

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

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In the Matter of)

Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

CC Docket No. 96-98

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COMMENTS ON POLE ATTACHMENT ISSUES

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SUMMARY

As electric and telephone companies seek to compete head-to-head with cable operators through the provision of video and telecommunications services, old patterns of monopoly abuse are reemerging. Before the passage of the Pole Attachment Act of 1978, and the cable-telco cross-ownership ban, utility abuse of its monopoly control over essential pole and conduit space was commonplace. Those abuses historically subside as the Commission shows its resolve. In recent years, LECs engaged in video have informed cable operators incumbent on the poles that they could not remain a tenant on the poles unless they were willing to pay to replace those poles with poles of sufficient height to accommodate a new VDT network. Others utilities have pretended that there was no available conduit space which could be shared with dial-tone-capable fiber; then, when space was shown to be available, tripled the rental rate. Electric utilities with telecommunications interests have claimed that all available space on poles—even unoccupied space—is "reserved," and that the cable operator would have to pay to replace every pole.

These Comments explain the engineering principles which make poles and conduits available for attachments, and develop straightforward rules consistent with those principles. Unless the Commission adopts these proactive rules of open and nondiscriminatory access, the long history of pole attachment abuses threatens to repeat itself.

Rule 1: Access must be provided without makeready (changeout) payments where there is available space. As under current practice, space is available as measured under the NESC based upon current use and pending applications for attachment accepted in

ordinary course of business without discrimination. The departure from these standards is presumptively unlawful.

Rule 2: All poles and conduits are deemed suitable and available for attachment or use. The utility has the burden of demonstrating why any facility is not available for joint use. Space which is nominally "reserved" in old joint ownership agreements among electric and telephone companies must continue to be treated as available for attachment, as under current practice. Poles may not be removed from joint use merely because the utility would prefer that only its own fiber be attached, nor because the utility is unwilling to follow standard makeready and NESC practices.

Rule 3: Conduit congestion may be relieved by pulling (installing) inner duct, which is commonly placed in new construction and is used by telephone companies to relieve congestion in downtown business districts. There is no technological impediment to joint use of electric conduits.

Rule 4: Any concerns about reliability or safety are satisfied by adherence to NESC. Any demand stricter than NESC should be presumed unreasonable. The NESC is an objective source from which one may determine whether attachments would satisfy any concerns over safety and reliability. NESC Interpretations are published by the Institute of Electrical & Electronics Engineers (IEEE). Proposed revisions to the Code are subjected to extensive peer review, published in advance after committee evaluation, and then applied only on a prospective basis, with current facilities grandfathered to prior codes. If utilities depart from the NESC the FCC should presume that decision to be unreasonable. Likewise, parties should not be permitted to use unnecessary engineering (e.g, separately stranding commonly

owned conductors on strands which are 12" apart) in order to consume available pole space and displace potential entrants.

Rule 5: The terms and conditions of attachment should not discriminate in favor of utilities or their affiliates. Just as cable operators pay for the makeready needed to accommodate their initial attachments, the same rules should apply to new entrants, including affiliates of the pole owners.

Rule 6: The right of utilities to give notice of intent to change poles may not become a subterfuge for charging cable operators with makeready from which they are exempt under the 1996 Act.

Rule 7: If construction costs for new facilities are shared, only recurring incremental costs may be recovered in rent. If a party does pay for a share of the capital costs under subsection (h), the ongoing rental should be reduced to the incremental costs. Otherwise, the utility will be recovering a return and other compensation for an investment which was made in part by its tenants.

Rule 8: Open access provisions also apply in "certified" states and to non-rural LECs. It would entirely defeat the purpose of the Act to promote access to local monopoly facilities if "certified" states (which regulate pole attachments at the state PSC) were permitted to carve out and protect access to the very bottleneck which spawned pole attachment regulation in the first place. By the same token, municipalities and cooperatives which offer telephone exchange service or exchange access (for the purpose of the origination or termination of telephone toll services) are subject to the same access requirements, unless they qualify under the rural exchange provisions of Section 251.

