

Carrying Charges

Section 119-a prescribes that cable operators be charged no more than their share of the "actual operating expenses. . .of the utility" relative to the portion of the pole they occupy. The carrying charge issue concerns the statute's intent in referring to "actual operating expenses," or, as Judge Matias framed the issue, "whether the Legislature intended the utilities to recover expenses in their capacity as utilities or whether expenses to be recovered are those of entities merely providing space on a pole."<sup>1/</sup> The utilities proposed the application of company-wide carrying charges in deriving the pole attachment rate, while the Association urged a more selective determination of carrying charges in order to limit cost recovery to those expenses that can be traced to CATV's presence on utility poles. Judge Matias recommended adoption of the former approach, reasoning that if the space provided CATV were used for a utility purpose, company-wide average carrying charges would be applicable in developing a rate. Should CATV operators fall short of meeting this expense, he said, their presence on the pole would be subsidized by utility ratepayers. And, he concluded, "there is no basis for concluding that the Legislature intended profitable, non-utility businesses using utility property to be subsidized by the utilities' customers."<sup>2/</sup>

The Association, the Cable Commission, and NMP except to the recommended decision.

The Association maintains that the Judge's recommendation would charge cable operators for numerous items that bear no relation whatsoever to the provision of space for

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<sup>1/</sup>R.D., p. 94.

<sup>2/</sup>Id., p. 95.

cable television attachments, and thus is assertedly at odds with the intent of Section 119-a. And the Association objects to the Judge's use of the term "de-averaging," claiming it unfairly characterizes its proposal. According to it, the task of establishing a carrying charge always involves selecting expenses to be included, and there is no uniform carrying charge that needs to be "de-averaged," as the Judge implies.

The Association further submits that the Judge's justifications for recommending full carrying charges are unconvincing. First, it characterizes as "ludicrous" his finding that the cable operators' relationship with the pole owner is "tantamount to full partnership." It maintains that in all respects, cable interests are subordinate to those of the utility owners and other utility joint users. More accurately, it says, the cable operator remains in the position of a bare licensee. Second, as to the Judge's conclusion that the rate should be calculated as if the space occupied by the cable attachment were being used for utility purposes, the Association contends that the space is plainly non-utility and must be priced as such. It points out that under the pole attachment contracts, the cable attachment may not deprive the utility from using that space, and that the space may be reclaimed if needed to furnish utility service. And it argues that, by definition, CATV uses only "excess space" on the utility pole, and claims that any revenues derived by the utility in excess of avoidable costs would be a windfall in that no additional investment is required.

The Association's position is that language in the statute limiting the cable operator's liability to expenses "attributed to that portion of the pole. . .used" should be viewed as restricting expenses chargeable to cable operators "to those directly related to making space available for the cable attachment."<sup>1/</sup> As support for this interpretation, it points out that the Federal Communications Commission (FCC) reached a similar construction in examining corresponding language in the federal statute.<sup>2/</sup> Relying on the FCC's findings, the Association objects to including in the carrying charge any accounts not included by the FCC in its determination of pole attachment rates.

The Cable Commission largely echoes the sentiments of the Association, arguing on exceptions that the Judge's recommendation would result in a charge to cable television operators for items, such as advertising and sales expense incurred for the provision of utility service, that have nothing to do with the provision of pole space for cable television. It urges that the recovery of maintenance expenses allocated to CATV operators should be adjusted to reflect an exclusion of items such as advertising and sales.

NMP's exception concerns the inclusion of short-term debt in the sample carrying charge calculation set out in the appendix to the recommended decision. NMP suggests instead that the rate of return approved in the utility's last rate case be used in this calculation, and submits that short-term debt should be considered only to the extent it

1/Association's Brief on Exceptions, p. 41.

