Accounting & Audits
Rm 812

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Cencom Cable Income Partners, II, L.P., Cencom Cable Entertainment, Inc. and Cencom Cable Television, Inc.,	)	CC 95-93
	)	File No. PA91-~~002~~ 001
Complainants,	)	
	)	
v.	)	
	)	
Duke Power Company,	)	
	)	
Respondent.	)	

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ANSWER OF DUKE POWER COMPANY TO THE COMPLAINT FILED BY CENCOM CABLE INCOME PARTNERS, II, L.P., CENCOM CABLE ENTERTAINMENT, INC. AND CENCOM CABLE TELEVISION, INC.

RECEIVED
FEB 14 1991
Federal Communications Commission
Office of the Secretary

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February 14, 1991

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SUMMARY

Duke's CATV pole attachment rate for calendar year 1991 has not yet been determined. In accordance with the Agreements, an interim rate is in effect until Duke has the data necessary to calculate its 1991 rate. This new rate will replace the interim rate, retroactive to January 1, 1991, protecting Complainants from any possible overcharges resulting from use of the interim rate. Therefore, the Commission should defer evaluation of Duke's CATV pole attachment rate pending receipt of Duke's 1991 rate calculation.

In the event the Commission proceeds to evaluate Duke's interim CATV pole attachment rate, it is just and reasonable. Duke's rate is calculated in accordance with Commission methodology and precedent, using Duke's calendar year 1989 data. Therefore, the Complaint should be denied.

The Commission should deny the relief requested in the Complaint because: (1) the Commission has accepted the use of gross figures in calculating CATV pole attachment rates; (2) Duke does not earn a return on "makeready" payments; (3) calculating the rate using gross figures is simpler and produces a more accurate rate; and (4) the Commission has accepted Duke's rate of return figure in calculating its CATV pole attachment rate.

In addition, Duke has provided probative evidence supporting minor modifications to the Commission's formulas used to compute maintenance expenses and normalized taxes.

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	)	File No. PA91-002
Complainants,	)	
	)	
v.	)	
	)	
Duke Power Company,	)	
	)	
Respondent.	)	

To: The Common Carrier Bureau

ANSWER OF DUKE POWER COMPANY TO THE COMPLAINT FILED BY CENCOM CABLE INCOME PARTNERS, II, L.P., CENCOM CABLE ENTERTAINMENT, INC. AND CENCOM CABLE TELEVISION, INC.

On January 8, 1991, Cencom Cable Income Partners, II, L.P., Cencom Cable Entertainment, Inc. and Cencom Cable Television, Inc., (Complainants) filed a Complaint against Duke Power Company (Duke). In accordance with Sections 1.724 and 1.1407 of the Federal Communications Commission's (Commission) Rules and Regulations, 47 C.F.R. §§ 1.724 and 1.1407, Duke submits the following Answer to the Complaint.

INTRODUCTION

Complainants first seek a determination from the Commission that Duke's interim cable television (CATV) pole attachment rate

of $4.87 exceeds the maximum rate Duke lawfully may charge. The Commission next is requested to adopt, as just and reasonable, the per pole attachment rate computed by Complainants in the amount of $4.19. Assuming it makes such findings, the Commission then is asked to substitute Duke's rate of $4.87 with Complainants' rate of $4.19 in the Pole Attachment Agreements and to order Duke to refund any amounts Complainants have paid in excess thereof.

As will be shown below, Duke's currently effective CATV pole attachment rate is an interim rate, subject to adjustment retroactive to January 1, 1991, based on Duke's 1990 calendar year cost data. This data will not be available until April 30, 1991. Therefore, the Commission should defer evaluation of Duke's rate pending receipt of Duke's 1991 rate calculation.

In any event, the Commission should determine that Duke has calculated its CATV pole attachment rate in accordance with the Commission's methodology and accept Duke's interim rate of $4.87 as just and reasonable.

