

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Rules and Policies)
Governing Pole Attachments)

CS Docket No. 97-98 /

**PETITION FOR RECONSIDERATION OF THE
UNITED TELECOM COUNCIL
AND THE
EDISON ELECTRIC INSTITUTE**

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SUMMARY

Whether through its failure to engage in reasoned decision-making, or just in its ultimate conclusions, the Commission's initial *Report & Order* goes out of its way to deprive utilities of just compensation for the value of pole or conduit attachments. The Commission's *Report & Order* is rife with unsupported, conclusory statements and findings. Some of the discussion and conclusions are illogical, mutually inconsistent, or inconsistent with other Commission decisions regarding similar issues. All in all, the Commission's *Report & Order* must be withdrawn and rewritten, as being arbitrary and capricious.

The Commission arbitrarily dispensed with recommendations to revise presumptions with respect to usable space on poles and in conduit that would account for safety and reliability requirements that uniquely impact electric utilities but not local exchange carriers subject to Section 224. The FCC's implementation of Section 224 contradicts the intent of Congress that safety, reliability and generally applicable engineering standards not be compromised for the sake of pole attachments. Moreover, by rejecting proposals for a forward-looking cost rate methodology, the Commission reverses its own policy of favoring forward-looking cost methodologies in other contexts, such as local service exchange interconnection. In fact, the Commission can point to no other context in which it has adopted a rate methodology based on historical costs. Such inconsistent positions require a better explanation than arbitrarily expressing a preference for preserving the status quo.

The status quo should not be preserved because it is clear that the current approach will not provide just compensation for the value of attachments to utility

infrastructure at the time of its Taking. Mandatory access to utility property undeniably effects a Taking of utility property, which has thusfar only been upheld on the theoretical possibility that utilities may receive just compensation. The *Report and Order* eliminates even the possibility of just compensation by excluding FERC accounts that are both directly and indirectly attributable to the cost of providing pole attachments; by underestimating the percent of space occupied on poles and in conduit; and by denying fair market value and instituting regulated rates plainly designed to subsidize the communications industry at the expense of utility rate payers. Thus, the *Report and Order* must be revised in order to ensure that utilities are justly compensated for the value of attachments to their poles, ducts and conduits.

Although it is clear that utilities are entitled to just compensation as guaranteed by the Fifth Amendment, a formulaic approach based on costs alone cannot be expected to produce just compensation in the vast majority of cases. Nevertheless, if the Commission believes it is constrained by Section 224 to adopt a cost-based approach, then it must, at a minimum, account for all costs that are directly and indirectly associated with the space that the attachment actually and effectively occupies. Moreover, a regulated rate should only be prescribed when necessary to resolve a legitimate dispute, and should rely on fair market value. However, if the Commission declines to award just compensation as provided by the Fifth Amendment, it should use forward-looking, rather than historical costs in applying its cost-based formulae. Therefore, UTC and EEI respectfully request that on reconsideration the Commission adopt the proposed changes as more fully discussed herein, to interpret Section 224 in conformity with the Fifth Amendment guarantee against an unconstitutional Taking of utility property.

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Pursuant to Section 1.429 of the Federal Communications Commission’s (“Commission”) Rules, the United Telecom Council (“UTC”) and the Edison Electric Institute (“EEI”) hereby submit their Petition for Reconsideration in response to the *Report and Order* in the above-referenced proceeding.¹ The *Report and Order* deprives utilities of space on their poles, ducts and conduits without any assurances of just compensation, and in the process dispenses with utility proposals in an arbitrary and capricious manner in order to pursue policies that are inconsistent with Commission precedent and established law.

Pole attachments effect a permanent physical occupation of utility property and require just compensation.² “The fact a utility gained its property knowing it would be subject to extensive regulation for the public use does not mean its property may be taken

¹ Amendment of Rules and Policies Governing Pole Attachments, *Report and Order*, CS Docket No. 97-98, 65 Fed. Reg. 31270 (May 17, 2000)(hereinafter “*Report and Order*”), See also Amendment of Rules and Policies Governing Pole Attachments, *Notice of Proposed Rulemaking* 12 FCC Rcd 7449 (1997)(hereinafter “*Notice*”).

