

Utilities believe that using forward-looking economic costs to value a utility's infrastructure is the most feasible solution.

**C. The FCC Must Adopt A Rate Policy That Encourages Attaching Entities And Utilities To Enter Into And Commit To Pole Attachment Agreements Without FCC Intervention**

Finally, a voluntarily negotiated pole attachment agreement must be binding on the parties, just as a voluntarily negotiated interconnection agreement under § 252(a)(2) is binding on the parties. The rates, terms and conditions of contracts voluntarily entered into must be deemed binding and enforceable, even if those terms and conditions depart from prior FCC precedent. If not, the ability of parties to contract at all, and Congress's emphasis on a deregulated, not a regulated marketplace, is meaningless. As the U.S. Court of Appeals for the Eighth Circuit recognized in rejecting the FCC's "most favored nation" treatment under § 252(i), one party cannot be given the unilateral ability to subsequently modify an existing agreement with additional or alternate terms without undermining the whole negotiation process.<sup>43/</sup>

Attaching entities currently have little incentive to reach and be bound by an agreement regarding the terms and conditions for making a pole attachment when the attaching entity knows that it can readily turn to the FCC to contest terms it has agreed to, in order to try to obtain more favorable terms through the complaint process. In order to ensure that relief is sought only in circumstances where it is truly justified,<sup>44/</sup> the

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<sup>43/</sup> Iowa Utilities Board, slip op. at 115.

<sup>44/</sup> E.g., in such instances where fraud, duress or misrepresentation on the part of the attaching entity or the utility lead to an unfair agreement.

Commission must adopt rate regulations that create an incentive for both the attaching entity and the utility to voluntarily enter into pole attachment agreements without FCC intervention. The linchpin of any such policy must be rules that cause both the attaching entity and the utility to believe that the FCC solution will not result in terms and conditions that are significantly more favorable to one of the parties than those to which the parties can agree in the course of their own negotiations.

So long as an attaching entity understands that it can turn to the FCC to secure a rate that is significantly below market rate, the attaching entity has no real incentive to use its best effort to negotiate, and later comply, with a rate that was agreed to by both the attaching entity and the utility through good faith negotiations. Instead, the attaching entity is encouraged to go through a series of steps in order to fulfill the FCC's requirement that it "try" to enter an agreement without really having any intention of honoring the terms and conditions negotiated by the two parties.

The ease with which attaching entities can make ex post facto changes to executed agreements is also problematic from a statutory perspective. Congress obviously intended that the FCC take measures to help parties come to an agreement when the parties cannot do so on their own. Explicit in this congressional mandate is that the parties must come to "agree." An "agreement" is evidenced by some willingness on the part of both parties to accept what each other is offering.<sup>45/</sup> While acceptance almost always means that neither party has obtained everything it wanted, general principals of contract law and common sense

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<sup>45/</sup> The dictionary defines an "agreement" as "an arrangement that is accepted by all parties; unanimity of opinion; an expression of assent; concurrence." Random House Dictionary of the English Language (unabridged) (2d ed. 1997).

dictate that, to have an agreement, both parties must concur on the proposals. The FCC's past and proposed rate regulations do not facilitate "agreements" at all. Unfortunately, the FCC's current regulatory scheme has resulted in cable system operators unilaterally modifying certain terms and conditions agreed to in the contract without regard for the balance of costs and benefits that were traded by the utility and attaching entity in order to reach consensus on the entirety of the agreement. The utility is forced to accept FCC-mandated terms with no ability to recapture any of its previously given consideration. The rules proposed by the FCC in this rulemaking appear to be an improper continuation of government-sponsored unilateral contract modification and subsidization of the cable industry by electric utility ratepayers.

The 1996 Act Amendments to the Pole Attachments Act was Congress's way of acknowledging the inadequacy of the 1978 Pole Attachment Act in today's competitive environment and requiring the FCC to remediate the imbalance in its historical approach to regulating pole attachments. That the correction of this imbalance was intended by Congress is evident by the terms of the amended Pole Attachments Act, as well as the overall goals and policies of the 1996 Act. Congress requires the Commission to encourage negotiations by adopting rate regulations that lead to FCC resolution of pole attachment rate complaints that are consistent with competitive market prices and that honor the binding nature of the terms and conditions agreed to between telecommunications carriers and utilities. The 1996 Act Amendments and the dramatic changes in market conditions compel the Commission to revise its formulas to reflect today's environment.

#### **IV. The FCC Must Adopt Procedural Protections To Ensure That Utilities And Attaching Entities Are In Compliance With The Pole Attachments Act**

The Electric Utilities believe that little regulation of pole attachments is required due to Congress's belief and intent that the marketplace can and must serve as the predominant means by which reasonable rates are set. However, in light of the different cost allocation models adopted by Congress for attachments made by "pure" cable system operators and telecommunications carriers, certain procedures are necessary to ensure the fair and efficient negotiation and resolution of pole attachment matters.