BACKGROUND

Duke and Complainants entered into the respective CATV Pole Attachment Agreements (Agreements)1/ on October 18, 1990. Under

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1/ See Agreement with Cencom Cable Income Partners, II, L.P. (CCIP), for Anderson, South Carolina District (October 18, 1990); Agreement with CCIP for Clemson, South Carolina District (October 18, 1990); Agreement with Cencom Cable Entertainment, Inc. (CCE) for Greenville, South Carolina District (October 18, 1990); Agreement with CCE for Greenwood, South Carolina District (October 18, 1990); Agreement

the terms of each of the Agreements, Duke agreed "to issue to [Complainant] a license . . . authorizing attachment of [Complainant's] cable television facilities to the utility poles of [Duke] and on such poles as are, in the sole judgment of [Duke], suitable and available for such attachments."[2/] Duke receives as partial consideration for this license an annual pole attachment fee for each CATV attachment by Complainants to Duke's utility poles.

Duke has developed its CATV pole attachment rate in reliance on the Commission-approved methodology.[3/] This methodology relies in large part on data prepared by Duke each calendar year and filed with the Federal Energy Regulatory Commission (FERC) on or before April 30 of the following year on FERC Form 1.

In order for Duke's CATV pole attachment rate to more closely track Duke's costs of providing this service, the Agreement provides that every June 1, the "Annual Pole Attachment Fee ...

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with CCE for Spartanburg, South Carolina District (October 18, 1990) and Agreement with Cencom Cable Television, Inc. for Greer, South Carolina District (October 18, 1990). The six Agreements contain identical terms and conditions. Therefore, for purposes of this Answer, the term Agreements will refer to any one or all of the Agreements, as necessary. These Agreements are attached to the Complaint.

2/ Agreements at 1, § 3.1.1.

3/ See In the Matter of Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 2 F.C.C. Rcd. 4387 (July 23, 1987); Erratum (August 21, 1987), recon. denied 4 F.C.C. Rcd. 468 (1989) (Report and Order).

shall be retroactively adjusted to January 1 and shall be based upon data from [Duke's] FERC Form 1 for the prior year."[4/]

Each of the Agreements established the per pole CATV attachment rate at $4.87, subject to change retroactively to January 1, 1991 based upon Duke's 1991 FERC Form 1 (containing calendar year 1990 data).

Less than three months after signing the Agreements, without providing any notice to or discussing the matter with Duke,[5/] Complainants filed the instant Complaint.

ANSWER TO SPECIFIC ALLEGATIONS[6/]

1. Duke lacks knowledge or information sufficient at this time to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint.

4/ Agreement at 4, §§ 4.2 and 4.3.2. For example, on January 1, 1991, Duke's CATV pole attachment rate was the same as that charged in 1990. However, on June 1, 1991, Duke will adjust its rate (retroactive to January 1, 1991) based on data contained in Duke's 1991 FERC Form 1.

5/ Duke has met with a representative of one other cable television company (TeleCable of Piedmont, Inc.) regarding Duke's CATV pole attachment rate. The TeleCable representative was accompanied by its attorney, Mr. Paul Glist. At that meeting, Mr. Glist did not indicate that he was at the meeting on behalf of any other cable television company. No other meetings have been held between Duke personnel and Mr. Glist.

6/ The paragraphs which follow, numbered 1-21, are Duke's specific answers to the numbered paragraphs contained in the Complaint.

2. Duke admits the allegations contained in paragraph 2 of the Complaint; and avers further that it also provides electric service in portions of the State of North Carolina and provides water utility service and transit utility service.

3. Duke admits that Section 224 of the Federal Communications Act, 47 U.S.C. § 224, authorizes the Commission, in certain circumstances, to regulate the rate charged for the attachment to utility poles of facilities used to provide cable television service.

4. Duke denies each and every allegation in paragraph 4 of the Complaint; except that Duke admits that it owns utility poles in the States of South Carolina and North Carolina, that Duke has authorized Complainants in accordance with the terms and conditions of the Agreements to attach CATV equipment to certain of Duke's poles for the provision of cable television service and that Duke is not owned by any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

5. Duke lacks knowledge or information sufficient at this time to form a belief as to the truth of the allegations contained in paragraph 5 of the Complaint.

6. Duke denies each and every allegation in paragraph 6 of the Complaint; except that, as stated therein, a certificate of service is attached to the Complaint certifying that a copy of the Complaint was mailed to Duke, to the Federal Energy Regulatory

Commission and to the South Carolina Public Service Commission (SCPSC).

