

RECEIVED

JUL 17 1995

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

| | | |
|----------------------------------|---|---------------------|
| In the Matter of |) | |
| |) | |
| UACC Midwest, Inc. d/b/a |) | CC Docket No. 95-94 |
| United Artists Cable Mississippi |) | |
| Gulf Coast; et al. |) | |
| |) | PA 91-0005 through |
| v. |) | PA 91-0009 |
| |) | |
| South Central Bell Telephone |) | |
| Company |) | |

To: The Commission

DOCKET FILE COPY ORIGINAL

APPLICATION FOR REVIEW

BellSouth Telecommunications, Inc., d/b/a South Central Telephone Company, aggrieved by the action taken by the Chief of the Common Carrier Bureau, acting under delegated authority in Hearing Designation Order DA 95-1363 (June 15, 1995) ("HDO") requests review of that action by the Commission.

SUMMARY

The Commission's Pole Attachment Order established that the administrative expense component of the carrying charge element of the pole attachment formula constitute a ratio of total administrative and general expense to total plant investment.¹ In the HDO, the Common Carrier Bureau

¹ Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Report and Order, 2 FCC Rcd 4387, 4392, para. 37, recon., 4 FCC RCD 468 (1989) ("Pole Attachment Order").

No. of Copies rec'd 029
LINA B C D E

disallowed the total amount of administrative and general expenses contained in Accounts 6535, Engineering Expense, and Account 6124, General computer expenses from the administrative numerator, but required no corresponding reduction in the administrative denominator. The Commission has never revised the Pole Attachment Order to modify the total administrative and general expense to total plant investment ratio, nor has it revised its pole attachment regulations to take into account the effect thereupon, if any, of the 1988 change from Part 31 to Part 32 accounting.

Despite the absence of any such modification to the Pole Attachment Order, and relying on a 1990 guidance letter that was never published for notice and comment, the Bureau nevertheless exceeded its delegated authority and ordered South Central Bell to analyze certain Part 32 administrative and general expense accounts to determine the expenses recorded therein during the period covered by the complaint that previously would have been included in pole attachment rate calculations under Part 31. South Central Bell had abandoned Part 31 accounting, by order of the Commission, two years before the beginning of the period covered by the complaints. The Bureau also determined erroneously that employee benefits attributable to pole line accounts were properly included in the administrative expenses portion of the formula (together with rents received from third party

users) rather than the maintenance component. Finally, the Bureau published a schedule of formulas in the form of Attachment A to the HDO which contain new elements to the pole attachment rate formulae which substantively revise the Pole Attachment Order in derogation of the Administrative Procedure Act.

By ordering a part 32 to part 31 retroactive accounting conversion when the records on which such a task would have to be based were never, by law, required to be maintained, the Bureau has impermissibly limited the scope of the ALJ's inquiry, effectively shifted the burden of proof from complainants to respondent and made a legal determination that is contrary to the Pole Attachment Order. The practical effect of the accounting is to require telephone companies to implement parallel accounting systems: Part 32 for their regulated activities under Commission jurisdiction and Part 31 in order to calculate pole attachment rates. Such a result is unnecessary, extraordinarily cumbersome, and completely contrary to the policies of simplicity expressed in the Pole Attachment and Part 32 Orders.

QUESTION PRESENTED

WHETHER THE BUREAU EXCEEDED ITS DELEGATED AUTHORITY BY DESIGNATING FOR HEARING A POLE ATTACHMENT COMPLAINT THAT PRESENTS NOVEL QUESTIONS OF FACT, LAW AND POLICY WHICH CANNOT BE RESOLVED UNDER OUTSTANDING PRECEDENTS AND GUIDELINES?

(47 C.F.R. § 0.291(e); HDO para. 4, 14, 17, 18, 19, 27; Attachment A)

FACTORS WARRANTING COMMISSION CONSIDERATION

THE BUREAU EXCEEDED ITS DELEGATED AUTHORITY BY DESIGNATING FOR HEARING A POLE ATTACHMENT COMPLAINT THAT PRESENTS NOVEL QUESTIONS OF FACT, LAW AND POLICY WHICH CANNOT BE RESOLVED UNDER OUTSTANDING PRECEDENTS AND GUIDELINES

Section 0.291(e) of the Commission's rules provides:

(e) *Authority to designate for hearing.*
The Chief, Common Carrier Bureau shall not have authority to designate for hearing any formal complaints which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents or guidelines.

In the Hearing Designation Order instant, the Bureau has exceeded its authority as follows:

(i) The Bureau's attempt to further reduce the numerator of the administrative carrying charges component of the pole attachments rate formula without a corresponding reduction in the total plant investment denominator yields an artificially low percentage and is in conflict with

statute,² regulation,³ case precedent⁴ and established Commission policy.⁵

² Contra 47 U.S.C. § 224(d)(1) (" . . . a rate is just and reasonable if it assure a utility the recovery of not . . . more than an amount determined by multiplying the percentage of the total usable space . . . by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole. . .) There is no support in the Pole Attachments Act for reducing and portion of the utilities total operating expenses as the Bureau has done in the HDO.

