

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

In the Matter of

TELEPHONE COMPANY - CABLE
TELEVISION Cross-Ownership Rules,
Sections 63.54 - 63.58

and

Amendments of Parts 32, 36, 61, 64, and 69
of the Commission's Rules to Establish and
Implement Regulatory Procedures for Video
Dialtone Service

RECEIVED

DEC 16 1994

CC Docket No. 87-266 FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

RM-8221

**POLE ATTACHMENT COMMENTS
OF CONTINENTAL CABLEVISION, INC., ET AL.**

Paul Glist
John Davidson Thomas
COLE, RAYWID & BRAVERMAN, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
(202) 659-9750

Attorneys For

- Continental Cablevision, Inc.
- Greater Media, Inc.
- Jones Intercable, Inc.
- Western Communications, Inc.
- Adelphia Cable Communications
- Charter Communications Group
- Community Cable TV
- Prime Cable of Chicago, Inc.

- The Florida Cable Television Association
- The Cable Television Association of New York, Inc.
- The Texas Cable TV Association

December 16, 1994

No. of Copies rec'd 024
List Above

Summary

Continental Cablevision, Inc. ("Continental"), Jones Intercable, Inc., Western Communications, Inc., Greater Media, Inc., Adelphia Cable Communications, Charter Communications Group, Prime Cable of Chicago, Inc., and cable operator members of the Texas Cable TV Association, New York State Cable Television Association, and Florida Cable Television Association (collectively "Pole Licensees") each have experienced, first hand, abuses inflicted upon them by utilities exercising their monopoly power over essential pole and conduit facilities. Continental and the other Pole Licensees are extremely concerned that utilities only will increase such anticompetitive conduct as they seek to compete directly with cable operators in broadband services.

This concern is especially acute when telephone companies seek to compete head-to-head with cable operators through the provision of video dialtone services. Utility abuse of essential pole and conduit space is nothing new. Indeed before the passage of the Pole Attachment Act of 1978, and the cable-telco cross-ownership ban, utility abuse of its monopoly control over essential pole and conduit space was commonplace.

The cross-ownership and Pole Attachment Act safeguards are no longer sufficient as telephone companies seek to provide broadband video services in direct competition with cable operators through video dialtone.

With the Commission's introduction of video dialtone, the pattern of historical abuse has reemerged with a vengeance. Cable operators now, as much as at anytime in the industry's history, are completely at the mercy of utilities that possess monopoly control over

essential pole and conduit space. Recent examples of abusive LEC conduct include:

- imposition of \$120 per-pole surcharge for fiber optic attachments or non-entertainment services;
- raising pole and conduit attachment fees charged to cable operators by as much as 550% on the heels of filing competing video dialtone applications;
- requiring cable to secure advance permits for fiber, but not coaxial conductor installation;
- requiring cable operators to provide timeframes for fiber construction projects in order to monitor cable's fiber optic construction progress;
- forcing cable operators, contrary to long-standing business and engineering practice, to secure separate permits for fiber overlash;

These and other telco abuses require the Commission to adopt video dialtone-specific regulations:

- specifying that the Commission shall not grant a video dialtone authorization, amendment to an existing authorization, or approve a video dialtone tariff or tariff modification, if the video dialtone applicant/grantee imposes in any state any rate, term or condition on a cable operator, or, engages in any other practice against a cable operator which has the purpose or effect of distinguishing between coaxial and fiber conductors or video or non-video transmissions, or, which otherwise has the purpose or effect of impeding cable operators' deployment of fiber, non-video services, or any other facilities or services;
- requiring that if a cable operator or other party makes a substantial showing with respect to telephone company rate or other discrimination in coax/fiber attachments or video/non-video services, within the applicable comment or petition period, the application, amendment or tariff submission will not be processed until the matters raised in the comments or petition are resolved;

- requiring all video dialtone applications, application amendments, and tariff submissions to contain a sworn certification executed by an officer or director, that the video dialtone applicant/grantee is not presently engaging, nor in the future shall engage, in any practice, including the imposition of unreasonable pole and conduit rates, that has the purpose or effect of discriminating between coaxial and fiber conductors, or video and non-video services;
- amending its pole complaint rules to provide for the institution of expedited pole complaint proceedings by a cable operator or any other interested party, against a video dialtone applicant or grantee engaging in any of the acts or practices against cable operators proscribed herein;
- mandating that video dialtone applicants/grantees provide notice to all cable operators, within the state where the video dialtone system is located, of the filing of any video dialtone application, amendment, tariff or tariff modification or proposed pole or conduit rate increase;
- specifying new procedures for telcos with pending video dialtone applications or authorizations to submit requests for pole and conduit rate increases, with sufficient supporting documentation, for prior Commission approval.

