

II. ANY REFUNDS THAT MIGHT BE DUE COMPLAINANT ARE  
UNAVAILABLE FOR THE PERIOD PRIOR TO NOVEMBER 15, 1990.

Should the Commission substitute a new rate, Complainant asks for refunds in excess of the Commission determined maximum lawful rate for the period from July 1, 1990, plus interest. Complaint at 5, ¶21. However, both the Commission's Rules and Regulations and prior case law mandate that refunds, where appropriate, are due only from the date the Complaint was filed.

Section 1.1410(c) of the Commission's Rules states, in pertinent part, that the Commission may "[o]rder a refund, or payment, if appropriate . . . from the date that the complaint, as acceptable, was filed, plus interest." The Commission consistently has applied this rule, limiting refunds to the date the Complaint was filed. For example, in Booth American, the Commission stated that "a refund of excess payments retroactive to the date of the filing of the Complaint, plus interest, is proper." Id., mimeo at 8. See also the cases cited by Complainant, 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, should the Commission determine that any refunds are appropriate in this proceeding, such refunds should be ordered only from November 15, 1990.<sup>32/</sup>

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<sup>32/</sup> In this regard, Duke reserves its right to modify its CATV pole attachment rate effective January 1, 1991, in accordance

Moreover, the Commission's rules imply that refunds are a remedy only when "a substantial overcharge is established by the record...." Cable Information Services, Inc., 81 F.C.C.2d at 393 (emphasis added). Therefore, the Commission must determine not only that Duke's CATV pole attachment rate is unjust and unreasonable, but that it also results in a "substantial overcharge" before a refund is proper.

#### **CONCLUSION**

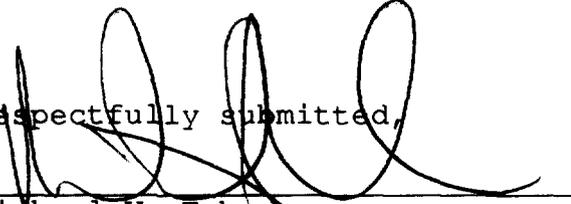
Duke has shown that by applying the Commission's rate methodology to Duke's costs, its CATV pole attachment rate for calendar year 1990 was properly set at \$4.87. The Commission should so determine and affirm Duke's rate as just and reasonable. Should the Commission reduce Duke's rate, and determine that such reduction is substantial, it may only order refunds effective from November 15, 1990.

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with the Agreements. While Duke's 1990 FERC Form 1 will not be publicly available until April 30, 1991, Duke will inform Complainant and the Commission of the newly effective rate as soon as it is available.

WHEREFORE, Duke Power Company respectfully requests that the Commission deny all the relief requested by Complainant and declare that Duke's CATV pole attachment rate is just and reasonable.

Respectfully submitted,



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Michael W. Faber  
Michael D. Paul  
Reid & Priest  
701 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
(202) 508-4000

Attorneys for Duke Power Company

January 18, 1991

A F F I D A V I T

STATE OF NORTH CAROLINA    )  
  )  
COUNTY OF MECKLENBURG    )       ss:

I Wm. Larry Sheppard, Manager of Duke Power Company,  
on oath do state that I have read the foregoing document  
attached hereto; that I am familiar with the matters contained  
therein and know the purpose thereof; and that the facts set  
forth therein are true and correct to the best of my knowledge,  
information and belief.

  
\_\_\_\_\_

Subscribed and sworn to before me  
this 16<sup>th</sup> day of January, 1991.

  
\_\_\_\_\_  
Notary Public

My Commission Expires: July 4, 1995

EXHIBIT A



TeleCable Corporation  
Post Office Box 2098 (23501)  
740 Duke Street  
Norfolk, Virginia 23510

August 6, 1990

**CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

Mr. Timothy F. Elmore  
Supervisor, Special Contracts  
Duke Power Company  
P. O. Box 33189  
Charlotte, NC 28242

**RE: Pole Attachment Agreement Between  
TeleCable Corporation and Duke Power Company**

Dear Mr. Elmore:

We are reviewing the pole attachment proposed to be charged under the referenced agreement, and hereby request certain information required under the rules of the Federal Communications Commission.