2/Although no party responded directly to this argument, the utility parties generally consider FCC precedent distinguishable in light of that agency's lack of regulatory responsibility over electric utilities. Thus, the argument goes, the FCC views CATV interests as paramount to the interests of utilities in recovering their costs.

is included in the rate of return last approved. A review of the sample calculation included in the recommended decision, however, shows that this is the precise procedure envisioned by the Judge.<sup>1/</sup> Accordingly, no revision of the Judge's proposal on this point is warranted.

In response to the Association's and the Cable Commission's exceptions, staff concedes that the level of certain administrative and general expenses may be independent of CATV attachments. But it submits that other costs to utilities arising exclusively from cable attachments, such as productivity impairment, added administrative effort, and other "avoidable" costs, are not recovered in carrying charge rates. Thus, it claims, the Judge's approach represents a "good overall balance" that would minimize the inequities to any party.

In its response, NYT argues that the average carrying charge calculation ideally should be modified to reflect known instances where certain expenses attributable to CATV are either greater or less than average. But it submits that the Association proposes to refine the development of carrying charges only to reduce costs, ignoring those instances where the costs relating to CATV are greater than the average. As an example, NYT cites the additional field administration and headquarters administration costs resulting from CATV attachments. Rochester Telephone also opposes the Association's exception, describing it as a "process of picking winners and then averaging away losers."<sup>2/</sup> In any event, NYT concludes, given the substantial disagreement among the parties over the manner by which data could be developed to identify more precisely the costs caused by CATV attachments, "the simplest and most reliable method" of calculating pole attachment rates is through use of its unmodified carrying charges.

<sup>1/</sup>See R.D., Appendix F, p. 3, Footnotes 1 and 2.

<sup>2/</sup>Rochester Telephone's Brief Opposing Exceptions, p. 10.

RG&E, for its part, also supports the Judge's recommendation, claiming that the accounts to which the Association objects are clearly part of a utility's general cost of doing business. Although these accounts admittedly do not relate exclusively to poles, says RG&E, that is not to say that these accounts are unrelated to the provision of pole space, as the Association contends. Finally, Con Edison decries the Association's reliance on accounting categories as the basis for excluding certain costs from carrying charges. According to it, such categories cannot represent with total precision the way a utility operates, and their use runs the risk of excluding every category that is not on its face applicable to cable television. It urges adoption of Judge Matias' recommendation, contending that although some unrelated items may be included, they are offset by the denial of the utilities' rights to bill separately for certain costs that are incurred solely because of the presence of cable television on poles.

We agree with staff and the utilities that the Judge's recommended resolution of this issue provides a sound basis for determining annual carrying charges. As these parties point out in their replies, the additional refinement sought by the Association should, by rights, include not only those instances cited by the Association where costs caused by CATV are less, but also situations where costs relating to CATV are greater than average. The net effect of these revisions in all likelihood would produce a carrying charge calculation not materially different from that recommended by Judge Matias. Thus, like the calculation of pole investment, this appears to be an instance where the potential administrative costs associated with the increased precision outweigh its benefits. Given our interest in making the pole attachment rate-setting procedure as self-executing as possible, it is a refinement that we are unwilling to adopt. Accordingly, the Association's and the Cable Commission's exceptions are denied.

In a related issue, NYT seeks to supplement the calculation of carrying charges with the consideration of certain avoidable costs that it claims are not reflected in the development of company-wide average carrying charges. Specifically, it cites the costs of productivity impairment--resulting from diminution of productivity in the performance of telephone work due to the presence on the pole of third party attachments--and added right-of-way acquisition activity incurred by the utilities as the result of the presence of CATV on the utilities' poles. Judge Matias recommended rejection of NYT's proposal, citing three reasons:

- (1) The difficulty in measuring or developing an acceptable estimate of such costs.
- (2) His earlier conclusion that average company-wide carrying charges should be employed in cost development.
- (3) His observation that most direct utility costs associated with CATV attachments are reimbursed through inspection and make-ready fees.<sup>1/</sup>

On exceptions, NYT submits that the Judge's reasoning is unpersuasive. First, it says, these additional costs can be accurately identified and incorporated into our decision. Second, reliance on average company-wide carrying charges is no response to its argument, it says, inasmuch as these additional costs assertedly are not reflected in average carrying charges. And, third, it submits that these costs are not recoverable through make-ready charges or

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<sup>1/</sup>R.D., p. 109.

inspection fees, either. The exclusion of these two items from development of a pole attachment fee, NYT concludes, would deny utilities the recovery of their costs, to the detriment of their customers.

