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June 20, 2000

VIA MESSENGER

Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C.

RECEIVED
JUN 20 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Petition for Reconsideration; CS Docket No. 97-98
ERRATUM

Dear Ms. Salas:

The above referenced document filed with the Commission on June 16, 2000, contained the incorrect name of one of the parties to the Petition for Reconsideration. The filed petition mistakenly referred to the corporation as American Electric Power Corporation, instead of American Electric Power Services Corporation. We ask that the attached, corrected copy replace the copy originally submitted. Please do not hesitate to contact us if you have any questions on this matter.

Very truly yours,

Shirley S. Fujimoto/ame
Shirley S. Fujimoto

Enclosure

cc: Thomas St. Pierre

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EXECUTIVE SUMMARY

American Electric Power Services Corporation, Commonwealth Edison Company, and Duke Energy Corporation (hereinafter referred to as “The Electric Utilities”) believe that the rules set forth in this proceeding are inappropriate, misguided, and patently unfair to the Electric Utilities. More importantly, however, the Electric Utilities believe that the Commission has violated the Fifth Amendment of the Constitution and has violated the Administrative Procedures Act in promulgating these rules. Specifically, the Electric Utilities believe that the Commission’s pole attachment formulas do not provide just compensation as required by the Fifth Amendment, for attachments to their poles, ducts, conduits and rights-of-way, and the Commission should reconsider their pole attachment formulas to bring them into conformance with the just compensation principles.

While reserving their right to just compensation under the Constitution, the Electric Utilities contend that the Commission’s rejection of the use of a forward-looking costs approach, which would at a minimum produce fairer compensation for pole attachments, was arbitrary and capricious. Although a forward-looking cost methodology better emulates competitive market prices, the Commission adopted a historical cost approach to the pole rate formula as part of the Report and Order.

Additionally, the Commission’s findings regarding pole capacity are not supported by the evidence in the record. The Commission failed to take into account that allocation of space on a pole cannot be determined purely by considering only pole height and the number of attachers.

Finally, the Commission’s adoption of the half-duct presumption for conduit will lead to gross under-recovery by the Electric Utilities. The Commission’s finding will subsidize the attaching party while heavily burdening the Electric Utilities. The Commission’s findings

regarding forward-looking costs, pole capacity and the half-duct presumption should be set aside as arbitrary and capricious.

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

In the Matter of)	
)	CS Docket No. 97-98
Amendment of Rules and Policies)	
Governing Pole Attachments)	

PETITION FOR RECONSIDERATION

OF

**AMERICAN ELECTRIC POWER SERVICES CORPORATION, COMMONWEALTH
EDISON COMPANY AND DUKE ENERGY CORPORATION**

Pursuant to Section 1.429 of the Commission's Rules, American Electric Power Services Corporation, Commonwealth Edison Company and Duke Energy Corporation (herein after referred to as the "Electric Utilities"), hereby respectfully submit the following Petition for Reconsideration of the FCC's *Report and Order* (R&O), FCC 00-116, released April 3, 2000, in the above-captioned matter regarding the adoption of final rates, terms and conditions governing pole attachments prior to February 8, 2001.¹

INTRODUCTION

The Electric Utilities are investor-owned electric or power companies engaged in the generation, transmission, distribution and sale of electric energy. The Electric Utilities own electric energy distribution systems that include millions of distribution poles and thousands of miles of conduits, ducts and rights-of-way, which are used to provide electric power service to residential and business customers across the Midwest and Eastern United States.

¹ The R&O was published in the Federal Register on May 17, 2000.

The Electric Utilities seek reconsideration of the Commission's Report and Order in the above captioned proceeding for the following reasons:

- The Commission's pole attachment formula does not provide just compensation to the Electric Utilities as required by the Fifth Amendment to the U.S. Constitution.
- The rules set forth in the Report and Order must be set aside as arbitrary and capricious, because the Commission failed to address the Electric Utilities forward-looking cost methodology, as well as the Electric Utilities arguments associated with pole capacity and the half-duct presumption for conduit.