Most of the information requested appears on the FERC Form 1 or comparable reports to state agencies.

These should be answered within 30 days.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry Brett", written over a horizontal line.

Larry Brett  
Vice President  
Regional Operations

LB/cmk

Enclosure

## INSTRUCTIONS

1. For each question, please indicate whether the answer is based on data for the State of South Carolina; on regional data; or on another basis, which you should specify. The use of state data is preferable.
2. Please indicate the date of the data used.
3. Please include all calculations and worksheets necessary to verify the requested data.

### REQUEST FOR DOCUMENTS

1. The most recently filed annual report to the FERC on Form 1.
2. The most recently filed annual report to the South Carolina Public Service Commission (PSC) on a Form 1 counterpart or other report form.
3. The South Carolina PSC order establishing your current overall rate of return.

### REQUEST FOR INFORMATION

1. Please state the investment in crossarms and other items which do not reflect the cost of owning and maintaining poles, if available.
- \*2. Please state the number of poles.
  - a. Solely owned by your company.
  - b. Partially owned by your company (indicate total poles).
  - c. Indicate the fractional interest as a percentage, and the resulting pole equivalents: e.g., 20,000 poles, 50% interest = 10,000 equivalents; 30,000 poles, 1/3 interest = 10,000 equivalents.
3. Please state the components of annual carrying charges attributable to the cost of owning a pole as listed below. These charges should be expressed as a percentage of the net pole investment. For each of the following components of the annual carrying charge, please specify the account or accounts of any publicly-filed report used in computing the carrying charge and provide sufficient calculations to verify the charge claimed.
  - a. Maintenance expenses.
  - b. Depreciation.

- c. Taxes attributable to poles.
- d. Administration and overhead allocable to poles.
- e. Rate base rate of return authorized by the appropriate regulatory agency. Please indicate if this is subject to pending proceedings or court review.

- 4. Please state your accumulated deferred taxes.
- 5. Please state your gross investment in plant in service.
- 6. Please state whether the rate of return established by the PSC for your company treats accumulated deferred taxes as a source of funds weighted into the overall rate of return.
- 7. Please state whether the South Carolina PSC establishes your residential service rates by deducting accumulated deferred taxes from rate base. *Yes*
- 8. Do you contend that cable television pole attachments occupy other than 1/13.5 of the average pole use in such attachments?
- 9. If yes, explain the basis for that contention, and the data relied upon.



**DUKE POWER**

August 31, 1990

Mr. Larry Brett  
Telecable Corporation  
Post Office Box 2098 (23501)  
740 Duke Street  
Norfolk, Virginia 23510

Dear Mr. Brett:

This letter is in response to your letter dated August 6, 1990 requesting information concerning our pole attachment rental rate. I will address each of your requests individually. As you can see the data utilized for the pole rental calculation is based on Duke Power system data, which is comprised of territory in both North Carolina and South Carolina.

REQUEST FOR DOCUMENTS

1. Unfortunately we are unable to fulfill your request to provide our most recently filed FERC Form 1. The report can be obtained by you directly from the Federal Energy Regulatory Commission.
2. Attachment I is a copy of the South Carolina PSC Form 1 counterpart.
3. Attachment II is a copy of the South Carolina PSC order which established our current rate of return.

REQUEST FOR INFORMATION

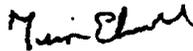
1. The pole investment amount is reduced by fifteen percent to eliminate cross-arms and other items which do not reflect the cost of owning and maintaining poles. (Attachment III, p.2).
2. Duke Power owned 1,582,752 poles as of 12/31/89. (Attachment III, p.2). Duke Power does not partially own poles.
3. Attachment III provides the details of our rate calculation. Footnotes on each page indicate the Form 1 page where the data can be found.

Mr. Larry Brett  
Page Two

4. Accumulated deferred taxes appear on Attachment III, p.2.
5. Gross investment in plant appears on Attachment III, p.2.
6. The rate of return established by the PSC does not treat accumulated deferred taxes as a source of funds weighted into the overall rate of return.
7. The South Carolina PSC does establish our residential service rates by deducting accumulated deferred taxes from rate base.
8. The rental rate is based on cable television attachments occupying 1/13.5 of the average pole.
9. Not applicable.

