Comments at 35-36.

**V. THE FCC SHOULD REJECT THE UTILITIES' PROPOSALS FOR NEW POLE ATTACHMENT RULES**

**A. The Utilities' Proposed Revisions To The Pole Attachment Formula Have Been Rejected Before And Should Be Rejected Again**

In their comments, the utilities urged the FCC to adopt changes to the pole attachment formula that have been repeatedly rejected by the FCC. The utilities present no new arguments for why the FCC should change course now. Moreover, some of the utilities' proposals run counter to the language and purpose of Section 224. The utilities' proposals must therefore be rejected yet again.

*First*, the utilities argue that the FCC should allocate the communications worker safety zone to common, usable space.<sup>126</sup> They argue that the FCC is incorrect in classifying the safety space as used by the utility, and they assert that it exists solely so that “communications companies can employ workers who are not certified to work near high voltage electrical lines.”<sup>127</sup> The FCC has repeatedly rejected this argument, and it should do so again. As the FCC held, “[i]t is the presence of the potentially hazardous electric lines that makes the safety space necessary. ... Th[is] space is usable and is used by the electric utilities.”<sup>128</sup> The utilities have not shown why they do not continue to be the cause and beneficiaries of the safety space. That space should therefore continue to be classified as unusable for the purpose of the telecommunications service formula.

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<sup>126</sup> See EEI and UTC Comments at 75.

<sup>127</sup> *Id.*

<sup>128</sup> *2000 Pole Attachment Order* ¶ 22; *2001 Reconsideration Order* ¶ 51 (“UTC/EEI continues to urge that we consider as unusable the 40-inch safety space...No new arguments or evidence was presented in the filings as based on our previous reasoning, that the space is usable and used by the electric utility, we reject arguments to reduce the presumptive usable space of 13.5 feet by 40 inches.”).

*Second*, the utilities urge the FCC to count only third-party cable or telecommunications carrier attachers, not government or utility attachments, in the rate formulas. They argue that there is no reason to count governmental entities because “local governments typically do not pay a fee for their attachments [and] use of the pole by a government entity effectively constitutes a tax on the electric utility.”<sup>129</sup> But as the FCC has recognized, even in those cases where the government does not pay money for its attachment, the pole owner receives many significant non-monetary benefits from the government. For example, the utility may have been given access to government controlled rights of way and the privilege of operating as a monopoly in return for compensation in kind, such as the right of the government to place attachments on the utility’s poles. As the FCC explained, “[s]ince the government attacher and the pole owner have a relationship that benefits both parties, we are not persuaded that the pole owner is unfairly absorbing the cost of the government’s telecommunications attachments...”<sup>130</sup>

In addition, the utility itself *must* continue to be counted because the FCC found that such an approach is “consistent with the language of the statute and with Congress’ intent to count all attaching entities when allocating the costs of unusable space.”<sup>131</sup> The utilities have not proffered a reason for why the FCC’s statutory interpretation is incorrect.

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<sup>129</sup> EEI and UTC Comments at 76.

<sup>130</sup> *1998 Pole Attachment Order* ¶ 54; *see also 2001 Reconsideration Order* ¶ 58 (“[I]n the case of government attachments, we find that any physical attachment by a government entity qualifies the government attacher as an attaching entity. The statute does not provide an exclusion for non-telecommunications attachments.”); *see id.* ¶ 60.

<sup>131</sup> *2001 Reconsideration Order* ¶ 59.

*Third*, the utilities argue that the FCC should establish a single presumption that there are three attaching entities per pole (or two if the utility is not counted) instead of mandating separate urban and rural presumptions. Such an approach is justified, the utilities argue, because “the number of attaching entities is far fewer than the presumptive average [of five].”<sup>132</sup> But, as many commenters have explained, the utilities’ counts of average number of attachers per pole previously provided to the FCC are fatally flawed and should be dismissed.<sup>133</sup>

Moreover the utilities’ three attacher presumption proposal is completely at odds with their many statements that they must construct ever larger poles to accommodate attachers (*see* Section II.B.2 *supra*).<sup>134</sup> If the utilities install taller poles than is necessary for their own purposes as a matter of course, it is likely that the FCC’s presumptions regarding the number of attachers and pole height are, if anything, too conservative. The FCC found that even a 30 foot electrical utility pole (well below the presumptive 37.5 foot average) can hold at least two third-party attachers while a 30 foot incumbent LEC

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<sup>132</sup> Florida Utilities Comments at 77; *see also* Alliance Comments at 79.

<sup>133</sup> *See* Level 3 Comments at 10; TWTC and COMPTTEL Comments at 22-23; Bright House Networks Comments at 30; *see also* NCTA comments at 27-28; Kravtin Report ¶ 42.

<sup>134</sup> Some utilities recognize the tension between the need for tall poles and their assertion that the average number of attachers is lower than is presumed under the FCC’s rules. For example, the American Public Power Association candidly acknowledged that the presence of a significant number of attachers has justified both the construction of tall poles and the FCC’s three and five attacher presumptions: “the Commission’s suggestion that pole owners make their investment decisions based solely on their own core needs is unfounded and incorrect as to municipal electric utilities. . . . [F]or at least the past thirty years, most municipal electric utility distribution poles have had a minimum of three users -- the electric utility, the telephone provider and the cable company. Indeed, the FCC’s own rules assume that, in non-urbanized areas, the average number of attaching entities is three, and in urbanized areas, the average number is five.” American Public Power Association Comments at 14.

pole can hold even more.<sup>135</sup> Therefore, if utilities need to regularly install poles in excess of 37.5 feet, there must be significantly more than an average of two non-utility attachers per pole.

*Fourth*, the utilities argue that overlashers should be assessed a separate attachment fee because “[o]verlashed attachments impose substantial wind and ice loading burdens on electric utility poles.”<sup>136</sup> The FCC has repeatedly rejected this argument, and the utilities provide no reason for a change of course. Any additional wind and ice loading, whether from an attachment or an overlasher, is taken into account through pole strengthening paid for by the attacher in make ready,<sup>137</sup> and the FCC is only permitted to include the space occupied, not the load, in determining the appropriate attachment rate.<sup>138</sup> The utility therefore should not receive double compensation through an additional pole attachment fee for overlashing.

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<sup>135</sup> *2000 Pole Attachment Order* ¶ 26 (“A 30 foot electrical utility pole can accommodate two communications attachments or more with overlashing. A 30 foot LEC pole can accommodate more.”).

<sup>136</sup> EEI Comments at 78.

<sup>137</sup> *2000 Pole Attachment Order* ¶¶ 29-30 (“The weight load factor is considered when deciding whether a stronger pole is necessary as part of make-ready work. ... These make-ready costs have been fully recovered. It would be inappropriate to allow for their recovery again through the pole rate.”); *2001 Reconsideration Order* ¶ 77 (“[I]f the addition of overlashed wires to an existing attachment causes an excessive weight to be added to the pole requiring additional support or causes the cable to sag to increase to a point below safety standards, then the attacher must pay the make-ready charges to increase the height or strength of the pole.”).

<sup>138</sup> *2001 Reconsideration Order* ¶ 77 (“The statutory language prescribes that we allocate costs based on space occupied, not load capacity.”).

**B. The FCC Should Reject The Utilities' Proposal For A New, Anti-Competitive Unauthorized Attachment Rules**

The utilities continue to argue that they should be allowed to contract for, and enforce, what are essentially automatic punitive damages for unauthorized attachments.<sup>139</sup> The utilities argue that such penalties are necessary to discourage unauthorized attachments, which purportedly endanger the safety of their systems.<sup>140</sup> The utilities' proposal should be rejected because the automatic imposition of contractual punitive damages provisions is bad policy, and it is contrary to FCC precedent and basic principles of contract law. Rather, utilities can continue to seek such damages through the pole attachment complaint process where the fact finding inherent in that process would ensure that such damages are only awarded where appropriate.<sup>141</sup> If the FCC nevertheless does adopt an unauthorized attachment penalty scheme, it should require that any penalties above the current back rent plus IRS interest be paid to the FCC, not to the pole owner. Finally, in no event should the FCC pattern its rules after those adopted in Oregon since these rules continue to allow pole owners to game the system.

**1. It Would Be Contrary To Public Policy And Contract Law Principles To Permit Utilities To Impose Automatic Punitive Damages For Unauthorized Attachments**

Automatic imposition of \$500, \$100 or even \$25 per-attachment fines can only be characterized as a penalty above and beyond compensation sufficient to make a pole

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<sup>139</sup> See, e.g., Oncor Comments at 50.

<sup>140</sup> See e.g., Alliance for Fair Pole Attachment Rules at 74-76.

<sup>141</sup> See *The Cable Television Ass'n of Georgia. v. Georgia Power Co.*, Order, 18 FCC Rcd 16333 ¶ 24 (2003) (“*Georgia Power Order*”); *Mile Hi Cable Partners et al. v. Public Service Company of Colorado*, Order, 17 FCC Rcd 6268, ¶ 10 & n.24 (2002) (“*Mile Hi FCC Order*”).

owner whole for actual losses it incurs from unauthorized attachments. The utilities have argued that unauthorized attachments cause damage to pole infrastructure for which they are purportedly not compensated through the currently available remedy of back rent plus interest. But the utilities have never attempted to quantify such damages or the measure of damages caused by the “average” unauthorized attachment. In fact, as CenturyLink, itself a pole owner, argues, unauthorized attachments in many cases cause no damage to pole infrastructure and do not impact pole safety.<sup>142</sup> For this reason, as even some pole owners agree, it is inappropriate to permit utilities to impose default penalties since they bear no relation to the actual losses suffered by the utility.<sup>143</sup>

In those significant number of cases where unauthorized penalties do not cause harm to the utilities’ infrastructure, the appropriate measure of damages (i.e., the utilities’ loss of income from non-payment of the attachment rate) remains back rent plus interest. As the FCC has found, back rent plus interest at the IRS rate approximates the *actual loss* that the utility incurs as a result of the attachers’ failure to pay.<sup>144</sup> The Commission has

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<sup>142</sup> See CenturyLink Comments at 38 (“Not all ostensibly-unauthorized attachments raised safety issues, however. Many properly places attachments -- including attachments installed many years ago -- are actually just problems in record keeping. Moreover, many ostensibly unauthorized attachments are neither deliberate nor abusive -- nor necessarily a fault of the attacher.”).

<sup>143</sup> See CenturyLink Comments at 39 (“The Commission should not adopt any provisions that impose penalties for unauthorized attachments or even for safety violations. Creating a penalty system creates an incentive for pole owners to find and impose penalties as a revenue enhancement, and could needlessly multiply disputes.”); ITTA Comments at 10 (“As pole owners, ITTA members have been characterized as unauthorized attachers when pole owners have not maintained accurate records. Overall, ITTA notes that record keeping is imperfect, and reasonable errors among pole owners and attaching entities can and do occur. Therefore, ‘cookie cutter’ penalties should not be implemented.”).

<sup>144</sup> *Mile Hi FCC Order* ¶ 10.

continually affirmed that damages in excess of the actual losses suffered by the utility may not be imposed through contract and are only appropriate upon a particular factual record supporting such damages.<sup>145</sup> The FCC’s approach accords with the contract law principle that “the damages collectible for *failure to pay a sum of money* are limited to interest at the legal rate, if one exists, or at market rates.”<sup>146</sup>

Even where unauthorized attachments cause damage to pole infrastructure, substantial penalties are unnecessary in most cases to make utilities whole. In those cases where an attacher has contractual privity with a pole owner, the contract likely requires that the attacher indemnify the utility for any damages caused and for any costs incurred to rearrange unauthorized attachments or to correct safety violations arising from such attachments. Moreover, as discussed above, attachers must often post a bond which can be collected upon for any damage to or liability incurred by the attacher. These cost recovery mechanisms ensure that a pole owner can be made whole even in those small number of cases where unauthorized attachments actually cause damage to the pole owner’s infrastructure.

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<sup>145</sup> See *Salsgiver Commc’ns., Inc. v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 20536, ¶ 28 (2007) (finding “it would be unreasonable . . . to charge a \$250 per attachment penalty, *above and beyond compensatory damages, without a specific basis to justify such charges*”) (emphasis added); *Mile Hi FCC Order* ¶¶ 10-11 (finding unreasonable a \$250 per attachment charge where “there is no basis in the record to support a conclusion that Respondent is entitled to exemplary or punitive damages beyond compensatory damages,” and finding just and reasonable an attachment fee five times the annual rent plus interest); *Georgia Power Order* ¶ 24 (noting, with respect to a 10 % administrative fee for unauthorized attachments, that “[w]e may conclude that application of such provisions is reasonable only in extraordinary situations of egregious conduct by an attacher”); *Mile Hi FCC Order* ¶ 10 & n.24 (“Our conclusion does not preclude a finding, under other circumstances, that action by an attacher might support a penalty reflecting exemplary or punitive damages.”).

<sup>146</sup> Joseph M. Perillo, *11 Corbin on Contracts*, § 58.13, at 479 (rev. ed. 2005) (“Corbin”) (emphasis added).

Revealingly, the utilities refer to unauthorized attachment penalties as “liquidated damages” provisions and argue that “the liquidated damages currently allowed under [the FCC’s] precedent in complaint cases...do not discourage attachers from engaging in unlawful behavior.”<sup>147</sup> But the only lawful purpose of contractual liquidated damages clauses is to provide compensation for loss, not to serve as a penalty or deterrent. It is hornbook law that liquidated damages provisions which serve as a penalty are invalid. Under the Restatement (Second) of contracts “[d]amages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.”<sup>148</sup> Moreover if “[t]he amount made payable [as liquidated damages] is the same without regard to the extent of injury done by the various breaches; such a penalty is not enforceable. This is particularly true if the actual injury is considerably less than the agreed amount.”<sup>149</sup> Because an automatic contractual penalty provision is “the same without regard to the extent of the injury done” by the presence of unauthorized attachments, it is unenforceable.