Continental and the other Pole Licensees believe that the adoption of these safeguards will provide additional and much-needed protection against monopoly abuse over essential pole and conduit facilities by video dialtone operators, and foster robust competition between the telephone and cable industries, to the ultimate benefit of consumer service and choice.

TABLE OF CONTENTS

	<u>PAGE #</u>
Summary	i
I. INTRODUCTION	1
II. BACKGROUND AND HISTORY OF POLE ATTACHMENT ABUSES AND THE LEGISLATIVE AND REGULATORY RESPONSES	4
A. Pole and Conduit Facilities are Essential Facilities	4
B. The Congress And The Commission Have Recognized The Danger Abuse of Pole And Conduit Space and Sought To Foster Cable's Development As A Broadband Services Provider	6
III. RECENT UTILITY POLE AND CONDUIT ABUSES	17
A. LECs Are Increasing Their Anticompetitive Tactics Against Cable Operators	17
B. Recent Anticompetitive Conduct of Local Exchange Carriers	21
1. NYNEX	21
2. Bell Atlantic	24
3. GTE	25
4. Southwestern Bell	27
IV. PROPOSED STANDARDS FOR VIDEO DIALTONE APPLICATION AND SERVICES	29
A. FCC Approval of Video Dialtone Authorizations and Tariffs Should Be Granted Only in the Absence of Pole and Conduit Abuses	30
1. The Video Dialtone Rules Should Prohibit VDT Operators from Attempting to Limit Use of Cable Operator Facilities and Cable Operator Construction and Service Expansion	31

2.	Video Dialtone Applicants and Grantees Must Serve Cable Operators With of All Video Dialtone-Related Filings	33
3.	All Video Dialtone Submissions Must Contain a Sworn Certification that the Video Dialtone Operator is Not Engaging in Anticompetitive Practices Against Cable Operators	33
4.	These Proposals Impose No Significant Regulatory Obligations on Video Dialtone	34
B.	The Commission Should Amend Its Pole Attachment Rules to Protect Competition	34
1.	Telephone Company Violations Subsequent to Commission Approval Would Be Subject to an Expedited Pole Complaint Proceeding Under Part 1 Subpart J of The Commission's Rules	36
2.	The Commission Should Adopt Regulations Requiring All Video Dialtone Service Grantees and Applicants to Receive Advance Approval for All Pole and Conduit Rate Increases	37
V.	CONCLUSION	39
	ATTACHMENT 1: TEXT OF PROPOSED RULES	i

RECEIVED

DEC 16 1994

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

TELEPHONE COMPANY - CABLE
TELEVISION Cross-Ownership Rules,
Sections 63.54 - 63.58

and

Amendments of Parts 32, 36, 61, 64, and 69
of the Commission's Rules to Establish and
Implement Regulatory Procedures for Video
Dialtone Service

CC Docket No. 87-266

RM-8221

**POLE ATTACHMENT COMMENTS OF
CONTINENTAL CABLEVISION, INC., ET AL.**

I INTRODUCTION

Continental Cablevision, Inc. ("Continental"), Jones Intercable, Inc., Western Communications, Inc., Greater Media, Inc., Adelphia Cable Communications, Charter Communications Group, Prime Cable of Chicago, Inc., and the cable operator members of the Texas Cable TV Association, Cable Television Association of New York, Inc., and the Florida Cable Television Association (collectively "Pole Licensees") respectfully submit these Joint Comments in response to the Commission's request for comment appearing at Paragraph 285 of the Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking ("Third Further Notice") released November 7, 1994 in the captioned

proceeding.¹

The Third Further Notice requests comment on whether the Commission should adopt rules preventing video dialtone service providers from unreasonably denying cable operators access to essential pole and conduit space. There, also, the Commission notes that Rule Section 63.57 already imposes certain requirements on LECs seeking to provide channel service to cable operators. That Rule requires LECs, as part of their Section 214 application, to demonstrate that pole attachment rights or conduit space is available "at reasonable charges and without undue restrictions on the uses that may be made of the channel by the operator". This Rule, in part, was intended to prevent telephone companies from denying independent cable operators access to pole (and conduit) space so that such cable operators either would be forced to lease channel capacity from the telephone company (at higher rents) or abandon its plans to construct a video delivery system in that telephone service area.