³ Pole Attachment Order, CC Docket No. 86-212, 2 FCC Rcd 4387, 4392 (1987) (" . . . we will adopt, as suggest in Alabama Power, the ratio of total administrative expenses and general expenses to total plant investment) (emphasis added). There is no basis in the Pole Attachment Order for the Bureau to properly consider anything other than total administrative expenses in determining the maximum allowable rate.

⁴ Alabama Power Co. v. F.C.C., 773 F.2d 362, 369-70 (D.C. Cir. 1985) (it was clear error for the Commission to use only cable-related accounts in calculating administrative costs; by so restricting the numerator and dividing it by a denominator that represents total plant investment an artificially low percentage is yielded).

⁵ Pole Attachment Order, supra n. 2:

. . . the components of the formula should be predictable and retain a level of certainty that will facilitate negotiated settlements based on our formula. Indeed, Commission procedures and calculations should remain simple and expeditious and not modelled on ratemaking or complex tariff proceedings. The commenters have proposed a number of additions, deletions, or other modifications of the various components of the distribution ratio which substantially complicate the methodology. . . Therefore, since the proposed distribution ratio is not only more complicated than a total expense to total plant ratio, but is also not demonstrably superior to the total expense to total plant ratio, we will adopt, as suggested in Alabama Power, the ratio of total administrative and general expenses to total plant investment. (emphasis added).

(ii) The action involves questions of law and policy which has not previously been resolved by the Commission. As the Bureau noted in the HDO, effective January 1, 1988, the Commission replaced the accounting system on which the Pole Attachment Order was based with a new system that changed how telephone companies account for their costs, including those used in applying the pole attachment formulas.⁶ The question of law that has never been addressed by the Commission is, for Class A & B telephone companies, how are the formulas set forth in the Pole Attachment Order, which require that total administrative and general expenses be included therein, affected, if at all, by the mandatory conversion from Part 31 to Part 32?⁷ The question of policy raised by the Bureau's action is

⁶ HDO at para. 5, pp 3-4. citing to 47 C.F.R. Part 32, Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and B Telephone Companies, 51 Fed. Reg. 24745 (July 8, 1986) & 51 Fed. Reg. 43493 (Dec. 2, 1986); recon. in part, 2 FCC Rcd 1086 (1987).

⁷ The Bureau relied on a January 22, 1990 "guidance" letter from the Common Carrier Bureau's Accounting and Audits Division that "indicates where expenses recorded previously under Part 31 were required to be recorded under Part 32." HDO para. 5, p. 6. The guidance letter, published at 5 FCC Rcd 3898 ("Guidance Letter"), was a unilateral Bureau response to limited questions framed by complainants' counsel and so begs the legal question as to whether the Pole Attachment Order's mandate to use total administrative and general expenses requires a detailed conversion, or mapping, of former Part 31 accounts to Part 32 accounts, assuming a comprehensive conversion is even possible. In any event, the Guidance Letter was neither promulgated pursuant to the Administrative Procedure Act's or the Commission's own rulemaking requirements, nor was it the product of an adjudication, and does not have the force of law.

whether Class A & Class B telephone companies should be required (1) to completely reconstruct their accounting records for the past seven years using a system that the Commission had earlier abandoned as inappropriate to serve the Commission's needs in regulating a complex and rapidly changing telecommunications industry, for the purpose of the Commission's calculation of the maximum just and reasonable rate in the context of a pole attachment complaint initiated for any rate year after 1988; and whether, on a going-forward basis, Class A and Class B telephone companies must, under the Pole Attachment Order and the Pole Attachments Act, implement and maintain parallel Part 31 and Part 32 accounting systems across the entire company in order to calculate pole attachment rates for cable television systems.

(iii) The action involves application of a precedent or policy which should be overturned or reversed. More specifically, seventeen years and two comprehensive federal cable communications laws after passage of the Pole Attachments Act, this industry, alone among communications providers, continues to be afforded an unreasonably discriminatory, subsidized rate to attach to occupy valuable communications space on utility poles at a time when local and interexchange markets are rapidly opening to competition. This affords an undue and unreasonable preference and advantage to a particular class of

communications providers, namely, cable television systems. The costs of other than usable space on telephone poles should be borne proportionately by all users, and the definition of usable space should be revised to reflect the actual amount of space occupied by a cable system.