² *Gulf Power v. United States*, 187 F.3d 1324, 1329 (11th Cir.1999), citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

for a public purpose without payment of just compensation, however laudable that public purpose might be.”³ Just compensation includes the diminution of the value of the entire property, not just the value of the portion that is taken.⁴ In determining just compensation, the Commission must reasonably balance its bias towards cable television systems and telecommunications providers with factual findings concerning utilities’ financial integrity, ability to distribute dividends and access to capital markets.⁵ The rate “cannot be justified simply by a showing that each of the choices underlying it was reasonable; those choices must still add up to a reasonable result.”⁶

The *Report and Order* unreasonably and arbitrarily denied every proposal in a “Whitepaper”⁷ by utilities suggesting methods and factors for calculating just and reasonable rates for attachments to poles, ducts and conduits by cable television systems and, on an interim basis, by telecommunications providers, as well. Sometimes illogical,

³ *Id.*, citing *GTE Northwest, Inc. v. Public Utility Commission*, 900 P.2d 495, 504 (1995).

⁴ *United States v. Grizzard*, 219 U.S. 180, 182-86 (1911) (holding that, when a portion of a party's property is taken, an owner is not justly compensated if he is unable to recover for the depreciation in the value of the remaining property).

⁵ *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944). In arriving at an end result that provides just compensation, the regulated rate may not exclude investment that is used and useful to the public. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 301-302 (1989). Moreover, the overall regulatory framework must provide a reasonable opportunity for a fair return on investment, not including revenues derived for services beyond the jurisdiction of the Commission. *Smith v. Ill. Bell*, 282 U.S. 133 (1930).

⁶ *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1178 (D.C. Cir. 1987).

⁷ Whitepaper filed by the law firm of McDermott, Will and Emery, CS Docket 97-98, at 3 (Aug. 28, 1996) (cited by the *Notice* as the impetus behind many of the rulemaking proposals). The Whitepaper was filed on behalf of the American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy

sometimes inconsistent but always negating full-cost recovery, the *Report and Order* upheld presumptions that fail to account for the total usable space occupied on a pole or in a duct or conduit; excluded certain FERC accounts that contain costs that are directly and indirectly attributable to attaching entities; and denied the recovery of fair-market value or forward-looking costs in order to subsidize the communications industry with rates based on fully depreciated, historical costs that distort market forces, which Congress sought to unleash when it enacted the Telecommunications Act of 1996. Therefore, UTC submits that the Commission acted arbitrarily and capriciously in adopting the *Report and Order* by failing to accommodate, or even address seriously, the utilities proposals, or to interpret the Act so as to avoid taking utility property without just compensation in accordance with the Fifth Amendment of the U.S. Constitution.

I. The Commission Should Affirm the Primacy of Negotiated Agreements for Pole Attachments.

Central to the Whitepaper were proposals that the Commission encourage the recovery of fair-market value by upholding negotiated rates in most cases, and prescribe regulated rates based on forward-looking replacement costs in the remainder of the cases.⁸ However, neither proposal was even mentioned in the *Notice*, and the *Report and Order* grudgingly addressed only the proposal on forward-looking costs, rejecting it based in part on the fact that “the *Notice* did not specifically raise the possibility of shifting to a

Services, Inc., Florida Power and Light Company, Northern States Power Company, The Southern Company and Washington Water Power Company.

⁸ Whitepaper at 1-3 (noting that Congress intended “to allow parties to negotiate the rates, terms and conditions for attaching to poles, ducts, conduits and rights-of-way owned or controlled by utilities.”)

methodology based on forward-looking economic costs, and it therefore may not have been fully considered in the comments.”⁹

Yet, the *Notice* specifically cited the utilities' Whitepaper, placing a copy of that Whitepaper in the docket of this proceeding concurrent with the issuance of the *Notice* itself. Moreover, the Commission stated that it was seeking comment "on aspects of the formula which some parties believe require modification," citing the Whitepaper as a source for some of these proposed changes.¹⁰ The Commission further acknowledged that the issues in the *Notice* "are broad in scope, and there may be additional issues we have not specifically addressed in the *Notice*."¹¹ Thus, the issues of fair market value and forward-looking costs were squarely in front of the Commission and commenting parties, and would have been well within the scope of the *Notice*. The Commission should not arbitrarily pick and choose proposals from the Whitepaper to include in the *Notice*, and then rely on its censorship in the *Notice* to deny the proposals in the *Report and Order*.

A. Mutually Negotiated Market-based Rates Assure Just Compensation for Pole Attachments.

The Commission should encourage the development of market-based rates by promoting negotiated access for pole attachments.¹² Congress intended as much, explaining that the 1996 amendments to the Pole Attachment Act were designed “to

⁹ *Report and Order* at ¶ 9.