The FCC has followed and cited this precedent in rejecting substantial per attachment penalties.<sup>150</sup> In *Mile Hi*, the FCC determined that liquidated damages may be included in a contract, “but only at an amount that is reasonable in light of the *anticipated*

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<sup>147</sup> EEI and UTC Comments at 54.

<sup>148</sup> *Corbin* § 58.6 at 435.

<sup>149</sup> *Id.* § 58.14 at 483-84.

<sup>150</sup> *See Mile Hi FCC Order* ¶ 10.

or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.”<sup>151</sup> As explained above, there is no reason to believe that a \$100 or even \$25 per attachment penalty is “reasonable in light of the anticipated or actual loss caused” by every unauthorized attachment.

In all events, if the FCC does for some reason permit the imposition of substantial per-attachment penalties for unauthorized attachments, amounts in excess of back rent plus interest at the IRS rate should be paid to the FCC unless the excess amount is necessary to compensate the utility for losses associated with the unauthorized attachment.<sup>152</sup> If the FCC allows the utility to recover an amount in excess of its losses, the utility will have an incentive to inflate the number of unauthorized attachments.

## **2. The FCC Should Not Adopt An Oregon-Like Scheme For Unauthorized Attachment Penalties**

The FCC should not adopt penalty rules patterned on Oregon’s regulations. As Charter explains, Oregon’s penalty scheme was imposed as “part and parcel of Oregon’s comprehensive inspection program.”<sup>153</sup> The Oregon Joint Use Association and the Oregon PUC “dedicate[] a significant amount of manpower towards managing th[at] program, including performing field inspections, monitoring plans of correction and addressing disputes arising from the program.”<sup>154</sup> While Oregon’s management program

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<sup>151</sup> *Id.* ¶ 10 & n.22 (quoting Restatement (Second) of Contracts § 356 (1979 Main Vol.) (emphasis added)).

<sup>152</sup> *See* TWTC and COMPTTEL Comments 33-34.

<sup>153</sup> Charter Comments at vii.

<sup>154</sup> *Id.*; *see also* Comcast Comments at 37 (“[T]he Oregon PUC’s unauthorized attachment rules are only one piece of a broader pole attachment regulatory regime

is necessary to prevent the utilities from extracting unjustified attachment penalties from attachers, such a program is not contemplated in the FCC's FNPRM and would impose substantial costs on attachers, pole owners and the FCC if adopted by the Commission.

If, despite all of the evidence to the contrary, the FCC decides to adopt unauthorized attachment penalties similar to Oregon's, it must adopt the rules as modified by Oregon in 2007, along with additional changes necessary to prevent the utilities from extracting unjustified unauthorized attachment penalties. The unauthorized attachment penalty scheme *originally* adopted by Oregon (which the utilities appear to support)<sup>155</sup> was abused by Oregon utilities. Pole owners exploited the original Oregon rules by overstating the number of unauthorized attachments and imposing high and unjustified penalties on attachers. As a result, Oregon substantially altered the rules in 2007 so that the \$100 penalty for unauthorized attachments without a permit and the \$500 penalty for unauthorized attachments without a contract are rarely deemed appropriate.<sup>156</sup>

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whereby the PUC involves itself in a vast array of field issues and policies that extend far beyond the Commission's experience, resources, and likely (on some matters) jurisdiction."); NCTA Comments at 48 ("[T]he Commission is not proposing wholesale revisions to its practices that adoption of a safety compliance program like Oregon's would entail. The Oregon Joint Use Association (OJUA) and the Oregon Public Utility Commission actively monitor the pole inspection process by all state pole owners and attachers and devote significant state resources to the program's oversight and to resolving the many disputes that arise among the parties under this regime.").

<sup>155</sup> See *Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment Use and Safety (AR 506) and Rulemaking to Amend Rules in OAR 860, Division 028, Relating to Sanctions for Attachments to Utility Poles and Facilities (AR 510)*, Order No. 07-137 (PUC Oregon, Apr. 10, 2007).

<sup>156</sup> See Charter Comments at 29-30; CenturyLink Comments at 39 ("Oregon's penalty of \$500 per pole, cited by the FNPRM, is not the answer to this problem. This results of the Oregon experiment show that such a rule can be abused. In fact, the Oregon Public Utility Commission had to substantially modify and scale back its original penalty rules precisely because of such abuse.").

In addition, as several commenters observed, the Oregon rules continue to suffer from ambiguities and defects which allow the utilities to game the system.<sup>157</sup> These flaws must be corrected if an Oregon-like scheme is adopted.

Finally, as TWC argued, the FCC should only permit utilities to adopt unauthorized attachment penalties if the FCC adopts the same safeguards put in place by the New York PSC. These safeguards are necessary to ensure that poor utility recordkeeping does not result in the imposition of unjustified penalties. Specifically, the New York PSC prohibits imposition of unauthorized attachment penalties (1) “unless and until the attacher and the utility have established a common attachment baseline, either through a joint audit or agreement based on their existing attachment records;” (2) based on a “disparity between the number of attachments that it has on record and the number of attachments counted in the field by its auditors;” and (3) unless the utility owned the pole during the period for which it is seeking to impose an attachment.<sup>158</sup>

## **VI. CONCLUSION**

The Commission should adopt rules for pole attachments as described herein.

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<sup>157</sup> See Charter Comments at 29 (“The only time a pole owner may lawfully assess the additional \$100 is when the attacher ‘decline[s]’ to participate in the audit. ... In Charter’s experience, pole owners make it physically impossible for an attacher to participate in audits because they hire contractors to audit attacher plant in several areas simultaneously. As a result, parties often dispute over whether imposing the additional \$100 penalty is lawful.”); Comcast Comments at n.115 (“Although the [Oregon] PUC rules provide for \$100 plus five years back rent in cases where an attacher declines to participate in a utility pole inspection, utilities rarely provide any notice of inspections that any attacher has the ability to decline. ... Therefore, as a practical matter, attachers are essentially subject to a five-year back rent penalty.”).

<sup>158</sup> Time Warner Cable Comments at 35.

Respectfully submitted,

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October 4, 2010

## **APPENDIX A**

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C.

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
	)	
	)	
	)	
	)	

**DECLARATION OF DON J. WOOD  
ON BEHALF OF TW TELECOM INC.**

**I. Background and Qualifications**

1. My name is Don J. Wood. I am a principal in the firm of Wood & Wood, an economic and financial consulting firm. My business address is 914 Stream Valley Trail, Alpharetta, Georgia 30022. I provide economic and regulatory analysis of telecommunications and related convergence industries with an emphasis on economic and regulatory policy, competitive market development, and cost-of-service issues.

2. I received a BBA in Finance with distinction from Emory University and an MBA with concentrations in Finance and Microeconomics from the College of William and Mary.

3. My telecommunications experience includes employment at both a Regional Bell Operating Company and an Interexchange Carrier. Specifically, I was employed in the local exchange industry by BellSouth Services, Inc. in its Pricing and Economics, Service Cost Division. My responsibilities included performing cost

analyses of new and existing services, preparing documentation for filings with state regulators and the Commission, developing cost methodology and computer models for use by other analysts, and performing special assembly cost studies. I was employed in the interexchange industry by MCI Telecommunications Corporation, as Manager of Regulatory Analysis for the Southern Division. In this capacity I was responsible for the development and implementation of regulatory policy for operations in the southern U. S. I then served as a Manager in MCI's Economic Analysis and Regulatory Affairs Organization, where I participated in the development of regulatory policy for national issues.

4. I have testified on telecommunications issues before the regulatory commissions of forty-two states, Puerto Rico, and the District of Columbia; in state, federal, and overseas courts, before alternative dispute resolution tribunals, and in proceedings before the Commission. A listing of my previous testimony is attached as Exhibit DJW-1.

5. In my testimony, I have addressed issues related to both the calculation of costs and the means through which costs should be recovered. My work has included the analysis of the costs incurred to provide network facilities and the associated "structures." These network structures include poles, ducts, conduit, and rights-of-way.

## **II. Purpose**

6. The purpose of my declaration is to address cost-related issues as set forth in the Commission's FNPRM and proposed rules,<sup>1</sup> particularly those related to "pole

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<sup>1</sup> *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, FCC 10-84 (rel. May 20, 2010) ("*FNPRM*").

rental rates.” I will explain why both the Commission’s and NCTA’s approaches are fundamentally and economically sound and why the FCC has the discretion to adopt either approach.<sup>2</sup> I will respond to the Comments of other parties, particularly the Coalition of Concerned Utilities (“CCU”) and Alliance for Fair Pole Attachment Rules (“AFPAR”), who oppose the Commission’s approach.

### **III. The Commission’s Proposed Approach is Fundamentally Sound and Should Be Adopted with Minor Modifications**

#### *A. The Commission’s Focus on Cost Causation is Appropriate*

7. In the FNPRM, the Commission sets forth three broad objectives that it is seeking to accomplish in the proposed rules for determining “pole rental rates”:

- 1.) Consistent with the National Broadband Plan, establish pole rental rates that are as low as possible in order to promote broadband deployment.<sup>3</sup>
- 2.) Consistent with the National Broadband Plan, reduce (and ideally eliminate) the current disparity in cable and telecom rates that distorts deployment decisions and deters broadband deployment.<sup>4</sup>
- 3.) Ensure that pole rental rates are just and reasonable, and provide pole owners with adequate compensation.<sup>5</sup>

8. In order to develop a means of achieving each of these objectives, and of doing so in a way that “is readily administrable” and can be “applied in a ‘simple and expeditious’ manner,”<sup>6</sup> the Commission properly elected to “rely on the basic principles

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<sup>2</sup> As I will explain in a later section, the application of the existing and proposed rules should be fine-tuned in a way that will increase the accuracy of the calculations and the effectiveness of the resulting rates as a policy tool to encourage broadband development.

<sup>3</sup> See FNPRM, ¶¶ 115-117.

<sup>4</sup> See *id.*

<sup>5</sup> See *id.* ¶¶ 111, 141, 129.

<sup>6</sup> *Id.* ¶ 141.

of cost causation.”<sup>7</sup> In justification of this sound economic principle, the Commission correctly notes that “[u]nder cost causation principles, if a customer is causally responsible for the incurrence of a cost, then that customer, as the cost causer, pays a rate that covers this cost.”<sup>8</sup>

9. Proper consideration of cost causation will permit each of the Commission’s stated objectives to be met: (1) broadband deployment will be promoted if all attachers pay a pole rental rate that covers the costs they *cause* the pole owner to incur, but are not required to pay excessive rates designed to recover costs that are not causally related to the actual rental of the pole space for the attachment; (2) broadband deployment will be promoted, and distortions regarding deployment decisions will be minimized, if the gap between the §254(d) and (e) pole rental rates is reduced or eliminated; and (3) a pole rental rate that reflects the costs *caused* by the attacher will be “just and reasonable” and will permit the pole owner to receive adequate compensation.

*B. Options for Developing a Pole Rental Rate Based on Incremental Costs*

10. The Commission’s proposal, under which utilities would “calculate the low-end telecom rate and the rate yielded by the current cable formula, and charge whichever is higher” represents one, but only one, of the available methods for developing a pole rental rate that will meet the stated objectives. It is my understanding that the Commission adopted the “higher of low-end telecom or cable” approach in part because “the cable rate formula has been upheld by the courts as just, reasonable, and

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<sup>7</sup> *Id.* ¶ 134.

<sup>8</sup> *Id.*

fully compensatory.”<sup>9</sup> While such an approach is conservative – the process yields a rate that can be no lower than a level that has previously been upheld as “just, reasonable, and fully compensatory” – it may result in a pole rental rate that is higher than necessary to accomplish this objective. To the extent that the cable rate is higher than the low-end telecom rate, the “higher of” approach creates a buffer to ensure that the rate is fully compensatory. But the presence of such a buffer is inherently a trade-off; a pole rental rate that is higher than necessary (here, “higher than necessary” means “higher than the incremental cost *caused* by the attacher”) is in tension with the FCC’s objectives because an incremental cost approach would most efficiently promote the deployment of broadband services while providing fair compensation to the owner of the pole.

11. When considering the development of a lower bound telecom rate, the Commission correctly concludes that “a rate that covers the pole owners’ incremental cost associated with attachment would, in principle, provide a reasonable lower limit.” The Commission also explains that “legal precedent has established that a pole attachment rate above marginal cost provides just compensation, and marginal or incremental cost pricing can be an appropriate approach to setting regulated rates.”<sup>10</sup> In addition to being compensatory, a rate based on a proper calculation of incremental costs would provide the clearest signals to the marketplace (thereby minimizing any distortion to carrier deployment decisions) and would represent the most effective means of promoting broadband deployment.

12. In the FNPRM, the Commission concluded that “some definition of ‘costs’ somewhat above incremental cost would need to be used so that when those costs

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<sup>9</sup> *Id.* ¶ 141.

<sup>10</sup> *Id.* at n.358.

are allocated pursuant to the section 224(e) formulas, the resulting pole rental rate would allow the utility to recover the incremental cost associated with attachment.”<sup>11</sup> The presence of an allocation formula in §224(e) suggests, at least superficially, that some adjustment must be made to the level of calculated costs to be allocated in order to ensure reasonable compensation to the pole owner. But such an adjustment is necessary only if two conditions are met: (1) the formula used to calculate the costs to be allocated includes only costs that are directly and causally related to the function being provided (here, providing space for an attachment to the pole), and (2) the statutory formula for allocation is economically efficient (i.e. it accurately reflects cost causation). Neither of these conditions is met when the lower bound telecom rate is calculated.