Rule 9: The FCC need not adopt a rule capping the number of foreign attachments on the pole. Pole owners should not be permitted to choose marketplace winners and losers; or to create a tithing obligation among those they deign to let on the pole. In an environment of growing pole heights, driven by increased demand for utility as well as telecommunications services, exaggerated worries about the adequacy of pole space should not be allowed to constrain the entry of any entity into any market. All new entrants will be faced with the ordinary costs makeready. Likewise, at some point, a new entrant will be faced with the economic limits of the retail market to sustain multiple redundant local exchanges. Together, these economic realities will create the effective ceiling on the number of attachments long before the FCC must guess at the engineering result.

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Continental Cablevision, Inc., Jones Intercable, Inc., Century Communications Corp., Charter Communications Group, Prime Cable, InterMedia Partners, TCA Cable TV, Inc., Greater Media, Inc., Cable TV Association of Georgia, Cable Television Association of Maryland, Delaware & the District of Columbia, Inc., Montana Cable TV Association, South Carolina Cable Television Association, Texas Cable & Telecommunications Association respectfully submit these Joint Comments in response to the Commission's request for comment appearing at Paragraphs 220-225 of the Notice of Proposed Rulemaking released April 19, 1996 in the captioned proceeding.

I. BACKGROUND

Cable operators are dependent upon access to poles, ducts, and rights of way over which utilities hold a monopoly. Local franchises, environmental restrictions, and economic barriers to erecting redundant plant require the use of existing utility poles and conduits. The monopoly abuse of these essential facilities has been catalogued by the U.S.

Congress,¹ federal district and circuit courts,² the FCC,³ the Department of Justice,⁴ and the

¹ See, e.g., 123 Cong. Rec. H35006 (1977) (remarks of Rep. Wirth, sponsor of Pole Attachment Act) ("The cable television industry has traditionally relied on telephone and power companies to provide space on poles for the attachment of CATV cables. Primarily because of environmental concerns, local governments have prohibited cable operators from constructing their own poles. Accordingly, cable operators are virtually dependent on the telephone and power companies. . . ."); 123 Cong. Rec. H16697 (1977) (remarks of Rep. Wirth) ("Cable television operators are generally prohibited by local governments from constructing their own poles to bring cable service to consumers. This means they must rely on the excess space on poles owned by the power and telephone utilities."); S. REP. NO. 580, 95th Cong., 1st Sess. 13 (1977) ("Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles."); H.R. REP. NO. 721, 95th Cong., 1st Sess. 2 (1977) ("Use is made of existing poles rather than newly placed poles due to the reluctance of most communities, based on environmental considerations, to allow an additional duplicate set of poles to be placed").

² See, e.g., *United States v. Western Elec.*, 673 F. Supp. 525, 564 (D.D.C. 1987) (cable TV companies "do depend on permission from the Regional Companies for attachment of their cables to the telephone companies' poles and the sharing of their conduit space. . . . In short, there does not exist any meaningful, large-scale alternative to the facilities of the local exchange networks. . . ."); *General Tel. Co. of Southwest v. United States*, 449 F.2d 846, 851 (5th Cir. 1971) (construction of systems outside of utility poles and ducts is "generally unfeasible").

