TIME WARNER CABLE TEXAS LLC'S COMMENTS ON CPS ENERGY'S PROPOSED POLE ATTACHMENT STANDARDS

J. D. Thomas
Ray Rutngamlug
Susan M. Stith
Sheppard Mullin Richter & Hampton LLP
2099 Pennsylvania Ave. NW, Suite 100
Washington, D.C. 20006-6801
202.747.1900
dthomas@sheppardmullin.com
rrutngamlug@sheppardmullin.com
sstith@sheppardmullin.com

Counsel for Time Warner Cable Texas LLC

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TIME WARNER CABLE TEXAS LLC'S COMMENTS ON CPS ENERGY'S PROPOSED POLE ATTACHMENT STANDARDS

Time Warner Cable Texas LLC ("TWC") respectfully submits these comments in response to the City of San Antonio Public Service Board's ("CPS Energy") proposed Pole Attachment Standards ("Standards"). TWC also submits, as *Exhibit A*, its initial proposed revisions to the Standards, and as *Exhibit B,* its initial proposed revisions to CPS Energy's Draft Pole Attachment Agreement.

I. INTRODUCTION AND BACKGROUND

TWC appreciates the opportunity to participate in this process and to offer these comments, as well as its initial redlines of the proposed Pole Attachment Standards and the Draft Pole Attachment Agreement. TWC also appreciates CPS Energy's effort to make this process transparent and inclusive of all stakeholders, and hopes that the result will be fair, reasonable and non-discriminatory standards that will become a model for municipally-owned utilities ("MOUs") in Texas, and for other infrastructure owners both within Texas and beyond.

TWC strongly favors approaches to pole access and infrastructure use that facilitate efficient, non-discriminatory deployment and maintenance. But CPS Energy is pursuing many different (but related) pole-use objectives at once. It faces daunting challenges, not only in addressing a current backlog of permits and other work for TWC and perhaps other attachers, but in preparing for Google Fiber's deployment. And now, it has recently come to light, CPS Energy is undertaking a pole and communications attachment inventory of several hundred

thousand poles, and presumably close to a million attachments across its entire service area. Each of these tasks alone poses a significant challenge, let alone attempting to accomplish them all simultaneously.

TWC (along with AT&T) is one of the largest communications companies operating in San Antonio. It is attached to several hundred thousand CPS Energy poles and it, and its predecessors, have operated in San Antonio for decades. TWC presently is experiencing significant demand for its network and services and is expanding and improving its network to meet this demand. Thus, we have a real interest in the implementation of procedures that promote a speedy and efficient deployment of services, but we also have a significant interest in protecting the integrity of our existing network and the continued service our customer currently depend upon. As a mature, incumbent provider, TWC's network would be at disproportionate risk from a new pole-access regime that allowed new entrants to demand a premium on speed and allowed such demand to trump existing providers' concerns for the physical integrity of their deployed networks (as it would from any system favoring new entrants to the disadvantage of those with an existing system). On the other hand, because TWC is engaged in ongoing efforts to deploy new facilities, it embraces a program that will speed and make more efficient its own new deployments.

TWC's comments and accompanying redlines, therefore, must be viewed from the context of its own network expansion which will require the processing of several hundred permits per month, as well as the expansion of its fellow/competing communications providers. From what is known, and what we can surmise from available information, it would appear that within a matter of weeks, CPS Energy will be attempting to (i) process *several thousand* permit applications per month; (ii) deal with an existing backlog of applications; (iii) implement new

across-the-board pole attachment Standards and pole attachment agreements; *and* (iv) design, implement and execute the first pole and communications attachment audit in memory. The complexity and sheer volume of the work ahead is difficult to overstate.

But before turning to the substance of the standards, there are important preliminary and procedural matters. First, and while we appreciate that CPS remains cognizant of time-to-market considerations, CPS Energy should be careful not to rush the process. CPS Energy's grant of a two week extension of time for the initial comment period has been not merely helpful, but essential, to allow the attaching parties to provide feedback. On the other hand, a single comment round combined with a mere four-month implementation deadline – especially given the number and complexity of the issues – is unrealistic. TWC anticipates additional opportunity for further discussion, and as a result, anticipates the possibility of additional feedback on the Standards and Agreement in conjunction with such ongoing discussions.

TWC is also concerned about the down-the-road placeholder in the draft Standards for "Wireless Attachments." However those standards ultimately are defined (will it apply to DAS? Small Cell? WiFi? All of the above? Or something else?), and because of the increased deployment of such facilities, TWC believes that it would be better to consider "wireless" attachments now.

A system-wide audit, new entrants planning and staging a market-wide build, and shiny new Standards procedures to accommodate these entrants, create a host of important – indeed fundamental – questions that need to be resolved *before* the plan is implemented. These questions include the following:

- *Selection of Contractors.* The draft Standards contain some information regarding the selection of contractors. But how, exactly, does CPS propose to proceed?