7. Duke denies each and every allegation in paragraph 7 of the Complaint; and avers that Duke and Complainants have entered into the Agreements and that the Agreements provide for Duke, in its sole discretion, to license Complainants to attach their CATV equipment to certain of Duke's poles in the communities of Anderson, Clemson, Greenville, Greenwood, Spartanburg and Greer, South Carolina. Duke further avers that Duke has authorized Complainants to attach their CATV equipment to 5,864 poles in the communities of Anderson, Clemson, Greenville, Greenwood, Spartanburg and Greer, South Carolina.

8. Duke denies each and every allegation in paragraph 8 of the Complaint; and avers that, for the calendar year 1990, Duke charged Complainants an annual per pole CATV attachment fee of $4.87 and that, in accordance with Sections 4.2 and 4.3.2 of the Agreements, this rate will continue into effect until June 30, 1991 wherein it will be adjusted retroactively to January 1, 1991, based upon Duke's 1991 FERC Form 1.

9. Duke denies each and every allegation in paragraph 9 of the Complaint; and avers that the Commission has established a methodology for calculating an annual CATV pole attachment rate that approaches the statutory maximum just and reasonable rate and that, in accordance with the Agreements, this methodology cannot

yet be applied to Duke's cost elements to determine the appropriate CATV pole attachment rate for 1991.

10. Duke denies each and every allegation in paragraph 10 of the Complaint.

11. Duke denies each and every allegation in paragraph 11 of the Complaint; and avers that, at best, such allegations are premature since the CATV pole attachment rate for calendar year 1991 cannot yet be determined.

12. Duke denies each and every allegation in paragraph 12 of the Complaint; and avers that Duke always has used, and the Commission repeatedly has accepted Duke's use of, its rate of return on common equity (rate of return) component in calculating its CATV pole attachment rate.

13. Duke denies each and every allegation in paragraph 13 of the Complaint; except that the SCPSC has authorized for Duke a 13.0% rate of return and a 10.66% weighted cost of capital and avers that the North Carolina Utilities Commission (NCUC) has authorized for Duke a 13.2% rate of rate of return and a 10.82% weighted cost of capital.

14. Duke denies each and every allegation in paragraph 14 of the Complaint; except that Duke continues to calculate its CATV pole attachment rate using its rate of return figure, and avers that this figure repeatedly has been accepted by the Commission.

15. Duke denies each and every allegation in paragraph 15 of the Complaint; and avers that the most important consideration for

the Commission is that "like kind" figures -- all gross or all net -- be used in calculating the appropriate CATV pole attachment rate.

16. Duke denies each and every allegation in paragraph 16 of the Complaint; and avers that "makeready" payments do not fully compensate Duke for the cost of rearranging pole plant or replacing poles to accommodate CATV equipment.

17. Duke denies each and every allegation in paragraph 17 of the Complaint; except that makeready payments constitute less than 0.458% of Duke's additions to distribution depreciation reserve for 1989 and 1990, and avers that Duke does not "earn a return on pole plant erected at the expense of cable television."

18. Duke lacks knowledge or information sufficient at this time to form a belief as to the truth of the allegation contained in paragraph 18 of the Complaint; and avers that Complainants' consent is not necessary for the use of gross investment figures to calculate Duke's CATV pole attachment rate.

19. Duke denies each and every allegation in paragraph 19 of the Complaint; and avers that the important goal is to ensure that like kind figures are employed consistently throughout the calculation of the CATV pole attachment rate.

20. Duke denies each and every allegation in paragraph 20 of the Complaint.

21. Duke avers that Complainants have failed to justify their allegations, failed to meet their burden of proof and have not justified the relief requested.

As for separate defenses to the Complaint, Duke avers the following:

I. THE COMMISSION CANNOT YET DETERMINE DUKE'S 1991 MAXIMUM JUST AND REASONABLE CATV POLE ATTACHMENT RATE.

Complainants seek a Commission determination that Duke's currently effective CATV pole attachment rate -- $4.87 -- exceeds the maximum rate Duke lawfully may charge. However, Duke's CATV pole attachment rate of $4.87 is an interim rate, subject to adjustment on June 1, 1991, retroactive to January 1, 1991.[7] Therefore, the Commission cannot yet evaluate Duke's 1991 CATV pole attachment rate.

