

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

The Petition of the United States Telecom  
Association For a Rulemaking to Amend Pole  
Attachment Regulation and Complaint  
Procedures

RM No. 11293

**BELLSOUTH CORPORATION  
COMMENTS IN SUPPORT OF USTELECOM PETITION  
FOR RULEMAKING**

**BELLSOUTH CORPORATION**

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USTELECOM PETITION FOR RULEMAKING**

BellSouth Corporation, on behalf of itself and its wholly-owned subsidiaries (collectively “BellSouth”), respectfully submits its comments in support of the petition for rulemaking filed by the United States Telecom Association (“USTelecom”)<sup>1</sup> in the above-captioned proceeding.<sup>2</sup> In its Petition, USTelecom asks the Commission to initiate a rulemaking to amend its rules to ensure that just and reasonable pole attachment rates, terms, and conditions are available to all providers of telecommunications service (including incumbent local exchange carriers (“ILECs”)).

BellSouth supports USTelecom’s request. As demonstrated in the Petition (and affirmed in these comments), ILECs are increasingly experiencing unfair and unreasonable treatment when seeking to attach to the poles of other utilities. Demands by certain utilities that ILECs

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<sup>1</sup> The United States Telecom Association Petition for Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures, RM No. 11293 (filed Oct. 11, 2005) (“USTelecom Petition” or “Petition”).

<sup>2</sup> Consumer and Governmental Affairs Bureau Reference Information Center Petition for Rulemakings Filed, *Public Notice*, Report No. 2737 (rel. Nov. 2, 2005).

bear a disproportionate share of pole costs or agree to unduly burdensome terms and conditions are becoming more commonplace. To address this inequitable treatment, which ultimately harms ILEC customers, the Commission should initiate a rulemaking.

As discussed more fully herein, the Commission has a statutory obligation under Section 224(b) to ensure that rates, terms, and conditions for pole attachments are just and reasonable for all providers of telecommunications services (including ILECs). To fulfill this statutory mandate, the Commission should expressly assert its jurisdiction over the pole attachments of all providers of telecommunications service and amend its rules to allow ILECs to file complaints against other utilities for unjust and unreasonable pole attachment rates and practices. Such action by the Commission not only will send the appropriate signals to the market that imposing unjust and unreasonable rates, terms, and conditions upon ILECs is unlawful but also will help ensure that ILEC customers are not deprived of affordable and competitive service offerings.

## **I. INTRODUCTION AND SUMMARY**

On October 11, 2005, USTelecom petitioned the Commission to initiate a rulemaking to amend the current rules governing pole attachment rates, terms, and conditions. Specifically, USTelecom requested that the Commission amend its rules to: (1) clarify that an ILEC, as a “provider of telecommunications service” under 47 U.S.C. § 224(a)(4), is entitled to just and reasonable rates, terms, and conditions when attaching to the poles of other utilities; (2) permit an ILEC to utilize the Commission’s pole attachment complaint procedures to dispute unjust and unreasonable pole attachment rates, terms, and conditions imposed by other utilities; and (3) establish the formula set forth in 47 C.F.R. § 1.1409(e)(2) for computing rates for pole attachments by “any telecommunications carrier” as an appropriate default to apply in rate

disputes involving all “providers of telecommunications service,” including ILECs as attaching entities.

A rulemaking is necessary at this time in order to address the inequitable treatment of ILECs. Through a rulemaking, the Commission can analyze the legal and policy framework of Section 224 in light of current market conditions and take appropriate steps to implement fully the statute’s mandate to protect all providers that attach to utility poles in order to provide cable and telecommunications services. As USTelecom demonstrates, the inconsistencies between Section 224 of the 1996 Act and the Commission’s existing rules have created an environment in which certain utilities have sought to impose unreasonable rates, terms, and conditions upon ILECs seeking to attach to the utilities’ poles. Such unreasonable treatment has become more pervasive since the passage of the 1996 Act, and, in the absence of prompt Commission action, the situation is only likely to worsen, thereby placing ILECs at a competitive disadvantage.

Accordingly, the Commission should proceed with the requested rulemaking. An affirmative assertion of jurisdiction by the Commission over the pole attachments of all providers of telecommunications service (including ILECs), combined with USTelecom’s proposed modifications to the Commission’s rules, is necessary to ensure that the agency fully and faithfully implements the statute’s mandate of just and reasonable rates, terms, and conditions for all providers of telecommunications service.

**II. THE IMPOSITION OF UNJUST AND UNREASONABLE RATES, TERMS, AND CONDITIONS UPON ILECS SEEKING TO ATTACH TO THE POLES OF OTHER UTILITIES IS BECOMING MORE PERVASIVE.**

Contrary to popular belief, ILECs, including BellSouth, are not immune from the unjust and unreasonable pole attachment practices of certain utilities. ILECs often find themselves in

an unequal bargaining position when negotiating to attach to other utilities' poles. As the Commission has recognized, energy utilities own the majority of poles nationwide, not the ILECs.<sup>3</sup> Therefore, the assumption that ILECs are always in a superior bargaining position is simply not the case.

BellSouth's experience proves the fallacy in the above assumption. It is common in today's environment for energy utilities that own poles to which BellSouth attaches to notify BellSouth of the intent to terminate existing contracts and a desire to negotiate new pole rates. Certain of these electric utilities have demanded excessive rates that bear no relation either to the amount of pole space occupied by BellSouth or comparable increases in the Consumer Price Index. Indeed, there have been instances in which certain electric utilities have proposed rate increases in excess of 300% for attaching to the utilities' poles.

In addition, BellSouth has faced situations in which energy utilities that have terminated agreements with BellSouth have advised the Company that it cannot place any new attachments on the electric utilities' poles. In some instances, these utilities have ordered BellSouth to remove all existing attachments from the utilities' poles. These types of unreasonable demands have led to lengthy negotiations that ultimately culminate in lawsuits or arbitration.

As the above demonstrates, the Commission must recognize that the bargaining relationship between electric utilities and ILECs has changed over the years as the electric utilities have gained leverage because of their position as majority pole owners.<sup>4</sup> Moreover, the

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<sup>3</sup> *Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket Nos. 97-98 & 97-151, *Consolidated Partial Order on Reconsideration*, 16 FCC Rcd 12103, 12118, ¶ 23 (2001) ("The majority of poles nationwide are owned or controlled by electric utilities, with the remaining poles owned or controlled by telephone companies.").

<sup>4</sup> As USTelecom notes, railroads, cooperatives, and state- or federal-owned utilities are expressly excluded from Section 224's definition of a "utility." USTelecom Petition at 11, n.27.

absence of the Commission's express assertion of jurisdiction over attachments by ILECs and the apparent exclusion of ILECs from the Commission's pole attachment complaint procedures has created an environment in which some utilities consider it acceptable to impose unjust and unreasonable rates, terms, and conditions upon ILECs.

