

The suggestion by some of the utilities that National Merchandising Corp. v. Public Service Commission, 5 N.Y.2d 45 (1959), narrowed the Solomon construction of Commission jurisdiction is, in our view, unfounded. There the Court adopted the Solomon discussion in concluding that the Commission might, upon a proper showing, even regulate covers that might be placed on telephone directories. It concluded, however, that the Commission had erred in approving a ban on advertising covers for directories supplied by third parties since (1) the record did not show any interference with telephone service and (2) the Commission had no authority simply to protect telephone companies from competition with respect to its yellow page advertising where impairment of telephone service was not involved. These findings plainly did not narrow the Solomon analysis. Moreover, the Court's holdings that our jurisdiction over yellow page advertising was limited cannot realistically be related to utility poles. While yellow page advertising may not be "within the scope of an essential public service" (5 N.Y.2d at 490), utility poles clearly are an essential part of the physical plant required to provide the utility service we are explicitly charged with regulating, the cost of which, in contrast with that of yellow pages, must therefore be recovered--except for the contribution from the attachment fees that are the subject of this proceeding--from charges for that service. The record developed in this proceeding demonstrates the need for our exercising jurisdiction over pole attachments.

The revenues that a utility receives from renting pole space to cable operators must be taken into account in fixing utility rates, and used to offset the utility costs that are reflected in the rates paid by other customers.

While two decades ago that contribution may have been de minimis, and might therefore arguably have been ignored by the commission responsible for setting telephone rates, that is no longer the case. For example, the record shows that New York Telephone alone has permitted more than 500,000 attachments, which produce more than \$2.5 million in revenues, annually.

The record in this proceeding shows that, as a result of environmental, legal, and economic restraints, utilities have a virtual monopoly over the pole space that is often a necessity for the operation of a cable system. A utility's relationship to cable operators in its service area is in many ways analogous to its relationship to its other customers, and carries the same potential for undue discrimination and other monopoly abuses. Thus, as a matter of policy, and in accordance with the proscription against unreasonable preferences contained in Sections 65 and 91 of the Public Service Law, we view it important to assume jurisdiction over pole attachment rates and policies in order to ensure that both cable operators and utility customers bear reasonable, but not excessive, shares of the costs incurred by utilities in constructing, maintaining and owning pole plant.

The record recounts a number of instances in which utilities have failed to cooperate with CATV companies that were attempting to construct or expand cable systems; but it does not reveal the extent to which this lack of cooperation has, in fact, impeded the growth of cable television. We find it reasonable to conclude, however, that even if the

misunderstandings and disputes testified to on the record are not representative of utility/CATV relations, such incidents surely have had some negative affect on the growth of cable television. More important, the record shows that utility pole attachment policies have not been well articulated. To a very great extent it appears that utility operating personnel are given broad and undefined discretion to determine pole attachment policy. This creates an atmosphere of uncertainty, makes it difficult for cable operators to plan construction and expansion, and serves to inhibit the growth of cable television. Therefore, we conclude that we should exercise our jurisdiction in this area in order to regularize and formalize utility pole attachment procedures. The greater certainty that our regulation can be expected to produce will benefit utility customers by accelerating the growth in pole attachment revenues and by avoiding individual disputes that can only increase costs, and will, as well, comply with the legislative policy expressed in Article 28 of the Executive Law to promote the growth of cable television.<sup>1/</sup>

The record shows that the potential impact of cable television on utility operations is not limited to financial matters. Cable operators use the same poles that are used to deliver essential electric and telephone service, so that abuses by cable operators can potentially disrupt utility service. Our obligation to assure that the State's

1/Article 28 of the Executive Law established the Commission on Cable Television. The Cable Association contends that Article 28 embodies a clear legislative intent that cable television be promoted. We agree that Article 28 provides us with guidance in exercising the broad jurisdiction that the Legislature had previously conferred on us, although it does not, itself, confer jurisdiction on this Commission.

citizens receive safe and adequate telephone and electric service requires us to do what is in our power to prevent the growing use of utility poles for cable service from interfering with the primary purpose of utility poles--the provision of electric and telephone service. We do not view our role as a passive one of merely waiting for disruption of service to occur; instead, we believe that policies must be formulated and procedures instituted to make certain that the disruption of essential utility service as a result of cable use of utility facilities does not occur.