The Commission's methodology for calculating CATV pole attachment rates for electric utilities is based largely on data contained in an electric utility's FERC Form 1.[8] In order for Duke's CATV pole attachment rate to more closely reflect the costs

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7/ The Complaint was filed with the Commission on January 8, 1991. In accordance with the Commission's Rules, the Commission may "[o]rder a refund, or payment, if appropriate . . . from the date that the Complaint, as acceptable, was filed, plus interest." 47 C.F.R. § 1.1410(c). The Commission consistently has applied this rule, limiting the effectiveness of any rate change to the date the complaint was filed. Trenton Cable TV, Inc. v. Missouri Public Service Co., 50 R.R.2d 1395, at 1399 (1982); Riverside Cable TV, Inc. et al. v. Arkansas Power & Light Company, PA85-0001, mimeo 4813 (released May 30, 1985). Therefore, all that is at issue in the Complaint is Duke's CATV pole attachment rate from January 8, 1991.

8/ 47 C.F.R. § 1.1404(g). The FERC Form 1 is compiled by each electric utility and filed with the FERC on or before April 30 of each year. The cost data contained in the FERC Form 1 is based on actual utility costs for the previous calendar year.

Duke incurs in providing this service, Duke calculates its rate once a year, on June 1, based upon its most recent FERC Form 1.[9] In accordance with Section 4.2 of the Agreements, this redetermination of Duke's CATV pole attachment rate is then "retroactively adjusted to January 1...."

Thus, once Duke prepared its FERC Form 1 for calendar year 1989, it calculated its 1990 CATV pole attachment rate based on that data. On June 1, 1990, Duke issued bills to its CATV pole attachment licensees which contained the newly effective CATV pole attachment rate. Since this rate became effective retroactive to January 1, 1990, the bill not only charged the licensees for amounts due for the period from July 1, 1990 through December 31, 1990, but also included additional amounts owed for the period January 1, 1990 through June 30, 1990 (over and above that amount already paid).[10]

On December 1, 1990, Duke issued bills to its CATV pole attachment licensees (including Complainants) for amounts due -- based upon a rate of $4.87 -- for the period January 1, 1991 through June 30, 1991, subject to retroactive adjustment on June 1, 1991. In accordance with Section 4.2, Duke will calculate its 1991 CATV pole attachment rate based upon its FERC Form 1 data

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9/ See Agreements at 4, § 4.2.

10/ The additional amounts were owed because Duke's CATV pole attachment rate for 1990 was higher than its rate for 1989. If the newly determined rate had been lower than the interim rate, the licensees would have received a credit for the difference.

for calendar year 1990. On June 1, 1991, Duke will issue bills containing the rate for 1991 which will include any necessary adjustments for the period January 1, 1991 through June 30, 1991.

The foregoing discussion demonstrates that what is at issue in this proceeding is a CATV pole attachment rate which does not yet exist. Complainants are protected from any overcharges that might have been paid to Duke pursuant to the interim rate by the terms of the Agreements which provide for adjustment of the rate retroactive to January 1, 1991, with corresponding adjustments -- up or down -- to the payments already made by Complainants.[11/] The Commission therefore should defer taking any action in this proceeding until Duke submits its 1991 CATV pole attachment rate.

II. DUKE'S INTERIM CATV POLE ATTACHMENT RATE IS JUST AND REASONABLE.

In the event the Commission proceeds to evaluate Duke's interim CATV pole attachment rate, the Commission should deny the relief requested in the Complaint. The CATV pole attachment rate charged Complainants by Duke is just and reasonable. As will be shown below, Duke's rate is fully justified and comports with the Commission-approved methodology.

11/ Complainants are further protected by the Complaint which permits adjustments to Duke's rate, in the event the Commission determines that Duke's rate for 1991 exceeds the maximum just and reasonable rate.

A. Duke Calculates Its Pole Attachment Rate In Accord With The Commission's Rules.

On July 23, 1987, the Commission released its Report and Order which, inter alia, established the methodology to be used by utility pole owners to calculate annual rates which could be charged to cable television companies for the attachment of equipment used to provide cable television service. By this methodology, the Commission has attempted to balance the desire to establish a simple mechanism for calculating the applicable rate, using publicly verifiable data,[12/] while achieving "a rate approaching the statutory maximum...." Id. at 4389. The Commission noted, however, that its "formulas are treated as rebuttable presumptions: they are normally to be used unless a utility chooses to present probative direct evidence regarding an acceptable alternative to meet its unique circumstances." Id. at 4394, n.27.

