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

DA 95-1364

In the Matter of)
)
 American Cablesystems of)
 Florida, Ltd., d/b/a Continental)
 Cablevision of Broward County, and)
)
 Continental Cablevision of)
 Jacksonville, Inc.)
)
 Complainants,)
)
 v.)
)
 Florida Power and Light Company)
)
 Respondent)

CC Docket No. 95-95

PA 91-0012

HEARING DESIGNATION ORDER

Adopted: June 15, 1995

Released: June 15, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order, we designate for hearing a pole attachment complaint filed by American Cablesystems of Florida, Ltd., d/b/a/ Continental Cablevision of Broward County and Continental Cablevision of Jacksonville, Inc. (collectively Continental) against Florida Power and Light Company (Florida Power). The complaint concerns the pole attachment rates Florida Power has charged Continental since August 4, 1992. To expedite the resolution of this complaint, we direct the presiding administrative law judge (ALJ) to require the parties to meet prior to the hearing to determine whether the case can be settled. In the event a settlement is not reached, the presiding judge will, if possible, resolve the case on a paper record, but, if unable to do so, shall conduct such further proceedings as may be necessary.

II. BACKGROUND

A. Statutory and Rule Requirements

2. Pole attachments refer to the placement of cable operator equipment on utility poles owned or controlled by telephone or electric companies. The utility can charge the cable operator for the attachment of its facilities to the utility's poles. Section 224 of the Communications Act of 1934, as amended,¹ empowers the Federal Communications Commission to adjudicate disputes between cable system operators and utilities concerning allegedly unjust and unreasonable pole attachment rates that no state regulates. In enacting Section 224, Congress specified that each pole attachment rate should be deemed just and reasonable if it:

assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space ... which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole....²

This statutory language defines a zone of reasonableness for pole attachment rates that extends from the utility's incremental costs to the cable operator's share of the utility's fully allocated costs. Incremental costs consist of those costs that the utility would not have incurred "but for" cable attachments.³ Fully allocated costs refer to the operating expenses and capital costs of owning and maintaining poles. These costs include depreciation, taxes, administrative expenses, maintenance expenses, and a return on investment.⁴

3. Based on the statutory language contained in Section 224 and the legislative history, the Commission adopted Section 1.1409(c) of its rules.⁵ This section translates the upper bound of the zone of reasonableness defined by Congress into the following formula:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times (\text{Operating Expenses} + \text{Capital Cost of Poles})$$

¹ 47 U.S.C. §224.

² 47 U.S.C. §224(d)(1).

³ S. Rep. No. 95-580, 95th Cong., 1st Sess. 19 (1977).

⁴ *Id.* at 19-20.

⁵ 47 C.F.R. §1.1409(c).

4. We generally calculate the sum of operating expenses and capital cost of poles by multiplying the net cost of a bare pole times the carrying charges, so that the formula for defining the upper bound of the zone of reasonableness becomes:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times \frac{\text{Net Cost of a Bare Pole}}{\text{Carrying Charges}^6}$$

For electric utilities, the net cost of a bare pole equals 85 percent of the net investment per pole, as in the following formula:

$$\text{Net Cost of a Bare Pole}^7 = \frac{\text{Gross Pole Investment} - \text{Depreciation Reserve (Poles)} - 15\% \text{ Net Pole Investment}}{\text{Number of Poles}}$$

Carrying charges refer to costs incurred by the utility in owning and maintaining poles regardless of the presence of cable attachments. They include the utility's income tax, pole maintenance, administrative, and depreciation expenses, as well as a return on pole-related investment at the authorized intrastate rate of return. We express the carrying charges as a percentage that we calculate using formulas that are set forth in Attachment A.

5. In the Pole Attachment Order, the Commission listed the regulatory accounts to be used, where possible, in applying the formulas to determine the maximum allowable rate for pole attachments. For electric utilities, the accounts are set forth in the Federal Energy Regulatory Commission's (FERC's) Uniform System of Accounts, which is similar to the FCC's Part 32.⁸ Attachment B lists these FERC accounts. For rates charged by large electric utilities, like Florida Power, the data used in applying the formulas are derived from those the utility reports on FERC Form 1.⁹ The Commission's rules require the electric utility to provide the rate formula data to the cable operator.¹⁰

⁶ See Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Report and Order, 2 FCC Rcd 4387, 4388, para. 6 (1987) (Pole Attachment Order), recon., 4 FCC Rcd 468 (1989).