13. As NCTA correctly points out, the costs included in the telecom formula include categories of cost that are not caused by the presence of a third party attacher.<sup>12</sup> For example, Account 364, used as the basis for “pole” costs, also includes “towers, transformer racks, and platforms.” Third-party attachers to a pole do not cause the utility to deploy “towers, transformer racks, and platforms,” nor does the attacher consume any of the utility’s capacity of “towers, transformer racks, and platforms.” Because the costs yielded by the telecom formula are overstated (that is, they are in excess of the costs caused by the presence of the attacher), the allocation of those costs may not result in a rate that is below the utility’s incremental cost to provide the attachment.

14. NCTA also points out that, unlike the allocation formula in §224(d), which creates at least a first approximation of the allocation of costs on a relative-use,

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<sup>11</sup> *Id.* ¶ 133.

<sup>12</sup> See NCTA Comments, Attach. A: Report of Patricia D. Kravtin, at 35-39 (“Kravtin Report”).

cost-causative basis,<sup>13</sup> the allocation formula in §224(e) is a hybrid formula that allocates costs on both a relative use and a per-capita basis. The NCTA analysis demonstrates that, even if the costs developed by applying the telecom formula were not overstated, the §224(e) “hybrid allocation” results in a cost allocation to the utility that exceeds the utility’s incremental cost to provide the attachment.<sup>14</sup> Therefore, the FCC may set the 224(e) definition of cost equal to the pole owner’s incremental cost of attachment.

15. To the extent that the Commission continues to have concerns regarding just compensation for the utilities, the process of defining the “cost somewhat above incremental cost” that will, after application of the §224(e) allocation formula, allow the pole owner to recover its incremental costs can be a purely empirical or mathematical exercise. As noted above, the NCTA analysis provides a compelling demonstration that that the application of the §224(e) allocation formula results in a pole rental rate that exceeds the utility’s incremental costs. To the extent that the resulting rate is found to be below the utility’s incremental cost, as determined using an allocator (such as relative use) that more accurately reflects cost causation, a “plus factor” can be calculated and applied to the cost to be allocated.

*C. The Application of the Lower-Bound Telecom Rate Formula Should Be Fine-Tuned in Order to Yield a More Accurate Calculation of Incremental Cost*

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<sup>13</sup> Section 224(d) uses the percentage of usable space consumed by an attachment as the cost allocator (which accurately reflects cost causation), but applies this allocator to the cost of the “entire pole” rather than to the cost of usable space. Because the cost of the unusable space is sunk, a proper calculation of incremental cost would apply the allocator only to the cost of usable space on the pole. NCTA is correct, however, that the single allocator (relative use) used in §224(d) better captures cost causation than the multiple allocators (relative use and per-capita) used in §224(e).

<sup>14</sup> *See* Kravtin Report at 31-34.

16. In the FNPRM, the Commission elected to exclude capital-related costs from its lower-bound rate based on two observations: (1) “if capital costs arise from the make-ready process, our existing rules are designed to require attachers to bear the entire amount of those costs,” and (2) “[w]ith respect to other capital costs, we believe it is likely that the attacher is the ‘cost causer’ for, at most, a *de minimis* portion of these costs.”<sup>15</sup> As explained in the next section of my declaration, the utilities have not provided compelling evidence that third-party attachers cause them to incur incremental capital costs.

17. Once capital costs are removed, it is important to carefully examine the operating costs incurred because of the presence of attachers. In its Comments, NCTA identifies two operating expenses that should be adjusted in order to more accurately reflect the costs caused by pole attachers.

18. First, maintenance expenses are tracked by the utilities for multiple categories of plant, including but not limited to poles. FERC account 593 includes maintenance costs associated with poles, distribution lines, and drops, and costs are allocated to each category based on net asset value. While the utility may incur some maintenance expenses that are directly related to the pole itself, the majority of its maintenance expenses are associated with the cables (distribution lines and drop wires) attached to those poles. As a result, the current method of allocating maintenance costs based on net asset value represents a poor method of identifying maintenance costs that are caused by the pole itself and therefore a poor method of identifying maintenance costs that are causally related to pole attachers.

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<sup>15</sup> FNPRM ¶ 135.

19. I have reviewed the methodology proposed by NCTA to more accurately identify the percentage of utility maintenance costs that are directly associated with poles, rather than with the utility's distribution lines and drops.<sup>16</sup> The NCTA methodology represents a reasonable, albeit somewhat conservative, means of more accurately identifying the relevant maintenance costs to be included in the lower bound telecom rate.

20. Second, administrative expenses caused by the presence of attachers must also be tracked and allocated. In the current formula, administrative expenses are allocated based on the relationship between the net asset value of poles and the net asset value of total plant. This methodology implicitly assumes that administrative costs are driven primarily by investment. However, a review of this account suggests that administrative costs are driven primarily by labor rather than investment. Therefore, it is proper to allocate administrative costs according to the labor costs attributable pole attachments. Ideally, administrative expenses should be expressed on a "per dollar of labor" basis, and assigned based on the utility's labor costs directly incurred as a result of a third-party attachment.<sup>17</sup>

21. It is important to note that even if pole owners charge the attachers what they deem to be the "actual cost" of the labor necessary to perform pole replacement, the utilities' calculation of "actual cost" is well in excess of the costs incurred by the utility to make the labor available. Utilities generally do not take into account the needs of

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<sup>16</sup> See NCTA Comments at 19-20.

<sup>17</sup> The labor costs at issue here are not those associated with "make-ready" work, as those costs are recovered through separate rates. Any labor costs included in the monthly "pole rental rates" (and used as an allocator to include administrative expenses) should be limited to those incremental labor costs incurred by the utility as a result of having third-party attachments on its pole.

attachers in determining the number of work-crews that they must keep on hand. In addition, utilities generally hire substantially more work crews than need to be in the field on a typical day in order to meet peak demand in an emergency.<sup>18</sup> These crews, which are often idle, are funded through the utility rate base. As a result, there is little or no incremental cost for the utility (beyond fuel for the truck) to send a work crew to perform pole replacement, or indeed any make-ready work. As a result, they are likely to earn a substantial profit from make-ready work even at “actual cost.”

22. I have reviewed the methodology proposed by NCTA to more accurately identify the utility’s administrative costs caused by attachers.<sup>19</sup> The NCTA solution represents a compromise approach that is administratively straight-forward but that may result in a higher assignment of administrative costs than is actually caused by the presence of attachers.

#### **IV. Response to Comments of Other Parties**

##### *A. An Additional “Disparity” to be Recognized*

23. In the FNPRM, the Commission’s focus was properly on the disparity in the pole rental rates yielded by the current interpretations of the cable rate formula in §224(d) and the telecom rate formula contained in §224(e). But a review of the comments strongly suggests that a different disparity – the fundamental difference in the way that electric utilities and telecommunications carriers are now regulated – continues to play a significant role in the current debate.

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<sup>18</sup> Utilities are evaluated based on their ability to restore service quickly after a service outage, including the wide-spread service outages caused by weather or other natural disasters. In my experience, utilities attempt to maintain the labor resources necessary to respond in these situations, and state regulators allow them to keep a “manpower buffer” in place in order to do so.

<sup>19</sup> See Kravtin Report at 18-19.

24. Prior to the 1980s, both the electric and telecommunications industries were characterized by monopoly supply and rate-of-return regulation. In such an environment, the only “costs” that are likely to be considered are embedded, fully-distributed costs, and the only reason for calculating the level of such costs is in order to permit cost recovery at an aggregate level. While important changes have certainly occurred in the electric industry since that time, the industry is still characterized by rate of return regulation, and calculations of “cost” continue to be primarily for the purpose of aggregate cost recovery. While rates charged to different classes of customers are often differentiated, these differences are not usually based on differences in cost, but instead reflect public policy, equity, value of service, or other non-economic considerations.

25. In contrast, the telecommunications industry has been characterized by more rapid changes in technology and market structure, with many markets being opened to competition. Except for the smallest local exchange companies, rate-of-return regulation is rare. Equally important, regulation in telecommunications is now driven by various measures of economic cost, which bear little resemblance to the embedded, fully distributed costs used in rate of return regulation. Many regulated rates are set in relation to economic cost with an explicit consideration of cost causation, and ratemaking is driven by efforts to maximize productive and allocative efficiency rather than an effort to reflect value of service (Ramsey pricing) or to create equal allocations of recoverable cost across different classes of customers. The opening of telecommunications markets has also led to the development of rules to identify (and often to prevent) true economic subsidies, while the identification of a subsidy is not typically part of ratesetting process for electric utilities.

26. When these differences of perspective are considered, it is hardly surprising that commenters view the Commission's proposal very differently. Telecommunications companies, while they may or may not fully endorse the Commission's proposal, appear in their comments to be more familiar, and therefore more comfortable, with the idea of incremental costs and the means of setting rates in relation to this measure of economic cost. In contrast, commenters from the electric industry, viewing the proceeding through the lens of rate-of-return regulation, a working definition of "cost" that almost always means "embedded, fully distributed cost," and a ratemaking process based more on perceived equity than efficiency, appear to be less familiar and decidedly less comfortable. This lack of familiarity appears to have led to a number of misinterpretations of the Commission's proposal.

27. For example, CCU argues that "under traditional ratemaking principles, rates are intended to recover both operating expenses and capital costs, including a rate of return."<sup>20</sup> Here, the CCU clearly equates "cost" with "revenue requirement," and considers the use of this information within the confines of a "traditional" rate case. CCU goes on to describe the calculation in the FNPRM as "the Commission's novel interpretation of 'costs.'"<sup>21</sup> While the Commission's definition of cost as "the pole owner's incremental cost associated with attachment" may appear to be "novel" when compared to the calculation of a utility's revenue requirement, it is in no way "novel" when compared to well-established economic concepts or the definition of "cost" as commonly used by the FCC and state regulators for the purpose of setting rates.

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<sup>20</sup> CCU Comments at 109.

<sup>21</sup> *Id.* at 108.

28. As another example, both CCU and AFPAR refer to a “subsidy” being provided to pole attachers. Their basis for this claim has little to do with the economic definition of “subsidy” – that is, whether the rate in question permits the recovery of the provider’s marginal cost – but instead appears to be based on notions of “value of service” and an “equal share” allocation. AFPAR argues that “although the cable rate subsidy is larger than the subsidy provided by the telecom rate, the telecom rate is nevertheless inherently a subsidy rate because it allocates only two-thirds of the common-space costs of the pole among attaching utilities. ... [T]he utility must absorb not only an ‘equal share’ of the common-space costs, but also an entire third of such costs, regardless of the number of attaching entities. ... [A]ll attachers benefit equally from the use of the pole, but Congress nevertheless chose to allocate a greater share of the common costs to the pole owner.”<sup>22</sup> What AFPAR is describing is an unequal allocation of costs in a situation in which it argues that all entities derive an equal benefit. But even assuming that all of AFPAR’s factual claims are correct, what it describes is not a “subsidy.” So long as the rate being paid by the attacher permits the utility to recover the marginal cost of the attachment, no subsidy is being provided regardless of how any common costs are being allocated. Unfortunately, this false notion of what constitutes a subsidy colors the utilities’ analysis of the rate proposal in the FNPRM.

29. The utilities also appear to have difficulty conceptualizing measures of cost other than the kind of embedded, fully-distributed costs typically used in rate-of-return regulation. For example, AFPAR argues that “although the FNPRM wisely eschews the sheer crassness of TWTC’s proposal, the Commission’s proposal shares the

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<sup>22</sup> AFPAR Comments at n.157.

same fundamental flaw: it turns a statutory capital cost rate into an incremental cost rate.”<sup>23</sup> Such a statement is, of course, meaningless: “capital cost” and “incremental cost” do not represent mutually exclusive (or even conflicting) alternatives. AFPAR might be seeking to draw a distinction between “incremental cost” and the “embedded, fully-distributed cost” used in a rate case. While embedded, fully-distributed costs nearly always include capital costs, an analysis of incremental cost may include or exclude capital costs, depending on whether such capital costs are caused by the increment of demand being studied. AFPAR’s assertion that capital costs have been excluded from the lower bound rate because the Commission elected to “apply an incremental cost approach is incorrect: an incremental cost may (and often does) include capital costs, if those capital costs are causally related to the increment of demand at issue. In the FNPRM, the Commission was clear that its decision to exclude capital costs was based not on the choice of methodology (i.e. incremental versus fully-distributed) but instead on the conclusion that no such causal relationship exists: “it is likely that the attacher is the ‘cost causer’ for, at most, a *de minimis* portion of these [capital] costs.”<sup>24</sup> This fundamental misunderstanding causes the utilities to argue against the methodology (incremental cost) chosen by the Commission, although their real disagreement is not with the methodology but with the Commission’s factual conclusions that resulted from an application of that methodology.

30. In sum, many of the arguments, and certainly much of the heated rhetoric, in the utilites’ comments appears to be the result of the disparity in experience with cost-related issues. Utilities, viewing the question through the lens of rate-of-return regulation

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<sup>23</sup> *Id.* at 82.

<sup>24</sup> *FNPRM* ¶ 135.

and “costs” that are equivalent to “revenue requirement,” clearly have trouble conceptualizing any definition of “cost” other than embedded, fully-distributed costs. But this lack of familiarity with economic costing concepts does not make these concepts any less valid, or their application any less appropriate in this proceeding.

*B. The Current Application of the Cable Rate Formula and the Telecom Rate Formula Does Not Create a “Subsidy” for Pole Attachments*

31. Both CCU and AFPAR refer repeatedly to what they claim is a subsidy inherent in the existing cable and telecom rates,<sup>25</sup> yet neither provides any evidence to support such a claim. CCU goes so far as to claim (p. 115) that “electric utility ratepayers currently subsidize the cable industry with artificially low cable-only attachment rates to the astounding tune of approximately \$10 million per year for every 500,000 attachments that cable companies affix to electric utility poles.” Such a claim is not only astounding, it is incredible. For CCU’s claim to be true, utilities must be incurring, on average, a marginal cost per attachment that is \$20/year<sup>26</sup> above and beyond the existing cable rate.

