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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Implementation of Section 703
of the Telecommunications Act
of 1996

Amendments and Additions to the
Commission's Rules Governing Pole
Attachments

CS Docket No. 96-166

ORDER

Adopted: August 2, 1996

Released: August 6, 1996

By the Commission:

I. INTRODUCTION

1. In this *Order*, the Commission continues its implementation of Section 703 of the Telecommunications Act of 1996 ("1996 Act"),¹ by making amendments to the Commission's rules relating to pole attachments.² The 1996 Act is intended to "accelerate . . . private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunication markets to competition."³

2. Section 703 of the 1996 Act added and amended several provisions of Section 224 of the Communications Act of 1934, as amended ("Section 224").⁴ Specifically, Section 703 amended Sections 224(a)(1), (a)(4), (c)(1) and (c)(2)(B), and added new Sections 224(a)(5),

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 104 Stat. 56, 149-151, signed February 8, 1996 (to be codified at 47 U.S.C. § 224).

² "The term pole attachment means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." See Section 224 of the Communications Act of 1934, as amended, 47 U.S.C. § 224(a)(4) (1996).

³ Telecommunications Act of 1996 Conference Report, S. Conf. Rep. 230, 104th Cong., 2nd Sess. 113 (1996).

⁴ 47 U.S.C. § 224.

(d)(3), (e), (f), (g), (h) and (i).⁵ Many of these additions and revisions to existing federal statutory provisions are self-effectuating. This *Order* conforms our rules to meet these new statutory requirements. We are revising these rules without providing prior public notice and an opportunity for comment because the rule modifications do not involve discretionary action on the part of the Commission but rather, simply conform our rules to the applicable provisions of the 1996 Act. We find that notice and comment procedures are unnecessary, and that this action falls within the "good cause" exception of the Administrative Procedure Act.⁶ Sections 224(e) is not self-effectuating. We will seek notice and comment regarding implementation of Section 224(e) in a separate proceeding consistent with the two-year period specified by Section 224(e). In addition, the Commission has sought notice and comment regarding the implementation of Sections 224(f) and (h) in a separate proceeding.

II. BACKGROUND

A. Section 224

3. Congress enacted Section 224 in 1978 to address obstacles that cable operators encountered as they sought to expand, such as being denied access to poles, ducts, conduits or rights-of-way owned or controlled by utilities.⁸ Section 224(b)(1) sought to ensure that rates, terms, and conditions governing pole attachments for cable operators were just and reasonable, and granted the Commission authority to implement such standards and to adopt procedures necessary to hear and to resolve complaints concerning such rates, terms, and conditions.⁹ To foster competition in telecommunications services, the 1996 Act amendments seek to ensure that "telecommunications carriers" have access to poles, ducts, conduits and rights-of-way owned or controlled by utility companies on a basis similar to cable operators.

B. Legislative History

4. In enacting Section 224 in 1978, Congress directed the Commission to institute an expeditious program for determining just and reasonable pole attachment rates that would necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient

⁵ 47 U.S.C. § 224 as amended by the 1996 Act, § 70.

⁶ 5 U.S.C. § 553(b)(B).

⁷ The Commission has issued a Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC 96-182 par. 220-225 (April 19, 1996), to implement the Interconnection provisions of Section 251.

⁸ Pub. Law No. 95-234, § 6, 92 Stat. 33, 35 (codified at 47 U.S.C. § 224).

⁹ 47 U.S.C. § 224(b)(1). Pursuant to Sections 224(c)(2) and (c)(3), however, the Commission does not have jurisdiction over rates, terms and conditions in states who have certified with the Commission that they have issued and made effective rules and regulations over pole attachments.

regulation.¹⁰ Congress determined then that the rates should permit a utility to recover its fully allocated costs, as defined by Section 224(d)(1). Congress stated that although there may be some difficulty in determining certain components of a utility's operating expenses and actual capital costs, special accounting measures or studies should not be necessary because the majority of cost and expenses attributable to utility pole plant were already established and reported to various regulatory bodies and therefore the information was already a matter of public record.¹¹ Congress did not expect the Commission to re-examine the reasonableness of the cost methodologies that various regulatory agencies had sanctioned; it recognized that the Commission would have to "make its best estimate" of some of the less readily identifiable costs.¹²

5. To meet the just and reasonable standard, a pole attachment rate must fall between the statutory minimum of Section 224(d)(1) -- incremental costs -- and the Section's statutory maximum -- fully allocated costs.¹³ In the Senate Report of 1977, Congress indicated that incremental costs might include pre-construction survey costs, engineering costs, and make-ready and change-out costs incurred in preparing for cable attachments.¹⁴ Congress indicated that pole attachment rates based on incremental costs should be low, because utilities generally recover the make-ready or change-out charges directly from cable operators.¹⁵ Under Section 224(d)(1), fully allocated costs refer to the portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles that are associated with the space occupied by pole attachments.¹⁶

6. The 1996 Act expanded the scope of Section 224 to telecommunications carriers.¹⁷

¹⁰ *S. Rep. No. 580, 95th Cong., 1st Sess. 19 (1977)(1977 Senate Report)*

¹¹ *Id.* at 19-20.