¹⁰ *Notice* at ¶17 and n. 53.

¹¹ *Notice* at ¶47.

¹² Comments of UTC/EEI on the *Notice*, CS Docket No. 97-98 at 7-11, 15. *See also* Comments of BellSouth at 2-5; Comments of Electric Utilities Coalition at 22-23 and Reply Comments of Electric Utilities Coalition at 4; Comments of U.S. West, Inc. at 7-8.

allow parties to negotiate the rates, terms and conditions for attaching to poles, ducts, conduits and rights-of-way owned or controlled by utilities.”¹³ Congress expressed a preference for negotiated market-based rates as part of its larger “pro-competitive deregulatory national policy framework” for stimulating “deployment of advanced telecommunications and information technologies and services to all Americans.”¹⁴ Therefore, faithful execution of the intent of Congress requires that the Commission affirm the primacy of negotiated market-based rates, as recommended by the Whitepaper.

As UTC/EEI and others commented, a negotiated rate is the most efficient and accurate means to justly compensate utilities for the value of the pole attachment that by law must be provided on a non-discriminatory basis to cable television systems and telecommunications providers. The free market for pole attachments is robust and competitive. Utilities lack market power to control the price of pole attachments due to the availability of alternatives, including roadways and railroad or pipeline rights-of-way. Moreover, utilities lack any incentive to discriminate against attaching entities. If anything, the opposite is the case, because pole attachments make efficient use of utility assets and help to defray the cost of those assets. Finally, unlike the highly concentrated telecommunications industry, the utility industry is still highly fractured, reducing the potential for cost coordination for pole attachments.

¹³Joint Explanatory Statement of the Committee of Conference, H. Rpt. No. 104-458 (1996).

¹⁴ Joint Explanatory Statement of the Committee on Conference at 1.

The negotiated rate reflects the entire package of benefits that attaching entities reap from access to utility poles, ducts, conduits, and rights-of-way. These benefits include time-to-market, dispute avoidance, and maintenance, construction, and partnership, as well as non-infrastructure opportunities such as service resale. Moreover, attaching entities are sophisticated negotiators with the resources to place them in an equal, if not superior bargaining position with utilities. Hence, the negotiated rate accurately reflects the true value of the pole attachment in the competitive marketplace.

Policies that encourage market-based negotiations are in the public interest. Parties will be encouraged to negotiate in good faith, if terms and conditions are not routinely redlined in a complaint proceeding. Consequently, the Commission's resources will not be exhausted by an endless parade of illegitimate complaints that seek to unilaterally modify the mutually agreed upon rates, terms and conditions of the pole attachment agreement. Negotiations will proceed more quickly, owing to the added certainty that the terms will likely be enforced by the Commission. Hence, cable systems and carriers will gain quicker access to poles, ducts and conduits, thereby promoting competition and the deployment of service to the customer. Therefore, UTC/EEI submit that promoting market-based negotiated rates will serve the public interest with lower cost to the consumer and better quality service.

B. Forward-looking Costs More Closely Approximate the Value of the Attachment Than Historical Costs.

The proper measure of just compensation is the value of the property at the time of the Taking.¹⁵ If the Commission does not adopt rates based on fair market value as determined by negotiations, and if it believes it is constrained by Section 224 from awarding just compensation as required by the Fifth Amendment, the Commission should at least base its decisions on forward-looking costs. “Forward-looking economic cost best approximates the costs that would be incurred by an efficient carrier in the market . . . [and] will send the correct signals for entry, investment, and innovation.”¹⁶

Despite its own policy statements to the contrary, the Commission refused to consider modifying the rate formula to account for forward-looking costs, claiming that

¹⁵ See *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312 (1893); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 441. “Just compensation . . . means in most cases the fair market value of the property on the date it is appropriated. Under this standard, the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking.” *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5 (1984)(quoting *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511-513 (1979)). “Where by legislation prescribing rates or charges the use of the property is taken, just compensation assured by these constitutional provisions is a reasonable rate of return upon that value. To an extent value must be a matter of sound judgment, involving fact data. To substitute for such factors as historical cost and cost of reproduction, a “translator” of dollar value obtained by the use of price trend indices, serves only to confuse the problem and to increase its difficulty, and may well lead to results anything but accurate and fair. This is not to suggest that price trends are to be disregarded; quite the contrary is true. And evidence of such trends is to be considered with all other relevant factors.” *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662, 672 (1935) citing *St. Louis & O'Fallon Ry. Co. v. United States*, 279 U.S. 461, 485; *Clark's Ferry Bridge Co. v. Public Service Comm'n*, 291 U.S. 227, 236.