##### **A. There Must Be A Rebuttable Presumption That Cable Service Providers, At A Minimum, Are Telecommunications Carriers**

As discussed previously,<sup>46/</sup> § 224(d)(3) makes clear that certain costs are to be borne by those solely providing cable service.<sup>47/</sup> Section 522 defines "cable services" as the one-way delivery of video programming comparable to that provided by television broadcast stations.<sup>48/</sup> Telecommunications carriers, on the other hand, will be subject to a different regulatory framework due to Congress's desire to reduce the FCC's role in regulating pole attachments by such entities in favor of market-driven "regulation." In order to ensure fairness among all attaching entities and in light of the cable industry's diversification into providing various telecommunications services, the Electric Utilities urge

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<sup>46/</sup> See discussion supra at Section II.

<sup>47/</sup> 47 U.S.C. § 224(d)(3).

<sup>48/</sup> 47 U.S.C. § 522.

the FCC to adopt a rebuttable presumption that cable service operators have become, at a minimum,<sup>49/</sup> telecommunications carriers.<sup>50/</sup>

**B. Cable Systems Operators Are Diversifying Their Businesses To Include Two-Way Video, Telecommunications And Information Services**

In recent years, there has been an introduction of two-way video, telecommunications services and information services by cable operators, largely through efforts to increase the two-way capability of cable networks and through the use of high-speed cable modems. As a result, the number of "pure" cable operators in existence today is decreasing and the number in existence in the future is likely to be negligible.

In order to provide new video, telecommunications and information services, many cable operators are scrambling to increase their capability to deliver two-way services. According to modem supplier Scientific-Atlanta Inc., all of the top five cable companies — TeleCommunications, Inc. ("TCI"), Time Warner, Continental (now "MediaOne"), Comcast Corp. and Cox Communications Inc. — will dramatically increase their two-way capability over the next few years. By the end of 1997, Scientific-Atlanta estimates that Time Warner will have two-way capability throughout 40% of its systems. Comcast will have 32.7%

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<sup>49/</sup> Information and two-way video services providers are not covered by § 224. Therefore, to the extent that a cable system operator is providing or delivering these services over their attachments, the utility has the right to charge market rates for such attachments. See discussion supra at Section II.C.

<sup>50/</sup> Placing the burden on the "pure" cable television system operator is proper and in conformance with the FCC's philosophy regarding presumptions — Cable system operators will be in the best position to provide information about the nature of their traffic, both when making a certification about their "pure" cable status and when defending complaint cases where it is alleged that a cable entity is, in fact, providing a service other than "pure" cable service.

penetration, Cox will have 20%, TCI will have 12.5% and Continental will have 5%.<sup>51/</sup>

Within two years, however, Scientific-Atlanta states that each of the five operators "will see their infrastructure investments reach fruition as the majority of their cable plant will be two-way, ... with Time Warner reaching 90% capability, Comcast 71.2%, Continental 67%, Cox 64% and TCI 60%."<sup>52/</sup> Additionally, Adelphia Communications estimates that "approximately 29% of the Company systems have cable plant capable of delivering two-way data transmission service to its customers" and the Company is "considering which additional product offerings to introduce to maximize the two-way data service capability."<sup>53/</sup>

The increase in telecommunications services offered by cable operators may also be seen in the volume of high-speed cable modem sales to cable operators, as well as in the number of operators testing this equipment in various communities. Motorola announced last year that it has been shipping its cable modem systems to major North American cable operators "including Home Network, TCI, Comcast, Cox, Time Warner, Continental, Shaw,

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<sup>51/</sup> Balancing Risks, Rewards Tell Cable Modem Story: MSOs Could Get 60 Percent of High Speed Market by 2005, Interactive Video News, Vol 4., No. 19, Sept. 16, 1996.

<sup>52/</sup> Id.

<sup>53/</sup> Adelphia Communications Corp., Annual Report on Form 10-K for the Fiscal Year Ended December 31, 1996, Commission File Number 1-16014.

Videotron, Pacific Bell, NYNEX, and US West-MediaOne.<sup>54/</sup> According to Price Waterhouse cable operators had already ordered 500,000 cable modems in 1995.<sup>55/</sup>

Cable operators are testing high-speed cable modems in numerous communities around the nation. One source reported that, as of March 1996, there were "more than two dozen tests being conducted nationwide by cable companies such as Cox Cable Communications, Comcast, Jones Intercable, TCI, Time Warner, and Continental."<sup>56/</sup> It is widely believed that these tests will result in significant increases in the use of high-speed cable modems. For instance, CableLabs, an industry-funded cable consortium, observed, "[w]hatever cable modems are in place today will be exponentially multiplied within the next 12 months."<sup>57/</sup> Forrester Research, a new-media consultancy, agrees; predicting that 7% of U.S. households will use cable modems in place of telephone modems by the year 2000.<sup>58/</sup>

Each major national cable operator has either made commitments or stated its intention to upgrade its systems in order to provide interactive broadband services to supplement their traditional cable services. For instance, Continental Cablevision's 1996

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<sup>54/</sup> Motorola Cable Modems Shipping to More Than 40 Cities Worldwide, Business Wire, Oct. 30, 1996.

