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JAN 18 1991

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

Federal Communications Commission  
Office of the Secretary

In the Matter of )  
TeleCable of Piedmont, Inc., )  
Complainant, )  
v. )  
Duke Power Company, )  
Respondent. )

CC 95-93

File No. PA90-003

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**ANSWER OF DUKE POWER COMPANY  
TO THE COMPLAINT FILED BY  
TELECABLE OF PIEDMONT, INC.**

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January 18, 1991

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## SUMMARY

Duke's CATV pole attachment rate for calendar year 1990 is just and reasonable. Duke's rate is calculated in accordance with Commission methodology and precedent. 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.

Finally, in the event the Commission determines that a reduction in Duke's rate is justified, no refunds can be ordered for the period prior to the date the Complaint was filed and then only if the record establishes that a "substantial" overcharge was assessed by Duke.

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To: The Common Carrier Bureau

**ANSWER OF DUKE POWER COMPANY  
TO THE COMPLAINT FILED BY  
TELECABLE OF PIEDMONT, INC.**

On November 15, 1990, TeleCable of Piedmont, Inc. (Complainant) 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**

Complainant first seeks a determination from the Commission that Duke's current 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 Complainant 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 Complainant's rate of \$4.19 in the Pole Attachment Agreement and to order Duke to refund, with interest, the amounts Complainant has paid in excess thereof since July 1, 1990.

As will be shown below, Duke's per pole CATV attachment rate is just and reasonable. The Commission should so find and, on this basis, deny the relief requested by Complainant.

#### **BACKGROUND**

Duke and Complainant first entered into a CATV Pole Attachment Agreement on September 26, 1988. Under the terms of that agreement, 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."<sup>1/</sup> Duke receives as partial consideration for this license an annual pole attachment fee for each CATV attachment by Complainant to Duke's utility poles.

Duke has developed its CATV pole attachment rate in reliance

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<sup>1/</sup> CATV Pole Attachment Agreement at 1, § 3.1.1. This language is identical to that contained in the currently effective Agreements.

on the Commission-approved methodology.<sup>2/</sup> 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 on each July 1, the "Annual Pole Attachment Fee ... shall be retroactively adjusted to January 1 and shall be based upon data from [Duke's] FERC Form 1 for the prior year."<sup>3/</sup>

On May 1, 1990, Duke and Complainant entered into a new Pole Attachment Agreement for the communities of Spartanburg and Greer, South Carolina. Each of the Agreements<sup>4/</sup> established the per pole CATV attachment rate at \$4.26, subject to change retroactively to January 1, 1990 based upon Duke's 1989 FERC Form 1 data.

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<sup>2/</sup> 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).

<sup>3/</sup> Agreement at 4, § 4.2. For example, on January 1, 1990, Duke's CATV pole attachment rate was the same as that charged in 1989. However, on July 1, 1990, Duke adjusted its rate (made retroactive to January 1, 1990) based on data contained in Duke's 1989 FERC Form 1.

<sup>4/</sup> The terms and conditions contained in each of the Agreements are virtually identical. Therefore, for purposes of this Answer, the term Agreements will be used to describe either Agreement or both, as necessary.

On July 1, 1990, Duke notified Complainant that, based on Duke's 1989 FERC Form 1 data, its 1990 CATV pole attachment rate is \$4.87.

In response to such notice, on August 6, 1990, TeleCable Corporation<sup>5/</sup> sent a letter to Duke requesting "certain information required under the rules of the Federal Communications Commission."<sup>6/</sup> Duke responded to this information request on August 31, 1990.<sup>7/</sup>

On October 5, 1990, Complainant's counsel in this case sent a letter to Duke, claiming that Duke's calculations contained two basic errors and stating that he has "concluded that the \$4.87 rate exceeds the maximum lawful rate, which I believe to be \$4.16."<sup>8/</sup> Complainant then requested a meeting with Duke to discuss their respective differences.

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<sup>5/</sup> It is our understanding that TeleCable Corporation is the parent company of TeleCable of Piedmont, Inc.

<sup>6/</sup> See letter from Larry Brett, Vice President, Regional Operations, TeleCable Corporation, to Timothy F. Elmore, Supervisor, Special Contracts, Duke Power Company (August 6, 1990) (Request letter) (attached as Exhibit A).

<sup>7/</sup> See letter from Tim Elmore to Larry Brett (August 31, 1990) (Response letter) (attached as Exhibit B).

<sup>8/</sup> See letter from Paul Glist, Counsel for Complainant, to Tim Elmore (October 5, 1990) (Attached as Exhibit C). Complainant has since revised its calculation of Duke's lawful rate to \$4.19 as evidenced in the Complaint.

The meeting was held on November 5, 1990. At this meeting, Duke and Complainant were unable to resolve their differences and on November 15, 1990, Complainant filed the instant Complaint.