While Continental and the other Pole Licensees believe that Rule 63.57 has addressed important but narrowly defined considerations in the limited context of channel service leaseback, particularly in its recognition that LECs cannot limit the manner in which

¹See Telephone Company-Cable Television Cross Ownership Rules and Amendments of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, RM-8221 (FCC 94-269) ¶ 285 (Released Nov. 7, 1994) ("Third Further Notice"). Continental and the other Pole Licensees, moreover, support the Video Dialtone Comments ("VDT Comments") filed in this proceeding by the Atlantic Cable Coalition, Georgia Cable Television Association, Great Lakes Cable Coalition, Minnesota Cable Television Association, Oregon Cable Television Association, and the Tennessee Cable Television Association. The Texas Cable TV Association, in addition to joining in these Pole Attachment Comments, is a Joint Commenter in the referenced VDT Comments.

cable operators use their channels of communication, recent experience has demonstrated that this rule alone does not adequately protect competition. The Third Further Notice, and the proposed rules specified in these Comments, represent significant steps in the direction of protecting competition and consumer choice in the broadband services market with respect to LECs' continued monopoly control over essential pole and conduit space.

Both the history of competition between the cable and telephone industries, and recent conduct by utility pole and conduit owners demonstrate that opportunities for utilities to inflict competitive injury on cable operators seldom pass unexploited.

Utility pole and conduit owners, both investor owned electric power and telephone companies, as well as rural electric coops (which are beyond the reach of the Pole Act), traditionally have presented persistent problems for the cable television industry throughout its history. While the 1978 Pole Attachment Act ("Pole Act")² and the cable/telco cross-ownership rules³ have deterred some utility abuses against cable operators, the Commission's files are filled with pole complaint proceedings (many still pending for several years)⁴ demonstrating utilities' continuing efforts to thwart full broadband competition

²47 U.S.C. § 224.

³47 C.F.R. § 63.54.

⁴See, e.g., First Commonwealth Communications, Inc. v. VEPCO, 7 F.C.C. Rcd. 2614 (Com. Car. Bur. 1992) (filed over 6 years before decision); Newport News Cablevision, Ltd. v. VEPCO, 7 F.C.C. Rcd. 2610 (Com. Car. Bur. 1992)(filed 6 years prior to decision); Mississippi Cablevision, Inc. v. South Central Bell, PA-91-0007 (filed Oct. 1, 1991) (still pending); TCA Management Co. v. Southwestern Public Serv. Co., PA-90-002 (filed Oct. 16, 1990) (still pending); TeleCable of Piedmont, Inc. v. Duke Power Co., PA-90-003 (filed Nov. 15, 1990) (still pending); TeleCable of Spartanburg, Inc. v. Duke Power Co., PA-91-002

between the telephone industry and cable.

With the institution of video dialtone, telco abuse of essential pole and conduit space has re-emerged with a vengeance. For this reason, adoption of the safeguards specified in these Comments is necessary both to protect cable operators and to foster competition between the telephone and cable industries, to the ultimate benefit of consumer service and choice.

II. BACKGROUND AND HISTORY OF POLE ATTACHMENT ABUSES AND THE LEGISLATIVE AND REGULATORY RESPONSES

A. Pole and Conduit Facilities are Essential Facilities

It is undisputed that utility poles and conduit space are essential facilities over which utilities have monopoly control. Congress,⁵ federal district and circuit courts,⁶ the

(filed Jan. 15, 1991) (still pending); Cencom Cable Income Partners II, LP v. Duke Power Co., PA-91-001 (filed Jan. 9, 1991) (still pending).

⁵See, e.g., 123 Cong. Rec. 35006 (1977) (remarks of Rep. Wirth, sponsor of Pole Attachment Law) ("The cable television industry has traditionally relied on telephone and power companies to provide space on poles for the attachment of CATV cables. Primarily because of environmental concerns, local governments have prohibited cable operators from constructing their own poles. Accordingly, cable operators are virtually dependent on the telephone and power companies. . . ."); 123 Cong. Rec. 16697 (1977) (remarks of Rep. Wirth) ("Cable television operators are generally prohibited by local governments from constructing their own poles to bring cable service to consumers. This means they must rely on the excess space on poles owned by the power and telephone utilities."); S. Rep. No. 580, 95th Cong., 1st Sess. 13 (1977) ("Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles."); H.R. Rep. No. 721 95th Cong., 1st Sess. 2 (1977) ("Use is made of existing poles rather than newly placed poles due to the reluctance of most communities, based on environmental considerations, to allow an additional duplicate set of poles to be placed").

FCC,⁷ the Department of Justice,⁸ and the U.S. Supreme Court⁹ all have classified utility poles and conduits as essential facilities. Congress has sought to prevent monopoly abuse of pole and conduit space by passage of the Pole Attachment Act.¹⁰ The safeguards in the Pole Act, and the Commission's regulations adopted thereunder,¹¹ however, are insufficient to protect cable operators from the in-market pole and conduit abuses of video dialtone operators.