I. THE COMMISSION'S POLE ATTACHMENT FORMULAS DO NOT PROVIDE JUST COMPENSATION TO ELECTRIC UTILITIES AS REQUIRED BY THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION

The Pole Attachments Act, as amended in 1996, effects a "taking" of utility property within the meaning of the Fifth Amendment of the U.S. Constitution.² Accordingly, Electric Utilities are entitled to constitutionally-defined "just compensation" for pole attachments to their poles, ducts, conduits and rights-of-way.³

The Electric Utilities respectfully submit that the Commission's pole attachment formulas, on their face, do not, and cannot, provide just compensation to Electric Utilities for pole attachments. The Electric Utilities advanced this argument in the *Gulf Power II* case, where the Court indicated that the "record at hand" did not permit the Court to conclude that the formula will deny just compensation in all cases.⁴ In this reconsideration proceeding, however, the Electric Utilities will provide evidence for the record which will demonstrate overwhelmingly that the formula does indeed deny just compensation in all cases. This evidence

² *Gulf Power v. FCC*, 187 F.3d 1324 (11th Cir. 1999) ("*Gulf Power I*"); accord, *Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000) ("*Gulf Power II*").

³ *Id.*

⁴ *Gulf Power II*, 208 F.3d at 1272.

will be provided in the form of an expert report describing the principles of just compensation for pole attachments, which will be submitted for the record in this docket as soon as it is finalized. The Electric Utilities will proceed with all deliberate speed in submitting this report to the docket.

A. The Commission Has The Power To Review The Constitutionality Of Its Pole Attachment Formulas and Implementing Regulations

Even if provided with record evidence that its formulas do not and cannot provide just compensation, the Commission must also acknowledge that it has the power to rule on the constitutionality of the pole attachment statute and, notwithstanding the rate methodology of the statute, to establish its implementing regulations in conformance to constitutional requirements for just compensation. The Supreme Court has held, while "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies . . . [t]his rule is not mandatory . . ."⁵ The power of federal agencies to review the constitutionality of statutes and regulations was recently acknowledged by the Commission itself in a case involving a "takings" challenge to Commission's "must carry" rules for cable operators,⁶ While in the *Matter of WXTV License Partnership* the Commission declined to review the constitutionality of the "must carry" rules, the case represents a clear and unequivocal acknowledgment by the Commission that it has both the power and the discretion to review the constitutionality of its rules under the Communications Act. The Electric Utilities respectfully submit the Commission should exercise that power to address the constitutionality of its pole attachment formulas in the instant reconsideration proceeding.

⁵ *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994); *Bonnichsen v. United States Dept. of Army*, 969 F. Supp. 628, 650 (D. Ore. 1997) (noting that "in recent years, the traditional doctrine -- that an agency has no authority to declare a statute or regulation unconstitutional -- has come under attack").

⁶ *In the Matter of WXTV License Partnership, G.P.*, 15 FCC Rcd 3308, ¶ 30 (2000) ("[w]e recognize that the decision in *Thunder Basin* may provide administrative agencies an opportunity to consider the constitutionality of implementing statutes").

B. The Pole Attachment Formulas Do Not Provide Just Compensation

The general standard for just compensation is that the owner of the property taken must receive the "full monetary equivalent of the property taken."⁷ In other words, the owner of the property is to be put in "as good a position pecuniary as he would have occupied if his property had not been taken."⁸ The Supreme Court has emphasized that it has never attempted to prescribe a rigid rule for determining what is just compensation in all circumstances.⁹ However, the Supreme Court has long held that in most cases, the "fair market value" of the property at the time of the taking is the preferred measure used to achieve this goal.¹⁰

The Supreme Court has declined to do more than sketch the broad outlines of the concept of "fair market value" or to prescribe how fair market value is to be determined. The Court has held that market value is established by determining "what a willing buyer would pay in cash to a willing seller."¹¹ Further, the Court has held that market value is determined as of the date of the taking.¹² Beyond this, the Court has provided little in the way of useful guidance that might be applicable to pole attachments.

