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.

The 1996 Act has two provisions which may be harmonized. One, subsection (i), 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)."[33] The other provides:

> Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.[34]

We believe that this contemplates that a utility that plans to replace NESC-compliant poles with taller poles, such as might occur as an incident to a road widening project, must offer existing parties the right to share in *increased* space on the pole. If, on the other hand, the changeout is to cure a pre-existing utility violation on the pole; or the changeout is to accommodate only the needs of the utility (such as carrying higher loads to new residential

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[33] 1996 Act, Section 703 (7)(i).

[34] *Id.*, Section 703 (7)(h).

developments) and is not needed by the other parties, then the cost of the changeout would be borne by the pole owner. Parties who would be satisfied with a transfer to a pole of the same height would not be required to share up front capital costs of the new pole. This rule will harmonize the two provisions.

The Commission has asked for a suggested notice period. The only current notice provision in the pole rules is that utilities provide notice 60 days prior to termination. Under common pole contracts, transfer and makeready notices are received 30-90 days ahead of time. If the purpose of the notice rule is to provide for coordinated planning of construction, 90 days should be sufficient.

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 applied in "certified" states and to non-rural LECs.

As is evident from the remainder of this Docket, the availability of access to unbundled network elements can best be assured through national guidelines. Congress has radically restructured the Communications Act of 1934 to preempt state and local barriers to entry. We submit the same kind of preemption is accomplished by the access provisions of the 1996 Act.

Section 251 provides that any LEC has "[t]he duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224." The only exceptions are limited ones for rural carriers.

Section 271 includes as part of the "competitive checklist" that RBOCs provide "(iii) [n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224."

There is no limitation within these Sections to carve out utilities serving "certified" states from these requirements. None should be inferred. It would entirely defeat the purpose of the Act to promote access to local monopoly facilities if states were permitted to carve out and protect access to the very bottleneck which spawned pole attachment regulation in the first place. The Commission should rule that the competitive access rules it adopts in this Docket apply equally to "certified" states (which regulate pole attachments at the state PSC) and non-certified states (which leave pole attachment regulation to the FCC).

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 have in recent years invoked a parade of horribles of poles burdened with a dozen CAPs with no end in sight. We respectfully submit that these are the protestations of utilities which would prefer to chose marketplace winners and losers; or to create a tithing obligation among those they deign to let on the pole. Electric utilities themselves are increasing pole heights in order to transport higher electric loads to new developments. (The NESC requires lines with higher loads to be racked higher and to have higher clearance above grade.) In an environment of growing pole heights, driven by increased demand for utility as well as telecommunications services, we do not believe that exaggerated worries about the adequacy of pole space should be allowed to constrain the entry of any entity into any market. The market can operate very effectively without such a rule. At some point, a new entrant will be faced with the costs of replacing so many poles in the network, as part of makeready, that the economic constraints of those costs will direct the party to invest in another market. 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 long before the FCC must guess at the engineering result.

V. CONCLUSION

Immediate and decisive action by the Commission is needed to forestall the proliferation of anticompetitive activities by power companies and other utility companies in connection with pole attachments. The Commission is well aware of the economic power that utility companies exercise with respect to pole attachments. The Commission should act now by adopting the rules recommended above, thus preventing the exercise of that economic power in ways detrimental to cable companies and their subscribers.

Respectfully submitted,

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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

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