

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

HAWAIIAN TELCOM, INC. REPLY TO COMMENTS

Steven Golden
Vice President External Affairs
Hawaiian Telcom, Inc.
Hawaiian Telcom Services Company, Inc.
1177 Bishop Street
Honolulu, Hawaii 96813

Gregory J. Vogt
Suzanne Yelen*
Law Offices of Gregory J. Vogt, PLLC
2121 Eisenhower Ave.
Suite 200
Alexandria, VA 22314
(703) 838-0115
Fax: (703) 684-3620
gvogt@vogtlawfirm.com

October 4, 2010

*Licensed to practice law in the District of Columbia, not licensed in Virginia

SUMMARY

Hawaiian Telcom (“HTI”) supports the Commission’s goal of facilitating and expediting the deployment of advanced services facilities. However, the comments in this proceeding demonstrate that some of the rules proposed by the Commission risk making the pole attachment process more cumbersome. Any rules the Commission adopts must take into account the real-world conditions faced by pole owners, improve the attachment process, and protect the safety of utility workers and the public.

Deadlines or timeframes adopted by the Commission must take into account actual conditions affecting the pole attachment process. For example, local ordinances and environmental conditions and regulations can substantially lengthen the time needed for make-ready work and are beyond the pole owner’s control. Similarly, because pole owners can be unfamiliar with wireless technology and wireless attachments often involve active components, processing and installing wireless attachments requires more time than typical cable and telecommunications attachments. In addition, if a carrier receives applications for a substantial number of pole attachments at the same time, it will need additional time for processing. The number of pole attachment requests each pole owner can address will vary depending on the carrier’s size and circumstances, such as the difficult terrain and multiple islands faced by HTI. HTI supports the use of third-party contractors, but the Commission must recognize that most telephone companies have collective bargaining agreements with their employees which control the process and time needed to gain approval for third-party contractors. Because of the substantial number of factors affecting the attachment process that are outside of the pole owner’s

control, the Commission should not impose substantial fines for delays during the pole attachment process.

HTI opposes the Commission's proposals to make one pole owner serve as manager for jointly-owned poles, to have one pole owner serve as a clearinghouse for payments among attachers, and to allow payments for make-ready work in stages. These would put unreasonable demands on the pole owner and hinder in the attachment process. HTI also believes that allowing attachers to overlash without providing notice to the pole owner will delay the processing of future attachment applications and increase the likelihood of safety violations.

The Commission should always ensure that safety for both utility employees and the public is a priority. Unauthorized attachments greatly increase the risk of hazardous conditions and can expose the pole owner to legal action. Therefore, HTI urges the Commission to permit pole attachment contracts to include increased penalties and incorporate significant sanctions for unauthorized attachments in those cases where there is no contract between the pole owner and the attacher. In addition, suggestions that the Commission should allow "non-serious" violations of safety rules to be addressed after an attachment is installed should be rejected. Generally accepted engineering practices and state safety rules are essential to protecting utility workers and the public and should not be disregarded for expediency.

HTI urges the Commission to adopt rules that are sufficiently flexible to take the necessary factors into account and ensure that safety is a paramount consideration.

TABLE OF CONTENTS

I.	THE COMMISSION’S POLE ATTACHMENT RULES MUST REFLECT REAL-WORLD CONDITIONS.	1
A.	Local Ordinances	3
B.	Environmental Conditions and Regulations	5
C.	Volume Limitations	6
D.	Third-Party Contractors	7
E.	Wireless Attachments	8
F.	Damages.....	9
II.	SEVERAL PROPOSALS WILL MAKE THE ATTACHMENT PROCESS LESS EFFICIENT.....	11
A.	Jointly-Owned Poles and Clearinghouse	11
B.	Overlapping.....	14
C.	Make-Ready Work Installment Payments	16
III.	STRONG ENFORCEMENT AGAINST UNAUTHORIZED ATTACHMENTS WILL MAKE THE ATTACHMENT PROCESS MORE EFFICIENT AND LESS COSTLY.....	18
IV.	THE COMMISSION SHOULD NOT SACRIFICE SAFETY IN AN EFFORT TO INCREASE EFFICIENCY.....	20
V.	CONCLUSION.....	21

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

HAWAIIAN TELCOM, INC. REPLY TO COMMENTS

Hawaiian Telcom, Inc. (“HTI”) hereby submits its reply to the comments filed in response to the Federal Communications Commission’s (“FCC” or “Commission”) Further Notice of Proposed Rulemaking (“FNPRM”) in the above-captioned docket.¹ The comments in this proceeding demonstrate the thought and consideration that pole owners, attachers, and those who are both owners and attachers have invested in improving the pole attachment process. However, the comments also confirm that several of the proposed changes will hinder, rather than assist, the placement of new attachments. Further, parties emphasize that installation of facilities is affected by factors beyond the pole owner’s control and that safety concerns must always be paramount. Therefore, HTI urges the Commission to adopt rules that take into account the actual conditions pole owners face, facilitate the attachment process, and protect public and utility worker safety.