In this Answer Duke provides justification for its currently effective CATV pole attachment rate using FERC Form 1 data for calendar year 1989 and utilizing the methodology adopted by the

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12/ The Commission explained that, "[c]onsistent with our goal of utilizing a simple and predictable approach, we have chosen formulas which are both reasonable and straight-forward." Id. at 4394.

Commission. The following discussion explains Duke's application of the Commission's methodology to Duke's cost data.[13/]

1. No Basis Exists For Rejecting Duke's Use Of Gross Figures.

Duke calculates its CATV pole attachment rate using "gross" figures. Complainant objects to Duke's use of gross figures in its calculations ostensibly for two reasons: (1) "calculations are preferred when they reflect pole investment net of depreciation" (Complaint at 4, ¶15); and (2) "unless pole investment is calculated net of depreciation, a utility is permitted to earn a return on pole plant erected at the expense of cable television" (id at 4, ¶17). Neither of Complainants' objections warrants Commission rejection of Duke's use of gross figures.

a. The Commission has accepted the use of gross figures.

The Commission's formula is intended to produce a rate approaching the statutory maximum just and reasonable CATV pole attachment rate. The Commission has stated that, when calculating CATV pole attachment rates, the "important goal is to ensure that

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13/ Duke appreciates the need for the Commission to require that CATV pole attachment rates be calculated using public information prepared in a uniform manner. On this basis, Duke has attached as Exhibit A a calculation of its CATV pole attachment rate, using 1989 data from its FERC Form 1. The only information used in Duke's calculations that is not contained in the FERC Form 1 is the total number of poles owned by Duke (of which there is agreement between the parties) and its authorized rate of return (see Exhibit B) which itself is contained in a publicly available document.

'like kind' figures, i.e., all gross or all net figures, are used in the calculation." Report and Order at 4392, n.21. While Duke acknowledges that the Commission has expressed a "preference" for net figures, Complainant has cited no cases where the use of gross figures was rejected.

In several cases, where a CATV company has proposed a rate using net calculations and the utility has developed its rate using gross calculations, the Commission has accepted the utility's gross pole investment figure and determined the appropriate carrying charges on a gross basis. See, e.g., Cable Information Services, Inc. et al. v. Appalachian Power Company, 81 F.C.C.2d 383, at 387 (1980) ("Therefore, we will adopt Appalachian's $114.61 figure for gross cost of a bare pole . . . ."); Television Cable Service, Inc., et al. v. Monongahela Power Company, 88 F.C.C.2d 63, at 69 (1981) ("In the instant case, we adopted Monongahela's $89.27 figure for gross cost of a bare pole . . . ."); and Teleprompter of Greenwood Inc. v. Duke Power Company, Memorandum Opinion and Order, mimeo 001866 at 3 (released July 6, 1981) (Teleprompter).[14/]

Obviously, past practice indicates that, at least in certain circumstances, the Commission has preferred gross figures over net.

14/ The foregoing discussion, demonstrating that the Commission has accepted the use of gross figures over the objections of cable television companies, also refutes the argument that Duke needs Complainants' consent before Duke can calculate its rate using gross figures.

b. Duke's rate does not produce a return on makeready payments.

Complainants argue erroneously that Duke's use of gross figures enables Duke "to earn a return on pole plant erected at the expense of cable television." Complaint at 4, ¶17. Complainants' argument is both procedurally and substantively flawed.

Complainants offer absolutely no evidence to support their bare allegation that Duke earns a return on makeready payments. Section 1.1409(b) of the Commission's Rules, 47 C.F.R. § 1.1409(b) states that "[t]he complainant shall have the burden of establishing a prima facie case that the rate, term or condition is not just and reasonable." Complainants surely have not met their burden here.

The Commission repeatedly has determined that bare assertions by themselves are insufficient to persuade the Commission to act or to refrain from acting. See, e.g., Fulani v. CBS, et al., 3 F.C.C. Rcd. 6245, at 6245-46 (1988); The Offshore Telephone Company v. South Central Bell Telephone Company, et al., 2 F.C.C. Rcd. 4546, at 4554, n.37 (1987); Estman, et al., 4 F.C.C. Rcd. 6872, at 6872 (1989). In lieu of supporting documentation Complainants simply claim that "[m]akeready payments are added to the pole depreciation reserve." Complaint at 4, ¶17. Complainants make no attempt to demonstrate how this affects Duke's CATV pole attachment rate.

