

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

|  |   |                      |
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| 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  |
|  | ) |                      |

**OPPOSITION OF TW TELECOM INC. TO THE PETITION FOR  
RECONSIDERATION OF THE COALITION OF CONCERNED UTILITIES**

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tw telecom inc. (“TWTC”), by its attorneys, hereby files this opposition to the petition for reconsideration of the Pole Attachment Order<sup>1</sup> filed by a coalition of public utility pole owners (“Coalition”)<sup>2</sup>. As explained below, there is no merit to most of the changes proposed by the Coalition.

**I. INTRODUCTION AND SUMMARY**

In the Order, the Commission established a regulatory regime that will significantly increase the speed and efficiency of obtaining access to utility-owned poles subject to FCC jurisdiction. This regime is important to advancing the Commission’s goal of broad deployment of broadband services to American consumers and businesses. As the Commission has explained, lack of reliable, timely, and affordable access to poles “is often a significant barrier to deploying wireline and wireless services.”<sup>3</sup> Moreover, the rules adopted in the Order are the

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<sup>1</sup> *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (“Order”).

<sup>2</sup> See Petition for Reconsideration of the Coalition of Concerned Utilities, WC Docket No. 07-245, GN Docket No. 09-51 (filed June 8, 2011) (“Petition”).

<sup>3</sup> Order ¶ 3.

product of years of deliberation, multiple rounds of comments and reply comments and numerous in-person ex parte discussions. That process yielded a balanced approach to ensuring efficient pole access while still protecting the safety of the power lines and other facilities that are affixed to poles as well as the safety of the people who work on those facilities.

Unfortunately, the electric utilities have done everything possible to prevent or slow the adoption of this regime. At every opportunity, the electric utilities have sought to subvert the process, filing endless and largely meritless arguments that the FCC's proposed rules were unreasonable, dangerous and unnecessary. The Coalition's petition for reconsideration fits this pattern. In it, the electric utility companies essentially repeat arguments that they have made over and over and that the Commission has soundly rejected. Repetition of arguments already made in the underlying rulemaking proceeding is not a basis for agency reconsideration.<sup>4</sup> The Commission should therefore strike from the record all arguments raised in the Petition that simply repeat arguments considered and rejected by the agency in the rulemaking proceeding. To the extent that the Commission feels compelled to consider the merits of the arguments raised in the Petition, it should reject the vast majority of them outright as they consist mostly of lazy, unsupported assertions that have no merit.

*First*, the Coalition seeks to significantly weaken the make-ready timeline in numerous ways. For example, the Coalition seeks a reduction in the size of pole requests subject to the new make-ready timeline. The Coalition argues that the new rules will cause smaller utilities to be overwhelmed by large pole attachment orders, but there is no reason to think that the new

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<sup>4</sup> It is "settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected." *In re S&L Teen Hosp. Shuttle, Application to Modify and Reinstate License for Business Radio Service Station WIJ767, Montrose, CA*, Order on Reconsideration, 17 FCC Rcd 7899, ¶ 3 (2002) (internal citations omitted).

rules will result in larger attachment requests. The Coalition also argues that the size limits fail to account for the capacity of a utility's workforce, but the FCC considered this issue and expressly held that the size of a workforce cannot dictate the size of orders subject to the timeline.

The Coalition seeks to exempt from the timeline those projects that require rearrangement of attachments not subject to Section 224. This is unnecessary as a matter of policy because pole owners clearly have the ability to require attachers on their poles to comply with reasonable rearrangement requirements that would enable pole owners to meet the timeline requirements. The Coalition's proposal is also unnecessary as a matter of law because it is well within the FCC's authority to require that firms within the agency's jurisdiction comply with the FCC's regulations when entering into contracts with firms not covered by the FCC's jurisdiction.

The Coalition next asks the Commission to delay the effectiveness of the make-ready rules by six more months, at which time the Coalition would like the rules to take effect in phases. There is no basis for this request, especially since the Commission provided pole owners ample notice that the timeline would likely be established.

The Coalition also asks the Commission to establish four specific contexts in which the timeline would be tolled. The Commission already considered and rejected utility arguments that three of these contexts (seasonal storms, safety violations, and delay associated with obtaining government permits) justify tolling the timeline. The fourth proposed context, deficiencies discovered in attachers' route designs, are more appropriately addressed by pole owners providing prospective attachers sufficient information about the route design information that must be included in pole attachment applications.