I. THE COMMISSION’S POLE ATTACHMENT RULES MUST REFLECT REAL-WORLD CONDITIONS.

In the FNPRM, the Commission has proposed several changes that, although they may seem reasonable standing alone, do not reflect the actual issues that pole owners face

¹ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, Order and Further Notice of Proposed Rulemaking, WC Docket No. 07-245, GN Docket No. 09-51 (rel. May 20, 2010) (“Order and FNPRM”).*

in accommodating pole attachments. For example, the Commission notes that its proposed timeline “appears to have the potential to speed pole access more than 50 percent of the time, and to cut average make-ready time in half (or better) in approximately 30 percent of cases.”² This statement presumes that any delays in the attachment process can be rectified solely by the pole owner acting more quickly. Similarly, the Commission proposes that pole owners make available “a schedule of common make-ready charges.”³ This proposal rests on the assumption that pole owners can generally forecast the costs of make-ready work.

As the service provider for an insular area, HTI faces unique circumstances that increase the cost and difficulty of installing facilities and providing services. Hawaii is made up of a series of volcanic islands separated from the mainland United States by deep ocean waters. The state’s six main islands (Kauai, Oahu, Molokai, Lanai, Maui, and Hawaii) are themselves divided by deep ocean channels that span distances of over one hundred miles. Equipment and supplies must be shipped long distances, which increases their expense. HTI must maintain personnel on each island or move them from one island to another. Further, the Island of Hawaii is sparsely populated with mountainous, uneven terrain and continuous volcanic activity. Grounding and undergrounding are therefore more difficult and costly. In addition to seismic activity, the State of Hawaii’s insular location makes it more subject to coastal salt erosion and violent storms. These factors make the installation of all facilities, including pole attachments, more challenging than in most areas on the mainland.

² Order and FNPRM, ¶ 26 (footnote omitted).

³ Order and FNPRM, ¶ 71.

Make-ready work and installation of attachments often require pole owners to address: legal requirements, such as permitting, collective bargaining, and environmental protection; limited resources, especially for smaller local exchange companies like HTI; and technical expertise, particularly for resolving environmental hazards and installing equipment unfamiliar to the pole owner. As the commenters in this proceeding have demonstrated, substantial flexibility is needed because each pole attachment can present different challenges. If the Commission adopts generalized timeframes and cost schedule requirements, it must ensure that its rules do not place unrealistic burdens on pole owners or make them liable for circumstances beyond their control.

A. Local Ordinances

In developing any suggested or required timeframes for completion of pole attachments, the Commission must take into account state, county, and city ordinances that affect pole owner access to facilities. Several commenters support the Commission's proposal to adopt strict timelines for completing attachments, including make-ready work,⁴ but ignore the real-world factors pole owners confront in gaining access to facilities. As others have made clear, any timeframes must be sufficiently flexible to accommodate numerous circumstances, including local requirements.⁵

⁴ Comments of Time Warner Cable Inc., WC Docket No. 07-245, GN Docket No. 09-51, at 15-20 (filed Aug. 16, 2010) ("Time Warner Cable Comments") (proposing more abbreviated timeline than in FNPRM); Comments of tw telecom inc. and COMPTTEL, WC Docket No. 07-245, GN Docket No. 09-51, at 10-11 (filed Aug. 16, 2010) ("TWTC/COMPTTEL Comments"); Comments of Fiber Technologies Networks, L.L.C., WC Docket No. 07-245, GN Docket No. 09-51, at 5-8 (filed Aug. 16, 2010) (proposing shorter time frames than in FNPRM); Comments of NTELOS, Inc., WC Docket No. 07-245, GN Docket No. 09-51, at 5-7 (filed Aug. 16, 2010) (proposing shorter time frames than in the FNPRM).