<sup>55/</sup> Katherine Statler, Cable Modems Invite Promise of Interactive TV, Hyper-driven Data, Daily Variety, June 28, 1996. See also High-speed Modems a Top Priority: Faster Internet and Online Access By Year's End is Goal of MSOs and Equipment Makers, Broadcasting & Cable, Vol. 125, No. 49, Dec. 4, 1995, at 82.

<sup>56/</sup> Kim Cleland, Cable TV: System Operators Tout Speed to Web Crawlers; Technology and Price Pose Problem in Push for Share of Internet Access, Advertising Age, Mar. 25, 1996, at 24.

<sup>57/</sup> Id.

<sup>58/</sup> Id.

annual report stated: "The Company believes that as a result of its investment in technologically advanced systems, it is well positioned to offer new services such as on-line services, data communications, and telephony." The report continued to declare that Continental is "rebuilding and upgrading its U.S. systems to create advanced hybrid, fiber optic and coaxial cable networks that will serve as the infrastructure for the provision of enhanced video, high speed data, telephony and other telecommunications services."<sup>59/</sup>

It is evident that Continental/MediaOne has followed through on its commitment to these services. In fact, U.S. West, Inc. "reiterated plans to invest \$5 billion over the next three years to upgrade its video transmission network."<sup>60/</sup> U.S. West also stated that it has upgraded about half of the MediaOne network to hybrid fiber/coaxial cable technology and that the MediaOne Express (formerly "HighwayOne") access service is available in Jacksonville, Detroit, Boston, and Chicago, and is planned for launch in several other service areas.<sup>61/</sup> The company expects its hybrid fiber optic/coaxial cable network will be capable of providing telecommunications service to about 500,000 homes by the end of 1997.<sup>62/</sup> In

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<sup>59/</sup> Continental Cablevision Inc., Annual Report on Form 10-K for the Fiscal Year Ended December 31, 1996, Commission File No. 33-57471.

<sup>60/</sup> U.S. West Renames Cable Unit, Updates \$5 Billion Upgrade Plan, Telecommunications Reports, Vol. 63, No. 20, May 19, 1997, at 11.

<sup>61/</sup> Id.

<sup>62/</sup> Id. See also Continental Rolls Out Cable Modem Service in Mass., Telecommunications Reports, Vol. 62, No. 39, Sept. 30, 1996.

1997 alone, U.S. West will increase its capital expenditures 43%, to \$1 billion, in order to enable it to offer telephone services over MediaOne's cable system.<sup>63/</sup>

Other cable operators have made similar commitments. In its annual report for fiscal year 1996, Cox Communications stated:

Cox continues to deploy fiber optic cable and to upgrade the technical quality of its hybrid fiber-coaxial broadband network. The result is a significant increase in channel capacity, facilitating the delivery of additional programming and services such as enhanced video, high speed Internet access and telephony.<sup>64/</sup>

The company also expressed a commitment to increasing access to two-way services: "In Cox's 9 largest systems, by the end of 1997, 75% of its customers will have access to 550 MHz or 750 MHz capacity and 2 million customers will be able to receive 2-way service."<sup>65/</sup> In 1997, Cox expects to spend \$670 million, up 22% from 1996, on system upgrades facilitating the introduction of telecommunications services.<sup>66/</sup>

Time Warner Entertainment has also discussed intentions to upgrade its cable systems. The company declared in its annual report for 1996:

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<sup>63/</sup> David Lieberman, Cable Mixed Signals Upgrade Costs Frighten Some Firms Off Fast Track, USA Today, Feb. 5, 1997, at 1B.

<sup>64/</sup> Cox Communications, Inc., Annual Report on Form 10-K for the Fiscal Year Ended December 31, 1996, Commission File No. 1-06590.

<sup>65/</sup> Id.

<sup>66/</sup> Lieberman, USA Today, Feb. 5, 1997, at 1B; Charles Haddad, Cox Adds San Diego to Long-Distance Plan, Atlanta Journal and Constitution, Aug. 1, 1997, at F3 (noting Cox Communications, Inc. will offer telecommunications service to 477,000 cable television customers in San Diego); Charles Haddad, Cox Weds Cable, Phone Service in Part of California, Atlanta Journal and Constitution, Sept. 11, 1997, at F3 (stating Cox Communications, Inc. is implementing commercial roll-out of its local telephone service offering in Orange County, California, with the intent to provide similar service in its other cable markets).