32. Existing cable rates are often in the range of \$6.50 - \$8.50 per attachment per year. For CCU’s claim to hold, a utility with an \$8.00 cable attachment rate must be incurring a marginal cost per attachment of \$28.00 per year. Based on my review of the comments, no utility is claiming costs of this magnitude, and certainly no utility has *demonstrated* that it incurs a marginal cost of \$28.00. In contrast NCTA has provided detailed data showing (based on 2007 FERC Form 1 data) that marginal costs per

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<sup>25</sup> See AFPAR Comments at 77-80, CCU Comments at 114-119.

<sup>26</sup> \$10,000,000/yr / 500,000 attachments = \$20/yr/attachment.

attachment per year are likely to be in the range of \$0.75 - \$1.50.<sup>27</sup> While offering no quantitative evidence whatsoever, CCU asserts that marginal costs that equal at least *eighteen times* the level indicated by the FERC Form 1 data.

33. Both AFPAR and CCU argue that the existing telecom rate results in a subsidy to telecommunications providers, though one that is smaller than the subsidy provided to cable providers through application of the cable rate.<sup>28</sup> Once again, they offer no evidence that existing telecom rates, typically in the range of \$10 - \$15 per attachment per year, are insufficient to permit the recovery of incremental costs. As noted above, the available evidence suggests that the existing telecom rates are a full order of magnitude higher than a reasonable estimate of incremental costs.

*C. No Legitimate Incremental Costs, Beyond Those Included in the Commission's Proposal, Have Been Identified or Quantified*

34. In the FNPRM, the Commission sought comment on whether “the exclusion of capital costs from the lower bound telecom rate under this approach” is consistent “with principles of cost causation.”<sup>29</sup> In the same paragraph, the Commission invited parties to provide evidence of additional incremental costs, and specifically capital costs, that are incurred by the utilities because of the presence of attachers. The Commission specifically requested that the utilities “isolate and quantify the effect” of any claimed additional incremental costs, and explicitly noted that “how frequently such situations would arise” is a relevant factor. As explained below, the utilities utterly failed

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<sup>27</sup> See Kravtin Report at 43.

<sup>28</sup> See AFPAR Comments at 78; CCU Comments at 115.

<sup>29</sup> FNPRM ¶ 136.

to do so and instead rely on anecdotal, unverifiable, and unquantifiable assertions regarding the costs imposed by attachers.

35. In its comments, CCU asserts that the Commission’s conclusion that “most, if not all, of the past investment in an existing pole would have been incurred regardless of the demand for attachments other than the owner’s attachments” represents a “mistaken assumption.”<sup>30</sup> Instead, CCU argues, “communications attachers demonstrably add significantly to electric utility capital expenditures.”<sup>31</sup> I have reviewed each of CCU’s specific claims in order to determine if each represents incremental capital costs that are “demonstrable” and “significant,” as CCU claims.

36. CCU first claims that “electric utilities must install taller poles than they need for their own purposes in order to accommodate communications attachers.”<sup>32</sup> CCU later asserts that “utilities are not legally required to replace poles to accommodate attachers,” and that the installation of taller poles represents “one more way in which utilities with no fanfare have helped communications attachers reach their customers with as little inconvenience and expense as possible.”<sup>33</sup>

37. The stated basis for the CCU claim is a survey of coalition members. Of the nine companies listed as coalition members sponsoring CCU’s comments, only four responded to the survey.<sup>34</sup> Each of the four responding members indicates that it currently installs poles that are five feet taller “than they would need for their own

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<sup>30</sup> CCU Comments at 109.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 110.

<sup>34</sup> CCU does not explain why it was unable to obtain responses from the remaining five coalition member companies regarding an issue that, at least according to CCU, is important.

purposes if they were the only attacher.” Unfortunately, CCU makes no attempt to “isolate and quantify the effect” of this claimed incremental capital cost.

38. In order to “isolate and quantify the effect” in incremental costs of the claimed installation of new poles that are five feet taller than would otherwise be installed, it is necessary to perform the following steps.

39. First, as explained, CCU states that its four responding members claim to be installing new poles that are five feet taller than they would for its own purposes. CCU does not claim that any of its member companies has engaged in any early retirement of the shorter poles, and it is reasonable to conclude that to the extent these four CCU members are installing taller poles, they are doing so only in “greenfield” areas of new buildout or as a part of the routine replacement of poles whose condition warrants replacement. Any additional cost does not apply to each pole owned by the utility, but only to those that have been replaced by taller poles, and for which the use of the taller pole was specifically for the purpose of providing space to attachers. Because pole costs (whether capital or operations) are calculated on an average basis, it is first necessary to determine the percentage of poles in a utility’s network that meet these criteria.

40. Next, for any of the new taller poles that the utility claims to have been placed in order to accommodate communications attachers, the utility must show that an additional five feet of pole height represents a reasonable response to the anticipated need to provide space to third-party attachers in the area in which the pole is placed.

41. While CCU claims that four members are installing at least some new poles that are taller “in order to accommodate communications attachers,” it does not quantify the difference in capital costs between these taller poles and the poles that it

would install for its own purposes. The incremental capital cost of attachment is not the capital cost of the taller pole, but the difference between the cost of the taller pole and the cost of the pole that would have been installed “but for” the utility’s desire to proactively accommodate communications attachers. It is necessary for the utility to quantify this incremental capital cost.

42. It is also necessary to identify any incremental impacts on capital costs other than the acquisition cost of the taller pole. For example, if a utility has replaced existing shorter poles because of a need to accommodate communications attachers, the useful life of the taller pole is likely to be longer than that of a shorter pole.<sup>35</sup> This longer depreciable life should be reflected in the carrying charge percentage used when calculating any annual or monthly incremental capital costs. When calculating this increment, it is also necessary to use a “capital-only” carrying charge.

43. An incremental capital cost associated with “taller poles” would be equal to the following: ((capitalized cost of the taller pole\*capital-only carrying charges for the taller pole) – (capitalized cost of the shorter pole\*capital-only carrying charges for the shorter pole)) \* percentage of taller poles owned by the utility that were installed specifically for the purpose of providing space to communications attachers.<sup>36</sup>

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<sup>35</sup> By replacing the shorter pole with a pole capable of accommodating additional attachers, the utility will have eliminated one of the potential factors (the need to provide space to a third-party attacher) that could cause replacement of the shorter pole in the future.

<sup>36</sup> The simple addition of any such incremental capital cost to a monthly pole rental rate would result in a double-counting of the additional capital costs for any calculation (such as the Commission’s upper bound telecom rate) that includes capital costs. The utility’s booked investment in pole plant would already include the additional costs of acquiring and installing any taller poles that are actually in place. Before adding the incremental capital cost described above, the utility would first need to restate its pole investment

44. In addition to any purported incremental capital costs associated with the installation of poles five feet higher than the replaced poles, CCU also claims that “communications attachers cause electric utilities to incur substantial other capital expenditures.” As a group, CCU’s claims underscore the validity of the Commission’s conclusion that any capital costs caused by attachers are likely to be *de minimis*.

45. CCU states that “Poles must be replaced more often because of the additional load and pole damage caused by communications attachers.” In order to substantiate incremental capital costs from such damage, the utility would need to quantify the extent of the damage. But CCU does not provide any actual examples where poles had to be replaced due to damage from attachers. To the extent such replacements occur, the incremental capital cost to the utility would be present value, calculated over the number of years of depreciable life (if any) remaining for the old pole, of the difference between the capital carrying cost of the old pole and the capital carrying cost of an equivalent new pole, multiplied times the percentage of poles in the utility’s network that must be replaced because of “communications attacher damage” in a given period of time.

46. CCU states that, “[u]nlike many electric wires, communications cables do not break when a tree falls on them, so it is the communications attachments – not the electric lines – that bring down poles in storms.”<sup>37</sup> This assertion is based on the unsubstantiated (and ultimately false) factual claims that communications cables never

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accounts to reflect only the placement of shorter poles, and to use this restated amount in any calculation. Of course, since the cost of any taller poles actually put in place by the utility would already be reflected in the pole investment account, the simplest solution would be to make no adjustment at all.

<sup>37</sup> CCU Comments at 111.

break when a tree falls (they often do) and that power cables always break (they often do not). CCU also ignores the fact that trees and tree branches nearly always “fall down” and almost never “fall up.” Because the electric wires occupy the higher space on a pole, a tree or branch falling in a downward direction is likely to make first contact with the electric wires, and it is these wires that are most likely to be the cause of a pole failure in such a circumstance. To the extent that CCU is correct that when a tree falls the power cables break (thereby saving the pole) but the communications cables do not (thereby causing the pole to fail), the incremental capital cost to the utility would be present value, calculated over the number of years of depreciable life (if any) remaining for the old pole, of the difference between the capital carrying cost of the old pole and the capital carrying cost of an equivalent new pole, multiplied times the percentage of poles in the utility’s network that must be replaced in a given period of time because the pole is brought down by a falling tree that breaks the power cables but does not break the communications cables. CCU does not provide any of the information needed to perform this calculation.

47. Furthermore, CCU argues that “[g]arbage trucks or other vehicles pull down the communications lines, not the electric lines, and in the process pull down the poles with them.”<sup>38</sup> CCU does not provide any data to support an assertion that this occurs with any frequency. Nor does it attempt to “isolate and quantify the effect” on the utility’s capital costs of errant garbage truck drivers. The incremental capital cost to the utility of such an event would be present value, calculated over the number of years of depreciable life (if any) remaining for the old pole, of the difference between the capital carrying cost of the old pole and the capital carrying cost of an equivalent new pole,

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<sup>38</sup> *Id.*

multiplied times the percentage of poles in the utility's network that must be replaced in a given period of time because the pole is brought down by a garbage truck that snags only communications cables attached to the pole. Again, CCU does not provide any of the information needed to perform this calculation.

48. In addition, CCU argues that, “[w]hen poles are changed out that already have many communication companies attached, the pole change out is more difficult, takes longer, and increases capital costs.”<sup>39</sup> While a utility would need to pay for the costs of pole change outs in those cases where the utility must change out a pole for its own needs, the attacher will pay, through make ready charges, the cost of pole replacements necessary to accommodate the attacher. CCU does not “isolate or quantify” the costs of pole change out that are not paid for through make-ready charges.

49. CCU also asserts that, “[w]hen an electric utility must install certain additional equipment like transformers and risers on an existing pole, the pole often must be changed out because there is insufficient space or strength on the pole, which would not be the case if the communication companies were not also attached.”<sup>40</sup> In effect, CCU is arguing that the presence of communications attachers in the Communications Space limits the utility's ability to place equipment within the Electric Supply Space. As with its other claims, CCU does not provide any examples (hypothetical or actual) of how such circumstances might arise, other than to claim that these circumstances occur “often.” If an electric utility finds that it does not have sufficient space on a given pole to install a transformer or riser, it is unlikely that the presence (or absence) of communications attachers is in any way a contributing factor, and CCU has not availed

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

itself of the Commission’s invitation to “isolate and quantify” any incremental capital costs that such circumstances would create.

50. To the extent that a utility is unable to place needed equipment in the Electric Supply Space because of the presence of communications attachers in a given pole’s Communications Space (and therefore must replace the pole), the incremental capital cost to the utility would be present value, calculated over the number of years of depreciable life (if any) remaining for the old pole, of the difference between the capital carrying cost of the old pole and the capital carrying cost of an equivalent new pole, multiplied times the percentage of poles in the utility’s network that must be replaced in a given period of time because the presence of a communications attacher in the Communications Space makes it impossible for the utility to install needed equipment in the Electric Supply Space. CCU does not provide any of the information needed to perform this calculation.

*D. The Commission’s Proposal is Readily Administrable*

51. In the FNPRM, the Commission proposed a methodology for the development of pole rental rates that would permit it to meet its objectives of establish pole rental that are as low as possible in order to promote broadband deployment,<sup>41</sup> that reduce (and ideally eliminate) the current disparity in cable and telecom rates that distorts deployment decisions,<sup>42</sup> and do so in a way that “is readily administrable” and can be “applied in a simple and expeditious manner.”<sup>43</sup>

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<sup>41</sup> See FNPRM ¶¶ 115-117.

<sup>42</sup> See *id.*

<sup>43</sup> *id.* ¶ 141.

52. Both CCU and AFPAR characterize the Commission’s proposal as a “radical departure” from the existing rules that would be difficult to administer. They are wrong on both counts: the Commission’s proposal as set forth in the FNPRM represents a refinement of, not a radical departure from, the methodology in the existing rules. This refined process would yield pole rental rates that better reflect cost causation and as a result would be economically more efficient. At the same time, the proposed rules would not require the utilities to undertake any radically new calculations or to change their data collection and accounting methods.

53. In its comments, NCTA presents a series of proposed refinements to the cost calculations in the lower bound and upper bound telecom rates. Attachment A to the NCTA comments includes a recalculation of pole rental rates based on the existing rules, the Commission’s proposed rules, and NCTA’s refinements to the Commission’s proposed rules.<sup>44</sup> These tables demonstrate that calculations based on either the Commission’s proposed rules or NCTA’s proposed refinements to those rules, are “readily administrable” and can be “applied in a simple and expeditious manner.”

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<sup>44</sup> See Appendix C to. Kravtin Report.

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

**Executed on October 1, 2010**



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**Don J. Wood**

***Curriculum Vitae of Don J. Wood***

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**CURRENT EMPLOYMENT**

Don J. Wood is a principal in the firm of Wood & Wood. He provides economic, financial, and regulatory analysis services in technology-driven industries, specializing in economic policy related to the development of competitive markets, cost of service issues, and the calculation of financial damages. In addition, Mr. Wood advises industry associations on regulatory and economic policy and assists investors in their evaluation of investment opportunities.