⁶See, e.g., United States v. Western Elec., 673 F. Supp. 525, 564 (D.D.C. 1987) (cable TV companies "do depend on permission from the Regional Companies for attachment of their cables to the telephone companies' poles and the sharing of their conduit space. . . . In short, there does not exist any meaningful, large-scale alternative to the facilities of the local exchange networks. . . ."); General Telephone Co. of Southwest v. United States, 449 F.2d 846, 851 (5th Cir. 1971) (construction of systems outside of utility poles and ducts is "generally unfeasible").

⁷See, e.g., Twixel Technologies, Letter from FCC Common Carrier Bureau, July 6, 1990 at 4 (basis of telco-cable crossownership rule is "the Commission's traditional concerns with carrier denial of access to essential poles and conduit"); Section 214 Certificates, 21 F.C.C.2d 307, 323-29 (1970) (CATV systems "have to rely on the telephone companies for either construction and lease of channel facilities or for the use of poles for the construction of their own facilities." Telco has monopoly and "effective control of the pole lines (or conduit space) required for the construction and operation of CATV systems"); General Tel. Co. of California, 13 F.C.C.2d 448, 463 (1968) (by control over poles, Telco is in a position to preclude an unaffiliated CATV system from commencing service).

⁸See, e.g., United States v. AT&T, Civ. No. 74-1698, Plaintiffs' First Statement of Contentions and Proof (D.D.C., filed Nov. 1, 1978) (Justice Department's cataloguing of BOC dominance of pole and conduit facilities. "The cost of building a separate pole system was prohibitive, and many municipalities simply forbade this alternative").

⁹See, e.g., F.C.C. v. Florida Power Corp., 480 U.S. 245, 247 (1987) ("In most instances underground installation of the necessary cables is impossible or impracticable. Utility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of television cables").

¹⁰47 U.S.C. § 224.

¹¹47 C.F.R. §§ 1.1401-1.1415.

B. The Congress And The Commission Have Recognized The Danger Abuse of Pole And Conduit Space and Sought To Foster Cable's Development As A Broadband Services Provider

Federal pole attachment regulation arose in response to a dual need: the need to arrest utility abuses that inhibited the deployment of cable as a vehicle for entertainment,¹² and the need to encourage the deployment of independently owned facilities that could deliver the full range of potential broadband services to the home and to local businesses.

The legislative history of the Pole Act was the direct result of overwhelming evidence of utility overreaching to capture or frustrate the development of cable television as the national communications network. The communications space on utility poles is pure surplus to the utility; CATV never consumes or preempts pole space needed for utility purposes.¹³ Moreover, the utilities conceded that pole attachment fees are "added income, and it must be understood it is added income that inures to the benefit of consumers . . . because it offsets operating expenses. . ."¹⁴

Amos Hostetter, Chairman and Chief Executive Officer of Continental, testified

¹²As the Commission has stated, "we know from experience that, as a practical matter, a CATV operator desiring to construct his own system must have access to those poles." Better TV, Inc., 31 F.C.C.2d 939, 956 (1971), recon. denied, 34 F.C.C.2d 142 (1972). Accord, S.Rep. No. 960, 95th Cong. 1st Sess. 13 (1977) ("owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles").

¹³Communications Act Amendments of 1977, Hearings on S. 1547 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 95th Cong., 1st Sess. (1977) (hereinafter "1977 S. Comm.>").

¹⁴Id. at 181.

before Congress regarding this problem. One would expect, he testified, that utilities would encourage cable operators to rent pole space. But in practice, the telephone companies did just the opposite, in "a striking parallel to the changes in the telephone company's perception of cable as a competitive force and to the frustration of its efforts to directly enter the cable television business."¹⁵

When, during the 1950s, cable was viewed as a service inherently limited to small rural communities in mountainous areas, telephone companies permitted attachments at approximately \$1.50 per pole.¹⁶ As telephone carriers became aware, from 1955 to 1965, that CATV would develop in urban markets, the Bell system and the major independents (General Telephone and United Telecommunications) each changed their practice. Bell refused attachments and proposed to cable operators that it construct an entire distribution plant for

¹⁵Id. at 30. Mr. Hostetter testified, further, that:

I am in search of a forum. If [FCC] Chairman Wiley can direct me to a State forum which works and protects me from the monopolistic extortion that this industry has faced, that would be fine. However, I have tried that route. I have also tried the route of private negotiations. I have been a member of three different committees over a period of 6 years, attempting to reach a settlement with A.T.&T. and G.T.&E. Trying to negotiate with your friendly neighborhood utility has not proved very productive.