The Association argues in response that combining avoidable and fully allocated costs would be improper as a matter of rate design in that these methods of setting rates are based on entirely different theories. With respect to the costs cited by NYT in particular, the Association maintains that avoidable costs are not sufficiently measurable to be the basis for setting rates in this proceeding. The productivity impairment and right-of-way expenses, it says, are "wholly speculative, unproved, and disputed."<sup>1/</sup>

We shall deny NYT's exception as well, largely for the same reasons as those discussed above. The approach recommended by Judge Matias, while not picking up all of the instances where CATV-related costs depart one way or the other from company-wide average carrying charges, nonetheless provides a good overall solution that minimizes the inequities to any affected interest. Moreover, the costs cited by NYT do not seem worthy of special consideration, for the Association has drawn into question the reliability of their estimation.<sup>2/</sup> Accordingly, company-wide average carrying charges will be used in deriving pole attachment rates, as recommended by the Judge.

<sup>1/</sup>Association's Brief Opposing Exceptions, p. 12.

<sup>2/</sup>See S.M. 4967-68, 5521-22.

Usable Space

Universe of Poles and Pole Attachment Survey

Judge Matias recommended rejection of the Association's contention that the universe of poles to be considered in calculating usable space be limited to those poles that currently contain CATV attachments. Evidence in the proceeding showed that poles with CATV attachments are longer on the average and contain more usable space; thus, the effect of limiting the universe in the manner suggested by the Association would be to increase the amount of usable space, thereby lessening the portion of the pole for which CATV operators would be responsible. Judge Matias concluded, however, that use of the limited universe was supported by "no compelling rationale other than the fact that it is a population of poles with characteristics favoring the Association's position in this proceeding."<sup>1/</sup> Given that this proceeding was designed to develop a cost formula to govern the establishment of rates for CATV attachments for not only those poles to which CATV attachments have been made in the past, but also those to which attachments will be made in the future, said the Judge, the proper universe is all poles. He therefore turned to the pole measurement and attachment survey submitted by NYT.

This survey presented data in four general categories--pole data, measurements, appurtenances, and pole design--drawn from over 12,000 randomly selected poles. Of importance to this issue are the measurement category, which includes information on pole height; and pole design category, which includes data related to required clearances and separations between electric and communications conductors

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<sup>1/</sup>R.D., p. 98.

at the pole and at mid-span. In calculating usable space, NYT surveyors compared the actual pole and mid-span measurements to the minimum allowable National Electrical Safety Code (NESC) standards for separations and ground clearance. On the basis of this comparison, certain adjustments were made through field measurements. Specifically, where attachments appeared to deviate from clearance and separation requirements without an acceptable reason, the computer model adjusted the clearance or separation. In the survey, 6,787 poles required minimum clearance adjustments and the average adjustment increased clearance space requirements by one foot, five inches. Separations adjustments were applied to 3,711 poles, and the average adjustment increased neutral space--the clearance that must be maintained between line conductors with different characteristics, i.e., primary and secondary line conductors and communications conductors--by 2.1 inches. NYT contended that the proper determination of usable space requires that pole measurements reflect conditions as they should be in order to comply with minimum NESC requirements.