¹² *Id.* at 20.

¹³ *Alabama Power Co. v. FCC*, 773 F.2d 362-364 (D.C. Cir. 1985)(*Alabama Power*).

¹⁴ *See Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CC Docket No. 86-212, 2 FCC Rcd 4387, 4388 (1987)(*"Pole Attachment Order"*), *recon. denied*, 4 FCC Rcd 468 (1989); *1977 Senate Report* at 19. The term "make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. *See 1977 Senate Report* at 19. A pole change-out is the replacement of a pole to accommodate additional users. *Pole Attachment Order*, 2 FCC Rcd at 4405, n. 3.

¹⁵ *1977 Senate Report* at 19.

¹⁶ *Id.* at 19-20.

¹⁷ Under Section 3(44) of the Communications Act of 1934, as amended by the 1996 Act, "[T]he term 'telecommunication carrier' means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunication carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services... ." Under Section 3(46) of the Communications Act of 1934, as amended by the 1996 Act, "[T]he term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such

Among other things, the 1996 Act made the existing maximum just and reasonable pole attachment rate formulas temporarily applicable to telecommunications carriers and cable operators providing telecommunications services.¹⁸ The 1996 Act also created a distinction between pole attachments used by cable operators solely to provide cable service and pole attachments used by cable operators or by any telecommunication carrier to provide any telecommunications service.¹⁹ The Act prescribed a new methodology for determining pole attachment rates for the latter group.²⁰ The new formulas will require that, in addition to paying their share of a pole's usable space, these telecommunications service providers also must pay their share of the fully allocated costs associated with the unusable space of the pole, duct, conduit, or right-of-way.²¹ In order to implement these new formulas, Congress directed the Commission to issue new pole attachment formulas within two years of the effective date of the 1996 Act.²² We will propose these new rules and seek comment in a subsequent Notice. In this *Order*, we amend our rules to reflect the self-effectuating provisions of Sections 224(a)(1), (a)(4) and (c)(2)(B), and new Sections 224(a)(5), (d)(3), (g), and (i) pursuant to Section 703 of the 1996 Act.²³ We will amend our rules pertaining to Section 224(c)(1) in a separate proceeding.²⁴

III. DISCUSSION

A. Reflecting Amendments and Additions to Section 224 under the 1996 Act

1. Revisions to Section 224

classes of users as to be effectively available directly to the public, regardless of the facilities used."

¹⁸ 47 U.S.C. § 224(a)(4) *as amended by the 1996 Act*, § 703. Under Section 3(43) of the Communications Act of 1934, as amended by the 1996 Act, "[T]he term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."

¹⁹ 47 U.S.C. § 224(d)(3) *as added by 1996 Act*, § 703

²⁰ 47 U.S.C. § 224(e)(1) *as added by 1996 Act*, § 703

²¹ 47 U.S.C. § 224(e)(2) *as added by 1996 Act*, § 703

²² 47 U.S.C. § 224(e)(1) *as added by 1996 Act*, § 703

²³ 47 U.S.C. § 224 *as amended by the 1996 Act*, § 703

²⁴ Section 224(c)(1) allows States to preempt Commission jurisdiction with respect to "... access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by a State." The 1996 Act's amendments to Section 224(c)(1) and Section 224(f), pertain to access and will be addressed in the forthcoming *Interconnection Order Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC 96-182

7. Section 224, as amended by the 1996 Act, now defines "pole attachment" as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."²⁵ The statute also redefines "utility" to mean any person that is a local exchange carrier or an electric, gas, water, steam, or other public utility, and that owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communications.²⁶ The term "utility" does not include any railroad, cooperative, or federal or state-owned entity.²⁷ Additionally, the 1996 Act excludes any incumbent local exchange carrier as defined in Section 251(h) of the 1996 Act from the definition of a "telecommunications carrier."²⁸ The 1996 Act states that the Commission's authority under Section 224 does not extend to "access to poles, ducts, conduits, and rights of way" that a state regulates.²⁹ Furthermore, in describing state certifications that regulate pole attachments, the 1996 Act strikes the phrase "cable television services" and in its place inserts "the services offered via such attachments."³⁰

8. Accordingly, in Appendix A hereto, we amend our rules to incorporate the above self-effectuating language found in section 703(1), (2), (3) and (5) of the 1996 Act.