If you have questions or concerns, please do not hesitate to call me at 704-373-2303.

Sincerely,



Tim Elmore  
Supervisor Special Contracts

TE/jcb

Enclosures

EXHIBIT C

COLE, RAYWID & BRAVERMAN

JOHN P. COLE, JR.  
ALAN RAYWID  
GURT A. BRAVERMAN  
ROBERT L. JAMES  
JOSEPH H. REIFER  
FRANCES J. CHETWYND  
MARGARET E. HAERING  
JOHN D. SEIVER  
WESLEY R. HEFFLER  
PAUL GLIST  
DAVID M. SILVERMAN  
JAMES F. IRELAND III  
MAURITA K. COLEY  
SUSAN PARADISE BAXTER  
ROBERT G. SCOTT, JR.  
SUSAN WHELAN WESTFALL  
BART M. BUKAS  
JULIE A. MARK  
YVONNE R. BENNETT  
LYNN S. FRIEDMAN\*

ATTORNEYS AT LAW  
SECOND FLOOR  
1919 PENNSYLVANIA AVENUE, N. W.  
WASHINGTON, D. C. 20006-3458  
(202) 659-9750

CRAIG S. MCCOY  
(1943-1978)

CABLE ADDRESS  
"CRAB"

TELECOPIER  
(202) 452-0067

October 5, 1990

Direct Dial  
(202) 828-9820

\* ADMITTED IN PENNSYLVANIA ONLY

Tim Elmore  
Supervisor Special Contracts  
Duke Power Company  
P. O. Box 33189  
Charlotte, NC 28242

Dear Mr. Elmore:

TeleCable Corporation and Masada Cable Partners have asked me to evaluate the \$4.87 pole attachment rate specified by Duke Power. I have reviewed the information you have furnished, other available data, and pertinent decisions of the Federal Communications Commission. I have concluded that the \$4.87 rate exceeds the maximum lawful rate, which I believe to be \$4.16.

There are two basic errors in Duke Power's computations. First, it calculates rates based on multistate, rather than South Carolina data. The FCC has ruled that state specific data is preferable. Teleprompter of Dubuque v. Northwestern Bell Tel. Co., PA-81-0012, Mimeo 001810 (June 30, 1981). Second, it does not account for the depreciation of the pole plant. By using gross investment calculations, it ignores the fact that pole distribution plant is more heavily depreciated than general plant; and that the pole depreciation reserve is used to account for makeready reimbursements by cable operators. By failing to factor in the pole depreciation reserve, cable operators are not given credit for past makeready payments. The FCC has ruled that "net" calculations are preferable to "gross." Riverside Cable TV, Inc. v. Arkansas Power & Light Co., PA-85-0001, Mimeo 4813 (June 30, 1985).

My computations and the FCC cases are attached for review.

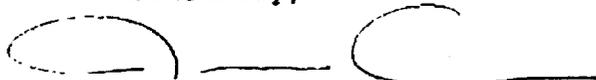
Tim Elmore  
October 5, 1990  
Page -2-

I therefore request that:

- (1) Duke Power reduce its pole rates to \$4.16; and
- (2) Duke Power agree to refund payments made this year in excess of \$4.16.

Please let me hear from you by October 15, 1990. I would like to resolve this informally without need for formal filing at the FCC.

Sincerely,

A handwritten signature in black ink, consisting of a large, stylized 'P' followed by a horizontal line and a large, stylized 'G'.

Paul Glist

Enclosures

cc: Kirby Brooks  
Rex Buettgenbach

EXHIBIT D

Duke Power Company  
Pole Attachment Rate for Cable TV Companies

1989

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**Schedule 1 - Summary of Charges Under FCC Rulemaking**

1	Depreciation	Sch. 2, L11	3.85%
2	Administration	Sch. 3, L5	2.49%
3	Maintenance	Sch. 3, L15	4.93%
4	Taxes	Sch. 4, L9	5.80%
5	Cost of Capital	Sch. 5, L8	10.33%
			-----
6	Total	L1 thru L5	27.40%
			-----
7	Percent of space applicable to CATV	Note (a)	7.41%
8	Bare pole investment	Sch. 2, L7	\$241.61
			-----
9	Pole attachment rate per pole	L6 x L7 x L8	\$4.91
			-----

Notes:

(a) See Report and Order.