⁷ Id.

⁸ See 18 C.F.R. Part 101.

⁹ Form 1 is the annual report that electric utilities file with FERC. Form 1 contains both financial and operational data.

¹⁰ 47 C.F.R. §1.1404(h).

B. The Pleadings

6. Continental filed its complaint on August 4, 1992. In it, Continental states that it owns and operates cable television systems serving several Florida communities. Continental also states that it has pole attachment contracts with Florida Power, that it has attached distribution facilities to Florida Power's poles pursuant to those contracts, and that it pays Florida Power an annual rental fee of \$6.04 for each pole attachment.¹¹ Using information provided by Florida Power and applying the Commission's pole attachment formula, Continental calculates that the maximum just and reasonable rate for its pole attachments is \$5.69 per year.¹² Continental urges the Commission to substitute this lower rate for the \$6.04 rate contained in the contracts, and to order refunds with interest of any payments in excess of the \$5.69 rate.¹³ Continental also states that it attempted to negotiate a reduction in the current rate with Florida Power, but that the differences between the parties do not appear susceptible to settlement.¹⁴

7. In its response to Continental's complaint, Florida Power states that the only issue in this case is what is properly includable in the denominator of the maintenance formula the Commission uses to calculate pole attachment rates. We address that issue below.

III. SUBSTANTIVE ISSUE

A. Parties' Positions

8. The formula Continental used in its complaint for calculating maintenance expense carrying charges divides the utility's balance in FERC Account 593, Maintenance of overhead lines, by the sum of its balances in FERC Accounts 364, Poles, towers & fixtures, 365, Overhead conductors, and 369, Services, minus the depreciation reserves related to those accounts.¹⁵ Florida Power reduces Account 369, Services, to exclude underground plant expenses from the maintenance expense denominator.¹⁶ Florida Power defends this reduction by stating that it records

¹¹ Continental Complaint at 2-3.

¹² Id. at 3.

¹³ Id. at 13-14.

¹⁴ Id. at 3.

¹⁵ Id. at 12 and Exhibit E.

¹⁶ Florida Power Response at 3.

underground plant expenses in a separate subaccount within Account 369 and reports that subaccount on FERC Form 1,¹⁷ that FERC has sanctioned use of that subaccount,¹⁸ that excluding underground plant expenses would produce a more accurate maintenance component and would not upset the balance between maintenance expenses and investment,¹⁹ and use of a subaccount is consistent with FCC rules and requirements.²⁰

9. Continental objects to this exclusion. Continental states that Florida Power's calculation is contrary to established precedent.²¹ Moreover, Continental states that neither FERC nor the Florida Public Service Commission requires Florida Power to include subaccounts in its FERC Form 1 filing.²² Also, Continental asserts that Florida Power has unilaterally and selectively chosen to include its underground plant expense subaccount in its FERC Form 1.²³ Finally, Continental contends that instead of providing a more accurate maintenance component, Florida Power's approach would upset the balance between maintenance expense and investment contained in the FCC's methodology.²⁴

B. Discussion

10. We reject the exclusion of a portion of Account 369 from the maintenance expense denominator, even though that account includes aerial as well as underground investment. The Commission adopted the pole attachment rate formulas, including the maintenance expense formula Florida Power seeks to adjust, in order to provide a fair, but expeditious methodology for calculating maximum reasonable pole attachment rates. The formulas rely on data electric utilities must report for specific accounts on FERC Form 1. The exclusion Florida Power proposes disaggregates one of those accounts in a way favorable to Florida Power. If we were to allow that exclusion, we would also, in fairness to Continental, require Florida

¹⁷ Id. at 6.

¹⁸ Id. at 9.

¹⁹ Id. at 10.

²⁰ Id. at 15.