In summary, our review of the record in this proceeding convinces us that regulation of the use of utility pole space by cable operators is now required in order to assure that the rates paid by the general body of utility customers are effectively regulated, to eliminate potential discrimination against cable television operators, and to avoid potential disruption of utility service. We turn now to a discussion of the specific regulations to be applied to pole attachment agreements.<sup>1/</sup>

#### POLE ATTACHMENT RATES

In December of 1974, New York Telephone Company introduced evidence concerning the proper level of annual pole attachment fees. While the Administrative Law Judge admitted the testimony into evidence, he ruled that the level of attachment fees was not at issue in this proceeding. New York Telephone appealed this ruling. While at this

<sup>1/</sup>While regulation of agreements between utilities and cable operators covering buried distribution facilities may be advisable, the record provides very little evidence on these agreements. The parties are, however, free to supplement the record in this area during the hearings on remand.

stage in the proceeding, New York Telephone's motion is moot, we agree with our Administrative Law Judge's conclusion that opening up the question of the pole attachment rate at the late date proposed by the company could not be justified.

The level of pole attachment fees is, in fact, intimately connected with many other issues raised in this proceeding. The reasonableness of a utility's pole attachment practices can best be judged by reference to the compensation that it receives from cable companies for the service. For example, a pole attachment fee designed to recover all of the utilities' fully allocated costs<sup>1/</sup> might justify giving cable operators all of the rights with respect to poles as other utility users, subject only to the higher priority that exists for the maintenance of telephone and electric service. Alternatively, a fee designed to recover only the utility's avoidable costs, which could be expected to be minimal since most of those costs are the outlays that should be fully recovered in makeready charges, would justify treating cable as a clearly secondary use subordinate in every respect to the provision of electric and telephone service. More likely, the annual pole attachment fee should be set somewhere between avoidable and fully allocated costs in order to avoid inhibiting the growth of cable television and to insure that cable operators and their subscribers

1/On the basis of 1974 data, NYT estimated that the fully allocated cost of a pole attachment was \$13.47 per year. This figure should be compared with NYT's current rental fee of \$5.00 per year, and Rochester's fee of \$7.90 per year. The latter is reputed to be the highest in the State.

make some equitable contribution to the fixed costs of the utility systems they use.<sup>1/</sup>

In view of the fact that the record contains so little discussion of the annual rate for pole attachment rental, this proceeding will be remanded for further development of that issue. The parties should, however, explore the possibility of establishing a pole attachment rate through negotiation, subject to Commission approval, or stipulations of fact, so that protracted evidentiary hearings might be avoided. We now turn to a discussion of various standards for utility pole attachment agreements that we believe can be promulgated now. Those standards are premised on the assumptions that annual pole rental rates will remain substantially below fully allocated costs, and that the connection of cable facilities to utility plant should not be allowed to increase the costs borne by utility ratepayers.

#### STANDARDS FOR UTILITY POLE ATTACHMENT CONTRACTS

The primary substantive issues raised in this proceeding concern makeready work. That work consists primarily of the rearrangement of existing telephone facilities to make room for the addition of a cable pole attachment. Upon occasion, installing a new pole or reconductoring

<sup>1/</sup>In order to accomplish these results, we might consider an annual rental fee based on the number of cable subscribers or the cable operator's annual revenues, rather than on the number of poles used by the cable operator. Such a fee could provide utilities with the same revenues as pole fees, but would maximize revenues from high density, presumably highly profitable, cable systems, while minimizing revenue from low density, presumably less profitable, systems. It would have the virtue of giving utilities a financial stake in the growth of cable television and ensuring some contribution by cable operators to common costs while not hampering the extension of cable service that was capable of covering the bare, marginal costs it imposed on the utility system.

