DOCKET FILE COPY ORIGINAL

STAMP & RETURN

RECEIVED

OCT 13 '94

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COLE, RAYWID & BRAVERMAN, L.L.P.

ATTORNEYS AT LAW

SECOND FLOOR

1919 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20006-3458

(202) 659-9750

JOHN P. COLE, JR.
BURT A. BRAVERMAN
ROBERT L. JAMES
JOSEPH R. REIFER
FRANCES J. CHETWYND
JOHN D. SEIVER
WESLEY R. HEPPLER
PAUL GLIST
DAVID M. SILVERMAN
JAMES F. IRELAND, III
STEVEN J. HORVITZ
CHRISTOPHER W. SAVAGE
ROBERT G. SCOTT, JR.
SUSAN WHELAN WESTFALL
THERESA A. ZETERBERG
STEPHEN L. KABLER
JOHN C. DODGE
FREDERICK W. GIROUX
MATTHEW P. ZINN
JOHN DAVIDSON THOMAS
MARIA T. BROWNE
DONNA C. RATTLEY
THOMAS SCOTT THOMPSON
TODD G. HARTMAN*

* ADMITTED IN MINNESOTA ONLY

ALAN RAYWID
(1930-1991)

CABLE ADDRESS
"CRAB"

TELECOPIER
(202) 452-0067

WRITER'S DIRECT DIAL
(202) 828-9820

MAR 1 [illegible]

October 13, 1994

CS 97-98

BY HAND DELIVERY

Kenneth P. Moran
Common Carrier Bureau
Federal Communications Commission
Room 812
2000 L Street, N.W.
Washington, D.C.

Re: Comments on Southwestern Bell Telephone Company's Petition for Clarification of Pole Attachment Rules

Dear Mr. Moran:

The Texas Cable TV Association, the Arkansas Cable Television Association, the Kansas Cable Television Association, the Missouri Cable Telecommunications Association, and the Cable Television Operators of Oklahoma, Inc. represent the cable television operators serving Southwestern Bell Telephone Company's five-state service area. On their behalf, I am submitting accounting and policy comments on the Petition by Southwestern Bell to modify the pole attachment rules.

The Problem

According to its Petition, Southwestern Bell has added a large negative net salvage value to the pole depreciation reserve in anticipation of pole removal expenses which have not yet been incurred. Because retirements have so lagged the anticipated recovery level, the depreciation reserve now exceeds the gross pole asset account. Southwestern Bell is rightfully

concerned about creating a pole rental rate based upon a negative rate base, but for the wrong reason and with the wrong solution.

By creating a negative addition to the depreciation reserve, Southwestern Bell has in effect created a positive regulatory asset which it has been depreciating and on which it has been earning a return. Although Southwestern Bell states that its pole investment is not recovered, its own books demonstrate that by recovering pole removal expenses which are *anticipated but not realized* because of long delay in actual pole retirements, it has more than recovered that investment.

The adjustment recommended by Southwestern Bell does not compute a lawful rate. In the first place, Southwestern Bell seeks to remove all of the recovery and profit which it has already obtained and start from scratch, regardless of the actual level of unrecovered cost. Moreover, even if that extraordinary premise were accepted, Southwestern Bell has carried forward still more distorting effects of the overrecovery they claim to have cured. Exhibit 1 is a spreadsheet demonstrating the effect on Oklahoma pole rents of adopting the Southwestern Bell methodology. There are three problems evident from the exhibit. First, the depreciation rate used by Southwestern Bell is a number which has been adopted for application to a *net* figure. It is based on the remaining life of net plant, not the 30 year life of gross plant. Thus, the depreciation rate is recovering the same phantom regulatory asset which Southwestern Bell claims it has eliminated from the formula. Second, the rate of return has been established for application to *net* rate base. Southwestern Bell concedes that rate base has been inflated by a phantom asset. Thus, the rate of return figure is overrecovering investment if it is not adjusted downward to reflect the ratio of net plant reflected in Southwestern Bell's current books to actual plant. Third, because accumulated deferred taxes is based on the difference of book and tax depreciation, and it is now evident that book depreciation is incorrect, the figures for accumulated deferred taxes are incorrect. In short, Southwestern Bell's adjustment does not cure the problem. It carries forward overrecovery of a phantom asset through depreciation and return.

What is remarkable about Southwestern Bell's approach is to reflect on its long-term implications. For as long as Southwestern Bell could benefit from the rapid depreciation of regulatory assets which had not yet been purchased, it did so and passed through the high depreciation costs and return to cable operators through pole rent. Once that strategy caught up with the fact that retirements did not match the projections, Southwestern Bell seeks to undo that accounting only partially, without the slightest effort to undo either the past overcharges or the present overcharges buried in the remaining unadjusted elements of the formula. If the formula were simply left alone, the problem would right itself in the long run, because retirements will catch up with the projections if Southwestern Bell has been truthful in its predictions for

depreciation. But there is no basis for carving out those few years during which the strategy does not benefit Southwestern Bell and adopting a new formula to carry forward the distorted overrecovery.

