

Pole Attachments and the Telecommunications Act of 1996

A Practical Guide for Electric Utilities

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A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. 47 C.F.R. 1.1403(a).

I. Overview.

Cable television companies and telecommunications carriers have a federal right of access to a utility's poles, ducts, conduits or rights-of-way. Moreover, the FCC has promulgated regulations that establish formulas for determining just and reasonable rates for attachments to poles and placements in conduits. Consequently, while initially the rates, terms and conditions for that access are privately negotiated between the parties, if a cable company or a telecommunications carrier complains to the FCC about the rates, terms and conditions that are contained in the agreement, the FCC has jurisdiction to resolve the complaint, unless the dispute arises in a State that has certified that it regulates pole attachments. Utilities have complained about this "sign and sue" tactic, but the FCC has condoned it because the FCC feels that the attaching parties do not have equal bargaining power with utilities.

There is a considerable body of case precedent applying these formulas¹ and ruling on the reasonableness of many contract terms and provisions. Many of these case precedents, including several cited in this paper, are decisions of the FCC's Cable Services Bureau (pole attachments are now subject to Enforcement Bureau jurisdiction), which do not carry the same weight as decisions of the Commissioners or reviewing courts. There also are policy pronouncements regarding attachment issues. Although the FCC regards this body of law as a "backdrop" against which individual pole attachment agreements are to be negotiated, as a practical matter this backdrop has evolved into a regime to regulate pole attachments.

¹See, for example, *Time Warner Entertainment v. Florida Power and Light Co.*, DA 99-1120, 14 FCC Rcd 9149 (Cab. Serv. Bur. released June 9, 1999).

This white paper attempts to pull together the statutes, regulations, policy statements and case precedents to provide some guidance to utilities who are facing pole attachment questions. Although it is comprehensive, it is not and cannot be an all-inclusive treatise on the subject. **THIS WHITE PAPER IS NOT TO BE CONSIDERED LEGAL ADVICE FOR ANY PARTICULAR UTILITY THAT IS FACING ANY PARTICULAR FACTUAL OR LEGAL QUESTION.**

A. The following States have certified to the FCC that they regulate pole attachments:

Alaska	Massachusetts
California	Michigan
Connecticut	New Jersey
Delaware	New York
District of Columbia	Ohio
Idaho	Oregon
Illinois	Utah
Kentucky	Vermont
Louisiana	Washington
Maine	

B. Jurisdiction reverts to the FCC, however, if a State fails to timely resolve a complaint.

II. Pole Attachments Are Governed by Section 224 of the *Communications Act of 1934*, 47 U.S.C. §224.

A. Section 224 was adopted in the Communications Act Amendments of 1978, Public Law No. 95-234, and rules carrying out the provisions of Section 224 were implemented by the FCC in *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C. 2d 1585 (1978) (adopting Part 1, Subpart J of the FCC's rules, §§1.1401 *et seq.*).

B. Section 224 was amended by the *Telecommunications Act of 1996*, ' 703, Public Law No. 104-104).

C. The FCC's rules were modified by the Commission in:

1. *Local Competition Order*, CC Dockets 96-98 and 95-185, 11 FCC Rcd 15499 (1996) (affirmed in large part in *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999)); *Order on Reconsideration*, 14 FCC Rcd 18049 (1999);

affirmed in part and denied in part, *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir., June 13, 2002) (Case No. 99-15160).

2. *Implementation of Section 703 of the Telecommunications Act of 1996; Amendments and Additions to the Commission's Rules Governing Pole Attachments* (conforming FCC rules to the 1996 Act), CS Docket 96-166, 11 FCC Rcd 9541 (1996).
3. *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendments of the Commission's Rules and Policies Governing Pole Attachments* (implementing a separate rate calculation for telecommunications carriers), CS Docket No. 97-151, 13 FCC Rcd 6777 (1998) ("*Telecom Order*").
4. *Amendment of Rules and Policies Governing Pole Attachments* (CS Docket No. 97-98, 15 FCC Rcd 6453 (2000) ("*Fee Order*").
5. *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, FCC 01-170 (May 25, 2001) ("*Consolidated Reconsideration of Telecom Order and Fee Order*"), appeal pending, *Am. Elec. Power Serv. Corp. v. FCC*, Case No. 01-1328, in the U.S. Court of Appeals for the D.C. Circuit.

III. **Frequently Asked Questions.** In the *Local Competition Order*, the FCC established five rules of general applicability.⁶ It also established several guidelines concerning particular issues that have been raised.⁷ Neither these rules⁸ nor guidelines⁹ were actually codified as numbered regulations appearing in the Code of Federal Regulations. In fact, some of these pronouncements, especially those dealing with a utility's right to deny access on the basis of lack of capacity or for safety, reliability or engineering reasons, contradict the plain language of the codified regulations. The answers given to the questions below are based on a combined reading of the statute, the codified regulations, case precedents and the non-codified rules and guidelines found in the *Local Competition Order*.