Lower courts, however, have held that the three most recognized methods of determining market value are (1) comparable sales; (2) the income or capitalization of income; and (3) replacement cost less depreciation.¹³ Some of the specific types of evidence which can be brought forward to support calculations of market value are the demand for the particular type of property at issue, the existence of plans evaluating the value or the development of such

⁷ *United States v. Reynolds*, 397 U.S. 14, 16 (1970).

⁸ *United States v. 564.64 Acres of Land*, 441 U.S. 506, 510 (1979).

⁹ *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950).

¹⁰ *United States v. 564.54 Acres of Land*, 441 U.S. at 506; *Olson v. United States*, 292 U.S. 246, 255 (1934); *Kirby Forest Industries v. United States*, 467 U.S. 1 (1984).

¹¹ *United States v. 50 Acres of Land*, 469 U.S. 24, 25 n.1, quoting *United States v. Miller*, 317 U.S. 369, 373 (1943).

¹² See *First Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 320 (1987); *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984); *Olson v. United States*, 292 U.S. 246, 255 (1934).

¹³ *United States v. Certain Parcels of Land*, 327 F. Supp. 181 (W.D.N.Y. 1970), affirmed 443 F.2d 375 (2d Cir. 1970).

property, the use of the property at the time of the taking, and other evidence giving an idea of the value a buyer would put on the property.¹⁴

The comparable sales method is the most straightforward and looks at comparable sales of similar, not necessarily identical, property to determine the market value of such property.¹⁵ The income capitalization method takes the future income which would have been generated by the property taken and then discounts it to present value.¹⁶ The replacement cost less depreciation approach is sometimes used in cases where there is no market.¹⁷

C. A Formula Based On Historical Costs Bears No Relationship To Current Market Value

The Commission's pole attachment formulas are based on the historical cost of the poles, ducts, conduits or rights-of-way at issue.¹⁸ The Supreme Court clearly stated that historical costs are not a proper measure of just compensation. The Supreme Court addressed just compensation for an old railroad car ferryboat on the Great Lakes.¹⁹ The Court determined there was no real "market" for sales of Great Lakes ferries. The evidence adduced at trial identified only five sales of dissimilar vessels, which the Court concluded did not adequately establish a market. The Court then turned to alternative ways to measure value, and stated, *inter alia*, that "[o]riginal cost is well termed the 'false standard of the past' [citations omitted] where, as here, present market value in no way reflects that cost."²⁰

¹⁴ *West Jefferson Levee District v. Coast Quality Construction Corp.*, 640 So.2d 1258 (La. 1994).

¹⁵ *United States v. Trout*, 386 F.2d 216 (5th Cir. 1967).

¹⁶ *Saratoga Water Servs. v. Saratoga County Water Auth.*, 630 N.E.2d 648 (N.Y. 1994).

¹⁷ *Trustees of Grace & Hope Mission v. Providence Redevelopment Agency*, 217 A.2d 476 (R.I. 1966).

¹⁸ Although the FCC notes that it favors negotiations between parties, the option for parties to negotiate rates only exists in theory. In every rate complaint the Commission has adjudicated, it always insists on applying its historical cost-based rate formula to determine what is a just and reasonable rate which a utility may charge. It then imposes that rate regardless of any previously negotiated rate agreed upon by the parties. Consequently, the ability to "negotiate" a rate different than the FCC's formula rate is illusory.

¹⁹ *United States v. Toronto, Hamilton & Buffalo Navigation Property*, 338 U.S. 396 (1949),

²⁰ *Id.*, 338 U.S. at 403. See also 8 Sackman, Nichols on Eminent Domain, Ch 14A-20 ("[o]riginal cost is . . . largely regarded as unsatisfactory as a measure of value in eminent domain").