(iv) The action is based on an erroneous finding as to an important or material question of fact. More specifically, since January 1, 1988, when it implemented Part 32 accounting pursuant to Commission Order, South Central Bell has not maintained the detailed time and expense reporting records necessary to allocate costs and expenses from Part 31 holding accounts to final Part 31 departmental accounts. The HDO could be construed as a requirement to reconstruct these accounts, when the data does not exist for such a reconstruction to take place. The Bureau apparently mistakenly believed that this data was available to South Central Bell, when, in fact, it is not.

(v) The action constitutes prejudicial procedural error. More specifically, the requirement that South Central Bell produce data demonstrating a retrospective application of Part 31 accounting in order to determine how much of the total administrative and general expenses under Part 32 should be pared from the administrative numerator without a corresponding reduction in the denominator constitutes an impermissible reallocation of the burden of

proof in a pole attachment complaint proceeding.⁸ The Bureau's application of the "logic" of the Guidance Letter to reduce the administrative numerator in contravention of the express language of the Pole Attachment Order constitutes the creation of a new rule in derogation of the Administrative Procedure Act. Finally, the Bureau's publication of Attachment A to the HDO, containing new "elements" of its pole attachments rate formulas, was done unilaterally and without resort to the notice and comment safeguards of the Administrative Procedures Act, and must be withdrawn.

Conclusion

For the foregoing reasons, South Central Bell Telephone Company respectfully request that this Commission:

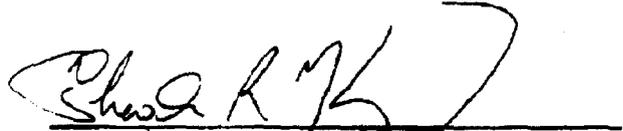
- 1) Overturn Hearing Designation Order 95-1363;
- 2) Clarify that the Pole Attachment Order's requirement that total administrative expenses be included in the administrative expense portion of the carrying charge means 100% of Part 32 Accounts 6124, General Computers and 6535, Engineering, as well as the Benefits Portion of Account 6411 and all of Part 32 Account 6534 Plant Operations Administrative Expense;
- 3) Determine that the rate charged by South Central Bell Telephone Company during the period covered by the Complaints was just and reasonable.
- 4) Clarify that Class A & B Telephone Companies are neither required to reconstruct, nor prospectively implement, Part 31 accounting practices in order to formulate lawful pole attachment rates;

⁸ The HDO specifically states that the burden of proof and the burden of proceeding with the introduction of evidence shall be upon complainants. HDO, para. 25.

- 5) Clarify that the Total Plant In Service denominator should not include general support assets.
- 6) Clarify that telephone companies may use, where publicly available data is not available, internal data with respect to calculating an accurate amount of accumulated deferred taxes.
- 7) Allow telephone companies to include other than usable space in the calculation of pole attachment rates for cable communications providers, or in the alternative, to calculate in the first instance the actual amount of space available for use, as well as the actual amount of space occupied by cable television facilities, in order to produce a more accurate percentage of the cost of providing space to cable communications providers.

RESPECTFULLY SUBMITTED,

BELLSOUTH TELECOMMUNICATIONS,
INC., d/b/a/ SOUTH CENTRAL
BELL TELEPHONE COMPANY

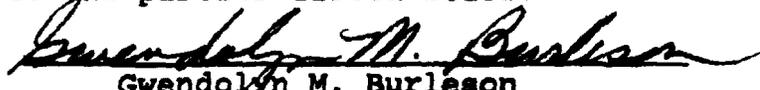


M. Robert Sutherland
Theodore R. Kingsley
4300 Southern Bell Center
675 West Peachtree Street
Atlanta, Georgia 30375
(404) 529-3957

Date: July 17, 1995

CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of July, 1995 served all parties to this action with a copy of the foregoing **APPLICATION FOR REVIEW** by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed below.


Gwendolyn M. Burleson

**Honorable Joseph Chachkin
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W., Room 226
Washington, D.C. 20554**

**Vicksburg Video, Inc.
by its attorneys
Michael S. Horne, Esq.
Kurt A. Wimmer, Esq.
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044**

**Kathleen M.H. Wallman
Chief, Common Carrier Bureau
by her attorneys
John C. Hays, Esq.
John V. Giusti, Esq.
Federal Communications Commission
2000 L Street, N.W.
Washington, D.C. 20554**

**Kenneth P. Moran, Esq.
Accounting & Audits Branch
Federal Communications Commission
2000 L Street, N.W., Room 812
Washington, D.C. 20554**

**Telecable Associates, Inc.
Mississippi Cablevision, Inc.
Mississippi Cable Television Association
UACC Midwest, Inc.
d/b/a United Artists Cable Mississippi
Gulf Coast
by their attorney
Paul Glist, Esq.
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006**

**Mississippi Public Service Commission
P.O. Box 1174
Jackson, MS 39215**