- *Costs of the One-Touch, Inventory & Plant Inspection.* How much is this going to cost? And, how are the costs for all aspects of the One-Touch program going to be allocated across the stakeholders? Are they going to be assigned to general pole maintenance or plant-asset accounts, or will reimbursement be sought from attachers directly? Who is going to be responsible for the cost of plant inventories and safety inspections? What accounting and other safeguards will be in place to ensure that costs (and benefits) and functions are appropriately allocated to new entrants and not *inappropriately* allocated to existing attachers as general plant maintenance or inventories or inspections?
- *Responsibility for Make-Ready and Related Costs for New Entrants.* TWC presumes that reasonable, long-standing policies and practices related to cost-causation will continue to apply in CPS Energy's new program. But how does CPS Energy propose to address nettlesome questions such as who is responsible for addressing existing safety violations? Assuming it is a cause or fault-based analysis, what is the process for making this determination? When a pole needs to be replaced to accommodate a new entrant, will that new entrant bear the (entire) cost of that pole replacement?
- *Plant Inventories and Inspection Standards & Methodologies.* The draft Standards contain some information regarding methodologies and contractors to be used for anticipated inventories and inspections, but much more development of this aspect of the Standards is necessary.
- *Rental Rates.* TWC has requested back-up information from CPS Energy regarding rental rates. To date, CPS Energy has not provided that information. Rental rates continue to be a contested item in an ongoing proceeding between CPS Energy and other attachers. CPS Energy's disclosure of this information will facilitate prompt resolution

of these issues.

In addition to these points, TWC has other very significant concerns regarding CPS Energy's authority to unilaterally modify the Standards, particularly in light of the fact that where there is a conflict between an individual pole attachment agreement and the standards of general applicability, CPS proposes that the general standards will prevail. In order to avoid future conflicts and ensure continued stakeholder involvement in developing policies, the Standards (and any future modifications thereto) must be developed jointly and applied uniformly.

In its operations nationwide, TWC is constantly concerned that an absence of nondiscriminatory and reasonable rates, terms and conditions may lead to pole-owner abuses and the imposition of non-cost-based rates, terms, and conditions. The development and implementation of the new Standards should balance the need for accelerated deployment of broadband services to all areas of CPS Energy's service territory with the needs and interests of CPS Energy, as a pole owner, and the needs and interests of other stakeholders, in order to increase the dissemination and quality of services to communities. In order to balance these interests – as well as stabilize conditions to facilitate the increased deployment of advanced services to more communities in CPS Energy's service territory – Texas law requires that CPS Energy implement reasonable nondiscriminatory policies and apply them to all stakeholders.

II. FUNDAMENTAL QUESTIONS THAT REQUIRE SWIFT RESOLUTION

But before turning to the specific questions raised by CPS Energy's proposed Standards, TWC has three preliminary matters of particular concern that we believe should first be addressed: (A) the 2016 attachment inventory and audit ("Audit"); (B) Selection of One-Touch Contractor; and, (C) Wireless facilities.

A. The 2016 Audit

By its own admission, CPS Energy was well down the road in commencing a system wide pole and communications attachment audit, including selection of a contractor, before it was revealed that CPS Energy did not provide notice of the audit to either AT&T (the other significant San Antonio pole owner) or to the owners of hundreds of thousands of communications attachments on CPS Energy poles. This was a significant oversight because CPS Energy is taking the position that considerable portions of the Audit are to be paid by the communications parties. Selection of a capable and impartial contractor to conduct the pole-attachment inventory is essential to the reliability of the Audit's results. And choosing a qualified, contractor acceptable to all the parties expected to pay some portion of the contractor's charges is just the first step: the affected parties must also be given the opportunity to participate in the design of the inventory parameters, including, critically, the definition of the term "Attachment" that will be applied. In addition, there must be consensus on the audit parameters, the definition and the allocation of costs, and the specific locations of auditing crews throughout the course of the audit so that the attaching parties can be present to QC the auditors' work. From a recent meeting and correspondence, *see,* Exhibit C (Letter from J. D. Thomas, TWC Counsel to Carolyn Shellman and Gabriel Garcia, CPS Energy Counsel, March 29, 2016), CPS Energy has provided helpful information and assurances regarding the Audit parameters. And while the devil is in the details, TWC remains cautiously optimistic that its voice will be heard, accounted for, and incorporated in the Audit plan. The same holds true for the quality of the Audit, the costs, and proportional share that TWC may be asked to pay for the Audit.

That said, TWC will be closely scrutinizing how the Audit unfolds and is implemented and will take the steps necessary to ensure that all aspects of it are executed in a just, reasonable

and non-discriminatory fashion. *See* Letter from J.D. Thomas, TWC Counsel to Gabriel Garcia, CPS Energy Counsel, March 4, 2016 (Exhibit C).

B. Selection of One-Touch Contractor

TWC also has significant concerns regarding the operational and financial effects of the One-Touch process on TWC, and other owners of vast, existing aerial networks.

To the extent CPS Energy proposes to implement its One-Touch process, the selection of contractors permitted to work on an Attaching Entity's network must be addressed first. While TWC has other grave reservations regarding the One-Touch proposal (which are discussed in more detail in Section III.A.1. of these comments), as a threshold matter, TWC will insist upon prior approval of any contractors that may be utilized to work on its facilities. This issue can be efficiently resolved if CPS Energy maintains a list of contractors that have been pre-approved by all Attaching Entities and CPS Energy.