TWE has agreed to use its best efforts to complete upgrades to a substantial portion of its cable systems to Full Service Network capability by the end of 1998. Time Warner Cable expects that by the end of 1997, more than half of its systems will be upgraded. Such upgrades include the broad development of fiber and electronics.<sup>67/</sup>

The purpose of these upgrades has been to expand Time Warner's delivery of telecommunications services to its cable customers. As it stated in its annual report, Time Warner intends to use a portion of the bandwidth in its upgraded systems to support its Roadrunner online service for home personal computers.<sup>68/</sup> Representatives of Time Warner have said that the service is being implemented in several U.S. markets as part of its plan to roll out metropolitan-wide, high speed data services throughout the nation.<sup>69/</sup>

Adelphia Communications has also aggressively expanded its use of high-speed cable modems for the delivery of telecommunications services. In January 1997, Adelphia announced that it had begun a \$100 million, 5,000 mile rebuild of its cable systems in Palm Beach, Martin and St. Lucie counties in Florida, thus allowing Adelphia customers to use "high speed cable modems for internet access by the middle of this year." Adelphia has also invested about \$6.5 million in the greater Boston area to deploy fiber optic cable to carry video, data and telephone service.<sup>70/</sup>

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<sup>67/</sup> Time Warner Entertainment, Annual Report on Form 10-K for the Fiscal Year Ended December 31, 1996, Commission File No. 33-53742.

<sup>68/</sup> Id.

<sup>69/</sup> Motorola Cable Modems Shipping to More Than 40 Cities Worldwide, Business Wire, Oct. 30, 1996.

<sup>70/</sup> Internet Via Cable Coming To Area; Adelphia Widening Traditional Cable Role, Patriot Ledger, Dec. 23, 1996, at 28.

Among the other cable operators to express intentions to expand their offerings in telecommunications-related services are Jones Intercable, TCI, Comcast and Cablevision System Corporation. In a recent prospectus supplement filed with the SEC, Jones Intercable stated that it planned to upgrade its plant in order to pursue the possible offering of telephony and other telecommunications services.<sup>71/</sup> In December of 1996, Comcast began marketing high-speed cable services in areas served by two of its cable systems and "expects to expand the marketing of such services in selected cable systems during 1997."<sup>72/</sup> TCI has stated that it is testing the provisioning of telephone service over its cable infrastructure and plans to launch the service commercially in 1997.<sup>73/</sup> Finally, Cablevision Systems Corporation has begun offering telephone services in Long Island, New York.<sup>74/</sup>

It is evident that the cable industry is well on its way in executing plans to diversify their business beyond the delivery of one-way "pure" cable service. As a result, the FCC must adopt a rebuttable presumption that all cable entities are "telecommunications carriers" absent a showing to the contrary. Where a cable entity is providing information or two-way video services over its attachments, the utility may charge a market rate for these attachments, as such services are not subject to § 224.

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<sup>71/</sup> Jones Intercable, Inc., Prospectus Supplement Filed Pursuant to Rule 424(b)(5) (to Prospectus dated November 27, 1995), filed on March 19, 1997, Registration No. 33-62537.

<sup>72/</sup> Comcast Corp., Annual Report on Form 10-K, for the Fiscal Year Ended December 31, 1996, Commission File No. 0-6983.

<sup>73/</sup> TeleCommunication, Inc. New, Annual Report on Form 10-K, for the Fiscal Year Ended December 31, 1996, Commission File No. 0-20421.

<sup>74/</sup> Pradnya Joshi, New Option In LI Phone Service, Newsday, July 25, 1997, at A53.

**C. "Pure" Cable Companies Must Be Required To Certify That They Are Solely Delivering One-Way Video Programming**

The Commission must require "pure" cable operators to make an annual certification to each utility on whose poles, ducts, conduit or right-of-way the entity has wire attachments,<sup>75/</sup> upon penalty of perjury, that their respective system is used solely to provide traditional one-way cable services.<sup>76/</sup> Absent the required certification, a utility must be entitled to presume that the attachments of a cable entity will be used to provide both one-way cable and two-way telecommunications services and to assess the pole attachment rate applicable to telecommunications carriers.<sup>77/</sup> Moreover, a cable operator must be required to inform a utility with whom it has pole attachments of the nature of its service changes — that is, from "pure" cable television services to "mixed" services or vice versa — within 60 days of the change. Such notice must be given in instances where a cable system operator begins to offer telecommunications, information or two-way cable services. Depending on the services that will be provided by the cable system operator over the attached facilities, the utility will either follow the rate regulations developed pursuant to this rulemaking or will rely on a market rate.