¹⁶ In the Matter of Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd 8776, 8899, ¶ 224 (1997). See *United States v. 564.54 Acres of Land*, 441 U.S. 506, 513 (1979) (noting that replacement cost may be the more appropriate measure of compensation where “an award of market value would diverge so substantially from the indemnity principle as to violate the Fifth Amendment.”).

“[s]uch a change would require the Commission to develop a new formula that would necessitate a long and protracted rulemaking proceeding, and would likely involve complicated pricing investigations.”¹⁷ Although conceding the advantages of forward-looking costs generally, it concluded without elaboration that “these advantages are likely to be less pronounced in this context.”¹⁸

Nowhere does the *Report and Order* consider the validity of rates based on historical costs, apart from their administrative convenience.¹⁹ In fact, historical costs has been called the “‘false standard of the past,’ where, as here, present market value in no way reflects that cost.”²⁰ Whatever the validity of the Commission’s rate methodologies prior to the 1996 Telecommunications Act, the Commission has a duty to consider whether its regulations will adequately compensate utility pole owners, which are now subject to mandatory attachment by cable television operators and telecommunications service providers.²¹ Therefore, the *Report and Order* arbitrarily and capriciously

¹⁷*Report and Order* at ¶9.

¹⁸ *Id.*

¹⁹ *Id.* at ¶10 (supporting historical costs with cursory references to “established accountability for prior cost recoveries” and “generally accepted accounting principles.”)

²⁰ See *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396 (1949), quoting E. Schmalenback, *Finanzierungen*, pp. 4-6 (3d ed., Leipzig, 1922), quoted in 1 Bonbright, *Valuation of Property* 147, n. 9 (1937).

²¹ See *Gulf Power v. U.S.*, 187 F.3d at 1329; *c.f. Florida Power Corp. v. FCC*, 772 F.2d 1537, 1546 (11th Cir. 1985).

preserves the status quo rate methodology, irrespective of its denial of just compensation.²²

II. When Prescribed Rates are Necessary, the Commission Must Revise Presumptions to Accurately Account for the Space Occupied By and Available for Attachments, as Well as Increased Weight and Wind Loads from Overlashed Attachments.

A. An Attachment Occupies the Safety Space on a Pole and the Entire Duct in a Conduit to the Extent that It Precludes Electric Cable from Occupying the Space.

In the *Report and Order*, the Commission refused to modify presumptions that currently do not accurately account for the space occupied by attachments on the pole or in ducts and conduit. Specifically, it refused utility proposals to either deduct the 40-inch safety space from the usable space or allocate a prorata share of the cost of the 40-inch safety space to each attachment. Similarly, it refused to admit that communications attachments effectively occupy all the space in a duct.

In both cases, the Commission dismissed or ignored the National Electric Safety Code (“NESC”), which established the 40-inch safety space on poles to protect communications crews from electrocution, and which prohibits electrical cable from either sharing the same duct with communications cable or occupying ducts adjacent to a

²² UTC/EEI similarly object to the Commission’s use of net book costs as the default estimate for prescribing rates based on cost. Gross book costs still subsidize attaching entities by setting rates based on the historic costs of utility infrastructure, but they do not further strip utilities of just compensation by depreciating the value of the infrastructure. If the Commission prescribes rates based on historic costs, it should allow utilities at their option to calculate rates based on gross book costs in order to simulate market conditions, which do not arbitrarily discount a commodity solely based on its age. Permitting gross book costs only “when all the parties to a complaint agree,” works only to the advantage of attaching entities, because intuitively attaching entities will not agree to gross book costs if net book costs results in a subsidy. *See Report and Order* at ¶11. *See also* Comments of UTC/EEI at 42-46.

duct containing communications cable.²³ Not only does this contravene the intent of Congress,²⁴ but it also denies just compensation by excluding assets that are ineluctably used and useful for attaching entities.²⁵ Therefore, the Commission must reconsider its decision to affirm the half-duct presumption for conduit and to include the 40-inch safety space as part of the usable space on a pole.

B. Adjustments to the Pole Formula are Necessary to Account for Variations in Line Sag and Increased Loads from Overlapping.