A recent paper by Veronica Mahanger MacPhee and Mark Simonson entitled "Two Wrongs Don't Make a Right: The Electric Industry's Exploitation of its Captive Pole User Market" describes in detail how certain electric utilities are engaging in unjust and unreasonable pole attachment practices when dealing with ILECs seeking to attach to their poles.<sup>5</sup> The paper was written in direct response to an article that set forth a "Bill of Rights" purportedly designed to assist electric utilities that allegedly are unable to recover their pole costs due to the Commission's rate methodologies and "pro-attacher, anti-utility rulings."<sup>6</sup> The first item in the "Bill of Rights" is:

*Utilities may negotiate UNREGULATED rates, terms, and conditions for access to: interstate transmission towers by any entity; distribution poles by ILECs, Internet-only providers, and telecom non-common carriers.<sup>7</sup>*

As Mahanger & Simonson explain (and BellSouth's experience confirms), some energy utilities are demanding that ILECs pay pole rates that result in the energy utilities recouping far

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As a result, these entities are not subject to the Commission's jurisdiction over pole attachments. Some electric municipal cooperatives and other government-owned utilities use this statutory exclusion as the basis for demanding unreasonable rates, terms, and conditions. Therefore, although a grant of the relief requested herein would provide ILECs some protection against the discriminatory treatment described herein, ILECs still would find themselves without recourse for unreasonable rates, terms, and conditions imposed by these statutorily exempt entities.

<sup>5</sup> Veronica Mahanger MacPhee & Mark Simonson, *Two Wrongs Don't Make a Right: The Electric Industry's Exploitation of its Captive Pole User Market* (Mahanger Consulting Associates, 2005) (Attachment A) (hereinafter "Two Wrongs Don't Make a Right").

<sup>6</sup> Tom Magee, Keller and Heckman LLP, *A Joint-Use "Bill of Rights,"* *Transmission & Distribution World*, Sept. 2004, at 62 (Attachment B).

<sup>7</sup> *Id.* at 64 & 66 (italics in original).

more than the costs incurred to set up and maintain the pole. Indeed, certain energy utilities are recovering a majority of their pole costs from other attachers, and ILECs, without the protection of the Commission's rate formulas, are bearing the largest portion of those costs. In some instances, ILECs are required to pay pole rates that range from 40 to 50% of an electric utility's annual carrying costs, despite the existence of multiple attaching entities and the fact that the ILEC is occupying far less than 40 to 50% of the pole space.<sup>8</sup>

As demonstrated above, there is clear evidence that certain utilities are engaging in unjust and unreasonable practices against ILECs seeking to attach to their poles. The disproportionate allocation of costs and the imposition of unreasonable terms and conditions are common realities as more and more utilities take advantage of gaps and inconsistencies in the Commission's pole attachment framework and rules. As discussed more fully below, in order to minimize the opportunities for the inequitable treatment of ILECs as attaching entities and establish a more level playing field, the Commission should affirm its jurisdiction over the pole attachments of ILECs and provide a procedural remedy for ILECs when disputes arise.

### **III. THE COMMISSION'S STATUTORY AUTHORITY TO REGULATE POLE ATTACHMENT RATES, TERMS, AND CONDITIONS IS BROAD AND EXTENDS TO ILECS.**

The Commission's authority over the attachments of cable service providers and all providers of telecommunications service, including ILECS, is clear. Section 224(b)(1) states that

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<sup>8</sup> Two Wrongs Don't Make a Right at 8-9. Mahanger & Simonson explain that requiring ILECs to bear 40 to 50% of a utility's pole costs made sense historically when there were only two attaching entities on a pole – an electric utility and an ILEC – and they each occupied approximately the same amount of space. *Id.* at 6-7. However, it is not uncommon today to have four or five attaching entities (*i.e.*, electric utility; ILEC; CATV; CLEC; wireless) all making payments to the pole owner. Notwithstanding the existence of these multiple attachers, certain utility pole owners have refused to negotiate rates with ILECs that reflect a re-allocation of costs based upon the existence of multiple attaching entities.

“the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions.”<sup>9</sup> Section 224(a)(4) defines a “pole attachment” as “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.”<sup>10</sup> Section 153(46) of the Communications Act defines “telecommunication service” as the “offering of telecommunications for a fee directly to the public.”<sup>11</sup> As USTelecom states, “[i]ncumbent local exchange carriers are properly viewed as ‘providers of telecommunications’ because they offer telecommunications for a fee directly to the public.”<sup>12</sup> Thus, the Commission’s jurisdiction over the pole attachments of ILECs cannot be disputed.<sup>13</sup>

The statutory exclusion of ILECs from the definition of a “telecommunications carrier” does nothing to diminish the Commission’s authority to regulate the rates, terms, and conditions of ILEC attachments on other utilities’ poles. As USTelecom appropriately acknowledges, the statutory exclusion of ILECs is relevant only in the context of nondiscriminatory access rights to

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<sup>9</sup> 47 U.S.C. § 224(b)(1) (emphasis added). The Commission’s authority under Section 224(b)(1) does not extend to pole attachment rates, terms, and conditions that a state regulates. 47 U.S.C. § 224(c)(1).

<sup>10</sup> 47 U.S.C. § 224(a)(4) (emphasis added).

<sup>11</sup> 47 U.S.C. § 153(46).

<sup>12</sup> USTelecom Petition at 6-7.

<sup>13</sup> The Commission itself has acknowledged that the term “provider of telecommunications service” is broader than the term “telecommunications carrier.” As the Commission stated, “the term pole attachment is defined in terms of attachments by a ‘provider of telecommunications service’ not as an attachment by a ‘telecommunications carrier.’” *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and*

poles.<sup>14</sup> Section 224(f) grants nondiscriminatory access rights only to cable television systems or “any telecommunications carrier,”<sup>15</sup> thereby excluding ILECs by definition. This statutory limitation, by its terms, does not extend to the requirement that rates, terms, and conditions for pole attachments be just and reasonable. ILECs, just like any other provider of telecommunications service, are entitled to just and reasonable pole attachment rates and practices, and the Commission is obligated, pursuant to Section 224(b)(1), to implement regulations to protect this right.

**IV. THE COMMISSION SHOULD MODIFY ITS RULES TO EXPRESSLY PERMIT ILECS TO CHALLENGE UNJUST AND UNREASONABLE POLE ATTACHMENT RATES, TERMS, AND CONDITIONS THROUGH THE COMMISSION’S COMPLAINT PROCESS.**

BellSouth agrees with USTelecom that there is ambiguity as to whether ILECs are entitled to use the Commission’s pole attachment complaint process to seek relief from unjust and unreasonable rates, terms, and conditions. Despite Congress’s use of different terms to reflect different rights in Section 224 (*e.g.*, only “telecommunications carriers” have a right to nondiscriminatory access, while all “providers of telecommunications service” are entitled to just and reasonable rates, terms, and conditions), the Commission’s rules do not make a similar distinction. Throughout its complaint rules, the Commission uses the term “telecommunications carrier” instead of “provider of telecommunications service.” As a result, the Commission does not distinguish between rules that govern access to poles pursuant to Section 224(f) and rules that govern just and reasonable rates, terms, and conditions for all providers of

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*Policies Governing Pole Attachments*, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd 6777, 6802, ¶ 49 (1998) (“*Report and Order*”).

<sup>14</sup> USTelecom Petition at 7.

<sup>15</sup> 47 U.S.C. § 224(f).

telecommunications service pursuant to Section 224(b).<sup>16</sup> Accordingly, as USTelecom notes, the Commission's rules are generally interpreted as precluding ILECs from using the Commission's complaint procedures to seek redress for unjust and unreasonable pole attachment practices.

