

## AMENDMENTS TO POLE ATTACHMENT RULES

\*\*\*

### §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.
- (c) The term usable space means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.
- (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.
- (g) The term State means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.
- (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)).
- (i) For purposes of this subpart, the term telecommunications services means communications services other than cable services, institutional network services, public, governmental and educational access channels, interactive programming services, and high-speed internet access provided by cable operators.
- (i) The term "conduit" shall refer to an underground enclosure, installed for the principal purpose of containing and protecting multiple ducts used for wire communications and other

purpose.

(k) The term "duct" shall refer to the tubular enclosures used to contain and protect conductors used communications and other purposes placed within underground conduits.

\*\*\*

§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 Sec. 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.
- (b) The complaint shall be accompanied by a certification of service on the named respondent and each State, Federal or local agency which regulates any aspect of service provided by the utility or cable television system named as either complainant or respondent.
- (c) The complaint shall contain a statement that the State has not certified to the Commission that it regulates the rates, terms and conditions for pole attachments, and that the utility is not owned by any railroad, any person who is cooperatively organized or any person owned by the Federal Government or any State.
- (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:
- (1) A statement that the utility uses or controls poles, ducts, or conduits used or designated, in whole or in part, for wire communication; and
  - (2) A statement that the cable television system operator or telecommunications carrier currently has attachments on the poles, ducts, conduits, or rights-of-way.
- (e) The complaint shall state with specificity the pole attachment rate, term or condition which is claimed to be unjust or unreasonable.
- (f) In any case, where it is claimed that a term or condition is unjust or unreasonable, the claim shall specify all information and argument relied upon to justify said claim.
- (g) In a case where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said

claim. The data and information shall include, where applicable:

- (1) The gross investment by the utility for pole lines or duct and conduit systems;
- (2) The investment in crossarms and other items which do not reflect the cost of owning and maintaining poles, if available;
- (3) The depreciation reserve from the gross pole line investment or duct and conduit systems;
- (4) The depreciation reserve from the investment in crossarms and other items which do not reflect the cost of owning and maintaining poles, if available;
- (5) The total number of poles or total linear feet of duct and conduit systems : (i) Owned; and (ii) controlled or used by the utility.  
If any of these poles are jointly owned, the complaint shall specify the number of such jointly owned poles and the percentage of each joint pole or the number of equivalent poles owned by the subject utility;
- (6) The total number of poles or linear feet of duct and conduit which are the subject of the complaint;
- (7) The number of poles or linear feet of duct and conduit included in paragraph (g)(6) of this section that are controlled or used by the utility through lease between the utility and other owner(s), and the annual amounts paid by the utility for such rental;
- (8) The number of poles or linear feet of duct and conduit included in paragraph (g)(6) of this section that are owned by the utility and that are leased to other users by the utility, and the annual amounts paid to the utility for such rental;
- (9) The annual carrying charges attributable to the cost of owning a pole or duct and conduit system investment. These charges may be expressed as a percentage of the net pole or duct and conduit investment. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which determines the treatment of accumulated deferred taxes if it is at issue in the proceeding and shall note the section which specifically determines the treatment and amount of accumulated deferred taxes.
- (10) The rate of return authorized for the utility for intrastate service. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which establishes this authorized rate of return if the rate of return is at issue in the proceeding and shall note the section which specifically establishes this authorized rate and whether the decision is subject to further proceedings before the state regulatory body or a court;
- (11) The average amount of usable space per pole for those poles used for pole attachments (13.5 feet may be presumed for poles solely owned by a local exchange carrier in lieu of actual measurement, but may be rebutted. 16 feet may be presumed for poles solely or jointly owned by an electric, gas, water, steam, or other public utility, but may be rebutted.);
- (12) Reimbursements received from CATV operators for non-recurring costs; and data and information should be based upon historical or original cost methodology, insofar as possible.
- (13) In cases involving a Section 1.1417(b) rate, the number of entities on the pole. A utility shall provide full and complete documentation and access to underlying information concerning the number of entities on its poles.

Data should be derived from Form M/ARMIS, FERC 1, or other reports filed with state or Federal regulatory agencies (identify source). Calculations made in connection with these figures should be provided to the complainant. Where the attachments involve ducts, conduits, or rights of way, in whole or in part, appropriate and equivalent data and information should

be filed. The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.

Calculations shall be made on a net investment basis.

(h) If any of the information required in paragraph (g) of this section is not provided to the cable television operator by the utility upon reasonable request, the cable television operator shall include a statement indicating the steps taken to obtain information from the utility, including the dates of all requests. No complaint filed by a cable television operator shall be dismissed where the utility has failed to provide the information in paragraph (g) of this section after such reasonable request. A utility should supply a cable television system operator the information required in paragraph (g) of this section, along with the supporting pages from its FERC Form 1, FCC Form M/ARMIS, or other report to a regulatory body, within 30 days of the request by the cable operator. (The cable operator, in turn, shall submit these pages with its complaint). If the utility did not supply these pages to the cable operator in response to the information request, it shall supply this information in its response to the complaint.

(i) In cases where the utility's net investment in pole lines is negative (where the depreciation reserve from such investments exceeds gross investment), and where the Commission determines that the applicable pole attachment rate should not be set at the level at which the net pole investment was last at positive levels, it shall be incumbent upon the utility to show with credible evidence the portion of the depreciation reserve for pole line investment is attributable to the future costs of removal. In such cases, the applicable pole attachment rate shall be calculated by adjusting the depreciation reserve for pole line investment by (1) extracting the future costs of removal; (2) calculating the return element of the carrying charges on the pre-adjustment (net negative) pole-line investment; (3) eliminating the tax carrying charge component of the calculation.