In the case of pole attachments, historical costs bear no relationship to the current market value of an attachment. Given that nearly universal deployment of electricity in this country was complete by the early part of the century, much of the electric utility distribution infrastructure is quite old -- in many cases 50 or even 100 years old. While many of these assets have been fully depreciated on a utility's balance sheet, their market value has risen dramatically over the past 20 years due to the explosion in demand for cable and telecommunications attachments. A compensation formula based on historical costs totally ignores the increase in demand, and the attendant increase in market value, that has been occasioned for access to utility poles, ducts, conduits and rights of way by the proliferation of cable and telecommunications services over the past 20 years. By ignoring the explosion in demand for access to utility poles, ducts, conduits and rights-of-way -- indeed, the very demand which led to the enactment of the Pole Attachments Act in the first place -- the Commission's historical cost-based formula cannot possibly provide "just" compensation to utility companies for pole attachments.

Moreover, a formula based on the costs of pole plant and/or underground facilities fails to capture the "network" value of access to utility infrastructure. Properly understood, utility companies are not merely providing access to individual poles under §224. Rather, utilities are providing access to distribution network facilities which affords cable and telecommunications companies access to hundreds of thousands or even millions of customers. The value of access to this network in the current exploding communications environment is not fully captured in the cost of individual poles, however measured. For this reason as well, the Commission's cost-based formula cannot provide "just" compensation to utility companies.

D. The FCC Must Conform Pole Attachment Rates to Just Compensation Principles

Given the pronouncements of the Court in *Gulf Power I* and *Gulf Power II*, the Commission must seriously review its whole historical-cost rate formula approach to pole attachments. The Electric Utilities intend to provide the Commission with an analysis of

principles of valuation of utility infrastructure by which the Commission should be guided in such an inquiry. With the recent definitive findings in the *Gulf Power* cases that the Pole Attachment Act results in a taking of utility property under the Fifth Amendment, the Commission cannot ignore its responsibility to ensure that the statute is constitutionally implemented. Adherence to its historical cost-based approach simply because the agency “has always done it that way” does not meet this responsibility. It must revise its approach to conform with the more market-based, just compensation principles.

II. THE FCC ERRED IN REJECTING THE ELECTRIC UTILITIES’ PROPOSAL FOR THE USE OF FORWARD-LOOKING COSTS

The Electric Utilities strongly believe that they are entitled to just compensation as provided for by the Fifth Amendment. Assuming arguendo, however, that the agency (or a court) determines that pole attachment rentals must conform to §224, the Electric Utilities reiterate their recommendation that the Commission adopt a forward-looking cost approach.

In their Comments and Reply Comments, the Electric Utilities pointed out that the actual economic capital costs for poles and conduits are forward-looking costs. To ensure that the pole attachment and conduit rate formulas are consistent with a competitive market paradigm, Electric Utilities demonstrated why rates should be set at replacement costs (i.e., forward-looking costs).

The Electric Utilities also demonstrated how the Commission’s current interpretation of §224 results in economic inefficiencies and a misallocation of resources. Because the 1996 Amendments to the Pole Attachments Act anticipated a move to a market environment, the Electric Utilities argued that the Commission should revisit its interpretation of §224 in an effort to make it more consistent with the deregulatory, pro-competitive underpinnings of the 1996 Act.

With extensive support by expert testimony, the Electric Utilities provided a framework for the Commission to do this by employing forward-looking cost methodology. As demonstrated in the Reed Report, the Electric Utilities showed that the use of forward-looking

costs would lead to a rate structure that (1) emulates competitive market prices; (2) effectively allocates pole and conduit capacity; (3) serves as a relevant barometer to trigger efficient entry and exit in the marketplace; and (4) prevents the inappropriate subsidy or burden upon one party over the other. In contrast, the use of historic costs for poles and conduits, has no relevance to the current or prospective market conditions. These costs do not at all reflect the cost structure faced by either a competitive entrant or a utility seeking to expand capacity to accommodate a new entrant.

In its R&O the Commission failed to give reasoned consideration to the underlying rationale for the use of the forward-looking cost methodology. The Commission merely glossed over the Reed Report and the Electric Utilities' position, in essence stating that the investigation of such positions would be too taxing on the Commission.