²¹ Continental Reply at 2, (citing Warner Amex Cable Communications Inc. v. Arkansas Power & Light, Mimeo 100 (Com. Car. Bur. released Oct. 11, 1983)).

²² Id. at 5.

²³ Id. at 7.

²⁴ Id.

Power to disaggregate other accounts to eliminate other mismatches between investments and expenses. We decline to take that step because it would unduly complicate the pole attachment rate calculation process without materially increasing its accuracy.²⁵

IV. CONCLUSION

11. Notwithstanding our findings in paragraph 10 above, we believe that further proceedings are necessary to resolve questions of fact bearing on whether Florida Power charged Continental more than the just and reasonable rates for pole attachments since the complaint was filed in 1992. In TCA Management Co. v. Southwestern Public Service Company,²⁶ the Commission delegated authority to the Common Carrier Bureau (Bureau) to designate pole attachment complaints for hearing in appropriate circumstances. Consistent with that Order and to expedite this proceeding, we designate this complaint for a hearing before an ALJ. In taking this step, we direct the presiding ALJ to use procedures designed to encourage the parties to settle the case or narrow their differences. The ALJ may request some or all of the parties to provide any additional information deemed necessary to clarify the issues or facilitate their resolution.²⁷ If the parties are unable to settle the case, the ALJ will attempt to decide this case based on the paper record. If unable to do so, the ALJ shall have discretion to conduct such further proceedings as deemed necessary and to add any issues during the hearing that will aid in resolving the complaint.

12. If the parties fail to reach a settlement, the ALJ will determine whether Florida Power charged Continental pole attachment rates in excess of the maximums allowable under Section 1.1409(c) of the rules.²⁸ If the rates are unlawful, the ALJ shall determine the refund amounts and any interest that is to be paid pursuant to Section 1.1410 of the rules.²⁹ To assist the ALJ in efforts to decide the case based on a paper record, we direct Florida Power to file with the Commission the data required by Section 1.1404(g) and any other data needed to calculate the maximum rates pursuant to our pole attachment formulas. The data shall be for each of the calendar years 1992 through 1994, be supported by affidavit, and take into consideration the rulings made in this Order. Florida Power shall serve these data on Continental.

²⁵ FCC 95-221, PA 90-0002 (adopted June 9, 1995).

²⁶ Id.

²⁷ See 47 C.F.R. §1.1409(a).

²⁸ 47 C.F.R. §1.1409(c).

²⁹ 47 C.F.R. §1.1410.

13. We direct Continental to file with the Commission the number of Florida Power's poles to which cable fixtures were attached in each of the years 1992 through 1994 and in 1995 through the date of Florida Power's filing in response to this Order. We also direct Continental to file with the Commission the annual pole attachment rates it has been charged by Florida Power for the years 1992 through the date of Florida Power's responsive filing. Continental shall support these data by affidavit and serve them on Florida Power. The issues to be decided in the hearing are set forth below.

VI. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), & 224, and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91 and 0.291, that the complaint American Cablesystems of Florida, Ltd. and Continental Cablevision of Jacksonville, Inc. filed August 4, 1992, against Florida Power and Light Company IS GRANTED to the extent indicated in Paragraph 10 of this Order, and to the extent not granted, IS REFERRED to an Administrative Law Judge.

15. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), & 224, and Sections 0.91 and 0.291 of the Rules, 47 C.F.R. §§0.91 and 0.291, that the above-captioned complaint proceeding IS DESIGNATED FOR HEARING in a proceeding to be held before an Administrative Law Judge at a time and place to be specified in a subsequent order upon the following issues:

1. To determine whether Florida Power charged Continental pole attachment rates that exceeded the maximum amounts allowable under Commission rules during the period covered by the complaint.
2. If Florida Power has charged Continental excessive pole attachment rates during the period covered by the complaint, to determine the amounts of the refunds Florida Power must pay Continental.
3. To determine, in view of the evidence adduced on the foregoing issues, whether Continental is entitled to interest on any refund amounts and, if so, the amount of that interest.

16. IT IS FURTHER ORDERED, that the burden of proof and the burden of proceeding with the introduction of evidence SHALL BE UPON Complainants.