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<sup>75/</sup> A copy must also be provided to the FCC so that other interested parties may have notice of a cable system's "pure" cable certification status.

<sup>76/</sup> For purposes of this certification, the cable system operator is attesting not only that it is offering only "pure" cable service, but also that its facilities are not being used for anything other than one-way video programming by any other entity. For example, a cable entity should not be allowed to certify that it is a "pure" cable system operator when it is leasing capacity to another entity for purposes of carrying telecommunications traffic. This is a particularly troubling scenario when the cable entity is leasing capacity to a telecommunications subsidiary or other company to which it is related while attaching at the low "pure" cable rate.

<sup>77/</sup> See 47 U.S.C. § 224(e).

Because cable system operators providing "pure" cable services over their entire system will be indefinitely grandfathered at the current, low FCC rate, a potential for abuse and the creation of unfair competitive advantages exist. For example, a cable entity could be providing telecommunications services, but because of its history of being a pure cable operator, the utility may only be charging the "pure" cable rate. This would be inherently unfair to a telecommunications carrier competing with the cable system operator because the telecommunications carrier would have a higher cost-base for its attachments.

**1. The Scope Of The Rebuttable Presumption Should Be Cable Operator-Wide, While Certification Should Be Made On A Cable Community-Basis**

The rebuttable presumption that a cable system operator is a telecommunications carrier for purposes of § 224 must be for all the cable systems owned or operated by a given company. For example, TCI has cable systems throughout the United States. All of these systems should be presumed to be providing telecommunications services. The Electric Utilities, however, believe that the presumption should be rebuttable on a community-by-community basis via certification.

Certification should reflect the "pure" cable status within a particular community served by a cable system operator. For ease of application, it is recommended that the default community used for certification align with those reported in the most recent edition of the TV & Cable Factbook. However, the cable system operator should be allowed to demonstrate in its certification that an alternative definition of "community" is appropriate. The utility or other interested party would have the burden of overcoming this presumption

by demonstrating that the cable system is providing services other than "pure" cable in the community in question.

## **2. Interested Third Parties Must Have Standing To Challenge The Certification Of A "Pure" Cable System Operator**

The FCC must allow third parties to question a cable system operator's certification. Third party standing is required to ensure fairness in the pole attachment regulation process because Congress enacted a statute that creates different burdens on attaching entities based on the services they are offering. For example, a telecommunications carrier has an interest in ensuring that a cable operator with whom it is competing in the provisioning of telecommunications services is paying an attachment rate comparable to its own. Therefore, the FCC must adopt procedures that allow such third parties to challenge the certification of a "pure" cable operator. The Electric Utilities propose that the Commission limit consideration of such presentations to only those parties that are able to demonstrate that they are "interested parties" or that otherwise demonstrate that they have standing to participate in the proceeding.

As a result of this standing, any interested party, as well as the utility, must be allowed to require the cable entity to provide information to support its certification in instances where the party has information that the cable operator may be providing services other than "pure" cable. For instance, where the cable operator has stated in the TV & Cable Factbook that a system in a given community has two-way capability or where the cable system operator has made statements in filings with federal, state or local agencies<sup>78/</sup>

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<sup>78/</sup> E.g., with the FCC or SEC, a state utility commission or a local franchise authority.

that it is providing two-way video, telecommunications or information services, these self-made statements should be adequate to give the interested party the right to request that the cable system operator make additional information available to it to support its claim of "pure" cable status. If attaching entities are trying to take advantage of the statutory provisions that will allow them to secure a lower attachment rate, these same attaching entities must be prepared to prove, in the face of contrary information, that the attestations made in their certifications are true.

**D. Utilities Must Know The Identities Of Parties Attaching To Their Poles, Ducts, Conduit And Rights-Of-Way**

The FCC has stated that utilities may not need to know any additional information about the nature of a given pole attachment other than that the attachment is by a telecommunications carrier or a "pure" cable system operator.<sup>79/</sup> However, § 224(h) requires the utility to give written notification "to any entity that has obtained an attachment" that the utility intends to modify or alter a pole, duct, conduit or right-of-way. To the extent that a utility must give § 224(h) notification to attaching entities with which it has direct privity of contract the utility must have current and complete information about the existence of such entities and the nature of their attachments. The Electric Utilities also urge the Commission to require attaching entities to utilize a standardized, nationwide organization to which the utility can send notice of its proposed modifications.

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<sup>79/</sup> In the Matter of Marcus Cable Associates, L.P. v. Texas Utilities Electric Co., P.A. No. 96-002 at ¶ 22 (released July 21, 1997) (stating that once the FCC established rules under § 224(e), an attaching entity "may need only disclose that it is providing telecommunications services" in order to be in compliance with the Pole Attachments Act).