The proposed Standards contemplate that an Attaching Entity may use its own employees, contractors, or subcontractors approved by CPS Energy, but fails to specify whether the affected Attaching Entity whose facilities are being transferred or modified by another Attaching Entity under the One-Touch regime has such a right. *See* Standards, Section III.A.2. This is critical to TWC. If the One-Touch proposal is to become the go-to approach for high-volume deployments, the affected Attaching Entity must be given the right to protect the integrity of its own network from the actions of its direct competitors. The entire One-Touch process should be thoroughly considered by all affected parties before its implementation. This includes the circumstances of its use, notice, remediation of non-compliant attachments during the One-Touch process, allocation of costs, and the selection of a contractor by a competitor to work under the direction of that competitor on another entity's network. Without universal buy-

in *on the specifics*, any One-Touch program is simply unacceptable.

C. "Wireless" Attachments

CPS Energy has concluded that development of "wireless" attachment standards should be considered after these wireline Standards are put into place. *See* Standards, Section V. Yet in an apparent – and stark – contradiction, the Standards mandate separate agreement for wireless attachments – and take the truly draconian step of declaring that mid-span, strand-mounted WiFi devices are unauthorized attachments. While we address the WiFi issue in greater detail at Section III.A.3., there are fundamental definitional issues here. Treating these facilities as essentially an afterthought does not make sense.

"Wireless" can mean equipment used to provide WiFi, which uses unlicensed spectrum – bandwidth that does not require an FCC license to be used. It also can mean "small cells," facilities used to supplement coverage for licensed cellular service, for which utility poles play an essential role as hosting sites. These facilities will be placed on the same poles that existing wire-based providers are on today – and given the different, and in some cases greater use of the pole, they could create substantial and unique impacts throughout CPS' aerial distribution system. CPS Energy should consider the particular issues associated with wireless attachments now, or introduce yet another risk to the smoothest possible development and implementation of these Standards. TWC, therefore, requests that CPS Energy provide its proposed Standards governing wireless services, incorporate authorization for such facilities in the Draft Pole Attachment Agreement, and include consideration of "wireless" attachments in the current comment process.

III. COMMENTS ON PROPOSED STANDARDS

A. Operational Issues

1. One-Touch Methodologies

The pole permitting process in the past has been long and slow, characterized by months of delay, uncertain expense, and, in the cases of the many time-sensitive projects that mark competitive communications today, informal "verbal" approvals from pole-owner personnel. Rather than putting in a fast lane for new entrants, CPS' practice has been to ensure that it has sufficient time to control all aspects of the process, even if that resulted in delays to the Attaching Entity. Until now.

With Google Fiber's arrival, (and perhaps also to alleviate past permitting delays and strains), CPS Energy now proposes four Application processes, two of which provide that Applications for mass deployment of facilities be reviewed in the same 21-day time period as standard applications. Standards, Section IV.A.

To further accelerate the Attachment process, CPS Energy has proposed to allow certain aspects of Make-Ready to be completed using a "One-Touch" method. This method allows one Attaching Entity to transfer, relocate, or alter an Attachment of all of the other Attaching Entities in the Communications Space of a CPS Energy Pole as may be necessary to accommodate the installation of that Attaching Entity's new Attachment. Standards, Section IV.B.5. Certain aspects of the One-Touch framework are thoughtful and workable for handling projects of different sizes, but the proposal covers more than just large-scale projects by new entrants -- and it otherwise raises a number of concerns.

As a threshold matter, TWC anticipates that, given the competitive pressures and market demands that it confronts for its network expansion and services, it will fall into the "Mass

Deployment / Medium Volume" category of attachers – and therefore supports generally the One-Touch approach. Yet the Standards do not clearly define the circumstances under which One-Touch transfers can be used, or who determines when One-Touch is permissible. One-Touch transfers are limited to "Simple Transfers" only. Standards, Section IV.B.5. TWC certainly supports a limitation on the use of One-Touch transfers, but has questions regarding what constitutes a "Simple Transfer."

A "Simple Transfer" is defined as a transfer that does not require the cutting and splicing of the Attachment and will not result in an outage to the network or customers of the affected Attaching Entity. TWC is not confident that outages or other issues could not occur during "Simple Transfers" and is opposed to a competing Attaching Entity making a determination as to what constitutes a simple or complex transfer of TWC's facilities. TWC proposes that, if One-Touch is to be successfully implemented, significant revisions that clarify the circumstances for using the One-Touch process, among other things, must be made. *See* Standards, Section IV.B.5.(g).

TWC, however, wants to be very clear: to the extent that personnel that it has not expressly authorized to move its facilities do so, TWC will enforce its legal rights to the fullest extent of the law.

TWC notes, furthermore, that a mass deployment of new attachments in a short time period, will create an increased risk for damage to existing attachers' facilities. This is not a speculation: other new entrants in large deployments have damaged TWC's facilities and other expensive problems when engaging in similar practices. Unless and until these questions and other potential problems are addressed, the use of One-Touch transfers should not be implemented.

Yet another problem with One-Touch is the short notice period. An Attaching Entity is required to provide only forty-eight (48) hours prior notice (by email) to the affected parties for up to one hundred (100) pole transfers. Standards, Section IV.B.5.(f). This notice period would be insufficient and unworkable for the affected Attaching Entity to evaluate the proposed make-ready, much less take any necessary measures to prepare for the transfer. In TWC's experience, one hundred (100) poles may cover as much as three or four miles of aerial plant. Even if the email notice were promptly received and the affected Attaching Entity immediately began its review, there simply is not enough time to review alternative construction options or to ensure that the proposed transfers will not result in an interruption of service. TWC suggests a 30-day notice period. Standards, Section IV.B.5(f).