EXHIBIT E

Duke Power Company  
Pole Attachment Rate for Cable TV Companies

1989  
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**Schedule 2 - Bare Pole Investment:**

1	Account 364 - Gross Pole Investment	Note (a)	\$509,438,407
2	Factor to reflect elec ADIT	Sch. 8, L11	88.31%
3	Gross pole investment net of ADIT	L1 x L2	\$449,885,057
4	Factor to eliminate cross-arms, etc.	Note (b)	0.85 -----
5	Net cost for determining bare pole investment per pole	L3 x L4	\$382,402,299 -----
6	Number of poles at year end	Note (c)	1,582,752 -----
7	Bare pole investment	L5 / L6	\$241.61 -----

**Schedule 3 - Depreciation expense:**

8	Distribution depreciation rate	Note (d)	3.40% -----
9	Account 364 - Gross Pole Investment	L1	\$509,438,407 -----
10	Gross pole investment net of ADIT	L3	\$449,885,057 -----
11	Distribution Depreciation Expense component	L8 x L9 / L10	3.85% -----

Notes:

- (a) Per Form 1, page 207, Line 59, Column (g).
- (b) Report and Order at 4390.
- (c) Per Plant Accounting.
- (d) Form 1, page 337, Line 22, Column (e).

EXHIBIT F

Duke Power Company  
Pole Attachment Rate for Cable TV Companies

1989

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**Schedule 4 - Administrative Expense:**

1	Total Electric A & G expense	Note (a)	\$211,369,386
			-----
2	Gross electric plant	Note (b)	9,594,051,569
3	Factor to reflect elec ADIT	Sch. 8, L11	88.31%
4	Gross electric plant net of ADIT	L2 x L3	8,472,506,941
			-----
5	Administrative expense component	L1 / L4	2.49%
			-----

**Schedule 5 - Maintenance Expense:**

6	Account 593, Maint of OH lines (elec)	Note (c)	48,985,761
7	Account 407.3, Storm damage amort (elec)	Note (d)	1,743,584
			-----
8	Total maintenance expense	L6 + L7	50,729,345
			-----
	Investment in account:		
9	364, Poles, towers, fixtures	Note (e)	509,438,407
10	365, Overhead conductors & devices	Note (f)	405,391,425
11	369, Services	Note (g)	251,139,791
			-----
12	Total of accounts 364, 365, and 369	L8 + L10 + L11	1,165,969,623
13	Factor to reflect electric ADIT	Sch. 8, L11	88.31%
			-----
14	Investment in accounts 364, 365 and 369 net of ADIT	L12 x L13	1,029,667,774
			-----
15	Maintenance Expense component	L8 / L14	4.93%
			-----

Notes:

- (a) Per Form 1, page 323, Line 167, Column (b).
- (b) Per Form 1, page 200, Line 8, Column (c).
- (c) Per Form 1, page 322, Line 118, Column (b).
- (d) Per Form 1, page 230, Line 2, Column (e).
- (e) Per Form 1, page 207, Line 59, Column (g).
- (f) Per Form 1, page 207, Line 60, Column (g).
- (g) Per Form 1, page 207, Line 64, Column (g).

EXHIBIT G

Duke Power Company  
Pole Attachment Rate for Cable TV Companies

1989

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**Schedule 6 - Normalized Electric Taxes:**

1	Taxes other than income taxes (408.1)	Note (a)	184,134,381
2	Income taxes - Federal (409.1)	"	203,898,721
3	Income taxes - Other (409.1)	"	44,784,230
4	Provision for Deferred Inc. Taxes (410.1)	"	196,365,250
5	(Less) Prov. for Def. Inc. Taxes - Cr. (411.1)	"	(130,553,992)
6	Investment Tax Credit Adj. - Net (411.4)	"	(6,915,512)
			-----
7	Total electric taxes	L1 thru L6	491,713,078
			-----
8	Gross electric plant net of ADIT	Sch. 4, L4	8,472,508,841
			-----
9	Tax Expense component	L7 / L8	5.80%
			-----

Note:

(a) Per Form 1, page 115, Column (e).