1977 S. Comm. 27.

¹⁶ Id. at 36.

leased channel service.¹⁷ General Telephone & United Telecommunications refused attachments and, not being bound by the 1956 Bell consent decree, created CATV subsidiaries, which thereafter enjoyed great success in obtaining franchises where General and United operated telephone companies.¹⁸ In pole attachment agreements and channel lease tariffs the telephone companies inserted prohibitions on services that CATV could offer, such as pay TV.¹⁹ Additional evidence, detailed during extensive hearings in 1976 and 1977,²⁰ showed:

- Efforts by the Bell System to force the migration of cable operators onto cables owned by the telephone company, on which they forbade any data transmission and delays imposed on operators who sought to provide independently-owned cable until a more compliant "lease-back" operator could be installed on the poles.²¹
- Petty rejections of application forms, the

¹⁷Id.

¹⁸Id.

¹⁹Id.

²⁰Cable Television Regulation Oversight: Hearings Before the Subcomm. on Communications of the Comm. on Interstate & Foreign Commerce, Parts 1 & 2, 94th Cong., 2d Sess. (1976) (hereinafter "1976 Oversight"); Pole Attachment: Hearings on H.R. 15372 and H.R. 15268 Before the Subcomm. on Communications of the House Comm. on Interstate & Foreign Commerce, 94th Cong., 2d Sess. (1976) (hereinafter "1976 H. Comm."); 1977 S. Comm.

²¹1977 S. Comm. at 30; Better T.V., 31 F.C.C.2d at 966-67 (independent operator "quickly took the hint about the lack of manpower to perform makeready work and accepted channel service rather than run the risk of having the competing channel service customer get such a head start as to make a grant of its request for a pole attachment agreement an empty and worthless gesture.")

refusal to provide pole or conduit maps to cable operators and interminable delays in processing applications or performing makeready.²²

- Prohibitions in telco pole attachment agreements and channel lease tariffs on services that cable television could offer, such as pay TV, ETV, CCTV, FM music and two-way services.²³
- In virtually every case designated for adjudication, the Commission found that the telephone company had abused its monopoly control over poles to gain control over cable television distribution cable.²⁴ Federal courts reached a similar conclusion.²⁵

Power companies acted in conjunction with telephone utilities in engaging in such abuses. Such concerted action between power companies and telcos consisted of power companies' granting control of their poles' "communications space" to the telephone industry,

²²Section 214 Certificates, 21 F.C.C.2d 307, 316, modified, 22 F.C.C.2d 746 (1970), aff'd, 449 F.2d 846 (5th Cir. 1971).

²³Id.; Plaintiff's First Statement of Contentions & Proof at 207, United States v. AT&T, Civ. No. 74-1698 (D.D.C. 1978), Attachment 3. General Telephone & United Telecommunications also refused attachments for independent cable operators and, not being bound by the 1956 Bell consent decree, created cable television subsidiaries, which thereafter enjoyed great success in obtaining franchises where General and United operated telephone companies. United States v. Western Elec. Co., 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956); 1977 S. Comm. at 37.

²⁴1977 S. Comm. at 37.

²⁵TV Signal Co. of Aberdeen v. AT&T, 1981-1 Trade Reg. Rep. (CCH) ¶ 63,944 (D.S.D., Mar. 13, 1981).

thus expanding the power of telephone companies to discriminate against independently owned cable operators.²⁶

In 1966 the Commission concluded that "by reason of its control over utility poles . . . the telephone company is in a position to preclude or to substantially delay an unaffiliated CATV system from commencing service and thereby eliminate competition."²⁷ Eventually, in Docket 18509 (a proceeding initiated by the Commission on its own motion in response 17 LEC Section 214 channel leasing applications), the Commission found that there was "ample basis" for regarding CATV service not just as an entertainment service but as a gateway to the developing market for broadband communications services.²⁸

After describing the "retailing aspects of CATV services", the FCC went on to describe the other legitimate cable television services threatened by utilities. Cable's broadband facilities, said the FCC, "will make economically and technically possible a wide variety of new and different services involving the distribution of data, information storage and retrieval, and visual, facsimile and telemetry transmission of all kinds."²⁹

When the FCC undertook the comprehensive regulation of cable television systems in 1970, it proposed a framework under which cable systems would do far more than

²⁶Congressman Van Deerlin later called this an "unholy alliance between the electric utility companies and the telephone companies." 2 1976 Oversight at 822.

²⁷General Tel. Co. of Cal., 13 F.C.C.2d 488, 463, recon. denied, 14 F.C.C.2d 693 (1968), aff'd, 413 F.2d 390 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969).

²⁸Section 214 Certificates, 21 F.C.C.2d 307 (1970).