The Competitive Effect

It is no accident that this effort to distort pole attachment rents should come at this time. In recent years, Southwestern Bell has adopted a concerted strategy to frustrate cable television operator's ability to use their facilities to compete with telephone. First, Southwestern Bell distributed notices unilaterally advising cable operators that poles which had been licensed for "all lawful services" would nonetheless be assessed a surcharge of up to $100/pole if they were used for nonvideo transmissions over cable. Now, Southwestern Bell is seeking to drain capital away from cable's core business to handicap cable's expansion at a critical juncture in the telecommunications business. The timing of cable operators' upgrades is critical. To keep pace with technology and competition, such upgrades must take place immediately or in the very near future. In light of this shortened time frame and the extraordinary dynamism in the video services industry, Southwestern Bell's abuse of pole attachment rates is a particularly effective anticompetitive approach. Southwestern Bell well knows that pole attachment complaint proceedings are extremely slow, with many complaints pending for several years before any decision is reached.[1] By artificially increasing its pole attachment rental rates, Southwestern Bell will destroy or cripple cable's ability to make timely and necessary advancements required to compete with Southwestern Bell's services.

This type of anticompetitive pole rent is illustrative of chronic anticompetitive abuses of monopoly control over poles to the detriment of competing cable operators. Indeed, Congress passed the Pole Attachment Act after extensive hearings in 1976 and 1977 revealed

---

[1] See, e.g., First Commonwealth Communications, Inc. v. VEPCO, 7 F.C.C. Rcd. 2614 (Com. Car. Bur. 1992)(filed over 6 years before decision); Newport News Cablevision, Ltd. v. VEPCO, 7 F.C.C. Rcd. 2610 (Com. Car. Bur. 1992)(filed 6 years prior to decision); Mississippi Cablevision, Inc. v. South Central Bell, PA-91-0007 (filed Oct. 1, 1991) (still pending); TCA Management Co. v. Southwestern Public Serv. Co., PA-90-002 (filed Oct. 16, 1990) (still pending); TeleCable of Piedmont, Inc. v. Duke Power Co., PA-90-003 (filed Nov. 15, 1990) (still pending); TeleCable of Spartanburg, Inc. v. Duke Power Co., PA-91-002 (filed Jan. 15, 1991) (still pending); Cencom Cable Income Partners II, LP v. Duke Power Co., PA-91-001 (filed Jan. 9, 1991) (still pending).

ubiquitous telephone company abuse.[2] Examples of telephone company conduct exposed at the hearings include:

- Efforts by the Bell System to force the migration of cable operators onto cables owned by the telephone company, on which they forbade any data transmission, and imposed delays on operators who sought to provide independently-owned cable until a more compliant "lease-back" operator could be installed on the poles.[3]

- 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.[4]

- 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.[5]

---

[2] Cable Television Regulation Oversight: Hearings Before the Subcomm. on Communications of the Comm. on Interstate & Foreign Commerce, Parts 1 & 2, 94th Cong., 2d Sess. (1976) (hereinafter "1976 Oversight"); Pole Attachment: Hearings on H.R. 15,372 and H.R. 15,268 Before the Subcomm. on Communications of the House Comm. on Interstate & Foreign Commerce, 94th Cong., 2d Sess. (1976) (hereinafter "1976 H. Comm."); Communications Act Amendments of 1977: Hearings on S. 1547 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 95th Cong., 1st Sess. (1977) (hereinafter "1977 S. Comm.").

[3] 1977 S. Comm. at 30; Better T.V., 31 F.C.C.2d at 966-67 (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 a pole attachment agreement an empty and worthless gesture.")

[4] 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).

[5] Id.; Plaintiff's First Statement of Contentions & Proof at 207, United States v. AT&T, Civ. No.

(continued...)

- In virtually every case designated for adjudication, the Commission found that the telephone company had abused its monopoly control over poles to gain control over cable television distribution cable.[6] Federal courts reached a similar conclusion.[7]

- Efforts to evade crossownership limitations by undermining cable operators financially through vastly increased pole attachment rates.[8] As explained in an AT&T memo, the telephone companies' pole attachment prices were not based on the company's cost, but rather on discouraging independent attachments and encouraging lease of channels controlled by the telco.[9]

---

[5](...continued)
74-1698 (D.D.C. 1978), Attachment 3. General Telephone & 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); 1977 S. Comm. at 37.

[6] 1977 S. Comm. at 37.