More importantly, Duke's CATV pole attachment rate calculation does not result in Duke receiving a return on makeready payments. Duke includes makeready payments in accumulated depreciation.[15] Duke's rate of return figure is adjusted downward to account for accumulated depreciation. This downward adjustment has the effect of precluding Duke from earning a return on its accumulated depreciation. In this manner, Duke calculates its CATV pole attachment rate without providing a return on makeready payments.

c. Gross methods minimize the use of estimated components.

In addition, calculation of a CATV pole attachment rate using net figures requires calculation of an inexact depreciation component which then is applied five times in the pole attachment rate calculations. The depreciation component, like the ADIT Factor, is only an estimate of actual value,[16] and its use five times in calculating the applicable components only exaggerates the impact of the estimates on the rate. In contrast, the use of

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15/ Makeready payments constitute less than 0.458% of Duke's additions to distribution depreciation reserve in 1989 and 1990.

16/ Calculation of a depreciation component and an ADIT Factor are by necessity estimates because Duke's FERC Form 1 does not indicate the amount of depreciation or ADIT attributable to Duke's distribution system investment. These estimates are arrived at by assuming that the same depreciation rate or ADIT Factor applies to poles and to all other subsets of Duke's electric plant. Duke's use of gross figures results in a more accurate CATV pole attachment rate by reducing the number of estimates used in its calculations.

gross figures removes from these calculations a determination of a depreciation component. Thus, any inaccuracy stemming from Complainants' use of estimated depreciation components is eliminated by Duke's use of gross figures in its CATV pole attachment rate calculations.

It is clear that a CATV pole attachment rate calculation is not tainted simply because it is based upon gross figures. The Commission thus should accept Duke's use of gross figures in calculating its CATV pole attachment rate.

B. Utilization Of Gross Figures In The Commission's Methodology Results In A Just And Reasonable Rate.

Duke has demonstrated above the Commission's historic acceptance of gross figures. Following is a discussion of Duke's application of its gross figures in accordance with the Commission's methodology. Differences between the calculations used by the parties will be identified and explained.

1. Gross Investment In A Bare Pole

The Commission formula requires, *inter alia*, a calculation of Duke's investment in a bare pole. Duke calculates its gross investment in a bare pole by dividing its investment in Poles, Towers and Fixtures (Account 364) net of accumulated deferred income taxes (ADIT)[17/] and cross-arm investment,[18/] by the number

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17/ Calculation of Duke's pole investment is consistent with the Report and Order at 4394 ("If the state regulatory Commission treats deferred taxes as a rate base deduction the formula for determining pole attachment rates should include a deduction of accumulated tax reserve from the utility's pole investment.") The SCPSC treats ADIT as a rate base deduc-

of poles Duke owned as of December 31, 1989.[19] This calculation results in a gross investment in a bare pole of $241.61. See Exhibit C.

On the other hand, Complainants' calculation of Duke's investment in a bare pole not only utilizes net figures but also calculates ADIT by calculating a ratio of pole investment (Account 364) to total company plant investment and applying the ratio to total company ADIT. The problem with Complainants' ADIT figure is that Duke's total company plant investment includes investment in its water utility plant and transit utility plant, in addition to its electric plant investment. Duke's total company ADIT figure also includes ADIT for these other plant investments, as included in FERC Form 1. Thus, Complainants' ADIT calculation is not limited to the accounts relevant to the Commission's methodology.

Duke's FERC Form 1 specifically breaks out accounts reflecting Duke's investment in total electric plant and total electric plant ADIT. Duke has divided Duke's total electric plant ADIT by Duke's total electric plant investment. This quotient reflects the percentage of ADIT attributable to Duke's electric

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tion.

18/ See Report and Order at 4390.

19/ Duke does not partially own any poles.

plant (ADIT Factor).[20] Duke then multiplies the amount contained in Account 364 by this percentage to determine Duke's investment in Account 364 net of ADIT. This proxy more closely reflects that portion of ADIT attributable to Duke's distribution plant investment by removing from the ADIT Factor those amounts relating to Duke's water utility plant and transit utility plant.[21]

2. Carrying Charges

In order to apply consistently "like kind" figures, Duke also has calculated its carrying charges using gross figures. Any differences between the method Duke uses to calculate its carrying charges and that used by Complainants (in addition to the use of gross versus net figures) will be discussed below.

a. Maintenance Expense

The major difference[22] between the parties' calculation of the Maintenance Expense component is Duke's inclusion of storm damage expense[23] in its Maintenance Expense component.[24]

20/ See Exhibit G for a calculation of Duke's ADIT Factor.