³ See, e.g., *Twixtel Technologies, Inc.*, 5 FCC Rcd. 4547, 4548 (Com. Car. Bur. 1990), Letter from FCC Common Carrier Bureau at 4, (July 6, 1990) (basis of telco-cable cross-ownership rule is "the Commission's traditional concerns with carrier denial of access to essential poles and conduit"); *Section 214 Certificates*, 21 F.C.C.2d 307, 323-29 (1970) (CATV systems "have to rely on the telephone companies for either construction and lease of channel facilities or for the use of poles for the construction of their own facilities." Telco has monopoly and "effective control of the pole lines (or conduit space) required for the construction and operation of CATV systems"); *General Tel. Co. of California*, 13 F.C.C.2d 448, 463 (1968) (by control over poles, telco is in a position to preclude an unaffiliated CATV system from commencing service); as the Commission has stated, "we know from experience that, as a practical matter, a CATV operator desiring to construct his own system must have access to those poles." *Better TV, Inc. of Dutchess Co. NY*, 31 F.C.C.2d 939, 956 (1971); *Accord*, S. REP. NO. 580, 95th Cong., 1st Sess. 13 (1977) ("owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles").

U.S. Supreme Court.⁵

State and federal pole attachment regulations arose in response to dual needs: the need to arrest utility abuses that inhibited the deployment of cable as a vehicle for information and entertainment services, and the need to encourage the deployment of independently owned broadband communications facilities that could deliver the full range of modern, state-of-the-art telecommunications services to homes, educational institutions and local businesses.⁶ Upon their recognition that cable operators represented a potential threat to their core voice telephony business, and that the video services markets that cable operators were developing represented a logical extension of their core telephony markets, telephone companies ("telcos") responded with a variety of anti-competitive tactics. These included:

- Efforts by the Bell System to force the migration of cable operators onto cables owned by the telco, where any data transmission was prohibited and delays were imposed on operators who sought to provide independently-owned cable until a more compliant "lease-back" operator could be installed on the poles.⁷

⁴ See, e.g., *United States v. AT&T*, No. 74-1698, Plaintiffs' First Statement of Contentions and Proof (D.D.C., filed Nov. 1, 1978) (Justice Department's cataloging of BOC dominance of pole and conduit facilities. "The cost of building a separate pole system was prohibitive, and many municipalities simply forbade this alternative").

⁵ See, e.g., *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) ("[I]n most instances underground installation of the necessary cables is impossible or impracticable. Utility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of television cables").

⁶ *Section 214 Certificates*, 21 F.C.C.2d 307, 324-5 (1970)(Cable's broadband facilities, said the FCC, "will make economically and technically possible a wide variety of new and different services involving the distribution of data, information storage and retrieval, and visual, facsimile and telemetry transmission of all kinds.")

⁷ S. Rep. No. 580, 95th Cong., 1st Sess. 13 (1977); *Better T.V.*, 31 F.C.C.2d 939 at 967 (independent operator "quickly took the hint about the lack of manpower to perform makeready work and accepted channel service rather than run the risk of having the competing channel service customer get such a head start as to make a grant of its request for

- Petty rejections of application forms, the refusal to provide pole or conduit maps to cable operators and interminable delays in processing applications or performing makeready.⁸
- Prohibitions in telco pole attachment agreements and channel lease tariffs on services that cable television could offer, such as pay TV, ETV, CCTV, FM music and two-way services.⁹

These are described in detail in the Pole Attachment Comments of Continental Cablevision, et al., in CC Docket No. 87-266, filed December 16, 1994.

Following passage of the Pole Attachment Act of 1978¹⁰ ("Pole Act"), the utilities tested the FCC's resolve by trying to terminate cable rights of access to utility poles.¹¹ After the FCC made clear in those two cases that it would enter temporary injunctions to prevent utilities from terminating such rights of access, pole regulation fell into a general pattern of conventional ratemaking oversight.

Then the price of fiber deployment reached levels of commercial feasibility, and the world changed.

a pole attachment agreement an empty and worthless gesture.")

⁸ *Section 214 Certificates*, 21 F.C.C.2d 307, 316, *modified*, 22 F.C.C.2d 746 (1970), *aff'd*, 449 F.2d 846 (5th Cir. 1971).