For example, the Commission concluded that it is more convenient to continue to rely on historical costs because it has employed historical costs as part of the cable formula since the passage of the Pole Attachment Act in 1978. The Commission indicated in its R&O that switching to a methodology based on forward-looking costs “would cause significant disruption and impose significant costs on attachers and this Commission.”²¹ The Commission even acknowledged that “setting prices on the basis of forward-looking economic costs has significant advantages, including that it gives the appropriate signal for new entrants to invest in facilities ...” but stated that the development of a new formula would involve complex investigations and a protracted rulemaking.²²

This summary rejection is at complete odds with the Commission’s obligation to give reasoned consideration to the evidence before it.²³ The Commission has not set forth any

²¹ R&O at ¶ 9.

²² *Id.* Similarly, the Commission summarily rejected the Electric Utilities’ arguments regarding additional FERC accounts that should be included in the pole rate calculation, if the Commission were to adopt the historical cost methodology.

²³ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401U.S. 402 (1971).

“rational connection between the facts found and the choice made” as required by law.²⁴ Pursuant to the Administrative Procedures Act, a court will set aside any agency action that is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²⁵ Contrary to the holding of the Supreme Court, the Commission did not consider the weight of the evidence in the record below before making its decision. If it had, the Commission would not have summarily dismissed the forward-looking cost methodology.²⁶ Therefore, the Commission should reconsider the rules set forth in the R&O and should incorporate the forward-looking cost methodology into the pole attachment rate formula.

III. POLE CAPACITY IS A CRUCIAL ELEMENT FOR DETERMINING SPACE ALLOCATION ON A POLE

Again, assuming arguendo that the agency (or a court) determines that pole attachment rentals must conform to § 224, the Commission must reconsider its position on pole capacity.

The current Commission rules for determining the allocation of usable space takes into account the number of attachers on a pole and the amount of space occupied by any given attacher purely on the basis of the height of the pole. In their Comments and Reply Comments, the Electric Utilities instead urged the Commission to adopt a pole rate formula that allocates costs based on the actual pole capacity (e.g., taking into account wind loading, icing, and temperature changes) utilized by an attaching entity. The Electric Utilities pointed out that capacity-based cost allocation will lead to a greater number of attaching entities that can be accommodated on a pole. The Electric Utilities stated that the current formula gives the

²⁴ *City of Brookings Mu. Tel Co. v. Federal Communications Commission*, 822 F.2d 1153, 1165 (D.C. Cir. 1987).

²⁵ 5 U.S.C. § 706(2)(A)

²⁶ See *Motor Vehicles Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983) (quoting *Greater Boston Television Corp. v. FCC*, 144 F.2d 841 (D.C. Cir. 1970)). Furthermore, as the Electric Utilities pointed out, Congress expressly gave the Commission discretion to decide when the use of historical cost data would be appropriate. Accordingly, the Commission has the authority to deem the continued use of historical costs inappropriate in this context and to interpret the language of §224(d)(1) to include the use of forward-looking economic costs.

attaching parties no incentive to deploy practices and technologies that would reduce the amount of capacity they use on a given pole. With a capacity allocation approach, attachers would be given an incentive to take unused or obsolete facilities off of poles. Similarly, the Electric Utilities pointed out that overlashing significantly affects pole capacity, which in turn affects how much of the costs on a pole should be allocated to an overlasher. Poles have a limited amount of capacity and while overlashed lines may not take up anymore space on the pole, the increased diameter of the cables strung on the pole causes an increase in the resistance to wind and a larger surface upon which ice can accumulate.

In the R&O, the Commission concluded that, since weight and wind load relate directly to the engineering of the pole, these loading considerations should be dealt with in make-ready charges rather than in rate calculations. From that faulty premise, the Commission improperly concludes that loading factors should not be taken into account as part of §224 pole rate calculations. Similarly, in the R&O, the Commission erroneously concluded that the burdens associated with overlashing are simply another factor that should be considered as part of make-ready instead of viewing overlashing as an on-going pole capacity allocation issue.