*Second*, the Coalition seeks to impose more onerous safety requirements on pole attachers. The Coalition urges the Commission to adopt the \$200 per violation penalty for safety violations permitted under Oregon law and to codify the Oregon safety and unauthorized attachment rules as FCC regulations to be effective immediately without regard to the provisions in an attachment agreement. But adoption of the \$200 safety violation penalty is unnecessary because the Commission established ample safety protections in the rules adopted in the Order. More generally, mandatory compliance with Oregon’s regulations would unfairly skew pole attachment agreement to favor pole owners even more than is already the case.

The Coalition also argues that a pole owner should be permitted to change its boxing and extension arm policies on a going forward basis as long as the policies apply to all new attachers. But the Commission correctly concluded in the Order that “even a policy that is equally applied prospectively is discriminatory in the sense that it disadvantages new attachers.”<sup>5</sup> The Coalition has offered no basis for the Commission to revisit this conclusion.

*Third*, the Coalition argues that the Commission should disavow its ruling that it is unreasonable for joint pole owners to require attachers to undergo a duplicative permitting or payment process for attaching to poles. There is no merit in this proposal. There is every reason to expect joint owners to coordinate their review of pole access requests so that attachers do not need to follow an unnecessarily redundant process. The Commission’s ruling requires no more.

Finally, the Coalition proposes new rules governing the rearrangement of attachments. These proposals, such as required participation in notification systems and the proposal that pole owners be reimbursed for work performed on other parties’ attachments, require further review before they can be assessed conclusively.

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<sup>5</sup> Order ¶ 227 (internal citation omitted).

## **II. THE COMMISSION SHOULD REJECT THE COALITION'S EFFORTS TO WEAKEN FUNDAMENTAL ASPECTS OF THE MAKE-READY TIMELINE**

The make-ready timeline adopted by the Commission in the Order strikes the appropriate balance between accelerating the attachment process and protecting legitimate utility pole owner interests. The Coalition proposes several changes to the timeline rules that would limit the effectiveness and delay the implementation of those rules. The Commission should reject these proposals.

### **A. The Size Limits on Attachment Requests Eligible for the Make-Ready Timeline are Reasonable.**

In the Order, the Commission calibrated the rules applicable to pole owners under the make-ready timeline to the size of the attachment requests submitted by a party within a 30 day period in a particular state. For example, the baseline requirements in the make-ready timeline apply only to orders up to the lesser of 0.5 percent of a utility pole owner's poles within a state or 300 poles within a state during any 30 day period.<sup>6</sup> Larger aggregate requests for attachments during a 30 day period within a state are subject to longer make-ready timelines (i.e., 60 days are added to the timeline for requests up to the lesser of five percent of a pole owner's poles in a state or 3,000 poles in a state, and the timeline does not apply to requests that exceed these limits).<sup>7</sup> The obvious rationale underlying this regime is that pole owners should be given more time to perform make-ready work on larger attachment requests.

In adopting the size limits, the FCC considered proposed caps as low as 100 poles per order and as high as 5,000 poles per month.<sup>8</sup> After evaluating the full range of proposals, the

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<sup>6</sup> *See id.* ¶ 63.

<sup>7</sup> *See id.*

<sup>8</sup> *See id.* ¶ 65.

Commission arrived at a compromise solution “that receive[d] favorable comment from both utilities and attachers.”<sup>9</sup> The Commission’s approach is eminently reasonable.

The Coalition nevertheless argues that the FCC should lower the size limits from 300 to 100 poles for small orders subject to the baseline make-ready timeline and from 3,000 to 500 poles for larger orders subject to the extended make-ready timeline.<sup>10</sup> But the Coalition offers no compelling basis for these proposals.