Moreover, the proposed Standard is that the Attaching Entity that performs the One-Touch transfer has the discretion to determine that the affected third party's facilities are noncompliant with the Standards, make necessary corrections, and impose all costs upon the third party. Thus, an attacher's competitors would have the ability to declare that TWC's facilities violate the Standards, and then charge TWC for the correction. That obviously is loaded with the potential for unreasonable plant-correction and make-ready cost shifts. To allow one Attaching Entity to exercise that level of authority over one of its competitors would be an invitation to discrimination and abuse, and could lead to numerous disputes between the various attachers as well as CPS Energy itself.

If the One-Touch transfer concept is to be implemented, it must be defined clearly, reasonably limited, jointly planned and developed with proper notice and the use of contractors approved by the affected party. One Attaching Entity should not be given blanket authority to declare another Attaching Entity's facilities noncompliant, nor can costs be imposed on an

Attaching Entity without a clear showing of the cause of noncompliance. *See also,* Section III.C.1. of these Comments. TWC urges CPS Energy to carefully consider these issues prior to implementing the One-Touch transfer regime.

2. Overlashing

The Standards related to overlashing of existing facilities are, for the most part, reasonable and balanced. CPS Energy appears to recognize the importance of the "time to market" for communications providers, as well as their customers. However, the requirement that certain types of overlashing will be subject to the Application process is unreasonable and will result in operational delays for established stakeholders that will stifle efforts to speed the proliferation of advanced services, which is the opposite of the purported intent of these Standards.

Overlashing is a crucial practice for communications providers, enabling them to meet bandwidth and competitive demands by deploying advanced services and upgrades to existing facilities in a cost-effective manner, and without requiring additional pole space. The FCC has found that overlashing is a critical aspect of implementing the Telecommunications Act of 1996 ("the 1996 Act") because it promotes competition and does not require prior permission, notification or payment.

The practice of overlashing a relatively small and lightweight fiber optic cable to an existing cable television strand and coaxial cable assembly adds only a very small incremental amount to existing pole loads. In general, overlashing is of great value in the proliferation of advanced services, providing significant benefits with minimal burdens. CPS Energy's proposed Standards takes stock of some of these facts as they allow overlashing that does not exceed three and one-half (3.5) inches in diameter to be installed with prior notice only. Standards, Section

III.C.1.(a). TWC agrees with this concept, but proposes that a notice period of only five (5) days is appropriate for such overlashing. Where overlashing is expected to result in a diameter of greater than three and one-half (3.5) inches, a longer notice period of ten (10) calendar days will provide sufficient time for review of the requested information. Standards Section II.C.1. The imposition of additional costs related to an Application filing, and more than five (5) days for review of overlashing that has minimal, if any, impact on pole loading, is unnecessary. Because of the critical role that overlashing plays in the efficient expansion of services, reasonable timetables for accomplishing overlashing are imperative.

In order to address these concerns, while still ensuring overlashing is safely conducted, TWC has proposed reduced notice periods for the overlashing process. TWC's proposed revisions to Section II.C. of the Proposed Standards provide for sufficient notice to CPS Energy to provide any objection to the requested overlashing, as has been the industry practice for years without significant issues.

3. **WiFi Installations**

One of the most troubling aspects of the draft Standards is CPS Energy's decision to treat strand-mounted WiFi devices as unauthorized attachments. Section II. C. 1. More specifically, the new Standards require that a "Wireless Installation" may only be attached to CPS Energy Poles pursuant to a "separate agreement for Wireless Installations." The draft standards expressly target strand-mounted WiFi devices by providing that "Wireless installations found on CPS Energy Poles, or Overlashed mid-span to an Attaching Entity's wired Attachments shall be considered an Unauthorized Attachment subject to Unauthorized Attachment Charges."

To date, TWC has installed several hundred strand-mounted WiFi access points as part of its cable network in and around the City of San Antonio. It has filed for permits for these devices

and received verbal permission to complete their installation. These devices are designed, manufactured and installed for the specific applications for which TWC is using them and are simply part of the TWC cable system. It is unreasonable and potentially discriminatory and otherwise unlawful for CPS Energy to precipitously declare that these component parts of a cable system require a separate agreement (particularly when approvals have been routinely sought and received).

4. Reclamation of Space

TWC appreciates that there may be times when CPS Energy might need to reserve space on its poles for its own future use. However, timely notice of CPS Energy's intent to reserve capacity on poles is essential to TWC's planning, design and construction of its network. The disruption of a provider's services should be minimized. TWC thus proposes that notification of CPS Energy's intention to reserve space in accordance with a *bona fide* system expansion should be required *at or before the time of application and attachment*, not after installation. This would have the effect of being perpetually responsible for make-ready and pole replacement. Standards, Section II.H.10.(a).