Put simply, the Commission missed the Electric Utilities' point on pole capacity completely. Make ready is a one time reimbursement by an attaching entity to the pole owner for the costs incurred to ready the pole attachment. The Electric Utilities' capacity arguments go to how the agency should allocate the pole costs to the attaching entity for calculating annual pole rental charges. For example, in lieu of allocating a cable entity for 1/13.5 or 7.41% of the pole costs, the allocation would be based on the amount of capacity on the pole used by the attaching entity.

Considering the undisputed evidence presented by the Electric Utilities' that a pole has limits as to the load that it can bear, the Commission was arbitrary in rejecting any consideration of capacity as it relates to the formula for allocation of space on a pole. The summary nature of

the Commission's dismissal of the Electric Utilities position was unreasonable as it did not afford any weight to the evidence presented. As explained herein, the Commission's conclusion that this issue is adequately addressed as part of make-ready is simply incorrect. Failure to correct this deficiency in the way the formula is applied would be arbitrary and capricious, and will result in under recovery by the pole owners.

IV. THE COMMISSION SHOULD NOT HAVE ADOPTED THE HALF-DUCT PRESUMPTION FOR CONDUIT

The Commission erred in not interpreting the rate methodology for conduit to be consistent with contemporary, forward-looking costing methodologies. In addition, the Commission, adopted a flawed formula which incorporates an incorrect half-duct presumption which will lead to under-recovery by the Electric Utilities.

As the Electric Utilities stated in their comments, the sharing of conduit or duct space is not universally possible by all Electric Utilities and the NESC precludes the installation of supply/control cables in the same duct as communications cables, "unless the cables are maintained or operated by the same utility."²⁷ In the R&O, the Commission misinterprets the NESC. The fact is that *the only way for the half duct presumption to be valid* would be for both the electric and communications cable to be operated or maintained by the same utility.

The use of the half-duct presumption is analogous to a situation where a tenant in a two bedroom apartment attempts to pay the landlord for only the half of the apartment that he occupies. In the real world, the tenant will actually be required to pay the landlord the entire rent until the time that another individual is found to rent the second half of the apartment. The half-duct presumption as adopted by the Commission, however, would allow the attacher to pay for only half of the "apartment," and the landlord would have to subsidize the second half until a suitable tenant could be found. This reasoning is flawed. The utility should not be forced to

²⁷ NESC, Rule 341A6 (1997 Ed.).

subsidize the second half of the available space until another suitable attacher can be found, particularly since the presence of the first tenant effectively denies the landlord the ability to use the apartment for its own purposes.

Consequently, the Commission should not have adopted a presumption that all cable communications utilize only half of the space in a duct. This ignores the fact that the presence of even one third-party cable in a duct precludes the utility from using the duct. It is not the Electric Utilities that necessarily preclude communications facilities from the duct space. If a communications cable is occupying any portion of a duct, it is the communications company that is precluding the electric utility from using that duct. The Commission should treat communications and electric cable as if each takes up an entire duct and not make any arbitrary distinction regarding which parties' cable precludes the use of the entire duct. The basis for the Commission's decision regarding half-duct methodology is inherently flawed, and its action arbitrary and capricious.

The half-duct presumption adopted by the Commission does not provide adequate compensation either under the dictates of §224 or the Fifth Amendment. The Commission has again failed to consider all of the relevant facts and circumstances involved and its adoption of the half-duct presumption is a clear error of judgment.²⁸ Therefore, in light of the reasoning set forth above, the Commission should reconsider its adoption of the half-duct presumption.

V. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, American Electric Power Services Corporation, Commonwealth Edison Company, and Duke Energy Corporation urges the Commission to

²⁸ See *Citizens to Preserve Overton Park* 401 U.S. at 416.

consider this petition for Reconsideration of the Report and Order and to proceed in a manner consistent with the views expressed herein.

Respectfully Submitted,

AMERICAN ELECTRIC POWER SERVICES
CORPORATION, COMMONWEALTH
EDISON COMPANY AND DUKE ENERGY
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June 16, 2000