The Commission should eliminate any ambiguity by modifying the existing complaint rules to explicitly permit ILECs to file pole attachment complaints. Such action is warranted to ensure that the Commission's rules are consistent with Section 224's directive that the Commission prescribe regulations governing just and reasonable pole attachment rates, terms, and conditions for the attachments of all providers of telecommunications service as well as adopt procedures to resolve complaints concerning such rates, terms, and conditions.<sup>17</sup>

There is neither a statutory nor policy basis for excluding ILECs from the protection of just and reasonable pole practices or from invoking the Commission's pole attachment complaint process. As demonstrated above, the statutory exclusion of ILECs from the definition of "telecommunications carrier" cannot be read to foreclose ILECs from the protections afforded under Section 224(b). Moreover, the Commission has already expressed its commitment to protecting the rights of attaching entities, while balancing the competing interests of pole owners. As the Commission has stated:

An uncomplicated complaint process and a clear formula for rate determination are essential to promote the use of negotiations for pole attachment rates, terms, and conditions. We are committed to an environment where attaching entities have enforceable rights, where the interests of pole owners are recognized, and where both parties can negotiate for pole attachment rates, allowing the availability of telecommunications services to expand.<sup>18</sup>

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<sup>16</sup> See 47 C.F.R. §§ 1.1402, 1.1404(d).

<sup>17</sup> 47 U.S.C. § 224(b).

<sup>18</sup> *Report and Order*, 13 FCC Rcd at 6787, ¶ 16.

Although ILECs are pole owners, they also are entities needing to attach to the poles of other utilities. Consequently, as attaching entities, ILECs are entitled not only to just and reasonable pole attachment rates, terms, and conditions but also to an “uncomplicated complaint process and a clear formula for rate determination,”<sup>19</sup> just like any other provider of telecommunications service. To satisfy Section 224’s mandate and facilitate reasonable negotiations, the Commission should amend its rules to enable ILECs to seek recourse before the Commission when there is a dispute with another utility regarding pole attachment rates and practices.

While private negotiations should continue to be the preferred means by which pole attachment agreements are reached, the reality of the marketplace is that negotiations are not always successful and disputes do arise. The availability of a process to seek relief in the event of a dispute helps facilitate timely negotiations and acts as a deterrent to minimize unjust and unreasonable pole attachment practices. There is no statutory or policy reason for excluding ILECs as attaching entities from availing themselves of such a dispute resolution process. ILECs that are subject to unreasonable pole attachment rates, terms, and conditions imposed by other utilities should be able to pursue a remedy in order to protect their statutory right to just and reasonable pole attachment practices just like any other provider of telecommunications service.

In addition, modifying the pole attachment complaint procedures to permit ILECs to file complaints is consistent with the Commission’s prior conclusions regarding the importance of pole attachments to competition. The Commission has interpreted Section 224 to mean that “no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those

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<sup>19</sup> *Id.*

seeking to compete in those fields.”<sup>20</sup> This prohibition against denying or impeding the use of necessary facilities should apply with equal force to utilities that engage in unreasonable and unjust practices when dealing with ILECs seeking to attach to their poles.

As demonstrated above, ILECs often find themselves in an inferior bargaining position when seeking to attach to the poles of other utilities. Certain utilities take advantage of this unequal bargaining power by engaging in unjust and unreasonable practices that adversely affect competition by driving up ILECs’ cost of providing affordable service and constraining the deployment of competitive and innovative services. This unequal bargaining power also prevents the establishment of a fair allocation of pole costs among attaching entities. To remedy this situation, the Commission should amend its rules to afford ILECs the same opportunity as CLECs (and cable service providers) to pursue complaints for unjust and unreasonable pole attachment rates and practices. Such an action is wholly consistent with, and in fact is mandated by, Section 224.

**V. THE TELECOMMUNICATIONS FORMULA USED TO CALCULATE RATES FOR CLECS IS AN APPROPRIATE DEFAULT TO APPLY IN DISPUTES INVOLVING ILECS SEEKING TO ATTACH TO OTHER UTILITIES’ POLES.**

BellSouth supports using the current Commission formula applicable to pole attachments used to provide telecommunications services (“Telecom Formula”) as the default in disputes in which an ILEC is seeking to attach to the poles of other utilities. As USTelecom states, “[t]here is no compelling reason why the standard used to establish a ‘just and reasonable’ rate for ILECs

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<sup>20</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 & 95-185, *First Report and Order*, 11 FCC Rcd 15499, 16060, ¶ 1123 (1996) (“*Local Competition Order*”).

should be different from that of a CLEC.”<sup>21</sup> Establishing the Telecom Formula as the default for calculating a rate for the attachments of all providers of telecommunications service (including ILECs) will facilitate negotiations because the parties will be able to anticipate a range of acceptable rates.<sup>22</sup> Timely negotiations and reduced legal wrangling over pole attachment practices benefit consumers by enabling providers to deploy affordable and competitive services in a timely manner. In addition, as USTelecom states, “adoption of a single formula promotes the interests of fairness, consistency, and competition.” Accordingly, the Commission should apply the existing Telecom Formula as the default in disputes involving all providers of telecommunications service, including ILECs as attaching entities.

## VI. CONCLUSION

The issues raised in the USTelecom Petition and affirmed in these comments warrant initiating a rulemaking. Specifically, the Commission should amend its rules to: (1) clarify that an ILEC, as a “provider of telecommunications service” under 47 U.S.C. § 224(a)(4), is entitled to just and reasonable rates, terms, and conditions when attaching to the poles of other utilities; (2) permit an ILEC to utilize the Commission’s pole attachment complaint procedures to dispute unjust or unreasonable pole attachment rates, terms, and conditions imposed by other utilities; and (3) use the Telecom Formula as the default to apply in rate disputes involving all “providers

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<sup>21</sup> USTelecom Petition at 18.

<sup>22</sup> If the Commission proceeds with a rulemaking as requested herein, it may be appropriate to consider changes to the current pole attachment rate formulas for both cable and telecommunications services. The Commission has previously indicated that it may need to revise the formulas from time to time, and the requested rulemaking would provide an appropriate opportunity for Commission review of the formulas. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-

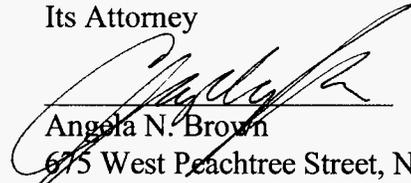
of telecommunications service,” including instances in which an ILEC is seeking to attach to the poles of another utility.

Respectfully submitted,

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98 & 95-185, *Order on Reconsideration*, 14 FCC Rcd 18049, 18056, ¶ 21 (1999), citing *Local Competition Order*, 11 FCC Rcd at 16073, ¶ 1156.

# **ATTACHMENT A**

# **TWO WRONGS DON'T MAKE A RIGHT**

**The Electric Industry's Exploitation of its Captive Pole User Market**

**By**

**Veronica Mahanger MacPhee**

**&**

**Mark Simonson**

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## TWO WRONGS DON'T MAKE A RIGHT

### The Electric Industry's Exploitation of its Captive Pole User Market

Citywide Power is a national company that provides electricity to the city of Urban. Cross Town Telephone is the local phone company, a small enterprise formed in 1995 to acquire the city's telephone system from the Beau Tel Group when the latter divested itself of its access lines in the state. The two companies share approximately 100,000 utility poles, some 90% owned by Citywide. MegaCable Television Company and various long-distance, wireless, internet-only and competitive access providers lease space on these joint use poles. The local municipality also places streetlights on the poles.