A. What is a "**utility**" for purposes of the pole attachment regulations?

1. A utility is any person that is a local exchange carrier or an electric, gas, water, steam, or other public utility, **and** who owns or controls poles, ducts, conduits, or rights-of-way **used, in whole or in part**, for any wire communications. Such term **does not include** any railroad, any person that is cooperatively organized, or any person owned by the Federal Government or any State.

2. In other words, an electric utility that does not allow **any** use of its poles, ducts, conduits, or rights-of-way for communications by wire (including its own, internal communications) is not a **Utility** within the meaning of the statute and has no obligation to allow others to attach to its facilities.
 3. Electric cooperatives and federal, state and municipal entities providing utility service are specifically exempted from the definition of electric utility and thus are not subject to FCC pole attachment jurisdiction.
- B. Who is entitled to attach to a utility's poles and to use its conduits?
1. Section 224 of the Communications Act originally applied to cable television systems. The Telecommunications Act of 1996 extended Section 224 to providers of telecommunications services.
 2. In the 1998 *Telecom Order* in CS Docket 97-151 (II.C.3, *supra*), the FCC held that wireless companies, such as cellular, mobile radio and PCS companies, are **telecommunications services** and as such, they are entitled under the *1996 Telecommunications Act* to attach their facilities to the poles of **Utilities**. The FCC reaffirmed this position in October, 1999, in its reconsideration of the *Local Competition Order*. The U.S. Court of Appeals for the 11th Circuit overturned the FCC and ruled that wireless companies are not entitled to access, but the Supreme Court reversed. In *National Cable Telecommunications Association v. Gulf Power Company*, 534 U.S. 327 (Jan. 16, 2002) ("*Gulf Power II*"), the Supreme Court held that the FCC has authority to regulate the rates, terms and conditions of pole attachments by wireless telecommunications companies. In the same case, the Court also affirmed the FCC's jurisdiction over attachments to provide Internet service.
- C. As an electric utility, are we exempt from the obligation to grant access to our poles, ducts, conduits and rights-of-way if we don't presently permit any use of these assets for wire communications?
1. Yes, so long as there is no such use whatsoever, including your own.
- D. Can we limit access to just those poles, ducts, conduits and rights-of-way that are presently used for wire communications?
1. No. The use of any utility pole, duct, conduit or right-of-way triggers access to all poles, ducts, conduits and rights of way owned or controlled by the utility.

- E. Can we deny access to poles, ducts, conduits and rights-of-way on the basis of safety, reliability or operational concerns?
1. Probably not. In evaluating an access request, a utility may rely on such codes as the National Electrical Safety Code and other federal, state and local safety codes to prescribe standards with respect to capacity, safety, reliability and general engineering principles. If these standards cannot be met, access can be denied. However, in a case where a particular attachment cannot be safely accomplished, the utility may nevertheless have an obligation to take reasonable steps to improve the facility in order to permit the safe attachment. (*See also* discussion of capacity, below.) If a utility denies access, citing reasons of capacity, safety, reliability or general engineering principles, the utility will have the ultimate burden of proof if a complaint is filed.

In Cavalier Telephone LLC v. Virginia Elec. and Power Co., DA 00-1250, 15 FCC Rcd 9563 (Cab. Serv. Bur. 2000), the utility entered into a pole attachment agreement with the complaining CLEC, but sought to prevent the CLEC, on safety and reliability grounds, from using extension arms and attaching its facilities on the field side of the poles. The Cable Services Bureau ordered the utility to permit such methods of attachment.
- F. Can we deny access to our poles, ducts, conduits or rights-of-way on the basis of a lack of capacity?
1. Yes. The U.S. Court of Appeals for the Eleventh Circuit recently overturned an FCC ruling that required utilities to expand capacity to meet requests for new attachments. As a result of this ruling, lack of capacity on a particular facility entitles a utility to deny a request for access. *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir., June 13, 2002) (Case No. 99-15160).
- G. Do the FCC's pole attachment rules take precedence over FERC, OSHA or other federal regulations that deal with attachments?
1. No.
- H. Do the FCC's pole attachment rules invalidate state and local requirements affecting pole attachments?
1. No. Even if a particular state has not preempted the FCC's jurisdiction by certifying that it regulates pole attachments, any state or local pole attachment requirements are entitled to deference. Only if there is a direct

conflict between the local requirement and an FCC regulation will the FCC regulation prevail. Note, however, that Congress invalidated all state or local legal requirements that prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. If a state or local jurisdiction wants to make laws to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers, it must do so in a way that is competitively neutral. State and local governments still have the right, however, to manage public rights-of-way and to require fair and reasonable compensation for their use.