[7] TV Signal Co. of Aberdeen v. AT&T Co., 1981-1 Trade Reg. Rep. (CCH) ¶ 63,944 (D.S.D., Mar. 13, 1981).

[8] Section 214 Certificates, 21 F.C.C.2d at 328.

[9] The memo states:

> Apparently, the incremental cost to the Bell System is expected to average about $1 per pole attachment. The cost to a CATV company to provide its own plant and equipment, which will be of a lower quality would average between $4 and $5 per pole attachment, with high probability of added maintenance costs.
>
> According to economic theory, Bell should charge a fee very close to the $4 level. If these CATV companies can save even 10 cents per attachment by buying them from Bell it would add that amount to their profits.
>
> Charging a few cents below the $4 level, however, is cutting it rather close, so it is probably better strategy to charge a fee somewhere in the middle

(continued...)

By distorting its pole attachment rates, Southwestern Bell "intend[s] to take advantage of [its] control over the telephone poles . . . and place [competing cable operators] at a substantial competitive disadvantage.[10]

The Solution

Southwestern Bell's accounting problem is not unique to it, and there are two solutions. If Southwestern Bell's accounting produces a negative number, it may simply issue credits against future billing, and the accounting cycles will catch up to each other.

If that is impossible, then one should apply a different ratemaking approach. Regulatory agencies have often faced carriers with no rate base, and have traditionally turned to the operating ratio method to assure a fair return.[11] In this case, the pole attachment formula may

---

[9](...continued)
ground between $1 and $4.

United States v. AT&T, No. 74-1698, Plaintiff's First Statement of Contentions and Proof at 209-210, attachment 3 (quoting AT&T memo).

[10] Manatee Cablevision, 22 F.C.C. 2d at 862.

[11] The operating ratio method of ratemaking sets revenues as profits over expenses and has been employed by regulatory bodies to enable regulated companies to earn a fair return on their investment. See, e.g., Hammv. South Carolina Pub. Serv. Comm'n, 422 S.E.2d 118, 122 (S.C. 1992) (water and sewage utility); Parks v. Rent Control Bd., 526 A.2d 685, 686 (N.J. 1987) (rent control); Hamm v. South Carolina Pub. Serv. Comm'n, 344 S.E.2d 600, 602 (S.C. 1986) (motor carrier services); Public Srv. Comm'n v. Dewitt Water Dist., 720 S.W.2d 725, 729 (Ky. 1986) (water utility); State Ex. Rel. Util. Comm'n v. Public Staff, 343 S.E.2d 898, 901 (N.C. 1986) (water utility); Texas Indus. Traffic League v. Railroad Comm'n, 683 S.W.2d 368, 369 (Tex. 1984) (railroad); State, etc. v. Intervenor Residents, etc., 278 S.E.2d 761, 766-67 (N.C. 1981) (water and sewer utility); In the Matter of Wilmington Suburban Water Corp. for a General Increase in Rates, Slip Op. No. 82A-JN-6 (Del. 1982) (water utility); Moore v. Arkansas Transport Co., 606 S.W.2d 575, 576 (Ark. 1980) (transport company); Casco Bay Lines v. Public Util Comm'n, 390 A.2d 483, 490-91 (Me. 1978) (shipping); Guida v. Public Util. Comm'n, 348 A.2d 613, 617 n. 4 (Conn. 1974) (motor transit companies); Commonwealth v. Federal Maritime Comm'n, 468 F.2d 872, 874 (D.C. Cir. 1972) (shipping); D.C. Transit Sys. v. Washington Metro. Area Trans. Comm'n., 350 F.2d 753, 759 (D.C. Cir. 1965); Florida Rate Conference v. Florida Railroad and Pub. Util. Comm'n, 108 So.2d 601, 603 (Fla. 1959) (common carrier motor freight lines).

be used to determine the amount of actual pole expenses plus a prorata share of administrative and tax expense in proportion to the ratio which poles revenues bears to total operating revenues. No depreciation charge is required because the plant is fully depreciated. A margin equal to the currently authorized return on rate base could be added. The result is attached as Exhibit 2.