The Electric Utilities must also have information about the identities of the companies attaching to their poles, ducts and conduit for safety and liability purposes. When a line has fallen off a pole, the utility is frequently the company called by the public to report the problem. The utility and local enforcement agencies must have the ability to know who owns the fallen line in order to ensure that rapid repair is accomplished. This information is particularly necessary when an emergency is involved. Rapid contact and problem resolution can save lives and property. In instances where some harm has come from an attachment to a utility's poles, ducts, conduit or right-of-way, the utility must also know the identities of attaching entities for purposes ensuring that the proper parties are involved in any suits and are responsible for any resulting damages.<sup>80/</sup>

**1. Attachment Permitting And Pre-Approval Is Mandated By Safety And Reliability Concerns**

The attachment of telecommunications and cable television facilities to the poles, ducts, conduit and rights-of-way of utilities necessarily raises safety and reliability concerns. Care must be taken to ensure that the required clearances are maintained, that personnel are properly trained in maneuvering around and avoiding contact with electrical wires, and that the pole attachment will not compromise the structural integrity of a utility's infrastructure. Engineering studies must be performed to account for such factors as wind and ice loading, guying and anchoring, and the availability of ducts. In short, the process for granting access to a pole, duct, conduit or right-of-way is not automatic; it requires careful consideration and resolution of many engineering and safety factors.

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<sup>80/</sup> The Electric Utilities are routinely sued for damages directly and indirectly relating to, or stemming from, third-party attachments on their poles.

To ensure that pole attachments comport with safety, reliability and engineering concerns, the prevailing practice in the industry is to require parties seeking to attach to a utility's poles, ducts, conduit or rights-of-way to apply for a notification permit to attach and to obtain the utility's pre-approval before actually attaching wire facilities. In theory, this practice should prevent unauthorized attachments. In practice, it does not.

Utility surveys of distribution pole systems routinely reveal significant numbers of unauthorized attachments. For example, the Electric Utilities report that during any given pole inspection, roughly 10-15% of the poles were supporting attachments by telecommunications companies that were placed on the pole without notice to, or permission from, the utility. The approximate number of unauthorized attachments by cable operators is generally higher; in the range of 20-22%. It is reasonable to expect that, by virtue of the 1996 Act's inclusion of telecommunications carriers under the Pole Attachments Act, utilities will see an increase in the number of both authorized and unauthorized attachments.

Unauthorized attachments allow the attaching entity to avoid paying pole attachment charges or addressing safety code compliance requirements. Either outcome is problematic, but the safety concerns are of greatest significance.

Unauthorized attachments on poles do not give pole owners the opportunity to make reasonable determinations as to the proper loading and stress on the pole. The inability to perform accurate safety and reliability calculations threatens reliable electric service and, accordingly, the public safety (since police, fire, and other emergency and public safety services rely on electric service in the performance of their public safety responsibilities). Unauthorized attachments also may cause personal and property damages and the loss of

telecommunications and cable television services.<sup>81/</sup> The significance of each of these engineering and safety concerns will grow exponentially in the future as more authorized attachments consume pole capacity.

In addition, the "free ride" enjoyed by parties who make unauthorized attachments to, or overlash existing attachments on, utility poles, ducts, conduit and rights-of-way will raise the rates paid by later attaching entities. The most obvious rate increase will be seen in instances where a later attaching entity is made to replace a pole or lay additional duct in order to be allowed to attach its facilities because the current pole or duct cannot accommodate any additional facilities. When pole capacity is consumed by an attachment for which no entity is paying an attachment fee, that entity is causing later parties to pay for its attachment via make ready fees. The unfairness of this scenario is further highlighted when one considers that the later attaching entity is likely to be a competitor to those entities already using a utility's distribution infrastructure. Thus, the unauthorized attachment creates an unnecessary competitive hurdle that must be overcome disproportionately by new entrants to the telecommunications and cable industries. It, therefore, would not be unreasonable for the FCC or the utility to impose a significant penalty fee for unauthorized attachments.

The Electric Utilities, therefore, urge the Commission to adopt in this proceeding regulations requiring parties seeking access to utility poles, ducts, conduit or rights-of-way to

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<sup>81/</sup> One of the Electric Utilities was recently involved in an instance where a contract employee of a large cable entity was injured in the course of overlash fiber on an unauthorized attachment made by the same cable company. Had the utility known of the original unauthorized attachment, and of the later attempt to overlash additional cable, the accident could have possibly been avoided. The cable entity thus would not have been required to pay for the damages caused by the actions of its contract employee and service outages could have been prevented.

obtain an up-front permit and a utility's pre-approval in order to use an electric utility's distribution infrastructure.<sup>82/</sup> The FCC should also find that contractual provisions are just, reasonable and nondiscriminatory if they require parties with approved attachments to obtain a permit prior to attaching additional facilities to a utility's distribution infrastructure. Only by doing so will the Commission ensure that the very real safety and reliability concerns of utilities are met, that the pole, duct, conduit or right-of-way on which telecommunications or cable facilities are to be mounted can accommodate the added attachment and that all attaching entities share in the costs of maintaining the structures on which their respective facilities are attached.