FCC formulas govern the rental rates cable television and telecommunications carriers in this state pay Citywide and Cross Town. These rates equal a set percentage of a pole owner's annual cost to own and "carry" a joint use pole. MegaCable, a huge cable conglomerate, pays 7.4% of the owner's carrying cost for 1 foot of space, based on the FCC cable television formula. Companies subject to the FCC's telecommunications carrier formula pay 11.2% of the owner's annual carrying cost, also for 1 foot of space, in urban areas like this one.

With the exception of Cross Town, Citywide assesses all lessees not covered by either formula a flat percentage of its annual carrying cost based on the number of entities on the pole: 20% on five-user poles, 33-1/3% on three-user poles. Cross Town is assessed a rate based on 45% of Citywide's annual carrying cost. This is because when Cross Town purchased Urban's phone system, it also acquired Beau Tel's existing joint use agreement with Citywide. This agreement requires Cross Town to pay 45% of Citywide's carrying cost for 2 feet of space on Citywide's 90,000 or so poles, and Citywide to pay 55% of Cross Town's carrying cost for 8-1/2 feet, plus the 40 inches of separation space, on some 10,000 Cross Town poles. Cross Town has tried to buy poles from Citywide to reduce the pole-ownership disparity, but Citywide has refused to sell any of its poles to Cross Town.<sup>1</sup>

A presentation at an electric industry conference held in late September of this year, based apparently on an article published last September in the electric utility trade magazine *Transmission and Distribution*, came to our attention recently. The original article lamented the cost and inconvenience utilities allegedly suffer to provide space on their poles to third-party users such as cable television and telecommunications companies. Decrying the "attacher-friendly regulatory environment" created by the Federal Communications Commission (FCC), the article charged that the Commission's "pro-attacher, anti-utility rulings" on pole attachments have left the electric industry "short of funding and without many of the tools required to control cable and telecommunications attachers."

The article points out, however, that there are "several provisions [in the FCC's regulations] that utility pole owners may use to **recover their costs** (emphasis ours) and deal appropriately with outlaw attachers." Those "core regulations" form the basis for the

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<sup>1</sup> All entities are fictional.

article's proposed utility pole attachment "Bill of Rights" - a plan to redress utility joint use grievances and "recover the cost" of permitting pole attachments. The article thus gives lip service to the principle that pole attachment rates should achieve reasonable cost recovery for the pole owner.

Despite this assertion, the first "Right" immediately articulated in the article's electric utility "Bill of Rights" is as follows:

1. Utilities may negotiate UNREGULATED (*capitals used in the original*) rates, terms and conditions for access to:
  - Interstate transmission towers by any entity
  - Distribution poles by ILECs, Internet-only providers, and telecom non-common carriers.

An injunction to maximize joint use attachment rates for pole users whose rates are "UNREGULATED" suggests a profit motive. This "Right" is aimed at revenue generation, not cost recovery.

The reality is that power company pole rental rates assure them much more than mere cost recovery. To understand why, it is necessary to understand the interplay of several factors: the establishment by Congress of two contradictory and irreconcilable pole attachment rate formulas for cable television companies and telecommunications carriers (the first wrong), the FCC pole attachment rate methodology that underlies the formulas, the express exemption of the nation's incumbent local exchange carriers (ILECs) from the application of either formula (the second wrong), and the ILECs' disadvantageous position with respect to pole usage and ownership.

The revenue realized by ELCOs as a result of these factors operating in tandem is disproportionately and unacceptably high, but is hardly a "Right."

### ***The FCC Pole Attachment Rate Methodology***

The FCC has authority to regulate pole attachment rates unless a state certifies that it has taken regulatory jurisdiction over the matter. The FCC has developed a standard methodology for determining the maximum permissible annual pole rental rates based on defined space usage factors and the pole owner's associated cost parameters.

The FCC has concluded that 35- and 40-foot poles suffice for joint use. Blending these two heights yields a 37.5-foot standard joint use pole. With 6 feet buried in the

ground, and 18 feet of clearance to the first attachment on the pole, there are 24 feet of "non-usable" space (space unavailable for the placement of attachments) on a pole. The remaining space above this level is deemed "usable" space - 11 feet on a 35-foot pole, and 16 feet on a 40-foot pole, or an average of 13.5 feet on the blended 37.5-foot pole.

The FCC's joint use rate methodology calls for determining a pole owner's "fully allocated" annual cost to own and "carry" a joint distribution pole - the "annual carrying cost." The methodology requires a pole owner to determine its historical capital investment in an average pole, then calculate the combined carrying charge factor it incurs annually on that investment, based on the sum of five annually recurring expense components - depreciation, maintenance, taxes, administration, and cost of capital. A just and reasonable pole attachment rate would permit a pole owner to recover a user's fair share of this annual cost, based on the user's allocated percentage of both usable and unusable space on the blended pole.

Expressed as simply as possible, the FCC's pole attachment equation, applicable to both FCC formulas, is:

$$\text{User's Annual Pole Attachment Rate} = \frac{\text{Owner's Historical Average Pole Cost} \times \text{Owner's Pole Carrying Charge \%} \times \text{User's Space \%}}{\text{Owner's Historical Average Pole Cost}}$$

It is important to note that the FCC methodology actually establishes the *upper* limit for attachment rates. The *lower* limit of permissible rates is the incremental cost an owner incurs to accommodate the attachment. This lower limit is routinely ignored; pole owners simply utilize the upper-limit methodology across the board to develop their attachment rates.

### ***The First Wrong The Establishment of Contradictory and Irreconcilable FCC Rate Formulas***

The original FCC pole attachment rate formula was established in 1978 to establish rates for attachments by cable television (CATV) companies to utility poles. The pole attachment provisions of the 1996 Telecommunications Act retained the original CATV formula to determine rates for providers of cable television service only, but also introduced a second formula to determine rates for telecommunications carriers.

(These will be referred to collectively here as CLECs, the acronym for Competitive Local Exchange Carriers, and their rate formula as the CLEC Formula.)

There are thus two versions of the FCC methodology, or two FCC formulas. The CATV and CLEC Formulas differ only with respect to the third factor of their common methodology - a user's allocated percentage of the owner's annual carrying cost based on space usage. Although both a CATV and a CLEC are deemed to be using 1 foot of space, this factor is developed differently for these two classes of pole users.

Stated as simply as possible, under the CATV Formula a pole user shares the *total carrying cost* of a joint pole in direct proportion to its share of the pole's usable space. A CATV thus pays 1/13.5 or 7.4% of both the usable and the non-usable space on a pole. Under the CLEC Formula, however, a pole user shares the *total carrying cost* of a joint pole based upon two different fractions or percentages added together. A CLEC also pays 1/13.5 or 7.4% of the cost of the usable space on a pole, but then pays a share of 2/3 of the pole's non-usable space, based equally on the number of users. A CLEC thus pays a fraction of the cost of a pole that varies based on the number of entities on the pole.