²⁹Id. at 324.

deliver entertainment services. As early as 1970, the Commission recognized the possibility that cable systems would "cater to a variety of sophisticated communications needs."³⁰ In 1972, when the Commission announced its comprehensive regulatory framework for cable television, it required major market cable television systems to build networks capable of providing services other than conventional video entertainment.³¹ Cable systems were required to maintain two-way capability for "return communications at least on a non-voice basis," "for surveys, marketing services, burglar alarm devices, educational feedback, to name a few."³² Systems were also required to make channels available for lease.³³ The FCC even anticipated that a cable television system's principal income would be from non-broadcast sources.³⁴ The Commission clearly intended that federal policy should assure cable's role as one link in a national communications system.³⁵ Cable television was never relegated to be a mere conduit for entertainment. There is "ample basis," said the FCC, "for regarding the

³⁰CATV, 25 F.C.C.2d 38, 39 (1970) (notes omitted, emphasis added).

³¹For every broadcast signal carried, the system was required to provide an additional 6 MHz channel suitable for transmission of Class II or Class III signals. Class II are non-broadcast cablecast services. Class III signals are "other forms of communication" -- transmissions other than television pictures, such as "facsimile and printed message materials." Some of these involve analog signals; others make use of digital signals." Cable Television Report & Order, 36 F.C.C.2d 143, 190, 198-00 (1972).

³²Id. at 192.

³³Reconsideration of Cable Television Report & Order, 36 F.C.C.2d 326, 356 (1972).

³⁴Cable Television Report and Order, 36 F.C.C.2d at 190. The specific requirements were later set aside, but neither the policy nor the technology was reversed.

³⁵Recon. of Cable Television Report and Order, 36 F.C.C.2d at 354.

provision of CATV service within a community as, at least, one important gateway" for broadband services. The Commission attempted "to insure against any arbitrary blockage of this gateway."³⁶

In an effort to protect this "gateway" for data services, the FCC adopted the telco/cable crossownership rules, and required utilities to offer "leaseback" applicants independent pole attachment rights free of such use restraints.³⁷ The rules were intended to "preserv[e] . . . a competitive environment for the development and use of broadband cable facilities and services and thereby avoid undue and unnecessary concentration of control over communication media."³⁸

Stymied in the use of affiliated subsidiaries and channel lease agreements, telephone carriers almost immediately demanded, through the direction of their corporate headquarters, vastly increased cable pole rates,³⁹ a powerful weapon frequently employed by telephone companies today. As explained in an AT&T memo, the prices were set not on Bell's cost but to discourage independent attachments and encourage lease of channels controlled by Bell.⁴⁰

³⁶Section 214 Certificates, 21 F.C.C.2d at 324 (emphasis added).

³⁷Id. at 325-27.

³⁸Id. at 325.

³⁹S. Comm. at 38.

⁴⁰The memo states:

Apparently, the incremental cost to the Bell System is expected

(continued...)

Thus, the telephone companies attempted to inhibit the development of services which might in the future compete with services that they themselves wished to offer, through the imposition of punitively high pole attachment rates. Absent video dialtone-specific safeguards, telephone companies will continue to gain unwarranted competitive advantage by "favoring its own or affiliated interest, as against non-affiliated interests in providing access to those pole lines or conduits."⁴¹

With video dialtone, direct service competition between the two industries again has appeared. Telcos and other utilities have brought considerable creativity to inventing new practices designed to anticompetitively thwart the development of cable's full complement of broadband services. In addition to punitively high pole attachment rates, telcos and other utilities have attempted to impose higher rates on Continental and the other

⁴⁰(...continued)

to average about \$1 per pole attachment. The cost to a CATV company to provide its own plant and equipment, which will be of a lower quality would average between \$4 and \$5 per pole attachment, with high probability of added maintenance costs.

According to economic theory, Bell should charge a fee very close to the \$4 level. If these CATV companies can save even 10 cents per attachment by buying them from Bell it would add that amount to their profits.

Charging a few cents below the \$4 level, however, is cutting it rather close, so it is probably better strategy to charge a fee somewhere in the middle ground between \$1 and \$4.

Attachment 3 (United States v. AT&T, No. 74-1698, Plaintiff's First Statement of Contentions and Proof at 209-210 (quoting AT&T memo)).

⁴¹Section 214 Certificates, 21 F.C.C.2d at 324.

Pole Licensees for fiber, as opposed to coaxial attachments, as well as attempts to limit cable operators to supplying one-way video entertainment programming alone. Utility practices to effect these ends have taken a variety of forms, and run directly contrary to decades of Commission policy specifically designed to position cable as a full-fledged broadband service provider, in competition with telephone companies.