In the area of administrative law, Mr. Wood has presented testimony before the regulatory bodies of forty-two states, the District of Columbia, and Puerto Rico, and has prepared comments and testimony for filing with the Federal Communications Commission. The subject matter of his testimony has ranged from broad policy issues to detailed cost and rate analysis.

Mr. Wood has also presented testimony in state, federal, and overseas courts regarding business plans and strategies, competition policy, and cost of service issues. He has presented studies of the damages incurred by plaintiffs and has provided rebuttal testimony to damage calculations performed by others. Mr. Wood has also testified in alternative dispute resolution proceedings conducted pursuant to both AAA and CPR rules.

Mr. Wood is an experienced commercial mediator and is registered as a neutral with the Georgia Office of Dispute Resolution.

**PREVIOUS EMPLOYMENT**

**Klick, Kent & Allen/FTI Consulting, Inc.**

Regional Director.

**GDS Associates, Inc.**

Senior Project Manager.

**MCI Telecommunications Corporation**

Manager of Regulatory Analysis, Southeast Division.

Manager, Corporate Economic Analysis and Regulatory Affairs.

**BellSouth Services, Inc.**

Staff Manager.

**Georgia Power Company/Southern Company Services, Inc.**

Generating Plant Construction cost analyst and scheduler.

**EDUCATION**

**Emory University, Atlanta, Ga.**

BBA in Finance, with Distinction (1985).

**College of William and Mary, Williamsburg, Va.**

MBA, with concentrations in Finance and Microeconomics (1987).

**TESTIMONY - STATE REGULATORY COMMISSIONS:**

**Alabama Public Service Commission**

Docket No. 19356, Phase III: Alabama Public Service Commission vs. All Telephone Companies Operating in Alabama, and Docket 21455: AT&T Communications of the South Central States, Inc., Applicant, Application for a Certificate of Public Convenience and Necessity to Provide Limited IntraLATA Telecommunications Service in the State of Alabama.

Docket No. 20895: In Re: Petition for Approval to Introduce Business Line Termination for MCI's 800 Service.

Docket No. 21071: In Re: Petition by South Central Bell for Introduction of Bidirectional Measured Service.

Docket No. 21067: In Re: Petition by South Central Bell to Offer Dial Back-Up Service and 2400 BPS Central Office Data Set for Use with PulseLink Public Packet Switching Network Service.

Docket No. 21378: In Re: Petition by South Central Bell for Approval of Tariff Revisions to Restructure ESSX and Digital ESSX Service.

Docket No. 21865: In Re: Petition by South Central Bell for Approval of Tariff Revisions to Introduce Network Services to be Offered as a Part of Open Network Architecture.

Docket No. 25703: In Re: In the Matter of the Interconnection Agreement Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc., Pursuant to 47 U.S.C. § 252.

Docket No. 25704: In Re: Petition by AT&T Communications of the South Central States, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE South Incorporated and CONTEL of the South, Inc. Concerning Interconnection and Resale under the Telecommunications Act of 1996.

Docket No. 25835: In Re: Petition for Approval of a Statement of Generally Available Terms and Conditions Pursuant to §252(f) of the Telecommunications Act of 1996 and Notification of Intention to File a §271 Petition for In-Region InterLATA Authority with the Federal Communications Commission Pursuant to the Telecommunications Act of 1996.

Docket No. 26029: In Re: Generic Proceeding - Consideration of TELRIC Studies.

Docket No. 25980: Implementation of the Universal Support Requirements of Section 254 of the Telecommunications Act of 1996.

Docket No. 27091: Petition for Arbitration by ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996.

Docket No. 27821: Generic Proceeding to Establish Prices for Interconnection Services and Unbundled Network Elements.

Docket Nos. 27989 and 15957: BellSouth "Full Circle" Promotion and Generic Proceeding Considering the Promulgation of Telephone Rules Governing Promotions.

Docket No. 28841: In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996.

Docket No. 29075: Petition of CenturyTel to Establish Wholesale Avoidable Cost Discount Rates for Resale of Local Exchange Service.

Docket No. 29054: IN RE: Implementation of the Federal Communications Commission's Triennial Review Order (Phase II – Local Switching for Mass Market Customers).

Docket No. 29172: Southern Public Communication Association, Complainant, and BellSouth Telecommunications, Inc., Defendant.

**The Regulatory Commission of Alaska**

Case No. U-02-039: In the Matter of Request by Alaska Digitel, LLC for Designation as a Carrier Eligible To Receive Federal Universal Service Support Under the Telecommunications Act of 1996.

Case No. U-04-62: In the Matter of the Request by Alaska Wireless Communications, LLC For Designation as a Carrier Eligible to Receive Federal Universal Service Support Under the Telecommunications Act of 1996.

**Arkansas Public Service Commission**

Docket No. 92-337-R: In the Matter of the Application for a Rule Limiting Collocation for Special Access to Virtual or Physical Collocation at the Option of the Local Exchange Carrier.

**Public Utilities Commission of the State of California**

Rulemaking 00-02-005: Order Instituting Rulemaking on the Commission's Own Motion into Reciprocal Compensation for Telephone Traffic Transmitted to Internet Service Provider Modems.

Application Nos. 01-02-024, 01-02-035, 02-02-031, 02-02-032, 02-02-034, 02-03-002: Applications for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application No. 05-02-027: In the Matter of the Joint Application of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation.

Application No. 05-04-020: In the Matter of the Joint Application of Verizon Communications Inc. ("Verizon") and MCI, Inc. ("MCI") to Transfer Control of MCI's California Utility Subsidiaries to Verizon, Which Will Occur Indirectly as a Result of Verizon's Acquisition of MCI.

**Public Utilities Commission of the State of Colorado**

Docket No. 96A-345T: In the Matter of the Interconnection Contract Negotiations Between AT&T Communications of the Mountain States, Inc., and US West Communications, Inc., Pursuant to 47 U.S.C. Section 252. Docket No. 96A-366T: In the Matter of the Petition of MCIMetro Access Transmission Services, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with US West Communications, Inc. (consolidated).

## **Exhibit DJW-1**

Docket No. 96S-257T: In Re: The Investigation and Suspension of Tariff Sheets Filed by US West Communications, Inc., with Advice Letter No. 2608 Regarding Proposed Rate Changes.

Docket No. 98F-146T: Colorado Payphone Association, Complainant, v. US West Communications, Inc., Respondent.

Docket No. 02A-276T: In the Matter of the Application of Wiggins Telephone Association for Approval of its Disaggregation Plan

Docket No. 02A-444T: In the Matter of NECC's Application to Redefine the Service Area of Eastern Slope Rural Telephone Association, Inc., Great Plains Communications, Inc., Plains Coop Telephone Association, Inc., and Sunflower Telephone Co., Inc.

Docket No. 07A-153T: In the Matter of the Combined Application of N.E. Colorado Cellular, Inc. for Designation as an Eligible Telecommunications Carrier and Eligible Provider in Additional Areas of Colorado.

Docket No. 09a-107t: In the Matter of the Application of N.E. Colorado Cellular, Inc. D/B/A Viaero Wireless for Initial Receipt of Support From Colorado High Cost Support Mechanism for New Territories.

Docket No. 10R-191T: In the Matter of Proposed Rules Relating to the Colorado High Cost Support Mechanism Regulations 723-2.

### **State of Connecticut, Department of Utility Control**

Docket 91-12-19: DPUC Review of Intrastate Telecommunications Services Open to Competition (Comments).

Docket No. 94-07-02: Development of the Assumptions, Tests, Analysis, and Review to Govern Telecommunications Service Reclassifications in Light of the Eight Criteria Set Forth in Section 6 of Public Act 94-83 (Comments).

Docket No. 03-11-16: Petition of Tel Comm Technologies, et. al., for Review and Amendment of Southern New England Telephone Company's Charges for Pay Telephone Access Services.

### **Delaware Public Service Commission**

Docket No. 93-31T: In the Matter of the Application of The Diamond State Telephone Company for Establishment of Rules and Rates for the Provision of IntelliLinQ-PRI and IntelliLinQ-BRI.

Docket No. 41: In the Matter of the Development of Regulations for the Implementation of the Telecommunications Technology Investment Act.

Docket No. 96-324: In the Matter of the Application of Bell Atlantic-Delaware, Inc. for Approval of its Statement of Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996 (Phase II).

Docket No. 02-001: In the Matter of the Inquiry into Verizon Delaware Inc.'s Compliance with the Conditions Set Forth in 47 U.S.C. § 271(c).

**Florida Public Service Commission**

Docket No. 881257-TL: In Re: Proposed Tariff by Southern Bell to Introduce New Features for Digital ESSX Service, and to Provide Structural Changes for both ESSX Service and Digital ESSX Service.

Docket No. 880812-TP: In Re: Investigation into Equal Access Exchange Areas (EAEAs), Toll Monopoly Areas (TMAs), 1+ Restriction to the Local Exchange Companies (LECs), and Elimination of the Access Discount.

Docket No. 890183-TL: In Re: Generic Investigation into the Operations of Alternate Access Vendors.

Docket No. 870347-TI: In Re: Petition of AT&T Communications of the Southern States for Commission Forbearance from Earnings Regulation and Waiver of Rule 25-4.495(1) and 25-24.480 (1) (b), F.A.C., for a trial period.

Docket No. 900708-TL: In Re: Investigation of Methodology to Account for Access Charges in Local Exchange Company (LEC) Toll Pricing.

Docket No. 900633-TL: In Re: Development of Local Exchange Company Cost of Service Study Methodology.

Docket No. 910757-TP: In Re: Investigation into the Regulatory Safeguards Required to Prevent Cross-Subsidization by Telephone Companies.

Docket No. 920260-TL: In Re: Petition of Southern Bell Telephone and Telegraph Company for Rate Stabilization, Implementation Orders, and Other Relief.

Docket No. 950985-TP: In Re: Resolution of Petitions to establish 1995 rates, terms, and conditions for interconnection involving local exchange companies and alternative local exchange companies pursuant to Section 364.162, Florida Statutes.

Docket No. 960846-TP: In Re: Petition by MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc. for Arbitration of Certain Terms and Conditions of a proposed agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996 and Docket No. 960833-TP: In Re: Petition by AT&T Communications of the Southern States, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996 (consolidated).

Docket No. 960847-TP and 960980-TP: In Re: Petition by AT&T Communications of the Southern States, Inc., MCI Telecommunications Corporation, MCI Metro Access Transmission Service, Inc., for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE Florida Incorporated Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996 (consolidated).

Docket No. 961230-TP: In Re: Petition by MCI Telecommunications Corporation for Arbitration with United Telephone Company of Florida and Central Telephone Company of Florida Concerning Interconnection Rates, Terms, and Conditions, Pursuant to the Federal Telecommunications Act of 1996.

Docket No. 960786-TL: In Re: Consideration of BellSouth Telecommunications, Inc.'s Entry Into InterLATA Services Pursuant to Section 271 of the Federal Telecommunications Act of 1996.

Docket Nos. 960833-TP, 960846-TP, 960757-TP, and 971140-TP: Investigation to develop permanent rates for certain unbundled network elements.

Docket No. 980696-TP: In Re: Determination of the cost of basic local telecommunications service, pursuant to Section 364.025 Florida Statutes.

Docket No. 990750-TP: Petition by ITC^DeltaCom Communications, Inc., d/b/a/ ITC^DeltaCom, for arbitration of certain unresolved issues in interconnection negotiations between ITC^DeltaCom and BellSouth Telecommunications, Inc.

Docket No. 991605-TP: Petition of BellSouth Telecommunications, Inc. for Arbitration of the Interconnection Agreement Between Time Warner Telecom of Florida, L.P., pursuant to Section 252 (b) of the Telecommunications Act of 1996.

Docket No. 030137-TP: In re: Petition for Arbitration of Unresolved Issues in Negotiation of Interconnection Agreement with BellSouth Telecommunications, Inc. by ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom.

Docket No. 030300-TP: In re: Petition for expedited review of BellSouth Telecommunications, Inc.'s intrastate tariffs for pay telephone access services (PTAS) rate with respect to rates for payphone line access, usage, and features, by Florida Public Telecommunications Association.

Docket No. 030851-TP: In Re: Implementation of Requirements Arising from Federal Communications Commission Triennial UNE Review: Local Circuit Switching for Mass Market Customers.

Docket No. 040353-TP: In Re: Petition of Supra Telecommunications and Information Systems, Inc. to Review and Cancel BellSouth's Promotional Offering Tariffs Offered In Conjunction with its New Flat Rate Service Known as PreferredPack.

Docket No. 040604-TL: In Re: Adoption of the National School Lunch Program and an Income-based Criterion at or Below 135% of the Federal Poverty Guidelines as Eligibility Criteria for the Lifeline and Linkup Programs.

Docket No. 050119-TP: Joint Petition of TDS Telecom d/b/a TDS Telecom/Quincy Telephone, ALLTEL Florida, Inc., Northeast Florida Telephone Company d/b/a NEFCOM, GTC, Inc. d/b/a GT Com, Smart City Telecommunications, LLC d/b/a Smart City Telecom, ITS Telecommunications Systems, Inc., and Frontier Communications of the South, LLC ("Joint Petitioners") objecting to and requesting suspension of Proposed Transit Traffic Service Tariff filed by BellSouth Telecommunications, Inc. and Docket No. 050125-TP: Petition and complaint for suspension and cancellation of Transit Tariff Service No. FL 2004-284 filed by BellSouth Telecommunications, Inc. by AT&T Communications of the Southern States, LLC (consolidated).

Docket No. 060598-TL: In Re: Petition by BellSouth Telecommunications, Inc., Pursuant to Florida Statutes §364.051(4) to Recover 2005 Tropical System Related Costs and Expenses.