⁹ *Id.*; Plaintiff's First Statement of Contentions & Proof at 207, *United States v. AT&T*, Civ. No. 74-1698 (D.D.C. 1978). General Telephone and United Telecommunications also refused attachments for independent cable operators and, not being bound by the 1956 Bell consent decree, created cable television subsidiaries, which thereafter enjoyed great success in obtaining franchises where General and United operated telephone companies. *United States v. Western Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956); S. Rep. No. 580, 95th Cong., 1st Sess. 13 (1977).

¹⁰ Pub. L. No. 95-234, 92 Stat. 33 (codified at 47 U.S.C. § 224).

¹¹ *Tele-Communications, Inc. v. South Carolina Electric & Gas Company*, PA-83-0027, Mimeo No. 5957 (August 16, 1983); *Whitney Cablevision of Indiana, Ltd. v. Southern Indiana Gas & Electric Co.*, PA-84-0017, Mimeo No. 841 (November 16, 1984).

One of the first responses was from Texas Utilities ("TU"). TU sought to distinguish between fiber and coaxial cable when pricing its Dallas pole attachments, and priced the fiber contact rate so high (\$50-100/pole, instead of the \$5/pole rate applied to coax) that it was cheaper for end user customers to buy dark fiber from the Local Exchange Carrier ("LEC") than for the cable operator to even pay pole rent for a fiber run. This was a convenient (though anticompetitive) result for TU, which was experimenting then with joint venture relationships with CAPs. (Today, TU is a coventurer with major LECs in a PCS venture in Dallas.) The FCC and the DC Circuit Court of Appeals rejected TU's efforts as contrary to Section 224.¹²

Since then, the FCC has warned utilities to adopt open access principles.¹³ However, beginning in the late 1980's, cable operators found that utilities were resorting to a number of tactics to finance their new plant at cable's expense or to deny access outright. A few examples will illustrate.

- As C&P Telephone began to deploy fiber in 1988, it changed its makeready and inspection practices so that the cost charged to cable for the "makeready" by which poles are prepared for cable attachment soared nine fold. The FCC

¹² *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, 6 FCC Rcd. 7099 (1991), *aff'd sub nom. Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

¹³ FCC Public Notice, DA-95-35 (Jan. 11, 1995) (utility pole owners cautioned "to be aware of their responsibilities pertaining to cable television pole attachments" and warning against "unreasonably preventing cable operators from 'overlashing' fiber to their existing lines").

proceeding (Docket PA 88-002) was eventually settled with a statewide settlement agreement adopted by the FCC.¹⁴

- As Bell South began to build its video dial tone "experiment" in 1995 in Chamblee, Georgia, it informed the incumbent cable operator that the cable operator could not remain a tenant on the Bell South poles unless it was willing to pay to replace those poles with poles of sufficient height to accommodate the new Bell South VDT network. (The matter was eventually resolved through settlement.)
- As NYNEX began construction of a competing cable system in Somerville, Massachusetts in 1995, it informed the incumbent cable operator, Time Warner, that the cable operator must pay the cost of raising its lines to accommodate the new NYNEX attachment. The cost to Time Warner to accommodate NYNEX's desired rearrangement would have been \$400,000.¹⁵
- When Southwestern Bell first learned in 1984 that Multimedia was planning to offer non-video service over its rebuilt hybrid fiber coax system in Wichita, Kansas, Bell claimed that there was no available conduit space which could be shared with the new fiber. Under pressure from the City to open the manholes for inspection, Bell relented, admitting that there was available space, but that

¹⁴ See, *Cable Television Association of Maryland, Delaware and the District of Columbia, Inc. v. Chesapeake and Potomac Tel. Co. of Maryland, Inc.*, 5 FCC Rcd. 2571 (1990).

¹⁵ *Fight for Pole Position Goes Down To The Wire*, Boston Globe, Apr. 26, 1995 at 45.

the rental rate would be recalculated to more than three times its prior rate.

This matter is pending before the Commission in PA Docket 95-008.