The FCC has established a presumption that poles in an urban location are typically occupied by five entities, while poles in a rural location carry three entities. (As with all the FCC's presumptions, these may be rebutted by actual data.) On this basis, the typical joint use configuration of the 13.5 ft of usable space on a 37.5-foot blended urban pole would be 1 foot each to any combination of three attachers (CATV, CLECs, or other users), 2 feet to an ILEC, and the remaining 8.5 feet to the ELCO. These allocations indicate that on all joint use poles, even those owned by ILECs, the ELCO's share of the usable space is four and a quarter times to eight and a half times that of any other user.

### ***The Second Wrong The Exemption of ILECs from the CLEC Formula***

For those unfamiliar with the term, ILECs are the abbreviation for Incumbent Local Exchange Carriers, defined in Section 251 of the 1996 Telecommunications Act as those providers of telephone exchange service (local exchange carriers or LECs) that were already in place, or "incumbent," when the 1996 Act was passed, and were deemed at the time to be members of the exchange carrier association (or their successors or

assigns). Section 703 of the 1996 Act, amending the existing Pole Attachment Act (47 U.S.C. 224), created a new formula for calculating pole attachment rates for a telecommunications carrier as defined by Section 3 of the Act (the CLEC Formula), but exempted any ILEC from the definition of telecommunications carrier for purposes of the new provision.

Consequently, the two rate formulas of the Pole Attachment Act as amended in 1996 apply only to "pole attachments" by "a cable television system" (CATV Formula) or "a telecommunications carrier" (CLEC Formula). Because of the clearly defined and limited classes of user to which they apply, neither formula covers ILECs or certain other new entrants into the communications marketplace. Consequently the prevailing assumption is that ILECs (the only other pole-owning utility) and certain other pole users are not covered by the amended Pole Attachment Act.

The narrow scope of the 1996 pole attachment provisions, including the exemption of ILECs from the definition of "telecommunications carrier," was, in retrospect, wrong. The language of the first article of the utility "Bill of Rights," enjoining electric companies to be sure to charge ILECs UNREGULATED pole attachments rates, is revealing in and of itself. Its entire purpose is to remind the electric utilities that because the formulas in the 1996 Pole Attachment Act were narrowly drawn, the classes of pole users they do not (apparently) cover may be charged any rate the pole rental market will bear.

### ***The Historical Conversion of ILECs into a Captive Market***

As a direct result of their exemption from the application of the CLEC formula, the most exploited class of attachers in the UNREGULATED pole attachment arena is the ILECs.

Agreements between ILECs and electric companies (ELCOs) often date back to the 1920s. The typical pole configuration encountered back then was a 35-foot pole, upon which the local telephone company was allocated some 3 feet of space, and the local electric company some 3 to 4 feet, not counting the separation space. The respective allocations of space and cost responsibility in early joint use agreements were typically 40%/60%, 42.5%/57.5%, 45%/55%, or 50%/50%. Space usage by the two

industries was comparable because phone companies still used open wire, while electric companies did not carry the high voltages requiring the ubiquitous transformers of today.

Today ILECs use insulated cable, and require a mere 2 feet or less of pole space. At the same time, pole heights have risen to 40 feet to 45 feet to provide ELCOs with approximately double their initial space allocation.

Yet in renegotiating their contracts with ILECs, ELCOs are interested only in maximizing revenue. They typically decline to even discuss, let alone update, the contracts' obsolete cost percentages to reflect current space usage, including their own use of the separation space, which the FCC has expressly noted. They also decline to even discuss, let alone incorporate, the offset in their pole costs generated by the income they receive from proliferating pole users. Power companies simply continue to demand that ILECs continue to defray 40% to 50% of their annual pole carrying cost, as though joint use poles still carried just two parties each occupying 3 to 4 feet of space - a patent absurdity. They can do this because, as the supposed "Bill of Rights" points out, ILEC rates are UNREGULATED.

This call to ELCOs to capitalize on ILEC occupancy of their poles underscores the stark reality that in the current utility climate the interests of ILECs as pole owners do not coincide with those of the ELCOs. This is because, for a number of reasons, most ILECs today are in fact *not* significant pole owners. While we have no numbers, our thirty-odd-years combined experience in joint use tells us that an ILEC will typically own anywhere from 0% to 30% of the poles it shares with an ELCO. In rare cases, pole ownership by a large telephone company might exceed our 30% upper limit. The current imbalance is due not to indolence or negligence on the part of the ILECs, but to the differing nature of the two industries, including the primacy of electricity.

The ILECs, with extensive facility infrastructures now located on joint use poles that are largely power-owned, are a captive market on those poles. They have little bargaining clout both because of their minority status as pole owners, and their lack of options for facility relocation. Exempted as they are from the protection of the FCC formulas, they are prey to high UNREGULATED pole rental rates assessed by the power utilities, as the "Rights" article points out.

### ***Power Company Revenue from Pole Attachments***

The FCC presumption is that an urban distribution pole is typically occupied by five entities. Where the pole owner is an electric company (like Citywide), the pole's other occupants will generally be an ILEC (like Cross Town), a CATV company (like Megacable), and two other entities (a CLEC and a non-telecom carrier, for example).

Based on this usage scenario, application of the FCC formulas would permit the ELCO pole owner to recover the following percentages of its costs from the CATV and the CLEC for their use of 1 foot each of the pole's "usable" space:

**CATV: 7.4%**

**CLEC: 11.2%**

With neither formula applying to ILECs, who are still paying rates that typically range from 40% to 50% of an ELCO's annual carrying cost for 2 ft of pole space, we project that the ILEC here is paying **45%** of the ELCO's cost. This is the percentage Cross Town pays Citywide under the terms of the Beau Tel contract it was required to assume. This is also the most often encountered ILEC cost allocation percentage in existing contracts between ILECs and ELCOs.

And while it is not possible to know what a non-ILEC pole user not subject to either the CATV or the CLEC formula might be charged, the utility "Bill of Rights" suggests that an UNREGULATED attacher's rate will be based on the pole owner's market power. Our hypothetical ELCO, Citywide, charges other UNREGULATED pole lessees **20%** on five-user poles, which we believe is actually a conservative projection, but which we employ for purposes of our illustration here.

Under this scenario, which is based on the FCC's presumption with respect to the number of attaching entities on urban poles, an ELCO would be receiving a combined offset of **83.6%** (**7.4%+11.2%+45%+20%**) of its annual carrying cost of a distribution pole for the use of 5 feet of the pole's usable space. The ELCO's own effective contribution is thus **16.4%** of its annual carrying cost for its own utilization of the remaining 8.5 feet of space.

As ELCOs add more and more attachers to their poles, especially UNREGULATED attachers, their own contribution to their annual carrying cost of a pole

rapidly approaches zero dollars. With enough attachers their revenue intake can easily exceed **100%** of their annual pole costs. Add another UNREGULATED attacher also paying **20%** in an urban context, for instance, and the power company pole owner might well be receiving "cost recovery" in the amount of some **104%** of its costs, which amounts to a free ride with respect to its own usage of 8.5 feet of the usable space on a pole.

Despite the complaints of the electric industry, therefore, pole attachments represent a massive subsidization of electric company annual pole carrying costs by the attachers on their poles, not "cost recovery" at all. And as the first Article of the utility "Bill of Rights" reminds us, it is only attachments to *distribution* poles that are regulated. Electric companies may charge UNREGULATED rates across the board for attachments to their *transmission* poles.