For example, the Coalition relies primarily on statistics intended to show that smaller utilities do not often receive attachment requests as large as those that would be covered by the timeline and will be overburdened if required to comply for projects of this size.<sup>11</sup> But the Coalition offers no reason to think that the new rules would change the number or size of the pole attachment requests received by utilities. Nor is there any information in the record of this proceeding that supports such a prediction. Furthermore, by structuring the caps as the *lesser* of a fixed volume of poles and a percentage of a utility’s total poles,<sup>12</sup> the Commission built in protection for small utilities, whose limited pole holdings will cause their caps to be substantially lower than the absolute numbers of poles (300 and 3,000) included in the limits. In fact, the Commission explicitly noted that the structure of its caps reflects a desire to protect utilities of all sizes, including smaller utilities.<sup>13</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *See* Petition at 6.

<sup>11</sup> *See id.* at 5.

<sup>12</sup> *See* Order ¶ 63.

<sup>13</sup> *See id.* ¶ 64 (“[W]e find this approach to be a reasonable method that appropriately scales the work required with the existing resources of the utility.”)

The Coalition also argues that the size limits established for the make-ready timeline do not account for the multiple demands that are regularly placed on power company pole owners.<sup>14</sup> In the Order, the Commission stated that proposals for “capping timeline orders based on the size of a utility’s workforce,” i.e., proposals based on exactly the argument made by the Coalition, were both “less administrable and more subjective” than the size limits adopted in the Order.<sup>15</sup> The Commission therefore fully accounted for, and rejected, the argument that the size limits for the timeline should be set based on the capacity of a particular pole owner’s capabilities. Again, the Coalition offers no basis for revisiting this reasonable conclusion.

In sum, the size limits adopted for the make-ready timeline in the Order represent reasoned decision making in which the Commission fully accounted for the concerns raised by the Coalition. The Commission should therefore reject the Coalition’s request to establish smaller size limits than those adopted in the Order.

**B. Poles Requiring Rearrangement of Non-Section 224 Attachments Should Not Be Exempt from the Make-Ready Timeline.**

In the Order, the Commission provided flexibility in the make-ready process by permitting pole owners to fulfill their obligation to perform make ready work by performing the work themselves, hiring contractors, or working with existing attachers’ contractors.<sup>16</sup> The Commission further explained that the rearrangement process could be facilitated by structuring attachment agreements to “include provisions for transfer of facilities, or otherwise address

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<sup>14</sup> See Petition at 6.

<sup>15</sup> Order ¶ 66.

<sup>16</sup> See *id.* ¶ 35.

liability or other concerns they might have in cases where they elect to perform make-ready themselves.”<sup>17</sup>

Notwithstanding this flexibility, the Coalition argues that, because pole owners often cannot compel entities such as municipalities whose attachments are not governed by Section 224 to rearrange their facilities, they should not be required to comply with the make-ready timeline for projects requiring rearrangements of such non-Section 224 attachments.<sup>18</sup> But the flexibility provided to pole owners in complying with their make-ready obligations fully accommodates any concerns regarding non-Section 224 attachments. Pole owners can ensure that municipalities and other entities whose attachments are not governed by Section 224 cooperate with make-ready schedules by offering such attachers the option to performing rearrangement work themselves, by hiring contractors or by permitting the pole owners to perform the work. These options can be, and likely already are, established in attachment contracts between pole owners and attachers. Indeed, it is notable that the Coalition has not provided a single example of a non-Section 224 attachment for which some arrangement cannot be reached to ensure that make-ready work is performed promptly.

In any event, the FCC expressly considered the Coalition’s argument and rejected it in the Order. In particular, Oncor opposed the adoption of the make-ready timeline based on problems associated with “the presence of non-jurisdictional attaching entities on [] poles,”<sup>19</sup> the Commission responded as follows:

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<sup>17</sup> *Id.* ¶ 39.

<sup>18</sup> *See* Petition at 7-8.

<sup>19</sup> *See* Oncor Comments at 26 (August 16, 2010). Unless otherwise indicated, all comments cited and or referred to herein were filed in WC Dkt. No. 07-245 and GN Dkt. No. 09-51.

[W]e disagree with certain commenters . . . that the presence of non-regulated attachment (such as a municipality’s traffic light) on poles somehow places these poles outside of Commission authority. As previously stated, the Commission has the authority to regulate, by rule, the terms and conditions of pole attachments; a utility cannot escape the Commission’s jurisdiction simply by attaching attachments that are outside the reach of the statute . . . .<sup>20</sup>

This is exactly right.