In discussing the survey results, Judge Matias expressed concern over the proposed adjustments inasmuch as they disproportionately decreased usable space. In light of the Association's convincing argument on the credibility of the adjustment process, he said, the adjustments must be seen as "questionable." He therefore recommended that the pole measurement and attachment survey be accepted in part and rejected in part. Specifically, said the Judge, that part of the survey including measurements and factual observations should be accepted as the basis upon which to calculate usable space on a statewide basis. But he recommended rejection of

all clearance adjustments, maintaining instead that observed minimum attachment levels--the actual rather than adjusted minimum height--be regarded as minimum grade levels for purposes of determining usable space under Section 119-a.<sup>1/</sup>

On exceptions, the Association and the Cable Commission object to the rejection of the Association's proposal to limit the pole universe to those poles currently used for cable attachments. And Rochester Telephone, RG&E, and NMP except to various aspects of the Judge's treatment of the pole measurement and attachment survey.

The Association maintains that as a matter of simple logic we must look to those poles on which cable attachments are actually made rather than all utility distribution poles in the state. Furthermore, it says, the language of the statute itself requires this approach. Because Section 119-a refers to actual expenses of the utility "attributed to that portion of the pole. . .used," it reasons, the poles actually "used," and not those that can be used, are relevant.

The Association further takes issue with the Judge's use of the measured height of the lowest line attachment as an approximation of the minimum grade level. Although this approach would be acceptable if the pole universe were limited to poles bearing a cable television attachment, it says, it is not acceptable when applied to all poles because attachments on other poles are typically well above the NESC minimum. According to the Association, the attaching of CATV to a pole containing only power attachments will itself lower by at least 3.3 feet the

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<sup>1/</sup>The statute provides that "usable space shall be the space on a utility pole above the minimum grade level which can be used for the attachment of wires and cables."

measured height of the lowest attachment, as shown below in Table 1:

TABLE 1

<u>Type of Pole</u>	<u>Average Height of Lowest Attachment</u>
Poles <u>with</u> CATV attachments	18.45'
Poles <u>without</u> CATV attachments	21.14'
All poles	20.38'

Similarly, says the Association, the average pole to which CATV is attached is also over a foot taller than the average to which CATV is not attached, as shown below in Table 2. For the reasons described above, it says, only poles with cable attachments should be considered in determining pole height.

TABLE 2

<u>Type of Pole</u>	<u>Average Pole Height</u>
Poles <u>with</u> cable attachments	38.20'
Poles <u>without</u> cable attachments	36.86'
All poles	37.24'

It should be recalled that the practical result of lowering the height of the lowest line attachments or increasing the height of the average pole is to increase the space classified as usable, thereby reducing the "use ratio" of pole costs for which CATV operators are held responsible.

Finally, the Association points out that the FCC uses the average pole with a CATV attachment in applying the federal statute to determine pole attachment rates. In Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Company of West Virginia, on reconsid., 85 FCC 2d 243, 246 (1981), the FCC stated:

The average pole height and the average-total-usable space vary, depending on the presence or absence of attachments. Since pole attachments are not generally made to very short or very tall poles, we must consider only poles with attachments.

The Cable Commission, too, submits that it would be "inequitable" to make a determination as to average usable space by including poles without CATV attachments given that the attachment of cable television wires to a pole significantly lowers the height of the lowest measured line attachment. It should be kept in mind, it says, that cable television operators only pay for poles to which they are actually attached. Furthermore, the Cable Commission submits, the statute limits the pole attachment rate to costs relating to that portion of the pole used.

Staff, in responding to the Association's and the Cable Commission's exceptions, supports the Judge's recommendation to base pole attachment rates on the characteristics

of all utility poles available for cable attachments. It points out that the Association's advocacy of a limited universe of poles in determining usable space contradicts its preference for use of a total pole universe in determining average investment per pole--a position whose adoption would have served its interests by decreasing pole investment as the lower costs of the shorter poles were reflected. Staff also argues that limiting the universe of poles as proposed by the Association would be impractical given the difficulties of determining the characteristics of that universe over time with the rapid growth of cable television. The universe of all utility poles, on the other hand, grows at a much slower rate, staff submits.