17. IT IS FURTHER ORDERED, that the designated parties may avail themselves of an opportunity to be heard by filing with the Commission a Notice of Appearance in accordance with Section 1.221 of the Rules, 47 C.F.R. §1.221, within twenty (20) days of the mailing of this Order.³⁰

18. IT IS FURTHER ORDERED, that Florida Power and Continental SHALL FILE the information set forth in paragraphs 12 and 13, above, within thirty (30) days of the mailing of this Order.

19. IT IS FURTHER ORDERED, that the parties SHALL ADDRESS any exceptions to the ALJ's decision in this proceeding to the Commission.

FEDERAL COMMUNICATIONS COMMISSION



Kathleen M.H. Wallman
Chief, Common Carrier Bureau

³⁰ If the Bureau intends to participate in the proceedings before the presiding ALJ, the Bureau shall file an appropriate Notice of Appearance.

ATTACHMENT A POLE ATTACHMENT FORMULAS FOR ELECTRIC UTILITIES

Maximum Rate	=	$\frac{A \times C \times D}{B}$
Net Cost of a Bare Pole (C)	=	$\frac{.85 (E - F - G^*)}{I}$
Net Pole Investment (H)	=	$E - F - G^*$
Net Plant Investment (J)**	=	$K - L - M^*$
Accumulated Deferred Income Taxes (Poles) (G)	=	$\frac{E \times M^*}{K}$
Depreciation Carrying Charge (N)	=	$O \times \frac{E}{H}$
Administrative Carrying Charge (P)	=	$\frac{Q}{J^{**}}$
Tax Carrying Charge (R)	=	$\frac{S}{J^{**}}$
Maintenance Carrying Charge (T)	=	$\frac{U}{W}$

A = Space Occupied by CATV; 1 foot
 B = Total Usable Space; usually 13.5 feet
 C = Net Cost of a Bare Pole
 D = Carrying charges, (N + P + R + T + V)
 E = Gross Pole Investment in FERC Account 364
 F = Depreciation Reserve (Poles)
 G = Accumulated Deferred Income Taxes (Poles)
 H = Net Pole Investment
 I = Number of Poles
 J = Net Plant Investment**
 K = Total Gross Plant Investment
 L = Total Depreciation Reserve
 M = Total Accumulated Deferred Income Taxes = Sum of Accounts (281, 282, 283, and 190)*
 N = Depreciation Carrying Charge
 O = Depreciation Rate for Poles
 P = Administrative Carrying Charge
 Q = Total General and Administrative Expenses
 R = Tax Carrying Charge
 S = Total Current and Deferred Tax Expense = Sum of Accounts 408.1, 409.1, 410.1 and 411.4) less Account 411.1
 T = Maintenance Carrying Charge
 U = Maintenance of overhead lines (Account 593)
 V = Cost of Capital (Return) = Return Authorized by State Regulatory Commission
 W = Investment in FERC Accounts 364, 365 and 369 less Depr Reserve and Accumulated Deferred Taxes related to those accounts.*

* We treat deferred taxes as most state commissions do -- as a rate base deduction. If the state utility commission includes the reserve for deferred income taxes in the utility's capital structure at zero cost, we would not make any further adjustment.

** For companies with multiple operations, the Commission, in calculating the administrative expense carrying charge, utilizes only investment relating to electric operations. However, for the tax carrying charge, the total plant investment of all the company's operations is utilized because taxes paid by a utility generally relate to its entire operations.

ATTACHMENT B

ACCOUNTS USED IN FORMULAS

<u>FERC ACCOUNT NO.</u>	<u>ACCOUNT NAME</u>
364	Poles, Towers & Fixtures
365	Overhead Conductors
369	Services
593	Maintenance of Overhead Lines
408.1	Taxes Other Than Income Taxes
409.1	Income Taxes-Federal
409.1	Income Taxes-Other
410.1	Deferred Income Taxes
411.1	Deferred Income Taxes (Credit)
411.4	Investment Tax Credit Adjustment
NA	Depreciation
NA	Total Administrative and General Expenses
NA	Gross Plant Investment
NA	Depreciation Rate for Accounts 364, 365 & 369
NA	Investment in Accounts 364, 365 & 369