**ANSWER TO SPECIFIC ALLEGATIONS<sup>2/</sup>**

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.

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 Complainant 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

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<sup>2/</sup> The paragraphs which follow, numbered 1-21, are Duke's specific answers to the numbered paragraphs contained in the Complaint.

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 Complainant have entered into the Agreements (attached to the Complaint as Exhibit B) and that the Agreements provide for Duke, in its sole discretion, to license Complainant to attach its CATV equipment to certain of Duke's poles in the communities of Spartanburg and Greer, South Carolina. Duke further avers that Duke has authorized Complainant to attach its CATV equipment to 11,453 poles in the communities of 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 1989, Duke charged Complainant an annual per pole CATV attachment fee of \$4.26 and that, in accordance with Section 4.2 of the Agreements,

on July 1, 1990, Duke notified Complainant that Duke was increasing the rate to \$4.87, effective January 1, 1990.

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 application of this methodology to Duke's cost elements supports a rate of \$4.87.

10. Duke denies each and every allegation in paragraph 10 of the Complaint; except that, to date, the differences between Duke and Complainant have not been susceptible to settlement.

11. Duke denies each and every allegation in paragraph 11 of the Complaint; and avers that at least two areas of dispute exist concerning the proper method for calculating Duke's CATV pole attachment rate.

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 a 13.0% rate of return for Duke and a 10.66% weighted cost of capital and avers that the North Carolina Utilities Commission (NCUC) has authorized

a 13.2% rate of rate of return for Duke 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 addition 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 admits the allegation contained in paragraph 18 of the Complaint; and avers that Complainant's 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 Complainant has failed to justify its allegations, failed to meet its burden of proof and has not justified the relief requested.

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

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

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

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,<sup>10/</sup> 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 and utilizing the methodology adopted by the Commission. The following discussion explains Duke's application of the Commission's methodology to Duke's cost data.<sup>11/</sup>

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

<sup>10/</sup> 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.

<sup>11/</sup> 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 D a calculation of its CATV pole attachment rate, using data from its 1989 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 Complaint, Attachment II) which itself is contained in a publicly available document.

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).

- 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 '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).<sup>12/</sup>

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

Complainant argues 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. Complainant's argument is both procedurally and substantively flawed.

Complainant offers absolutely no evidence to support its 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." Complainant surely has not met its 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

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<sup>12/</sup> 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 Complainant's consent before Duke can calculate its rate using gross figures.

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 Complainant simply claims that "[m]akeready payments are added to the pole depreciation reserve." Complaint at 4, ¶17. Complainant makes 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.<sup>13/</sup> 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 minimizes the use of estimated components.

In addition, calculation of a CATV pole attachment rate using net figures requires calculation of a depreciation component which then is applied five times in the pole attachment rate calculations. The depreciation component, like the ADIT Factor,

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<sup>13/</sup> Makeready payments constitute less than 0.458% of Duke's additions to distribution depreciation reserve in 1989 and 1990.

is only an estimate of actual value,<sup>14/</sup> 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 gross figures removes from these calculations a determination of a depreciation component. Thus, any inaccuracy stemming from Complainant's 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 conclude that the use of gross figures is acceptable for calculating Duke's 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.

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<sup>14/</sup> 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.

1. Gross Investment In A Bare Pole

The Commission formula requires the 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)<sup>15/</sup> and cross-arm investment, by the number of poles Duke owned as of December 31, 1989.<sup>16/</sup> This calculation results in a gross investment in a bare pole of \$241.61. See Exhibit E.

On the other hand, Complainant's 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 Complainant's 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, Complainant's ADIT calculation is not limited to the accounts relevant to the Commission's methodology.

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<sup>15/</sup> 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 deduction.

<sup>16/</sup> Duke does not partially own any poles.

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 plant (ADIT Factor).<sup>17/</sup> 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.<sup>18/</sup>

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 Complainant (in addition to the use of gross versus net figures) will be discussed below.

a. Maintenance Expense

The major difference<sup>19/</sup> between the parties' calculation of

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<sup>17/</sup> See Exhibit I for a calculation of Duke's ADIT Factor.

<sup>18/</sup> 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.

<sup>19/</sup> Duke's ADIT Factor for Maintenance Expense is determined in the same manner as it is for calculating its gross investment

the Maintenance Expense component is Duke's inclusion of storm damage expense<sup>20/</sup> in its Maintenance Expense component.<sup>21/</sup>

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 con-

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in a bare pole and thus will not be explained again here.

<sup>20/</sup> Accounted for in FERC Form 1 Account 407.3.