- An electric utility offering telecommunications services in Montana informed a small cable operator in 1995 that the operator would not be granted access to any of the available space on poles which were the sole corridor to a new mining location. Instead, it claimed that 12 feet of unused space was "reserved," and that the cable operator would have to pay to replace every pole.

II. THE 1996 ACT

Poles represent social resources established as a public trust at a time when utilities were regarded as natural monopolies, segregated into distinct geographic provinces, and isolated from competition among each other and from their customers. Today, competition between telecommunications companies and cable operators is both rampant and growing. Because of the historical trust the utilities are supposed to maintain for the public, the onset of multi-faceted competition in telecommunications, and the central role that utility poles play in the development of such competition, both this Commission and Congress have refused to allow pole monopolies to be leveraged to the disadvantage of customers of this essential resource and the public at large.

Congress has addressed these recent access problems with several interrelated clauses in the Telecommunications Act of 1996¹⁶ ("1996 Act").

¹⁶ Pub. L. No. 104-104, 110 Stat. 56 (1996).

- Mandatory access (subject to just and reasonable compensation), so that cable operators can never be threatened with eviction for the convenience of the utility.¹⁷
- Protection from subsequent makeready charges once cable operators attach to surplus space on the pole. The 1996 Act provides that a cable operator, once attached to a pole, "shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way)."¹⁸
- Multiple requirements for nondiscrimination. It is an overall duty of all LECs to permit access to poles, ducts, and rights of way under the terms of Section 224.¹⁹ It is a "competitive checklist" requirement that RBOCs permit such access at rates which are just and reasonable under Section 224.²⁰ All parties, including electric utilities, must provide such access under Section 224. A narrow exception is carved out for electric utilities to apply generally

¹⁷ *Id.*, Section 251(b)(4).

¹⁸ *Id.*, Section 703(7).

¹⁹ *Id.*, Section 251(b)(4).

²⁰ *Id.*, Section 271(b)(2)(B)(iii).

applicable engineering principles when deciding whether particular poles are suitable for access.²¹

In the wake of these revisions, however, a wholesale assault on these access terms has begun once again, originating with the electric utility industry. For example, Duke Power has unilaterally announced that henceforth, any operator seeking access to a pole would need to install a pole which is taller by at least 5 feet, regardless of current pole capacity.

In order to understand how such changes in contract practice threaten to undermine the regulatory regime, it is important to understand the customary practices which define cable operators' use of utility poles.

III. WHAT MAKES SPACE AVAILABLE

From the beginning of the industry, cable television operators have attached to surplus space on utility poles. When existing facilities on the pole need to be moved or rearranged to accommodate cable attachments within available space, cable operators pay for the cost of that rearrangement. When a pole lacks space and requires replacement with a taller pole for attachment of cable's facilities, cable is required to pay those costs as well. The availability of space has always been defined by the current uses to which the pole was put, by pending applications for attachment accepted in ordinary course of business, and by the applicable engineering codes. For instance, the National Electrical Safety Code ("NESC") prescribes minimum clearance above grade, so that truck traffic can pass under lines, and minimum separation between conductors of differing voltages. The rules are straightforward.

²¹ *Id.*, Section 703(7).

First, every pole is set in the ground to a certain depth (typically 10% plus 2 feet) for stability. A 40 foot pole would be set 6 feet underground.

Second, under the NESC, a minimum distance must be maintained above ground before the first horizontal conductor may be attached. This minimum grade clearance varies according to application. For example, the typical clearance for a communications conductor under the NESC is 15.5 feet above grade over a highway, plus some additional space for sag, depending on the weight of the conductor and length of the span.²² But that clearance may be reduced to as little as 9.5 feet under differing configurations, such as alongside rural roads or in spaces or areas subject only to pedestrian traffic.²³ The typical minimum grade clearance for electrical conductors is greater than that for communications conductors.²⁴ Thus, the typical clearance for an electrical conductor under the NESC is 22 feet above grade over a highway, plus some additional space for sag, depending on the weight of the conductor and length of the span.