⁵ Comments of Verizon, WC Docket No. 07-245, GN Docket No. 09-51, at 30 (filed Aug. 16, 2010) ("Verizon Comments"); Comments of the United States Telecom Association, WC Docket No. 07-245, GN Docket No. 09-51, at 20-21 (filed Aug. 16,

For example, in the State of Hawaii, permits are often required to allow a pole owner to block streets to enter manholes or to block traffic lanes with installation vehicles. Before any make-ready work implicating a local ordinance can be initiated, HTI must obtain a permit and can only perform the work according to the permit's terms, which often restrict work to certain hours of the day to minimize inconvenience to the public. In addition, in many cases, permits are issued to only one utility at a time. Thus, if the water company has a permit to block the street to perform maintenance, the telephone company will not be granted a permit until the water company has completed its work. Further, permits that allow pole owners to block streets near shopping districts and shopping centers are not granted during the holiday seasons (from Thanksgiving through New Year's Day), except in emergency situations.

Pole owners should not face the threat of contract or regulatory enforcement action if they fail to meet minimum response timeframes as a result of delays from permitting processes. Any mandatory processing timelines must take into account the delays involved in obtaining permits. For example, if a particular pole attachment request requires make-ready work, any timeframe for completing such work should be suspended while a request for a permit from the local authority is pending. Although it is reasonable to expect that the pole owner apply for the permit in a timely manner, the pole

2010) ("USTelecom Comments"); Comments of the Alliance for Fair Pole Attachment Rules, Comments of United States Telecom Association, WC Docket No. 07-245, GN Docket No. 09-51, at 46, 50 (filed Aug. 16, 2010) ("Fair Attachment Alliance Comments"); Comments of Qwest Communications International, WC Docket No. 07-245, GN Docket No. 09-51, at 8-9 (filed Aug. 16, 2010) ("Qwest Comments"); Comments of the Independent Telephone & Telecommunications Alliance, WC Docket No. 07-245, GN Docket No. 09-51, at 5 (filed Aug. 16, 2010) ("ITTA Comments"); Comments of the Edison Electric Institute and the Utilities Telecom Council, WC Docket No. 07-245, GN Docket No. 09-51, at 34 (filed Aug. 16, 2010) ("EEI/UTC Comments"); Comments of the Coalition of Concerned Utilities, WC Docket No. 07-245, GN Docket No. 09-51, at 22 (filed Aug. 16, 2010) ("Coalition Comments").

owner should not be penalized for the requirements of or delays in obtaining permits from local authorities.

B. Environmental Conditions and Regulations

Although some commenters urge the Commission to adopt both strict timeframes for completing attachment requests and specific lists of “standard” costs for make-ready work, any rules regarding timing and costs must take into account environmental conditions and regulations.⁶ In places with varied and often difficult terrain, such as Hawaii, differing conditions can result in vastly increased costs and time for similar work in different areas served by the same carrier. For instance, pole replacement costs in volcanic rock on narrow roads located on steep hillsides are substantially higher than the costs of pole replacement in other areas.

Environmental regulations also increase make-ready times and costs. For instance, pumping water out of a manhole to perform make-ready work can either be a routine matter performed by the utility or an involved process involving third-party experts. Environmental laws require water to be pumped into special tankers (trucks), depending on what substances are detected in the water. Any Commission rules should allow for increased time limits and/or cost estimates to address and comply with environmental circumstances and regulations.

⁶ Comments of Idaho Power Company, WC Docket No. 07-245, GN Docket No. 09-51, at 3 (filed Aug. 16, 2010) (“Idaho Power Comments”) (stating that environmental conditions affect pole attachment process); EEI/UTC Comments at 34 (noting that terrain and weather affect pole attachment process); Coalition Comments at 23; Comments of Alliant Energy, WC Docket No. 07-245, GN Docket No. 09-51, at 3 (filed Aug. 16, 2010).

C. Volume Limitations

Some commenters have suggested that any timeframes adopted by the Commission should not apply when the attacher requests a high volume of attachments.⁷ HTI agrees that a large number of attachments included in contemporaneous applications will lengthen the time needed to fill the requests. However, a one-size-fits-all number threshold will not take into account the resources of individual pole owners or local conditions.

Smaller companies such as HTI have limited resources and cannot process the same volume of pole attachment requests as larger carriers. For example, AT&T suggests that a single request for attachment to 200 or more poles should result in a suspension of any Commission-adopted timeframes.⁸ Although a large company like AT&T might have the resources to address up to 200 simultaneous attachment requests, HTI could not possibly handle requests for such a large volume of attachments in the timeframes proposed by the Commission. In addition, pole owners must respond to the total volume of attachments included in applications pending at a particular time, not just to those from one particular attacher. HTI could not quickly complete surveys and make-ready work for applications for 200 attachments regardless of whether they are from one attacher or several. In addition, the Commission should note that processing an application requires less time than completing make-work. For example, although a carrier like HTI may be able to perform the survey work for 100 poles within the

⁷ *See, e.g.*, Verizon Comments at 32-33.