electric facilities may be required before a cable can be attached. For the year ended September 1974, according to New York Telephone Company, roughly 8% of all new pole attachments required some makeready work, but only .05% required replacement of the existing pole. In contrast, a Cable Association witness, an independent contractor engaged in telephone and cable construction, testified that his experience indicated that roughly 20% of all poles required some makeready work. He did not contradict the NYT evidence on pole replacements.

While closely related to makeready work, anchoring and guying has been considered a separate phase of the pole attachment relationship. Whenever additional facilities, whether cable, electric or telephone, are added to an existing pole an additional guy wire may be required to maintain the lateral forces on the pole in equilibrium. The new guy wire may be connected to either an existing or new ground anchor, and the ground anchor may be located on property that is owned by someone other than the owner of the land on which the pole is located. For example, the pole might be on a public right-of-way but the anchor on private land, or the pole might be on one person's property and the anchor on his neighbor's.

#### Makeready Work

Most of the controversy over makeready work concerns the allegation that New York Telephone systematically underestimates its cost before doing the work, but then charges cable companies at least the greater costs it actually incurs. There were fewer complaints about Niagara Mohawk Power Corporation's practice of billing cable companies for the

estimated cost of makeready work regardless of what the actual cost turns out to be. Staff proposed that makeready work be charged at a flat rate per pole derived from the utility's construction experience in the previous year, regardless of the actual costs of performing a particular job.

The record shows that while New York Telephone's estimates of makeready costs are reasonably accurate in the aggregate, substantial underestimates and overestimates have occurred in specific cases. While a flat rate for makeready work, as proposed by staff, would add predictability to cable-utility relationships, and avoid much of the controversy relating to inaccurate estimates evidenced in this record, it would require a relatively cumbersome procedure for its administration. Instead, we conclude that the problems highlighted by this record can be adequately dealt with by requiring every utility to perform makeready work at the price it originally estimated, and to which the cable operator agreed, regardless of the actual, final cost of any specific project.<sup>1/</sup> In order to protect utility cash flows, cable companies may be required to pay for makeready work 30 days before the commencement of a specific project.

Under existing practices, NYT adds a flat 10% to the already fully allocated cost of makeready work. Moreover, when outside contractors are used, the work is billed at NYT's labor rates regardless of the actual cost incurred by the telephone company. The company claims that there are

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<sup>1/</sup>In those instances, where a utility and cable operator disagree about the reasonableness of an estimate, our staff will be directed to mediate. In those circumstances which staff mediation does not resolve the dispute, the matter will be referred to the Commission for resolution.

overhead costs not covered by its allocations, and that when it acts as a contractor it is entitled to a reasonable profit for the services it performs. The record indicates that utilities may be overly reluctant to engage independent contractors to perform makeready work even though use of independent contractors could expedite scheduling and reduce costs. As staff points out, however, since the utilities have primary responsibility for the safety and reliability of their telephone and electric plant, it could well be imprudent to direct them to make more use of contract labor. We conclude, therefore, that a modest markup, of 10%, on all makeready work performed by independent contractors would provide the best balance, compensating the utilities for any unallocated administrative costs they incur when outside contract labor is employed, and providing them with some incentive to use such labor, where they conclude this would be consistent with their responsibility to maintain properly the condition of their plant. Such markups may be included in calculating the utility's estimate for makeready. For makeready work, performed by utility employees, only those costs allocable to the work, under the utility's normal accounting practices, without any markup, shall be included in any estimate.

