# APPENDIX A

## EXAMPLES OF FCC, STATE AND COURT DECISIONS ADDRESSING REASONABLENESS OF CABLE POLE ATTACHMENT RATES

### Supreme Court

*NCTA v. Gulf Power*, 534 U.S. 327 (2002) – affirming FCC decision to apply the cable rate formula to attachments used by a cable operator to provide broadband services

*FCC v. Florida Power*, 480 U.S. 245 (1987) – finding that FCC regulation of pole attachment rates is not an unconstitutional taking of property and that the cable rate formula is not confiscatory

### Courts of Appeals

*Alabama Power v. FCC*, 311 F.3d 1357 (11th Cir. 2002), *cert. denied*, 124 S.Ct. 50 (2003) – affirming FCC's decision that utility's rates were unreasonable and that the cable rate formula provides just compensation and is not an unconstitutional taking of property

*Southern Co. Services v. FCC*, 313 F.3d 574 (D.C. Cir. 2002) – affirming FCC's implementation of changes to Section 224 that were adopted as part of the Telecommunications Act of 1996

*Texas Utilities Electric Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993) – affirming FCC's decision to apply cable rate formula to non-video attachments

*Monongahela Power v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981) – affirming FCC's original rules implementing the cable rate formula contained in Section 224(d)

### Federal Communications Commission

A. Rulemakings

*Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103 (2001) (*Consolidated Reconsideration Order*) – rejecting utilities' arguments that regulation of pole attachment agreements no longer is necessary and reaffirming the validity and importance of the FCC's rate formulas

*Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453 (2000) (*Fee Order*) – reaffirming the use of rate formulas based on historical costs and declining to modify the usable space presumptions

*Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777 (1998) (*Telecom Order*) –

establishing the telecom rate formula and deciding that the cable rate formula will continue to apply when a cable operator provides commingled cable and Internet services

*Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387 (1987) – making minor adjustments to the cable rate formula and clarifying that make-ready fees may not recover costs already recovered in the annual pole rental fee

*Petition to Adopt Rules Concerning Usable Space on Utility Poles*, 56 Rad. Reg. 2d 707 (1984) – declining to reconsider assumptions underlying the cable rate formula adopted in 1978-80

B. Adjudications[1]

*FCTA v. Gulf Power*, 22 FCC Rcd 1997 (ALJ 2007) – rejecting utility arguments that poles were at full capacity and therefore it was appropriate to charge an unregulated attachment rate

*FCTA v. Gulf Power*, 18 FCC Rcd 9599 (EB 2003) – granting complaint that utility violated FCC rules by unilaterally imposing attachment rate and finding that payment of rent based on cable rate formula plus make-ready expenses exceeds just compensation

*Teleport Communications Atlanta v. Georgia Power*, 16 FCC Rcd 20238 (EB 2001), *affirmed* 17 FCC Rcd 19859 (2002) – granting complaint that utility violated FCC rules by using its own formula to calculate pole attachment rates rather than using cable or telecom rate formula and reaffirming that both formulas provide just compensation to pole owners

*RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Co*., 17 FCC Rcd 25238 (EB 2002) – rejecting utility's $47.25 pole attachment rate as unjust and unreasonable and calculating a maximum just and reasonable annual cable rate of $6.79 per pole attachment

*Nevada State Cable Television Ass'n v. Nevada Bell*, 17 FCC Rcd 15534 (EB 2002) – affirming a Cable Services Bureau Order that calculated a maximum per pole attachment rate of $1.26 for poles owned by Nevada Bell

*Cable Television Ass'n of Georgia v. BellSouth Telecommunications*, 17 FCC Rcd 13807 (EB 2002) – finding unjust and unreasonable an annual pole attachment rate of $5.03 and setting the proper rate at $4.27

*ACTA v. Alabama Power*, 15 FCC Rcd 17346 (EB 2000), *affirmed* 16 FCC Rcd 12209 (2001) – granting complaint that utility's proposed attachment rate was unreasonable and affirming that cable rate formula plus the payment of make-ready expenses provides the pole owner with compensation that exceeds the just compensation required under the Constitution

[1] This list only includes examples of adjudications following the Supreme Court's 1987 decision in *Florida Power*. There are literally dozens of decisions prior to *Florida Power* applying the cable rate formula and finding that rates proposed by utilities were unreasonable.