⁸ Comments of AT&T Inc., WC Docket No. 07-245, GN Docket No. 09-51, at 30 (filed Aug. 16, 2010) (“AT&T Comments”).

Commission's proposed deadlines, it could not perform make-ready work for so many poles within the time frame suggested in the FNPRM.

Moreover, local conditions, such as the fact that HTI has personnel and equipment divided among the several islands that make up Hawaii, increase the length of time needed to complete surveys and make-ready work. HTI supports allowing pole owners to self-define what constitutes a large request, based on both the absolute number of attachment applications pending and specific local conditions, such as location.⁹ To ensure that potential attachers are aware of these limits, HTI suggests that they be made publicly available, such as by posting them on the pole owner's website.

D. Third-Party Contractors

The FNPRM contains a number of proposals to facilitate the use of third-party contractors.¹⁰ As numerous commenters demonstrate, the use of third-party contractors must be consistent with pole owner internal policies and collective bargaining agreements.

If the Commission believes that additional rules regarding third-party contractors are necessary, it should confirm that work performed by attachers' third-party contractors are subject to the same requirements as work performed by outside contractors on behalf of pole owners. For example, pole owners should be allowed to supervise any third-party work on pole owner facilities and bill the attacher for these costs if the pole owner supervises work done by third-party contractors on its own behalf in similar

⁹ See Comments of CPS Energy, WC Docket No. 07-245, GN Docket No. 09-51, at 10 (filed Aug. 16, 2010) ("recommends allowing municipal utilities to self-define small, medium, and large limits").

¹⁰ Order and FNPRM, ¶¶ 55-68.

circumstances. In addition, pole owners should be permitted to require that third-party work be inspected by a pole owner's engineer or authorized agent if the pole owner applies these standards to its own third-party contractors. HTI supports requiring pole owners to establish a list of qualified third-party contractors, although for jointly-owned poles those contractors will have to be acceptable to both pole owners.

Many of the comments in this proceeding reiterate that most telephone company pole owners have collective bargaining agreements which limit the use of third-party contractors.¹¹ The FCC should not adopt rules that are inconsistent with pole owner's collective bargaining obligations. For example, although HTI's collective bargaining agreement allows for the use of third-party contractors, HTI must meet and discuss each proposal to use such contractors with the appropriate union representatives, even if the third-party contractors are to be employed by the attacher. The need to engage in such discussions increases the time needed to process a pole attachment application.

E. Wireless Attachments

The Commission requests comment on a timeline for the attachment of wireless facilities.¹² Although some wireless carriers state that the same timeframes should apply to wireless and wireline attachments,¹³ they fail to recognize the increased difficulties wireless attachments present.¹⁴ Any FCC-mandated or recommended timeframes for

¹¹ Verizon Comments at 39-40; USTelecom Comments at 23.

¹² Order and FNPRM, ¶ 19.

¹³ Verizon Comments at 34; Comments of T-Mobile USA, Inc., WC Docket No. 07-245, GN Docket No. 09-51, at 8-10 (filed Aug. 16, 2010) (stating that "'wired' timeline could be applied two wireless with a few appropriate adjustments").

¹⁴ See Qwest Comments at 10 (noting difficulties involving wireless attachments); Coalition Comments at 36-40 (explaining numerous challenges presented by wireless attachments).

completing wireless attachments must recognize that such attachments are more complicated than typical telephone or cable attachments and require additional time to process.

Wireless attachments are typically “active,” *i.e.*, require electricity, and may also transmit microwave signals.¹⁵ This means that further coordination with the electrical provider is required because the attachment is installed above the normal telecommunications space and must draw power from the electrical facilities on the pole. In addition, increased vigilance regarding safety is needed to avoid injury to workers from “active” components.¹⁶ Moreover, specialized knowledge is often required to evaluate and install wireless attachments, which increases the technical expertise and coordination above that needed for wireline attachments.¹⁷ For example, most HTI employees do not have experience installing microwave equipment so HTI must ensure that its employees are not injured when they climb poles and/or pass through the signals with HTI’s boom trucks.

F. Damages

The FNPRM asks if the Commission should amend its rules “to specify that compensatory damages may be awarded where an unlawful denial or delay of access is established, or a rate, term, or condition is found to be unjust or unreasonable.”¹⁸

¹⁵ ITTA Comments at 2; Coalition Comments at 36.

¹⁶ ITTA Comments at 2-3; EEI/UTC Comments at 26.