### ***The Need for a Single Pole-Attachment Methodology with Universal Application***

The dimensions of the pole attachment problem are clear. With an unchallenged monopoly over the nation's pole infrastructure, and absolute control over a captive market, electric companies are driving up the cost of pole occupancy to later comers trying to provide necessary services, and in particular, to their traditional joint use partners, the ILECs.

The creation in 1996 of a new formula for telecommunications carriers, while leaving intact the existing CATV Formula, was in itself problematic. The fact that the CATV and CLEC Formulas apply two inconsistent and irreconcilable rate mechanisms, and thus produce two different cost allocation percentages for the use of a foot of pole space, allows the charge to be made that at least *one* of the percentages and its underlying formula must be unreasonable - and if one is questionable, so may the other be. The Act's narrow application of the CLEC Formula, including the express exemption of the ILECs from its application, compounded the problem.

Perhaps the ILECs were exempted from the application of the 1996 CLEC Formula because they were and have traditionally been viewed as utility pole owners, not lessees like the emerging CLECs - and as such on par with the electric companies. However, the joint use landscape has changed greatly over the years, particularly with

respect to pole ownership and control. Our estimate is that the overall ELCO/ILEC pole ownership ratio is now some 80% to 20% in favor of the ELCOs, and in some instances small phone companies who have recently entered the marketplace as successors to an older ILEC may actually own no poles at all. The Citywide/Cross Town ratio of ownership of 90%/10% is thus quite typical. The federal legislation does not reflect and has not so far addressed this changed reality.

The current pole attachment regulatory landscape - two contradictory formulas which apply selectively to some pole users, leaving others without a means of redress, is an invitation to abuse. Given the inconsistencies in the existing formulas, congressional action may well be required to establish a consistent policy. Even without such action, however, we believe that the FCC can and should step in to develop "just and reasonable" rates for all pole users, taking into consideration the nature and application of the existing formulas.

### ***The Case for FCC Jurisdiction over All Pole Attachments***

We would suggest that the FCC has existing jurisdiction to bring the ILECs within the ambit and protection of the existing federal pole attachment legislation with respect to their use of electric utility poles. We would like to see it exercise that jurisdiction to redress the inequities faced by ILECs - and indeed, by the other pole users identified in the electric utilities' recitation of "Rights" - and stem the growing tide of pole attachment revenue flowing into the electric companies' coffers from these UNREGULATED pole attachment rates.

When the pole attachment Act was amended in 1996, Section 224 (a) (4) was also amended to confer jurisdiction on the FCC to regulate "pole attachments," defined as any attachment(s) by a "cable television system" (original language) "or a "provider of telecommunications service" (new language added in 1996). The 1996 definition of a pole attachment for the purpose of conferring FCC jurisdiction - i.e., "provider of telecommunications service" - is not the same as and is broader and more inclusive than the term "telecommunications carrier" for the purpose of exempting ILECs from application of the Act's new formula. The broader language, which was surely not inadvertent, would appear to give the FCC general, residual jurisdiction over pole

attachments by "providers of telecommunications service" other than either "cable systems" or "telecommunications carriers," which would include ILECs and all those other entities the Bill of "Rights" reminds us may be charged UNREGULATED rates.

This interpretation is supported by the Supreme Court's ruling in *National Cable and Telecommunications Assn., Inc. vs Gulf Power Co.*, in which the Court stated in language that could not be less ambiguous:

The sum of the transactions addressed by the rate formulas - S 222 (d) (3) (attachments "used by a cable television system solely to provide cable service") and S 224 (e) (1) (attachments "used by telecommunications carriers to provide telecommunications services") - is less than the theoretical coverage of the Act as a whole. Section 224 (a) (4) reaches "any attachment by a cable television system or provider of telecommunications service." The first two subsections are simply subsets of - but not limitations upon - the third.

It appears from the Court's statement that the FCC has the authority - and may indeed have the obligation - to ensure that pole attachment rates for all providers of telecommunication service are "just and reasonable." In cases where the existing formulas do not apply, the FCC could conceivably exercise its authority to determine "just and reasonable" rates to develop entirely new methodologies. It is also at least arguable that the FCC is actually free to extend the range of application of at least the CLEC formula.

The FCC should confront the internal inconsistency of the existing FCC formulas, and articulate some clear, limited distinctions between them with respect to their use and application. The Pole Attachment Act clearly limits application of the CATV formula to providers of pure cable television service. However, in the current communications climate a "pure" CATV company might expand its service offerings at any moment beyond the formula's defined scope; the technology underlying cable facilities placed on poles is clearly impossible to police. Furthermore, it makes no logical sense - nor is it equitable - that a huge, well-established company such as Megacable should pay 7.4% of a pole owner's carrying cost for 1 foot of pole space, while a small, newly-formed entity like Cross Town pays 45% for 1 to 2 feet. Even more to the point, it makes no logical sense - nor is it equitable - that *any* ILEC on a joint use pole should pay 45% of an ELCO's carrying cost for the use of 1 to 2 feet of pole space, while for the use of 8-1/2 feet the ELCO pole owner pays 16.4% - an already unreasonably low percentage which disappears completely with enough pole users.

It is also difficult to comprehend why attachments to transmission poles and towers are completely UNREGULATED. A just and reasonable rental rate for attachments to these much taller structures should at a minimum reflect the usable space on them. A just and reasonable rate would also not pass along to attachers the cost of either installation or maintenance of these huge structures specific to the electric industry.

We are of the opinion that the FCC CATV formula, which allocates total pole cost in direct proportion to usable space occupied, actually produces the fairest, most reasonable and most easily calculated pole attachment rates. Once the usable space on a distribution or transmission pole or tower is established, a user's percentage of its cost is easily determined. It would not vary based on the number of entities, as the CLEC Formula does. It is also fair and equitable - one would expect to share the common facilities in, say, an office building, in proportion to the number of offices one occupies.

The "Rights" article suggests that rates should be based on the cost a user "avoids" by not having to set its own poles. The immediately obvious objection to this observation is that newcomers cannot set their own poles even if they wanted to. Public right of way is already crowded by the existing utilities, and even if it wasn't, municipalities would frown on five pole lines on two sides of every street. Furthermore, if the article is suggesting that each occupant should pay based on its "avoided cost," then it would seem to us that this seemingly reasonable suggestion would result in a pole owner receiving rental based on the "avoided cost" of four poles - one for each user - a somewhat unreasonable revenue stream for one jointly used pole. This is certainly not the intent or effect of the Maine rule.

This brings us to the final consideration in all this. We believe that the FCC might wish to take a closer look at the total disregard for the articulated range of rates called for by the pole attachment regulations. No utility that we know of charges rates based on the incremental cost of providing pole attachment space, rendering the range meaningless. This is particularly egregious in the face of the up-front collection of every single cost utilities incur to accommodate an attacher, as recounted at length in the second "Right" described in the "Bill of Rights." (But the issue of cost is the subject of our next article.)

### *Summary*

The power companies' revenue generation campaign thinly disguised as "cost recovery," as reflected in the "Rights" article, is neither just nor reasonable. The revenue stream the power industry derives from pole attachments comes close to eliminating, or actually eliminates, any cost to ELCOs for use of their own poles. Only integrated, fair and reasonable pole attachment regulations applicable equally to all users would ensure that these companies are not permitted to continue to recover some 100% or more of their annual costs from their pole lessees.