Docket No. 060644-TL: Petition by Embarq Florida, Inc., Pursuant to Florida Statutes §364.051(4) to Recover 2005 Tropical System Related Costs and Expenses.

Docket No. 060763-TL: In Re: Petition for waiver of carrier of last resort obligations for multitenant property in Collier County known as Treviso Bay, by Embarq Florida, Inc.

**Georgia Public Service Commission**

Docket No. 3882-U: In Re: Investigation into Incentive Telephone Regulation in Georgia.

## **Exhibit DJW-1**

Docket No. 3883-U: In Re: Investigation into the Level and Structure of Intrastate Access Charges.

Docket No. 3921-U: In Re: Compliance and Implementation of Senate Bill 524.

Docket No. 3905-U: In Re: Southern Bell Rule Nisi.

Docket No. 3995-U: In Re: IntraLATA Toll Competition.

Docket No. 4018-U: In Re: Review of Open Network Architecture (ONA) (Comments).

Docket No. 5258-U: In Re: Petition of BellSouth Telecommunications for Consideration and Approval of its "Georgians FIRST" (Price Caps) Proposal.

Docket No. 5825-U: In Re: The Creation of a Universal Access Fund as Required by the Telecommunications Competition and Development Act of 1995.

Docket No. 6801-U: In Re: Interconnection Negotiations Between BellSouth Telecommunications, Inc. and AT&T Communications of the Southern States, Inc., Pursuant to Sections 251-252 and 271 of the Telecommunications Act of 1996.

Docket No. 6865-U: In Re: Petition by MCI for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996.

Docket No. 7253-U: In Re: BellSouth Telecommunications, Inc.'s Statement of Generally Available Terms and Conditions Under Section 252 (f) of the Telecommunications Act of 1996.

Docket No. 7061-U: In Re: Review of Cost Studies and Methodologies for Interconnection and Unbundling of BellSouth Telecommunications Services.

Docket No. 10692-U: In Re: Generic Proceeding to Establish Long-Term Pricing Policies for Unbundled Network Elements.

Docket No. 10854-U: In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996.

Docket No. 16583-U: In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996.

Docket No. 17749-U: In Re: FCC's Triennial Review Order Regarding the Impairment of Local Switching for Mass Market Customers.

Docket No. 22682-U: In Re: Notice of Merger of AT&T, Inc. and BellSouth Corporation together with its Certificated Georgia Subsidiaries.

### **Public Utilities Commission of Hawaii**

Docket No. 7702: In the Matter of Instituting a Proceeding on Communications, Including an Investigation of the Communications Infrastructure of the State of Hawaii.

**Idaho Public Utilities Commission**

Case No. GNR-T-03-08: In the Matter of the Petition of IAT Communications, Inc., d/b/a NTCDIdaho, Inc., or ClearTalk, for Designation as an Eligible Telecommunications Carrier, and Case No. GNR-T-03-16: In the Matter of the Application of NCPR, Inc., d/b/a Nextel Partners, seeking designation as an Eligible Telecommunications Carrier.

**Illinois Commerce Commission**

Docket No. 04-0653: USCOC of Illinois RSA #1, LLC., USCOC of Illinois RSA #4 LLC., USCOC of Illinois Rockford, LLC., and USCOC of Central Illinois, LLC. Petition for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. Section 214(e)(2).

Docket Nos. 05-0644, 05-0649, and 05-0657: Petition of Hamilton County Telephone Co-Op et. al. for Arbitration under the Telecommunications Act to Establish Terms and Conditions for Reciprocal Compensation with Verizon Wireless and its Constituent Companies.

**Indiana Utility Regulatory Commission**

Cause No. 42303: In the Matter of the Complaint of the Indiana Payphone Association for a Commission Determination of Just and Reasonable Rates and Charges and Compliance with Federal Regulations.

Cause No. 41052-ETC-43: In the Matter of the Designation of Eligible Telecommunications Carriers by the Indiana Utility Regulatory Commission Pursuant to the Telecommunications Act of 1996 and Related FCC Orders. In Particular, the Application of NPCR, Inc. d/b/a Nextel Partners to be Designated.

Cause No. 42530: In the Matter of the Indiana Utility Regulatory Commission's Investigation of Matters Related to Competition in the State of Indiana Pursuant to Ind. Code 8-1-2 *et seq.*

**Iowa Utilities Board**

Docket No. RPU-95-10.

Docket No. RPU-95-11.

**State Corporation Commission of the State of Kansas**

Docket No. 00-GIMT-1054-GIT: In the Matter of a General Investigation to Determine Whether Reciprocal Compensation Should Be Paid for Traffic to an Internet Service Provider.

Docket No. 04-RCCT-338-ETC: In the Matter of Petition of RCC Minnesota, Inc. for Designation as an Eligible Telecommunications Carrier under 47 U.S.C. § 214(e)(2).

Docket No. 07-GIMT-498-GIT: In the Matter of a Review of the Commission's Federal USF Certification Requirements to Remove All Expenses and Investments by Competitive Eligible Telecommunications Carriers in a Southwestern Bell Telephone, L.P., Study Area from the Competitive Eligible Telecommunications Carrier's Justification of Use of High Cost Federal USF Support.

Docket No. 06-GIMT-187-GIT: IN the Matter of the General Investigation into the Commission's Telecommunications Billing Practices Standards.

**Kentucky Public Service Commission**

Administrative Case No. 10321: In the Matter of the Tariff Filing of South Central Bell Telephone Company to Establish and Offer Pulselink Service.

Administrative Case No. 323: In the Matter of An Inquiry into IntraLATA Toll Competition, An Appropriate Compensation Scheme for Completion of IntraLATA Calls by Interexchange Carriers, and WATS Jurisdictionality.

- Phase IA: Determination of whether intraLATA toll competition is in the public interest.
- Phase IB: Determination of a method of implementing intraLATA competition.
- Rehearing on issue of Imputation.

Administrative Case No. 90-256, Phase II: In the Matter of A Review of the Rates and Charges and Incentive Regulation Plan of South Central Bell Telephone Company.

Administrative Case No. 336: In the Matter of an Investigation into the Elimination of Switched Access Service Discounts and Adoption of Time of Day Switch Access Service Rates.

Administrative Case No. 91-250: In the Matter of South Central Bell Telephone Company's Proposed Area Calling Service Tariff.

Administrative Case No. 96-431: In Re: Petition by MCI for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996.

Administrative Case No. 96-478: In Re: The Petition by AT&T Communications of the South Central States, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE South Incorporated Concerning Interconnection and Resale Under the Telecommunications Act of 1996.

Administrative Case No. 96-482: In Re: The Interconnection Agreement Negotiations Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc., Pursuant to 47 U.S.C. § 252.

Administrative Case No. 360: In the Matter of: An Inquiry into Universal Service and Funding Issues.

Administrative Case No. 96-608: In the Matter of: Investigation Concerning the Provision of InterLATA Services by BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996.

Administrative Case No. 382: An Inquiry into the Development of Deaveraged Rates for Unbundled Network Elements.

Case No. 2003-00143: In the Matter of: Petition of NCPR, Inc., d/b/a Nextel Partners for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Kentucky.

Case No. 2003-00397: Review of Federal Communications Commission's Triennial Review Order Regarding Unbundling Requirements for Individual Network Elements.

Case Nos. 2006-00215: Petition of Ballard Rural Telephone Cooperative Corporation, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement with American Cellular f/k/a ACC Kentucky License LLC, Pursuant to the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and consolidated Case Nos. 2006-00217, 2006-00218, 2006-00220, 2006-00252, 2006-00255, 2006-00288, 2006-00292, 2006-00294, 2006-00296, 2006-00298, and 2006-00300.

Case No. 2008-00135: In the Matter of Complaint of Sprint Communications Company L.P. Against Brandenburg Telephone Company for the Unlawful Imposition of Access Charges.

**Louisiana Public Service Commission**

Docket No. 17970: In Re: Investigation of the Revenue Requirements, Rate Structures, Charges, Services, Rate of Return, and Construction Program of AT&T Communications of the South Central States, Inc., in its Louisiana Operations.

Docket No. U-17949: In the Matter of an Investigation of the Revenue Requirements, Rate Structures, Charges, Services, Rate of Return, and Construction Program of South Central Bell Telephone Company, Its Louisiana Intrastate Operations, The Appropriate Level of Access Charges, and All Matters Relevant to the Rates and Service Rendered by the Company.

- Subdocket A (SCB Earnings Phase)
- Subdocket B (Generic Competition Phase)

Docket No. 18913-U: In Re: South Central Bell's Request for Approval of Tariff Revisions to Restructure ESSX and Digital ESSX Service.

Docket No. U-18851: In Re: Petition for Elimination of Disparity in Access Tariff Rates.

Docket No. U-22022: In Re: Review and Consideration of BellSouth Telecommunications, Inc.'s TSLRIC and LRIC Cost Studies Submitted Pursuant to Sections 901(C) and 1001(E) of the Regulations for Competition in the Local Telecommunications Market as Adopted by General Order Dated March 15, 1996 in Order to Determine the Cost of Interconnection Services and Unbundled Network Components to Establish Reasonable, Non-Discriminatory, Cost Based Tariffed Rates and Docket No. U-22093: In Re: Review and Consideration of BellSouth Telecommunications, Inc.'s Tariff Filing of April 1, 1996, Filed Pursuant to Section 901 and 1001 of the Regulations for Competition in the Local Telecommunications Market Which Tariff Introduces Interconnection and Unbundled Services and Establishes the Rates, Terms and Conditions for Such Service Offerings (consolidated).

Docket No. U-22145: In the Matter of Interconnection Agreement Negotiations Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc., Pursuant to 47 U.S.C. § 252.

Docket No. U-22252: In Re: Consideration and Review of BST's Preapplication Compliance with Section 271 of the Telecommunications Act of 1996, including but not limited to the fourteen requirements set forth in Section 271 (c) (2) (b) in order to verify compliance with section 271 and provide a recommendation to the FCC regarding BST's application to provide interLATA services originating in-region.

Docket No. U-20883 Subdocket A: In Re: Submission of the Louisiana Public Service Commission's

Forward Looking Cost Study to the FCC for Purposes of Calculating Federal Universal Service Support.

Docket No. U-24206: In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996.

Docket No. U-22632: In Re: BellSouth Telecommunications, Inc. Filing of New Cost Studies for Providing Access Line Service for Customer Provided Public Telephones and Smartline Service for Public Telephone Access.

Docket No. Docket No. U-24714-A: In Re: Final Deaveraging of BellSouth Telecommunications, Inc. UNE Rates Pursuant to FCC 96-45 Ninth Report and Order and Order on Eighteenth Order on Reconsideration Released November 2, 1999.

Docket No. U-27571: In Re: Louisiana Public Service Commission Implementation of the Requirements Arising from The Federal Communications Commission's Triennial Review Order, Order 03-36: Unbundled Local Circuit Switching for Mass Market Customers and Establishment of a Batch Cut Migration Process.

**Public Service Commission of Maryland**

Case 8584, Phase II: In the Matter of the Application of MFS Intelenet of Maryland, Inc. for Authority to Provide and Resell Local Exchange and Intrastate Telecommunications Services in Areas Served by C&P Telephone Company of Maryland.

Case 8715: In the Matter of the Inquiry into Alternative Forms of Regulating Telephone Companies.

Case 8731: In the Matter of the Petitions for Approval of Agreements and Arbitration of Unresolved Issues Arising Under Section 252 of the Telecommunications Act of 1996.

**Massachusetts Department of Telecommunications and Energy**

D.P.U./D.T.E. 97088/97-18 (Phase II): Investigation by the Department of Telecommunications & Energy on its own motion regarding (1) implementation of section 276 of the Telecommunications Act of 1996 relative to public interest payphones, (2) Entry and Exit Barriers for the Payphone Marketplace, (3) New England Telephone and Telegraph Company d/b/a NYNEX's Public Access Smart-Pay Service, and (4) the rate policy for operator service providers.

**Michigan Public Service Commission**

Case No. U-14781: In the matter on the Commission's Own Motion to examine the total service long run incremental costs of the Michigan Exchange Carriers Association Companies, including Ace Telephone Company, Barry County Telephone Company, Deerfield Farmers' Telephone Company, Kaleva Telephone Company, Lennon telephone Company, Ogden telephone Company, Pigeon Telephone Company, Upper Peninsula Telephone Company, and Waldron Telephone Company.

**Minnesota Public Utilities Commission**

PUC Docket No. PT6153/AM-02-686, OAH Docket No. 3-2500-14980-2: In the Matter of Petition of Midwest Wireless Communications, LLC for Designation as an Eligible Communications carrier under 47 U.S.C. § 214(e)(2).

PUC Docket No. PT-6182, 6181/M-02-1503: In the Matter of RCC Minnesota, Inc. and Wireless Alliance, LLC for Designation as an Eligible Telecommunications Carrier under 47 U.S.C. § 214(e)(2).

**Mississippi Public Service Commission**

Docket No. U-5086: In Re: MCI Telecommunications Corporation's Metered Use Service Option D (Prism I) and Option E (Prism II).

Docket No. U-5112: In Re: MCI Telecommunications Corporation's Metered Use Option H (800 Service).

Docket No. U-5318: In Re: Petition of MCI for Approval of MCI's Provision of Service to a Specific Commercial Banking Customers for Intrastate Interexchange Telecommunications Service.

Docket 89-UN-5453: In Re: Notice and Application of South Central Bell Telephone Company for Adoption and Implementation of a Rate Stabilization Plan for its Mississippi Operations.

Docket No. 90-UA-0280: In Re: Order of the Mississippi Public Service Commission Initiating Hearings Concerning (1) IntraLATA Competition in the Telecommunications Industry and (2) Payment of Compensation by Interexchange Carriers and Resellers to Local Exchange Companies in Addition to Access Charges.