In the *Report and Order*, the Commission peremptorily dismissed utility proposals that would account for variations in line sag and increased wind- and ice-loads that result from overlapping attachments. The Commission discounted utility reports that variations in line sag affect both the minimum ground clearance and the one-foot of space presumably occupied on a pole.²⁶ Complaints against overlapping similarly fell on deaf

²³ The Commission concludes that electric utilities are wholly responsible for costs attributed to the 40-inch safety space, by condemning the space that could otherwise be occupied by communications attachments. It applies the same “but for” rationale to conduit, claiming that “it cannot be said . . . that any given communications cable occupies the whole duct [because] it is the electric supply cable that occupies the entire duct, not the communications cables it excludes.” *Id.* at ¶94.

²⁴ See Section 47 U.S.C. §224(f)(2) (permitting non-discriminatory denial of access for reasons of insufficient capacity, safety, reliability and generally applicable engineering purposes).

²⁵ See e.g. *Duquesne Light Co.*, 488 U.S. 301-302.

²⁶ See *Report and Order*, at ¶23. “The data provided by the utilities regarding sag does not demonstrate the same rigor as the studies,” underlying the current presumptions. *Id.* The Commission does not explain how a study from an unpublished order written in 1984 (Petition to Adopt Rules Concerning Usable Space on Utility Poles, *Memorandum Opinion and Order*, RM 4556, FCC 84-325, slip op. (rel. July 25, 1984)) would be more reliable than current industry studies on the record.

ears, as the Commission summarily stated that “the statutory language for allocating costs in Section 224 refers to space, not load capacity.”²⁷ The Commission also suggested that additional costs from increased loads from overlashing are already recovered from make-ready charges.²⁸

It is apparent that overlashing, fiber-stretching and other industry practices will negate presumptions underlying the usable space factor. In Property Law, it is axiomatic that a substantial increase in the burden on the servient estate extinguishes an easement.²⁹ Yet, the Commission places no limits on and denies any compensation for the increased burden that overlashing and similar cost-saving practices have on utility poles. Its narrow reading of “costs” cognizable under Section 224 and its arbitrary rejection of line-sag data produces an “end result” that deprives utilities of just compensation for both the percentage of the pole occupied and the actual capital costs incurred.³⁰ Therefore the Commission’s pole formula must account for pole costs attributable to overlashing.³¹

²⁷ *Id.* at 28. “We do not believe that an attachment ‘burden on the pole’ relates to anything other than an assessment of need for make-ready change to the pole structure, including pole change-out to meet the strength requirement of the NESC.” *Id.*

²⁸ *Id.* at ¶¶28-29 (“We do not believe that an attachment ‘burden on the pole’ relates to anything other than an assessment of need for make-ready changes to the pole structure, including pole change-out, to meet the strength requirements of the NESC. Make-ready costs are non-recurring costs for which the utility is directly compensated and as such are excluded from expenses used in the rate calculation.”)

²⁹ See e.g. *National Wildlife Fed’n. v. ICC*, 850 F.2d 694, 706 (D.C. Cir. 1988).

³⁰ See *FPC v. Hope Natural Gas Co.*, 320 U.S. at 605. See also 47 U.S.C. §224(d)(1).

³¹ See *Alabama Power Co. v. FCC*, 773 F.2d 362, 369 (D.C. Cir. 1985)(holding that attaching entities are liable for the fair share of pole related expenses that benefit all users, and reserving judgment on the appropriateness of the recovery of stress related

III. Any Prescribed Rate Formula Must Account for All Costs Attributable to Pole Attachments.

The *Report and Order* also unjustifiably denied every FERC account that utilities suggested that the FCC include as a component of the pole and conduit rate formulae. In so doing, the Commission assumes that utilities may not recover costs that “relate more directly to the electric utilities’ core business operations rather than “actual capital costs attributable to the entire pole, duct, conduit or right-of-way.”³² However, the denial of all costs other than those that are “but for” attributable to attachments is,

“only a calculation of incremental costs, and is inconsistent with the statutory definition of the maximum rate. The statutory language is quite clear: the maximum rate is calculated 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 *entire pole*, duct, conduit, or right of way.’ 47 U.S.C. § 224(d)(1).”³³

Even if such an interpretation was consistent with the statute, the Commission is obligated to explain a reasonable basis upon which it separated pole costs from attachment costs, which it has utterly failed to do. Nor is it necessarily so that certain costs must be recovered as make-ready or change-out, rather than through the rate.³⁴

costs as part of the pole attachment the rate.) *But see Report and Order* at ¶28-29, as discussed more fully *supra* at n.28.