21/ This ADIT Factor is used consistently throughout Duke's calculation of its CATV pole attachment rate, since it reflects the percentage of ADIT attributable to electric plant.

22/ Duke's ADIT Factor for Maintenance Expense is determined in the same manner as it is for calculating its gross investment in a bare pole and thus will not be explained again here.

23/ Accounted for in FERC Form 1 Account 407.3.

24/ See Exhibit D for a calculation of Duke's Maintenance Expense

The Commission's Maintenance Expense formula does not expressly provide for the inclusion of extraordinary maintenance expenses such as those incurred by Duke on September 21, 1989, from Hurricane Hugo and from the tornadoes which ravaged Duke's service area in May 1989. However, these expenses relate directly to Duke's maintenance of its distribution system and therefore, in Duke's view, should be included.

As noted above, the Commission's formula is a guideline, to be adjusted to take into account special circumstances affecting a utility's system. As required by the Report and Order, Duke presents below "probative direct evidence" regarding unique circumstances warranting Commission acceptance of these extraordinary expenses in the Maintenance Expense component.

In May 1989, a series of tornadoes ravaged Duke's service area, leaving about 250,000 Duke customers without power for several days. The damage caused by these tornadoes fell mainly on Duke's distribution system, the most exposed portion of Duke's electric utility plant. The clean-up after the tornadoes consisted largely of repairing and/or replacing utility poles on Duke's distribution system.

Duke's clean-up after the tornadoes proved to be merely a test run for the biggest clean-up in Duke's history - the aftermath of Hurricane Hugo. William S. Lee, Duke's Chairman and President, stated in his 1989 shareholder's address

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component.

> Hurricane Hugo wracked [Duke's] service area, destroying much of a distribution system that took the better part of 80 years to build. Interrupting service to more than 40 percent of Duke Power's customers, the storm sparked the most massive clean-up and repair effect in [Duke's] history.25/

As a result of these storms, thousands of utility poles were destroyed.26/ Much of the repair work consisted of replacing and repairing Duke's utility poles.27/ The damages attributable to these storms exceeded $73 million.28/

The evidence is clear that these storm damage expenses should be included in Duke's Maintenance Expense component.

25/ Duke Power Company, 1989 Annual Report to Shareholders at 2.

26/ The Charlotte Observer described the destructive force of Hurricane Hugo as follows: "[w]hen Hurricane Hugo blasted through the Carolinas, it toppled trees, snapped power poles and strewed the streets with tangles of live power and telephone lines. The morning light of September 22 revealed scenes of utter devastation to the electrical distribution systems from Charleston to Charlotte to the [North Carolina] mountains." Charlotte Observer, December 25, 1989 at pg. 1C.

27/ See Exhibit H (1989 Annual Report to Shareholders at 15).

28/ Of this amount, approximately $50 million is to be capitalized and the remainder expensed through Account 407.3 over a five year period. Duke has included in its Maintenance Expense component that amount allocable to Account 407.3 in 1989.

b. Depreciation Expense

The only difference between the parties' calculations of Depreciation Expense is the use of gross versus net figures.[29]

c. Administrative Expense

As referenced above in other contexts, Duke calculates its Administrative Expense component utilizing its ADIT Factor while Complainant subtracts Duke's total company ADIT and depreciation reserve from total electric plant.[30]

d. Normalized Taxes

The Commission's methodology contemplates the use of gross plant investment net of ADIT when calculating the Normalized Taxes component. The Commission justified this requirement because "taxes paid by the utility generally relate to its entire operations." Report and Order at 4402, n.***. While this proposition may be true generally, Duke's methodology more closely approximates the normalized taxes related to Duke's electric plant.

As we have noted above, limiting the calculations to electric plant results in a rate that more accurately reflects the costs that Duke incurs in providing this service. Duke's FERC Form 1 includes accounts that indicate the taxes paid and credits received by Duke for its specific operations. For example, page

29/ See Exhibit C for a calculation of Duke's Depreciation Expense component.

30/ See Exhibit D for a calculation of Duke's Administrative Expense component.