Staff proposed a program under which New York Telephone would be obligated to prepare for attachment up to 2,000 poles in any construction district if an application is submitted to it at least five months prior to the desired date of physical attachment, while work in excess of 2,000 poles would require notification further in advance. The recommendation was made on the basis of New York Telephone's performance in a few isolated instances, and has no applicability

to other utilities. In lieu of this proposal, we shall require each utility (or each utility construction district)<sup>1/</sup> to determine how much notice it requires, and how many poles it can makeready per month.<sup>2/</sup> In addition, each utility shall establish a procedure to allocate makeready work among different cable companies where the aggregate poles sought to be made ready for a month exceed its capabilities.<sup>3/</sup>

The Cable Television Association also objects to New York Telephone's policy of charging for such additional rearrangement work as may be required after cable facilities are installed to make space for new telephone facilities that could have been installed without makeready work but for the cable attachment. New York Telephone argues that this practice benefits CATV, since without it the company would be required to make a more comprehensive initial projection of makeready requirements, which could result in greater makeready costs and a greater number of pole replacements. As long as cable rentals appear to be substantially less than fully allocated costs, we believe that a cable operator is entitled to little, if any, permanent right in his attachment, and that it is reasonable to charge him for any

1/An underlying problem raised by the Cable Association is that New York Telephone's policies vary between construction districts depending primarily on the personnel in charge. The system of published rules that we are instituting here should alleviate this problem.

2/Any party who is dissatisfied with a specific utility's makeready scheduling practice may file a complaint with the Commission.

3/A first come, first served, allocation could conceivably lock new cable companies out of a utility's service area for inordinate lengths of time. In such a situation, an allocation based on each cable company's potential number of pole attachments might be preferable.

makeready costs later incurred by the telephone company. In order, however, to ensure that utilities make reasonable and careful projections of future needs when planning the initial makeready work, they will be prohibited from charging for additional makeready work when it occurs within two years of the performance of initial work.

Pole Replacements

Staff proposed that, in instances where poles must be replaced in order to accommodate CATV facilities, CATV companies should be permitted to own a joint interest in those poles, either by purchasing the interest from the utilities, or by placing the poles themselves and charging the other occupants a pole attachment fee.<sup>1/</sup> Staff also contends that charges to a cable company for a new pole should be reduced to reflect accumulated depreciation. In contrast, the utilities argue that they, in fact, receive no benefit from the new pole because the actual useful life of poles, in contrast to their useful life for accounting purposes, is indefinitely long, and the additional usefulness of a single taller pole in a line of shorter poles is minimal. For the most part, to the extent that the utilities' assertion that a pole replacement only minimally extends useful life is correct, that fact will be reflected in their mortality studies. Accordingly, we conclude that where a cable attachment requires a utility pole to be replaced, the cable operator should pay the cost of rearranging utility facilities plus the

<sup>1/</sup>In view of the fact that pole replacements constitute such a small portion of pole attachments (estimated by New York Telephone at .05%), and that the cable companies have shown little enthusiasm for staff's proposal that they be the owners of replacement poles, we find that little would be gained by adoption of it.

installed cost of the new pole and any removal costs reduced by the percentage depreciation applicable to the old pole, less any salvage value of the old pole.

### Anchoring and Guying

When additional facilities are added to an existing pole, additional guying may be required in order to balance the stresses on that pole. In some circumstances, the additional guying may be accomplished by using existing guy wires or existing anchors, while in others, new guys or anchors may be required. The record shows that New York Telephone's policy has been to require CATV companies to install their own guys and anchors whether or not existing telephone guys and anchors can be altered to meet the new stress put on the pole by the cable facilities. The Telephone Company argues that allowing cable companies to use its spare anchoring or guying capacity would make the provision of telephone service more expensive in the long run if that capacity is ever needed for new telephone facilities.