Third, electrical conductors placed on the poles at or above minimum grade clearance must maintain a prescribed distance from other conductors. Thus, a pole used exclusively for cable television would measure 25-30 feet, because an attachment at 18-19 feet could be accommodated on a 25-foot pole set no more than 5.5-6 feet in the ground. A pole used for electrical conductors, however, carries different clearances. Not only is the

²² Institute of Electrical & Electronics Engineers, Inc., *National Electric Safety Code* (1993 Edition), Rule 232.

²³ *Id.*; NESC Table 232-1, n.9.

²⁴ NESC Table 232-1.

minimum grade clearance significantly greater than that for communications conductors,²⁵ but electrical conductors must also maintain a prescribed distance from other conductors. Thus, the NESC prescribes a so-called "neutral zone" of 30-40 inches between a communications conductor and the first horizontal electrical conductor.²⁶ The NESC also prescribes that electrical conductors of differing voltages be "racked," with lines of differing voltages separated by prescribed clearances and line voltages increasing as one moves up the pole.

Fourth, communications facilities are located at the bottom and electrical at the top of the pole. By Bell "Bluebook" and utility contract, 12 inches of separation must be maintained between any two communications conductors. This accounts for the allocation by the FCC of one foot of usable space directly "used" by cable television facilities.²⁷

Thus, the typical configuration has telephone at bottom, cable next, then electric lines racked up the pole with highest voltages at the top. When there is adequate space, cable attaches after paying the engineering costs incurred by the utilities for inspecting the pole and (if necessary) rearranging lines to make the space available on the existing pole (such as by lowering telephone to minimum grade clearance in order to open up more communications space). If the pole needs to be replaced, it is replaced at cable's expense with one 5 feet higher, the standard interval among classes of poles. These up-front payments

²⁵ *Id.*

²⁶ Under current NESC specifications, the neutral zone may be only 30 inches, instead of 40 inches, where the top communications facility and the electric facilities are bonded to a common ground. See NESC Rules 235C1 (Exception 3), 235C2b(1)(a), and 235C2b(3).

²⁷ See, e.g., *Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd. 4387 (1987).

are known as makeready. Based on FCC records, on average, these payments were \$1,500-\$2,000/mile in 1988;²⁸ today, they have risen to \$2,000 to \$2,500/mile.

Duke Power's unilateral announcement that henceforth, any operator seeking access to a pole would need to install 5 feet of new space, would dramatically change the economics of joint use. With approximately 35 poles per mile, and low end changeout costs approximating \$1,000 per pole, makeready costs alone could soar to \$35,000/mile. The typical cable budget for installation of aerial plant is \$15,000 to \$16,500/mile for material, strand, cable, electronics, labor, and makeready combined. Practices such as Duke's would also permit the utility pole owner to escape his own obligation to replace the pole at the end of its useful life, for which it has been collecting depreciation and even negative net salvage,²⁹ and to continue to collect attachment charges from the cable operator which has paid the cost of replacing the pole.

It is no accident that such efforts are originating with the electric utility industry. Such efforts were chronic among telephone companies 30 years ago. But electric utilities have only recently begun to diversify into telecommunications. We believe that, without regulatory intervention, the utility and cable industries are doomed to repeat the cable-telco pole attachment experience.

²⁸ See Affidavits in Support of Complaint in *Cable Television Ass'n of Maryland, Delaware and the District of Columbia v. C&P Telephone of Maryland, Inc.*, PA 88-002 (March 10, 1988).

²⁹ The FCC and many PSC's permit utilities to recover through current depreciation charges the costs they expect to incur to dispose of poles in the future. Because this is netted against the salvage value (which is predicted to be less), it is known as negative net salvage value.