In its reply, NYT challenges the Association's contention that the language of the statute limits the universe of poles. In fact, it says, the "actual operating expenses" referred to in the statute are a function of the poles to which CATV may reasonably be expected to attach during a future period and, thus, usable space must be defined by reference both to those poles to which CATV operators are now attached and to those poles to which they may attach in the future. Second, NYT claims that the difference in minimum attachment heights between poles with and without the cable attachments, cited by the Association, is unsurprising; the disparity arises, it says, because poles without cable attachments are generally located in more rural areas with a greater span length between poles, which forces the company to attach the cable higher on the pole in order to meet minimum NESC requirements at mid-span. Third, it dismisses the Association's suggestion that the character of poles to which CATV is likely to attach will be

closer, for at least seven years, to today's average pole with CATV attachments than today's average of all poles. According to NYT, CATV can be expected to attach to a significant number of shorter poles within the near future; as a result, the average usable space on those poles to which CATV will be attached by mid-1983 will be closer to the average of all poles in the survey. Finally, NYT submits that the FCC precedent cited by the Association provides us no guidance on the resolution of the issues in this case. It argues that the FCC's interpretation would have applied had the New York Legislature not provided for state regulation of pole attachment rates; but the enactment of the state statute "shows an intent by the Legislature not to have rates in New York determined by the FCC."<sup>1/</sup> Moreover, it goes on, Section 119-a includes a definition of "usable space" substantially different from the federal statute.

Other utility parties also responded to the Association's exception, echoing a number of NYT's arguments. In addition, Rochester Telephone advises that on the basis of its experience, poles to which CATV companies have attached have less usable space than the average Rochester Telephone pole; it thus challenges the Association's contention that cable interests would be prejudiced by not limiting the universe of poles. RG&E similarly claims that the Association has failed to show that the presence or absence of CATV is the determining factor with regard to pole size or minimum attachment height. Like NYT, it submits that the differences cited by the Association relate more to where CATV has already developed than to any unique

<sup>1/</sup>NYT's Brief Opposing Exceptions, p. 16.

characteristics of poles to which CATV attachments are made. RG&E also rejects the Association's interpretation of Section 119-a as unreasonably restrictive. It contends that the reference to the "portion of the pole. . .used" is intended in a generic sense rather than in the limited past tense meaning urged by the Association, and that the latter interpretation would ignore the fundamental precept of our ratemaking function, which is to establish rates for the future.

As Table 3 below shows, limiting the universe of poles in the manner suggested by the Association, because it would increase the amount of space characterized as usable, would substantially decrease the fraction of that space attributable to CATV operators.

TABLE 3

	<u>Recommended Decision (All Poles)</u>	<u>Association (Only Poles With CATV Attachments)</u>
CATV Portion of Usable Space	12.29%	9.98%

The Association's arguments in support of such a reduction, however, are unconvincing. First, logic argues not for the Association's position, but in favor of the Judge's recommendation to look to all poles in defining usable space. For given that the ratemaking procedure prescribed here will operate prospectively, it makes sense to consider all distribution poles available for CATV attachments now and in

the future. Second, as a matter of statutory construction, the phrase "portion of the pole. . .used" does not explicitly say whether the pole universe should be restricted to those poles currently used. Although the Association emphasizes the past tense meaning of "used" in support of its position, a better argument can be made that a rate formula to be applied prospectively should not be based solely on pole attachments that already have been made. Third, as staff suggests, it would be inconsistent to look to the entire universe of poles to determine average investment (as we have done) but to consider a smaller sample for purposes of determining usable space. Finally, and most fundamentally, the Association has not established that the presence or absence of CATV attachments in and of itself explains the difference in observed heights. As RG&E and NYT point out, the difference can just as easily be attributed to development of CATV thus far in urban areas, where the poles are generally taller, and its absence in rural areas, where shorter poles are prevalent. Thus, the difference between poles with and without CATV can be viewed geographically, and, as cable moves to rural areas, the disparity can be expected to decline. Accordingly, Judge Matias' recommendation that all poles be considered is sound, and we shall adopt it.