It is also important to emphasize that Section 224(b) grants the FCC broad jurisdiction to ensure that utilities provide access to attachments governed by Section 224 on just and reasonable terms and conditions. The Commission may exercise that authority by requiring that utilities utilize their ample legal rights as pole owners to ensure that non-Section 224 pole owners perform make-ready work in a timely manner. This means of exercising authority under the Communications Act is neither novel nor controversial.<sup>21</sup> Moreover, in the current context, it is a critically important component of the make-ready regime adopted in the Order. The Commission should therefore reject the Coalition’s argument to the contrary.

**C. Implementation of the Make-Ready Timeline Should Not Be Delayed Any Further.**

The administrative process that resulted in the adoption of the Order was long and painstakingly thorough. Any additional postponement of the rules’ implementation would of course deprive broadband service providers as well as American consumers and businesses of the benefits of more efficient access to utility-owned poles.

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<sup>20</sup> Order ¶ 94 (internal citations omitted).

<sup>21</sup> See, e.g., *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, ¶ 60 (2007) (holding that the Commission had authority to regulate agreements between multichannel video programming distributors and owners of multiple dwelling units, despite the fact that the FCC did not assert jurisdiction over building owners), *aff’d*, 567 F.3d 659, 666 (D.C. Cir. 2009) (“[M]ost every agency action has relatively immediate effects for parties beyond those directly subject to regulation.”).

The Coalition now raises a series of make-weight arguments in support of delaying the implementation of the make-ready timeline rules. They complain that they must change their pole attachment application process and develop new operating procedures to comply with the timeline, work that they claim justifies delaying the benefits of the Order by another six months, at which point the new regulations would only take effect in phases over time.<sup>22</sup>

The Commission should reject this delay tactic. Pole owners have known *for years* that the FCC was considering adopting a make-ready timeline. It has been more than five and a half years since Fibertech filed the petition for rulemaking that eventually led to the adoption of the timeline,<sup>23</sup> more than five years since the FCC sought comments regarding that petition,<sup>24</sup> more than three and a half years since the FCC released an NPRM seeking further comments on the proposed timeline,<sup>25</sup> and more than a year since the FCC released another NPRM in which it sought comment on detailed proposed rules that would form the basis for the timeline adopted in the Order.<sup>26</sup> It is simply absurd to suggest that pole owners lacked sufficient advance notice of the likelihood that the FCC would adopt a make-ready timeline regime. But if this were not enough, more than three more months passed between the adoption of the Order on April 7th and the date on which the timeline rules took effect (after approval by the Office of Management and

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<sup>22</sup> See Petition at 10-11.

<sup>23</sup> See Fibertech Networks, LLC, Petition for Rulemaking, RM-11303 (filed Dec. 7, 2005).

<sup>24</sup> See *Pleading Cycle Established for Petition for Rulemaking of Fibertech Networks, LLC*, Public Notice, 20 FCC Rcd 19865 (2005).

<sup>25</sup> See *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 22 FCC Rcd 20195, ¶ 37 (2007).

<sup>26</sup> See *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, ¶¶ 25-69 (2010).

Budget), which was July 12th.<sup>27</sup> If utility pole owners are not ready by now to comply with the requirements adopted in the Order, they should be held liable for such failure. There is no basis for granting further delay.

**D. The Standard Adopted in the Order for Tolling the Make-Ready Timeline is Reasonable.**

As the Commission explained in the Order, the make-ready timeline is critically important to the deployment of broadband facilities.<sup>28</sup> In order for attachers to plan their businesses to take advantage of the time line, they must be able to count on it applying in the circumstances defined in the Commission's rules. Given that the Commission limited the size of attachment requests subject to the timeline, it is reasonable for the Commission to limit the circumstances in which pole owners can toll the timeline. As the Commission explained,

Time is of the essence for requesting entities, their investors, and their potential consumers. We limit the size of orders subject to the timeline in part to create a manageable workflow that will allow the timeline to absorb occasional interruptions. Whenever possible, a utility should accommodate a moderate interruption without interruption in the timeline, and if a utility resorts to stopping the clock, its reason for doing so should usually be apparent.<sup>29</sup>

In keeping with this policy, the Commission adopted a "good and sufficient cause" standard, under which pole owners may only toll the timeline for non-routine, unforeseeable events.<sup>30</sup> As the determination of whether conditions constitute "good and sufficient cause" will undoubtedly be quite fact-specific, the Commission wisely chose to leave this to case-by-case evaluations.<sup>31</sup>

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<sup>27</sup> See *Pole Attachments Timeline Rules Take Effect*, Public Notice, DA 11-1187 (rel. July 12, 2011).