¹⁷ Comments of National Rural Electric Cooperative Association, WC Docket No. 07-245, GN Docket No. 09-51, at 13-14 (filed Aug. 16, 2010) (“NRECA Comments”) (noting lack of experience with wireless attachments).

¹⁸ Order and FNPRM, ¶ 86.

Although some commenters support substantial fines against pole owners,¹⁹ many recognize that this type of liability is unnecessary and fails to take into account real-world circumstances.²⁰

As explained above, numerous factors can affect pole attachments, including local ordinances, environmental requirements, varying conditions for installation, repair, and maintenance, and the number of outstanding pole attachment requests. Allowing compensation for delays will put unreasonable burdens on pole owners for conditions outside of their control. If the Commission determines that damages for delays should be awarded, they should be limited to egregious circumstances that are within the control of the pole owner. Further, if the pole owner presents evidence that the delay was caused by factors beyond its control, the burden should be on the attacher to show that the delay was the pole owner's fault.

The Commission asks whether it should eliminate the limitation in rule 1.404(m) that requires an attacher to file a complaint within thirty days of denial of access to a pole, duct, or conduit.²¹ HTI agrees that the thirty-day deadline can hamper informal dispute resolution and mediation between the parties because the attacher must file a complaint promptly to protect its legal rights. However, eliminating the deadline altogether exposes pole owners to having to defend a denial of an attachment application many months or years later and requires them to keep records in case legal action is brought at some indefinite point in the future. Instead, HTI proposes that the

¹⁹ Time Warner Cable Comments at 26-28; TWTC/COMPTEL Comments at 18-19.

²⁰ Idaho Power Comments at 14; EEI/UTC Comments at 50-53; Coalition Comments at 88-93; AT&T Comments at 24-25.

²¹ Order and FNPRM, ¶ 82.

Commission extend the deadline to sixty days, which allows sufficient time for parties to pursue informal dispute resolution, including Commission mediation, but still requires an attacher to take action promptly so that the pole owner is not exposed to complaints years after the conduct at issue has occurred.

II. SEVERAL PROPOSALS WILL MAKE THE ATTACHMENT PROCESS LESS EFFICIENT.

Although the Commission desires to “speed access to utility poles,”²² commenters demonstrate that several of the FNPRM’s proposals will have the opposite effect. Forcing one pole owner to manage the attachment process for jointly owned poles, making pole owners serve as clearinghouses for payments among attachers, allowing overlashing without notice to the pole owner, and mandating installment payments for make-ready work will all lengthen and complicate the attachment process. Therefore, the Commission should modify its proposals to make them consistent with its stated goal of promoting timely deployment and competition.²³

A. Jointly-Owned Poles and Clearinghouse

The Commission proposes that for jointly-owned poles, a single pole owner serve as the managing utility for the pole attachment process. Although some commenters support this proposal, they fail to show how the numerous difficulties noted by other parties will be addressed.²⁴ Requiring that one entity manage jointly-owned poles is infeasible and would put unreasonable liability on the managing pole owner.

²² Order and FNPRM, ¶ 1.

²³ *Id.*

²⁴ *See, e.g.*, Verizon Comments at 38-39; Qwest Comments at 10-11; ITTA Comments at 6; Coalition Comments at 72-76.

When poles are owned by more than one utility, the rights and responsibilities of each owner are governed by contracts and state rules. For example, HTI's contracts with electrical utilities often put the cost and responsibility of pole removal on the electrical utility as long as HTI meets certain deadlines. If HTI were solely responsible for allowing attachments, the failure of an attacher to move its equipment by a required date could force HTI to bear the costs of removing a pole. In addition, pole owners are frequently subject to legal action when incidents involving utility poles result in damage or injury. Therefore, if one entity is managing jointly owned poles, it could allow attachments that result in liability on the other owner. As several commenters note, FCC rules will not affect the rights and liabilities imposed by these agreements²⁵ and may be in conflict with state laws.²⁶ If there is inconsistency between FCC rules and contract requirements and state laws, the managing pole owner will be in the position of either violating FCC rules or its contract and state law requirements.

Moreover, requiring a managing pole owner is likely to lead to increased delays, costs, and safety violations. Allowing one pole owner to authorize an attachment even if another pole owner fails to respond to a request may well lead to lawsuits, court-mandated work stoppages, and/or an increase in expense for all parties. In addition, allowing one pole owner to approve an attachment without affirmative consent of the other pole owner could result in safety violations that endanger pole owner and attacher employees and the public, as well as attachments that are inconsistent with one another. This is particularly likely when the joint pole owners are an electrical utility and a

²⁵ EEI/UTC Comments at 39; Coalition Comments at 73.