Staff proposes that New York Telephone be required to rent spare anchoring and guying capacity to cable companies for an annual rental equal to the pole attachment rental times the ratio of anchoring and guying costs to the total installed cost of a pole. We conclude that anchoring and guying are responsibilities that must be imposed on the owner of pole plant. The fact that cable operators make use of a pole and increase guying and anchoring requirements justifies charging them for the costs this imposes on utility systems, but does not relieve the utility from its primary responsibility for physical integrity of pole plant. Accordingly, utilities will be required to ensure that their poles be

properly guyed, either by the utility or cable operator, and will be permitted to charge either an initial or annual fee to compensate them for any additional anchoring or guying costs incurred as a result of a cable placement.

#### Right-of-Way Acquisition

Most CATV companies have the legal right to condemn easements needed for the construction and operation for their distribution facilities. Typically, they use existing utility rights-of-way, and rarely bother to notify the property owners of the new use. In Hoffman v. Capitol Cablevision Systems, Inc., 82 Misc.2d 986 (Sup. Ct., St. T., Albany Cty., 1975), affirmed \_\_\_ A.D.2d \_\_\_ (3rd Dept., 1976), the Court held that an easement which granted NYT and Niagara Mohawk the right to construct and maintain "lines . . . and appurtenances for the distribution of electricity and messages upon, under, along and across" the complainant's property permits a CATV installation where it would impose no additional burden on the complainant's land. Thus, in a large, but unknown, number of cases, CATV pole attachments are permissible without the consent of the owner of the land on which a pole is located. The record indicates that the cable right-of-way acquisition is often a problem when additional anchoring facilities must be installed.<sup>1/</sup>

Most of the utilities claim that they have little or no obligation to help cable systems obtain additional rights-of-way that may be required in constructing cable distribution systems. They argue that participation in

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<sup>1/</sup>We view anchoring and guying as primarily an obligation of the owner of the pole. It is the pole rather than the attached facilities that must be guyed. See p. 15, supra.

cable right-of-way acquisition dissipates their good will in the communities in which they do business, and can result in their taking the blame for acquisition abuses perpetrated by cable operators.

Though utilities will not be required to devote any additional effort to obtain needed rights-of-way for cable operators, any utility which chooses to do so will be compensated by permitting the fully allocated cost of such efforts to obtain easements for a cable operator to be billed directly to the cable operator for whose benefit such efforts were made. Moreover, since cable operators must be fully responsible for any damage done by their employees during the construction or operation of cable facilities, utility pole attachment agreements should require cable operators to indemnify utilities for any damages legally imposed on the utility as a result of their acts or those of their agents.

#### Post-Construction Surveys

The charges made by New York Telephone for inspecting cable facilities after construction in order to determine whether they comply with safety and operating requirements are contested by the Cable Association. It claims that such inspections are of joint benefit to the cable and telephone company, because it enables NYT to determine whether its own facilities comply with applicable standards. In contrast, New York Telephone argues that it needs no inspection because its facilities are continuously investigated by its employees in the ordinary course of their work. Staff suggests, and we agree, that the cost of an initial post-construction inspection be recovered in the utility's charges for makeready

work, but that the cost of any periodic, future inspections, if any are needed, should be recovered in the annual license rental. The latter part of staff's proposal, which relates to the annual license rental fee, will, of course, have to await our proceedings on remand.

The Commission orders:

1. Each electric and telephone corporation doing business in this State shall file a proposed pole attachment agreement, which is consistent with this Opinion and Order, and which the utility intends to offer on a nondiscriminatory basis to all cable television operators legally entitled to do business within its service territory. Each proposed agreement shall include, or be accompanied by, the utility's procedures for scheduling makeready work. Telephone and electric corporations with annual revenues from New York State operation in excess of \$75,000,000 shall submit their proposed agreements within 60 days of this Order, while those with lesser annual revenues should submit their filings within 120 days of this Order. Copies of all filings shall be served on the New York State Commission on Cable Television, the New York State Cable Television Association or any person requesting one.

2. This case is remanded for further proceedings consistent with this Opinion and Order.

3. This proceeding is continued.

By the Commission,

(SEAL)

(SIGNED)

SAMUEL R. MADISON  
Secretary