- I. A pole attachment agreement is a contract. Has the FCC replaced our state courts in matters of disputes involving such contracts?
 1. No, but the FCC has *primary jurisdiction* to decide whether the rates, terms and conditions found in the contract are just and reasonable. *See, Mile Hi Cable Partners et al. v. Public Service Company of Colorado*, 14 FCC Rcd 3244 (1999), which holds that the FCC has jurisdiction to hear a complaint regarding the penalty for unauthorized attachments to poles.
- J. If our pole attachment agreement contains provisions to govern termination of the agreement upon notice by either party, can we terminate the agreement in order to assess a higher rental rate?
 1. Maybe not. In *Alabama Cable Telecomms. Ass'n v. Alabama Power Co.*, 15 FCC Rcd 17346 (Cab. Serv. Bur. 2000), the utility gave notice of termination to attached cable companies, but offered to enter into a new pole attachment agreement at a substantially higher rate, which the utility felt represented just compensation under the constitution. The Cable Services Bureau ruled the new rate unreasonable and ordered the utility to permit the cable companies to remain attached on the poles at the current rate while a new agreement was negotiated. This decision was affirmed in *Alabama Cable Telecomms. Ass'n v. Alabama Power Co.*, FCC 01-181 (rel. May 25, 2001). (Note, this case is now before the 11th Circuit Court of Appeals. *See, Alabama Power Co. v. FCC*, Nos. 00-14763-I, 00-15068-D (11th Cir. filed March 5, 2001).)
- K. Can we give a break to a particular telecommunications carrier who wants to attach to our poles?
 1. No. Where access is mandated, the rates, terms, and conditions of access must be uniformly applied to all telecommunications carriers and cable

operators that have or seek access. Note, however, that there is an exception for incumbent local exchange carriers. A utility is not obliged to grant access to an incumbent local exchange telephone company.

L. We have formed a subsidiary in order to offer telecommunications and video programming services. Can we give our own subsidiary a break for the use of our poles, ducts, conduits or rights-of-way?

1. No. A utility may not favor itself over other parties with respect to the provision of telecommunications or video programming services. A utility must impute to itself or its affiliate, subsidiary or associate company the pole attachment rate such entity would be charged were it a non-affiliated entity.

M. How much can we charge for pole attachments?

1. There is no simple answer to this question, although parties may mutually agree to any rate. In its 1998 *Telecom Order* in CS Docket 97-151 (II.C.3, *supra*), the FCC reaffirmed its preference for negotiated agreements. In general, rates must be just and reasonable. A rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing attachments (its incremental costs), nor more than its fully allocated cost, that is, an amount determined by multiplying the percentage of certain pole space (or duct or conduit capacity) which is occupied by the attachment, by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

a) Examples of incremental costs are:

- (1) Pre-construction survey costs;
- (2) Engineering costs;
- (3) Make-ready and change-out costs incurred in preparing for attachments, such as installation of guys and anchors.

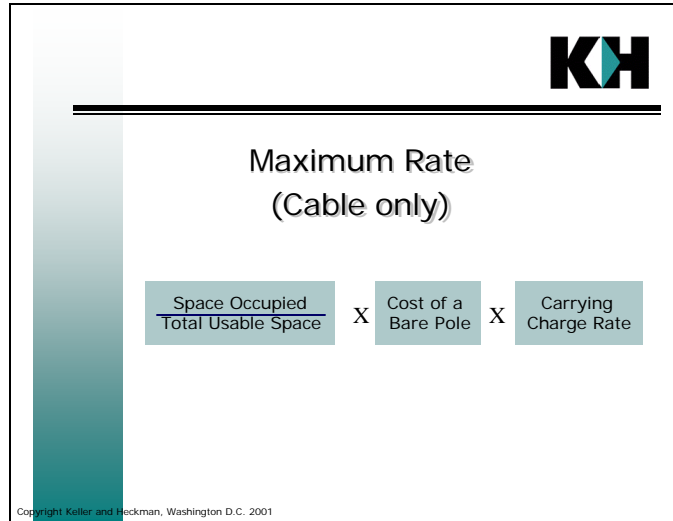
b) Fully allocated costs refer to the portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles, ducts, conduits and rights-of-way.

c) Separate fees to recover recurring costs can be charged, but only if these fees are not already included in the rate calculation based on fully allocated costs. Such fees would include charges for application processing or periodic inspections. *See, Texas Cable*

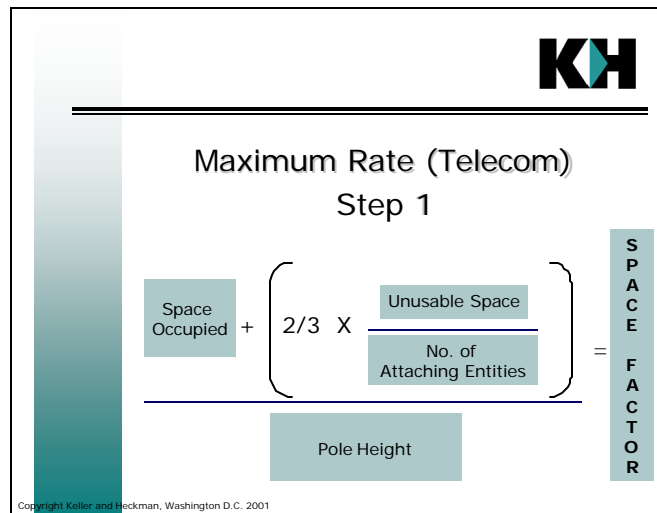
and Telecomms. Ass'n v. GTE Southwest Inc., 14 FCC Rcd 2975 (Cab. Serv. Bur. 1999), holding that the utility could not charge a billing event fee of \$25, a pole attachment origination fee of \$400 and a license assignment fee of \$200, because these fees are included in the carrying charges factor that goes into the maximum rate formula.