³² *See e.g. Report and Order* at ¶40 (concluding that grounding systems should be excluded from the rate base because, like cross-arms and appurtenances, they are part of the electric utilities’ entire system of conductors, rather than of poles.”) *and* ¶103 (concluding that Accounts 580 and 583 “relate directly to the electric utilities’ core business operations rather than ‘actual capital costs attributable to the entire pole, duct, conduit or right-of-way.’”)

³³ *Alabama Power*, 773 F.2d. at 368 (*emphasis in original*).

³⁴ *See Report and Order* at ¶40 (concluding that the costs for grounding systems equipment are often included in make-ready expenses that attaching entities pay on an

Therefore UTC/EEI submit that the Commission must reconsider its exclusion of certain FERC accounts from the pole and conduit formulae.

A. FERC Accounts That Should Be Included in the Pole Formula.

UTC/EEI and others commented that the pole attachment formula for utilities should include the following FERC accounts: Accounts 360, 364, 365, 367, 368, 369 and 397.³⁵ These accounts include costs that are directly attributable to pole attachments, such as additional tree-trimming, right-of-way acquisition, line transformers and grounding costs. In addition, UTC/EEI and others recommended that the Commission account for operating and maintenance expenses indirectly attributable to pole attachments, including FERC Accounts 580, 583, 588, 590, 593, 594.1 and 595.³⁶

The *Report and Order* “declined to add portions of Accounts 365 or 368,” claiming the net cost of a bare pole factor can be adjusted with verifiable data. It also rejected the recovery of grounding expenses included in accounts other than Account 364, because “[l]ightning protectors and grounding installed on poles by utilities are equipment specific to the electric utility’s core business services and not related to the

up-front, non-recurring basis, implying that such costs could not be recovered as part of the rate). *But see Alabama Power*, 773 F.2d at 369, n. 14. (“The claim has not been made in this case, and therefore we have not considered, whether requiring the cable company by contract to provide and install the guys and anchors necessary only for the cable installation imposes upon the cable company a cost that should be considered part of the “rate” whose maximum is described by § 224(d)(1).”) *See also Section II(B), supra*. n.31(discussing Commission claims that costs created by overlashing only relate to make-ready and change-out costs, rather than the rate.)

³⁵ *See* Comments of UTC/EEI at 39. *See also* Comments of American Electric Power Co. at 58-67 and Carolina Power at 50-52.

³⁶ Comments of UTC/EEI at 41. *See also* Comments of Carolina Power at 50-52.

general cost of the pole plant.”³⁷ Nor would it consider including indirectly attributable operational and maintenance expenses from Accounts 580, 583 and 590, “even if they contain some capital expense incurred with respect to all electric power distribution plant,” because “any increased accuracy that would be derived from including some minute percentage of pole-related expenses that may be recorded in miscellaneous accounts, is outweighed by the complexity of arriving at an appropriate and equitable percentage of expenses.”³⁸

Nowhere does the Commission provide a reasoned analysis for excluding these FERC accounts. Instead, each denial is either conclusory,³⁹ illogical⁴⁰ or inconsistent.⁴¹

³⁷ *Id.* at ¶38.

³⁸ *Id.* at ¶39 (disputing that these expenses are “actual capital costs attributable to the entire pole, duct, conduit or right-of-way”). *And see* ¶¶57-61 (rejecting its own tentative conclusion in the *Notice* to include Account 590 in the maintenance element of the carrying charge.) *See e.g.* 47 U.S.C. § 224(d)(1).

³⁹ The Commission offers no basis for its conclusion that “lightning protectors and grounding installed on poles by utilities are equipment specific to the electric utility’s core business services and not related to the general cost of the pole plant.” *Id.* at ¶38.

⁴⁰ The Commission fails to explain how “adjustment components, relating to appurtenances such as crossarms,” have anything to do with costs in Accounts 365 (Overhead Conductors and Devices) or 368 (Line Transformers), let alone how those adjustments that presume to discount the cost of a bare pole by 15% would hold-out the possibility for the recovery of costs included in Accounts 365 and 368. *See Report and Order* at ¶38.