*TCTA v. GTE Southwest*, 14 FCC Rcd 2975 (CSB 1999) – reaffirming that a utility cannot recover in make-ready charges any costs that it recovers through the annual pole fee

*Time Warner Entertainment v. Florida Power & Light Co.*, 14 FCC Rcd 9149 (CSB 1999) – rejecting a pole attachment rate of $6.00 as unjust and unreasonable and calculating the maximum just and reasonable rate at $5.79 per pole

*Texas Cable & Telecommunications Association, et al. v. Entergy Services Inc., et al.*, 14 FCC Rcd 9138 (CSB 1999) – ordering Entergy to reimburse cable company complainants the difference between the parties prior negotiated rate of $3.50 and a non-negotiated rate of $4.34 per pole charged by Entergy

*Heritage Cablevision v. Texas Utilities Electric Co.*, 6 FCC Rcd 7099 (1991) – finding that it is unreasonable for a pole owner to charge a cable operator higher pole attachment rates for attachments that carry commingled cable and data services; *see also Selkirk Communications v. Florida Power & Light*, 8 FCC Rcd 387 (CCB 1993); *WB Cable Assoc. v. Florida Power & Light*, 8 FCC Rcd 383 (CCB 1993)

**State Public Utility Commissions**

Alaska

*In the Matter of the Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations Adopted Under 3 AAC 52.900 – 3 AAC 52.940*, Order Adopting Regulations, 2002 Alas. PUC LEXIS 489 (Alas. PUC Oct. 2, 2002) – finding that the cable rate formula "provides the right balance given the significant power and control of the pole owner over its facilities" and that "changing the formula to increase the revenues to the pole owner may inadvertently increase overall costs to consumers . . . ."

California

*Order Instituting Rulemaking on the Commission's Own Motion Into Competition of Local Exchange Service*, R.95-04-043, I.95-04-044, Decision 98-10-058, 1998 Cal. PUC LEXIS 879, pp. 53-56, 82 CPUC 2d 510 (Oct. 22, 1998) (internal citations omitted) – finding "that the adoption of attachment rates based on the [cable rate] formula provides reasonable compensation to the utility owner, and there is no basis to find that the utility would be lawfully deprived of any property rights."

Connecticut

*Petition of the United Illuminating Company for a Declaratory Ruling Regarding Availability of Cable Tariff Rate for Pole Attachments by Cable Systems Providing Telecommunications Service and Internet Access*, Docket No. 05-06-01, pp. 5-6, 2005 Conn. PUC Lexis 295 (Dep't of Pub. Util. Control 2005) – upholding cost-based attachment rate and finding that the provision of additional services by a cable operators does not impose costs on the pole owner.

District of Columbia
*Formal Case No. 815, In the Matter of Investigation Into The Conditions For Cable Television Use of Utility Poles In The District of Columbi*a, Order No. 12796 (2003) – finding that FCC regulations should be followed in determining reasonable rates

Massachusetts
*A Complaint and Request for Hearing of Cablevision of Boston Co.*, D.P.U./D.T.E. 97-82 at 18-19 (Apr. 15, 1998) – finding that FCC formula "meets Massachusetts statutory standards as it adequately assures that [the utility] recovers any additional costs caused by the attachment of [] cables . . . while assuring that the [attachers] are required to pay no more than the fully allocated costs for the pole space occupied by them."

Michigan
*In the Matter of the Application of Consumer Power Company*, Case Nos. U-10741, U-10816, U-10831 at 27, 1997 Mich. PSC Lexis 26 (1997), *reh'g denied*, 1997 Mich. PSC LEXIS 119 (April 24, 1997), *aff'd Detroit Edison Co. v. Mich. Pub. Serv. Comm'n*, No. 203421 (Mich. Court of Appeals, Nov. 24, 1998); *aff'd Consumers Energy Co. v. Mich. Pub. Serv. Comm'n*, No. 113689 (Mich. Sup. Ct. Aug. 31, 1999) – adopting FCC standard and finding that the FCC cable rate formula aligns pole rates in Michigan "more closely with other states that already adhere to this standard."

New Jersey
*Regulations of Cable Television Readoption with Amendments: N.J.A.C. 14:18*, Docket No. CX02040265 (2003) – affirming use of a cost-based attachment rate and adopting the FCC formula

New York
*In the Matter of Certain Pole Attachment Issues Which Arose in Case No. 94-C-0095*, 997 N.Y. PUC Lexis 364 (1997) – adopting FCC approach to pole attachments

*Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments and to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Carriers*, Case 01-E-0026 (2001) – rejecting a higher telecom rate formula based on concerns that competition would suffer

Ohio
*Re: Columbus and Southern Electric Company*, 50 PUR 4th 37 (1982) – adopting the FCC cable formula for attachments by cable operators

Oregon
*Oregon Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, regarding Pole Attachment Use and Safety*, AR 506; 510 at p. 10 (2007) – adopting FCC cable rate formula and finding that "the cable formula has been found to fairly compensate pole owners for use of space on the pole."

Utah

*In the Matter of an Investigation into Pole Attachments*, 2006 Utah PUC Lexis 213 (2006) – adopting the FCC cable rate formula following a comprehensive pole attachment rulemaking, later codified at UTAH ADMIN. CODE R746-345-5(A) Pole Attachments (2006).

Vermont

*Vermont Policy Paper and Comment Summary on PSB Rule 3.700* (2001) at 6 – finding that a reduction in pole attachment costs to cable companies will lead to increased deployment of advanced services and "lead to cable services becoming available in some additional low-density rural areas. . . . [Thus creating] even more value for Vermonters as cable TV companies are increasingly offering high-speed Internet service to new customers."