²⁶ EEI/UTC Comments at 39.

telephone company. For example, when an electrical utility is in the process of adding cable to a jointly-owned pole, it assesses the load on the pole and determines if the pole load would be within acceptable limits. If HTI, as the manager of the pole, were to approve an attachment even though it had not received a response from the electric utility, the attacher may install its facilities on the pole prior to the electric utility completing its own installation. When the electric utility field technicians then install the additional cable on the pole, they will not be aware that attacher facilities are now on the pole and the additional electric utility cable could result in the pole being overloaded, creating a hazardous situation. In contrast, a more targeted rule that requires joint owners to comply with the same obligations in responding to pole attachment requests submitted to only one of them would make the attachment process more efficient. Any enforcement action should be taken against the owner that fails to meet the FCC's requirements.

Similarly, the Commission's proposal to force a pole owner to "manage the transfer of funds"²⁷ when an existing attacher must rearrange its attachment to make room for a new attachments will only make the reimbursement process more difficult and time consuming.²⁸ Disagreements over appropriate compensation will take more time to resolve because the interested parties will be negotiating through a third party – the pole owner – rather than directly resolving any dispute. Moreover, the pole owner will have to expend resources to develop the appropriate accounting expertise needed to handle this process.²⁹ Instead, HTI urges the Commission to require that when a new attacher must

²⁷ Order and FNPRM, ¶ 73.

²⁸ Fair Attachment Alliance Comments at 54-56; NRECA Comments at 17; ITTA Comments at 6-7; Idaho Power Comments at 10-12; EEI/UTC Comments at 39-40.

²⁹ NRECA Comments at 17.

reimburse existing attachers for rearrangement costs, the pole owner must provide the names and contact information to the relevant parties and all attachers must negotiate in good faith among themselves.

Increasing numbers of pole attachments by multiple providers on a single pole has led to a significant decrease in excess space in many locations. To make the best use of the space available, attachers must utilize space on poles as efficiently as possible. In HTI's experience, some providers continue to string new attachments to the poles on which they already have facilities, rather than consolidating wires where possible to minimize the space used and load on the pole. Consolidation promotes competition, improves safety, and is consistent with generally accepted practices. It also limits the need for pole replacement, which reduces the costs, safety concerns, and adverse environmental impact associated with pole replacement. Therefore, the Commission should promote consolidation wherever possible and encourage the adoption of contract provisions which require consolidation whenever needed. An attacher should be responsible for the costs associated with consolidating its own attachments because consolidation is an accepted practice and will benefit all attachers by ensuring more available space on the pole.

B. Overlapping

Time Warner Cable asks the Commission to “reaffirm that cable operators may overlap existing attachments without advance notice or approval.”³⁰ However, in the same order cited by Time Warner in support of its contention that notice of overlapping is not required, the Commission explicitly found that for third-party overlapping, “the utility

³⁰ Time Warner Cable Comments at 28.

is entitled to notice of the overloading” and that “it would be reasonable for a pole attachment agreement to require notice of third party overloading.”³¹ Moreover, the Commission has never found it unreasonable for a pole owner to ask for prior notice of any type of overloading.

Time Warner has presented no basis for changing the Commission’s existing rules by forbidding pole owners from requiring advance notice of overloads, and allowing overloading without notice would impede the attachment process. If the pole owner has no record of an overload, it is more difficult for the pole owner to respond to pending and future pole attachment requests. For example, when HTI is processing a pole attachment application, it reviews its records regarding the facilities located on the relevant pole and conducts a visual inspection. If the facilities physically on the pole are not consistent with HTI’s records, HTI must attempt to reconcile the problem and determine to whom the unrecorded facilities belong. Then, because the survey has shown different facilities than those in its records, HTI must redo its engineering calculations to determine if the attachment can be accommodated, all of which takes additional time.

In addition, if pole owners do not receive notice of overloading, it vastly increases the risk of safety violations. Pole owners are often subject to legal action regarding any accidents or damages caused by their poles and thus have the strongest incentive to ensure that they are maintained in a safe manner in compliance with all relevant engineering and state requirements. If attachers can continually overload with no notice to the pole owner, the pole owner will not know that any change to the load of a

³¹ *Amendment of Commission’s Rules and Policies Governing Pole Attachments, Implementation of Section 703(e) of The Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12141, 12144 (¶¶ 74, 82) (2001).

particular pole has taken or will take place and will not be aware that it should inspect the pole to ensure that the all facilities on the pole meet safety requirements. In addition to exposing the public to potentially dangerous conditions, this could also subject a pole owner to legal action over unsafe conditions about which it had no notice.