Turning to the parties' discussion of the pole measurement and attachment survey, Rochester Telephone, RG&E, and NMP each object to the Judge's recommendation to use the measurements and factual observations "as the basis upon which to calculate usable space on a statewide basis."<sup>1/</sup> They claim that the books and records of each utility will provide more accurate information concerning pole size, and

<sup>1/</sup>R.D., pp. 107-108.

submit that the only instance in which a utility should be required to rely upon survey results for such data is where the utility's books and records do not provide sufficient information. They urge that the recommended decision be modified to permit the utilities to use their own books and records in preference to survey results for such information.

In response, the Association opposes Rochester Telephone's and NMP's proposal to use the survey results to determine the minimum grade level but not the pole height for usable space purposes. Using the average pole in the utilities' pole investment account rather than survey results, says the Association, would fail to appreciate the recognized correlation between pole size and minimum attachment height; it submits that the use of shorter poles normally reflects lower minimum grade requirements. It would thus be improper, it says, to mix survey results with actual utility records.

Staff, in its brief opposing exceptions, agrees with the utility parties that actual data from plant records, if available in a usable format, would be superior to data derived from survey measurements.

Considering that pole size varies substantially from utility to utility and between jointly and solely owned poles, we agree that it may be somewhat imprecise to impose the statewide pole size data on every utility, at least where utility-specific books and records provide more precise information. Moreover, such an approach would be to some extent inconsistent with the use of individual utilities' investment data, which reflects different pole sizes. Accordingly, we shall modify the recommended decision to

allow the utilities to rely upon the more accurate information contained in their records.<sup>1/</sup>

Neutral Space

This issue concerns the proper classification of the 40 inches of "neutral space" separation required between electrical conductors and communication lines under the NESC. The utilities argued that neutral space is space that cannot be used for the attachment of horizontal wires and cables and therefore cannot be classified as usable. The Association, on the other hand, contended that all space above minimum grade level is usable space. It pointed out that street lights and other non-line attachments often are attached in neutral space and the utilities gain considerable revenues from such attachments. It also cited an FCC decision in which that agency adopted the same conclusions regarding usable space that the Association urges here.

Judge Matias viewed the FCC precedent as inapplicable to this proceeding. First, he claimed that the FCC has displayed an interest in fostering CATV's development, and accordingly, has interpreted usable space in the federal statute in a manner suggestive of a promotional rate policy. The CATV industry in New York State, on the other hand, does not require such promotional rates to ensure growth and development, he reasoned. Second, he found that the conclusions reached by the FCC regarding responsibility for neutral space were unsupported by the record evidence developed in this proceeding. Specifically, unlike the FCC, Judge Matias found that neutral space is generally of no

<sup>1/</sup>The asserted problem of mixing distinct data sources referred to by the Association does not appear to have any significant consequence, and we believe does not prevent a refinement of the recommended method.

practical benefit to the utilities. The determining factor, he said, is that adequate separation is required; and the presence or absence of any pole-grounded piece of equipment has no bearing on this fact. Rather, he said, the usability of this space depends upon whether it can be used for the attachment of utility distribution conductors or communications cables, and the neutral space, he concluded, could not be so used. Judge Matias also rejected the second rationale cited by the FCC in reaching its conclusion--the responsibility of CATV operators for pole replacement when neutral space cannot be maintained after subsequent utility attachments. As a practical matter, said the Judge, the risk of pole replacement for CATV operators appears to be very slight on the basis of the evidence developed here.

Turning to the construction of the New York statute, Judge Matias found that the Legislature's definition of usable space was clearly different from that urged by the Association. The statute provides that "usable space shall be the space on a utility pole above the minimum grade level which can be used for the attachment of wires and cables." The last phrase is particularly important, said the Judge, for it establishes that usable space and space above minimum grade level are not the same. Thus, he said, the Association's position that all space above minimum grade level is usable space is unsupported. The Legislature's clear intention, it appears, was to define usable space in terms of the space available for the attachment of horizontal wires and cables, which, by definition, does not include neutral space. Accordingly, Judge Matias recommended that all NESC-required separations be excluded from the calculation of usable space.