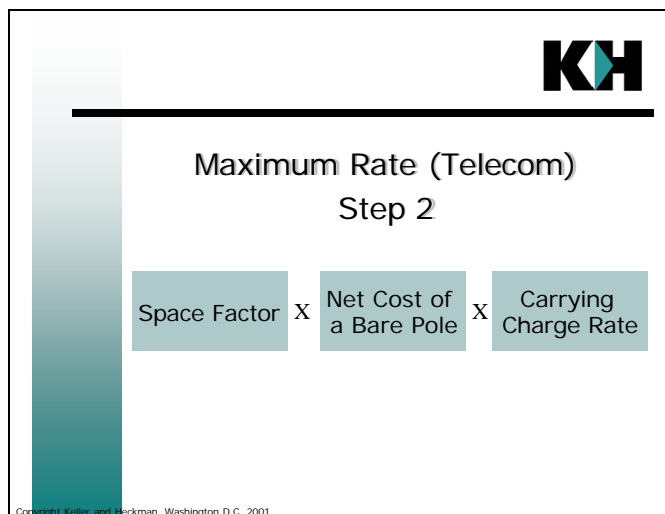
See also, Texas Cable & Telecomms. Ass'n v. Entergy Services, Inc., 14 FCC Rcd 9138 (Cab. Serv. Bur. 1999), holding that the utility could not charge an up-front \$10 per pole engineering survey fee, although the utility could seek reimbursement of the actual cost of engineering surveys. Nor could the utility impose a flat fee of \$5,000 for origination of a new pole attachment agreement and \$2,000 for a major expansion of the cable system. These administrative costs are already reflected in the FERC accounts that are part of the rate calculations and the utility may not recover these costs a second time.

2. The FCC's pole attachment regulatory program is complaint-driven. In its 1998 *Telecom Order* (II.C.3, *supra*), the FCC prescribed new regulations to determine just and reasonable attachment rates for use in resolving complaints, including rates for attachments by telecommunications providers. These rules became effective on February 8, 2001. However, if the application of these new rules results in any increase of pole attachment rates charged to cable TV companies from those now in effect, the increase must be phased in over 5 years. Any decrease must be applied immediately.
3. There are two formulas that will govern the maximum pole attachment rate. One applies to attachments by cable TV companies for the provision solely of cable TV service ("cable-only rate"). The other applies to attachments by telecommunications carriers, and by cable TV companies providing telecommunications service in addition to cable TV service ("telecom rate"). The difference between the two formulas is that the cable-only rate is calculated based solely on the attacher's share of the usable space. The telecom rate is calculated based on the share of both usable and unusable space. Until February 8, 2001, however, both cable TV companies and telecommunications companies (if the telecommunications companies are not already under a prior pole attachment agreement) were subject to the same cable-only formula. That formula is as follows:

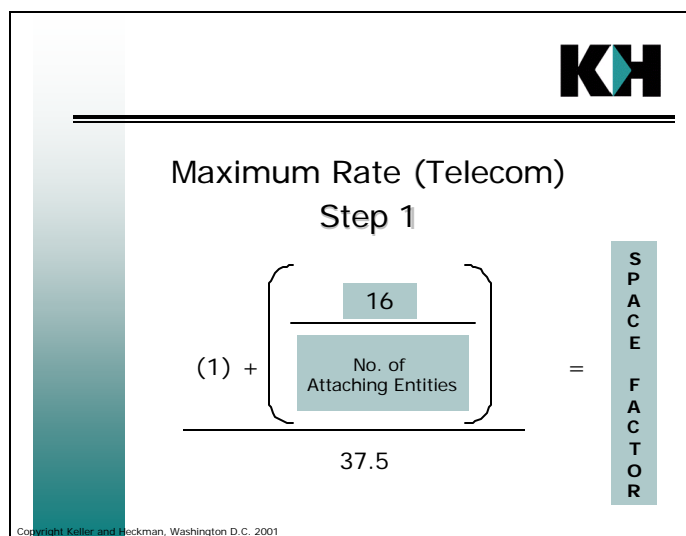


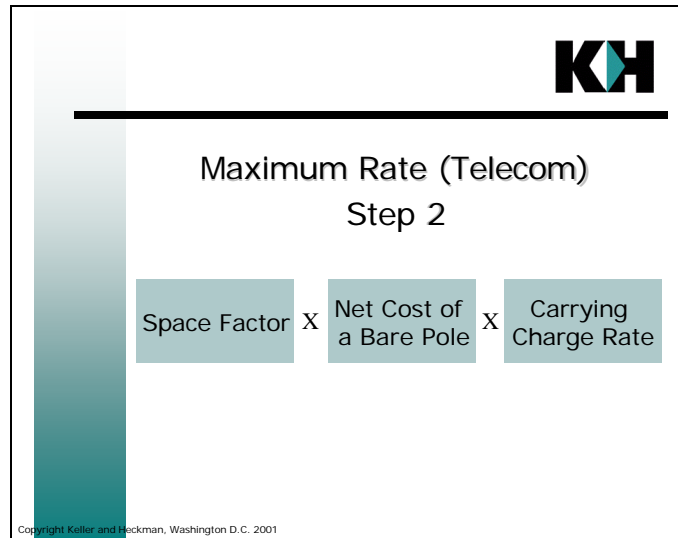
4. After February 8, 2001, the following formula applies to telecommunications carriers (but not cable TV companies providing solely cable TV service). This formula was formerly calculated based on unusable space factors and usable space factors, but the May 25, 2001, *Consolidated Reconsideration of Telecom Order and Fee Order* (II.C.5., above) simplified the formula by combining the usable and unusable space calculations into one. This simplified calculation is broken down into the following two steps:



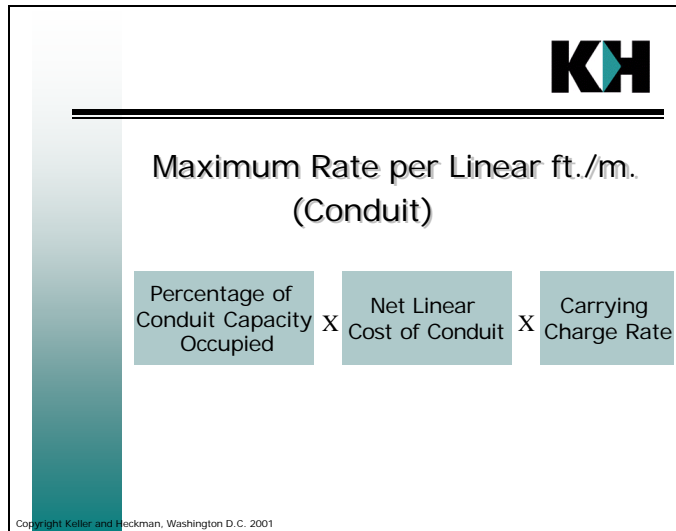


In lieu of actual measurements, the figure of 13.5 feet may be used as the average amount of usable space per pole for those poles used for pole attachments. The figure of 24 feet may be used as the average amount of unusable space on a pole. The figure of 18 feet may be used as the average pole space reserved for ground clearance. The figure of 37.5 feet may be used as the average height of a pole. The figure of 1 foot may be used as the presumptive amount of space occupied by an attachment on a pole (even if the attachment has been overlashed). These figures may, however, be rebutted by an attaching party. Using these presumptions, the telecommunications formula can be further simplified, as follows:

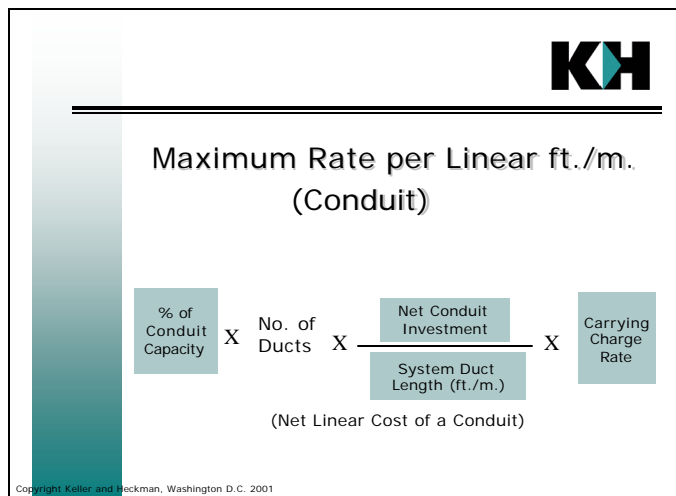




5. For the pole attachment telecom formula, each utility must either calculate an average number of attachers for urbanized (50,000 or greater population) and non-urbanized (less than 50,000) areas, or use the Commission's presumptive averages. The Commission presumes five attachers in urbanized areas, and three attachers in non-urbanized areas.
6. The factors in the above formulas, such as ANet Cost of a Bare Pole@ and ACarrying Charge Rate,@ are explained in considerably greater detail in the FCC's 2000 *Fee Order* in CS Docket 97-98 (II.C.4, *supra*), and in the May 25, 2001, *Consolidated Reconsideration of Telecom Order and Fee Order* (II.C.5, *supra*). These factors draw on standard accounts using FERC Form No. 1 data in the case of electric utilities or data from the FCC's Automated Reporting Management Information System (AARMIS@) in the case of telephone utilities. Note that the Net Cost of a Bare Pole factor for electric utilities is somewhat different from the Net Cost of a Bare Pole factor for telephone utilities. This reflects a typically greater use of cross arms and other non-pole related items by electric utilities.
7. There were two formulas for conduits, the first applying to cable TV companies providing solely cable TV service, and the second for telecom providers. Like the pole telecom formula, the conduit telecom formula was to be based on a calculation of usable and unusable space. After affirming in its May 25, 2001, *Consolidated Reconsideration of Telecom Order and Fee Order* (II.C.5, *supra*), that there is no unusable space in conduits, the Commission explained that the cable-only formula and telecom formula for conduits were essentially the same. This formula is as follows:



After spelling out the “Net Linear Cost of Conduit,” this formula is expressed as:



The “% of Conduit Capacity” is calculated as follows:

$$\begin{aligned}
 \text{\% of Conduit Capacity} &= \frac{(1) \text{ \# of Ducts}}{(1 \text{ Duct }) \text{ \# of Inner Ducts}} \times
 \end{aligned}$$

Note: if no inner duct is installed, the factor **1 Duct) Number of Inner Ducts** is presumed to be **2**.

There is a rebuttable presumption that an attacher occupies one half duct of usable space. All attaching entities with lines occupying any portion of a conduit system are counted as separate attaching entities for purposes of apportioning the costs of unusable space. As in the case of poles, the determination of factors that comprise the Carrying Charge Rate is different for electric utilities than for telephone utilities.

8. There is no formula that governs access to rights-of-way, or to transmission facilities, or to attachments by wireless telecommunications providers. The access and reasonable rate provisions of Section 224 of the Communications Act apply where a cable TV company or a telecommunications carrier seeks to install facilities in a right-of-way but without physical attachment to a pole, duct or conduit. In the May 25, 2001, *Consolidated Reconsideration to Telecom Order and Fee Order* (II.C.5, *supra*), the FCC affirmed that it would handle any complaints about rates for rights-of-way, transmission facilities, and for wireless attachments on a case-by-case basis.
9. Since the FCC's formulas do not apply to cooperatives or municipal power utilities, application of the above principles of just and reasonable rates may be a useful guideline.

N. Can we pass through the cost of counting the number of poles to which the attaching company has attached its facilities?

1. Yes. You need not assure that you are charging the lowest possible fee, but the method you use must be at reasonably competitive rates. Furthermore, any additional benefit that you derive from the count or survey must not be billed to the attacher.

O. When a potential new attacher inquires as to the availability of pole or conduit capacity, can we charge for developing and providing this information?

1. Yes. You may recover your actual labor and administrative costs for providing maps, plats and other data. However, the FCC expects the utility to have a standard quote for such service. Only in the case of an unusually expensive request could the standard rate be exceeded. The utility is required to take reasonable steps to protect proprietary information.

- P. Can we charge extra when a cable company uses its facilities to deliver nonvideo service to customers?
1. No. In the case of *Marcus Cable Associates, L.P. v. Texas Utilities Elec. Co.*, 12 FCC Rcd 10362 (Cab. Serv. Bur. 1997), the FCC's Cable Services Bureau ruled that the nature of transmissions on the cable was irrelevant. The utility had no right to an additional fee, such as a share of the revenues, when the cable company made capacity available to others. The FCC's ruling was that the cable company has no obligation under the then-present pole attachment regulations to disclose to the utility anything about its leasing of capacity to third parties. However, for purposes of applying the formulas that took effect February 8, 2001, the utility has the right to know whether or not the cable company is providing solely cable service. If the cable company also is providing telecommunications services, it could be charged for its share of the unusable space on a pole after February 8, 2001. Indeed, the cable company is required under the FCC's regulations to notify pole owners upon offering telecommunications services.
- Q. The cable TV company in our area is offering Internet access over their cable system using cable modems. Also the telecommunications carriers attached to our poles are offering Internet service. Which formula applies in each case?
1. The FCC has ruled that a cable company that also provides Internet service is entitled to the lower cable-only rate. This approach was affirmed by the Supreme Court in *Gulf Power II. National Cable Telecommunications Association v. Gulf Power Company*, 534 U.S. 327 (Jan. 16, 2002). In *Gulf Power II*, the Supreme Court overturned the 11th Circuit Court of Appeals by ruling that the FCC does have jurisdiction over the rates, terms and conditions of cable company pole attachments even if those companies also offer Internet service. In essence, *Gulf Power II* holds that the FCC has jurisdiction over any attachment whatsoever by a cable or telecommunications company. Although the Commission has not specifically ruled on whether the telecommunications rate or some new rate would apply to Internet attachments by a telecommunications company, the most likely selection appears to be the telecommunications rate.
- R. A party who has existing attachments on our pole now wants to overlash a fiber optic cable to its existing wire. Can we charge extra for this overlashed cable?
1. No. Overlashing one's own pole attachment must be permitted without additional charge. If, however, an engineering study demonstrates that a

significant burden would be created by the overlashing, the pole owner may deny the attachment for reasons of safety, reliability or generally applicable engineering practice.