⁴¹ The Commission acknowledges that accounts 580 and 583 include costs that may be attributed to pole attachments, but denies the recovery of those costs based on the “complexity of arriving at an appropriate and equitable percentage of the expenses.” *Id.* at ¶39. The Fifth Amendment, on the other hand, requires just compensation for any asset that is used and useful for pole attachments. Moreover, the Commission’s concern for the “complexity” of the apportionment of costs is in marked contrast to its insistence that utilities compute the net linear cost of conduit based on system duct length per linear meter or per linear foot, disregarding the hardship that this imposes on utilities that must

The Commission must reexamine its refusal to include accounts with costs that may be attributable to pole attachments, and it must adequately explain the basis for its conclusions that other excluded accounts contain no attributable costs whatsoever.⁴²

translate FERC accounts from dollar values into linear measurements. *See e.g. Id.* at ¶104 (“The record indicates that the utilities often have the data required for calculations and, when they do not have the data they can estimate it from the data they have.”) *See also* Comments of Ohio Edison at 42.

⁴² *See Alabama Power*, 773 F.2d at 369, n.13 (“The legislative history defining the maximum rate as a proportionate share of the expense, ‘irrespective of the CATV attachment, of owning and maintaining poles,’ Senate Report at 19-20, *may call into question the elimination of the other items that were subtracted from gross pole investment on the grounds that they were not ‘cable-related.’* The question is not whether the investments were cable-related, but whether they were pole-related, as the entire figure for gross pole investment would seem at first glance to be. However, we cannot determine from the record what precise costs were excluded as non-cable-related pole investments, and it may be that the account includes expenses that do not all reflect the cost of ‘owning and maintaining poles.’ Since guys and anchors were the only excluded costs challenged by Alabama Power, they are the only ones we examine here.” (*emphasis added*)).

B. FERC Accounts That Should Be Included in the Conduit Formula.

Comments by UTC/EEI and others recommended modifying the conduit attachment formula to include costs directly attributable to conduit attachments in Accounts 357, 358, 371 and 373 for underground distribution equipment; Accounts 367, 368, and 369 for related grounding equipment; and Account 369 for land easement rights.⁴³ UTC/EEI also traced costs indirectly attributable to conduit attachments in Operation Accounts 580, 584, and 588; and in Maintenance Accounts 590, 594, 594.1 and 595.⁴⁴

The *Report and Order* excluded Accounts 367 and 369 from the net conduit investment factor, claiming that no costs in Account 369 were attributable to attachments and that any costs in Account 367 should be recovered as part of the maintenance element of the carrying charge.⁴⁵ Similarly, the *Report and Order* excluded Operating Accounts 580, 583, 584, 588, 590 or 598 from the carrying charges as well as the net conduit investment factor, claiming that any expenses from distribution plant in those accounts, “relate directly to the electric utilities’ core business operations rather than ‘actual capital costs attributable to the entire pole, duct, conduit or right of way.’”⁴⁶ For the same reason it also excluded FERC Accounts 357, 358, 371 and 373.⁴⁷

⁴³ Comments of UTC/EEI at 25.

⁴⁴ Comments of UTC/EEI at 25-26. *See also* Comments of Carolina Power at 50-52.

⁴⁵ *Report and Order* at ¶102.

⁴⁶ *Id.* at ¶103 and ¶112.

⁴⁷ *Id.*

As with the exclusion of FERC accounts from the pole formula, the *Report and Order* failed to explain how it determined which costs “relate . . . to the electric utilities’ core business” rather than to conduit attachments. Moreover, it failed to include any discussion of why it completely denied some accounts, but not others. On reconsideration, the Commission must provide a reasoned analysis for its otherwise arbitrary and capricious conclusions.

IV. The Commission Should Revise Any Prescribed Conduit Formula Methodology to Account for Differences Between Urban and Suburban Conduit and Between Utility and LEC Conduit.

UTC/EEI and others opposed the use of system-wide data for establishing the maximum rate for conduit attachments because system-wide data fails to account for significant differences between the cost of deploying conduit in urban and suburban areas.⁴⁸ Likewise, utility comments suggested accounting for “safety and reliability considerations for attachments in utility conduit that warrant special caution due to potential dangers to untrained personnel, electric equipment, and high voltage requirements.”⁴⁹

The *Report and Order* summarily dismissed both recommendations. First, it stated that system-wide data was necessary for the sake of being consistent with the use

⁴⁸ Comments of Carolina Power at 66; and Comments of Ohio Edison at 35.