Further, notice of at least ninety (90) days, as opposed to sixty (60) days, prior to reclamation of space is reasonable and necessary for an Attaching Entity to complete relocation or undergrounding of affected Attachments. *Id.* In the event an Attaching Entity does not elect to pay the cost of Make-Ready to expand facilities or to go underground, the Attaching Entity should be provided the full ninety (90) days for removal of such facilities. *Id.*

A. Administrative Issues

1. Reporting Requirements

TWC shares the goal of improving the record-keeping practices related to Attachments on CPS Energy's poles. Historically, the attachment records held by both Attaching Entities and Pole Owners have not been maintained in a standardized manner. While TWC is amenable to providing reasonable records related to its attachments that it currently maintains, the level of detail requested by CPS Energy in its Annual Reporting Requirements should not be unreasonably burdensome. For example, much of the information that the Standards would require simply is not maintained in a readily accessible format. Standards Section II.F. TWC proposes that the parties evaluate the requested data in light of the current information maintained by each party, the relevance of that information, as well as the parameters of the information that the impending inventory of facilities will gather.

2. Unilateral Modification and Application of Unreasonable Standards

TWC is committed to working with CPS Energy to cooperatively resolve all issues with the proposed Standards. Nevertheless, TWC has serious concerns with CPS Energy's planned implementation of the proposed Standards in August 2016 without fully engaging in the review process with all stakeholders and making appropriate revisions to the Standards. While TWC will make every effort to work through these concerns in the coming months, we urge CPS Energy to consider extending the effective date of the Standards, if necessary, until the parties have had an opportunity to respond to all submitted comments and continue discussions with CPS Energy regarding all proposed revisions.

The newly proposed Standards cannot apply to existing or prior contracts without the express agreement of the parties. By allotting the appropriate time to the development of

reasonable, non-discriminatory Standards, CPS Energy may avoid future conflicts with stakeholders regarding their application. TWC thus urges CPS Energy to step back and allow for a full review of the proposed Standards and Pole Attachment Agreement.

TWC is also concerned that CPS Energy has reserved the right to unilaterally modify standards in the future, "at any time and manner in response to market conditions." Standards, Section I. This right would contravene the age-old principle that any modifications to a contractual relationship require the assent of the Parties, particularly in light of the lack of any mechanism for the attaching parties to provide comments on or consent to CPS Energy's proposed modifications to the Standards. The lack of input from affected parties creates a potential for unbalanced, unreasonable and discriminatory practices, and may essentially undo the parties' good work throughout these proceedings. Any significant changes to CPS Energy's Standards should be implemented only after there has been an appropriate comment period, and the changes have been accepted by the affected parties.

Finally, the notice period for both Tier 1 and Tier 2 revisions may be insufficient. The Standards merely describe these types of revisions in terms of whether they would require a change in the collection of data needed to file an attachment Application. While this distinction is noteworthy in that the Attaching Entity will have to adjust their procedures in preparing an Application, there are many other revisions that could require substantial preparation as well. As drafted, the affected parties have no voice in the revision process, and would be bound by the resulting Standards, thus, a much greater notice period is necessary. Standards, Section II.G.1.

3. Pole Attachment Rates

It is no secret that the calculation of Pole Attachment Rates in accordance with PURA Section 54.204(c) has been the subject of considerable controversy between CPS Energy and

Attaching Entities. Despite TWC's requests, CPS Energy has not provided the necessary cost data and back-up information for the parties to confirm CPS Energy's pole attachment rates are in compliance with Texas law. In order to resolve rental-rate issues and avoid future rate disputes, full transparency in rate calculations is necessary.

The Standards do not appear to contemplate a process for CPS Energy to provide the cost data, back-up information and rate calculations to the Attaching Entities prior to invoicing its Annual Pole Attachment Connection charges. In order to allow the Attaching Entities to confirm CPS Energy's Attachment Rate is calculated in accordance with Section 54.204(c), CPS Energy should provide at least 60 days' notice prior to invoicing the annual attachment fees of the calculated Pole Attachment Rate. Under the FCC rules, which apply to MOUs by operation of Section 54.204, attachers are entitled to sixty days prior notice of any increase in pole attachment rates, regardless of the justification for the increase in rates. 47 C.F.R. § 1.1403(c)(2). This process of transparency in rates would do much to resolve any issues regarding CPS Energy's rate calculation and should be implemented here.

All required justification and supporting data for the Pole Attachment Rate should be provided with the notice of the yearly attachment rate. This will enable the parties to review the information, discuss the pole owner's rate justification or supporting data, and, if necessary, negotiate the rate prior to the invoice due date. This could avoid potential conflicts regarding the rate calculation and obviate the need for parties to delay payment of contested charges. This cooperative process is consistent with approaches taken by the FCC as well. 47 C.F.R. § 1.1411 ("Commission may. . . require one or more informal meetings with the parties to clarify the issues or consider settlement of the dispute. . ."). TWC urges CPS Energy to consider the value of these practices and to incorporate them into the proposed Standards.

Additionally, and in light of the FCC's 2015 Order on Reconsideration, the Attachment Rate Formula provided in Appendix H of the Standards must be updated to incorporate the FCC's revisions to the definition of "Cost." *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, Order on Reconsideration, WC Docket No. 07-245 (rel. Nov. 24, 2015).* The formula provided in the proposed Standards uses the prior definition of Cost, as applied to Urbanized Service Areas, from the FCC's 2011 Order. *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future,* 26 FCC Rcd. 5240, 5244 (Apr. 7, 2011). The FCC's 2015 Order adjusts Cost by the average number of Attaching Entities applied in the rate formula, rather than the population of the service area. The new Cost definition, effective March 4, 2016, is as follows:

- In Service Areas where the number of Attaching Entities is 5 = 0.66 x (Net Cost of a Bare Pole x Carrying Charge Rate)
- In Service Areas where the number of Attaching Entities is 4 = 0.56 x (Net Cost of a Bare Pole x Carrying Charge Rate)
- In Service Areas where the number of Attaching Entities is 3 = 0.44 x (Net Cost of a Bare Pole x Carrying Charge Rate)
- In Service Areas where the number of Attaching Entities is 2 = 0.31 x (Net Cost of a Bare Pole x Carrying Charge Rate)
- In Service Areas where the number of Attaching Entities is not a whole number = N x (Net Cost of a Bare Pole x Carrying Charge Rate), where N is interpolated from the cost allocator associated with the nearest whole numbers above and below the number of Attaching Entities.