Allowing pole owners to require advance notice of overlashing will not delay the attachment process because the pole owner is not required to act on the notice. The Commission has made clear that overlashing is subject to “compliance with generally accepted engineering practices”³² and third-party overlashing is “subject to the same safety, reliability, and engineering constraints that apply to overlashing one’s own pole attachment.”³³ Therefore, if a pole owner uses the overlashing notice received to remind attachers of engineering and safety requirements relevant to a particular overlash, this will only serve to promote compliance with the FCC’s requirements, while not delaying the attachment process.

C. Make-Ready Work Installment Payments

Many commenters demonstrate that allowing attachers to pay for make-ready work in installments will only delay the completion of necessary work while increasing the costs of attachments.³⁴ Some parties suggest that installment payments should be

³² *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, 6807-08 (¶ 64) (1998).

³³ *Id.* at 6809 (¶ 68).

³⁴ Verizon Comments at 27-28; ITTA Comments at 5; Idaho Power Comments at 9-10; EEI/UTC Comments at 38; Coalition Comments at 76-77.

adopted and that such payments are typical for third-party contractors.³⁵ However, these arguments highlight the crucial difference between utilities and third-party contractors and why installment payments are not appropriate in the attachment context. Utilities, unlike contractors, are not in the business of providing construction services and do not have expertise or resources devoted to managing installment payments.

To handle installment payments, pole owners would have to use personnel to track payments which will squander resources that could be used to process pole attachment applications. Further, to ensure that full payment is made, pole owners would need to stop all make-ready work in the event that payments are not received in a timely fashion. This will cause additional delay for all attachers. If an installment payment for a particular attachment is not received, the pole owner will need to divert its resources from performing that make-ready work to processing other make-ready work requests. Once payment on the first attachment is made, the pole owner will have to move its resources back to addressing the first attachment, to avoid running afoul of any deadlines. Forcing utility workers to move among incomplete projects wastes time that would be better spent completing the make-ready work. Requiring full payment for make-ready work upfront is consistent with minimizing the costs of attachments and the time for completing make-ready work for all parties.

³⁵ See TWTC/COMPTEL Comments at 16 (“TWTC usually pays contractors in stages as the work is completed. Third-party contractors are subject to competition, and payment by installment is the scheme yielded by a competitive market.”)

III. STRONG ENFORCEMENT AGAINST UNAUTHORIZED ATTACHMENTS WILL MAKE THE ATTACHMENT PROCESS MORE EFFICIENT AND LESS COSTLY.

The Commission asked a number of questions regarding unauthorized attachments and whether such attachments are a widespread problem.³⁶ The comments demonstrate that there is little consensus regarding the severity of this problem, but that the problem clearly exists.³⁷ However, given the risks and costs associated with unauthorized attachments, as well as the fact that penalties will only apply to those entities guilty of installing unauthorized attachments, the Commission should allow contracting parties to include penalties that provide a strong incentive to attachers to comply with the application process and adopt significant fines for unauthorized attachments where there is no agreement between the attacher and pole owner.

Numerous commenters note the many problems caused by unauthorized attachments.³⁸ First, such attachments present substantial safety hazards. Unauthorized attachments are installed without the benefit of any review by the pole owner to ensure that applicable safety and engineering requirements are being followed. Moreover, pole owners can be subject to legal action regarding unsafe conditions caused by the attachment, despite that they have no knowledge that the attachment even exists.

Second, unauthorized attachments also increase costs for all parties. Pole owners do not, by definition, have records of unauthorized attachments. This increases survey costs when the pole owner is trying to determine whether a new request can be

³⁶ Order and FNPRM, ¶¶ 89-98.

³⁷ Time Warner Comments at 30; TWTC/COMPTEL Comments at 27; Verizon Comments at 45-46; Idaho Power Comments at 15; EEI/UTC Comments at 55-56.

³⁸ Verizon Comments at 45-46; Idaho Power Comments at 15; Coalition Comments at 96-100.

accommodated. Before a new attachment can be approved, the pole owner will have to update its records, determine the owner of the unauthorized attachment, and address any existing safety issues.

Currently, under Commission rules, there are minimal consequences to installing an unauthorized attachment, and Commission decisions have invalidated contract provisions with sufficient penalties to deter unauthorized attachments.³⁹ Stronger penalties will deter entities from engaging in this dangerous practice. Regardless of how widespread this problem is, only those entities that intentionally install unauthorized attachments will be subject to the penalties so those entities complying with the Commission's rules will be unaffected.