The Association, the New York Cable Commission, NYT, RG&E, and NMP each except to the Judge's recommendation.

The Association challenges Judge Matias' discussion of the FCC precedent. First, it says, there is nothing in the FCC's action to suggest that it intended to promulgate promotional pole attachment rates. Second, the Association argues that the FCC properly gave weight to the cable operator's obligation to maintain the neutral space. Although Judge Matias dismissed the risk of pole replacement as insignificant, the Association maintains that given the responsibility of cable operators for maintaining neutral space, that space should not be classified as unusable by the utilities. It points out that if the utility desires to use the space, it does so, and the cable operator is required to relocate his wires.

The Association also reasserts its contention that New York utilities gain significant revenues from their use of the neutral space for street lighting attachments. It claims that if the neutral space is excluded from usable space, the utility is provided a double recovery for it, an asserted clear subsidy of utility ratepayers by CATV and street light users. Finally, the Association disputes the Judge's interpretation of the New York statute. It submits that Judge Matias failed to distinguish between the evidence introduced here and the facts before the Legislature at the time Section 119-a was enacted. According to the Association, there is no indication that the Legislature knew in 1978 what this case assertedly has established--that all space above minimum grade level is in fact usable for the attachment of wires and cables. Accordingly, the Association maintains the statutory language cited by the Judge simply reflects

the Legislature's view that the issue should be left open. The Cable Commission, in its exception, reiterates many of the arguments asserted by the Association.

NYT's exception objects to the Judge's use, in computing the amount of usable space on a pole, of 40 inches as the amount of neutral space. In doing so, it says, the Judge has failed to recognize that the required NESC separation between power and communications facilities could be 40 inches or 60 inches, depending on the nature of the specific electric facilities on the pole. NYT would substitute a composite requirement of 44 inches, which it computed on the basis of survey data.

RG&E's and NMP's exceptions argue that neutral space should be treated in a manner fundamentally different from that recommended by the Judge. Specifically, they propose treating all required neutral space on sole-use electric poles to which cable attaches as space "used" by cable because before cable attachment there were no neutral space requirements. Accordingly, they claim that CATV concerns should bear responsibility for the entire 40 inches of neutral space, and urge that the Judge's method be modified to permit the electric utilities to establish separate attachment rates for solely owned electrical utility poles.

In its brief opposing exceptions, staff urges adoption of the Judge's recommendation. As to NYT's exception, staff concedes that 60 inches of neutral space may be required where only primary electric distribution facilities are involved. But because power companies can and may at any time add secondary distribution wires to these poles--which reduces the neutral space requirements to 40 inches--staff

contends that the Judge's proposed 40-inch measurement need not be adjusted. Staff similarly urges rejection of RG&E's and NMP's proposal to charge cable operators for the neutral space. It submits that neutral space requirements apply irrespective of CATV attachments, as NESC ground clearance requirements are generally higher for power cables than for communication cables.

The Association also opposes the utility parties' exceptions. It dismisses NYT's exception on the ground that the separation required between certain power facilities and communication lines can be considerably less than the 40-inch standard used by the Judge. Specifically, it notes that grounded transformers may be placed 30 inches above communication lines, and grounded street lights may be placed as close as 4 inches to the communication lines. RG&E's and NMP's exceptions are "simply wrong," it says, and ignore all the revenue-generating attachments that may be placed in the neutral space. Moreover, the Association emphasizes that the utilities have universally reserved for themselves the right to use the neutral space at any time, and to require the cable operator to move, or remove, his attachment.