It is high time the electric companies learn that two wrongs don't make a "Right."

# **ATTACHMENT B**

# A Joint-Use "Bill of Rights"

Ten inalienable rights utilities have for dealing with pole attachments.

By Tom Magee, Keller and Heckman LLP

**W**hen the U.S. Congress entrusted the Federal Communications Commission (FCC) with pole attachment regulation 26 years ago, it could not have anticipated that the FCC's pro-attacher, anti-utility rulings would leave the joint-use departments of many electric utilities short of funding and without many of the tools required to control cable and telecommunications attachers. But here we are, more than a quarter-century later, with just that result.

The attacher-friendly regulatory environment has enabled attachers to move quickly into new markets, but at the expense of overworked, outmanned joint-use employees. Taking advantage of the permissive regulatory environment, many attachers fail to comply with utility attachment guidelines and make far too many unauthorized and unsafe attachments. Therefore, it is no wonder so many utilities treat pole attachments as little more than a nuisance.

Despite the pro-attacher nature of most FCC rulings, the commission's regulations contain several provisions that utility pole owners may use to recover their costs and deal appropriately with outlaw attachers. These core regulations are identified in this article, forming the basis for what we consider to be the electric utility industry's pole attachment "Bill of Rights."

## Pole Attachment Regulations

The FCC regulates attachments to investor-owned utility (IOU) poles unless a state certifies that it regulates such attachments. Eighteen states and the District of Columbia have certified that they regulate pole attachments, and most



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states have adopted regulations similar in type and scope to those of the FCC. Attachments to poles owned by cooperatives and municipally owned utilities are exempt from federal and state pole attachment regulation, except in a handful of states such as Kentucky, Vermont and Oregon.

The rates, terms and conditions of pole attachments imposed by the FCC favor attachers at the expense of utilities for two main reasons. First, both the Pole Attachment Act and the 1996 Telecommunications Act are designed—first and foremost—to promote the spread of cable and telecommunications services, not the preservation and protection of the nation's electric power grid. Second, the FCC is naturally more accountable to cable and telecommunications companies that, unlike electric utilities, are in the business of providing video programming and telecommunications services as their primary lines of business, and that, incidentally, interact with the agency on a daily basis.

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As a practical matter, the FCC's pole attachment formulas establish rates at levels far lower than the actual value of utility distribution systems to attachers. As implemented by the agency, FCC pole attachment regulations do not do nearly enough to protect the safety and reliability of electric distribution systems, and in practice make it difficult to recover—at a bare minimum—all legitimate and prudent expenses incurred by utilities in installing and maintaining their poles.

From the utility perspective—in the real world—the results of FCC regulation have not been positive:

- Joint-use departments that are poorly funded
- High levels of unauthorized attachments
- National Electric Safety Code (NESC) and other safety violations
- Less safe and reliable electric distribution systems.

#### One-Sided FCC Decisions

One-sided decisions by the FCC have rendered many utilities timid and reluctant to assert their rights as pole owners, either for fear of another adverse decision or because they simply are resigned to being shortchanged by pole attachment regulations.

Because of the adverse nature of most FCC decisions in this area, utilities must remain ever more vigilant, not less. The FCC's core regulations, comprising what we characterize as the "Bill of Rights," will be enforced by the agency only if the utility proves to the FCC that application of the regulations is justified under the circumstances. This means, for instance, that if a utility wishes to assess

**One-sided decisions by the FCC have rendered many utilities timid and reluctant to assert their rights as pole owners, either for fear of another adverse decision or because they simply are resigned to being shortchanged by pole attachment regulations.**

penalties for unauthorized attachments, to take action to remedy safety violations, or to seek recovery for certain costs, its oversight and accounting of pole attachments must be at a level high enough to enable the utility to prove such measures are "reasonable." Moreover, it takes money to collect money and to enforce safety and other requirements. As explained by John Sullivan, general manager of the Utility Asset Management Group for Portland General Electric, a utility could spend \$1 on joint-use activities to collect 50 cents or it can spend \$2 to collect \$2.

As with the U.S. Constitution, there are 10 inalienable rights contained in the electric utility pole attachment Bill of Rights.

#### Rates and Cost Recovery.

1. Utilities may negotiate **UNREGULATED** rates, terms and conditions for access to:

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Many utilities believe they must charge all attachers the same rate, but unregulated attachments may be charged more reasonable rates, terms and conditions than those permitted by the FCC. The situation is even better for cooperatives and municipally owned utilities, because attachments to cooperatives and munis are unregulated in most states. For unregulated attachments, a variety of reasonable, more utility-friendly cost-based rate formulas may be applied. For example, the state of Maine employs an "avoided cost" methodology that allocates far more costs to attachers than does the FCC formula based on what each attacher would pay to build its own independent facilities.

The primary concern with unregulated rates, terms and conditions is that antitrust laws may apply, especially if the utility or its telecom subsidiary competes with the attacher. That said, a utility's use of a cost-based rate that has been approved by a regulatory entity such as Maine offers a compelling defense for any antitrust claim based on rates.

2. Utilities may recover all direct and indirect costs of providing access, including costs associated with:

- Permit applications
- Providing maps, plats and other data
- Engineering
- Pre-construction
- Make-ready
- Inspections
- Audits
- Changeouts and other modifications

- Relocation or removal of attacher facilities
- Damage to distribution facilities
- Correcting safety violations.

FCC regulations are designed to allow utilities to recover all of their out-of-pocket expenses, but in practice, very few utilities employ the detailed accounting necessary to effect a full recovery. The way the regulations operate, any direct or indirect expenses incurred by utility pole owners that would not be incurred in the absence of the attachments are recoverable from the attacher. Many utilities use their annual rental calculation to recover some of these costs, but the annual rental allocates only a small percentage of costs to attachers and is a poor substitute for requiring attachers to make separate payments for each incurred expense.

FCC rules require that all charges to attachers be reasonable. The challenge for utility joint use departments is establishing a system that properly substantiates those charges and can verify that none of the separate charges are double-recovered through the annual rental.

3. Utilities may undertake reasonable measures to ensure prompt and reliable payment by attachers, including:

- Deposit requirements
- Performance bonds or other payment guarantees
- Up-front payments
- Unauthorized attachment penalties.

Using any of these protections must be justified under the circumstances. However, utilities are not required to bear unreasonable credit risks. If an attacher has a history of nonpayment or if a threat of bankruptcy exists, then higher performance bonds and other payment guarantees may be appropriate. Upfront payments also may be appro-



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priate, particularly for annual rentals. A deposit system may facilitate advance payments for items such as make-ready expenses, if such up-front payments are reasonable. If upfront payments are not possible, utilities should consider requiring the attacher to pay for one step in the attachment process before it may proceed to the next.

Penalties for unauthorized attachments are permissible under FCC regulations, but any significant penalty must be justified under the circumstances. The greater the penalty imposed, the greater the evidence that may be required to prove the attacher needs a penalty incentive to comply with the permitting process.