2. Additions to Section 224

9. Section 703(6) of the 1996 Act creates a new Section 224(d)(3) of the Communications Act which expands the scope of Section 224 by applying the maximum just and reasonable pole attachment rate formulas to telecommunications carriers in addition to cable operators.³¹ The provision reads as follows:

(d)(3) This subsection shall apply to the rate for any pole attachment used by a cable system solely to provide cable service. Until the effective date of the regulations required

²⁵ 47 U.S.C. § 224(a)(4) as amended by the 1996 Act. § 703

²⁶ 47 U.S.C. § 224(a)(1) as amended by the 1996 Act. § 703

²⁷ 47 U.S.C. § 224(a)(1) as amended by the 1996 Act. § 703

²⁸ 47 U.S.C. § 224(a)(5) as added by the 1996 Act. § 703 The term "telecommunications carrier" is defined *supra* at n. 17.

²⁹ 47 U.S.C. § 224(c)(1) as amended by the 1996 Act. § 703

³⁰ 47 U.S.C. § 224(c)(2)(B) as amended by the 1996 Act. § 703

³¹ In a separate proceeding, within the two-year period specified under Section 224(e), we will propose a formula for telecommunication carriers to provide telecommunication services. Thereafter, our original formula under Section 224 for cable service providers will only be applicable to pole attachments used by cable operators solely to provide cable services.

under subsection (e), this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

Accordingly, as set forth in Appendix A, we add a new subsection to our rules regarding the Commission's expanded authority to regulate the pole attachment rates of telecommunications service providers, which incorporates the provisions of Section 703(6) of the 1996 Act.

10. Section 703 of the 1996 Act creates a new Section 224(g) of the Communications Act, which provides for the imputation of costs in the provision of pole attachments. The provision reads as follows:

(g) A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section

Accordingly, as set forth in Appendix A, we add a new section to our rules regarding the imputation of pole attachment costs, which incorporates the provisions of Section 703 of the 1996 Act.

11. Section 703 of the 1996 Act creates a new Section 224(i) of the Communications Act, which provides for the allocation of costs for rearrangement and replacement of pole attachments. The provision reads as follows:

(i) An entity that obtains an attachment to a pole, conduit, or right-of-way 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).

Accordingly, as set forth in Appendix A, we add a new section to our rules regarding the costs of rearrangement and replacement of existing pole attachments because of the addition or modification of pole attachments, which incorporates the provisions of Section 703 of the 1996 Act.

12. As previously noted, Section 703 of the 1996 Act amended several provisions of Section 224. In order to clarify our existing rules, we will conform our rules to fit these new

definitions. Accordingly, as set forth in Appendix A, we amend Sections 1.1401; 1.1402(a), (b), (d), (e), and (f); 1.1403 (a) and (b); and 1.1404 (a) and (d), which incorporate the self-effectuating language found in Section 703 of the 1996 Act.

IV. EFFECTIVE DATE

13. The statutory requirements reflected in the final rules adopted in the *Order* were effective February 8, 1996, the date of enactment of the 1996 Act. We find good cause for making these rule changes effective upon publication in the Federal Register because the rules merely conform our rules to self-implementing statutory language from the 1996 Act. See 5 U.S.C. § 553(d).

V. INITIAL PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

14. This Order contains either proposed or modified information collections. The Commission has requested Office of Management and Budget ("OMB") approval, under the emergency processing provisions of the Paperwork Reduction Act of 1995,³² of the information contained in this rulemaking. Approval is requested to be effective no later than the date that the summary of the Order appears in the Federal Register. The OMB control number for information collection contained in this rulemaking is 3060-0392. The Commission, as part of its continuing effort to reduce paperwork burdens and to obtain regular OMB approval of the information collections, invites the general public and OMB to comment on the information collections contained in this Order, as required by the Paperwork Reduction Act of 1995. Public and agency comments are due 60 days from date of publication of this Order in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

VI. PROCEDURAL PROVISIONS

15. Written comments by the public on the proposed and/or modified information collections are due on or before 30 days after publication of the Order in the Federal Register. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after publication of the Order in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20054, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer,

³² 5 CFR 1320.13

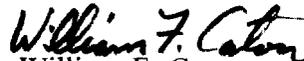
10236 NEOB, 725-17th Street, N.W., Washington, D.C. 20503 or via the Internet to fain_t@al.eop.gov.

VII. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that pursuant to Section 703 of the Telecommunications Act of 1996, (Section 224 of the Communications Act of 1934, as amended, 47 U.S.C. § 224), and to Sections 4(i) and 303(r) of the Communications Act of 1934 as amended, 47 U.S.C. §§ 154(i), 303(r) Subpart J of Part 1 of the Commission's Rules is amended as set forth in Appendix A. The rule changes will become effective upon publication in the Federal Register.