IV. PROPOSED RULES

The evidence in Heritage showed that TU had priced pole attachments so high that it was cheaper to simply buy tariffed dark fiber from the LEC (or TU's telephony affiliate) than even to pay for pole rent.³⁰ We believe that the same effort to handicap cable entry into telephony is underway here. Consistent with the competitive principles adopted in the 1996 Act, we urge the Commission to put to rest such affronts to competition. The purpose of these Comments is to recommend specific actions which the FCC may take to arrest these alarming trends.

The FCC should adopt the following rules:

Rule 1: Access must be provided without makeready (changeout) payments where there is available space. Space is available as measured under the NESC based upon current use and pending applications for attachment accepted in ordinary course of business without discrimination.

Standard practice in evaluating the suitability of a pole for attachments is to look to the available space under the NESC. For example, if the lowest user (telephone) is at 18 feet and there is 52 inches of space between the telecommunications line and the power neutral, a cable line could be attached at 12 inches above telephone (Blue Book standard) and 40 inches below power (the greatest clearance required by NESC between power and telecommunications).

³⁰ *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, 6 F.C.C.R. 7099 (1991), *aff'd sub nom. Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

In some cases, there may be a race going on between two telecommunications networks which are under construction. The most common arrangement is to treat a pending application for permit as "using" the first 12 inches of space if the application has been accepted (i) from a party with a valid pole contract with the utility (ii) prior to receipt of the second application (iii) if the application meets the processing standards of the utility pole owner. Utilities sometimes impose limits on the number of poles which may be "under permit" at any one time, in order to manage work load and to limit the potential for hoarding pole space through pending permits. A variation of this is for the utility pole owner to offer the applicant who is first in time an option. The first applicant may have its own makeready needs met first, at its own expense; or, with the consent of the second, may share the cost of meeting the needs of both applicants at the same time. The first applicant is then forced to balance need for speed against likely costs on the pole for which it was first and the poles on which it was second.

The departure from these two models is completely inconsistent with customary practice in the industry, and is presumptively unlawful under existing FCC precedent.³¹

Rule 2: All poles and conduits are deemed suitable and available for attachment or use. The utility has the burden of demonstrating why any facility is not available for joint use.

The standard pole attachment agreement provides cable operators with the right to apply for individual permits, pole by pole, and reserves the right of utilities to exclude

³¹ S. Rep. No. 580, 95th Cong., 1st Sess. 21 (1977) (FCC to look to "prevailing practices in the industries involved"); *Adoption of Rules*, 68 F.C.C.2d 1585, 1590 (1978); *Teleprompter Corp. v. General Tel. Co. of the Southwest*, 50 RR2d 508 (1981).

certain poles from use. This mechanism is followed because the makeready process usually involves a pole by pole survey to determine what rearrangements or changeouts are needed to accommodate new lines. A permit is then granted for one or more poles, which specifies the work (if any) which is needed to accommodate the new lines. Thus, in actual practice, all poles are made available for attachment. Rare exceptions are made. Some utilities, for example, state in their agreements that high-power transmission towers will ordinarily not be made available for attachments, and will do so only in exceptional circumstances.

Electric and telephone utilities frequently have joint ownership or use agreements under which each agrees in advance to make its poles available for attachments by the other. In many of these, the utilities are nominally required to maintain a certain relative proportion of ownership (e.g., telephone will own 40%, power will own 60% of all poles), although it is commonplace for telephone companies to fall below the required threshold. In others, a "normal" pole will be defined, such as a 35 or 40 foot pole with sufficient space to accommodate the attachments of each; and each party agrees that poles of at least this "normal" height will be installed. These agreements allow the pole owners to lease space to third parties, when the issue of third party use is addressed at all. There are many varieties of these joint ownership and use agreements in place today, and regional variations in certain terms and in the level of compliance. But the universal rule is that regardless of the stated terms in these joint pole agreements, both the electric and telephone pole owners have always looked to the NESC for measuring the availability of space on a pole. The contract may state that, for example, the top 8-10 feet is reserved for electric and the bottom 2-4 feet is reserved for telephone. But that reservation is only as between the

joint owners and only in the sense that it directs where the joint owners can attach. In actual practice, the space between existing telephone and power attachments is made available to cable and other telecommunications entities. Thus, even if space is "reserved" for the telephone and electric companies on poles under these joint agreements, there is still surplus space available for rent under 40 years of practice and industry usage.