The Senate Commerce Committee reported that the Pole Act was premised on "testimony that the introduction of broadband cable services may pose a competitive threat to telephone companies, and that the pole attachment practices of telephone companies could, if unchecked, present realistic dangers of competitive restraint in the future."⁴² The House Commerce Committee found "that the pole attachment controversy exists, in part, because telephone companies consider the cable industry to be a potential competitor, and pole disputes are the result of anticompetitive conduct."⁴³ It was noted on the House floor how "the utilities . . . have responded in traditional monopolistic fashion," "hamper[ing] the expansion of cable service," "thwart[ing] the growth of cable television service."⁴⁴

The 1983 hearings on cable legislation which ultimately led to the adoption of the 1984 Cable Act, were replete with discussions of the broadband services then being

⁴²S. Rep. No. 580, 95th Cong. 1st Sess. at 13 (1977).

⁴³H. R.Rep. No. 721, 95th Cong. 1st Sess. 3 (1977).

⁴⁴123 Cong. Rec. H 5079, 16,694-95 (Wirth).

offered by cable television systems.⁴⁵ Congress learned of cable channels leased by the Tampa Tribune; of the deployment of institutional networks (I-nets); even of cities' concerns that Congress permit them to enforce cable's promises, including the "transmission of data."⁴⁶ In that same hearing, Congress heard testimony both on the need to continue the Pole Attachment Act and on the private-line services offered on CATV.⁴⁷

By 1984, Congress was fully informed that cable operators were beginning to offer "two-way" services and the House Commerce Committee report on the Cable Act contained an approving reference to the potential of cable systems to provide "communications links for business, government offices, and schools." The Committee recognized and welcomed the probability that this was likely to result in competition with existing utilities.⁴⁸

Fully briefed on developing two-way cable services, Congress applauded the competition between the industries as "beneficial."⁴⁹ It premised the entire Cable Act on "promot[ing] competition in cable communications" and expanding "information . . . services"

⁴⁵See, e.g., Options for Cable Legislation: Hearings before the Subcomm. on Telecommunications of the House Commerce Comm. on H. R. Rep. No. 4103, 98th Cong. 1st Sess. 6 (1983) (comments of Rep. Rinaldo).

⁴⁶Cable Telecommunications Act of 1983, Hearings before the Subcomm. on Communications of the Senate Commerce Comm. on S.66, 98th Cong. 1st Sess. 221, 798, 155 (1983).

⁴⁷Cable Television Regulation: Hearings before the Senate Commerce Comm., 97th Cong. 2d Sess. 104, 124 (1982).

⁴⁸H.R. Rep. No. 934, 98th Cong. 2d Sess. 27-28 (1984) ("H.R. Rep.").

⁴⁹*Id.* at 28.

delivered over cable.⁵⁰ It specifically endorsed the new ventures: "[C]able operators are permitted under the provisions of Title VI to provide any mixture of cable and non-cable service they choose."⁵¹ It assured cable operators that their facilities would remain "cable systems" even if they delivered non-cable services:

The term "cable system" is not limited to a facility that provides only cable service which includes video programming. Quite the contrary, *many cable systems provide a wide variety of cable services and other communications services as well. A facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service.*⁵²

Thus, Congress explicitly defined "mixed use" cable facilities to be cable systems. Congress even gave cable operators a federal right to prevent theft of "any communications services offered over a cable system," including "data."⁵³ The Congress, Commission, and courts all have attempted to protect the mixed use attachments of cable operators. For example, in 1992 the Commission reconfirmed that utilities could not assess surcharges on cable operators who upgrade their plant with fiber optics or who transport non-entertainment services over their cable systems.⁵⁴

⁵⁰47 U.S.C. § 521(4) and (6).

⁵¹H. R. Rep. at 44.

⁵²*Id.* (emphasis added).

⁵³47 U.S.C. § 553(a)(1); H. R. Rep. at 83.

⁵⁴Heritage Cablevision Assocs. of Dallas, L.P. et al. v. Texas Utils. Elec. Co., 6 FCC Rcd. 7099 (1991), recon. dismissed, 7 FCC Rcd. 4192 (1992), aff'd, Texas Utils. Elec. Co. v. FCC, 997 F.2d 925 (D.C. Cir. 1993).

Notwithstanding the explicit policy objectives of both the Congress and the Commission to encourage full broadband service deployment by cable operators and the numerous attempts to check abusive utility conduct, utilities remain recalcitrant in their attempts to frustrate cable operators' efforts to be full broadband service providers. The institution of video dialtone service by telephone companies raises both the competitive stakes between the two industries and LECs' temptations to abuse their monopoly control of essential pole and conduit space to harm cable operators. Continental and the other Pole Licensees believe that these high stakes, and absence of effective video dialtone-specific safeguards, require that the Commission accord greater protection for cable operators from video dialtone providers' pole and conduit abuses.