17. For additional information regarding this *Order*, contact Michael T. McMenamin, Financial Analysis and Compliance Division, Cable Services Bureau (202) 418-7200.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A

Title 47, Part 1 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 1 continues to read as follows:

Authority: 47 U.S.C. 151, 154, 303 and 309(j) unless otherwise noted.

2. Subpart J is revised to read as follows:

Subpart J - Pole Attachment Complaint Procedures

- § 1.1401 Purpose.
- § 1.1402 Definitions.
- § 1.1403 Notice of removal and petition for temporary stay
- § 1.1404 Complaint.
- § 1.1405 File Numbers.
- § 1.1406 Dismissal of complaints.
- § 1.1407 Response and reply.
- § 1.1408 Number of copies and form of pleadings
- § 1.1409 Commission consideration of the complaint.
- § 1.1410 Remedies.
- § 1.1411 Meetings and hearings.
- § 1.1412 Enforcement.
- § 1.1413 Forfeiture.
- § 1.1414 State certification.
- § 1.1415 Other orders
- § 1.1416 Access provisions for telecommunications carriers and cable systems.

* * * * *

3. Section 1.1401 is amended to read as follows:

Section 1.1401 Purpose.

The rules and regulations contained in Subpart J of this part provide complaint and enforcement procedures to ensure that the rates, terms and conditions for pole attachments of cable television systems and telecommunications carriers are just and reasonable.

* * * * *

4. Section 1.1402 is amended by revising paragraphs (a), (b), (d), (e), and (f) to read as follows and by adding new paragraph (h):

Section 1.1402 Definitions.

(a) The term *utility* means any person that is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person that is cooperatively organized, or any person owned by the Federal Government or any State

(b) The term *pole attachment* means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility

* * * * *

(d) The term *complaint* means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable

(e) The term *complainant* means a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers who files a complaint.

(f) The term *respondent* means a cable television system operator, a utility, or a telecommunications carrier against whom a complaint is filed.

* * * * *

(h) For purposes of this Subpart, the term *telecommunications carrier* means any provider of telecommunications services, except that the term does not include aggregators of telecommunications services (as defined in 47 U.S.C. 226) or incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)).

* * * * *

5. Section 1.1403 is amended by revising paragraph (a) and (b) to read as follows:

Section 1.1403 Notice of removal and petition for temporary stay.

(a) A utility shall provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to (1) removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term, or condition of the cable television system operator's or telecommunications carrier's pole attachment agreement, or (2) any increase in pole attachment rates.

(b) A cable television system operator or telecommunications carrier may file a "Petition for Temporary Stay" of the action contained in a notice received pursuant to paragraph (a) of this section within 15 days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of cable television service or telecommunication service, a copy of the notice, and certification of service as required by § 1.1404(b) of this subpart. The named respondent may file an answer within 7 days of the date the Petition for Temporary Stay was filed. No further filings under this section will be considered unless requested or authorized by the Commission and no extensions of time will be granted unless justified pursuant to § 1.46

* * * * *

6. Section 1.1404 is amended by revising paragraph (a), (d) and (d) (2) to read as follows:

Section 1.1404 Complaint.

(a) The complaint shall contain the name and address of the complainant, name and address of the respondent, and shall contain a verification (in the form in § 1.721(b)), signed by the complainant or officer thereof if complainant is a corporation, showing complainant's direct interest in the matter complained of. Counsel for the complainant may sign the complaint. Complainants may join together to file a joint complaint. Complaints filed by associations shall specifically identify each utility, cable television system operator, or telecommunications carrier who is a party to the complaint and shall be accompanied by a document from each identified member certifying that the complaint is being filed on its behalf.

* * * * *

(d) The complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable system operator or telecommunications carrier and the utility. If there is no present pole attachment agreement, the complaint shall contain:

* * *

(d)(2) A statement that the cable television system operator or telecommunications carrier currently has attachments on the poles, ducts, conduits, or rights-of-way.

* * * * *

7. Section 1.1409 is amended by adding paragraph (e) to read as follows:

§ 1.1409 Commission consideration of the complaint.

(e) Section 1.1404 of this subpart shall apply to the rate for any pole attachment used by a cable system operator solely to provide cable service. Until the effective date of the regulations required under 47 U.S.C. § 224(e), Section 1.1404 of this subpart shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

* * * * *

8. A new Section 1.1416 is added to read as follows:

§ 1.1416 Access Provisions for Telecommunication Carriers and Cable Systems.

(a) A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(b) An entity that obtains an attachment to a pole, conduit, or right-of-way 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).