As the FCC 2015 Order is already in effect, the correct definition of "Cost" should be reflected in the proposed Standards.

B. Penalties

CPS Energy's Standards are fraught with a host of stiff penalties, many of which are

draconian, unnecessary, and if adopted would be an invitation to abuse. While penalties for rule violations may be appropriate where there is no reasonable alternative to encourage compliance, (and TWC appreciates CPS Energy's need to maintain control over its infrastructure) the penalties are excessive and, in many circumstances, would be imposed without any evaluation of the intent or fault of the Attaching Entity.

1. Suspension of Permitting Process

Perhaps most problematic of these measures, are the many situations where CPS Energy could halt facilities deployment and permit processing for supposed noncompliance with the Standards. Among them are administrative requirements, such as the failure to provide the updated Registration Form and the annual information in the required time frame, failure to pay a non-disputed invoice ninety (90) days beyond its due date, or failure to pay or otherwise follow CPS Energy's claim procedures. Standards, Sections II.F.5, II.I.1.(f) and II.J.5. CPS Energy will also suspend the processing of permits if it determines that an Attaching Entity (i) makes use of an Attachment in any what not specified in the Standards; or (ii) improperly tags an Attachment. Standards, Sections II.H.8, and III.A.7. Finally, CPS Energy will freeze permit processing if an Attaching Entity *allows* its Communications Facilities to continue to interfere with the operation of CPS Energy Facilities after an initial fifteen-day correction period. Standards, Section III.A.8. Essentially, there is no violation of Standards that CPS Energy could not use as a basis for refusing to process an Attaching Entity's Applications: "[t]he uninterrupted processing of an Attaching Entity's Pole Attachment Application is contingent on the timely payment of pole attachment invoices *and compliance with the requirements and specifications of these Standards*." Standards, Section II.C, *emphasis added.*

While TWC certainly agrees that compliance with all Standards is an important goal, penalizing an Attaching Entity for late payments, improper tagging, an inability to promptly resolve a technical issue or any number of minor infractions that may or may not be within the Attaching Entity's control, by foreclosing their ability to conduct business is not reasonable. It is also excessive, anti-competitive and rife with potential to inflict significant economic and financial damage on communications attachers. The repeated and looming threat of such a sanction in the Standards is unlikely to increase compliance with Standards, especially where the infractions have no element of intent. This type of virtually limitless penalty, however, will create the opportunity for unreasonable application and selective enforcement in violation of Texas law. For these reasons, CPS Energy's proposed penalty to suspend permitting activities should be stricken from the Standards completely.

2. Excessive Monetary Penalties

The Standards also contain several penalties that are unnecessary, excessive, and lacking a legitimate cost basis. For example, CPS Energy will impose an Unauthorized Attachment charge of $500 per pole per year, if the Attaching Entity does not have a valid pole attachment agreement. Standards, Appendix H.3(a). This fee is more than 25 times the regular rental rate per year (which TWC believes itself may be excessive). For entities with a valid agreement, the Unauthorized Attachment charge will be five times the annual Attachment Rate (in effect at the time the Unauthorized Attachment is discovered) per pole per year if the offending Unauthorized Attachments are either self-reported or discovered through a joint inspection. An additional sanction of $100 per pole per year is tacked on if the Unauthorized Attachment is found by CPS Energy during any inspection or inventory, bringing the amount to over ten times the regular rental rate per year. Keep in mind, these fees are over and above the annual Attachment

Connection fees that will be due for authorized Attachments. Even for egregious violations of the Standards, these penalties alone are unreasonable. Where, as here, fines are assessed in addition to the fully allocated cost-based recovery, there is great cause for concern.

It is likely that the Attachment records of Attaching Entities and Pole Owners have not been as meticulously maintained as would be ideal. Indeed, CPS Energy only now is conducting the first inventory of its poles in memory. There are a number of reasons for this lack of orderly records and processes, but in place of good records and consistent procedures, informal practices have developed among CPS Energy personnel and communications attachers, resulting (certainly in some places) in imperfect records. In addition, communication attachers have merged with or acquired systems and assets of other entities over the decades, thereby inheriting attachment records which may be inaccurate and incomplete. Recognizing this, some pole owners, occasionally at the urging of certain contractors whose financial interests are tied to maximizing the discovery of "unauthorized attachments," have attempted to turn these past practices into profit centers. For these reasons, establishing a baseline Attachment count, whether by stipulation or pole attachment inventory, should occur at least every five years in order to prevent widely divergent pole attachment counts from developing over time. This principle is often part of pole attachment agreements, which frequently deem all baseline Attachments as authorized, especially if over five years have elapsed since the prior inventory (if any was conducted at all).