- S. What about the case where an existing attacher allows a third party to overlash a fiber optic cable to its existing wire. Can we charge for this overlashed cable?
1. No. Reasoning that third party overlashing does not place an additional burden on the pole owner, the FCC disallows additional charges to the attacher or the overlasher. Utilities, however, are entitled to notice of third party overlashing.
- T. What if an existing attacher leases excess capacity on its cable or dark fiber in its fiber bundle to a third party. Can we charge for the use of the excess capacity or dark fiber by the third party?
1. No. This use places no additional spatial or physical burdens on the pole. The FCC has ruled that the leasing of dark fiber or excess capacity is not an individual pole attachment, separate from the host attachment. Therefore, no payment is due to the pole owner, separate from the payment by the host attaching entity. Exception: if the host attaching entity used its cable to provide solely cable TV service and the leasing party uses the excess capacity to provide telecommunications services, the pole attachment rate formula would shift from the usable-space-only formula to the usable-plus-unusable-space formula.
- U. Can we negotiate a paragraph in our pole attachment agreement where the attaching party agrees not to contest any provision of the agreement?
1. No. Such a paragraph would be *per se* unreasonable and a request to include such a paragraph in an agreement would be an act of bad faith in negotiation.
- V. Can we require attaching parties to tag their attachments in order to facilitate easy identification of their lines?
1. Yes. The pole attachment agreement may contain a provision requiring tagging.
- W. Can we include a paragraph in the pole attachment agreement which imposes a charge for unauthorized attachments that we discover?
1. Yes. The Commission has recognized the utility's genuine interest in preventing such attachments and the use of monetary penalties as a

deterrent. *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colorado*, 14 FCC Rcd 3244 (1999).

X. What happens if the FCC finds that our rates are not just and reasonable?

1. The FCC can order several remedies, including:
 - a) Termination of the unjust and unreasonable rate, term, or condition in the contract. (Note: the termination of an unjust and unreasonable term would apply not only to the complainant's pole attachment agreement, but to all of the utility's pole attachment agreements containing the same provision. See, *Marcus Cable Associates, L.P. v. Texas Utilities Elec. Co.*, 12 FCC Rcd 10362 (Cab. Serv. Bur. 1997).
 - b) Substitution in the pole attachment agreement of a just and reasonable rate, term, or condition established by the Commission.
 - c) Order of a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission from the date that the complaint, as acceptable, was filed, plus interest.
2. Note, there is no provision in the FCC regulations authorizing the FCC to award actual or punitive damages. However, in the *Marcus Cable Associates* case cited above, the FCC's Cable Bureau implied that it might have such authority.
3. The FCC does not have authority to award costs and attorneys' fees. *Texas Cable and Telecomms. Ass'n v. GTE Southwest Inc.*, 14 FCC Rcd 2975 (Cab. Serv. Bur. 1999).

Y. How long does it take the FCC to rule on a complaint?

1. The case of *Time Warner v. Florida Power & Light Co.*, DA 99-1120, 14 FCC Rcd 9149, involved a dispute over whether the pole attachment rate should be \$6.00 per pole or \$5.80 per pole. The complaint was filed April 13, 1998 and the decision was released on June 9, 1999. The FCC performed the formula calculations and determined that the proper rate should be \$5.79 per attachment per year.

2. The complaint in the case of *Texas Cable & Telecomms. Ass'n v. Entergy Services, Inc.*, 14 FCC Rcd 9138, discussed above, was filed on July 9, 1997 and the decision was released June 9, 1999.
- Z. If we must modify or replace a pole, duct, conduit or right-of-way to accommodate a new attachment request, who has to pay for the modification?
1. Only the party who benefits from the modification. However, if other parties expand their use of the facilities at the same time, they would also share in the cost. Note, the FCC has ruled that even if the utility benefits from the increased pole capacity without paying for it, the utility does not have to compensate the parties who paid for the expansion. However, the modifying party or parties can recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification.
- AA. Can we reserve capacity on our facilities for future expansion?
1. Yes, but only if such reservation is consistent with a *bona fide* development plan that reasonably and specifically projects a need for that space **in the provision of your core utility service**. However, you must allow attachments in the reserved space until you actually need the space. At that time you may recover the reserved space by giving notice to whoever was using it that they must now pay for the cost of any modifications needed to expand capacity in order to maintain their attachment. You may not reserve or recover capacity if you are a telecommunications utility such as a LEC or in order to provide telecommunications or video programming service.
 2. You are also entitled to reserve capacity for the provision of emergency service. On reconsideration of its *Local Competition Order* (II.C.1, *supra*), the FCC clarified that space that is reserved for emergency purposes is distinct from other reserved space and is not subject to interim use.
 3. In the same *Order on Reconsideration*, the FCC ruled that a utility could reserve space in anticipation of its near-term requirement to install cables for its own, internal communications needs in support of its core utility service.