Some commenters argue that increased penalties for unauthorized attachments are unwarranted because unauthorized attachments are the fault of dilatory pole owners⁴⁰ or because pole owners overestimate the number of unauthorized attachments though poor record keeping or the failure of a prior owner to issue permits.⁴¹ However, none of these claims is valid. Even if a pole owner were failing to comply with its legal obligations, the remedy should be to initiate dispute resolution procedures or legal action, not to violate the Commission's rules and potentially expose the public to unsafe conditions. Further, any pole owner mistakes in identifying unauthorized attachments are easily remedied. The attachment process has always been subject to an application process so even if the pole owner did not issue formal permits, the attacher should have evidence of

³⁹ See, e.g., *Mile Hi Cable Partners, L.P., et al.*, Order, 17 FCC Rcd 6268 (2002), *aff'd*, 328 F.3d 675 (D.C. Cir. 2003).

⁴⁰ Comments of Sunesys, LLC, WC Docket No. 07-245, GN Docket No. 09-51, at 27 (filed Aug. 16, 2010).

⁴¹ Time Warner Cable at 31-33; TWTC/COMPTEL Comments at 32-34.

its application or similar document that it can use to prove its claim to a pole owner.

Because the attacher is placing its property on that of the pole owner, the burden should be on the attacher to show that the attachment was authorized. Attachers should not be liable for fines if an unauthorized attachment was a result of a good-faith error, rather than intentional violations of the application process.

Given the evidence that there are unauthorized attachments, the dangers associated with these attachments, and the minimal burden on authorized attachers, the Commission should permit pole attachment contracts to incorporate increased penalties for unauthorized attachments and include in its rules significant sanctions for unauthorized attachments when there is no contract between the pole owner and attacher.

IV. THE COMMISSION SHOULD NOT SACRIFICE SAFETY IN AN EFFORT TO INCREASE EFFICIENCY.

Some parties suggest that the Commission allow “non-serious” violations of safety rules to be rectified after the attachment is installed. Such proposals should be rejected. Safety requirements and generally accepted engineering practices, such as the National Electric Safety Code, are needed to ensure the safety of the public and utility workers. In addition, pole owners are frequently to legal action for injury or damage caused by unsafe pole conditions. Requiring pole owners to allow any installations that violate safety codes potentially puts liability on the pole owner for actions beyond its control.

Time Warner Cable suggests that “non-serious” violations caused by new attachments can be cured post installation and that violations that “are not expected to endanger life or property can be noted and corrected once responsibility has been

determined and should not derail the make-ready process.”⁴² Generally accepted engineering practices, such as the NESC, and state safety rules have been developed over many years based on the substantial experience of experts across the country. Allowing one entity to decide unilaterally that some of these rules are unimportant and can be ignored will result in substantial risk of injury and damage to persons and property.

Time Warner also suggests that as soon as payment for make-ready work is made, an attacher should be allowed immediately to use boxing, bracketing, and other means to install the attachment until the make-ready work is completed.⁴³ Such temporary attachments would be potentially dangerous. By definition, if make-ready work is required, the attachment cannot be installed in a safe manner until that work is completed. Moreover, the Commission has recognized that cross-arms, boxing, and bracketing may present hazards and has limited attacher use of these methods only to the extent that the pole owner itself uses such practices.⁴⁴ Time Warner has neither presented a basis for overturning this decision nor shown that use of these practices, even temporarily, is safe. Although HTI appreciates the Commission’s goal to expedite the deployment of new networks through the use of attachments, the use of time-honored practices to protect the safety of both the public and utility workers must be respected.

V. CONCLUSION

HTI urges the Commission to adopt rules that are sufficiently flexible to take into account the real-world factors faced by pole owners, including local requirements,

⁴² Time Warner Cable Comments at 21.

⁴³ *Id.* at 20.

⁴⁴ Order and FNPRM, ¶ 8.

environmental conditions, and available resources. In addition, the Commission should avoid adopting proposals that will make the attachment process more lengthy, complex, and costly for all parties. Finally, the Commission must ensure that the safety of the public and utility workers is maintained.

Respectfully submitted,

By: /s/ Gregory J. Vogt

Steven Golden
Vice President External Affairs
Hawaiian Telcom, Inc.
Hawaiian Telcom Services Company, Inc.
1177 Bishop Street
Honolulu, Hawaii 96813

Gregory J. Vogt
Suzanne Yelen*
Law Offices of Gregory J. Vogt, PLLC
2121 Eisenhower Ave.
Suite 200
Alexandria, VA 22314
(703) 838-0115
Fax: (703) 684-3620
gvogt@vogtlawfirm.com

October 4, 2010

*Licensed to practice law in the District of Columbia, not licensed in Virginia