<sup>21/</sup> See Exhibit F for a calculation of Duke's Maintenance Expense component.

sisted 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

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.<sup>22/</sup>

As a result of these storms, thousands of utility poles were destroyed.<sup>23/</sup> Much of the repair work consisted of replacing and repairing Duke's utility poles.<sup>24/</sup> The damages attributable to these storms exceeded \$73 million.<sup>25/</sup>

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<sup>22/</sup> Duke Power Company, 1989 Annual Report to Shareholders at 2.

<sup>23/</sup> 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.

<sup>24/</sup> See Exhibit J (1989 Annual Report to Shareholders at 15).

<sup>25/</sup> 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.

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

b. Depreciation Expense

The only difference between the parties' calculations of Depreciation Expense is the use of gross versus net figures.<sup>26/</sup>

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.<sup>27/</sup>

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.

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<sup>26/</sup> See Exhibit E for a calculation of Duke's Depreciation Expense component.

<sup>27/</sup> See Exhibit F for a calculation of Duke's Administrative Expense component.

Duke's FERC Form 1 includes accounts that indicate the taxes paid and credits received by Duke for its specific operations. For example, page 115, column (e) of Duke's FERC Form 1 disaggregates the total taxes paid by Duke for its electric utility operations. Thus, Duke has calculated the numerator of its normalized taxes component using the figures contained in column (e).<sup>28/</sup>

In order to maintain consistency, Duke has included in the denominator Duke's total electric plant net of electric plant ADIT. The resulting quotient more closely approximates the actual Normalized Taxes component of Duke's electric carrying costs.

e. Rate of Return on Common Equity

The Commission's formula requires that the utility's most recently authorized intrastate rate-of-return figure be used as the cost of capital figure when computing its CATV pole attachment rate. Complainant objects to Duke's use of its SCPSC approved rate of return of 13.0% in its CATV pole attachment rate. However, as stated above, the Commission treats its formulas "as rebuttable presumptions," to be used unless an acceptable alternative is provided. Duke believes its use of 13.0% as its rate of return component is appropriate for calculating its CATV pole attachment rate.

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<sup>28/</sup> See Exhibit G for a calculation of Duke's Normalized Taxes component.

Duke consistently has used its rate of return figure to calculate its CATV pole attachment rate. In Booth American Company v. Duke Power Company, PA82-0068, mimeo 3064 (released March 22, 1984) (Booth American),<sup>29/</sup> Duke calculated its CATV pole attachment rate using its rate of return figure. Booth American filed a complaint with the Commission claiming that Duke's rate was too high. In its order, the Commission accepted Duke's rate of return figure. Id., mimeo at 7. This was so notwithstanding the fact that the Commission could have -- on its own motion -- rejected Duke's use of its rate of return and replaced it with Duke's approved overall weighted cost of capital.

Moreover, Duke's use of its rate of return figure appeared proper in calculating the Booth American CATV pole attachment rate because the Commission had previously sanctioned its use in Teleprompter of Greenwood, Inc. v. Duke Power Company, Memorandum Opinion and Order, Mimeo 001866 (released on July 6, 1981) (Teleprompter). There, Teleprompter had opposed, among other things, Duke's rate of return figure. The Commission accepted the use of Duke's rate of return figure, adjusting it only to be consistent with the use of gross figures throughout the calcula-

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<sup>29/</sup> While Complainant argues that Booth American has been "superseded," Complainant is unclear as to why or when this precedent was disturbed. Indeed, Complainant concedes that the rate of return figure "... was never challenged."

tion of the appropriate CATV pole attachment rate. Teleprompter, mimeo at 3, n.2.<sup>30/</sup>

Duke's consistent use of its rate of return figure in calculating its CATV pole attachment rate is thus based on the Commission's acceptance of its use in prior contested proceedings. The Commission should give some weight to the fact that it implicitly has upheld this component of Duke's rate on at least two prior occasions.

Finally, with respect to the rate of return issue, Duke believes its use of 13.0% is a compromise. The Commission and the courts have made it clear that CATV pole attachment rates should be based on system-wide data.<sup>31/</sup> Duke's system spans two states, yet it uses only the rate of return figure approved in South Carolina. If Duke were to use system-wide data, it would develop a weighted average of its 13.0% figure and its NCUC approved 13.2% rate of return figure. Duke has declined to increase its rate of return figure despite this apparent opportunity to do so.

On these bases, the Commission is requested to again refrain from upsetting this component in Duke's rate calculation which has remained unchanged since the inception of the Commission's methodology for calculating such rates.

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<sup>30/</sup> The method by which the Commission adjusted Duke's rate of return in Teleprompter is adopted by Duke for purposes of calculating its CATV pole attachment rate. See Exhibit H.

<sup>31/</sup> See, e.g., Texas Power & Light Company v. FCC, 784 F.2d 1265, at 1275 (5th Cir. 1986); 47 C.F.R. § 1.1404(g).