**Access**

4. Utilities may deny access to distribution poles if there is insufficient capacity.

Two years ago, the U.S. Court of Appeals for the 11th Circuit overturned an FCC ruling that required utilities to expand capacity to meet requests for new attachments. As a result of this ruling, the lack of capacity on a particular facility entitles a utility to deny a request for access. Changeouts to larger poles also are not required (*See Southern Co. v. FCC, 293 F.3d 1338, 11th Cir. 2002*). If utilities wish to entertain requests for access in circumstances where insufficient capacity exists, they should establish separate contracts governing the rates, terms and conditions of such access.

5. Utilities may reserve space on their poles for future expansion and for emergencies.

A utility's reservation of space for future expansion must be consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of the utility's core utility service. However, until a utility actually needs the reserved space, it must allow attachments to be made in the space. When needed, the utility may recover the reserved space and require whoever was using it to pay for the cost of any modifications needed to expand capacity in order to maintain their attachments.

Furthermore, utilities are entitled to reserve capacity for the provision of emergency service, and space reserved for emergencies is not subject to interim use.

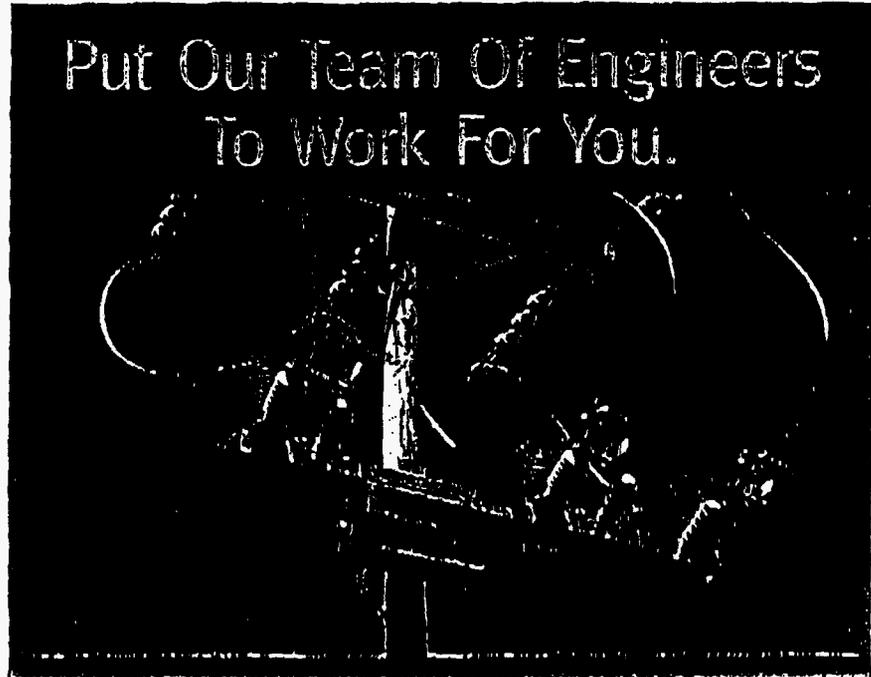
6. Utilities may require advance notice of overloading.

Attachers sometimes claim that FCC rules do not permit a utility to require advance notice of overloading. In fact, commission rules only prohibit a utility from requiring advance permitting of overloading. Utilities may require advance notice of overloading, but that requirement must be specified in the pole attachment agreement.

**Safety and Reliability Provisions**

7. Utilities may protect the safety and reliability of their distribution systems by requiring:

- Adequate training of attachers and contractors
  - Reasonable pole loading studies
  - Post-attachment and periodic inspections
  - Correction of safety violations
  - Identification tags on all attachments.
- Under FCC rules, utilities



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## Even the FCC recognizes that full reimbursement for damages caused by attachers is appropriate.

may require the contractors used by attachers to be at least as well trained as the utility's own employees. Pole loading studies may be conducted, but they should be conducted on representative poles, not every pole. Inspections may be conducted frequently, starting with the initial attachments and continuing up to once per year thereafter. The attacher must pay for the inspection to the extent that the inspection was conducted to review attachments made by the attacher. Utilities also may require attachers to affix identification tags to their lines in order to enable the utility easily to identify the owner of the attachments from ground level.

It is still unclear whether the FCC would allow utilities to impose penalties in an effort to discourage safety violations. Oregon allows utilities to impose safety violation penalties of \$200 per pole, which increases if the violation is not fixed in a timely manner. As expected, Oregon's penalty provision has greatly reduced the number of unsafe attachments in that state.

As with the other "utility-friendly" provisions, more stringent safety requirements require utilities to produce adequate documentation that such requirements are justified under the circumstances.

**8. Utilities may be reimbursed for any damage caused by attachers.**

Even the FCC recognizes that full reimbursement for damages caused by attachers is appropriate. Sufficient proof is required that the attacher caused the damage, and compensation for consequential damages (for lost profits, for example) may not be recoverable.

### Risk Prevention

**9. Utilities may minimize risks by requiring attachers to:**

- Obtain adequate insurance and warrant their contractors have obtained insurance
- Properly indemnify the utility for damage and injury caused by their attachments
- Warrant that they have obtained all required easements, rights-of-way and other authorizations
- Assume the risk of injuries associated with working on or near electric distribution poles.

The insurance that attachers and their contractors should be required to carry includes commercial general liability, worker's compensation, employer's liability, automobile and umbrella (excess liability) coverage. Broad indemnity provisions should be drafted to protect utilities from damage or injury resulting in any way from attachments. It is reasonable for utilities to require attachers to warrant that they have obtained all necessary easements and rights-of-way, which has become a particularly important issue. Landowners are increasingly suing pole owners themselves for violations of easement provisions, on the grounds that the landowner's easement does not permit access to their property by telecom and cable companies attaching to the utilities' poles.

### Remedies for Breach

**10. Utilities may employ a variety of measures to remedy**

an attacher's material noncompliance with contract provisions, including:

- Refusing to issue new permits
- Removing the offending attachments
- Denying access
- Requiring reimbursement of any corrections made by the utility
- Requiring specific performance.

One difficulty with many, if not most, pole attachment agreements is that termination of the agreement is listed as the only remedy available to the utility in the event the agreement is breached by the attacher. Termination of the agreement, however, is a drastic remedy that is almost always impractical to impose. For this reason, pole attachment agreements should provide utilities with a variety of remedies to provide meaningful incentives for attachers to bring themselves back into compliance.

### Conclusion

The pole attachment Bill of Rights identifies the regulatory tools available to enable utilities to recover pole attachment costs, improve attacher relations, and protect the safety and integrity of electric distribution systems. Utilities interested in making the pole attachment process safer, easier and less costly will be well served by these regulatory tools, if they devote additional resources to the oversight and management of pole attachments. ▀

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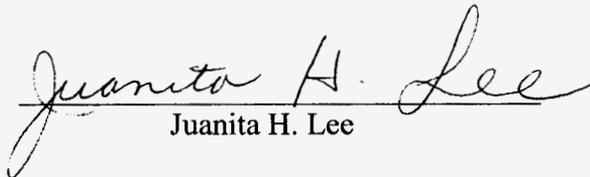
**CERTIFICATE OF SERVICE**

I do hereby certify that I have this 2<sup>nd</sup> day of December 2005 served the following parties to this action with a copy of the foregoing **COMMENTS IN SUPPORT OF USTELECOM PETITION FOR RULEMAKING** by electronic filing and/or by placing a copy of same in the United States Mail, addressed to the parties listed below.

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