<sup>28</sup> See Order ¶ 21.

<sup>29</sup> *Id.* ¶ 69.

<sup>30</sup> *Id.* ¶ 68.

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

The Coalition now asks the Commission to abandon this approach and carve out four conditions that would be deemed to automatically warrant tolling the make-ready timeline.<sup>32</sup>

Again, the Coalition offers no sound basis for changing the Order in the manner proposed.

To begin with, three of the justifications for tolling the timeline that the Coalition proposed have already been expressly rejected by the Commission. Specifically, utility pole owners argued in the underlying rulemaking that seasonal storms, safety violations, and delay associated with obtaining government permits justify tolling the timeline.<sup>33</sup> The Commission responded by rejecting these requests, and by identifying them as prime examples of conditions that would *not* constitute “good and sufficient cause.” The Commission described permissible tolling as follows:

For example, utilities may toll the timeline to cope with an emergency that requires federal disaster relief, but may not stop the clock for routine or foreseeable events such as repairing damage caused by routine seasonal storms; repositioning existing attachments; bringing poles up to code; alleged lack of resources; or awaiting resolution of regulatory proceedings, such as a state public utilities commission rulemaking, that affect pole attachments.<sup>34</sup>

The only one of the Coalition’s proposed justifications for tolling the make-ready timeline that has not already been considered and rejected by the Commission is the discovery, after the initial survey, of “deficiencies in the attacher’s route design that must be corrected before the electric utility can complete its engineering design.”<sup>35</sup> But this situation does not justify tolling the make-ready timeline. Rather, utilities that are concerned about this eventuality

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<sup>32</sup> See Petition at 11-15.

<sup>33</sup> See EEI/UTC Comments at 22–25 (August 16, 2010) (suggesting the timeline should be tolled for various events including severe weather conditions, state and local regulatory proceedings, or the need to correct for safety violations).

<sup>34</sup> Order ¶ 68.

<sup>35</sup> Petition at 15.

should provide proper guidance to prospective attachers as to the route design information that must be included in the application. Any route design issues can then be resolved before the timeline clock starts, thereby obviating the need to stop the clock later in the process.

**III. THE COMMISSION SHOULD REJECT THE COALITION’S REQUEST TO SKEW THE RULES ADDRESSING SAFETY ISSUES IN FAVOR OF POLE OWNERS**

Several of the Coalition’s proposals for changing the safety rules adopted in the Order would diminish the effectiveness of the regulatory regime adopted in the Order without materially improving the safety of the network or those that work on it. Those proposals should be rejected.

**A. The Commission Should Not Adopt Oregon’s Penalties for Safety Violations.**

In the Order, the Commission adopted numerous mechanisms to protect the safety of the electricity network and other network facilities affixed to utility poles as well as to protect the people who work on these facilities. For example, the Commission granted electric utilities the right to oversee and manage the make-ready process and, where attachers utilize third-party contractors, electric utilities have the right to oversee the contractors’ work and to make final decisions about capacity, safety, reliability, and sound engineering.<sup>36</sup> In addition, even though there is no basis in the record for concluding that unauthorized attachments are widespread or that they raise significant safety concerns,<sup>37</sup> the Commission announced a new policy under which it would treat as presumptively reasonable the unauthorized attachment penalties allowed under Oregon law.<sup>38</sup>

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<sup>36</sup> See Order ¶ 61.

<sup>37</sup> See *id.* ¶ 114 (stating that “the record is insufficient for us to make specific findings regarding the scope and severity of non-compliance” resulting in unauthorized attachments).

<sup>38</sup> See *id.* ¶ 118.

The Coalition argues that the Commission should go even further by adopting the \$200 per violation penalties for safety violations permitted under Oregon law and by codifying the Oregon rules as FCC regulations to be effective immediately without regard to the provisions in a pole attachment agreement.<sup>39</sup> The Commission has already considered these arguments<sup>40</sup> and chosen to reject them. The Coalition offers no factual or theoretical basis for reconsideration of this outcome.