In response to the Association's exception in favor of including neutral space in the usable space calculation, the utility parties argue generally that (1) neutral space is of no benefit to utilities in that no additional lines can be placed therein; (2) the risk cable operators incur in maintaining the neutral space is insignificant given the infrequency with which CATV operators have been required to replace a pole; (3) the plain meaning

of the statute, with its reference to "attachment of wires and cables," defines the usability of neutral space in terms of horizontal attachments, thus excluding consideration of vertically placed street light supply wires; (4) the FCC precedent is irrelevant given the inclusion in the federal statute of language allowing the consideration of street lighting brackets; and (5) the FCC precedent is suspect in any event due to the degree of paternalism for CATV operators and disregard for utility ratepayers that pervade the federal regulatory scheme, factors that are not present in this proceeding.

Table 4 below shows the approximate effect on the use ratio of the alternative treatments of neutral space.

TABLE 4

	<u>Recommended Decision (Neutral Space Excluded From Usable Space)</u>	<u>Association's Method (Neutral Space Included in Usable Space)</u>
CATV Portion of Usable Space	12.29%	9.43%

Although we agree with the Judges's conclusion that the FCC's findings on this issue are not instructive to us, we are unconvinced by other aspects of the Judge's recommendation on this issue. First, we find little support in the record for the suggestion that particular significance should be tied to the language in Section 119-a referring to the attachment of wires and cables. Though differences between the state and federal statutes are noteworthy, in the absence of some evidence regarding the Legislature's interest in enacting the state provision, we are unwilling to assume that

the "wires and cables" referred to in the state statute were intended to restrict the usable space to areas available for horizontal wires and cables. Second, the presence of revenue-producing attachments in the neutral space, while not dispositive, nevertheless argues for including the neutral space as usable. Finally, that the parties agreed cable operators should be held responsible for one foot of usable space,<sup>1/</sup> when in fact cable attachments occupy only about three inches of space, suggests that some portion of neutral space is being charged to CATV. In these circumstances, where a portion of neutral space is already included in the numerator of the use ratio, it is only equitable that neutral space be included in the denominator as well, by counting it as usable area. Accordingly, we shall grant the Association's exception on this point.

The exceptions of the other parties are denied. As to NYT's argument that neutral space should be expanded to 44 inches, staff points out that the addition of secondary distribution lines to poles--a common occurrence--reduces the neutral space requirement to 40 inches. And, as the Association notes, the clearance in other circumstances may be less than 40 inches. The exception of NMP and RG&E--which proposes to charge the 40 inches of neutral space as used by CATV--is without merit, for neutral space requirements arise irrespective of the presence of CATV attachments.

Pole Top

At issue is the usability of the top few inches of the pole. The utilities had argued that because of rotting and splintering problems, the top six to nine inches of a pole were not usable. The Association, pointing to the use

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<sup>1/</sup>See p. 12, supra.

of pin top fixtures and extensions that would permit an attachment above the top of the pole, contended that usable space should include the full length of the pole above minimum grade level. The utilities countered that even where extension pins are used to make a partial use of that space, they are normally placed at least five inches from the top of the pole; accordingly, half of the top ten inches of the pole would still be unused.

Judge Matias concluded that the top of the pole in fact was frequently used for attachments, and at least a portion of it, therefore, should be included as usable space. Given the "possibility of rotting and splintering" in the top five inches of the pole, however, he recommended that five of the ten inches of pole top be regarded as unusable and excluded from usable space. The Association and the Cable Commission except to this recommendation.

The Association maintains that the top of the pole is routinely used for attachments, and that evidence suggesting otherwise is inconsistent. It also points to evidence concerning the use of pin top and pole extension fixtures that permit utilities to string their lines on or above the top of a pole. Finally, it cites staff's position in the proceeding, which favored the inclusion of pole tops in usable space in light of the widespread use of pole top extensions. The Cable Commission, in its exception, similarly suggests that pole top pins and extenders actually lengthen the pole, creating additional usable space above the top. The Judge's proposal to subtract five inches of pole top from usable space is therefore unjustified, it says.