## **2. Facilities Must Be Marked For Easy Identification**

In addition to requiring parties to obtain a permit and the authorization of the utility prior to placing facilities on or in a pole, duct, conduit or right-of-way, the Electric Utilities urge the Commission to require attaching entities to clearly identify their attachments through a standardized, nationwide identification process. An identification requirement, like the permit and pre-approval requirement, is necessitated by public safety concerns.

Many utility poles currently accommodate multiple attachments. Often times, those attachments cannot be identified by visual inspection. Moreover, although there may only be

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<sup>82/</sup> In fact, state utility commissions are recognizing the need to establish more stringent regulation over unauthorized attachments. For example, the Public Utilities Commission of Ohio recently stated that it "would strongly encourage [the utility] to issue a warning to all attaching parties suspected of unauthorized attachments, that if such non-permitted attachments are made in the future, [the utility] would cease permitting the unauthorized party to attach to its poles." In the Matter of the Complaint of the Ohio Cable Telecommunications Ass'n v. Columbus Southern Power Co., Public Utilities Commission of Ohio, Case No. 96-1309-EL-CSS, 1997 Ohio PUC LEXIS 645, \*60 (Aug. 27, 1997).

two pole attachments on any given pole — by the ILEC, a cable television operator, or a competitive access provider — a utility's system of distribution poles may be used by many parties in different localities. For example, Duke Energy Corporation reported that approximately 70 different cable television operators or telecommunications carriers, some with multiple contracts, have pole attachments on its distribution infrastructure in North and South Carolina. Florida Power and Light Company has a similar number of attaching entities. American Electric Power Service Corp. deals with 256 CATV and telecommunications providers in its seven-state territory. These statistics are not atypical. In light of the variety of attaching entities and because many utilities do not maintain a database of pole, duct, conduit or right-of-way information, it is virtually impossible to identify a particular party's facilities.

In emergency situations, utilities must be able to identify the owners of facilities that are attached to their infrastructure. Without that information, the utility cannot contact attaching entities to inform them that a pole, duct, conduit or right-of-way is experiencing problems, and thus its cables and other facilities that might be owned by an attaching entity, are in jeopardy or down. Contact about routine operations and maintenance is difficult, as well and often results in additional field work to trace a cable to an identified source.

The most efficient and reliable way of resolving this problem is to require a party seeking access to a utility's poles to identify its facilities at each pole or manhole when it makes its attachment and to update that information as necessary. Ideally, a nationwide, standardized system should be developed so that facilities can be easily identified across overlapping distribution territories. The easiest solution is to assign each attaching entity

with a single identification code that would be placed on each of its attachments at every pole or manhole. The code could be kept in a central database that could be accessed by all utilities so that the utility would have the ability to identify other parties on a given pole, etc. in the event of an emergency or planned activity affecting the distribution infrastructure in question. The database should include the name of the company, its location, and 24-hour telephone number (an 800 or other toll free number), and any other telephone number to be used in the event of an emergency. Without uniform and easy access to such information, the FCC should find that utilities are relieved of their obligation to provide a telecommunications carrier or cable operator with written notice of scheduled modifications to the facilities pursuant to § 224(h) or to otherwise assume any liability for the facilities of those providers.

**V. Section 224(e) Requires That Telecommunications Carriers Pay For A Portion Of The Costs Associated With Unusable Space**

Section 224(e)(2) of the Pole Attachments Act states:

A utility shall apportion the cost of providing space on a pole, duct, conduit or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

The FCC is proposing to implement this statutory provision with the adoption of the following formula:

$$\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{Pole Height}} \times \frac{\text{Net Cost of a Bare Pole}}{\text{Number of Attachers}} \times \text{Carrying Charges}$$

In order to be consistent with the 1996 Act Amendments to the Pole Attachments Act, as well as the overall goals and policies of the 1996 Act, the Commission should amend its regulations to establish formulas that generate rates consistent with competitive market prices. Although § 224(e) allows the parties to negotiate a rate without Commission intervention, the Electric Utilities believe that any default pricing formula established pursuant to § 224(e) should be based on a Forward-Looking Economic Cost Pricing Model based on economic capital costs.<sup>83/</sup> Once the FCC has agreed on a pricing framework, it must next determine how to derive the number of attachers for purposes of allocating unusable space costs.