Nor is there any question that the Commission was justified in refusing to take the steps urged by the Coalition. The Oregon rules governing unauthorized attachments that the Commission has deemed presumptively reasonable include a “mutual obligation of pole owners and pole occupants to correct immediately violations that pose imminent danger to life or property.”<sup>41</sup> In addition, “[i]f a party corrects another party’s violation, the party responsible for the violation must reimburse the correcting party for the actual cost of corrections.”<sup>42</sup> There is no basis for adding to these safety protections an additional financial penalty for safety violations. This is especially true because, as Comcast has explained, financial penalties for safety violations create an incentive for pole owners to mischaracterize safety problems as having been caused by attachers. Comcast provided concrete examples of precisely this behavior.<sup>43</sup>

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<sup>39</sup> See Petition at 16-17.

<sup>40</sup> The Coalition made these arguments in its comments and reply comments. See Coalition Comments at 102 (August 16, 2010); Coalition Reply Comments at 11-13 (October 4, 2010).

<sup>41</sup> Order ¶ 115.

<sup>42</sup> *Id.*

<sup>43</sup> See Comcast Comments at 25 n.86 (March 7, 2008) (citing *Florida Cable Telecomms. Ass’n v. Gulf Power Co.*, Initial Decision, 22 FCC Rcd. 1997, 2002 ¶ 17 (2007), Bowen Cross, Apr. 25,

It also makes no sense to impose financial penalties regardless of whether they are included in a pole attachment agreement.<sup>44</sup> Pole attachment agreements are already one-sided affairs in which pole owners generally dictate terms on a take-it-or-leave-it basis to attachers. It would be unreasonable to further skew this balance in pole owners' favor by essentially mandating inclusion in agreements of financial penalties that favor pole owners. Moreover, doing so is inconsistent with the Commission's<sup>45</sup> and *pole owners'*<sup>46</sup> stated preference for relying on pole rental agreements as the primary means of implementing the requirements of Section 224 and the Commission's rules.

**B. The Commission Should Not Permit Pole Owners to Adopt Discriminatory Policies for the Use of Boxing and Extension Arms.**

In the Order, the Commission sought to ensure that pole owners provide boxing and extension arms to all attachers on a nondiscriminatory basis. In so doing, the Commission held that “even a policy that is equally applied prospectively is discriminatory in the sense that it disadvantages new attachers.”<sup>47</sup> This makes sense. Absent this rule, pole owners that have satisfied all of their own attachment space needs with boxing and extension arms already established could deny new attachers such benefit by prohibiting boxing and extension arms in

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2006, Tr., at 1066-76); Comcast Reply Comments at 23-28, Ex. 3 ¶ 16 (Report of Michael T. Harrelson) (Apr. 22, 2008).

<sup>44</sup> See Petition at 17-18.

<sup>45</sup> See Order ¶ 118, n.366 (“We do not adopt the Oregon system as federal law, but rather continue to favor agreements negotiated between utilities and attaching entities.”) (citing the Commission’s “preference for negotiated agreements” described in *Pole Attachments for Telecommunications Services*, Report and Order, 13 FCC Rcd 6777, ¶ 10 (1998)).

<sup>46</sup> See, e.g., Coalition Comments at 105 (“Attachers should be required to engage in good faith negotiations to resolve any issues or concerns before any claims can be raised at the FCC.”).

<sup>47</sup> Order ¶ 227 (internal citation omitted).

the future. The pole owner would have received the full benefits of boxing and extension arms whereas new, unaffiliated attachers would be denied those benefits. This is obviously unreasonably discriminatory.

Nevertheless, the Coalition argues that the Commission should permit pole owners to engage in precisely this conduct.<sup>48</sup> The Coalition claims that permitting pole owners to prohibit boxing and extension arms in the future in the same circumstances in which pole owners have provided them in the past would not be discriminatory so long as pole owners treat attachers the same on a prospective basis.<sup>49</sup> The Coalition made exactly this argument in their petition for reconsideration of the 2010 Pole Attachment Order.<sup>50</sup> The Commission rejected that petition.<sup>51</sup> The Coalition has added nothing to the argument made in that petition. The Commission should therefore reject this same argument again.