The 1996 Act adopted a narrow provision which, we believe, merely reconfirms this rule. The Act states "a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."³² This was carefully written to conform with current practice. Poles may not be removed from joint use merely because the utility would prefer that only its own fiber be attached. For poles to be removed from joint use, there would need to be insufficient capacity (which makeready can always remedy) or "safety, reliability, and generally applicable engineering" reasons (which compliance with the NESC can cure). In addition, the principles would need to be applied without discrimination. Thus, an electric utility should not be permitted to reserve its poles for the use of its favored CAP or affiliate.

Rule 3: Conduit congestion may be relieved by pulling (installing) inner duct.

Conduits and ducts owned by telephone companies are routinely subject to joint use. The typical "conduit" is a collection of multiple ducts (nine is a common configuration). Each duct may itself be subdivided through the use of inner duct. Inner duct

³² 1996 Act, Section 703(7).

is a long partition (a cross section of which would look like this \oplus) which is pulled through the duct and creates subdivided passages through which individual conductors may be pulled without disturbing other conductors sharing that duct. Inner duct is commonly placed in new construction and is used by telephone companies to relieve congestion in downtown business districts. Thus, a telephone company might replace copper bundles within the ducts between two manholes with inner duct containing fiber and three spare passages for future use. This method is available for relieving almost all congestion, and should be presumed to be available absent convincing evidence to the contrary.

Electric utilities have been far more reluctant to share their conduits, but it is not for reasons of engineering. Electric utilities today will make ducts and conduits available to CAPs (but not cable) because CAPs are willing to pay more than regulated conduit rental rates, to provide dark fiber, or to make other concessions to the power company. There should be no presumption that electric conduits are subject to any technological impediment to joint use of their conduits.

Rule 4: Any concerns about reliability or safety are satisfied by adherence to NESC.

Any demand stricter than NESC should be presumed unreasonable.

As noted above, "safety and reliability" is a factor included in Section 224 for defining concerns which electric companies may apply in evaluating pole access. This is not different in kind from the terms of the standard pole attachment contract. What the Commission must watch for, however, is the tendency of some utilities to invoke "safety and reliability" as a mantra to disguise naked discrimination against cable's access to monopoly facilities. The NESC is an objective source from which one may determine whether

attachments would satisfy such concerns. Interpretations are published by the Institute of Electrical & Electronics Engineers (IEEE). Proposed revisions to the Code are subjected to extensive peer review, published in advance after committee evaluation, and then applied only on a prospective basis, with current facilities grandfathered to prior codes. If utilities depart from the NESC and these procedures for modification—such as by a sudden decision to increase the clearance from power to cable from 40 inches to 52 inches—the FCC should presume that decision to be unreasonable and leave it to the utility to defend the change against the presumption.

Likewise, parties should not be permitted to use unnecessary engineering (e.g, separately stranding commonly owned conductors on strands which are 12 inches apart) in order to consume available pole space and displace potential entrants.

Rule 5: The terms and conditions of attachment should not discriminate in favor of utilities or their affiliates.

The standard for third party attachment to the pole is for that third party to pay for the makeready needed to accommodate its attachments. This includes the costs to preexisting users to transfer lines to new locations or to install replacement (taller) poles. It does not include the costs of correcting preexisting NESC violation on the pole. The same rules should apply to new entrants, including affiliates of the pole owners. For example, a CAP should not be excused from covering an incumbent cable operator's costs of rearrangement, just as the cable operator paid for parties to rearrange when cable first attached to the pole.