**A. The Commission Must Limit Who Is Classified As An Attaching Entity For Purposes Of Allocating Unusable Space Costs**

In order to calculate a rate for unusable space, the utility must know how many attaching entities are on a given pole. The FCC, therefore, must explicitly define the class of entities to be included by the utility when allocating the costs associated with unusable space based on the attachment and the nature of the services delivered over an attachment.

**1. The FCC May Properly Count Cable System Operators, Telecommunications Carriers, And Utility Telecommunications Ventures With Wire Attachments As Attaching Entities For Purposes Of § 224(e)**

The FCC proposes to include telecommunications carriers and cable system operators as attaching entities for purposes of allocating the costs associated with unusable space. The

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<sup>83/</sup> See Pre-2001 Comments of AEP, et al., at Sections IV & V.

Electric Utilities do not object to this proposal so long as the attachments made by such entities are wires.<sup>84/</sup>

The FCC also proposes to include attachments by an electric utility where the attachment is used to provide telecommunications service. Telecommunications service is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."<sup>85/</sup> Section 224 further narrows this definition to include only such services delivered over wires. Therefore, the Electric Utilities urge the Commission to make it clear that a utility will only be counted as an attaching entity in instances where the utility, or its subsidiary or affiliate, is using wire attachments to offer "telecommunications services."

For example, electric utilities may place attachments on their poles, such as fiber optic cable, that might be viewed as telecommunications attachments. However, where the electric utility is using a fiber optic cable to support its core business functions, such as would be the case with a supervisory control and data acquisition ("SCADA") system that is used to control the flow of electricity, these attachments should not serve as a trigger for counting the electric utility as an attaching entity. Such an exception would be justified because the electric utility is not "providing" "telecommunications services" to the "public," but is merely using telecommunications for internal purposes to provide electric service. As a result, the FCC would not have jurisdiction to count such attachments because they are not the attachments of a cable system operator or a telecommunications carrier.

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<sup>84/</sup> See discussion supra at Section II.D.

<sup>85/</sup> 47 U.S.C. § 153(46).

**2. The FCC Is Precluded By § 224 From Counting ILECs When Apportioning The Costs Associated With Unusable Space**

The FCC proposes to include ILECs as attaching entities when apportioning the costs associated with unusable space.<sup>86/</sup> As the FCC itself notes, § 224's definition of a "telecommunications carrier" excludes ILECs. In turn, the definition of a "pole attachment" specifically includes only those attachments made by telecommunications carriers or cable system operators.<sup>87/</sup> As such, attachments made by ILECs are specifically excluded from the definition of a "pole attachment." The FCC would be improperly extending the scope of the Pole Attachments Act in contravention of Congress's explicitly stated intent if it were to count ILECs as attaching entities when allocating the costs associated with unusable space.

**3. Government Entities Should Not Be Included As Attaching Entities When Calculating The Rate For Unusable Space**

The FCC proposes to classify governmental agencies as attaching entities for purposes of allocating the costs associated with unusable space.<sup>88/</sup> To the extent that the governmental attachment proposed by the FCC is a traffic signal, street light or other non-wire attachment,<sup>89/</sup> such items cannot be counted because they are not wire attachments. Attachments that are other than wires do not fall into the statutory definition of a "pole

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<sup>86/</sup> Post-2001 NPRM ¶ 23.

<sup>87/</sup> Post-2001 NPRM ¶ 23 (citing 47 U.S.C. § 224(a)(4)-(5)).

<sup>88/</sup> Post-2001 NPRM ¶ 24.

<sup>89/</sup> See id.

attachment" and cannot be included by the FCC when allocating the costs associated with unusable space.<sup>90/</sup>

Furthermore, governmental entities that attach to utility infrastructure are not attaching entities under § 224. Section 224 is written specifically in terms of attachments made by telecommunications carriers and cable system operators. Thus, like ILECs, attachments made by government entities should not be counted for purposes of allocating the costs associated with unusable space.

Finally, government entities generally do not pay to place streetlights and other attachments on poles. A utility, therefore, is required to bear the cost of such attachments on its own. It would be unfair to count such attachments in any allocation of the costs associated with unusable space despite the Commission's claim that the utility is allowing the government attachment as a condition to its franchise or statutory authority. Instead of placing the burden on one entity, it would be more equitable to distribute the costs of such attachments on all attaching entities because they all ultimately benefit from the government allowing the utility to build its distribution infrastructure.

**4. Overlashed Cables Can Only Be Counted As Attachments If The FCC Finds That Utilities May Charge An Attachment Fee For Overlashing**

The Electric Utilities believe that overlashed cables are attachments under § 224.<sup>91/</sup> As a result, utilities must have the right to charge for such attachments in order for the FCC

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<sup>90/</sup> Pre-2001 Reply Comments of AEP, et al., at Section XVIII.

<sup>91/</sup> See discussion supra at Section VII.