- BB. Do we have to grant access to our rights-of-way that we do not own or control but exist by virtue of an easement or public right-of-way?
1. The scope of your ownership or control of an easement or public right-of-way is a matter of state law. Note, however, that if an easement or public right-of-way for power lines permits compatible uses, several court decisions have required the utility to allow access by cable operators. In reconsidering the *Local Competition Order*, the FCC reversed itself and held that a utility is **not** required, as a matter of federal regulation, to exercise its eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access by third parties.
 2. Utilities need to pay particular attention to their charter and other constraining documents.
- CC. If we grant access, particularly to our underground conduits, can we require the work to be performed only by our employees or contractors?
1. No. You can, however, specify the training criteria of those who will perform the work. In addition, where electric supply cables share a duct with communications cables, the cables must be maintained by the utility.
- DD. Are transmission towers considered poles?
1. No. The U.S. Court of Appeals for the Eleventh Circuit recently overturned an FCC ruling that transmission towers are subject to FCC regulation the same as distribution poles. *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir., June 13, 2002) (Case No. 99-15160). Attachments to transmission towers are therefore not subject to FCC jurisdiction.
- EE. Do we have to grant access to all of our property, such as the roof of our corporate offices, if a telecommunications service provider wants to put up an antenna tower?
1. No. The statute does not grant access to every piece of equipment or real property owned or controlled by the utility. However, in the *Competitive Networks Order*, WT Docket 99-217 and CC Docket Nos. 96-98, 88-57, 22 CR 1 (2000), the FCC ordered utilities to allow access by cable TV companies and telecommunications providers to “rights-of-way” owned or controlled by utilities in multiple tenant commercial and residential buildings. These rights-of-way include all ducts and conduits that are being used as part of your transportation and distribution network.

- FF. What obligations do we have to existing attaching parties when we determine that a pole or other facility must be modified?
1. Unless your agreements with the attaching parties provide otherwise, you must generally give at least 60 days notice prior to making the planned modifications. Emergency modifications may be performed immediately, even in advance of any notice. Attachment rate increases are also subject to the 60-day notice requirement.
 2. In general, the cost of the modification is to be borne by the party or parties who benefit from the modification, in proportion to their benefit. This includes the costs to maintain these modifications on an ongoing basis. If, however, the owner of the pole derives a benefit, such as curing an NESC violation, the owner will be deemed to share in the benefit and will be required to bear a proportionate share of the cost.
 3. There are provisions to prevent parties from remaining silent while others bear the direct costs of modification and then seeking attachments at normal attachment rates. These provisions allow the initiators of modifications to recover a percentage of their costs from later attachers. To do so, however, the modifying parties must maintain the necessary accounting records to support their claim for reimbursement from later attaching parties. It is not the responsibility of the utility to maintain these records.
 4. If the owner of the pole does not initiate the modification or benefit from it, but nevertheless acquires additional capacity from which attachment revenues may be derived, there is no obligation to use such revenues to compensate those attachers who paid for the modification.
- GG. How much do existing attachers have to pay if we are forced by the local government to move our poles to accommodate road widening?
1. The reasonably projected incremental costs associated with movement of attaching entities= facilities must be factored into the standard rent that the attaching parties pay, and not treated as a separate cost to be recovered.

IV. Commentary on Federal Pole Attachment Policy.

- A. To the extent that the above policy pronouncements are not codified in the regulations --- and most of them are not --- they are subject to argument. In fact, former FCC Commissioner Harold W. Furchtgott-Roth and now-Chairman Michael Powell dissented from the FCC's *Order on Reconsideration of the Local Competition Order* (II.C.1, *supra*) on the ground that many of the agency's rulings exceeded the requirements of the Communications Act.
- B. The FCC's pole attachment program has been administered by its Cable Services Bureau, although those functions have now been transferred to the Enforcement Bureau. The mission of the Cable Services Bureau was to foster the development of cable TV. A bias in favor of cable TV in the agency's rulings and policy pronouncements has long been excused by the historical notion that cable TV companies are at a bargaining disadvantage *vis a vis* utilities. While that may have been true 20 years ago, this view would seem to be in need of revision today. Some FCC Commissioners seem to have agreed. Utilities who choose to test some of the FCC's policies, especially those that seem to run counter to the plain language of the statute, may find a sympathetic forum in the new Commission and in a U.S. Court of Appeals.
- C. Most of the FCC's regulations implementing the *Telecommunications Act of 1996* (§§1.1401 *et seq.*) are now in effect, although the regulation prescribing a different formula for conduit attachments by cable TV companies providing only cable service have not yet been finally approved.

V. Additional Information

We hope that this white paper has been useful in outlining many of the most important joint use management issues facing electric utilities. For additional information on this subject, please contact:

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Notes