Docket No. 92-UA-0227: In Re: Order Implementing IntraLATA Competition.

Docket No. 96-AD-0559: In Re: In the Matter of the Interconnection Agreement Negotiations Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc., Pursuant to 47 U.S.C. § 252.

Docket No. 98-AD-035: Universal Service.

Docket No. 97-AD-544: In Re: Generic Proceeding to Establish Permanent Prices for BellSouth Interconnection and Unbundled Network Elements.

Docket No. 2003-AD-714: Generic Proceeding to Review the Federal Communications Commission's Triennial Review Order.

**Public Service Commission of the State of Missouri**

Case No. TO-2004-0527: In the Matter of the Application of WWC License, LLC, d/b/a CellularOne, for Designation as an Eligible Telecommunications Carrier, and Petition for Redefinition of Rural Telephone Company Areas.

Case No. to-2005-0384: Application of USCOC of Greater Missouri, LLC For Designation as an Eligible Telecommunications Carrier Pursuant to the Telecommunications Act of 1996.

**Public Service Commission of the State of Montana**

Docket No. D2000.8.124: In the Matter of Touch America, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 of the Terms and Conditions of Interconnection with Qwest Corporation, f/k/a US West Communications, Inc.

## **Exhibit DJW-1**

Docket No. D2000.6.89: In the Matter of Qwest Corporation's Application to Establish Rates for Interconnection, Unbundled Network Elements, Transport and Termination, and Resale Services.

Docket No. D2003.1.14: In the Matter of WWC Holding Co. Application for Designation as an Eligible Telecommunications Carrier in Montana Areas Served by Qwest Corporation.

Docket No. D2007.7.86: In the Matter of the Filing of a Notice of the Making of a Bona Fide Request for Interconnection with Ronan Telephone Company by Gold Creek Cellular of Montana Limited Partnership and Verizon Wireless LLC Both d/b/a Verizon Wireless Pursuant to 47 U.S.C. §§251 and 252 and §69-3-834, MCA; and Docket No. D.2007.7.87: In the Matter of the Filing of a Notice of the Making of a Bona Fide Request for Interconnection with Hot Springs Telephone Company by Gold Creek Cellular of Montana Limited Partnership and Verizon Wireless LLC Both d/b/a Verizon Wireless Pursuant to 47 U.S.C. §§251 and 252 and §69-3-834, MCA (consolidated).

### **Nebraska Public Service Commission**

Docket No. C-1385: In the Matter of a Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Midwest, Inc., and US West Communications, Inc.

Application No. C-3324: In the Matter of the Petition of N.E. Colorado Cellular, Inc., d/b/a Viaero Wireless for designation as an Eligible Telecommunications Carrier under 47 U.S.C. § 214(e)(2).

Docket No. 3725: In the Matter of Application of United States Cellular Corporation for Designation as an Eligible Telecommunications Carrier Pursuant To Section 214(e)(2) of the Communications Act of 1934.

### **Public Utilities Commission of Nevada**

Docket No. 04-3030: In re: Application of WWD License LLC, d/b/a CellularOne, for redefinition of its service area as a designated Eligible Telecommunications Carrier.

Docket No. 08-12017: In the Matter of Commnet of Nevada, LLC, Application for Designation as an Eligible Telecommunications Carrier for Purposes of Receiving Federal Universal Service Support.

### **New Jersey Board of Public Utilities**

Docket No. TM0530189: In the Matter of the Joint Petition of Verizon Communications Inc., and MCI, Inc. for Approval of Merger.

### **New York Public Service Commission**

Case No. 28425: Proceeding on Motion of the Commission as to the Impact of the Modification of Final Judgement and the Federal Communications Commission's Docket 78-72 on the Provision of Toll Service in New York State.

### **North Carolina Public Utilities Commission**

Docket No. P-100, Sub 72: In the Matter of the Petition of AT&T to Amend Commission Rules Governing Regulation of Interexchange Carriers (Comments).

## Exhibit DJW-1

Docket No. P-141, Sub 19: In the Matter of the Application of MCI Telecommunications Corporation to Provide InterLATA Facilities-Based Telecommunications Services (Comments).

Docket No. P-55, Sub 1013: In the Matter of Application of BellSouth Telecommunications, Inc. for, and Election of, Price Regulation.

Docket Nos. P-7, Sub 825 and P-10, Sub 479: In the Matter of Petition of Carolina Telephone and Telegraph and Central Telephone Company for Approval of a Price Regulation Plan Pursuant to G.S. 62-133.5.

Docket No. P-19, Sub 277: In the Matter of Application of GTE South Incorporated for and Election of, Price Regulation.

Docket No. P-141, Sub 29: In the Matter of: Petition of MCI Telecommunications Corporation for Arbitration of Interconnection with BellSouth Telecommunications, Inc., Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Interconnection with BellSouth Telecommunications, Inc. (consolidated).

Docket No. P-141, Sub 30: In the Matter of: Petition of MCI Telecommunications Corporation for Arbitration of Interconnection with General Telephone Company of North Carolina, Inc., Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Interconnection with General Telephone Company of North Carolina, Inc. (consolidated).

Docket No. P-100, Sub 133b: Re: In the Matter of Establishment of Universal Support Mechanisms Pursuant to Section 254 of the Telecommunications Act of 1996.

Docket No. P-100, Sub 133d: Re: Proceeding to Determine Permanent Pricing for Unbundled Network Elements.

Docket No. P-100, Sub 84b: Re: In the Matter of Petition of North Carolina Payphone Association for Review of Local Exchange Company Tariffs for Basic Payphone Services (Comments).

Docket No. P-561, Sub 10: BellSouth Telecommunications, Inc., Complainant, v. US LEC of North Carolina, LLC, and Metacomm, LLC, Respondents.

Docket No. P-472, Sub 15: In the Matter of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Time Warner Telecom of North Carolina, L.P. Pursuant to Section 252(b) of the Telecommunications Act of 1996.

Docket Nos. P-7, Sub 995; P-10, Sub 633: ALEC., Inc. v. Carolina Telephone and Telegraph Company and Central Telephone Company.

Docket No. P-500, Sub 18: In the Matter of: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996.

Docket No. P-118, Sub 30: In the matter of: Petition of Cellco Partnership d/b/a Verizon Wireless for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996.

Docket No. P-100, Sub 133q: In Re: Implementation of Requirements Arising from Federal Communications Commission Triennial UNE Review: Local Circuit Switching for Mass Market Customers.

**Public Utilities Commission of Ohio**

Case No. 93-487-TP-ALT: In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation.

Case No. 05-0269-TP-ACO: In the matter of the Joint Application of SBC Communications, Inc. and AT&T Corp. for Consent and Approval of a Change of Control.

**Oklahoma Corporation Commission**

Cause No. PUD 01448: In the Matter of the Application for an Order Limiting Collocation for Special Access to Virtual or Physical Collocation at the Option of the Local Exchange Carrier.

Cause No. PUD 200300195: Application of United States Cellular Corporation for Designation as an Eligible Telecommunications Carrier Pursuant to the Telecommunications Act of 1996.

Cause No. PUD 200300239: Application of Dobson Cellular Systems, Inc. for Designation as an Eligible Telecommunications Carrier Pursuant to the Telecommunications Act of 1996.

Cause No. PUD 200500122: In the matter of Dobson Cellular Systems, Inc., and American Cellular Corporation application for designation as a competitive eligible telecommunications carrier and redefinition of the service area requirement pursuant to Section 214(e) of the Telecommunications Act of 1996.

**Public Utility Commission of Oregon**

Docket No. UT 119: In the Matter of an Investigation into Tariffs Filed by US West Communications, Inc., United Telephone of the Northwest, Pacific Telecom, Inc., and GTE Northwest, Inc. in Accordance with ORS 759.185(4).

Docket No. ARB 3: In the Matter of the Petition of AT&T Communications of the Pacific Northwest, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996. Docket No. ARB 6: In the Matter of the Petition of MCIMetro Access Transmission Services, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996 (consolidated).

Docket No. ARB 9: In the Matter of the Petition of an Interconnection Agreement Between MCIMetro Access Transportation Services, Inc. and GTE Northwest Incorporated, Pursuant to 47 U.S.C. Section 252.

Docket No. UT-125: In the Matter of the Application of US West Communications, Inc. for an Increase in Revenues.

Docket No. UM 1083: RCC Minnesota, Inc. Application for Designation as an Eligible Telecommunications Carrier, Pursuant to the Telecommunications Act of 1996.

Docket No. UM 1084: United States Cellular Corporation Application for Designation as an Eligible Telecommunications Carrier, Pursuant to the Telecommunications Act of 1996.

Docket No. UM 1217: Staff Investigation to Establish Requirements for Initial Designation and Recertification of Telecommunications Carriers Eligible to Receive Federal Universal Service Support.

**Pennsylvania Public Utilities Commission**

Docket No. I-00910010: In Re: Generic Investigation into the Current Provision of InterLATA Toll Service.

Docket No. P-00930715: In Re: The Bell Telephone Company of Pennsylvania's Petition and Plan for Alternative Form of Regulation under Chapter 30.

Docket No. R-00943008: In Re: Pennsylvania Public Utility Commission v. Bell Atlantic-Pennsylvania, Inc. (Investigation of Proposed Promotional Offerings Tariff).

Docket No. M-00940587: In Re: Investigation pursuant to Section 3005 of the Public Utility Code, 66 Pa. C. S. §3005, and the Commission's Opinion and Order at Docket No. P-930715, to establish standards and safeguards for competitive services, with particular emphasis in the areas of cost allocations, cost studies, unbundling, and imputation, and to consider generic issues for future rulemaking.

Docket No. A-310489F7004: Petition of Celco Partnership d/b/a Verizon Wireless for Arbitration Pursuant to Section 252 of the telecommunications Act of 1996.

Docket Nos. A-310580F9, A-310401F6, A-310407F3, A-312025F5, A-310752F6, A-310364F3: Joint Application of Verizon Communications Inc. and MCI, Inc. For Approval of Agreement and Plan of Merger.

**South Carolina Public Service Commission**

Docket No. 90-626-C: In Re: Generic Proceeding to Consider Intrastate Incentive Regulation.

Docket No. 90-321-C: In Re: Petition of Southern Bell Telephone and Telegraph Company for Revisions to its Access Service Tariff Nos. E2 and E16.

Docket No. 88-472-C: In Re: Petition of AT&T of the Southern States, Inc., Requesting the Commission to Initiate an Investigation Concerning the Level and Structure of Intrastate Carrier Common Line (CCL) Access Charges.

Docket No. 92-163-C: In Re: Position of Certain Participating South Carolina Local Exchange Companies for Approval of an Expanded Area Calling (EAC) Plan.

Docket No. 92-182-C: In Re: Application of MCI Telecommunications Corporation, AT&T Communications of the Southern States, Inc., and Sprint Communications Company, L.P., to Provide IntraLATA Telecommunications Services.

Docket No. 95-720-C: In Re: Application of BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company for Approval of an Alternative Regulation Plan.

Docket No. 96-358-C: In Re: Interconnection Agreement Negotiations Between AT&T Communications of the Southern States, Inc. and BellSouth Telecommunications, Inc., Pursuant to 47 U.S.C. § 252.

Docket No. 96-375-C: In Re: Interconnection Agreement Negotiations Between AT&T Communications of the Southern States, Inc. and GTE South Incorporated Pursuant to 47 U.S.C. § 252.

Docket No. 97-101-C: In Re: Entry of BellSouth Telecommunications, Inc. into the InterLATA Toll Market.

## **Exhibit DJW-1**

Docket No. 97-374-C: In Re: Proceeding to Review BellSouth Telecommunications, Inc. Cost for Unbundled Network Elements.

Docket No. 97-239-C: Intrastate Universal Service Fund.

Docket No. 97-124-C: BellSouth Telecommunications, Inc. Revisions to its General Subscriber Services Tariff and Access Service Tariff to Comply with the FCC's Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996.

Docket No. 1999-268-C: Petition of Myrtle Beach Telephone, LLC, for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Horry Telephone Cooperative, Inc.

Docket No. 1999-259-C: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996.

Docket No. 2001-65-C: Generic Proceeding to Establish Prices for BellSouth's Interconnection Services, Unbundled Network Elements and Other Related Elements and Services.

Docket No. 2003-326-C: In Re: Implementation of Requirements Arising from Federal Communications Commission Triennial UNE Review: Local Circuit Switching for Mass Market Customers.

Docket No. 2003-227-C: Application of Hargray Wireless, LLC for Designation as an Eligible Telecommunications Carrier under 47 U.S.C. 214(e)(2).

### **South Dakota Public Utilities Commission**

Docket No. TC03-191: In the Matter of the Filing by WWC License, LLC d/b/a CellularOne for Designation as an Eligible Telecommunications Carrier in Other Rural Areas.

Docket No. TC03-193: In the Matter of the Petition of RCC Minnesota, Inc., and Wireless Alliance, L.L.C., for Designation as an Eligible Telecommunications Carrier under 47 U.S.C. §214(e)(2).

### **Tennessee Public Service Commission**

Docket No. 90-05953: In Re: Earnings Investigation of South Central Bell Telephone Company.

Docket Nos. 89-11065, 89-11735, 89-12677: AT&T Communications of the South Central States, MCI Telecommunications Corporation, US Sprint Communications Company -- Application for Limited IntraLATA Telecommunications Certificate of Public Convenience and Necessity.

Docket No. 91-07501: South Central Bell Telephone Company's Application to Reflect Changes in its Switched Access Service Tariff to Limit Use of the 700 Access Code.

### **Tennessee Regulatory Authority**

Docket No. 96-01152: In Re: Petition by AT&T Communications of the South Central States, Inc. for Arbitration under the Telecommunications Act of 1996 and Docket No. 96-01271: In Re: Petition by MCI Telecommunications Corporation for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the

Telecommunications Act of 1996 (consolidated).