As written, CPS Energy's proposed Standards could generate unfair retroactive penalties on Attaching Entities for what is likely the parties' shared failure to conduct timely inventories and maintain an accurate baseline. Limiting the imposition of unauthorized attachment fees to a maximum of five years, or back to the most recent baseline, will create an incentive to the parties to ensure an accurate baseline count is made every five years. This will minimize disputes

regarding divergent attachment counts, foster better working relationships between pole owners and attachers, and prevent pole owners from pocketing windfall penalties at the expense of the Attaching Entity. The excessive fines provided in the Standards create the perverse incentive for CPS Energy to determine Attachments are unauthorized during their independent inspections to maximize the penalties and should be stricken.

TWC has identified several other unreasonable penalties having no relationship to actual costs. For example, if an Attaching Entity fails to make a Complex Transfer in the required time frame, CPS Energy may deem the Attachment as Unauthorized, stop processing Applications and assess penalties, including a $350 penalty per Attachment for the failure to transfer in a timely manner as well as the Unauthorized Attachment penalty of five times the Attachment fee. Not only are these fines excessive, they are contingent upon a competing Attaching Entity's request for transfer of another Attaching Entity's facilities. As discussed in the "One-Touch Methodologies" section of these comments, this system allows an Attaching Entity to have some level of authority over another, especially if one Attaching Entity is in the process of a mass deployment that may necessitate a high volume of Simple and Complex Transfers of other entities' attachments in a short time frame. This will strain contractor and other resources to perform the necessary make-ready and transfers of facilities, thereby leading to delays in work completion and the exorbitant penalties that CPS Energy wishes to attach to such delays.

Similarly, CPS Energy seeks to impose a $1000 Safety Violation Assessment per Safety Violation identified. Standards, Appendix H. This is essentially a strict-liability assessment with no evaluation or determination of fault in the Standards. In accordance with the One-Touch procedures, a competing Attaching Entity will possess the discretion to determine whether the affected Attaching Entities facilities are in compliance, thereby shifting the costs of remediation

to its competitor and subjecting them to the $1000.00 fine for each violation, regardless of whether they caused the violation or not. Standards, Section IV.B.5.(e)(i).

These types of penalties have no reasonable cost basis and are at high risk of discriminatory and malicious or abusive application. Attaching Entities already have a monetary incentive to prevent Unauthorized Attachments and Safety Violations, simply to avoid the extra costs imposed for the Unauthorized Attachments (which normally would be as five times the cost of authorized Attachments if such Attachments were discovered within a year of installation) and the remediation costs of Safety Violations (which abundantly exceed the costs of doing it right the first time). These penalties are unreasonable, unjustifiable, and susceptible to discriminatory application, and should be removed from the Standards.

3. Other Unreasonable Charges

In addition to the many unreasonable penalties and pervasive threats to shut down the permitting process, CPS Energy has added several charges that are either unreasonably high or may result in double-recovery as they should already be included in the annual Pole Attachment Connection Fee, and requirements that will unreasonably increase costs without valid cause.

In general, all fees and charges related to pole attachments should be rooted in cost causation. Thus, if a payment is not made by the required due date, the pole owner at most should be compensated for the time value of the money "lost" during the time period it was denied payment. The interest rates set for the period of nonpayment by the Internal Revenue Service for individual underpayments pursuant to Section 6621 of the Internal Revenue Code are designed to provide compensation for the value of money, and are utilized by the FCC, which is consistent with the requirements of PURA §54.204. TWC proposes the use of the Internal Revenue Code interest rate, as opposed to CPS Energy's proposed application of 1.17% simple

interest per month, to provide CPS Energy appropriate compensation for late payments. Standards, Section II.I.1.(e).

CPS Energy also proposes to add a 10% surcharge to the remediation costs where an Attaching Entity has not made corrections in a timely manner. Standards, Section II.K.3.(c). There is no cost basis for recovering anything above the actual reasonable costs of remediation, especially when the violation may have been caused by another party, including CPS Energy.

TWC is also concerned that the Application Fee, tree trimming charges and other costs contemplated by the Standards are likely to result in double recovery of costs because such charges are generally covered by the Annual Attachment Connection Fee. Routine Vegetation Management, in particular, should be covered by CPS Energy as they are responsible for keeping the rights-of-way clear and book such charges to the maintenance account, which is a component of the Annual Attachment Connection Fees. Any initial right-of-way clearing is generally covered by Make-Ready charges, so CPS Energy is appropriately compensated for all such costs already. Similarly, any administrative or other costs associated with CPS Energy employees investigation of an untagged attachment should be booked to the appropriate account and recovered through the Annual Attachment Connection Fees. CPS Energy's proposal to charge a $150 Tracing Line Ownership Fee plus an additional $100 per hour thereafter to investigate Untagged Attachments is unreasonable, not only because it is excessive, but also because historically there has not been a tagging requirement, and as such there are likely thousands of untagged attachments that were in compliance with applicable standards at the time of installation. These should not be subject to penalties now.