⁴⁹ *Report and Order* at ¶85, citing Comments of Carolina Power at 65, Reply Comments at 38; Comments of ConEd at 3; Comments of UTC/EEI at 18-19; Comments of Dayton Power and Light at 3; and Comments of Public Service Co. of New Mexico at 5.

of “the entire pole inventory for establishing a rate for pole attachments,”⁵⁰ even though utilities protested that “they lack the detailed information necessary to apply the proposed formula.”⁵¹ Second, the *Report and Order* denied factoring-in costs for precautions to assure safety and reliability that are attributable to conduit attachments, stating, “[t]hese costs . . . are currently reflected in the rates . . . [by] accounts used to calculate the net book value of the respective types of conduit, [by] make-ready costs [and by] the maintenance element of the carrying-charge rate.”⁵² Yet, the *Report and Order* offered absolutely no reasonable explanation for its therefore arbitrary and capricious conclusions.

The Commission should not insist on system-wide data, which is inconsistent with its policies in other contexts. For example, the Commission has steadfastly maintained that incumbent local exchange carriers must disaggregate service quality data to the wire center level.⁵³ Yet, in the context of utility conduit attachments, the Commission takes the opposite tack, even though “[s]mall geographic units lead to more accurate cost estimates and avoid wide disparities in the cost of serving different

⁵⁰ *Report and Order* at ¶82.

⁵¹ *Id.* at 83.

⁵² *Id.* at 85.

⁵³ In the Matter of Policy and Rules Concerning Rates for Dominant Carriers and Amendment of Part 61 of the Commission's Rules to Require Quality of Service Standards in Local Exchange Carrier Tariffs, *Memorandum Opinion and Order*, CC Docket No. 87-313; AAD 97-28, 12 FCC Rcd. 8115, 8122-23 (1997).

customers in the same service area.”⁵⁴ The Commission must provide a more complete explanation for its inconsistent policy with respect to system-wide data reporting.⁵⁵

Similarly, the Commission should provide at least a "rational connection between the facts found and the choice made,"⁵⁶ in order to adequately explain its refusal to recognize the additional costs associated with ensuring safety and reliability that uniquely apply to attachments in utility conduit. Uncontroverted utility evidence demonstrates that these costs are not completely recovered through the net linear cost of conduit factor, nor through make-ready or maintenance element charges. The Commission must reexamine this issue and provide full recovery of the safety and reliability costs associated with making attachments in utility conduit.

⁵⁴ In the Matter of Federal-State Joint Board on Universal Service Forward-Looking Mechanism for High Cost Support for Non-Rural LECs, *Further Notice of Proposed Rulemaking*, CC-Docket No. 96-45; CC Docket No. 97-160, 12 FCC Rcd. 18514, 18533 (1997).

⁵⁵ “An agency’s view of what is in the public interest may change either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.” *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

⁵⁶ *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

CONCLUSION

The *Report and Order* will likely result in the unconstitutional Taking of utility property without just compensation. It denies fair market value, insisting instead on using historic costs to price utility infrastructure at its low depreciated cost, even though in similar contexts the Commission has repeatedly preferred forward-looking costs for sending “correct signals for entry, investment and innovation.” Its presumptions underestimate the occupied space on poles and in conduit, and completely deny full cost recovery when variations due to line sag and wind and weight load increase either the space occupied or the stress on the pole. Its sweeping denial of every FERC Account suggested by utilities magnifies the extent to which utilities are arbitrarily and systematically shortchanged under the current formula.

Moreover, the arbitrary and capricious manner in which the Commission has ignored the existing record to advance the interests of the cable and telecommunications industries to the detriment of utilities clearly raises the “combination of danger signals that the [FCC] has not really taken a ‘hard look’ at the salient problems and has not genuinely engaged in reasoned decision-making.”⁵⁷ If, on reconsideration the Commission concludes that it is not required or authorized to award utilities just compensation as required by the Fifth Amendment, then it must at least permit the full recovery of costs for assets that are used and useful for pole attachments, and must adequately explain the basis for excluding those assets which it considers to “relate

⁵⁷ *Greater Boston Television Corp.*, 444 F.2d at 851-852.

directly to the electric utilities' core business operations rather than 'actual capital costs attributable to the entire pole, duct, conduit or right of way.'"⁵⁸

⁵⁸ *Report and Order* at ¶103 and ¶112.

WHEREFORE, THE PREMISES CONSIDERED, UTC/EEI urge the Commission to act in conformity with the views expressed herein, reconsidering its *Report and Order* so as to best ensure that utilities are not compelled to divest their private property without just compensation.

Respectfully submitted,

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