Respectfully submitted,

Paul Glist

Enclosures

cc: Richard Metzger
Kathy Wallman
Robert M. Lynch
Richard C. Hartgrove
Jonathan W. Royston

POLE ATTACHMENT RENTAL SWB-OK
Using SWB Adjustment

CALCULATION OF MAXIMUM POLE ATTACHMENT RATE	
Southwestern Bell Telephone Company	
Year End 1993	
State of Oklahoma	
Calculated:9/29/94	
Calculated by: Paul Glist	
Net Investment Per Bare Pole	
Gross Investment in Pole Plant	$27,739,826.00
-Depreciation Reserve for Poles	$13,662,620.40
-Accumulated Deferred Taxes	$1,996,382.00
=Net Investment in Pole Plant	$12,080,823.60
-Net Investment in Appurtenances (5%)	$604,041.18
=Net investment in Bare Pole Plant	$11,476,782.42
/Number of Poles	221,272
=Net Investment per Bare Pole	$51.87
Carrying Charges	
Maintenance	
Chargeable Maintenance Expenses	$432,304.00
/Net Investment in Pole Plant	$12,080,823.60
=Maintenance Carrying Charge	3.58%
Depreciation	
Annual Depreciation Rate for Poles	9.20%
Gross Investment in Pole Plant	$27,739,826.00
/Net Investment in Pole Plant	$12,080,823.60
=Gross/Net Adjustment	229.62%
Deprec Rate Applied to Net Pole Plant	21.12%
Administrative	
Administrative Expenses	$128,802,020.00
Total Plant In Service	$2,637,335,908.00
-Depreciation Reserve for TPIS	$1,216,710,765.00
-Accumulated Deferred Taxes	$189,804,000.00
=Net Plant in Service	$1,230,821,143.00
Administrative Carrying Charge	10.46%
Taxes	
Normalized Tax Expense	$83,151,693.00
Total Plant In Service	$2,637,335,908.00
-Depreciation Reserve for TPIS	$1,216,710,765.00
-Accumulated Deferred Taxes	$189,804,000.00
=Net Plant in Service	$1,230,821,143.00

POLE ATTACHMENT RENTAL SWB-Ok
Using SWB Adjustment

Tax Carrying Charge	6.76%
Return	
Return Authorized by State	11.98%
Total Carrying Charges	53.90%
Allocation of Annual Carrying Costs	
Space Occupied by Cable	1.0
/Total Useable Space	13.5
Charge Factor	7.41%
Maximum Rate	
Net Investment Per Bare Pole	$51.87
*Carrying Charges	53.90%
*Charge Factor	7.41%
=MAX!MUM RATE	$2.07
DATE ENTRY AND SOURCE	
Gross Investment in Pole Plant	$27,739,826.00
Gross Investment in Total Plant	$2,637,335,908.00
Depreciation reserve for Pole Plant	$13,662,620.40
Depreciation Reserve for TPIS	$1,216,710,765.00
Pole Maintenance Expense	$432,304.00
Depreciation rate for Poles	9.20%
Administrative Expense 1	$128,802,020.00
Administrative Expense 2	$0.00
Taxes	$83,151,693.00
Accumulated Deferred Taxes	$189,804,000.00
Accumulated Deferred Taxes (Prorated to Poles)	$1,996,382.00
Overall Rate of Return (Last Rate Case)	11.98%
Number of Poles	221,272

POLE ATTACHMENT RENTAL SWB-OK
Using Operating Margin

CALCULATION OF MAXIMUM POLE ATTACHMENT RATE	
Southwestern Bell Telephone Company	
Year End 1993	
State of Oklahoma	
Calculated:9/29/94	
Calculated by: Paul Glist	
Maintenance Expense	$ 432,304
Administration	
Administrative Costs	$ 128,802,020
Revenue Allocator	0.02586%
Share of Admin Cost	$ 33,313
Taxes	
Tax Expense	$ 83,151,693
Revenue Allocator	0.02586%
Share of Tax Cost	$ 21,506
Total Expenses	$ 487,123
Allocation of Annual Carrying Costs	
Space Occupied by Cable	1.0
/Total Useable Space	13.5
Charge Factor	7.41%
Maximum Rate	
Carrying Costs	$ 487,123
Number Poles	221,272
Carrying Cost per Pole	$ 2.20
*Charge Factor	7.41%
Maximum Rate without Margin	$0.16
Margin	11.98%
Maximum Rate with Margin	$ 0.18
Development of Revenue Allocator	
Total Operating Revenue	$ 855,537,439
Total Poles Available for Rent	221,272
Assumed Rental Revenues (1)	$ 221,272
Ratio of Rental revenues to Total OR	0.02586%
(1) Estimate. Actual will be used when	
figures are produced by SWB	

CERTIFICATE OF SERVICE

I, Elizabeth Johnson, a secretary in the law firm of Cole, Raywid & Braverman, L.L.P., hereby certify that a copy of the foregoing was mailed by first-class mail, postage prepaid, this 12th day of December 1994, to the following:

Robert M. Lynch
Richard C. Hartgrove
Jonathan W. Royston
Southwestern Bell Telephone Company
One Bell Center, Suite 3520
St. Louis, MO 63101

Elizabeth Johnson

Elizabeth Johnson

20551.1

If you have any questions regarding this matter, please contact the undersigned.

Sincerely,

Paul Glist

Enclosure

cc: Thaddeus Machcinski
ITS