Finally, CPS Energy's proposed Standards require the use of a CPS Energy-approved licensed professional engineer to complete the engineering analyses required in completing a

permit application, for Make Ready Engineering, for certification of overlashing and completion of any pole loading analyses. *See* Standards, Sections II.A.23, III.A.1, III.C.1, and Appendix G. In TWC's experience, the use of a licensed Engineer to complete any of these tasks has generally not been required, nor missed, in a century of construction of aerial communications networks. This long-standing industry standard is reflected in the lack of regulatory or legal requirements mandating the use of professional engineers to perform the analyses associated with a permit application. There is no legitimate basis to impose such a requirement now – and doing so will add additional and unnecessary expenses and delays to network deployment, particularly since Attaching Entities typically do not staff their construction departments with professional engineers, and would have to hire engineers from outside firms (some of which may be situated in distant locations), which is not only unnecessary and time consuming, it is contrary to the primary purpose of the Standards. So long as the employees and contractors approved to perform such tasks possess the requisite knowledge and training to safely complete their work, all the stakeholders' – and CPS Energy's interests – are protected.

C. Liability Issues

1. Costs for Remediation of Safety Violations

An issue of the highest importance to both CPS Energy and TWC is the installation and maintenance of Attachments in compliance with all Standards, especially those related to safety. TWC agrees that prompt remediation of any safety violations is necessary. However, just because an Attachment is in violation of the Standards, does not mean that the Attaching Entity who installed the Attachment caused the safety violation. To the contrary, most, if not all, Attachments are approved as compliant with Standards in the post-construction inspection

conducted after installation. Often, the later modifications of another Attaching Entity or the pole owner cause the existing Attachments to become noncompliant with the Standards. In addition the character of the surrounding area may have changed. For example yesterday's drainage ditch between a dirt road and cow pasture today could be a driveway to a new housing development, convenience store or strip mall. As with all reasonable, cost-based regulation, the cost causer, *i.e.*, the party that caused the violation of the Standards, should pay for the remediation costs.

CPS Energy's proposed Standards make no effort to distinguish between the causer of the violation and the owner of the noncompliant Attachments, but instead purport to shift all costs and responsibility to the Attaching Entity, and tack on additional penalties and surcharges. Standards, Section II.K.3. TWC and other Attaching Entities cannot be forced to fit the bill, and then some, for violations of Standards caused by CPS Energy or any other third party.

TWC proposes that the Standards be modified to ensure that the party who caused the violation is responsible for all remediation costs, and eliminate any additional penalties or surcharges associated with such violations.

2. Indemnification

As confirmed by the FCC and numerous courts, indemnification provisions between Attaching Entities and pole owners should be reciprocal in nature, and should exclude liability caused by either party's negligence or willful misconduct. TWC has redlined the draft Pole Attachment Agreement indemnification provisions accordingly. *See* Exhibit B.

3. Claims Investigations

CPS Energy has provided comprehensive standards related to the processing of claims for damages to CPS Energy's facilities resulting from an Attaching Entity's construction. Standards,

Section II.J. TWC believes the Standards contain, for the most part, thorough and reasonable requirements. However, it is problematic that CPS Energy controls all aspects of claims processing, including the dispute process, and has not included a process for adjudicating damages claims of Attaching Entities.

As a threshold matter, CPS Energy must include a procedure to address claims for damages to the facilities of Attaching Entities. *See* Standards, Section II.J. Additionally, the Standards provide that CPS Energy's Claims Department is solely responsible for the investigation and resolution of all claims. Standards, Section II.J.1.(c). In the event there is a dispute in resolving the claims, CPS Energy submits the dispute to an "internal independent review panel" which is presumably CPS Energy employees. Standards, Section II.J.1.(b). TWC agrees that disputes should be referred to an independent person, but, in fairness, that person should not be another CPS Energy employee. An Attaching Entity has the right to a truly independent review of disputes, as well as their own independent claims investigator from the outset of an incident, and must also reserve all rights and remedies available to them if the internal conflict resolution process administered by CPS Energy is not satisfactory to them. TWC urges CPS Energy to accept these simple but important revisions to the Standards.

IV. CONCLUSION

Much like the provision of electricity to our rural areas almost a century ago, reliable broadband communications services will continue to greatly improve Texans' quality of life by providing increased opportunities for employment, education and other transformative benefits. CPS Energy's Proposed Standards present a comprehensive set of practices and procedures, including, for the first time, the accelerated deployment plan which contemplates a "One-Touch" practice that will allow third parties to modify TWC's (and other stakeholders) network without

notice or opportunity for objection. While the intent of this practice may be to speed the deployment of broadband services, especially for those providers who are new market entrants, the potential and substantial risks and costs associated with the One-Touch practice to established communications service providers must be addressed.

TWC supports adoption of revised Standards that are more aligned with the changing face of Telecommunications services, including Standards related to Wireless Attachments. However, such Standards should be implemented only after they have been thoroughly vetted by all stakeholders and CPS Energy. TWC thus submits these comments, consistent with its initial proposed revisions set forth in the TWC's redlined proposed Standards and draft Pole Attachment Agreement, attached as Exhibits A and B, for consideration.

Respectfully submitted,

Time Warner Cable Texas LLC

By its Attorneys

CERTIFICATE

I hereby certify that a copy of the above and foregoing Comments of the Time Warner Cable Texas LLC this day has been forwarded to all persons listed on the Official Service List in this Matter by electronic process as well as placing same in the United States mail, postage prepaid and properly addressed.

San Antonio, Texas, this 1st day of April, 2016.

J. D. Thomas