(j) The complaint shall include a brief summary of all steps taken to resolve the problem prior to filing. If no such steps were taken, the complaint shall state the reason(s) why it believed such steps were fruitless.

(k) Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

\*\*\*

§1.1409 Commission consideration of the complaint.

(a) In its consideration of the complaint, response, and reply, the Commission may take notice of any information contained in publicly available filings made by the parties and may accept, subject to rebuttal, studies that have been conducted. The Commission may also request that one or more of the parties make additional filings or provide additional information. Where one of the parties has failed to provide information required to be provided by these rules or requested by the Commission, or where costs, values or amounts are disputed, the Commission may estimate such costs, values or amounts it considers reasonable, or may

decide adversely to a party who has failed to supply requested information which is readily available to it, or both.

(b) The complainant shall have the burden of establishing a prima facie case that the rate, term, or condition is not just and reasonable. If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the statutory minimum just and reasonable rate.

(c) The Commission shall determine whether the rate, term or condition complained of is just and reasonable. ^ {{moved to 1.1417(a)}}}

(d) If the Commission determines that the complainant has not established a prima facie case or that the rate, term, or condition complained of is just and reasonable, it shall deny the complaint.

(e) Section 1.1417(a) shall apply to the rate for any pole attachment used by a cable system operator solely to provide cable service. ~~Until 47 U.S.C. 224(e) is implemented, Sec. 1.1404 shall also apply and, for billing periods up to February 8, 2001,~~ 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.

\*\*\*

#### §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).

#### §1.1417 Just and Reasonable Rate

(a) for billing periods up to February 8, 2001, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(b) for billing periods following February 8, 2001, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments nor more than:

(1) for any pole attachment used by a cable system operator solely to provide cable service and for any attachment to a duct, conduit, or right-of-way:

an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) for any pole attachment used by a cable system operator or telecommunications carrier to provide telecommunications services:

(i) an amount determined by multiplying the percentage of the total usable space which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the usable space of the pole. (13.5/37.5 of the cost of the entire pole may be presumed to be the costs of usable space for poles solely owned by a local exchange carrier in lieu of actual measurement, but may be rebutted. 16/40 of the cost of the entire pole may be presumed to be the costs of usable space for poles solely or jointly owned by an electric, gas, water, steam, or other public utility, but may be rebutted.); plus

(ii) an amount determined by apportioning the cost of providing space on a pole other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities. (24/37.5 times 2/3 of the cost of the entire pole may be presumed to be the costs of unusable space for poles solely owned by a local exchange carrier in lieu of actual measurement, but may be rebutted. 24/40th times 2/3 of the cost of the entire pole may be presumed to be the costs of unusable space for poles solely or jointly owned by an electric, gas, water, steam, or other public utility, but may be rebutted.)

For purposes of this section, entities shall be any party attaching facilities to the poles, including a local exchange carrier (whether or not the pole owner); an electric, gas, water, steam, or other public utility (whether or not the pole owner); a telecommunication affiliate of such local exchange carrier or electric, gas, water, steam, or other public utility; a cable system operator; and a governmental user; but shall not include a party which has overlashed its facilities to the lines of such entities. The number of entities among which costs of the unusable space shall be apportioned may be presumed to be 6 (3 in rural areas), but may be rebutted.

(3) for lines owned by an unaffiliated third party which are overlashed to a cable system operator's or telecommunications carrier's existing strand:

an amount determined by apportioning the cost of providing space on a pole other than the

usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities. (24/37.5 times 2/3 of the cost of the entire pole may be presumed to be the costs of unusable space for poles solely owned by a local exchange carrier in lieu of actual measurement, but may be rebutted. 24/40 times 2/3 of the cost of the entire pole may be presumed to be the costs of unusable space for poles solely or jointly owned by an electric, gas, water, steam, or other public utility, but may be rebutted.)

(c) A cable system operator or telecommunications carrier shall provide timely notice to a utility of changes in service as necessary to assure that pole attachments are charged at the appropriate rate. Such notice arrangements shall be by mechanisms which are mutually agreeable to the parties, but shall not require advance notice of deployment of telecommunications services. When the number of poles used for telecommunications service may reasonably be identified by discrete line (such as dedicated lines serving an institutional user), poles should be counted individually. When the number of poles used for telecommunications service may not be reasonably so identified (such as when only a changing portion of residential customers subscribe to telecommunications services), poles should be counted as being used for telecommunication services in the same proportion as the number of telecommunications subscribers of the attaching party to the number of total subscribers of the attaching party.

(d) A utility shall provide timely notice to attaching parties of changes in the number of entities on poles licensed at Section 1.1417(b) rates, as necessary to assure that pole attachments are charged at the appropriate rate. Such notice arrangements shall be by mechanisms which are mutually agreeable to the parties, but shall not require advance notice of deployment of telecommunications services.

#### §1.1418 Phase In of Rate Increases

Any increase in the rates for pole attachments that result from application of Section 1.1417(b) shall be phased in equal annual increments over a period of 5 years starting with the billing period beginning February 8, 2001 and concluding on the billing period for February 8, 2006.

#### §1.1419 Overlapping

A utility shall not prohibit, delay, require advance notice of, or require separate permits for the overlapping of facilities owned by an attaching party to existing strand owned by an attaching party; provided that overlapping must conform to generally accepted engineering standards, and the attaching party shall provide timely notice of change in service pursuant to Section 1.1417(c).