Docket No. 96-01262: In Re: Interconnection Agreement Negotiations Between AT&T of the South Central States, Inc. and BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. § 252.

Docket No. 97-01262: Proceeding to Establish Permanent Prices for Interconnection and Unbundled Network Elements.

Docket No. 97-00888: Universal Service Generic Contested Case.

Docket No. 99-00430: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996.

Docket No. 97-00409: In Re: All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission Docket No. 96-128.

Docket No. 03-00119: In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc.

Docket No. 03-00491: In Re: Implementation of Requirements Arising from Federal Communications Commission Triennial UNE Review: Local Circuit Switching for Mass Market Customers.

Docket No. 06-00093: In Re: Joint Filing of AT&T, Inc., BellSouth Corporation, and BellSouth's Certified Tennessee Subsidiaries Regarding Change of Control.

**Public Utility Commission of Texas**

Docket No. 12879: Application of Southwestern Bell Telephone Company for Expanded Interconnection for Special Access Services and Switched Transport Services and Unbundling of Special Access DS1 and DS3 Services Pursuant to P. U. C. Subst. R. 23.26.

Docket No. 18082: Complaint of Time Warner Communications against Southwestern Bell Telephone Company.

Docket No. 21982: Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996.

Docket No. 23396: Joint Petition of CoServ, LLC d/b/a CoServ Communications and Multitechnology Services, LP d/b/a CoServ Broadband Services for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Southwestern Bell Telephone Company.

Docket No. 24015: Consolidated Complaints and Requests of Post-Interconnection Dispute Resolution Regarding Inter-Carrier Compensation for FX-Type Traffic Against Southwestern Bell Telephone Company.

PUC Docket No. 27709: Application of NPCR, Inc., dba Nextel Partners for Eligible Telecommunications Carrier Designation (ETC).

PUC Docket No. 28744: Impairment Analysis for Dedicated Transport.

PUC Docket No. 28745: Impairment Analysis for Enterprise Loops.

PUC Docket No. 29144: Application of Dobson Cellular Systems, Inc., for Designation as an Eligible

Telecommunications Carrier (ETC) pursuant to 47 U.S.C. 241 (e) and P.U. C. Subst. Rule 26.418.

**State of Vermont Public Service Board**

Docket No. 6533: Application of Verizon New England Inc. d/b/a Verizon Vermont for a Favorable Recommendation to Offer InterLATA Services Under 47 U.S.C. 271.

Docket No. 6882: Investigation into Public Access Line Rates of Verizon New England, Inc., d/b/a Verizon Vermont.

Docket No. 6934: Petition of RCC Atlantic Inc. for designation as an Eligible Telecommunications Carrier in areas served by rural telephone companies under the Telecommunications Act of 1996.

**Virginia State Corporation Commission**

Case No. PUC920043: Application of Virginia Metrotel, Inc. for a Certificate of Public Convenience and Necessity to Provide InterLATA Interexchange Telecommunications Services.

Case No. PUC920029: Ex Parte: In the Matter of Evaluating the Experimental Plan for Alternative Regulation of Virginia Telephone Companies.

Case No. PUC930035: Application of Contel of Virginia, Inc. d/b/a GTE Virginia to implement community calling plans in various GTE Virginia exchanges within the Richmond and Lynchburg LATAs.

Case No. PUC930036: Ex Parte: In the Matter of Investigating Telephone Regulatory Methods Pursuant to Virginia Code § 56-235.5, & Etc.

Case No. PUC-200540051: Application of Verizon Communications Inc. and MCI, Inc. for approval of Agreement and Plan of Merger resulting in the indirect transfer of control of MCImetro Access Transmission Services of Virginia, Inc., to Verizon Communications Inc.

**Washington Utilities and Transportation Commission**

Docket Nos. UT-941464, UT-941465, UT-950146, and UT-950265 (Consolidated): Washington Utilities and Transportation Commission, Complainant, vs. US West Communications, Inc., Respondent; TCG Seattle and Digital Direct of Seattle, Inc., Complainant, vs. US West Communications, Inc., Respondent; TCG Seattle, Complainant, vs. GTE Northwest Inc., Respondent; Electric Lightwave, Inc., vs. GTE Northwest, Inc., Respondent.

Docket No. UT-950200: In the Matter of the Request of US West Communications, Inc. for an Increase in its Rates and Charges.

Docket No. UT-000883: In the Matter of the Petition of U S West Communications, Inc. for Competitive Classification.

Docket No. UT-050814: In the Matter of the Joint Petition of Verizon Communications Inc., and MCI, Inc. for a Declaratory Order Disclaiming Jurisdiction Over or, in the Alternative a Joint Application for Approval of, Agreement and Plan of Merger.

**Public Service Commission of West Virginia**

Case No. 02-1453-T-PC: Highland Cellular, Inc. Petition for consent and approval to be designated as an eligible telecommunications carrier in the areas served by Citizens Telecommunications Company of West Virginia.

Case No. 03-0935-T-PC: Easterbrooke Cellular Corporation Petition for consent and approval to be designated as an eligible telecommunications carrier in the area served by Citizens Telecommunications Company of West Virginia d/b/a Frontier Communications of West Virginia.

**Public Service Commission of Wyoming**

Docket No. 70000-TR-95-238: In the Matter of the General Rate/Price Case Application of US West Communications, Inc. (Phase I).

Docket No. PSC-96-32: In the Matter of Proposed Rule Regarding Total Service Long Run Incremental Cost (TSLRIC) Studies.

Docket No. 70000-TR-98-420: In the Matter of the Application of US West Communications, Inc. for authority to implement price ceilings in conjunction with its proposed Wyoming Price Regulation Plan for essential and noncompetitive telecommunications services (Phase III).

Docket No. 70000-TR-99-480: In the Matter of the Application of US West Communications, Inc. for authority to implement price ceilings in conjunction with its proposed Wyoming Price Regulation Plan for essential and noncompetitive telecommunications services (Phase IV).

Docket No. 70000-TR-00-556: In the Matter of the Filing by US West Communications, Inc. for Authority to File its TSLRIC 2000 Annual Input Filing and Docket No. 70000-TR-00-570: In the Matter of the Application of US West Communications, Inc. for Authority to File its 2000 Annual TSLRIC Study Filing.

Docket No. 70042-AT-04-4: In the Matter of the Petition of WWC Holding Co., Inc., d/b/a CellularOne for Designation as an Eligible Telecommunications Carrier in Areas Served by Qwest Corporation, and Docket No. 70042-AT-04-5: In the Matter of the Petition of WWC Holding Co., Inc., d/b/a CellularOne for Designation as an Eligible Telecommunications Carrier in Clark, Basin, Frannie, Greybull, Lovell, Meeteetse, Burlington, Hyattville, and Tensleep (consolidated).

**Public Service Commission of the District of Columbia**

Formal Case No. 814, Phase IV: In the Matter of the Investigation into the Impact of the AT&T Divestiture and Decisions of the Federal Communications Commission on Bell Atlantic - Washington, D. C. Inc.'s Jurisdictional Rates.

**Puerto Rico Telecommunications Regulatory Board**

Case No. 98-Q-0001: In Re: Payphone Tariffs.

Case No. JRT-2001-AR-0002: In the Matter of Interconnection Rates, Terms and Conditions between WorldNet Telecommunications, Inc. and Puerto Rico Telephone Company.

## **Exhibit DJW-1**

Case No. JRT-2003-AR-0001: Re: Petition for Arbitration pursuant to Section 252(b) of the Federal Communications Act, and Section 5(b), Chapter II of the Puerto Rico Telecommunications Act, regarding interconnection rates, terms, and conditions.

Case No. JRT-2004-Q-0068: Telefónica Larga Distancia de Puerto Rico, Inc., Complainant, v. Puerto Rico Telephone Company, Defendant.

Case Nos. JRT-2005-Q-0121 and JRT-2005-Q-0218: Telefónica Larga Distancia de Puerto Rico, Inc., and WorldNet Telecommunications, Inc., Plaintiffs, v. Puerto Rico Telephone Company, Inc., Defendant.

Case No. JRT-2010-AR-0001: In the Matter of WorldNet Telecommunications, Inc., Petition for arbitration pursuant to Section 47 U.S.C. 252(b) of the Federal Communications Act and Section 5(b), Chapter III, of the Puerto Rico Telecommunications Act, regarding interconnection rates, terms, and conditions with Puerto Rico Telephone Company.

**COMMENTS/DECLARATIONS - FEDERAL COMMUNICATIONS COMMISSION**

CC Docket No. 92-91: In the Matter of Open Network Architecture Tariffs of Bell Operating Companies.

CC Docket No. 93-162: Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access.

CC Docket No. 91-141: Common Carrier Bureau Inquiry into Local Exchange Company Term and Volume Discount Plans for Special Access.

CC Docket No. 94-97: Review of Virtual Expanded Interconnection Service Tariffs.

CC Docket No. 94-128: Open Network Architecture Tariffs of US West Communications, Inc.

CC Docket No. 94-97, Phase II: Investigation of Cost Issues, Virtual Expanded Interconnection Service Tariffs.

CC Docket No. 96-98: In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996.

CC Docket No. 97-231: Application by BellSouth to Provide In-Region InterLATA Services.

CC Docket No. 98-121: Application by BellSouth to Provide In-Region InterLATA Services.

CCB/CPD No. 99-27: In the Matter of Petition of North Carolina Payphone Association for Expedited Review of, and/or Declaratory Ruling Concerning, Local Exchange Company Tariffs for Basic Payphone Services.

CC Docket No. 96-128: In the Matter of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CCB/CPD No. 99-31: Oklahoma Independent Telephone Companies Petition for Declaratory Ruling (consolidated).

CCB/CPD No. 00-1: In the Matter of the Wisconsin Public Service Commission Order Directing Filings.

CC Docket No. 99-68: In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic.

File No. EB-01-MD-020: In the Matter of Sprint Communications Company, L.P., Complainant v. Time Warner Telecom, Inc. Defendant.

Request by the American Public Communications Council that the Commission Issue a Notice of Proposed Rulemaking to Update the Dial-Around Compensation Rate.

File Nos. EB-02-MD-018-030: In the Matter of Communications Vending Corp. of Arizona, et. al., Complainants, v. Citizens Communications Co. f/k/a Citizens Utilities Co. and Citizens Telecommunications Co., et. al., Defendants.

CC Docket No. 96-45: In the Matter of Federal-State Joint Board on Universal Service, Cellular South License, Inc., RCC Holdings, Inc., Petitions for designation as an Eligible Telecommunications Carrier in the State of Alabama.

CC Docket No. 96-45: In the Matter of Federal-State Joint Board on Universal Service, Declaration in Support of the Comments to the Federal-State Joint Board of the Rural Cellular Association and the Alliance of Rural CMRS Carriers.

**REPRESENTATIVE TESTIMONY – STATE, FEDERAL, AND OVERSEAS COURTS**

**Court of Common Pleas, Philadelphia County, Pennsylvania**

Shared Communications Services of 1800-80 JFK Boulevard, Inc., Plaintiff, v. Bell Atlantic Properties, Inc., Defendant.

**Texas State Office of Administrative Hearings**

SOAH Docket No. 473-00-0731: Office of Customer Protection (OCP) Investigation of Axces, Inc. for Continuing Violations of PUC Substantive Rule §26.130, Selection of Telecommunications Utilities, Pursuant to Procedural Rules 22.246 Administrative Penalties.

SOAH Docket No. 473-03-3673: Application of NPCR, Inc., dba Nextel Partners for Eligible Telecommunications Carrier Designation (ETC).

SOAH Docket No. 473-04-4450: Application of Dobson Cellular Systems, Inc., for Designation as an Eligible Telecommunications Carrier (ETC) pursuant to 47 U.S.C. 241 (e) and P.U. C. Subst. Rule 26.418.

**Superior Court for the State of Alaska, First Judicial District**

Richard R. Watson, David K. Brown and Ketchikan Internet Services, a partnership of Richard R. Watson and David K. Brown, Plaintiffs, v. Karl Amylon and the City of Ketchikan, Defendants.

**Superior Court for the State of Alaska, Third Judicial District**

Dobson Cellular Systems, Inc., Plaintiff, v. Frontline Hospital, LLC, Defendant.

**United States District Court for the District of South Carolina, Columbia Division**

Brian Wesley Jeffcoat, on behalf of himself and others similarly situated, Plaintiffs, v. Time Warner Entertainment - Advance/Newhouse Partnership, Defendant.

**United States District Court for the Northern District of Texas, Fort Worth Division**

Multitechnology Services, L. P. d/b/a CoServ Broadband Services, Plaintiffs, v. Southwestern Bell Telephone Company, Defendant.

Multitechnology Services, L. P. d/b/a CoServ Broadband Services, Plaintiffs, v. Verizon Southwest f/k/a GTE Southwest Incorporated, Defendant.

**United States District Court for the District of Oregon**

Time Warner Telecom of Oregon, LLC, and Qwest Communications Corporation, Plaintiffs, v. The City of Portland, Defendant.

**High Court of the Hong Kong Special Administrative Region, Court of First Instance**

Commercial List No. 229 of 1999: Cable and Wireless HKT International Limited, Plaintiff v. New World Telephone Limited, Defendant.

**REPRESENTATIVE TESTIMONY – PRIVATE COMMERCIAL ARBITRATION TRIBUNALS**

**American Arbitration Association**

Southwestern Bell Telephone Company, Claimant vs. Time Warner Telecom, Respondent.

New Access Communications LLC, Choicetel LLC and Emergent Communications LLC, Claimants vs. Qwest Corporation, Respondent (Case No. 77 Y 1818 0031603).

**CPR Institute for Dispute Resolution**

Supra Telecommunications and Information Systems, Inc., Claimant vs. BellSouth Telecommunications, Inc., Respondent.

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