III. RECENT UTILITY POLE AND CONDUIT ABUSES

A. LECs Are Increasing Their Anticompetitive Tactics Against Cable Operators

Utility attempts to limit, by means of their control of pole and conduit space, both the kinds of facilities that Continental and the other Pole Licensees may attach to utility-owned poles and conduits, and, the kinds of services that cable operators provide over those facilities are not merely historical but are occurring today, from Maine to Hawaii. Indeed, earlier this year the utility industry sought to reverse, through federal legislation, the findings of both the Commission⁵⁵ and the United States Court of Appeals for the District of Columbia Circuit,⁵⁶ that assessment of punitive pole attachment rates for non-video services violated

⁵⁵Heritage, 6 FCC Rcd. 7099 (1991), recon. dismissed, 7 FCC Rcd. 4192 (1992).

⁵⁶ Texas Utils., 997 F.2d 925.

federal law.⁵⁷ Rather than abide by the law, utilities sought to change it by amendment to H.R. 3636, in order to tighten their grip over their essential pole and conduit facilities to leverage anticompetitive advantage into broadband services.

Where video dialtone puts telephone companies in direct competition with cable operators, this pattern of conduct, absent additional effective safeguards, only will intensify, to the detriment of competition and consumer choice. Over the years and even subsequent to the adoption of the Pole Act, utility creativity in delaying cable system upgrades and line extension projects has known no limit. Utility abuse in this area takes two forms: (a) the imposition of unreasonable pole and conduit attachment rates (including exorbitant surcharges for fiber optic attachments and non-video transmissions), and (b) anticompetitive tactics in permitting, makeready construction and auditing procedures.⁵⁸

Among the non-rate tactics used by telcos are:

- requiring cable operators to obtain additional permits for fiber overlashes;
- stonewalling in the processing of attachment permits;
- flyspecking permit applications and claiming that insufficient data was submitted or that permitting procedures were not followed;
- unwarranted denial of permits;
- delays in the processing of makeready permits and other measures;

⁵⁷H. R. 3636, 103d Cong., 2d Sess. (1994) (Boucher Amendment).

⁵⁸See supra, at 6-12.

- overly zealous pole audits and forced "correction" of supposed code "violations" before pending or anticipated permits are issued;
- rescission of previously granted permit applications.

Although prudence would seem to dictate that utilities would be loathe to overtly subvert competition at the very time they seek regulatory reform for their own business, several telephone companies nonetheless continue to engage in the very kinds of pole attachment practices that led to the adoption of the Pole Act and cable-telco cross-ownership ban. What follows are just a few illustrations of some of the more egregious recent abuses. While the anticompetitive conduct of local exchange carriers is of primary interest in this proceeding, both investor-owned electric utilities,⁵⁹ and rural electric coops,⁶⁰

⁵⁹It is no secret that electric utilities, like their telephone counterparts, are positioning themselves to supply broadband communications services to the public. See, e.g., Norlight, 2 F.C.C. Rcd. 132 (1987) (FCC promotes effort of a consortium of electric utilities to provide telecommunications service); Public Service Company of Oklahoma, 3 F.C.C.R. 2327 ¶ 4 (P.R.B. 1988) (electric utility leased excess capacity of its 800 mile fiber optic/microwave communications network to third parties, and planned to provide service for "banks, insurance companies, local governments, hospitals and public utilities"); Chesapeake & Potomac Tel. Co. v. Virginia Elec. & Power Co., 116 P.U.R.4th 229 (Va. Corp. Comm'n 1990) (electric utility leased excess capacity on its private fiber optic telecommunications network to stock brokerage); Hawaiian Elec. Co., 87 P.U.R.4th 227 (Hawaii P.U.C. 1987) (electric utility sought to offer fiber optic data and voice communication services to a bank); Pacific Gas & Elec. Co., 1992 Cal. P.U.C. LEXIS 599, Docket No. 92-07-007 (July 1, 1992) (electric utility lease of capacity to long distance telephone carrier); Intermedia Communications of Florida, Inc., 1990 Fla. P.U.C. LEXIS 526 (May 2, 1990) (same); Tampa Elec. Co., 1990 Fla. P.U.C. LEXIS 1177, Docket No. 900061-EI (September 25, 1990) (same); Duke Power Co., 105 P.U.R.4th 521 (N.C. Util. Comm'n 1989) (same).

The electric utilities' growing interest in telecommunications has produced dramatically anticompetitive efforts to handicap cable operators. Texas Utilities initiated one of the first publicized efforts to frustrate the use of cable-owned fiber facilities. After entering into a
(continued...)