#### **IV. THE COMMISSION SHOULD REJECT THE COALITION'S REQUEST TO MAKE IT MORE DIFFICULT TO ESTABLISH ATTACHMENTS ON JOINTLY-OWNED POLES**

TWTC has experienced significant problems associated with obtaining efficient access to jointly owned poles. These problems are particularly severe where one of the pole owners does not take the lead in managing the pole access process, leaving the attacher to follow a confusing and redundant process with both owners.

Recognizing this problem, the Commission stated in the Order that it expects joint owners to “coordinate and cooperate with each other and with requesting attachers consistent

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<sup>48</sup> See Petition at 17-18.

<sup>49</sup> See *id.*

<sup>50</sup> See Coalition of Concerned Utilities, Petition for Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, at 2-3 (filed Sept. 2, 2010).

<sup>51</sup> See Order ¶ 227.

with pole owners' duty to provide just and reasonable access."<sup>52</sup> The Commission further stated, appropriately, that it would consider "utility procedures requiring attachers to undergo a duplicative permitting or payment process to be unjust and unreasonable."<sup>53</sup>

The Coalition argues that the Commission should abandon this approach and instead permit each pole owner to require that attachers undergo a separate, redundant permitting and payment process. The Coalition seems to believe that this approach is required because joint owners "are engaged in different businesses and operate independently."<sup>54</sup> But the Coalition does not explain why the two owners could not coordinate to provide attachers a single point of contact while still enabling both owners to review an attachment application and conduct necessary make-ready work. The Order requires nothing more, and it fully protects the interests of both pole owners while ensuring an efficient process from the stand point of the attacher. The Commission should therefore reject the Coalition's request to introduce unnecessary inefficiencies into the process for attaching to jointly owned poles.

#### **V. THE COMMISSION SHOULD CAREFULLY REVIEW THE COALITION'S REQUESTS REGARDING REARRANGEMENT OF THIRD-PARTY ATTACHMENTS**

The Coalition proposes two changes to the rules governing rearrangement of attachments during the make-ready process that warrant further consideration by the Commission. First, the Coalition requests that the Commission require attacher participation in an electronic notification system such as NJUNS or SPANS to notify attachers of pending make-ready projects.<sup>55</sup>

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<sup>52</sup> *Id.* ¶ 82.

<sup>53</sup> *Id.* ¶ 84.

<sup>54</sup> Petition at n.43.

<sup>55</sup> *See id.* at 19-20.

TWTC's experience is that NJUNS is an efficient notification mechanism. TWTC does not have sufficient experience with SPANS or other notification mechanisms to assess their effectiveness. TWTC is concerned, however, that the Commission is not well-positioned to assess the optimal notification system for attachers because different systems may work better in different contexts. In addition, capabilities, cost, and availability of different systems will likely change over time. A system that may seem optimal today could well become outmoded and inefficient after several years. The Commission should therefore be very cautious about mandating participation in particular attacher notification systems.

Second, the Coalition argues that the Commission should clarify that "pole owners are entitled to be reimbursed by the new attacher for moving existing attachments if the existing attachers do not move their attachments in a timely manner."<sup>56</sup> This appears to be a fair request since pole owners should themselves not be held responsible for such costs. It is critical, however, that pole owners be permitted to recover only *reasonable* costs incurred in performing rearrangements. The Commission should examine the optimal means of enforcing this limitation. Otherwise, pole owners will needlessly increase the costs of attachers, thereby undermining the purpose of the pole attachment rules.

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<sup>56</sup> *Id.* at 20.

**VI. CONCLUSION**

For the foregoing reasons, the Commission should deny the Coalition of Concerned Utilities' petition for reconsideration of the policies discussed herein.

Respectfully submitted,

/s/ Thomas Jones

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August 10, 2011

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**CERTIFICATE OF SERVICE**

I, Matthew Jones, do hereby certify that on this day, August 10, 2011, I caused to be served a true and correct copy of the foregoing Opposition of tw telecom inc. to the Petition for Reconsideration of the Coalition of Concerned Utilities, via First Class US Mail, to:

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Thomas B. Magee  
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A handwritten signature in black ink, appearing to read 'Matt Jones', written over a horizontal line.

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