EXHIBIT H

Duke Power Company  
 Pole Attachment Rate for Cable TV Companies

1989

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**Schedule 7 - Adjustment to Rate of Return:**

	Note (a)	
1	S.C. retail allowed rate of return	Note (b) 13.00%
2	Total distribution plant, gross	Note (c) \$2,773,018,286
3	Total accumulated depreciation, distribution plant	Note (d) 826,188,384
4	Total distribution plant, net of accumulated depreciation	L2 - L3 1,946,829,902
5	Factor to reflect electric ADIT	Sch. 8, L11 88.31%
6	Total distribution plant net of ADIT	L2 x L5 2,448,852,448
7	ROR restated to gross basis - dist	L1 x L4/L6 10.33%

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Notes:

- (a) This method was adopted by the Commission in Teleprompter.
- (b) SCPSC allowed rate of return on common equity.  
 Docket No. 86-188-E implemented Nov. '86 - 13%.
- (c) Per Form 1, page 207, Line 69, Column (g).
- (d) Per Form 1, page 219, Line 24, Column (b).

EXHIBIT I

Duke Power Company  
Pole Attachment Rate for Cable TV Companies

1989  
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**Schedule 8 - Calculation of Accumulated  
Deferred Income Taxes Factor (ADIT Factor):**

1	Account 190 - electric	Note (a)	(\$13,367,121)
2	Account 281 - electric	Note (b)	8,045,456
3	Account 282 - electric (depr)	Note (c)	938,055,170
4	Account 282 - electric (other)	Note (d)	257,318,144
5	Account 283 - electric	Note (e)	7,353,817
			-----
6	Total electric ADIT	L1 thru L5 Note (f)	1,197,405,466
			-----
7	Gross electric plant	Sch. 4, L2	9,594,051,569
8	Nuclear fuel	Note (g)	651,573,742
			-----
9	Total plant investment	L7 + L8	10,245,625,311
			-----
10	ADIT as a percent of elect plant investment	L6 / L9	11.69%
			-----
11	Factor to reflect electric ADIT	1.0 - L10	88.31%
			-----

Notes:

- (a) Per Form 1, page 234, Line 8, Column (c). See also Form 1, page 111, Line 64 (identifying Account 190 as ADIT).
- (b) Per Form 1, page 273, Line 8., Column (k).
- (c) Per Form 1, page 275, Line 2, Column (k).
- (d) Per Form 1, page 275, Line 4, Column (k).
- (e) Per Form 1, page 277, Line 8, Column (k).
- (f) The sum of lines 1-5 include all of the electric plant ADIT accounts of Duke.
- (g) Per Form 1, page 203, Line 10, Column (f). Nuclear fuel is included in electric plant investment because a part of the ADIT in Account 282 relates to nuclear fuel.

EXHIBIT 3

# Duke Power

NEWCASTLE OPERATING MANAGERS



EXHIBIT J



CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of January, 1991, served, by hand or by first class U.S. mail, postage prepaid, a copy of the foregoing Answer upon the following persons:

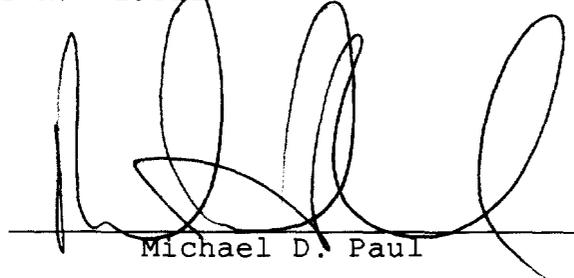
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Accounting and Audits Division  
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Federal Communications Commission  
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Columbia, South Carolina 29211



Michael D. Paul

Counsel for Duke Power Company